No. 12-696

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Town Board in Greece, New York, opens its monthly meetings with clergy-led prayer. With the exception of a four-meeting hiatus around the time of the filing of this lawsuit in 2008, the Town has relied exclusively on Christian clergy, who have persistently delivered overtly Christian prayers. Many of the prayer-givers have elaborated on Christian tenets and celebrated the birth and resurrection of Jesus Christ; one asked attendees to recite the Lord's Prayer in unison; and another criticized objectors to the prayer practice as an "ignorant" "minority."

Clergy request that attendees join in the prayers. Town Board members participate by bowing their heads, standing, responding "Amen," or making the sign of the cross. Members of the audience do the same. At the conclusion of the prayer, the Town's Supervisor typically thanks the prayer-giver for serving as the Town's "chaplain of the month," though he did not bestow this title on the few non-Christians who delivered the prayer in 2008. Many members of the audience are required to attend the meetings; children also routinely attend to fulfill a high-school civics requirement.

The question presented by the petition is whether the Second Circuit correctly concluded, under *Marsh* v. *Chambers*, 463 U.S. 783 (1983), that the Town Board exploited its prayer opportunity to advance one faith to the exclusion of others.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

The decision that petitioner asks this Court to review is not one that the Second Circuit actually issued. According to petitioner, "[t]he Second Circuit held that legislative prayer practices can be unconstitutional * * * simply because the prayers (and prayer-givers) disproportionately use explicitly Christian references." Pet. 15. What the Second Circuit in fact did was to review "the totality of the circumstances," rather than "any single aspect of the town's prayer practice," to conclude that the practice, "viewed in its entirety," had "advance[d] a single religious sect." Pet. App. 14a, 19a.

Unhappy with this outcome, petitioner argues that the differing results in the circuits' legislative-prayer cases flow from disparate legal standards that emanate from a "perceived conflict" in this Court's decisions. Pet. 19. But no circuit has recognized a conflict in this Court's jurisprudence, and none of the cases that petitioner cites applied a standard that conflicts with the Second Circuit's analysis. The differing outcomes in the circuits' decisions have stemmed from factual differences among the cases, not from the application of divergent legal tests. Although the Ninth Circuit's decision in *Rubin* v. *City of Lancaster*, __ F.3d __, No. 11-56318, 2013 WL 1198095 (9th Cir. Mar. 26, 2013), issued after the filing of the petition, can be read to create a narrow circuit split with respect to a single aspect of the *Marsh* test, that split has no bearing on the outcome here.

Petitioner's limited-public-forum argument was

neither pressed nor passed upon below, and it conflicts with the unanimous rulings of the circuit courts.

Nor does the decision below implicate the practices of state legislatures or the United States Congress, which are wholly distinct from the one here.

Finally, even if this case might otherwise warrant the Court's attention, review would be premature because the district court has yet to fashion a remedy.

STATEMENT

I. Factual Background

The Greece Town Board meets monthly to vote on proposed ordinances, obtain residents' input, bestow citizenship awards, swear in new Town employees, and otherwise conduct the Town's public business. Pet. App. 3a. Historically, Board meetings commenced with a moment of silence. *Ibid.* In 1999, however, the Town began asking local clergy to open meetings with prayer. *Ibid.*

1. *The Town's overwhelmingly Christian prayer-givers.* From 1999 through 2007, Christian prayer-givers delivered every one of the Town's monthly prayers. Pet. App. 4a. After respondents complained about the prayer practice—and for the first (and only) time in the history of the Town's prayer practice—the Town scheduled three non-Christians to deliver prayers at four of twelve Board meetings in 2008, the year in which this lawsuit was filed. Pet. App. 4a-5a. After that, however, no non-Christian returned to the podium: during the eighteen-month period preceding the record's closure, the Board's prayer-givers were, once again, 100% Christian clergy. Pet. App. 5a.

Indeed, the Town's line-up has been so lacking in religious diversity that, at his deposition, the Town's Supervisor, John Auberger, could not recall a single non-Christian's having ever delivered the prayer. C.A. App. 800.

2. *The Town's overwhelmingly Christian prayers.* Roughly 130 invocations were offered from January 1999 through June 2010, and the transcripts and videos of more than 120 of these are in the record. Pet. App. 6a. During the nine-year period from the inception of the Town's prayer practice to the eve of the filing of this lawsuit—a period involving exclusively Christian prayer-givers (Pet. App. 4a)—over two-thirds of the prayers included Christian language, and no other religious traditions were referenced. Appellants' C.A. Br. 8 & n.4 (citing transcripts). Even in 2008, the only year in which non-Christians delivered prayers, a majority of the prayers contained distinctly Christian content. See *id.* at 8-9 (citing transcripts). And from 2009 until the record closed—an eighteen-month period once again limited to Christian prayer-givers—approximately *90% of the prayers were overtly Christian*. See *id.* at 9 (citing transcripts) (emphasis added).

These numbers do not rest on subtle interpretations of content. All the prayers identified as Christian included references to "Jesus," "Jesus Christ," "Your Son," or the "Holy Spirit." Pet. App. 7a; Appellants' C.A. Br. 9 n.6. Many went much further, elaborating on Christian tenets or celebrating Christ's resurrection. Pet. App. 7a. One prayer-giver asserted that God shows the extent of his kindness "in the life and death, resurrection and ascension of the Savior

Jesus Christ" (C.A. App. 1078); another cited "the saving sacrifice of Jesus Christ on the cross" (C.A. App. 668); and a third spoke of the coming of Spring as "an expressive symbol of the new life of the risen Christ" (C.A. App. 1098). Prayer-givers have used the opportunity to invite Board members to church events, and a Board member has himself used the time to praise such an event. See C.A. App. 619, 639, 661. One prayer-giver called on attendees to join together in reciting the Lord's Prayer (C.A. App. 629); another said that he would like to solicit contributions for his church (Pet. App. 21a-22a n.7); and a third criticized objectors to the prayer practice as an "ignorant" "minority" (Pet. App. 8a).

3. *Other factors further align the Town with Christianity*. Prayer-givers are summoned to the podium by Supervisor Auberger, who announces each clergymember's religious affiliation by stating the name of his or her house of worship—an affiliation that is also memorialized in the minutes and agendas. Pet. App. 3a-4a; *e.g.*, C.A. App. 341-446, 469-570, 599-709; see also C.A. App. 791. When Auberger has a special relationship with a pastor, he makes that plain as well. See C.A. App. 682 (introducing Father Falletta as "my pastor, and also the pastor of Councilman Antelli's"); see also C.A. App. 615, 623, 666.

Prayer-givers stand behind a podium adorned with the Town's official seal, and deliver the prayers over the Town's public-address system. Pet. App. 3a; C.A. App. 30, 49-50. They typically begin with a request for attendees to join in the prayer. Pet. App. 3a. Members of the Board participate by bowing their heads, standing, responding "Amen," or making the sign of the

cross. Pet. App. 6a, 23a. The audience does the same. Pet. App. 6a.

At the conclusion of the prayer, Supervisor Auberger typically thanks the prayer-giver for serving as the Town's "chaplain of the month," and has, at times, presented the prayer-giver with a commemorative plaque to that effect. Pet. App. 4a. Unlike the Christian clergy, however, the three non-Christians who prayed in 2008 were not bestowed with this title. C.A. App. 692, 695, 698, 709.

For many members of the audience, attendance at Town Board meetings is not optional. Police officers, for example, must attend to be sworn in to office. Pet. App. 3a; C.A. App. 780-781. Attending meetings is a job requirement for various Town employees. C.A. App. 863. Any resident seeking a zoning variance must likewise attend. C.A. App. 788. And meetings provide the only opportunity for community members to address the collective Board about pending issues. C.A. App. 779. Children also routinely attend meetings to lead the Pledge of Allegiance, receive awards, and fulfill a state-mandated civics requirement that is a condition of high-school graduation. Pet. App. 3a; *e.g.*, C.A. App. 294, 345, 355, 366, 383, 401, 411; see also C.A. App. 779.

II. Proceedings Below

Respondents are long-time residents who regularly attend Board meetings. Pet. App. 5a, 7a-8a. Susan Galloway is Jewish, and Linda Stephens is an atheist; both felt marginalized by the Town's legislative-prayer practice. C.A. App. 189a-190a, 195a-196a. Accordingly, in September 2007, they complained to Town officials.

Pet. App. 8a. But the Town declined to modify its practice, and the following month's prayer-giver leveled the "ignorant" "minority" accusation. *Ibid.*; C.A. App. 690.

In February 2008, respondents filed suit, alleging that the Town's prayer practice violated the Establishment Clause. Pet. App. 28a-29a. The Town secured as its counsel the Alliance Defending Freedom ("ADF"), a self-identified "Christ-Centered" legal-advocacy organization.[1]

On cross-motions for summary judgment, respondents argued that the Town had violated the Constitution in two ways: (1) the Town intentionally discriminated against non-Christians in selecting prayer-givers; and (2) the Town's prayer practice advanced a single faith in violation of *Marsh* v. *Chambers* (463 U.S. 783 (1983)). See Pet. App. 8a. The district court rejected both claims (Pet. App. 28a-131a), and respondents appealed the ruling on the latter claim (Pet. App. 10a).

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[1] ADF, *Guiding Principles*, http://www.alliancedefending freedom.org/about/detail/4205 (last visited Apr. 6, 2013). Petitioner's *amici* are variously represented by the Liberty Institute, "a conservative Christian legal advocacy group" (John Schwartz, *After New York, New Look at Defense of Marriage Act*, N.Y. Times, June 28, 2011, at A12, available at 2011 WLNR 12832730); the Family Research Council, which "advance[s] faith * * * from a Christian worldview" (*About FRC*, http://www.frc.org/about-frc (last visited Apr. 6, 2013)); and Peter Gentala, who previously worked for ADF (see Ariz. State Univ., *Faculty Associate Profile: Peter Gentala*, http://tinyurl.com/ petergentala (last visited Apr. 6, 2013)).

After considering the "totality of the circumstances" surrounding the Town's practice (Pet. App. 19a), a unanimous panel of the Second Circuit held that the Town had affiliated itself with a single religion in violation of *Marsh*. Pet. App. 1a-27a.

With respect to the Town's prayer-givers, the court concluded that the Town's rules and procedures undermined the randomness of the selection process and "virtually ensured a Christian viewpoint." Pet. App. 19a. The court found that the Town's litigating position—that it would accept volunteers of any faith, whether clergy or otherwise—was undercut by the Town's failure ever to announce, much less formally enact, an all-comers policy. Pet. App. 20a. The randomness of the selection process was further undermined by the Town's reliance on a "a cadre of recurrent volunteers who were willing to appear frequently to give the invocation." Pet. App. 20a n.5. Consequently, "Christian clergy delivered each and every one of the prayers for the first nine years of the town's prayer practice, and nearly all of the prayers thereafter." Pet. App. 19a.

With respect to the prayers themselves, the court observed that "[w]e need not 'embark on a sensitive evaluation' or 'parse the content of a particular prayer,' * * * to recognize that most of the prayers at issue here contained uniquely Christian references and that prayers devoid of such references almost never employed references unique to some other faith." Pet. App. 20a (quoting *Marsh*, 463 U.S. at 795). Following *Marsh* and other courts of appeals, the Second Circuit held that "[t]he sectarian nature of the prayers * * * was not inherently a problem." Pet. App. 21a. But the

court was troubled that, "despite the homogeneity of viewpoints reflected by the invocations, the town did not explain that it intended the prayers to solemnize Board meetings, rather than to affiliate the town with any particular creed," and did not request that prayer-givers avoid proselytizing or disparaging remarks. Pet. App. 22a. Under those circumstances, the court concluded, "the rare handful of cases, over the course of a decade, in which 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." *Ibid.*

Finally, the court considered the context of the prayers, noting that Board members participate in the prayers by, among other things, making the sign of the cross; that clergy deliver invocations on behalf of the Town and its residents as a whole, rather than on behalf of themselves or the Board; and that prayer-givers request audience participation—all of which "placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation." Pet. App. 23a.

In sum, the court concluded, the Constitution is transgressed "[w]here the overwhelming predominance of prayers offered are associated, often in an explicitly sectarian way, with a particular creed, and where the town * * * conveys the impression that town officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate

in them." Pet. App. 26a.

The court carefully limited the reach of its decision to the unique circumstances in this case. Pet. App. 19a, 24a. And it underscored that the Town could continue to pray:

> We do not hold that the town may not open its public meetings with a prayer or invocation. Such legislative prayers, as *Marsh* holds and as we have repeatedly noted, do not violate the Establishment Clause.

Pet. App. 25a. The court thus remanded to allow the district court, "with the assistance of the parties, to craft appropriate relief." Pet. App. 27a.

REASONS FOR DENYING THE PETITION

Just one year ago, this Court denied a petition for certiorari in which ADF made arguments virtually identical to the ones it makes here. Compare Pet. Cert. 9-25, *Forsyth Cnty., N.C.* v. *Joyner*, No. 11-546, with Pet. 8-25. The decision below, which joins company with *Joyner*, offers further indication that the Court's involvement is unnecessary.

I. The Alleged Circuit Split Is Illusory.

The Second and Fourth circuits see eye-to-eye with the Eleventh, not only on the operative legal standard for evaluating legislative-prayer practices, but also on the breadth of facts pertinent to the application of that standard. The differing outcomes in these circuits' decisions have stemmed not from a conflict in legal principle, but from factual differences among the cases.

Although a recent ruling of the Ninth Circuit may

be read to create a circuit split regarding one factor of the *Marsh* inquiry, that factor is not outcome-determinative here.

A. The circuits agree that legislative-prayer practices are governed by *Marsh*, not *Lemon*.

Petitioner contends that the circuits are divided over the legal standard governing legislative prayer, arguing that the Eleventh Circuit "has adhered to the *Marsh* test," while the Second and Fourth Circuits have applied an endorsement test "derived directly from *Lemon* [v. *Kurtzman*, 403 U.S. 602 (1971)] and its progeny." Pet. 10, 15.

Not so. The Second Circuit stated unequivocally that "the touchstone of our analysis must be *Marsh*," which "did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon*." Pet. App. 10a, 16a. Thus, the Second Circuit did not ask whether the Town's prayer practice had the primary purpose or effect of advancing religion. Cf. *Lemon*, 403 U.S. at 612-613. Rather, the court evaluated whether the prayer opportunity had been "exploited to proselytize or advance any one, or to disparage any other, faith or belief." Pet. App. 15a (quoting *Marsh*, 463 U.S. at 794-795). The court cited *Lemon* only to eschew its application. Pet. App. 10a-11a.[2]

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[2] Petitioner asserts that the court below "conceded" that the challenged prayers did not contravene *Marsh* when it noted that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*." Pet. 8 (quoting Pet. App. 21a). Read in context, however, the court was simply saying that no

The Second Circuit's reference to "endorsement" and the "reasonable observer" does not mean that the court was applying the *Lemon* or endorsement test in lieu of *Marsh*. Cf. Pet. 12. As the Eleventh Circuit noted, *Marsh* likewise is concerned with"promot[ion] or endors[ement]" (*Pelphrey* v. *Cobb Cnty., Ga.*, 547 F.3d 1263, 1281 (11th Cir. 2008) (quotation marks omitted)), but it prohibits legislative-prayer practices that have the effect of advancing or endorsing *a single faith* (*Marsh*, 463 U.S. at 793-795), whereas *Lemon* and the endorsement test prohibit governmental action that endorses even "religion generally" (*Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 8 (1989)). Here, it is clear that the Second Circuit asked the question dictated by *Marsh*, not the one called for by *Lemon*. See Pet. App. 19a (considering whether practice "must be viewed as an endorsement of a *particular religious viewpoint*") (emphasis added). The difference between these two questions cannot be lightly dismissed: it is well-settled that legislative prayers—nonsectarian or otherwise—would not pass the *Lemon* test. See Pet. App. 82a n.42.

The Fourth and Eleventh Circuits have likewise applied *Marsh*, rather than *Lemon*, in legislative-prayer cases. See *Atheists of Fla., Inc.* v. *City of Lakeland, Fla.*, __ F.3d __, No. 12-11613, 2013 WL 1197772, at *10 (11th Cir. Mar. 26, 2013) ("Supreme Court did not apply the *Lemon* test" in *Marsh*); *Joyner*

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individual prayer, *in isolation*, rose to the level of a constitutional violation. See Pet. App. 21a-22a (contrasting "any single prayer" with the "totality of the circumstances presented [by] the town's prayer practice").

v. *Forsyth Cnty., N.C.*, 653 F.3d 341, 345-350 (4th Cir. 2011) (applying *Marsh* and its progeny, while declining even to cite *Lemon*), cert. denied, 132 S. Ct. 1097 (2012); *Pelphrey*, 547 F.3d at 1269 (*Marsh* was decided "without applying *Lemon*"); *Simpson* v. *Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 281 (4th Cir. 2005) (*Marsh* "declined to apply" *Lemon*). And the Ninth Circuit has followed suit. *Rubin*, 2013 WL 1198095, at *3 ("[T]his case falls within the ambit of *Marsh*."). As a district court recently concluded after canvassing the circuits' jurisprudence, "no legislative-prayer case that post-dates *Marsh* * * * either (1) disregards *Marsh* or (2) relies on *Lemon*." *Jones* v. *Hamilton Cnty., Tenn.*, 891 F. Supp. 2d 870, 880 n.6 (E.D. Tenn. 2012).

B. The circuits agree on the nature of the *Marsh* analysis.

1. Petitioner contends that the Second, Fourth and Eleventh circuits disagree on whether the content of clergy's prayers can be considered in the *Marsh* analysis. Pet. 13 & n.2. In petitioner's telling, *Pelphrey* turned a blind eye to sectarian references, while *Joyner* and the court below impermissibly parsed the prayers by considering their sectarian content. Pet. 11-13.

But *Pelphrey* straightforwardly observed that "*Marsh* * * * weighed all of the factors that comprised the practice, *including the nature of the prayers*, the identity of the speaker, and the selection of the clergy." *Pelphrey*, 547 F.3d at 1281-1282 (emphasis added); accord *id.* at 1271 (noting that *Marsh* "considered several factors"—"the chaplain's religious affiliation, his tenure, and the overall nature of his prayers"); *ibid.*

("'nonsectarian' nature of the [*Marsh*] chaplain's prayers was one factor in * * * fact-intensive analysis"). In turn, the Eleventh Circuit evaluated these same factors (see *id.* at 1277-1278) to conclude that the commission's practice, "taken as a whole," did not advance any one religion (*id.* at 1278). A more recent Eleventh Circuit decision reiterated that *Pelphrey*'s multi-factor test requires consideration of "the nature of the prayers," and went on to evaluate the speaker-selection process, and the religious diversity of prayers and prayer-givers, in upholding the practice challenged there. *Lakeland*, 2013 WL 1197772, at *11-*14 (quoting *Pelphrey*, 547 F.3d at 1277).[3]

Thus, *Pelphrey*'s approach was no different than the one taken by the Second and Fourth Circuits. The court below weighed the "totality of the circumstances," taking stock of "the prayer-giver selection process, the content of the prayers, and the contextual actions (and inactions) of prayer-givers and town officials." Pet. App. 19a; see also Pet. App. 18a, 19a (noting that "[i]n fact-intensive cases like this one," no "single aspect of the town's prayer practice" is dispositive). *Joyner* likewise evaluated the commission's practice "taken as a whole." 653 F.3d at 353; see also *id.* at 344-345, 349-355 (discussing content of prayers, religious affiliations of prayer-givers, and county officials' actions and

[3] The Tenth Circuit highlighted these same factors in *Snyder* v. *Murray City Corp.*, 159 F.3d 1227, 1228 (10th Cir. 1998) (noting prayer-giver diversity); *id.* at 1233-1235 & n.12 (examining content of prayer); *id.* at 1234 (reviewing prayer-giver selection).

inactions).[4]

Indeed, Judge Wilkinson, writing for the court in *Joyner*, noted that "the *Pelphrey* court adopted the same approach" that the Fourth Circuit has. 653 F.3d at 353. The Second Circuit similarly concluded that "[t]he other circuits that have addressed the issue, while acknowledging the limits on 'parsing' prayers, have consistently looked to substance." Pet. App. 21a n.6 (citing *Pelphrey*, 547 F.3d at 1277-1278; *Hinrichs* v. *Bosma*, 440 F.3d 393, 399 (7th Cir. 2006) (denying stay pending appeal), injunction vacated on standing grounds, 506 F.3d 584 (7th Cir. 2007); *Wynne* v. *Town of Great Falls, S.C.*, 376 F.3d 292, 299 n.4 (4th Cir. 2004)). Indeed, petitioner's claim of a circuit split is especially puzzling because the cases it cites as evincing that split themselves described the circuits' jurisprudence as in alignment.

2. The circuits also agree that, while the content of prayers is relevant to the analysis, it is not dispositive; sectarian references, standing alone, are "not inherently a problem." Pet. App. 21a; see also Pet. App. 16a ("*Marsh* * * * is hard to read, even in light of [*County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)], as saying that denominational prayers, in and of themselves, violate the Establishment Clause."); *Rubin*, 2013 WL 1198095, at *6 ("[W]e join several of our sister circuits in

[4] To say that courts have reviewed the overall content of prayers is not to say that they have decided "theological questions." Cf. Theologians' Br. 8. Indeed, the theologians fail to identify a single theological question that was discussed, let alone decided, below.

concluding that neither *Marsh* nor *Allegheny* categorically forbids sectarian references in legislative prayer."); *Joyner*, 653 F.3d at 349 ("Infrequent references to specific deities, standing alone, do not suffice to make out a constitutional case."); *Pelphrey*, 547 F.3d at 1271 (*Marsh* cannot be read "as allowing only nonsectarian prayers"); *Snyder* v. *Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) ("[T]he mere fact [that] a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause."). Petitioner thus errs when it posits "a conflict among the courts of appeals over whether the Establishment Clause precludes legislative invocations that reference particular religious traditions." Pet. 13 n.2.

3. The differing results in the circuits' decisions have flowed not from a conflict in legal principle or an overriding focus on the frequency of sectarian references, but from material factual differences among the cases.

a. In *Pelphrey*, a diversity of prayer-givers and religious references led the court to conclude that the commission had not affiliated itself with any one faith. 547 F.3d at 1277-1278. Nor was the "inclusion of diverse faiths [ ] merely a 'token' gesture to mechanically avoid judicial intervention." *Pelphrey* v. *Cobb Cnty., Ga.*, 448 F. Supp. 2d 1357, 1369 (N.D. Ga. 2006), aff'd, 547 F.3d 1263 (11th Cir. 2008). In fact, non-Christians had presented prayers before the County Commission in each of the five years preceding the record's closure. See Pls.' Mot. Summ. J. Exh. C Attach. 1 at 14-31, *Pelphrey*, No. 1:05 Civ. 2075-RWS

(N.D. Ga.); see also *Lakeland*, 2013 WL 1197772, at *13 (noting that prayers and prayer-givers in 2010 and 2011 were religiously diverse, and that county even welcomed "speakers from congregations outside the county"). And after citizens "voiced concerns about the invocation practice, the number of [Christian-specific] sectarian references dropped significantly, approaching the 50% mark." *Pelphrey*, 448 F. Supp. 2d at 1361 n.7. Here, in contrast, with the exception of a brief hiatus triggered by this lawsuit, Christian clergy have delivered *all* of the prayers in the record. Pet. App. 4a-5a, 19a. And the frequency of sectarian references has actually *increased* over time: in the eighteen months preceding the record's closure—a time period highly relevant to the propriety of injunctive relief—100% of the prayer-givers, and approximately 90% of the prayers, were Christian. See pages 2-3, *supra*. *Joyner* involved a similar situation: no non-Christian had delivered the prayer there in the year-and-a-half before the record closed. 653 F.3d at 353.

b. *Pelphrey* did not involve prayer-givers who routinely elaborated on Christian theology or disparaged objectors. See 547 F.3d at 1266 (characterizing sectarian references as "ordinarily" "brief"). And in *Lakeland*, the city proactively directed prayer-givers to "maintain a spirit of respect and ecumenism" and to avoid proselytizing and disparaging remarks. Pls.' Mot. Summ. J. Exh. 4 at 5, *Lakeland*, No. 8:10 Civ. 1538-T-17-MAP (M.D. Fla.). Here, the Town makes no such request, so prayer-givers have discussed and celebrated the resurrection of Jesus Christ, requested the audience's recitation of the Lord's Prayer, discussed soliciting contributions for a

particular congregation, and disparaged objectors as an "ignorant" "minority." See page 3-4, *supra*. Similarly, in *Joyner*, one prayer-giver expressed appreciation for "the stand the Board took as a whole allowing me, a minister of the Gospel of the Lord Jesus Christ, to be able to pray as the New Testament instructs," and others regularly delivered invocations that "not only invoked Jesus' name throughout" but also "invoked specific tenets and articles of * * * Christianity." 653 F.3d at 344, 350.

c. The legislative-prayer practices in *Pelphrey* and *Lakeland* were truly even-handed: both cases involved random scheduling processes (*Pelphrey*, 547 F.3d at 1268; *Lakeland*, 2013 WL 1197772, at *13-*14; Pls.' Mot. Summ. J. Exh. 4 at 5, *Lakeland*, No. 8:10 Civ. 1538-T-17-MAP (M.D. Fla.)); in neither case was there any indication that government officials had otherwise manifested an alliance with Christian prayer-givers; and the City of Lakeland had affirmatively disclaimed any endorsement of prayer-givers' beliefs (*Lakeland*, 2013 WL 1197772, at *6). Here, by contrast, the Town has favored certain prayer-givers in the scheduling process; Town officials have denominated Christian, but not non-Christian, prayer-givers as their "Town chaplain"; Supervisor Auberger has expressed an even greater affinity with select Christian prayer-givers; and Board members have engaged in uniquely Christian behavior. See pages 2-5, *supra*; Pet. App. 19a-23a & n.5. In *Joyner*, the Board had likewise taken affirmative measures to encourage sectarian prayers. 653 F.3d at 353-354.

d. Finally, there was no indication in *Pelphrey* that

some members of the audience were required to attend meetings or that attendees faced pressures to participate in the prayers. See *Pelphrey* v. *Cobb Cnty., Ga.*, 410 F. Supp. 2d 1324, 1325 (N.D. Ga. 2006) (prayer introduced with "for all who wish to do so, please rise for the invocation and the Pledge"); see also *Lakeland*, 2013 WL 1197772, at *4, *5 (upholding policy providing that "[n]o member or employee of the Commission or any other person in attendance * * * shall be required to participate in any invocation" and that "only those who wish to do so" can be invited to stand). Here, many individuals—such as various Town employees, new police officers, and those seeking zoning variances—are required to attend meetings. See page 5, *supra*. Children also attend, not as mere observers, but as actual meeting participants. See, *e.g.*, C.A. App. 383, 411, 779.[5] And, as in *Joyner* (653 F.3d at 345, 354), the actions of prayer-givers, the Board, and audience members placed pressure on attendees to participate in the prayers. See Pet App. 23a.

All of these considerations, not just the overwhelming frequency of sectarian references, led the court below to conclude, correctly, that the town had exploited the prayer opportunity to advance a single faith. Pet. App. 18a-27a. In light of the "fact-intensive" nature of the *Marsh* analysis (*Pelphrey*, 547

[5] Although "there is no reason to believe that children are any more present in [Greece] Board meetings than they were in meetings of the Nebraska legislature" (Pet. App. 24a n.8), there *is* reason to believe that children are involved in Greece's meetings to a greater degree than they were in *Pelphrey* and *Lakeland*, neither of which mentioned children's attendance.

F.3d at 1271), it is neither remarkable nor surprising that the Second Circuit reached this result; that other circuits have similarly enjoined offending prayer practices; and that still other circuits, on different facts, have upheld legislative-prayer policies. Far from evincing a circuit split, these differing results simply illustrate that the role of a court is to apply the law to the facts. That the defendants do not always prevail is not a legitimate basis to cry foul. Cf. Pet. 16 (legislative-prayer defendants should win "in most instances").

C. The circuit split putatively created by *Rubin* v. *City of Lancaster* is both overstated and irrelevant.

Since the filing of the petition, the Ninth Circuit issued a decision in which it claimed to create a circuit split regarding one element of the *Marsh* inquiry. Because the case at hand would come out the same way under even the Ninth Circuit's standard, it presents a poor vehicle for resolving that putative split.

1. At most, *Rubin* diverges from the decision below with respect to a single aspect of a multi-factor test.

In *Rubin*, the Ninth Circuit considered a situation in which a city bent over backwards to ensure that its practice was both diverse and evenhanded. 2013 WL 1198095, at *9. The city had taken proactive measures to invite people of all religious persuasions; it followed a truly random scheduling process; it explicitly proclaimed respect for the city's diversity of religious denominations; it disclaimed any intention to affiliate with any faith; and it requested that prayer-givers

"maintain a spirit of respect and ecumenism" and avoid disparaging or proselytizing remarks. *Id.* at *9-*10 & n.13. As a result of the city's efforts, six of twenty-six prayer-givers were non-Christian—but, despite the city's request that prayers be ecumenical, all the Christian prayer-givers referenced Jesus Christ. *Id.* at *2.

In evaluating that practice, the Ninth Circuit held that the question "is not simply whether, given the frequency of Christian invocations, the reasonable observer of Lancaster's city-council meetings would infer favoritism toward Christianity. Rather, it is whether the City itself has taken steps to affiliate itself with Christianity." *Rubin*, 2013 WL 1198095, at *9. Because the government had "taken every feasible precaution * * * to ensure its own evenhandedness" (*ibid.*), the court concluded that the content of the prayers and the denominations of prayer-givers were of no consequence, as they were a function of local demographics rather than governmental choice (*id.* at *10-*11).

The *Rubin* panel averred that its holding was in conflict with *Joyner* and the decision below, which *Rubin* characterized as "invalidating any legislative-prayer practice that, from the vantage point of the prayers' listeners, has resulted in too large a proportion of sectarian invocations from one particular religious group." *Rubin*, 2013 WL 1198095, at *7. But the Second Circuit actually rejected having the legitimacy of a prayer practice turn on the frequency of sectarian references. See Pet. App. 15a-17a (critiquing sectarian/nonsectarian distinction); Pet. App. 16a

("*Marsh* * * * is hard to read, even in light of *Allegheny*, as saying that denominational prayers, in and of themselves, violate the Establishment Clause."); Pet. App. 21a (sectarian references are "not inherently a problem"). Instead of focusing on the content of clergy's presentations, the Second Circuit emphasized the actions of "town officials themselves." Pet. App. 26a; see also Part I.B.3.c., *supra*.[6] Indeed, the Second Circuit expressly approved a practice not unlike the one upheld in *Rubin*:

> [I]t seems to us that a practice such as the one to which the town here apparently aspired—one that is inclusive of multiple beliefs and makes clear, in public word and gesture, that the prayers offered are presented by a randomly chosen group of volunteers, who do not express an official town religion, and do not purport to speak on behalf of all the town's residents or to compel their assent to a particular belief—is fully compatible with the First Amendment.

Pet. App. 26a. Accordingly, any split created by *Rubin* is considerably less pronounced than the Ninth Circuit suggested.

Insofar as *Rubin* is read to create a circuit split, the split relates to, at most, one aspect of a test that even *Rubin* otherwise deems to be plenary. 2013 WL

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[6] Although the *Joyner* court placed substantial emphasis on the content of Forsyth County's prayers (653 F.3d at 349-350), it also faulted county officials for taking steps that encouraged sectarian references (*id.* at 353-354), and for placing pressure on audience members to participate in the prayers (*id.* at 344-345, 355).

1198095, at *7 (agreeing with decision below that prayer practice must be "viewed in its entirety"). So while the Second, Fourth, and Eleventh Circuits may assess the full totality of circumstances surrounding a challenged prayer practice—including the actions taken by members of the legislative body, the prayer-giver-selection process, and the resulting religious diversity—*Rubin* would place the last of these considerations off-limits when an analysis of the other factors indicates that the legislative body has been truly inclusive and evenhanded. *Id.* at *9-*10. In all other respects, *Rubin* keeps company with the decisions of the other circuits. See *id.* at *4 n.5, *6-*7 & n.6 (citing decision below on numerous points of overlap).

2. This case does not turn on the single factor over which the putative conflict exists.

This case is a poor vehicle for resolving the split that *Rubin* allegedly creates, because it would be decided the same way on either side of the divide. Indeed, as mentioned above, the panel below reached the result that it did in no small part because of actions undertaken by "town officials themselves." Pet. App 26a. It was not the "homogeneity of viewpoints reflected by the invocations" that doomed the Town's practice; rather, it was that, "despite th[at] homogeneity * * *, the *town* did not explain that it intended the prayers to solemnize Board meetings, rather than to affiliate the town with any particular creed," and did not request that prayer-givers avoid proselytizing or disparaging remarks. Pet. App. 22a (emphasis added). Similarly, it was not the Christian

affiliation of prayer-givers that swayed the court; it was that "[t]he *town's process for selecting prayer-givers* virtually ensured a Christian viewpoint." Pet. App. 19a (emphasis added). Likewise, it was not simply that prayer-givers spoke on behalf of the Town and its residents, it was that "Town officials * * * contributed to the impression that these prayer-givers spoke on the town's behalf" by denominating Christian prayer-givers as Town chaplains, by expressing an even greater affinity with select Christian prayer-givers, and by participating in the prayers with uniquely Christian behavior. Pet. App. 23a; see also pages 4-5, *supra*.

Because Town officials played an affirmative role in creating an impermissible affiliation, this case does not fairly present the legal question over which the alleged conflict exists. The case thus does not provide a suitable opportunity for conducting the careful line-drawing that is called for when this Court intervenes. The Court accordingly should wait for a case—perhaps *Rubin* itself—in which a truly evenhanded practice nonetheless yields prayers that are decidedly sectarian. Only then would a choice between standards affect the outcome. And if no such case ever presents itself, it would simply highlight that *Rubin*'s putative circuit split is of no import.

Furthermore, because of the self-avowed circuit split created by the *Rubin* panel, together with the panel's make-up (one active judge, one senior judge, and a district judge sitting by designation), the Ninth Circuit's history of granting en banc review, and the lack of any need for the court to have reached the

question that it did,[7] the decision in *Rubin* stands a reasonable chance of being reheard. And respondents' counsel has confirmed that plaintiffs' counsel in *Rubin* does indeed plan to seek rehearing. If the decision were to be reheard, the en banc Ninth Circuit could very well appreciate—like the Fourth Circuit did in *Joyner* and the Second Circuit did below—that there is, indeed, no meaningful split among the circuits.

Finally, even if *Rubin* is not reheard, its recent vintage counsels in favor of allowing the other circuits, and the district courts, to wrestle with its reasoning before this Court considers its merits. Until other courts have had an opportunity to apply the *Rubin* standard to various factual scenarios, the meaning and reach of the decision remain unknown. An appeals court's adoption of a novel standard, just days ago, is a quintessential circumstance in which patience should prevail.

II. The Second Circuit's Opinion Does Not Conflict With This Court's Decisions, Which Are Themselves Harmonious.

Petitioner asserts that the decision below is in conflict with this Court's decisions in *Marsh* and *Lee* v. *Weisman*, 505 U.S. 577 (1992). Pet. 15-19. Petitioner claims that *Allegheny* is to blame for having led the

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[7] Because the plaintiffs had challenged a single reference to Jesus Christ, rather than the city's invocation policy as a whole (*Rubin* v. *City of Lancaster*, 802 F. Supp. 2d 1107, 1111 (C.D. Cal. 2011), aff'd, No. 11-56318, 2013 WL 1198095 (9th Cir. Mar. 26, 2013)), the portion of *Rubin* that creates a circuit split is *dictum* (2013 WL 1198095, at *2 n.3).

Second Circuit astray, as *Allegheny* itself is in "perceived conflict" with *Marsh*. Pet. 19. But these alleged conflicts rest on caricatures of the Court's decisions. The Court's jurisprudence is harmonious, and the decision below is faithful to all of it.

A. Petitioner contends that the decision below departs from *Marsh*'s "bright-line rules" that "the touchstone for whether legislative prayer is constitutional is whether the government acts with impermissible motive" (Pet. 16, 17-18), and that prayers' content is irrelevant absent a showing of religious animus (Pet. 15). But that is not what *Marsh* held. It held that "[t]he content of the prayer 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." *Marsh*, 463 U.S. at 794-795. If the *Marsh* Court had been of the view that exploitation arises only when a legislative body acts with a requisite level of scienter, it could easily have said so—in far fewer words. Instead, *Marsh* itself addressed the question of "impermissible motive" separately from the question of whether the prayer opportunity had been exploited. *Id.* at 792-795; see also *Pelphrey*, 547 F.3d at 1277-1278 (separately analyzing whether "the [s]election [p]rocess * * * [w]as * * * [b]ased on an [i]mpermissible [m]otive" and whether "the [i]dentity of the [s]peakers and the [n]ature of the [p]rayers * * *

[a]dvance[d] a [s]ingle [r]eligion").[8]

If the government's intent were all that mattered, not only would prayers exclusive to a single faith prevail in countless communities around the country, but prayer-givers could deliver diatribes against other creeds, seek to convert members of the audience, denigrate the beliefs of minority groups, and call out members of the audience who dissent or fail to participate. And they could do so with relative impunity, because "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislat[ure's actions]." *Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971). In addition to failing to heed the Court's disfavor of legal standards that call for courts to inquire into government officials' subjective intent (see, *e.g.*,

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[8] *Amicus curiae* Robert Palmer claims that his removal of references to Christ was a "post-litigation modification" after "the record ended." Palmer Br. 8. But the trial court took evidence regarding the change, so it most certainly took place before the record closed. See Palmer Dep. Exh. 5, *Chambers* v. *Marsh*, No. Civ. 79-L-294 (D. Neb.) ("[Y]ou may look at the prayers offered during 1980 from that point on * * * and I don't think there is any reference to Jesus or Christ * * * ."). Palmer also claims that, by characterizing his prayers as "nonsectarian," he meant only that they were not specific to any particular *Christian* denomination. Palmer Br. 9. But he testified that a "[n]onsectarian [prayer] is one that does not promote * * * any specific group, cult or division of the *Judeo-Christian faith*"—not the Christian faith alone. Palmer Dep. Exh. 5, *Marsh*, No. Civ. 79-L-294 (emphasis added). Another deposition passage captures the point even more clearly: when asked whether a particular prayer reflected "the Judeo-Christian tradition," Palmer replied that the entire prayer did, "except for the last sentence," which referenced "the name of Christ Our Lord." Palmer Dep. Exh. 5, *Marsh*, No. Civ. 79-L-294.

Harlow v. *Fitzgerald*, 457 U.S. 800, 815-818 (1982)), this result would "do[ ] violence to the pluralistic and inclusive values that are a defining feature of American public life," disregard the "inclusive aspect" of legislative prayer that *Marsh* took pains to emphasize, and "surrender the essence of the Establishment Clause." *Joyner*, 653 F.3d at 347, 351. "*Marsh* did not countenance any such idea." *Id.* at 351.

B. Petitioner contends that the decision below is in tension with *Lee*'s warning against government's superintending the content of prayers. Pet. 17-18. As Justice O'Connor has explained, this argument "misses the mark." *Turner* v. *City Council*, 534 F.3d 352, 355 (4th Cir. 2008) (O'Connor, J., sitting by designation). *Lee* disallowed a rabbi's prayer at a public-school graduation because, in the context of "a formal religious exercise which students * * * are obliged to attend," "it is no part of the business of government to compose official prayers"—whether nonsectarian or otherwise. 505 U.S. at 588, 589 (quoting *Engel* v. *Vitale*, 370 U.S. 421, 425 (1962)). *Marsh*, in contrast, permits legislative bodies to deliver prayers and to rely on government-employed chaplains as their mouthpieces. 463 U.S. at 793-794. So while *Lee* may counsel a light touch with respect to prayers' content (see Pet. App. 15a-16a), it is illogical to assert that *Lee* altogether bars government officials from crafting the prayers that *Marsh* permits them to deliver.

C. Finally, petitioner claims that the source of all the confusion is *Allegheny*'s criticism of sectarian references. Pet. 19-21. But *Allegheny* did not hold that such references "must be expunged" (Pet. 20), any more

than *Marsh* held that they must be ignored. *Allegheny*'s statement that the prayers in *Marsh* were upheld "because" of the chaplain's removal of the sectarian references (*Allegheny*, 492 U.S. at 603) merely acknowledges that removing sectarian references is one way—not the *only* way—that a legislature can avoid impermissible affiliations. See, *e.g.*, Pet. App. 16a (*Allegheny* "does not mean" that all denominational references must be avoided); *Rubin*, 2013 WL 1198095, at *6 ("*Allegheny* does not in fact say that a legislative prayer is constitutional only if nonsectarian."); *Pelphrey*, 547 F.3d at 1271-1272 ("*Allegheny* does not require that legislative prayer conform to the model in *Marsh*.").

Nor did *Allegheny* suggest that legislative prayers should be analyzed under the *Lemon* or endorsement test when it acknowledged *Marsh*'s concern with legislative prayers' "effect." Cf. Pet. 20-21. *Marsh* itself considered whether the chaplain's "long tenure ha[d] the effect of giving preference to his religious views." 463 U.S. at 793; see also *Pelphrey*, 547 F.3d at 1277 (analyzing whether prayer practice "had 'the effect of affiliating the government with any one specific faith'" (quoting *Allegheny*, 492 U.S. at 603)).[9]

In light of the harmonious nature of this Court's jurisprudence, it is hardly surprising that no circuit

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[9] That is not to say that *Marsh* and *Lemon* are concerned with the same effect: *Marsh* precludes practices that have the effect of advancing a single faith, while *Lemon* prohibits, among other things, actions that have the primary effect of advancing even religion in general. See page 11, *supra*.

has perceived the conflict that petitioner posits. Instead, the circuits have drawn guidance from *all* of the Court's decisions, deeming them to be complementary rather than contradictory. Pet. App. 10a-18a (relying on *Marsh*, *Allegheny*, and *Lee*); *Rubin*, 2013 WL 1198095, at *6 ("Far from displacing *Marsh*, *Allegheny* merely illuminates its boundaries."); *id.* at *11 (relying on *Lee*); *Pelphrey*, 547 F.3d at 1271 ("*Marsh*, as informed by *Allegheny* and *Lee*, controls our review of the constitutionality of legislative prayers.").

III. Petitioner's Private-Speech Claim Was Not Preserved And Lacks Merit.

Petitioner argues that the decision below conflicts with this Court's limited-public-forum jurisprudence. Pet. 23-25. It faults the Second Circuit for having ruled "without regard" to the "critically important" free-speech rights of clergy to deliver prayers of their choosing. Pet. 23, 25. But petitioner itself never asserted these alleged rights, either before the Second Circuit or the district court; nor did petitioner cite any of the limited-public-forum cases that it cites now.[10] Accordingly, petitioner has failed to preserve this claim. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (petitioner cannot "assert new substantive arguments attacking * * * the judgment when those arguments were not pressed in the court

[10] Petitioner mentioned *in a footnote* on appeal (but not in the district court) that the venue "ha[d] many characteristics of a limited public forum" (Appellees' C.A. Br. 39 n.16), but it never argued that the venue was, in fact, such a forum.

whose opinion we are reviewing").

Petitioner's silence on this issue was likely driven by the fact that the argument is specious: lower courts have consistently refused to treat legislative prayers—whether delivered by public officials or by invited clergy—as private speech. See, *e.g.*, *Pelphrey*, 547 F.3d at 1266-1282 (applying Establishment Clause, not Free Speech Clause, to prayers delivered by outside clergy); *Turner*, 534 F.3d at 355 (prayers offered by city council members "[were] government speech"); *Simpson*, 404 F.3d at 288 (invocations offered by various religious leaders "[were] government speech"); *Snyder*, 159 F.3d at 1235 (characterizing clergy-led prayer at municipal council meetings as "government prayer," and holding that council was "well within its rights" to prohibit resident's prayer). As in *Turner*, petitioner has not identified "a single case in which a legislative prayer was treated as individual or private speech." 534 F.3d at 355.

IV. The Decision Below Imperils Neither State Nor Federal Practices.

Petitioner argues that the circuits' treatment of legislative prayer "changed dramatically" with the Fourth Circuit's decision in *Wynne*, such that the "ubiquitous American tradition of legislative prayers" is now under threat. Pet. 26. But in the nine years since *Wynne*, legislative prayer has thrived: prayers "are still going strong today" in both houses of the U.S. Congress and in the legislatures of forty-nine of the fifty states. Indiana Br. 5-7.

The Indiana brief contends that the Second

Circuit's ruling renders states' practices "vulnerable," but Indiana describes only its own practice, and does so with outdated evidence. Indiana Br. 8, 15-16. While space limitations preclude a comprehensive discussion of the current practices of all eighteen states that joined the Indiana brief, a review of the practice followed by one—Florida—demonstrates that the decision below is not the harbinger of doom that *amici* describe.

Although a majority of Florida's legislative prayer-givers are Christian, prayers are also delivered by legislators, members of the military, and members of the Native American, Buddhist, and Jewish faiths.[11] Prayer-givers in the Florida Senate are directed to use terms "that allow persons of different faiths to give assent to what is said," and to "use[ ] universal, inclusive terms for the deity rather than proper names for divine manifestations." App. 1a-2a. Prayer-givers in the Florida House are likewise "expected to use common language" and are reminded that "[r]eligious sectarianism * * * is not only a breach of etiquette, but represents insensitivity to the faith of others." App. 3a, 4a. Accordingly, in 2011 and 2012, approximately one-third of the prayers in the House, and just three out of forty-four prayers in the Senate, included Christian

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[11] See Fla. H.R., *Session Specific Documents*, http://www.myfloridahouse.gov/Sections/Documents/publications.aspx (last visited Apr. 6, 2013) (follow "House Journals" hyperlink for 2011 and 2012; then follow "Complete" bound journal hyperlink); see also Fla. S., *Senate Journals*, http://www.flsenate.gov/Session/Journals.cfm (last visited Apr. 6, 2013) (follow "Final Bound Journal" hyperlinks for 2011 and 2012).

language. See note 11, *supra*.[12] It is thus petitioner's interpretation of the law, not the decision below, with which the Sunshine State should take issue: if petitioners were correct about what *Marsh* and *Lee* require, Florida's apparently inclusive practices would reflect unconstitutional censorship of prayer and free speech.

The brief filed by some members of the U.S. House of Representatives[13] likewise errs in suggesting that the Second Circuit's decision will jeopardize that institution's practice. While Christian clergy present a majority of the House's prayers, non-Christian guest chaplains routinely deliver prayers, and have done so consistently in the last several years.[14] And the percentage of sectarian references is far lower than it is in the Town of Greece: approximately half (rather than up to 90%) of the prayers in the 112th Congress contained Christian language, even under *amici*'s

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[12] These numbers rest on the same narrow definition of "sectarian" that was used in characterizing the prayers in the record below. See page 3, *supra*.

[13] Although the 112th Congress was a diverse body—with forty-four members who identified as Jewish, Muslim, or Buddhist (cf. Tracy Miller, *Faith on the Hill: The Religious Composition of the 112th Congress*, Pew Forum on Religion & Pub. Life (Feb. 28, 2011), http://tinyurl.com/pewforum112)—*no* non-Christian joined the brief.

[14] See Office of the Chaplain, U.S. H.R., *Guest Chaplains (2001–Present)*, http://tinyurl.com/guestchaplains (identifying religious affiliations of guest chaplains) (last visited Apr. 6, 2013). In the 111th and 112th Congresses, for example, Jewish or Muslim prayer-givers delivered invocations on at least seven occasions during each Congress.

expansive definition of "sectarian." See Members of Cong. Br. 10-20. Further, Greece Town Board meetings—in which both children and other Town residents routinely participate—are dissimilar in context to congressional sessions, "where spectators are incidental to the work of the public body" (*Coles* v. *Cleveland Bd. of Educ.*, 171 F.3d 369, 382 (6th Cir. 1999)). And because most citizens attend municipal-body meetings "only sporadically," they would not witness the full range of prayers in any given year. *Joyner*, 653 F.3d at 354. There is also no reason to believe that members of the House have taken action to align themselves with Christian prayer-givers, as Greece Town officials have (see pages 4-5, *supra*). It is precisely because of factual differences of this kind that the courts have eschewed the one-size-fits-all approach that petitioner advocates.

Petitioner's *amici* warn that this area of law could "slid[e] into irretrievable chaos" if this Court does not intervene, because "conflicting precedents leave state legislatures, localities, and subdivisions with very little guidance when it comes to crafting legislative prayer policies." Indiana Br. 13, 24. But their exemplar of this alleged conflict was reversed six years ago for lack of standing. *Id.* at 15-24 (discussing *Hinrichs* v. *Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), rev'd on standing grounds, 506 F.3d 584 (7th Cir. 2007)). Today, state and local legislatures have available to them substantial guidance, in the form of both decisional law

and model policies.[15] Indeed, as Judge Wilkinson noted in *Joyner*, the constitutional standard that this Court and the circuits have endorsed "asks * * * no more than what numerous public and governmental entities already meet." 653 F.3d at 354.

There has been no "litigation bonanza." Palmer Br. 17; cf. Pet. 27; Indiana Br. 10 & App. 1a-5a. Of the thirteen legislative-prayer lawsuits filed nationwide over the past nine years,[16] four arose in the Fourth Circuit, whose jurisprudence is well-settled (see Part I.A., *supra*); and several were decided or dismissed by district courts, without any hint that the litigants or the court had trouble discerning the law. See Indiana Br. 1a-5a. The filing of thirteen lawsuits over the course of a decade—many resolved without appeal, and

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[15] Indeed, a model policy can be found in the survey on which the Indiana brief heavily relies. See Nat'l Conf. of State Leg., *Inside the Legislative Process, Prayer Practices* 5-146 (2002), available at http://tinyurl.com/ncslprayer. The Indiana brief neglects to mention that this model policy cautions prayer-givers to "be especially sensitive to expressions that may be unsuitable to members of some faiths." *Ibid.* The National Conference for Community and Justice ("NCCJ") has published similar guidelines for "inclusive public prayer," which Florida's Senate and House have adopted. See NCCJ, *When You Are Asked to Give Public Prayer in a Diverse Society, Guidelines for Civic Occasions*, available at http://tinyurl.com/nccjprayer (last visited Apr. 6, 2013); see also App. 1a-4a (incorporating NCCJ recommendations).

[16] In an effort to pad their numbers, *amici* include school-board decisions in their tally. Indiana Br. App. 1a-5a. But these cases are inapposite, as the circuits have agreed that *Marsh* does not apply to school boards. See, *e.g.*, *Doe* v. *Indian River Sch. Dist.*, 653 F.3d 256, 275 (3d Cir. 2011); *Coles*, 171 F.3d at 381.

others resolved by appellate courts that have seen eye-to-eye—hardly reflects the sort of deep confusion warranting the Court's intervention.

V. It Would Be Premature For This Court To Address This Case.

Because the district court awarded the Town summary judgment, it has not had occasion to fashion an injunction. The Second Circuit remanded to allow the district court this opportunity, specifically instructing that the Town can continue to pray and that there is no single permissible way for the Town to do so. Pet. App. 16a, 25a-27a.

This case therefore arises in the same unripe posture as *Mount Soledad Memorial Ass'n* v. *Trunk*, 132 S. Ct. 2535 (2012) (mem.), denying cert. to 629 F.3d 1099 (9th Cir. 2011), in which Justice Alito observed:

> The current petitions come to us in an interlocutory posture. The Court of Appeals remanded the case to the District Court to fashion an appropriate remedy, and, in doing so, the Court of Appeals emphasized that its decision "d[id] not mean that the Memorial could not be modified to pass constitutional muster [or] that no cross can be part of [the Memorial]." 629 F.3d, at 1125. Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari.

Mount Soledad, 132 S. Ct. at 2536 (Alito, J., statement respecting denial of cert.) (citing cases).

As in *Mount Soledad*, a denial of the petition here would "not amount to a ruling on the merits, and [petitioner] is free to raise the same issue in a later petition following entry of a final judgment." *Ibid.* Until then, the case is not ripe for consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 8, 2013