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

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding and Rule 29.6 statement included in the Brief for Petitioner remain accurate.

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REPLY BRIEF FOR PETITIONER

Respondents concede that municipalities like the Town of Greece can start their deliberative sessions with a prayer without violating the Establishment Clause. Resp. Br. 48. And respondents effectively abandon the legal theory that they persuaded the court of appeals to adopt—that the Town impermissibly "aligned" itself with or "endorsed" Christianity by offering a prayer opportunity at the start of each legislative session. Pet. App. 8a-9a, 23a; Resp. C.A. Br. 21, 35-48.

Evidently unwilling to defend the Second Circuit's decision on its own terms, respondents now assert that they should prevail either because the Town (1) "puts coercive pressure on citizens to participate in the prayers," or (2) permits prayer-givers to use "sectarian" references. Resp. Br. 17. Neither argument has merit.

First, no court has ever held that the mere existence of a prayer opportunity at a deliberative meeting impermissibly coerces citizens to participate. To the contrary, this Court has repeatedly concluded that adults are not readily susceptible to such "'religious indoctrination'" or "peer pressure." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (citation omitted); *see also Lee v. Weisman*, 505 U.S. 577, 597 (1992). Nor has this Court ever suggested that children are susceptible to such coercion outside the public education setting. *Lee*, 505 U.S. at 597.

Respondents' eleventh-hour embrace of the coercion test is understandable, as is their attempt to twist that test beyond all recognition. Properly defined, a coercion test is consistent with both *Marsh* and an accurate understanding of the Religion

Clauses. Pet. Br. 35-40. But there is no basis in law or lexicography for respondents' infinitely expansive and elastic concept of coercion, whereby citizens who voluntarily attend Board meetings and observe an invocation with which they disagree can claim to be "coerced . . . to participate in the prayers." Resp. Br. 15.

Nor did respondents proffer any evidence suggesting that they or any other Town residents were compelled or pressured into attending Board meetings or participating in prayer. To the contrary, the record refutes any such claim. Respondents attend Board meetings at will, refuse to bow their heads or stand when invocations are offered, and have forcefully stated their opinions about the wisdom of legislative prayer and other matters of Town business during the meeting's public comment period. Pet. App. 7a-8a; C.A. App. A1067-69, A1085. Simply put, respondents have not been coerced. And respondents lack standing to assert the speculative purported injuries of other Town residents whom they now allege (without evidence) have been coerced.

Second, the claim that faith-specific references in prayers violate the Establishment Clause is irreconcilable with *Marsh* and with the history of legislative prayer in this country. Under *Marsh*, legislative prayer is presumptively constitutional, and the content of specific prayers is of no concern to courts unless the government exploits the opportunity to proselytize, advance, or disparage a particular religion. Thus, invocations since the Founding have regularly included references to specific faith traditions, without leading to or threatening an establishment of religion. *See*, *e.g.*, U.S. Br. 18.

Ultimately, respondents' theories are hopelessly conflicted. On the one hand, they argue that coercive prayer violates the Constitution and that all prayer at Board meetings is "inherent[ly]" coercive. Resp. Br. 48. Yet they concede that so-called "nonsectarian" prayer is constitutional, despite its supposedly coercive effects. *See id.* at 48-49. Thus, under respondents' theory, the Establishment Clause permits government to "coerce" atheists by offering prayers to God, but prohibits prayers that refer to Jesus because they would purportedly "coerce" persons of non-Christian faiths. That cannot be the law.

The court of appeals' analysis is fatally flawed, as confirmed by respondents' failure to defend it, but respondents cannot rescue the judgment below by substituting dangerously overbroad and mutually irreconcilable constitutional theories. This Court should reverse the court of appeals and reaffirm that "opening . . . sessions of legislative and other deliberative public bodies with prayer" is consistent with the Establishment Clause. *Marsh*, 463 U.S. at 786.

ARGUMENT

I. THE TOWN OF GREECE'S PRAYER PRACTICE IS CONSTITUTIONAL UNDER *MARSH V. CHAMBERS*.

Respondents concede that "some form of prayer will be allowed at meetings of local legislative bodies," and they "have not, at any point in this litigation, asked that they be eliminated altogether." Resp. Br. 48. And respondents make practically no effort to defend the court of appeals' application of an "endorsement" or "reasonable observer" test in the legislative-prayer context. Thus, unless respondents can distinguish *Marsh v. Chambers*, which upheld the Nebraska legislature's practice of starting delib-

erative sessions with a prayer, the Town must prevail.

Respondents cannot evade *Marsh*. First, respondents err in contending that *Marsh* did not address the possibility that legislative prayer could be psychologically coercive. Resp. Br. 41-43. Senator Chambers testified that he felt "pressure" to stand during prayers when he was "caught" in the chamber as a prayer was offered. Joint Appendix, *Marsh*, 463 U.S. 783 (No. 82-83), 1982 U.S. S. Ct. Briefs LEXIS 915, at *22. But *Marsh* rejected the argument that Chambers was impermissibly coerced, noting that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination'" or "peer pressure." 463 U.S. at 792 (citations omitted).

Respondents resist this conclusion because *Marsh* involved a challenge by a state legislator rather than a member of the general public. Resp. Br. 42-43. But that distinction did not matter in *Marsh* and should not matter here. In *Marsh*, Senator Chambers brought suit both as a state legislator and as a non-Christian taxpayer and citizen of the State of Nebraska. *Chambers v. Marsh*, 675 F.2d 228, 231 (8th Cir. 1982). This Court assigned no special importance to his status as a legislator. *Marsh*, 463 U.S. at 793-95. And there is no principled reason why resolving a claim of religious coercion should turn on whether or not the claimant is a government official, elected or otherwise.

Moreover, respondents' claim that state legislators have more freedom than average citizens to absent themselves from deliberative sessions cannot withstand scrutiny. In *Marsh*, "[l]egislative rules require[d] attendance at every session," but Chambers

nonetheless "excused himself on occasions during the prayers." 675 F.2d at 231 n.5. By contrast, the Town of Greece has no rule requiring that any citizen attend its Board meetings, nor does it prohibit any citizen from being absent for parts of the meeting. The meeting is visible through large glass windows in the entry doors, and attendees routinely enter and leave at will. *See*, *e.g.*, Pls.' C.A. Exs. 820, 821, 824, 825. If it is not impermissibly coercive under *Marsh* for a State to require a legislator to choose between hearing a paid chaplain's invocation or leaving the chamber in violation of procedural rules, it cannot be coercive to offer a prayer opportunity at a municipal meeting that has no audience attendance requirement.

Second, respondents argue that *Marsh* is distinguishable because the prayers in that case were allegedly "nonsectarian," rather than "explicitly Christian." Resp. Br. 44. Respondents' sole support for this argument is a single footnote in the majority opinion noting that after litigation had commenced, Reverend Palmer "removed all references to Christ" in his prayers. 463 U.S. at 793 n.14. This footnote cannot bear the weight assigned to it. Nothing in the Court's analysis turned on it, and the actual reasoning and record in *Marsh* refute the conclusion that this Court permitted only "nonsectarian" prayer practices as respondents define it. *See* Pet. Br. 25-26; *see also* Amicus Br. of Rev. Dr. Robert E. Palmer 6-17.[1]

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[1] Respondents seemingly use the term "sectarian" broadly to mean all faith-specific or nongeneric religious references. But the term more naturally relates to a single denomination within a broader religious tradition, *see Webster's Third New International Dictionary* 2052 (1976) (definitions 1a-b of "sect"), and it

Instead, *Marsh* affirmed the original understanding of the Establishment Clause with respect to legislative prayer. Specifically, the Framers dismissed the objection that the people "'were so divided in religious sentiments'" that no legislative prayer should be offered. 463 U.S. at 791 (citation omitted). Rather, Samuel Adams's view prevailed that regardless of religious persuasion, Americans could "'hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.'" *Id.* at 792 (citation omitted). Accordingly, this Court concluded that, absent exploitation of the prayer opportunity, "[t]he content of the prayer is not of concern to judges" and courts should not "embark on a sensitive evaluation" or "parse the content of a particular prayer." *Id.* at 794-95.

Marsh, in other words, *presupposed* that legislative invocations would reflect the diverse faith-specific beliefs of different prayer-givers and that not everyone within earshot would agree with the prayers' content. But the Court refused to intervene to police that religious diversity, absent evidence that the government had exploited the prayer opportunity to proselytize, advance, or denigrate other religions. Therefore, this Court upheld Nebraska's "unbroken practice" for "more than a century" of opening its sessions with a prayer, which provided "abundant assurance that there is no real [Establishment Clause] threat." *Id*. at 795. The Court could not have relied on a century of tradition as evidence in

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has also historically been used as an anti-Catholic pejorative. *See Mitchell v. Helms*, 530 U.S. 793, 826-29 (2000) (plurality op.). These definitional problems illustrate why courts are ill-suited to draw or administer a distinction between "sectarian" and "nonsectarian" prayer. *See infra* at 21-22.

favor of the practice's constitutionality if the only thing that mattered was that Reverend Palmer had "removed all references to Christ the year after the suit was filed." *Van Orden v. Perry*, 545 U.S. 677, 688 n.8 (2005) (plurality op.).[2]

Respondents' unduly narrow reading of *Marsh* also cannot be reconciled with the well-established principle that voluntary cessation of an allegedly unconstitutional practice cannot save it from invalidation. *See* Pet. Br. 26. As respondents recognized below, "[w]hen a defendant voluntarily changes its behavior in response to litigation, the court *must* still examine the original policy." Resp. C.A. Br. 44 (emphasis added). And contrary to respondents' suggestion here (Resp. Br. 45-46), Senator Chambers expressly argued to this Court that Reverend Palmer's removal of references to Christ was immaterial. *See* Brief for Respondent, *Marsh*, 463 U.S. 783 (No. 82-83), 1983 U.S. S. Ct. Briefs LEXIS 1437, at *38 & n.17. If prayers using faith-specific terminology were really forbidden by *Marsh*, Senator Chambers would have prevailed.

Respondents also attempt to derive a "nonsectarian" test from the *Marsh* Court's pronouncement that the prayer opportunity cannot be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." Resp. Br. 46 (citation omitted). Under respondents' view, faith-specific references in prayers necessarily advance one religion. But as the Tenth Circuit has observed, "all prayers 'advance' a

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[2] Contrary to respondents' suggestion (Resp. Br. 47), footnote 8 in *Van Orden* confirms that the *Marsh* Court upheld Nebraska's prayer practice *notwithstanding* that many of the prayers contained "explicitly Christian" references. 545 U.S. at 688 n.8 (plurality op.).

particular faith or belief in one way or another," because the "act of praying to a supreme power assumes the existence of that supreme power." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) (en banc). Thus, "the mere fact [that] a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause." *Id.*

Further, in light of *Marsh*'s refusal to parse the text of particular prayers and its holding that explicitly Christian prayers are constitutional, the Court's use of the word "advance" must require something more than mere inclusion of faith-specific language. In context, it must instead be understood as prohibiting activities that are comparable to attempts to proselytize, or to "convert from one religion, belief, opinion, or party to another." *Webster's Third New International Dictionary* 1821 (1976) (definition of "proselytize" or "proselyte"). At minimum, impermissible efforts to "advance" religion must, like direct attempts at conversion, "benefi[t] religion in a way more direct and more substantial than practices that are accepted in our national heritage." *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 662-63 (1989) (Kennedy, J., concurring in part and dissenting in part). By allowing a nondiscriminatory prayer opportunity, the Town has not "plac[ed its] official seal of approval on one religious view." U.S. Br. 12 (internal quotation marks omitted).

In short, *Marsh* controls this case, and respondents cannot distinguish it. For that reason alone, the court of appeals' decision should be reversed.

II. THE TOWN DID NOT COERCE RESPONDENTS OR ANYONE ELSE INTO PARTICIPATING IN ANY INVOCATION.

Unable to distinguish *Marsh*, and unwilling to defend the court of appeals' endorsement test, respondents devote much of their brief to the assertion (barely mentioned in their papers below) that they were coerced into participating in the prayers offered at the start of Board meetings. Resp. Br. 1, 17, 20-32. As the Town has shown, the coercion test enunciated in Justice Kennedy's opinion in *Allegheny* is consistent with *Marsh* and expresses a proper understanding of the Religion Clauses. Pet. Br. 38-40. But respondents' claim that they or others were coerced to participate in invocations offered by fellow Town residents has no support in either the record or the law.

Respondents thus lack standing to assert their coercion claim, and could not prevail without radically expanding the concept of coercion far beyond anything this Court has recognized. *Marsh* and kindred cases resolve this issue in the Town's favor: An adult is not coerced in any cognizable way by observing an invocation with which he or she disagrees. *See Marsh*, 463 U.S. at 791-92.

1. Under this Court's precedents, the Religion Clauses "forestal[l] compulsion *by law* of the acceptance of any creed or the practice of any form of worship." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (emphasis added). Thus, this Court has invalidated government actions that compel religious adherence by operation of law or threat of penalty, such as coercing students into attending religion classes, *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cnty.*, 333 U.S. 203 (1948), or re-

quiring religious oaths to obtain government offices or benefits. *Torcaso v. Watkins*, 367 U.S. 488 (1961). But respondents' test would expand the concept of coercion to situations where adults are mere passive observers of religious activities performed by others.

This Court has never embraced such a broad concept of psychic coercion. To the contrary, the general rule under the Establishment Clause is that "psychological consequence presumably produced by conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). This limitation on standing is consistent with this Court's broader First Amendment jurisprudence, which presupposes that citizens in our democracy will sometimes be exposed to speech that they find disagreeable or even offensive. *See*, *e.g.*, *Cohen v. California*, 403 U.S. 15, 21 (1971).

Respondents argue that "'subtle and indirect'" peer pressure or the mere "'perception'" of such pressure is coercive under the Establishment Clause. Resp. Br. 21, 25 (quoting *Lee*, 505 U.S. at 593). Not so. While this Court has expressed such concerns about prayers in "the classroom setting" and analogous school contexts where the "risk of compulsion is especially high," those precedents have taken pains to distinguish the school environment from other settings where that risk is absent. *Lee*, 505 U.S. at 596; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-12 (2000).

In *Marsh* itself, the Court rejected any potential coercion challenge to Nebraska's prayer practice. *See supra* at 4-5. In so holding, the Court relied on *Colorado v. Treasurer & Receiver General*, 392 N.E.2d

1195, 1200 (Mass. 1979), which contrasted the school setting, whose "purpose . . . is to teach impressionable children," with a legislature, where participants and observers "may reasonably be assumed to have fully formed their own religious beliefs or nonbeliefs."

Lee, in turn, noted that "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event [*i.e.*, graduation] most important for the student to attend." 505 U.S. at 597. In invalidating a commencement invocation, this Court noted that "[t]he influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Id.* But outside the unique educational context, it is simply not the case that "every state action implicating religion is invalid if one or a few citizens find it offensive." *Id*. To the contrary, "sometimes to endure social isolation or even anger may be the price of conscience or . . . nonconformity." *Id.* at 597-98.[3]

To expand the reasoning in cases like *Lee* and *Santa Fe* to situations outside of the school setting would not only be unprecedented, but would call into question long-standing practices—such as the invocation "God save the United States and this Honorable Court" and the recitation of the Pledge of Alle-

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[3] Indeed, respondents themselves acknowledged before the district court that, "of course, it mattered greatly in *Marsh* that the audience for the legislative invocations consisted of adult[s], . . . rather than impressionable schoolchildren." Pls.' Mem. in Support of Mot. Summ. J. at 15, Dkt. 6:08-cv-06088 (W.D.N.Y. Jan. 20, 2009) (internal quotation marks omitted).

giance, with its words "under God," at state or municipal meetings. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Under respondents' view, the Pledge would be impermissible, compelled religious speech because the person leading the Pledge "requests or assumes everyone's participation" and "asks those assembled to stand," and the "social conventions of our people" require that audience members place their hands over their hearts and recite the words. Resp. Br. 29-30. If anything, the Pledge is far more participatory, and under respondents' theory more coercive, than a legislative invocation because people are expected to join in reciting the Pledge.

This Court should not adopt a test that eviscerates any legal distinction between the scholastic and legislative settings and presumes that mature citizens are so delicate that they cannot resist participating in prayers with which they disagree.

2. Even assuming that the test for coercion were as expansive as respondents claim, the record is completely devoid of evidence that anyone was coerced—psychologically or otherwise—into participating in prayer.

To the contrary, there is ample record evidence *refuting* any claim of coercion. Respondents regularly and voluntarily attend Board meetings without incident. Pet. App. 7a-8a. Though respondents assert that "few would have the fortitude to disregard a chaplain's instruction" (Resp. Br. 23), respondents declined to follow the very requests they now claim are coercive. *See* C.A. App. A1067-69 (respondent remained seated after a prayer-giver asked that persons stand), A1085 (respondent refrained from bowing her head). Respondents also publicly expressed

their disagreement with the prayer practice and raised other issues of concern to them during the public forum following the invocation. *See*, *e.g.*, J.A. 115a-17a; C.A. App. A1067, A1069. Thus, respondents have not been prevented from attending or speaking at the meetings, and their mere passive exposure to an opening invocation does not amount to forced participation in prayer. *See*, *e.g.*, *Allegheny*, 492 U.S. at 662 (Kennedy, J.). They simply have not suffered the type of alleged injury they now purport to make the centerpiece of their case.[4]

Respondents seek to bolster their argument by alleging that *other* Town citizens have been coerced to observe prayers because they must attend meetings to receive honors or to seek zoning variances. But respondents have no standing to challenge the perceived coercion supposedly experienced by unrelated third parties. *See Valley Forge*, 454 U.S. at 486-87 n.22; *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963).

Even if such parties were properly before the Court, the record does not support the conclusion that anyone present at the Board meetings was coerced to participate in any prayer. Indeed, despite

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[4] Although respondents contend that "participation" in Board meetings is "a universal right of citizenship," Resp. Br. 22, New York law does not require that municipalities allow for public comment. All that is required is that Board meetings—like sessions of Congress—be publicly observable. N.Y. Pub. Off. Law §§ 100-11. There is no justification for forcing legislatures to sacrifice the long-standing tradition of legislative prayer simply because they decide to allow direct public comment. Respondents' suggestion (Resp. Br. 21) that the public-comment right undercuts the legitimacy of the prayer practice would lead to the perverse result that municipalities could start their legislative sessions with a prayer if only they silenced their citizens.

ample opportunity to do so, respondents adduced no evidence before the district court that anyone (whether police officers, Boy Scouts, or others) was even required to attend the Board meetings, let alone be physically present during the prayer. Nor is the handful of social science articles cited by respondents competent evidence that they or other Town citizens were coerced into participating in prayer. *See* Resp. Br. 25-26 & nn.7-10. Respondents did not offer such evidence in the summary judgment record or provide the Town with any opportunity to rebut it. It is far too late to attempt to cure deficiencies in the record with armchair psychology.

There is also no evidence to suggest that any Town citizen felt coerced to participate in an invocation by the hypothetical and purely speculative fear that the Board might respond to nonparticipation by denying that citizen's application at a public hearing. To the contrary, public hearings (where such matters as zoning applications are considered) (Resp. Br. 5-6) are *not the same event* as the Board meeting where the invocation takes place. By law, the public hearing is noticed for a distinct, pre-announced, fixed time, typically 30 minutes or more after the invocation. N.Y. Town Law § 274-b; Town of Greece Code § 211-60; *see also* C.A. App. A929. And the public hearing itself does not start with an invocation. *See*, *e.g.*, Pls.' C.A. Exs. 733, 738, 779, 795, 829. Any potential applicant could easily time his or her arrival to avoid the invocation simply by showing up at the specified time for the public hearing.

Moreover, a citizen's mere subjective belief that he or she would receive unfavorable treatment as a result of not attending the prayer is insufficient to demonstrate an Establishment Clause violation under *Marsh*. If such fears were enough, respondents

would be immunized from establishing that the government exploited the prayer opportunity—the evidentiary showing required by *Marsh*. Respondents' proposed test would instead presuppose bad faith and discriminatory intent merely because the government provided a nondiscriminatory prayer opportunity. Indeed, respondents' concept of coercion is even more erroneous and pernicious than the court of appeals' endorsement test. It would replace a "reasonable observer," aware of the "history and context" of the long-standing practice of legislative prayer, with a paranoid observer who assumes government malfeasance in the absence of supporting evidence. *Cf. Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001). That is not the law.

3. Perhaps aware of the unprecedented scope of their coercion argument and the lack of record support for it, respondents argue that the Town's prayer practice is unconstitutional because children sometimes attend Board meetings to receive awards. But again, respondents have no standing to challenge the perceived coercion purportedly experienced by underage attendees. *See supra* at 10, 13.

The court of appeals correctly rejected respondents' attempt to shoehorn this case into the *Lee* framework; as even respondents concede, "there is no reason to believe that children are any more present in [Greece] Board meetings than they were in meetings of the Nebraska legislature." Br. in Opp. 18 n.5 (quoting Pet. App. 23a-24a n.8). To the contrary, a review of the "Visitors" entries in the Nebraska Unicameral's 1979 Legislative Journal (the year the *Marsh* suit was filed) shows that children visited the chamber during at least 64 of 89 legislative days—over 70% of all meetings. *See* 1 Legislative Journal of the State of Nebraska, 86th Leg., 1st Sess. (1979),

available at http://nebraskalegislature.gov/FloorDocs/86/PDF/Journal/r1journal.pdf. Nor are children mere passive spectators at the state level. Rather, children routinely participate and receive honors and recognition at state legislative sessions. *See*, *e.g.*, New Hampshire, Senate Journal, 163d Sess., 306 (May 23, 2013), *available at* http://www.gencourt.state.nh.us/scaljourns/journals/2013/SJ%2012.pdf; 139 Rhode Island, Journal of the House of Representatives, No. 6, at 1 (Jan. 12, 2012), *available at* http://webserver.rilin.state.ri.us/Journals12/HouseJournals12/HJournal1-12.pdf. In this regard, practice at the municipal level cannot be distinguished.

Nor can respondents prevail under *Lee* merely by noting that children sometimes attend Board meetings to satisfy a civics requirement. Resp. Br. 22. The high school students to whom respondents refer can fulfill that requirement by attending any number of government functions, including library meetings, court sessions, and zoning hearings. *See* C.A. App. A929, A1038-39. No student is required to attend a Town Board meeting. Moreover, state and local legislative meetings are far different from school functions, as they are not focused on the instruction or indoctrination of young people. This Court has never suggested that the "'particular concerns that arise in the context of public elementary and secondary schools' . . . would extend to a legislative chamber." *Van Orden*, 545 U.S. at 691 (plurality op.) (citation omitted).

4. Respondents argue that application of the traditional coercion test (as opposed to their vastly expanded approach) would open the floodgates for government officials to "admonish, harangue, and intimidate citizens to participate in prayers." Resp.

Br. 31. That, too, is incorrect. If a government actor responsible for providing benefits to a citizen attempted to "browbeat" that citizen into praying (*id.* at 19, 60), the courts would properly conclude that such activity was impermissibly coercive and thus improper exploitation under *Marsh*. Similarly, respondents' examples of a parole officer or caseworker preaching conversion or demanding attendance at church would plainly constitute coercion. Moreover, the Town's volunteer prayer-givers do not stand in the same position as a parole officer; the prayer-givers are private citizens and cannot offer or deny benefits to any meeting attendee. And there is no evidence in the record that the invocations delivered at Board meetings "admonish, harangue, [or] intimidate citizens." *Id.* at 31; *see* Pet. App. 21a. Other examples, like opening a legislative session with a Catholic mass, have nothing to do with legislative invocation and would instead involve a full-fledged worship service that would unconstitutionally place "the government's weight behind an obvious effort to proselytize." *Allegheny*, 492 U.S. at 661 (opinion of Kennedy, J.).

Respondents point to one occasion on which a prayer-giver stated, in extemporaneous remarks preceding the actual invocation, that those who object to legislative prayer "are ignorant of the history of our country." J.A. 108a. That opinion on the wisdom of legislative prayer does not "advance or disparage" any faith or religion in the manner deemed problematic in *Marsh*; instead, it accurately describes the teaching of *Marsh* itself. Moreover, *Marsh* does not ensure that the citizenry will never be exposed to a single improvident prayer. Rather, under *Marsh*, the relevant test is whether the government has "exploited" the "*prayer opportunity*" to proselytize, ad-

vance, or disparage. 463 U.S. at 794-95 (emphasis added). The government action here consists of providing a forum for private citizens to deliver invocations according to the dictates of their own consciences, not in composing official prayers or dictating that prayer-givers must hold certain views.[5] While a pattern of disparaging invocations might demonstrate that the government is exploiting the prayer opportunity for an improper purpose, the Town should not be held accountable for the stray remarks of an individual prayer-giver.

III. RESPONDENTS' PROPOSED BAN ON "SECTARIAN" PRAYERS HAS NO BASIS IN ESTABLISHMENT CLAUSE JURISPRUDENCE AND WOULD BE UNWORKABLE IN PRACTICE.

Despite the claim that coercion is "inherent" in legislative invocations and "cannot be eliminated," respondents in the same breath concede that not all municipal prayer is unconstitutional, and suggest as a remedy that courts purge invocations of any "sectarian" content. Resp. Br. 48. These positions cannot be reconciled. If it were coercive for someone to observe an invocation with which he or she disagrees, it would not matter whether that prayer made

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[5] Indeed, censoring the prayers of private volunteers in such a forum would raise potentially serious free-speech concerns. The volunteer prayers in this case are unlike those given at the football games in *Santa Fe*, where the selection process prevented minority voices from being heard. 530 U.S. at 304. There is also no conflict between *Marsh*'s prohibition on exploitation of the prayer opportunity and prayer-givers' free speech rights. *See* Resp. Br. 57. Those prayer-givers who abuse the prayer opportunity could properly be excluded for using it for something other than its "intended purposes"—*i.e.*, to solemnize and ask guidance for the Board proceedings. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

reference to a generic deity or to a specific faith tradition. Indeed, that is the holding of *Lee v. Weisman*. Having all but abandoned the ill-conceived endorsement test adopted by the court of appeals, respondents have no basis for claiming that government establishment of religion turns on the content of particular prayers.

According to respondents, "sectarian" references in legislative prayers threaten government neutrality in matters of religious belief. Resp. Br. 32. That conclusion rests on an "untutored devotion to the concept of neutrality" of the sort that leads to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington*, 374 U.S. at 306 (Goldberg, J., concurring). The principle of neutrality is certainly not threatened where, as here, the government makes a prayer opportunity available to citizens of any (or no) faith tradition. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Good News Club*, 533 U.S. at 114.[6]

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[6] Respondents litter their brief with references to the Town's prayer-giver selection processes, despite having abandoned any argument that the Town discriminated against non-Christian prayer-givers. Pet. App. 10; Resp. Br. 37. That issue has been waived. In any event, the record does not support a "pattern [of] frequent reliance on a small number of repeat chaplains who would come whenever asked." Resp. Br. 36. As the court of appeals noted, the Town schedulers "worked their way down [a] list . . . until they found someone willing to give the prayer." Pet. App. 5a. Only one of three schedulers who served from 1999 to 2008 testified that she would call a "couple of stand[by] people" in the event of cancellation. C.A. App. A905. And the record reflects that in her time as scheduler, there were at least seventeen different prayer-givers, and no one delivered the prayer more than three times. *See* Pet. App. 41a. The district court thus correctly discerned no "evidence that the Town excluded non-Christians for impermissible reasons." *Id.* at 78a.

Respondents' argument cannot be reconciled with *Marsh*, which ratified this country's long history of invocations that include references to specific religious traditions. The first prayer before the Continental Congress was expressly faith-specific, invoking "Jesus Christ, Thy Son and our Savior." Rev. Jacob Duché, First Prayer of the Continental Congress (Sept. 7, 1774), Office of the Chaplain: U.S. House of Representatives, http://chaplain.house.gov/archive/continental.html. The country's first Thanksgiving Proclamation was likewise faith-specific and encouraged citizens to "humble and earnest supplication that it may please God, through the merits of Jesus Christ." 9 Journals of the Continental Congress, 1774-1789, at 855 (Worthington Chauncey Ford ed., 1907).

Faith-specific prayer remains a consistent feature of our country's legislative prayer practice today. From "'[the] earliest days to the present times, the prayers delivered by [legislative] chaplains have been true sacral prayers, and [often] true Christian prayers.'" *Rubin v. City of Lancaster*, 710 F.3d 1087, 1093-94 (9th Cir. 2013) (second alteration in original) (quoting Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 (1996)). For example, in the six years between 1990 and 1996, "over two hundred and fifty opening prayers delivered by congressional chaplains . . . included supplications to Jesus Christ." *Id.* at 1094 (internal quotation marks omitted). Of the 304 prayers offered during the 112th Congress, a majority contained identifiably Christian content. Cert.-Stage Amicus Br. of Members of Congress 20; *see also* U.S. Br. 20; Amicus Br. of U.S. Senators 12-13, 16-17.

Moreover, it would be unprecedented and dangerous for this Court to attempt to draw and police a line between "sectarian" and "nonsectarian" prayer, however defined. In *Lee*, the Court declined to make the constitutional test turn on whether or not prayers "make[] explicit references to the God of Israel, or to Jesus Christ, or to a patron saint." *Lee*, 505 U.S. at 589. The Court concluded that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id*. Rather, the "suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds" is "a contradiction that cannot be accepted." *Id.* at 590.

A constitutional test that turns on a "sectarian"/"nonsectarian" divide would be impossible to administer. As Justice Souter observed, there is hardly a task "less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than the task of distinguishing the "sectarian" from the "nonsectarian." *Lee*, 505 U.S. at 616-17 (Souter, J., concurring); *see also* Amicus Br. of Dr. Daniel L. Akin 1; Amicus Br. of Jewish Social Policy Action Network 6. It is no surprise that the lower courts have generally refused to draw a constitutional line between "sectarian" and "nonsectarian" prayer. *See Rubin*, 710 F.3d at 1100; *Pelphrey v. Cobb Cnty*., 547 F.3d 1263, 1272 (11th Cir. 2008).

Respondents attempt to avoid these problems by asking the Court to rule that only "[o]bviously sectarian" references are unconstitutional. Resp. Br. 50-52. This argument is fatally flawed for at least two reasons.

First, respondents' view of what constitutes "obviously sectarian" references would disfavor religions (like Christianity) whose specific theological references are easier for courts to identify and expunge.

Second, once the Court decreed certain "obviously sectarian" references out of bounds, it is a virtual certainty that the courts would immediately become embroiled in more difficult cases that "invite the courts to engage in comparative theology." *Lee*, 505 U.S. at 616 (Souter, J., concurring). This is not difficult to imagine. For example, respondents declare that references to Allah are easily classified as "sectarian." Resp. Br. 53. But at least one court has reached the opposite conclusion. *Hinrichs v. Bosma*, No. 05-813, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005). And one of the respondents was unsure of the answer herself at her deposition. Pet. App. 45a.

Courts fashioning remedies in such cases would assume the role of official censor, framing injunctions that prohibit prayer-givers from using terms like "Messiah," "Allah," "Buddha," or "Father" based on the court's subjective perception of what constitutes "sectarian" content. Simply put, the judiciary is not suited for such a task, nor do our constitutional traditions allow it.

If respondents' "nonsectarian" test were to become the law, countless deliberative bodies in this country—from both houses of Congress, to all fifty state legislatures, to innumerable counties and municipalities—would have their prayer practices subjected to intricate judicial regulation and wordsmithing. Such an outcome would "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions," and "could thereby create the very kind of religiously based divisiveness

that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). This Court should decline respondents' invitation. It should instead reaffirm *Marsh* and uphold the Town's prayer practice as consistent with the unbroken history of legislative prayer since the Founding.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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