No. 12-696

In The Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY and LINDA STEPHENS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* GERARD V. BRADLEY AND EIGHT OTHER CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Gerard V. Bradley has been a Professor of Law at the University of Notre Dame since 1992, before which time he taught at the University of Illinois College of Law.[2] At Notre Dame, he has taught courses in various areas of Constitutional Law, including the law of the First Amendment. Bradley serves as Co-Director of the Natural Law Institute, and as Co-Editor-in-Chief of *The American Journal of Jurisprudence*, an international forum for legal philosophy published in partnership with Oxford University Press. Bradley is a Senior Fellow at the Witherspoon Institute in Princeton, New Jersey. He has been a Visiting Fellow at the Hoover Institution of Stanford University and a Visiting Professor of Politics at Princeton University. In 2012, Cambridge University Press published his edited collection, *Challenges to Religious Liberty in the Twenty-First Century*. His most recent book is *Unquiet Americans: U.S. Catholics and the Genuine Common Good*, to be published in late 2013. For many years, Bradley served as

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[1] Counsel of record for the parties in this case have consented to the filing of *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] The views expressed by Bradley and the other *amici curiae* herein do not necessarily reflect the views of their respective institutions.

President of the Fellowship of Catholic Scholars, and as Chair of the Federalist Society's Religious Liberties Practice Group.

The remaining eight *amici curiae* (listed in the attached Appendix) are also constitutional law scholars, who, along with Bradley, share the view that this Court in *Marsh v. Chambers* rightly affirmed legislative prayer as a practice deeply rooted in our nation's longstanding constitutional tradition, and that the *Lemon*-based "endorsement" test applied by the court of appeals is entirely inapposite to legislative prayer, requiring reversal of the decision below.

SUMMARY OF ARGUMENT

Legislative prayer, a practice upheld by this Court in *Marsh v. Chambers*, is deeply rooted in our constitutional tradition. As Justice William O. Douglas, writing for the Court in *Zorach v. Clauson*, famously observed, "We are a religious people whose institutions presuppose a Supreme Being." 343 U.S. 306, 313 (1952). The truth of this statement has been reflected in the public acknowledgement of God by all the branches of our government from the time of our founding through the present day.

In view of these historical practices, this Court held in *Marsh* that legislative prayer is sanctioned by the Establishment Clause, noting, in particular, that choosing a clergyman of a single denomination to serve as the chaplain for a public body does not

advance the beliefs of a particular church. *Marsh v. Chambers*, 463 U.S. 783, 793-94 (1983). Moreover, legislative prayer is by definition the invocation of "Divine guidance on a public body entrusted with making the laws." *Id.* at 792. The holding affirms that a government-sponsored prayer to a personal, benevolent, and providential "Supreme Being" – a common, but certainly not universally held concept of the Divine – is, nonetheless, a "tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792.

Moreover, unless there is an indication that the public body exploited the prayer opportunity to proselytize or to disparage other faiths – and this Court recognized that legislative opening prayers have not been viewed historically as a proselytizing activity – courts are not to concern themselves with the content of the prayers. *See id.* at 791-95. It is, of course, a natural consequence of allowing the practice of legislative prayer that prayer-givers will pray in terms that express the convictions of their own faith. The fact that the prayer-givers in the Town of Greece, a largely Christian community, mostly prayed in Christian terms is, therefore, neither remarkable nor incompatible with *Marsh*.

Despite the clear-cut holdings of *Marsh*, courts of appeals, including the court below, have applied the *Lemon*-based "endorsement" test (or some variation of it) to the practice of legislative prayer and, in so doing, have reached results that directly contradict *Marsh*. Given what legislative prayer *is*, however – as

recognized by this Court in *Marsh* – the *Lemon*/endorsement test is intrinsically and necessarily inapposite.

For one, legislative prayer – which by definition petitions God for guidance and assistance – has an indisputably religious purpose and is, therefore, necessarily incompatible with the "secular purpose" prong of the *Lemon*/endorsement test. For the same reason, the broad concept of neutrality implicit in the *Lemon*/endorsement test that government may not favor religion over nonreligion is inapplicable to legislative prayer (for the practice of petitioning a Divine entity has no "nonreligious" counterpart). In addition, the *Lemon*/endorsement test's "reasonable observer" standard clouds the proper focus of a legislative prayer analysis, which is to be on the public body's *practice*, not on any single *prayer*. In the context of a continuing government practice, a reasonable observer cannot be reasonable unless she has observed all of the events that make up the particular practice – which is rarely, if ever, the case in reality. Finally, the *Lemon*/endorsement test's mandate against the communication of messages that make nonadherents feel like "outsiders" cannot be satisfied in the context of legislative prayer absent the public body carefully scripting a universalized, amorphous "common prayer" to be delivered by the prayer-givers. Such scripting would itself likely violate the Establishment Clause, and would certainly violate the clear command of *Marsh* that, absent improper exploitation, judges are not to concern themselves with the content of prayers.

For all of these reasons, to apply the *Lemon*/endorsement test to legislative prayer is simply to overrule *Marsh v. Chambers*.

To be sure, in applying the *Lemon*/endorsement test to legislative prayer, the Second Circuit in the decision below (and the Fourth Circuit in *Joyner v. Forsyth County, North Carolina*) undermined, indeed effectively "overruled," *Marsh*. Neither court found that the public body had an impermissible motive in selecting prayer-givers, but both courts – troubled by the preponderance of Christian clergy that resulted from the public bodies' neutral selection processes – held that the Establishment Clause requires a diversity of religious speakers. *See Galloway v. Town of Greece*, 681 F.3d 20, 30-31 (2d Cir. 2012); *Joyner v. Forsyth Cnty., N.C.*, 653 F.3d 341, 354 (4th Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012). Similarly, despite finding no evidence of exploitation of the prayer opportunity, both courts "embark[ed] on a sensitive evaluation" (*see Marsh*, 463 U.S. at 796) of the content of particular prayers. The prayers' distinct Christian references in both cases, the courts held, made non-Christians feel like outsiders. *See Galloway*, 681 F.3d at 31-32, 34; *Joyner*, 653 F.3d at 354-55. Perhaps most troubling of all was the Second Circuit's suggestion that prayer-givers must refrain from conveying their own views of religious truth when they pray (*see Galloway*, 681 F.3d at 34), an instruction that censors religious believers' speech and promotes a meaningless, court-created civil religion.

Finally, this Brief contends that this Court was correct in *Marsh* to recognize the inapplicability of the *Lemon*/endorsement test to the practice of legislative prayer. That being said, praying public bodies are not free to disregard other norms of constitutional limitation. Those public bodies may look to *Marsh* itself for those limiting principles to ensure the absence of an impermissible motive or improper exploitation, while at the same time allowing prayer-givers, in our time-honored tradition, to pray according to their consciences as informed by the tenets of their own religions.

ARGUMENT

I. LEGISLATIVE PRAYER IS A PRACTICE DEEPLY ROOTED IN OUR CONSTITUTIONAL TRADITION AND EXPRESSES AMERICANS' CONVICTION THAT WE ARE "ONE NATION, UNDER GOD"

Opening deliberative public assemblies, including legislative meetings, with prayer has been a conspicuous part of our experiment in democratic self-government since the founding. It is now practically an indelible feature of our civic life. Legislative prayer carries into practice Americans' beliefs that our nation stands "under God." Lawmakers at the national, state, and local levels thus naturally begin their work as our representatives by seeking Divine guidance and assistance.

In fact, throughout our history *all* the branches of government have habitually acknowledged the blessings of God upon our country, and sought Divine assistance with the challenges of governing. United States presidents, for example, have regularly marked the inauguration of their political service "with a request for divine blessing." *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 671 (1989) (Kennedy, J., concurring in judgment in part, dissenting in part).

Thomas Jefferson stated at his second inauguration:

> I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.

Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), http://www.bartleby.com/124/pres17.html (last visited July 29, 2013).

John Adams declared during his inaugural address:

> [W]ith humble reverence, I feel it to be my duty to add, if 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, can enable me in any degree to comply with your wishes, it shall be my strenuous endeavor that this sagacious injunction of the two Houses shall not be without effect. . . .
>
> And may that Being who is supreme over all, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessing upon this nation and its Government and give it all possible success and duration consistent with the ends of His providence.

John Adams, Inaugural Address (Mar. 4, 1797), http://www.bartleby.com/124/pres15.html (last visited July 29, 2013).

Presidents have often issued religious proclamations and executive orders, and both presidents and Congress have delivered other official announcements to "proclaim[ ] both Christmas and Thanksgiving National Holidays in religious terms." *See Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (O'Connor, J., concurring). Beginning with President Washington and followed by most of his successors, "American Presidents have issued Thanksgiving Proclamations

establishing a national day of celebration and prayer." *Allegheny*, 492 U.S. at 671 (Kennedy, J., concurring in judgment in part, dissenting in part). President Franklin D. Roosevelt "went so far as to 'suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas' so that 'we may bear more earnest witness to our gratitude to Almighty God.'" *Id.* (citing Presidential Proclamation No. 2629, 58 Stat. 1160).

Many generations of Americans have perpetuated this early practice of giving thanks to the Divine Being within the context of petitionary prayer, all the way down to the present moment. This Court's own sessions begin with an unusually concise recognition of, and prayer for guidance to, a Provident Supreme Being: "God save the United States and this honorable Court." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); *see also Allegheny*, 492 U.S. at 672 (Kennedy, J., concurring in judgment in part, dissenting in part).

II. IN *MARSH V. CHAMBERS*, THE COURT RELIED UPON CONSTITUTIONAL TRADITION AND HISTORICAL PRACTICE TO DECLARE THAT LEGISLATIVE PRAYER IS SANCTIONED BY THE ESTABLISHMENT CLAUSE

These many illustrations of our country's tradition of government prayer are compelling evidence of what the Establishment Clause means today. This Court has often declared that our country's historical

traditions must inform our understanding of the Establishment Clause,[3] especially when it comes to affirmations of religion on public property or within government settings.[4] The guiding force of history and tradition lay at the heart of *Marsh v. Chambers,* where the Court upheld Nebraska's longstanding practice of opening its state legislative sessions with prayer. *See Marsh*, 463 U.S. at 786-92. As Chief Justice Burger said in *Marsh*, "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent." *Id.* at 790.

This Court has sometimes referred more specifically to actions of the First Congress as authoritative gloss upon the Constitution. "In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it

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[3] *See*, *e.g.*, *Walz v. Tax Comm'n*, 397 U.S. 664, 671-73, 680 (1970) (analyzing property tax exemptions for religious organizations in light of "more than a century of . . . history and uninterrupted practice").

[4] Interpretation of the Establishment Clause must "comport[ ] with what history reveals was the contemporaneous understanding of its guarantees." *See Lynch*, 465 U.S. at 673 (O'Connor, J., concurring) (crèche on public property); *Allegheny*, 492 U.S. at 669-70 (Kennedy, J., concurring in judgment in part and dissenting in part) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.") (crèche in courthouse).

enacted legislation providing for paid chaplains for the House and Senate." *Lynch*, 465 U.S. at 674 (O'Connor, J., concurring). On the same day that the Bill of Rights was approved, "the House resolved to request the President to set aside a Thanksgiving Day to acknowledge 'the many signal favors of Almighty God.'" *Marsh*, 463 U.S. at 790 n.9 (citing J. of the H.R. 123).

In *Marsh*, the Court validated the legislative prayer practice of the Nebraska Legislature, which began each of its sessions with a prayer offered by Chaplain Rev. Dr. Robert E. Palmer, a Presbyterian minister, who was paid out of public funds and who had served as the Legislature's chaplain for a period of sixteen years. *See Marsh*, 463 U.S. at 784-85. In view of the country's historical traditions, the Justices in *Marsh* held that, absent an impermissible motive on the part of the Legislature, "[w]e no more than Members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church." *Marsh*, 463 U.S. at 793.

The *Marsh* Court specifically noted that, in the course of debates regarding whether or not to begin the first session of the Continental Congress with a prayer, Samuel Adams responded to an objection that the delegates were too divided on matters of religion to "join in the same act of worship," by stating that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." *Marsh*, 463 U.S. at

791-92 (quoting Charles Francis Adams, *Familiar Letters of John Adams and His Wife, Abigail Adams, During the Revolution* 37-38, reprinted in Stokes, at 449). This Court concluded that the "interchange emphasizes that the delegates *did not consider opening prayers as a proselytizing activity* or as symbolically placing the government's 'official seal of approval on one religious view[.]'" *Id.* at 792 (emphasis added). The exchange further shows that prayer can be joined with patriotism to promote political unity, even among people who disagree in matters of religion.

III. ACCORDING TO *MARSH*, THE ESTABLISHMENT CLAUSE SANCTIONS A PRACTICE WHICH, TAKEN AS A WHOLE, ENDORSES CERTAIN BASIC PROPOSITIONS CONCERNING GOD AND HUMAN AFFAIRS

The prayers offered by Rev. Palmer in *Marsh* were squarely within the constitutional tradition described in the first two sections of this Brief. He directed these prayers to a Divine Being and implored God to guide the assembly's deliberations. The *Marsh* Court upheld this practice. The Court did *not* say or imply that it upheld some hallowed verbal formulae as the mechanism for getting legislators' attention and for causing them to get down to business – as if the "prayers" constitutionally validated in *Marsh* were merely an alternative to sounding a gong. Nor did the Court say or imply that the prayers in

Nebraska were one tolerable way to "solemnize" the occasion – as if the "prayers" were an alternative to a moment of silence or to reading Walt Whitman.

The *Marsh* Court instead affirmed the constitutionality of *precisely* "invok[ing] Divine guidance on a public body entrusted with making the laws." *Marsh*, 463 U.S. at 792. Justice Brennan quoted Rev. Palmer's description of the prayers' purpose in his (Brennan's) *Marsh* dissenting opinion: "'I strive to relate the Senators and their helpers to the divine. . . . [,] to provide an opportunity for Senators to be drawn closer to their understanding of God as they understand God. In order that the divine wisdom might be theirs as they conduct their business for the day.'" *Marsh*, 463 U.S. at 797-98, n.4 (Brennan, J., dissenting) (quoting Palmer Deposition, at 28, 46).

The prayers sanctioned by the *Marsh* Court did not amount to some spiritual Esperanto or religious least common denominator. These prayers affirmed or presupposed a set of common but hardly universally held propositions, namely, that there (i) is a Supreme Being, who (ii) has a continuing interest in human affairs; (iii) possesses the power to affect the course of human affairs; (iv) is benevolent (for the legislators assembled are obviously seeking some *good* effect by and through their prayer); and (v) actually listens and responds to people when they pray.

Many people do not hold beliefs such as these. Non-believers of course reject all such claims. Even some religious people deny or doubt some of them.

More than a few Founding Fathers, for example, have been described as Deists. Deists affirm the existence of a Creator God. But they characteristically deny Divine Providence; that is, they profess belief in a "clockmaker" God who at the beginning of time set in motion a course of events which includes human affairs, but who remains forever after aloof from them. Deists of this description would not affirm the efficacy of prayers for God's guidance in deciding what people should do about ordering earthly matters.

Buddhists are "Deists" in this one sense. Although Buddhism is a blend of ancient traditions and practices, Buddhists characteristically do not believe in a Creator God who remains interested in "guiding" or "assisting" human political affairs. *See* Rupert Gethin, *The Foundations of Buddhism* 65-66 (Oxford University Press 1998). Buddhists would thus characteristically eschew the types of prayers upheld in *Marsh*.

Jehovah's Witnesses are well-known to students of constitutional religious liberty, having served as plaintiffs in so many important Supreme Court cases. Jehovah's Witnesses are not Deists. They typically affirm, however, that God's undivided sovereignty over the whole universe renders human government so presumptuous as to be almost blasphemous. This is the theological basis for Jehovah's Witnesses' famous refusal to salute the American flag. Given these beliefs, Jehovah's Witnesses are not likely candidates to seek Divine assistance to a legislative assembly.

Wicca – a religion represented by the priestess who offered an invocation at a Town of Greece Board meeting (*see Galloway*, 681 F.3d at 23) – is an eclectic blend of beliefs and traditions, with origins and continued influence supplied by witchcraft. The dominant form of belief among Wiccans is pantheistic; Wicca is perhaps most accurately described as a "nature" religion with certain magical elements. In any event, the possibility of a prayerful appeal to a personal Supreme Being for guidance in practical matters is practically unintelligible within this framework of thought.

Justice Scalia gave effective voice to much of what we are saying in this section about the inescapable underpinnings of governmental prayer, in his dissent in one of the 2005 Ten Commandments cases:

> If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. . . . Historical practices . . . demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.

McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 893-94 (2005) (Scalia, J., dissenting).

This irreducibility of legislative prayer arises, not from any discrimination by public authorities, but rather by the inherent nature of the undertaking. The legislative prayer practice upheld by this Court in *Marsh v. Chambers* intrinsically and thus necessarily adopts – affirms, presupposes, makes no sense apart from – a nested set of beliefs which are not, and have never been, shared by all Americans – or even by all Americans who profess religious faith.

Public authorities who open their meetings with prayers therefore do not "discriminate" against marginalized or "outsider" religions, any more than a prison or public school, which prepares special meals for believers adhering to dietary restrictions (such as Muslims and Jews), "discriminates" against Christians, for example, who adhere to no such regimen.

IV. UNDER *MARSH*, THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE A LEGISLATIVE PRAYER PRACTICE TO REFLECT AN IDEAL UNIVERSALISM

The Court in *Marsh v. Chambers* held that Nebraska's way of conducting legislative prayer was "a tolerable acknowledgement of beliefs widely held among the people of this country" and, in so doing, adopted and repeated the words of Justice William O. Douglas, who wrote for the Court in *Zorach v. Clauson* that "'[w]e are a religious people whose institutions presuppose a Supreme Being.'" 463 U.S. at 792 (quoting *Zorach*, 343 U.S. 306, 313 (1952)).

This terse statement in *Marsh* expresses the two main elements of the Court's holding in that case, namely, that a constitutionally valid legislative prayer practice would both affirm ("presuppose") some *basic* propositions about the Divine entity, and reflect more specific (or "sectarian") *particularities*, according to their prevalence in the relevant state or local community. Both sorts of statements are integral to the practice validated in *Marsh v. Chambers*.

In the preceding section we saw how the *basic* propositions distinguish legislative prayer from other sorts of ice-breakers (the gong), from devices to instigate recollection (Whitman's poetry), and even from other types of religious expression (among Wiccans or Buddhists, for example). The *Marsh* Court also faced and met objections rooted in misunderstandings – or rejections – of the *particularity* norm. To these we now turn.

One such objection had to with the assertion that the Nebraska prayers were drawn from "the Judeo-Christian tradition." *See Marsh*, 463 U.S. at 793. Indeed they were; the content of Rev. Palmer's prayers reflected his own faith. They contained "'frequent references to the Christian religion.'" *See Brief of Amicus Curiae Rev. Dr. Robert E. Palmer Supporting Petitioner* at 5-7, *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012) (No. 12-696) (citing plaintiff-petitioner's original complaint).

The *Marsh* Court was not scandalized by this particularity. It held that "[t]he content of the prayer

is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. There was no such indication of exploitation in *Marsh*. In other words: *particularity* as such is constitutionally unremarkable. So the Court stated: "[I]t is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.

Why was the *Marsh* Court not scandalized? Because, we submit, if the Constitution permits the longstanding tradition of opening legislative meetings with prayer, and it is permissible to invite individuals to offer the prayers, then it is unsurprising that the prayer-givers pray in terms that are personal to them and that express the convictions of their faith. "Prayer includes the invocation of the Divine Being according to the understanding of the religion, not the court." *Joyner*, 653 F.3d at 367 (Niemeyer, J., dissenting). Thus, "Whatever name is spoken, it is spoken by the religious leader in accord with the leader's religion to call on the Divine Being." *Id*.

The Second Circuit found in the instant case that "[a] substantial majority of the prayers in the record contained uniquely Christian language" and "[r]oughly two-thirds contained references to 'Jesus Christ,' 'Jesus,' 'Your Son,' or the 'Holy Spirit.'" *See Galloway*, 681 F.3d at 24. Virtually all religious congregations in the Town of Greece during the time of record were Christian. *Id.* In fact and as the Second Circuit noted,

Respondents Susan Galloway and Linda Stephens, who have lived in or near the Town for more than thirty years, both testified that they were unaware of any non-Christian places of worship in the Town. *See id*. Given the predominance of Christian churches, the fact that the prayer-givers who volunteered to pray at the Town Board's monthly public meetings were predominantly Christian and prayed in Christian terms is hardly remarkable. It is by no means incompatible with *Marsh*. It is instead a "tolerable acknowledgement" – or *reflection*, we would say – "of beliefs widely held among the people of this country."

V. THE *LEMON*/ENDORSEMENT TEST IS INAPPOSITE TO LEGISLATIVE PRAYER

Courts often say that the practice of legislative prayer constitutes an exception to the *Lemon*/endorsement test. *See*, *e.g.*, *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 829 (11th Cir. 1989) ("*Marsh* created an exception to the *Lemon* test. . . ."); *Card v. City of Everett*, 520 F.3d 1009, 1014 (9th Cir. 2008) ("*Marsh* is a narrow opinion that should be construed as carving out an exception to normal Establishment Clause jurisprudence."). Legislative prayer as described and upheld in *Marsh* does not support this way of speaking. There is no basis in *Marsh* for speaking of an "exception" to the *Lemon*/endorsement test, if what is meant by that term is that it might be theoretically possible to apply that test to legislative prayer and get more or less plausible, coherent results, but that for extrinsic reasons the test is to be

put aside on this occasion. It is plainly the case that, given what legislative prayer *is* (as described and upheld in *Marsh*), the *Lemon*/endorsement test is intrinsically and necessarily inapposite.

The *Lemon*/endorsement test inquires (1) whether a particular government action has the actual purpose of endorsing religion or (2) whether it creates the perception of endorsement to a "reasonable" or "objective" observer who is familiar with the text, legislative history, and implementation of the law in question. *See Allegheny*, 492 U.S. at 592-94, 620 (Kennedy, J., concurring in judgment in part, dissenting in part) (modifying the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held that a particular government action violates the Establishment Clause unless (1) it has a secular purpose; (2) the principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion); *see also Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

With its focus on the reasonable observer, the *Lemon*/endorsement test implicitly requires the government to maintain an appearance of neutrality toward religion. *See McCreary*, 545 U.S. at 860 ("The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.") (citation and internal quotation marks omitted). If the challenged government action has the purpose or effect of favoring religion, it "sends

the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members. . . ." *Id.* (citation and internal quotation marks omitted).

What is the relevance of all this to the practice of legislative prayer, and to *Marsh v. Chambers?*

A. Legislative Prayer Necessarily Has A Religious Purpose

It is correct to say that, in one sense, the "purpose" of legislative prayer is the welfare of the political community. After all, legislators pray for God's help in making wise and just decisions about our common life. But this temporal benefit is sought by and through an activity – petitions for Divine guidance and assistance – which makes no sense apart from a religious purpose. It has been argued that legislative prayer serves the "secular purposes of 'solemnizing public occasions' and 'expressing confidence in the future'" (*see Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring in part and concurring in the judgment)) (citation omitted), but that argument misses the point.

The purpose of legislative prayer in *Marsh* was to seek "Divine guidance." This irreducibly religious aim is incompatible with the first prong of the *Lemon*/endorsement test. To apply this test to legislative prayer is simply to overrule *Marsh v. Chambers,* and

thereby to eradicate a practice cherished by Americans since the founding.

It is worth noting that, in applying the endorsement test to legislative prayer practices, both the Second Circuit and the Fourth Circuit inappropriately attributed secular purposes to legislative prayer. *See Joyner*, 653 F.3d at 342 (Niemeyer, J., dissenting) ("[I]n order to survive constitutional scrutiny, invocations must consist of the type of non-sectarian prayers that solemnize the legislative task and seek to unite rather than divide."); *Galloway*, 681 F.3d at 32 (requiring the town to explain to observers that it intended the prayers "to solemnize Board meetings"). *Marsh*, however, makes clear that the purpose of legislative prayer – to seek Divine guidance for the legislature – is distinctly religious. *See* 463 U.S. at 792. *Marsh* makes no mention of legislative prayer solemnizing the occasion or uniting the listeners because the Court there did not concern itself with whether legislative prayer has a secular purpose.

There are any number of equally effective ways to solemnize the legislative session – such as reading a patriotic message, or offering a moment of silence to reflect on the obligations and privileges of serving in a representative government – that would be devoid of any religious purpose. Furthermore, while it may well be that legislative prayer can serve as an "express[ion] of confidence in the future," that is not because it is secular. Seeking Divine guidance does not express confidence in the future absent an underlying religious belief that seeking such guidance will be

fruitful, i.e., that the hearer of the prayer is a God who listens and has the desire and power to influence human affairs.

B. The Concept Of "Neutrality" Underlying The *Lemon*/Endorsement Test Makes No Sense Of Legislative Prayer

The *Lemon*/endorsement framework is itself shaped by a broad concept of "neutrality," first embraced by the Court in *Everson v. Board of Education*, 330 U.S. 1 (1946), and often affirmed since, according to which government may not favor religion over what the Court calls "nonreligion." It is impossible, however, for legislative prayer – a practice which "coexisted with the principles of disestablishment"[5] – to satisfy this demand. Appeal to a Divine entity for guidance and assistance has no "nonreligious" counterpart. It is not that legislative prayer is to be preferred to some secular alternative. There is no secular alternative. It is not that legislators select prayer from a class of possible religious and non-religious ways of asking for God's help. There is no such class. There is no "neutrality" between belief and unbelief to be violated, because none is available. To apply the "endorsement" test to legislative prayer is therefore simply to overrule *Marsh v. Chambers*.

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[5] *Marsh*, 463 U.S. at 786.

C. Legislative Prayer Does Not Comport With The *Lemon*/Endorsement Test, Because That Test Cannot Apply To A Continuing And Perhaps Long-Time Government Practice With The Same Force As It May Apply To A Single Act Or Display

The *Lemon*/endorsement test's reasonable observer standard is prone to producing inconsistent results, especially when applied to a government practice or series of events like legislative prayer, as opposed to a single government act or display. For an observer can only be reasonable if he or she has observed all of the events that make up the particular government practice. For example, in a case involving roadside memorial crosses honoring fallen state troopers, the reasonable observer envisioned by a panel of the Tenth Circuit would be "driving by *one* of the memorial crosses [along a public highway] at 55-plus miles per hour." *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160 (10th Cir. 2010) (emphasis added). That observer, therefore, would only see the "conspicuous" imprimatur of the state highway patrol on a religious symbol, but would not notice the biographical information of the fallen trooper suggesting that the cross served the secular purpose of standing as a memorial. *Id.* The dissenters' reasonable observer, on the other hand, would have seen all thirteen of the roadside crosses, including four on side streets with lower speed limits, and thus would have seen the "secularizing details" of the memorials. *American Atheists, Inc. v. Davenport*, 637 F.3d 1095,

1108-09 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of rehearing en banc).

The same tension exists in the case of legislative prayer. The focus of the inquiry in *Marsh* was clearly on the Nebraska Legislature's prayer *practice*, not on any single prayer. *See Marsh*, 463 U.S. at 784 (noting that the issue was whether the Legislature's "*practice* of opening each legislative day with a prayer" violated the Establishment Clause); *id.* at 785 ("[Petitioner] claim[s] that the . . . Legislature's chaplaincy *practice* violates the Establishment Clause); *id.* at 786 ("[T]he [court of appeals] held that the chaplaincy *practice* violated all three elements of the [*Lemon*] test"); *id.* at 792 ("[T]he *practice* of opening legislative sessions with prayer has become part of the fabric of our society."); *id.* at 793 ("[T]hese factors do not serve to invalidate Nebraska's *practice*.") (all emphases added). The *Lemon*/endorsement test's "reasonable observer" standard only clouds this distinction.[6]

[6] *See Joyner*, 653 F.3d at 354 (4th Cir. 2011) (applying the endorsement test and stating "citizens attending Board meetings hear the prayers, not the policy"); *cf.*, *id.* at 358, 364 (Niemeyer, J., dissenting) (criticizing majority's parsing of individual prayers and noting the distinction between focusing on particular "legislative invocations, not the policy governing the prayers").

D. Applying The *Lemon*/Endorsement Test To Legislative Prayer Could Itself Lead To An Unconstitutional Result

The *Lemon*/endorsement test is also inapplicable to legislative prayer because of the test's mandate against the communication of messages by the government that make nonadherents feel like "outsiders." *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). The only way to accomplish this goal and at the same time to allow prayer before legislative sessions would be for the public body to script a "nonsectarian," "endorsement"-inoculated common prayer to be delivered at each meeting.[7]

To apply this standard to legislative prayer would not only reverse *Marsh*. It would probably itself

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[7] Indeed, as Justice Kennedy has observed:

> [T]he very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to [an inquiry into the minority or majority status of a religion in analyzing whether government recognition constitutes an endorsement]. . . . Those religions enjoying the largest following must be consigned to the status of least-favored faiths so as to avoid any possible risk of offending members of minority religions. . . . Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular. . . .

See Allegheny, 492 U.S. at 677-78 (Kennedy, J., concurring in judgment in part, dissenting in part).

violate the Establishment Clause. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("[The] government . . . is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."); *see also West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion. . . ."). *Marsh* affirmed this principle in the face of the petitioner's argument that the prayers were impermissible because they were in the "Judeo-Christian tradition":

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794-95. Because satisfaction of the *Lemon*/endorsement test would require an unconstitutional scripting of prayer content, the test is an unsuitable measure of the constitutionality of legislative prayer.

VI. COURTS APPLYING THE *LEMON*/ENDORSEMENT TEST HAVE UNDERMINED, IF NOT SILENTLY "OVERRULED," THIS COURT'S HOLDING IN *MARSH V. CHAMBERS*

The Second and Fourth Circuits have applied the endorsement test to reach holdings that the prayer-givers were not of sufficiently diverse religious backgrounds. In *Galloway,* the plaintiffs-appellants had "expressly abandoned the argument that the town intentionally discriminated against non-Christians in its selection of prayer-givers." 681 F.3d at 26. Moreover, the court ascribed "no religious animus to the town or its leaders" and found "no evidence" that the town would not have accepted "any and all volunteers who asked to give the prayer." *Id.* at 31, 32. Having thus found no evidence of an impermissible motive, the court inexplicably went on to find an Establishment Clause violation, at least in part, because of the "preponderance of Christian clergy" resulting from the town's selection process. *Id.* at 31.

In *Joyner*, the prayer practice of the Forsyth County Board of Commissioners clearly was crafted to ensure compliance with *Marsh*. The Board utilized a random process to invite clergy from every religious congregation in the community to schedule an appointment to deliver an invocation. *Joyner*, 653 F.3d at 343. The written invitation stated that (a) the opportunity to pray was voluntary; (b) the clergy were free to offer the invocation according to the dictates of their own consciences; (c) and, in order to "maintain a

spirit of respect and ecumenism, . . . the prayer opportunity [should] not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker." *Id.* After receiving a complaint by the would-be plaintiffs about some of the prayers, the Board formalized the policy to clarify further that the prayers were not intended to affiliate the Board with any particular religion. *Id.* at 344.

The Fourth Circuit held that the Board's policy was, indeed, neutral. *Id.* at 353. Despite the absence of an impermissible motive, however, the court invalidated the policy because, in the short time following the Board's adoption of the formal policy,[8] Christian clergy were the only leaders to come forth to give a prayer, and the policy, therefore, had the effect of "favor[ing] the majoritarian faith in the community." *Id.* at 354. In applying the endorsement test, the court required a diversity of religious speakers in complete contradiction of this Court's finding that appointment of a single Presbyterian chaplain for sixteen years did not violate the Establishment Clause.

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[8] The formal policy was adopted in May 2007, and the district court heard oral argument on the parties' summary judgment motions in October 2009. *Joyner v. Forsyth Cnty., N.C.*, No. 1:07CV243, 2009 WL 3787754, at *1 (M.D.N.C. Nov. 9, 2009). The district court appeared to limit its analysis to "prayers delivered under the Policy through December 2008." *Id.* at *1 n.1.

In addition to improperly requiring that prayer-givers represent a diversity of religious viewpoints, both the Second and Fourth Circuit required that prayer-givers limit the use of Christian terminology in their invocations. In *Marsh*, however, this Court rejected the argument that the prayer practice was unconstitutional because the prayers were in the Judeo-Christian tradition, holding instead that, absent an "indication that the prayer opportunity has been exploited to proselytize, or advance any one, or to disparage any other, faith or belief," the "content of the prayer is not of concern to judges." 463 U.S. at 794-95. As discussed, the Court's focus in *Marsh* was on the prayer *practice*, not the prayers offered by Rev. Palmer. Because the legislature's prayer practice was not rooted in an impermissible motive and had not been exploited to proselytize or disparage, it was not for the Court "to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.

As Justice Stevens recognized in his dissenting opinion in *Marsh*, the prayers in the record were "clearly sectarian" (*id.* at 823-24 (Stevens, J., dissenting)), in the sense that they contained explicit references to Christianity. In particular, one prayer stated: "Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory." *Id.* at 824 n.2 (citing App. 103-04). The prayer went on to reference "the wonder of Christ crucified," the "glorious resurrection," and the

"great event of our redemption." *Id.* (citing App. 103-04).

Upon examination of a record containing sixteen years' worth of such prayers, this Court emphasized that the *content* of legislative prayers was not relevant to whether the *practice* was constitutional. Because the Nebraska Legislature did not have an impermissible motive and did not exploit the prayer opportunity, its prayer practice was consistent with the long history of legislative prayer as a "tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792 (majority opinion).

Ignoring this Court's mandate not to embark on an evaluation of the content of legislative prayers, the Second and Fourth Circuits – focusing on the "effect" of the prayers on the reasonable observer – did exactly that. The court in *Joyner*, despite finding an absence of religious animus or intent to discriminate against non-Christians, went into a hypercritical analysis of the content of specific prayers offered by the community's various clergy members. In the court's estimation, these prayers were unconstitutional because they contained multiple references to Jesus Christ, closed with invocations to the name of Christ, and invoked specific tenets of the Christian faith. *Joyner*, 653 F.3d at 349-50 (Neimeyer, J., dissenting). Applying the exact inverse of this Court's analysis in *Marsh*, the Fourth Circuit used the content of the prayers to justify its finding that the Board's policy was an "advancement of one religion." *Id.* at 353.

The Second Circuit took the same approach in *Galloway*. The court noted that most of the prayers at issue "contained uniquely Christian references" and that the "steady drumbeat of often specifically sectarian Christian prayers" improperly associated the Town with Christianity.[9] *Galloway*, 681 F.3d at 31-32. Notably, and in direct contravention of *Marsh*, the court made this finding in spite of the fact that the prayers did *not* "preach conversion, threaten damnation to nonbelievers, [or] downgrade other faiths." *Id.* Moreover, even though there had been no proselytizing in roughly 130 invocations over an eleven-year period of time, the court was apparently very concerned about the possibility, warning that public bodies have "few means to forestall the prayer-giver who cannot resist the urge to proselytize." *Id.* at 34.

This statement demonstrates again an inappropriate focus on the individual prayers, and not the Town's prayer practice. *Marsh*'s command to avoid exploitation of the prayer opportunity was directed to the public body implementing the prayer practice. A single prayer-giver who cannot resist the urge to proselytize would not violate that command; the

[9] Even so, the Second Circuit stated, "The sectarian nature of the prayers, we emphasize, was not inherently a problem." *Id.* at 31. If this is the case, then composing a prayer using universally acceptable phraseology (albeit impossible) cannot be what *makes* the prayer constitutionally acceptable.

public body's repeated invitations to that same prayer-giver likely would.[10]

What is even more disturbing than the Second and Fourth Circuit's evaluating and parsing the content of prayers is the nascent wariness of religion that seems to underlie the majority opinions. In particular, the Second Circuit went so far as to warn prayer-givers to "resist [the] temptation" to "convey their view of religious truth, and thereby run the risk of making others feel like outsiders." *Galloway*, 681 F.3d at 34. And the Fourth Circuit expressed the same sentiment, albeit less directly: "[T]he deep beliefs of the speaker afford only more reason to respect the profound convictions of the listener. Free religious exercise posits broad religious tolerance." *Joyner*, 653 F.3d at 355 (Neimeyer, J., dissenting).

While no one would disagree with the importance of respect and tolerance, especially in matters as personally defining as religious faith, what is alarming is the suggestion that the only way to display respect and tolerance for others' beliefs is for the prayer-giver to keep his own beliefs to himself. "Prayer includes the articulation of words addressed to the Divine

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[10] Furthermore, the public bodies at issue in both *Galloway* and *Joyner* utilized a random process to invite all local clergy to offer invocations. The fact that the majority of the prayers were Christian prayers was simply a by-product of the fact that Christianity is, by a long shot, the predominant religion in both the Town of Greece and Forsyth County. *See Galloway*, 681 F.3d at 24; *Joyner*, 653 F.3d at 356-57 (Neimeyer, J., dissenting).

Being *in accordance with the beliefs of the prayer-giver's religion*." *Id.* at 366 (emphasis added). Furthermore, every religious tradition – whether Christianity, Islam, Judaism, Hinduism, Buddhism, or any number of others – consists of a set of claims defining the particular religion's view of reality (i.e., *truth*) with regard to the great questions of life. Inviting religious believers into the public square, asking them to "pray," and then telling them to avoid suggesting that they are speaking the truth, from their hearts, as they understand that truth to be, only promotes an artificial dialogue, a phony "pluralism," and a meaningless civil, "court-shaped religion" (*id.*). To the many millions in our society for whom prayer is the "sacred dialogue between humankind and God" (*id.* at 356), this form of censorship would be such an affront that it would be better to abandon the charade altogether.

VII. PROPER EVALUATION OF THE CONSTITUTIONALITY OF LEGISLATIVE PRAYER DEPENDS UPON OTHER NORMS SUITED TO IT AS A DISTINCT PRACTICE, AS ARTICULATED IN *MARSH*

We have argued in this Brief that a public body cannot look to the main prevailing Establishment Clause "tests" of constitutionality, any more than this Court in *Marsh v. Chambers* did. This argument does not mean that legislative prayer inhabits First Amendment free-range. Not at all; on the contrary, there are several robust norms of constitutional limitation

which must be observed by any praying public body. Those norms must make sense, however, in the legislative prayer context. They must also be consistent with our country's unbroken tradition of legislative prayer, and this Court's validation of it in *Marsh v. Chambers*.

A public body desiring to open its sessions with an invocation need look no further than *Marsh* itself for the limiting principles to guide its practice. First, the public body should ensure that it is not acting with an improper motive in selecting prayer-givers.[11] To require the public body to go beyond this requirement of proper motive, however, places burdens on the practice that the Constitution does not demand; by requiring the Town to invite clergy from outside its borders, the Second Circuit did just this. Furthermore, such requirements are inconsistent with the definition of legislative prayer as a tolerable acknowledgment of beliefs widely held. If a predominantly Christian community, for example, is required to bring in from outside the community equal numbers of speakers from various faiths, the prayers will necessarily be a less accurate representation of the beliefs widely held within the community.

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[11] For example, although selecting a single minister to deliver the prayer at every meeting of a town board would not, standing alone, violate the Establishment Clause under *Marsh*, it would be impermissible if a majority of the board members were members of a particular church, and they selected their pastor with the intent to promote the church itself.

As does the proper motive requirement, the second requirement under *Marsh* – that the public body not exploit the prayer opportunity to proselytize or disparage a particular faith – flows from the expressed purpose of legislative prayer to seek Divine guidance for the work of the legislators or public officials. The acts of proselytizing and disparaging fall outside this purpose. Although *Marsh* does not expressly require it, the public authority would be wise to advise invited speakers of the nature and purpose of the occasion – to invoke Divine assistance upon the deliberations, and to give thanks for the blessings which heretofore have been bestowed – and that these aims naturally exclude "proselytizing" and "disparaging." The prayer-giver should be encouraged to pray according to his or her conscience as informed by the teaching of the prayer-giver's religion. The prohibition against proselytizing does not mean that the prayer-giver cannot convey his or her view of religious truth. Rather, the prayer-giver may not induce the listeners to convert to his or her faith.[12] If an individual violates this guideline or uses the opportunity to disparage other faiths, the public authority should decline to extend any further invitation to pray to that particular individual.

[12] *See* http://www.merriam-webster.com/dictionary/proselytize (defining the term "proselytize" as "to induce someone to convert to one's faith").

CONCLUSION

This Court's decision in *Marsh v. Chambers* affirmed legislative prayer as a practice deeply rooted in our nation's longstanding historical and constitutional tradition involving public petitions for Divine guidance by members of our civic institutions in the carrying out of their duties. The *Lemon*-based "endorsement" test applied by the court of appeals is inapplicable to legislative prayer as defined in *Marsh* and, if adopted by the Court, would eradicate a practice cherished by Americans since the founding. For all of the foregoing reasons, the Court should once again affirm the applicability of *Marsh* to legislative prayer and reverse the judgment of the court of appeals.

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