No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE, NEW YORK, PETITIONER

v.

SUSAN GALLOWAY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, under this Court's decision in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), a court's review under the Establishment Clause of a legislature's practice of providing for the delivery of a prayer at the beginning of a session is properly limited to assuring that the practice is not exploited to proselytize or advance any one, or disparage any other, faith or belief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 681 F.3d 20. The order of the district court (Pet. App. 28a-131a) is reported at 732 F. Supp. 2d 195.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2012. A petition for rehearing was denied on August 8, 2012 (Pet. App. 132a-133a). On October 17, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including December 6, 2012, and the petition was filed on that date. The petition was granted on May 20, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTEREST OF THE UNITED STATES

Throughout its history, and dating back to the first session of the Continental Congress in 1774, the United States Congress has appointed Chaplains to open each legislative day with a prayer. When the First Congress met in 1789, among its first orders of business was to select Chaplains for the House of Representatives and Senate. Today, both the House and Senate Rules require that each legislative day begin with a prayer from the House or Senate Chaplain or from a guest. *Rules of the United States House of Representatives*, Rules II.5, XIV.1; *Rules of the United States Senate*, Rule IV.1(a). The United States participated as amicus curiae in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), in which this Court upheld the Nebraska State Legislature's practice of employing a chaplain who opened every legislative session with prayer, and has participated as a party in numerous cases concerning the constitutionality of opening legislative prayers in the United States Senate and House of Representatives. See *Kurtz* v. *Baker*, 829 F.2d 1133 (D.C. Cir. 1987), cert. denied, 486 U.S. 1059 (1988); *Murray* v. *Buchanan*, 720 F.2d 689 (D.C. Cir. 1983); *Newdow* v. *Eagen*, 309 F. Supp. 2d 29 (D.D.C. 2004).

STATEMENT

1. The Town of Greece is a municipal corporation located in Monroe County, New York. Pet. App. 3a. As of the 2000 census, the town had approximately 94,000 residents. *Ibid.* The five-member Town Board is elected to govern the town and conducts official business at monthly public meetings. *Ibid.* Before 1999, the Board opened its meetings with a moment of silence. *Ibid.* In 1999, the Town Supervisor implemented a practice of inviting local clergy to offer an opening prayer at each Town Board meeting. *Ibid.* The Town lists the prayer

in each meeting's official minutes, but it does not review the language of any prayer before it is delivered and does not censor any prayer for content. *Id.* at 3a-4a, 29a-30a.

As of 2010, when the factual record in this case closed, the Town Board had not adopted a written policy governing its selection of prayer-givers or any other aspect of its opening prayer practice. Pet. App. 4a. But as a matter of practice, an employee in the Town's Office of Constituent Services has invited local clergy to deliver opening prayers. *Id.* at 5a. Initially, the town employee solicited clergy by telephoning all the religious organizations that were listed in the Town's Community Guide, which is published by the Greece Chamber of Commerce. *Ibid.* The employee later compiled a "Town Board Chaplain" list of individuals who had accepted invitations to give prayers. *Ibid.* That employee and her successors thereafter selected guest chaplains by calling individuals on the list approximately a week before each meeting until they found someone willing to deliver a prayer. *Ibid.* Until 2008, the list included only Christian congregations and clergy. *Ibid.* Nearly all of the religious congregations located within petitioner's borders are Christian. *Id.* at 5a, 30a, 42a. A map introduced into evidence indicates that there is one Buddhist temple and one Jehovah's Witness church located in the Town's borders and that there are several Jewish congregations located just outside of its borders. *Id.* at 5a-6a, 30a-31a, 42a-43a. Nothing in the record indicates that any of those organizations was listed in the community guide. *Id.* at 6a. From 1999 through 2007, every individual who delivered a prayer at a Town Board meeting was Christian. *Id.* at 4a. Most of the prayers that were delivered at the Board's meetings contained

sectarian Christian references, including references to "Jesus," "Jesus Christ," "Your Son," the "Holy Spirit," or the Holy Trinity. *Id.* at 7a. Other prayers used more generically theistic terms such as "God of all creation" and "Heavenly Father." *Ibid.* The non-Christian prayer-givers included references to "God," "the Father," "Lord," "Alláh-u-Abhá" (which loosely translates as "God the All Glorious"), Athena, and Apollo. *Ibid.*; see *id.* at 44a.

Respondents are two residents of the Town of Greece who have attended Town Board meetings. See Pet. App. 7a-8a & n.2, 44a-47a. Respondent Stephens is an atheist and finds all legislative prayer to be offensive. *Id.* at 44a. Respondent Galloway similarly believes that prayer is inappropriate at government meetings and believes that, if legislative prayers are given, they should be non-sectarian. *Id.* at 45a-47a. In 2007, respondents began complaining to town officials about the Board's prayer practice, contending that the practice aligned the Board with Christianity. *Id.* at 8a. Town officials met with respondents and explained that the Board would accept any volunteer who wished to deliver a prayer and that the Board would not police the content of any prayer. *Ibid.* In 2008, non-Christian individuals delivered prayers at four of the twelve Town Board meetings. *Id.* at 4a. The prayer-givers included the chair of the nearby Baha'i congregation, a lay Jewish man, and a Wiccan priestess. *Ibid.* In 2009, Christian individuals again delivered all of the prayers. *Id.* at 5a.

2. In February 2008, respondents filed this suit against petitioner under 42 U.S.C. 1983, asserting that the Town's prayer practice violates the Establishment Clause because its selection process prefers Christianity over other faiths and because the content of the prayers

is impermissibly sectarian. Pet. App. 8a.[1] The district court granted summary judgment for petitioner. *Id.* at 28a-131a. The district court rejected respondents' challenge to petitioner's method of selecting prayer-givers for the Board's meetings, finding "no evidence that [petitioner] intentionally excluded non-Christians from giving prayers at Town Board meetings." *Id.* at 73a; see *id.* at 69a-78a.

Guided by this Court's decision in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), the district court also rejected respondents' argument that the sectarian content of many of the prayers violated the Establishment Clause. Pet. App. 79a-131a. The court considered "the nature of the prayers" that had been delivered and concluded that "they did not proselytize or advance any one, or disparage any other, faith or belief." *Id.* at 126a. The court explained that many of the prayers that respondents considered to be sectarian were "indistinguishable" from the prayers that respondents considered to be non-sectarian except for the fact that the prayers ended with the phrase "in Jesus' name." *Ibid.* The court rejected respondents' arguments that all sectarian legislative prayers violate the Establishment Clause and that petitioner was required to direct potential prayer-givers to deliver "inclusive ecumenical prayers." *Id.* at 127a; see *id.* at 127a-130a.

3. The court of appeals reversed. Pet. App. 1a-27a. The court acknowledged that "the touchstone of [the court's] analysis must be *Marsh*." *Id.* at 16a. Reading *Marsh* in light of this Court's subsequent cases, the court concluded that, although the Establishment

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[1] Respondents also sued the Town Supervisor, but the district court dismissed that claim as redundant of the claim against petitioner. Pet. App. 8a-9a.

Clause prohibits a legislative prayer practice that, "viewed in its entirety, * * * advance[s] a single religious sect," it does not prohibit "all legislative invocations that are denominational in nature." *Id.* at 14a-15a. The court of appeals stated that its role was to determine "whether the town, through its prayer practice, has established particular religious beliefs as the more acceptable ones, and others as less acceptable." *Id.* at 17a.[2]

Applying that inquiry to the "totality of circumstances presented in this case," the court of appeals concluded that "the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint." Pet. App. 19a; see *id.* at 18a-26a. In the court's view, petitioner's "practice of inviting clergy almost exclusively from places of worship located within [petitioner's] borders" "virtually ensured" that "a Christian viewpoint" would be represented by prayer-givers. *Id.* at 19a. The court also noted "that most of the prayers at issue here contained uniquely Christian references." *Id.* at 20a. The court stated that "[t]he sectarian nature of the prayers * * * was not inherently a problem" and emphasized that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*," because they "did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." *Id.* at 21a; see *Marsh*, 463 U.S. at 794-795 ("[T]he content of [legislative] prayer is not of concern to judges where, as here, 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.").

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[2] Respondents abandoned on appeal their claim that petitioner intentionally discriminated against non-Christians in its selection of prayer-givers. Pet. App. 10a.

Nevertheless, the court concluded that the sectarian content of many of the prayers, taken together, violated the Establishment Clause because "an objective, reasonable observer would believe that the town's prayer practice had the effect of affiliating the town with Christianity." Pet. App. 24a. In so holding, the court of appeals "ascribe[d] no religious animus to the town or its leaders," but faulted petitioner for failing to explain to the public "the nature of its prayer program" and failing to "inform[] prayer-givers that invocations were not to be 'exploited'" to proselytize or to disparage other religions. *Id.* at 22a.

The court of appeals concluded by noting that, although legislative prayers are not inherently unconstitutional, see Pet. App. 25a, municipalities may have considerable difficulty structuring a legislative prayer practice in a way that, in the court of appeals' view, avoids "the appearance of religious affiliation," *id.* at 26a. The court stated that "even a single circumstance may appear to suggest an affiliation" and acknowledged that, "[t]o the extent that the state cannot make demands regarding the content of legislative prayers, * * * municipalities have few means to forestall the prayer-giver who cannot resist the urge to proselytize." *Id.* at 27a; see *id.* at 24a-25a ("Nor can a municipality insulate itself from liability by adopting a lottery to select prayer-givers or by actively pursuing prayer-givers of minority faiths whose members reside within the town."). "These difficulties," the court of appeals cautioned, "may well prompt municipalities to pause and think carefully before adopting legislative prayer." *Id.* at 27a.

SUMMARY OF ARGUMENT

In *Marsh* v. *Chambers*, 463 U.S. 783 (1983), this Court held that a state legislature's practice of employ-

ing a chaplain to deliver prayers at the beginning of its legislative sessions does not violate the Establishment Clause. The Court's decision relied primarily on the history of legislative prayer in this country, which has existed without pause since the Continental Congress and was adopted as the official practice of the United States House of Representatives and Senate at the same time those bodies were drafting and approving the First Amendment. In light of that history, the Court concluded that a practice of legislative prayer that is not exploited to proselytize, to disparage any religion, or to advance any one faith or belief does not violate the Establishment Clause. The Court admonished that, in such circumstances, courts should not parse or evaluate the content of prayer, a warning the Court has reiterated in later cases.

The court of appeals erred in its application of *Marsh*. The court agreed with petitioner that petitioner's practice of providing for the offering of a prayer at the beginning of Town Board meetings has not been exploited to proselytize or to denigrate any faith; it also accepted the uncontested finding that petitioner did not intentionally favor any one faith over any other. The court of appeals nevertheless held that petitioner's practice violates the Establishment Clause because it has almost always resulted in participation by Christian prayer-givers, many of whom have employed identifiably Christian words in their prayers. In the court of appeals' view, a "reasonable observer" would therefore understand petitioner's prayer practice as an establishment of Christianity. That was error.

Under the principles announced in *Marsh*, which relied heavily on the history of legislative prayer in this country, a prayer practice that is not problematic in the

ways identified in *Marsh* (as petitioner's practice concededly is not) does not amount to an unconstitutional establishment of religion merely because most prayer-givers are Christian and many or most of their prayers contain sectarian references. The unbroken history of the offering of prayer in Congress, for example, has included a large majority of Christian prayer-givers and a substantial number of prayers with identifiably sectarian references. Neither federal courts nor legislative bodies are well suited to police the content of such prayers, and this Court has consistently disapproved of government interference in dictating the substance of prayers.

ARGUMENT

UNDER THIS COURT'S DECISION IN *MARSH*, LEGISLATIVE PRAYER WITH SECTARIAN CONTENT IS PERMISSIBLE IF IT DOES NOT PROSELYTIZE OR ADVANCE ANY ONE, OR DISPARAGE ANY OTHER, FAITH OR BELIEF

This Court's decision in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), established that the practice of providing an opportunity for a prayer at the beginning of a legislative body's day or session, when not exploited to proselytize, advance, or disparage any faith or belief does not violate the Establishment Clause. Although the court of appeals purported to apply *Marsh*, its view of what *Marsh* requires was erroneous. The court did not contest the district court's finding that the prayer practice at issue is not problematic in the ways proscribed by *Marsh*. But the court nevertheless based its decision in significant part on the sectarian content of the prayers that were delivered at Town Board meetings. Concluding that too many of the prayers contained Christian references, and that too many of the prayer-givers were Christian, the court of appeals held that petitioner's

practice violates the Establishment Clause. *Marsh*, however, calls for neither that type of inquiry into the content of prayers nor that type of court-ordered sectarian diversity. Because the court of appeals erred in applying *Marsh* to petitioner's challenged practice, reversal is warranted.

A. *Marsh* Neither Requires Nor Permits A Court To Parse The Sectarian Content Of Prayers Offered At The Opening Of The Session Of A Legislative Body

1. In *Marsh* v. *Chambers*, *supra*, the Court considered whether the Nebraska State Legislature's practice of paying a chaplain to open every legislative session with a prayer violated the Establishment Clause. Rather than apply the three-part test that had been articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), the Court examined the history and practice of providing for such prayers in Congress and in state legislatures throughout the country. *Marsh*, 463 U.S. at 786-795. Finding that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," the Court concluded that such a practice does not violate the Establishment Clause. *Id.* at 786, 792. This Court has since described the decision in *Marsh* as an exception, grounded in historical practice, to the Court's usual approach to Establishment Clause questions. See *McCreary Cnty.* v. *ACLU*, 545 U.S. 844, 859 n.10 (2005); *Edwards* v. *Aguillard*, 482 U.S. 578, 583 n.4 (1987); see also *Lee* v. *Weisman*, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring); *Wallace* v. *Jaffree*, 472 U.S. 38, 63 (1985) (Powell, J., concurring).[3]

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[3] The Court has indicated on several occasions, including in *Marsh*, that certain other government invocations that include religious

In reaching its conclusion, the Court in *Marsh* noted that, "[f]rom colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of religious disestablishment and religious freedom." 463 U.S. at 786. Both the Continental Congress and the First Congress—which drafted and approved the First Amendment—adopted the practice of opening every day with a prayer delivered by a paid chaplain. *Id.* at 787-788. The Court recognized that, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees"—but concluded that "there is far more here than simply historical patterns." *Id.* at 790. Relying on the First Congress's near simultaneous authorization of a paid legislative chaplain and adoption of the First Amendment, the Court reasoned that "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent." *Id.* at 788-790. In light of that history, the Court concluded that "the men who wrote the First

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references and have a similarly long history in this country—such as this Court's use of the phrase "God save the United States and this Honorable Court"—also do not violate the Establishment Clause. See *Marsh*, 463 U.S. at 786; *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952); see also *Van Orden* v. *Perry*, 545 U.S. 677, 716 (2005) (Stevens, J., dissenting); *McCreary Cnty.*, 545 U.S. at 886 (Scalia, J., dissenting); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 29 (2004) (Rehnquist, C.J., concurring in judgment); *id.* at 37 (O'Connor, J., concurring in judgment); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Wallace*, 472 U.S. at 84 (Burger, C.J., dissenting); *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); *id.* at 714 (Brennan, J., dissenting).

Amendment did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788.

Significantly, the Court concluded that the Framers "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view,'" even when such prayers were consistently delivered by a single chaplain who was identified with a particular faith. *Marsh*, 463 U.S. at 792. The Court explained:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being."

Ibid. (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952)).[4]

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[4] Petitioner is incorrect in suggesting in the alternative (Br. 52-53) that, when a legislature provides an opportunity for opening prayers at its deliberative sessions, it creates a limited public forum. As discussed in the text, the historical purpose of providing such an opportunity is not to provide a forum for private prayer; it is to solemnize the body's proceedings and to seek divine guidance for the body's deliberations.

When considering the particular features of Nebraska's legislative prayer practice, moreover, the Court rejected the challenger's argument that the prayers violated the Establishment Clause because they were "in the Judeo-Christian tradition." *Marsh*, 463 U.S. at 793. The Court explained that "where, as here, 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," "[t]he content of the prayer is not of concern to judges." *Id.* at 794-795. In such circumstances, the Court held, "it is not for [judges] to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.

2. The court of appeals correctly concluded that the decision in *Marsh* governs the constitutionality of legislative prayer practices and should govern the inquiry here. Pet. App. 10a-13a. The court of appeals erred, however, in its application of *Marsh* to petitioner's practice concerning the offering of prayers at the opening of Town Board sessions because it misconstrued this Court's later decision in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), as requiring that a court evaluating legislative prayer examine the sectarian nature of such prayers. Pet. App. 13a. In *County of Allegheny*, this Court held, *inter alia*, that a county's display of a crèche in the county courthouse violated the Establishment Clause because the display had the effect of communicating a government allegiance to a particular religious belief. 492 U.S. at 598-613. In responding to Justice Kennedy's dissenting opinion, the majority distinguished the legislative prayer practice upheld in *Marsh*. Acknowledging that "history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed"—a proposition that *Marsh* also

embraced, see 463 U.S. at 794-795—the Court stated that "[t]he legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" *County of Allegheny*, 492 U.S. at 603. The court of appeals here viewed that statement as requiring the court to graft a "reasonable observer" inquiry onto the *Marsh* analysis, including by examining the content of the prayers at issue. Pet. App. 13a. That was error.

The Court in *Marsh* did note that the chaplain employed by the Nebraska State Legislature described his prayers as "nonsectarian" and "Judeo Christian." 463 U.S. at 793 n.14. The Court also noted that, "[a]lthough some of [the chaplain's] earlier prayers were often explicitly Christian, [he] removed all references to Christ after a 1980 complaint from a Jewish legislator." *Ibid.* But the Court did not rely on those facts in rejecting the challenge before it; to the contrary, as noted above, the Court emphasized that it would not "parse the content" of the prayers absent any "indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-795.[5] The Court's characterization of *Marsh* in *County of Allegheny*—which did not concern legislative prayer—therefore did not alter the rule announced in *Marsh* itself.

In *Lee* v. *Weisman*, 505 U.S. 577 (1992), the Court—in the course of holding that the delivery of a prayer at a public high school graduation violated the Establishment Clause—explained that school officials could not play a role in dictating the content of prayer delivered at the ceremony even in a good-faith effort to ensure that

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[5] See *Van Orden*, 545 U.S. at 688 n.8 (Rehnquist, C.J., plurality opinion) ("In *Marsh*, the prayers were often explicitly Christian.").

the prayer was inclusive and nonsectarian and therefore less potentially divisive. *Id.* at 588-592. As the Court observed, "while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, the [Religion] Clauses exist to protect religion from government interference." *Id.* at 589. The circumstances of *Lee* differ from those in this case, for here the offering of a prayer serves to solemnize and "invoke Divine guidance" for the legislative body's own deliberations. *Marsh*, 463 U.S. at 792; see also *Lee*, 505 U.S. at 596-597) (noting that "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential" of a public school event at which attendance is essentially mandatory for all graduating students). Still, the court of appeals' suggestion, see Pet. App. 22a, that petitioner should have been more involved in directing the content of the prayers delivered at Town Board meetings creates many of the concerns regarding involvement in the content of prayer this Court warned against in *Lee*.

B. The Court Of Appeals Erred In Declaring Petitioner's Prayer Practice To Be Unconstitutional Because Of The Prevalence Of Christian Sectarian References

1. The court of appeals erred in parsing the sectarian content of prayers offered at Town Board meetings

The court of appeals correctly noted that the prayers delivered by private individuals at petitioner's Town Board meetings "were not offensive in the way identified as problematic in *Marsh*" because "they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." Pet. App. 21a. The

court also correctly noted that "[t]he sectarian nature of the prayers * * * was not inherently a problem." *Ibid.* But the court nevertheless believed it was necessary to examine the prevalence of Christian references in the prayers that were delivered, explaining that its Establishment Clause analysis turned on "the extent to which the selection process" employed by petitioner "results in a perspective that is substantially neutral amongst creeds." *Id.* at 20a. In so doing, the court rejected petitioner's argument that, under *Marsh*, a court should "not consider the content of prayers absent an independent showing that the prayer opportunity has 'been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* at 20a-21a n.6 (quoting *Marsh*, 463 U.S. at 794-795). After examining the content of the prayers, see *id.* at 20a (noting that "most of the prayers at issue here contained uniquely Christian references"), the court of appeals concluded that a "reasonable observer" would feel, based on "the totality of the circumstances presented," that petitioner's "prayer practice identified [petitioner] with Christianity in violation of the Establishment Clause," *id.* at 21a-22a; see *id.* at 19a (concluding that petitioner's "prayer practice must be viewed as an endorsement of a particular religious viewpoint," based in part on "the content of the prayers"). That is not a proper application of *Marsh*.

The Court in *Marsh* established that a legislative prayer practice that has not been exploited to "proselytize or advance" any one faith or belief, or to disparage another, does not establish religion. 463 U.S. at 794. The limits concerning prayers that proselytize, advance one faith, or disparage another are consistent with the traditional purposes of legislative prayer to solemnize

the legislature's own proceedings and to invoke divine guidance for its deliberations. See *id.* at 792. Under that standard, petitioner's prayer practice is constitutional. It is not clear to what extent the Court intended the word "advance" to have a role beyond being an elaboration upon "proselytize," encompassing a broader range of conduct with the same general purpose. But to the extent it did, when read in context, the Court in *Marsh* presumably used "advance" to encompass as well a government affiliation with or a declaration of government allegiance to a particular faith or belief. The Court explained that legislative prayer does not offend the Establishment Clause because the Framers did not view it "as symbolically placing the government's official seal of approval on one religious view." *Ibid.* The Court in *County of Allegheny* similarly noted that a historical practice could not legitimate a modern-day practice "that demonstrates the government's allegiance to a particular sect or creed." 492 U.S. at 603. Thus, a legislative body may not adopt a practice concerning the offering of a prayer that has the effect of affiliating the government with a particular religion or otherwise declaring the government's allegiance to a particular religion—either through the government's own actions or through exploitation of the prayer opportunity by the prayer-givers themselves.[6] *Marsh* makes clear, howev-

[6] Contrary to petitioner's suggestion (see, *e.g.*, Pet. Br. 21-22, 44), *Marsh*'s prohibition on the exploitation of an opportunity for prayer to proselytize or advance one faith, or to disparage another, applies both to the government entity providing the opportunity and to the prayer-givers accepting the opportunity, whether employed by the government or not. Under *Marsh*, a legislature could not, for example, invite private opening prayer-givers who proselytize or disparage another faith, even if the legislature itself did not have that purpose.

er, that a legislative prayer practice that results in the delivery of a substantial majority of prayers containing Christian references does not in itself have the effect of affiliating the government with Christianity or declaring the government's allegiance to Christianity.

2. The Nation's history of legislative bodies providing for a prayer at the opening of legislative sessions must inform the Court's analysis

a. The Court in *Marsh* relied heavily on the history of the offering of prayers in Congress. See 463 U.S. at 786-795. That history reveals that prayers offered in the House of Representatives and Senate have historically included (and to a lesser degree continue to include) frequent sectarian references. On its second day of business in 1774, the Continental Congress resolved that the Reverend Jacob Duché, an Episcopalian clergyman, should open the following day's meeting with prayer. See 1 J. of the Continental Cong. 26 (1774) (Journals). See also Martin J. Medhurst, *From Duché to Provoost: The Birth of Inaugural Prayer*, 24 J. Church & St. 573, 574 (1982) (Medhurst). On the following morning, September 7, 1774, Reverend Duché appeared before the Continental Congress "in his pontificals, and read several prayers in the established form, and then read the collect for the seventh day of September, which was the thirty-fifth psalm." *Id.* at 577. Following the reading of the prescribed Anglican prayers for that day, Reverend Duché then "struck out into an extemporary prayer," *ibid.*, that called upon the "Lord our Heavenly Father, King of Kings, and Lord of lords," and that concluded with the following words: "All this we ask in the name and through the merits of Jesus Christ thy son, our Savior, Amen," 25 *Letters of Delegates to Congress: 1774 to 1789* 551-552 (Paul Smith ed. 1998). In subse-

quent sessions of the Continental Congress, Reverend Duché continued the practice of opening legislative sessions with prayers that included similar sectarian references. See 2 Journals 12 (1775); 5 Journals 530 (1776). For example, the prayer Reverend Duché delivered in the Continental Congress after the Declaration of Independence was issued followed the same form as his prayer of September 7, 1774—*i.e.*, he addressed his prayer to "lord, our heavenly Father, high and mighty, King of kings and Lord of lords," and concluded by stating, "[a]ll this we ask in the name, and through the merits of Jesus Christ, thy Son and our Savior." 1 Lorenzo Sabine, *Biographical Sketches of Loyalists of the American Revolution* 389 (1979); see also Medhurst 580.

Since the adoption of the Constitution, prayers in Congress have similarly included sectarian Christian references. For example, Bishop William White, who was chosen as Senate Chaplain in 1790, regularly referred to Jesus in his official prayers. See Letter to the Reverend Henry D. Johns (Dec. 29, 1830), *reprinted in* Bird Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episcopal Church of the State of Pennsylvania* 322 (1939). The practice of delivering prayers with sectarian references has continued with every Congress. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 (1996) (noting that, "[f]rom America's earliest days to the present times," congressional legislative prayers "have been true sacral prayers, and many of them, true Christian prayers"); see also Pet. App. 127a (noting that "legislative prayer in Congress * * * is often overtly sectarian"). Although Congress today invites non-Christians to participate as guest chaplains, the great

majority of prayer-givers are still Christians and a substantial proportion of the prayers delivered at least in the House of Representatives may be viewed as containing identifiably sectarian references. Br. of Some Members of Cong. as Amici Curiae in Supp. of Pet. 10-20 (stating that a majority of the prayers delivered in the House of Representatives during the 112th Congress included Christian content); see, *e.g.*, 159 Cong. Rec. H2848 (daily ed. May 22, 2013); *id.* at H2664 (daily ed. May 16, 2013); *id.* at H2399 (Apr. 30, 2013); 158 Cong. Rec. H6471 (daily ed. Nov. 28, 2012); *id.* at H6305 (daily ed. Oct. 12, 2012); see also 159 Cong. Rec. S5625 (daily ed. July 11, 2013); 158 Cong. Rec. S5419 (daily ed. July 26, 2012); *id.* at S4379 (daily ed. June 21, 2012); *id.* at S2745 (daily ed. Apr. 26, 2012); *id.* at S1029 (daily ed. Feb. 27, 2012).[7]

Thus, the very historical practice on which this Court relied in *Marsh* to conclude that the offering of a prayer at the beginning of the session of a legislative body is permissible has included a great number of sectarian references, the overwhelming majority of which have been Christian. Such prayers are permissible notwithstanding their sectarian content because they "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 36 (2004) (O'Connor, J., concurring in the judgment); see also *County of Allegheny*, 492 U.S. at 596 n.46. As the Court in *Marsh* explained, such a prayer invok[ing] Divine guidance" for the day's deliberations is a "tolerable acknowledgement of beliefs widely held

[7] The text of the opening prayers offered in the House of Representatives for the 106th through 113th Congresses can be viewed at http://chaplain.house.gov/archive (last visited Aug. 1, 2013).

among the people of this country." 463 U.S. at 792. It does not have the effect of declaring the government's affiliation with or allegiance to a particular faith. See *id.* at 792, 794-795.

Where, as here, legislative prayers neither proselytize nor denigrate any faith, the inclusion of Christian references alone does not constitute an impermissible advancement or establishment of religion. The court of appeals therefore erred in declaring petitioner's practice unconstitutional based on an examination of the content of the prayers, contrary to this Court's admonition that courts have no place "embark[ing] on a sensitive evaluation" or "pars[ing] the content" of such prayers. *Marsh*, 463 U.S. at 794-795. When the Constitution permits prayer in a government setting (as the parties agree is the case with prayers offered at the beginning of a legislative body's day), the government must allow the prayer-giver to deliver the prayer in accordance with his own religious beliefs, including by praying to his own religious deity and in his own religious idiom—as long as the limits recognized in *Marsh* itself are respected by the government and prayer-giver. The principle that the government may not dictate the content of religious prayer is deeply embedded in the First Amendment. As this court explained in *Lee*: "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.'" 505 U.S. at 588 (quoting *Engel* v. *Vitale*, 370 U.S. 421, 425 (1962)).

Thus, as noted, when Christian prayer-givers have opened sessions of the House of Representatives, they

have frequently invoked the name of Jesus. Similarly, when non-Christian guests have delivered opening prayers in Congress, they have frequently invoked the names of deities and other figures in distinctly non-Christian terms. For example, a rabbi who recently served as a guest chaplain addressed his opening prayer in the Senate to "Adon Olam, Master of the Universe." 159 Cong. Rec. S3791 (daily ed. May 23, 2013). Similarly, a Muslim imam recently quoted Islamic scripture and called on the words of the Prophet Muhammed in his opening prayer before the House of Representatives. 158 Cong. Rec. H5633 (daily ed. Aug. 2, 2012).

b. As this Court has noted, the history of this country encompasses an unbroken tradition of formally "invok[ing] Divine guidance on [our] public bodies entrusted with making the laws," *Marsh*, 463 U.S. at 792, and "is replete with official references to the value and invocation of Divine guidance in deliberations," *Lynch* v. *Donnelly*, 465 U.S. 668, 675 (1984). It is that very history that insulates the practice of legislative prayer from challenge under the Establishment Clause so long as—consistent with the practice's purpose—the opportunity for prayer is not exploited in the ways identified in *Marsh*. The Court in *Marsh* thus concluded that "the Founding Fathers looked at invocations as 'conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions,'" *Marsh*, 463 U.S. at 792 (quoting *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961)) (alterations in original), rather than as "proselytizing activity" or conduct that "symbolically place[d] the government's official seal of approval on one religious view," *ibid.* (internal quotation marks omitted).

When a prayer is delivered in the proceedings of a governmental body that does not have the type of histor-

ical pedigree discussed in *Marsh*, it may be useful in mitigating Establishment Clause concerns for the body to take steps to clarify to a reasonable and informed observer that its practice is intended and designed to fall within that tradition. See *Simpson* v. *Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005) (upholding a county board of supervisors' prayer practice in part because the "invocations [were] directed only at the legislators themselves" rather than the public) (internal citation omitted). For example, a governmental body may choose to publish a statement expressing the purpose of the invocation or publicizing neutral and inclusive selection criteria. See *Rubin* v. *City of Lancaster*, 710 F.3d 1087, 1097-1099 (9th Cir. 2013) (upholding city council prayer practice where city opened participation to all and had publicized the nonsectarian purpose of its practice), petition for cert. pending, No. 13-89 (filed July 17, 2013); cf. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 823, 841-842 (1995) (concluding that University's support of religious student group on same terms that it supported other student groups did not violate Establishment Clause in part because the "University ha[d] taken pains to disassociate itself from the private speech involved" by requiring public disclaimers).

A governmental body may also opt to structure its proceedings to reflect the role that the delivery of a prayer has historically played in legislative bodies such as the United States Congress. In some respects, for example, petitioner's Town Board differs from Congress because some members of the public attend Board meetings to conduct business directly with the Board rather than simply to observe the proceedings. See, *e.g.*, N.Y. Town Law § 274-b (West 2004) (authorizing towns to

issue special-use permits for various land-use purposes); http://greeceny.gov/files/clerk/townboard/TB%20SP%20instruct%20other%203~09.pdf (last visited Aug. 1, 2013) (instructions for obtaining special-use permits, including presenting request to the Board at a hearing convened by the Board). A practice of providing for the delivery of a prayer may more clearly fall within the type of historical tradition examined in *Marsh* if such a body structures its sessions to allow individuals who wish to conduct business before the Board but prefer not to be present for a prayer to "enter and leave with little comment and for any number of reasons." *Lee*, 505 U.S. at 596-597; cf. *Wynne* v. *Town of Great Falls*, 376 F.3d 292, 295 (4th Cir. 2004) (when plaintiff arrived late to town council meeting to avoid prayer, she was not permitted to participate in the meeting even though she had signed up and was listed on the agenda), cert. denied, 545 U.S. 1152 (2005).

3. Neither courts nor legislative bodies are well suited to police the sectarian content of prayers

The court of appeals acknowledged the admonitions concerning governmental scrutiny of the content of prayer in *Marsh* and disclaimed undertaking such an analysis. Pet. App. 20a. The court nevertheless suggested that it could easily discern which prayers contained sectarian references by counting such references as Jesus Christ and the Holy Trinity. *Id.* at 20a-21a; see *id.* at 7a. That approach cannot be reconciled with *Marsh*. Courts should not be in the business of parsing the theological content or meaning of particular prayers. It is true that references to Jesus Christ are generally Christian references. But courts have no business attempting to decide, for example, whether members of the group "Jews for Jesus" are Jewish, Christian, both,

or something else entirely. See, *e.g.*, *Rubin*, 710 F.3d at 1100-1101 (noting that "the very act of deciding—as a matter of constitutional law, no less—who counts as a 'religious figure' or what amounts to a 'sectarian reference' not only embroils judges in precisely those intrareligious controversies that the Constitution requires us to avoid, but also imposes on us a task that we are incompetent to perform"); *Pelphrey* v. *Cobb Cnty.*, 547 F.3d 1263, 1272 (11th Cir. 2008) (same).

Similarly, because a court could not enjoin or place limits on the prevalence of only sectarian Christian prayers, the court of appeals' approach would inevitably require courts to decide questions such as whether references to the "Holy Spirit" are uniquely Christian, whether prayers addressed to "Allah" are uniquely Muslim, and whether references in particular prayers to "King of Kings" are Jewish, Christian, or Muslim. Courts should play no role in rendering a verdict on such theological questions. See, *e.g.*, *Hernandez* v. *CIR*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith."); *Lee*, 505 U.S. at 616-617 (Souter, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than drawing "distinction[s] between 'sectarian' religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster."). It is not the place of the federal Judiciary, a Town Board, or Members of Congress to compile a list of religious words that may be used in legislative prayers and a list of religious words that may not, so long as the prayer opportunity is not exploited to proselytize or

ally the government with a particular faith or disparage another.

Nor is it an answer to suggest that nonsectarian "Judeo-Christian" prayers are permissible while other types of prayers are not. Judeo-Christian prayers "exclude those who do not believe in monotheism (for example, those who practice the Hindu faith)," *Newdow* v. *Bush*, 355 F. Supp. 2d 265, 289 n.29 (D.D.C. 2005) (citation omitted), and "presuppose[] one God who is generally thought to be omniscient, omnipotent, benevolent, and responsive to prayer," *Hinrichs* v. *Bosma*, 400 F. Supp. 2d 1103, 1123 (S.D. Ind. 2005). See also *Lee*, 505 U.S. at 617 (Souter, J., concurring) (noting that "[m]any Americans who consider themselves religious are not theistic," and that "some, like several of the Framers, are deists who would question * * * a plea for divine advancement of the country's political and moral good"). The court of appeals thus observed that "it is not even clear that the removal of references to Christ" by the chaplain at issue in *Marsh* "rendered all post-1980 prayers [in the Nebraska State Legislature] nondenominational." Pet. App. 17a. The Establishment Clause frowns on the government's endorsement of a "civic religion" that includes "nonsectarian prayer * * * within the embrace of what is known as the Judeo-Christian tradition" and makes no "explicit references to the God of Israel, or to Jesus Christ, or to a patron saint," just as much as it frowns on the government's allegiance to a particular religious sect. *Lee*, 505 U.S. at 589.

C. The Court Of Appeals Further Erred By Assessing The Constitutionality Of Petitioner's Practice Concerning The Delivery Of A Prayer According To The Prevalence Of Christians Among The Prayer-Givers

The court of appeals also erred in determining that petitioner's practice violates the Establishment Clause because petitioner's process of selecting prayer-givers has nearly always resulted in the selection of a Christian prayer-giver. Pet. App. 19a-20a. The court of appeals accepted the district court's conclusion that petitioner's selection process was free of religious animus. *Id.* at 10a, 22a. The court also acknowledged that nearly every religious institution within petitioner's borders is a Christian denomination. *Id.* at 5a-6a, 19a. And the court accepted petitioner's contention that "it would have accepted any and all volunteers who asked to give the prayer," regardless of their religious affiliation (if any). *Id.* at 20a. The court of appeals nevertheless viewed petitioner's practice as unconstitutional because its religiously neutral selection criteria resulted in the delivery of predominantly Christian prayers rather than "a perspective that is substantially neutral amongst creeds." *Ibid.*

The history of prayers offered in connection with legislative deliberation in this country makes clear that a legislative body need not affirmatively solicit a court-mandated variety of different religious faiths—from inside and outside of the borders governed by the legislative body—in order to avoid running afoul of the Establishment Clause. As noted, the United States House of Representatives and Senate have a long and virtually unbroken tradition of employing official chaplains. Every House and Senate Chaplain has belonged to a Christian sect, a fact of which this Court was well aware

when it decided *Marsh*. See Gov't Amicus Br. at 11-12, 16-17, *Marsh*, No. 82-23.[8] The Court explained that the long-term appointment of a chaplain of one denomination does not "advance[] the beliefs of a particular church" absent proof that such appointment "stemmed from an impermissible motive." *Marsh*, 463 U.S. at 793. Even in *Marsh*, where the challenged practice involved the long-term employment of a chaplain of one faith, this Court explained that "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." *Id.* at 791 (internal citations omitted). It is difficult to understand how petitioner's practice, which affords an opportunity to all who volunteer, regardless of their faith, could present more "potential for establishment"

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[8] The Chaplains who delivered opening prayers in the Continental Congress and the First and Second Congresses were each from Christian denominations. The Continental Congress selected and paid Episcopal clergyman Reverend Jacob Duché. See 1 Journals 26 (1774); 2 Journals 12 (1775); 5 Journals 530 (1776). In the First Congress, the Senate elected as its Chaplain Episcopal bishop Reverend Samuel Provoost, see 1 J. of Senate 10, 16 (1789), while the House elected as its Chaplain Presbyterian minister Reverend William Linn, see 1 J. of H.R. 11-12, 26 (1789). Since that time, it appears that all the Chaplains in the United States Senate and House of Representatives, who deliver most of the opening prayers in those bodies, also have been from Christian denominations. See http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm#2e; (listing all Senate Chaplains) (last visited Aug. 1, 2013); http://chaplain.house.gov/chaplaincy/history.html (listing all House Chaplains) (last visited Aug. 1, 2013). The same is true of most of the private clergy who have delivered opening prayers in the Senate and House of Representatives in recent years. See Br. of Some Members of Cong. as Amicus in Supp. of Pet. 9.

than the practices of the Nebraska State Legislature or the United States Congress. *Ibid.*

Indeed, the court of appeals' view that petitioner should have implemented what amounts to a sectarian-quota system raises more First Amendment problems than it might solve. First, it would require petitioner to closely police the content of prayers delivered by private individuals. As discussed at pp. 15-27, *supra*, that alone would offend the Establishment Clause. Second, it would require petitioner affirmatively to solicit participation by particular non-Christian sects outside petitioner's borders until the diversity of religious viewpoints presented at Board meetings reached the point of satisfying the court of appeals' undefined "substantially neutral amongst creeds" standard. See Pet. App. 20a.

That type of selective invitation and viewpoint-balancing would require the government to engage in behavior that is not neutral as to all religions. As Justice Souter explained in his concurring opinion in *Lee*: "Nor does it solve the problem to say that the State should promote a 'diversity' of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each." 505 U.S. at 617. Such a system is certainly not required by *Marsh*, which held that a legislature's selection of persons to deliver a prayer at the beginning of its session need only be free of any intent to advance a particular religion. See 463 U.S. at 793.

Nor is such an approach consistent with Establishment Clause principles in other contexts. In *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 643-662 (2002), for example, the Court held that the government may offer

school vouchers for use at any private school, including a religious school, as long as the government uses neutral eligibility rules and the choice of school is left to private citizens. That was so even though up to 96% of voucher recipients chose to enroll in religious schools. See *id.* at 658-659; see also *Rosenberger*, 515 U.S. at 837-846 (holding that a public university's provision of financial assistance to a student religious group did not violate the Establishment Clause where such aid was provided to student groups generally without regard to whether they had a religious affiliation); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-14 (1993) (holding that a deaf student enrolled in a religious school was entitled to the services of a publicly employed sign-language interpreter where the interpreter's services were generally available to children with hearing impairments).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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