No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

—v.—

SUSAN GALLOWAY, ET AL.,

Respondents.

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

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

Arthur N. Eisenberg
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 607-3324

Deborah H. Karpatkin
Law Offices of Deborah H. Karpatkin
99 Park Avenue, Suite 1600
New York, NY 10016
(646) 865-9930

Daniel Mach
Counsel of Record
Heather L. Weaver
American Civil Liberties Union Foundation
915 15th Street, N.W.
Washington, D.C. 20005
(202) 675-2330
dmach@aclu.org

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

TABLE OF CONTENTS

INTERESTS OF [1]

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

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the worldís leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADLís core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a hETB.052(ue)-77hand4(l)5(l)-4(y)-2( )our embrationthndCour18 s

SUMMARY OF ARGUMENT

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

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

At the very least, if the Court retains *Marsh*'s legislative-prayer exception, it should reaffirm that the exception remains exceedingly narrow and

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

I. CANNOT BE RECONCILED WITH THE ESTABLISHMENT CLAUSEíS NEUTRALITY MANDATE AND SHOULD BE OVERRULED.

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

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

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

Even assuming the historical accuracy of the Courtís assessment,[2] *Marsh*ís analytical approach

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

was unsound. Relying on the acts of the First Congress to rule out particular interpretations of the Establishment Clause makes sense only if lawmakers are regarded as infallible. History has shown all too often that this is not the case: ò Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact.ó *Marsh*, 463 U.S. at 814 (Brennan, J., dissenting). The Founders and their successors were not immune to these lapTBT4

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

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

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

Ultimately, the *Marsh* holding was both analytically problematic and unnecessary. Legislative bodies can easily solemnize meetings using non-religious means. *See*, *e.g.*, *Cnty. of 1 19 0 0 Tm[(*

U.S. 573, 673 (1989) in part and dissenting in part) (òI fail to see why prayer is the only way to convey these [solemnizing] messages; appeals to patriotism, moments of silence, and any number of other approaches would be as effective.ó). Prior to adopting its prayer practice in 1999, the

a moment of silence. *See* Pet. App. 3a. There is no indication that the Townôs governance suffered without official prayer, and certainly no suggestion in the record or elsewhere that the Establishment Clause needs any exception for official, government-sponsored entreaties to the divine.

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

Marsh was not a license to violate this rule in 1983, and it should not be treated as one today. On the contrary, at a time when our nation is more religiously diverse than ever,[4] it is even more critical that this Court reaffirm our commitment to governmental neutrality among faiths.

A. Gov

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

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

Since *Marsh*, this Court has emphasized that the decision was predicated, at least in part, on the nonsectarian nature of the prayers. Distinguishing between òa specifically Christian symbol, like a crèche, and more general religious references, like the legislative prayers in *Marsh*,ó the Court explained in *Allegheny* that *Marsh*õs legislative invocations

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

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

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

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

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

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

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

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[5] *See, e.g.*, Natõl Conference of Community & Justice (NCCJ), *When You Are Asked to Give Public Prayer in a Diverse Society*: *Guidelines for Civic Occasions*

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Not surprisingly, the isolating influence of sectarian legislative prayer has caused considerable acrimony and divisiveness, both in the Town of Greece itself and nationwide. *See, e.g.*, Andy Dillon, *Exclusivity in Diversity's Clothing*, Indymedia (Aug. 18, 2013), http://rochester.indymedia.org/node/99429 (describing anonymous letter, which was signed as ò666ó and sent to a plaintiff in this case, stating: òIf you feel ôunwantedõ at the Town of Greece meetings, itõs probably because you areó; òStay away from town meetings & do everyone a favoró; and òBe carefulé..lawsuits can be detrimentaló) (PDF of letter available at http://rochester.indymedia.org /sites/default/files/%27666%27%20letter_2.pdf); Greg Stohr, *"Let Us Pray" Before Town Council Becomes High Court Case*, Bloomberg News (July 26, 2013), http://www.bloomberg.com/news/2013-07-26/let-us-pray-before-town-council-begins-is-high-court-case.html (same plaintiff had her mailbox pulled out of the ground and defaced); *see also, e.g.*, Stephen Clark, *Hartford's Inclusion of Muslim Prayers in Council Meetings Sparks Outrage*, FoxNews.com (Sept. 8, 2010), http://www.foxnews.com/politics/2010/09/08/hartford-councils-inclusion-muslim-prayers-sparks-outrage/ (noting that council staff members òwere bombarded by hate mail overnightó after announcing they had invited local Muslim leaders to offer opening prayers); Howard Friedman, *County Board Moves to Moment of Silence; Generates Strong Objections*, Religion Clause (Feb. 12, 2009), http://religionclause.blogspot.com/2009/02/county-board-moves-to-moment-of-silence.html (revealing that county supervisor who had initiated change in boardõs practice of opening with explicitly Christian prayers had received death threats); Robert Patrick

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

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

Marsh does not counsel otherwise. The decision evinced respect for the fundamental principle of nonsectarianism by limiting permissible p

nonsectarian legislative tradition embraced by *Marsh*.

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

Petitioner's argument that the prayers fall under the Court's public-forum jurisprudence or otherwise constitute privateudence orecth,

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

In any event, Petitioner concedes that minority-faith residents are much more likely to be put in this untenable position because the vast majority of the community and clergy are Christian. Pet. Br. 5. Indeed, in the eighteen monthJETоached [/,2ET7oe ET

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

In various other cases, the Court has, with similar ease, identified religious expression and tenets specific to one faith. *See, e.g.*, *McCreary*, 545 U.S. at 897 (Scalia, J., dissenting) (detailing history of public prayer and proclamations that reference òGod, but not Jesus Christó); *Elk Grove*, 542 U.S. at 42 (OíConnor, J., concurring) (reference to Jesus or Vishnu would be sectarian but a ògeneraló reference to God is not); *Allegheny*, 492 U.S. at 601 (òGlory to God for the birth of Jesus Christó was a òpatently Christian messageó); *id.* at 605 n.55, 611 (characterizing the Trinity or the divinity of Jesus as òexclusively Christian creedsó and deeming the view that Jesus is the Messiah a òspecifically Christian beliefó);

341, 349-50 (4th Cir. 2011) (prayers were sectarian where they referenced Jesus, Jesus Christ, the Savior, the Cross of Calvary, the Virgin Birth, the Gospel of the Lord Jesus Christ, and Jesus Christ, Thy Son and our Savior), *cert. denied*, 132 S. Ct. 1097 (2012); *id.* at 364 (Niemeyer, J., dissenting) (òTo be sure, a prayer that references Jesus is sectarian.ó); *Hinrichs v. Bosma*, 440 F.3d 393, 395 (7th Cir. 2006) (òidentifiably Christianó prayers included òsupplications to Christó), *vacated on standing grounds*, 506 F.3d 584, 587 (7th Cir. 2007) (òovertly

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

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

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

For example, pointing to the òreligious diversity of our membership,ó the Colorado House of

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted,

Daniel Mach
Counsel of Record
Heather L. Weaver
American Civil Liberties Union Foundation
915 15th Street, N.W.
Washington, D.C. 20005
(202) 675-2330
dmach@aclu.org

Steven R. Shapiro
American Civil Liberties Union Foundation