No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY, ET AL.,

Respondents.

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

BRIEF OF THE NATIONAL CONFERENCE FOR COMMUNITY AND JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STEPHEN G. HARVEY
Counsel of Record
ERIC ROTHSCHILD
KATHLEEN A. MULLEN
ELIZABETH M. HEIN
Pepper Hamilton LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
(215) 981-4000
harveys@pepperlaw.com

Counsel for Amicus Curiae National Conference for Community and Justice

QUESTION PRESENTED

Whether the government opens up a limited public forum when it begins public meetings with a prayer given by a prayer-giver selected by the government and no other persons are permitted to offer any speech.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

ORGANIC LAWS OF THE UNITED STATES

MISCELLANEOUS AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF OF THE NATIONAL CONFERENCE FOR COMMUNITY AND JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The National Conference for Community and Justice was founded in 1927 as the National Conference for Christians and Jews, in response to a rise in racism, anti-Catholicism, and anti-Semitism in America. *See Aims to Harmonize National Groups, Conference Outlines a Wide Campaign of Goodwill Among All Classes*, N.Y. Times, Dec. 11, 1927, at 1. Its founders were leading citizens from various faiths, including Benjamin N. Cardozo, Charles Evans Hughes, and Theodore Roosevelt. *Id.*

Founded more than 80 years ago, the Connecticut/western Massachusetts Chapter was the first of many chapters of the National Conference of Christians and Jews. In the 1990s, the name of the parent organization was changed to the National Conference for Community and Justice to better reflect the breadth and depth of its mission, the growing diversity of our country, and our need to be more inclusive. In the summer of 2005, the parent organization closed its doors, but many of the chapters continued. As the oldest chapter, the Connecticut/western Massachusetts Chapter took the name National Confer-

[1] The parties in the case have consented to the filing of this *amicus* brief. Blanket letters of consent are on file with the Court. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

ence for Community and Justice (hereinafter, "NCCJ") and continues its mission of promoting understanding and respect among all races, religions, and cultures. The NCCJ focuses many of its activities in Connecticut and western Massachusetts, but it also has national programs.

The document now entitled *When You Are Asked to Give Public Prayer In a Diverse Society -- Guidelines for Civic Occasions* (hereinafter, *Guidelines for Civic Occasions*)[2] (App. 1a-7a) was drafted over 20 years ago by a group of interfaith leaders from diverse religious traditions working with the National Conference of Christians and Jews. There have been language changes over the years, but the purpose and spirit of the *Guidelines* remain the same. Through the *Guidelines*, the NCCJ actively promotes the use of inclusive, nonsectarian language when faith leaders and others are called upon to present prayer at civic occasions, including legislative sessions. NCCJ has an interest in this case because the Petitioner and its *amici curiae* take the position that legislative bodies that engage in prayer cannot encourage inclusive prayer without infringing the rights of volunteer prayer-givers under the Free Speech Clause of the First Amendment.

STATEMENT OF THE CASE

In 1999, at the direction of John Auberger, the Supervisor of the Town of Greece, New York (the "Town"), the Town began the practice of prayer at its monthly town board meetings. Pet. App. 3a. Au-

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[2] *See* National Conference for Community and Justice, *Guidelines for Civic Occasions*, http://www.nccj.org/whatwedo/documents/PUBLICPRAYERGUIDELINES81610docx.pdf.

berger himself led a "moment of silent prayer" at the first three board meetings in 1999 (J.A. 26a-27a), and thereafter relied on clergy or others to give the prayers. Typically, Auberger called each meeting to order, the town clerk called the roll of board members, Auberger asked the audience to rise for the Pledge of Allegiance, the audience recited the Pledge, Auberger introduced the prayer-giver for the month, the prayer-giver offered the prayer over the public address system, and then the meeting continued. Pet. App. 3a-4a. Auberger often thanked the clergy person who offered the prayer as "our chaplain for the month" and sometimes gave them a plaque. *See, e.g.*, J.A. 27a, 29a-39a ("chaplain for the month"); J.A. 33a-37a (awarding plaques).

There can be no question that the Town permitted prayer and only prayer during the time on the agenda devoted to prayer. The official agenda and minutes for the meetings consistently listed "prayer" right after the Pledge of Allegiance. Pet. App. 3a; C.A. A448- A570; C.A. A312- A446. At 124 of the 127 meetings in the record, Auberger called for "prayer" when introducing the prayer-giver.[3] J.A. 26a-143a. At two meetings, Auberger omitted the word "prayer," but implicitly called for prayer by introducing clergy, who offered prayers. J.A. 92a, 101a. At the remaining meeting, another board member called for "prayer" in Auberger's absence. J.A. 102a.

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[3] The court of appeals stated that it could locate transcripts of only 121 prayers in the record. Pet. App. 6a n.1. But by our count, there are 127 town board meetings reflected in the record from January 1999 through June 2010 and a prayer or moment of silent prayer was offered at each one of them, with two prayers offered on August 20, 2002.

There is no dispute that the Town chose the prayer-givers for the meetings. Pet. App. 4a-5a. All prayers through 2007 were offered by Christian clergy, except five where Auberger asked members of the board and others in attendance to "remain standing for a moment of silent prayer." J.A. 26a, 29a 45a, 67a.[4] From 2008 through June of 2010, all prayers were offered by Christian clergy, except for four occasion in 2008, when prayers were offered by a member of the Jewish religion (twice), a member of the Wiccan religion, and member of the Bahá'í religion, and they were all invited by the board. Pet. App. 4a-5a.

The content of the prayer at all 127 town meetings was exclusively prayer. There was never a reading of the Declaration of Independence or any other civic document, piece of literature, or other statement of any kind.

The record contains evidence of the divisive nature of public prayer. On one occasion, the prayer-giver gave thanks for the privilege to live in Greece and noted that "My sister doesn't get to live in a town where there's a supervisor and councilmen that are God-fearing people." J.A. 79a. A similar comment was made in August 2009, after the filing of this litigation, when a pastor thanked the town supervisor and board "for this opportunity to pray and to open up our meetings in prayer. On behalf of all God-fearing people in this town, we appreciate it." J.A. 137a. On October 16, 2007, in an obvious reference to the Respondents in this case, who by then had complained about the Town's prayer practice,

[4] On one occasions, two prayers were offered at a meeting, one by a Board member and one by a clergy person. J.A. 66a-67a.

the prayer-giver said of them that "they are in the minority and they are ignorant . . . ." J.A. 108a.

In addition to the portion of the agenda at each board meeting dedicated to prayer, there was a separate part of each meeting dedicated to a "public forum." C.A. App. A448-A570.

SUMMARY OF ARGUMENT

This brief responds to the Town's argument that (1) it opened up a limited public forum for "private individuals . . . to open meetings of its legislative body in a manner consistent with their own consciences" and (2) the Free Speech Clause does not permit it to "censor[] its citizens views based on their religious content without engaging in impermissible viewpoint discrimination." Pet. Br. 44, 53. This *amicus* is compelled to respond to this argument because, apart from its factual and legal flaws, if adopted by the Court it would have the effect of prohibiting legislative bodies that engage in prayer from suggesting or requiring that the prayer-giver offer inclusive prayer that respects the diversity of views on matters of religion.

1. This Court should reject the arguments made by the Town that by enlisting volunteer chaplains to open town meetings with prayer, the Town opened up a limited public forum and could not restrict the sectarian content of the prayers. This argument was never made in the district court or the courts of appeals and for that reason alone should not be considered.[5] And the argument has no merit. There is

[5] In the courts of appeals, Petitioner in a footnote suggested that the Town's prayer practice "had many characteristics of a

nothing in the record to suggest that the Town opened up a limited public forum. The undisputed facts show that it decided to have prayer at its town board meetings and then it enlisted prayer-givers to give that prayer, one per meeting. The Town never implemented a policy or a practice of opening up the prayer portion of the meeting for speech by members of the general public or anyone other than the designated prayer-givers. This falls far short of "intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). And by limiting the speech of the prayer-givers to prayer, the Town engaged in impermissible viewpoint discrimination. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This restriction permits virtually no expression of opinion, anti-religious comments, non-religious comments, or any other speech. It discriminates against all viewpoints other than the one promoted by the Town -- prayer. This is a separate, compelling reason why the Court should hold that the Town did not open a limited public forum.

2. A decision by this Court that the Town opened up a limited public forum would suggest that public bodies that engage in public prayer cannot require volunteer prayer-givers to limit the overtly sectarian content of prayers. This is not only wrong as a matter of law, but also it would be very bad public policy. Overtly sectarian prayer offends citizens who do not share the beliefs of the religious majority, divides communities based on religious belief, and sends the

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limited public forum" (Appellees' C.A. Br. 39 n.16), but never made the argument, either in that court or the district court.

message that the government prefers members of the religious majority. The Court's decision in this case should not foreclose public bodies from making prayer inclusive and nonsectarian.

ARGUMENT

I. BY ITS PRAYER PRACTICE THE TOWN DID NOT OPEN UP A LIMITED PUBLIC FORUM; AS A RESULT THE TOWN COULD HAVE LIMITED THE SECTARIAN REFERENCES IN THE PRAYER WITHOUT INFRINGING ANY RIGHTS UNDER THE FREE SPEECH CLAUSE.

The Town claims that "[t]his case can begin and end with *Marsh,*" Pet. Br. 12, but then it attempts to raise an issue not presented in *Marsh*, namely, the alleged Free Speech rights of the volunteer chaplains it enlisted to offer legislative prayer. The Town claims that it decided "to offer a prayer opportunity to all citizens, regardless of faith," that its "prayer policy offers private individuals a forum in which to open meetings of its legislative body in a manner consistent with their own consciences," and that it "could not have censored its citizens' views based on their religious content without engaging in impermissible viewpoint discrimination." Pet. Br. 16, 44, 53. By this argument the Town suggests that it opened up a limited public forum. Pet. Br. 52. But, in a signal of the weakness of its position, the Town never actually argues that it opened up a limited public forum. In fact, the Town did not open up a limited public forum, and that concept does not fit the facts of this case. The Town's prayer practice was the antithesis of a limited public forum.

The framework governing limited public forums is well established by the Court's precedents. Lim-

ited public forums are contrasted with traditional public forums, such as parks and streets, "which by long tradition or government fiat have been devoted to assembly and debate . . . ." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In a limited public forum, "the State is not required to and does not allow persons to engage in every type of speech." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). "The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" *Id.* (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

There are two related reasons why the Town's prayer practice cannot qualify as a limited public forum. First, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (citing *Perry*, 460 U.S. at 46). The Court looks to the "policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Id.* (citing *Perry*, 460 U.S. at 46). The Court "has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent." *Id.* Under these standards, the Town here did not open up a public forum. There is no evidence that the Town intended to open up a public forum, legislative prayer is incompatible with expressive activity, and the cases that have recognized a limited public forum all involved multiple groups or speakers. A government practice of sponsoring speech by a single speaker -- like the Town's

prayer practice here -- could never qualify as a limited public forum.

Second, in a limited public forum the government may not "discriminate against speech on the basis of its viewpoint." *Rosenberger,* 515 U.S. at 829 (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993); *Perry*, 460 U.S. at 46; *R.A.V. v. St. Paul*, 505 U.S. 377, 386-88 (1992)).[6] A practice of permitting only one speaker chosen by the government per meeting to speak on a narrow topic chosen by the government is not viewpoint neutral -- it is an extreme example of viewpoint discrimination.

A. THE TOWN DID NOT OPEN UP A LIMITED PUBLIC FORUM.

The record contains no support for the Town's suggestion that what it did was "open a forum" for "any town resident," "its citizens," or "private individuals" "from any faith tradition (or no faith tradition)" "to deliver an opening statement according to the dictates of their own conscience and free from any form of guidance or censorship." Pet. Br. 2, 44, 52, 53. The suggestion is wrong in almost every particular. There was never a communication from the Town at any meeting, in any agenda, or in any other way that members of the public could come forth and offer a prayer, much less something other than prayer. The practice always was that the Town arranged for one prayer-giver per meeting. There was never an opportunity opened for any person other than the

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[6] Also, the "the State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum . . . .'" *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius*, 473 U.S. at 804-06).

designated prayer-giver to be heard during the prayer portion of the meeting. The prayer practice was controlled by the Town in every respect other than the content or tone of the prayers. Under these circumstances, there is no evidence in the record to support a conclusion that the Town "intentionally open[ed] a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802.

The Court in *Perry* rejected the argument that a school district had opened up a limited public forum when it gave access to teachers' mailboxes to the union that was the exclusive representative for the teachers but denied the opportunity to a rival union. The Court said that "[i]f by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created," but that "was not the case," as there was "no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public." 460 U.S. at 47. While the mailboxes had been made available to "some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations," the Court held that "[t]his type of selective access does not transform government property into a public forum." *Id.*

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court rejected the argument that by permitting high school students to elect a student to give an invocation before home football games the school district had opened up a limited public forum. In support of its holding, the Court noted that the Santa Fe school officials simply do not "evince either 'by policy or by practice' any intent to open [the pregame ceremony] to 'indiscriminate use,'

. . . by the student body generally." *Id.* at 303 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988); *Perry*, 460 U.S. at 47). "Rather, the school allows only one student, the same student for the entire season, to give the invocation." *Id.* The Court noted that "the statement or invocation . . . is subject to particular regulation that confines the content and topic" of the message. *Id.* The Court in *Santa Fe* contrasted these facts with *Perry,* where it had "rejected a claim that the school had created a limited public forum in its school mail system despite the fact that it had allowed far more speakers to address a much broader range of topics than the policy at issue here." *Id.* The Court repeated its observation from *Perry*: "selective access does not transform government property into a public forum." *Id.* (quoting *Perry*, 460 U.S. at 47).

This case is governed by *Perry* and *Santa Fe*. Here, there was no opening of the prayer portion of the meeting for "indiscriminate use by the general public," *Perry*, 460 at 47, and the extent of the government control over the message was at least as great as in *Santa Fe*. Whereas the school district in *Santa Fe* "encourage[d] the selection of a religious message," 530 U.S. at 307, here the Town *mandated* a religious message and only one type of religious message -- prayer. Under *Perry* and *Santa Fe*, the Court should reject the Town's suggestion that it opened up a limited public forum.

None of the Court's precedents offer any support for the notion that a limited public forum could arise when the government permits a single speaker at an event. As the Court said in *Pleasant Grove City v. Summum*, 555 U.S. 460, 478 (2009), "[t]he forum doctrine has been applied in situations in which gov-

ernment-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program."

All of the cases where the Court has recognized limited public forums have been where the government opened up its property to use by multiple groups or persons. *See, e.g., Rosenberger*, 515 U.S. at 822, 825 (student organizations could receive university funds for a broad range of extracurricular activities); *Lamb's Chapel,* 508 U.S. at 386, 391 (school district made its facilities available for use by the general public after school for a wide range of purposes pertaining to the welfare of the community); *Good News Club,* 533 U.S. at 102 (school district made its buildings available after school to the general public for uses pertaining to the welfare of the community); *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Pub. Emp't Relations Comm'n*, 429 U.S. 167, 169-75 (1976) (public comment section at school board meeting was open to the public).

Implicit in these cases and in the concept of a limited public forum is the discussion of ideas, which is the *sine qua non* of a forum. The dictionary defines "forum" as "an organization that holds public meetings for the discussion of subjects of current interest" and "a public meeting place for open discussion." Webster's Third New International 896 (1986). With a single prayer-giver per meeting there can never be a discussion of ideas. The concept of a limited public forum simply does not fit the facts of this case. *Cf. Summum,* 555 U.S. at 478 ("Public forum principles . . . are out of place in the context of this case.") (*quoting U.S. v. Am. Library Ass'n.*, 539 U.S. 194, 205 (2003) (plurality opinion)). The Solici-

tor General agrees with this conclusion. *Amicus* Br. for the U.S. 12 n. 4.

B. The Town Could Not Lawfully Open Up A Public Forum Limited to Prayer, Because Prayer Is Not A Viewpoint Neutral Limitation.

"[T]he Court has permitted restrictions on access to a limited public forum . . . with this key caveat: Any access barrier must be reasonable and viewpoint neutral." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 130 S. Ct. 2971, 2984 (2010) (citing *Rosenberger*, 515 U.S. at 829; *Good News Club,* 533 U.S. at 106-07; *Lamb's Chapel*, 508 U.S. at 392-93; *Perry*, 460 U.S. at 46). The Town here could not open up a limited public forum for one prayer-giver a month, because that restriction is not viewpoint neutral. It discriminates against all viewpoints except prayer. It forecloses anyone with a different viewpoint, such as a disgruntled citizen who might want to say words to the effect of "I curse this public body," "a plague on all of you," or any other statement of opinion about the town board. The Court at times has suggested that government could open up a limited public forum for the discussion of certain topics, *see, e.g., Perry*, 460 U.S. at 45 n. 7 ("A public forum may be created for limited purposes such as . . . the discussion of certain subjects, *e.g., City of Madison Joint Sch. Dist. v. Wisconsin Pub. Emp't Relations Comm'n* (school board business)"), but it has never suggested that a limited public forum could be opened so narrowly as to preclude all but a single viewpoint.

The Town's prayer practice also discriminates in favor of a religious viewpoint. In an unbroken line of decisions, the Court has recognized that government

engages in viewpoint discrimination when it treats speech differently for purposes of a limited public forum based on its religious content. *See Good News Club,* 533 U.S. at 112 ("speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."); *Rosenberger,* 515 U.S. at 828-37 (university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause); *Lamb's Chapel*, 508 U.S. at 393 (1993) ("it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."); *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) ("In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions."). This case differs from the cited precedent only in that the government seeks to favor religious speech. This violates the rule on viewpoint neutrality. Viewpoint neutrality is (at least) a two-way street. The government can neither disfavor nor favor religious speech. *Cf. Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion) ("Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate . . . the Free Speech Clause, since it would involve content discrimination.") (parentheses omitted).

If the Town's purpose truly is to solemnize its meetings, and assuming for the sake of argument

that it could and did open up a limited public forum for that purpose, it could achieve that purpose with religious speech or nonreligious speech. But it only permitted religious speech, not nonreligious speech that could be used for the same purpose, such as a reading of the Declaration of Independence, Learned Hand's "Spirit of Liberty" speech, the words to "This Land is Your Land," or countless other nonreligious readings that would be appropriate to solemnize a public meeting. By foreclosing all nonreligious speech, the Town clearly engaged in viewpoint discrimination.

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For all these reasons, the Town did not open up a limited public forum by its prayer practice. For that reason, the prayer-givers enlisted by the Town have no Free Speech right to offer prayer of their own choosing. The Town could have limited the prayers given at its town meetings without violating the Free Speech Clause.

II. A DECISION BY THE COURT RECOGNIZING A LIMITED PUBLIC FORUM IN THE CONTEXT OF LEGISLATIVE PRAYER WOULD PREVENT PUBLIC BODIES FROM PROMOTING NON-SECTARIAN PRAYER AS RECOMMENDED IN THE *AMICUS'S GUIDELINES FOR CIVIC OCCASIONS*.

The NCCJ is concerned with the Town's argument that, by sponsoring volunteer chaplains, one per meeting, to offer an opening prayer, the Town opened up a limited public forum and that it could not require or encourage inclusive prayer. Pet. Br. 53. This suggests that the *NCCJ Guidelines for Civic Occasions* could not be used with prayer-givers in legislative sessions without risking a violation of the

Free Speech Clause. The NCCJ believes that result would be wrong both as a matter of law, for the reasons discussed *supra* at pp. 7-15, and as a matter of sound public policy.

As explained *supra* at pp. 1-2, as part of its mission of promoting understanding and respect among all races, religions, and cultures, the NCCJ and its former parent organization have for more than 20 years published the *Guidelines.* As stated in the *Guidelines*, "Individuals who lead the general community in prayer have the responsibility to be clear about the public nature of the occasion and respectful of the composition of the audience. Prayer on behalf of the entire community should be easily shared by listeners from different faiths and traditions." App. 3a.

The NCCJ believes that when prayer is presented in public settings, including legislative sessions, it "can and should bind a group together in a common concern. However, it can become unintentionally divisive, when forms or language exclude persons from faith traditions different than that of the speaker." *Id.* The NCCJ seeks to promote inclusive prayer for public, secular occasions. Inclusive prayer is nonsectarian, and can include invocations to "Almighty God," "Our Maker," "Source of All Being," "Creator God," "Creator and Sustainer," and similar nonspecific references to God and closing words like "Hear Our Prayer," or "Amen." *Id.*

The NCCJ takes the position that, if a public body decides to present public prayer, it should require or encourage inclusive prayer. Inclusive prayer is much less likely than overtly sectarian prayer to implicate core concerns of the Establishment Clause, including offense to the beliefs of the minority, the

suggestion that the government takes sides in matters of religion, and government encouragement of sectarian conflict.

Can there be any question that overtly sectarian prayer in a legislative setting is highly offensive to persons outside of the religious majority? As Judge Wilkinson said, "To . . . Jewish, Muslim, Bahá'i, Hindu, or Buddhist citizens[,] a request to recognize the supremacy of Jesus Christ and to participate in a civic function sanctified in his name is a wrenching burden." *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 354 (4th Cir. 2011) (quoting *Amicus* Br. of Am. Jewish Congress, *et al.* 8). In this respect, there is a huge difference between freely attending and possibly participating in a religious event or occasion outside of one's own faith, such as a wedding of friends from a different religious tradition, and being forced to observe or join as the price of admission to participation in local government.

Overtly sectarian prayer suggests to persons outside the religious majority that they are not welcome as full participants in the affairs of government. This is not right. "[C]itizens should come to public meetings confident in the assurance that government plays no favorites in matters of faith but welcomes the participation of all." *Joyner v. Forsyth Cnty.*, 653 F.3d at 355.

Overtly sectarian prayer also can lead to the impression that the government fosters or takes sides in sectarian conflict. As Justice O'Connor said in her *McCreary* concurrence, "Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that easily might spill over into suppression of rival beliefs." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 883 (2005). We see evidence of

that type of division in the record of this case, with two different members of the clergy twice in public recognizing a division in the community between those who are "God-fearing" and those who are not and a third clergy person calling those who object to sectarian prayer "ignorant." J.A. 79a, 108a, 137a.

The value of inclusive prayer has been recognized by many organizations, including the United States House of Representatives (Resp. Br. App. 1a-3a) and the National Conference of State Legislatures ("NCSL"). The NCSL publishes "Basic Guidelines" that encourage inclusive legislative prayer: "In opening and closing the prayer, the leader should be especially sensitive to expressions that may be unsuitable to members of some faiths." National Conference of State Legislatures, *Prayer Practices* 2, http://www.ncsl.org/documents/legismgt/ilp/02tab5pt7.pdf. The NCSL in its Basic Guidelines identifies the National Conference for Christians and Jews, NCCJ's former parent organization, as the source for the "Basic Guidelines."

Inclusive prayer is feasible by clergy and lay people. It is used frequently outside of legislative sessions. By way of example, two of the major service clubs promote inclusive prayer -- Rotary International and Kiwanis International. According to the *ABCs of Rotary*, "In many Rotary clubs, it is customary to open weekly meetings with an appropriate invocation or blessing. Usually such invocations are offered without reference to specific religious denominations or faiths. Rotary policy recognizes that throughout the world Rotarians represent many religious belief, ideas, and creeds." *See* Cliff Dochterman, Invocations at Club Meetings, *reprinted in The ABCs of Rotary* (2003), http://www.rotary9790.

org.au/info/ftp/abcsofrotary.pdf. International Rotary assemblies and conventions traditionally begin with a silent invocation, in which all persons are invited to seek divine guidance and peace "each in his own way." *Id.* Kiwanis International publishes a brief compilation of sample non-sectarian invocations as guidance for local meetings. *See* Kiwanis International, *Invocations for Kiwanis Occasions*, http://community.kiwanisone.org/media/p/5723.aspx. These prayers are directed to a "Heavenly Father," include petitions focusing on unifying themes, and contain no sectarian references.

Concern has been suggested that sectarian prayer is difficult to identify. Pet. Br. 42-44. To the contrary, the record in this case proves that sectarian prayer is readily identifiable, including prayers offered in the name of Jesus Christ and other obvious sectarian references, including a recitation of the "Our Father." J.A. 56a. The fact is that clergy and even lay leaders know what it means to offer sectarian prayer and if asked to refrain, they can do so. Our experience as citizens gives us many examples of nonsectarian prayer.[7]

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[7] Readily available examples of appropriate non-sectarian prayer include: Archbishop Charles J. Chaput, Invocation Delivered at Philadelphia City Council Meeting (Oct. 20, 2011), *available at* http://archphila.org/archbishop-chaput/statements/citycouncil.php (last visited Sept. 23, 2013); United Kingdom Chief Rabbi Jonathan Sacks, Invocation delivered at U.S. Senate (Nov. 2, 2011), *available at* http://www.jpost.com/Jewish-World/Jewish-Features/UK-Chief-Rabbi-delivers-Invocation-prayer-at-US-Senate (last visited Sept. 23, 2013); Rev. Dr. Luis Leon, Invocation Delivered at the Inauguration of President George W. Bush (Jan. 20, 2005), available at http://www.beliefnet.com/News/2005/01/A-New-Beginning-In-Our-

The NCCJ understands that certain members of the Christian faith sincerely believe that they cannot pray unless they make specific reference to the prayer being given in the name of Jesus Christ. Of course they can always offer that portion of the prayer in their hearts, silent to the audience, if they wish to offer inclusive prayer in a public legislative setting. But if they cannot do that, then they should refrain from offering public prayer. As stated in the *Guidelines*, "When asking a person to offer a prayer on a civic occasion, it is important to explain clearly the need for general and inclusive prayer. Some persons are reluctant to offer Inclusive Public Prayer. This position should be respected, and the individual should be given the option of gracefully declining the invitation." App. 4a.

Any legislative prayer practice presents some risk that the practice will prove divisive, communicate a message that the government is aligned with religion, or suggest to some people that they are not welcome as full participants in the affairs of government, but inclusive prayer is far less likely to do so than overtly sectarian prayer. This Court's ruling should promote efforts by public bodies to encourage inclusive prayer.

CONCLUSION

For the foregoing reasons, if the Court reaches the issue of whether the Town by its prayer practice opened up a limited public forum, the Court should hold that the Town did not open up a limited public forum.

Journey-As-A-People-And-A-Nation.aspx (last visited Sept. 23, 2013).

Respectfully submitted,

STEPHEN G. HARVEY
Counsel of Record
ERIC ROTHSCHILD
KATHLEEN A. MULLEN
ELIZABETH M. HEIN
Pepper Hamilton LLP
3000 Two Logan Square
Eighteenth and Arch
Streets
Philadelphia, PA 19103
(215) 981-4000
harveys@pepperlaw.com

Counsel for Amicus Curiae National Conference for Community and Justice

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APPENDIX

APPENDIX A

National Conference for Community and Justice

"Guidelines for Civic Occasions"

WHEN YOU ARE ASKED TO GIVE PUBLIC PRAYER

IN A DIVERSE SOCIETY

nccj

The National Conference
for Community and Justice

Guidelines for Civic Occasions

PUBLIC PRAYER
IN A DIVERSE SOCIETY

Guidelines for Civic Occasions

Faith leaders and others are sometimes called upon to present prayer at civic occasions including club meetings, legislative sessions, graduations, political rallies, testimonial dinners and community forums. Prayer in such secular settings can and should bind a group together in a common concern. However, it can become unintentionally divisive, when forms or language exclude persons from faith traditions different than that of the speaker.

Individuals who lead the general community in prayer have the responsibility to be clear about the public nature of the occasion and respectful of the composition of the audience. Prayer on behalf of the entire community should be easily shared by listeners from different faiths and traditions.

Inclusive Public Prayer is nonsectarian, general and carefully planned to avoid embarrassments and misunderstandings. On civic occasions, it is authentic prayer that also enables people to recognize the pluralism of American society.

When asking a person to offer a prayer on a civic occasion, it is important to explain clearly the need for general and inclusive prayer. Some persons are reluctant to offer Inclusive Public Prayer. This position should be respected, and the individual should be given the option of gracefully declining the invitation.

INCLUSIVE PUBLIC PRAYER

- seeks the highest common denominator without compromise of conscience

- calls upon God on behalf of the particular public gathered; avoids individual petitions

- uses forms and vocabulary that allow persons of different faiths to give assent to what is said

Sensitivity to the public's diversity and a commitment to inclusiveness should also apply to the content of meditations or addresses on civic occasions and to the selection and performance of music.

- uses universal, inclusive terms for deity rather than particular proper names for divine manifestations.
  Some opening invocations are "Almighty God", "Our

Maker" "Source of All Being", "Creator God" or "Creator and Sustainer." Possible closing words are "Hear Our Prayer," "May Goodness Flourish," or, simply "Amen."

- uses the language most widely understood by the audience, unless one purpose of the event is to express ethnic/cultural diversity, in which case multiple languages can be effective.

- considers other creative alternatives, such as a moment of silence

- remains faithful to the purposes of acknowledging the divine presence, giving thanks and seeking blessing, and is not used as an opportunity to preach argue or testify.

Inclusive public prayer in a pluralistic society must be sensitive to a diversity of faiths.

Leading such prayer is both a privilege and a responsibility.

NCCJ The National Conference for Community and Justice *of Connecticut and Western Massachusetts, Inc.*

What is NCCJ?

The National Conference for Community and Justice (NCCJ), founded in 1927 as the National Conference of Christians and Jews, is a human relations organization dedicated to fighting bias, bigotry and racism in America. NCCJ promotes understanding and respect among all races,

religions and cultures through advocacy, conflict resolution and education.

NCCJ promotes quality inter-group relations by empowering individuals and leaders to create institutional changes that will transform communities to provide fuller opportunity for all.

NCCJ seeks to build just and inclusive communities in which people from different religious, racial, ethnic and cultural backgrounds learn to live together with mutual respect and without compromising their faiths and identities. NCCJ opens minds and opens hearts!

THE NATIONAL CONFERENCE FOR COMMUNITY & JUSTICE
of Connecticut and Western Massachusetts, Inc.

1095 Day Hill Road, Suite 100 Windsor, CT 06095 860.683.1039

WWW.NCCJ.ORG