No.

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court upheld the practice of starting legislative sessions with an invocation, based on an "unambiguous and unbroken history" of legislative prayer dating back to the First Congress. *Id.* at 792. The prayers in *Marsh* were offered for sixteen years by the same paid Presbyterian minister and frequently contained explicitly Christian themes. *See id.* at 785, 793 n.14. Nonetheless, this Court held that such prayers are "simply a tolerable acknowledgment of beliefs widely held among the people of this country," and constitutional unless the selection of prayer-givers "stem[s] from an impermissible motive" or "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 792, 793, 794-95. The Court declined to apply the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In this case, the court of appeals held that the Town of Greece violated the Establishment Clause by allowing volunteer private citizens to open town board meetings with a prayer. Though the Town had never regulated the content of the prayers, had permitted any citizen from any religious tradition to volunteer to be a prayer-giver, and did not discriminate in selecting prayer-givers, the court struck down the Town's prayer practice, applying an "endorsement" test derived from *Lemon*. *See* App. 17a. The question presented is:

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.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was defendant-appellee below, is the Town of Greece, New York.

Respondents, who were plaintiffs-appellants below, are Susan Galloway and Linda Stephens.

In addition, John Auberger, the Town of Greece Supervisor, was a defendant in the district court in his official capacity. The claims against Mr. Auberger were dismissed by the district court and Respondents did not appeal that ruling. App. 9a-10a.

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

The Town of Greece, New York, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 681 F.3d 20. The order of the court of appeals denying rehearing *en banc* (App. 132a-133a) is unreported. The order of the district court (App. 28a-131a) is reported at 732 F. Supp. 2d 195.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2012. The court of appeals denied the petition for rehearing *en banc* on August 8, 2012. On October 17, 2012, Justice Ginsburg extended the time within which to file a petition for certiorari to and including December 6, 2012. No. 12A366. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech[.]

U.S. Const. amend. I.

STATEMENT

This petition presents the question whether a legislative body can allow private citizens to offer an

invocation of their choosing at the start of each session to solemnize the proceedings, consistent with two centuries of tradition of legislative prayer in the United States and this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983).

The Town of Greece has a policy whereby any citizen of any faith (or of no faith) may volunteer to give the invocation at the beginning of Town Board meetings, and that policy has resulted in invocations reflective of the faith communities in the Town—including prayers with Christian, Jewish, and Bahá'í references. When two town citizens challenged this practice under the Establishment Clause, the district court concluded—based on *Marsh*—that the practice was permissible. The court of appeals, however, relying on dictum in this Court's decision in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), applied an "endorsement" test and concluded that the proportion of Christian prayers to non-Christian prayers could be viewed by an "ordinary, reasonable observer" as affiliating the Town with the Christian faith. App. 17a, 19a.

The courts of appeals are hopelessly divided over whether legislative-prayer practices should be analyzed under *Marsh*'s historical test or instead under an "endorsement" test derived from *County of Allegheny*. Legislative bodies—from Congress, to state legislatures, to municipal boards—lack sufficient guidance as to which prayer practices are permissible, despite this Court's pronouncement nearly thirty years ago that legislative prayers are generally permissible and, indeed, have become "part of the fabric of our society." *Marsh*, 463 U.S. at 792. Certiorari is warranted to resolve the conflict in authority among the courts of appeals and to clarify that *Marsh*'s

holding, not *Allegheny*'s dictum, provides the proper standard for evaluating legislative prayer.

I. THE TOWN OF GREECE'S LEGISLATIVE PRAYER PRACTICES

Since 1999, the Town of Greece has allowed its citizens to open monthly board meetings with a prayer. App. 29a. To identify potential prayer-givers, the Town telephoned clergy from religious communities in the Town, using a list in the Community Guide, a publication of the Greece Chamber of Commerce. App. 31a. The Town then created a list of clergy who had accepted an invitation to offer a prayer, which the Town periodically updated based on requests from community members and new listings in both the Community Guide and a local newspaper. App. 5a. Town employees would work their way down the list in advance of each meeting until they found someone willing to give the invocation. *Id*.

The Town also allowed any citizen to volunteer to deliver an invocation, and never rejected such a request. App. 4a. Members of many different religious traditions accepted the opportunity to offer a prayer, including Catholics, Protestants from several denominations, a Wiccan priestess, the chairman of a local Bahá'í congregation, and a lay Jewish man. App. 125a. Under the Town's policy, atheists and non-believers were equally welcome to volunteer to give an invocation. *Id*.

The Town has never had any guidelines concerning the appropriate content for a prayer, nor has the Town ever asked to review the wording of any prayers before their delivery. App. 29a-30a. Roughly two thirds of the prayers included uniquely Christian references; others spoke in "generically theistic

terms." App. 7a. Some prayers contained specific references to other faith traditions: the Jewish lay-person referred to "David, your [*i.e.*, God's] servant," the Bahá'í prayer-giver offered the Bahá'í greeting "Alláh-u-Abhá," and the Wiccan priestess referred to Athena and Apollo. *Id*.

Respondents, who periodically attend Town meetings, complained to Town officials starting in September 2007 that the prayers "aligned the [T]own with Christianity" and "were sectarian rather than secular." App. 8a. In response to these concerns, Town officials met with Respondents and explained that any volunteer could deliver the prayers, but the Town would not police prayer content. *Id.*

II. PROCEEDINGS BEFORE THE DISTRICT COURT

Respondents filed suit against the Town in February 2008, alleging two Establishment Clause violations: (1) that the Town's procedure for selecting prayer-givers unconstitutionally "prefer[red] Christianity over other faiths," and (2) that the Town impermissibly permitted individual citizens to deliver "sectarian" prayers. App. 57a-58a.

With respect to the Town's selection process, the district court focused on the Town's motives for its legislative prayer practices, and found no admissible evidence that anyone ever "intentionally excluded [members of] non-Christian faiths from offering prayers." App. 74a. The court also found "no indication that the Town established its unwritten policy of having prayer before meetings for an improper purpose." App. 121a. Accordingly, the court ruled that the Town's selection procedures did not violate the Establishment Clause. App. 78a.

As for Respondents' claim that the prayers were impermissibly "sectarian," the district court observed that "[a]ny analysis of the constitutionality of legislative prayer necessarily begins with" this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983). App. 79a. The district court noted that this Court affirmed legislative prayer practices in *Marsh* based on the "unique history" of legislative prayer in the United States. *Id.* (internal quotation marks omitted). Legislative prayer, the court explained, was a "unique exception to the *Lemon* test, based primarily if not exclusively on the long history of legislative prayer in Congress, which is often overtly sectarian." App. 127a.[1]

The district court noted that there was dictum in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989), suggesting that the prayers in *Marsh* were acceptable because "the particular chaplain [in that case] had removed all references to Christ." App. 129a (internal quotation marks omitted). The district court concluded, however, that this "statement does not indicate that legislative prayers must be nonsectarian," particularly in light of the fact that the chaplain in *Marsh* was a Presbyterian minister who had delivered prayers in the Judeo-Christian tradition for sixteen years. *Id.* Rather, the court concluded that the *Marsh* test for evaluating the

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[1] Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a practice which touches upon religion is permissible under the Establishment Clause if it "ha[s] a secular legislative purpose;" "its principal or primary effect . . . neither advances nor inhibits religion;" and it does not "foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks omitted).

constitutionality of legislative prayer "is not whether the prayer is sectarian or nonsectarian, but whether, based on the totality of the circumstances, the prayer is being exploited to advance or disparage a belief, or to associate the government with a particular religion." App. 129a-130a.

Because the prayers offered by Town members did not "proselytize" or advance or disparage any one creed or belief, the court concluded there was no constitutional infirmity. App. 131a. The court also found that the Town's practice of permitting "a variety of clergy to give invocations" lessened the likelihood "that the government could be viewed as advancing a particular religion, and therefore less[ened] concern over the sectarian nature of particular prayers." App. 129a.

By contrast, the court found that the Respondents' "proposed nonsectarian policy" was "vague and unworkable," since "many of the prayers that [Respondents] say are sectarian are indistinguishable from prayers that they say are not." App. 130a-131a. Even if the Town could differentiate between sectarian and nonsectarian prayers, the court explained that any attempt "to control the content of prayer" would impose "a state-created orthodoxy," which itself would violate the Establishment Clause. App. 130a (citing *Lee v. Weisman*, 505 U.S. 577 (1992)). The court therefore granted summary judgment in favor of the Town on both claims.

III. PROCEEDINGS BEFORE THE COURT OF APPEALS

On appeal, Respondents "expressly abandoned the argument that the [T]own intentionally discriminated against non-Christians in its selection of prayer-givers." App. 10a. Indeed, the court of appeals

acknowledged that the Town had "no religious animus" in implementing its legislative prayer practices. App. 22a. Nevertheless, the Second Circuit reversed the grant of summary judgment because, in that court's view, "the [T]own's prayer practice had the *effect*, even if not the purpose, of establishing religion." App. 10a (emphasis added).

The Second Circuit recognized that *Marsh* "did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon v. Kurtzman*." App. 10a. Nevertheless, based on this Court's observation in *County of Allegheny* that the prayers in *Marsh* did not have "the effect of affiliating the government with any one specific faith or belief," the court of appeals proceeded to apply the "endorsement" test to evaluate the constitutionality of the Town's prayer practices. *See* App. 19a ("We conclude, on the record before us, that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint."); App. 17a ("We must ask, instead, whether the town's practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs."). This mode of reasoning, with its focus on "endorsement" and the "reasonable observer," mirrors the analysis employed by this Court in *Lemon* and rejected in *Marsh*. *See*, *e.g.*, *Cnty. of Allegheny*, 492 U.S. at 620 (opinion of Blackmun, J.) (applying *Lemon* to consider whether government action signaled "endorsement . . . of individual religious choices . . . according to the standard of a 'reasonable observer'" (internal quotation marks omitted)).

In applying its "endorsement" test, the Second Circuit closely scrutinized the content of the prayers

offered. The court conceded that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*: they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." App. 21a. Nevertheless, the court placed substantial weight on the fact that most of the prayers at issue "contained uniquely Christian references." App. 20a. The court reasoned that the fact that "individuals from other faiths delivered the invocation cannot overcome the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." App. 22a.

The court concluded its analysis by noting that the constitutional "difficulties" it identified with the Town's policies "may well prompt municipalities to pause and think carefully before adopting legislative prayer." App. 27a. Petitioner sought rehearing *en banc*, which was denied. App. 132a-133a.

REASONS FOR GRANTING THE PETITION

In *Marsh v. Chambers*, this Court held, based on over 200 years of tradition and history, that "the practice of opening legislative sessions with prayer has become part of the fabric of our society," and that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment." 463 U.S. 783, 792 (1983). "Weighed against th[is] historical background," this Court upheld the legislative prayers at issue in *Marsh* even though "a clergyman of only one denomination—Presbyterian—ha[d] been selected for 16 years," was "paid at public expense," and selected prayers that were "often explicitly Christian." *Id.* at 793 & n.14. *Marsh* created

a clear test for future courts to follow: legislative prayers are constitutional, so long as the government does not act with improper motive in selecting prayer-givers or exploit the prayer opportunity to proselytize, advance, or disparage any one faith or belief. *Id.* at 793-95.

The Second Circuit applied a different, and incorrect, rule of law based on dictum in this Court's decision in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). That case concerned the constitutionality of a crèche display on government property, but the Court distinguished *Marsh* in passing, noting that the chaplain in *Marsh* had "removed all references to Christ" in his prayers (albeit fifteen years into his service). *Id.* at 603 (internal quotation marks omitted). The court below misinterpreted this dictum to mean that *County of Allegheny* had modified *Marsh* such that *Marsh*'s holding that legislative prayer is constitutional absent improper government motive or exploitation of the prayer opportunity no longer applied; in the Second Circuit's view, frequent "sectarian" references in legislative prayers offered predominantly by Christian prayer-givers could render unconstitutional a legislative prayer practice—regardless of the government's intent—because such references "have the *effect* of affiliating the government with [a] specific faith or belief." *Id.* (emphasis added); *see* App. 15a-17a.

The decision below conflicts with this Court's decision in *Marsh*, and deepens an already-existing circuit conflict over whether *Marsh* or *Lemon* (as modified by *County of Allegheny*) supplies the correct standard for evaluating legislative prayer. Like the Second Circuit in this case, the Fourth Circuit has

also relied on *County of Allegheny*'s dictum to strike down legislative prayer unless it is "nonsectarian in both policy and practice" and does not result in an "effective endorsement of one faith." *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 348, 355 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). Indeed, in *Joyner* the Fourth Circuit went even further, requiring deliberative bodies to be "proactive in discouraging sectarian prayer in public settings." *Id.* at 353. By contrast, the Eleventh Circuit has adhered to the *Marsh* test, holding that "courts are not to evaluate the content of [legislative] prayers absent evidence of exploitation" and refusing to read *County of Allegheny* "narrowly to permit only nonsectarian prayer." *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1271 (11th Cir. 2008).

Thus, the courts of appeals are divided over the perceived tension between the test set forth in *Marsh* and the dictum in *County of Allegheny*. This Court's intervention is necessary to resolve this conflict and to clarify the proper legal standard for evaluating legislative prayer.

I. THE COURTS OF APPEALS ARE DIVIDED OVER THE PROPER STANDARD FOR EVALUATING LEGISLATIVE PRAYER UNDER THE ESTABLISHMENT CLAUSE

The courts of appeals are divided over the question whether to analyze the constitutionality of legislative prayer using the test set forth by this Court in *Marsh* (which focuses solely on whether the government had an impermissible motive in the selection of speakers or an impermissible intent to proselytize or to advance or disparage a particular faith or creed) or instead to apply the "endorsement" test derived from *Lemon, County of Allegheny*, and other cases

(which focuses principally on the assumed effect that a prayer practice may have on a "reasonable" observer).

At one end of the spectrum, the Eleventh Circuit has faithfully applied the standard announced by this Court in *Marsh*. In *Pelphrey* the court of appeals recognized that *Marsh* only "prohibited the selection of invocational speakers based on an 'impermissible motive' to prefer certain beliefs over others." 547 F.3d at 1278. With respect to the prayers themselves, the court found "no clear consensus among [its] sister circuits about sectarian references in legislative prayer," but "read *Marsh* . . . to forbid judicial scrutiny of the content of prayers absent evidence that the legislative prayers have been exploited to advance or disparage a religion." *Id.* at 1274. Despite the fact that: (1) the prayers at issue in *Pelphrey* contained references to "'Jesus, 'Allah,' 'God of Abraham, Isaac, and Jacob,' 'Mohammed,' and 'Heavenly Father,'" and (2) upwards of sixty-eight percent of the prayers contained explicitly Christian references, the court refused to "embark on a sensitive evaluation or to parse the content of a particular prayer" absent evidence of exploitation, and shunned the role of "ecclesiastical arbiter." *Id.* at 1266-67, 1274 (internal quotation marks omitted). Thus, the Eleventh Circuit affirmed the district court's holding that Cobb County's prayer practices were permissible, except during two years in which the county had categorically and intentionally excluded speakers from particular faiths. *Id.* at 1282.

On the other end of the spectrum, the Fourth Circuit in *Joyner* "hewed to th[e] approach" purportedly set forth in *County of Allegheny*, which the *Joyner* court understood to require an evaluation of

whether the prayers had the *effect* of aligning the government with a particular religion in the eyes of a reasonable observer. 653 F.3d at 348. Even though the legislative prayer policy at issue there was neutral and inclusive, and thus free of discriminatory intent, the court concluded that citizens at board meetings "hear the prayers, not the policy." *Id.* at 354. Thus, the court focused on what it perceived as "the practical effects of the invocations at issue." *Id.* In the Fourth Circuit's view, legislative prayer is permissible only if it "strive[s] to be nondenominational" and is "nonsectarian in both policy and practice." *Id.* at 348-49. As a consequence, the Fourth Circuit's test would require a court to play the role of censor, policing the content of legislative prayer.

Finally, the Second Circuit in the decision below explicitly imported the "endorsement" test from *County of Allegheny* into the legislative prayer context, holding that the dispositive inquiry is not the *Marsh* test, but rather whether the town's practice, when viewed in context by an "ordinary, reasonable observer," "can be seen as endorsing a particular faith or creed over others." App. 17a, 25a. Unlike the Fourth Circuit in *Joyner*, the Second Circuit did not hold that a "reasonable observer" would take offense at sectarian prayers. App. 17a, 21a. But the Second Circuit nonetheless concluded that "[t]he [T]own had an obligation to consider how its prayer practice would be perceived by those who attended town board meetings," regardless of whether the Town's motive was exploitative or otherwise impermissible under *Marsh*. App. 22a.

The circuits are thus deeply divided on both the proper test to apply when evaluating legislative prayer practices (the "exploitation"/"impermissible

motive" test from *Marsh* or the "endorsement" test from *County of Allegheny*) as well as the extent to which this Court's precedents permit references to particular religious traditions in legislative prayer.[2]

These differing legal standards have created an incoherent legal environment in which similar prayer practices have been upheld or struck down depending on the jurisdiction in which a challenge is raised. Indeed, the prayers at issue in *Pelphrey, Joyner*, and *Galloway* all shared the following material characteristics:

- The deliberative bodies neutrally extended invitations to the leaders of religious congregations within the jurisdiction; App. 4a-6a; *Joyner*, 653 F.3d at 343; *Pelphrey*, 547 F.3d at 1267;

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[2] On the latter issue, the court below (unlike the Fourth Circuit in *Joyner*) correctly conceded that "sectarian" references do not "inherently" violate the Establishment Clause. App. 21a. But the Second Circuit nevertheless concluded that, "in light of *Allegheny*," it could "consider, more broadly, the substance of the prayers under challenge" in applying the "endorsement" test. App. 21a n.6. Ultimately, the court held that the Town's "steady drumbeat of often specifically sectarian Christian prayers" amounted to an impermissible endorsement. App. 22a. This case thus provides the Court with an opportunity to resolve a conflict among the courts of appeals over whether the Establishment Clause precludes legislative invocations that reference particular religious traditions. *Compare* App. 21a, *and Pelphrey*, 547 F.3d at 1271 ("To read *Marsh* as allowing only nonsectarian prayers is at odds with the clear directive by the Court."), *with Joyner*, 353 F.3d at 351-52 (asserting that *Allegheny* and *Marsh* preclude sectarian prayer), *and Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006) ("The Supreme Court itself has read *Marsh* as precluding sectarian prayer."), *vacated on other grounds*, 506 F.3d 584 (7th Cir. 2007).

- Private citizens voluntarily delivered the invocations; App. 4a; *Joyner*, 653 F.3d at 343; *Pelphrey*, 547 F.3d at 1267;

- The invocation's content was dictated by the speaker's conscience, without prior review by the deliberative body; App. 4a; *Joyner*, 653 F.3d at 343; *Pelphrey*, 547 F.3d at 1267;

- Clergy identified with the Christian faith delivered a significant number of the invocations because of the community's demographics; App. 4a; *Joyner*, 653 F.3d at 356 (Niemeyer, J., dissenting); *Pelphrey*, 547 F.3d at 1267;

- A majority of the invocations contained explicitly Christian references; App. 7a; *Joyner*, 653 F.3d at 343; *Pelphrey*, 547 F.3d at 1267; and

- Invocations were offered by a variety of faith traditions, both Christian and non-Christian; App. 4a-5a; *Joyner*, 653 F.3d at 356 (Niemeyer, J., dissenting); *Pelphrey*, 547 F.3d at 1267.

The Eleventh Circuit determined that such practices are consistent with this Court's decision in *Marsh*. Yet the Second and Fourth Circuits declined to apply the unvarnished *Marsh* test, adopting instead a *Lemon*-style endorsement test that asks "whether the [prayer] practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the [government] favored or disfavored certain religious beliefs." App. 17a; *see also Joyner*, 653 F.3d at 348.

Review is therefore warranted to ensure consistency across the Nation and to provide uniform guidance to the federal, state, and local governments regarding the constitutionality of legislative prayer practices.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *MARSH* AND OTHER CASES

The Second Circuit held that legislative prayer practices can be unconstitutional, even absent any evidence of "religious animus," simply because the prayers (and prayer-givers) disproportionately use explicitly Christian references. App. 22a. That holding conflicts squarely with this Court's holding in *Marsh* that legislative prayers are constitutional unless there is evidence of "impermissible motive" or "exploit[ation]" of the prayer opportunity. *Marsh*, 463 U.S. at 793-95. Whereas *Marsh* rejected application of the *Lemon* test in legislative prayer cases, the court below applied an "endorsement" test derived directly from *Lemon* and its progeny. *See*, *e.g.*, *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282 (3d Cir. 2011) ("The endorsement test and the second *Lemon* prong are essentially the same."), *cert denied*, 132 S. Ct 1097 (2012). This Court should grant certiorari to resolve the conflict and reaffirm that *Marsh* provides the proper standard by which to evaluate legislative prayer.

A. *Marsh* Establishes That Legislative Prayers Are Constitutional Absent Evidence Of Impermissible Intent Or Exploitation Of The Prayer Opportunity

This Court has given plenary consideration to the constitutionality of legislative prayer practices only once. In *Marsh*, this Court upheld the State of Nebraska's practice of opening each legislative session with an invocation—a practice the Court described as "deeply embedded in the history and tradition of this country." 463 U.S. at 786. "From colonial times through the founding of the Republic and ever

since," this Court explained, "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id*. Moreover, the First Congress vigorously debated whether or not to institute legislative prayer before deciding in the affirmative, which the Court explained "demonstrat[es] that the subject was considered carefully and the action not taken thoughtlessly." *Id.* at 791. Members of that Congress even considered the problem presented by clergy delivering prayers with which some listeners were bound to disagree; Samuel Adams replied to this objection that "'he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.'" *Id.* at 792 (quoting Charles Francis Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams, During the Revolution* 37-38 (1875)).

Thus, this Court established simple rules to govern legislative-prayer cases that would, in most instances, result in upholding the practice of legislative prayer. First, selection of a prayer-giver from a single denomination over an extended period of time is constitutional absent proof of impermissible motive. *See* 463 U.S. at 793-94. Second, the content of prayers is "not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95.[3] The Court thus eschewed the multifactor *Lemon* test in favor of relatively bright-line rules. *See id.* at 786; *see also Van Orden v. Perry*, 545 U.S. 677, 686 (2005)

[3] The Court also held that paying a chaplain at public expense does not violate the Establishment Clause. 463 U.S. at 794.

(Rehnquist, C.J., plurality opinion) (noting that *Marsh* did not apply *Lemon*).

Applying its announced standard, the *Marsh* Court rejected the notion that a Presbyterian minister's reappointment over many years "has the effect of giving preference to his religious views." 463 U.S. at 793. It also refused to make any inquiry into the content of the minister's prayers, despite the fact that for nearly all of his tenure the prayers contained explicitly Christian themes. *Id.* at 793 n.14; *see also Van Orden*, 545 U.S. at 688 n.8 (Rehnquist, C.J., plurality opinion) (noting that "[i]n *Marsh*, the prayers were often explicitly Christian" and references to Christ were not limited until the year after suit was filed). The Court concluded that "it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." 463 U.S. at 795.

The Court addressed the related topic of government-sponsored prayers outside of the legislative prayer context in *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, the Court held that the Establishment Clause prohibits school officials from superintending the content of school prayers to ensure that they are inclusive and nondenominational. *Id.* at 590. The Court explained that the government may not "establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds," and that a state-imposed requirement that all prayers be nondenominational is akin to the establishment of "an official or civic religion." *Id.*

The legal standards applied by the court of appeals below cannot be reconciled with this Court's decisions in *Marsh* and *Lee*, or with the plurality's reasoning in *Van Orden*. Under *Marsh*, the touch-

stone for whether legislative prayer is constitutional is whether the government acts with impermissible motive; in the case at bar, however, the court of appeals conceded that the Town harbored no discriminatory motive, App. 21a, but invalidated its prayer practice anyway. In *Marsh* and *Lee*, the Court discouraged inquiries into the content of government-sponsored prayers; in the case at bar, by contrast, the content of the prayers offered at the Town's board meetings was central to the Second Circuit's holding that the Town had violated the Constitution. *See* App. 23a. *Marsh* makes clear that legislative prayer is a special context in which historical precedent provides the answer and the *Lemon* test does not apply; the court below, however, rejected that teaching and instead applied an "endorsement" test derived from *Lemon*.

The Second Circuit acknowledged that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*," but it did not end the inquiry there. App. 21a. Rather, the court concluded that the Town had advanced a particular faith (Christianity) because the prayers given were not "substantially neutral amongst creeds." App. 20a. In making that determination, the court of appeals painstakingly parsed prayer language, criticizing for example the fact that some citizen prayer-givers "spoke in the first-person plural: let 'us' pray, 'our' savior, 'we' ask, and so on." App. 23a. This inquiry into the content of prayers is prohibited by *Marsh* and *Lee*.

In short, review is warranted because the Second Circuit's adoption of a *Lemon*-style endorsement test conflicts directly with this Court's precedents. The court below declined to follow this Court's guidance

in *Marsh* and established its own constitutional standard which, as it candidly admits, will cause municipalities to "think carefully before adopting legislative prayer." App. 27a. That standard turns the presumption of constitutionality established by this Court in *Marsh*, which was steeped in over 200 years of history, on its head. For this reason as well, the Court should grant review to reaffirm the *Marsh* standard and resolve the conflict between its precedents and the decision below.

B. This Court's Review Is Necessary To Resolve The Perceived Conflict Between *Marsh* And *Allegheny*

In adopting the "endorsement" test, the Second Circuit relied heavily on dictum in this Court's opinion in *County of Allegheny*. But that opinion cannot bear the weight that the Second Circuit has placed on it. Certiorari is warranted to address the perceived conflict between *Marsh*'s rule and *Allegheny*'s dictum, which has created confusion in the courts of appeals.

In *County of Allegheny*, this Court concluded that the display of a crèche on the staircase of a court building violated the Establishment Clause because it had the "effect of promoting or endorsing religious beliefs." 492 U.S. at 621 (opinion of Blackmun, J.). Justice Kennedy, joined by three other Justices, dissented in part, urging the Court to apply *Marsh*'s historical approach to the crèche display rather than the endorsement test. *Id*. at 669-70 (Kennedy, J., concurring in the judgment in part and dissenting in part). In response, Justice Blackmun, writing for the majority, cabined *Marsh*'s holding to the unique historical practice of legislative prayer. *See id.* at 603 (majority opinion). In dictum, Justice Blackmun

added that even after *Marsh*, not all legislative prayer practices would necessarily pass constitutional muster. According to Justice Blackmun, even *Marsh* could not justify prayers that "demonstrate the government's allegiance to a particular sect or creed," or that have the "effect of affiliating the government with any one specific faith or belief." *Id.* He added that the Court had not confronted such questions in *Marsh* because the chaplain in that case had eliminated any possibility of a constitutional violation by "remov[ing] all references to Christ." *Id*. (internal quotation marks omitted).

County of Allegheny did not, however, modify the *Marsh* test or announce a standard for assessing whether, or to what extent, sectarian references must be expunged from legislative prayer. Nor could it have done so, because the constitutionality of legislative prayer was not at issue in *Allegheny*. Whatever the intent of Justice Blackmun's dictum, any suggestion that *Marsh* turned on the supposed absence of faith-specific references is contrary to the record and reasoning in that case. The Presbyterian chaplain in *Marsh* often offered prayers that were explicitly Christian, and did so over the course of fifteen years. 463 U.S. at 793 n.14. The dissenters even cited these sectarian references as a basis for their disagreement with the majority decision. *Id*. at 800 nn.9-10 (Brennan, J., dissenting); *id.* at 823 & n.2 (Stevens, J., dissenting). While the Court noted in passing that the chaplain voluntarily removed references to Christ in 1980, all of the prayers in the record were offered in 1979 or earlier. *See id*. at 793 n.14 (majority opinion); *see also Van Orden*, 545 U.S. at 688 n.8 (Rehnquist, C.J., plurality opinion) (noting that "[i]n *Marsh*, the prayers were often explicitly Christian" and references to Christ were not limited

until the year after suit was filed). Yet the *Marsh* Court declined to review the content of those prayers, because the absence of government exploitation sufficed to render the practice constitutional. Thus, the passing dictum in *County of Allegheny* does nothing to undermine *Marsh*'s holding that the faith-specific prayers in the record in that case passed constitutional muster.

Nevertheless, multiple courts of appeals have erroneously relied on *County of Allegheny*'s dictum to justify use of the endorsement test when evaluating legislative prayer. *See*, *e.g.*, App. 15a ("It is also clear, under *Allegheny*, that legislative prayers may not have the effect of affiliating the government with any one specific faith or belief.") (internal quotation marks omitted); *Joyner*, 653 F.3d at 349 (holding that *Allegheny* and *Marsh* should be read together to preclude sectarian prayer); *see also Hinrichs*, 440 F.3d at 399 ("The Supreme Court itself has read *Marsh* as precluding sectarian prayer."). This confusion has led to inconsistent, conflicting results across the country in challenges to substantially similar prayer practices. Thus, this Court should grant review to provide the lower courts with guidance regarding the continued vitality of the explicit holding in *Marsh*.

C. *Marsh* Provides A Rational Framework For Protecting Traditional Legislative Prayer And The Prayer-Giver's Conscience Rights

Marsh provides a workable framework for evaluating legislative prayers that is consistent with the purposes underlying the Establishment Clause. That clause protects the rights of conscience by prohibiting government censorship or the parsing of

prayers. *See Lee*, 505 U.S. at 592 ("A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."). Because of the risks inherent in allowing the state to police theological matters, this Court has emphasized that the government may take no action for the *purpose* of establishing religion. *See*, *e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). Indeed, the First Amendment would not even permit the government to mandate a prayer that promotes a transcendent ethic or morality divorced from any particular creed. *Lee*, 505 U.S. at 589; *see also Engel v. Vitale*, 370 U.S. 421, 430 (1962) (noting that the government "is without power to prescribe by law any particular form of prayer" even when part of a government-sponsored activity). These matters, rather, are left to the particular prayer-giver's conscience, consistent with the rights to freedom of speech and religious expression.

Recognizing the potential danger to conscience rights posed by government oversight of worship practices, this Court has repeatedly cautioned against government control of prayer content. *See*, *e.g.*, *Lee*, 505 U.S. at 588; *Engel*, 370 U.S. at 425. The adoption of an endorsement test effectively nullifies this line of precedent. An endorsement test requires courts to parse prayers' content and thus inevitably forces courts to play the role of theologian, making judgments about the prayers' validity based on the supposed religious effect they are likely to have on observers. Courts applying this test have tended to strike down the prayer practice in question, after carefully parsing the judicially perceived theological content of the prayers. *See* App. 24a; *Joyner*, 653 F.3d at 349 (focusing on the number of references to Jesus and Christian tenets). This ap-

proach unduly constricts, and effectively rewrites, the *Marsh* presumption that such prayers are constitutional, regardless of their content.

The *Marsh* test allows courts to guard against *governmental* promotion of a particular faith tradition, while respecting the right of any prayer-giver to offer an invocation in that individual's religious tradition by refusing to police the content of prayers. This Court should grant certiorari to clarify that, notwithstanding the *County of Allegheny* dictum, the *Marsh* test remains the governing standard for analysis of legislative prayer.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S LIMITED PUBLIC FORUM JURISPRUDENCE

The test articulated in *Marsh* provides sufficient guidance to lower courts to resolve this case in its entirety. But this case also presents the Court with an opportunity to make clear that legislative prayers receive additional constitutional protection when offered by private citizens—as opposed to paid chaplains—in a limited public forum. The Second Circuit did not address this issue, and instead engaged in a content-based analysis of the legislative prayers without regard to the free-speech rights of the prayer-givers, implicitly assuming that the prayers of private citizens could be attributed to the state. Thus, not only did the Second Circuit adopt an endorsement test that is inconsistent with *Marsh*, it also created a test that burdens private prayer-givers' free-speech rights. Simply put, the Second Circuit's approach overlooks the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech

and Free Exercise Clauses protect." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

This Court has repeatedly recognized that "a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (citing *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46, n.7 (1983)); *see Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (forum limited to student groups); *see also City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 174-76 (1976) (forum limited to discussing school business). That is the case here: the Town opened a forum for legislative prayers at Town Board meetings in which any private citizen could participate; the prayers offered in that forum were therefore a form of constitutionally protected speech.

The Town did not run afoul of the Establishment Clause by establishing a limited public forum for legislative prayer. As this Court has explained, "'[A] significant factor in upholding governmental programs in the face of an Establishment Clause attack is their *neutrality* towards religion.'" *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995)). Unlike the government-paid chaplain in *Marsh* (whose prayers were constitutional despite his status as a state employee), the prayers at issue here were offered by volunteers or individuals invited pursuant to a neutral policy. This Court's precedents recognize that the First Amendment protects the content of speech offered by private citizens in a limited, and neutral,

public forum. The Second Circuit's opinion overrode those protections in invalidating the Town's prayer practices as prohibited by the Establishment Clause.

These free-speech protections are critically important. Most recent legislative-prayer litigation involves deliberative bodies at the municipal or county level. None of the cases has involved the services of a paid chaplain. As in this case, many involve prayers delivered by volunteer citizens.[4] Application of this Court's limited public forum jurisprudence to uphold the Town's legislative prayer practice would provide additional clarity and much-needed guidance for state and local governments and lower courts attempting to distinguish between government and private speech in the context of legislative prayer.

IV. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT, AND REVIEW IS WARRANTED TO HARMONIZE THE FIRST AMENDMENT STANDARDS APPLICABLE TO LEGISLATIVE PRAYER

This Court's historical analysis in *Marsh* affirms the role of public prayer from the very founding of this Nation. Deliberative bodies at every level of government have adopted legislative prayer practices. This widespread practice highlights the compel-

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[4] *See* App. 4a; *Pelphrey*, 547 F.3d 1263, 1266; *Hinrichs*, 506 F.3d 584, 586; *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 379 (4th Cir. 2005); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (en banc); *Rubin v. City of Lancaster*, 802 F. Supp. 2d 1107, 1115 (C.D. Cal. 2011) (appeal pending); *Atheists of Fla., Inc. v. City of Lakeland*, 838 F. Supp. 2d 1293, 1312-13 (M.D. Fla. 2012) (appeal pending); *Jones v. Hamilton Cnty.*, --- F. Supp. 2d ----, 2012 WL 3763963, at *1-2 (E.D. Tenn. 2012) (appeal pending); *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823, 826-27 (E.D. La. 2009).

ling need for this Court to articulate clear, constitutional standards under which deliberative bodies at all levels of government may appropriately engage in this historical practice without constant threats of costly litigation and arbitrary and unpredictable decisionmaking in the lower courts.

For more than two decades after the *Marsh* Court recognized and affirmed the historical and ubiquitous American tradition of legislative prayers, the constitutional status of legislative prayer practices was largely undisputed. The issue produced only three lower court decisions, just two of which were published.[5] But in 2004, that changed dramatically with the Fourth Circuit's holding that legislative prayer practices must be analyzed in light of *County of Allegheny's* gloss on the *Marsh* standard. *See Wynne v. Town of Great Falls,* 376 F.3d 292, 297-98 (4th Cir. 2004) (determining that *Allegheny* "offered further guidance on the proper scope" of *Marsh*). Since the *Wynne* decision in 2004, numerous federal constitutional challenges have been raised to legislative-prayer practices, and the number continues to rise.[6]

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5 *See Coles ex rel. Coles v. Cleveland Bd. of Educ.,* 171 F.3d 369 (6th Cir. 1999); *Bacus v. Palo Verde Sch. Dist. Bd. of Ed.*, 52 F. App'x 355 (9th 2002) (memorandum); *Snyder*, 159 F.3d 1227.

6 At present, cases presenting this issue are pending in five circuits, in addition to this Second Circuit case. *See Jones*, 2012 WL 3763963 (appeal of denial of preliminary injunction pending before the Sixth Circuit); *Doe v. Pittsylvania Cnty.,* 842 F. Supp. 2d. 906 (W.D. Va. 2012) (awaiting a ruling regarding the entry of a permanent injunction); *Atheists of Fla.*, 838 F. Supp. 2d 1293 (oral argument before Eleventh Circuit heard on December 6, 2012); *Rubin*, 802 F. Supp. 2d 1107 (oral argument before Ninth Circuit heard on November 8, 2012); *Doe v. Franklin*

The *Wynne* court's injection of the endorsement test into the evaluation of legislative prayer practices has sparked nationwide litigation generating divided panel opinions and an irreconcilable three-way circuit conflict culminating in the Second Circuit's conclusion here that municipalities must "pause and think carefully" before adopting legislative prayers. App. 27a. Indeed, at least one State has already abandoned this important historical practice to avoid costly litigation in light of the jurisprudential uncertainty created by the conflicting lower-court precedents. *See* Kerry Picket, *Hawaii Senate Becomes First Legislative Body To End Daily Prayer*, Wash. Times Water Cooler Blog (Jan. 21, 2011, 4:44 PM), http://www.washingtontimes.com/blog/watercooler/2011/jan/21/hawaii-senate-becomes-first-legislative-body-end-d/. Since 2008, this Court has been presented with three prior petitions for certiorari directly seeking guidance on the confusion surrounding the application of *Marsh* to legislative prayer practices.[7] The question presented continues to arise with increasing frequency, and the circuit conflict has only deepened since the last such petition was considered. As the lower courts continue to wrestle with the proper test to apply in legislative prayer cases, the disagreements and conflicts simply widen, sowing ever-greater confusion and disharmony. The time has come for this Court to speak directly to this re-

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[Footnote continued from previous page]

Cnty., No. 4:12-cv-00918-SNLJ (E.D. Mo.) (discovery ongoing in anticipation of summary judgment motions in January 2013).

[7] *Indian River Sch. Dist.*, 132 S. Ct. 1097 (2012) (cert. denied); *Joyner*, 132 S. Ct. 1097 (cert. denied); *Turner v. City Council*, 555 U.S. 1099 (2009) (cert. denied).

curring and important question that has divided the lower courts, before still more governmental bodies are subjected to costly litigation applying inconsistent constitutional standards to a solemn and profound practice that has commenced meetings of this Nation's legislative bodies from before the Founding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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