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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 *AMICI CURIAE* AMERICAN JEWISH COMMITTEE AND JEWISH COUNCIL FOR PUBLIC AFFAIRS IN SUPPORT OF RESPONDENTS

MARC STERN, ESQ.
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, New York 10022
(212) 891-1480

ERIC A. TIRSCHWELL, ESQ.
(*Counsel Of Record*)
CRAIG L. SIEGEL, ESQ.
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

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INTERESTS OF *AMICI*[1]

The American Jewish Committee ("AJC"), established in 1906 by a small group of American Jews deeply concerned about pogroms aimed at Russian Jews, is dedicated to the defense of religious rights and freedoms of all Americans. In the decades since its founding the AJC has collaborated with other minority groups in shared strivings to realize fully the constitutional guaranties of protection for conscience and liberty. Some AJC members are religiously observant and some are not, some pray and some do not, and AJC's membership – like the United States population at large – reflects a diverse and wide range of beliefs about God. As a group, AJC is committed to the idea that government should not involve itself in sponsoring, encouraging, or discouraging religious observances or practices, including prayer. AJC believes that our Constitution wisely leaves decisions concerning matters of individual conscience and belief, such as whether and when to pray, exclusively to individuals and the private religious community. In support of these principles, AJC through the years has filed numerous briefs in this Court on important matters of religious freedom.

[1] Pursuant to Rule 37.3 of the Rules of the Supreme Court (the "Rules"), all parties have consented to the filing of this brief by filing blanket consent letters with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored the brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. In addition, no persons or entities other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

The Jewish Council for Public Affairs ("JCPA") is the coordinating body of fifteen national and 125 local Jewish community relations organizations. JCPA was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a pluralistic society. The JCPA recognizes that the Jewish community has a direct stake – along with an ethical imperative – in assuring that America remains a country wedded to the Bill of Rights and that the wall of separation between church and state remains an essential bulwark for religious freedom in the United States. The JCPA believes that religious institutions and people of faith can and should play a vital role in public discourse. At the same time, the pluralistic fabric of our society demands that individuals, especially those acting in an official public capacity, should never impose personal religious views on others and that government bodies should operate without preferential treatment for any one religious perspective.

The AJC and JCPA submit this brief principally to oppose the argument of Petitioner and many of its *amici* that this Court should supplant current Establishment Clause doctrine with some form of a coercion or proselytization test, and to urge the Court instead to preserve the deeply rooted Establishment Clause understanding of neutrality that reaches beyond non-coercion and non-proselytization to protect against government programs that have the purpose or effect of advancing or inhibiting religion.[2]

[2] The AJC and JCPA have long opposed the recurring arguments made to this Court that it should reduce the protection of the Establishment Clause to some version of a

SUMMARY OF ARGUMENT

Petitioner and many of its *amici* take aim at the Court's "endorsement test" and the three-part *Lemon* test. But in fact their agenda is far more ambitious. Petitioner argues that "*Lemon* and its endorsement-test offspring should be replaced" (Brief of Petitioner ("Pet. Br.") at 50) with a test that asks only (a) if citizens are being "coerced" into "religious participation" or to "adopt a particular tenet or belief" (*id.* at 48, 39), or (b) whether the challenged practice or expression is being "exploited" to "advance or proselytize on behalf of one religion to the exclusion or detriment of others." *Id.* at 38. Petitioner's *amici* propose an even narrower reading of the Establishment Clause that would supplant current law with a single question: whether "the challenged policy, practice or action involves coercion in regard to religion" (Brief for American Civil Rights Union as *Amicus Curiae* Supporting Petitioner at 5) or "actual legal coercion" (Brief for Virginia Christian Alliance, *et al.* as *Amici Curiae* Supporting Petitioner at 19-20). Or as one *amicus* proposes, "[if] the power of the government is not used coercively to compel *adherence* to a particular belief or support of a particular church, there is no establishment." (Brief for Center for Constitutional Jurisprudence as *Amicus Curiae* Supporting Petitioner at 18) (emphasis added).

We most respectfully urge the Court to decline these numerous invitations to radically

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narrow "no coercion" rule. More than twenty years ago, AJC and JCPA joined with a number of other religious and secular organizations in filing an *amicus* brief opposing such arguments in *Lee v. Weisman*, 505 U.S. 577 (1992).

redraw the boundaries of church/state relations. What Petitioner and its *amici* are suggesting – that this Court adopt some version of a narrow coercion test as the only limit on establishment – would require a wholesale rewriting of sixty-six years of the Court's Establishment Clause jurisprudence, beginning with *Everson v. Board of Education*, 330 U.S. 1 (1947). It would eliminate any consideration of the purposes or effects of government programs relating to religious messages or religious activity. It would open the floodgates to re-litigation of a number of long-settled questions, including as just one example whether the Establishment Clause stands as a barrier to various forms of allegedly "voluntary" government-sponsored prayer in public school classrooms. *See, e.g., Wallace v. Jaffree,* 472 U.S. 38 (1985); *Abington School Dist. v. Schempp,* 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). And because coercion (like effect and endorsement) is not a self-defining term – and Petitioner and its *amici*, like members of this Court, have disagreed over the form it must take – its adoption as the exclusive test of establishment would not eliminate the "delicate and fact-sensitive" review that has been the hallmark of this Court's Establishment Clause decisions. *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

The proposition that coercion is a sufficient *but not a necessary* predicate for an Establishment Clause violation – that it represents the floor, not the ceiling, of the Establishment Clause's protective ambit – is deeply embedded in the Court's precedents. The Court has struck down numerous government-sponsored programs relating to religion and religious exercises without

finding any actual coercion, and for fifty years has been on record rejecting the argument that coercion should be installed as the *sin qua non* of an Establishment Clause violation. *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 597 n.47 (1989) ("[The Court] repeatedly has stated that 'proof of coercion' is 'not a necessary element' of any claim under the Establishment Clause."); *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 786 (1973) ("The absence of any element of coercion . . . is irrelevant to questions arising under the Establishment Clause."); *Schempp,* 374 U.S. at 223 ("[A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.").

That so few Establishment Clause cases involving actual coercion have come to this Court shows a broad consensus understanding – emphasized by the Court in recent decisions – that at a "minimum" the Establishment Clause took coercion with respect to religion off the table of acceptable government conduct. Virtually all Establishment Clause cases decided by this Court have turned instead on a different question – beyond coercion, what else, what more, does the Establishment Clause forbid? In this way, the broad history of Establishment Clause litigation reinforces the understanding that the core and disputed Establishment Clause question is not whether the anti-establishment rule reaches beyond non-coercion but rather how much further it goes.

Diverse majorities of this Court accordingly have used coercion as only one marker for

assessing such constitutional challenges, alongside other long-established and recently reaffirmed "signposts," including the requirements of government neutrality, that the government not act with "the purpose of advancing religion," and that state-sponsored programs or activities have "a primary effect that neither advances nor inhibits religion." *See, e.g., McCreary County v. American Civil Liberties Union,* 545 U.S. 844, 874, 881 (2005) (reaffirming the "importance of neutrality as an interpretive guide" and asking whether county's Ten Commandments policy has a "predominantly religious purpose"); *Zelman v. Simmons-Harris,* 536 U.S. 639, 649 (2002) (asking whether Ohio's school voucher program "has the forbidden 'effect' of advancing or inhibiting religion"); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305-08, 312-13 (2000) (assessing whether policy permitting student-led prayer before high school football games "encourages" or "endorses" or "sponsors" a religious activity and also whether it had "the improper effect of coercing").

As for a non-proselytization test, Petitioner and its many *amici* are at odds with themselves. They universally condemn any outcome that would have courts or local elected officials "entangle" themselves in attempting to distinguish "sectarian" from "nonsectarian" prayer. *See, e.g.,* Brief for United States Senators Marco Rubio, *et. al.* as *Amici Curiae* Supporting Petitioner at 22-33. At the same time, they propose an alternative test that would require a similar if not more scrutinizing parsing of those same prayers to discern from the words or presentations any forbidden motivation or *subjective* intent to proselytize. Any such subjective

test is impractical and easily circumvented. It leaves unanswered whose illicit motives matter. Is it the government body that passed the challenged program, local officials who are implementing it, or the clergy or other prayer-givers who may be involved in selecting the religious messengers and delivering the challenged messages? And how will such improper motive or forbidden intent be proven – depositions, or even trials, on the question of whether a particular prayer-giver was selected to deliver, or in fact delivered, a prayer with the prohibited intention of seeking to convert audience members? Instead, to the extent *Marsh v. Chambers*, 463 U.S. 783 (1983), requires inquiry as to proselytization or exploitation of prayer programs, the inquiry should be an objective one only.

That this Court "has found no single mechanical formula that can accurately draw the constitutional line in every case," (*Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring)), is neither grounds for despair nor justification for a purported quick-fix that would be inconsistent with both the broad religious neutrality required by the Establishment Clause and nearly seven decades of the Court's "delicate and fact-sensitive" Establishment Clause case law. *Lee,* 505 U.S. at 597. The Court should not boil down the broad protections against establishment to an exclusive, narrow, and permissive test that would stand in the way of only the most obvious and extreme instances of coercion or intentional proselytization.

We also fully agree with Respondents that the Town of Greece's legislative prayer program amounts to an unconstitutional establishment

of religion, whether the test is coercion, proselytization, exploitation or endorsement. We accordingly join in urging affirmance of the Second Circuit's decision below.

ARGUMENT

I. The Court Should Not Overturn Fifty Years of Precedent By Holding Coercion To Be A Prerequisite To An Establishment Clause Violation

We begin with the observation that the object of the attacks that fill so many pages of the briefing from Petitioner and its *amici* – the three-part *Lemon* test – was adopted by a 6-1 vote (7-1 with Justice Brennan's concurrence) and summarized "the cumulative criteria developed by the Court over many years." *Lemon*, 403 U.S. at 612. The first two parts – purpose and primary effect – came directly from the 8-1 decision in *Schempp*, 374 U.S. at 222. The third part came from *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

The *Schempp-Lemon* formulation was an elaboration of the foundational Establishment Clause principle that government must be neutral with respect to religion. *See Lemon*, 403 U.S. at 612. The Court stated that enduring rule in its first modern Establishment Clause decision: the First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers." *Everson*, 330 U.S. at 18.

Petitioner says that "*Lemon* and its endorsement-test offspring should be replaced."

Pet. Br. at 50. But in urging their replacement with some form of a coercion test, Petitioner and its *amici* challenge the whole history of Establishment Clause jurisprudence in this Court and would eliminate any consideration of purpose or effect. It is true that many early opinions of this Court discuss the evil of coercing persons to participate in religious observances, and that certain more recent cases have been decided by applying the consensus understanding that "at a minimum" the Establishment Clause forbids such government coercion. This is because coercion is the clearest example of establishment, and where it is found there is no need for the Court to explore the boundaries of the Establishment Clause any further. But this Court rejected proof of coercion as *necessary* to prove an Establishment Clause violation at its first opportunity. Since then it has never held – and repeatedly has refused invitations that it hold – that the government *only* runs afoul of the Establishment Clause if it engages in religious coercion.

To appreciate just how far Petitioner and its *amici* are asking this Court to depart from its settled precedent, it is instructive to look back to the Court's earliest Establishment Clause opinions. Those decisions drew no distinction between coercion on the one hand and aid, persuasion, promotion, sponsorship, influence, approval, or encouragement on the other hand, condemning the former and permitting the latter. Rather, a wide range of non-coercive conduct by which the government put its thumb on the scale in favor of religion was understood and described as plainly unconstitutional.

Justice Black wrote for the majority in *Everson*:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion.*

Everson, 330 U.S. at 15 (emphasis added). This passage treats force and influence in matters of religion as equally objectionable. The Court certainly did not suppose that the government could "set up a church" if no one were coerced to support it.

Justice Rutledge for the four dissenters in *Everson* was even more explicit about non-coercive violations of the Establishment Clause. He listed coercive violations of the Establishment Clause, and he contrasted these with "the serious surviving threat[s]" of financial aid to religious institutions and "efforts to inject religious training or exercises and sectarian issues into the public schools." *Id.* at 44 (Rutledge, J., dissenting). Thus, none of the nine Justices in *Everson* believed that coercion was an element of every Establishment Clause violation.

In *Zorach v. Clausen*, 343 U.S. 306 (1952), the Court upheld programs under which public schools released students to attend off-premises private religious instruction. The Court distinguished the released time program in *Zorach*

from the similar program struck down in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), on grounds that had nothing to do with coercion. The charge of coercion in both cases rested on the claim that limiting students to either study hall or religious instruction coerced them to choose religious instruction. *Zorach*, 343 U.S. at 309-10. *Zorach* rejected that claim, finding neither coercion nor persuasion. *Id.* at 311. The Court distinguished the two cases instead on the ground that religious instruction was off campus in *Zorach*, but on campus in *McCollum*. *Id.* at 309. The key to an Establishment Clause violation was not coercion, but use of school property to "assist[]" and "aid," *McCollum,* 333 U.S. at 210, and "promote," *Zorach*, 343 U.S. at 315, programs of religious instruction. Allowing students to leave campus for such instruction, on the other hand, was viewed as "no more than accommodat[ing]" the private choices of religious families. *Id.*

Building on these precedents, the Court broke no new ground when it emphatically rejected a coercion test in the first school prayer case, *Engel v. Vitale*, 370 U.S. at 430-31. The Court said that the Establishment Clause went far beyond even indirect coercion:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. *But the purposes*

> *underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.*

Id. at 431 (emphasis added).

Other language in the opinion confirms the strength of the Court's belief that coercion is not an essential part of Establishment Clause analysis. It did not matter that no pupil was "required" to recite the prayer or that New York's prayer program "permit[ted] those who wish[ed] to do so to remain silent or be excused from the room." *Id.* at 430. It was unconstitutional for state actors "to *encourage* recitation of the Regents' prayer," *id.* at 424, to place "its *official stamp of approval*" on any religion, *id.* at 429, or to use its "prestige" to "*support or influence* the kinds of prayer the American people can say," *id.* (all emphases added).

Justice Douglas, concurring, similarly highlighted that there was "no element of compulsion or coercion," as the statute provided that school children could be excused or remain silent and no comment or penalty was to follow, *id.* at 438, and that the prayer at issue was "of a character that does not involve any element of proselytizing." *Id.* at 439. Yet he too found the prayer program to violate the Establishment Clause, as an unconstitutional financing by government of a "religious exercise." *Id.* at 442.

The Court reaffirmed its commitment to an interpretation of the Establishment Clause that went well beyond coercion in the second

school prayer case, *Schempp*, 374 U.S. 203. The Court said that the purpose of the First Amendment was "to take every form of *propagation of religion* out of the realm of things which could directly or indirectly be made public business." *Id.* at 216 (quoting *Everson*, 330 U.S. at 26 (Jackson, J., dissenting) (emphasis added)). And the state cannot "*perform or aid in performing* the religious function." *Id.* at 219 (quoting *Everson*, 330 U.S. at 52 (Rutledge, J., dissenting) (emphasis added)).

The Court quoted the entirety of *Engel*'s holding that coercion is not an element of an Establishment Clause violation, *Schempp*, 374 U.S. at 221, and then repeated the point more succinctly, *id.* at 223 ("[A] violation of the Free Exercise clause is predicated on coercion while the Establishment Clause violation need not be so attended."). Accordingly, it was of no constitutional significance that the program requiring the daily reading in public schools from the Holy Bible was "voluntary" in so far as it provided that any child could be excused or decline to participate in the exercises. *Id.* at 207, 211-12, 224-25. Elaborating on "the wholesome 'neutrality' of which this Court's cases speak," the Court formulated what became the first two parts of the *Lemon* test: "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222 (citation omitted).

Justice Stewart in dissent argued at length that the constitutional challenge should "turn[] on the question of coercion," *id.* at 316-20, so the issue was squarely presented. His view was not joined by any of his fellow Justices.

Still, his sensitive understanding of coercion makes clear that he would not define coercion as narrowly as Petitioner and its *amici*. Foreshadowing the kind of "subtle" and "indirect" pressure that this Court would come to recognize as coercive in later decisions, *see Lee*, 505 U.S. 577, and *Santa Fe Indep. School Dist.,* 530 U.S. 290 (discussed below), Justice Stewart was careful to acknowledge the dangers of "psychological compulsion to participate." *Schempp*, 374 U.S. at 318. He thought it would be coercive if students who failed to attend religious exercises had to forego "morning announcements" or if the "excusal provision was so administered as to carry any overtones of social inferiority." *Id.* at 320 n.8. All nine Justices in *Schempp* thus rejected the type of narrow and limited coercion test advanced by Petitioner. *See, e.g.,* Pet. Br. at 39 ("[c]oercion occurs when an individual is *required* to adopt a particular tenet or belief" (emphasis in original)); *id.* ("[A]n individual is not coerced . . . so long as that individual is not required to participate [in a civic acknowledgement of religion] or assent to the views expressed.").

A decade later, the argument that coercion is "a necessary element of any claim under the Establishment Clause" was again raised, and again squarely rejected, this time by a six-Justice majority. *Nyquist,* 413 U.S. at 786 ("The absence of any element of coercion . . . is irrelevant to questions arising under the Establishment Clause.").

In *Stone v. Graham*, 449 U.S. 39 (1980), the Court reviewed a Kentucky statute requiring the posting of the Ten Commandments, pur-

chased with voluntary contributions, on the walls of schoolrooms. If coercion had been a requirement to prove the Establishment Clause violation, the lower court decision upholding the statute surely would have been affirmed. The dissent emphasized that there "was no compelled reading." *Id.* at 45 n.1 (Rehnquist, CJ.). But this Court invalidated the Kentucky practice, citing state "auspices" and "official support" for religion as unconstitutional. *Id.* at 42 (quoting *Schempp*, 374 U.S. at 222).

Two years later, the Court unanimously invalidated a law that authorized students and teachers to volunteer to lead the class in prayer. *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982). The statute stated that "no student or teacher could be compelled to pray," but that did not solve the establishment problem or even require full argument. *Id.*

The following term the Court decided *Marsh*, 463 U.S. 783. Prayer in the Nebraska legislature was upheld in a narrow opinion by Chief Justice Burger, focusing on the "unique history" of legislative prayer. *Id.* at 791. In the same term, another opinion by Chief Justice Burger quoted and reaffirmed the *Schempp-Lemon* test, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982), and condemned a "symbolic benefit" to religion. *Id.* at 125. Eight justices joined this opinion.

The next year, the Court unanimously affirmed invalidation of a statute authorizing public school teachers to lead willing students in prayer. *Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd in part*, 466 U.S. 924 (1984). And all nine Justices applied the

Schempp-Lemon test to the municipal Christmas display in *Lynch v. Donnelly*, 465 U.S. 668 (1984), although they disagreed on what the outcome should be.

In a concurring opinion in *Lynch,* Justice O'Connor for the first time set out her endorsement test to clarify the first two prongs of the *Lemon* test. *Lynch*, 465 U.S. at 690. The following year, in *Wallace*, 472 U.S. 38, the Court again struck down a so-called "voluntary" prayer provision for public schools. The Court quoted and applied the *Schempp-Lemon* test, but also incorporated Justice O'Connor's endorsement test as an authoritative interpretation:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.

Id. at 56 n.42 (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

Two years later, in *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court again applied the *Schempp-Lemon* test, *id.* at 582-83, as clarified by the endorsement test, *id.* at 585, to strike down a statute requiring balanced treatment of evolution and "creation science." It followed that same analysis – *Schempp-Lemon* and the endorsement test – to prohibit display of a crèche in a county courthouse in *County of Allegheny*, 492 U.S. at 592. The *County of Allegheny* Court did not say

that the display was coercive; rather, it said that the display "has the effect of endorsing a patently Christian message." *Id.* at 601.

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principal remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . . .

Id. at 593-94.

Justice Kennedy's *County of Allegheny* dissent suggested a fundamentally different standard: that "government may not coerce anyone to support or participate in any religion or its exercise," *id.* at 659, and that government may not "proselytize on behalf of a particular religion," *id.* at 661.

The majority declined to adopt this test, recalling that the Court "repeatedly has stated that 'proof of coercion' is 'not a necessary element of any claim under the Establishment Clause'." *Id.* at 597 n.47. It also noted that Justice Kennedy's proposed proselytization test was "no less fact intensive than the 'endorsement' formulation." *Id.* at 606-608.

Justice O'Connor, concurring, underscored the differences between the Court's settled framework and Justice Kennedy's proposed alternative:

> An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, . . . but fails to take

> account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.

Id. at 627-628. Justice O'Connor also pointed out the logical fallacy of equating the Establishment Clause with a no coercion rule. *Id.* at 628 ("To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise clause a redundancy."). *See also* Kathleen M. Sullivan, *Religion and Liberal Democracy,* 59 U. Chi. L. Rev. 195, 205 (1992) ("[T]he Establishment Clause cannot be mere surplusage. If the Free Exercise Clause standing alone guarantees free exercise of non-religion, the Establishment Clause must do more than bar coercion of non-believers. Thus a 'coercion' test for establishment would reduce the Establishment Clause to a redundancy.").

Three years after *County of Allegheny*, in *Lee*, 505 U.S. 577, this Court again declined the urgings that it discard *Lemon*. *Id.* at 587. "[A]t a minimum," Justice Kennedy wrote for the six-member majority, "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.* at

587 (citation omitted). This constitutional floor of no coercion was enough to invalidate a government policy that invited clergy to deliver prayers at secondary public school graduation ceremonies. The Establishment Clause injury was "that the State, in a school setting, *in effect* required participation in a religious exercise." *Id.* at 594 (emphasis added). One "timeless lesson of the First Amendment," the Court observed, was that citizens were not to be "subjected to state-sponsored religious exercises." *Id.* at 592. Accordingly, neither the fact that the prayers were said to be "nonsectarian" nor the stipulation that attendance at graduation was "voluntary" could save the program from a finding of unconstitutionality. It was struck down because objecting graduates were "induced to conform" through "subtle and indirect" pressure that "can be as real as any overt compulsion." *Id.* at 594-95, 599, 593.

Four Justices wrote or joined two separate concurring opinions in *Lee* to "make clear that proof of government coercion is not necessary to prove an Establishment Clause violation," although "it is sufficient." *Id.* at 604 (Blackmun, J., concurring).

> Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.
>
> But it is not enough that the government restrain from compelling religious practices: it must not engage in them either. *The Court repeatedly has recognized that a violation of the Estab-*

> *lishment Clause is not predicated on coercion.*

Id. (emphasis added). *See also id.* at 618 (Souter, J., concurring) (noting that adopting "a 'coercion' analysis of the [Establishment] Clause" would require "abandoning our settled law").

In *Santa Fe Independent School Dist.*, 530 U.S. 290, a six-member majority of this Court reaffirmed that while "at a minimum" the Establishment Clause bars coercion, *id.* at 302 (quoting *Lee*, 505 U.S. at 587), the Court's Establishment Clause jurisprudence continues to be guided by the three *Lemon* factors, including the endorsement test. *Id.* at 308, 314.

> In cases involving state participation in religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."

Id. at 308 (citation omitted). The three dissenting Justices acknowledged that the majority had applied – and thus reaffirmed – the *Lemon* test. *Id.* at 319 & n.1 (Scalia, J., dissenting).

Applying these multiple tests, and strongly reaffirming that the Establishment Clause protects against more than just actual coercion, the Court in *Santa Fe* invalidated a government policy permitting (but not requiring) student-led, student-initiated prayer at public high school football games. The policy

was struck down because it "involve[d] both perceived and actual endorsement of religion," *id.* at 305; constituted state "sponsorship of a religious message," *id.* at 309-10, 313; had the improper "effect of coercing those present to participate in an act of religious worship," *id.* at 312; and had the "purpose and create[d] the perception of encouraging the delivery of prayer," *id.* at 317.

The same *Schempp-Lemon* framework was reaffirmed again two years later, as the Court upheld Cleveland's school voucher program. *Zelman*, 536 U.S. at 640 (asking whether Ohio's school voucher program "has the forbidden 'effect' of advancing or inhibiting religion"). The Court made clear that if the program had been "skewed" toward religion, the outcome would have been different. *Id.* at 653. *Zelman* drew upon a long line of decisions involving state aid to religion that also had followed the *Schempp-Lemon* framework. *See, e.g.*, *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 485 (1986) ("We are guided . . . by the three-part test set out by this Court in *Lemon* . . . ."); *Mueller v. Allen*, 463 U.S. 388, 394 (1983) ("The general nature of our inquiry in this area has been guided, since the decision in *Lemon* . . . by the 'three-part' test laid down in that case . . . ."). *See also Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) ("[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged.").

In a pair of cases announced on the same day in 2005, *McCreary County*, 545 U.S. 844, and *Van Orden*, 545 U.S. 677, the Court split over the

constitutionality of public displays of the Ten Commandments. Displays were prevented in courthouses in Kentucky, *McCreary*, 545 U.S. at 870, and permitted on the grounds of the Texas State Capitol, *Van Orden*, 545 U.S. at 681.

Only one of the two decisions – *McCreary* – yielded a majority opinion. The Court again declined the invitation to abandon *Lemon* – this time, its purpose prong. *McCreary*, 545 U.S. at 861-64. It reaffirmed "[t]he importance of neutrality as an interpretive guide," harkening back to *Everson* in 1947, *id.* at 874-76; discussed and applied the reasonable observer test, *id.* at 866; and concluded that under the first *Lemon* prong – and without any finding of coercion – the counties' courthouse displays presented an impermissible predominantly sectarian purpose. *Id.* at 859-70.

In *Van Orden*, the display in the state capitol was upheld through the combination of a four-Justice plurality and Justice Breyer's concurrence. The plurality found the *Lemon* test "not useful" and relied instead on "the nature of the monument and . . . our Nation's history." *Van Orden*, 545 U.S. at 686. Along the way it reaffirmed that Governmental "institutions must not press religious observances upon their citizens." *Id.* at 683 (Rehnquist, C.J., plurality opinion).

Justice Breyer was of the view that the Court's "prior tests provide useful guideposts." *Id.* at 700. But he saw "no test-related substitute for the exercise of legal judgment," *id.* at 700, and relied more on "consideration of the basic purposes of the First Amendment's Religion Clauses themselves," *id.* at 704.

The Court's most recent Establishment

Clause decision – *Salazar v. Buono*, 559 U.S. 700 (2010) – resulted in no majority opinion. Justice Kennedy's controlling plurality opinion remanded the case and raised – but did not answer – the question of whether the endorsement test's '"reasonable observer' standard continued to be the appropriate framework through which to consider the Establishment Clause" challenge. *Id.* at 720.

A review of this Court's modern Establishment Clause jurisprudence thus yields a few important conclusions. The proposition that a showing of coercion is *not* a prerequisite to demonstrating an Establishment Clause violation has been the settled and binding law for more than fifty years, since the issue was raised and unequivocally decided in *Engel* and *Schempp*. It was expressly reaffirmed twice since then, in *Nyquist* and then in *County of Allegheny*. The *Schempp-Lemon* test – and in particular the proposition that government action that has the purpose or effect of advancing or inhibiting religion violates the Establishment Clause – also has been the settled law of this Court for fifty years. That framework has been applied to overturn, or at least considered in overturning, numerous government practices and programs, including those in two of the Court's most recent Establishment Clause majority opinions, *Santa Fe* and *McCreary*. Discarding and overturning all of this precedent in favor of some version of the proposed non-coercion/non-proselytization tests would require a wholesale rewriting of the Court's deeply rooted interpretation of the Establishment Clause. To do so would eliminate any consideration of improper

sectarian purpose or effect and would re-open for litigation some of the most divisive practices that this Court has consistently condemned, including the many variations of so-called voluntary prayer in school. It would not change the fact that whatever the test – effect, endorsement, coercion, exploitation, or proselytization – its definition and application will not be easy or noncontroversial and will require the same kind of fact-intensive and sometimes difficult line-drawing that has long been a part of this Court's decisions in this area. For all of these reasons, we urge the Court to adhere to its precedents and decline to adopt coercion (or coercion plus proselytization) as the only Establishment Clause limitation on state involvement with religion.

II. The Court Should Reject Any Proselytization Test That Would Require A Finding of Subjective Intent

Beyond a coercion test, Petitioner puts forth a subjective intent to proselytize test as an additional "limitation on government action." Pet Br. at 38-39. Certain of Petitioner's *amici* similarly urge the Court to hold that sectarian legislative prayer is permissible "in the absence of findings of improper governmental motivation, or intentional government exploitation, proselytization or disparagement of one faith over another" (Brief for The Rutherford Institute as *Amicus Curiae* Supporting Petitioner at 16) and propose that the inquiry should look to "the intent of the government speaker" (Brief for Board of Commissioners for Carroll County,

Maryland, *et. al.* as *Amici Curiae* Supporting Petitioner at 32-33) or "for evidence of an 'impermissible motive' or exploitation to proselytize" (Brief for Members of Congress as *Amici Curiae* Supporting Petitioner at 35).

To the extent *Marsh* requires inquiry into whether a prayer program or other religious expression is being used to proselytize or exploited to advance religion, the test should instead be an *objective* one, including and reflecting a realistic assessment of the *effect* that religious messages have on reasonable citizens. *See County of Allegheny*, 492 U.S. at 661 (Kennedy, J., dissenting) (the Establishment Clause "forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion"). The proposals of Petitioner and its *amici*, on the other hand, raise more questions than they answer by requiring close scrutiny of the subjective motivations of legislators, local officials, and even clergy.

Petitioner (and its *amici* supporters) harshly criticizes – and to varying degrees maintains that this Court has prohibited – any test that would require courts or local officials to attempt to "superintend[] the content of prayers to ensure that they are nonsectarian." (Pet. Br. at 41-42 (citing *Lee*, 505 U.S. at 588-89)). But nowhere do they answer the obvious question that their own criticisms raise: How are the courts or local officials to apply the test they suggest – i.e., whether prayers are subjectively "intended to proselytize" – without engaging

in a similar scrutiny of the content of what is said? While we agree with the Second Circuit that the lower courts may, and often must, consider "the substance of the prayers under challenge," (Pet. App. at 21a n.6; *see also Joyner v. Forsyth County*, 653 F.3d 341, 351 (4th Cir. 2011) ("It is to say the least an odd view of the judicial function that denies courts the right to review the practice at issue."), our point is that Petitioner and its *amici* cannot have it both ways. Whatever the challenges presented in separating the sectarian from the nonsectarian in state-sponsored prayers (and we agree with Respondents that it is a manageable task), it often will be even more challenging to discern from the text of a prayer whether the author's subjective intention is to convert others to or advance a particular religious faith, or simply to acknowledge or discuss that faith. Not surprisingly, in deciding challenges to prayer practices that raise issues of prohibited proselytization, the lower courts, like local officials, have in fact, and necessarily, looked to the content of the prayer at issue. *See, e.g.*, *Newdow v. Roberts,* 603 F.3d 1002, 1021 (D.C. Cir. 2010) (reviewing content of Presidential Inaugural prayers to assess whether they were being "exploited to proselytize"); *Pelphrey v. Cobb County,* 547 F.3d 1263, 1277-78 (11th Cir. 2008) (reviewing "diversity of religious expressions," as well as their duration and placement, in affirming finding of no exploitation to advance one faith); *Cole v. Oroville Union High School Dist.,* 228 F.3d 1092, 1096-1097 (9th Cir. 2000) (explaining the proselytizing nature of the proposed student prayer by quoting phrases and

words from the prayer itself); *Snyder v. Murray City*, 159 F.3d 1227, 1235 (10th Cir. 1998) (same).

Petitioner and its *amici* are also unclear on whose intent or motivation or exploitation matters, and how it could ever be practically proven. Are the courts to focus on the legislators who enacted the prayer program? Local government officials who carry it out? The clergy or prayer-givers themselves? All three? Each raises its own difficulties. And the various briefs by Petitioner and its *amici* make clear that even they cannot agree on whose intent matters. *See, e.g.,* Brief for The United States as *Amicus Curiae* Supporting Petitioner at 17 n.6 ("Contrary to Petitioner's suggestion (*see, e.g.*, Pet. Br. 21-22, 44), *Marsh*'s prohibition on the exploitation of an opportunity for prayer to proselytize or advance one faith, or to disparage another, applies both to the government entity providing the opportunity and to the prayer-givers accepting the opportunity, whether employed by the government or not.").

As Justice Scalia has observed, "assessing the subjective intent of governmental decision-makers" is a "perilous enterprise" involving "many hazards," and "discerning the[ir] subjective motivation . . . is . . . almost always an impossible task." *Edwards,* 482 U.S. at 636-639 (dissenting opinion). Evidence of intent may be sparse or non-existent; post-litigation denials of improper motivation are easily stated but not so easily contested; and these and other sources of evidence of intent "are eminently manipulable." *Id.* These are some of the reasons why "Establishment Clause analysis does not look to the veiled psyche of gov-

ernment officers." *McCreary*, 545 U.S. at 863.

There are other problems. Different prayer givers may be invited by different legislators or a particular local official, each with his or her own motivations, presenting the question of whether one individual's improper motivations may fairly be ascribed to a government body as a whole. *See Edwards*, 482 U.S. at 636-639 (Scalia, J., dissenting); *see also Church of the Lukumi Babalu Aye Inc. v. City of Hialeah,* 508 U.S. 520, 558-59 (1993) (Scalia, J., concurring) (noting that "it is virtually impossible to determine the singular 'motive' of a collective legislative body" and that the First Amendment "does not put us in the business of invalidating laws by reason of the evil motives of their authors"). Legislators may enjoy the protection of legislative privilege, which may prevent inquiry into and discovery of whether the legislator's "conduct was improperly motivated." *United States v. Johnson*, 383 U.S. 169, 180 (1966). That privilege applies to local government officials, *Bogan v. Scott-Harris,* 523 U.S. 44 (1998), and even in some circumstances to their employees, *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (*per curiam*).

Beyond the difficulties of proving the subjective intent of elected or appointed government officials or their employees, in several states local ministerial associations are permitted to choose the legislative prayer-givers.[3] And of course all so-called legislative prayer involves individual prayer-givers, often (but not always) members of the clergy. Are litigants and the

[3] See National Conference of State Legislatures, Table 98-3, available at http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf.

courts to take depositions, and even hold trials, to ferret out the subjective motivations and intentions of local officials or clergy (or even, in the case of school prayer, students)? We respectfully submit that this is not a sound road for this Court to send litigants and the lower courts down, especially in light of the free exercise and entanglement concerns that any such inquiries inevitably would raise.

Finally, any test focusing on subjective questions such as whether there was an improper "intent to proselytize" also would run against the tide of this Court's decisions in other areas of constitutional adjudication eschewing inquiries into the subjective motivations of government actors. *See, e.g., Brigham City, Utah v. Stuart,* 547 U.S. 398, 404-405 (2006) ("Our cases have repeatedly rejected" consideration of "officers' subjective motivations" as relevant to whether there was a Fourth Amendment violation); *Devenpeck v. Alford,* 543 U.S. 146, 154-55 (2004) ("Subjective intent of the arresting officer. . . is simply no basis for invalidating an arrest."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000) (rejecting argument that nude dancing ban should be struck down because "the city council . . . had an illicit motive in enacting the ordinance"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) ("[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); *United States v. Leon*, 468 U.S. 897, 923 n.23 (1984) ("'[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of

judicial resources'.") (citation omitted).

Current law compensates for all of these difficulties of proof by requiring courts to objectively assess the effects and impact of a practice. Petitioner and its *amici* would eliminate that back-up and have outcomes turn solely on a showing of improper purpose. We submit that the Court should not erect tests that public officials can all too easily evade with a wink and a nod. The First Amendment, like the Fourth Amendment, regulates government conduct, and in cases raising First Amendment challenges the focus likewise should be on actions and their objective effects and not on elusive questions of the propriety or illicitness of the subjective motives of individual actors. *See Edwards,* 482 U.S. at 636-639 (Scalia, J., dissenting).

Here, the Second Circuit rejected the argument that there could be no Establishment Clause violation where it was undisputed that "the town did not intentionally favor Christian prayer-givers." Pet. App. 17a n.3. We submit that the Second Circuit got that right, and that for the reasons set forth above the question raised in *Marsh* – i.e., whether a prayer practice is being exploited to "proselytize or advance any one, or to disparage any other, faith or belief," *Marsh*, 463 U.S. at 794-95 – is and should be an objective inquiry, focused, as the court below was, not on motivations but instead on effects. Pet. App. 17a n.3.

CONCLUSION

To be clear, we do not argue for banishing prayer from the public sphere. And affirming the Second Circuit, which we urge the Court to do, would not require such banishment. Both Respondents and the United States suggest practical and reasonable steps that could be taken to ameliorate Establishment Clause concerns in the context of prayer at meetings of local legislative bodies. *See* Brief of Respondent at 48-49; Brief for The United States as *Amicus Curiae* Supporting Petitioner at 23-24. The Second Circuit's decision below similarly outlined modestly different ways that the Town of Greece might implement a prayer program to avoid running afoul of the Establishment Clause. Pet. App. 24a-26a. All of these proposals share a good amount of common ground. The Town has not taken any of the suggested steps, but disclaims any intention to coerce, proselytize, or exploit in connection with its prayer program. So perhaps it might agree. But unless and until that time comes, the Court must assess the Town's prayer practice as reflected in the record on this appeal. We submit that this practice clearly crossed the vitally important line separating permissible government acknowledgment from unconstitutional government coercion, proselytization, advancement, endorsement, sponsorship, and encouragement of religion. Accordingly, and for the foregoing reasons and those stated in Respondents' brief, we respectfully urge the Court to affirm the Second Circuit and to decline to supplant decades of settled Establishment Clause case law with a coercion and/or non-proselytization test.

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KRAMER LEVIN NAFTALIS
& FRANKEL LLP

s/ Eric A. Tirschwell
Eric A. Tirschwell
(Counsel of Record)
Craig L. Siegel
1177 Avenue of the Americas
New York, NY 10036-2714
(212) 715-9100

Attorneys for Amici Curiae American Jewish Committee and Jewish Council for Public Affairs

Of Counsel:

Marc D. Stern
American Jewish Committee
165 East 56th Street
New York, New York 10022
(212) 891-1480