

No. 12-696

---

---

**In the Supreme Court of the United States**

TOWN OF GREECE, PETITIONER

*v.*

SUSAN GALLOWAY AND LINDA STEPHENS, RESPONDENTS

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

**BRIEF FOR UNITED STATES SENATORS MARCO RUBIO, LAMAR ALEXANDER, JOHN BARRASSO, ROY BLUNT, JOHN BOOZMAN, RICHARD BURR, SAXBY CHAMBLISS, JEFF CHIESA, DAN COATS, BOB CORKER, JOHN CORNYN, MIKE CRAPO, TED CRUZ, MIKE ENZI, DEB FISCHER, LINDSEY GRAHAM, ORRIN HATCH, JOHN HOEVEN, JIM INHOFE, JOHNNY ISAKSON, MIKE JOHANNNS, RON JOHNSON, MARY LANDRIEU, MIKE LEE, MITCH MCCONNELL, JERRY MORAN, ROB PORTMAN, JIM RISCH, PAT ROBERTS, TIM SCOTT, JOHN THUNE, PAT TOOMEY, DAVID VITTER, AND ROGER WICKER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

LINDA T. COBERLY  
MICHAEL D. BESS  
WILLIAM P. FERRANTI  
*Winston & Strawn LLP*  
*35 West Wacker Drive*  
*Chicago, IL 60601*  
*(312) 558-5600*

STEFFEN N. JOHNSON  
*Counsel of Record*  
GENE C. SCHAERR  
ELIZABETH P. PAPEZ  
ANDREW C. NICHOLS  
*Winston & Strawn LLP*  
*1700 K Street, N.W.*  
*Washington, DC 20006*  
*(202) 282-5000*  
*sjohnson@winston.com*

*Counsel for Amici Curiae*

---

---

## QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment invalidates a practice of legislative prayer in which those offering the invocation are permitted to pray in accordance with the particular language of their own faiths and the dictates of their own consciences, in keeping with “[t]he unbroken practice for two centuries in the National Congress” and the Framers’ view that this practice poses “no real threat” of establishing religion. *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

## TABLE OF CONTENTS

	<b>Page</b>
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	v
INTRODUCTION AND INTEREST OF <i>AMICI CURIAE</i> .....	1
STATEMENT.....	3
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
I.    The unbroken 200-year practice of legislative prayer upheld in <i>Marsh</i> confirms that legislators, their chaplains, and their guests may pray freely in accordance with conscience and their own religious language.....	6
A. The Framers of the Constitution endorsed legislative prayers that identified with a particular faith. ....	8
B. The Congresses of the nineteenth, twentieth, and twenty-first centuries continued the practice of allowing legislative prayer in accordance with conscience.....	11
C. Congress continues the practice of legislative prayer according to conscience today with invocations from a variety of religious traditions.....	15

D.	The Second Circuit’s analysis cannot be reconciled with <i>Marsh</i> , and would threaten Congress’s unbroken 200-year tradition of legislative prayer.....	17
II.	Distinguishing “nonsectarian” from “sectarian” prayer would entangle the courts in theological matters that the First Amendment bars them from addressing. ....	22
A.	Distinguishing between “sectarian” and “nonsectarian” prayer necessarily entails making theological judgments. ....	23
B.	Several lines of this Court’s precedent forbid courts from analyzing whether prayer is “nonsectarian.” .....	24
1.	Church autonomy precedents .....	24
2.	Free exercise precedents .....	25
3.	School prayer precedents .....	26
4.	Free speech precedents .....	27
C.	Enforcing a “sectarian”-“nonsectarian” distinction is also highly unworkable and incapable of neutral administration. ....	28
III.	Judicial inquiry into the content of legislative prayers would unduly interfere with the internal workings of a co-equal branch of government. ....	30
A.	The constitutionality of legislative prayer has been considered by Congress, whose practice was dispositive in <i>Marsh</i> .....	31

B. The practice of legislative prayer is supported by constitutional provisions that commit the appointment of officers and the creation of internal rules to the legislative branch.....	33
C. There are no judicially manageable standards for adjudicating the permissibility of legislative prayer.....	33
CONCLUSION .....	35

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Baker v. Carr</i> , 369 U.S. 186 (1962) .....	33
<i>Cooley v. Board of Wardens</i> , 53 U.S. 299 (1851) .....	7
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962) .....	26, 27
<i>Hernandez v. Commissioner</i> , 490 U.S. 680 (1989) .....	26
<i>Jones v. Wolf</i> , 443 U.S. 595 (1979) .....	25
<i>Kreisner v. City of San Diego</i> , 1 F.3d 883 (9th Cir. 1993) .....	34
<i>Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993) .....	27
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992) .....	26, 27, 34
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983) .....	<i>passim</i>
<i>McGrain v. Daugherty</i> , 273 U.S. 135 (1927) .....	7
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000) .....	26
<i>Myers v. United States</i> , 272 U.S. 52 (1926) .....	7
<i>Pelphrey v. Cobb County</i> , 547 F.3d 1263 (11th Cir. 2008) .....	34

<i>Perry Education Ass'n v. Perry Local Educators' Ass'n</i> , 460 U.S. 37 (1983) .....	27
<i>Presbyterian Church v. Hull Church</i> , 393 U.S. 440 (1969) .....	24
<i>Printz v. United States</i> , 521 U.S. 898 (1997) .....	7
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981) .....	5, 30
<i>Serbian Orthodox Diocese v. Milivojevich</i> , 426 U.S. 696 (1976) .....	25
<i>Thomas v. Review Board</i> , 450 U.S. 707 (1981) .....	25
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981) .....	28
<b>CONSTITUTIONAL PROVISIONS AND STATUTE</b>	
U.S. Const. amend. I.....	<i>passim</i>
U.S. Const. art. I, §3, cl. 5 .....	33
U.S. Const. art. I, §5, cl. 2 .....	33
20 U.S.C. §7904(b) .....	27
<b>OTHER AUTHORITIES</b>	
<i>Al-Fatiha</i> .....	17
1 Annals of Cong. 24 (Joseph Gales, ed. 1789) .....	33
Annotation, 1 J. Continental Cong. 27 (Sept. 7, 1774).....	21
Karen Armstrong, <i>A History of God: The 4,000- Year Quest of Judaism, Christianity and Islam</i> (1993).....	29
<i>Book of Common Prayer</i> (1789 American ed.) .....	9, 18

<i>Book of Common Prayer</i> (Philadelphia, Hall & Sellers 1790) .....	10
Cong. Globe, 28th Cong., 2d Sess. 72 (1845).....	20
Cong. Globe, 36th Cong., 2d Sess. 1 (1860) .....	11
Cong. Globe, 37th Cong., 1st Sess. 1 (1861).....	11
Cong. Globe, 37th Cong., 2d Sess. 1 (1861) .....	11
Cong. Globe, 37th Cong., 2d Sess. 909 (1862).....	14
25 Cong. Rec. 197 (1893) .....	12
33 Cong. Rec. 1 (1900) .....	20
87 Cong. Rec. 9503 (1941) .....	14
91 Cong. Rec. 4370 (1945) .....	14
91 Cong. Rec. 8317 (1945) .....	14
96 Cong. Rec. 286 (1950) .....	20
103 Cong. Rec. 6651 (1957) .....	16
110 Cong. Rec. 15777 (1964) .....	14
114 Cong. Rec. 16149 (1968) .....	14
121 Cong. Rec. 3 (1975) .....	12
123 Cong. Rec. 3 (1977) .....	12
125 Cong. Rec. 135 (1979) .....	12
127 Cong. Rec. 1 (1981) .....	12
129 Cong. Rec. 260 (1983) .....	12
129 Cong. Rec. 2113 (1983) .....	13
129 Cong. Rec. 2278 (1983) .....	12
129 Cong. Rec. 4055 (1983) .....	12
129 Cong. Rec. 4919 (1983) .....	13
129 Cong. Rec. 9093 (1983) .....	13

138 Cong. Rec. 1718 (1992) .....	16
145 Cong. Rec. 7095 (1999) .....	15
146 Cong. Rec. 3005 (2000) .....	20
147 Cong. Rec. 16865 (2001) .....	15
147 Cong. Rec. 20554 (2001) .....	17
153 Cong. Rec. 18657 (2007) .....	17
158 Cong. Rec. S1559 (daily ed. Mar. 12, 2012).....	13, 21
158 Cong. Rec. S2559 (daily ed. Apr. 23, 2012).....	13
158 Cong. Rec. S2745 (daily ed. Apr. 26, 2012).....	13
158 Cong. Rec. S4379 (daily ed. June 24, 2012).....	13
158 Cong. Rec. S5419 (daily ed. July 26, 2012).....	13
159 Cong. Rec. S881 (daily ed. Feb. 27, 2013).....	21
159 Cong. Rec. S3791 (daily ed. May 23, 2013).....	16, 21
<i>Contemporary Hinduism: Ritual, Culture, and Practice</i> (Robin Rinehart, ed., 2004).....	17
<i>2 Corinthians</i> .....	10
Thomas J. Curry, <i>The First Freedoms: Church and State in America to the Passage of the First Amendment</i> (1986) .....	9
<i>Dictionary of the Bible</i> (rev. ed. 1963).....	29
Mary Baker Eddy, <i>Science and Health with Key to the Scriptures</i> (2000 ed.) .....	29
<i>Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools</i> , 68 Fed. Reg. 9645 (Feb. 28, 2003) .....	27
<i>Harper Collins Bible Dictionary</i> (rev. ed. 1996) .....	29

H.R. Rep. No. 31-171 (1850).....	31
H.R. Rep. No. 33-124 (1854).....	31
<i>Jeremiah</i> .....	12
<i>John</i> .....	28
Paul Johnson, <i>The Quest for God: A Personal Pilgrimage</i> (1996) .....	29
<i>Letters of Delegates to Congress 1774-1789</i> (Paul Smith <i>et al.</i> , eds., 1976) .....	8, 9
Michael W. McConnell, <i>Institutions and Interpretations: A Critique of City of Boerne v. Flores</i> , 111 Harv. L. Rev. 153 (1998) .....	35
Macy Nulman, <i>The Encyclopedia of Jewish Prayer: The Ashkenazic and Sephardic Rites</i> (1996) .....	16
<i>Prayers by Chaplain Edward L.R. Elson, 96th and 97th Congresses, 1979-1981</i> , S. Doc. No. 97-39 (1983) .....	12
<i>Prayers Offered by the Chaplain of the Senate of the United States—Reverend Richard C. Halverson</i> , S. Doc. 98-43 (1984) .....	12-13
<i>Prayers of Peter Marshall</i> (1954).....	12
<i>Psalms</i> .....	14
<i>Rig Veda</i> .....	17
S. Journal, 32d Cong., 2d sess. 114 (Jan. 19, 1853).....	31
S. Rep. No. 32-376 (1853).....	31, 32
S. Standing Rule IV.1(a) (2000) .....	33
<i>Three Faiths, One God: A Jewish, Christian, Muslim Encounter</i> (John Hick & Edmund S. Meltzer, eds., 1989).....	30

Bird Wilson, *Memoir of the Life of the Right  
Reverend William White, D.D., Bishop of the  
Protestant Episcopal Church of the State of  
Pennsylvania* (1839) ..... 9-10

## INTRODUCTION AND INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici Curiae* are a bipartisan group of thirty-four United States senators who share the conviction that legislative prayer is a vital and constitutionally protected part of their work as elected officials. In particular, they believe that those who pray in our Nation's legislatures must be free to do so in accordance with the language of their own religious traditions and the dictates of their consciences.

America's tradition of appointing legislative chaplains and solemnizing legislative sessions with prayer dates to the Founding. The First Congress, which drafted the First Amendment, appointed the congressional chaplains who have prayed for and ministered to members of Congress ever since. Similarly, many state and local legislatures have followed Congress's unbroken tradition of joining in prayer to seek divine guidance concerning the important work before them. And it is the considered judgment of the Senate, notably expressed by the First Congress and in an 1853 Report of the Senate Judiciary Committee, that legislative chaplaincies and the related practice of opening each session with prayer are constitutional—not an establishment of religion.

The work of the Senate is often divisive. But for a few moments each morning, politics and party are set

---

<sup>1</sup> The parties consented to this filing. Their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amici* and their counsel, has contributed monetarily to the brief's preparation or submission.

aside. Instead of debate, senators reflect on their duty to represent every constituent, mindful of the Nation's core values and their need for divine assistance in carrying out their responsibilities.

If allowed to stand, the Second Circuit's decision would threaten this tradition. That decision sends a troubling message to legislatures—that “no substantive mixture of prayer language” will “necessarily avert the appearance of affiliation,” and that “even a single circumstance may appear to suggest an affiliation” with a particular faith. Pet. App. 25a, 27a. The court went so far as to warn that “[t]hese difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer.” Pet. App. 27a.

This Court should eliminate the uncertainty and affirm the strong constitutional footing on which legislative prayer stands. In a nation of broad religious diversity, the best means of ensuring that the government does not prefer any particular religious view in the context of legislative prayer is to allow all those who pray to do so in accordance with their own consciences and in the language of their own faiths. Only this approach respects the “unbroken practice \* \* \* in the National Congress” and the Framers' view that this practice poses “no real threat” of establishing religion. *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

## STATEMENT

Since 1999, the Town of Greece, New York, has permitted its citizens to open its monthly board meetings with prayer. Citizens of any faith may volunteer to give the invocation, and no volunteer has ever been denied the opportunity to pray.

Those offering invocations are permitted to pray in accordance with the language of their own faiths and the dictates of their own consciences. The Town has never asked to review a prayer before its delivery, or restricted a prayer's content. Although prayers have been offered by adherents of various faiths—ranging from Jews to Wiccans—most have identified themselves as Christian. Thus, most of the prayers have referred to Jesus, or to Christian theology.

Reasoning that “an objective, reasonable person would believe that the town’s prayer practice had the effect of affiliating the town with Christianity” (Pet. App. 24a), the Second Circuit struck it down under the Establishment Clause. In particular, the court objected to “the prayer-giver selection process,” which typically produced Christian clergy, “the content of the prayers,” which often included “uniquely Christian references,” and “the contextual actions (and inactions) of prayer-givers and town officials,” which included praying in the “first-person-plural” and town officials “bowing” their heads or saying “Amen.” Pet. App. 19a-23a. But according to the court, it was not “any single aspect of the town’s prayer practice” that warranted invalidating that practice; it was “the interaction of the[se] facts”—“the totality of the circumstances.” Pet. App. 24a, 26a.

The Second Circuit did not consider whether its analysis would require striking down the practice of

legislative prayer in Congress—whose practice and understanding of the Constitution from the Founding through modern times informed this Court’s decision to sustain legislative prayer in *Marsh*. But the practices that the court found unacceptable generally reflect the practice of legislative prayer in Congress.

### SUMMARY OF ARGUMENT

I. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), sustained legislative prayer on the ground that the practice was instituted by the authors of the Establishment Clause and “ever since \* \* \* has coexisted with the principles of disestablishment and religious freedom.” The Second Circuit held that *Marsh* invalidates a legislative prayer practice that produces a majority of prayers that the court deemed “sectarian”—in particular, prayers referring to Jesus. But the Establishment Clause does not forbid a legislative prayer practice open to all citizens—of any faith—in which chaplains or guest chaplains are free to pray in accordance with their own consciences and the particular language of their own religions.

From the Founding until today, that has been the practice in Congress. And while the range of faiths represented has broadened over time—in keeping with our Nation’s growing religious diversity—even today a substantial percentage of the prayers offered in Congress use explicitly Christian language. The Second Circuit’s reading of *Marsh* cannot be squared with the reasoning of this Court’s opinion or the unbroken, 200-year history upon which it relied.

II. Not only is it improper to read *Marsh* as requiring the removal of references to particular deities from legislative prayers, but that reading also unnecessarily puts *Marsh* in conflict with several other

lines of this Court's precedent. Any attempt to distinguish between "sectarian" and "nonsectarian" prayers requires courts (and those executing their orders) to make *theological* judgments about which prayers pass muster. But numerous decisions of this Court forbid such determinations, which "entangle" the state in theology and establish a government-approved religious orthodoxy. Religious doctrine is far too complex—and too precious—to be governed by tests such as the Second Circuit's "objective, reasonable person" standard. And it is beyond civil courts' constitutional authority to administer such tests.

III. Finally, the Court "must have 'due regard to the fact that [it] is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.'" *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). Enforcing the line drawn by the court below—a theological line between "sectarian" and "nonsectarian" prayers—is wholly unworkable and constitutes a grave affront to the internal workings of a co-equal branch of government. Thus, principles of federalism, comity, and the separation of powers further support sustaining legislative prayer.

## ARGUMENT

**I. The unbroken 200-year practice of legislative prayer upheld in *Marsh* confirms that legislators, their chaplains, and their guests may pray freely in accordance with conscience and their own religious language.**

In sustaining the practice of legislative prayer in *Marsh*, this Court found it dispositive that the Congress that drafted the First Amendment did not view legislative prayer as a violation of the Establishment Clause. As the Court recounted, “the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer,” and just “three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights.” 463 U.S. at 787-788.

The Court went on to explain that enactments of the Congress that framed the First Amendment are “weighty evidence of its true meaning,” and that “an unbroken practice \* \* \* is not something to be lightly cast aside.” *Id.* at 790. “It can hardly be thought,” the Court stated, “that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.” *Ibid.* Moreover, “it would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government.” *Id.* at 790-791 (citations omitted).

In light of this evidence of original meaning, the Court in *Marsh* concluded that legislative prayers are not even a “step toward establishment,” but rather reflect a “tolerable acknowledgment of beliefs widely held among the people of this country,” “whose institutions presuppose a Supreme Being.” *Id.* at 792 (citations omitted). “The unbroken practice for two centuries in the National Congress and for more than a century in \* \* \* many \* \* \* States,” the Court noted, “gives abundant assurance” that the practice poses “no real threat” of erecting “the establishment the Founding Fathers feared.” *Id.* at 795.

As the Court in *Marsh* understood, such historical evidence concerning the practice of legislative prayer illuminates the constitutional principles embodied in the Establishment Clause. “[C]onstrutions of the Constitution made by \* \* \* the Congress that launched the government” and “propos[ed] \* \* \* the first 10 amendments” for “ratification \* \* \* have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.” *Myers v. United States*, 272 U.S. 52, 174-175 (1926). All the more so where this “contemporaneous construction of the Constitution” has “since [been] acted on with \* \* \* uniformity in a matter of much public interest and importance.” *Cooley v. Board of Wardens*, 53 U.S. 299, 315 (1851); accord *Printz v. United States*, 521 U.S. 898, 905 (1997); *McGrain v. Daugherty*, 273 U.S. 135, 156-157, 174 (1927). Here, a careful review of the relevant history confirms that legislators, their chaplains, and their invited guests may pray in accordance with the language of their own faiths and the dictates of their own consciences—even if a majority of the resulting prayers reflect the beliefs of a particular faith.

**A. The Framers of the Constitution endorsed legislative prayers that identified with a particular faith.**

The practice of opening legislative sessions with prayer dates to the birth of our Republic, when the Continental Congress adopted the practice despite concerns about the divergent faiths of the delegates. As John Adams recounted,<sup>2</sup> a motion to open the Continental Congress's session with prayer was opposed by John Jay, who argued that the delegates were "so divided in religious Sentiments, some Episcopalians, some Quakers, some [A]nabaptists, some Presbyterians and some Congregationalists \* \* \* that [they] could not join in the same Act of worship." *Ibid.* In response, "Mr. S Adams arose and said he was no Bigot, and could hear a Prayer from a Gentleman of Piety and Virtue, who was at the same time a Friend to his country." *Ibid.*

Samuel Adams then moved to invite a local Anglican minister, Jacob Duché, to lead a prayer the next morning. The motion carried, Duché's prayer met with wide approval, and the practice of opening sessions with prayer continued. *Ibid.* *Marsh* cited the Jay-Adams "interchange" as establishing "that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.'" 463 U.S. at 792 (citation omitted).

---

<sup>2</sup> Letter from John Adams to Abigail Adams (Sept. 16, 1774), in 1 *Letters of Delegates to Congress 1774-1789*, at 75 (Paul Smith *et al.*, eds., 1976) (hereinafter, "Smith, *Letters*").

Duché's prayer was addressed to the "Lord, our heavenly father, King of Kings and Lord of lords," and concluded as follows: "All this we ask in the name and through the merits of Jesus Christ thy son, Our Saviour, Amen."<sup>3</sup> See also Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 217 (1986) (the Continental Congress "sprinkled its proceedings liberally with the mention of God, Jesus Christ, [and] the Christian religion"). Thus, the prayer that *Marsh* cited to illustrate that prayer need not "proselytize" or approve "one religious view" used language that the court below deemed unduly sectarian.

Invocations using explicitly Christian language continued in the First Congress. The first two Senate chaplains, Samuel Provoost and William White, were Episcopal bishops who followed *The Book of Common Prayer*.<sup>4</sup> Chaplain White, who served from 1790 until 1800, described his practice as follows:

My 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 men; the general thanksgiving; St. Chrysostom's Prayer; the grace of the Lord Jesus Christ, etc.

Bird Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episco-*

---

<sup>3</sup> 25 Smith, *Letters*, at 551-552.

<sup>4</sup> *The Book of Common Prayer* (1789 American ed.), available at <http://justus.anglican.org/resources/bcp/1789/1790/>.

*pal Church of the State of Pennsylvania* 322 (1839) (Letter to Rev. Henry V. D. Johns, Dec. 29, 1830).

Notably, every prayer that White listed either appealed to Jesus or made other Christian references. *A Prayer for Congress*, for example, closes by stating: “These and all other necessities \* \* \* we humbly beg in the Name and mediation of Jesus Christ, our most blessed Lord and Saviour.” *Book of Common Prayer* (Philadelphia, Hall & Sellers 1790) (unpaginated).<sup>5</sup> Thus, those “who wrote the First Amendment Religion Clauses” and established the practice of legislative prayer (*Marsh*, 463 U.S. at 788)—whose “actions reveal their intent” in drafting the Establishment Clause (*id.* at 790)—routinely heard explicitly Christian prayers.

---

<sup>5</sup> See also *ibid.* (The Collect for Peace, ending “through the might of Jesus Christ our Lord”; The Collect for Grace, ending “through Jesus Christ our Lord”; *A Prayer for the President of the United States, and all in civil authority*, ending “through Jesus Christ our Lord”; *A Prayer for all Conditions of Men*, ending “[a]nd this we beg for Jesus Christ’s sake”; *A General Thanksgiving*, ending “through Jesus Christ our Lord; to whom with thee and the Holy Ghost, be all honour and glory, world without end”; *A Prayer for St. Chrysostom*, including a reference that “when two [or] three are gathered together in thy Name, thou will grant their requests”; “The Grace of our Lord Jesus Christ, and the love of God, and the fellowship of the Holy Ghost, be with you all” (quoting 2 *Corinthians* 13:14)).

**B. The Congresses of the nineteenth, twentieth, and twenty-first centuries continued the practice of allowing legislative prayer in accordance with conscience.**

The Congresses of the nineteenth, twentieth, and twenty-first centuries followed their forebears' example, routinely opening their sessions with prayer. As outlined in Part I.C, this practice has broadened over time in keeping with the Nation's growing religious diversity. Initially, however, the practice was exclusively Christian. And regardless of their background, those praying have always been free to use the distinctive language of their own faiths.

1. At the outset of the Civil War, for example, a representative prayer petitioned "that the disorders of the land may be speedily healed \* \* \* and that Thy Church and Kingdom may flourish in a larger peace and prosperity, for Thy Son, our Savior, Jesus Christ's sake." Cong. Globe, 37th Cong., 1st Sess. 1 (1861); see also Cong. Globe, 36th Cong., 2d Sess. 1-2 (1860) (House: "Unto Thee we come, trusting in the atonement of our Lord and Savior, Jesus Christ, and in the sanctifying influence of the Holy Spirit \* \* \* [G]rant us Thy special aid"). Similarly, in December 1861, a guest Navy chaplain thanked God for "Christ, and for the great salvation, and for the hope of heaven" in asking "thy blessing upon this body of Senators, upon thy servant their President, and upon all Members of this body." Cong. Globe, 37th Cong., 2d Sess. 1 (1861).

2. Several chaplains have had a practice of leading the Senate in reciting the Lord's Prayer. As noted above (at 9), the second Senate Chaplain, William White, regularly followed this practice. In 1893, Sen-

ate Chaplain John George Butler asked God to “Bless the two Houses of Congress now assembling,” and to guide them in their work, before leading the Chamber in the Lord’s Prayer. 25 Cong. Rec. 197 (1893). Senate Chaplain Edward Elson, who served from 1969 to 1981, had a “first day tradition” of opening sessions of Congress by leading the Senate in that prayer. 127 Cong. Rec. 1 (1981); 125 Cong. Rec. 135 (1979); 123 Cong. Rec. 3 (1977); 121 Cong. Rec. 3 (1975); see *Prayers by Chaplain Edward L.R. Elson, 96th and 97th Congresses, 1979-1981*, S. Doc. No. 97-39, 1 (1983).

3. Invocations using explicitly Christian language continued throughout the twentieth century. In 1947, for example, Senate Chaplain Peter Marshall asked the “Lord Jesus” to “put [His] arm around [the Senators] to give them strength,” concluding: “[W]e humbly ask in Jesus’ name.” *The Prayers of Peter Marshall* 129 (1954). And in 1983, when *Marsh* was decided, more than 95 percent of invocations offered in the Senate used identifiably Christian language or references. See, e.g., 129 Cong. Rec. 4055 (1983) (“In the name of the Father and the Son and the Holy Spirit.”); 129 Cong. Rec. 2278 (1983) (“In the name of the God of Israel and His Son, our Savior.”); 129 Cong. Rec. 260 (1983) (opening with a reading from *Jeremiah* and closing: “In the name of Him who loved us unconditionally and who prayed on the cross for the forgiveness of those who put him there. Amen.”).

In fact, one-third of the prayers in 1983 invoked Jesus’ name. See, e.g., *Prayers Offered by the Chaplain of the Senate of the United States—Reverend Richard C. Halverson*, S. Doc. 98-43, 23 (1984) (concluding “in the matchless name of Jesus, the Humble

Servant of all”); 129 Cong. Rec. 2113 (1983) (“we pray in the name of the Utterly Selfless Servant, Jesus Christ”); 129 Cong. Rec. 4919 (1983) (“This we pray in the name of Jesus Christ, whose greatness exceeds the containment of any political, social, or religious body and whose exaltation in time will draw all men to Himself.”). Indeed, on April 20, 1983—when *Marsh* was argued—Senate Chaplain Richard Halverson closed his prayer, “in the name of Jesus, Savior and Lord.” 129 Cong. Rec. 9093 (1983).

Legislative prayers that include explicitly Christian references remain commonplace today. In 2012, for example, dozens of prayers in Congress referred to Jesus or “Christ.” *E.g.*, 158 Cong. Rec. S4379 (daily ed. June 24, 2012) (“This we pray in the matchless name of Jesus Christ our Lord.”); 158 Cong. Rec. S5419 (daily ed. July 26, 2012) (“We pray all this is Jesus’s name.”); 158 Cong. Rec. S2745 (daily ed. Apr. 26, 2012) (“In Jesus’s name we pray.”). In addition, many prayers are offered in the first-person plural. *E.g.*, 158 Cong. Rec. S1559 (daily ed. Mar. 12, 2012) (“Let us pray”); 158 Cong. Rec. S2559 (daily ed. Apr. 23, 2012) (“We pray in Your sacred Name”).

4. The need for a practice of uninhibited legislative prayer is underscored by the fact that such prayer often marks occasions of national turmoil or personal grief. The Senate is at once the Nation’s highest legislative chamber and a small body of just one hundred members living away from home. Senators often feel compelled to seek divine guidance in times of personal loss or national strife. Some of the Nation’s most important events have been marked in the Senate by thoughtful prayers that echoed the public sentiment, whether of grief or jubilation.

In 1862, for example, Reverend Byron Sunderland marked the death of eleven-year-old Willie Lincoln, son of President Abraham Lincoln, with a heartfelt prayer: “Our thoughts have been suddenly arrested by the dark shadow of domestic and personal affliction which has fallen now upon the heart and home of the President.” Cong. Globe, 37th Cong., 2d Sess. 909 (1862). In 1941, following the attack on Pearl Harbor, the Senate took time for prayer. 87 Cong. Rec. 9503 (1941). In 1945, the Senate celebrated the defeat of the Nazi regime with a prayer to God, “who has brought us to this shining hour.” 91 Cong. Rec. 4370 (1945). Months later, the Senate celebrated victory over Japan with prayer: “Over a world dyed dark with suffering breathes the deep, sweet sigh of peace, and countless hearts break forth in praise and unutterable thanksgiving to Thee who wast our shield and our shelter when the earth did tremble, which now is still.” 91 Cong. Rec. 8317 (1945) (alluding to *Psalms* 18).

The trials and triumphs of the 1960s were likewise commemorated with prayer. The legislative day that brought passage of the Civil Rights Act in the Senate began with a prayer asking “Infinite God, our Father” to “grant us wisdom to know what is right, and the courage to do it.” 110 Cong. Rec. 15777 (1964). Years later, when Senator Robert Kennedy was assassinated, Reverend Edward Lewis of Capitol Hill United Methodist Church prayed: “[A] worthy Member of this U.S. Senate has been slain by an assassin’s gun \* \* \* Tragedy upon tragedy is being written as our contemporary history. Have mercy upon us, O God. Forgive us. Guide us. Give to us a sense of divine direction in our confusion.” 114 Cong. Rec. 16149 (1968).

More recently, after the horrific 1999 shooting at Columbine High School, Senate Chaplain Lloyd Ogilvie prayed: “This morning, we are shocked by the accounts of the shooting of fellow students by disaffected young men filled with hate and anger. \* \* \* O Lord of Hosts, be with us yet, lest we forget to love you and glorify You by respecting the wonder of each person’s life. Through our Lord and Savior. Amen.” 145 Cong. Rec. 7095 (1999).

Similarly, when the Senate convened in the wake of the September 11, 2001, terrorist attacks, the Chaplain appealed for divine help in gaining “victory over tyranny”: “Almighty God, source of strength and hope in the darkest hours of our Nation’s history \* \* \* . Quiet our turbulent hearts. Remind us of how You have been with us in trouble and tragedies of the past and have given us victory over tyranny. \* \* \* You are our Lord and Saviour. Amen.” 147 Cong. Rec. 16865 (2001). Then-Senate Majority Leader, Tom Daschle, thanked the Chaplain, stating: “I know he speaks for us all.” *Ibid.*

The only meaningful constraints upon prayers in Congress have been those imposed by the conscience and the good will of those praying. *Amici* have found these constraints to produce prayers that respect the solemnity of the occasion and the varied beliefs of those listening.

**C. Congress continues the practice of legislative prayer according to conscience today with invocations from a variety of religious traditions.**

As our Nation has grown in religious diversity, the range of prayers offered in the Senate has grown with it. For example, such prayers have long included in-

vocations from rabbis, and more recently from imams and leaders of Eastern religions. But whatever their background, those praying have always been free to do so in the language of their own religion.

The Congressional Record is filled with prayers offered by Jewish rabbis. In 1957, for example, the Senate welcomed a Holocaust survivor, Rabbi Arthur Schneier, to give the invocation. He prayed: “Heavenly Father, on the 10th anniversary of my arrival on these blessed shores, after years of Nazi and Communist persecution, I lead Thy children in prayer for our country, these United States of America, the land dedicated to the sanctity of man, the invigorating spring of liberty where the oppressed may quench their thirst.” 103 Cong. Rec. 6651 (1957).

As recently as May 23, 2013, Senator Christopher Coons welcomed Rabbi Michael Beals to lead the prayer. He took the opportunity to pray for victims of the recent tornado in Oklahoma, using a name for God that has been part of the Jewish liturgy since the fifteenth century: “Adon Olam, Master of the Universe.” 159 Cong. Rec. S3791 (daily ed. May 23, 2013).<sup>6</sup>

In 1992, the Senate heard its first prayer from a Muslim leader. At the invitation of then-Senators Paul Simon and Alan Dixon of Illinois and Senator Orrin Hatch of Utah, Imam Wallace Mohammed of Chicago prayed to “Our Creator, the merciful benefactor, the merciful Redeemer” (138 Cong. Rec. 1718 (1992))—an Islamic description of Allah derived from

---

<sup>6</sup> Macy Nulman, *The Encyclopedia of Jewish Prayer: The Ashkenazic and Sephardic Rites* 7-8 (1996) (defining “Adon Olam” as “Eternal Lord”).

the first verse of the Qu’ran. *Al-Fatiha* 1:1. In 2001, Muslim leader Imam Yusuf Saleem prayed, invoking “the Holy Qur’an Guidance to humanity,” which states that “God has honored all of the children of Adam.” 147 Cong. Rec. 20554 (2001).

In 2007, Senator Harry Reid invited Rajan Zed, a Hindu, to offer the invocation. In keeping with Hindu conceptions of the divine, he prayed the Gāyatrī Mantra—a Hindu prayer “honor[ing] the sun as the giver of all things”<sup>7</sup> found in *Rig Veda* 3.62.10, one of the four canonical sacred texts (*śruti*) of Hinduism known as the Vedas: “We meditate on the transcendental Glory of the Deity Supreme, who is inside the heart of the Earth, inside the life of the sky, and inside the soul of the Heaven. May He stimulate and illuminate our minds.” 153 Cong. Rec. 18657 (2007).

In sum, while the language of legislative prayer in the Senate continues to become ever more diverse, the Senate’s practice of allowing prayer in accordance with conscience has remained constant. As discussed below, the Second Circuit’s analysis would threaten this “unambiguous and unbroken history of more than 200 years.” *Marsh*, 463 U.S. at 792.

**D. The Second Circuit’s analysis cannot be reconciled with *Marsh*, and would threaten Congress’s unbroken 200-year tradition of legislative prayer.**

The Second Circuit’s reasoning cannot be squared with *Marsh*. The court disclaimed reliance upon “any single aspect of the town’s prayer practice,” reasoning that, under “the totality of the circumstances,” that

---

<sup>7</sup> *Contemporary Hinduism: Ritual, Culture, and Practice* 127 (Robin Rinehart, ed., 2004).

practice “identified the town with Christianity in violation of the Establishment Clause.” Pet. App. 19a, 21a. If applied to Congress, however, the factors cited by the court below would threaten the very “unbroken practice” approved in *Marsh*. 463 U.S. at 788.

For example, the court below disapproved of the fact that the town’s clergy-selection process resulted in Christians delivering “every one of the prayers for the first nine years of the town’s prayer practice, and nearly all of the prayers thereafter.” Pet. App. 19a. But the same can be said of the Senate’s practice.

Since the creation of its chaplaincy in 1789, there have been 62 Senate chaplains—all of whom have identified themselves as Christian.<sup>8</sup> Indeed, the first eight Senate chaplains, who served for the first nineteen years of the chaplaincy, were members of the same religious denomination (the Episcopal Church), and offered prayers according to that denomination’s prayer book (*The Book of Common Prayer*). And contrary to the Second Circuit’s analysis, *Marsh* itself rejected arguments that appointing a single Presbyterian chaplain for 16 years invalidated Nebraska’s legislative prayer practice. 463 U.S. at 793.

Similarly, the Second Circuit found it objectionable that many who prayed used “uniquely Christian” language, such as “the name of Jesus Christ,” or “Christ \* \* \* ‘Our Savior,’” or the “Holy Trinity,” while few prayers were “devoid of such references” or “employed references unique to some other faith.” Pet. App. 20a, 21a. Again, the same is true of the Senate’s practice, in which chaplains and guest chap-

---

<sup>8</sup> [http://www.senate.gov/artandhistory/history/common/briefing/Senate\\_Chaplain.htm](http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm).

lains are permitted to pray in their own religious language. See *supra* Part I.A-C. To be sure, the range of represented faiths has broadened as Americans have become more religiously diverse. But even today, a large percentage of these prayers contain explicitly Christian content. See *supra* Part I.B.

Unlike the decision below, *Marsh* did not rely on a distinction between “sectarian” and “nonsectarian” prayer. The sole appearance of the term “nonsectarian” in *Marsh* was a reference to the chaplain’s own description of his prayers, and the Court did not suggest removing language specific to particular faiths. 463 U.S. at 793. To the contrary, it discouraged “a sensitive evaluation” of, or “pars[ing] the content of a particular prayer” absent “indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Id.* at 794-795. As history confirms, the fact that legislative prayers explicitly refer to particular deities does not mean this standard is violated.

The Second Circuit even deemed it objectionable that those praying may be unable to “resist th[e] temptation” to “convey their views of religious truth.” Pet. App. 26a. But this is no less true of prayers offered in the Senate. Not surprisingly, the court did not explain how prayer, which by definition is addressed to a deity, could avoid embodying *some* understanding of “religious truth.” All prayers reflect some such understanding. That, in part, is what is meant by prayer. *Infra* Part II.C.

In a similar vein, the court below found it “worthy of weight” that those praying “appeared to speak on behalf of the town and its residents”—sometimes requesting audience participation or speaking “in the

first-person plural”—and that “members of the Town Council participated in the prayers, by bowing their heads, saying ‘Amen,’ or making the sign of the Cross.” Pet. App. 23a. But Senate Chaplains likewise pray in such terms. *E.g.*, 146 Cong. Rec. 3005 (2000) (guest chaplain Roger Kaffer) (“Let us pray \* \* \* [i]n the name of the Father and of the Son and of the Holy Spirit.”); 96 Cong. Rec. 286 (1950) (guest chaplain Alvin Murray) (“In Christ’s name we pray.”); 33 Cong. Rec. 1 (1900) (Chaplain Milburn) (“We humbly ask, through Jesus Christ our Saviour.”); Cong. Globe, 28th Cong., 2d Sess. 72 (1845) (Chaplain Tustin) (“humbly beg[ging]” for “the forgiveness of all our sins, personal and national”). And *amici* can attest that many senators likewise choose to “bow their heads” in respect, “make the sign of the Cross,” or “say ‘Amen.’”

The Second Circuit next deemed it troubling that the neutrality of the Town’s selection process was undermined by its “practice of inviting clergy almost exclusively from places of worship located within the town’s borders.” Pet. App. 19a. But the Senate’s chaplains and guests are likewise drawn from houses of worship within the Nation’s borders. Nor is this a departure from religious neutrality. It is a *geographic* limitation.

Not content to denounce what the Town of Greece actually did, the court below also seized upon what the Town purportedly failed to do: “explain that it intended the prayers to solemnize Board meetings, rather than to affiliate the town with any particular creed,” or that “the prayers were not to be used for proselytizing or disparaging other faiths.” Pet. App. 22a. But legislative prayers are by definition intended to solemnize, and these *amici*’s experience con-

firms that, even without a formal prohibition, citizens can be expected to avoid using the opportunity to pray as a platform to convert or to disparage.

The court below further criticized the Town for “neither publicly solicit[ing] volunteers to deliver invocations nor inform[ing] members of the general public that volunteers would be considered or accepted, let alone welcomed, regardless of their religious beliefs or non-beliefs.” Pet. App. 20a. The same critique, however, could be leveled against the Senate, whose members nominate as guest chaplains those adhering to a wide variety of faiths—yet without extending any invitation to the general public or adopting any formal policy of “nondiscrimination.”

The final factor cited by the court below—the fact that the town “thanked” those who prayed “for being ‘chaplain of the month’” (Pet. App. 23a)—is frankly absurd. The same criticism would apply to the Senate, which has always thanked its guest chaplains. *E.g.*, 159 Cong. Rec. S3791 (daily ed. May 23, 2013) (statement of Sen. Chris Coons); 159 Cong. Rec. S881 (daily ed. Feb. 27, 2013) (statement of Sen. Michael Crapo); see also 158 Cong. Rec. S1559 (daily ed. Mar. 12, 2012) (statement of Sen. Harry Reid) (thanking Chaplain Black). This practice dates to the Continental Congress, which voted to thank Jacob Duché “for performing divine Service, and for the excellent prayer.” Annotation, 1 J. Continental Cong. 27 (Sept. 7, 1774). And, as noted, the Court in *Marsh* approved of Duché’s prayer.

In sum, a review of the factors cited by the court below confirms that they do not—even in their “totality”—distinguish the Town of Greece’s practice from the very “unbroken practice” that this Court relied

upon in sustaining legislative prayer in *Marsh*. From the Founding until today, the only significant limitations on legislative prayers in Congress have been those imposed by conscience and the good will of those praying. Since many, though not all, of those praying identify themselves as Christians, many of their prayers have invoked the name of Jesus or used other Christian language. But so long as others are likewise free to pray on their own terms, this practice does not establish religion.

**II. Distinguishing “nonsectarian” from “sectarian” prayer would entangle the courts in theological matters that the First Amendment bars them from addressing.**

Quite apart from *Marsh*’s historical analysis, having to draw lines between different prayers would entangle the courts (and those enforcing their orders) in controversial theological matters that the First Amendment bars them from addressing. This difficulty with the decision below provides an independent ground for permitting those offering legislative prayer to pray according to their own convictions.

The court below acknowledged that “the line between sectarian and nonsectarian prayers” presents “sizeable doctrinal problems,” but brushed off this difficulty based on its misreading of *Marsh*. Pet. App. 15a. In reality, it is the decision below that conflicts with *Marsh*’s admonition that courts should not “embark on a sensitive evaluation or \* \* \* parse the content of a particular prayer” (463 U.S. at 795)—an admonition rooted in several lines of precedent.

**A. Distinguishing between “sectarian” and “nonsectarian” prayer necessarily entails making theological judgments.**

We begin by emphasizing that any line between “sectarian” and “nonsectarian” prayer is necessarily a *doctrinal* line. And administering that line requires courts both to interpret different faiths and to make debatable judgments about which aspects of those faiths are most vital to their adherents.

The Second Circuit’s ruling only confirms this. Although the court disclaimed any “sensitive evaluation” of prayer, it ultimately was compelled to comb the facts for “uniquely Christian references” and “references unique to some other faith.” Pet. App. 20a. That is, the sectarian-nonsectarian line employed by the court compelled it to ask which faiths the prayers reflected, and which references were “unique” to that faith (which in turn required discerning what *other* faiths believe).

The Second Circuit purported to draw these lines from the vantage point of “an objective, reasonable person,” insisting that it “need not determine whether any single prayer” gives “an indication of establishment,” because there was “a steady drumbeat” of “sectarian” prayers. Pet. App. 21a, 22a. But such disclaimers cannot disguise the fact that determining whether prayer is sufficiently inclusive requires delving into matters of comparative theology—a constitutionally prohibited analysis.

**B. Several lines of this Court’s precedent forbid courts from analyzing whether prayer is “nonsectarian.”**

Numerous decisions of this Court prohibit courts from resolving doctrinal matters or analyzing the importance of particular tenets to any religion.

**1. Church autonomy precedents**

In *Presbyterian Church v. Hull Church*, 393 U.S. 440, 444 n.3 (1969), for example, the Court held that church property disputes could not be resolved under a “departure from doctrine” approach that turned on whether the denomination had “substantially abandoned” its core tenets. Such an approach required courts to interpret “the meaning of church doctrines,” to “decide that a substantial departure has occurred,” and “to determine whether the issue on which the general church has departed holds a place of \* \* \* importance in the traditional theology.” *Id.* at 450. But “assessing the relative significance to the religion of the [abandoned] tenets \* \* \* requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion.” *Ibid.* “If civil courts undertake to resolve such controversies,” “the hazards are ever present of inhibiting the free development of religious doctrine.” *Id.* at 449. Thus, “the First Amendment forbids civil courts from playing such a role.” *Ibid.*

So too here. Determining whether prayer is “sectarian” entails determining both the doctrinal meaning of the prayer and whether that meaning differs meaningfully from others’ beliefs (which, again, requires ascertaining their beliefs). Any such approach would inhibit praying in accordance with conscience

and create powerful incentives to conform to the government-imposed orthodoxy. Accord *Jones v. Wolf*, 443 U.S. 595, 604 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976). This Court should not read *Marsh* to create such difficulties.

## 2. Free exercise precedents

Similarly, this Court’s free exercise decisions recognize that civil courts are jurisdictionally prohibited from comparing different faiths. A leading example is *Thomas v. Review Board*, 450 U.S. 707 (1981), which arose when Indiana denied unemployment compensation to a Jehovah’s Witness who turned down work building military equipment because his faith prohibited him from building weapons. Indiana argued that such work was consistent with his faith, citing testimony from another Jehovah’s Witness, who believed “such work was ‘scripturally’ acceptable.” *Id.* at 715. The Indiana courts agreed, but this Court reversed, explaining that “[c]ourts are not arbiters of scriptural interpretation” and that “the judicial process is singularly ill equipped to resolve [intrafaith] differences.” *Id.* at 715, 716.

In purporting to identify “uniquely Christian references” and prayers framed in terms “to the clear exclusion of other faiths” (Pet. App. 20a, 21a), the court below implicitly deemed itself competent to resolve “intrafaith differences.” To deem prayer “non-sectarian,” courts must conclude that it reflects the “common faith” of a broad class of adherents—that it appeals to the lowest common religious denominator. Further, weighing the importance of religious differences to people of different faiths is akin to judging the “centrality” of a religious belief to a broader religious tradition. Cases such as *Thomas* emphatically

stress that such analysis “is not within the judicial function.” 450 U.S. at 716; accord *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

### 3. School prayer precedents

The Second Circuit’s approach also contravenes this Court’s school prayer decisions, which hold that public school officials may not regulate the content of prayers. *E.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992). These cases do not invalidate legislative prayer. As *Marsh* confirms, public schools raise particular Establishment Clause concerns absent in legislative settings. 463 U.S. at 792 (legislative prayer involves “adult[s], [who] presumably [are] not readily susceptible to ‘religious indoctrination’”); accord *Weisman*, 505 U.S. at 596-597.

At the same time, the Second Circuit’s decision flouts an important *rationale* for these school prayer cases—namely, that public officials (including judges) are “without power to prescribe by law any particular form of prayer.” *Engel*, 370 U.S. at 430. As *Engel* put it, the Framers—the same officials who viewed legislative prayer as consistent with the Establishment Clause—recognized that “one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government’s placing its official stamp of approval upon one particular kind of prayer.” *Id.* at 429; see also *Weisman*, 505 U.S. at 589 (prayer is “too precious to be either proscribed or prescribed by the State”); cf. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) (analyzing whether institutions are “pervasively sectarian” involves a problematic “inquiry into the recipient’s religious views”).

Thus, just as *Marsh* settled the constitutionality of legislative prayer, *Engel* and *Weisman* establish

that judges may not regulate the content of prayers that *are* permitted. Indeed, citing *Engel* and *Weisman*, the Department of Education has stated that “where students are entitled to pray, public schools may not restrict or censor their prayers on the ground that they might be deemed ‘too religious’ to others. The Establishment Clause prohibits state officials from making judgments about what constitutes an appropriate prayer, and from favoring or disfavoring certain types of prayers—be they ‘nonsectarian’ and ‘nonproselytizing’ or the opposite—over others.” U.S. Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003); see 20 U.S.C. §7904(b).

The Second Circuit thus erred in reading *Marsh* to forbid offering what it deemed “sectarian” invocations at municipal board meetings. Indeed, requiring that prayers reflect judges’ preconceived notions of the appropriate amount of religious diversity is a grave departure from the religious neutrality required by the Establishment Clause.

#### 4. Free speech precedents

Finally, the Second Circuit’s decision runs afoul of the Free Speech Clause and the command of viewpoint neutrality. Even in administering a nonpublic forum for “official business,” the government may not discriminate based on viewpoint, including religious viewpoint. See *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46-49 (1983); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Further, the Court’s free speech precedents teach that “inquir[ing] into the significance of words and practices to different religious

faiths” unconstitutionally “entangle[s] the State with religion.” *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981).

Under the Second Circuit’s ruling, however, those who believe that prayer should address particular deities are barred from praying, while those who believe that the deity may be addressed in generic terms may pray. This is precisely the sort of viewpoint-based discrimination and government-imposed orthodoxy that the First Amendment was designed to prohibit.

**C. Enforcing a “sectarian”-“nonsectarian” distinction is also highly unworkable and incapable of neutral administration.**

Enforcing a “sectarian”-“nonsectarian” line in anything like a neutral manner is also highly unworkable, if not impossible. Indeed, the Second Circuit’s own examples reveal the futility of trying.

The court characterized a “third of the prayers” as speaking in “generically theistic terms,” citing as examples a Christian minister’s invocation of “Heavenly Father” and a Wiccan priestess’s invocation of “Athena and Apollo.” Pet. App. 7a. But the notion that these examples are “generally theistic” is at best debatable. Appeals to “Athena and Apollo” imply a Greek polytheism rejected by monotheistic faiths. And appeals to God as “Father” reflect a personal, and possibly trinitarian, conception of God.

Among those who identify themselves as Christian, there are substantial differences of opinion on the nature of the Trinity. Many liberal Protestants would not describe the Trinity as “Father, Son, and Holy Spirit.” Instead, citing scriptures such as *John* 4:24 (KJV), they would argue that “God is a Spirit,” and describe the triune God in gender-neutral terms,

such as “Creator, Savior, and Spirit.” Cf. Karen Armstrong, *A History of God: The 4,000-Year Quest of Judaism, Christianity and Islam* 382-383 (1993).

By contrast, many Catholics and Protestants would decline to use gender-neutral terms to address God. Such an understanding of God would be inconsistent with their understanding of the Bible and church tradition. Cf. Paul Johnson, *The Quest for God: A Personal Pilgrimage* 48-49 (1996). And this is to say nothing of the views of sects such as Christian Scientists, which understand the divine in a purely impersonal, metaphysical sense. See Mary Baker Eddy, *Science and Health with Key to the Scriptures* 331 (2000 ed.). Given such deep-seated religious differences, the Second Circuit’s decree that a gender-specific reference to God as “Father” is “generally theistic” is uninformed and incorrect.

The same is true of other names for the divine, such as “Elohim” or “Allah,” which some consider generic but others deem sect-specific. For example, one leading authority states that “[m]ost often [*Elohim*] is a plural of majesty for Israel’s ‘God’” (*Harper Collins Bible Dictionary* 737 (rev. ed. 1996)), and another states that “the widespread usage in Hebrew of this plural form \* \* \* was almost certainly encouraged by the belief in the Israelite God as the only one of significance in Israel and therefore as the sum and total of all deity” (*Dictionary of the Bible* 334 (rev. ed. 1963)). Thus, some may view use of *Elohim* as “sectarian.”

Similarly, some Muslims view the term “Allah” as a generic term for God, while others believe “Allah” to be “the proper name of God” as it is “a unique noun in Arabic” with “no female counterpart” and “no plural

form.”<sup>9</sup> Thus understood, use of the word “Allah” might well “exclude” those who do not share a Muslim conception of God—or even be viewed as discriminating among Muslim conceptions of the divine.

In short, theological distinctions are not amenable to evaluation under an “objective, reasonable person” test borrowed from the world of torts. And differences among faiths are not only subtle and complex, but far beyond civil courts’ authority to administer. The constitutional way to respect people of all faiths is to let everyone pray in accordance with conscience and in the language of their own religion.

**III. Judicial inquiry into the content of legislative prayers would unduly interfere with the internal workings of a co-equal branch of government.**

As we have shown, *Marsh* cannot be read to hold that “nonsectarian” prayer is constitutional and “sectarian” prayer is unconstitutional. Furthermore, the judicial oversight needed to administer the Second Circuit’s approach would be both unworkable and an affront to the internal workings of a co-equal branch of government.

In cases such as this, the Court “must have ‘due regard to the fact that [it] is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.’” *Rostker*, 453 U.S. at 64 (citation omitted). Deference to legislative judgments is especially ap-

---

<sup>9</sup> *Three Faiths, One God: A Jewish, Christian, Muslim Encounter* 68 (John Hick & Edmund S. Meltzer, eds., 1989).

appropriate when matters concern the legislature’s internal workings, when there is no principled basis for adjudication, or when the legislature has “specifically considered the question of \* \* \* constitutionality.” *Ibid.* All of these factors—together with principles of federalism—warrant sustaining the prayer practice here. See *Marsh*, 463 U.S. at 790-791.

**A. The constitutionality of legislative prayer has been considered by Congress, whose practice was dispositive in *Marsh*.**

To begin with, the constitutionality of legislative prayer has been considered by Congress, whose practice was central in *Marsh*—and States and localities are no less entitled to engage in the same practices.

In the 1850s, the Senate received numerous petitions seeking “to abolish the office of chaplain” and, along with it, the practice of prayer. S. Rep. No. 32-376, 1 (1853). The Senate acknowledged that, if the practices at issue “violate either the letter or the spirit of the constitutional prohibition, \* \* \* they should at once be repealed.” *Ibid.* But the Senate recognized that these practices did not violate the Establishment Clause. *Id.* at 2-4; S. Journal, 32d Cong., 2d sess. (Jan. 19, 1853), 114; S. Rep. No. 32-376 (1853); accord H.R. Rep. No. 33-124 (1854); H.R. Rep. No. 31-171 (1850). A Senate Judiciary Committee report found “no doubt” about this conclusion. S. Rep. No. 32-376 at 4.

For example, the report deemed it significant that the “range of selection” of chaplains was “absolutely free in each house amongst all existing professions of religious faith.” *Id.* at 2. “[N]o religion, no form of faith, no denomination” was given any “preference.” *Ibid.* Members were not “compelled” to attend the

prayers, nor did any member “gain[] any advantage,” “incur[] any penalty,” or “lose[] any advantage by declining to attend.” *Ibid.* The chaplain did not “owe[] his place” to his “holding a particular faith.” *Ibid.* And while chaplains “[were] always [selected] from some one of the [Christian] denominations,” this was “not in consequence of any legal right or privilege, but by the voluntary choice of those who have the power of appointment” and “the fact that almost our entire population belong to or sympathize with some one of the Christian denominations.” *Id.* at 3.

The “strongest reason” supporting the practice’s constitutionality, however, was that “from the beginning, our government has had chaplains in its employment” and that the same Congress that established the chaplaincies drafted the First Amendment. *Id.* at 4. The Founders “were true lovers of liberty,” “utterly opposed any restraint upon the rights of conscience,” and “did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators.” *Ibid.* Thus, the challenged practices did not “inwad[e] religious liberty in the widest sense of the term.” *Id.* at 2.

That conclusion is entitled to deference, even in a case involving a town’s practice of legislative prayer. *Marsh* mentioned the Senate Report in a footnote, without explaining its doctrinal significance. *Id.* at 787 n.10. But the report’s content provides additional support for *Marsh*’s holding. And it would be “incongruous” to “impos[e] more stringent First Amendment limits” on state and local legislatures than are imposed upon Congress. *Id.* at 790-791.

**B. The practice of legislative prayer is supported by constitutional provisions that commit the appointment of officers and the creation of internal rules to the legislative branch.**

Deference to the practice of unhindered legislative prayer is also warranted in light of “textually demonstrable constitutional commitment[s] of the issue to a coordinate political department.” *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The Constitution textually commits to Congress the exclusive authority to choose its officers (U.S. Const. art. I, §3, cl. 5), and to determine the rules of its proceedings (*id.* art. I, §5, cl. 2). When the First Congress convened, the Senate’s first order of business was to determine its rules and choose its officers. It promptly appointed the first Senate chaplain. 1 Annals of Cong. 24 (Joseph Gales, ed. 1789). By Senate rule, the chaplain’s prayer immediately follows the Presiding Officer taking the chair and immediately precedes the recitation of the Pledge of Allegiance. S. Standing Rule IV.1(a) (2000). The internal practices of Congress merit deference, and similar deference should be accorded to the internal practices of state and local legislatures.

**C. There are no judicially manageable standards for adjudicating the permissibility of legislative prayer.**

Deference to legislative prayer is also supported by “the lack of satisfactory criteria for a judicial determination” of what constitutes sufficiently inclusive prayer. See *Baker*, 369 U.S. at 210 (citation omitted). The court below made little effort to conceal this, admitting it could offer only “limited guidance” about

what a permissible prayer practice would look like. Pet. App. 24a. Even “municipalities with the best of motives may still have trouble,” the court reasoned, because “even a single circumstance may appear to suggest an affiliation” and the Constitution requires a “delicate balancing act.” Pet. App. 26a, 27a, 25a.

With due respect to the Second Circuit, the “appearance” of a “suggestion” of an “affiliation” is not a sound constitutional basis for interfering with the internal workings of a legislature. “The Establishment Clause, as the name suggests, forbids only the establishment of religion, not the mere appearance of doing so.” *Kreisner v. City of San Diego*, 1 F.3d 883, 899 (9th Cir. 1993) (Kozinski, J., concurring). And identifying “sectarian” legislative prayers is beyond the realm of manageable *legal* standards.

As Justice Souter observed, no “subject [is] less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible,” than “comparative theology.” *Weisman*, 505 U.S. at 617-618 (Souter, J., concurring); see also *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008) (“Whether invocations of ‘Lord of Lords’ or ‘God of Abraham, Isaac, and Mohammed’ are ‘sectarian’ is best left to theologians”). Indeed, the Second Circuit all but conceded this in abjuring any principled test in favor of its own “judgment” about “the totality of the circumstances.” Pet. App. 18a, 19a.

Absent clear, workable standards for governing legislators’ conduct, judicial interference with the internal workings of state legislatures is unjustified. And “[c]ourts are particularly likely to defer to the judgments of representative bodies when there are no judicially manageable standards for decisionmaking.”

See Michael W. McConnell, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 186 (1998). That is the case here.

\* \* \* \* \*

In this religiously diverse Nation, the best means of ensuring that the government does not prefer any particular religious view in the context of legislative prayer is not to silence some such prayers while allowing others. It is to allow those who pray to do so in accordance with the dictates of their consciences.

As *Marsh* confirms, this approach respects 230 years of “unbroken practice \* \* \* in the National Congress,” and the Framers’ view that the practice poses “no real threat” of establishing religion. 463 U.S. at 795. This approach also heeds *Marsh*’s admonition that the state ought not “parse \* \* \* particular prayer[s].” *Ibid.* And it ensures that legislative prayers will not become a uniform state-imposed litany, but rather will reflect varied and vibrant expressions of faith from the Nation’s many citizens.

In sum, allowing those who offer legislative prayers to pray in accordance with their own consciences is the approach that best serves the value of religious liberty that underlies the First Amendment.

### CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

LINDA T. COBERLY  
MICHAEL D. BESS  
WILLIAM P. FERRANTI  
*Winston & Strawn LLP*  
*35 West Wacker Drive*  
*Chicago, IL 60601*  
*(312) 558-5600*

STEFFEN N. JOHNSON  
*Counsel of Record*  
GENE C. SCHAERR  
ELIZABETH P. PAPEZ  
ANDREW C. NICHOLS  
*Winston & Strawn LLP*  
*1700 K Street, N.W.*  
*Washington, DC 20006*  
*(202) 282-5000*  
*sjohnson@winston.com*

*Counsel for Amici Curiae*

AUGUST 2013