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 *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENT

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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.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law[1] (the Foundation) is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God, especially when exercised by public officials. The Foundation encourages the judiciary and other branches of government to return to the historic and original interpretation of the United States Constitution and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, the recitation of the Pledge of Allegiance, and other public acknowledgements of God. The Foundation has filed several amicus briefs in federal circuit courts around the country defending the constitutionality of public prayer in legislative bodies.

The Foundation has an interest in this case because it believes that prayer by or for legislative and other policy-making bodies constitutes one of the many public acknowledgements of God that have been

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[1] Pursuant to this Court's rule 37.3, all parties have consented to the filing of this amicus brief. Further, pursuant to Rule 37.6, this amici curiae states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

espoused from the very beginning of the United States as a nation without violating the United States Constitution. The Foundation believes that the government should encourage such acknowledgments of God because He is the sovereign source of American law, liberty, and government. This brief primarily focuses on whether the Court should determine the constitutionality of legislative prayers based on the nonsectarian nature of the prayers and whether the Town of Greece's practices in choosing someone to lead prayer was a violation of the Establishment Clause.

SUMMARY OF ARGUMENT

When courts and local officials attempt to distinguish between sectarian and nonsectarian prayers and censor out the former, they embark upon a slippery slope of entanglement with religion, prefer some religions over others, and engage in theological exercises in which they have neither expertise nor jurisdiction. Demanding that the government allow only nonsectarian legislative prayers also risks the establishment of a "civic religion," which the Supreme Court has expressly forbidden. Accordingly, the Court should refuse to determine the constitutionality of legislative prayers on the basis of whether or not they are nonsectarian. The Court should take into consideration the fact that legislative prayer and other acknowledgements of God by the branches of our government are deeply embedded in American history and traditions.

Furthermore, that the prayers offered at the Town of Greece's board meetings were predominantly Christian does not mean that the Town must alter its prayer-giver selection process by soliciting volunteers outside town borders. Asking the town for such

"affirmative action" exceeds the requirements of the Establishment Clause. The Town of Greece did not spitefully exclude members of other religions from giving prayer. On the contrary, the Town accepted volunteers from all faiths. That the majority of the prayers given at this town's board meetings were Christian prayers simply reflects the religious makeup of the town of Greece, which would no doubt differ in other cities.

Greece's Town Board meeting prayers seek God's favor and express an American view of law and government. As such, these prayers are not an establishment of religion. They are merely a demonstration of the philosophy upon which our nation was founded.

ARGUMENT

I. DISTINGUISHING "SECTARIAN" FROM "NON-SECTARIAN" PRAYERS FAVORS SOME RELIGIONS OVER OTHERS AND LEADS TO A JUDICIAL QUAGMIRE WHICH THE COURT HAS NEITHER JURISDICTION NOR EXPERTISE TO NAVIGATE.

Some circuits have chosen to determine the constitutionality of legislative prayers based on whether or not the prayers are sectarian. *See, e.g., Joyner v. Forsyth County, North Carolina*, 653 F.3d 341, 347 (4th Cir. 2011); *Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006). The Second Circuit correctly chose to avoid ruling on the basis of this distinction. However, Amicus will address this issue because Galloway has raised this issue at the district and circuit court levels, and the issue may be raised at the Supreme Court level as well.

A ruling that permits nonsectarian prayer but prohibits sectarian prayer puts judges and other government officials in the difficult position of defining "sectarian" and, even more difficult, drawing a line between sectarian and nonsectarian. James Madison, a primary author of the First Amendment, recognized this danger in 1784 when he spoke against religious assessments, a proposal in the Virginia House of Burgesses to impose a tax, the proceeds of which were for the support of "Christian" clergy. Madison's notes from one of his speeches on the religious assessments bill were as follows:

> 3. What is [Christianity]? Courts of law to Judge. …
>
> 7. What sense the true one for if some doctrines be essential to [Christianity] those who reject these, whatever name they take are no [Christian] society?
>
> 8. Is it Trinitarianism, Arianism[2], Socinianism[3]? Is it salvation by faith or works also, by free grace or by will, &c, &c.
>
> 9. What clue is to guide Judge thro' this labyrinth when ye question comes before them whether any particular society is a [Christian] society?

James Madison, 1784, reprinted by Norman Cousins, *In God We Trust*, 302-04 (Harper and Brothers 1958). Madison's point was that if the State of Virginia was going to give the proceeds of this assessment to "Christian clergy," then the State of Virginia would

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[2] An heretical doctrine that Christ was divine but not equal to the Father.

[3] Similar to Unitarianism.

have to define who is and who is not a Christian. If a Roman Catholic priest asked for his share of the subsidy, should he receive it? Some Protestants in Madison's time would have denied that Roman Catholics are Christians. Would an Arian or a Socinian be defined as a Christian for subsidy purposes? What about a person who believes salvation is by works rather than by faith? Judges and state officials have neither the jurisdiction, nor in many instances, the competence to determine who is and who is not a Christian.

Thomas v. Review Board of Indiana Employment Sec. Division, 405 U.S. 707, 714-16 (1981), involved a Jehovah's Witness who worked in a steel foundry and who was fired because he refused to build tank turrets. He was denied unemployment compensation because, his employer said, he was fired for misconduct, i.e., refusing to do the work he was ordered to do. Thomas claimed a free exercise violation, contending that work on tank turrets violated his pacifist religious convictions as a Jehovah's Witness. The lower court held that his objections to working on tank turrets were personal and philosophical, not religious, because (1) Jehovah's Witness doctrine forbade serving in the military and participating in war but said nothing about working on tank turrets; (2) a fellow Jehovah's Witness testified that he worked on tank turrets for the same foundry, saw no conflict between that work and his Jehovah's Witness religious beliefs, and had not been admonished or disciplined by the Jehovah's Witnesses for doing so; and (3) Thomas said he did not object to working in other parts of the foundry refining steel that would ultimately be used for tank turrets. However, the Supreme Court reversed and ruled for Thomas, saying at 715-16:

In reaching its conclusion, the Indiana court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs, and that he was not able to "articulate" his belief precisely. It noted, for example, that Thomas admitted before the referee that he would not object to

> working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . .

271 Ind. at ___, 391 N.E.2d at 1131. The court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a

> particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. *Courts are not arbiters of scriptural interpretation.* [Emphasis added]

Determining whether a prayer is sectarian or nonsectarian requires councilmen, commissioners, judges, legislators, and other public officials to become "arbiters of scriptural interpretation," church doctrine, and other matters that are beyond their jurisdiction and often beyond their competence.

First, they must define "sectarian." A "sect" is defined as "a subdivision within a larger religious group." *The American Heritage Dictionary of the English Language* (Houghton Mifflin 1969, 1976) defines "sect" as "a group of people forming a distinct unit within a larger group by virtue of certain refinements or distinctions of belief or practice" and "sectarian" as "pertaining to or characteristic of a sect or sects." *Black's Law Dictionary, 7th Ed.* (West 1999) defines "sectarian" as "of or relating to a particular religious sect."

Using these definitions, Christianity, Judaism, Islam, Buddhism, and others are religions, not sects. Sects within Christianity would include Roman Catholicism, Lutheranism, Methodism, Presbyterianism, etc; sects within Judaism might include Reformed, Conservative, and Orthodox; sects within Islam might include Sunni and Shiite; sects within Buddhism might include Zen, Mahayana, and others.

Under this definition of sect, using the name of Jesus Christ in a prayer would not be "sectarian." Using the Anglican *Book of Common Prayer*, the Augsburg Confession of Lutheranism, the Catechism of the Roman Catholic Church, or other such documents might be sectarian. But if a policy singles out Christianity and prohibits prayer in the name of Jesus but does not prohibit prayer in the name of the God of Abraham, Isaac, and Jacob, that policy discriminates against the Christian religion.

Once a court or other government official has defined sectarian, he/she must then determine whether a particular prayer has crossed that fine and gray-clouded line and has become sectarian. If we decide that all prayer "in the name of our Lord and Savior Jesus Christ" is sectarian, then would a prayer that merely mentions "Jesus" also be sectarian? Many religions outside the pale of Christianity respect Jesus as a teacher and as a person. Would a prayer in the name of "the Messiah of Israel" be considered sectarian? What about a prayer that contains phraseology from the Old or New Testament? Would a prayer be sectarian if it does not mention Jesus Christ but incorporates elements of Christian theology like the grace of God, intercession, forgiveness for sin, providence in history, miraculous power, or answers to prayer? Neither public officials, such as Town Board

members, nor judges have the jurisdiction or competence to "parse" these prayers. Leading theologians, even theologians of the same religion or denomination, might disagree as to where to draw this line. Furthermore, if judges immerse themselves in distinguishing sectarian from nonsectarian prayers, they risk fostering the excessive entanglement of government with religion that, according to *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the Establishment Clause was intended to avoid.

Those who pray in the name of Jesus Christ generally do not do so to proselytize; they do so out of obedience to God and His commands as they understand them. Jesus said:

> Verily, verily, I say to you, Whatever ye shall ask the Father in my name, he will give it to you. Hitherto ye have asked nothing in my name: ask, and ye shall receive, that your joy may be full. (*John* 16:23-24 (KJV)).

Many have interpreted this and other passages as commands to pray in the name of Jesus. The *Catechism of the Catholic Church* 702 (Doubleday Edition 1995) provides, "there is no other way of Christian prayer than Christ. Whether our prayer is communal or personal, vocal or interior, it has access to the Father only if we pray 'in the name' of Jesus." Lutheran scholar Francis Pieper, whose four volume systematic theology text *Christian Dogmatics* (Concordia Publishing House 1953, 1970) has been used in seminaries to train thousands of Lutheran pastors, states, "[P]rayer presupposes justifying faith. Only faith in the forgiveness of sins for Christ's sake makes prayer a prayer 'in the name of Christ,' and only prayer in the name of Christ has God's command and promise (John 16:23; 14:13-14)." Pieper, 3

Christian Dogmatics at 80. Writing from a Calvinist Presbyterian perspective, Robert L. Dabney in his *Systematic Theology* 713 (Banner of Truth 1871, 1995), writes that praying in the name of Jesus is part of the very definition of prayer: "Prayer is an offering up of our desires unto God for things agreeable to His will, *in the name of Christ*, with confession of our sins, and thankful acknowledgment of his mercies." (Emphasis added). Many more statements from various Christian traditions and denominations could be similarly cited. Taken together, they represent a large portion of Christianity.

While other Christians may hold a different view and believe it is permissible to lead in prayer without mentioning Jesus Christ, the previous examples demonstrate that large numbers of Christians believe, based on the Bible and the teachings of their respective denominations, that all prayer must be in the name of Jesus. A clergyman or other person who holds this belief would violate his own conscience, what he or she perceives to be the command of God, and the doctrine of his or her church, if he or she were to pray without using the name of Jesus Christ. Inviting a member of the clergy to pray before a Town Board meeting but telling that person that he or she may not pray in the name of Christ, forces that clergyperson to either (1) decline the invitation to pray, or (2) disobey the perceived command of God and of his or her religious faith. Generally, the Court has not allowed the government to force individuals to sacrifice their religious convictions in this way.

For example, *Sherbert v. Verner*, 374 U.S. 398 (1963), involved a Seventh Day Adventist who was fired from her job because, in obedience to her religious convictions, she could not work on Saturdays. The

State of Indiana denied her claim for unemployment compensation, claiming that she had been fired for misconduct, i.e., refusing an order to work on Saturdays. But this Court reversed, holding that

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.
>
> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right," but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Id. at 404. Citing *Speiser v. Randall*, 357 U. S. 513, *Sherbert* further noted that "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, a to inhibit or deter the exercise of First Amendment freedoms," *Id.* at 405, and that "the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression, and thereby threatened to 'produce a result which the State could not command directly.'" *Id.* at 405.

Likewise, in *McDaniel v. Paty*, 435 U.S. 618, 626 (1978), this Court invalidated a provision of the

Tennessee Constitution which prohibited clergymen from holding public office, because "it conditions his right to the free exercise of his religion on the surrender of his right to seek office." As the Court further stated at 641, "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here; *Abington School Dist. v. Schempp*, 374 U. S. 203, 222 (1963). It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life."

The case at hand is similar. Some might argue that no one has a "right" to pray at a town board meeting. However, if the town board calls upon religious leaders to pray at board meetings, it cannot arbitrarily refuse to consider a religious leader for selection to pray solely because that person's religious convictions compel him or her to pray in the Name of Jesus Christ, just as holding public office is not a constitutional right but the State of Tennessee may not arbitrarily prohibit a person from running for public office solely because that person exercises his/her free exercise right to serve as a clergyperson.

Some claim that praying in the name of Jesus sends a message of exclusion to those who do not believe in Christ, telling them that they are not fully part of the community. In the same way, forbidding a person from leading in prayer because that person believes prayer must be in the Name of Jesus sends a similar message of exclusion to that person, telling him or her that he or she is not fully part of the community. To prevent a message of exclusion to anyone, the Town Board has chosen the side of religious freedom in prayer, allowing prayer givers to volunteer and pray as they

are led. The Constitution does not give judges the authority or the capacity to veto or alter that decision.

Additionally, the Second Circuit is correct in asserting that *Marsh v. Chambers*, 463 U.S. 783 (1983), does not require legislative prayers to be nonsectarian. In fact, *Marsh* upheld the constitutionality of a legislative prayer practice that was in many ways more narrowly "sectarian" than the prayers in the town of Greece. In *Marsh*, the same Presbyterian minister, paid by the taxpayers, opened the Nebraska legislature sessions with prayer for sixteen years.[4] In contrast, different pastors were invited or permitted to pray at the town of Greece's board meetings, and they received no compensation for doing so. The town accepted volunteers from all denominations and never rejected a request to lead prayer. Some cases seem to accept *Marsh*'s ruling on the grounds that the minister removed all references to Christ after a legislator complained. *See Allegheny County v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989). Even the Second Circuit agrees, however, that this does not mean that "any *single* denominational prayer has the forbidden effect of affiliating the government with any one faith." *Galloway v. Greece*, 681 F.3d 20, 29 (2nd Cir. 2012), emphasis original.

The Supreme Court has held the Establishment Clause to mean that the government can have no

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[4] We should add that Chaplain Palmer did not always pray in the Name of Jesus Christ and that at times he invited other religious leaders to lead the prayers. Nevertheless, it was recognized by all that Chaplain Palmer was the official chaplain of the Legislature, that he was a professing adherent of the Christian religion and of the Presbyterian sect/denomination, and that his predecessor was also a Presbyterian clergyman.

official preference, even for religion over non-religion. *Allegheny County*, 492 U.S. at 605. At the same time, the Court should not license the government to prefer non-religion over religion by requiring legislative prayers to adhere to a nebulous definition of "non-sectarian." For the Court to ask the government to show "callous indifference" toward religious groups is the equivalent of a governmental preference for no religion over religion. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). The Court has also interpreted the establishment clause to mean that the government cannot prefer one sect or creed over another. *Allegheny County*, 492 U.S. at 605. For the Court to mandate that legislative prayers must be nonsectarian is a preference in itself—it is a preference for nonsectarian prayers over those that are sectarian. When a school principal advised a rabbi that his prayer before the school must be nonsectarian, the Court interpreted this as the government attempting to compose an official prayer and reiterated that the prohibition of government from doing this is a "cornerstone of our Establishment Clause jurisprudence." *Lee v. Weisman*, 505 U.S. 577, 588 (1992). And in *Engel v. Vitale*, 370 U.S. 421 (1962) at 430, striking down the use of a 22-word nonsectarian prayer ("Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us our parents, our teachers and our Country"), this Court stated that government "is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."

As the Second Circuit recognized, deciding the constitutionality of legislative prayers based on whether they are sectarian or nonsectarian risks the establishment of a "civic religion." *Greece*, 681 F.3d at 28-29. The Supreme Court has explicitly rejected the

idea that the government "may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Lee*, 505 U.S. at 590. Nor may the State establish a "religion of secularism" by affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." *School Disrict of Abington v. Schempp*, 374 U.S. 203, 225 (1963), citing *Zorach*, 343 U.S. at 314. The Supreme Court has also recognized that a doctrine need not teach a belief in the existence of God to be considered a religion:

> Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.

Torcaso v. Watkins, 367 U.S. 488, n.11 (1961), citing *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (1957). Thus, simply because a prayer does not mention God does not exempt it from being a religious prayer. The confusion that a distinction between sectarian and nonsectarian prayers would cause is simply not navigable for anyone, and the Court should not use it as a basis for deciding the constitutionality of legislative prayers.

Ironically, the middle school graduation prayer in *Lee v. Weisman* was declared unconstitutional precisely because the school tried to make the graduation prayer nonsectarian. Rabbi Leslie Gutterman had been invited to give the invocation at the graduation. In keeping with the policy of past graduations, school principal Robert E. Lee gave Rabbi Gutterman a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians

and Jews. As the Court said, "The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be nonsectarian." *Lee*, 505 U.S. at 581. The Court went on to say:

> The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," *Engel* v. *Vitale*, 370 U. S. 421, 425 (1962), and that is what the school officials attempted to do.
>
> Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or

> images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

The dilemma is apparent: If the State allows sectarian prayers, the courts will hold that to be a government establishment of religion. If the State directs nonsectarian prayers, the courts will hold that to be a government attempt to dictate the content of prayers. And yet, as this Court has made clear and as the Second Circuit acknowledges, prayer is not forbidden. The best solution is for officials to devise a fair and inclusive means of selecting people to give prayers and to leave the content of the prayers to those who give them – precisely what the Town of Greece has done here.

II. AMERICAN HISTORY DEMONSTRATES THAT PRAYER BY PUBLIC FIGURES IN PUBLIC SETTINGS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

As this Court recognized in *Marsh*, 463 U.S. at 786,

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since,

> the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

The Court further noted at 787 that the Continental Congress had paid chaplains to lead in prayer and that the each House of the First Congress of 1789 – the same Congress that adopted the First Amendment – adopted a policy of selecting a chaplain to open each session with prayer.

The Second Circuit found it both "relevant" and "worthy of weight" that those who prayed before Greece's town board meetings "appeared to speak on behalf of the town and its residents . . . " *Greece*, 681 F.3d at 32. While the Second Circuit considered these facts as further contextual support that the town acted unconstitutionally, "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). This Court itself has acknowledged the role of religion in our society. *See e.g.*, *Schempp*, 374 U.S. at 212 ("Religion is closely identified with our history and our government."); *Zorach*, 343 U.S. at 313 ("We are a religious people whose institutions presuppose a Supreme Being."). Even the Court's previous case involving legislative prayer held, "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment'

of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

Invocation of the Almighty by our public figures, at all levels of government, remains commonplace. *McCreary County, Kentucky. v. ACLU of Kentucky.*, 545 U.S. 844, 888-89 (2005) (Scalia, J., dissenting). The executive has acknowledged God officially with the words "so help me God" in the Presidential oath, words that George Washington himself added. *Id.* at 886 (Scalia, J., dissenting), citing Blomquist, The Presidential Oath, the American National Interest and a Call for Presiprudence, 73 UMKC L.Rev. 1, 34 (2004). In addition to the Presidential oath, presidents have specifically invoked help and guidance for the country through prayer. George Washington opened his presidency with prayer. *McCreary County*, 545 U.S. at 887 (Scalia, J., dissenting), citing *Inaugural Addresses of Presidents of the United States*, 1-2, 1989. On October 3, 1789 during the National Day of Thanksgiving Proclamation, George Washington addressed the nation saying, "It is the duty of all nations to acknowledge the providence of the Almighty God." After opening his presidency with prayer, President Washington ended his presidency by reminding his fellow citizens that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." *McCreary County*, 545 U.S. at 887 (Scalia, J., dissenting), citing Farewell Address (1796), reprinted in 35 *Writings of George Washington* 229 (J. Fitzpatrick ed.1940).

Numerous other Presidents have officially acknowledged God through prayer or official addresses to the

people of the nation. In President Lincoln's Proclamation Appointing a National Fast Day, he stated, "It is the duty of nations as well as of men, to own their dependence upon the overruling power of God…" (March 30, 1863). Additionally, Thomas Jefferson concluded his second inaugural address not only by praying, but also by inviting the audience to pray. *McCreary County*, 545 U.S at 888 (Scalia, J., dissenting), citing *Inaugural Addresses of the Presidents of the United States*, at 18, 22–23. James Madison also prayed at his first inaugural address. *McCreary County*, 545 at 888 (Scalia, J., dissenting), citing Inaugural Addresses of the Presidents of the United States, at 25, 28. Franklin Roosevelt suggested "a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas" so that "we may bear more earnest witness to our gratitude to Almighty God." *Allegheny County*, 492 U.S. at 671 (Kennedy, J., dissenting), citing Presidential Proclamation No. 2629, 58 Stat. 1160.

Like both the Executive and Judicial branches, the Legislative branch has a history of acknowledging the role of prayer in our government. In fact, the First Congress began the practice of opening legislative sessions with prayer. *McCreary County*, 545 U.S. at 886 (Scalia, J., dissenting), citing *Marsh*, 463 U.S. at 787-88. Seventeen members of that First Congress were Delegates to the Constitutional Convention, where freedom of religion and antagonism toward an established church were frequently discussed. *Lynch*, 465 U.S. at 674, citing *Marsh*, 463 U.S. 783.

The very week that Congress submitted the Bill of Rights for the States to ratify, including the Establishment Clause, it enacted legislation providing for paid chaplains. *McCreary County*, 545 U.S. at 886

(Scalia, J., dissenting), citing *Marsh*, 463 U.S. at 788. In examining the constitutionality of the congressional chaplaincy in 1863, a Senate Judiciary Committee Report stated, "Our Fathers did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators." Additionally, the day after First Amendment was proposed, Congress requested the President to proclaim "a day of thanksgiving and prayer to be observed by acknowledging, with grateful hearts, the many and signal favors of Almighty God. *McCreary County*, 545 U.S. at 886 (Scalia, J., dissenting), citing H.R. Jour. 1st Cong. 1st Sess. 123 (1826 ed). Sen. Jour. 1st Sess. 88 (1820 ed.). That the very men who penned the Establishment Clause approved and practiced legislative prayer proves that legislative prayer is not a constitutional violation.

Continuing the traditions of the First Congress, Congress today recognizes the importance of legislative prayer. Congress still employs a legislative chaplain. 2 U.S.C. § 61d. In addition to providing a legislative chaplain, there is also a special prayer room for members of the House and Senate. *Allegheny County*, 492 U.S. at 672 (Kennedy, J., dissenting). Choosing not to stop there, Congress has directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." *Id*.

III. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE THE TOWN OF GREECE TO LOOK BEYOND ITS BOUNDARIES TO FIND RELIGIOUS LEADERS TO LEAD IN PRAYER.

The Second Circuit found that the prayer policy of the Town of Greece, considering the totality of circumstances, must be viewed as the endorsement of the Christian religion. They reached this conclusion largely because the Town selected religious leaders to pray "almost exclusively from places of worship located within the town's borders." *Greece*, 681 F.3d at 31. The Court continued, "The town failed to recognize that its residents may hold religious beliefs that are not represented by a place of worship within the town. Such residents may be members of congregations in nearby towns or, indeed, may not be affiliated with any congregation." *Id.*

The very use of the word "may" three times in these two sentences demonstrates the conjectural nature of the Court's concern. The Court cites no evidence, on or off the record, that any town residents did not find their beliefs represented by religious establishments within the town, that any were associated with religious organizations elsewhere, or that any of them had ever expressed any concern that the prayers offered at the Town Board meetings did not represent them, other than Galloway or Stephens. Amicus respectfully submits that the question of going beyond the town's borders is not at issue in this case and should not be considered unless and until a plaintiff presents evidence that some town residents worship at religions establishment outside the town borders and contend that those who are chosen to pray do not represent them.

The Second Circuit did not dispute the District Court's finding that "the plaintiffs had failed to advance any credible evidence that town employees intentionally excluded representatives of particular faiths." *Id.* at 25. The Circuit acknowledged that "anyone may request to give an invocation, including adherents of any religion, atheists, and the non-religious, and that it has never rejected such a request." *Id.* at 23. The Circuit concluded, "We ascribe no religious animus to the town or its leaders." *Id.* at 32. In fact, the Town has done as much as anyone could reasonably expect it to do to ensure that the prayer policy does not exclude anyone who wants to be included.

As the Town Board became aware of constitutional concerns, they broadened their policy. At first, one Town Supervisor Auberger invited people to lead in prayer. Then they used the list of places of worship in the Town's Community Guide to invite clergy. Then they began inviting religious leaders from places of worship not listed in the Community Guide and accepted requests from others who asked to lead in prayer. Those who have prayed in recent years include Christians, Jews, Baha'i, and a Wiccan priestess. Still other non-Christians have been invited.

If the prayers offered at Town Board meetings are predominantly Christian, that reflects only the fact that Greece is a predominantly Christian town. If the city councils of Berkeley, California, or of San Francisco, California, were to adopt the same prayer policy as Greece, the prayers offered at council meetings in Berkeley and San Francisco would undoubtedly be more cosmopolitan than those of Greece. Surely that does not mean that Berkeley and San Francisco can have prayer but Greece cannot, or that

Berkeley and San Francisco may use this policy but Greece must find another formula.

The Court's conclusion that the Town must go beyond its borders to publicly solicit prayer-givers from other religions or denominations, exceeds anything the First Amendment requires and, so far as *Amicus* can determine, anything any court has ever required before. "Affirmative action" may be permitted under the Equal Protection Clause; it is not required under the Establishment Clause. The Second Circuit has no authority to require this, and this Court should not sustain its attempt to do so.

IV. THE PRAYERS AT THE GREECE TOWN BOARD MEETINGS REFLECT A LONG AND UNBROKEN NATIONAL TRADITION OF OPENING PUBLIC DELIBERATIVE MEETINGS WITH PRAYER.

In *Marsh v. Chambers* at 792, this Court said that to "invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." It also reflects a long and unbroken national tradition.

The Declaration of Independence of 1776 recognized the "Laws of nature and of nature's God" as the basis for American independence, creation by God as the basis for equality, and the rights of life, liberty, and happiness as endowed by the Creator. As the Constitutional Convention opened on 25 March 1787, Convention President George Washington told the delegates,

> Let us raise a standard to which the wise and honest may repair. The Event is in the hand of God.[5]

On 28 June 1787 Benjamin Franklin noted that during the War for Independence, "when we were sensible of danger we had daily prayer in this room [in Independence Hall] for the divine protection. Our prayers, Sir, were heard, and they were graciously answered." He then said:

> I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth- that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings, that "except the Lord build the House they labour in vain that build it." I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel.

As noted earlier, on October 3, 1789 in his National Day of Thanksgiving Proclamation, George Washington addressed the nation saying, "It is the duty of all nations to acknowledge the providence of the Almighty God." President Thomas Jefferson said in his Second Inaugural Address,

> I shall need the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land, and planted

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[5] George Washington, March 25, 1787, as quoted by Gouverneur Morris in Max Farrand, *Records of the Federal Convention of 1787.*

> them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with providence, and our riper years with his wisdom and power; and to whose goodness I ask you to join with me in supplications that He will so enlighten the minds of your servants, guide their counsels, and prosper their measures, that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations. ...

In 1853 the Senate Judiciary Committee prepared a comprehensive study concerning the meaning of the Establishment Clause concerning the constitutionality of the Congressional chaplaincy:

> The clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was. It was the connection with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances. These three particulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided. ... Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended,

> by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; *they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends;* they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of 'atheistical apathy.' Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.

The Reports of Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress, 1852-53 (Washington, D.C.: Robert Armstrong, 1853) pp. 1-4. Senate Rep. No. 32-376 (1853) (emphasis added).

Having a clergyman come to the courtroom to lead the jury in prayer, was a common practice in early American courtrooms around the time of the drafting and ratification of the United States Constitution and the First Amendment (1787-81). In the early years after the Constitution was ratified, the Supreme Court was in session for only a few months out of the year,

so the Judiciary Act of 1789 gave Supreme Court Justices the added responsibility of presiding over the various federal circuit courts. John Jay was the first Chief Justice of the United States Supreme Court (1789-95) and an author of *The Federalist Papers* along with Alexander Hamilton and James Madison. A Connecticut judge, Richard Law, wrote to Chief Justice Jay on February 24, 1790, asking for guidance on how the new federal courts should be conducted. The letter is printed in the *Documentary History of the Supreme Court of the United States, 1789-1800*.[6]

> ...whether they would wish to give any Directions relative, to the preparation for their Reception in point of Parade, Accomidations or the like whether, any uniformity particularly Formalities of Dress is expectable, whether they would wish to have a Clergiman attend as Chaplin, as has been generally the Custom in the New England States, upon such Occasions.[7]

Chief Justice Jay answered Judge Law on March 10, 1790:

> It appears to me adviseable to respect ancient usages in all Cases where Deviations from them are not of essential importance. In my opinion the Judges on the Circuits should in the first Instance be recd in the Manner acustomed with respect to the Judges of the

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[6] *Documentary History of the Supreme Court of the United States*, Maeva Marcus, ed. (New York: Columbia University Press, 1988. Amicus has preserved the original spellings in most instances.

[7] *Id.* Vol. II p. 11.

> State sup. Courts__ If alterations should be expedient, they may be better introduced afterwards.
>
> No particular Dress has as yet been assigned for the Judges on the circuits. *The custom in New England of a clergyman's attending, should in my opinion be observed and continued.* For accommodations I presume there can be no Difficulty in any of the towns in which the Courts are to be held in New England__ I wish to lodge in a clean orderly Inn, for as to the Manner in which the Table may be served, it is among the least and last of my Cares. I thank you Sir![8]

It is significant that on some matters Jay said no determination had been made, on others he did not care, and on others it was best to follow the local usage at first and possibly deviate from it later. But on one matter Jay was clear and emphatic: The practice of clergy leading the jury in prayer should be not only "observed" but also "continued." At the time he wrote, Chief Justice Jay undoubtedly was aware that the First Amendment had been approved by Congress the previous year (1789) and was in the process of being ratified by the states.

And in fact the practice did continue, as early court records demonstrate:

> Circuit Court for the District of Massachusetts
>
> November 3, 1790 Boston, Massachusetts

[8] *Id.* II:13 (emphasis added).

> The circuit court for Massachusetts opened on November 3, with Chief Justice John Jay, Associate Justice William Cushing, and Judge John Lowell in attendance. After the usual forms were gone through with, and the Grand-Jury impannelled, an excellent CHARGE was given them, by the Chief-Justice, and the Throne of Grace was addressed in prayer, by the Rev. Dr. STILLMAN. On November 5, the court adjourned to the next term.[9]

Court proceedings commonly were published in a local newspaper, and the *Documentary History of the Supreme Court of the United States, 1789-1800* contains this entry from a newspaper account:

> Procession was formed at the Senate-Chamber, and proceeded therefrom in the following order:
>
> Eight Constables, with staves.
>
> Deputy-Marshals BRADFORD and THOMAS.
>
> Marshal JACKSON.
>
> CHIEF JUDGE JAY.
>
> Judge CUSHING –Judge LOWELL
>
> Attorney of the U.S. – Attorney-General of this State.
>
> CLERK. – Rev. Mr. WEST.
>
> Barristers, Counsellors, other Gentlemen of the Bar,
>
> and Citizens, two and two.

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[9] *Id.* II:105.

> The procession having arrived at the Court-House, and the usual Proclamations being made – a very respectable Grand Jury was sworn, (of which Mr. THOMAS HARRIS, of *Charlestown*, was appointed Foreman) – After which the CHIEF JUSTICE delivered to them a short and elegant extempore Charge. ...
>
> [The account then summarized Chief Justice Jay's charge to the Grand Jury.] ...
>
> The Throne of Grace was then addressed in prayer, by the Rev. Mr. WEST.[10]

The following account was published in the *New-Hampshire Gazette* (Portsmouth), May 26, 1791:

> Circuit Court for the District of New Hampshire
>
> May 24, 1791 Portsmouth, New Hampshire
>
> Pursuant to law, court convened with Chief Justice Jon Jay, Associate Justice William Cushing, and Judge John Sullivan in attendance. "After the customary proclamations were made and the Grand Jury sworn – a short, though pertinent charge was given them by his Honor the Chief Justice – when the throne of Grace was addressed by the Rev. Dr. Haven." The court adjourned on May 26 to the next term.[11]

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[10] *Id.* II:165.

[11] *Id.* II:192.

Another such account appears in the *Columbian Centinel* November 16, 1791:

> November 16, 1791 Boston, Massachusetts
>
> On Monday last the Circuit Court of Massachusetts District, opened in this town, before the Ho. Chief Justice JAY, and Judge LOWELL. After the customary formalities were over, the Chief Justice gave a short and elegant charge to the Grand-Jury. ...[The account then summarized Chief Justice Jay's charge.] ...
>
> After the charge, the Rev. Mr. Belknap addressed the Throne of Grace in prayer.
>
> Mr. JOHN GODDARD, of *Brooklyne*, was appointed Foreman of the Grand Jury, and Mr. JOHN CUTLER, of this town, Foreman of the Jury of Trials.[12]

The *Columbian Centinel* on May 16, 1792, reported that the Circuit Court for the District of Massachusetts opened on Saturday, May 12, with Chief Justice John Jay, Associate Justice William Cushing, and Judge John Lowell in attendance. On Monday, May 14, Jay delivered a charge to the grand jury. Jay's charge was

> …replete with his usual perspicuity and elegance. The prayer was made by the Rev. Dr. PARKER. His Excellency the Vice President of the United States, was in Court.[13]

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[12] *Id.* II:231-32.

[13] *Id.* II:276.

After Supreme Court Justice James Wilson (a leading delegate to the Constitutional Convention) gave a charge to the Grand Jury for the Circuit Court for the District of Massachusetts on 7 June 1793, the *Columbian Centinel* reported that "After the Charge, the Rev. Dr. THACHER addressed the throne of Grace, in prayer."[14]

An entry from the *Providence Gazette* 16 November 1793 describes another court session:

> On Thursday, last Week, the Circuit Court of the United States was opened in this Town, before the Hon. Judge WILSON, and Judge MARCHANT. The Throne of Grace was addressed, in a Prayer well adapted to the Occasion, by the Rev. JAMES WILSON, Co-pastor of the Congregational Church on the West Side of the River; after which His Honour the presiding Judge delivered a pertinent and affecting Charge to the Grand Jury. ...[15]

Still another account of a New Hampshire Circuit Court session is found in the May 24, 1800 edition of the *United States Oracle* of Portsmouth, New Hampshire:

> On Monday last the Circuit Court of the United State was opened in this town.
>
> The Hon. Judge PATTERSON presided. After the Jury were empannelled, the Judge delivered a most elegant and appropriate Charge. – The *Law* was laid down in a masterly manner: *Politicks* were set in their

[14] *Id.* II:406.

[15] *Id.* II:430.

> true light, by holding up the Jacobins, as the disorganizers of our happy Country, and the only instrument of introducing discontent and dissatisfaction among the well-meaning part of the Community: – *Religion & Morality* were pleasingly inculcated and enforced, as being necessary to good government, good order, and good laws, for "when the righteous are in authority, the people rejoice." [quoting Proverbs 29:2] ...
>
> After the Charge was delivered, the Rev. Mr. ALDEN addressed the Throne of Grace, in an excellent, well adapted prayer.[16]

Furthermore, the Supreme Court did not limit its holding in *Marsh v. Chambers* to prayer in legislatures. Rather, as noted earlier, the Court declared that "[t]he opening of sessions of *legislative and other deliberative public bodies* [with prayer] is deeply imbedded in ... history ... ." *Marsh v. Chambers*, 463 U.S. at 786 (emphasis added). *Marsh* further noted that the practice of prayer continues in courts today:

> In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an Announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

Marsh, 463 U.S. at 786.

As Professor and Dean Robert J. Barth has noted in "Philosophy of Government vs. Religion and the First Amendment," *Oak Brook] Journal of Law and*

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[16] *Id.* III:436. These are only a few of many examples.

Government Policy V (2006), public recognition of God in the national pledge, national anthem, and other public documents or occasions is not an establishment of religion but rather the expression of the legal and political philosophy upon which the nation was established: that all persons are created by God and are therefore equal, that all are endowed by God with certain unalienable rights and therefore government is limited and must not infringe those rights, and that all are subject to the "laws of nature and of nature's God." The Supreme Court has sanctioned this philosophy in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), stating, "We are a religious people whose institutions presuppose a Supreme Being." Dissenting in *McGowan v. Maryland*, 366 U.S. 420 (1961), Justice Douglas quoted the Declaration of Independence and stated, "The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect." *Id.* at 562.

CONCLUSION

In conclusion, the Establishment clause is not meant to restrict any acknowledgement of God through prayer at government meetings but to protect the people from the establishment of a specific sect or denomination. The Second Circuit, and this Court in previous Establishment Clause cases, recognize that sectarian vs. nonsectarian prayer test is not a constitutional test for judges to decide what prayers are appropriate in a specific set of circumstances. If the courts are allowed to evaluate prayer then they are policing prayers, entangling themselves in religious matters and eroding the neutrality they claim to

protect. Secularism is not a neutral position but one of nonbelief, and governmental preference for nonbelief creates hostility toward religion and violates the establishment clause by favoring secularism over religious perspectives. True neutrality allows the presence of sincere prayer when requested and nonbelief to coexist; not the exclusion of one and the presence of another. Therefore this court should uphold the District Court's ruling on the Town of Greece prayer practice and reverse the ruling of the Second Circuit.

Respectfully submitted,

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