No. 12-696

In the

Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY, et al.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

EDWIN MEESE III
214 Massachusetts Ave., NE
Washington, D.C. 20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae Center for Constitutional Jurisprudence

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Rules

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Claremont Institute's Center for Constitutional Jurisprudence,[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Arizona Christian School Tuition Organization v. Winn*, ___ U.S. ___, 131 S.Ct. 1436 (2011); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

The Center is vitally interested in preserving the freedom of religion as one of the central liberties protected by the Constitution. The First Amendment prohibits interference with an individual's free exercise of religion, but does not require a prohibition on public acknowledgment of our religious heritage. Indeed, the history of the nation both before and after adoption of the Bill of Rights demonstrates a commitment to public recognition of the central role that religion plays in the life of the nation and its citizens.

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief by filing blanket consent with the clerk.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Court's Establishment Clause jurisprudence is in a hopeless tangle. The tests developed by this Court have led to wildly conflicting decisions by the appellate courts and yield results far removed from the original purpose of the Religion Clause of the First Amendment.

A proper interpretation of the Religion Clause requires the Court to consider the reasons that states pressed for its inclusion in the Constitution. Further evidence of the meaning of the First Amendment is found in the practices of the three branches of the federal government in the wake of its ratification by the states. This history demonstrates that the concern motivating the "no law respecting an establishment of religion" language of the First Amendment was federal government coercion of private religious conduct. Although adopted as a federalism protection, this portion of the First Amendment has been incorporated against the states. But the courts have lost sight of the "no coercion" principle at the foundation of the amendment.

This Court should return to the original understanding of the "no coercion" principle in interpreting how this provision applies against state and local government. In the absence of coercion, the *content* of legislative prayer is beyond the control of the judiciary.

ARGUMENT

I. THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE FAILS TO PROTECT INDIVIDUAL LIBERTY IN RELIGIOUS OBSERVANCE

As then Justice Rehnquist noted in his dissent in *Wallace v. Jaffree*, "[I]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history." 472 U.S. 38, 92 (1985)(Rehnquist, J., dissenting). Twenty-eight years later, it is clear that Justice Rehnquist's admonition fell on deaf ears. The direct result of this is "[A]n Establishment Clause jurisprudence in shambles." *Utah Hwy Patrol Ass'n v. American Atheists, Inc.*, __ U.S. __, 132 S.Ct. 12 (2011) (denying cert. in *American Atheists Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010)(Thomas, J. dissenting).

The constitutional history that should be considered here includes reasons for adding the Religion Clause to the Constitution and the founding generation's interpretation of the clause as they applied it to public life. As this Court has stated, the First Congress "...was a Congress whose constitutional decisions 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, 174-75 (1926); *see also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (stating that constitutional interpretations of those who drafted the document are "contemporaneous and weighty evidence of its true meaning").

A. The Religion Clause Was Added To The Constitution To Ensure That The Federal Government Would Not Interfere With the Individual Freedom Of Religion

In colonial America, state establishments of religion were ubiquitous. While the Puritans ruled New England to advance their vision of a Christian commonwealth, the Church of England held the allegiances of colonies like Virginia and Georgia. Michael McConnell, *The Origins And Historical Understanding Of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409, 1422-23 (1990) [hereinafter McConnell, *Origins of Free Exercise*]. New York and New Jersey welcomed those that did not fit into the Puritan or Anglican tradition. *Id.* Pennsylvania and Delaware were founded as safe havens for Quakers, while Maryland was founded as a refuge for English Catholics who suffered persecution in Britain. *Id.* Most notably, Roger Williams founded Rhode Island as a colony for Protestant dissenters after the General Court banished him from Massachusetts. *Id.*

This variety of religious establishments allowed colonists to settle in a place that most accommodated their own religious preferences. Even as disestablishment took hold after the Revolution, states viewed religious belief and practice as essential to a civil society. *See* Mass. Const. of 1780, pt. 1, art. III ("[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality.."); Petition for General Assessment (Nov. 4, 1784), *reprinted in* C. James, Documentary History of the Struggle for Religious Liberty in Virginia 125, 125 (1900 and photo.

reprint 1971) ("[B]eing thoroughly convinced that the prosperity and happiness of this country essentially depends upon the progress of religion..."); Washington, *Farewell Address* (Sept. 17, 1796), *reprinted in* 1 Documents of American History 169, 173 (H. Commager 9th ed. 1973) ("[O]f all the dispositions and habits that lead to political prosperity, religion and morality are indispensible supports...").

This history of varied establishments and trend of disestablishment provided the impetus for the Religion Clause. Antifederalists were alarmed at the Constitution's failure to secure the individual rights of Americans and were concerned that the federal government would have the power to declare a national religion, thus squelching the practices of religious minorities. *See Letters from the Federal Farmer (IV)* (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist 245, 249 (Herbert J. Storing ed., 1981); *see also Essay by Samuel, Indep. Chron. & Universal Advertiser (Boston),* Jan. 10, 1788, reprinted in 4 The Complete Anti-Federalist, *supra*, at 191, 195. Though not hostile to state establishments, the antifederalists were concerned that a federal government might "[M]ake every body worship God in a certain way, whether the people thought it right or no, and punish them severely, if they would not." *Letters from a Countryman (V)*, N.Y, J., (Jan. 17, 1788), reprinted in 6 The Complete Anti-Federalist, *supra,* 86, 87. As one antifederalist noted regarding the differences between different states, "It is plain, therefore, that we [Massachusetts citizens] require for our regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us." *Letters of Agrippa*

(XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, *supra,* 93, 94.

Acting upon these concerns, at least four states submitted amendments concerning religious liberty along with their official notice of ratification of the Constitution. *See Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter The Founders Constitution] ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion, according the dictates of his conscience.."); *New Hampshire Ratification of the Constitution* (June 21, 1788), reprinted in 1 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 325, 326 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) ("Congress shall make no laws touching religion, or to infringe the rights of conscience"); *New York Ratification of Constitution* (July 26, 1788), reprinted in The Founders' Constitution, *supra* 11-12 ("That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."); *Proposed Amendments to the Constitution, Virginia Ratifying Convention* (June 27, 1788), reprinted in The Founders' Constitution, *supra* 15-16 ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion...").

With these demands from various states in mind, the First Congress set to work to fashion an

amendment that would appease these concerns. McConnell, *Origins of Free Exercise, supra*, at 1476-77 After debate over the exact wording of the Religion Clause in the House and the Senate, both houses agreed to the final conference committee report. 1 Annals of Cong. 88 (Joseph Gales ed., 1789). From this committee emerged the Religion Clause as it is known today: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I.

The key term for purposes of this case is "establishment." As noted above, the Congress that proposed the First Amendment and the states that ratified it had significant experience with the concept of religious establishments. Some establishments involved governmental coercion that compelled a *form* of religious observance. Thus some states sought to control the doctrines and structure of the church. South Carolina did this through its 1778 Constitution requiring a church to ascribe to five articles of faith before being incorporated as a state church. S.C. Const. of 1778 art. XXXVIII, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1626 (Ben Perley Poore ed., The Lawbook Exch. Ltd. 2d ed. 2001) (1878). Other states, like Virginia, sought to control the personnel of the church and vested the power of appointing ministers of the Anglican Church in local governing bodies known as vestries. Rhys Isaac, *Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause*, 30 Wm. & Mary Q. 3 (1973).

The other type of government coercion at play in religious establishments involved coercion of the individual in his or her religious practice. Massachusetts, for instance, prosecuted Baptists who refused to baptize their children or attend Congregationalist services. Michael McConnell, *Establishment & Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev 2105, 2145 (2003)[hereinafter McConnell, *Establishment & Disestablishment*]. Georgia, supported the state church through a liquor tax. *Id.* at 2154. Other states limited political participation to members of the state church. *Id.* at 2178.

States that had establishments feared federal interference. *Letters of Agrippa (XII)*, Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, *supra,* 93, 94. That fear was also shared by states that had no establishment. Because of the Supremacy Clause, states were concerned that Congress might impose a federal establishment that would overrule individual state rules. Thus, the First Amendment's "no law respecting an establishment of religion" provision of the Religion Clause had a clear federalism purpose. The incorporation of this provision against the states must be understood as protecting state authority to the maximum extent possible consistent with individual liberty. *Zelman v. Simmons-Harris*, 536 U.S. at 678, 679 (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 50 (Thomas, J., concurring). The individual liberty protected by the clause is freedom from government coercion of individual religious observance or interference with the form of religious worship.

The prohibition on any law "respecting an establishment of religion" was never meant to be a prohibition on public acknowledgement of religion. It was instead a ban on federal government coercion and federal intrusion on state authority. This distinction is clear from the rich history of religious acknowledgments and exercises by all three branches of government after adoption of the First Amendment.

B. The Founders' Understanding Of The Religion Clause As A Protection For Individual Religious Liberty Is Reflected In The Practices Of The Three Branches Of Government

The clearest example of the founders' understanding of the operation of the Religion Clause is reflected in acknowledgements of religion that were commonplace in every branch of the early federal government. Neither the courts, Congress, nor the President viewed public acknowledgements of religion as a threat to religious liberty. Instead, the founding generation embraced public religious proclamations and practices.

In the executive branch, all of the early Presidents – including Thomas Jefferson, an oft-cited proponent of strict separation between church and state - invoked the name of God in their inaugural addresses. 1 *Messages and Papers of the Presidents*, 1789-1897 at 382 (J. Richardson ed. 1897). Additionally, Presidents Washington, Adams, and Madison all declared official days of prayer and thanksgiving. *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). In 1800, Congress approved the use of the Capitol Building as a venue for Christian worship. 10 Annals of Cong. 797 (1800). President Jefferson often frequented

these services. James Hutson, *Religion and the Founding of the American Republic* 84, 89 (1998).

Throughout history Presidents often invoked divine guidance and comfort in the midst of troubled times. Examples include President Franklin Roosevelt's prayer for the soldiers who landed on Omaha Beach (Franklin Delano Roosevelt, D-Day Speech (June 6, 1944), in http://www.historyplace.com /speeches/fdr-prayer.htm); President George W. Bush's address to Congress after the September 11 attacks (George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), in 2 Pub. Papers of the Presidents: George W. Bush: 2001, at 1140 (2003)); and President Obama's Newtown address (Barack Obama, *Remarks by the President at Sandy Hook Interfaith Prayer Vigil*, WhiteHouse.Gov (Dec. 16, 2012), http://www.whitehouse.gov/the-press-office/2012/12/16/remarks-president-sandy-hook-interfaith-prayer-vigil).

This Court also has a long history of religious acknowledgment. "God save this Honorable Court," became the traditional opening of Court, as early as Chief Justice Marshall's time - a practice that continues today. C. Warren, 2 *The Supreme Court in United States History* 469 (1922). Further, John Jay invited members of the clergy to open sessions of the New England circuit court in prayer. 2 *The Documentary History of the Supreme: Court of the United States: The Justices on Circuit, 1789-1800*, at 13-14 (M. Marcus ed. 1988).

Nowhere in the federal government was religion's influence more pronounced than in the legisla-

tive branch. Congress passed laws like the Northwest Ordinance, stating that "Religion, morality, and knowledge being necessary to good government, schools and means of education shall ever be encouraged." Northwest Ordinance of 1787, Art. III., reenacted as Northwest Ordinance of 1789, ch. 8, § 1, 1 Stat. 50. The first Congress also pressed the President to recommend a day of prayer to the people. 1 Annals of Congress 914-15 (J. Gales ed. 1789). The national motto that adorns our currency has been statutorily decreed to be "In God we trust." 36 U.S.C § 302. Perhaps most tellingly, "in the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate." *Lynch*, 465 U.S. at 674. Notably, one of the Congressmen appointed to draft the bill providing for paid chaplains was James Madison, another founder who is often claimed to be a proponent of strict separation between church and state. *Marsh v. Chambers*, 463 U.S. 783, 788 n.8 (1983).

Not only does Congress still have an office of the chaplain (Office of the Chaplain, United States House Of Representatives, http://chaplain.house.gov/ (last visited July 20, 2013)), but the Capitol Building has a special prayer room set aside for use by members of the House and Senate (*County of Allegheny v. ACLU, Greater Pittsburgh Chapter,* 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in part, dissenting in part)). The House and Senate have a prayer breakfast every Thursday morning, and they sponsor an annual Prayer Breakfast. Alan Cooperman, Bush Lauds Catholics' Role in U.S. Freedom, Wash. Post, May 21, 2005, at A6. In the House Chamber, a portrait of Moses faces the Speaker and the national

motto of "In God we trust" is etched across the wall behind the Speaker's rostrum. Eugene F. Hemrick, *One Nation Under God: Religious Symbols, Quotes, and Images in Our Nation's Capital* at 28 (2001). The seals of religious leaders that were lawmakers also adorn the House Chamber walls, including Popes, saints, a Jewish rabbi, and a Muslim sultan. *Id.* at 49-51. The Capitol rotunda is emblazoned with a fresco of George Washington ascending into heaven. Architect of the Capitol, *The Apotheosis of Washington*, http://www.aoc.gov/cc/art/rotunda/apotheosis/Overview.cfm (last visited July 23, 2013). Finally, the front door of the Capitol is adorned with crucifixes and depictions of Popes, Franciscan monks, and rosaries. Architect of the Capitol, *Columbus Doors Main Page*, http://www.aoc.gov/cc/art/coldoors/index.cfm (last visited July 23, 2013).

The United States Capitol is and always has been replete with religious imagery and religious activity, yet none of the traditions or adornments are rightly conceived as a threat to religious liberty. Indeed, the government of the early Republic celebrated our rich religious history with a variety of public acknowledgements, many of which continue today. In view of the founding generation's disposition towards religion in the public square, a correct reading of the Religion Clause evidences no hostility to public religious acknowledgment. Acknowledgment of religion – even the start of legislative sessions with prayer – does not coerce any person to adhere to any particular doctrine nor does it interfere with ecclesiastical decisionmaking.

C. The *Lemon*/Endorsement Test Does Not Advance The Purpose Of Individual Liberty In Religion

Departing from this history, this Court established a three-part test for reviewing Establishment Clause claims in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). One prong of the *Lemon* test has evolved into a freestanding "endorsement" test. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J. concurring in the judgment). Under the *Lemon*/endorsement test, courts must ask whether a theoretical objective, neutral observer would believe that the government is endorsing a particular religion. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000). The type of government coercion meant to be outlawed by the Religion Clause is not considered in this analysis. The circuit courts of appeals struggle to apply these tests. *See*, *e.g.*, *Doe v. Elmbrook School Dist.*, 687 F.3d 840, 849-50 (7th Cir. 2013) (petition for writ of certiorari pending, No. 12-755); *Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 974 (9th Cir., 2011); *Doe v. Indian River School Dist.*, 653 F.3d 256, 267 (3rd Cir., 2011); *American Civil Liberties Union of Ohio v. DeWeese*, 633 F.3d 424, 434 (6th Cir., 2011).

Members of this Court have noted that strict application of this "endorsement test" would "invalidate scores of traditional practices recognizing the place religion holds in our culture." *Allegheny*, 492 U.S. at 674 (1989) (Kennedy, J., dissenting). Lower courts, attempting to weave their way between the language of the test and historical practices, have understandably come to hopelessly conflicting deci-

sions. Indeed, "five sitting Justices have questioned or decried the *Lemon*/endorsement test's continued use." *Utah Hwy. Patrol Ass'n*, 132 S.Ct. at 21 (Thomas, J. dissenting). Over the course of *Lemon's* existence, this Court has ignored it (*See Zelman v. Simmons-Harris*, *supra*), applied it (*See Santa Fe Indepent School Dist.*, 530 U.S. at 314) and declared that it is not binding (*See Lynch,* 465 U.S. at 679).

The height of this confusion occurred in 2005 when this Court applied the *Lemon* test to declare a courthouse display of the Ten Commandments to be unconstitutional, *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 859-66 (2005), and then, on the same day, declined to apply *Lemon* in upholding a Ten Commandments display on the grounds of a state capitol, *Van Orden v. Perry*, 545 U.S. at 696-97 As one appellate court put it, "we remain in Establishment Clause purgatory." *American Civil Liberties Union of Kentucky v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005).

The Court's discordant analysis of Establishment Clause challenges has resulted in widespread confusion throughout the lower courts. One appellate court held a public crèche display unconstitutional under the Establishment Clause, while another found it to be constitutional. *Compare Smith v. County of Albemarle,* 895 F.2d 953 (4th Cir. 1990) *with American Civil Liberties Union of Kentucky v. Wilkinson*, 895 F.2d 1098 (6th Cir 1990). Another court held that a menorah displayed near a city hall was unconstitutional, while it later held that a menorah displayed at a public school did not violate the Establishment Clause. *Compare Kaplan v. Burling-*

ton, 891 F.2d 1024 (2d Cir. 1989) *with Skoros v. New York,* 437 F.3d 1 (2d Cir, 2006).

In assessing the constitutionality of legislative prayer, the Eleventh Circuit applied the standard set forth by this Court in *Marsh v. Chambers*, upholding the constitutionality of legislative prayer, *Pelphrey v. Cobb County, Georgia*, 547 F.3d 1263, 1278 (11th Cir. 2008), while the Fourth Circuit relied on *Allegheny*, finding legislative prayer to be unconstitutional because it had the "effect of aligning the government with a particular religion under the eyes of a reasonable observer," *Joyner v. Forsyth County, North Carolina*, 653 F.3d 341,348 (4th Cir. 2011). In the instant case, the Second Circuit ruled that the Town had an obligation to consider how those who attended Town meetings would perceive the prayer practice, finding the Town of Greece's prayer practice unconstitutional. *Galloway v. Town of Greece*, 681 F.3d 20, 32 (2d Cir. 2012). The court focused on the content of the prayers given by private actors chosen by lottery. These cases are merely a sampling of the widespread confusion throughout the lower courts on how to apply the Religion Clause to public acknowledgment of religion. *Utah Highway Patrol Ass'n*, 132 S.Ct. at 21 (Thomas, J., dissenting).

With such inconsistency amongst lower courts, it is no wonder that Justice Scalia once referred to the *Lemon*/endorsement test as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). It is time that this Court heed Justice Sca-

lia's advice and "drive a pencil through the creature's heart," finally putting *Lemon* to rest. *Id.*

II. THIS COURT SHOULD ANNOUNCE A NEW TEST MORE IN LINE WTH THE PURPOSE AND ORIGINAL UNDERSTANDING OF THE RELIGION CLAUSE

Interpreting the Establishment Clause to protect individual liberty against the backdrop of our federalist structure requires that the Court focus on the coercive nature of "establishments" as understood by those who drafted and ratified the First Amendment. *Zelman*, 536 U.S. at 679 (Thomas, J., concurring); *Newdow*, 542 U.S. at 52 (Thomas, J., concurring). An appropriate analysis shifts the inquiry away from the hypothetical neutral observer and refocuses it on the prevention of coercion in order to protect individual liberty. The content of the prayer is irrelevant so long as government power is not used to coerce participation in the prayer.

A. The *Marsh* Test Accurately Reflects The Founders' Understanding Of Establishment, Applied In The Context Of Legislative Prayer

In *Marsh v. Chambers*, this Court held that the Nebraska *legislature's* practice of opening sessions with a prayer by a paid chaplain did not violate the Establishment Clause. 463 U.S. at 784-85 (1983). In defense of the practice, the court cited the weighty historical tradition of legislative prayer that stretches back to the founding. *Id. at* 790. The Constitution's draftsmen did not see legislative prayer as a path to religious establishment, evidenced by their vote to appoint and pay for a chaplain for both hous-

es of Congress in the same week that they voted to approve the draft of the First Amendment for ratification by the states. *Id.* This Court continued by distinguishing legislative prayer from the concept of establishment by noting that it the prayer is "simply a tolerable acknowledgement of beliefs widely held among this country." *Id.* at 792.

The *Marsh* Court's understanding of establishment is one that aligns with the original understanding of "establishment." Like other governmental acknowledgments of this country's rich religious heritage, legislative prayer is not coercive and therefore does not establish religion. Rather, it recognizes, as Justice Douglas did in *Zorach v. Clauson* that "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Thus, the Establishment Clause "[D]oes not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

B. There Can Be No Establishment in the Absence of Government Coercion of the Individual or Interference with the Religious Organization

The *Lemon*/Endorsement test is a failed experiment in expanding the Establishment Clause in a manner that ultimately defeated the purpose of protecting individual rights in religion. Instead of protecting against coercion of individuals or government interference in ecclesiastical decisions, the test has been used as a weapon in a campaign to purge religion from the public square. The time has come to return to the original understanding of the First

Amendment as a protection for individual freedom of religion.

The appropriate standard for judging whether a government action interferes with the individual freedom of religion protected by the Establishment Clause will focus on preventing governmental interference and coercion. Such a test must proscribe "actual legal coercion," *Newdow*, 524 U.S. at 52 (Thomas, J., concurring), such as "coercion of religious orthodoxy...under force of law or threat of penalty, *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J.,dissenting). If the power of government is not used coercively to compel adherence to a particular belief or support of a particular church, there is no establishment.

At the same time, the Court's test must continue to prevent government interference in ecclesiastical decisions. Government, for example, cannot be allowed to interfere in the selection of ministers. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, __ U.S. __, 132 S.Ct 694, 703 (2012). Nor can government dictate mode or content of worship and prayer to which individuals and churches must adhere. *See Engel v. Vitale*, 370 U.S. 421, 425 (1962).

Under this test, the content of a prayer is irrelevant. So long as the government entity is not using its power to coerce participation or adherence, there is no constitutional command that the prayer be devoid of religious content. In instances of prayers delivered by private individuals chosen by lottery, as in this case, any requirement that government police the content of the prayer is itself a violation of the Religion Clause. The Constitution is not offended by the mention of religion or even any particular reli-

gion. Instead, violation of the Religion Clause lies only in actual government coercion of the individual.

CONCLUSION

The decision below should be reversed and this Court's long-infirm decision in *Lemon* should be finally laid to rest.

DATED: August, 2013.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave., NE
Washington, D.C.
20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional
Jurisprudence
c/o Chapman University
School of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence