

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 FOR PAUL FINKELMAN, STEVEN K. GREEN,
MICHAEL I. MEYERSON, JOHN A. RAGOSTA, AND
36 OTHER LEGAL HISTORIANS AND SCHOLARS OF
RELIGION AND AMERICAN LAW AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE

Amici are historians and legal scholars who specialize in constitutional history and religious freedom.¹ They have substantial expertise in the history of the Establishment Clause and related issues. Amici have a

¹ Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici curiae or their counsel, made any monetary contribution to the preparation or submission of this brief.

professional interest in the proper disposition of those issues and believe that the Court should decide this case based on a complete and accurate historical record.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers of the Constitution understood that religion was central to the social, political, and cultural life of the new republic. They also believed, however, that religion should be a force to unite, not divide, the nation. Because of this, the Framers were particularly concerned about governmental action that had the potential to exclude members of the political community based on religious views or to coerce individuals into conforming to the beliefs of the majority, thus potentially fracturing the nation along religious lines and violating individual rights of conscience.

The Framers struggled to accommodate religion and the government in complex and nuanced ways. Their approach to the charged question of religious speech by government officials demonstrates this point. By and large, the Framers did not seek to banish religious language from political discourse. But their approval or condemnation of such speech depended crucially on the *context* of the speech as well as its *content*. Amici's study of the history of the Founding has identified several categories of religious speech, each of which was approached differently by the Framers and each of which sheds light on distinct features of the original understanding of the Establishment Clause.

First, the Framers accepted personal religious speech by government officials, a category that included, for example, Presidents' personal invocations for divine guidance in inaugural addresses, especially when that speech was nonsectarian. Second, the Framers viewed government conduct resulting in ministering to the spiritual needs of government officials—such as hiring legislative or military chaplains—as raising some concerns, but such conduct was accepted by many so long as it did not amount to coercion or otherwise infringe the religious liberties of private citizens. Third, many Founders, including Jefferson and Madison, steadfastly opposed any official government religious proclamations directed to the public. Even those Framers, like Washington, who accepted some form of government religious speech believed that it should never have the purpose or effect of endorsing a sectarian position or excluding members of the political community based on their religious beliefs, because such outcomes were also inconsistent with individual rights of conscience.²

This historical account reveals the profound error in Petitioner's broad contention that any "civic acknowledgment of religious belief" or "prayer" by government officials would have been accepted by the Framers. Pet. Br. 35. Instead, the historical record establishes that, for most Framers, the appropriateness (or not) of government religious speech was a question of circumstance, not absolutes. That informs application of the Establishment Clause here in two ways.

² State officials engaged in certain religious speech, but because they were not then bound by the Establishment Clause, see Ragosta, *Religious Freedom: Jefferson's Legacy, America's Creed* 117-128 (2013) [hereinafter Ragosta, *Religious Freedom*], their practices shed little light on the original understanding of the Establishment Clause, see, e.g., *Indiana et al. Br.* 6-9.

I. In the context of official governmental speech directed to the public, the Framers were deeply suspicious of sectarian religious language, and they were careful to ensure such speech united rather than divided. Their aversion to sectarianism was pragmatic as well as philosophical. They were familiar with the wars of religion, the history of religious persecutions, and the corrosive effect that state patronage had on religion, and vice versa. See Ragosta, *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution and Secured Religious Liberty* 138 (2010). They also understood, as this Court has explained, that “sectarianism” is “often the flashpoint for religious animosity.” *Lee v. Weisman*, 505 U.S. 577, 588 (1992).

The words the Framers used in national charters, presidential addresses, and prayer proclamations—that is, speech directed at the public analogous to the speech at issue in this case—demonstrate the Framers’ belief that such religious language should be universal and nonsectarian. To be sure, the early Presidents did not shy from religious rhetoric, but the public religious speech of Presidents Washington, Jefferson, and Madison reflects an overriding concern that religion should unite, not divide, the nation. These Framers sought “to find a civil vocabulary that could encompass all people, regardless of their faith.” Meyerson, *Endowed by Our Creator: The Birth of Religious Freedom in America* 12 (2012).

II. In addition to uniting around the principle that religious speech directed to the public should be unifying and non-sectarian, the Framers shared a philosophical commitment to the rights of conscience. This led the Framers to reject emphatically coerced religious observance, in any form. Petitioner is therefore correct

to identify “coercion” as a central evil the Establishment Clause was enacted to combat, but wrong to define the concept as narrowly as it does. Pet. Br. 36.

By the time the First Amendment was adopted, the Framers’ concerns regarding establishment and protecting individual rights of conscience from coercion extended to any government practice that might exclude members of the political community based on religious belief or pressure individuals to conform to the majority. For some of the Framers, most prominently, Jefferson and Madison, this risk of exclusion or coercion occurred whenever the government made official proclamations regarding religion. Other Framers, such as Washington, demonstrated by unwavering practice that they viewed official sectarian proclamations aimed at the public as contradicting the American understanding of freedom of religion. The formative debates regarding the roles of government and religion in the 1770s and 1780s show that the Framers’ concepts of coercion and establishment were expansive.

This understanding of coercion informs application of the Establishment Clause here. Many Framers accepted Congress’s use of legislative chaplains because the potential of that practice to coerce citizens was minimal: the Framers understood that chaplains would minister to the spiritual needs of legislators, not of the general public. The Framers’ diffident acceptance of the limited practice of legislative prayer therefore sheds no light on whether they would have tolerated overtly sectarian religious speech directed at the public, particularly in a captive situation in which citizens must observe and face pressure to participate in religious worship to engage the government for some public purpose.

ARGUMENT**I. LEADING FRAMERS WIDELY BELIEVED THAT GOVERNMENTAL RELIGIOUS SPEECH, IF ALLOWED, SHOULD BE NONSECTARIAN**

The Founders' understanding of the relationship between religion and government was complicated and nuanced. We know that many Framers accepted some religious activity by government officials—though, as discussed below, the two Founders most central to the Religion Clauses, Jefferson and Madison, went far in rejecting such activity. Legislative prayer was one such activity. As explained by this Court in *Marsh v. Chambers*, the First Congress appointed chaplains to minister to the spiritual needs of legislators, including through prayer. *See* 463 U.S. 783, 787-788 (1983).

We also know that the Framers followed a circumspect approach regarding other types of government religious activity. The words they employed in government charters, presidential addresses, and prayer proclamations—that is, speech directed to the public—evinced a belief that such speech, if acceptable at all, should be thoroughly nonsectarian. In other words, the Framers agreed both that, particularly in speech directed to the public, the government should not “advance any one, or ... disparage any other, faith or belief,” *Marsh*, 463 U.S. at 794-795, and that no government conduct should “have the effect of affiliating the government with any one specific faith or belief,” *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989). Above all, they believed that government religious speech should use cautious language that “expressed reverential concepts without implying that those not of a favored faith were second-class citizens.” *Meyerson, supra*, at 271.

A. In Public Settings, Leading Framers Used General, Nonsectarian Religious Language

1. Government charters

Important foundational documents drafted by the Framers in the years leading up to the First Amendment evidence an obvious interest in avoiding the use of sectarian religious language and provide compelling evidence that the Framers consciously departed from earlier practices and “strove to find a civil vocabulary that could encompass all people, regardless of their faith.” Meyerson, *supra*, at 12.

At the state level, Jefferson’s Virginia Act for Establishing Religious Freedom powerfully illustrates the point. This statute—a state precursor to the federal Establishment Clause—declared in its Preamble that “Almighty God hath created the mind free” and that governmental penalties for religious beliefs “are a departure from the plan of the Holy author of our religion.” Act for Establishing Religious Freedom, in 5 *The Founders’ Constitution* 84 (Kurland & Lerner eds., 1987). The Virginia legislature rejected a separate proposal that would have included a sectarian version of that sentence—namely, “a departure from the plan of Jesus Christ, the holy author of our religion.” Jefferson, *Autobiography*, in 1 *The Writings of Thomas Jefferson* 62 (Ford ed., 1892-1899) [hereinafter *WTJ*].

Madison and Jefferson each recognized the difference and the significance of the omission of the reference to “Jesus Christ.” Madison explained that including “Jesus Christ” would “imply a restriction of the liberty defined in the Bill, to those professing his religion only.” Madison, *Detached Memoranda*, in Fleet, *Madison’s “Detached Memoranda,”* 3 *Wm. & Mary Q.* 534, 554-560 (1946). Similarly, Jefferson wrote that omitting

“Jesus Christ” demonstrated an intent “to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination.” Jefferson, *Autobiography*, in 1 *WTJ* 62. By contrast, the Act’s reference to “Almighty God” was designed to encompass persons of all faiths and even non-believers, since “God” could refer to “Nature’s God,” a non-deity. See Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* 53-54 (2010). Madison’s and Jefferson’s views are particularly important, of course, because of their instrumental role in formulating the intellectual underpinnings of the Establishment Clause. See Ragosta, *Religious Freedom* 102; see also, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 11, 13, 33 (1947); *McGowan v. Maryland*, 366 U.S. 420, 437 (1961).

A similar ecumenical approach is enshrined in federal founding documents. In fact, “[t]he organic documents of the new national government contain only the vaguest references to God or divine Providence[.]” Green, *supra*, at 53. Although the Continental and Confederation Congresses were not always sensitive to the need to avoid sectarian language, the Declaration of Independence is an early and prominent example of the Founders’ evolving commitment to religious inclusion. The Declaration’s memorable phrase “endowed by their Creator, with certain unalienable rights” noticeably avoids affiliation of the nation with any religious sect. Similarly, the Declaration’s reference to the “laws of nature and of nature’s God” illustrates the Framers’ careful avoidance of secular or Christian language.

The Constitution is even further removed from religious acknowledgment. The nation’s founding charter does not recognize or reference a God or Creator at all. Green, *supra*, at 55. This omission was not an accident,

and some constitutional delegates and members of state ratifying conventions objected. *See* Ragosta, *Religious Freedom* 155-156. The Framers nevertheless chose not to include any reference to God in the Constitution. In fact, the only reference to religion in the original Constitution is a prohibition on religious qualifications for office—a clause designed to protect religious outsiders. *See* Green, *supra*, at 55-56.³

2. Public speech by the early Presidents

Public religious speech by the early Presidents further reveals the Framers' commitment to inclusion and the desire to avoid stirring sectarian divisions. With the exception of Adams, all the early Presidents carefully chose their public religious language, studiously limiting reference to any particular religion, including Christianity. The Framers' aversion to sectarianism was most pronounced when an official was speaking publicly on behalf of the government in an official capacity—for example, when issuing religious “proclamations.” As Madison stated, “[i]n their individual capacities, as distinct from their official station, [officials] ... might unite in [religious] recommendations of any sort whatsoever.” *Detached Memoranda* 560. On the whole and in any public context, however, the early Presidents chose religious language that reflected a paramount concern with uniting, not dividing, the new republic.

³ Petitioner points (at 34-35) to what it calls the “Oath Clauses” as evidence of a religious requirement in the Constitution, but it overlooks that the Framers chose to require an “Oath *or Affirmation*” specifically to avoid writing a religious test into the document. *See* Meyerson, *supra*, at 138-144.

a. President Washington

President Washington was greatly concerned with the tendency of religious disputes to divide a nation. As he wrote to a friend in Ireland: “Religious controversies are always productive of more acrimony and irreconcilable hatreds than those which spring from any other cause[.]” Letter from Washington to Newenham (June 22, 1792), in 10 *The Papers of George Washington: Presidential Series [1788-1797]* 493 (Haggard & Mastromarino eds., 2002) [hereinafter *PGW: Presidential*]. Washington’s concern was not merely in avoiding conflict, but also unifying the country. He believed that each individual must be treated as an equal member of society and that “every man, conducting himself as a good citizen ... ought to be protected in worshipping the Deity according to the dictates of his own conscience.” Letter from Washington to the United Baptist Churches of Virginia (May 1789), in 2 *PGW: Presidential* 424.

Washington also appreciated his role as a national symbol and understood that his actions would set important precedents. Starting with his first inaugural address, Washington helped to shape a governmental tradition of using inclusive religious language. An early draft of that address, written by his secretary David Humphreys, was rejected and rewritten. Humphreys wanted Washington to use distinctively Christian language, referring to “the blessed Religion revealed in the word of God.” Washington, *Undelivered First Inaugural Address: Fragments* (Apr. 1789), in 2 *PGW: Presidential* 166.⁴ But the final address, which contains

⁴ Eighteenth-century ministers frequently contrasted “natural religion” with the “revealed” religion of Christianity. See, e.g., 1 Pyle, *One Hundred and Twenty Popular Sermons* 81 (1789) (“All

abundant religious imagery, included no language uniquely Christian. Instead, Washington spoke universally, explaining that it would be “peculiarly improper to omit in this first official Act, my fervent supplications to that Almighty Being who rules over the universe.” Washington, *First Inaugural Address*, in 1 *A Compilation of the Messages and Papers of the Presidents* 52 (Richardson ed., 1896) [hereinafter *CMPP*].

Likewise, when Washington issued his Thanksgiving proclamation on October 3, 1789, he again avoided sectarian language in favor of religiously inclusive language. In this respect, he diverged from the sectarian approach followed by the Continental Congress in a 1777 proclamation, which urged “the good people ... [to] join the penitent confession of their manifold sins ... that it may please God, through the Merits of Jesus Christ.” 9 *Journals of the Continental Congress, 1774-1789*, at 855 (1904-1937). Washington, by contrast, recommended that Americans be devoted “to the service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be.” Washington, *Thanksgiving Proclamation* (Oct. 3, 1789), in 4 *PGW: Presidential* 131-132. Though unmistakably religious, Washington’s proclamation demonstrated awareness of the diversity of religious belief across the nation and the need to respect religious freedom.

In addition to avoiding sectarian language, Washington believed the government had a broad duty to protect all individuals from religious oppression. In a letter to Quakers in October 1789, he declared that, as President, he was obligated to respect their religious

adoration of any being ... except the supreme sovereign of the universe, is contrary even to the primitive religion of nature; but especially to the revealed religion of the gospel”).

rights and protect them from harm: “Government being, among other purposes, instituted to protect the Persons and Consciences of men from oppression, it certainly is the duty of Rulers, not only to abstain from it themselves, but according to their Stations, to prevent it in others.” Letter from Washington to the Society of Quakers, in 4 *PGW: Presidential* 266. He added that “the Conscientious scruples of all men should be treated with great delicacy & tenderness, and it is my wish and desire that the Laws may always be as extensively accommodated to them, as a due regard to the Protection and essential Interests of the Nation may Justify, and permit.” *Id.*

Throughout his presidency, various clergymen attempted to elicit statements from Washington indicating a preference for Christianity. In each case, Washington refused, revealing his firm dedication to avoid becoming a symbol for a particular religion. *See Green, supra*, at 72-73. On October 28, 1789, for example, the Presbytery of the Eastward, from Massachusetts and New Hampshire, wrote to Washington to complain that the Constitution lacked any Christian references: “Among these we never considered the want of a religious test, that grand engine of persecution in every tyrant’s hand: But we should not have been alone in rejoicing to have seen some Explicit acknowledgement of the only true God and Jesus Christ, whom he hath sent inserted somewhere in the Magna Charta of our country.” Letter from the Presbytery of the Eastward to Washington (Oct. 28, 1789), in 4 *PGW: Presidential* 275.

In response, Washington defended the Constitution’s absence of “[e]xplicit” Christian language. He explained that religion did not need governmental assistance: “You will permit me to observe that the path of true piety is so plain as to require but little political

direction. To this consideration we ought to ascribe the absence of any regulation, respecting religion, from the Magna-Charter of our country.” Letter from Washington to the Presbytery of the Eastward (Nov. 2, 1789), in 4 *PGW: Presidential* 274. Washington drew a line between sectarian religion and government: “To the guidance of the ministers of the gospel this important object is, perhaps, more properly committed.” *Id.* He also gently admonished the clergy that “it will be your care to instruct the ignorant, and to reclaim the devious—and, in the progress of morality and science, to which our government will give every furtherance, we may confidently expect the advancement of true religion, and the completion of our happiness.” *Id.*

Notably, Washington avoided mentioning or endorsing “Christianity” or “Jesus Christ,” while specifically pointing out that promoting religion is for ministers, not the government. Washington’s response further makes clear the limited role for government in matters of religion: Government, he wrote, is not responsible for furthering religion, but will give “every furtherance” to the “the progress of morality and science.” It was through such secular pursuits, Washington believed, that government could best advance religion, leaving sectarian matters to clergy.

Washington’s commitment to religious inclusion extended to the end of his presidency. For example, Washington edited Alexander Hamilton’s draft for his Farewell Address, which contained specific references to religion, to insure that only inclusive religious language was used. Letter from Hamilton to Washington (July 31, 1796), in 20 *Papers of Alexander Hamilton* 170 (Syrett et al. eds., 1961). Washington’s final version stated: “Let us with caution indulge the supposition that morality can be maintained without religion.

Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.” Washington, *Farewell Address*, in 1 *CMPP* 227. In the original draft, however, the prediction of an end to “national morality” without religion, was followed by a rhetorical question: “Does it not require the aid of a generally received and divinely authoritative Religion?” Washington deleted that line, and thus removed the Christian reference to “received ... religion.” See Meyerson, *supra*, at 197-198.

During the Revolution, General Washington had been concerned with ensuring that religious differences did not raise “the smallest uneasiness & jealousy among the Troops.” Letter from Washington to Hancock (June 8, 1777), in 9 *The Papers of George Washington: Revolutionary War Series [1775-1783]* 645 (Chase et al. eds., 1985-2010). This was due, in part, to the vast range of Christian denominations found among his troops, along with Jews and some deists. That a Jewish officer, David Franks, and a Catholic officer, Marquis de Lafayette, served directly under Washington, underscored his own commitment to ecumenicalism and helps explain his desire to avoid sectarian language that would divide his troops. See Hirschfeld, *George Washington and the Jews* 67-68 (2005); Koch, *A Popular History of the Catholic Church* 235-236 (1997). President Washington was equally determined not to permit religious differences to divide the new nation. Washington’s public words and actions reveal that his objective was to communicate in a way that “unites—rather than divides—a religiously pluralistic people.” Novak & Novak, *Washington’s God: Religion, Liberty, and the Father of Our Country* 14 (2006).

b. President Adams

Washington's successor, Adams—who came from a State with an established church⁵—did not emulate Washington's religiously inclusive style, and he was repudiated for it during his failed reelection bid.

In his inaugural address, Adams told his listeners he had “a veneration for the religion of a people who profess and call themselves Christians, and a fixed resolution to consider a decent respect for Christianity among the best recommendations for the public service.” Adams, *Inaugural Address* (Mar. 4 1797), in 1 *CMPP* 232. Adams's Thanksgiving proclamations were also “more overtly Christian than Washington's.” Hitchcock, *The Supreme Court and Religion in American Life* 30 (2004). In the first of these, Adams used explicitly Christian language in his recommendation that all citizens “offer their devout addresses to the Father of Mercies . . . beseeching Him at the same time, of His infinite grace, through the Redeemer of the World, freely to remit all our offenses, and to incline us by His Holy Spirit.” Adams, *A Proclamation* (Mar. 23, 1798), in 1 *CMPP* 269. The 1799 proclamation begins with a reference to the lessons of the “Volume of Inspiration” and calls for the citizens of the nation to “call to mind our numerous offenses against the Most High God, confess them before Him with the sincerest penitence, implore His pardoning mercy, through the Great Mediator and Redeemer, for our past transgressions, and that through the grace of His Holy Spirit we may be dis-

⁵ Indeed, Adams played a role in drafting the 1780 Massachusetts Constitution that authorized government support for Protestantism. See Meyerson, *supra*, at 77-78. As noted, the Framers understood that the First Amendment did not restrict state practices. See *supra* note 2.

posed and enabled to yield a more suitable obedience to His righteous requisitions in time to come.” Adams, *Proclamation* (Mar. 6, 1799), in 1 *CMPP* 285.

During his reelection campaign against Jefferson, religion was a major issue. In the view of one Adams’ supporter, “the approaching election ... is to decide a question not merely of preference to an eminent individual, or particular views of policy, but, what is infinitely more, of national regard or disregard to the religion of Jesus Christ.” Mason, *The Voice of Warning to Christians* (1800), in 2 *Political Sermons of the American Founding Era* 1453 (Sandoz ed., 2d ed. 1998). Jefferson was presented by supporters of Adams as distinctly anti-Christian. As the *Gazette of the United States* famously framed the question: “Shall I continue in allegiance to GOD—AND A RELIGIOUS PRESIDENT; or impiously declare for JEFFERSON—AND NO GOD!!!” Waldman, *Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America* 168 (2008). Jefferson’s supporters responded that the election was a choice between “[a]n established church, a religious test, and an order of Priesthood” under Adams, and “[r]eligious liberty, the rights of conscience, no priesthood, truth and Jefferson.” Duane, *Federalism vs. Republicanism* (Oct. 14, 1800), in *The Revolutionary Era: Primary Documents on Events from 1776 to 1800* 345 (Humphrey ed., 2003). In that way, “Jefferson’s supporters used the Federalists’ religious arguments to turn the election into a battle between those who wanted to return to the era of religious establishments,” evidenced by Adams’ proclamations, “versus those who supported religious freedom.” Meyerson, *supra*, at 205.

Adams lost the election of 1800. Although many causes contributed to his defeat, Adam’s vision of reli-

gion and government was one of them. Adams himself blamed his defeat on his religious proclamations: “The National Fast recommended by me turned me out of office.” Letter from Adams to Rush (June 12, 1812), in *Old Family Letters* 392 (Biddle ed., 1892). As he explained, “[n]othing is more dreaded than the National Government meddling with Religion.” *Id.* at 393. Adam’s failure to follow Washington’s inclusive religious style, in other words, was rejected by the People.

c. President Jefferson

For President Jefferson, the First Amendment’s respect for religious liberty and principles of federalism forbid the national government from “intermeddling with religious institutions, their doctrines, discipline, or exercises.” Letter from Jefferson to the Rev. Miller (Jan. 23, 1808), in 9 *WTJ* 174. “This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the U.S.” *Id.*

Jefferson steadfastly opposed *official* government religious practice, as reflected in his refusal to issue Thanksgiving proclamations during his presidency. For Jefferson, even a *recommendation* of a day of Thanksgiving carried an implicit threat against religious outsiders. At minimum, he said, it would lead to “some degree of proscription perhaps in public opinion.” Letter from Jefferson to the Rev. Miller (Jan. 23, 1808), in 9 *WTJ* 175. Because “Fasting & prayer are religious exercises” and “every religious society has a right to determine for itself the times for these exercises, & the objects proper for them,” the right to call for days of fasting and prayer “can never be safer than in their own

hands, where the constitution has deposited it.” *Id.* The government had no proper role in the process.⁶

When President Jefferson did use religious language in his public, though *unofficial*, speech it was limited, like Washington’s, and cast in general and universal terms. In his first inaugural address, Jefferson expressed concern for protecting minority interests. He emphasized that it is a “sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate would be oppression.” Jefferson, *First Inaugural Address* (Mar. 4, 1801), in 1 *CMPP* 322. He ended his inaugural address with a nondenominational religious plea similar in tone to that of Washington: “[M]ay that infinite power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity.” *Id.* at 324. Jefferson’s speeches throughout his presidency continued this language of inclusion. See Meyerson, *supra*, at 208-209; see, e.g., Jefferson, *Second Annual Message* (Dec. 15, 1802), in 1 *CMPP* 342 (referring to the “goodness of that Being from whose favor” “pleasing circumstances” flow); Jefferson, *Fifth Annual Message* (Dec. 3, 1805), in 1 *CMPP* 383 (referring to “Providence in His goodness”).

⁶ Jefferson struck a similar chord in his letter to the Danbury Baptists, explaining that the First Amendment erected a “wall of separation between Church and State” and that “religion is a matter which lies solely between man and his God.” Jefferson to Danbury Baptist Association (Jan. 1, 1802), in 5 *The Founders’ Constitution*, *supra*, at 96.

d. President Madison

President Madison followed Washington and Jefferson in their approach to public religious speech. In his first inaugural address, Madison announced his guiding objective “to avoid the slightest interference with the rights of conscience, or the functions of religion so wisely exempted from civil jurisdiction.” Madison, *First Inaugural Address* (Mar. 4, 1809), in 1 *The Papers of James Madison: Presidential Series [1809-1817]* 17 (Rutland et al. eds., 1984) [hereinafter *PJM*]. He ended his address with a religious statement reflecting general, nonsectarian language, acknowledging “the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.” *Id.* at 17-18.

Like Jefferson, Madison was opposed to official government religious proclamations, believing them to be unconstitutional. In his *Detached Memoranda*, a collection of private papers written after he left office in 1817, Madison explained that religious proclamations “imply a religious agency, making no part of the trust delegated to political rulers.” *Detached Memoranda* 560-561. Calling these proclamations “advisory,” he wrote, did not ameliorate the problem, since “an advisory Govt is a contradiction in terms.” *Id.* at 560. Madison warned that these proclamations “nourish the erroneous idea of a national religion.” Even were everyone of the same creed, Madison said, “reason and the principles of the Xn religion” require that any attempt to unite in an act of religion “ought to be effected thro’ the intervention of their religious not of their political representatives.” *Id.* at 560-561. In a country with

multiple religions, he warned, official proclamations had the tendency to “narrow the recommendation to the standard of the predominant sect.” *Id.* at 561. If not carefully guarded against, this tendency “naturally terminates in a conformity to the creed of the majority and a single sect, if amounting to a majority.” *Id.*

Despite his misgivings, and under enormous political pressure, Madison did issue four religious proclamations during the War of 1812, but he insisted the language be general and inclusive. *See* Meyerson, *supra*, at 222-223. Madison explained to a friend that he was “always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory; or rather mere *designations* of a day, on which all who thought proper might *unite* in consecrating it to religious purposes, according to their own faith & forms.” Letter from Madison to Livingston (July 10, 1822), in 9 *The Writings of James Madison* 101 (Hunt ed., 1910). For example, Madison opened his second proclamation by “recommending to all, who shall be piously disposed” to unite “in addressing at, one and the same, time their vows and adorations to the Great Parent and Sovereign of the Universe,” who had blessed the United States with the “sacred rights of conscience.” Madison, *Presidential Proclamation* (July 23, 1813), in 6 *PJM* 458-459.

B. The Framers’ Religious Speech Undermines Petitioner’s Historical Argument

The cautious and considered religious language used by leading Framers shows that they embraced a nuanced understanding of religious speech. “[G]overnment religious speech was to be permitted” but “strictly limited.” Meyerson, *supra*, at 11. “The critically important aspect of the framing generation’s compromise was that only the most general, nonsec-

tarian reference to God was deemed appropriate.” *Id.* at 11-12. This points to a central flaw in the historical narrative set forth by Petitioner and its amici.

To be sure, the Framers accepted some forms of religious activity by government officials, including speech that could be described as “prayer.” But to draw from that historical practice the lesson that the Framers accepted the government’s use of *any* religious language in *any* circumstance would be a significant misreading of history. The context of religious speech, as well as its content, was critical to the Framers. For official speech directed to the public, they were exceptionally careful to ensure that any religious language would unite, not divide, the nation and for that reason they would have been highly skeptical of overtly sectarian prayer in that context. The Framers’ wisdom was in recognizing the important but complicated relationship between religion and government, reflected in their ongoing efforts to “find a civil vocabulary that could encompass all people, regardless of their faith.” Meyerson, *supra*, at 12.

II. THE FRAMERS REJECTED RELIGIOUS COERCION BY THE GOVERNMENT, WHICH THEY DEFINED EXPANSIVELY, BUT MANY SAW NO RISK OF COERCION IN THE UNIQUE CONTEXT OF LEGISLATIVE CHAPLAINS

In addition to uniting around the principle that government speech about religion should be circumscribed, unifying, and non-sectarian, the Framers agreed that no government religious expression should be coercive. This principle derived from a deeply held philosophical belief. For example, referring to his wartime instructions to respect the Catholic faith of many Canadians, Washington remarked that, “[w]hile we are contending for our own Liberty, we should be very cau-

tious of violating the Rights of Conscience in others, ever considering that God alone is the Judge of the Hearts of Men, and to him only in this Case, they are answerable.” Boller Jr., *George Washington and Religion* 124 (1963). And in his letter to the Newport Jewish congregation, Washington wrote that “[a]ll possess alike liberty of conscience and immunities of citizenship,” and therefore “the Government of the United States[] ... gives to bigotry no sanction.” Washington to the Hebrew Congregation in Newport Rhode Island, (Aug. 18, 1790), in 6 *PGW: Presidential* 285.⁷

Although the Founders may have disagreed whether official government prayer proclamations were inherently coercive—as Jefferson’s letter to Reverend Miller and Madison’s *Detached Memoranda* argued, *see supra* pp. 22-25—they agreed that the government should not coerce people to participate in religious worship or observance. They would have agreed with this Court’s statement that “[t]he First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support

⁷ Madison expressed the same viewpoint. He wrote that all people had entered into society “on equal conditions” and were “to be considered as retaining an ‘equal title to the free exercise of religion according to the dictates of conscience.’” Madison, *Memorial and Remonstrance* ¶ 4, in 5 *The Founders’ Constitution, supra*, at 82; *see also* Madison, *Presidential Proclamation* (July 23, 1813), in 6 *PJM* 458-459 (American practice of limiting government involvement in religion proves that religion “freed from all coercive edicts, from that unhallowed connection with the powers of this world which corrupts religion into an instrument or an usurper of the policy of the state, and making no appeal but to reason, to the heart, and to the conscience, can spread its benign influence everywhere”).

or influence the kinds of prayer the American people can say.” *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

Indeed, by the time of the passage of the First Amendment, concerns regarding establishment and rights of conscience included any government endorsement of religion that might exclude members of the community based on their religious beliefs or that could pressure individuals to conform to the religion of the majority. For Jefferson and Madison, of course, this exclusion could occur any time the government made official religious proclamations, as such speech inherently involved “some degree of proscription.” Letter from Jefferson to the Rev. Miller (Jan. 23, 1808), in 9 *WTJ* 175; see *Detached Memoranda* 560-561 (religious proclamations “naturally terminate[] in a conformity to the creed of the majority and a single sect, if amounting to a majority”). As described above, other Framers, including Washington most prominently, demonstrated by their unwavering practice that they saw official sectarian proclamations aimed at the public as contradicting the American understanding of freedom of religion. And the formative debates regarding the roles of government and religion in the 1770s and 1780s show how expansive the concepts of “establishment” and religious “coercion”—understood here as any government infringement on an individual’s rights of conscience—had become.

This history directly responds to Petitioner’s cramped contention that the Establishment Clause was concerned only with forced subsidization of a “favored religion” or “compell[ed] obedience to the tenets of a particular faith.” Pet. Br. 36. It is also relevant for a second, less obvious, reason. The Framers understood that whether particular government conduct amounted to prohibited coercion depended entirely on context.

That contextual understanding explains why many Framers viewed legislative chaplains for Congress as acceptable, but also why they would have viewed government-sponsored sectarian prayer directed at the public as an affront to “freedom of belief and conscience.” *Lee*, 505 U.S. at 592.

A. At The Founding, The Related Concepts Of “Establishment” And Religious “Coercion” Were Broad And Still Expanding

The First Amendment prohibits any “law respecting an establishment of religion.” U.S. Const. amend. I. What constitutes an “establishment” is hardly self-evident. In the worst cases of establishment, the government had endorsed a particular official religion and required everyone to adhere to it, support it with taxes, and participate in its worship. *See Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment* 25 (1986) [hereinafter *Curry, First Freedoms*]. Opposition to this type of establishment was an easy case for the Framers, but it far from exhausted their concern. By the time the Establishment Clause was adopted, the Framers’ concern with coercion was far more expansive: even measures that, on their face, appeared to avoid restraints on individual liberty were rejected as establishments or violative of rights of conscience.

On this point, the lead up to and passage of the Virginia Act for Establishing Religious Freedom, a precursor to the federal Establishment Clause, is particularly informative. In 1784, Patrick Henry proposed a bill to the Virginia legislature for “establishing a provision for teachers of the Christian religion” and requiring religious teachers be paid by the state. Under the bill, individual taxpayers could designate the particular “society

of Christians” to which they wished to have their money allocated—that is, the state did not itself choose a sect to support. (The bill is printed in *Everson*, 330 U.S. at 72-74.) Taxpayers were also free not to choose a particular sect at all, in which case their taxes would be distributed for the encouragement of seminaries of learning,” or schools. *Id.* at 74. The assessment thus attempted to minimize both the government’s involvement in religion and the specter of adherents of minority religions being forced to contribute to the religious worship of others. In those ways, it addressed the traditional forms of government “coercion” that had plagued earlier establishments. See Laycock, “Noncoercive” Support for Religion: Another False Claim About the Establishment Clause, 26 Val. U. L. Rev. 37, 47 (1991).

Nevertheless, leading Founders, as well as religious dissenters, decried the bill, framing their objections in terms of both establishment and individual right of conscience. Madison’s *Memorial and Remonstrance*—written in opposition to Henry’s bill—termed the general assessment “a dangerous abuse of power” and an “establishment.” Madison, *Memorial and Remonstrance* at Preamble ¶¶ 6, 8, in 5 *The Founders’ Constitution*, *supra*, at 82-83. Asserting that it was “an unalienable right” of individuals to exercise their religion solely as their own “conviction and conscience” may dictate, Madison warned that religious establishments violate fundamental republican principles by permitting “Rulers who wished to subvert the public liberty” to utilize the “established Clergy [as] convenient auxiliaries.” *Id.* ¶ 1, 8. Madison further condemned treating the “Civil Magistrate” as a “competent Judge of Religious Truth” and “employ[ing] Religion as an engine of Civil policy.” *Id.* ¶ 5. Combining theories of religious obligation with personal autonomy,

Madison stated that “[i]t is the duty of every man to render to the Creator such homage ... only as he believes to be acceptable to him.” *Id.* ¶ 1. The bill, though nondiscriminatory on its face, “degrade[d] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.” *Id.* ¶ 9. Jefferson, as well, strongly opposed Henry’s bill on the same grounds. *See, e.g., Ragosta, Religious Freedom* 33.

Washington also opposed Henry’s bill on the ground that such support for religion was politically divisive. Washington did not object in principle to an assessment, so long as it scrupulously protected minority religions through appropriate exemptions. *See* Letter from Washington to Mason (Oct. 3, 1785), in 3 *The Papers of George Washington: Confederation Series* 292-293 (Abbot et al. eds., 1992-1997). He wrote, however, that he was opposed to the bill, explaining that it would “rankle, & perhaps convulse the State.” *Id.*

Religious groups criticized Henry’s bill because it would debase Christianity and violate individual rights of conscience. Virginia Presbyterians, for example, explained the religious grounds for their opposition: “We are fully persuaded of the happy influences of Christianity upon the morals of men; but we have never known it, in the history of its progress, so effectual for this purpose, as when left to its native excellence and evidence to recommend it, under the all-directing providence of God, and free from the intrusive hand of the civil magistrate. Its Divine Author did not think it necessary to render it dependent on earthly governments.” *Memorial of Convention at Bethel* (Aug. 1785), in *Documentary History of the Struggle for Religious Liberty in Virginia* 237 (James ed., 1900). They warned that the assessment harmed those who did not share the majori-

ty's religious beliefs, stating that it "unjustly subjects men who may be good citizens, but who have not embraced our common faith, to the hardship of supporting a system they have not as yet believed the truth of." *Id.* at 238. Virginia Baptists similarly decried the bill because they opposed any link between government and religion. See *Prince George County Petition* (Nov. 28, 1785), in Curry, *Farewell to Christendom: The Future of Church and State in America* 123-124 (2001).

Instead of the much criticized assessment, Madison successfully guided the Virginia Act for Establishing Religious Freedom that Jefferson had written through the Virginia legislature. 5 *The Founders' Constitution, supra*, at 84. That statute declared "that all attempts to influence [the mind] by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion." *Id.* The statute stated "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Id.* What is more, and crucially, the statute reflected opposition to the "impious presumption of legislators and rulers" who declare their own religious opinions as correct, as well as any action by government that effectively conditions the full "privileges and advantages" of citizenship on an individual "profess[ing] or renounc[ing] this or that religious opinion." *Id.* The statute accordingly announced that "all men shall be free to profess ... their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." *Id.* at 85.

The spirited debate over the Virginia assessment bill and the eventual enactment of Jefferson's competing bill demonstrate how broadly the founding genera-

tion conceived of establishment and coercion in the years preceding enactment of the Establishment Clause. Indeed, even supporters of the bill never doubted that it effected an establishment of religion. *See* Curry, *First Freedoms* 146-148. The debate is equally important because it demonstrates that the Framers rejected, as an affront to individual rights of conscience, measures far less intrusive than compelled obedience to particular state-sanctioned religious faith.

B. For Many Framers, Legislative Chaplains Did Not Offend Individual Conscience Or Effect An Establishment, But That Is Of Limited Relevance In This Case

The founding-era understanding of coercion casts important light on the Framers' understanding of legislative chaplains and legislative prayer. Although the view was not universal, many Founders deemed legislative chaplains unobjectionable, as this Court recognized in *Marsh*. *See* 463 U.S. at 788-790. But that is because the Framers embraced a contextual understanding of coercion that took account of the setting and purpose of government religious speech, and ministering to members of Congress simply did not present a risk of coercion that warranted condemnation.

The Framers would have understood that legislative chaplains were ministering to legislators themselves, much like military chaplains might serve the spiritual needs of those in the army. This ministering was not only *not directed* at the public, but it typically would not have been *observed* by the public.⁸ The risk

⁸ The Senate was closed to public viewing at the time Congress first hired chaplains, and the House was viewable from the gallery only. *See* Parry, *Legislatures and Secrecy*, 67 Harv. L. Rev. 737, 743 (1954).

of public coercion from legislative prayer thus was virtually non-existent. Even in this limited setting, the practice was not free of controversy. But the key point is that the Framers would have recognized the basic difference between, on the one hand, a chaplain ministering to members of Congress and, on the other, government-sponsored prayer intended for public consumption, especially when the audience for prayer is captive. Indeed, the United States in its brief acknowledges the importance of such contextual factors in evaluating religious speech, including, for example, whether a government body is engaged in providing direct benefits to citizens when it sponsors prayer and whether those who wish to do business with the body may enter and leave freely to avoid the prayer without consequence. *See* U.S. Br. 22-24.

Madison recognized the distinction between ministering to legislators and to the public in his *Detached Memoranda*, though he ultimately condemned the use of legislative chaplains. Madison argued that chaplains were inconsistent with the “pure principle of religious freedom” and that the practice was tantamount to a “national establishment.” *Detached Memoranda* 558. At the same time, Madison acknowledged that, strictly speaking, the appointment of chaplains for Congress enabled “religious worship for the national representatives.” *Id.* In that way, legislative chaplains resembled chaplains in the army and navy, which existed to minister to the spiritual needs of the armed forces, and which Madison viewed as a closer constitutional question. *See id.* at 559-560; *see also* H.R. Rep. No. 33-124, at 6-7 (1854) (noting that legislative chaplains were needed to serve the spiritual needs of Congress); Becket Fund Amicus Br. 23 (“employment of a legislative chaplain is different in kind from government funding of ministers

or religious teachers for the general public” because a chaplain “serves the unique needs of legislators” and not the “general public”).

Perhaps the most important proof that the Framers’ diffident acceptance of legislative chaplains was not a wholesale endorsement of government-sponsored religious worship comes from the scarcity of historical evidence of such practices outside that unique setting. To be sure, certain federal courts for a time may have followed practices common to the States in which they sat, practices which sometimes might include opening a session with sectarian prayer. See Letter from Jay to Law (Mar. 10, 1790), in 2 *The Documentary History of the Supreme Court of the United States, 1789-1800*, at 13 (Marcus et al. eds., 1988) [hereinafter *Documentary History*]; *Columbian Centinel* (Oct. 17, 1792), in 2 *Documentary History* 317 (“[T]he *Circuit Court* of the *United States* opened in this town. After the Rev. Dr. Lathrop had addressed the throne of Grace, in prayer, ... the business of the session commenced.” (internal footnote omitted)). But John Marshall effectively rejected that approach, selecting an invocation for the Supreme Court (“God save the United States and this honorable Court”) that, much like the religious speech of the early Presidents, is self-evidently universal and noticeably avoids any sectarian reference. 1 Warren, *The Supreme Court in United States History* 469 (1922). This historical example is thus further evidence of a founding generation that was continually evolving toward a more national and more inclusive religious vocabulary.

In sum, although the First Congress authorized legislative chaplains, that practice is of extremely limited value in discerning the original understanding of the Establishment Clause as relevant here. Because

legislative chaplains were hired principally to minister to the needs of legislators and because legislative prayers were not directed at the public, many Framers would not have seen the practice as posing any risk of coercion or diminution in the right of full participation in public discourse. The practice thus says nothing about application of the Establishment Clause in circumstances where, as here, the government is directing sectarian religious speech at the public in a setting in which citizens are directly engaging with a governmental body, and in which citizens face substantial pressure to participate in sectarian worship in order to do business with the governmental body.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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