No. 12-696

IN THE
Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

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

Brief of *Amici Curiae* Board of Commissioners for Carroll County, Maryland; Board of Commissioners for Cobb County, Georgia; Board of Commissioners for Rowan County, North Carolina; City of Lakeland, Florida; County Commission for Franklin County, Missouri; Forsyth County, North Carolina, Board of Commissioners; Hamilton County, Tennessee, Board of Commissioners, and The Franklin Select Board, Franklin, Vermont, Addressing the Merits in Support of Petitioner Town of Greece.

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INTEREST OF THE AMICI[1]

Amici curiae are local legislative bodies serving communities across the United States. They are Board of Commissioners for Carroll County, Maryland; Board of Commissioners for Cobb County, Georgia; Board of Commissioners for Rowan County, North Carolina; City of Lakeland, Florida; County Commission for Franklin County, Missouri; Forsyth County, North Carolina, Board of Commissioners; Hamilton County, Tennessee, Board of Commissioners and The Franklin Select Board, Franklin, Vermont. Each *amici* has or has had a practice of opening its meetings with legislative prayer, and each *amici* has had its prayer practice challenged on Establishment Clause grounds. An inconsistent patchwork of legal decisions has resulted from the application of *Allegheny*'s endorsement test, which has made it virtually impossible for *amici* to know whether a given prayer policy is constitutional without litigating each policy up through the federal court system. This is evidenced, for example, by *Galloway v. Town of Greece, New York*; as well as by *Joyner v. Forsyth County, North Carolina*, and *Pelphrey v. Cobb County, Georgia*---the latter two counties being *amici* on this brief where one county's prayer policy was

[1] Counsel of record for all parties received timely notice of the *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* its members or its counsel made a monetary contribution to its preparation or submission.

found constitutional (Cobb), while a virtually identical policy in the other county was deemed unconstitutional (Forsyth). *Amici*, therefore, have a direct interest in this case. They believe their years of experience with legislative prayers will aid this Court by providing an important and unique perspective on the Establishment Clause issues implicated by legislative prayer.

SUMMARY OF ARGUMENT

For the hundreds of local and state governments that participate in the longstanding history and tradition of starting their legislative meetings with prayer, the constitutionality of prayers that contain sectarian references is, to borrow a phrase from Justice Thomas, "anyone's guess." *Davenport v. American Atheists*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of cert.). Some circuit courts allow sectarian references, at least where the selection process for prayer-givers is neutral and generally available to all religious groups in the community. *Pelphrey v. Cobb Cnty, Ga.*, 547 F.3d 1263 (11th Cir. 2008); *Rubin v. City of Lancaster, Calif.,* 710 F.3d 1087 (9th Cir. 2013). Other circuits prohibit all sectarian references. *Hinrichs v. Bosma,* 440 F.3d 393, 399 (7th Cir. 2006), *dism'd on jurisdictional grounds sub nom Hinrichs v. Speaker of the House of Reps.,* 506 F.3d 584 (7th Cir. 2007) (concluding that *Allegheny* "read *Marsh* as precluding sectarian prayer"). Still others contend that some sectarian references are permissible, but not too many, because at some undefined point, recurring sectarian references constitute an Establishment Clause violation. *Joyner v. Forsyth*

Cnty, 653 F.3d 341 (4th Cir. 2011); *Galloway v. Town of Greece*, 681 F.3d 20, 33 (2d Cir. 2012) ("there is no substantive mixture of prayer language that will, on its own, necessarily avert the appearance of affiliation").[2]

Given this conflicting tapestry of cases, cities and counties truly must guess whether at the start of legislative meetings they are permitted to allow religious leaders to pray consistent with their own faith (which prayers might include sectarian references) or whether local governments must censor individual prayers to ensure that the invocations "embrace a non-sectarian ideal." *Joyner*, 653 F.3d at 347; *Stein v. Plainwell Cmty. Schs.*, 822 F.2d 1406, 1409 (6th Cir. 1987) (interpreting *Marsh v. Chambers*, 463 U.S. 783 (1983), as prohibiting prayers that go "beyond 'the American civil religion'"). Unfortunately, this uncertainty stems in large measure from conflicting Establishment Clause standards found in *Marsh* and *Cnty. of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). The lower courts' attempts to reconcile these cases have resulted in inconsistent holdings and widespread

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[2] The difficulty confronting local governments trying to follow our nation's deeply embedded history of legislative prayer is apparent from the Second Circuit's *Galloway* opinion. According to that court, its reasoning "def[ies] exact legal formulas" and is based on "the exercise of 'legal judgment.'" *Galloway,* 681 F.3d at 30. Given the subjective nature of its test, the court does "not aim to specify what the Establishment Clause allows." *Id.* at 33. As a result, local governments are left to their own devices to figure out what the Establishment Clause allows.

uncertainty as to the scope of public accommodation of religious beliefs permitted under the Establishment Clause.

In *Allegheny,* the majority sought to limit the scope of *Marsh* in response to Justice Kennedy's claim that *Marsh* legitimated all "practices with no greater potential for an establishment of religion" than those "accepted traditions dating back to the Founding." *Allegheny*, 492 U.S. at 669-70. Specifically, by interpreting *Marsh*, *Allegheny* sought to preclude legislative prayers "that have the effect of affiliating the government with any one specific faith or belief." *Id.* at 603. In so doing, *Allegheny* actually reintroduced the test that the dissent adopted in *Marsh*. Justice Brennan would have struck down Nebraska's prayer policy for the reason given in *Allegheny*—the prayers "explicitly link[ed] religious belief and observance to the power and prestige of the State." *Marsh,* 463 U.S. at 798 (Brennan, J., dissenting). But given that the majority in *Marsh* rejected this "explicitly linking" test, it necessarily also rejected an *Allegheny* "effect of affiliating" test. Instead of looking to see if a third party views the prayers as linking or affiliating government and religion, the *Marsh* majority upheld the legislative prayers because such facially religious government speech did not jeopardize "the principles of disestablishment and religious freedom" the Establishment Clause was meant to protect. *Marsh,* 463 U.S. at 786.

Because *Marsh* and *Allegheny* are at odds with each other, the legislative prayer cases, unlike *Lee v.*

Weisman, 505 U.S. 577 (1992),[3] "require [the Court] to revisit the difficult questions … of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens." *Id.* at 586. In particular, this Court must determine whether an *Allegheny* "effect of affiliating" test or the Establishment Clause principles discussed in *Marsh* govern sectarian legislative prayers. As discussed more fully below, *Allegheny*'s endorsement test—whether a reasonable observer would view the prayers as having the effect of affiliating the government with religion—is inconsistent with *Marsh* and also with this Court's newly articulated government speech doctrine in *Summum*, which permits the government (not third parties) to determine the content of its own messages. *See Pleasant Grove City, Utah v. Summum,* 555 U.S. 460 (2009); *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.") (plurality opinion). Thus, this Court should reaffirm *Marsh* and, in the

[3] In *Lee*, the majority did not have to address the scope of accommodation of religious belief under the Establishment Clause because of the unique coercive pressures at work in the school setting--- "the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid." *Lee*, 505 U.S. at 598. Given the differences between the public school system and a legislative session, the same coercive pressures are not at work in the legislative context. As a result, the difficult questions remain and must be clarified so that *amici* and other local governments do not need to guess at the constitutionality of their prayer practices.

process, protect the right of legislative bodies to celebrate (in a non-proselytizing, non-coercive manner) the rich religious history in their communities and in our nation.

To be sure, neither *Marsh* nor *Summun* gives local governments unlimited authority to engage in facially religious speech. As *Summum* makes generally clear, "government speech must comport with the Establishment Clause." *Summum*, 555 U.S. at 468. Contrary to the Second Circuit's opinion in *Galloway*, however, the operative question is not whether "an ordinary, reasonable observer" would view the town as favoring or disfavoring religion. *Galloway*, 681 F.3d at 29. Rather, under *Marsh*, legislative prayers---both sectarian and nonsectarian---are permissible if they do not infringe on the "religious freedom" of those in attendance. *Marsh*, 463 U.S. at 786.

The central inquiry is whether the government has attempted to "exploit[]" the "prayer opportunity … to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95. Provided the prayers do not "coerce anyone to support or participate in any religion or its exercise" and do not "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so,'" *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring and dissenting), then the Establishment Clause permits the government to accommodate the religious beliefs of its citizens through legislative prayer.

ARGUMENT

I. *Allegheny*'s "effect of affiliating" test is inconsistent with both the majority's reasoning in *Marsh* and this Court's government speech doctrine.

In *Galloway,* the Second Circuit holds that "the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint." *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2012). This is so, according to the court, because "an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity." *Id*. at 33. Although mentioning *Marsh v. Chambers*, 463 U.S. 783 (1983), throughout its opinion, the Second Circuit's reasoning in *Galloway*, is squarely rooted in *Cnty of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). An "effect of affiliating" test from *Allegheny*, however, is incompatible with the majority opinion in *Marsh*, which rejected the dissent's similar "explicitly linking" test, and also with this Court's government speech doctrine. By confirming that *Marsh*, not *Allegheny,* governs legislative prayers, this Court will clarify the proper scope of public accommodation of religious beliefs under the Establishment Clause and reconcile this Court's Establishment Clause jurisprudence with its government speech doctrine.

A. Marsh governs the constitutionality of sectarian and nonsectarian legislative prayers, not an *Allegheny* "effect of affiliating" test, which was developed in the entirely different context of holiday displays.

Marsh broke with the then-dominant Establishment Clause test, declining the invitation to apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971). While not discussing *Lemon*, the majority in *Marsh* was fully aware of the dissent's claim, echoed by the Second Circuit in *Galloway*, that legislative prayers had the impermissible effect of affiliating government with religion. In particular, the dissent concluded that legislative prayers are "clearly religious" and that "invocations in Nebraska's legislative halls *explicitly link* religious belief and observance to the power and prestige of the State." *Marsh*, 463 U.S. at 798 (Brennan, J., dissenting) (emphasis added). The dissent, therefore, had no problem deciding that Nebraska's prayer policy, pursuant to which the state paid the same Presbyterian minister to open sessions of the legislature with prayer for 16 years, was unconstitutional.

In contrast, the majority in *Marsh* rejected the dissent's "explicitly linking" test in favor of its broader understanding of the scope of public accommodation permitted for religious expression under the Establishment Clause. But the *Marsh* dissent's "expressly linking" test is the same as the "effect of affiliating" test that *Allegheny* championed and that *Galloway* applied to the prayers given at

board meetings in the Town of Greece. Under both tests, "an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity." *Galloway*, 681 F.3d at 32.[4] Having rejected the dissent's "explicitly linking" test, however, *Marsh* is also incompatible with an "effect of affiliating" test upon which *Allegheny* and the Second Circuit relied.

The fact that *Allegheny* was decided after *Marsh* does not mean *Allegheny* supplanted *Marsh*'s Establishment Clause analysis. Indeed, the majority in *Allegheny* discussed *Marsh* at some length---(i) in the context of holiday displays, which involved neither legislative prayers nor government speech,[5] and (ii) through the lens of the endorsement test. Under *Allegheny*, courts decide whether there is an Establishment Clause violation by looking to the effect of government speech on a third-party observer. "The effect of the display depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.'" *Allegheny*, 492 U.S. at 595 (*quoting Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J.,

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[4] *See also Marsh*, 463 U.S. at 798 (Brennan, J., dissenting) ("More importantly, invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. 'The mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.'") (*quoting Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982)).

[5] *Allegheny*, 492 U.S. at 600 ("On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own.").

concurring)). Applying this same reasoning, the Second Circuit concluded that a hypothetical reasonable observer would think that the Town's prayer practice had the effect of affiliating the town with Christianity. *Galloway*, 691 F.3d at 33.

The problem is that dicta in *Allegheny*, even dicta that has influenced some lower courts, cannot overrule this Court's prior holding in *Marsh*. *See, e.g., Allegheny*, 492 U.S. at 668 ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (Kennedy, J., concurring and dissenting); *Central Va. Community College v. Katz,* 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."). *Marsh* did not consider the effect of legislative prayers on third party listeners. Instead, *Marsh* focused on whether the government intended to exploit the prayer opportunity to proselytize or advance a particular faith and actually rejected the dissent's claim that the focus should be on the listener. Accordingly, *Allegheny* and *Galloway* applied the wrong Establishment Clause test in the context of legislative prayers. *Marsh* provides the proper lens through which to evaluate the constitutionality of legislative prayers.

B. **This Court should reject an *Allegheny* "effect of affiliating" test because that test is irreconcilable with the government speech doctrine, which applies to legislative prayers.**

While the Second Circuit suggested that the Town's legislative prayers were government speech,[6] it failed to consider, let alone discuss, how this Court's "recently minted government speech doctrine" might affect its analysis. *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460, 481 (2009) (Souter, J., concurring). Even though *Allegheny* admitted that the government was not "communicating a message of its own," 492 U.S. at 601, the Second Circuit applied an *Allegheny* "effect of affiliating" test to facially religious government speech instead of using the principles articulated in *Marsh* and *Summum*.

The problem is that an "effect of affiliating" test undermines the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). By predicating the constitutionality of facially religious government speech on the effect it has on a reasonable observer, *Allegheny* causes the government to forfeit its right "to select the views that it wants to express." *Summum*, 555 U.S. at 468. Instead of celebrating "what [government officials] view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture," *id*. at

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[6] The Second Circuit noted that "it is relevant, and worthy of weight, that most prayer-givers appeared to speak on behalf of the town and its residents," that the people giving the prayers "spoke in the first-person plural," and that "Town officials … contributed to the impression that these prayer-givers spoke on the town's behalf." *Galloway*, 681 F.3d at 32.

472, local governments like Town of Greece are required to censor (or possibly prohibit) sectarian legislative prayers to make sure a reasonable observer would not view them as affiliating the government with a specific religious sect.

In *Summum*, the Court considered whether Pleasant Grove City could refuse to display in a park a monument containing the Seven Aphorisms of the Summum religion when it already displayed a monument inscribed with the Ten Commandments. In holding that the City could accept some monuments (even facially religious monuments) while rejecting others, the Court confirmed that the government "has the right 'to speak for itself'" and that, when speaking, the government "'is entitled to say what it wishes'" and "to select the views that it wants to express." *Summum*, 555 U.S. at 467-8 (internal quotations and citations omitted). Stated differently, "the government's own speech … is exempt from First Amendment [speech] scrutiny." *Id.* (*quoting Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005)). When speaking, the government can discriminate based on content and viewpoint to insure that its message gets out without being distorted.[7]

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[7] In *Marsh*, the Nebraska legislature discriminated based on content (allowing facially religious speech but not other types of speech at the start of legislative sessions) and possibly viewpoint (retaining the same Presbyterian minister to give the prayers for 16 years and not hiring other religious leaders to give the prayers). Because there was no "proof that the chaplain's reappointment stemmed from an impermissible motive," Nebraska's favoring of a Presbyterian viewpoint "did

To qualify for the protection afforded by the government speech doctrine, the government must "effectively control[]" the message and have "final approval authority" over the selection of that message. *Summum*, 555 U.S. at 473 (*quoting Johanns*, 544 U.S. at 560-61). Given that the government decided which monuments "it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the park," the message about its image was government speech. *Summum*, 555 U.S. at 473. Having assumed the role of speaker, the government could claim the fundamental right protected by the Speech Clause—the right to choose the content of its message. "[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

As in *Marsh* and *Lee*, prayers given at the start of legislative meetings, such as the board meetings in *Galloway*, are government speech. In *Marsh*, the Nebraska Legislature started each session with a prayer offered by a minister who was selected and paid by the state government. The government had complete control over the legislative sessions, including who could speak and when. Although the Legislature did not dictate the content of Reverend Palmer's prayers, it retained the ability to do away with the prayer practice altogether or to employ others to deliver the prayers. As a result, *Marsh* realized that legislative prayer is a form of

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not conflict with the Establishment Clause." *Marsh*, 463 U.S. at 793-94.

government-sponsored religious speech that is subject to, but does not violate, the Establishment Clause.

Similarly, in *Lee v. Weisman*, 505 U.S. 577 (1992), the Court determined that graduation prayer is government speech—a "state-sanctioned religious exercise"—because in the context of a high school graduation "teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." *Id.* at 597. While there are important differences between high school graduations and legislative meetings for Establishment Clause purposes,[8] the government retains a high degree of control over the location, timing, agenda, speakers, and decorum of both events. As the Second Circuit noted in *Galloway*, the prayer-givers spoke on behalf of the Town and its residents, used the first-person plural, and were frequently acknowledged as "our chaplain of the month." *Galloway,* 681 F.3d at 32.[9] In addition, the Town Board called the monthly public meetings, set the agenda, conducted each meeting,

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[8] *Lee*, 505 U.S. at 596 ("Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*").

[9] Given that *Marsh* upheld Nebraska's retaining the same Presbyterian minister for 16 years, the fact that Town of Greece recognized the prayer-givers as "our chaplain of the month" does not create an Establishment Clause problem. Rather, in the context of legislative prayer, it reinforces that the government was adopting as its own the speech of the volunteer who gave the prayer just as the prayers of the paid chaplain in *Marsh* were the prayers of the Nebraska Legislature.

and established the procedures used for selecting the prayer-givers who gave each invocation. Accordingly, consistent with *Marsh* and *Lee*, legislative prayers are government speech.

Summum's government speech doctrine, that government has a right to determine its own message, limits how courts should evaluate the constitutionality of facially religious government speech such as legislative prayers. As evidenced by *Marsh*, the government's intended message (*e.g.*, to solemnize the legislative session or to "harmonize with the tenets of some or all religions," *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)) may differ significantly from how others interpret that message. For example, the *Marsh* dissent interpreted the prayers as sending a message that the government was officially promoting religion. *Marsh*, 463 U.S. at 798 (Brennan, J., dissenting). For the Nebraska Legislature and the majority, the prayers were simply "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792.

That different (reasonable) people will interpret the government's message differently is understandable. While the government controls its intended message by selecting only speech that "present[s] the image of the City that it wishes to project to all who frequent the [meetings]," *Summum*, 555 U.S. at 473, the government cannot control how others interpret a prayer, a monument, or any other government speech. After all, government speech, such as the Ten Commandments monument in *Summum*, is not limited to

"convey[ing] only one 'message.'" *Id.* at 474; *Salazar v. Buono*, 559 U.S. 700 (2010) ("[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people."). Those who hear a prayer at the start of a legislative session may interpret that speech activity in various ways. "Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Summum*, 555 U.S. at 474. *See also Lee*, 505 U.S. at 597 ("People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.").

Reasonable people—Representative Chambers and the dissenters in *Marsh*—interpreted the Nebraska prayers as an establishment of religion, but that did not decide the Establishment Clause question. Instead, the majority looked at "historical evidence" to discern "what the draftsmen intended the Establishment Clause to mean." *Marsh*, 463 U.S. at 790. Based on the "unambiguous and unbroken history of more than 200 years," the Court concluded 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).

The fact that third parties might ascribe different meanings to government speech does not change the fact that the government intended a specific message. "[I]t frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor." *Summum,* 555 U.S. at 476. And it is the government's *intended* message that is relevant when deciding whether government speech violates the Establishment Clause. Under *Marsh*, the question is whether the government sought to exploit the prayer opportunity to proselytize or advance a particular faith or belief, not how a reasonable observer might interpret the government's speech activity. *See*, *e.g.*, *Summum*, 555 U.S. at 483 (Scalia, J., concurring) (explaining that the Ten Commandments monument was government speech but did not violate the Establishment Clause "because the Ten Commandments 'have an undeniable historical meaning' in addition to their 'religious significance.'") (*quoting Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion)).

Stated differently, an "effect of affiliating" test, speech as understood by a reasonable observer, does not apply to facially religious government speech because, if a court required the government to convey only those messages a reasonable observer would view as neutral towards religion, the government would lose the "right to 'speak for itself.'" *Summum*, 555 U.S. at 467 (*quoting Bd. of*

Regents of Univ. of Wis. System v. Southworth, 629 U.S. 217, 299 (2000)). Instead of "say[ing] what it wishes," government is forced to filter its speech to account for how a reasonable observer might interpret the message. *See*, *e.g.*, *Galloway*, 681 F.3d at 33 ("What we do hold is that a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause."). This is true even though, as *Summum* warns, such an observer may interpret the message differently from what the government intended. "These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers….." *Summum*, 555 U.S. at 475. Moreover, relying on a reasonable observer's interpretation would have required Nebraska's legislature to review and edit Reverend Palmer's prayers, which, in turn, would have violated the Establishment Clause by driving the government into the prayer-writing business. "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….'" *Lee*, 505 U.S. at 588 (*quoting Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

The Second Circuit's reliance on an *Allegheny* "effect of affiliating" test is misplaced because it focuses on the wrong person in the communication process—the observer instead of the speaker. Rather than analyze what is critical in the government speech context—the government's intended message—the endorsement test considers the

message a reasonable observer, aware of the history and context, would attribute to the government. The endorsement test, therefore, presupposes a premise that *Summum* rejects---that the government's message is determined by the meaning others attribute to the government. *See Allegheny*, 492 U.S. at 599 (looking at the "effect of the crèche [or other religious display] on those who viewed it"); *Galloway*, 681 F.3d at 33 (considering whether a "reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity."). Under *Summum*, the government engages in speech activity "because it wishes to convey some thought or instill some feeling in those who see" or hear the speech. *Summum*, 555 U.S. at 470. Since an *Allegheny* "effect of affiliating" test deprives the government of its ability to control its message, this Court should reaffirm *Marsh*, not follow *Allegheny*.

II. Legislative prayers, whether sectarian or nonsectarian, are constitutional provided that government officials do not exploit the prayer opportunity to proselytize or to coerce participation in the prayers.

The fact that legislative prayers are government speech does not remove all constitutional limits on such prayers. As the Court instructs in *Summum*, "government speech must comport with the Establishment Clause." *Summum*, 555 U.S. at 468.[10]

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[10] Any government official or entity engaging in facially religious government speech also "is ultimately 'accountable to the electorate and the political process for its advocacy. If the

Any interpretation of the Establishment Clause must, in turn, "comport[] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673. As a result, it is not surprising that *Marsh* relied on "the unambiguous and unbroken history of more than 200 years" when evaluating whether legislative prayers violated the First Amendment. Based on this history, *Marsh* concluded that legislative prayers are consistent "with the principles of disestablishment and religious freedom" protected by the Establishment Clause. *Marsh*, 463 U.S. at 792, 786.

Contrary to the dissent in *Marsh* and the majority's view in *Allegheny*, *Marsh* was not a narrow opinion that carved out a limited historical exception to Establishment Clause jurisprudence.[11] *Marsh* looked at the historical evidence to "shed[] light … on what the draftsmen intended the Establishment Clause to mean," and "on how they thought that Clause applied to the practice authorized by the First Congress." *Marsh*, 463 U.S. at 790. As the Court stated, "their actions reveal their intent." *Id*.

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citizenry objects, newly elected officials later could espouse some different or contrary position.'" *Summum*, 555 U.S. at 468-69 (internal citations and quotations omitted).

[11] For a more detailed explanation of why *Marsh* is not a limited exception, *see* SCOTT W. GAYLORD, WHEN THE EXCEPTION BECOMES THE RULE: MARSH AND SECTARIAN LEGISLATIVE PRAYER POST-*SUMMUM*, 79 CIN. L. REV. 1017 (2011).

Based on the longstanding and important role of religion in the public sphere, *Marsh* concluded that the purpose of the Establishment Clause was to protect "religious freedom." 463 U.S. at 786.[12] Our American history illustrates that the government does not violate religious freedom by engaging in a broad array of facially religious speech (from hiring chaplains, starting legislative sessions with prayer, and requesting days of national prayer to Thanksgiving Proclamations and "God save the

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[12] That the central purpose of the Establishment Clause was to protect religious freedom by precluding government coercion is apparent from this Court's prior cases. *See McGowan*, 366 U.S. at 441 (noting that James Madison, who was the architect of the First Amendment, "'apprehended the meaning of the [Religion clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.'") (*quoting* 1 Annals of Congress 730 (1789)); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the Religion Clauses "forestal[l] compulsion by law of the acceptance of any creed or the practice of any form of worship."). In *Engel v. Vitale*, the Court asserted that "[t]he Establishment clause, unlike the Free Exercise clause, does not depend upon any showing of direct governmental compulsion." *Engel*, 370 U.S. at 430. The Court cited no authority to support this claim, and its discussion was dicta given that there was compulsion in that case. "This is not to say, of course, that [school prayers] do not involve coercion….. When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* at 430-31. Consequently, *Engel* stands at most for the limited proposition that *direct* coercion is not necessary to show an Establishment Clause violation. *See* MICHAEL W. MCCONNELL, COERCION: THE LOST ELEMENT OF ESTABLISHMENT, 27 WM. & MARY L. REV. 933 (1986).

United States and this Honorable Court"). Provided the speech does not "coerce anyone to support or participate in any religion or its exercise; [or], in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so,'" *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring and dissenting) (*quoting Lynch*, 465 U.S. at 678), the principles of "disestablishment and religious freedom" are protected. *Marsh*, 463 U.S. at 786. *See also Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.") (emphasis in original). Thus, the central inquiry when deciding the constitutionality of facially religious speech is whether legislative prayers interfere with the "great object" of the Establishment Clause—"freedom to worship as one pleases without government interference or oppression." *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring and dissenting).

In the wake of *Marsh* and *Summum*, the facially religious nature of government speech---what the public sees (a Ten Commandments monument) and hears (legislative prayer)—does not create an Establishment Clause violation. *Van Orden*, 545 U.S. at 690 ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.") (plurality opinion). Under *Marsh,* the government has broad, though not unlimited, authority to accommodate religion in the public

sphere. In particular, *Marsh* emphasizes that a person challenging legislative prayers must show, not that the prayers have the effect of affiliating the government with religion (the dissent's rejected position), but 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. Provided the legislative prayers do not "direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing," the Establishment clause is not violated. *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring and dissenting).

Similarly, absent evidence of coercion or proselytizing, *Marsh* instructs that courts should not censor legislative prayers or force the government to meet a court-imposed orthodoxy because "it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh*, 463 U.S. at 795. As the Court emphasized in *Lee*, "[t]he suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." *Lee*, 505 U.S. at 590. Without any indication that the government is using the prayer opportunity to coerce religious observance or promote a particular faith, courts need not worry about the content (*i.e.*, the sectarian or nonsectarian nature) of the prayers. The Establishment Clause does "not prohibit practices [such as legislative prayer] which by any realistic measure create none of the dangers which it is designed to prevent." *Sch.*

Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring).

The Court's general presumption that legislative prayers do not proselytize, indoctrinate, or coerce participation in a religious exercise is reinforced by the setting in which the prayers take place. Unlike high school graduation in *Lee*, legislative meetings are not one-time events of preeminent importance in the lives of those who attend. Government meetings are directed at adults. Attendees are free to come and go during the invocations or at other time during the meeting. *Lee*, 505 U.S. at 597. Moreover, because most of those hearing the prayers are adults, "[p]assersby who disagree with the message conveyed by these [prayers] are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." *Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring and dissenting). Although objectors may "take offense at all manner of religious … messages," including legislative prayers, the Court acknowledges that outside the school context "to endure social isolation or even anger may be the price of conscience or nonconformity." *Lee*, 505 U.S. at 597-98. *See also Marsh*, 463 U.S. at 792 (finding that the prayers did not violate the Establishment Clause because, among other things, "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' or peer pressure.").

The Establishment Clause analysis is no different for legislative prayers that contain sectarian

references.[13] Provided the government does not "exploit[]" the "prayer opportunity … to proselytize or advance any one … faith or belief," courts should not consider the "content of the prayer." *Marsh*, 463 U.S. at 794-95. Absent evidence of exploitation, "it is not for [courts] to embark on sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.

For some, the use of denominational references for the divine may suggest the government is promoting a particular faith. But sectarian references by themselves do not promote religion over nonreligion any more than their nonsectarian counterparts. *See Allegheny*, 492 U.S. at 665 n.4 (Kennedy, J., concurring and dissenting) ("In the first place, of course, this purported distinction [between sectarian and nonsectarian] is utterly

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[13] *Wallace v. Jaffree,* 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."); *Van Orden*, 545 U.S. at 688 n.8 (Rehnquist, C.J., plurality) ("In *Marsh*, the prayers were often explicitly Christian"); *Marsh*, 463 U.S. at 818 n. 38 (Brennan, J., dissenting) (noting that several state legislatures engaged in overtly sectarian legislative prayers); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir.1998) ("[T]he mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause. Rather, what is prohibited by the clause is a more aggressive form of advancement, *i.e.,* proselytization.") (*citing Marsh*, 463 U.S. at 794-95); *Newdow v. Bush*, 355 F. Supp.2d 265, 285 n. 23 (D.D.C. 2005) (recognizing that "the legislative prayers at the U.S. Congress are overtly sectarian").

inconsistent with the majority's belief that the Establishment Clause 'mean[s] no official preference even for religion over nonreligion.'"). Thus, without some indication that the prayers have been exploited to proselytize or to coerce religious observance, judges should not parse the content of prayers or count the number of sectarian references since a state prohibition on sectarian references would threaten to establish "an official or civic religion" that would violate the Establishment Clause. *Lee*, 505 U.S. at 590. Such state-imposed religious neutrality would threaten to produce "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

To be sure, *Marsh* realizes that some government official somewhere might try to exploit the prayer opportunity to proselytize or advance a particular religion. In an extreme case, a court might find that a prayer policy directly or indirectly coerces attendees to participate in a religious exercise. For instance, if government officials were to preclude individuals who do not stand or bow their heads during a prayer from speaking at meetings,[14] then the prayers might violate the Establishment Clause because the town officials used the prayer opportunity to proselytize or to coerce participation in violation of the religious liberty of attendees.

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[14] *See, e.g.*, *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292, 302 (4th Cir. 2004), where the town council (unlike the Board in *Galloway*) used legislative prayer "to advance its own religious view in preference to all others" by excluding the plaintiff from the political process and soliciting support for its specific sectarian practices from like-minded religious leaders.

But *Marsh* does not presume that the use of legislative prayer, even sectarian prayer, violates the Establishment Clause. This is consistent with *Summum*, where the Court refused to impute an impermissible religious message to the government without evidence that the government entity was actually intending to advance (or disparage) a particular religion.

> [A] painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same "message."

Summum, 555 U.S. at 476 n.5. Just as a public museum may accept and display a religious painting without violating the Establishment Clause, so *Marsh* holds that the government may engage in legislative prayer without impermissibly advancing religion. As *Marsh*, *Van Orden*, and *Salazar* demonstrate, the fact that the public is exposed to "sectarian" speech—be it legislative prayers from a specific religious tradition, a monument inscribed with a particular version of the Ten Commandments, or a solitary Roman cross on Sunrise Rock—is not dispositive. Rather, in each of these cases the Court considered the government's motivation and intent, upholding each in turn despite the dissenters' claims

that the facially religious speech had the effect of affiliating the government with religion.

Where, as in *Galloway*, a local government body opens the prayer opportunity to all faiths in the community to solemnize its meetings, thereby demonstrating respect for the diversity of religious beliefs among its citizens, there is no Establishment Clause violation even if some of the prayer-givers make sectarian references. *See Lee*, 505 U.S. at 638 (Scalia, J., dissenting) ("I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government ... can and should cultivate"). Under such policies, there is no basis for concluding that government entities are using legislative prayers to proselytize, coerce, or indoctrinate. *See Galloway*, 681 F.3d at 32 ("We ascribe no religious animus to the town or its leaders."); *Joyner v. Forsyth Cnty,* 653 F.3d 341, 353 (2011) ("The Board is correct to observe that its policy is neutral."). In *Pelphrey v. Cobb Cnty, Ga.*, 547 F.3d 1263 (11th Cir. 2008), and *Joyner*, the government commissions sought to include a variety of speakers from diverse religious faiths in the community on a first-come, first-served basis.[15] The number of participants in any given year depended on a variety of factors, including the size, demographics, and number of different religious traditions represented in the community as well as the willingness of particular religious leaders to participate in the program. Such prayer policies do

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[15] Of course, under *Marsh*, such diversity is not required. Nebraska's legislature retained the same Presbyterian minister to serve as chaplain for 16 years.

not violate the Establishment Clause simply because representatives from a "Christian viewpoint" or some other religious viewpoint repeatedly give the invocation. *But see Galloway*, 681 F.3d at 30 (striking down the prayer policy because, among other things, "[t]he town's process for selecting prayer-givers virtually ensured a Christian viewpoint."). In *Marsh*, the prayer-giver did not reflect the religious beliefs of all Nebraskans. He was a Presbyterian minister who offered prayers from a Christian perspective for 16 years. Yet the Court did not see this as a "real threat" to religious freedom. *Marsh*, 463 U.S. at 795. *A fortiori,* a random selection process opening the prayer opportunity to all religious leaders in a community on a first-come, first-serve basis must also be consistent with Establishment Clause principles. If one faith constitutes the largest denomination in a community and many religious leaders of that same denomination volunteer, it is unremarkable that the majority of prayer-givers would be from that one faith.

> It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. To attribute constitutional significance to this figure, moreover, would lead to the absurd result that … an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools,

> but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools.

Zelman v. Simmons-Harris, 536 U.S. 639, 658 (2002) (in the context of school vouchers). The reasoning in *Galloway* leads to the same "absurd result" in the legislative prayer context.

Counties in Georgia and North Carolina had virtually identical prayer policies, yet the Eleventh Circuit upheld Georgia's policy while the Fourth Circuit struck down North Carolina's. Why the constitutional difference if both policies were equally open to all religious leaders in their respective communities? The Fourth Circuit, like the Second Circuit in *Galloway*, attributed constitutional significance to the differing demographics in the communities. Whereas in Cobb County, Georgia "leaders of all faiths had come forth," "[i]n practice, the [Forsyth County] Board's policy resulted in a greater proliferation of sectarian prayer … [because] at no time after the adoption of the policy did a non-Christian religious leader come forth to give a prayer." *Joyner*, 653 F.3d at 352-53. *See also Galloway*, 681 F.3d at 31 ("The town fails to recognize that its residents may hold religious beliefs that are not represented by a place of worship within the town."). Under *Marsh* and *Zelman*, if the selection process is neutral, any disparity in the percentages of particular faiths participating in the prayer policy violates the Establishment Clause only

if the selection of prayer-givers "stemmed from an impermissible motive." *Marsh*, 463 U.S. at 793-94[16]

Under the neutral and inclusive selection process used by the Town of Greece and other local governments, there is no basis to ascribe an "impermissible motive" to government entities that allow prayer at the beginning of their meetings. Their policies are designed to encourage the participation of all faiths in the public life of the community. Even though the prayers might contain sectarian references, the government entities do not review the prayers to make sure they conform to some generic civic religion. *See*, *e.g.*, *Lee*, 505 U.S. at 588 ("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.'"); *Marsh*, 463 U.S. at 794-95 ("The content of the 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."); *Pelphrey*, 547 F.3d at 1274 ("The taxpayers

[16] Just as the Cleveland officials did not create the disparity in parochial and secular private schools in *Zelman*, government officials do not control the religious demographics of their communities. The fact that some religious groups may not want to participate or that some denominations provide the prayer on more than one occasion does not change the analysis. *See Joyner*, 653 F.3d at 363 (Judge Niemeyer dissenting) ("The frequency of Christian prayer was, rather, the product of demographics and the choices of the religious leaders who responded out of their own initiative to the County's invitation.").

would have us parse legislative prayers for sectarian references even when the practice of legislative prayers has been far more inclusive than the practice upheld in *Marsh*. We decline this role of 'ecclesiastical arbiter,' … for it 'would achieve a particularly perverse result.'") (internal citations omitted).

Accordingly, absent evidence of the government exploiting the prayer opportunity to proselytize or advance a particular religion, sectarian and nonsectarian legislative prayers are permissible under the Establishment Clause because they do "not coerce anyone to support or participate in any religion or its exercise," *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring and dissenting). Additionally, they serve as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

CONCLUSION

Allegheny's analysis of legislative prayers has fostered widespread confusion among the lower courts, leading to contradictory results even when reviewing virtually identical prayer policies. *Compare Pelphrey*, 547 F.3d 1263 and *Joyner*, 653 F.3d 341. The problem is that *Allegheny* seeks to reintroduce an "effect of affiliating" test, which *Marsh* rejected, without overturning *Marsh* itself. Whereas *Allegheny* focuses on whether a reasonable observer would view legislative prayers as having the effect of affiliating the government with a particular religion, *Marsh* announces a different Establishment Clause standard for legislative

prayers based on the intent of the government speaker—whether "the prayer opportunity has been exploited to proselytize or advance any one … faith or belief." *Marsh*, 463 U.S. at 794-95.

The *Marsh* standard, not *Allegheny*, is consistent with the Establishment Clause. It recognizes the diversity of faiths in the community without censoring or dictating the content of prayers. To the extent that some in attendance do not share the particular faith perspective of a prayer-giver, they can sit quietly during the prayer, leave the room, peaceably protest, or stand out of respect for the views of others in the community, as Sam Adams did in 1774 when he said "he was no bigot, and could hear a prayer from [any] gentleman of piety and virtue, who was at the same time a friend to his country." *Marsh*, 463 U.S. at 792. *See also Lee*, 505 U.S. at 597-98 ("We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity."); *Allegheny*, 492 U.S. at 664 ("Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."). What dissenters cannot do is to preclude government officials from participating in the longstanding "acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

Amici are very sincerely seeking guidance from this Court. The Court should reaffirm that *Marsh* provides the proper Establishment Clause standard in the context of legislative prayers and should

expressly reject *Allegheny*'s "effect of affiliating" test. Absent evidence that a government entity is intending to exploit the prayer opportunity to proselytize or coerce religious participation, courts should allow local communities to participate in the "unambiguous and unbroken history" of legislative prayer that "has become part of the fabric of our society." *Id.* To do otherwise would violate the Establishment Clause by forcing courts to become ecclesiastical arbiters for the nation.

Respectfully submitted,

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