No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,
Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE CENTER FOR INQUIRY, AMERICAN ATHEISTS, AMERICAN ETHICAL UNION, AMERICAN HUMANIST ASSOCIATION, AMERICANS FOR RELIGIOUS LIBERTY, INSTITUTE FOR HUMANIST STUDIES, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS, SECULAR STUDENT ALLIANCE, SECULAR COALITION FOR AMERICA, AND SOCIETY FOR HUMANISTIC JUDAISM, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST [1]

This *amici curiae* brief in support of Respondents is being filed on behalf of the Center for Inquiry ("CFI"), American Atheists, the American Ethical Union, the American Humanist Association, Americans for Religious Liberty, the Institute for Humanist Studies, the Military Association of Atheists and Freethinkers, the Secular Coalition for America, the Secular Student Alliance, and the Society for Humanistic Judaism. *Amici* are secular and humanist organizations that advocate on behalf of the separation of church and state and offer a unique viewpoint concerning the importance of religious freedom in the United States.

CFI is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The American Humanist Association advocates for the rights and viewpoints of humanists and works to defend the separation of church and state. Founded in 1941 and headquartered in Washington, D.C., its work

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[1] The parties have given blanket consents to the filing of *amicus* briefs; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

is extended through more than 120 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity.

Americans for Religious Liberty ("ARL") is a nonprofit educational organization, founded in 1982, dedicated to defending religious freedom and church-state separation. ARL has been involved in 60 *amicus* briefs and other actions before the United States Supreme Court and lower federal courts.

The Institute for Humanist Studies is a nonprofit organization dedicated to studying the role of non-theistic philosophies of life in contemporary society, and publishing the results of its studies on a regular basis.

The Military Association of Atheists and Freethinkers represents active duty and prior military personnel in all branches of service who protect a nation that does not discriminate on the basis of belief and does not promote one type of belief to the exclusion of all others.

The Society for Humanistic Judaism mobilizes people to celebrate Jewish identity and culture, consistent with a non-theistic philosophy of life. The Society is concerned with protecting religious freedom for all, especially for religious, ethnic and cultural minorities such as Jews, and for those who do not espouse a traditional religious belief, and for ensuring that its members will not be discriminated against by government favoring of theistic religion.

The deliberative-body prayer practice at issue in this case implicates *amici*'s core humanist and secular interests in the separation of church and state. *Amici*

are accordingly deeply invested in preserving appropriately stringent judicial scrutiny of deliberative-body prayer practices pursuant to the First Amendment.

SUMMARY OF ARGUMENT

This Court should not rubber-stamp the Town of Greece's program of sectarian prayer based on its claimed historical pedigree. In Petitioner's view, the Court can "begin and end" its analysis with *Marsh v. Chambers*, 463 U.S. 783 (1983) by "reaffirm[ing] that *Marsh*'s historical analysis governs the constitutionality of legislative-prayer practices." Pet. Br. 12-14; *see also* Beckett Fund for Religious Liberty *Amicus* Br. 3-4, 16-17, 22; State of Ind. et al. *Amici* Br. 4-5; United States Senators Marco Rubio et al. *Amici* Br. 6-7. But *Marsh* cannot bear the weight that Petitioner places on it because the factual and doctrinal foundations of that opinion have been eroded in the thirty years since it was decided. Not only do the distinctly coercive and sectarian prayers at issue here differ significantly from *Marsh*, *see* Resp. Br. 20-48, but experience has shown *Marsh*'s historical analysis of deliberative prayer to be faulty. The Court should accordingly reject the invitation to broadly immunize deliberative-body prayer from scrutiny based on history alone.

First, experience belies *Marsh*'s foundational premise that sectarian legislative-body prayer is essentially a harmless ceremonial practice which harmonizes with our nation's widely held religious beliefs. To the contrary, this country's experience with deliberative-body prayers since *Marsh* has been turbulent and divisive. Deliberative-body prayer can foster exclusion and harassment of minority groups, political disruption, and even violence directed at those who object to state-sponsored religious worship.

Nor does the homogeneous religious landscape quaintly envisioned in *Marsh* exist any longer. The country has grown increasingly diverse in its religious beliefs. This demographic change heightens the danger that—if gone virtually unchecked as Petitioner urges—government-sponsored prayer will lead to further strife and dissension. Searching evaluation of deliberative-body prayers is needed to account for both the recent disturbing experiences with prayer policies and modern shifts in religious demographics that may exacerbate conflict.

Second, the view that *Marsh* broadly shields deliberative-body prayer from meaningful challenge based on history cannot be reconciled with more recent Establishment Clause precedent. None of this Court's decisions since Marsh has insulated government sponsorship of prayer or other religious expression based solely on history. The Court has pointedly rejected the argument that history insulates school prayer from challenge. It has likewise employed a careful, context-specific review to assess even religious displays deemed "passive," rather than validating the displays based on historical practices. There is no basis to apply a more perfunctory, history-based analysis to deliberative-body prayer. To the extent *Marsh* can be read otherwise, it should have no application outside its own facts.

Evaluated under any of the more rigorous Establishment Clause principles that this Court has regularly employed after *Marsh*, Greece's prayer practice fails to measure up. It is not neutral: Greece picks only clergy to make opening prayers without any real opportunity for non-theists to speak. Even among clergy, it has selected almost exclusively Christians to lead prayers. It is coercive: local citizens, including

local school children, are invited or required to attend Board meetings to conduct their business, to participate in governmental affairs, and to earn school credits. And it unabashedly endorses religion: Greece does nothing to insulate itself from actual or perceived sponsorship of the religious messages delivered by those clergy whom the government selects. Even history, to the extent it is considered among other factors, does not support the constitutionality of Greece's program. Proponents of a prayer policy first enacted in 1999 to replace a secular moment of silence cannot rightly take shelter beneath the mantle of history. The Court should accordingly affirm.

ARGUMENT

I. RECENT EXPERIENCE UNDERMINES THE FACTUAL ASSUMPTIONS UNDERLYING *MARSH*

A. Deliberative-Body Prayers Are a Source of Religious Conflict and Division

In the three decades since *Marsh*, deliberative-body prayer practices have led to harassment of minority groups, sparked violence, distorted local political processes, and otherwise deeply divided communities. The nation's experience with such potentially divisive practices proves faulty the notion that history should immunize deliberative-body prayer from challenge.

Marsh's historical analysis yielded the conclusion that the prayer at issue was an essentially harmless, symbolic practice which harmonized with, rather than threatened to disrupt, society. After surveying historical practices, *Marsh* opined that "the practice of opening legislative sessions with prayer has become part of the fabric of our society." 463 U.S. at 792. *Marsh* then concluded that the "unbroken practice" of

national and state legislative prayer "gives abundant assurance that there is no real threat while this Court sits." *Id*. at 795 (internal quotation marks omitted).

But experience since *Marsh* disproves the assumption that sectarian deliberative prayer poses no threat. Deliberative-body prayer presents a very real and serious risk of breeding religious animosity and division.

1. Deliberative-body prayer practices frequently lead to backlash and ridicule of those who practice a minority faith, or no faith at all. Just this year, after an atheist member of the Arizona House of Representatives offered the daily prayer, a fellow lawmaker asked colleagues to join in "repentance"; about half of the legislature obliged. Bob Christie, *Arizona House Non-prayer Sparks Christian Re-do*, Associated Press, May 22, 2013. The lawmaker compared the atheist's prayer to pledging allegiance to England and remarked that "[w]hen there's a time set aside to pray . . . , if you are a non-believer, don't ask for time to pray." *Id*.

This backlash against the expression of minority views about religion was no isolated occurrence. In Tampa, Florida, three city council members walked out of a meeting rather than hear an atheist speak during a time reserved for prayer. Andy Reid, *3 on Council Snub Atheist's Invocation*, Tampa Tribune, July 30, 2004, at 1. At the Pompano Beach City Commission in Florida, an Imam's prayer created "uproar" as many showed up to "slam commissioners" for allowing the prayer. Linda Trischitta, *Imam's Invocation Sparks Controversy*, Sun Sentinel (Ft. Lauderdale, Fla.), May 17, 2010, at 1B. In Washington, a state representative left chambers when a Muslim cleric led the prayer, declaring her boycott "patriotic." David Potsman & Sarah Lorenzini,

Protest over Muslim Prayer Nothing New for Legislature, Seattle Times, Mar. 5, 2003, at A1. And in the U.S. Senate, when a Hindu clergyman gave the morning prayer for the first time, a group of spectators shouted in protest from the gallery that "this is an abomination." *Senate Prayer Led by Hindu Elicits Protest*, Associated Press, July 13, 2007.

2. Those who express opposition to deliberative-body prayers have been repeatedly subjected to threats or violence. In Florida, the home of a Jewish family was vandalized with red paint on Passover after the family sued the Manatee County School Board for opening each meeting with the Lord's Prayer. Robert Patrick & Laura Green, *Rosenauers' Home, Truck Vandalized*, Sarasota Herald Tribune, Apr. 13, 2004, at A1. Later testifying before Congress, the father stated that his family "received anonymous threatening phone calls . . . telling us we should move out of the country if 'we didn't like the way they do things here,' and . . . that . . . '[w]e know where you Jews live and if you don't drop the lawsuit there will be trouble.'" *Beyond the Pledge of Allegiance: Hostility to Religious Expression in the Public Square: Hearing Before the Subcomm. on the Constitution, Civil Rights and Prop. Rights of the S. Comm. on the Judiciary*, 108th Cong. 19 (2004) (statement of Steven Rosenauer). In South Carolina, a Wiccan high priestess who challenged the prayer policy of the Great Falls Town Council had her property repeatedly vandalized, her house broken into, and her pet mutilated with a note attached to its back threatening, "You're next!" Denyse Clark, *High Priestess Took Chester County Town to Court*, Herald (Rock Hill, S.C.), Aug. 16, 2005, at 1B.

Even in the absence of direct acts or threats of violence, those challenging prayer practices experience

insult and affront. In Virginia, a plaintiff who sued the Pittsylvania County Board of Supervisors over its prayer policy heard a comment about "Jew speak" at a board meeting and received a letter purporting to be from the Ku Klux Klan. *Doe v. Pittsylvania Cnty., Va.*, 844 F. Supp. 2d 724, 740 (W.D. Va. 2012). An Idaho student challenging prayer at Pocatello City Council meetings was called "un-American" by a pastor giving an invocation. Sean Ellis, *Battlelines Drawn in Fight over Invocation*, Idaho State J., Nov. 10, 2010, at A1. In this very case, the plaintiffs were ridiculed as "ignorant" by a prayer-giver at a Town Board meeting after objecting to the practice. Pet. App. 8a.

3. Deliberative-body prayer has also fractured local political processes along religious lines. Before a vote on the prayer policy by the Lodi City Council in California, a "chaplain suggested that if council members didn't vote with Jesus, their decision would be advertised on Lodi billboards." Loretta Kalb, *Public Invocations: Passions Run High in Lodi Prayer Debate*, Sacramento Bee, Oct. 1, 2009, at A1. In North Carolina, two incumbent commissioners on the Yadkin County Board of Commissioners lost their primaries "as part of a backlash over the board's decision to drop sectarian prayer from meetings." Sherry Youngquist, *Issues Led to Defeat of Yadkin Officials*, Winston-Salem J., May 11, 2008. The commissioners' vote against sectarian prayer "brought on the strongest attacks" of any issue in the election. *Id*. Also in North Carolina, a pastor critical of the High Point City Council's vote to disallow sectarian prayer warned that voters would "remember in 2008" and received a "loud standing ovation." Tom Steadman, *Council Votes on Prayer*, Greensboro News & Record, July 17, 2007, at A1. Other local legislators have chosen to resign rather than face the controversy and

division they feared would follow a vote on deliberative-body prayer practices. *E.g.*, Brad Kesler, *Member Resigns from Board, Cites Prayer Issue*, Herald-Sun (Durham, N.C.), May 6, 2013, at A5.

These are just a sampling of instances of deliberative-body prayer practices igniting controversies and dividing communities across the country. Each instance reaffirms that deliberative-body prayer risks intolerable religious conflict within local communities.

"[N]othing does a better job of roiling society" than "the civic divisiveness that follows when the government weighs in on one side of religious debate." *McCreary Cnty., Ky. v. ACLU*, 545 U.S. 844, 876 (2005). The Establishment Clause thus protects against governmental sponsorship of religious practices that create the "potential for divisiveness." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). The "anguish, hardship and bitter strife that could come when zealous religious groups struggle[] with one another to obtain the Government's stamp of approval" is a core danger that the Establishment Clause is meant to guard against. *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

Experience shows that deliberative-body prayers have the potential to foment religious conflict and create societal rifts of the very type the Establishment Clause was meant to avert. Under these circumstances, *Marsh* cannot be read to cloak deliberative-body prayer in virtual immunity from Establishment Clause challenge. The Court must closely scrutinize practices that present such an inherent potential for division and conflict along religious lines.

B. American Society Now Reflects a Wider Diversity of Religious Views

Marsh's historical analysis also is founded on the outdated assumption that the nation's religious views are generally homogeneous, and that the prayer at issue would therefore naturally coincide with the audience's religious views. *Marsh* spoke of opening invocations to legislative sessions as conduct which "harmonize[d] with the tenets of some or all religions." 463 U.S. at 792 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). It then characterized the prayer at issue as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id*. But religious demographics in the United States have drastically changed—and continue to change—since *Marsh* was decided. There is no basis in today's society to presume that deliberative-body prayer practices will widely harmonize rather than conflict with the religious beliefs of community residents.

This change in religious demography has been driven primarily by the rapid rise of the religiously unaffiliated. Pew Research Ctr., "*Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation* 13 (2012), *available at* http://tinyurl.com/NonesRise; *see also* Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey* 3 (2009), *available at* http://tinyurl.com/KosminKeysar. One-fifth of the U.S. public—and one-third of adults under thirty—do not affiliate with a religion. Pew Research Ctr., *supra*, at 9. These so-called "nones" are now the fastest growing "religious" group in the United States. *Id*. at 13. This growth is also recent; the rise of the religiously unaffiliated did not begin until the 1990s, after *Marsh* was decided. *See id*. at 14; Michael Hout et al., Inst. for the Study of Societal

Issues, Univ. of Cal. Berkeley, *More Americans Have No Religious Preference: Key Findings from the 2012 General Social Survey* 1-2 (2013), *available at* http://tinyurl.com/Houtetal. These "nones" may hold atheistic, agnostic, or their own individual spiritual beliefs. *See* Pew Research Ctr., *supra*, at 22. Overtly sectarian and explicitly denominational prayer does not in any case "harmonize" with the beliefs and consciences of this growing segment of our nation's population.

Minority religious groups have also steadily grown in size in the past two decades. Kosmin & Keysar, *supra*, at 3 tbl.1. Those who adhere to a non-Christian religion now constitute six percent of the U.S. population, Pew Research Ctr., *supra*, at 13, and their ranks are projected to increase. By 2030, for instance, the percentage of Muslims in the United States is expected to double—making Muslims roughly as numerous as Jews or Episcopalians today. Pew Research Ctr., *The Future of the Global Muslim Population* 15, 141 (2011), *available at* http://tinyurl.com/MuslimFuture. The United States is considered one of the most religiously diverse nations in the world. Todd M. Johnson & Brian J. Grim, *The World's Religion in Figures: An Introduction to International Religious Demography* 101-03 & tbls. 3.7, 3.8 (2013). It will only become more diverse in the years to come.

As a result, the world in which *Marsh* deemed legislative prayer "a tolerable acknowledgment of beliefs widely held among the people of this country," 463 U.S. at 792, does not exist today. In recent years, deliberative-body prayer practices have proved deeply divisive, and that trend is bound to continue as communities include more residents who adhere to

minority religions, are atheist or agnostic, or hold individual religious beliefs not affiliated with any organized religion. Petitioner's argument that *Marsh* should shield deliberative-body prayer practices from genuine scrutiny ignores these realities.

II. ESTABLISHMENT CLAUSE PRECEDENT SUBSEQUENT TO *MARSH* DOES NOT SUPPORT IMMUNIZING DELIBERATIVE-BODY PRAYER BASED ON HISTORY ALONE

The last three decades of Establishment Clause jurisprudence undermine any claim that historical practices are virtually the sole guidepost by which to measure the constitutionality of deliberative-body prayer. In light of that precedent, *Marsh* cannot be read as Petitioner and its *amici* urge as a blanket authorization of deliberative-body prayer.

While this Court has not addressed legislative prayer since *Marsh*, it has frequently analyzed claims of state-sponsored religious expression in the analogous contexts of prayers in public schools and religious displays. Yet no opinion of this Court has relied on *Marsh* to validate such religious expression under the Establishment Clause based on historical pedigree alone. To the contrary, the Court has repeatedly struck down the state-sponsored expression of religious views irrespective of their historical acceptance. And when the Court has found such practices compatible with the Establishment Clause, it has done so only after reviewing them under a careful, context-specific inquiry—not a history-based rubber-stamp.

1. The Court has consistently scrutinized school prayers with a careful eye, despite dissenters'

repeated arguments about their long historical acceptance. In three cases post-dating *Marsh*, the Court has evaluated school prayer practices, and held all three unconstitutional. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer at school football games); *Lee*, 505 U.S. 577 (prayer at school graduation ceremony); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence in public schools for meditation or voluntary prayer). In each case, the Court invalidated the law after a searching evaluation that did not depend upon the history of the practice alone.

In *Lee*, for example, the Court held unconstitutional a public school graduation prayer, 505 U.S. at 599, despite vigorous arguments that the practice's history should answer constitutional objections. The dissent characterized such prayers as "a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally." 505 U.S. at 632 (Scalia, J., dissenting). The petitioner school principal likewise relied heavily upon historical precedent, arguing that the practice must be permissible because similar "official expressions of religious sentiments" were "freely engaged in and encouraged" since the Founding. Brief for the Petitioners, Lee v. Weisman, 505 U.S. 577 (1992) (No. 90-1014), 1991 WL 527613, at *30-32; *see also id*. at *13-14. The Court nevertheless refused to restrict itself to a solely historical analysis. Explaining that "[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one," the *Lee* Court expressly declined to apply *Marsh* to uphold the prayer at issue. 505 U.S. at 597 (majority opinion).

In *Santa Fe*, the Court was again presented with the "long history of prayer at public gatherings" as a basis for validating a school prayer practice. Brief for Spearman Indep. Sch. Dist. et al. as *Amici Curiae* Supporting Petitioner, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62), 1999 WL 1272950, at *4; *see also* Brief for Marian Ward et al. as *Amici Curiae* Supporting Petitioner, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62), 1999 WL 1269303, at *7-11. And again the Court rejected this historical approach, instead holding that the school had impermissibly "sponsor[ed] the particular religious practice of prayer." 530 U.S. at 313.

History alone should not insulate deliberative-body prayer from meaningful scrutiny any more than it does the school prayer activities found unconstitutional in these cases. It is true that the Court has noted "heightened [Establishment Clause] concerns" with protecting public school children in particular. *See, e.g.*, *Lee*, 505 U.S. at 592 (collecting cases). But this heightened concern does not mean that deliberative-body prayer is so dissimilar as to warrant the back-of-the-hand treatment Petitioner urges here. As the Court remarked in *Lee*, "[t]he considerations we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in *Marsh*." *Id*. at 596-97. At bottom, both settings involve an active, state-sponsored religious exercise. Such prayers are a particular concern of the Establishment Clause because "one of the greatest dangers to the freedom of the individual to worship in his own way l[ies] in the Government's placing its official stamp of approval upon one particular kind of prayer." *Engel*, 370 U.S. at 429.

2. Nor has the Court focused exclusively on historical pedigree in the context of religious displays. Members of the Court have characterized such static displays as "passive," suggesting they pose less danger of offending constitutional norms than active religious expression such as prayer. *See Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion); *McCreary*, 545 U.S. at 909 (Scalia, J., dissenting). Yet history has not been the sole criterion by which the Court has analyzed even such "passive" expressions.

In *McCreary*, for example, the Court held unconstitutional a courthouse display of the Ten Commandments. It did so despite some of the dissenters' express argument that the decision was inconsistent with *Marsh*. *See McCreary*, 545 U.S. at 892 (Scalia, J., dissenting) ("Why, one wonders, is not respect for the Ten Commandments a tolerable acknowledgement of beliefs widely held among the people of this country?"). Instead of looking to history, the majority sought to avoid the dangerous consequences that follow when the government takes sides in matters of religion. The Court thus explained, "[t]he Framers and the citizens of their time intended . . . to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate." *Id*. at 876 (majority opinion).

Van Orden's validation of the Ten Commandments monument in that case also did not rely solely or even primarily on a historical analysis of the prevalence of such displays. Justice Breyer's concurrence rejected any "mechanical formula" for drawing the appropriate constitutional line. *See Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment). The plurality opinion, while discussing the role of the Ten Commandments in the nation's history, turned on the

understanding that the display was a "passive monument," *id*. at 686, 692, that had not garnered complaints for a number of years, and that the monument had a "dual significance" that included not only a religious meaning but an expression of the state's "political and legal history." *Id*. at 691-92; *see also McCreary*, 545 U.S. at 903 (Scalia, J., dissenting). Neither consideration is true in the context of the deliberative-body prayers here.

3. Deliberative-body prayer also does not fit within the discrete set of historically permitted, national practices with religious content sometimes included under the rubric of "ceremonial deism." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring in the judgment). Members of the Court have included within the category of such historically-tolerated practices the statement opening this Court's sessions, the Thanksgiving proclamations, and references to divinity in the Pledge of Allegiance and on our currency. *E.g.*, *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment); *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 672-73 (1989) (Kennedy, J., dissenting). Some have suggested that these religious references have gained such a level of acceptance through widespread historical usage that they present little danger of fostering religious strife, and that purging all such references would only create greater risk of social conflict. *See, e.g.*, *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment). Others have postulated that such practices are constitutionally valid because they have developed a secular, historical meaning through ubiquitous use over time. *See Elk Grove*, 542 U.S. at 37 (O'Connor, J., concurring in the judgment).

Whatever the merit of these positions, overtly sectarian deliberative-body prayer does not fall within the same category. Deliberative-body prayers have demonstrably and repeatedly led to religious animosity and rifts in local communities. *See supra* Part I. And prayer is a core form of religious expression; there can be no claim that clergy-led sectarian prayers have developed a secular meaning through long use. Prayer also presents an active opportunity for state-sponsored religious indoctrination, unlike a fixed customary phrase or static motto on a coin. Such an incidental or passing reference to the divine bears no resemblance to the state repeatedly sponsoring sectarian prayer as part of its core governmental activities. Programmatic, government-sponsored sectarian prayers such as Greece's therefore should not and cannot broadly be treated as innocuous symbolism, as Petitioner's *amici* urge. *See* United States *Amicus* Br. 10 n.3; Ctr. for Constitutional Jurisprudence *Amicus* Br. 10-12; Va. Christian Alliance et al. *Amici* Br. 16-17.

In sum, this Court's decisions since *Marsh* do not condone casual approval of state-sponsored religious expression on the basis of historical precedent alone. The Court should employ the same careful review to deliberative-body prayer that it used to assess other forms of religious expression in the public sphere.

III. THE TOWN OF GREECE'S PRAYER PRACTICE FAILS EACH PRINCIPLE OF RECENT ESTABLISHMENT CLAUSE ANALYSIS

The Court's Establishment Clause decisions since *Marsh* have not formulaically turned on historical pedigree, but on an analysis guided by one or more of three principles: neutrality, coercion, and endorsement.

Under any of these three modes of analysis, Greece's program of deliberative-body prayer fails to satisfy the Establishment Clause. And it fails to pass muster whether or not the Court parses the content of those prayers, which Petitioner and certain of its *amici* argue to be improper. *E.g.*, Pet. Br. 41-44; Justice and Freedom Fund *Amicus* Br. 8-10; United States Senators Marco Rubio et al. *Amici* Br. 22-30.

1. The prayer program at issue here is not neutral. The "First Amendment mandates governmental neutrality [both] between religion and religion, *and* between religion and non-religion." *McCreary*, 545 U.S. at 860 (emphasis added) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). *Accord Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (A "principle at the heart of the Establishment Clause" is "that government should not prefer one religion to another, or religion to irreligion."); *see Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (describing focus on "neutrality" and private choice in assessing governmental aid programs).

Greece's program is impermissibly skewed to favor religion over non-religion because the mechanism for choosing speakers ensures that only religious viewpoints are expressed. For most of the history of the Town's prayer practice, a series of Town employees were given unguided discretion to identify a "pastor" to give invocations. Resp. Br. 12-13; *see* Pet. App. 4a-5a. The employees adopted a practice of calling organizations or clergy from lists that—as far as any of them can remember—they created solely by reviewing religious organizations included in the Town's "Community Guide" and the "Religious Services Directory" of the Greece Post newspaper. Pet. App. 31a-40a.

Because these lists were created by looking only for religious congregations or organizations, by design they did not and could not include representatives of organizations with non-theistic belief structures. As of the record's closing in June 2010, the Town still had no process for seeking out individuals without religious affiliation to give invocations. Resp. Br. 14; *see* Pet. App. 4a. This systematic exclusion of those whose beliefs about religion are akin to the instant *amici*'s is alone a defect of constitutional magnitude.

By result if not design, Greece's prayer program also discriminates against minority religions. Until 2008, every entry on the employees' lists was a Christian organization or clergy. Resp. Br. 12; Pet. App. 5a. Accordingly, Christian clergy gave every one of the Town's invocations. Pet. App. 4a. And, with the exception of a brief interlude in 2008 when this lawsuit was filed, the Town has continued to have exclusively Christian clergy give invocations. Resp. Br. 13-14; Pet. App. 5a. This too represents a fatal lack of neutrality.

2. The Establishment Clause at a minimum "guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587, 594 (finding prayer at school graduation ceremony improperly "required participation in a religious exercise"). Greece's prayer program also creates an unacceptable risk of coercing participation in religious exercise.

Greece's board meetings are focused towards and connected to the community's residents in a way that differs, for example, from the way that Congress operates. The Town Board regularly invites or requires participation of private citizens at its meetings. Resp. Br. 2-8. In some cases, citizens are required to appear to petition the Board on matters

within its discretionary authority. *Id*. at 5-6. For example, an individual who wants to operate a business or to re-zone property must attend to participate in a hearing. *Id*. The presence—at times mandatory—of local citizenry at these meetings heightens the danger that state-sponsored prayer will exert a coercive influence.

Also unlike some other deliberative bodies, children frequently attend and participate in Town Board meetings, whether to receive an award, to deliver the Pledge of Allegiance, or to obtain class credit. *Id*. at 6-8. This Court has recognized the greater coercive effect a prayer practice has on children, who face heightened social pressure to conform. *Santa Fe*, 530 U.S. at 311-12.

Nor is the coercive pressure of the prayers ameliorated by the notion that those who take offense may simply walk out of the meeting. Particularly in a small setting like a town meeting in which residents may know one another, meeting participants may be very reluctant to publicly reveal their disagreement with the prevailing religious sentiment. Indeed, given the examples of backlash and threats against some who have objected to deliberative-body prayer, *see supra* Part I, such reluctance is understandable. Greece's prayer program thus presents the same risk of "citizens [being] subjected to state-sponsored religious exercises" the Court found intolerable in *Lee*, 505 U.S. at 592.

3. The Town's prayer practice also violates the Establishment Clause prohibition against a governmental practice that "either has the purpose or effect of 'endorsing' religion." *Allegheny*, 492 U.S. at 592; *id*. at 629 (O'Connor, J., concurring in part and in the judgment). In addition to the biased process for

selection of speakers which inherently favors religious expression and Christian prayer in particular, the Town has made no effort to counteract the impression of religious favoritism that its practice conveyed. The Town thus never "publicly solicited volunteers to deliver invocations nor informed members of the general public that volunteers would be considered or accepted, let alone welcomed," Pet. App. 20a, never made "any effort . . . to explain the nature of its prayer program to attendees," *id*. at 22a, nor otherwise took "steps to avoid [its] identification" with the Christian faith. *Id*. at 26a. The Town selected a few token speakers of minority religions only after complaints were made, and then quickly returned to a regime of uniformly Christian clergy-led prayer. *See* Resp. Br. 13-14; Pet. App. 4a-5a. Under these circumstances, a reasonable, objective observer could not help but perceive endorsement of religion generally and of one creed in particular.

4. Finally, if history is to be considered, the most pertinent history here is that of the Town's prayer practice itself. The Town only introduced a prayer to its Board meetings in 1999—overturning its own historical practice of beginning with a moment of silence. Pet. App. 3a. "[I]n today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs," this introduction of a new religious practice "prove[d] divisive in a way that [a] longstanding, pre-existing" practice would not. *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment). Petitioner's suggestion that the history of other prayer practices necessarily immunizes this one would require the Court to "turn a blind eye to the context in which this policy arose." *Santa Fe*, 530 U.S. at 315.

Viewed in its proper context, the Town's prayer practice runs afoul of each of the principles the Establishment Clause protects, and is therefore unconstitutional.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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