No. 12-696

In the
Supreme Court of the United States

TOWN OF GREECE,
Petitioner,
v.
SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Amici are scholars who teach and write in the field of church-and-state.[1] Andrew M. Koppelman is the John Paul Stevens Professor of Law at Northwestern University School of Law. Carl H. Esbeck is the R.B. Price Professor and Isabelle Wade & Paul C. Lyda Professor of Law at the University of Missouri School of Law. Paul Horwitz is the Gordon Rosen Professor of Law at the University of Alabama School of Law. Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law (Minnesota). William P. Marshall is the William Rand Kenan, Jr. Distinguished Professor of Law at the University of North Carolina School of Law.[2]

Amici come from a variety of backgrounds and have a variety of perspectives. Some of us identify as Democrats; others of us identify as Republicans. Some of us are religious believers; others of us are not. On other issues pertaining to religious liberty, *amici* disagree profoundly. But on the issue of legislative prayer, and this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), *amici* are agreed.

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[1] Counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent from both parties to the filing of this brief have been filed with the Clerk.

[2] *Amici* file this brief in our personal capacities as scholars. None of our respective universities takes any position on the issues in this case.

SUMMARY OF ARGUMENT

Thirty years ago, this Court called legislative prayer "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Even at the time, this did not capture the whole story. And the past thirty years have given cause for further doubt. *Marsh* saw, and accepted, the costs that legislative prayer imposed on nonbelievers. But the past thirty years have demonstrated how legislative prayer entails other kinds of costs—on religious believers and on our body politic—that would have been hard for *Marsh* to anticipate.

Some of these costs will be familiar to the Court from the briefs here and the cases they cite—listeners having to endure their government advancing religious views they reject, speakers having to face exclusion for being religious minorities. But the decided cases only tell part of the story. At its root, the problem with legislative prayer is that it commits the government to making an unparalleled number of religious choices: Inevitably government will have a dangerous degree of discretion over who gets to pray, what they will be allowed to say, and the penalties for nonconformists. Each decision is, unavoidably, a decision about religious truth—about what God wants to hear, and who God wants to hear from.

And because these choices are not static, they become the subject of ordinary politics, with ugly sorts of religious campaigning and religious voting as the inexorable result. These consequences are almost an academic case study in what can happen when the government is permitted to take religious positions, but these are not hypotheticals devised by

law professors. For even the most well-intentioned public officials, the drafting and execution of prayer policies has sown discord and division. *Amici* write to inform this Court of these on-the-ground developments, of controversies both historical and recent, so that they do not go overlooked.[3]

In urging this Court to accept legislative prayer thirty years ago, the government made this claim: "[H]istory tells us that legislative prayers do not represent any realistic potential for the kind of strife the Establishment Clause was intended to prevent, because no such strife has ever surfaced as a result thereof." Petitioners' Brief at 16, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23). Even at the time, this statement was too quick; it glossed over a number of things, including some darker aspects to the history of the congressional chaplaincies. But time has ravaged it even more. Thirty years of history have demonstrated, better than any dissent ever could, the constitutional dangers that develop when the government prays.

In *Marsh*, the government argued that one can recognize trees by their fruits. But the fruits of legislative prayer are more bitter than commonly supposed, and this suggests a terrible truth about the tree. *Amici* are certainly not the first to argue that *Marsh* should be overruled. *See* Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 363 (1988) ("[U]nless I can be

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[3] Some of the recent examples cited here were reported earlier in Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972 (2010). Some of the historical ones were discussed in Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171 (2009).

persuaded that there is some coherent understanding of the establishment clause, which can be applied consistently in the circumstances of today, I am forced to disagree with the holding in *Marsh*."). Also believing this conclusion follows from first principles, *amici* here point out how it has been reinforced by three decades' worth of hard experience.

ARGUMENT

I. LISTENERS AND LEGISLATIVE PRAYER

Of the issues spawned by this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), the most frequently arising has been over the content of legislative prayers. The instant case bears out this point—a central part of Respondents' claim here is that the prayers are explicitly Christian, and that citizens have been coerced to join in these Christian prayers.

Both sides ground their arguments in the *Marsh* opinion. In one part of *Marsh*, seized on by Petitioner, the Court said that the prayer opportunity should not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95. In another part, seized on by the Second Circuit below, the Court suggested that prayers had to be scrupulously nondenominational. *See id.* at 793 n.14 (noting approvingly that Nebraska's chaplain had "removed all references to Christ after a 1980 complaint from a Jewish legislator"); *see also County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573, 603 (1989) (taking this language as requiring that all legislative prayers remove all Christian references).

Amici believe that Respondents have the better of this argument, *see* Respondents' Br. at 42-47, but *amici* also wish to take a wider view. Petitioner gets so caught up in exegesis that these passages from *Marsh* end up seeming like bureaucratic formalities—requirements that Petitioner must satisfy only in the most literal and technical sense. This is probably not what *Marsh* intended. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute."). But even worse, it risks losing sight of the genuine constitutional concerns which motivated the language in the first place.

Those constitutional concerns are easily understood and universally shared. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) ("a principle at the heart of the Establishment Clause"). Some Justices voice disagreement with the current trajectory of the Establishment Clause, arguing for an end to the endorsement and *Lemon* tests. But on whether the government must remain neutral between religions, there is no disagreement. *See Grumet*, 512 U.S. at 748 (Scalia, J., dissenting) ("I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others."); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J. dissenting); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893-94 (2005) (Scalia J., dissenting). In this Court's most recent prayer case, for example, these same Justices addressed the basic

issue presented here and concluded that an overabundance of Christian prayers would indeed unconstitutionally affiliate the government with Christianity. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 321 (2000) (Rehnquist, C.J., dissenting) (arguing that "the [student] election could lead to a Christian prayer before 90 percent of the football games," in which case the policy would raise Establishment Clause problems).

Though the iron-clad prohibition on denominational discrimination existed before *Marsh*, it also has deep roots within it. It is not just the two disputed *Marsh* quotations, as Petitioner would have it; the theme of denominational neutrality runs through the opinion and binds it together. *Marsh* accepted legislative prayer as a legitimate way of encouraging political unity and religious toleration. This is what Chief Justice Burger meant when he called legislative prayer an "acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. It is also what Justice Scalia meant years later when he spoke of prayer as an "important unifying mechanism" for our citizenry. *Lee*, 505 U.S. at 646 (Scalia, J. dissenting). Echoing this same theme, Justice O'Connor explained how accepted legislative prayers "shared a common characteristic: they recognized the rich religious heritage of our country in a fashion that was designed to *include* members of the community[.]" *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 356 (4th Cir. 2008) (O'Connor, J., retired, sitting by designation) (emphasis added). Justices differ significantly in how they see legislative prayer. *Compare Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring)

("although [legislative prayers] speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes"), *with McCreary County*, 545 U.S. at 892 (Scalia J., dissenting) (seeing legislative prayers simply as "government-led prayer to God"). So it matters deeply that they all emphasize unity as legislative prayer's organizing theme and its foundational purpose. It would be hard for lower court judges to miss these signals, and indeed they have not. *See, e.g.*, *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998) (en banc) ("The genre [of prayer] approved in *Marsh* is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose."); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 287 (4th Cir. 2005) ("*Marsh* requires that a divine appeal be wide-ranging, tying its legitimacy to common religious ground."). This is not just *a* theory of legislative prayer. It has been *the* theory of legislative prayer; it was the theory upon which legislative prayer was accepted in *Marsh*.

The decided cases illustrate some of the dangers that will arise if the Court abandons course. Jews and Muslims cannot join in prayers celebrating the Virgin Birth and the Resurrection, because they do not believe those things happened. *See Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011). Songs that praise Jesus Christ can only be sung faithfully by Christians; they will make members of other religions intensely uncomfortable. *See Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006). Even attempts to broaden the circle sometimes backfire, exposing those who are truly minorities. *See* Don Davis, *Prayer Riles Minnesota House as Final Friday*

Begins, DULUTH NEWS-TRIB., May 20, 2011, *available at* 2011 WLNR 10121451 ("I know this is a non-denominational prayer in this chamber and it's not about the Baptists and it's not about the Catholics alone or the Lutherans or the Wesleyans or the Presbyterians, the evangelicals or any other denomination but rather the head of the denomination and his name is Jesus."). Of course, the principle of denominational neutrality is itself denominationally neutral. Mainstream Christian believers should not have to endure the government mocking their faith with sarcasm disguised as prayer. *See Snyder*, 159 F.3d at 1228 n.3 ("'Our Mother, who art in heaven (if, indeed there is a heaven and if there is a god that takes a woman's form), hallowed be thy name . . .'").

Here is one now well-known legislative prayer, which has been delivered at different times in various local governmental bodies and in three different state legislatures:

> We confess that [w]e have ridiculed the absolute truth of your word and called it pluralism. We have worshiped other gods and called it multiculturalism. We have endorsed perversion and called it alternative lifestyle. We have exploited the poor and called it the lottery. We have neglected the needy and called it self-preservation. We have rewarded laziness and called it welfare. We have killed our unborn and called it choice. We have shot abortionists and called it justifiable . . . We have polluted the air with profanity and pornography and called it

> freedom of expression . . . In the name of your son, the living Savior, Jesus Christ. Amen.

House Democrats Claim Prayer is 'Disrespectful', ARIZ. REPUB., Jan. 28, 2004, at B9, *available at* 2004 WLNR 23024185 (Arizona); *see also* Marc Fisher, *Stark Prayer Sparks an Absolute Political Furor*, WASH. POST, May 20, 1996, at A01, *available at* 1996 WLNR 6489017 (Kansas and Colorado). Some walked out in protest, but at least this prayer went after both sides of the political spectrum. Even more significantly, these were state legislatures. In less populated and more homogenous towns like Greece, where meetings are small and frequent, few would dare to not participate and fewer still would dare to protest. *See Wynne v. Town of Great Falls*, 376 F.3d 292, 295-96 (4th Cir. 2004) (noting how the plaintiff had been orally criticized for not participating in the town council's prayer and then barred from speaking at subsequent council meetings).

To be fair, the very worst has not happened. Imprecatory prayer may appear in the Bible, *see* PSALMS 109:8-9 ("Let his days be few, and let another take his office. Let his children be fatherless, and his wife a widow."), but legislatures have so far escaped the likes of Fred Phelps. But this may be due to *Marsh* itself, as even the narrowest reading of *Marsh* imposes limits on the content of these kinds of legislative prayers. Were this Court to remove those limits—or make the bar so high no victim could ever satisfy them—the possibilities are endless.

Of course, limits designed to protect listeners imply correlative limits on the government's speakers. Petitioner sees this as censorship. *See*

Petitioner's Brief at 41 (quoting *Lee v. Weisman,* 505 U.S. 577, 588 (1992) ("It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.'") (citations and quotations omitted). But *Lee* cuts the other way. *Lee* saw the costs of censorship as a reason for the government not to pray at all. To follow *Lee* is to overrule *Marsh*. Petitioner never comes to terms with how *Lee* actually required more rather than less censorship; the effect was to bar the Rabbi from making any religious remarks altogether.

But the key problem with Petitioner's theory is that this is simply not private speech. *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1017 (2010) ("[L]egislative prayer is prayer by a legislature—it is government speech by definition.") [hereinafter Lund, *Secret Costs*]. Experienced jurists have found this question so easy as to merit little discussion. *See Turner v. City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008) (O'Connor, J., retired, sitting by designation) (concluding this in a terse six-page opinion). The instant case is harder than some of the others. The rotating nature of the chaplaincy here gives this government speech some private aspects. But within the dichotomy of private and governmental speech, for reasons given by Respondents, it remains government speech. *See* Respondents' Br. at 54-57; *see also Rust v. Sullivan*, 500 U.S. 173 (1991). Still, even if their harm may be exaggerated, restrictions on speakers provide yet another reason why *Marsh*

should be overruled. Legislative prayer inevitably involves a trade-off between the rights of listeners to be free of denominational discrimination and the rights of speakers to pray how they wish. There is only one way out of this Catch-22.

II. PRAYER-GIVERS AND LEGISLATIVE PRAYER

Another persistent problem with legislative prayer has been the fights over the choice of prayer-givers. *Marsh* itself dealt with this issue. One specific charge leveled against Nebraska's chaplaincy was that the Presbyterian minister, Robert Palmer, had held the post for sixteen years. The Court rebuffed the claim that this was governmental support specifically for Presbyterianism. Palmer was a Presbyterian, the Court said, but that did not mean that Palmer was selected because he was a Presbyterian. *See Marsh v. Chambers*, 463 U.S. 783, 793 (1983) (saying that "the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him"). The Constitution would only be implicated if there were some "impermissible motive" in the selection process. *Id.*

This language means well, but it cannot handle the problem it purports to address. It ends up suggesting that chaplains must be chosen on a strictly religion-neutral basis. But that would be hard to imagine indeed. The congressional chaplaincies themselves provide the counterexample. When it comes to getting a job as a congressional chaplain, a Jewish rabbi almost assuredly does not stand on equal ground with a comparably credentialed mainline Protestant minister. After all, we have had more than a hundred Protestant chaplains but no Jewish ones. This is the

"inexorable zero"—as foolproof as circumstantial evidence can get. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) (citation and quotations omitted). And surely no one believes that Wiccan and Christian ministers have equal chances of being hired as congressional chaplains.[4]

These problems remain thorny today, but they have been thorny for a long time. The First Congress required the House and Senate chaplains to be of different denominations. *See Marsh*, 463 U.S. at 793 n.13. Somewhat unsurprisingly, the Senate routinely chose Episcopalian chaplains, while the House rotated among Presbyterian, Methodist, and Baptist chaplains. Yet this was an admirable degree of diversity for a country where Protestants took their religious differences seriously.

But there were limits to Congress's inclusivity. Catholics faced widespread discrimination in American life throughout the 18th and 19th centuries, and the congressional chaplaincies were no exception. Writing in retirement in the 1820s, Madison doubted that there would ever be a Catholic chaplain, and concluded that the chaplaincies would inevitably discriminate against religious minorities. *See* Elizabeth Fleet, *Madison's "Detatched*

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[4] Allegations of denominational imbalance have also been directed at this country's military chaplaincies. *See In re Navy Chaplaincy*, __ F.Supp.2d __, 2013 WL 811462 (D.D.C. Feb. 28, 2013). Like the Court, *amici* see the military chaplaincies as entirely different from legislative ones, because of the important free exercise considerations involved. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 875 (2005) ("[I]f the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions.").

Memoranda," 3 WILLIAM & MARY Q. 534, 558 (1946) ("[T]o say that his religious principles are obnoxious or that his sect is small, is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers, or that the major sects have a right to govern the minor.").

Of course, on the narrow issue, Madison turned out to be wrong. In 1832, the Senate nominated a Roman Catholic priest, Charles Constantine Pise, to be the first Catholic congressional chaplain. *See* JOURNAL OF THE SENATE, 22d Cong., 2d sess., Dec. 11, 1832, at 25; 9 REG. DEB. 5-6 (Dec. 11, 1832).

Pise's election caused an uproar. Nineteenth century Protestants did not see Catholics as their Christian brothers. They saw Catholicism as a rival, and thoroughly corrupt, religion. One Pise biographer wrote of the "intense anti-Catholic feeling and bigotry [in] press and pulpit . . . alike" at the time of Pise's nomination, and described how "[t]he thought of a Catholic priest holding such a position of honor in the Senate of the United States called forth strenuous efforts to prevent this 'disaster' to the Republic." Sister M. Eulalia Teresa Moffatt, *Charles Constantine Pise* (1801-1866), in 20 HISTORICAL RECORDS AND STUDIES 75, 78 (Thomas F. Mechan ed., 1931); *see also* Charles H. Whittier, *The Only Roman Catholic Chaplain of the United States Senate*, CONG. RES. SERV., Mar. 27, 1986, at 1 (noting that "nativists and anti-Catholic elements . . . regarded Catholicism as involving a dual allegiance (to the United States and to the Holy See)" and thus they, as a result, "bitter[ly] campaign[ed] against [Pise]").

These objections did not stop with Pise's election. Congress began receiving petitions to end the chaplaincies; and in apparent protests, Protestant chaplains in state legislatures refused to offer prayers. *See* Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1189 nn. 89 & 90 (2009) [hereinafter Lund, *Congressional Chaplaincies*]. On Independence Day 1833, Pise spoke out publicly to try and pacify the anti-Catholic forces arrayed against him. *Id*. at 1189-90. But at the end of that year, for unknown reasons, the Senate rejected Pise (who sought re-election) and chose an Episcopalian chaplain instead. *See* 10 REG. DEB. 27 (Dec. 10, 1833).

Pise went away, but the issue he sparked did not. Throughout the 19th century, Protestants came to oppose the congressional chaplaincies because of the fear that they would again fall in Catholic hands. *See* Lund, *Congressional Chaplaincies*, at 1190-91 & nn. 93-101. *Marsh* noted how the chaplaincies were suspended in the 1850s, *see Marsh*, 463 U.S. at 788 n.10, but it noted neither the reasons for that opposition nor their intensity, *see* Lund, *Congressional Chaplaincies*, at 1196-97 & nn. 126-27.

Perhaps the most telling indication of how anti-Catholicism affected the chaplaincies is this. Charles Constantine Pise was the first Catholic congressional chaplain, leaving office at the end of 1833. It would not be for another 167 years—until the year 2000—that either the House or the Senate would hire another Catholic as a congressional chaplain. That decision too was racked by controversy. The House committee had agreed upon

Rev. Timothy O'Brien, a Catholic priest. But the leadership in the House rejected the committee's decision, and chose a Protestant. One Catholic bishop publicly objected to the questions the House asked of O'Brien, seeing them as "questions rooted, if not in anti-Catholicism, at least in a denominational bias." David Waters, *Is There an Anti-Catholic Bias Afoot in the Halls of Congress?*, STUART NEWS (FLA.), Feb. 26, 2000, at D6, *available at* 2000 WLNR 7551920. Representative Henry Hyde publicly accused his Republican colleagues of partiality. *See* Steve Neal, *No Room for Politics in This Pulpit*, CHI. SUN-TIMES, Mar. 16, 2001, at 35, *available at* 2001 WLNR 13124467) (statement of Rep. Hyde) ("I hate to think it is anti-Catholic bigotry, but I don't know what other conclusion to draw."). O'Brien ended up telling the *New York Times*, "I do believe that if I were not a Catholic priest I would be the House chaplain." Alison Mitchell, *Rancor in House on Choice of a Chaplain*, N.Y. TIMES, Dec. 2, 1999, at A32, *available at* 1999 WLNR 3016126. The House eventually took neither O'Brien nor Wright. It asked Cardinal Francis George for recommendations, and he suggested the current House chaplain. *See* Neal, *supra*.

The point here is not to accuse Congress of misbehavior, but instead to say that legislatures inevitably will tend to prefer chaplains of their own religious denominations, because legislators are inevitably drawn to clergy who share their religious beliefs and values. This is perfectly natural. It explains why Congress waited so long to have another Catholic chaplain, even though anti-Catholicism had begun to fade significantly earlier. It explains why, throughout our history, we have

only had Christian chaplains. In fact, in a bizarre way, the congressional chaplaincies tell an interesting story about the perceived boundaries of Christianity. Unitarianism used to be thought of as a Christian denomination, and in the 19th and early 20th century we had Unitarian congressional chaplains. But Unitarianism is no longer thought of that way (even by Unitarians), and we no longer have Unitarian chaplains. *See* Lund, *Congressional Chaplaincies*, at 1193-96.

And, of course, not only has Congress never had a non-Christian chaplain, it has never had a female chaplain either. It is obvious why. For Congress to hire a female clergyperson to pray on behalf of the government would imply governmental approval of female clergy, and many well-established religious denominations do not ordain women. Sexual orientation is a similar but different issue, because mainline religious denominations have only recently begun to ordain gay clergy. But it has come up. Oklahoma's legislature recently moved to retroactively strike from the record the prayers of a minister who mentioned his homosexual partner before beginning to pray. *See* Michael McNutt, *Gay Pastor Irks Critics Before Offering Prayer*, OKLAHOMAN, Feb. 12, 2009, at 14A, *available at* 2009 WLNR 2867665. When the government accepts gay ministers as chaplains, it implies that gays and lesbians can be clergy in the government's eyes. But disestablishment requires the government to stay out of the inherently religious debates regarding fitness for ministry. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012).

There is an important difference here between Congress and state legislatures on the one hand, and local governments on the other. When Congress and state legislatures choose institutional chaplains, they do so infrequently and usually through a highly secretive selection process. This lack of transparency obscures discrimination, thus reducing feelings of alienation: The fact that Palmer held his position as chaplain for sixteen years meant that, for sixteen years, there were no fights over who would pray. But as local governments have opened up the prayer opportunity, acts of discrimination have been more common. One Fourth Circuit case involved a Wiccan clergyperson who signed up to give a prayer at a county board meeting and was sent a letter saying that the county did not want Wiccans. *See Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 280 (4th Cir. 2005). An Eleventh Circuit case involved a County Clerk that invited clergy from local congregations. The Clerk used a phone book to find them. When that phone book was turned over in discovery, it was revealed that the Clerk had crossed out certain sections of the phone book, thus excluding Islamic, Jewish, Mormon, and Jehovah's Witness congregations. *See Pelphrey v. Cobb County*, 547 F.3d 1263, 1267-68 (11th Cir. 2008). Perhaps there are other similar cases, but these kinds of allegations are extraordinarily difficult to prove. In *Pelphrey*, the county documented, and then preserved, evidence proving its discrimination; in *Simpson*, the county actually mailed that evidence to the plaintiff. In the average run of cases, plaintiffs will have an impossible time proving discrimination—especially when defendants begin to recognize the need to be more discreet.

III. POLITICS AND LEGISLATIVE PRAYER

Legislative prayer differs fundamentally from issues considered in this Court's other recent Establishment Clause cases—like the constitutionality of Ten Commandments displays, *see McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005), or the phrase "under God" in the Pledge of Allegiance, *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). Part of it is that those cases involved mixed messages. The Ten Commandments have moral as well as religious force, *see Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) ("communicates not simply a religious message, but a secular message as well"), and the Pledge sounds in patriotism as much as religion, *see Newdow*, 542 U.S. at 6 ("a patriotic exercise designed to foster national unity and pride"). But this Court could not recast prayer along such lines; it would be offensive and unconvincing at the same time. Prayer is intrinsically religious, if anything is.

But there is a second difference with just as much explanatory power. Legislative prayer requires more governmental involvement—it vests the government with more discretion to make religious decisions—than either Ten Commandments displays or the Pledge. No one wants to change the text of the Ten Commandments or rewrite the Pledge. Governments will have to decide whether to have a Ten Commandments display; public schools will have to decide whether to say the Pledge. But those operate more like simple up-or-down votes. There is no debate over the merits and demerits of particular theological views. And there are no fights over who gets to send the message. The Pledge is

said by everyone together; the message conveyed by a Ten Commandments display is delivered by no one in particular.

By contrast, legislative prayer requires the government to make a number of religious choices—not just whether to have legislative prayer, but how often, for how long, and so on. The first involves who will be given the platform to pray. Sensitive people will try to be as neutral as possible—by, say, inviting clergy from all religious denominations. Even this is not entirely religion-neutral, of course. Some religions are too small locally to have local clergy; others are theologically opposed to having clergy. *See* Lund, *Congressional Chaplaincies*, at 1204 n.168 (noting that Quakers and Mennonites, lacking ordained clergy, have not participated in the congressional chaplaincies).

But a larger problem lies in the temptation to play favorites. It is deeply unnatural to let minority believers give prayers that few people in the audience want to hear. *See, e.g.*, Shawn Vestal, *Prayer Vote Averts an Unlikely Clash of Faiths,* SPOKESMAN-REV. (SPOKANE, WASH.), June 29, 2011, at 5A, *available at* 2011 WLNR 12912079 ("I would plainly ask: Do you want to invoke the name of another god, whether it is Satan, a set of Wiccan gods or any other? It would be a tragedy to see our government resort to calling upon Satan or any number of other idols for guidance."). And elected officials are the ones making these decisions; letting the Wiccan pray will come with political consequences. *See* Lynne Bumpus-Hooper, *Davis Quitting Over Prayer Furor*, ORLANDO SENTINEL, Mar. 13, 1996, at D1, *available at* 1996 WLNR 5307777 (discussing a city council member who quit

over the backlash from her decision allowing a Wiccan to pray).

A second issue relates to content. Prayer comes in all forms, and there are innumerable lines that a legislature could draw. A legislature could entirely fix the content of the prayer; it could specify, for example, that sessions will open with the Lord's Prayer or the Pledge of Allegiance. It could offer nonbinding suggestions to speakers, it could require explicit pre-approval of prayers, or it could say nothing at all. There are any number of lines to draw, and any number of ways of implementing those lines.

Not only will local governments have to establish limits, they will sometimes be forced to decide penalties. Prayer-givers might cross the line. *See, e.g.*, Rob Johnson & Mason Adams, *Prayer Debate Swirls in Roanoke*, ROANOKE TIMES, Jan. 11, 2009, at A1, *available at* 2009 WLNR 646416 (noting that after an invited clergymember made devotional references to Jesus Christ in his prayers, one city councilman called it "a slap in our face and nothing we agreed to and is leading us down a road we have not agreed to"); Don Davis, *Prayer Riles Minnesota House as Final Friday Begins*, DULUTH NEWS-TRIB., May 20, 2011, *available at* 2011 WLNR 10121451 ("I respectfully apologize . . . for today's morning prayer. As Speaker of the House, I take responsibility for this mistake. I am offended at the presence of [the guest chaplain] Bradlee Dean . . . I denounce him, his actions and his words."). Audience members too will break the rules. In Alabama, a Unitarian Universalist offered a thoroughly nondenominational prayer only to be interrupted by someone praying over her. *See* Kay Campbell, *Meeting Spiritual*

Needs, HUNTSVILLE TIMES, May 23, 2008, at 1B, *available at* 2008 WLNR 13689842. A few years ago, the Senate invited a Hindu guest chaplain, who was interrupted by protestors in the balcony who were subsequently arrested. *See* Lund, *Congressional Chaplaincies*, at 1205-06.

These choices are judgments about religious truth. When the government decides who prays, it decides which religion or religions are true—or at least which are close enough to the truth to merit inclusion. The same is true when the government decides the boundaries of permissible prayers. Barring proselytizing prayers makes sense if God sees all religions as having equal value and sees none as being worthy of condemnation. But barring proselytizing prayers makes less sense if one's neighbors might really be on a wrong theological course and could potentially suffer eternal consequences as a result. *See* Lund, *Secret Costs*, at 1043 (similar phrasing).

And because these decisions are neither static nor inevitable, they bleed naturally out into politics. Here is a newspaper article about a 2009 election in a small North Carolina town:

> Yadkin voters booted out incumbent commissioners Kim Clark Phillips and Joel Cornelius in the Republican primary last week as part of a backlash over the board's decision to drop sectarian prayer from meetings, residents said . . . . Of all the changes [the two commissioners introduced], last year's vote to limit prayer brought on the strongest attacks . . . . Voters began organizing against Phillips and Cornelius more than a year ago after a prayer rally in

> Yadkinville that drew more than 2,500 people in support of opening meetings with Christian prayers. "Once we realized that we had some commissioners who were going to basically ignore a major conservative voting bloc, we began from that day to let our voice be heard at the voting," said Bruce Freeman, the pastor of Peace Haven Baptist Church. "I think they paid the price for not heeding the concerns of the voters." Days before the primary, advertisements ran in newspapers in Elkin and Yadkinville that promoted Wooten as the only commissioner to stand up in support of sectarian prayer . . . . But some people in Yadkin County say that voters also had the jail issue on their minds when they went to the polls.

Sherry Youngquist, *Issues Led to Defeat of Yadkin Officials*, WINSTON-SALEM J., May 11, 2008, *available at* 2008 WLNR 8869993. That last line is telling; the reporter apparently felt it necessary to add that at least some voters may have considered something other than the legislative prayer issue in casting their ballots.

That this happened even once is extraordinary, but it is no freak occurrence. *See, e.*g., *Commissioners Go Behind Closed Doors to Pray,* SALISBURY POST (SALISBURY, N.C.), Aug. 6, 2013, *available at* 2013 WLNR 19343575 ("'This judge didn't elect you. The ACLU didn't elect you. We the people elected you,' Ford said. 'If we don't like what you're doing we can go to the ballot box next year and change that.'"); Nick G. Maheras, *Prayer Issue Revisited*, HIGH POINT ENTERPRISE (N.C), Oct. 30,

2008, *available at* 2008 WLNR 20700493 ("Area Christian ministers met Monday to discuss the High Point City Council prayer issue and Tuesday's upcoming election."); Nick G. Maheras, *Prayer Issue Leaves Spotlight*, HIGH POINT ENTERPRISE (N.C), July 7, 2008, *available at* 2008 WLNR 12709775 ("Council has failed to represent what I consider to be the majority in this city. I hope, at election time, that would manifest itself."); Tom Steadman, *Council Votes on Prayer*, GREENSBORO NEWS & REC., July 17, 2007, at A1, *available at* 2007 WLNR 13681870 (explaining that after a council decision to allow only nonsectarian prayers, one minister "critical of the council vote, ended his comments with a political threat . . . 'We're going to remember in 2008,'" which was followed by a "loud standing ovation").[5]

This, in turn, leads to religious campaigning. One California town was considering possible restrictions on overly denominational prayers when it received a letter from a citizens' group, which threatened to purchase billboard space on nearby highways. The billboards would publicly display each council member's vote as being "For Jesus" or "Against Jesus." Maggie Creamer, *Group Threatens to Display on Billboards How Council Members Vote on Invocation*, LODI NEWS-SENTINEL, Sept. 29, 2009, *available at* 2009 WLNR 19276788. A recent Ninth

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[5] To be clear about what *amici* argue: Political divisiveness alone does not warrant striking something down, but the political division here is being generated by the government taking sides in live religious disputes. That is what the Constitution forbids. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 863 (2005) (arguing that constitutional difficulties exist when the government makes "a divisive announcement that in itself amounts to taking religious sides").

Circuit case involved a referendum which asked the voters to decide whether the City Council should continue its policy allowing prayers to refer to Jesus Christ. Twelve thousand votes were cast—seventy-six percent in favor of allowing references to Jesus, twenty-four percent opposed. *See Rubin v. City of Lancaster*, 802 F.Supp.2d 1107, 1109 (C.D. Cal. 2011) (upholding the policy and practice), *aff'd*, 710 F.3d 1087 (9th Cir. 2013).

No one believes that *Marsh* intended these consequences, but all of them are logical and inevitable outgrowths of the decision. When the government takes positions on religious issues, people will want the government to adopt their views. They will campaign for their religious positions; they will vote for them; they will lobby for them. All of this may be perfectly natural, but it goes against the old wisdom that matters of religion "may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (the government cannot "entrust[] the inherently nongovernmental subject of religion to a majoritarian vote").[6]

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[6] Of all the Court's opinions, it is the *Santa Fe* dissenters that most clearly recognized and feared these consequences. *Santa Fe* involved public high school football games, where winners of student elections were free to offer prayers over the public address system. The *Santa Fe* dissenters disagreed with the majority's conclusion that these elections would inevitably become referendums on religion and prayer. But they also made clear that if that happened, it would be a constitutional problem. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 321 (2000) (Rehnquist, C.J., dissenting) (arguing that "the

CONCLUSION

When *Marsh* was decided thirty years ago, it would have taken extraordinary powers of foresight to anticipate what would happen with legislative prayer. Few could have predicted the controversies, both constitutional and political, that legislative prayer would generate. *Marsh* recognized legislative prayer as *sui generis*, and it indeed has created unique kinds of problems. Yet all these problems flow from a single source: The extensive set of religious choices that legislative prayer requires the government to make. "Each choice marginalizes the religious segment that disagrees with it; each choice invites a struggle for future control of it; each choice furthers religious division along political lines. *Marsh* has committed us to a second-best theory of religious liberty. It would be better if it were overruled." Lund, *Secret Costs*, at 1049.

Yet *amici* understand that the Court, bound by principles of *stare decisis* and perhaps attracted to the passive virtues, may be hesitant to overrule *Marsh*. If this Court decides to preserve *Marsh*, it should not expand it beyond its current boundaries—beyond federal and state legislative chaplaincies. *Marsh* now operates as an exception to the central thrust of the Establishment Clause, an exception necessarily implied by the history of the congressional chaplaincies. But any exception to constitutional principle necessarily implied by

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[student] election could lead to a Christian prayer before 90 percent of the football games," in which case the policy would raise Establishment Clause problems). Religious campaigning was impermissible, the Chief Justice said, and would have to be resolved by either ending the elections or by "reasonable campaign restrictions." *Id*. at 321.

history should be only as wide as that history necessarily implies.

Writing in retirement, Madison regretted the congressional chaplaincies and called them unconstitutional. But he also doubted that they would be reversed. Nevertheless, he insisted they not be considered a "legitimate precedent," arguing that instead:

> [I]t will be better to apply to it the legal aphorism de minimis non curat lex [the law does not bother with trifles] or to class it cum maculis quas aut incuria fudit, aut humana parum cavit natura [a few blots which a careless hand has let drop or human frailty has failed to avert].

Elizabeth Fleet, *Madison's "Detatched Memoranda,"* 3 WM. & MARY Q. 534, 558-59 (1946).

Amici believe that Madison was doubly right. *Marsh* should not survive, but if it does, it should not be allowed to swallow the Establishment Clause. The battles over legislative prayer have burned brightly, but legislative prayer remains a quite narrow topic. *Amici* fear what would happen if the fires were to spread. For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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