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 AMICUS CURIAE OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE

The Freedom From Religion Foundation ("Foundation"),[1] a national nonprofit organization based in Madison, Wisconsin, is the largest association of freethinkers, representing nearly 20,000 atheists and agnostics. The Foundation has members in every state, the District of Columbia, and Puerto Rico. The Foundation's two purposes are to educate the public about nontheism and to defend the constitutional separation between state and church.

The Foundation's interest in this case arises from its position that prayers at government meetings violate the Establishment Clause of the First Amendment to the United States Constitution. For this reason, the Foundation has worked to end prayers at legislative meetings throughout its history. The Foundation was originally formed in 1976 explicitly to protest prayers at the Madison (Wisconsin) Common Council. The Foundation sued the Wisconsin State Legislature in 1978 to stop paid legislative prayer. *Gaylor v. Risser,* 78-C-146 (W.D. Wis. 1983) (dismissed after *Marsh v. Chambers*, 463 U.S. 783 (1983)). Legislative prayer has become the second most common complaint citizens and members bring

[1] This brief has not been authored, in whole or in part, by counsel for either party. No monetary contribution has been made to the preparation or submission of this brief other than the amicus curiae, its members or its counsel. Consent to this brief has been given by all parties and letters of consent have been filed with the Clerk.

to the Foundation's attention. Since 1989, the Foundation has written letters of complaint objecting to government prayer to more than 300 legislative entities, involving nearly every state. Foundation members have frequently been plaintiffs in lawsuits challenging government prayers.

ARGUMENT SUMMARY

Marsh should be overturned. This Court's most enduring decisions apply legal principles to overturn a long history of constitutional violations; its most tenuous decisions ignore legal principles and treat history as dispositive. *Marsh* does the latter. Government practices, like prayer, that co-existed with Congress's passage of the First Amendment or other amendments are not automatically constitutional – as the Sedition Act of 1798 and segregation illustrate. Even if *Marsh*'s originalist interpretation accurately reflected the framers' views on government prayer, which it did not, that interpretation can be incorrect – as Eighth Amendment jurisprudence shows. And sometimes, a long history is simply a longstanding injustice – as this Court's treatment of anti-miscegenation and discrimination against gay citizens demonstrates. In no other case involving the Religion Clauses has this Court placed history over principle as *Marsh* did.

Marsh's recitation of history is unsound. It missed significant facts and distorted others. *Marsh* relied on

congressional chaplaincies but overlooked the divisiveness that office engendered. *Marsh* relied on the First Congress's approval of chaplaincies to discern the framers' intent, but ignored framers' legal opinions against government prayer. *Marsh* relied on colonial prayers that were given years before the Constitution and First Amendment were adopted but minimized the fact that the framers did not pray during the Constitutional Convention when composing our godless Constitution.

Finally, *Marsh* wrongly subjugates fundamental rights to majority rule. Majority will does not trump rights. This country's rapidly shifting religious demographics should force this Court to revisit *Marsh*'s "tolerable acknowledgment" argument.

If this Court upholds *Marsh*, it should affirm the Second Circuit. Government prayer is government speech, as every court analyzing the issue, including the *Marsh* Court, has held. As government speech, Greece's prayers must comport with the Establishment Clause.

Contrary to Greece's assertions, coercion is not required to prove an Establishment Clause violation. Regardless, Greece's prayers are coercive and fail to accomplish any legitimate secular purpose.

Greece's prayers violate the Establishment Clause. Unlike the prayers in *Marsh* they are consistently sectarian, advance Christianity over other religions and religion over nonreligion, and proselytize. These violations are magnified because local governments,

like Greece, work in greater proximity to citizens than a state legislature as in *Marsh*. Nor do Greece's prayers accomplish the purpose of solemnizing government occasions: Christian prayers only solemnize for Christians – they exclude everyone else.

This Court should reverse *Marsh*. This Court has a long, hallowed tradition of overturning past mistakes. It is principle that this Court should revere, not the flawed, incomplete history laid out in *Marsh*. *Marsh* is unsalvageable and should be overturned.

Alternatively, this Court should affirm the Second Circuit.

ARGUMENT

I. *Marsh* is an outlier that should be overturned because it: (A) treats history as dispositive; (B) relies on flawed history; and (C) allowed demographics to trump constitutional rights.

A. *Marsh* is an outlier because this Court does not allow history to trump legal principles in any other context.

Marsh is an outlier. "[I]f the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause." *Marsh,* 463 U.S. at 796 (Brennan, J., dissenting). *Marsh* abandoned legal principles in favor of distorted

history, granting government prayer constitutional immunity because it pre-dates the First Amendment.

Unlike every other Establishment Clause decision, *Marsh* abjured the defining principle of Establishment Clause jurisprudence: "the principle that the 'First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968)).

Instead, *Marsh* let history trump the Constitution. Professor McConnell's criticism of *Marsh*'s historical approach is as accurate as it is devastating:

> *Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some *principle* that explains *why* legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause.

Michael McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988).

This Court rarely elevates history over principles in constitutional interpretation. This is because, as Justice Kennedy recently observed, "[f]reedom is always a work in progress." Opening Remarks at the American Bar Association Annual Meeting (Aug. 10, 2013). James Madison put it differently: "Is it not the

glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered ***a blind veneration*** for antiquity . . . ?" THE FEDERALIST NO. 14 (James Madison) (emphasis added).

Marsh ignored Madison and upheld legislative prayer based on what it mistakenly described as an "unambiguous and unbroken history of more than 200 years." 463 U.S. at 792. *Marsh* is "based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause." McConnell, *supra*, at 362. *Marsh*'s "blind veneration" for history rather than legal principles is unique and unjust.

1. Legislation adopted contemporaneously with the First Amendment is not automatically constitutional.

Marsh erred in relying on government prayer that occurred contemporaneously with an amendment's adoption to hold that the prayers complied with that amendment. The framers passed other legislation contemporaneously with the First Amendment that clearly violated that amendment. *Marsh* "noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press and religion [were discussed and this Court] saw no conflict with the Establishment Clause. . . ." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (discussing *Marsh*). The

Sedition Act of 1798 was passed seven years after the First Amendment was ratified. At least ***twenty-four*** members of the Congress that proposed the First Amendment were members of the Congress that passed the Sedition Act. Others occupied higher federal posts, including John Adams who was President of the Senate that proposed the First Amendment but signed the Sedition Act into law as President of the United States.

Under the *Marsh* rationale, this history should "lea[d] us to accept the interpretation of the First Amendment draftsmen who saw" the Sedition Act as conforming to the First Amendment. 463 U.S. at 791. Yet, the Sedition Act is now universally condemned, both "in the court of history" and "by Justices of this Court." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). Government prayer's co-existence with the First Amendment's passage cannot save it.

2. Practices contemporaneous with the adoption of other amendments have been declared unconstitutional.

In *Brown v. Board of Education*, this Court heard "reargument . . . largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868" including exhaustive coverage of "then existing practices in racial segregation, and the views of proponents and opponents of the Amendment." 347 U.S. 483, 489 (1954). But *Brown* did not use the rampant history of segregation at the time of the

Fourteenth Amendment's passage to determine the constitutionality of school segregation; instead it applied a legal principle to contemporary circumstances:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* [163 U.S. 537 (1896)] was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Id. at 492-93. Had the Court treated history as dispositive, *Brown* would have been another *Plessy*. Instead, the Court applied principles, and segregation was declared unconstitutional.

3. History may clearly show the framers' interpretations of amendments, but this Court is not bound to treat those interpretations as dispositive.

Marsh treated what it thought was the framers' interpretation of the First Amendment as dispositive, but this Court has disregarded original interpretations of the Eighth Amendment, which would exclude only "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (citations omitted), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

The historical interpretation would permit the execution of children over the age of seven because the framers thought it legal. This Court, in an opinion by Justice Kennedy, rejected this interpretation after "considering history. . . ." *Roper*, 543 U.S. at 560. Instead, Justice Kennedy "referr[ed] to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual." *Id.* at 561 (citations and quotations omitted). Justices Stevens and Ginsburg concurred, noting that "[i]f the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children. . . ." but "that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text." *Id.* at 579 (Stevens, J., concurring).

History clearly shows that the framers interpreted the amendment so that children seven and older could be lawfully executed. Despite this unambiguous history, the Court repudiated the framers' interpretation in favor of the underlying principle.

4. The duration and extent of a historical practice do not render it constitutional.

This Court has declared other practices dating from colonial history constitutional violations. The

200-year history of prayer extolled in *Marsh* is evidence of a longstanding violation, not legitimacy. Until *Loving v. Virginia*, "penalt[ies] for miscegenation" were common and had been "since the colonial period." 388 U.S. 1, 5-6 (1967). Hugh Davis received the earliest recorded punishment in 1630. Davis was "soundly whipped before an assembly of Negroes and others for abusing himself to the dishonor of God and the shame of Christians by defiling his body in lying with a negro; which fault he is to acknowledge next Sabbath Day." Walter Wadlington, *The Loving Case; Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191 (1966).

Instead of relying on history and religious tradition, *Loving* relied on legal principles and the self-evident truth that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." 388 U.S. at 12 (citations omitted). The Court correctly rejected the idea that a long history of anti-miscegenation could limit the right to marry. The Court "should be wary of any interpretive theory that implies, emphatically, [that *Loving*] was not [correctly decided]." *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3118 (2010) (Stevens, J., dissenting) (citations omitted).

5. A longstanding practice can simply be a longstanding violation, not a valid exercise of government power.

Legalized discrimination against gay citizens was, until very recently, deeply rooted in this nation's history and tradition. *See Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (upholding criminalization of sodomy), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). Chief Justice Burger's entire concurrence in *Bowers* argues that history validates discrimination against gay persons:

> [H]omosexual conduct ha[s] been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

Id. at 196-97 (1986) (Burger, C.J., concurring).

Writing for the Court, Justice Kennedy rejected this history in favor of the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence*, 539 U.S. at 572. This Court, again with Justice Kennedy writing, has continued to protect the rights of gay citizens in spite of the long history of legal oppression. *See United States v. Windsor*, 133 S.Ct. 2675 (2013) (excluding same-sex partners from legal definition of spouse

"violates basic due process and equal protection principles applicable to the Federal Government").

6. This Court focuses on principle, not history when interpreting the Religion Clauses.

This Court has refused to apply the historical interpretation to other cases involving the Religion Clauses:

> At one time it was thought that [the freedom of conscience] merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.

Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) (footnotes omitted). This Court has consistently adhered to this interpretation, even though the framers may have had a different interpretation. *See, e.g.*, *Everson v. Bd. of Ed. of Ewing Tp.,* 330 U.S. 1, 18 (1947) (government must "be neutral in its relations with groups of religious believers and non-believers"); *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 27 (1997) (Blackmun, J., concurring) (the "government may not

favor religious belief over disbelief"). Government prayer contravenes this function of the Establishment Clause.

Had school-related Establishment Clause cases been decided like *Marsh*, students' rights of conscience would be violated daily. *McCollum v. Board of Education* ignored the lone dissent of Justice Reed who specifically argued that devotion to "principle . . . should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. . . . [T]he history of past practices is determinative of the meaning of a constitutional clause. . . ." 333 U.S. 203, 256 (1948).

Abington v. Schempp noted the "long history . . . [of] Bible reading and daily prayer in the school" from private sectarian schools in 1684 until "free public schools supplanted [them] between 1800 and 1850" and beyond. 374 U.S. 203, 267-68 (1963) (Brennan, J., concurring). The Court correctly treated this as a history of violation, not validation.

Lee v. Weisman overturned prayers "at public-school graduation ceremonies . . . a tradition that is as old as public-school graduation ceremonies themselves. . . ." 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting). The Court relied on principle, "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Id.* at 587.

Some of this Court's most precarious decisions venerated history. *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (emphasis added below) relied on:

- "**[*T*]*he legislation and histories of the times, and the language used in the Declaration of Independence, show***, that neither . . . slaves, nor their descendants . . . were then acknowledged as a part of the people. . . ." *Id.* at 407.
- " . . . ***the following are truths which a knowledge of the history of the world, and particularly of that of our own country***, compels us to know – that the African negro race never have been acknowledged as belonging to the family of nations; . . . and that the introduction of that race . . . was not as members of civil or political society, but as slaves, as property in the strictest sense of the term." *Id.* at 475 (Daniel, J., concurring).
- "By the references above given it is shown, from the nature and objects of civil and political associations, ***and upon the direct authority of history***, that citizenship was not conferred by the simple fact of emancipation. . . ." *Id.* at 479-80 (Daniel, J., concurring).
- "**[*T*]*he history of the Confederation and Union affords evidence to attest the existence of this ancient law*** [that a master may reclaim his bondsman]." *Id.* at 496 (Campbell, J., concurring).

When this Court upheld laws limiting work hours for women but not men, it did so partly because, "history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present." *Muller v. Oregon*, 208 U.S. 412, 421 (1908). *See also Bradwell v. Ill.*, 83 U.S. 130, 141 (1872) (citing the "historical fact[s]" that the right to practice law was never "established as one of the fundamental privileges and immunities of [woman]" and that the "family organization, which is founded in the divine ordinance . . . is repugnant to the idea of a woman adopting a distinct and independent career.").

Conversely, this Court's most enduring decisions, like *Brown* and *Loving,* reject the "blind veneration" of history. This Court should focus not on history, but on legal principles as it did in *Brown*, *Loving*, *Roper*, and *Jaffree*. It should overturn *Marsh* on principle, and because the history *Marsh* treats as dispositive is flawed.

B. The "malleability and elusiveness" of history tainted *Marsh*'s historical analysis: it missed significant historical facts and misconstrued the facts it relied on to reach erroneous conclusions.

Posterity condemns decisions that treat history as dispositive because of history's "malleability and elusiveness." *McDonald,* 130 S.Ct. at 3117 (Stevens, J., dissenting). Much history eluded *Marsh*, and

the few historical facts in the opinion were distorted to reach subjective and incorrect historical conclusions.

1. The "elusiveness" of history: *Marsh* omits significant historical facts.

While "the world is not made brand new every morning," history is not static. *McCreary,* 545 U.S. at 866. New historical evidence undermines constitutional interpretation based on partial history. For example, in *Van Orden v. Perry*, the "determinative" factor of the controlling opinion upholding a Ten Commandments monument on public land was the apparent absence of divisiveness during the monument's history:

> 40 years [have] passed in which the presence of this monument, legally speaking, went unchallenged. . . . Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage. . . . This display has stood apparently uncontested for nearly two generations.

545 U.S. 677, 702-04 (2005) (Breyer, J., concurring). This history is wrong. Citizens challenged the legality of the monument in 1977 and possibly earlier; but Texas ignored those challenges. Madalyn Murray

"O'Hair asked [the Governor] to ***request an attorney general's opinion on the constitutionality of displaying*** a crèche scene in a public building and ***having a monument inscribed with the Ten Commandments on Capitol grounds, but the governor's aides refused.***" *O'Hair Wants Nativity Scene Out*, THE GALVESTON DAILY NEWS, Nov. 16, 1977, at 16B (emphasis added). *See also, Atheist leader disapproves*, CORPUS CHRISTI TIMES, Nov. 16, 1977, at 4A (showing O'Hair in front of the *Van Orden* monument 28 years before the decision: "Atheist leader disapproves . . . said the tablet, containing the Ten Commandments, violates the principle of separation of church and state."); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernisms*, 61 CASE W. RES. L. REV. 1211 (2011).

This Foundation and our Texas membership wrote multiple letters of complaint to Texas governors from the time co-founders Anne Nicol Gaylor and Annie Laurie Gaylor first visited the Texas Capitol in 1977, until our final letter, sent in September 2001, prior to Mr. Van Orden's lawsuit. Declaration of Annie Laurie Gaylor at 7-9, *Freedom From Religion Foundation v. Weber*, No. 9:12-cv-00019-DLC (D. Mont. Feb. 13, 2013).

The "determinative factor" in the controlling opinion – forty years of undivisive history – was wrong.

Marsh contains far more egregious historical omissions. *See, e.g.*, Christopher Lund, *The Congressional Chaplaincies*, 17 WM. & MARY L. REV. 1171 (2009). For instance, *Marsh* erroneously concluded that the framers did not "perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church." 463 U.S. at 793. But John Quincy Adams wrote that people believed *precisely* that:

> Mr. Sparks, the Unitarian['s], . . . election as chaplain to the House of Representatives . . . has been followed by unusual symptoms of intolerance. Mr. Hawley, the Episcopal preacher at St. John's Church, . . . preached a sermon of coarse invective upon the House, who, he said, by this act had voted Christ out-of-doors; and he enjoined all the people of his flock not to set their feet within the Capitol to hear Mr. Sparks. . . . Patterson, a member from the State of New York, moved that the House should proceed to the choice of another Chaplain. . . .

John Quincy Adams, 5 *Memoirs of John Quincy Adams,* 458-59 (Charles Francis Adams ed., Lippincott & Co. 1875).

Even the first chaplain election was divisive:

> In our congress, however, they sometimes set religion at nought [*sic*]. When a vote was taken for a chaplain . . . there were three votes given for Matthew Lyon and one for Tom Paine. . . . and where such contempt is

> expressed for religion, what care would be taken to preserve it?

Theodore Dwight, *President Dwight's Discussions of Questions discussed by the senior class in Yale College in 1813 and 1814*, 114, 229 (Jonathan Leavitt, New York, 1833). The votes for Lyon and Paine, both critics of religion, were a condemnation of congressional chaplains. This divisiveness is certainly worthy of mention, and, unlike the divisiveness unknown in *Van Orden*'s controlling opinion, was known to the *Marsh* Court.

2. The "malleability" of history: *Marsh* minimized and distorted history to reach erroneous conclusions.

Many historical facts eluded *Marsh*, but the Court also minimized and misconstrued the few facts it identified to reach incorrect conclusions. *Marsh* used "what historians properly denounce as 'law office history,' written the way brief writers write briefs, by picking and choosing statements and events favorable to the client's cause." Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 842 (1985). *Marsh* relied almost exclusively on two misconstrued historical facts: (a) the First United States Congress approving a bill for congressional chaplains and (b) a colonial tradition of prayer, including prayer at the First Continental Congress.

a. *Marsh* relied on the First Congress approving chaplaincies to discern their views on government prayer, but ignored the framers' stated legal opinions against government prayer.

The term "framers" is convenient shorthand, but too often disguises the fact that those men rarely all agreed. Just as some framers opposed the unconstitutional Sedition Act of 1798 but could not stop its enactment, some framers opposed legislative prayers. James Madison, the Father of the Constitution and the Bill of Rights, opposed both, and *Marsh*'s treatment of his legal opinion exemplifies its mistreatment of history.

Madison's *Virginia Resolution* condemned the Sedition Act and his *Detached Memorandum* condemned congressional chaplains and prayers stating, "[t]he establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles." Elizabeth Fleet, Madison's "Detached Memoranda," 3 WM. & MARY QUARTERLY 534 (1946). He was equally critical of "religious proclamations" by the government, calling them "shoots from the same root." *Id.*

Madison's legal opinion opposing chaplains was relegated to a footnote in *Marsh*. 463 U.S. at 791 n.12. This Court does not always discount Madison's legal opinions, quite the opposite: his *Virginia Resolution* was discussed at length in the Court's interpretation

of the First Amendment in *New York Times*, 376 U.S. at 273-76.

Curiously, *Marsh* ignored Madison's opinion on chaplains while citing his vote on and passage of an appropriations bill generally. 463 U.S. at 787 n.8. The bill approved chaplains, but was not about chaplains – it authorized salaries for government officials, including those voting on the bill. Act of Sept. 22, 1789, ch. 17, 1 *Stat.* 70. Madison specifically condemned the chaplaincy section writing that " . . . it was not with my approbation, that the deviation from it took place in Congress when they appointed Chaplains, to be paid from the National Treasury." Letter to Edward Livingston (July 10, 1822).

Partly from passage of the appropriations bill, *Marsh* concluded that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer." 463 U.S. at 791. The more reasonable conclusion: Congress acted in simple self-interest. The men voting on the bill had been serving at their own expense. No doubt they paid more attention to the salaries attached to the positions than the legality of the chaplaincy buried in the fourth of seven sections. This comports with the low attendance at the prayers: "[T]he Reverend Ashbel Green, . . . one of the chaplains for eight years from 1792 on, complained of the thin attendance of members of Congress at prayers. He attributed the usual two-thirds absences to the prevalence of free-thinking." A.P. Stokes, I *Church and State in the United States*, 457 (Harper & Brother, 1950).

The First Congress "saw no real threat to the Establishment Clause" because they did not look for one. The First Congress approved chaplains and prayers without vetting them through the First Amendment, which had just been written, but would not be ratified or have any legal effect for another two years.

This interpretation is supported by the discussion on government prayer, in the form of presidential proclamations of thanksgiving that followed the appropriation bill vote. Opponents of government prayer relied on the Constitution and law while proponents relied on "holy writ," the Bible, and prayers at the Continental Congress.

Thomas Tucker (S.C.) thought:

> [T]he House had no business to interfere in a matter [prayer] which did not concern them. Why should the President direct the people to do what, perhaps, they have no mind to do? . . . it is a business with which the Congress have nothing to do; it is a religious matter, and, as such, is proscribed to us.

I Annals of Cong. 950, Sept. 25, 1789. Roger Sherman (Conn.) countered Tucker. Sherman "justified the practice of thanksgiving . . . as warranted by a number of precedents in holy writ; for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple . . . This example, he thought, worthy of Christian imitation . . . " *Id*. The only other speaker in favor, Elias

Boudinot (N.J.) relied on pre-Constitutional "precedents from the late Congress," a mistake *Marsh* repeated as discussed below. *Id*.

Madison and Tucker are the only framers to offer legal opinions on government prayer. Both thought it unconstitutional. *Marsh*'s conclusion that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause" is wrong. 463 U.S. at 791.

b. *Marsh*'s reliance on pre-Constitutional prayers is illogical and historically inaccurate.

Like Mr. Boudinot, *Marsh* mistakenly relies on the Continental Congress's prayers. 463 U.S. at 787-91. First, it is illogical to base constitutional interpretation on prayers given fifteen years before the Constitution was ratified and seventeen years before the First Amendment was ratified. The colonies had not declared independence; we were still part of Great Britain. The prayers' legality could not possibly be determined when the document, legal system, and country constraining them had not yet been invented.

Second, the pre-Constitutional prayers were not an outpouring of piety; they were a political expedient. John Adams recorded the prayers as a political calculation. He wrote that during dinner with Samuel Adams and fellow-delegate Joseph Reed, Reed said "we were never guilty of a more Masterly Stroke of Policy, than in moving that Mr. Duché might read prayers." John Adams's Diary (Sept. 10, 1774), in 1

Letters of Delegates to Congress 1774-1789, at 60 (Paul H. Smith ed., 1976).

Finally, the colonial prayer tradition was not unbroken as *Marsh* claimed. 463 U.S. at 792. After reaping the political benefit of the first prayer, the Continental Congress had no further prayers for eight months, until May 11, 1775. 1 J. of the Continental Cong. (1775) Vol. II, 13. The sporadic prayers given between March 1, 1781, and June 21, 1789, occurred under the Articles of Confederation. The Articles were seriously defective and replaced by the Constitution after eight years. Whereas the Articles hardly recognized the separation between church and state, the Constitution fully incorporated that separation.

Significantly, there were no prayers at the Constitutional Convention. *Marsh* minimizes this fact, calling it "an oversight." 463 U.S. at 824 n.6. *Marsh* quotes Ben Franklin's prayer proposal, mistakenly claiming it was rejected for a lack of funds. *Id.* Funding was part of the debate, but Franklin himself noted that prayer was rejected because, "The Convention, except three or four persons, thought Prayers unnecessary." 1 *The Records of the Federal Convention of 1787*, at 452 n.15 (Max Farand ed., 1911). The framers purposefully drafted our entirely godless and secular Constitution without divine appeal.

This Court should not uphold religious privilege in a "blind veneration for antiquity" but stand with

posterity and eliminate legislative prayer altogether as the Constitution requires.

C. As a result of elevating history over principle, *Marsh* subjugates fundamental rights to majority rule.

In addition to ignoring neutrality – the defining principle of Establishment Clause jurisprudence – and placing selective history above principle, *Marsh* failed by allowing demographics to trump fundamental rights.

Marsh betrays the purpose of the Bill of Rights by finding that legislative prayer is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. Practices are not constitutional simply because their underlying beliefs are widely held. This Court has repeatedly affirmed that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 304-05 (2000) (quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638 (1943)). Indeed, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638. Put simply, "we do not count heads before enforcing the First Amendment." *McCreary*, 545 U.S. at 884 (O'Connor, J., concurring).

Although popularity is legally irrelevant, the "beliefs" underlying prayer are rapidly declining. Almost 20% of Americans are now nonreligious, up from 15% in 2007, and 8% in 1990. Pew Research Center, "Nones on the Rise: One-in-Five Adults Have No Religious Affiliation," *The Pew Forum on Religion & Public Life*, 13 (October 9, 2012); Barry Kosmin, *National Survey of Religious Identification* (1990) (for 1990 statistic). The three-fold increase from 20 to 61.5 million adults since 1990 makes "nones" the fastest growing self-identification and the second largest group after Roman Catholics. *Id.* (percentages applied to U.S. Census population estimates). One-third of Americans under 30 consider themselves nonreligious while less than one-in-ten over 65 consider themselves nonreligious. *Id.* at 10. For the first time, less than half the country (48%) is Protestant. *Id.* at 13. The number of self-identifying U.S. atheists and agnostics is more than triple the number of Mormons, and equal to Jews, Muslims, Hindus, and Buddhists *combined*. *Id.* at 9, 13. Religious belief is no longer as "widely-held" as when *Marsh* was decided.

D. *Marsh* is unsalvageable and should be overturned.

Marsh repudiates all settled legal doctrine by treating history as dispositive, ignoring constitutional principles, and placing the beliefs of a shrinking majority over the rights of religious minorities. If this Court insists on upholding *Marsh*, it must place simple,

cognizable restraints on legislative prayer based in Establishment Clause jurisprudence.

II. Legislative invocations are government speech subject to Establishment Clause restrictions.

Legislative invocations at official government meetings are government speech. Government messages, even if delivered with some indicia of private involvement, remain government speech. Thus, prayers delivered for Greece by invited clergy are government messages subject to the Establishment Clause.

A. Government prayer is government speech.

A government may express its own views: "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). *Summum* held that a city's display of privately donated monuments was government speech. *Id.* at 464. Such displays were not forums for private expression primarily because only a "limited number" of persons were able to speak. *Id.* at 478-79.

Even when government-sanctioned messages are not treated as pure government speech, the speech is subject to the Establishment Clause. For instance,

a crèche in a county courthouse violated the Establishment Clause despite a sign disclosing its private ownership:

> [T]he sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations.

County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 600 (1989).

Likewise, *Santa Fe* held that prayers delivered under a government policy and practice constituted government speech largely *because* they were authorized by that government policy and occurred on government property at a government-sponsored event. 530 U.S. at 302. There was no limited public forum because the school authorized only one student to give the invocation and limited the topic of the student's invocation. *Id.* at 303, 306 (noting that speakers select particular words but that prayers must be "consistent with the goals and purposes of this policy."). The Court held that "the delivery of such a message . . . is not properly characterized as 'private' speech." *Id.* at 310.

Most significantly, *Marsh* treated the chaplain's prayers as government speech subject to the Establishment Clause. 463 U.S. at 792-95. Were the chaplain's

invocations private speech, *Marsh*'s Establishment Clause analysis would have been superfluous.

Indeed, every court that has addressed the issue has treated the prayers as government speech. *See, e.g.*, *Joyner v. Forsyth County, N.C.*, No. 1:07CV243, 2009 WL 3787754 (M.D.N.C. 2009) ("Defendant's invocation prayers are government speech."), *aff'd*, 653 F.3d 341 (4th Cir. 2011); *Turner v. City Council of City of Fredericksburg, VA,* 534 F.3d 352, 353 (4th Cir. 2008) ("the prayers at issue here are government speech"); *Hinrichs v. Bosma,* 440 F.3d 393, 402 n.5 (2006) (noting speech limitations when speaking on behalf of the government) *Simpson v. Chesterfield County Bd. of Sup'rs,* 404 F.3d 276, 288 (4th Cir. 2004) ("the speech . . . was government speech"); *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194, 1207 (2002) ("[W]e are satisfied that it was not 'private speech.' "). Government prayer is government speech and is therefore subject to the Establishment Clause.

As government speech, restrictions on government prayer do not violate the free speech or free exercise rights of clergy or government officials who remain free to pray on their own time.

B. Greece's prayers are government speech.

Greece holds a monthly meeting in the Town Hall that includes a scheduled "moment of prayer." J.A. 27a-43a. Each prayer "moment" is limited to one clergy member. *Id.* Given the limited number of meetings, the opportunity is restricted to roughly a dozen

clergy per year – almost always Christian. A Greece employee identifies and schedules the prayer-givers. C.A. App. A177. During the meetings, the Town Supervisor John Auberger summons the prayer-giver to a podium emblazoned with the Town's seal to deliver what Auberger frequently describes as "our prayer." J.A. 45a-90a, 99a, 123a, 130a. The podium sits between the dais and the audience and a town employee turns it to directly face the audience, rather than council members. *See* Exhs. 701-807, 811-29.

Any reasonable observer under these circumstances would view the prayers as having Greece's stamp of approval. Greece has decided to speak through invited clergy during its "moment of prayer." It seeks out prayer-givers, not speakers. Greece arranges for clergy – not to speak on a topic of their choice – but to *pray at* citizens.

Significantly, Greece schedules a true open forum – a public comment period for citizens to speak on a broad array of topics. This simple fact belies Greece's argument that its prayer is private speech, which would gut *Marsh* and curiously result in two public forums: a privileged one for clergy and another for citizens. If followed, Greece's argument would allow prayer-leaders to exploit the prayer opportunity to proselytize, disparage, and advance religion in contradiction of *Marsh*. Government invocations would then be overt avenues for religious promotion and recruitment. The prayers are government speech, not private speech in a bona fide forum. As such, the

invocations in Greece are subject to the Establishment Clause.

III. The Establishment Clause prohibits government speech, like Greece's prayers, that advance religion.

Justice Brennan correctly observed in his *Marsh* dissent, "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." 463 U.S. at 800-01. This is because *Lemon* requires the application of legal principles, something *Marsh* mostly avoided. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Marsh's sole attempt to apply legal principles limited legislative prayers to those where "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794-95. Greece's *amici* seek to gut this protection. But the proselytize, advance, disparage safeguard ("safeguard") is the only protection to ensure that legislative prayer complies with the Establishment Clause. *Marsh*, 463 U.S. at 793-95. As such, the safeguard should be interpreted in light of Establishment Clause principles.

Greece deals with this case as a hypothetical ignoring the facts and arguing that its prayer practice under *Marsh* "presents no constitutional concerns" because the only constitutional inquiry is whether the government "purposely" advances religion by coercing

participation. Brief of Pet'r at 12-13, 18. This is incorrect because: (A) coercion is not necessary to prove an Establishment Clause violation, (B) the prayers accomplish no secular purpose, and (C) the intent behind government action is not the only Establishment Clause question; effects matter too. The facts show not the breezy hypothetical Greece desires, but prayers that breach the *Marsh* safeguard.

A. Coercion is not required to prove a violation of the Establishment Clause.

Petitioners rely on an artificially heightened Establishment Clause standard that requires coercion as forced participation in religious worship. While such coercion is sufficient to demonstrate a violation, it has never been necessary. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962).

Under a coercion analysis, forced participation is not required – any pressure from an entity as powerful as the government is coercive:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. 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.

Id. at 430-31. In short, "[e]ven subtle pressure diminishes the right of each individual to choose voluntarily what to believe." *Lee*, 505 U.S. at 605-06.

B. Greece's prayers fail to accomplish any secular purpose.

Marsh ignored the purpose inquiry typical of Establishment Clause jurisprudence, noting only that legislative prayer is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *See*, *e.g.*, *McCreary*, 545 U.S. at 861 (refusing to abandon or truncate *Lemon*'s purpose test); *Marsh*, 463 U.S. at 792. Justice O'Connor expanded the "tolerable acknowledgement" theme noting that legislative prayer and "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). Had the *Marsh* Court investigated the alleged solemnization rationale, it would have discovered flaws.

First, religion only solemnizes events for its adherents. Christian prayers solemnize for Christians,

Muslim prayers solemnize for Muslims, etc. For nonadherents and the 20% of nonreligious Americans, government prayer simply excludes. It tells nonbelievers their nonreligious views are wrong. It "sends the ancillary message to . . . nonadherents 'that they are outsiders, not full members of the political community and accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe*, 530 U.S. at 309-10 (quoting *Lynch*, 465 U.S. at 668) (O'Connor, J., concurring).

Second, for nonadherents and nonreligious citizens, government prayer not only fails to solemnize governmental proceedings, it defeats that purpose. Invoking a god or gods in whom many citizens may not believe alienates those citizens and, to them, confers an air of insult or even sacrilege upon the proceedings, rather than solemnity.

Third, even nonsectarian government prayer fails to solemnize. The nonsectarian nature of the prayers was crucial in *Marsh*. 463 U.S. at 793 n.14. *See also Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 36 (2004) (O'Connor, J., concurring) ("The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes."). While nonsectarian prayer is clearly required by *Marsh* and a step in the right constitutional direction, not all sects agree on public worship. James Madison recalled "a project of a prayer . . . intended to comprehend & conciliate College Students of every Christian denomination," but recognized that the project "must have failed, notwithstanding its winning

aspect from the single cause that many sects reject all set forms of Worship." Letter to Edward Everett (March 19, 1823). And many Christians take Jesus' Sermon on the Mount seriously and find public, governmental prayer a form of degradation, not solemnization: "[W]hen you pray, do not be like the hypocrites, for they love to pray standing in the synagogues and on the street corners to be seen by others. . . . when you pray, go into your room, close the door and pray to your Father, who is unseen." Matthew 6:5-6 (*NIV*). Thus, to those who find public prayer – nonsectarian or otherwise – sacrilegious and to nonbelievers, even nonsectarian prayers fail to solemnize government meetings.

Lastly, religion is not "the only reasonable way" to solemnize. Greece successfully solemnized every meeting until 1999 without prayer. Beating the gavel, pledging allegiance, calling for order, or having a moment of silence would *actually* solemnize the occasion without favoring one religion over others and religion over nonreligion.

Even were solemnization a valid purpose, Greece's prayers go beyond acknowledgement or solemnizing: they are quintessentially Christian worship.

C. Greece's prayers proselytize and advance religion.

Greece argues that the only relevant inquiry is whether it "purposely" sought to proselytize, advance, or disparage religion. But purpose, like history, is not

dispositive. The actual *effects* of government practices must also be reviewed. Government speech, including prayers, may not appear to give official government support to a religion and may not inculcate its religious doctrines.

Greece runs from the facts of this case in order to avoid the safeguard inquiry. But the prayers here (1) advance Christianity in relation to other religions, (2) proselytize for Christianity, and, (3) because they involve a local government, have a magnified effect on citizens.

First, prayers advance religion if they are sectarian. *Marsh* held that the Nebraska legislature's prayers did not advance religion because the prayers were "'nonsectarian,' 'Judeo-Christian,' and 'with elements of the American civic religion'" that "removed all references to Christ." 463 U.S. at 793 n.14. Even Justices who find other governmental ecumenical religious practices to be acceptable have not doubted the unconstitutionality of sectarian endorsements. Justice Scalia has pointed out that sectarian endorsements are unconstitutional:

> [O]ur constitutional tradition . . . [has] ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).

Lee v. Weisman, 505 U.S. at 641 (Scalia, J., dissenting). Greece residents differ greatly in their views on

the divinity of Jesus and the Christian religion, yet their government takes sides on matters of individual conscience. Greece's prayers are sectarian. They specify sectarian details, quote scripture and expound Christian theological doctrine, including the "divinity of Christ." They go beyond solemnization into Christian worship:

- "God's blessed us tremendously and so, it reminds me of just one verse in the Bible about our Lord's coming, about the birth of Christ. . . . 'For unto us a child is born; unto us a son is given. And the government shall be upon his shoulder, and his name shall be called wonderful, counselor, the mighty God, the everlasting father, and the Prince of Peace." [Quoting Isaiah 9:6]. J.A. 94a.
- "O Lord we thank you once again that you are directing our lives and directing this town. We give you all the praise and glory and honor in Jesus' name." J.A. 31a.
- "[A]nd Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen." J.A. 45a.
- "You are also a wise God, oh Lord, as seen in the world around us, and as evidenced even in the plan of redemption that is fulfilled in Jesus Christ." J.A. 99a.

- "And we ask this thinking about Good Friday and Easter coming ahead. We thank you for that Good News as well, but we ask this through Jesus Christ, amen." J.A. 73a.

One prayer-giver asked the audience to join in the recitation of the "Our Father" from the Christian Bible, Matthew 6:9-13. J.A. 56a. Alex Bradshaw gave a sermon, masquerading as a prayer on May 19, 2009, that explained and extolled Christian doctrine:

> We are approaching the end of the Easter Season . . . the ascension of the Lord on Thursday of this week. Coming at the end of the forty days of Jesus Christ's resurrection appearances, and with the Feast of Pentecost ten days later. . . . The beauties of spring . . . are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News. . . . The Holy Spirit continues to be the inspiration and the source of strength and virtue. . . . And so we acknowledge the role of the Holy Spirit in our lives. . . .

J.A. 134a. The prayers advance religion by preaching the tenets of Christianity with government imprimatur. Greece bestows a privileged station to officiants, behind the Greece Seal, facing the audience, like the Board. The full weight of Greece backs these sectarian Christian messages.

Greece's clergy selection process also advances religion. This Court has specifically stated that the

government selecting clergy is divisive: "the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent." *Lee v. Weisman*, 505 U.S. at 587. Clergy selection is divisive precisely because it selects, and thereby advances, one religion over another. And avoiding "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622. Greece argues that it has not advanced religion because selection of clergy is purportedly "neutral," but this is factually untrue: Christian clergy delivered 100% of Greece's prayers from 1999 through 2007. In the history of Greece's prayers, no religion other than Christianity was represented until just prior to litigation. However neutral the policy, its effects show an unconstitutional Christian bias in the selection process and "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Santa Fe*, 530 U.S. at 307 n.21 (citations omitted).

Second, by definition, proselytizing prayers violate *Marsh*'s sole constitutional safeguard. As Justice Kennedy has recognized, granting Christianity a privileged position alongside secular government constitutes proselytizing:

> Symbolic recognition or accommodation of religious faith may violate the [Establishment] clause in an extreme case. I doubt not, for example, that the 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.

Allegheny, 492 U.S. at 660-61 (Kennedy, J., dissenting) (citations omitted). It is inapposite that a Christian symbol at the seat of government is unconstitutional proselytizing, yet a government expression of worship to the god that symbol represents as its first order of official business passes constitutional muster.

Marsh could only be distinguishable from Justice Kennedy's example because there "government officials invoke[d] spiritual inspiration entirely for their own benefit without directing the religious message at the citizens they lead." *Lee v. Weisman*, 505 U.S. at 630 n.8 (Souter, J., concurring) (discussing *Marsh*). Before the prayer, a Greece employee rotates the podium and seal to face citizens, not the Board, then rotates it back after the prayer. The prayers, like Justice Kennedy's hypothetical cross, are directed at citizens.

Finally, the effect of the Greece prayers is substantially magnified because of Greece's proximity to its citizens: "The proximity of prayer to official government business can create an environment in which the government prefers – or appears to prefer – particular sects or creeds" in violation of "the clearest command of the Establishment Clause." *Joyner v.*

Forsyth County, N.C., 653 F.3d 341, 347 (4th Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012).

The government, and the prayers, are much closer to citizens in the instant case than in *Marsh*. Participation is often required for citizens desiring local government action and "participation in local government is a cornerstone of American democracy," *F.E.R.C. v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring). But there is little citizen participation in a state legislature: "[l]egislators . . . may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect." *Marsh*, 463 U.S. at 796 n.2 (Brennan, J., concurring). Greece citizens are required to come before the board on important civic matters ranging from public comment to obtaining licenses or variances. Before citizens address the government, they must state their name and address. *See* Exhs. 701-807, 811-29. Outing oneself as a nonbeliever in a small community could ruin the business for which one is seeking a license. The effect of government prayers on citizens is far greater and far more injurious at the local level than at the state level as in *Marsh*.

Greece avoids the facts of this case, but the facts establish that Greece's prayers are government speech that advance religion and proselytize in violation of the Establishment Clause.

CONCLUSION

If *Marsh* is to have a legitimate safeguard and not wholly exempt a government religious practice from constitutional scrutiny, then the safeguard must be based on Establishment Clause principles. And, "[w]hether the key word is 'endorsement,' 'favoritism,' or 'promotion,'" or proselytize, advance, or disparage, "the essential principle remains the same." *Allegheny*, 492 U.S. at 593. The Second Circuit applied this principle in deciding that Greece's prayers were unconstitutional. This Court should affirm the Second Circuit's decision.

Better still, this Court should correct *Marsh*'s "blind veneration" of an incomplete and flawed history. This Court should follow its remarkable tradition of impartially applying legal principles to strike down longstanding historical violations. We ask that you "strik[e] down all official legislative invocations" and overturn *Marsh*. 463 U.S. at 818 (Brennan, J., dissenting). By ruling against legislative prayer this Court can strike a blow for the freedom of conscience of *all* citizens.

Respectfully submitted,

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