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 INDIANA, TEXAS, AND TWENTY-ONE ADDITIONAL STATES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

GREG ABBOTT
Attorney General of Texas
DANIEL T. HODGE
First Assistant Attorney General
JONATHAN F. MITCHELL
Solicitor General
ADAM W. ASTON
Deputy Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711

GREGORY F. ZOELLER
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General
(*Counsel of Record*)
HEATHER HAGAN MCVEIGH
Deputy Attorney General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, Indiana 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for Amici Curiae

ADDITIONAL COUNSEL

LUTHER STRANGE
Attorney General
State of Alabama

DEREK SCHMIDT
Attorney General
State of Kansas

MICHAEL C. GERAGHTY
Attorney General
State of Alaska

JACK CONWAY
Attorney General
State of Kentucky

DUSTIN MCDANIEL
Attorney General
State of Arkansas

JAMES D. "BUDDY"
CALDWELL
Attorney General
State of Louisiana

JOHN W. SUTHERS
Attorney General
State of Colorado

BILL SCHUETTE
Attorney General
State of Michigan

PAMELA JO BONDI
Attorney General
State of Florida

JIM HOOD
Attorney General
State of Mississippi

SAMUEL S. OLENS
Attorney General
State of Georgia

TIMOTHY C. FOX
Attorney General
State of Montana

LAWRENCE G. WASDEN
Attorney General
State of Idaho

JON BRUNING
Attorney General
State of Nebraska

ADDITIONAL COUNSEL [cont'd]

MICHAEL DEWINE
Attorney General
State of Ohio

E. SCOTT PRUITT
Attorney General
State of Oklahoma

MARTY J. JACKLEY
Attorney General
State of South Dakota

ROBERT E. COOPER JR.
Attorney General
State of Tennessee

JOHN E. SWALLOW
Attorney General
State of Utah

KENNETH T.
CUCCINELLI, II
Attorney General
State of Virginia

PATRICK MORRISEY
Attorney General
State of West Virginia

QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

CASES [CONT'D]

CASES [CONT'D]

CASES [CONT'D]

OTHER AUTHORITIES

OTHER AUTHORITIES [CONT'D]

OTHER AUTHORITIES [CONT'D]

INTEREST OF THE *AMICI* STATES

The States of Indiana, Texas, Alabama, Alaska, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Virginia, and West Virginia respectfully submit this brief as *amici curiae* in support of the Petitioner. All fifty States follow, in some fashion, the longstanding American practice of opening each legislative session day with a prayer. The *amici* States have an interest in protecting these deeply rooted traditions and in avoiding complex Establishment Clause tests that would force officials either to parse the content of each prayer and purge them of any sectarian references or to abandon their legislative prayer practices altogether. The *amici* States urge the Court to re-affirm the central holding of *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), that legislative prayers are permissible as "simply a tolerable acknowledgment of beliefs widely held among the people of this country," and to disclaim any role for the so-called endorsement test when it comes to analyzing legislative prayer practices. The Court should also consider using this case as an opportunity to clarify Establishment Clause doctrine more generally by requiring a showing of religious coercion as a touchstone for proving any type of unlawful religious establishment.

SUMMARY OF THE ARGUMENT

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld the practice of legislative prayer based on its "unambiguous and unbroken history of more than 200 years"—a history that made legislative prayer "part of the fabric of our society." *Id.* at 792. *Marsh* seemed to remove legislative prayer from the wilderness of Establishment Clause jurisprudence, providing a clear constitutional license based upon history and tradition.

In recent years, however, lower courts have begun to dismiss *Marsh*'s straightforward historical analysis and instead subject particular prayer practices to the endorsement test derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), and *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). *See, e.g., Galloway v. Town of Greece*, 681 F.3d 20, 30-33 (2d Cir. 2012); *Joyner v. Forsyth County*, 653 F.3d 341, 348-49 (4th Cir. 2011). *See also Hinrichs v. Bosma*, 440 F.3d 393, 398-402 (7th Cir. 2006) (denying the Indiana House Speaker's motion to stay an injunction against "sectarian" legislative prayers pending appeal and suggesting that the court would apply an endorsement test should a legislative prayer case reach the court on the merits).

Fact-intensive inquiries into the precise sectarian content of legislative prayers conflict with this Court's broad approval of legislative prayer in *Marsh*. Instead of leaving the determination of sectarian content to the theologians, courts applying the endorsement test require legislators to censor the prayers—*i.e.* "parse the content of a particular prayer," *Marsh*, 463 U.S. at 795—of private citizens who step forward to provide a public service.

At a minimum, it is important that this Court reaffirm *Marsh*'s historical analysis and prevent legislative prayer from being dragged into the confusion that prevails in so many other areas of Establishment Clause doctrine. But the Court can, and should, do more. This case provides an opportunity to bring clarity to the Establishment Clause doctrine. The Court should provide that clarity by adopting a single Establishment Clause test that is clear, workable, and faithful to the text and history of the First Amendment.

ARGUMENT

I. The Court Should Affirm *Marsh*'s Historical Analysis and Reject an Unworkable Endorsement Test for Legislative Prayer

The same rich history of legislative prayer that supported the Nebraska Unicameral's use of a paid legislative chaplain in *Marsh v. Chambers*, 463 U.S. 783 (1983), equally grounds the rotating chaplaincy

practices of the Town of Greece and many other state and local legislative bodies across the country. Like the Town, a substantial number of state legislative bodies have relied on *Marsh* to continue their historical practices of accommodating clergy of diverse religions and sects who offer distinctive invocations as legislative sessions are called to order. Abandoning *Marsh* in favor of some version of the endorsement test would not only upend these settled practices, but also require officials—at first legislative, but ultimately judicial—to parse theological content and thereby entangle government even more in prayer, with the only alternative being to abandon prayers altogether. The Establishment Clause does not require officials either to edit historically permissible religious expressions or scrub them from the public square.

A. *Marsh*'s historical analysis governs legislative prayers involving rotating chaplains and was not overturned or modified by *Allegheny*

In *Marsh*, the Court upheld the Nebraska Unicameral's use of a "chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds." *Marsh*, 463 U.S. at 784-85. The basis for this holding was legislative prayer's "unambiguous and unbroken history of more than 200 years"—a history that has

made such prayer "part of the fabric of our society." *Id*. at 792.

In particular, the Court observed that the First Congress authorized the appointment of paid chaplains three days before it reached a final agreement on the language of the Bill of Rights. *Id*. at 788. Thus, concluded the *Marsh* Court, "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id*. The Court in *Marsh* also recounted how many state legislative bodies at the time of the Founding—both before and after ratification of the First Amendment—featured legislative prayer in some form. *Id*. at 787-90.

The historical-practice rationale should apply with equal force to the protocol at issue here, where volunteer clergy of *any* faith may offer a prayer before town council meetings. *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012). The Town of Greece invites clergy from religious communities within the Town on a rotating basis, working through a periodically updated list of religious organizations published by the Greece Chamber of Commerce. *Id.* at 23-24. As a service to the Town and its council, each prayer-giver delivers an un-previewed, un-censored invocation. *Id.* at 23.

1. The Town's rotating-chaplaincy practice parallels the historical practices of Congress and other legislative bodies. The U.S. House of Representatives, for example, experimented with a rotating chaplaincy for several years in the mid-nineteenth century. *See* Jeremy G. Mallory, *"An Officer of the House Which Chooses Him, and Nothing More": How Should* Marsh v. Chambers *Apply to Rotating Chaplains?*, 73 U. Chi. L. Rev. 1421, 1446 n.149 (2006) (collecting sources to support the proposition that "the House's switch to a rotating chaplaincy lasted for six years, from the Thirty-fourth through the Thirty-sixth Congress").

In addition, many—perhaps a majority—of state legislative chambers have a long history of using a rotating chaplaincy. Based upon a chaplaincy program dating back more than 188 years, the Indiana House of Representatives begins each legislative session day with an invocation delivered by a volunteer chaplain. *See Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1105 (S.D. Ind. 2005). Likewise, the Indiana State Senate has used a rotating chaplaincy since at least 1887. The Journal of the Indiana Senate's 1887 session indicates that the Senate invited a variety of clergymen to open each legislative day with a prayer. S. J. 55, Reg. Sess. (Ind. 1887). During each of the eleven legislative days running from January 11, 1887, to January 22, 1887, for example, eleven different clergymen—from ten different churches—offered an opening prayer.

Id. at 77, 83, 107, 119, 127, 135, 184, 197, 210, 222, 240.

The New York State Assembly's use of a rotating chaplaincy dates back as far as 1831. The Assembly's journal for that year includes an adopted resolution that directs the chamber's clerk "to request the several clergymen of the city of Albany having charge of congregations, to attend the opening of this House each morning by prayer, in such order as may suit their convenience." H. J. 54, 1st Sess., at 8 (N.Y. 1831). The New York State Senate's 1845 journal records an analogous resolution: "[t]hat the Clerk be directed to invite the Clergymen of this city, having charge of congregations, to open the daily sittings of the Senate with prayer, in such order as may be most convenient to themselves." S. J. 68, 1st Sess., at 4 (N.Y. 1845).

Similarly, both chambers of Pennsylvania's state legislature have long used a rotating chaplaincy. The 1862 Journal of the Pennsylvania Senate notes a resolution providing for a rotating chaplaincy: "the clergymen of the city of Harrisburg are hereby invited to open the morning sessions of the Senate with prayer, in such manner or succession as they may arrange." S. J. 1862, 1st Sess., at 13 (Pa. 1862). Indeed, Pennsylvania's House of Representatives has at least once explicitly rejected the idea of a

"situated chaplaincy."[1] During the first few weeks of the highly contentious 1868 House session, the chamber rejected a resolution naming a particular clergyman the House Chaplain for the duration of the session and instead adopted a resolution virtually identical to the Pennsylvania Senate's policy: "the Clergy of Harrisburg be invited to open the sessions of the House each day with prayer." H. J. 1868, 1st Sess., at 40 (Pa. 1868).

Since at least 1861, Virginia has followed a virtually identical policy. The Virginia Senate Journal of 1861 notes that the chamber approved a resolution "[t]hat the ministers of the gospel officiating in the churches of this city . . . are hereby invited to open our sessions with prayer, and the President is requested to make such arrangement with said ministers as will insure the presence of some one of them at our daily sessions." S. J. 1861, Reg. Sess., at 26 (Va. 1861). That same year, Virginia's House of Delegates adopted a resolution requesting that the Speaker "invite the clergy of all

---

[1] A situated chaplaincy refers to a legislative chamber appointing—whether to a paid position or to a volunteer post—an official chaplain for the duration of the legislative session, while a rotating chaplaincy refers to a legislative chamber inviting a series of different members of the clergy to offer prayers during or before each legislative day. *See* Jeremy G. Mallory, *"An Officer of the House Which Chooses Him, and Nothing More": How Should* Marsh v. Chambers *Apply to Rotating Chaplains?*, 73 U. Chi. L. Rev. 1421, 1426-27 (2006).

the religious denominations of this city to open the sessions of this house daily with prayer." H. J. 1861, Extra Sess., at 89 (Va. 1861) (provided by the Univ. of N.C. at Chapel Hill's digitization project *Documenting the American South*, at http://docsouth.unc.edu/imls/vadel61/vadel61.html). Additionally, over the course of the Virginia House's extra session that lasted from January 7 to April 4, 1861, fifteen different clergymen representing six different denominations prayed at the start of each legislative day. *Id.*

Finally, Maine's state legislative record also reveals that, in both chambers of its state legislature, a different minister led a prayer at the start of each legislative day. H. J. 68, Reg. Sess., at 5-71 (Me. 1897). The Maine Senate followed a virtually identical pattern. S. J. 68, Reg. Sess., at 1-75 (Me. 1897).

2. A rotating chaplaincy is even less prone to establishing a religion than the practice upheld in *Marsh*. With no single paid chaplain and no government censorship, it accommodates all religious viewpoints without supporting clergy with public funds. If anything, such a practice should put to rest any concerns about affiliating government too closely with a single religion.

Yet, the Second Circuit rejected the Town of Greece's rotating chaplaincy practice. Rather than ask whether rotating uncensored prayers at council

meetings fits within the parameters of *Marsh*, the court applied a different standard based on dictum from this Court's opinion in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Specifically, the court below relied on a passage from *Allegheny* stating that the prayers at issue in *Marsh* did not have "the effect of affiliating the government with any one specific faith or belief . . . because the particular chaplain had 'removed all references to Christ.'" *Id.* at 603 (quoting *Marsh*, 463 U.S. at 793 n.14).

Allegheny did not overrule or modify *Marsh*; nor did the Court in *Marsh* cabin its review of Nebraska's legislative prayer practice to the short period of time during which the chaplain delivered prayers not mentioning Christ. Indeed, as the Court later noted in *Van Orden v. Perry*, 545 U.S. 677 (2005), the Nebraska chaplain "removed all references to Christ *the year after* the suit was filed." *Id.* at 688 n.8 (emphasis added). Thus, the Court in *Marsh* focused on the entirety of Nebraska's practice, which included the much more prevalent periods of unabashedly Christian prayers. *Marsh*, 463 U.S. at 793 & n.14. The Court stated that "there is no indication that the prayer opportunity *has been exploited*[.]" *Id.* at 794 (emphasis added). In a case similar to this one, Judge O'Scannlain recently observed for the Ninth Circuit that the verb tense matters here, as it "denot[es] 'a time in the indefinite past' or 'a past action that comes up to and touches

the present.'" *Rubin v. City of Lancaster*, 710 F.3d 1087, 1093 (9th Cir. 2013) (quoting The Chicago Manual of Style 237 (16th ed. 2010)). This, in turn, suggests the Court was considering all of the prayers made before the Nebraska legislature, not merely the "nonsectarian" ones.

Furthermore, the Court based its decision on the long-standing history and tradition of legislative prayer in the United States, a tradition that involves almost exclusively Christian prayers. *Marsh*, 463 U.S. at 786-92. Thus, concluded Judge O'Scannlain in *Rubin*, "[a]s written, the [*Marsh*] opinion leaves the impression that *none* of Palmer's controversial prayers, at least viewed cumulatively, crossed the [Establishment Clause] line." *Rubin*, 710 F.3d at 1093. Indeed, as Judge O'Scannlain observed, the dissenting justices in *Marsh* interpreted the majority opinion as approving *all* prayers, including those specifically mentioning Christ. *Id.* Justice Brennan, for example, argued that the "controversy" surrounding the chaplain's "Christological references" demonstrated a threat of "excessive 'entanglement' [with religion that] might arise out of 'the divisive political potential' of a state statute or program." *Marsh*, 463 U.S. at 799-800 & n.9 (Brennan, J., dissenting) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614-22 (1971)). Justice Stevens, also dissenting, criticized the majority for failing to scrutinize the Nebraska chaplain's overtly Christian prayers, stating, "[t]he Court declines to

'embark on a sensitive evaluation or to parse the content of a particular prayer.' Perhaps it does so because it would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain." *Id.* at 823 (Stevens, J., dissenting) (citation omitted).

Furthermore, the decision in *Allegheny*—which did not even review the permissibility of legislative prayers—does not modify *Marsh*'s general approval of legislative prayers (including those invoking Christ). *Allegheny* states only that prayers not invoking Christ would not affiliate the government with religion. *Allegheny*, 492 U.S. at 603. But that unremarkable observation hardly establishes the inverse proposition that, while permissible for more than two hundred years, any Christ-centered legislative prayer must now be declared unconstitutional because it affiliates the government with religion.

B. The endorsement test is especially inapt where private citizens offer prayers in service to their elected legislative bodies

Applying the *Allegheny* endorsement test to the Town of Greece's prayer practices would force government officials and courts to "parse" and ultimately censor invocations crafted by private citizens in service to a local legislative body. That approach violates the venerable American tradition of accommodating religious practices (even in the

context of government service) and is ultimately self-defeating.

1. Without substantial discussion of the matter, the Court in *Marsh* treated the prayer of a "State-employed clergyman" as government speech. *See Marsh*, 463 U.S. at 786. The circuits have in turn treated *all* legislative prayers as government speech, even when offered by a private citizen. *See*, *e.g.*, *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354-55 (4th Cir. 2008) (treating prayers as government speech because of their focus on government business at the beginning of meetings); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1266 (11th Cir. 2008) (considering a rotating chaplaincy as government speech); *Joyner v. Forsyth County*, 653 F.3d 341, 343-44 (4th Cir. 2011) (considering a legislative prayer "practice" and eventual "policy" as government speech).

The Court should reject the assumption that the content of private citizens' prayers before legislative assemblies is attributable exclusively to the government. Such prayers, rather, are expressions of private belief made in service to an elected body of citizens. Those present may participate or not, but each citizen's mode of rendering this particular service to a governmental body may rightfully be accommodated.

In terms of government-operated fora, the floor of a legislative body is perhaps *sui generis*. A

legislative entity is not typically an open forum, where all may speak on any subject without fear of viewpoint or even content discrimination. *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). It is not even a limited public forum (such as a university meeting hall or a city-owned theater), where government may restrict the topics, but not the individuals who speak or the viewpoints discussed. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).

Rather, no one—other than (perhaps) an elected legislator—has a right to speak on the floor of an elected legislative body. In the American tradition, each legislative assembly chooses officers who decide who may speak on which subjects at any given time. *See, e.g.*, United States House of Representatives Rules I, XVII, 113th Cong., 1st Sess. (2013) (requiring recognition from the Speaker before speaking). Protection of legislators' floor speech rights is largely a matter for Speech and Debate Clauses (and electoral accountability). *See* Steven N. Sherr, *Freedom and Federalism: The First Amendment's Protection of Legislative Voting*, 101 Yale L.J. 233, 234 (1991) (acknowledging that legislative independence primarily has rested on the "Speech or Debate Clause, similar state constitutional provisions, and common law notions of legislative immunity"). In fact, the extent to which legislators have judicially enforceable First Amendment free speech rights on the chamber floor

is far from clear. *See, e.g., Parker v. Merlino*, 646 F.2d 848, 854-55 (3d Cir. 1981) (upholding a New Jersey Senate no-debate rule as necessary for "allowing the legislature efficiently and effectively to perform its main function of making collective decisions on proposals before it").

Yet unlike, for example, mottos on standard-issue license plates, symbols on government seals, and state house Ten Commandments displays, statements made on the floor of an elected legislative body do not generally constitute speech by "the government." In a very real sense, even legislators retain their identities as individual citizens when they speak in support of a bill or resolution, regardless that they do so officially as elected representatives. Citizen speech is even more removed from official sponsorship. It occurs only if invited, to be sure, but in no way does it constitute the speech of the body itself. *Cf.* United States House of Representatives, Office of Art & Archives, *Historical Highlights: General Douglas MacArthur Delivered His Farewell Address to a Joint Meeting of Congress*, http://history.house.gov/HistoricalHighlight/Detail/36088 (last visited July 30, 2013). In short, a legislative body in a republic has the particular functional need both to invite citizen speech (by elected representatives and others) and to restrict who speaks on which topics. So, while invited prayer fulfills a legislative function

generally, the specific words of each prayer belong to the speaker and those who wish to participate.

What is more, the Establishment Clause generally permits government accommodation of individual religious practices amid legitimate service to the government. Religious accommodation in general is a venerable American custom. The Court itself formerly *required* reasonable religious accommodation as a matter of free exercise. *See Sherbert v. Verner*, 374 U.S. 398, 403-09 (1963); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716-20 (1981). It has since retreated from that rule, *see Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 883-85 (1990), but still acknowledges the general permissibility of religious accommodation, *see id.* at 890. *See also Walz v. Tax Comm'n of New York*, 397 U.S. 664, 669 (1970) ("[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.").

Accordingly, the Federal Government may exempt religious organizations from Title VII's prohibition on religious discrimination in employment, *see Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987), and require States accepting federal correctional program grants to make reasonable accommodations of prisoners' religious

practices. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (deeming the Religious Land Use and Institutionalized Persons Act "a permissible legislative accommodation of religion that is not barred by the Establishment Clause").

The accommodation principle extends to contexts where religious leaders use their faiths and expertise to render government service, such as through chaplaincy programs. *See, e.g.*, *Katcoff v. Marsh*, 755 F.2d 223, 233 (2d Cir. 1985) (upholding the Army chaplaincy program against an Establishment Clause challenge and warning that the Establishment Clause must be "interpreted to accommodate other equally valid provisions of the Constitution, including the Free Exercise Clause, when they are implicated"); *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988) (confirming that "[p]risons are entitled to employ chaplains"); *Theriault v. A Religious Office in the Structure of the Gov't Requiring a Religious Test as a Qualification*, 895 F.2d 104, 107 (2d Cir. 1990) (same); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448, 457 (8th Cir. 1988) (upholding a county hospital's employment of a chaplain as "a permissible accommodation of at least some patients' free exercise rights").

The longstanding tradition of legislative prayer fits this model, particularly when carried out through the voices of private citizens. Citizens offer prayers in service to an elected assembly, and in so

doing may receive accommodation of their individual beliefs without implicating the Establishment Clause. Sanitizing legislative prayers of "sectarian" references, on the other hand, deprives adherents of the chance to undertake religious exercise based on core beliefs, to the point where some otherwise willing citizens may forego offering legislative prayer entirely if they cannot do so according to their consciences. Just as military chaplains draw on specific "sectarian" tenets to minister effectively, so too do citizens volunteering for legislative prayer require use of their consciences once inside the chamber door.

In short, the history of legislative prayer, the traditional and structural necessity of legislative floor control, and the American culture of religious accommodation combine to create a system where legislative assemblies may, without even remotely threatening an establishment of religion, invite citizens to offer uncensored prayers at the beginning of each legislative session day.

2. The endorsement test, in contrast, is not designed to accommodate private religious conduct in service to the government. To the contrary, enforcing an endorsement test and a "non-sectarian" mandate calls to mind government-sanctioned censorship of religious expression. For example, in *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 356 (4th Cir. 2008), the court approved a city

council's exclusion of a minister who wished to give a prayer in the name of Jesus Christ.

It is an insult to individual expression and religious exercise to permit prayers only by those who agree to pray in the government-ordered fashion. In fact, even a preeminent scholar who *opposes* legislative prayer acknowledges that policing invocations in the name of the Establishment Clause will result in "a disturbing sort of censorship," something he considers "an unsavory task." *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 Minn. L. Rev. 972, 1013-15 (2010). Professor Lund even goes so far as to say that "the exercise of this power [to censor prayer] is deeply troubling [because t]hose who pray in nondenominational terms can pray as they do normally[, b]ut those who pray in the name of Jesus are permanently excluded from the prayer opportunity, precisely because of their religious commitments." *Id*. at 1019. The ability of a community's clergy to offer an invocation opening a legislative session is an honor that many would desire, but an endorsement test requiring officials to scrub prayers of particular religious references (but not others) would exclude many whose faiths require them to mention specific deities or beliefs in their prayers.

In this way, an endorsement test is essentially self-defeating. A mandate for "non-sectarian"

prayers in effect endorses a mode of belief. That is, what a court decides is "nonsectarian" may well appear very sectarian from a different perspective. *See* Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralist Polity*, 40 Creighton L. Rev. 517, 540-41 (2007) ("The quest to find some 'common denominator' prayer language will characteristically depend on overlooking two elementary but essential points: first, the fundamental difference between monotheistic religions . . . and non-theistic religions . . . and second, the existence of ways of understanding and characterizing 'God' that strikingly distinguish the main monotheistic religions from each other—and, indeed, that distinguish believers even within each of the major monotheistic traditions.").

Any religious reference, no matter how banal it may appear to jurists, carries with it religious connotations not agreed upon by all. A court of law is not equipped to determine what individual believers find to be "sectarian," and a judicial attempt to establish a "non-sectarian" norm risks creating a "civil religion" of its own. *Cf. Lee v. Weisman*, 505 U.S. 577, 589 (1992) ("But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself."). Instead, the only practical solution is to embrace the plurality of faiths in America and "weave our tradition of religious liberty together

with our remarkable religious diversity . . . that recognizes our different faiths but that does not unconstitutionally prefer, or even appear to prefer, any of them." Delahunty, *supra*, at 561.

3. Indiana's experience in *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), *stay of injunction pending appeal denied*, 440 F.3d 393 (7th Cir. 2006), *injunction vacated on standing grounds sub nom. Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assem.*, 506 F.3d 584 (7th Cir. 2007), illustrates the difficulties inherent in applying the endorsement test to legislative prayer. At the time of that lawsuit, the Indiana House had been opening its sessions with an invocation for 188 years, *id.* at 1105, and continues to do so today. At the discretion of the Speaker, the House invites either a member or outside religious clergy to deliver a prayer after each daily legislative session is called to order. *Id.* The Speaker invites outside clergy based on members' nominations and supplies no guidance as to content other than to "strive for an ecumenical prayer." *Id.*

The district court found "sectarian" prayers—*i.e.* prayers containing overt references to Christianity—that resulted from this process to be troubling and declared them illegal. Rejecting the *Marsh* historical analysis, the court instead applied the endorsement test, which, in its view, forbids "expressly and consistently sectarian" prayers that "express the

faith of a particular religion[.]" *Id.* at 1121-22, 1131. In attempting to craft its injunction, however, the court appeared to only ban references to a Christian deity, but not references to the deities of other sectarian religions. *See Hinrichs v. Bosma*, No. 1:05-cv-0813, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005) (banning proclamations that claim "Jesus of Nazareth was the Christ, the Messiah, the Son of God, or the Savior, or that he was resurrected, or that he will return on Judgment Day or is otherwise divine" but permitting references to "the Arabic Allah" as but a foreign translation of "God").

Thus, in attempting to rid the Indiana House of "sectarian" prayers, the court in effect banned only overtly Christian prayers. And while the court acknowledged that "a practice of sectarian prayer favoring *any* particular religion violates the Establishment Clause[, including] sectarian Jewish or Muslim prayers," *Hinrichs*, 400 F. Supp. 2d at 1126, applying that injunction to preclude overt prayer references to Allah, Vishnu, Krishna, or other deities would only have underscored government endorsement of what remained permissible: general references to God, or no references to any deity at all. In this circumstance, where the religious reference occurs in the context of real-time religious exercise, and not simply as part of a static civic symbol (such as a seal or motto), the enforced preference for a particular religious exercise would be unmistakable.

II. The American People Deserve an Establishment Clause Jurisprudence That Is Clear, Workable, and Faithful to the Text and History of the First Amendment

Since 1791, the Constitution has compelled that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Despite the clarity of these words, modern Establishment Clause jurisprudence is anything but clear. As Justice Thomas recently noted, the "jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 14 (2011) (Thomas, J., dissenting from denial of certiorari).

The Second Circuit's decision striking down a town's traditional practice of opening board meetings with a prayer demonstrates once again the dire need for a new Establishment Clause jurisprudence. Rather than follow straight-forward, binding precedent from *Marsh v. Chambers*, 463 U.S. 783 (1983), the Second Circuit relied on: (1) dictum from *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), *see Galloway v. Town of Greece*, 681 F.3d 20, 27-28 (2d Cir. 2012); and (2) "the exercise of [its own] legal judgment" in lieu of any "precise criteria" or

test, *id.* at 30, to justify its holding that the Town's practice "must be viewed as an endorsement of a particular religious viewpoint," *id.*

Abandoning *Marsh* and adapting the *Lynch/Allegheny* endorsement test for legislative prayer could only ensure muddled, fact-intensive theological inquiries with no certain results for legislative bodies, the public, or the courts. The endorsement test has already led a federal court to declare legislative prayers invoking "Jesus" but not "Allah" inherently and impermissibly "sectarian." *Hinrichs*, *v. Bosma*, No. 1:05-cv-0813, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005). Such counterintuitive results and the general profusion of competing Establishment Clause standards should discourage replacing *Marsh* with the endorsement test.

Yet while *Marsh* provides a clear answer in this case, *see supra* Part I; *see also* Pet. Br. at 16-22, 27-40, it ultimately does not resolve the persistent Establishment Clause confusion. When circuit courts feel empowered by the uncertainty in the Court's Establishment Clause doctrine to strike down the very practice explicitly reviewed and upheld in *Marsh*, a fundamental problem that only this Court can solve is squarely presented: the Establishment Clause jurisprudence remains in "hopeless disarray," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J.,

concurring in the judgment), and it is in need of "[s]ubstantial revision," *Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test."); *cf. McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859 n.10 (2005) (noting that "[a]t least since *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947), it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes").

Accordingly, the Court should take this opportunity to provide long-overdue clarity to this area.

A. Modern Establishment Clause jurisprudence provides little guidance for governments and their citizens

One would be hard pressed to find an area of the law plagued with a greater uncertainty than this Court's Establishment Clause doctrine. When the Court has employed a new Establishment Clause test, the Court has added it to the list of options rather than offered it as a permanent replacement. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) ("Whatever may be the fate

of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with [a] passive monument . . . ."). Thus, (1) the *Lemon* test; (2) the *Lemon*/endorsement test, *see, e.g.*, *Allegheny*, 492 U.S. at 592-94 (On occasion, the Court has modified *Lemon*'s primary-effect prong by asking instead whether a "reasonable observer" would view the challenged conduct as an "endorsement" of religion.); (3) the coercion test, *see Lee v. Weisman*, 505 U.S. 577 (1992); and (4) the *Van Orden* legal-judgment test, *see* 545 U.S. at 690-92 (plurality opinion); *id*. at 700, 703-04 (Breyer, J., concurring in the judgment), seemingly remain options for courts reviewing Establishment Clause challenges. Indeed, according to one account, Members of the Court have advocated *ten* different Establishment Clause standards in recent years. Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. Pa. J. Const. L. 725, 725 (2006); *see also id*. at 728-64.

The *Lemon* test, in particular, has been treated inconsistently—even when it is purportedly shelved for another test. Sometimes the Court ignores it completely, *e.g. Marsh*, other times it has been described as "useful" but non-binding, *e.g. Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Perhaps most perplexingly, on the same day that the Court upheld Texas's Ten Commandments monument in *Van Orden*, the Court used *Lemon*/endorsement to

invalidate a different Ten Commandments display. *See McCreary County*, 545 U.S. at 859-66.

Given these inconsistencies, it is unsurprising that a majority of the current Justices have questioned the continued use of the *Lemon*/endorsement Test. *See, e.g.*, *Utah Highway Patrol Ass'n*, 132 S. Ct. at 17 (Thomas, J., dissenting from denial of certiorari) (agreeing with the assessment that "the endorsement test amounted to unguided examination of marginalia using little more than intuition") (internal quotation marks omitted); *Salazar v. Buono*, 130 S. Ct. 1803, 1818-20 (2010) (plurality opinion of Kennedy, J., joined in full by Roberts, C.J., and in part by Alito, J.) (criticizing the workability of the endorsement test); *id*. at 1824 (Alito, J., concurring in part and concurring in the judgment); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (plurality opinion of Scalia, J.) (stating that the endorsement test "supplies no standard whatsoever."); *Allegheny*, 492 U.S. at 669) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice."); *see also McCreary County*, 545 U.S. at 890 (Scalia, J., dissenting) (noting that "a majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun '*Lemon* test'").

B. The lack of clarity in Establishment Clause jurisprudence continues to have profound consequences

The current state of Establishment Clause jurisprudence has at least two significant consequences for government entities: (1) there can be little certainty how courts will treat a given state action or practice (the conflicting cases in the wake of *Van Orden* and *McCreary County* demonstrate one example) and (2) governments increasingly are put in situations where, no matter what action they take, they will be forced into costly litigation.

1. The confusion among lower courts has been especially pronounced following the Court's decisions in *Van Orden* and *McCreary County*. *E.g.*, *Am. Civil Liberties Union of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005) (noting that after these two decisions, "we remain in Establishment Clause purgatory"); *see also Skoros v. City of New York*, 437 F.3d 1, 13 (2d Cir. 2006) ("[W]e confront the challenge of frequently splintered Supreme Court decisions" and justices who "have rarely agreed—in either analysis or outcome—in distinguishing the permissible from the impermissible . . . ."). Some courts have continued to follow *Lemon*/endorsement in display cases, *e.g.*, *Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011), including in a case involving a Ten Commandments monument similar to the display

upheld in *Van Orden*, *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 796-97 (10th Cir. 2009). Other courts have followed *Van Orden*, *e.g.*, *Am. Civil Liberties Union Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 & n.8 (8th Cir. 2005) (en banc), including in a case that did not involve a religious display, *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 402 (4th Cir. 2005). And still other courts have adopted new variations on the *Lemon*/endorsement analysis. *E.g.*, *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012) (en banc) (ignoring the undisputed secular purposes of a school district and attributing to the government private religious expression).

As Chief Judge Easterbrook noted in his dissent in *Elmbrook School District*, the lack of clarity in current Establishment Clause doctrine makes it "easy for judges to disagree about its application." 687 F.3d at 869 (Easterbrook, C.J., dissenting); *see also id.* ("If the current establishment-clause doctrine had been announced by Congress or an administrative agency, the Supreme Court would declare it unconstitutionally vague.") (citation omitted). This observation echoed Justice Thomas's recent acknowledgment that "it is the very flexibility of this Court's Establishment Clause precedent that leaves it incapable of consistent application." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 17 (2011) (Thomas, J., dissenting from denial of certiorari) (internal quotations omitted). State and

local governments must therefore continue to make decisions regarding displays and conduct touching on religion with no meaningful way to know how the courts will judge their actions.

2. The uncertainty in Establishment Clause doctrine poses additional problems in scenarios involving the interplay between the religion clauses. Governments attempting to honor the Free Exercise rights of their citizens are frequently sued by those who wish to use the Establishment Clause to eliminate all things religious from the public square. *E.g.*, *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486 (5th Cir. June 3, 2011) (per curium order dissolving a district court's temporary restraining order and preliminary injunction requiring a school district to instruct student speakers that they may not include prayers as a part of their graduation speech). On the other hand, governments that attempt to avoid those lawsuits by preventing the inclusion of religious elements get sued by those seeking the protections of the Free Exercise Clause. *E.g.*, *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (356th Jud. Dist., Hardin County May 8, 2013) (summary judgment order in a case involving high school cheerleaders' decision to include religious messages on banners displayed at football games). Governments are thus increasingly being put in situations where, regardless which decision they make, costly litigation follows. A clear, workable Establishment Clause doctrine would

enable governments to make informed decisions when confronted by these issues. *See* Pet. Br. at 48-50.

C. A coercion-based test would better reflect the text and history of the Establishment Clause

The Constitution's religion clauses have long been understood to permit government to acknowledge the religions and religious practices of the American people. The Court has recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Justice Brennan cautioned that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). But the development of Establishment Clause doctrine (dating back at least to *Everson*) that has resulted in an unsustainable lack of "categorical absolutes," *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859 n.10 (2005), has also divorced the doctrine from the text and history of the First Amendment.

As Professor Philip Hamburger has explained, "[s]eparation of church and state is an attractively simple metaphor. . . . however, it is an oversimplification [that fails to] appreciate the more

measured positions advanced by eighteenth-century evangelical dissenters." Philip Hamburger, *Separation of Church and State* 486 (2002). This short-handed attempt to describe the First Amendment (tracing its origins to Thomas Jefferson's letter of 1802 to the Danbury Baptist Association, *id.* at 1, 481) misses the critical "distinction between the separation of church and state and the constitutional freedom from a religious establishment," *id.* at 479-80. Although this distinction may be lost on (or perhaps purposefully ignored by) those who today wish to eradicate from public life all things touching on the religious, the "difference . . . was of profound importance to earlier Americans," *id.* at 480; *see also generally id.* at 101-07.

The First Amendment's religion clauses followed from the desire to protect free exercise of religion and to permit government legislation protecting that exercise, so long as it would not legislate an establishment. *Id.* at 107; *see also id.* at 101, 105-06. Professor Philip Kurland observed that:

> [c]onsidered against the background of American history in 1789, the Founders' general purpose is not in serious doubt. The government was not to determine how any individual could worship God; nor could it compel an individual, through taxation or otherwise, to support a religious observance by

> an individual, whether it was the taxpayer's own religion or someone else's. If the Founders' generation truly sought freedom for religious beliefs, however, I find no evidence that they were equally concerned with freedom for irreligion. Quite to the contrary, they sought to protect man's relation to his god.

Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 856 (1987). The Court recognized the free-exercise rationale underlying the Establishment Clause in *Cantwell v. Connecticut*, explaining that:

> [t]he constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,-freedom to believe and freedom to act.

310 U.S. 296, 303 (1940).

During the debates in the First Congress, James Madison (the principal draftsman) explained that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce

the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 Annals of Cong. 730 (Aug. 15, 1789). Professor Michael McConnell thus observed "[i]s compulsion an element of an establishment clause violation? If Madison's explanations to the First Congress are any guide, compulsion is not just an element, it is the essence of an establishment." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 937 (1986). Many of the Court's earlier Establishment Clause cases likewise focused on an analysis of the presence or absence of religious compulsion. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 451-52 (1961); *Zorach*, 343 U.S. at 311-12, 314; *McCollum v. Bd. of Educ.*, 333 U.S. 203, 209-10, 212 (1948); *Cantwell*, 310 U.S. at 303.

Amici States offer these brief observations mindful of the warning against merely "'picking and choosing statements and events favorable to [one's] cause,'" a warning that has particular force in this area of law. McConnell, *supra*, at 933 (quoting Kurland, *supra*, at 842). The States ask only that, in revisiting Establishment Clause doctrine, the Court consider the historical context in which the religion clauses were proposed and particular text was debated, passed by Congress, and then ratified by the States.

***

As Justice Goldberg first explained:

> [t]he First Amendment does not prohibit practices by which any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact.

Abington, 374 U.S. at 308 (Goldberg, J., concurring). Likewise, requiring the government "to purge from the public sphere all that in any way partakes of the religious," would "promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

Yet that is precisely the effect of the Second Circuit's decision in this case. And it is the effect of numerous circuit court decisions, *e.g.*, *Elmbrook Sch. Dist.*, 687 F.3d at 840 (holding unconstitutional conducting high school graduations in a nondenominational church's sanctuary); *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011) (holding unconstitutional the inclusion of a large cross within a veterans' memorial), that were made possible in large part by an Establishment Clause jurisprudence that "either in appearance or in fact" turns on nothing more than "judicial predilections."

Van Orden, 545 U.S. at 697 (Thomas, J., concurring). Because "[t]he outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges," *id.*, at 697 (Thomas, J., concurring), the Court should replace the myriad of Establishment Clause standards with a single coercion-based test that is clear, easily applied by courts and litigants, and faithful to the text and history of the First Amendment.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas
DANIEL T. HODGE
First Assistant Attorney General
JONATHAN F. MITCHELL
Solicitor General
ADAM W. ASTON
Deputy Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711
(512) 936-0596
adam.aston@
texasattorneygeneral.gov

GREGORY F. ZOELLER
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General
(*Counsel of Record*)
HEATHER HAGAN MCVEIGH
Deputy Attorney General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for Amici States

Dated: August 2, 2013