No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

—v.—

SUSAN GALLOWAY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, THE ANTI-DEFAMATION LEAGUE, AND INTERFAITH ALLIANCE FOUNDATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The New York Civil Liberties Union (NYCLU) is a state affiliate of the national ACLU. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. As organizations that have long been dedicated to preserving religious liberty and the right to participatory democracy, the ACLU and the NYCLU have a strong interest in the proper resolution of this case.

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in

[1] Letters of consent to the filing of *amicus* briefs in support of either party or neither party have been lodged with the Clerk of the Court by both Petitioner and Respondents. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

America, and to the protection of minority religions and their adherents.

Interfaith Alliance Foundation is a 501(c)(3) non-profit organization that celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Founded in 1994, Interfaith Alliance supports people who believe that their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

STATEMENT OF THE CASE

Fourteen years ago, the Town Board of Greece, New York, decided to begin opening its monthly meetings with official prayers. Pet. App. 3a. Previously, the Board had solemnized meetings with a moment of silence. *Id.*

From 1999 through June 2010, roughly two-thirds of the Board's opening prayers were expressly Christian, featuring overt references to Jesus Christ or other distinctly Christian beliefs. *Id.* at 7a. For example, one prayer was offered in the name of "Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life." J.A. 88a-89a. Another proclaimed, "And in the life and death, resurrection and ascension of the Savior Jesus Christ, the full extent of your kindness shown to the unworthy is forever demonstrated." *Id.* at 129a.

The Town's prayers are delivered by clergy from local houses of worship. Pet. App. 4a. Before Respondents complained in 2007, only Christian clergy were invited to perform the invocation. *Id.* Under threat of litigation, the Board relented, asking non-Christians to deliver the opening invocation on four occasions throughout 2008. *Id.* at 4a-5a. Although the Board claims that it thereafter invited religious leaders of all faiths to serve as prayer givers, every invocation from 2009 through June 2010 was delivered by a Christian clergy member. *Id.* at 5a. And 85% of the prayers during that time period were explicitly Christian. *See* J.A. 129a-43a.

Board meetings are the sole forum for residents to address the Board on matters of Town governance. Pet. App. 3a. During meetings, Board members also swear-in public employees and honor residents, including children, for academic, athletic, or civic achievements. *Id.* In addition, the Board frequently invites local scouting troops to deliver the Pledge of Allegiance, and local students routinely attend meetings to receive credit for a state-mandated civics program. *Id.*

Respondents, several non-Christian residents of Greece, filed suit in 2007, arguing that the Town's practice of opening meetings with explicitly Christian prayer violates the Establishment Clause of the First Amendment to the U.S. Constitution. *Id.* at 57a-58a. The U.S. Court of Appeals for the Second Circuit agreed, unanimously holding that the prayers are unconstitutional because they indicate an "official affiliation with a particular religion." *Id.* at 26a.

SUMMARY OF ARGUMENT

This Court has repeatedly held that the Establishment Clause requires the government to remain neutral between religion and non-religion and impartial among faiths. The sectarian prayers used to open Town Board meetings in Greece, New York, contravene this core constitutional mandate.

As a threshold matter, *Marsh v. Chambers*, 463 U.S. 783 (1983), should be overruled. *Marsh*'s approval of legislative prayer runs afoul of the neutrality principle and cannot be squared with this Court's Establishment Clause jurisprudence prior or subsequent to *Marsh*. Governmental neutrality is exceptionally important when it comes to prayer. For many devout believers, prayer is the quintessential holy act. No matter the context, it cannot be fully divorced from its religious connotations. By its very nature, governmental prayer, even if nonsectarian, places the State firmly on the side of religion. The historical prevalence of legislative prayer does not justify retreat from the well-established constitutional prohibitions on government-sponsored prayer and official favoritism of religion over non-religion.

At the very least, if the Court retains *Marsh*'s legislative-prayer exception, it should reaffirm that the exception remains exceedingly narrow and insist that legislative invocations strive for neutrality among faiths by forsaking official sectarian prayer. Whatever disagreements may exist about the reach of the Establishment Clause, this Court has vigorously and repeatedly proscribed governmental sectarianism.

Our constitutional aversion to government-sponsored sectarianism is rooted in the understanding that the State's preferential support of one sect or denomination is especially likely to undermine the dignity and free conscience of individual citizens (particularly those of minority faiths); weaken religion by relying on the government, rather than religious institutions, to spread and validate messages of faith; and engender the type of religious discord that can wreak havoc on a pluralistic republic. When legislative prayers venture into the specific religious tenets and doctrines of particular faiths, they become instruments of official denominational preference and threaten to impose these harms on individuals and the community.

Marsh was not intended to abandon the clearest command of the Establishment Clause by allowing legislative bodies to indulge in sectarian entreaties to the divine. On the contrary, in upholding the Nebraska Legislature's invocation practice, the Court notably observed that all explicit Christian references had been removed by the legislative chaplain. The Court has subsequently confirmed that this fact was central to its decision in *Marsh*.

Since *Marsh*, our nation has grown even more religiously diverse. If legislative prayers are constitutionally permissible at all, they should reflect and comply with the neutrality principle by affirmatively avoiding denominational appeals. This rule is both sensible and workable. This Court and lower courts have already distinguished sectarian terminology from nonsectarian references and

provided numerous examples of each. And many legislative bodies across the country currently require invocations to be nonsectarian.

Because Petitioner routinely opens its meetings with expressly sectarian invocations, the Town's prayer practice fails the minimum requirements of the Establishment Clause. Accordingly, the court below properly enjoined the Town's current legislative-prayer practice, and *amici* respectfully request that this Court affirm the judgment.

ARGUMENT

For more than six decades, this Court's Establishment Clause jurisprudence has generally been guided by a fundamental rule: "[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 875-76 (2005). The neutrality principle has served the Establishment Clause well because it speaks to the very harms that the First Amendment was designed to prevent. When the government engages in religious activity, such as prayer, it tends to usurp the right of individual conscience, render religion dependent on the State for its propagation, and incite religiously based civic divisiveness. To be sure, as discussed below in Part II, the danger is more pronounced and the harm more potent when the government embraces sectarian preferences, but even more inclusive, nonsectarian prayer poses a threat to religious liberty when it is sponsored by the State.

The Court's departure from this principle in *Marsh v. Chambers*, which authorized nonsectarian legislative prayer based on its "unambiguous and unbroken history of more than 200 years," 463 U.S. at 792, was deeply flawed. Because legislative prayer of any stripe violates the neutrality principle, the Court should overrule *Marsh* and deem Petitioner's prayer practice unconstitutional, regardless of the prayers' content. At a minimum, however, the Court should enforce the Establishment Clause's absolute ban on denominational preference by ensuring that legislative prayers delivered pursuant to *Marsh* are nonsectarian.

I. *MARSH* CANNOT BE RECONCILED WITH THE ESTABLISHMENT CLAUSE'S NEUTRALITY MANDATE AND SHOULD BE OVERRULED.

This Court has long recognized that the "touchstone" of the Establishment Clause "is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary*, 545 U.S. at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); *see also, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (stating that "government must pursue a course of complete neutrality toward religion"); *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 696 (1994) ("'A proper respect for . . . the Establishment Clause[ ] compels the State to pursue a course of 'neutrality' toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents.") (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792–93 (1973)); *Sch. Dist. of*

Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (holding that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"). As the Court recently observed, "[t]he importance of neutrality as an interpretive guide is no less true now than it was . . . in *Everson*." *McCreary*, 545 U.S. at 874.

Marsh signaled a pronounced departure from this basic rule. "Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause." 463 U.S. at 808 (Brennan, J., dissenting). Indeed, there are few acts that could more plainly breach the neutrality mandate than government-sponsored prayer. "[P]rayer is fundamentally and necessarily religious." *Id.* at 810 (internal quotation marks omitted). At its essence, prayer "is religion *in act*." *Id.* at 811; *cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring) (distinguishing the reference to God in the Pledge of Allegiance from the "explicit religious exercise" prohibited in *Lee v. Weisman*, 505 U.S. 577 (1992)).

Stripping an invocation of patently sectarian references, as the chaplain did in *Marsh*, 463 U.S. at 793 n.14, is insufficient to satisfy the neutrality principle. The inherently religious character of the prayer remains. It is still "a solemn avowal of divine faith and supplication for the blessings of the Almighty," and the "nature of such a prayer has

always been religious." *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962). Although prayers with more inclusive, nonsectarian content might mitigate the constitutional harms of official religious exercise, *see infra* Part II, they violate the neutrality principle nonetheless. As the Court has explained, "One timeless lesson [of the First Amendment] is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee*, 505 U.S. at 592.

Marsh's departure from prevailing Establishment Clause principles primarily rested on two pieces of historical information: an "unbroken practice" of legislative prayer for two centuries and the First Congress's vote to appoint and pay a chaplain in the same week that it voted to submit the First Amendment to the states. *Marsh*, 463 U.S. at 786-90, 794. Given this history, the *Marsh* majority reasoned, it could "hardly be thought that . . . [members of the First Congress] intended the Establishment Clause of the [First] Amendment to forbid what they had just declared acceptable." *Id.* at 790.

Even assuming the historical accuracy of the Court's assessment,[2] *Marsh*'s analytical approach

[2] In fact, support among the Founders for legislative chaplaincies and prayer was not unanimous. James Madison, the principal architect of the First Amendment and a member of the first four Congresses, disavowed any involvement in establishing the legislative chaplaincies, reporting that "it was not with [his] approbation" that they had been set up. Letter from J. Madison to E. Livingston (July 10, 1822), *in Madison: Writings* 786, 788 (Jack N. Rakove ed., 1999). He denounced

was unsound. Relying on the acts of the First Congress to rule out particular interpretations of the Establishment Clause makes sense only if lawmakers are regarded as infallible. History has shown all too often that this is not the case: "Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact." *Marsh*, 463 U.S. at 814 (Brennan, J., dissenting). The Founders and their successors were not immune to these lapses. *See Van Orden v. Perry*, 545 U.S. 677, 726 n.27 (2005) (Stevens, J., dissenting) ("The First Congress was – just as the present Congress is – capable of passing unconstitutional legislation.").

For example, the First Congress passed a law requiring that certain thefts be punished by public whipping. *Marsh*, 463 U.S. at 814 n.30 (Brennan, J., dissenting). A mere ten years after proposing the First Amendment, Congress approved the Alien and Sedition Acts, laws that are "patently unconstitutional by modern standards." *Lee*, 505 U.S. at 626 (Souter, J., concurring). And only one week after sending the Fourteenth Amendment to the States, the 39th Congress enacted a law affirming the racial segregation of Washington D.C. public schools. *Compare* Act of July 23, 1866, 14

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the congressional chaplaincy as inconsistent with the Constitution and the "pure principle of religious freedom." James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.*, *in Madison*: *Writings*, *supra*, at 745, 762. Madison believed it to be "a palpable violation of equal rights, as well as of Constitutional principles." *Id.* at 763.

Stat. 216, *with Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Even James Madison, one of the most ardent defenders of the Establishment Clause, did not always act in accord with his conscience when it came to matters of religion. Following the lead of Thomas Jefferson, Madison staunchly refused to issue prayer proclamations during the first three years of his presidency, believing them to be a violation of the constitutional amendment that he had helped conceive. *See Lee*, 505 U.S. at 624 (Souter, J., concurring). However, "amid the political turmoil of the War of 1812," he relented and issued four different religious proclamations. *Id.* Madison later expressed deep regret about having done so, writing that the proclamations and legislative prayers were "shoots from the same [unconstitutional] root." *Id.* at 625 (internal quotation marks omitted).

"Madison's failure to keep pace with his principles in the face of congressional pressure cannot erase the principles." *Id.* Rather, it serves as a reminder that the Founders were imperfect men who, at times, failed to live up to the lofty, untested ideals embodied in the Constitution and the Bill of Rights. Like the prayer proclamations that Madison later regretted, some of these failures stemmed from weakened fortitude in the face of external pressures and trying times. Others were perhaps a product of the particular era in which they were passed, but have been recognized by future generations and this Court as both legally erroneous and morally unconscionable. Either way, these historical examples illustrate why the First Congress's conduct,

relating to legislative prayer or otherwise, should not be determinative of the Court's constitutional analysis. This is especially true where, as in *Marsh*, it results in "subverting the principle of the rule of law." *See* Michael W. McConnell, *On Reading the Constitution*, 73 Cornell L. Rev. 359, 362 (1988) (arguing that *Marsh* "clearly violates fundamental principles we recognize under the [Establishment] [C]lause").

Ultimately, the *Marsh* holding was both analytically problematic and unnecessary. Legislative bodies can easily solemnize meetings using non-religious means. *See*, *e.g.*, *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring in part and dissenting in part) ("I fail to see why prayer is the only way to convey these [solemnizing] messages; appeals to patriotism, moments of silence, and any number of other approaches would be as effective."). Prior to adopting its prayer practice in 1999, the Town of Greece did just that, opening meetings with a moment of silence. *See* Pet. App. 3a. There is no indication that the Town's governance suffered without official prayer, and certainly no suggestion in the record or elsewhere that the Establishment Clause needs any exception for official, government-sponsored entreaties to the divine.

II. AT A MINIMUM, LEGISLATIVE PRAYERS MUST RESPECT OUR LONGSTANDING CONSTITUTIONAL COMMITMENT TO DENOMINATIONAL NEUTRALITY.

While there has been debate about the reach of the neutrality mandate in certain contexts, few dispute that governmental sectarianism – official preference for one faith or denomination over others – is and should be forbidden. This "principle of denominational neutrality" is well recognized as "[t]he clearest command of the Establishment Clause." *See Larson v. Valente*, 456 U.S. 228, 244, 246 (1982); *see also Kiryas Joel*, 512 U.S. at 707 ("[I]t is clear that neutrality as among religions must be honored."); *Allegheny*, 492 U.S. at 605 ("Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)."); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects.").[3]

[3] This understanding of the Establishment Clause has also been embraced by a number of individual justices in concurring and dissenting opinions. *See, e.g.*, *McCreary*, 545 U.S. at 897

Marsh was not a license to violate this rule in 1983, and it should not be treated as one today. On the contrary, at a time when our nation is more religiously diverse than ever,[4] it is even more critical that this Court reaffirm our commitment to governmental neutrality among faiths. Straying from this principle now, over two centuries after the First Amendment's adoption, would render the Establishment Clause virtually meaningless and unleash the very evils that the First Amendment was designed to prevent. If the Court is not inclined to overturn *Marsh*, at a minimum, it should affirm that the Establishment Clause requires the Town of Greece to limit its invocations to those that are nonsectarian in nature.

(Scalia, J., dissenting) (rejecting view that the Establishment Clause permits "government invocation of Christianity"); *Van Orden*, 545 U.S. at 709 & n.5 (Stevens, J., dissenting) (noting the "widespread consensus" that "government may not exercise a preference for one religious faith over another"); *Kiryas Joel*, 512 U.S. at 748 (Scalia, J., dissenting) ("I have always believed . . . that the Establishment Clause prohibits the favoring of one religion over others"); *Wallace,* 472 U.S. at 113 (Rehnquist, J., dissenting) (stating that the Clause was designed to stop "[g]overnment from asserting a preference for one religious denomination or sect over others"); *Schempp*, 374 U.S. at 231 (Brennan, J., concurring) ("While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion.").

[4] *See generally Amicus* Br. of Unitarian Universalist Association, *et al*.

A. Governmental Sectarianism Strikes at the Heart of the Establishment Clause.

Sectarian governmental practices are constitutionally repugnant because they violate basic notions of fairness and equality and are especially likely to trigger and exacerbate the harms of government-sponsored religion. *See, e.g.*, *McCreary*, 545 U.S. at 861 ("[W]hen the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable."); *see also, e.g.*, *Elk Grove*, 542 U.S. at 42 (O'Connor, J., concurring) ("While general acknowledgments of religion need not be viewed by reasonable observers as denigrating the nonreligious, the same cannot be said of instances where the endorsement is sectarian . . . .") (internal quotation mark omitted); *Larson*, 456 U.S. at 245 (noting that, absent governmental sectarianism, "every denomination would be equally at liberty to exercise and propagate its beliefs," but "such equality would be impossible in an atmosphere of official denominational preference"). The primary harms associated with sectarianism fall into three basic categories.

First, sectarianism typically involves the imposition of majority-faith beliefs on adherents of minority religions, jeopardizing their right of individual conscience and free religious exercise. *See Engel*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive

pressure upon religious minorities to conform to the prevailing officially approved religion is plain."); *cf.* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 320 (1996) ("[B]ecause religious choices and commitments are so important to so many individuals, and because of the history of government efforts to suppress disapproved religions, many citizens will be highly sensitive to any hint that government disapproves of their religious beliefs or even that it prefers some other set of religious beliefs.").

Second, even if adherents of the preferred faith never fall out of official favor, they are still vulnerable to the dangers of denominational bias. As Madison observed, governmental preference for one faith tends to "weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author," stimulate "pride and indolence in the Clergy," and cause "ignorance and servility in the laity." James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in Madison: Writings*, *supra* note 2, at 29, 32. History has proven that "ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." *Id.*; *see also*, *e.g.*, *Engel*, 370 at 431 ("The history of governmentally established religion . . . showed that many people had lost their respect for any religion that had relied upon the support [of] government to spread its faith.").

Third, and equally troubling, governmental sectarianism is a "flashpoint for religious animosity." *Lee*, 505 U.S. at 588. Such religious strife "is a threat to the normal political process" in a pluralistic

republic and was one of the principal evils that the Establishment Clause was intended to prevent. *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971); *see also McCreary*, 545 U.S. at 876 (explaining that the Establishment Clause is an important safeguard "against the civic divisiveness that follows when the government weighs in on one side of religious debate"); *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) ("What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."); *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) ("[The Religion Clauses] seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.").

The harms of governmental sectarianism point to one inescapable conclusion: "[A] union of government and religion tends to destroy government and to degrade religion." *Engel*, 370 U.S. at 431 (detailing the historical fallout that has occurred when the government has "allied itself with one particular form of religion"). These harms are not hypothetical. They are borne out by the Founders' personal experiences and the more contemporary examples of official religious persecution in nations that fail to adhere to the principle of denominational neutrality. And the harms are evident in events today, including, for example, a well-documented wave of anti-Muslim sentiment, stoked, in part, by certain elected leaders who prey on fears of religious differences between the majority and minority faiths. *See, e.g.*, *Awad v.*

Ziriax, 670 F.3d. 1111, 1130 (10th Cir. 2012) (upholding preliminary injunction against Oklahoma constitutional amendment that purported to "Save Our State" from a supposed onslaught of Sharia law).

B. The Establishment Clause Prohibits the Town of Greece from Opening Meetings with Sectarian Prayer.

Given the quintessentially religious nature of prayer, it is particularly important – in the very limited circumstances in which the Court has authorized official invocations – that the government comply with the longstanding ban on sectarianism. To conform to this rule, legislative prayers must avoid invoking the religious tenets of any specific faith. Although the outcome in *Marsh* respected this line, Petitioner's prayers plainly do not.

1. Sectarian legislative prayer is incompatible with Marsh *and the principle of denominational neutrality.*

a. *Marsh* contemplated that legislative prayers would not be specific to one faith.

Prior to the Court's consideration in *Marsh*, the chaplain of the Nebraska Legislature had regularly opened sessions with explicitly Christian invocations. *Marsh*, 463 U.S. at 793 n.14. As is often the case with official sectarian practices, however, several non-Christian legislators found these prayers disquieting. *Id.* When a Jewish senator expressed his discomfort to the chaplain in 1980, the chaplain "removed all references to Christ" in future prayers. *Id.* By the time the case was heard by the Court, the record reflected that the prayers had been

"nonsectarian" for several years—a key point of fact that the Court confirmed during oral argument and specifically noted in its opinion. *See id.*; Oral Argument at 36:40, Marsh v. Chambers, 463 U.S. 783 (1983) (No. 82-23), *available at* http://www.oyez.org/cases/1980-1989/1982/1982_82_23 (confirming that the chaplain had "devoided himself of the uniquely Christian aspect" of the prayers after receiving a complaint).

These facts belie Petitioner's claim that *Marsh* authorized sectarian prayer. Rather, they reflect the Court's view of legislative prayer as "conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions" and "a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792 (alteration in original) (internal quotation marks omitted). The *Marsh* facts also informed the Court's conclusion that the Nebraska prayers did not "proselytize or advance any one, or . . . disparage any other, faith or belief." *Id.* at 794-95.

Since *Marsh*, this Court has emphasized that the decision was predicated, at least in part, on the nonsectarian nature of the prayers. Distinguishing between "a specifically Christian symbol, like a crèche, and more general religious references, like the legislative prayers in *Marsh*," the Court explained in *Allegheny* that *Marsh*'s legislative invocations did not violate the constitutional requirement of nonsectarianism because the "particular chaplain had removed all references to Christ." 492 U.S. at 603 (internal quotation marks omitted); *see Van Orden*, 545 U.S. at 688 n.8 (plurality opinion) (suggesting that, despite explicitly

Christian prayers in the past, no ongoing violation occurred because the "chaplain removed all references to Christ the year after the suit was filed"); *Grand Rapids*, 473 U.S. at 390 n.9 ("[T]his Court has held that prayers conducted at the commencement of a legislative session do not violate the Establishment Clause, in part because of long historical usage and lack of particular sectarian content."). In so doing, the Court reiterated that "[h]owever history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *Allegheny*, 492 U.S. at 603.

On this issue, the analysis in *Allegheny* and other cases are, *amici* acknowledge, dicta. But that does not mean the Court should dismiss it out of hand, as Petitioner urges. Pet. Br. 24-25. The dicta is persuasive precisely because it rests on, and reflects, our strong "constitutional tradition . . . [that has] ruled out of order government-sponsored endorsement of religion – even when no legal coercion is present . . . – where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *See Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

b. Denominational legislative prayer epitomizes the harms of governmental sectarianism.

The facts underlying *Marsh* illustrate the harm to individual conscience inflicted by governmental sectarianism. As in *Marsh*, the

imposition of prayers that invoke Jesus Christ is likely to offend the beliefs of the Jewish legislator or the Muslim or Sikh citizen in attendance. Simply put, sectarian prayers pressure minority-faith adherents to take part in religious exercises that are incompatible with their beliefs.

Those who resist this pressure do not escape injury, especially in the more coercive context of local governmental meetings. By declining to participate in Christian prayer during meetings, local residents risk offending the very officials from whom they must seek relief or action on any number of problems or issues.

Further, to the extent that legislative invocations serve to unite those who attend governmental meetings,[5] minority-faith adherents who cannot participate in sectarian prayer are excluded from, and thus effectively denied, the shared benefit of a solemnizing practice. Madison anticipated and denounced this very harm, observing that "[t]he tenets of the chaplains elected shut the door of worship ag[ain]st the members whose creeds & consciences forbid a participation in that of the majority. . . ." Madison, *Monopolies.*, in *Madison: Writings*, *supra*, note 2, at 763.

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[5] *See, e.g.*, Nat'l Conference of Community & Justice (NCCJ), *When You Are Asked to Give Public Prayer in a Diverse Society*: *Guidelines for Civic Occasions* 2 (instructing that civic prayer should unite those in attendance "in a common concern," rather than dividing the community, which can occur "when forms or language exclude persons from faith traditions different than that of the speaker"), *available at* http://www.nccj.org/whatwedo/documents/PUBLICPRAYERGUIDELINES81610docx.pdf (last visited Sept. 19, 2013).

Not surprisingly, the isolating influence of sectarian legislative prayer has caused considerable acrimony and divisiveness, both in the Town of Greece itself and nationwide. *See, e.g.*, Andy Dillon, *Exclusivity in Diversity's Clothing*, Indymedia (Aug. 18, 2013), http://rochester.indymedia.org/node/99429 (describing anonymous letter, which was signed as "666" and sent to a plaintiff in this case, stating: "If you feel 'unwanted' at the Town of Greece meetings, it's probably because you are"; "Stay away from town meetings & do everyone a favor"; and "Be careful…..lawsuits can be detrimental") (PDF of letter available at http://rochester.indymedia.org /sites/default/files/%27666%27%20letter_2.pdf); Greg Stohr, *"Let Us Pray" Before Town Council Becomes High Court Case*, Bloomberg News (July 26, 2013), http://www.bloomberg.com/news/2013-07-26/let-us-pray-before-town-council-begins-is-high-court-case.html (same plaintiff had her mailbox pulled out of the ground and defaced); *see also, e.g.*, Stephen Clark, *Hartford's Inclusion of Muslim Prayers in Council Meetings Sparks Outrage*, FoxNews.com (Sept. 8, 2010), http://www.foxnews.com/politics/2010/09/08/hartford-councils-inclusion-muslim-prayers-sparks-outrage/ (noting that council staff members "were bombarded by hate mail overnight" after announcing they had invited local Muslim leaders to offer opening prayers); Howard Friedman, *County Board Moves to Moment of Silence; Generates Strong Objections*, Religion Clause (Feb. 12, 2009), http://religionclause.blogspot.com/2009/02/county-board-moves-to-moment-of-silence.html (revealing that county supervisor who had initiated change in board's practice of opening with explicitly Christian prayers had received death threats); Robert Patrick

& Laura Green, *Rosenauers' Home, Truck Vandalized: The Jewish Family Suing the Manatee County School Board Over a Prayer Issue Calls Friday's Attack a Hate Crime*, Sarasota Herald-Trib. (Apr. 13, 2004), at A1 (reporting that Jewish family who objected to Christian prayers by local school board had received threatening phone calls and that their house and cars were vandalized over Passover with red paint); Christina Lee Knauss, *A Quiet Life No More*, The State (Sept. 19, 2004), at B2 (recounting experience of Wiccan citizen who objected to a South Carolina town's Christian prayer practice and, as a result, suffered harassment, threats, and violence, including a home invasion during which her parrot was beheaded and note left warning, "You're next!" as well as other incidents in which her pet cats were killed and her dog beaten).

2. The Town's prayers violate the principle of denominational neutrality.

Over two-thirds of the Town's opening invocations throughout a period of eleven years were overtly Christian in that they referred to Jesus, Christ, or other exclusively Christian tenets. *See* Pet. App. 7a. Over those eleven years, just four invocations were delivered by non-Christians; and those four prayer givers were invited only in response to Respondents' threat of litigation. *Id.* at 4a-5a. In the eighteen months before the record closed in this case, the proportion of Christian prayers reached 85%. *See* J.A. 129a-43a. Individually and collectively, these Christian prayers run afoul of the Establishment Clause.

Petitioner and its *amici* offer several arguments for why the Town's sectarian practice

should nevertheless be permitted. But neither the absence of extensive, vitriolic proselytizing in Greece nor the Town's decision to rotate delivery of the prayers among local clergy can cure the constitutional infirmity of the practice.

a. Legislative prayers that invoke the tenets of a particular religion run afoul of the sectarianism ban and *Marsh* even if they do not preach vitriol or aggressively proselytize.

Petitioner's observation that its prayers do not "preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like," Pet. Br. 3, 12-13, 20, does not alter the constitutional analysis.[6] Such prayers would unquestionably be sectarian, but so are prayers that appeal to the canons and divine beings of one specific faith.

No one disputes that the Town's prayers were offered repeatedly and routinely in the name of Jesus Christ and included other references to distinctly Christian beliefs. As Respondents demonstrate, this sectarian prayer practice bears all the hallmarks of religious coercion. *See* Resp. Br. 21-30. Under the watchful eye of Board members, those with business before the Board must decide between risking offense to officials who obviously support the Christian prayer and taking part in a religious exercise that contravenes their own beliefs. Minority-faith

[6] Petitioner's suggestion that this Court uphold the Town's prayers because they are not demeaning of other faiths or aggressively proselytizing directly conflicts with its claim that the Court must ignore the content of challenged prayers. *See* Pet. Br. 13, 17, 18.

adherents who step out during the prayer or resist the pressure to participate in the prayer are revealed immediately as non-Christians; there is no hiding at meetings typically attended by ten people. C.A. App. A777, A929.

Putting aside the question of whether attendees are coerced into taking part in these prayers,[7] offering them in the name of Jesus, at the very least, openly prefers and thereby advances Christianity over other faiths. And it operates as an impediment to participation for the Sikh citizen scheduled to present a zoning application to the Board, the Muslim police officer awaiting his swearing-in ceremony, or the Jewish student attending the Board meeting as part of the state-mandated civics program. Isolating members of minority faiths in this way is unconstitutional, and it is a recipe for religious divisiveness.

Marsh does not counsel otherwise. The decision evinced respect for the fundamental principle of nonsectarianism by limiting permissible prayers to those that do not "proselytize or advance any one, or to disparage any other faith, or belief." 463 U.S. at 794-95. Whether or not Petitioner's prayers "preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like," religious exercises that invite residents to pray in the name of Jesus simply do not fall within the

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[7] This Court clarified decades ago that the Establishment Clause "does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *See Engel*, 370 U.S. at 430 (quoted in *Wallace*, 472 U.S. at 60 n.51).

nonsectarian legislative tradition embraced by *Marsh*.

b. Rotating delivery of the prayers among local clergy does not cure the Establishment Clause violation.

Petitioner's argument that the prayers fall under the Court's public-forum jurisprudence or otherwise constitute private speech, *see* Pet. Br. 21, 41, 52, is not supported by the record or the law. Though Petitioner now tries to dissociate from the prayers, Pet. Br. 53, they clearly remain the Town's own. The prayers are specifically authorized by the Board for the sole purpose of solemnizing its meetings. A Board employee selects and invites the prayer giver, whom the Town designates its "chaplain of the month." Pet. App. 4a. And the Board lists the prayer on its official agenda. *Id.* at 29a.

Moreover, while the Board does not select the particular words used by the prayer giver, through these actions, it strongly "invites and encourages religious messages." *See Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 306-07 (2000) (rejecting claim that prayers were not attributable to the school merely because the "words used by the speaker [we]re not determined by [student] votes"). As noted above, those who deliver the invocation consistently abide by the Board's expectation of prayer. Accordingly, unlike the meetings' separate "public forum" period, during which Town residents may directly petition the Board, C.A. App. A779, invocations given by the Town's official "chaplain of the month" are plainly delivered on the Board's

behalf and retain the imprimatur of the Town.[8] The prayers must, therefore, comply with the principle of denominational neutrality.

Rotating the invocations among local clergy violates this mandate if the clergy are allowed to deliver sectarian prayers, even if some of the prayers end up being expressly Jewish, Muslim, or representative of any other faith. Last month's preference for Judaism will be of little comfort to the Jewish homeowner who must endure explicitly Christian prayer at this month's Board meeting in order to apply for a zoning permit.

So, too, a Christian student receiving an award from the Board may regard a Muslim prayer as intolerable, despite a string of Christian prayers in the months before and plans for more Christian prayers thereafter. For example, in Hartford, Connecticut, when city council leaders invited local imams to deliver opening invocations as "a break from the typical start of meetings with Christian prayers or occasionally an invocation by a rabbi," officials were "bombarded with hate mail overnight." Clark, *supra* (quoting one objector as declaring, "'I think opening with Islamic prayer is opening up for more people to go straight to hell'"). Because of the community's furor, the city council rescinded its invitation to the Muslim religious leaders. *See*

[8] This Court has never questioned the assumption that prayers delivered by invited guests at State events are official in character. *See Lee*, 505 U.S. at 581, 587 (treating prayer delivered by invited clergy during public-school graduation as governmental practice); *see also Santa Fe*, 530 U.S. at 306-07; *Marsh*, 463 U.S. at 794 n.18 (stating that some legislatures use guest chaplains, with no suggestion that such prayers should be considered private speech).

Everton Bailey, Jr., *Connecticut Muslims Ask for Equality from City Council*, Associated Press, Sept. 14, 2010.

In any event, Petitioner concedes that minority-faith residents are much more likely to be put in this untenable position because the vast majority of the community and clergy are Christian. Pet. Br. 5. Indeed, in the eighteen months before the record closed, residents and others attending Town Board meetings would have encountered explicitly Christian prayers 85% of the time. *See* J.A. 129a-43a.

Justice Brennan highlighted this dilemma in *Schemmp*, addressing the public schools' argument that daily Bible reading "prefer[red] no particular sect or sects at the expense of others" because the readings alternated between several different versions of the Bible:

> To vary the version as the Abington and Baltimore schools have done may well be less offensive than to read from the King James version every day, as once was the practice. But the result even of this relatively benign procedure is that majority sects are preferred in approximate proportion to their representation in the community and in the student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided.

Schempp, 374 U.S. at 283 (Brennan, J., concurring).

Petitioner dismisses these concerns as the price that non-Christians must pay for living in a religiously homogenous town, explaining that "these variations in prayer practices merely reflect the freely held and constitutionally protected religious beliefs and opinions of the people who live in a particular locality . . . ." *See* Pet. Br. 5. But tying the content of official prayers to religious demographics is no different than holding an unconstitutional majoritarian election on the question of sectarian prayer. *See Santa Fe*, 530 U.S. at 316; *see also W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). In the end, government officials in both cases, using the authority of the State, empower the majority to "subject [residents] of minority views to constitutionally improper messages." *See Santa Fe*, 530 U.S. at 316.

The harm of these sectarian practices is considerable. Those who do not follow the specific faith promoted in the government's prayer are unduly burdened in matters of individual conscience, rendered second-class citizens, and isolated from democratic participation for that meeting—setting the stage for division in the community along religious lines.

The religious beliefs and expression of the clergy members of Greece, New York, are unquestionably protected by the Free Exercise

Clause. Free religious exercise, however, has "never meant that a majority could use the machinery of the State" to impose its beliefs on the minority. *See Schempp*, 374 U.S. at 226.

C. A General Prohibition on Sectarian Legislative Prayer Is Sensible and Workable.

The wisest and most constitutionally faithful standard for legislative prayer is a prohibition on all legislative invocations. *See supra* Part I. Short of imposing this bright-line rule, however, any test should give full effect to the longstanding prohibition on denominational preference. A ban on legislative prayers that are sectarian – those that invoke or specify details upon which believers in a higher power are known to disagree – can, at the very least, mitigate the harms caused by the practice. Notwithstanding the objections of Petitioner and its *amici*, such a rule has been proven workable by the experience and practices of courts and legislatures across the country. Petitioner's only real alternative is to propose a hands-off approach that would permit any and all government-sponsored prayer, no matter how rancorous, triumphalist, and disparaging of other faiths and beliefs. The First Amendment does not permit, and certainly does not compel, such a result.

1. Courts are well equipped to enforce the ban on sectarian prayer.

Petitioner's argument that judges will be required to conduct an in-depth theological analysis to enforce a ban on sectarian legislative prayer, Pet. Br. 6, 42-44, is belied by the experience of this Court

and the lower federal courts. In *Lee*, the Court had little difficulty differentiating between sectarian and nonsectarian prayer. While sensibly rejecting the claim that official nonsectarian prayer was constitutionally permissible, the Court recognized that sectarian prayer "uses ideas or images identified with a particular religion," noting that "explicit references to the God of Israel, or to Jesus Christ, or to a patron saint" would render prayers sectarian. *Lee*, 505 U.S. at 588-89. *See also id.* at 641 (Scalia, J., dissenting) (defining sectarian endorsement).

In various other cases, the Court has, with similar ease, identified religious expression and tenets specific to one faith. *See, e.g.*, *McCreary*, 545 U.S. at 897 (Scalia, J., dissenting) (detailing history of public prayer and proclamations that reference "God, but not Jesus Christ"); *Elk Grove*, 542 U.S. at 42 (O'Connor, J., concurring) (reference to Jesus or Vishnu would be sectarian but a "general" reference to God is not); *Allegheny*, 492 U.S. at 601 ("Glory to God for the birth of Jesus Christ" was a "patently Christian message"); *id.* at 605 n.55, 611 (characterizing the Trinity or the divinity of Jesus as "exclusively Christian creeds" and deeming the view that Jesus is the Messiah a "specifically Christian belief"); *Marsh*, 463 U.S. at 793 n.14 (prayers with all references to Christ removed were "nonsectarian"); *see also, e.g.*, *Clay v. United States*, 403 U.S. 698, 702-03 (1971) (characterizing a belief in "Allah as the Supreme Being" as a "basic tenet[ ] of the Muslim religion").

With this guidance, the lower courts have generally had no problem identifying sectarian prayer. *See, e.g.*, *Joyner v. Forsyth Cnty.*, 653 F.3d

341, 349-50 (4th Cir. 2011) (prayers were sectarian where they referenced Jesus, Jesus Christ, the Savior, the Cross of Calvary, the Virgin Birth, the Gospel of the Lord Jesus Christ, and Jesus Christ, Thy Son and our Savior), *cert. denied*, 132 S. Ct. 1097 (2012); *id.* at 364 (Niemeyer, J., dissenting) ("To be sure, a prayer that references Jesus is sectarian."); *Hinrichs v. Bosma*, 440 F.3d 393, 395 (7th Cir. 2006) ("identifiably Christian" prayers included "supplications to Christ"), *vacated on standing grounds*, 506 F.3d 584, 587 (7th Cir. 2007) ("overtly Christian" prayers included those that quoted verses from the New Testament, or referred to the "saving power of Jesus Christ," "our lord and savior Jesus Christ," and "Jesus Christ as the son of God") (internal quotation marks omitted); *Simpson v. Chesterfield Cnty. Bd. of Superv'rs*, 404 F.3d 276, 284 (4th Cir. 2005) (prayers that "refrain from using Christ's name" or "any denominational appeal" are nonsectarian); *Wynne v. Town of Great Falls*, 376 F.3d 292, 300 (4th Cir. 2004) ("The prayers sponsored by the Town Council have invoked a deity in whose divinity *only* those of the Christian faith believe."); *Santa Fe*, 530 U.S. at 299 n.7 ("The graduation prayers at issue in the instant case, in contrast, are infused with explicit references to Jesus Christ and otherwise appeal to distinctively Christian beliefs." (quoting district court order)).

Although there may be some hypothetical, gray areas at the margins of the ban on sectarian prayer,[9] the Court's "jurisprudence in this area is of

[9] While the U.S. Court of Appeals for the Eleventh Circuit professed an inability to distinguish sectarian prayers from nonsectarian prayers, that court notably conceded that the

necessity one of line-drawing." *See Lee*, 505 U.S. at 598.[10] The real-world occasions of uncertainty, however, will be exceedingly rare. In any event, no such line-drawing is necessary in this case because the prayers regularly used by the Town of Greece to open its meetings are unquestionably Christian.

2. Legislative bodies across the country have successfully adopted and enforced invocation policies that promote and require nondenominational prayer.

Numerous legislative bodies across the country have voluntarily and successfully adopted invocation policies that strongly urge or require invocations to be nonsectarian or nondenominational, dispelling any concerns about the workability of a ban on sectarian legislative prayer. There is no evidence that these policies have been difficult to enforce, created confusion, or required governmental officials to become theologians.

For example, pointing to the "religious diversity of our membership," the Colorado House of

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nonsectarian nature of prayers is "one factor" in a "fact-intensive analysis." *See Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1271 (11th Cir. 2008).

[10] If line-drawing is a concern, the suggestion of Petitioner and its *amici* that the Court prohibit only proselytizing prayers, *see, e.g.*, Pet. Br. 38; *Amicus* Br. of Chaplain Alliance for Religious Liberty (CARL) 3, offers no relief. Quite the contrary: The proposed proselytizing test would require courts to delve into and analyze the content of prayers and draw lines to a greater extent than an outright ban on sectarian references, which can be enforced by a superficial screening for discrete references and terms that are associated with any particular faith. And the sectarian ban has the added benefit of addressing more directly all of the harms of governmental sectarianism.

Representatives instructs guest prayer givers to "keep your prayer or thought-for-the-day *non-sectarian and non-political* so that all of those present may benefit from your words." Letter from Lois Court, Chair of Colo. House Servs. Comm., to Pastor Rick Long, Grace Church of Arvada (Dec. 21, 2012).[11] Similarly, the Illinois House of Representatives requires that prayers be "nonsectarian." Letter from Sally Smith, Clerk of Ill. H.R. on Confirmation of Invocation (May 6, 2013). Prayer givers are informed that prayers "should not make reference to religious figures that are unique to any one religion, or make any other denominational appeal" out of respect for "the numerous different faiths practiced by our members and constituents." *Id.* Michigan's guidelines for legislative prayer state that the prayer "shall be general in nature." Michigan Legislative Handbook & Directory, 96th Legislature, 2011-2012, 153, http://www.senate.michigan.gov/other/LegHandbookComp.pdf. The Ohio Senate advises that prayers "should be non-denominational, non-sectarian and non-proselytizing." Memorandum from Matthew T. Schuler, Clerk, to Senate Offices on Ohio Sen. Opening Prayer Guidelines (n.d.). The Nebraska Legislature also now informs guest prayer givers that the prayer "should be nondenominational." Memorandum from Clerk of the Nebraska

[11] All of the state policies cited herein are publicly available and have been obtained from the relevant state agencies. Copies can be provided to the Court at the Court's request.

Legislature's Office to Chaplain of the Day on Guidelines to Follow (n.d.).[12]

These policies are sensitive to the harms of official sectarianism and are consistent with the legislative-prayer guidance provided by the National Conference of State Legislatures (NCSL) and the National Conference of Community and Justice (NCCJ) (formerly known as the National Conference of Christians and Jews). According to NCCJ, "[p]rayer on behalf of the entire community should be easily shared by listeners from different faiths and traditions." NCCJ Guidelines, *supra* note 5, at 2. Thus, NCCJ defines "Inclusive Public Prayer" as prayer that is "nonsectarian, general and carefully

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[12] The federal government also encourages chaplains to ensure that prayers are inclusive. The House Guidance for Guest Chaplains reminds prayer givers that "the House of Representatives is comprised of Members of many different faith traditions" and instructs that, among other limitations, "[t]he prayer must be free . . . from sectarian controversies . . . ." *See* Resp. Br. 49 & 1a.

In addition, the U.S. military requires chaplains to provide for the religious and spiritual needs of the entire community, not only those who share their particular faith. Although Petitioner's *amici*, CARL, suggests that military chaplains have a robust right to perform their duties "according to the manner and forms" of the chaplains' personal faith, *Amicus* Br. of CARL, at 11-13, that is true only when the chaplains are ministering to members of their own faith community. Outside the context of faith-specific worship, military chaplains are required to support an environment of religious pluralism. *See, e.g.*, U.S. Dep't of the Navy, SECNAV Instruction 1730.7D, 5.e.2 (2008) (parenthetical) ("[A]s a condition of appointment, every [chaplain] must be willing to function in the diverse and pluralistic environment of the military, with tolerance for diverse religious traditions and respect for the rights of individuals to determine their own religious convictions.").

planned to avoid embarrassments and misunderstanding," enabling "people to recognize the pluralism of American society." *Id.*

To that end, NCCJ recommends that civic prayer givers use "universal, inclusive terms for deity rather than particular proper names for divine manifestations." *Id.* Examples of inclusive opening terms include "Almighty God," "Our Maker," "Source of All Being," "Creator God," and "Creator and Sustainer," while universal closing appeals include "Hear Our Prayer," "May Goodness Flourish," or "Amen." *Id.* NCSL likewise recommends that legislative prayer givers "use common language and shared symbols" and "[i]n opening and closing the prayer, . . . be especially sensitive to expressions that may be unsuitable to members of some faiths." National Conference of State Legislatures, *Prayer Practices*, *in Inside the Legislative Process* (2010), http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf. *See also* Memorandum from Debbie Brown, Fla. Sen. Sec'y to All Senators on Chaplains for 2013 Season (Jan. 17, 2013) (advising that opening prayers should use "universal, inclusive terms for the deity rather than proper names for divine manifestations" because the "the [Florida] Senate includes members of many faiths").

With similar policies in place, legislative bodies can respect the Establishment Clause ban on sectarianism without having to review every prayer in advance. Individual prayer givers may occasionally transgress these boundaries, but officials can easily deal with these breaches by, for example, admonishing repeat offenders and, if need be, eliminating them from the list of eligible prayer

givers. Judicial intervention would be necessary if, and only if, legislative bodies fail to take reasonable steps to enforce their policies and avoid frequent violations. Adopting these sensible, workable policies, legislatures can fulfill their constitutional obligation to ensure denominational neutrality.

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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