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 *AMICUS CURIAE* STATE OF SOUTH CAROLINA IN SUPPORT OF PETITIONER

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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.

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INTEREST OF *AMICUS CURIAE* STATE OF SOUTH CAROLINA

This case is of paramount importance to South Carolina and its citizens. It raises the permissible limits of legislative prayer under the Establishment Clause. That issue was thought settled by *Marsh v. Chambers*, 463 U.S. 783 (1983). Yet, the question inexplicably continues to confound circuit courts, including the Second Circuit here. Based upon the Framers' original understanding and the centuries-old legislative prayer tradition, *Marsh* upheld a prayer opportunity which does not proselytize or advance one faith or belief or disparage other beliefs.

Nevertheless, the Second Circuit, paying only lip service to *Marsh,* held that decision is defined by *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), a non-prayer case. Petitioner's valid prayer practice was thus invalidated because it "convey[ed] to a reasonable observer under the totality of the circumstances an official affiliation with [the Christian] ... religion." *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2nd Cir. 2012). Thus, a legislative prayer practice must now comply with *Allegheny's* "endorsement" or "reasonable observer" test rather than *Marsh's* "no proselytization or disparagement" rule.

However, *Marsh* is unencumbered by *Allegheny.* Correcting this error by reversing the Second Circuit and applying *Marsh*, as written, is vitally important to South Carolina. First, the original understanding of the Establishment Clause not only

permitted legislative prayer; demonstrably Christian prayers were also consistent with that original understanding of the Framers.

Moreover, virtually from the State's founding, the South Carolina Legislature and other deliberative bodies in the State have opened sessions with explicitly Christian prayers. As prayers in the First Congress did, prayers before South Carolina bodies have invoked the name of Jesus Christ or used other Christian references.

To illustrate, in South Carolina's 1868 Constitutional Convention approving a state Establishment Clause, a prayer invoking Christ's name opened the second day's proceedings. *Proceedings of the Constitutional Convention of South Carolina,* 13 (1968). ("And all we ask is in the name of God our Father and Jesus our dear Redeemer. Amen."). Thus, Framers of the State Constitution, like authors of the First Amendment, did not perceive such non-proselytizing, yet explicitly Christian prayers, to be an "establishment" of religion..

After *Marsh,* South Carolina deliberative bodies understood such legislative prayers to be constitutional. Unfortunately, beginning with *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004), the Fourth Circuit misconstrued and narrowed *Marsh* using *Allegheny* as the means. *See e.g. Joyner v. Forsyth Co.*, 653 F.3d 341 (4th Cir. 2011). Now the Second Circuit has followed suit. These rulings wrongly conclude that *Allegheny* constitutionally constricts legislative prayer, thereby requiring "nonsectarian" prayers.

Such decisions destroy the original understanding of the First Amendment upon which *Marsh* rested.

Secondly, S.C. Code Ann. Section 6-1-160 establishes procedures for invocations by deliberative public bodies. Section 6-1-160(A)(1), comporting with *Marsh*, requires that a "public invocation ... must not be exploited to proselytize or advance any one or to disparage any other faith or belief." These deliberative bodies may use, among other options, "an invocation speaker selected on an objective and rotating basis from among a wide pool of the religious leaders serving established religious congregations in the local community ...." Section 6-1-160(B).

Furthermore, "the Attorney General's office shall prepare a statement of the applicable constitutional law and, upon request, make ... available to a member of the General Assembly or a deliberative public body." Section 6-1-160(C). The Attorney General recently issued an opinion concluding that the Fourth Circuit decisions require a deliberative body's "prayer policy must be nonsectarian." *Op. S.C. Atty. Gen.*, January 28, 2013 (2013 WL 482679). While obliged to advise localities they are bound by the Fourth Circuit rulings, the Attorney General believes these decisions disregard the Framers' original intent.

Thirdly, the Second Circuit ruling raises fundamental Free Speech rights. Section 6-1-160(B)(3)'s option of selection on an objective and rotating basis from congregations in the community creates a limited public forum. Speech thus cannot be discriminated against based upon its content, as the Second Circuit did here. *Pleasant Grove City v. Summum*,

555 U.S. 460, 470 (2009), citing *Perry Ed. Ass'n. v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 46, n. 7 (1983) ("... a government entity may create a forum that is limited to certain groups or dedicated solely to the discussion of certain subjects.").

Accordingly, for these reasons, South Carolina asks this Court to reverse the decision below and reaffirm *Marsh* as written. The State seeks to restore the original understanding of the Establishment Clause with respect to legislative prayer.

SUMMARY OF ARGUMENT

Like the Fourth Circuit, the Second Circuit misconstrued *Marsh*. Rather than applying *Marsh* and the Framers' original understanding of the Establishment Clause as it relates to legislative prayer, the court below mistakenly read *Marsh* through *Allegheny's* contracting lens. Referencing *Marsh*'s famously misunderstood footnote 14, the court relied upon *Allegheny's dicta* that the *Marsh* chaplain had "'removed all references to Christ.'" *Town of Greece*, 681 F.3d, *supra* at 27, quoting *Allegheny*, 492 U.S. *supra* at 603 (quoting *Marsh*, 463 U.S. at 783, n. 14). Thus, a "legislative prayer practice that, however well-intentioned, conveys to a reasonable observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause." *Town of Greece,* 681 F.3d, *supra* at 34.

Such analysis frustrates the original meaning of the Clause, applied in *Marsh*. By definition, prayer necessarily affiliates "with a particular religion." As demonstrated below, the Second Circuit ap-

proach is patently ahistorical. *Marsh* stands on its own feet. It is not dependent upon *Allegheny*, a non-prayer case. *Marsh* is based not upon a footnote, but the time-honored tradition, before and after the Founding, of opening legislative sessions with prayer. As *Marsh* recognized, "[c]learly the men who wrote the First Amendment Religion Clause did not view paid chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788.

Marsh neither applied *Allegheny's* "endorsement test," nor depended upon the fact that Chaplain Palmer "removed all references to Christ after a 1980 complaint from a Jewish legislator." *Id.* at 793, n. 14. Indeed, *Allegheny's* citation to *Marsh's* footnote 14 regarding the removal of "all references to Christ," makes clear that *Allegheny* did not so much limit *Marsh*, as conclude that *Marsh's* analysis – based upon 200 years of history – did not extend to the holiday crèche. *Allegheny,* 492 U.S. at 606. ("Nor can *Marsh* given its facts and reasoning, compel the conclusion that the display of the crèche involved in this lawsuit is constitutional."). Surely, *Allegheny*, by explaining that the crèche display was not validated by traditional legislative prayer practices, did not mean these practices must be diluted to conform to the constitutional standards governing the crèche.

The plurality opinion in *Van Orden v. Perry*, 545 U.S. 677, 688, footnote 8 (2005) agrees. As Chief Justice Rehnquist recognized in *Van Orden*:

> [*Marsh*] ... rejected the claim that an Establishment Clause violation was presented because the prayers had once been offered in the Judeo-Christian tradition: In *Marsh, the prayers were often explicitly Christian,* but the chaplain *removed all references to Christ the year after the suit was filed.* (emphasis added).

(Opinion of Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ.). Therefore, the notion that *Marsh* depended upon the actions of Chaplain Palmer, or upon a deliberative body not "'affiliating the government with one specific faith or belief,'" is wrong.

Accordingly, although "the prayers were often explicitly Christian" in *Marsh,* this legislative prayer practice was, nevertheless, upheld because of the "'unique history' of a practice 'deeply embedded in the ... tradition of this country." 463 U.S., *supra* at 786, 791. Such practice "[f]rom colonial times through the founding of the Republic and ever since has coexisted with the principles of the disestablishment and religious freedom ... ." *Id.* at 787.

Marsh's drawback was it did not go further. While emphasizing that federal judges should not parse individual prayers, *Marsh* could also have expressly recognized that, based upon the original understanding of the Establishment Clause, prayer practices which the lower courts now wrongly label

as "sectarian," are not necessarily unconstitutional. "Explicitly Christian" prayer has opened proceedings in Congress, assembly halls, town council chambers, and state houses since the Founding. As will be documented for the Court's edification, such explicitly Christian prayers opened congressional sessions *at the Founding* and beyond. Congress's prayer practices involved a duly appointed chaplain who performed "divine service" – in reality, a form of Christian worship service – prior to the start of each day's legislative business. Chaplains also performed divine service in the halls of Congress for funerals, historic celebrations and on the Sabbath for members of Congress and others. None of these were considered inconsistent with the Establishment Clause. If we are to interpret the Establishment Clause based upon history, as *Marsh* says we should, it ought to be the complete history, as it occurred.

Marsh, of course, is not limitless. Those limits should be maintained. In the *Marsh* Court's words, the prayer opportunity may not be "exploited to proselytize or advance any one, or to disparage any other faith or belief ... ." 463 U.S., *supra* at 794-795. Consistent therewith is the explanation of the Religion Clauses by its principal author, James Madison, who said "the meaning of the words [are] ... 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." 1 *Annals of Congress* 758 (1789). Likewise, Justice Kennedy, in *Lee v. Weisman*, 505 U.S. 577, 597 (1992) explained that legislative prayer is

ordinarily not coercive. At the opening of legislative sessions, "... adults are free to enter and leave with little comment and for any number of reasons ... ."

Yet, despite the unique nature of legislative prayer – a traditional accommodation between religion and governmental authority, which the Establishment Clause allows – the Second Circuit tried to walk the proverbial tightrope. Unfortunately, the balance tipped on the side of the incorrect application of the Establishment Clause. The lower court gave lip service to *Marsh* on the one hand, but on the other, employed *Allegheny* as a limitation upon *Marsh* – thereby imposing a "reasonable observer" or endorsement test. *See Allegheny*, 492 U.S. at 592-594. (recognizing "endorsement" test). The Court of Appeals acknowledged that *Marsh* requires judges to refrain from "pars[ing] the content of a particular prayer," yet parsed Greece's prayer practice anyway. In the Second Circuit's view, "[t]he town's process for selecting prayer-givers virtually ensured a Christian viewpoint." Having set up the strawman, the lower court knocked it down, invalidating Greece's prayer practice because of "the steady drumbeat of often explicitly sectarian Christian prayers." *Town of Greece,* 681 F.3d at 32. As we shall see, the Framers and congressmen thereafter, would be dumbfounded by such a conclusion.

This Court, writing *Marsh,* did not intend federal judges to engage in such a "highwire" balancing action, censoring prayer in the process. Instead, *Marsh* should be accepted based upon legislative prayer's history and unique nature, particularly at

the Founding. Herein, South Carolina will, for the Court's benefit, plow the historical ground supporting legislative prayer that Marsh did not. Our purpose is to provide historical support that "explicitly Christian" prayer services opened and were an integral part of congressional proceedings at the Founding and during the early years of the Republic. So long as the prayer opportunity did not proselytize or disparage particular faiths or beliefs, such practices were well within the confines of the First Amendment.

Congress, even at the Founding, understood the Establishment Clause limitations which *Marsh* recognized. Although in the early Republic, America was predominantly Christian, and as seen below, the Framers had no constitutional difficulties with overtly Christian prayers opening congressional sessions, still, Congress sought broad religious diversity within that cultural context. Both the House and Senate included persons of nearly all religious persuasions, including millennialists, Catholics, Unitarians and even female evangelists, as part of its religious prayers and services. Even though the Framers clearly recognized that legislative prayer, which was voluntary and not coercive, in no way constituted an "establishment" of religion, Congress, nevertheless, steadfastly sought to ensure that no religious sect dominated either the congressional chaplaincy or the many religious services held in the halls of Congress.

We recognize that America is a far different place today than in 1789. By documenting herein

the religious practices of Congress at the Founding and beyond, we are not suggesting that the Court return to a bygone age. As Justice Scalia has written, "originalism ... in its undiluted form, at least, ... is medicine that seems too strong to swallow." Scalia, *Originalism The Lesser Evil* 57 U. Cinn. L. Rev. 849, 861 (1989). This is undoubtedly true, but nonetheless, the lessons taught by the Framers, that religious diversity and sectarian prayer are constitutionally compatible, hold true today, as then. This Brief will demonstrate the applicability of these principles.

ARGUMENT

As this Court recognized in *Alden v. Maine,* 527 U.S. 706, 741 (1999), in construing the Constitution, "[w]e look first to evidence of the original understanding ... ." The Court recently explored the original purpose underlying the First Amendment's Religion Clauses. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, ___ U.S. ___, 132 S.Ct. 694, 702 (2012), noted the enormous burdens placed upon dissenters from the Church of England "seeking to escape the control of the national church ... . These Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship." Even in the South, colonists who "brought the Church of England with them ... sometimes chafed at the control exercised by the Crown ...." Thus, the Court explained,

> [i]t was against this background that the First Amendment was adopted. Familiar with life under the established Church of England,

> the founding generation sought to foreclose the possibility of a national church. *See* 1 *Annals of Cong.* 730-731 (1789) (noting that the Establishment Clause addressed the fear that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform," (remarks of J. Madison)).

Id. at 703.

This Court has often recognized that the First Amendment Religion Clauses hardly forbid governmental acknowledgment of religion. As Justice Goldberg wrote in concurrence in *Abington School Dist. v. Schempp*, 374 U.S. 203, 306 (1963), "[u]ntutored devotion to the concept of neutrality can lead to ... a brooding and pervasive dedication to the secular and passive, or even active hostility to the religious. Such results are not only not compelled by the Constitution, but ... prohibited by it." Justice Clark, in *Schempp,* further noted "[i]t is true that religion has been closely identified with our history and government ... . [T]he Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him ... ." *Id.* at 212-213. And, Chief Justice Rehnquist, in *Van Orden v. Perry*, explained that "we have not, and do not adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion." 545 U.S., supra at 684, n. 3. The Chief Justice quoted *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) stating "'[t]here is an unbroken history of official acknowl-

edgment by all three branches of government of the role of religion in American life from at least 1789.'" *Id.* at 686.

This recognition of the importance of history provides the foundation for *Marsh*. There, Chaplain Palmer, a Presbyterian minister, had served as legislative chaplain for 16 years. As *Van Orden* later observed, the prayers of Chaplain Palmer were "often explicitly Christian ...." 545 U.S. at 688, n. 8. Indeed, Dr. Palmer's, *amicus* brief supporting grant of *certiorari* here, acknowledged that the prayers he gave prior to the *Marsh* lawsuit were "routinely identifiably Christian." He recounts examples which invoked Jesus Christ's name. *See* Brief of *Amicus Curiae* of Rev. Dr. Robert E. Palmer in Support of Petitioner at 3-5 in *Town of Greece v. Galloway,* No. 12-696.

Also, in his *Marsh* dissent, Justice Stevens pointed to the "clearly sectarian content of some of the prayers given by Nebraska's chaplain," including those referencing Christ's crucifixion and resurrection. 463 U.S. at 823 (Stevens, J., dissenting). Thus, application of the "endorsement" test to long-standing religious practices, such as legislative prayer, which has traditionally been "sectarian," is ill-conceived. Justice Kennedy, dissenting in *Allegheny County,* recognized instead the importance of history and tradition in interpreting the Establishment Clause:

> *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the

> Establishment Clause, but rather that the meaning of the Clause is to be determined by references to historical practices and understandings ... .
>
> The ... [endorsement test approach] contradicts important values embodied in the Clause. Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as many understand it. I can conceive of no judicial function more antithetical to the First Amendment ... .

492 U.S. at 670, 677-678. (Kennedy, J., joined by Rehnquist, C.J., White, & Scalia, JJ, concurring in part & dissenting in part).

Justice Kennedy's fear is now stark reality. Under the Second Circuit's logic, one of the oldest continuing governmental practices – "sectarian" legislative prayer – violates the Establishment Clause even though the Framers clearly thought not. We ask that *Marsh* be restored to its former self and those prayer practices understood to be constitutional by the Framers, be ruled constitutional again. We document these practices below.

The Historical Evidence of the Original Understanding of the Establishment Clause in the Context of Legislative Prayer Leads Inescapably to the Conclusion that the First Amendment Does Not Forbid Prayers by and for Deliberative Bodies.

The Second Circuit's holding is completely at odds with the original understanding of the Establishment Clause as applied to legislative prayer practices. The historical evidence convincingly supports the fact that legislative prayer practices at the time of the First Amendment's adoption, as well as the Fourteenth Amendment' ratification, were, explicitly Christian in nature. Indeed, as shown below, at the Founding, and throughout the first half of the Nineteenth Century, the practice was for congressional chaplains to conduct "divine service" prior to the initiation of business. Divine service was also performed by congressional chaplains in the halls of Congress for funerals of members, for celebration of historic events, and on the Sabbath for the benefit of congressmen. In the latter case, these were worship services involving sermons preached by congressional chaplains or guest ministers. And nineteenth-century objections to these practices focused largely on use of public funds or objections by religious fundamentalists, not the First Amendment. Thus, Greece's invocation practices were well within the Framers' understanding of what the Establishment Clause permitted.

The Documented History of Congressional Prayer Demonstrates Sectarian Prayers are not Prohibited by the Establishment Clause.

Thomas J. Curry documents that early Americans viewed many traditions involving government and Christianity as not violative of the Establishment Clause. Curry writes:

> ... [t]he discrepancy between the widespread conviction of late eighteenth-century Americans that government possessed no power in matters of religion and the persistent interference of government in religious affairs arose out of the cultural and social context of the time. Americans enunciated their Church-State principles within a framework wherein Protestant Christianity and American culture intertwined ... .
>
> Customs like days of prayer and thanksgiving appeared not so much matters of religion as part of the common coin of civilized living.

Curry, *The First Freedoms: Church and State in America To The Passage of the First Amendment*, 218 (1986). At the time of adoption of the First Amendment, as Justice Story noted "... the general, if not the universal sentiment in America was that Christianity ought to receive encouragement from the state, so far as not incompatible with the private rights of conscience and the freedom of religious worship." Story, *Commentaries on the Constitution of the United States*, III, § 1868 (1833). Congressman Nisbet of Georgia described legislative

prayer conducted by paid chaplains as validly constituting "the union of religious principle with political conduct." *Congressional Globe*, 26th Cong., 1st Sess. 66 (Appendix 1839). Thus, in early America, references in legislative proceedings to Christian symbols of faith and the Christian deity were frequent and thought not to constitute an "establishment" of religion. Far from it. Instead, such references, whether in prayer, as part of a divine worship service, or in legislative proceedings, were well accepted.

Against this cultural backdrop, we now examine the early history of prayer in Congress. Historians document that the Continental Congress "... sprinkled its proceedings liberally with the mention of God, Jesus Christ, the Christian religion and many other religious references." Curry, at 217. Indeed, the First Continental Congress prayer in 1774, delivered by Episcopal minister Jacob Duché, ended with the words "[a]ll this we ask in the name and through the merits of Jesus Christ, Thy Son, and our Savior." Delahunty, *Varied Carols: Legislative Prayer In a Polity*, 40 *Creighton L. Rev.* 517, 533, n. 56 (April, 2007). Prior to Duché's service, Congress adopted a resolution requesting an opening prayer. Duché appeared in "full pontificals" and "read several prayers in the established form." Congress voted its thanks to Duché "... for performing [the] divine Services," which included, according to John Adams, an "extemporary prayer, which filled the

bosom of every man." 1 *Journals of the Continental Congress,* 27, n. 1, (1774).[1]

Significantly, the House Judiciary Committee found "... the same practice was in existence before and after the adoption of the constitution." *Report of House Judiciary Committee, 33d, Cong., 1st. Sess., (1853)* (available in Johnson, *Chaplains In the General Government* 9 (1856). This is demonstrated by overwhelming evidence. For example, following adoption of the Constitution, the First Congress directed a Christian service as part of the inauguration of President Washington, held on April 30, 1789. Congress mandated that "members of the Senate and House of Representatives proceed to St. Paul's Chapel to hear divine service to be performed by the Chaplain of the Congress already appointed." Stokes, *Church and State in the United States,* I:485; 1 *Annals of Congress* 216 (1789).

This service was highly significant, foreshadowing future congressional prayer practices. A "divine service" is generally considered to be of fourteenth century origin and is "a service of Christian worship ... ." *Merriam-Webster Online Dictionary.* Such a service usually is a form of "worship according to a prescribed form and order." *Random House Dictionary of the English Language* (Unabridged, 1966).

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[1] *See also,* 1 *Journal of the Provincial Congress of South Carolina,* 1776 1110, 1112 (1776) (Charles Pinckney chosen President of the Province of South Carolina; "Ordered, that the Reverend Mr. Turquand, a Member, be desired to celebrate divine service in Provincial Congress.").

Importantly, this divine service was "not a service provided by an Episcopal church to which senators and representatives were invited, but an official service carefully arranged for by both houses of Congress and conducted by their duly elected chaplain, who happened to be the bishop of the Episcopal diocese of New York." Stokes, *supra.*

At St. Paul's Church, Bishop Samuel Provoost, Chaplain of the Senate, read prayers from the *Book of Common Prayer*. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 *Colum.L.Rev.* 2083, 2108 (1996).[2] Significantly, the various prayers were explicitly Christian and each referenced "Jesus Christ." As to which specific prayers were part of the divine service, it is important that on April 30, 1889 – as Congress had directed – on the one hundredth anniversary of the divine service held in St. Paul's chapel for President Washington's inaugural, a reenactment was conducted which "practically reproduce[d] the service on that memorable day." *See Program for Centennial Anniversary of George Washington's Inauguration,* 30 Apr. 1889 (available at http://ww12.dataformat.com/Document.aspx?doc=28398.htm). The centennial ceremony consisted, in part, of reading Scripture passages by Bishop

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[2] See also, Martin May Medhurst, "God Bless the President: the Rhetoric of Inaugural Prayer," at 63 (1980) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with the Pennsylvania State University Library). Mr. Epstein cites this original work.

Provoost on that April day, a century earlier. Also part of his divine service were Te Deum Laudamus, the Apostles Creed and Several Collects from the *Book of Common Prayer*, including Collects for Peace, for Grace, our Civil Rulers, a Special Thanksgiving, a General Thanksgiving, and a Prayer for St. Chrysostom. The reading ended with "[t]he grace of our Lord Jesus Christ, and the love of God, and the fellowship of the Holy Ghost, be with you all evermore. Amen." *Id.*

Thus, the evidence is overwhelming that in April, 1789 – the very same session which approved the First Amendment for ratification – Congress directed members to attend a "divine service," conducted by its chaplain, which used *a number of prayers from the Book of Common Prayer*. These prayers referenced Jesus Christ, the Holy Ghost, the Holy Spirit, and many other Christian symbols.

There is much other compelling evidence of the Framers' intent regarding legislative prayer. Highly instructive are the documented practices of Bishop William White, the second Senate Chaplain, who served during the First Congress (1789-1790), and also immediately thereafter (until 1800). Bishop White was chaplain virtually at the moment of the creation and ratification of the Establishment Clause. In an 1830 letter to then Senate Chaplain Henry Van Dyck Johns, White reflected upon his own tenure as chaplain in those earliest years of the Republic:

> [m]y practice, in the presence of each house of Congress, was in the following series: The

> Lord's prayer; the collect Ash Wednesday; that for peace; that for grace; the prayer for the President of the United States; the prayer for Congress; the prayer for all conditions of man; the general thanksgiving; St. Chrysostom's prayer; the grace of the Lord Jesus Christ, etc.

Wilson, *Memoir of the Life of the Right Reverend William White* 322 (1839) (letter to the Reverend Henry V. D. Johns, Dec. 29, 1830).

Bishop White thus used a very similar divine service to the service his predecessor, Provoost, had employed for President Washington's inaugural. Both, as Episcopal ministers, read prayers extensively from the *Book of Common Prayer* and both used prayers which were explicitly Christian. More specifically, this "series" of prayers, enumerated in Bishop White's 1830 letter to Chaplain Johns, and identified as the typical prayer service he performed during his ten years as Senate Chaplain, was contained in the 1789 *Book of Common Prayer*. Thus, Bishop White unquestionably opened sessions of Congress with several prayers, each of which referenced Christ. Other Christian symbols such as "the Holy Spirit," "our Heavenly Father," and the "Holy Ghost" were also used. Again, we have highly persuasive evidence that at time of the adoption of the First Amendment, a "sectarian" prayer service, read from the *Book of Common Prayer*, was not deemed a violation of the Establishment Clause.

Notably, nine of the first ten Senate chaplains were Episcopalian. This means that for the first two

decades following adoption of the Establishment Clause, each of those Senate chaplains undoubtedly opened daily meetings of Congress by reading prayers from the *Book of Common Prayer*. *See, Ratification, Book of Common Prayer.* (Stating *Book of Common Prayer* is "declare[d] to be the Liturgy of the Episcopal Church ... ."). Indeed, the 1789 edition of the *Book* emphasized that the "Prayer for Congress" was "to be used *during their session.*" *Id.* at *Prayer of Congress.* (emphasis added). As seen above, this Prayer, as well as the others in the *Book of Common Prayer*, particularly those enumerated by Bishop White, irrefutably demonstrate that, during the early Republic, following adoption of the First Amendment, explicitly Christian prayers opened congressional business.

Congress, in choosing its two chaplains each year, was careful to direct that they rotate between the houses and be of different denominations. Even in the late eighteenth century, Congress wished to ensure diversity of faiths by requiring different denominations in the selection process. Therefore, while the early Senate chaplains were Episcopalian, the House contemporaneously selected Dr. Ashbel Green, a Presbyterian minister, as its Chaplain (1792-1800). In his autobiography, Dr. Green described that a "signal was given [in the senate chamber] for *prayers* ... by the vice president striking his desk with a key ... ." Dr. Green also spoke of the "service" he typically conducted. Jones, *The Life of Ashbel Green, V.D.M.*, 261-262 (1849) (emphasis added).

Dr. Green's recounting of his prayer practice confirms yet again that Congress opened with a "divine service" similar to those conducted by Chaplains Provoost and White. Based on Dr. Green's description, it is apparent he thought of his "prayers" as a "service" opening the typical legislative day. Dr. Green also described how, "after attending *prayers* in the House of Representatives," he often "had to wait from a quarter to half an hour" for Vice President John Adams to arrive. *Id.*, at 262. (emphasis added).

Baptist minister Obadiah B. Brown served as House Chaplain from 1807-1809, again in 1814-1815, and as Senate Chaplain in 1809-10. In 1809, a visitor recorded that

> the Speaker rapped on the table and Mr. Brown, a Baptist clergyman, the Chaplain of the House, went into the Clerk's place fronting the speaker's chair and addressed *the throne of grace* in a modest, appropriate, republican prayer of about eight or ten minutes, about half the members being in observing great decorum and apparent seriousness.

Hillhouse, *Obadiah B. Brown: A Neglected, Forgotten Baptist Hero* 4 (1993) (emphasis added) (*available at* http.//www.florida.baptisthistory.org/docs/monographs/obadiah_brown.pdf). The term "throne of grace" is taken from Hebrews (4:16), a Christian Biblical reference. This brief account shows that Brown also conducted a Christian worship service as House chaplain.

Chaplain Spencer Cone, a Baptist minister, served as Chaplain of the House in 1815. An example of Chaplain Cone's enthusiastic ministerial style is described in his biography. Cone and Cone, *The Life of Spencer H. Cone,* 142 (1857). As House Chaplain, Cone "fearlessly proclaimed the Gospel." During the congressional session, "a person, high in rank" became gravely ill. The man in question apparently sought out Chaplain Cone for aid. When, however, the man died, Chaplain Cone took to the floor of the House to preach about the lesson learned:

> ... the young chaplain ... made a striking allusion to those who lived without God in the world. When laid upon a death-bed, however and summoned to their account, they dare not meet the Judge. Then they call for God's people to supplicate, in their behalf, the God they had denied. ... But the hour of Mercy had passed, and they die in hopeless, terrible despair. This solemn truth he uttered boldly, and with striking effect, in the Hall of Representatives.

Id. at 142-143. Thus, Chaplain Cone preached a Christian sermon to Congress on the House floor regarding the need of sinners to seek God's mercy well before death. *Id.* at 143-144. In apparent reference to the same incident, Chaplain Cone himself recounted he "mentioned ... the last words of one of the members, who had died two or three weeks before," and that he "took occasion to prove from the Bible that 'except a man be born again, he cannot

enter the Kingdom of God.'" Armitage, *The Funeral Sermon on the Death of the Rev. Spencer Houghton Cone*, 38 (1853).

Other examples of congressional chaplains who performed divine service in Congress abound. Senate Chaplain John P. Durbin (1832) described his "religious services" for Congress in the mornings as including the Lord's Prayer. He stated he made morning prayers "as simple and devout as I can ... " and sought to assist members to "bear the fruit of salvation." Roche, *The Life of John Price Durbin:* 62, 63 (1889).

In 1832, a joint committee recommended, on the one hundredth anniversary of George Washington's birthday, that "the chaplains of the two Houses of Congress ... perform *divine service* in the capitol on the 22d instant ... ." 9 *Register of Debates,* 368 (1832). In performing the service, Chaplain Durbin read from Revelations and then spoke about how "[o]ur obligations to worship Jehovah are founded, mainly on his infinite excellence, our relations to him as his creatures, and his benefits to us." Roche, at 71. Moreover, on January 4, 1859, at the opening the new Senate chamber, a prayer was offered by the Rev. P. D. Gurley. In that prayer, there were references to "Jesus Christ," "our Father," and the "Father, Son, and Holy Ghost." Rev. Gurley asked God to protect "our country" and "all our precious interests." *Congressional Globe,* 35th Cong., 2d Sess. 204 (1859). Other examples of "sectarian" prayers opening legislative business include: *Congressional Globe,* 37th Cong. 2d Sess. 1 (1861) ("We are unwor-

thy of Thy regard; and yet Thou has so loved us as to give Thy Son to die for us; and if Thou didst not spare Him, we know Though wilt with Him freely give us all things."); *Congressional Globe,* 40th Cong., 1st Sess. 1 (1867) ("God grant that His blessing may be upon us and make us faithful in the discharge of all our high trusts and duties; and when we are called from this to another world may we are called from this to another world may we hear the great Judge saying to each of us individually, 'well done, good and faithful servant'; enter thou into the joy of Thy Lord. Through Jesus Christ we ask it. Amen."); *Congressional Record,* 43rd Cong., 1st Sess. 1 (1873) ("... Pardon and deliver us from all our sins, nationally and individually ... and [b]ring us everlasting life. Through Jesus Christ, our Lord. Amen").

Upon a member's death, Congress typically directed the chaplains to perform "divine service" in the Capitol prior to the funeral and burial. Congressional practices regarding funerals of members were also overtly Christian.

For example, in 1822, House Chaplain Jared Sparks delivered a lengthy sermon in the House upon the death of Senator William Pinckney. Sparks, a Unitarian minister, gave the following oration:

> [t]he promises of the Gospel will never fail. The truths which have been revealed from heaven, published by divine wisdom, and established by the miracles of Christ, will stand as firm as the pillars of the universe, or the throne of Omnipotence.

Sparks, *A Sermon Preached In The Hall of the House of Representatives In Congress ... Occasioned by the Death of the Hon. Wm. Pinckney.* Moreover, following the death of the Honorable Franklin Elmore, the *National Intelligencer* of May 31, 1850, contained the following notation:

> Both Houses will meet to attend the funeral. The Committee of Arrangements, Pallbearers and Mourners will assemble at 11 o'clock at the late residence of Mr. Elmore on Capitol Hill, and remove the corpse thence, in charge of the Committee of Arrangements, attended by the Sergeant-at-Arms, of the Senate Chamber, where *Divine Service will be performed.*

(emphasis added) (*available at* http://www.congressionalcemetery.org/hon-franklin-h-elmore.) (death of Hon. Franklin Elmore). Thus, performance of divine service at funerals in the halls of Congress was consistently part of the duties of congressional chaplains.

In the early 19th century, Congress began requiring chaplains to conduct divine service on the Sabbath for its members in the House chamber. House-Chaplain Jesse Lee, spoke of the "Sabbath duties of the Office." Lee, *The Life and Times of the Rev. Jesse Lee* 486 (1848). Lee's biographer noted that the congressional chaplain's function was to "open their [Congress's] proceedings with prayer and preach to them on the holy Sabbath ... ." *Id.* at 468; *see also*, Wilson,, (discussing chaplains "officiating in the public hall on Sundays"). And, in an Exhibit styled

Religion and the Federal Government, (Part 2), the Library of Congress documents this practice with various examples, including the sermons preached by a wide variety of guest ministers in Congress on the Sabbath. (*available at* http://www.loc./gov/exhibits/religion/relo6-2.html). The overview of this Exhibit states:

> [i]t is no exaggeration to say that on Sundays in Washington during the administration of Thomas Jefferson (1801 – 1809) and James Madison (1809-1817) the State became the church. Within a year of his inauguration, Jefferson began attending church services in the House of Representatives. Madison followed Jefferson's example, although unlike Jefferson who rode on horseback to church in the Capitol, Madison came in a coach and four. Worship services in the House – a practice that continued until after the Civil War – were acceptable to Jefferson because they were nondiscriminatory and voluntary. Preachers of every Protestant denomination appeared. (Catholic Priests began officiating in 1826). As early as January 1806, a female evangelist, Dorothy Ripley, delivered a campmeeting-style exhortation in the House to Jefferson, Vice President Aaron Burr, and a "crowded audience ... .
>
> Jefferson's actions may seem surprising because his attitude toward the relation between religion and government is usually thought to have been embodied in his recom-

> mendation that there exist a "wall of separation between church and state." In that statement, Jefferson apparently declaring his opposition, as Madison had done in introducing the Bill of Rights, to a "national" religion. In attending church services on public property, Jefferson and Madison consciously and deliberately were offering symbolic support to religion as a prop for republican government.

Id. Jefferson, the founder who wrote the oft-cited letter to the Danbury Baptist Association of Connecticut and thus, was attentive to Establishment Clause issues, had no compunction about congressional Sabbath services.

In these "church services," hymns were played by the Marine Band, but discontinued because the Band could not keep pace with the "psalm singing of the congregation ... ." The "speaker's podium was used as the preacher's pulpit." The Library of Congress Exhibit notes that the millenialist Reverend David Austin preached in the House in 1801. Austin "[h]aving proclaimed to his Congressional audience the imminence of the Second Coming of Christ, ... (and) took up a collection on the floor of the House to support services at 'Lady Washington's Chapel' in a nearby hotel where he was teaching that 'the seed of the Millenial estate is found in the backbone of the American Revolution.'" *Id.* In addition, millenialist John Hargrove preached on Sunday, December 26, 1802 "before the President and Congress. He preached, again by request, the following evening. He delivered another discourse before Congress, on

the twenty-fifth of December, 1804, on the Second Coming of the Lord and the Last Judgment. On more than one occasion he preached before the Legislature of Maryland." *The Historical Magazine*, Vol. III, No. 2, 76 (February, 1876). Following the 1802 sermon, the House "ordered, that the copies of the Sermon transmitted therewith be distributed among the members ... ." 4 *Annals of Congress*, 314 (1803).

As the Library of Congress Exhibit also notes, on January 8, 1826, Bishop John England of Charleston, South Carolina "became the first Catholic clergyman to preach in the House of Representatives." *Id.* Continuing, the Exhibit narrates as follows:

> [t]he overflow audience included President John Quincy Adams, whose July 4, 1821 speech England rebutted in his sermon. Adams had claimed that the Roman Catholic Church was intolerant of other religions and therefore incompatible with republican institutions. England asserted that "we do not believe that God gave to the Church any power to interfere with civil rights or our civil concerns."

Id. Bishop England concluded his sermon in the House chamber with the following: "Our Saviour himself tells his disciples, if they love him they will keep his word. The proof, then, of our love is not to be exhibited in our mere declaration, it is to be found in the manifestation of our assiduity to know what our creator has taught, that it may be the rule of our practice – that we may believe his declarations, obey his injunctions and adhere to his institu-

tions." Reynolds, *The Works of the Right Reverend John England, First Bishop of Charleston*, IV, 190 (1849).

In 1828, efforts, largely unrelated to concerns regarding the First Amendment, were made to abolish the Sunday service in the House chamber. In opposition, Representative Chilton of Kentucky staunchly defended this practice, noting that the Hall served two purposes: legislative business and worship "the very day set apart by himself for his service." 4 *Register of Debates* 1701 (1828). Despite the opposition, Congress continued the practice of Sabbath services for many more years.

Nineteenth-Century Objections to Legislative Prayer Focused on Using Public Funds for the Practice, Not on Supposed First Amendment Issues.

In the 1850s, Congress debated the abolition of congressional chaplains. One of the principal objections was the use of tax dollars to support the chaplaincy, rather than an objection that the practice generally violated the First Amendment. *See* Hamburger, *Separation of Church and State*, p. 167, n. 44 (2004) (quoting John Leland who "opposed the payment of government chaplains ... [but] did not complain of their appointment.")[3] Hamburger emphasized that Leland himself preached a sermon in

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[3] Leland thought that it was beyond a Legislature's power to pay chaplains, stating that "[i]f legislatures choose to have a chaplain, for Heavens sake, let them pay him by contributions, not out of the public chest."

the House of Representatives on January 3, 1802. *Id.*

The reason for this opposition from religious groups, such as so-called "hardshell Baptists," was fear of corruption of religion by government involvement, rather than separation of church and state as it is thought of today. This "evangelical separationism" movement began with Roger Williams. Williams "condemned the centuries-old linkage between the Christian church and the State ... forged under the Roman Emperor Constantine." In his view, the church should avoid the temptation of "an unholy bargain in which it exchanges its authority to witness to and judge the world in return for legal privileges and political power. Delahunty, at 535. Thus, the typical objection to the chaplaincy was not that government should avoid religion altogether, but that such religion should not take the form of paid chaplains which "politicized" religious principles. There is a major difference for purposes of the original understanding of the Establishment Clause.

In 1839, Congressman Cooper of Georgia sought unsuccessfully to end the practice of public funding of congressional chaplaincies. In Cooper's opinion, such practice was "without just and proper authority." By electing two chaplains of different denominations, the practice was seen by Cooper as "agitat[ing]" this "matter of religious denomination ... in this House." In his view, "we may not exercise powers not granted ... that we may prevent a union of

church and State." *Congressional Globe*, 26th Cong., 1st Sess., 83-84 (1839).

Congressman Nisbet of Georgia strongly disagreed. Nisbet rejected any argument regarding a union of church and state:

> [t]hat grave and venerable body which framed our present form of Government, had the benefit of the prayers of the ministers of that day and Congress had adopted the practice of electing persons to perform religious service, and he [Nisbet] hoped we would not now take upon ourselves to dispense with the services of the clergy.

Id. at 84.

And, on January 19, 1853, the Senate Judiciary Committee issued a report responding to "sundry petitions praying Congress to abolish the office of chaplain." *S. Rep. No.* 376, 32d Cong., 2d Sess. 1 (1853). The ground upon which the petitions were based was that "the provisions of law under which chaplains are appointed for the army and navy, and for the two houses of Congress, are in violation of the first amendment of the constitution of the United States which declares that 'Congress shall make no law respecting an establishment of religion or permitting the free exercise thereof.'"

In rejecting the petitions, the Senate Judiciary Committee invoked the original understanding of what constituted an "establishment" of religion. In the view of the Committee, an "establishment" referred:

... without doubt to that establishment which existed in the mother country, and its meaning is to be ascertained by ascertaining what that establishment was. It was the connexion with the state of a particular religious society by its endowment, at the public expense, in exclusion of, or in preference to any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances. These three particulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided. It is true that, at the time of our constitution was formed, the strictness of this establishment had been, in some respects, and to a certain extent, relaxed in favor of Protestant dissenters; but the main character of the establishment remained. It was still, in its spirit inconsistent with religious freedom, as [a]matter of natural right to be enjoyed in its full latitude ... . If Congress has passed, or should pass, any law which, fairly construed, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars – endowment at the public expense, peculiar privileges to its members or disadvantages or penalties upon those who reject its doctrines or belong to other communions – such law would be a "law respecting an estab-

> lishment of religion," and, therefore in violation of the constitution.

Id. at 1-2. In no way, concluded the Judiciary Committee, was the congressional chaplaincy in violation of the Establishment Clause, as defined by the original understanding of the Clause:

> [a]t every session two chaplains are elected – one by each house – whose duty is to offer prayers daily in the two houses and to conduct religious services weekly in the hall of the House of Representatives. Now, in this, no religion, no form of faith, no denomination of religious professor is established, in preference to any other, or has any peculiar privileges conferred upon it. The range of selection is absolutely free in each house amongst all existing professions of religious faith. *There is no compulsion exercised or attempted, upon any member or officer of either house, to attend the prayers or religious solemnities.* No member gains any advantage over another by attending, or incurs any penalty or loses any advantage by declining to attend.

Id. at 2. (emphasis added). As in *Marsh*, the Committee recognized the lack of compulsion or coercion in legislative prayer. With respect to paying chaplains with public funds, the Committee saw this objection as unwarranted because "it will equally apply to many other accommodations furnished to members of Congress at public expense." *Id.* The Committee thus concluded that "[i]n no sense of the phrase have we a national chaplaincy" any more

than there is a national church. According to the Committee, while it might be true that the denominations selected as chaplain are Christian, "that is not in consequence of any legal right or privilege, but by the voluntary choice of those who have the power of appointment." *Id.* at 3. The Committee found it stood to reason that "Christians will of course select, for the performance of religious services, one who professes the faith of Christ." *Id.*

The House Judiciary reached the same conclusions, that the petitions for abolition of the chaplaincy lacked merit. The purpose of the Establishment Clause was not to "level and discard all religion" but to "prevent rivalry among sects to the exclusion of others." *Report of House Judiciary Committee,* (available in Johnson, *Chaplains of the General Government* at 14 (1856). According to the Committee, "[i]n this age there can be no substitute for Christianity" because "in its general principles is the great conservative element on which we must rely for the purity and permanence of free institutions." *Id.* at 17.

As Congress debated the chaplaincy question, and other matters, the first three months of the 1856 session went without appointment of chaplains. "Ministers of the Gospel" from the Washington, D.C. community were thus utilized. In the Resolution providing for this substitute, a Preamble was adopted, stating:

> ... whereas, the great vital and conservative element in our system is the belief in the pure doctrines and divine truths of the Gospel of

> Jesus Christ, it eminently becomes the Representatives of a people highly favored to acknowledge in the most public manner their reverence for God ... .

Id. at 35. This Preamble was again adopted in 1857.

Thus, the Senate and House Committees' appreciation of the original understanding of the Establishment Clause is in marked contrast to the interpretation rendered by the Second Circuit here. Even though Greece used an absolutely neutral system of selecting ministers to deliver the opening prayer – one seemingly more painstakingly diverse than even Congress employed in the eighteenth and nineteenth centuries – the Second Circuit, still, held the Town violated the Establishment Clause. Even though there was not the slightest coercion or compulsion, the Town was held to have "established" a religion. Such a decision completely ignores the original intent of the Framers and the understanding of those who came immediately afterwards.

As Originally Understood, the Establishment Clause Allows Prayers Like Those at Issue in this Case.

We note Justice Thomas has recognized the Court's task "would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches the Court now uses." *Van Orden,* 545 U.S. at 693 (Thomas J., concurring) citing *Cutter v. Wilkinson,* 544 U.S. 709, 728 n. 3 (2005) (Thomas J., concurring). As he further emphasized:

> [t]he Framers understood an establishment "necessarily [to] involve actual legal coercion." [*Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004)], *supra* at 52 ... (Thomas, J., concurring in judgment); *Lee v. Weisman*, 505 U.S. [*supra* 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*") ....

545 U.S. at 693. This analysis, not the "endorsement" test, should govern legislative prayer practices of the Town and other state and local entities elsewhere. Legislative prayer is without any coercion whatsoever. People can go or come as they please. The Founding Fathers never envisioned that the Establishment Clause prohibited prayer practices such as these. As seen above, explicitly Christian prayer practices were generally viewed at the Founding and beyond as easily constitutional. Prayer services, known as divine service, explicitly sectarian, were routinely performed by congressional chaplains and other ministers of various denominations in the halls of Congress with little or no concern about any violation of the Establishment Clause because that Clause addressed questions regarding a national church, certainly one not involved in legislative prayer.

Even in the early Republic, Congress emphasized religious diversity in its divine services. Although America was overwhelmingly Christian, and Congress had no reservations about Christian prayer

services, it nevertheless ensured that the various denominations, including those then out of the mainstream, such as Catholics and Unitarians, were represented in congressional prayer services. The National Legislature avoided having the same denomination serve both houses simultaneously. Chaplains rotated between House and Senate and were appointed for only one year. A Catholic priest was elected senate chaplain.

Importantly, Congress also sought ministers from the community at large to lead services. Thus, even in a homogeneous America, the religious diversity achieved by Congress was remarkable.

South Carolina recognizes America is far more culturally and religiously diverse today than yesterday. Nonetheless, the original understanding of the Establishment Clause bestows an important constitutional principle: both religious diversity and explicitly sectarian prayer may coexist in opening legislative sessions. Like Congress in the early Republic, the Town of Greece and South Carolina (in Section 6-1-160(C)) today ensure a cross section of the community's faith leaders are selected as legislative prayer-givers.

Marsh recognized that it is not the content of the prayer, which violates the First Amendment, but whether the *prayer opportunity* has been exploited to proselytize or advance particular beliefs or disparage others. As the Senate Judiciary Committee stated in its *Report* to Congress in 1853, "the range of selection is absolutely free in each house amongst all existing professions of religious faith."

As Congress in 1789, Greece in 2013, employs a system to ensure that religious leaders of all faiths participated in leading its prayers. Greece's system thus exploited no belief. Yet, the Second Circuit imposed an endorsement test upon that system. The result was that a religiously diverse selection process was struck down because the Court concluded the Christian prayer-givers outnumbered others and thus the Town "established" a religion. This conclusion was constitutional error. As Judge Niemeyer has persuasively written, a policy "for legislative prayer [which] is totally neutral, proactively inclusive, and carefully implemented ... in no manner, could be perceived as selecting, or expressing a preference for a particular religious leader, a particular religion or denomination, or a particular prayer." *Joyner v. Forsythe Co.*, 653 F.3d at 365 (Niemeyer, J. dissenting). The original understanding of the Establishment Clause was entirely consistent with this view and the Town of Greece's prayer policy complied with this understanding, and certainly with *Marsh*.

The Founders did not censor the wide variety of prayer-givers who provided divine service to Congress and neither should any interpretation of the Establishment Clause by this Court. If this original understanding is to have any meaning whatever, the prayer practices of the Town of Greece should be deemed constitutionally valid. We believe they are.

CONCLUSION

Accordingly, we ask the Court to reverse the Second Circuit decision in this case.

Respectfully Submitted,

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