No. 12-696

IN THE
Supreme Court of the United States

TOWN OF GREECE,
Petitioner,
v.
SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, IDAHO, KANSAS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* STATES 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Longstanding Tradition of State Legislative Prayer Is Jeopardized by Growing Confusion Regarding the Correct Standard to Apply When Prayer Practices Are Challenged 4

II. Indiana's Experience in *Hinrichs v. Bosma* Demonstrates the Need for Clarification in This Area of the Law 15

CONCLUSION 24

APPENDIX

Legislative Prayer Lawsuits Since 2004 ..... 1a

TABLE OF AUTHORITIES

CASES

Coles ex rel. Coles v. Cleveland Bd. of Educ.,
171 F.3d 369 (6th Cir. 1999)..... 9

County of Allegheny v. American Civil Liberties Union,
492 U.S. 573 (1989)..... 2, 10

Doe v. Tangipahoa Parish Sch. Bd.,
473 F.3d 188 (5th Cir. 2006)..... 14

Doe v. Tangipahoa Parish Sch. Bd.,
494 F.3d 494 (5th Cir. 2007)..... 14

Hinrichs v. Bosma,
400 F. Supp. 2d 1103 (S.D. Ind. 2005) .....*passim*

Hinrichs v. Bosma,
440 F.3d 393 (7th Cir. 2006)..... 1, 3, 11, 12

Hinrichs v. Bosma,
No. 1:05-cv-0813-DCH-TAB, 2005 WL
3544300 (S.D. Ind. Dec. 28, 2005)..... 22, 23

Hinrichs v. Speaker of the House of Representatives,
506 F.3d 584 (7th Cir. 2007)..... 3, 12, 15

CASES [CONT'D]

Joyner v. Forsyth County,
653 F.3d 341 (4th Cir. 2011)..... 1, 3, 11, 18

Kurtz v. Baker,
829 F.2d 1133 (D.C. Cir. 1987)..... 9

Lemon v. Kurtzman,
403 U.S. 602 (1971)..... 14

Marsh v. Chambers,
463 U.S. 783 (1983).....*passim*

Pelphrey v. Cobb County,
547 F.3d 1263 (11th Cir. 2008).....*passim*

Snyder v. Murray City Corp.,
159 F.3d 1227 (10th Cir. 1998)..... 9, 21

RULES

New York House Rule VI, § 2(b)..... 6, 7

New York Senate Rule IX, § 4(a)..... 7

South Carolina House Rule 6.3 7

South Carolina Senate Rule 32A..... 7

Supreme Court Rule 37.4 1

Supreme Court Rule 37.2(a) 1

OTHER AUTHORITIES

Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 71 5

Cong. Globe, 37th Cong., 1st Sess. 1 (July 4, 1861) 19

Edward E. Hale, *Prayers Offered in the Senate of the United States in the Winter Session of 1904* (1904) 19

Mark Niesse, *Hawaii Senate Ends Daily Chamber Prayers*, Associated Press, Jan. 21, 2011 ..... 6, 13

Martin Lanouette, *Prayer in the Legislature: Tradition Meets Secularization*, Can. Parl. Rev. 2 (2009) 5

National Conference of State Legislatures, *Inside the Legislative Process: Background*, http://www.ncsl.org/legislatures-elections/legislatures/inside-the-legislative-process.aspx# (last visited Jan. 4, 2013) 6

National Conference of State Legislatures, *Prayer Practices*, *Inside the Legislative Process* (rev. ed. Sept. 2009), *available at* http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf 6, 7, 8

OTHER AUTHORITIES [CONT'D]

Prayers Offered by the Chaplain of the Senate of the United States—Reverand Richard C. Halverson, Sen. Doc. 98-43 (1984) 20

Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083 (1996) 19

The Prayers of Peter Marshall (1954)..... 20

Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986)..... 19

INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alabama, Arizona, Arkansas, Colorado, Florida, Idaho, Kansas, Michigan, Mississippi, Montana, Nebraska, New Mexico, Oklahoma, South Carolina, Texas, Utah, and Virginia respectfully submit this brief as *amici curiae* in support of the Petitioner. The longstanding tradition of opening each legislative session day with a prayer is followed, to some degree, in all 50 states. As the Court is aware, offended citizens bring lawsuits challenging such legislative prayers with some frequency, and the states are often called upon to defend the prayer practices of their legislatures, localities, and subdivisions. *See, e.g.*, *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011) (challenging prayer practice of county board of commissioners); *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008) (challenging prayer practices of county commission and county planning commission); *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) (challenging prayer practice of the Indiana House of Representatives).

These lawsuits are particularly burdensome because public officials cannot reliably predict their

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[1] Pursuant to Supreme Court Rule 37.2(a), the *amici* states provided all parties' counsel of record with timely notice of their intent to file this brief. Consent of the parties is not required for the states to file an amicus brief. Sup. Ct. R. 37.4.

outcomes based on precedents from this or any other court. Indeed, the lower courts are intractably divided over whether legislative prayer should be analyzed under the historical test of *Marsh v. Chambers*, 463 U.S. 783 (1983), or the endorsement test of *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). The states therefore have a compelling interest in obtaining clearer guidance from this Court regarding the permissible bounds of legislative prayer.

SUMMARY OF THE ARGUMENT

Nearly thirty years ago, in *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court upheld the practice of legislative prayer based on its "unambiguous and unbroken history of more than 200 years"—a history that has made legislative prayer "part of the fabric of our society." *Id.* at 792. For many years after *Marsh* was decided, legislative prayer appeared to be a settled issue, free from the uncertainty and confusion that characterizes Establishment Clause jurisprudence more generally.

In recent years, however, lower courts have begun to apply *Marsh* in ways that cast doubt on this certainty. The Second and Fourth Circuits have read dictum from this Court's subsequent decision in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), as modifying *Marsh* such that the earlier case's straightforward, history-

based analysis no longer applies. Instead, these courts have applied an endorsement test that focuses on the precise content of the challenged prayers. *See* Pet. App. 19a-24a; *Joyner v. Forsyth County*, 653 F.3d 341, 348-49 (4th Cir. 2011).

The fact-bound nature of the inquiries mandated by these decisions is at odds with this Court's broad approval of legislative prayer in *Marsh*. Moreover, these decisions give very little guidance to states and localities that wish to avoid costly and burdensome litigation over the prayers that traditionally begin each legislative or council session. As all 50 states practice legislative prayer to some degree—and many states have prayer practices closely resembling the practice struck down in the decision below—it is important that the Court address the growing split over this issue before it becomes yet another irredeemably muddled sector of Establishment Clause doctrine.

As Indiana's own experience with legislative prayer litigation demonstrates, the lack of clarity in this area is especially troubling to the extent it leaves courts to delve into questions "best left to theologians, not courts of law." *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008). In *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1131 (S.D. Ind. 2005), *stay of injunction pending appeal denied*, 440 F.3d 393 (7th Cir. 2006), *injunction vacated on standing grounds*, 506 F.3d 584 (7th Cir. 2007), the

district court enjoined the Speaker of the Indiana House of Representatives from allowing "sectarian prayers," but gave little definition as to what might render a prayer "sectarian." Indeed, with its focus on the unconstitutionality of pervasively Christian prayers, the *Hinrichs* injunction—ephemeral though it was—could have been read as to prohibit express references to Christianity but to permit invocations of the deities of other religions. Such a result is not contemplated by *Marsh*, which recognized that the "invo[cation of] Divine guidance on a public body entrusted with making the laws . . . is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

ARGUMENT

I. The Longstanding Tradition of State Legislative Prayer Is Jeopardized by Growing Confusion Regarding the Correct Standard to Apply When Prayer Practices Are Challenged

1. The practice of opening legislative assemblies with an invocation is "deeply embedded in the history and tradition of this country." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). The American tradition of legislative prayer is derived from the practices of both houses of the British Parliament, which, since the 16th Century, have begun every

session with a prayer. Martin Lanouette, *Prayer in the Legislature: Tradition Meets Secularization*, Can. Parl. Rev. 2, 2 (2009). This custom followed British colonists as they established Anglophone nations around the world. *Id*. at 2-7.[2] Thus, by the time of the Founding, the practice of legislative prayer was so far removed from the controversy that marks it today, that the First Congress enacted a law providing for the appointment of paid congressional chaplains the same week it finalized the language of the First Amendment. Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 71; *Marsh*, 463 U.S. at 788 ("Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment[.]"). The practice of opening daily congressional sessions with a prayer has continued without interruption since that time. *Marsh*, 463 U.S. at 788.

Following Congress's lead, state legislatures adopted their own prayer practices, most of which are still going strong today. *Id*. at 788-89 & n.11. In 2002, the National Conference of State Legislatures—a bipartisan organization serving the

[2] Australia, New Zealand, and Canada, during their respective founding periods, all solemnized their legislative assemblies with an opening prayer. Lanouette, *supra*, at 2. This practice continues today in Australia, New Zealand, and all Canadian provinces except Quebec. *Id*.

legislators and staffs of the nation's states, commonwealths, and territories—conducted a comprehensive survey on the topic of legislative prayer. *See* National Conference of State Legislatures, *Prayer Practices*, *Inside the Legislative Process* 5-145 (rev. ed. Sept. 2009), *available at* http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf [hereinafter "NCSL Survey"].[3] The NCSL Survey found that "[a]lmost all state legislatures still use an opening prayer as part of their tradition and procedure[.]" *Id*.

Legislative bodies from 48 states, the Commonwealth of Puerto Rico, and the territory of American Samoa responded to the survey and affirmed that they open each legislative session day with a prayer. *Id*. at 5-148, Table 02-5.50. With one exception—the Hawaii Senate voted to discontinue its prayer practice in 2011, *see* Mark Niesse, *Hawaii Senate Ends Daily Chamber Prayers*, Associated Press, Jan. 21, 2011—these results remain unchanged today. Additionally, the legislatures of the two states that did not respond to the NCSL Survey—New York and South Carolina—currently open their session days with a prayer. *See* New York

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[3] *See also* National Conference of State Legislatures, *Inside the Legislative Process: Background*, http://www.ncsl.org/legislatures-elections/legislatures/inside-the-legislative-process.aspx# (last visited Jan. 4, 2013) (explaining that the legislative prayer survey was conducted in 2002 and has appeared in all subsequent editions of *Inside the Legislative Process*).

House Rule VI, § 2(b); New York Senate Rule IX, § 4(a); South Carolina House Rule 6.3; South Carolina Senate Rule 32A.

Based on the results of the NCSL Survey, it is fair to conclude that Petitioner Town of Greece's prayer practices are well within the norm. Under the Town's prayer policy, any citizen of any faith may volunteer to give the opening prayer before a Town Board meeting. Pet. App. 4a. If there are no volunteers, the Town invites clergy from religious communities within the town, working through a periodically updated list of religious organizations published by the Greece Chamber of Commerce. Pet. App. 5a. Once a prayer-giver volunteers or is chosen, that person is free to choose the invocation. Pet. App. 4a. The Town has no guidelines concerning content of the prayers and does not review the prayers before their delivery. Pet. App. 4a.

These policies are consistent with the practices of many states, the majority of which utilize visiting chaplains of various faiths whose prayers are not screened or subjected to any content restrictions prior to delivery. According to the NCSL Survey, in 44 states a visiting chaplain delivered the opening prayer at least some of the time.[4] NCSL Survey,

[4] Opening prayers in these states are also sometimes delivered by an official legislative chaplain, a member of the legislative

supra, at 5-151 to -152, Table 02-5.52. Of these, nine states and Puerto Rico utilized visiting chaplains exclusively. *Id.* In 30 states, American Samoa, and Puerto Rico, at least one legislative chamber did not have guidelines for the delivery of an opening prayer. *Id*. at 5-153, Table 02-5.53. In 16 of these 30 states, *neither* legislative chamber had guidelines. *Id.* Only three legislative chambers reviewed prayers before they were delivered: the Florida House, the Ohio House and the Puerto Rico House. *Id.* at 5-157, Table 02-5.55. Finally, in 42 states, American Samoa and Puerto Rico, at least one of the legislative chambers rotated its visiting chaplain invitation among different religions. *Id*. at 5-171, Table 02-5.63. In 21 of these, both chambers rotated the visiting chaplain invitation among different religions. *Id*.

2. The similarities between the prayer policy struck down in this case and the practices employed by many states demonstrate just how vulnerable state legislative prayer is under current Establishment Clause doctrine (or, more precisely, lower-court application of that doctrine). As the Town of Greece observes in its Petition, uncertainty among the lower courts as to the correct legal standard to apply in legislative prayer cases means that similar practices are being upheld or struck

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body, the clerk or secretary, or a legislative staff person. NCSL Survey, *supra*, at 5-151 to -152, Table 02-5.52.

down based solely on the jurisdiction in which a challenge is raised. Pet. 13.

While this kind of uncertainty has long plagued Establishment Clause doctrine generally, it is a relatively new development with respect to legislative prayer. After the Court upheld legislative prayer in *Marsh v. Chambers*, federal-court challenges to particular prayer practices were scarce for the next two decades.[5] This period of relative quiet on the legislative prayer front is unsurprising given the breadth of the Court's decision in *Marsh*, where it said that a legislative prayer practice will be upheld so long as (1) the choice of prayer-giver does not stem from any "impermissible motive" on the part of the legislative body, and (2) "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 793-95.

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[5] In *Snyder v. Murray City Corporation*, 159 F.3d 1227 (10th Cir. 1998) (*en banc*), the court relied on *Marsh* to uphold a city council's practice of inviting clergy to give prayers; in *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987), the court dismissed on standing grounds a challenge to Congress's similar practice of inviting clergy to pray; and in *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999), the court struck down a public school board's prayer practice because it was more like school prayer than legislative prayer.

Since the mid-2000s, however, legislative prayer litigation has increased dramatically, as shown in a table of cases provided in an appendix to this brief at 1a. What is significant is both the number of cases (which shows a growing sense of opportunism for those who oppose legislative prayer) and the accompanying deterioration of doctrinal uniformity. Several lower courts—including the Second Circuit in the decision below, but also several others as the table shows—have begun to eschew *Marsh*'s straightforward historical analysis and to apply a different standard based on dictum from this Court's opinion in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), claiming that the prayers at issue in *Marsh* did not "have the effect of affiliating the government with any one specific faith or belief . . . because the particular chaplain had 'removed all references to Christ.'" *Id.* at 603 (quoting *Marsh*, 463 U.S. at 793 n.14).

For example, the Second Circuit here took that statement to modify *Marsh* such that legislative prayer is unconstitutional "[w]here the overwhelming predominance of prayers offered are associated, often in an explicitly sectarian way, with a particular creed, and where the [government] takes no steps to avoid the identification[.]" Pet. App. 26a. The court essentially adopted an endorsement test that asks whether the challenged prayer practice would convey to a "reasonable objective observer" the impression that

"[government] officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate in them[.]" Pet. App. 26a.

The Fourth Circuit has likewise applied *Allegheny* to strike down legislative prayer in recent years, holding that such prayer is constitutional only if it is "nonsectarian in both policy and practice" and does not result in an "effective endorsement of one faith." *Joyner v. Forsyth County*, 653 F.3d 341, 348, 355 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). The court explained that "[i]nfrequent references to specific deities, standing alone, do not suffice to make out a constitutional case." *Id.* at 349. "But legislative prayers that go further—prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith—transgress the boundaries of the Establishment Clause." *Id.*

The Seventh Circuit has also indicated that it would apply an endorsement test should a legislative prayer case reach that court on the merits. In its only occasion to address the constitutionality of legislative prayer, the court denied the Indiana House Speaker's motion to stay an injunction against "sectarian" legislative prayers pending appeal. *Hinrichs v. Bosma*, 440 F.3d 393, 398-402 (7th Cir. 2006). Although noting the "tentative nature" of its analysis, the court stated that it read *Marsh* (as modified by *Allegheny*) "as hinging on the

nonsectarian nature of the invocations at issue there." *Id*. at 395, 399. Thus, said the court, the argument that the Indiana House's prayer practice was permissible under *Marsh*'s historical analysis was unlikely to prevail. *Id*. at 401.[6]

The list goes on. As the appendix to this brief indicates, other federal courts have in recent years taken this same approach of citing *Allegheny* and footnote 14 of *Marsh* as justification for examining in detail the content of the legislative prayers in question. *See* App. 1a-5a.

The Eleventh Circuit, on the other hand, has used *Marsh*'s historical test, refused to read *Allegheny* to permit only "nonsectarian" prayer, and refused to "parse" the content of prayers. In *Pelphrey v. Cobb County*, 547 F.3d 1263, 1271 (11th Cir. 2008) the court held that "courts are not to evaluate the content of [legislative] prayers absent evidence of exploitation" of the prayer opportunity because "*Allegheny* does not require that legislative prayer conform to the model in *Marsh*." *Id*. at 1271-72. Thus while the Second, Fourth, and Seventh Circuits looked to prayer *content* to determine whether the "prayer opportunity ha[d] been

[6] The Seventh Circuit did ultimately reverse the district court's decision, but did so on standing grounds and did not reach the merits of the Establishment Clause issue. *See Hinrichs v. Speaker of the House of Representatives*, 506 F.3d 584, 585 (7th Cir. 2007).

exploited," *Marsh*, 463 U.S. at 794, the Eleventh Circuit examined the prayers' *context* and found there was no evidence of exploitation. *Pelphrey*, 547 F.3d at 1277 ("Although the majority of speakers were Christian, the parties agree that prayers were also offered by members of the Jewish, Unitarian, and Muslim faiths."); *id.* at 1278 ("Some prayers included references to 'Jesus Christ,' but others referenced 'Allah,' 'Mohammed,' and the Torah."). A number of other federal courts have followed this model in recent years as well. *See* App. 1a-5a.

These conflicting precedents leave state legislatures, localities, and subdivisions with very little guidance when it comes to crafting legislative prayer policies that comply with the Establishment Clause. As the Second Circuit acknowledged in the opinion below, this lack of guidance "may well prompt municipalities to pause and think carefully before adopting legislative prayer[.]" Pet. App. 27a. States with legislative prayer practices already in place may even consider abandoning those traditions in order to avoid costly and burdensome litigation. In fact, the Hawaii Senate recently did just that when faced with the threat of a lawsuit, thus becoming the first state legislative body in the nation to halt the practice of legislative prayer. Mark Niesse, *Hawaii Senate Ends Daily Chamber Prayers*, Associated Press, Jan. 21, 2011

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In sum, lower courts have recently undertaken misguided attempts to harmonize the Court's highly differentiated Establishment Clause precedents. As a consequence, yet another species of Establishment Clause doctrine—one that had seemingly been settled nearly 30 years ago—stands on the precipice of confusion, contradiction, and chaos.[7] The Court should grant the petition to prevent further cross-pollination of legislative prayer doctrine and clarify that the *Marsh* standard—not the *Allegheny* endorsement standard—remains the governing test.

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[7] A now-vacated Fifth Circuit panel decision enjoining a school board's prayer practice further illustrates the burgeoning confusion in this area. In *Doe v. Tangipahoa Parish School Board*, 473 F.3d 188 (5th Cir. 2006), three different judges used three different Establishment Clause analyses to arrive at three different conclusions. The lead opinion cited *Allegheny* and footnote 14 of *Marsh* as the basis for enjoining a school board's prayer practice; the concurring opinion held that school board prayer is more like school prayer than legislative prayer and therefore voted to enjoin the practice under *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and the dissenting opinion applied *Marsh*'s deferential historical analysis in voting to uphold the practice. *Doe*, 473 F.3d at 199, 211-12. Ultimately, the panel decision was vacated on standing grounds. *See Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc).

II. Indiana's Experience in *Hinrichs v. Bosma* Demonstrates the Need for Clarification in This Area of the Law

As mentioned in Part I.2., *supra*, the prayer practice of the Indiana House of Representatives was challenged in 2005 in a lawsuit brought by four Indiana residents and taxpayers. In a decision whose analysis closely presaged that of the Second Circuit in this case, the United States District Court for the Southern District of Indiana held that the practice violated the Establishment Clause and issued a permanent injunction barring the Speaker of the House from permitting "sectarian" prayer as part of the official proceedings of the House. *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1131 (S.D. Ind. 2005). That holding, though ultimately overturned by the Seventh Circuit on standing grounds, *see Hinrichs v. Speaker of the House of Representatives*, 506 F.3d 584, 585 (7th Cir. 2007), is nonetheless instructive here as it demonstrates the creeping uncertainty that threatens to upend legislative prayer doctrine.

1. The Indiana House of Representatives, like Congress and the legislative chambers of many other states, has a long and rich tradition of legislative prayer. At the time of the *Hinrichs* lawsuit, the Indiana House had been opening each session day with a prayer for 188 years. *Hinrichs*, 400 F. Supp. 2d at 1105. It continues to do so today.

In the Indiana House, the invocation is frequently delivered by a religious cleric or, when none is available, by a Representative. *Id.* The cleric for a particular day is nominated by a Representative, who submits a nomination form to the Majority Caucus Chair, who, in turn, schedules the cleric to deliver the invocation. *Id.* Once scheduled, the cleric receives a confirmation letter by mail, which states in part: "The invocation is to be a short prayer asking for guidance and help in the matters that come before the members. We ask that you strive for an ecumenical prayer as our members, staff and constituents come from different faith backgrounds." *Id.* Neither the Speaker nor any other Representative or staff member gives the cleric any further guidance as to the content of the prayer. *Id.*

Fifty-three opening prayers were offered in the House during the 2005 legislative session. *Id.* at 1106. Of these, 41 were delivered by clergy from Christian churches, nine were delivered by Representatives, and one each was delivered by a lay person, a Muslim imam, and a Jewish rabbi. *Id.*

In analyzing the House's prayer practice under the Establishment Clause, then-District-Judge David Hamilton—since elevated to the Seventh Circuit—began with *Marsh*. He acknowledged *Marsh*'s history rationale, but ultimately found it

unpersuasive. As with the Second Circuit in the opinion below, Judge Hamilton seized on footnote 14 of the *Marsh* opinion, where this Court explained that the Nebraska chaplain "removed all references to Christ [from his prayers] after a 1980 complaint from a Jewish legislator." *Id.* at 1116 (citing *Marsh*, 463 U.S. at 793 n.14).

Judge Hamilton reasoned that this fact—combined with *Marsh*'s statement that courts should not examine the content of prayers "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," *Marsh*, 463 U.S. at 794-95—means that "expressly and consistently sectarian" prayers that "express the faith of a particular religion" violate the Establishment Clause. *Hinrichs*, 400 F. Supp. 2d at 1121-22. Foreshadowing the decision below, Judge Hamilton invoked *Allegheny* to support this reading of *Marsh*. *Id.* at 1117.

Judge Hamilton therefore parsed the content of the prayers given during the 2005 Indiana House session. He examined each of 45 available prayer transcripts from that session and found that "[a] substantial majority of the prayers were explicitly Christian, offered in the name of Jesus Christ or with similar phrasing. Several used repeated references to specifically Christian beliefs and doctrine, and some can fairly be described as

proselytizing efforts." *Id*. at 1126. Concluding that such Christian predominance equaled establishment under *Allegheny*, Judge Hamilton enjoined the Speaker of the Indiana House from allowing "sectarian prayers," including specifically prayers using "Christ's name or title or any other denominational appeal." *Id*. at 1131.

2. While his decision was ultimately vacated on standing grounds, Judge Hamilton's analysis in *Hinrichs* is useful because it underscores how much this Court's guidance is needed regarding legislative prayers.

To begin, Judge Hamilton, the court below, and the Fourth Circuit in *Joyner* have misunderstood footnote 14 of *Marsh*, supplemented by reference to dictum in *Allegheny*, to indicate that overtly Christian prayers are inherently proselytizing and therefore illegal. *See* Pet. App. 20a-21a; *Joyner*, 653 F.3d at 349-50; *Hinrichs*, 400 F. Supp. 2d at 1125-26. Yet, for the most part, the prayers giving rise to the lawsuit in *Marsh* were "explicitly Christian," and the Court made no limitation on the chaplain's ability to give Christian prayers. *Marsh*, 463 U.S. at 793-95 & n.14.

Furthermore, the long history of legislative prayer on which the Court relied in *Marsh* was filled with overtly Christian references. The Continental Congress "sprinkled its proceedings liberally with

the mention of God, Jesus Christ, [and] the Christian religion." Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 217 (1986); *see also* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 (1996) ("[F]rom America's earliest days to the present times, the prayers delivered by [congressional] chaplains have been true sacral prayers, and many of them, true Christian prayers. Indeed, within the last six years alone, over two hundred and fifty opening prayers delivered by congressional chaplains have included supplications to Jesus Christ.").

The congressional practice of invoking Jesus's name in institutional prayers has continued ever since, as a brief, periodic historical sampling shows. A representative prayer in 1861 asked "that the disorders of the land may be speedily healed . . . and that Thy Church and Kingdom may flourish in a larger peace and prosperity, for Thy Son, our Savior, Jesus Christ's sake. Amen." Cong. Globe, 37th Cong., 1st Sess. 1 (July 4, 1861). In 1904, the Senate chaplain asked God "in Christ's name" to help the nations "fulfill the whole law of Christ," and quoted Christian scripture: "Thou shall name Him Jesus the Saviour, for He shall save my people from their sins." Edward E. Hale, *Prayers Offered in the Senate of the United States in the Winter Session of 1904* 16, 31 (1904) (quoting Matthew 1:21). In 1947, Senate

Chaplain Peter Marshall asked the "Lord Jesus" to "put [His] arm around [the Senators] to give them strength," and concluded, "we humbly ask in Jesus' name." *The Prayers of Peter Marshall* 129 (1954).

In 1983, when *Marsh* was decided, several congressional prayers were offered in Jesus' name. *See, e.g., Prayers Offered by the Chaplain of the Senate of the United States—Reverend Richard C. Halverson*, Sen. Doc. 98-43, at 23 (1984) (concluding "in the matchless name of Jesus, the Humble servant of all"). And on April 20, 1983, the day *Marsh* was argued, Chaplain Halverson closed his prayer, "in the name of Jesus, Savior and Lord." *Id.*

It was against this historical backdrop that *Marsh* stressed that those who instituted legislative prayer "did not consider opening prayers as proselytizing activity or as symbolically placing the government's official seal of approval on one religious view." *Marsh*, 463 U.S. at 792 (citation and quotation marks omitted). Accordingly, the Court was concerned only with whether "the prayer *opportunity* has been *exploited* to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95 (emphases added).

Consequently, contrary to the decision below, a prayer does not necessarily proselytize or "aggressively advocate" a particular faith merely by

making a few distinctly Christian references. As the Eleventh Circuit noted in *Pelphrey*, "[t]he *Marsh* Court considered several factors to determine whether the legislative prayers had been exploited to advance one faith. The Court weighed the chaplain's religious affiliation, his tenure, and the overall nature of his prayers." *Pelphrey*, 547 F.3d at 1271 (citing *Marsh*, 463 U.S. at 792-95). "The 'nonsectarian' nature of the chaplain's prayers was one factor in this fact-intensive analysis; it did not form the basis for a bright-line rule." *Id.*

In other words, sifting out proselytization merely by reference to whether a prayer can be identified with a particular religious viewpoint casts too broad a net. As the Tenth Circuit observed in reviewing city council prayers, "*all* prayers 'advance' a particular faith or belief in one way or another." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) (emphasis added). "Thus, the kind of legislative prayer that will run afoul of the Constitution is one that *proselytizes* a particular religious tenet or belief, or that *aggressively* advocates a specific religious creed, or that derogates another religious faith or doctrine." *Id.* at 1234 (emphases added).

In this regard, requiring legislative leaders to police prayers for "sectarian" references offers no real guidance. While Judge Hamilton's preclusion of prayers bearing "Christ's name or title" had at least

some commonly understood meaning, his prohibition on prayers with "denominational appeal" was highly elusive. In denying the House Speaker's motion to alter or amend the judgment in *Hinrichs*, Judge Hamilton attempted further definition: "Prayers are sectarian in the Christian tradition when they proclaim or otherwise communicate the beliefs that Jesus of Nazareth was the Christ, the Messiah, the Son of God, or the Savior, or that he was resurrected, or that he will return on Judgment Day or is otherwise divine." *Hinrichs v. Bosma*, No. 1:05-cv-0813-DCH-TAB, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005) (Entry on Post-Judgment Motions). But this definition leaves courts to do exactly what *Marsh* said they should not: "parse the content of [] particular prayer[s]." *Marsh*, 463 U.S. at 795.

Furthermore, while Judge Hamilton thereby set forth the prohibitions against *Christian* prayers in relatively explicit terms, he did not explain in similar detail what an impermissible "sectarian" prayer of another, non-Christian faith might look like. Judge Hamilton said only that "[i]f those offering prayers in the Indiana House of Representatives choose to use the Arabic Allah, the Spanish Dios, the German Gott, the French Dieu, the Swedish Gud, the Greek Theos, the Hebrew Elohim, the Italian Dio, or any other language's terms in addressing the God who is the focus of the non-sectarian prayers contemplated in *Marsh v. Chambers*, the court sees little risk that the choice of

language would advance a particular religion or disparage others." *Hinrichs*, 2005 WL 3544300, at *7.

Unfortunately, this statement raises as many questions as it answers. What, indeed, does it mean to pray to "the God who is the focus of the non-sectarian prayers contemplated in *Marsh v. Chambers*"? Is there a safe harbor for legislative prayer that excludes Hindus who may wish to pray to Vishnu or Shiva? Is it really fair to preclude prayers to Jesus because they advance Christianity, but to permit prayers to Allah on the theory that they do *not* similarly advance Islam? These are just a few of the puzzles that arise when courts seek to preclude supposedly "sectarian" legislative prayers.

Not only Judge Hamilton in *Hinrichs*, but also, tentatively, the Seventh Circuit in that same case, the Fourth Circuit in *Joyner*, and, in practice, the Second Circuit here, all have concluded that they *must* determine whether particular legislative prayers are sectarian or nonsectarian under *Marsh*, as modified (in their view) by *Allegheny*. The Eleventh Circuit, in contrast, has understandably struggled with the idea of defining "sectarian" prayers, stating, "We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions[.]" *Pelphrey*, 547 F. 3d at 1272. Ultimately, said the court, "[w]hether invocations of 'Lord of Lords' or 'the God of Abraham,

Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law." *Id.* at 1267.

Plainly, these distinguished federal judges—not to mention the judges whose varying approaches are illustrated in the appendix to this brief—fundamentally disagree with one another, and the emerging mix of precedents bearing on legislative prayer is creating divergent circuit precedents. The Court should grant the Town of Greece's Petition in order to prevent yet another sector of Establishment Clause doctrine from sliding into irretrievable chaos.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX: LEGISLATIVE PRAYER LAWSUITS SINCE 2004	
Citation	**Disposition**
Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004)	Town council prayer practice struck down based on *Marsh* footnote 14 and *Allegheny*
Dobrich v. Walls, 380 F. Supp. 2d 366 (D. Del. 2005)	School board prayer practice upheld based on *Marsh* historical analysis
Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005)	County board of supervisors prayer practice upheld based on *Marsh* footnote 14 and *Allegheny* because prayers were nonsectarian
Hinrichs v. Bosma, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), *vacated on standing grounds*, 506 F.3d 584 (7th cir. 2007)	Challenge to Indiana House of Representatives prayer practice; district court enjoined based on *Marsh* footnote 14 and *Allegheny*; Seventh Circuit ultimately vacated for lack of standing

Citation	**Disposition**
Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188 (5th Cir. 2006), *vacated on standing grounds*, 494 F.3d 494 (5th Cir. 2007) (en banc)	2-1 vote against school board prayer practice based on three different rationales (including two different readings of *Marsh*); vacated for lack of standing by *en banc* Fifth Circuit
Turner v. City Council of City of Fredericksburg, 534 F.3d 352 (4th Cir. 2008)	Upheld city council prayer policy that required prayers to be "nondenominational" because "the Establishment Clause does not absolutely dictate the form of legislative prayer."
Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008)	Upheld county commission prayer practice based on *Marsh* historical analysis

Citation	Disposition
Doe v. Tangipahoa Parish, 631 F. Supp. 2d 823 (E.D. La. 2009)	New school board prayer policy upheld based on *Marsh* historical analysis; new policy asked prayer-givers to strive for an ecumenical prayer but did-not require school board pre-screening of prayers
Doe v. Indian River School Dist., 653 F.3d 256 (3d Cir. 2011)	School board prayer struck down under *Lemon* as species of school prayer
Joyner v. Forsyth County, 653 F.3d 341 (4th Cir. 2011)	County board of commissioners prayer practice struck down under *Marsh* footnote 14 and *Allegheny*
Rubin v. City of Lancaster, 802 F. Supp. 2d 1107 (C.D. Cal. 2011)	City council prayer practice upheld based on *Marsh* historical analysis; appeal pending
Atheists of Florida, Inc. v. City of Lakeland, 838 F. Supp. 2d 1293 (M.D. Fla. 2012)	City commission prayer practice upheld based on *Marsh* historical analysis; appeal pending

Citation	**Disposition**
Galloway v. Town of Greece, 681 F.3d 20 (2d Cir. 2012)	Town board prayer practice struck down based on *Marsh* footnote 14 and *Allegheny*
Mullins v. Sussex County, 861 F. Supp. 2d 411 (D. Del. 2012)	County council president enjoined from reciting the Lord's Prayer before opening of meetings based on *Marsh* footnote 14 and *Allegheny*
Doe v. Pittsylvania County, 842 F. Supp. 2d 906 (W.D. Va. 2012)	County board's prayer practice unconstitutional based on *Marsh* footnote 14 and *Allegheny*
Jones v. Hamilton County, --- F. Supp. 2d ---, 2012 WL 3763963 (E.D. Tenn. Aug. 29, 2012)	Prayer upheld at preliminary injunction stage on theory that *Marsh* historical analysis permits sectarian references; appeal pending

Citation	Disposition
Doe v. Franklin County, No. 4:12-cv-918 (E.D. Mo. filed May 18, 2012)	County commission prayer practice challenged; commission ceased practice after lawsuit was filed and plaintiff dismissed the challenge