In The
Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF VIRGINIA CHRISTIAN ALLIANCE, CONCERNED WOMEN FOR AMERICA, CONGRESSIONAL PRAYER CAUCUS FOUNDATION, FREDERICK DOUGLASS FOUNDATION OF VIRGINIA, THE VALLEY FAMILY FORUM, FREDERICKSBURG RAPPAHANNOCK EVANGELICAL ALLIANCE, THE BLACK ROBE REGIMENT OF VIRGINIA and MEMBERS of the VIRGINIA SENATE and VIRGINIA HOUSE OF DELEGATES

AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

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INTEREST OF *AMICI*[1]

Amici are a collection of organizations and Members of the Virginia Senate and House of Delegates (individually named in an Appendix to this brief) who share a profound respect for America's rich religious heritage and oppose efforts to unmoor modern public affairs from that history.

Regrettably, the application of the Endorsement Test and the Effects prong of the *Lemon* Test in modern Establishment Clause cases has hastened a pronounced marginalization of our nation's heritage and a departure from cherished traditions—changes which have never been sanctioned by the people through constitutional revision or legislation. The Court's modern-day Establishment Clause framework effectively provides the secularist with a perpetual heckler's veto that undermines the broader values underlying the First Amendment as a whole. *Amici* request that the Court fundamentally reevaluate and reshape this framework.

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[1] Rita M. Dunaway authored this brief for *amici curiae*. No counsel for any party authored this brief in whole or part, and no one apart from *amici*, members of *amici* organizations, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties to this action have filed blanket consents to the filing of *amici curiae* briefs.

SUMMARY OF THE ARGUMENT

Amici urge the Court to abandon the Endorsement Test and the Effects prong of the *Lemon* Test, which result in the invalidation of non-coercive government recognitions of religion.[2] Religion in the public square is a defining characteristic of our nation's heritage.

The Second Circuit's decision below—invalidating a non-discriminatory policy of allowing private citizens to pray at town meetings—represents a fall down the slippery slope that has resulted from determining constitutional cases upon the subjective "feelings" of bystanders. *Amici* insist that the proper function of the Bill of Rights—and the courts charged with interpreting it—is not to protect *feelings* but to protect *liberty*. Simply put, the emotional, subjective feeling of "fitting in" is not a liberty interest that is recognized in the Bill of Rights, and it therefore should not be the basis for civil rights litigation.

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[2] The Endorsement Test, which was crafted by Justice O'Connor and applied in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), forbids government actions that have the purpose or effect of "endorsing" religion. The *Lemon* Test forbids government acts that have no secular purpose, have the primary effect of advancing or inhibiting religion, or involve an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Amici* will discuss these two analyses together because the Court has described *Lemon*'s second prong as prohibiting government endorsements of religion. *See Allegheny*, 492 U.S. at 592.

The propriety of incorporating the Establishment Clause as a component of the "liberty" protected by the Fourteenth Amendment hinges on the interpretation of the Clause to protect real, substantive liberty interests. When the Establishment Clause is divorced from its historical purpose (as evidenced by the ratification debates) and interpreted as a general mandate for government to be religiously sterile, it cannot be properly categorized as the same type of liberty interest as the others enumerated in the First Amendment and incorporated into the Fourteenth. But a return to the historical interpretation of the Establishment Clause as a protection against government acts that coerce some tangible support for or adherence to religion would supply the logic for incorporation.

Perhaps more importantly, interpretation of the Establishment Clause as the protection of a true liberty interest (freedom from coerced support for religion) rather than the prohibition of non-coercive government endorsements of religion would bring to this Court's Establishment Clause jurisprudence the coherence that, at present, is sorely lacking. This interpretive refinement would allow the Court to maintain logical integrity in upholding venerable national traditions such as the Pledge of Allegiance, public prayers, the recognition of religious holidays, and countless other practices that are integral components of our national identity, while striking

down government policies that feature coercive elements.

The abandonment of Establishment Clause analyses that allow litigants to successfully sue government officials and agencies based upon no more concrete injury than the litigants' hurt feelings would offer the important advantage of reducing the number of expensive, highly unpredictable federal lawsuits.

Finally, only by reworking its Establishment Clause analysis can the Court provide the proper breathing room for religious expression by citizens—whether a private citizen speaking at government meetings or an individual public official. Each enjoys the rights of free speech and religious freedom under the First Amendment, the exercise of which do not pose any of the true dangers addressed by the Establishment Clause. The liberty interests of free speech and free exercise—explicitly guaranteed by the First Amendment—are simply incompatible with a judicial analysis that is solicitous of bystander feelings, which find no source of constitutional protection. The Court cannot serve both masters. *Amici* submit that it is the duty of the Court to serve the master of liberty, as prescribed in our Constitution, by rejecting a jurisprudence of feelings.

ARGUMENT

I. The Endorsement Test and its application as part of the Effects Prong of the *Lemon* Test reflect an interpretation of the Establishment Clause that undermines the rationale for its incorporation into the Fourteenth Amendment.

Prior to 1947, the Establishment Clause[3] was interpreted, in keeping with its text, as a restriction on the federal government's ability to "establish" a national religion or to interfere with state "establishments" of religion. According to James Madison's explanation of the Clause to the First Congress, compulsion was the essence of establishment. *See* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. AND MARY L. REV. 933, 937 (1986) (*citing* 1 ANNALS OF CONG. 730 (J. Gales ed. 1834) (Aug. 15, 1789)).

In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court declared that the entirety of the First Amendment would thenceforth be applied to the states via the "liberty" guarantee of the Fourteenth Amendment.[4] The incorporation of the

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[3] "Congress shall make no law respecting an establishment of religion…" U.S. CONST. Amend. I.

[4] "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, §1.

Establishment Clause in particular, however, has been criticized. One scholar, for instance, has remarked that, "Everson's incorporation of the [Establishment] Clause against the states required a 'constructional wrench' in order 'to squeeze a structural clause into a "liberty mold."…" James J. Knicely, *"First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?* 52 DRAKE L. REV. 171, 175 (Winter, 2004) (*quoting* Arthur E. Sutherland, Jr., *Establishment According to Engel*, 76 HARV. L. REV. 25, 41 (1962); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 104 (1998).

It is undeniably awkward to turn a Clause that was designed, in part, to protect state religious establishments from federal interference into a prohibition of state government actions that manifest the slightest favor for religion. But if Madison's explanation of the Establishment Clause's purpose (the prohibition of government-compelled support for religion) is accepted, its application to the states flows naturally from the Fourteenth Amendment's liberty guarantee.

A citizen's freedom from being coerced to tangibly support religion or conform to its doctrines is unquestionably a constitutionally cognizable individual "liberty." It is only under contemporary interpretations of the Establishment Clause not as a protection from government coercion, but rather as a

blanket mandate of complete government separation from religion, that the Clause's incorporation into the Fourteenth Amendment loses its rational footing.

Verbal or symbolic "endorsements" of religion in public affairs surely cannot be said to impact individual liberty in a constitutional sense; they do no more than potentially impact *feelings*, or *thoughts*, which are no proper subject of constitutions nor the courts charged with interpreting and applying them. Those who settled this country and gave birth to the First Amendment did not flee their former homes to seek solace from hurt feelings, but from true religious bondage in the form of legal compulsion to support government-favored churches.

The Court should accordingly retreat from modern interpretations which reflect significant, unauthorized and counter-historical revisions to the Establishment Clause. The liberty interest protected by the Establishment Clause is nothing more nor less than freedom from tangible legal coercions with regard to religion.

II. The Endorsement Test and its application as part of the Effects Prong of the *Lemon* Test must be abandoned in order to bring coherence, logical integrity, and predictability to Establishment Clause jurisprudence.

A. The prevailing Establishment Clause frameworks have produced confusion.

The disheveled, inconsistent state of modern Establishment Clause analysis is all but universally acknowledged, having been described as a "hopeless disarray," producing "silly" and "embarrassing" results, and comprising "a multi-test, patchwork approach." James A. Campbell, Newdow *Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard provides the Necessary Renovation*, 39 AKRON L. REV. 541, 542 (2006) (*quoting Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting)). Fundamental reevaluation and substantive revision are clearly in order.

Under the Endorsement Test expounded by Justice O'Connor and applied by the Court in *Allegheny v. American Civil Liberties Union*, government practices are unconstitutional if they have the purpose or effect of "endorsing" religion. 492 U.S. 573, 592 (1989). This approach seeks to preclude the government from "mak[ing] a person's religious beliefs relevant to his or her standing in the political community by conveying a message that

religion or a particular religious belief is favored or preferred." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004) (O'Connor, J., concurring). Under this formula, the "evil" the Endorsement Test seeks to eliminate may be characterized as a certain type of message, perception, or emotion.

The Endorsement inquiry is echoed in various iterations of the second prong of the Court's *Lemon* Test, which requires a government practice to have a secular purpose, a primary effect that neither advances nor inhibits religion, and to avoid excessive entanglement of government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

But a truly consistent application of either the Endorsement Test or *Lemon* Test would invalidate countless historical practices and traditions that were perfectly acceptable to those who drafted and adopted the First Amendment. Campbell, *supra*, at 546-47, notes 40-42. For instance, on the very day after the adoption of the First Amendment by Congress, the House and Senate passed a resolution requesting that the President "recommend to the people of the United States a day of public fasting and prayer, to be observed, by acknowledging with grateful hearts, the many signal favors of the Almighty God."[5] It cannot seriously be maintained that such an act is not an endorsement of religion that may have caused sensitive non-religious Americans to "feel like outsiders," a factor that is of great constitutional moment under the Endorsement

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[5] *See* Daniel P. Whitehead, *Agostini v. Felton: Rectifying the Chaos of Establishment Clause Jurisprudence*, 27 CAP. U. L. REV. 639, 654 (1999).

Test. *See Newdow*, *supra*, 542 U.S. at 33 (O'Connor, J., concurring).

Chief Justice Burger recognized in *Lynch v. Donnelly* that, "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." 465 U.S. 668, 675 (1984). But as Justice Kennedy has observed, "Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of [the Endorsement Test] formula." *Allegheny*, 492 U.S. at 670 (Kennedy, J., dissenting).[6]

The Court can safely assume that the Founding Fathers understood the meaning of the Establishment Clause and complied with it. The fact, then, that countless of their actions would be invalid under the Court's Endorsement Test or the Effects prong of the *Lemon* Test leaves only one logical conclusion: these tests do not properly gauge whether an action violates the Establishment Clause.

As it stands, when venerated historical practices (such as legislative prayers) are challenged under the Establishment Clause, this Court is left with three unsavory alternatives: to strike down the practice as unconstitutional (thus implying that those who drafted and adopted the First Amendment

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[6] *See also Lee v. Weisman*, 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting) (arguing that the psychological coercion test would invalidate the national tradition of including prayers in public ceremonies).

were lacking either in understanding or integrity); to uphold the practice by declining to apply the tests it has created; or to seize upon the pronounced subjectivity of these tests and lend constitutional significance to trivial details of the case at hand. Selection of the third option makes it increasingly difficult for lower courts and citizens to distill any helpful guiding principles from the Court's voluminous, splintered opinions.

For instance, under *Allegheny* and *Lynch*, the constitutionality of religious symbols in town holiday displays appears to turn on such factors as the desirability of the religious symbol's precise location and the extent to which the religious message is diluted by the presence of silly, secular objects such as wishing wells and candy-striped poles. *Allegheny*, 492 U.S. 573 (crèche standing alone on Grand Staircase unconstitutional); *Lynch*, 465 U.S. 668 (crèche displayed in park amidst Santa Claus, teddy bears and reindeer constitutional).

Justice Kennedy has remarked that the Court has embraced a "jurisprudence of minutiae" and noted that current modes of analysis "must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past." *Allegheny*, 492 U.S. at 674 (Kennedy, J., dissenting). *See also* Stephen L. Carter, *The Culture of Disbelief – How American Law and Politics Trivialize Religious Devotion*, p. 113 (Anchor Books 1993) ("[S]quaring *Lemon*'s rules with the

accepted usages of the society's civil religion often requires some fancy footwork.").

Lower courts, however, lack the authority to either ignore this Court's tests or perform the sort of twisting and stretching Justice Kennedy describes. These courts—as well as the government officials and agencies charged with understanding and abiding by the Establishment Clause—require a legible, coherent roadmap in order to navigate with confidence a national terrain that includes both a rich religious heritage and deeply religious citizens, but also a scrupulous commitment to freedom of conscience. Until this Court provides such guidance, this area of constitutional law will be characterized by confusion.[7]

B. The Court's current frameworks are incapable of properly addressing legislative prayer.

The law on legislative prayer presents an excellent case study on the incompatibility of the Court's current Establishment Clause tests with the history of federal, state and local government practices.

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[7] *See The Supreme Court, 1988 Term: Leading Case: I. Constitutional Law*, 103 HARV. L. REV. 137, 234 (1989) (arguing that the Endorsement Test suffers from at least three flaws: uncertainty, malleability, and inability to account for past judicial decisions).

In *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court upheld the Nebraska legislature's practice of opening its sessions with prayers delivered by a state-employed clergyman. Under a faithful application of the *Lemon* Test, the legislative prayers certainly would have been struck down. Even assuming that the Court could have articulated some "secular purpose" for the practice (the possibility of which poses serious questions about the usefulness of the Purpose prong of the test), to expend state resources for a clergy-led prayer at legislative sessions certainly evinces a type of collective respect (and financial support) for religion that would be said to "advance" religion.

Presumably *because* the cherished tradition of legislative prayer could not have survived under the three-part *Lemon* Test, which had been the standard analysis for Establishment Clause cases since 1971, the Court simply ignored the test and relied on the longstanding history of the practice to uphold it. The Court sensibly reasoned that if the First Congress did not consider legislative prayer to constitute an "establishment," then neither should the Supreme Court. *Marsh*, 463 U.S. at 788. The Court thus approved the legislative prayers as "simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id.*, at 792.

It is virtually certain that the legislative prayers upheld in *Marsh* would have been doomed under an

application of the now-prevalent Endorsement Test. According to the Court's articulation of this test, it is almost impossible to believe that opening government sessions with prayer does not send a message that the government "endorses" religion.

From a historical perspective, the reasoning of *Marsh* is surely correct. If anyone understood what the Establishment Clause meant, it was surely those who crafted, debated and adopted it. The inability of the Court's prevailing analyses to arrive at the correct conclusion of *Marsh* thus signals their fundamental deficiencies.

While history provides confidence that *Marsh* was correctly decided, the fact that the decision was reached only by jettisoning the Court's prevailing Establishment Clause analyses obliterates our collective confidence that said analyses will produce sound results in future cases. The Court has, in effect, embraced a jurisprudence of "grandfathering" for certain, select practices, while subjecting newer or more unique acknowledgements of religion to subjective, malleable analyses that have been proven incompatible with the original purpose of the Establishment Clause.

In interpreting *Marsh* and applying its principles to other cases, some lower federal courts have emphasized the fact that the prayers offered by the Nebraska legislative chaplains were "non-sectarian," as if this fact might be the slender reed upon which

generic legislative prayers—as well as the multitude of traditional religious practices, symbols and acknowledgements that punctuate our government—might be upheld under the Court's contemporary Establishment Clause doctrine. *See*, *e.g.*, *Joyner v. Forsyth County*, 653 F.3d 341, 348-49 (4th Cir. 2011).

But this factor can provide no logical bridge between analytical tests that forbid government to "advance" or "endorse" religion and the Court's acceptance of official government prayers. The Supreme Court has specifically stated that, "[t]he suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). Indeed, this would be the type of "endorsement" (one appealing to the largest majority) that would presumably be most likely to produce in atheists, agnostics, or adherents of minority religions the feeling of being "an outsider" which the Court has purposed to eliminate from our culture.

So the non-sectarian or generic nature of historically ubiquitous prayers and religious acknowledgements cannot render them constitutionally acceptable under the Court's existing Establishment Clause frameworks. The frameworks, in other words, are hopelessly irreconcilable with history.

As Justice Kennedy has acknowledged, "A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring). While the historical pedigree of a practice should signal that it is consistent with the original purpose and understanding of the Establishment Clause, time-honored traditions cannot simply be "grandfathered" into constitutionality but must instead inform the Court's prospective interpretation of the Clause.

C. American government has historically been replete with openly religious expressions, displays, and acknowledgements.

It would be convenient to categorize legislative prayer as a unique appearance of religion in public life that warrants its own specialized legal analysis, but a day's tour of our nation's Capitol or a review of early government documents quickly disabuses one of such a notion. An intellectually honest application of either the *Lemon* Test (with the Court's "endorsement" gloss) or the Endorsement Test would render unconstitutional countless time-honored national traditions and treasures, including the Pledge of Allegiance, various National Monument inscriptions, Presidential Thanksgiving Proclamations, Supreme Court opening traditions, the décor of the Capitol and the presence of a

religiously themed "prayer room" therein, the United States Code's setting aside of a National Day of Prayer, the national motto, "In God We Trust," and its inscription on various government buildings and currency. *See Allegheny*, 492 U.S. at 670-74 (Kennedy, J., concurring).

Indeed, the text of the preamble to the Declaration of Independence itself is constitutionally offensive under the Endorsement Test and Effects prong, for it not only presumes the existence of a "Creator," but that the very purpose of all government institutions is to secure rights that He has bestowed upon mankind.

Our government has never been religiously "neutral," in the sense of being indifferent toward religion or sterile of religious reference, and absent proper constitutional revision, the Court lacks authority to make it so under the guise of a clause that was clearly not adopted for such purpose. As Justice Joseph Story has explained, "[T]he general if not the universal sentiment in America was that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: VOLUME 2 § 1874 (Melville M. Bigelow ed., 5th ed. 1891).

D. Establishment Clause litigation is rampant and unpredictable.

Since the Court made the Establishment Clause applicable to the states in 1947, challenges to government policies and practices under the Clause have mushroomed.[8] Due to the Court's adoption of imprecise, highly subjective analyses that ignore original legislative intent in favor of a focus on presumptions about legislative motives, "primary" effects, and the feelings of bystanders, the outcomes of Establishment Clause challenges are highly unpredictable. *See Van Orden v. Perry*, 125 S. Ct. 2854, 2867 (2005) (Thomas, J., concurring) ("[T]he very 'flexibility' of this Court's Establishment Clause precedent leaves it incapable of consistent application.")

The current framework functions as a virtual "hunting license" for persons or organizations who wish to eliminate religion from public life. For when they challenge a government policy or practice in zealous pursuit of this agenda, the lack of predictability in this area of constitutional law often influences government attorneys to advise their publicly accountable clients to simply accede to the demands for secularism.

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[8]*See*, *e.g.*, Knicely, *supra*, at 173 (contrasting number of Establishment Clause cases pre-*Everson* (2) and post-*Everson* (over 50 as of 2004)).

The case before the Court illustrates this point perfectly. Even when a local government body has ensured that its invocation practice is neutral toward religion and features private speakers, the locality risks a costly lawsuit in defending the practice. Few localities, if any, will be possessed of the sort of conviction required to take such a chance when the outcome of the litigation may turn on factors entirely beyond the body's control, such as the number of adherents to minority religions who show up and choose to pray. Those government officers who do assume such risks are likely to lose their public offices in the bargain.

The only way to stem the tide of litigation and bring coherence, logical integrity and predictability to the current disarray of Establishment Clause jurisprudence is to abandon the Endorsement Test and current interpretation of the Effects prong of the *Lemon* Test and replace them with a framework that can bear the weight of both our rich, religious history and our commitment to liberty from real religious oppression.

III. The Court should adopt an Establishment Clause framework that focuses on the element of coercion.

Governments surely do not exist to protect "feelings," but to protect *liberty*. *Amici* therefore echo the views of Justices Scalia and Thomas by urging the Court to adopt an "actual legal coercion"

test for Establishment Clause cases. *See Lee,* 505 U.S. at 631-46 (Scalia, J., dissenting) (discussing concept of coercion as it relates to meaning of Establishment Clause); *Newdow*, 542 U.S. at 52 (Thomas, J., concurring) (arguing for actual legal coercion test).[9] Adoption of such a straightforward, objective analysis would bring much-needed clarity, coherence, and predictability to Establishment Clause jurisprudence.[10]

In embracing judicial analyses that turn upon the emotional reaction of bystanders to words or symbols that reflect our nation's religious heritage or the role of religion in contemporary American life, the Court has enabled a collaboration of soft-skinned, feelings-focused litigants to obscure the legacy of the Founding Fathers and dramatically alter our public life. This has actually cheapened the concept of religious liberty.

Our forefathers did not craft the religion clauses of the First Amendment to ensure that no one would

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[9] *See also* McConnell, *supra* (arguing that coercion should be the primary consideration in Establishment Clause cases); Campbell, *supra*, at pp. 580-592 (arguing that Court should adopt Justice Thomas' actual legal coercion test).

[10] *See* Campbell, *supra*, at 580 ("The adoption of Justice Thomas's actual legal coercion test will 'provide Establishment Clause jurisprudence with clarity and predictability.'") (*quoting* Ralph W. Johnson III, *Lee v. Weisman: Easy Cases Can Make Bad Law Too—The "Direct Coercion Test is the Appropriate Establishment Clause Standard*, 2 GEO MASON IND. L. REV. 123, 178 (1993)).

"feel" like an "outsider;" they designed them to ensure that no one would be subjected to religious persecution, coerced to tangibly support government churches, or prohibited from exercising his religion.[11] Thus, under a historically correct interpretation of the First Amendment, "indirect" or "psychological coercion" are not relevant. The analysis must, instead, focus on whether the challenged government action compels an individual to embrace or support religion by word or act.[12]

A return to this original understanding of the Establishment Clause would offer considerable benefits to society. Among these are the provision of a logical basis for the incorporation of the Clause (now properly interpreted as a liberty interest) to the Fourteenth Amendment and the harmonizing of the Clause's modern interpretation with our national traditions. These issues have already been discussed, *supra*.

But adoption of a truly coercion-focused Establishment Clause analysis would also eliminate the unseemly tension between that Clause, as currently interpreted, and the Free Speech and Free Exercise Clauses, thus enhancing the broader values

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[11] *See Campbell*, *supra*, at 545-46 (recounting the real religious tyranny that led to America's founding and the Revolutionary War).

[12] *See Id.*, at 556; Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 591 (1999) (discussing various views of "coercion").

of the First Amendment as a whole. And finally, adoption of a coercion-focused analysis would demonstrate proper judicial restraint and due deference for the role of the political process with regard to citizen grievances that are essentially social and psychological in nature rather than legal.

A. An analysis focused on the prohibition of religious coercion would harmonize the Establishment Clause with the Free Speech and Free Exercise Clauses and eliminate censorship.

The case at bar is a perfect example of how the Court's current modes of Establishment Clause analysis result in censorship of religious expression. The example in this case is particularly compelling, because those being precluded from offering invocations are private individuals who were merely given the opportunity to pray in a public setting according to their own particular belief systems.

Justice O'Connor has posited that the Endorsement Test is particularly suited to cases involving challenges to government-sponsored speech or displays. *Newdow*, 542 U.S. at 33 (O'Connor, J., concurring). But under this framework, even the most fleeting benevolent reference to religion must be banned from the lips of

anyone who can be characterized as a "government speaker."[13]

Even when the words challenged as a religious endorsement are the expression of a government official, a nation committed to free expression should be loath to censor his or her speech, because it is just that: speech. Speech is personal, transient, and sometimes unplanned. It is, and is commonly understood to be, the conveyance of the unique formulation of thoughts, feelings, attitudes and beliefs of the speaker. It is thus inherently distinct from law or policy in regards that are constitutionally significant when the Establishment Clause is properly interpreted as a liberty guarantee.

As Justice Scalia has emphasized, speech is inherently non-coercive; "the listener may do as he likes." *Lee*, 505 U.S. at 642 (*quoting American Jewish Congress v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)). First Amendment scholar Stephen L. Carter has likewise recognized that religious verbiage "demand[s] nothing of us. Not only are [religious platitudes] easily ignored by those who happen to have no religious beliefs, but they make virtually no demands on the consciences of those who do." Carter, *supra*, at 52.

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[13] *See* Campbell, *supra*, at 559, "Current Establishment Clause analysis generally requires government silence regarding religious matters."

As a legal matter, there is simply no conflict between one person's free speech and another person's religious freedom. The bystander's impregnable shield against religious oppression is enshrined in the First Amendment's complementary guarantees that he may practice his own religion freely and may not be compelled to support any other. This shield is not permeated by the spoken words of others. On the other hand, interpreting the Establishment Clause to preclude religious speech or references from the halls of government interferes with individual liberty in a way that defies both the letter and the spirit of the First Amendment as a whole.

B. An analysis focused on the prohibition of religious coercion would stem the tide of unhelpful Establishment Clause litigation and restore the role of the political process in resolving grievances that do not infringe upon individual liberty.

Justice Scalia has aptly noted that courts are well-equipped to take cognizance of coercion when it is backed by legal force or threat of penalty, but ill-equipped to adjudicate feelings, for judges have "made a career of reading the disciples of Blackstone rather than of Freud." *Lee*, 505 U.S. at 632 (Scalia, J., dissenting). Yet the feelings of bystanders are a central component of the Endorsement Test which

has, in turn, been largely absorbed into the Effects prong of the *Lemon* Test.[14]

The judiciary's imbuing subjective, transient individual feelings with constitutional significance not only aggrandizes the judiciary's role in resolving the people's grievances against public officials; it proportionally diminishes the role of the political process. The actual legal coercion test does not leave without remedy the city resident who feels offended by a religious tone set at city meetings; it only requires that her concern be shared by sufficient numbers of others and expressed at election time. *See Campbell*, *supra*, at 586 (arguing political process is proper remedy for citizens displeased with government's religious speech). In this way, citizens' various feelings and persuasions can be given full vent at the ballot box and the judiciary can properly limit its role to protecting substantive rights.

CONCLUSION

Distasteful or unpleasant as it may be to some, the inescapable fact is that religion has always played a significant role in American government. Litigants who seek to eliminate public prayer and relegate religious references to the private recesses of society can only do so by liquidating the

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[14] *See Newdow*, 542 U.S. at 33 (O'Connor, J., concurring) (Endorsement is improper because it "sends a message to nonadherents that they are outsiders…"); *Allegheny*, 492 U.S. at 592.

Establishment Clause from its historical, liberty-based form and recasting it as a general mandate for an entirely secular public square, utterly sterile of religious tradition or acknowledgement. But they cannot succeed in doing this without the complicity of judicial analyses that exalt cultural trends over historical grounding, decisional expediency over logical integrity, and personal feelings over civil liberty.

Amici respectfully request that the Court reverse the Second Circuit's decision below and embrace a coercion-focused Establishment Clause analysis in place of the prevailing, dysfunctional Endorsement Test and Effects prong.

Respectfully submitted,

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APPENDIX

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APPENDIX A

The Members of the Virginia Senate and the Virginia House of Delegates who have joined this brief as *amici curiae* are the Honorable:

Delegate Richard P. Bell
Senator Richard H. Black
Delegate Todd Gilbert
Senator Emmett Hanger
Delegate Ben L. Cline
Delegate R. Steven Landes
Delegate Robert G. Marshall
Senator Steve Martin