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 OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

James J. Knicely
KNICELY & ASSOCIATES, P.C.
487 McLaws Circle, Suite 2
Williamsburg, VA 23185
(757) 253-0026

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court and the Courts of Appeal on numerous occasions over its 30 year history, including in recent years serving as counsel of record in the legislative prayer case of *Turner v. City Council of the City of Fredericksburg,* 534 F.3d 352 (4th Cir. 2008). One of the purposes of The Rutherford Institute is to advance the preservation of the most basic freedoms our nation affords its citizens—in this case, the constitutional right of citizens to engage in free speech in offering prayers at public meetings and freedom from governmentally imposed belief systems and establishments of religion.

---

[1] No counsel for either 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. The parties have filed letters with this Court consenting to the filing of this brief.

STATEMENT OF FACTS[2]

Amicus incorporates by reference the statement of facts set forth in the merits Brief of the Petitioner, but highlights the following *specific facts* that are highly relevant to the Court's resolution of this case.

Since 1999, the Town Board of Greece, New York, has invited community clergy and others to offer invocations at the beginning of each meeting[3] in order to solemnize the occasion.[4] The Board has never adopted any formal guidelines as to the content of prayers, nor has it ever required or requested invited clergy to limit themselves to any particular prayer format (including any requirement that prayers be inclusive or ecumenical).[5] However,

---

[2] Except as otherwise identified, the citations in the Statement of Facts are to pages in the Special Appendix and the Joint Appendix filed by the parties in the Second Circuit Court of Appeals. Such citations are identified by the abbreviation "S.A." or "J.A." followed by the page number from the Special Appendix or the Joint Appendix.

[3] The Town Board meets on the third Tuesday of every month in the Eastman Room of the Greece Town Hall (S.A. 6; J.A. A29). Meetings are open to the public and are broadcast on the local cable television station (J.A. A85).

[4] The practice of inviting clergy to pray replaced the Board's previous practice of opening meeting**s** with a moment of silent prayer (S.A. 6-7).

[5] S.A. 7.

the Board did publish a clear and concise statement of its prayer policy in a June 20, 2007, letter from Town Supervisor John T. Auberger to the Respondents' counsel (Sup. Ct. Joint Appendix at 24A-25A):

> As you know, the Greece Town Board opens its meetings with a prayer from a Greece clergy member seeking divine guidance in the decisions the board makes. We do not request our invited clergy to advance any particular faith or denomination. The Town does not control the content of the prayers given, nor does it place restrictions or guidelines on these prayers. The board believes such control would inhibit religious freedom and freedom of speech, both rights protected by the constitution.
>
> We invite Greece clergy from a list provided in the Greece Post on a rotating basis. While it has never been requested, if someone from a faith not listed in the Greece Post requested a prayer led by someone of their faith, we would make an effort to accommodate that request.
>
> It is therefore the Town's position that we are not advancing any religion or giving preference to any one faith over another. Accordingly, it is our intent to continue our current practice.

This succinct statement of Board policy is borne out in practice by the testimony of the multiple Town employees working in the Office of Constituent Services who were responsible for implementation of the policy over many years. Employees Linda Sofia, Geraldine Wagoner, and Michele Fiannaca all testified in depositions that they used the "Town Board Chaplains" list,[6] and sometimes a local Community Guide, to find persons who might offer a prayer. (J.A. A838). Each of the

[6] Since 1999, Sofia, Wagoner, and Fiannaca maintained the list of possible prayer-givers and scheduled individuals to deliver the prayers. (S. A. 8-14)). The list was compiled by the employees over time from the local Yellow Pages, the *Greece Post's* "Religious Service Directory," and the local Community Guide (J.A. A90). In 2003, Employee Linda Sofia prepared a document entitled "Town Board Chaplains" which included the names of people who had agreed to give a prayer at Town Board meetings. (J.A. A834-835). Ms. Fiannaca compiled a document that included all the names of churches, synagogues, places of worship, and people who had expressed interest in giving a prayer. Most of the religious congregations in the Town are primarily Christian, but there is one Buddhist temple in the Town and several Jewish synagogues located just outside the Town (S.A. 18-19). The document was not exclusive, as Ms. Fiannaca added to the list anytime someone indicated a desire to give a prayer. Additionally, Ms. Fiannaca attested that if she learned of a new church in Town or a church that was not on the list, she would add it to the list. Further, if anyone asked to be removed from the list, she would remove them. Finally, if anyone specifically asked to give a prayer, she would put them on the next available slot (J.A. A829; S.A. 14-17, 43-44).

employees randomly called people on the list to find prayer-givers. (J.A. A826, A828, A829, A834, A839). No one ever intentionally neglected to call a specific church, (J.A. A834, A839) or rejected anyone from giving a prayer. The employees confirmed that no one ever told them to reject someone as a prayer-giver, or to remove someone from the list, or how or to whom a prayer-giver should pray. (J.A. A830, A835, A839).

The Respondents met with Town Deputy Supervisor Jeffrey L. McCann and Director Constituent Services Kathryn Firkins on September 27, 2007, and asked if an atheist could give a prayer, at which point they were told that they could in fact give the invocation. (S.A. 19). However, they never requested to be placed on the list of potential prayer-givers. In this meeting, the Town Board representatives also told them that anybody could request to deliver the prayer, that the Town had never before rejected a request, and that it did not review or censor prayer language.[7] Further, in

[7] S.A. 7, 15, 41. In January 2008, Dave Chikowsky, a person of Jewish faith, asked and was given permission to give a prayer (Supreme Court Joint Appendix at 109A-110A). In April 2008, Jennifer Zarpentine, a Wiccan priestess, asked and was given permission to give the prayer (Supreme Court Joint Appendix at 112A). Chikowsky delivered the prayer again in July 2008 (Supreme Court Joint Appendix at 114A-115A), and a person from the local Baha'i congregation delivered the prayer in December 2008 (J.A. A91). The Town explicitly invited the lay Jewish man and the Wiccan priestess after receiving inquiries from them about delivering the prayer, and also invited the Baha'i representative to do so as well. (J.A. A829, A907; S.A. 47).

response to their complaints, Respondents were informed that the prayer practice would continue and that the Town would not control the content of prayers by requiring them to be nonsectarian. (S.A. 3, 7, 19, 47).

SUMMARY OF ARGUMENT

The Court of Appeals suggests that the central inquiry in this case is whether a hypothetical, reasonable observer "would *believe* that the town's prayer practice had the *effect* of affiliating the town with Christianity"[8] taking into account "the interaction of the facts"[9] in the case. The Court of Appeals' approach is problematic for several reasons.

First, it departs from the time-honored historical analysis of *Marsh v. Chambers,* 463 U.S. 783 (1983), and its recognition of limited judicial review of legislative prayer. *See Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013).

Second, the Court of Appeals' "contextual" analysis --- based on the perceptions of the hypothetical "reasonable observer" --- revives the repudiated "primary effects" test of *Lemon v. Kurtzman*, 403 U. S. 602 (1971), an analysis eschewed in *Marsh*.

---

[8] 681 F.3d at 33 (emphasis added).

[9] *Id*.

Third, the Court of Appeals' admission that its decision provides little, if any, guidance for legislative bodies as to the limits of permissible legislative prayer[10] is an indictment of the paucity of its decisional framework and highlights the need to reaffirm the broad parameters of *Marsh*, subject to clarification that expression of sectarian sentiments in legislative prayer is not prohibited unless it transgresses the requisite boundaries of improper motivation, exploitation or proselytization, or disparagement of one faith over another. *Marsh v. Chambers*, 463 U.S. 783 (1983); *Wynne v. Town of Great Falls,* 376 F.3d 292 (4th Cir. 2004).

Finally, if even eminent jurists cannot agree on the outcomes of the so-called "delicate balancing" required to determine just what a hypothetical "reasonable observer" might "believe," how can legislative bodies be expected to successfully engage in such guesswork? The inherent vagueness of the "reasonable observer" approach, if upheld, will inexorably lead to only one safe harbor, namely, sanitizing legislative prayer of all sectarian content, thereby creating an intolerant regime of civil religion that is not permitted by the Establishment Clause.[11]

---

[10] The Court stated: "It is true that contextual inquiries like this one can give only limited guidance to municipalities that wish to maintain a legislative prayer practice and still comply with the mandates of the Establishment Clause." 681 F.3d at 33.

[11] The unabashed goal of the Respondents and Americans United for Separation of Church and State in this case is to extirpate *all sectarian references* from legislative prayer, as they initially argued to the District Court in their motion for summary judgment:

As Justice Kennedy wrote in *Lee v. Weisman*, 505 U.S. 577, 588-90 (1992), while there may be some support for the proposition "that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not," the First Amendment "does not allow the government to undertake that task for itself. . . . . The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either *proscribed* or *prescribed* by the State" [12] (emphasis added).

> Only nonsectarian, broadly inclusive legislative prayers are constitutional. Those that use the terminology of, or are otherwise associated with, any particular faith or denomination, are not.

This absolutist position was later masked on appeal, with Respondents first conceding that various courts of appeals had indicated "some tolerance of the inclusion of sectarian references," but then arguing that no such tolerance exists "[w]hen the audience for the prayers includes both adults and children. . . .", which, of course, with Town Board meetings being broadcast on local cable television, would include adults and children. *Compare* Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *Galloway v. Town of Greece,* Case No. 6:08-cv-06088, Docket Entry 32, January 1, 2008, at 8, *with* Brief of Plaintiffs-Appellants, *Galloway v. Town of Greece*, U. S. Court of Appeals for the Second Circuit, Case No. 10-3635, Docket Document No. 37, filed December 16, 2010, at 24, 26, 31.

[12] *Lee*, 505 U.S. at 589.

The history and governing tradition of this country recognizes its religious diversity, as well as principles of religious accommodation, but not governmental prescriptions of religious expression. For those reasons, the broad historical discretion afforded by *Marsh* for legislative bodies to formulate and implement legislative prayer policies, including those permitting sectarian content, should be affirmed, conditioned on there being no demonstrable improper motivation, exploitation or proselytization, or disparagement of one faith over another.

ARGUMENT

I. THE PRAYERS DELIVERED UNDER THE TOWN OF GREECE'S PRAYER POLICY COMPORT WITH THE STANDARDS ANNOUNCED BY THE U. S. SUPREME COURT IN *MARSH v. CHAMBERS*.

This Court in *Marsh v. Chambers,* 463 U.S. 783 (1983), stated unequivocally that:

> [t]he *content of the prayer* is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id. at 794-795. Judicial review of the *content* of legislative prayer was thus predicated on "whether the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief" and whether the prayer selection policy arose from some "impermissible motive." *Id.* at 794-95 (emphasis added). Absent those two factual predicates, *Marsh* made clear that "*it is not for [courts] to embark on a sensitive evaluation or to parse the content of a particular prayer*." *Marsh,* 463 U.S. at 794-795 (emphasis added).

The Second Circuit departed from the *Marsh* rubric by proceeding to parse the content of prayers notwithstanding the fact that the Court (1) ascribed "no religious animus to the town or its leaders," *Galloway v. Town of Greece*, 681 F.3d 20, 32 (2d Cir. 2012), and (2) found specifically that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*: they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." *Town of Greece*, 681 F.3d at 31-32. Notwithstanding these exculpatory facts, the Court launched ahead to breach *Marsh*'s prudential constraints and to announce that "[t]he town had an obligation to consider how its prayer practice would be perceived by those who attended Town Board meetings," *id.* at 32, and that "taking into account all of these contextual considerations in concert, ...[w]e conclude that an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity." *Id.* at 33.

The Ninth Circuit panel opinion in *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013), provides a complete and effective rebuttal to the decisional error in the *Town of Greece* decision. According proper deference to the historical and constitutional acceptance of legislative prayer, the Ninth Circuit determined that "the touchstone of the [*Marsh*] analysis should be whether the *government* has placed its imprimatur, deliberately or by implication, on any one faith or religion," *quoting Joyner v. Forsyth Cnty.*, 653 F.3d 341, 362 (4th Cir. 2011)(Niemeyer, J., dissenting). Moreover, it determined under *Marsh* that any question as to whether the government had intentionally affiliated itself with a particular sect does "not pivot on the practice's effect on the disapproving listener," but rather should focus specifically "on the *government's* actions." *Id*. at 1095-96 (emphasis added). Stressing the neutrality of the City of Lancaster's prayer policy and practice, and the fact that any sectarian input arose from the individual choices of prayer-givers and/or demographics, the Ninth Circuit rejected arguments that the City had intentionally affiliated the City with Christianity or lent the City's imprimatur to any sect or faith. *Id*. at 1099-1100.

The *Rubin* Court also noted that the "reasonable observer" analysis is derived directly from the "primary effects" test of *Lemon v. Kurtzman*, 403 U. S. 602 (1971), a test that was not invoked in *Marsh*. "Instead, the [Supreme] Court left *Lemon* on the shelf, upholding Nebraska's practice solely on the basis of original intent, tradition, and the absence of evidence suggesting a *state-led* effort to proselytize, advance, or disparage

any one religion." *Rubin*, 710 F.3d at 1097 (emphasis added).[13]

Wholly apart from the Second Circuit's defective decisional rubric, its admission that courts can provide only limited guidance to legislative bodies as to the constitutional boundaries for legislative prayer is equally disturbing. [14] The best advice the Court could offer the Town of Greece was for it to "ask itself whether what it does, *in context*, reasonably can be seen as endorsing a particular faith or creed over others. That is the *delicate balancing act* required by the Establishment Clause and its jurisprudence." *Town of Greece*, 681 F.3d at 33 (emphasis added). Given the innumerable viewpoints as to what the perceptions of an "*ordinary,* reasonable observer" might be in any particular "context" (*id*. at 629), and recognizing the failure of even eminent jurists to agree on outcomes based on the "delicate balancing" required to discern them --- with the default in most cases being the

---

[13] The Second Circuit seems to treat the dicta from the plurality decision in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989) --- a Christmas creche case --- as having equal weight with the Court's opinion in *Marsh*. However, "[n]othing in *Allegheny* suggests that it supplants *Marsh* in the area of legislative prayer."*See Simpson v. Chesterfield County,* 404 F.3d 276*,* 281 n. 3 (4th Cir. 2005), *cert. denied*, 546 U.S. 947 (2005).

[14] The Court stated: "It is true that contextual inquiries like this one can give only limited guidance to municipalities that wish to maintain a legislative prayer practice and still comply with the mandates of the Establishment Clause." *Town of Greece*, 681 F.3d at 33.

equivalent of a "we know it when we see it" standard --- there is little likelihood that legislative bodies will succeed in drawing such fine lines. This is especially true taking into account the wide disparities in cultures, populations and geographies within the United States.

If allowed to stand, therefore, the Second Circuit decision places every legislative prayer policy at risk, leaving but one safe harbor, namely, the hermetic sealing of legislative prayer against any and all sectarian content, inexorably producing a *de facto*, Establishment of non-sectarian, American civil religion. The lower court's failure to provide clear standards in this regard is not only a further indictment of its decision, it amplifies the necessity of reaffirming the broad parameters of *Marsh*, subject to clarification that the expression of *sectarian* sentiments in legislative prayer is not prohibited unless it transgresses the requisite boundaries of improper motivation, intentional exploitation, proselytization, or disparagement of one faith over another. *Marsh v. Chambers*, 463 U.S. 783 (1983); *Wynne v. Town of Great Falls,* 376 F.3d 292 (4th Cir. 2004).

In the present case, the Town of Greece's adoption of an open legislative prayer policy properly adhered to constitutional standards. The Town invited persons from a neutral database of community religious leaders (drawn from the broadest possible sources) to deliver prayer at the start of its meetings on a rotating basis. It specifically did not in policy or practice seek to advance any particular faith or denomination, or to

regulate content, or to impose controls that "would inhibit religious freedom and freedom of speech," and it made efforts to accommodate requests to pray. The *governmental motivation* behind the program was aimed at providing a diverse and inclusive program of legislative prayer[15] and the policy was, therefore, neutral, and not intentinally exploitative, proselytizing, or disparaging of other faiths.[16]

---

[15] This Court's precedents have upheld governmental programs that involve or serve persons with diverse backgrounds and/or messages or benefits that are the product of neutral governmental action and individual, privately-expressed choices, where no reasonable person would expect or understand the parties' views or actions or receipt of benefits to constitute government endorsement of any particular religion. *See, e.g., Zelman v. Simmons-Harris,* 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch*., 533 U.S. 98 (2001); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens,* 496 U.S. 226 (1990); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen,* 463 U.S. 388 (1983); *Widmar v. Vincent,* 454 U.S. 263 (1981).

[16] Remarkably, the Second Circuit recognized that the Town's prayer policy aspirations were neutrally adopted and implemented. The Court stated: "*[I]t seems to us that a practice such as the one to which the town here apparently aspired*—one that is inclusive of multiple beliefs and makes clear, in public word and gesture, that the prayers offered are presented by a randomly chosen group of volunteers, who do not express an official town religion, and do not purport to speak on behalf of all the town's residents or to compel their assent to a particular belief—*is fully compatible with the First Amendment*." *Town of Greece*, 681 F.3d at 34. (Emphasis added).

In conclusion, the applicable standard in this case is not the "effects" test of *Lemon v. Kurtzman*, but whether the Town engaged in intentional official action that was the product of improper motivation, exploitation or proselytization, or disparagement of one faith over another. In that regard, the Second Circuit found that the Town's policy inviting individually-promulgated and expressed prayers from a broad cross-section of the community did not constitute any such intentional transgression. *See Town of Greece*, 681 F.3d 31-32.[17] Accordingly, the decision below must be reversed.

[17] The Fourth Circuit's decision in *Wynne v. Town of Great Falls, supra*, is a paradigm of a municipality that intentionally exceeded the limitations imposed by *Marsh*. In *Wynne*, the District Court made explicit findings that "the Town Council insisted upon invoking the name 'Jesus Christ,' to the exclusion of deities associated with any other particular religious faith, at Town Council meetings in public prayers in which the Town's citizens participated." *Wynne*, 376 F.3d at 301.

II. THE *MARSH* DECISION SHOULD BE CLARIFIED TO ALLOW ALL TYPES OF LEGISLATIVE PRAYER, INCLUDING PRAYER WITH SECTARIAN REFERENCES, IN THE ABSENCE OF FINDINGS OF IMPROPER GOVERNMENTAL MOTIVATION, OR INTENTIONAL GOVERNMENTAL EXPLOITATION, PROSELYTIZATION OR DISPARAGEMENT OF ONE FAITH OVER ANOTHER.

If there is any one flaw in the *Marsh* decision, it is its failure to bridge all of its recited facts with the legal standards announced in the case. Thus, after *Marsh*, litigants in lower courts were successful in persuading judges to "cherry-pick" allegedly distinguishing facts from the decision to find that sectarian legislative prayers could not possibly be permitted under *Marsh* because *Marsh* recited that the Nebraska Unicameral Chaplain in the latter years of his tenure had removed previous prayer references to Jesus Christ.[18] The subsequent *dicta* from the plurality opinion in the *Allegheny* case made legislative prayer even more susceptible to court-approved non-sectarian, ecumenical prayer.[19] Thus, in the face of an equal protection challenge by a Wiccan seeking to render a legislative prayer, the Fourth Circuit offered what is perhaps the most

---

[18] *See, e.g.*, *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 (6th Cir. 1987).

[19] *See, e.g.*, *Hinrichs v. Bosma*, 440 F.3d 393, 399-400 (7th Cir. 2006).

pristine expression of judicial dogma extolling the virtues of *non-sectarian* legislative prayer:

> *Our civic faith* seeks guidance that is not the property of any sect. To ban all manifestations of this faith would needlessly transform and devitalize the very nature of our culture. When we gather as Americans, we do not abandon all expressions of religious faith. Instead, *our expressions evoke common and inclusive themes* and *forswear*, as Chesterfield has done, *the forbidding character of sectarian invocations*.

Simpson, 404 F.3d at 287 (emphasis added).[20]

---

[20] In *Simpson*, the Chesterfield County Board amended its invitation letter to request that prayer-givers not use the name of Jesus Christ after its unrestricted content policy was challenged by the would-be Wiccan prayer-giver. *Id.*, 404 F.3d at 279, n.1. The Court reviewed the new policy, noting approvingly that "[c]lerics from multiple faiths and traditions have described divinity in wide and embracive terms — 'Lord God, our creator,' 'giver and sustainer of life,' 'the God of Abraham, Isaac and Jacob,' 'the God of Abraham, of Moses, Jesus, and Mohammad,' 'Heavenly Father,' 'Lord our Governor,' 'mighty God,' 'Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator.' Chesterfield's openness to this ecumenism is consonant with our character both as a nation of faith and as a country of free religious exercise and broad religious tolerance." *Id*. at 284.

This Court has recently reaffirmed a countervailing principle: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Agency for International Development et al. v. Alliance for Open Society International, Inc., et. al*, 133 S. Ct. 2321, 2332 (2013) (*quoting West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943)).[21] These concerns were recognized in *Lee v. Weisman,* 505 U.S. at 588, where this Court upheld a challenge to a high school graduation prayer policy provided to a rabbi (who was to offer the prayer) in a booklet titled "Guidelines for Civic Occasions" with the advice "that his prayers should be nonsectarian." The petitioner in *Lee* contended that *non-sectarian* prayer was necessary to avoid an Establishment Clause violation. Writing for the majority, Justice Kennedy stated that while there may be some

---

[21] The Court likewise acknowledged that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61 (2006) (citing *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), and *Wooley* v. *Maynard*, 430 U. S. 705, 717 (1977)). The Court further stated that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 641 (1994); *see Knox* v. *Service Employees*, 132 S. Ct. 2277, 2288 (2012) ("The government may not . . . compel the endorsement of ideas that it approves.").

support for the proposition "that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not," the First Amendment "does not allow the government to undertake that task for itself."[22] The Court further declared that "[i]t is a cornerstone principle of our Establishment Clause jurisprudence that *it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government* …. The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.* at 588-90 (emphasis added). The Court further explained:

> We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. . . . If common ground can be defined with permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. *But though the First Amendment does not*

[22] *Lee*, 505 U.S. at 589.

> *allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.*
>
> . . . . And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. *The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.*

Id. at 588-90 (emphasis added and internal citations omitted).

The dangers of regulating the content of prayers --- including commands to pray only with non-sectarian content --- are, of course, inherently recognized in *Marsh*'s proscription against "parsing the content of prayers." Both the Second Circuit in this case, and the Ninth Circuit in the *Rubin* case, also recognized even more explicitly the dangers of *prescribing* non-sectarian prayer. For example, the *Town of Greece* Court stated:

> Under the First Amendment, the government may not establish a vague theism as a state religion any more than

> it may establish a specific creed. . . . Nor do we hold that any prayers offered in this context must be blandly "nonsectarian." A requirement that town officials censor the invocations offered. . . risks establishing a "civic religion" of its own.

Id. at 29, 34. The *Rubin* Court specifically agreed with these Second Circuit conclusions, but went further to identify a second concern:

> the very act of deciding—as a matter of constitutional law, no less—who counts as a "religious figure" or what amounts to a "sectarian reference" not only embroils judges in precisely those intrareligious controversies that the Constitution requires us to avoid, but also imposes on us a task that we are incompetent to perform.[23]

In light of these mandates (but subject to the proscriptions of *Marsh*), it is clear that the government may not itself prescribe prayer. It may invite private clergy to give the invocation. It may employ and pay a Presbyterian minister, as in *Marsh*. Or, as in this case, it can even leave the choice of prayer to citizens or participating elected

---

[23] Justice Souter recognized likewise in *Lee v. Weisman*, that there is hardly "a subject less amenable to the competence of the federal judiciary [than comparative theology], or more deliberately to be avoided where possible." *Lee,* 505 U.S. at 616-17 (Souter, J., concurring).

officials in a prayer rotation who in their own words and in their individual capacities, pray as they see fit.

Notwithstanding these constraints on legislative prayer, however, misunderstandings as to the boundaries of governmental restraints on speech in more general public programs abound. For example, *individually* expressed prayers and speeches or performances at other government functions or on government property have led to repeated censorship when they have included *sectarian* sentiments (on grounds that the expression of sectarian viewpoints exceeds the limits of governmentally endorsed "civic faith"), whereas *non-sectarian* sentiments expressed at the same events conforming to the "civic faith" have been permitted.[24]

---

[24] *See*, *e.g.*, *McComb v. Crehan*, 320 Fed. Appx. 507 (9th Cir. 2009) (holding that prevention of Valedictorian's speech that allegedly proselytized in mentioning Jesus Christ and scripture did not violate First Amendment or Free Exercise rights although Co-Valedictorian's speech about prayer, God, and faith in non-sectarian terms was permitted); *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009) (finding censorship of instrumental graduation performance of "Ave Marie" in program containing eight other instrumental music pieces did not violate Equal Protection); *Turner v. City Council of Fredericksburg,* 534 F.3d 352 (4th Cir. 2008) (O'Connor, J. sitting by designation) (affirming that City Councilman's Free Exercise and First Amendment rights were not violated when Councilman mentioned Jesus Christ in opening legislative prayer while other Council members invoked Almighty Father, Gracious God and other references to Deities under non-denominational prayer policy), *cert denied*, 555 U.S. 1099 (2009); *Hinrichs v. Bosma*, 400

Obviously, in the context of legislative prayer, the Free Speech or Free Exercise rights of individual prayer-givers are more limited than such expression would be in a private forum or park, street or sidewalk. However, so long as an individually-given legislative prayer does not proselytize, or disparage one religion over another, or is not part of an intentional governmental program to advance such prohibited objectives, governmental coersion forcing individual speakers to render *non-sectarian* religious speech infringes on rights of conscience, inequitably advances state orthodoxy, silences diverse and disfavored viewpoints, and diminishes the vitality of free speech.[25]

F.Supp.2d 1103 (S.D. Ind. 2005) (holding that legislative prayer must be non-sectarian), *rev'd on other grounds*, 506 F.3d 584 (7th Cir. 2007); *Klingenschmidt v. Winter*, 275 Fed. Appx. 12 (D.C. Cir. 2007) (holding that Navy Chaplain's failure to follow Navy regulation limiting sectarian prayer did not violate First Amendment and was grounds for dismissal from service).

[25] Legislative prayer presented by private citizens intersects with individual rights granted under the Free Speech, Free Exercise and Establishment Clauses and is, therefore, a form of protected "hybrid speech," speech that is both private and governmental at the same time. *See, e.g., Sons of Confederate Veterans v. Comm'r of the Virginia Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2004) (Luttig, J., respecting the denial of rehearing *en banc*) ("[T]he particular speech at issue in this case is neither exclusively that of the private individual nor exclusively that of the government, but, rather, hybrid speech of both.").

Expressions of "civic religion" most evidently come to the surface at times of national crisis or tragedy. For example, the events of 9/11 precipitated numerous expressions of "civic faith." Likewise, during the Civil War, both sides equated serving country with serving God, and dying for country, dying for faith.[26] While it is understandable that citizens would draw deeply from common religious reservoirs when ways of life are threatened, or societal injustice and human costs are high, it is nevertheless true that no law, and indeed no decision of this Court or any other court ostensibly banning *sectarian* content from legislative prayer or religious speech at other official occasions would necessarily be recognized as legitimate or obeyed in practice. Conversely, a *de facto* or formal judicial declaration fostering a regime of legislative prayer or religious speech limited to *non-sectarian* precepts of God and country could very well serve to extinguish whatever virtues of accommodation and diversity of religious expression remain in the polity. It would also amplify the type of majoritarian intolerance that James Madison warned against in the Federalist Papers.[27] In the extreme, such an exclusively *non-sectarian* dogma could potentially feed fires of Nationalism or intolerance, when leaders, or a tyrannically fervent majority, co-opt and manipulate it to suppress potentially balancing *sectarian* sentiments that might otherwise challenge or undermine the advancement of questionable

---

[26] HARRY S. STOUT, UPON THE ALTAR OF THE NATION: A MORAL HISTORY OF THE CIVIL WAR xviii (2006).

[27] THE FEDERALIST NO. 10 (James Madison).

political or social ends, as has often been the case in our country's history.

In sum, the balance struck in *Marsh* for legislative prayer was appropriate and should be reinforced in the Court's decision of this case by explicitly confirming that *sectarian* content in legislative prayers is permitted, so long as it does not run afoul of the other restrictive requirements set forth in the *Marsh* opinion.

CONCLUSION

The diverse history, tradition and disparate cultures within each of the United States, including their diverse religious traditions, plainly allow for, and even prudentially advise, broad discretion for local, state and national legislative bodies to formulate and implement their own unique legislative prayer policies and practices. The boundaries announced by *Marsh*, while fully appropriate and viable under the Establishment Clause, should nevertheless be clarified by expressly confirming that it is only the *intentional* advancement or hostility to religion *by concrete government action* that is proscribed in the context of legislative prayer and that sectarian content is permitted in the absence of improper motive or intentional proselytization or disparagement of other faiths.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

James J. Knicely
KNICELY & ASSOCIATES, P.C.
487 McLaws Circle, Suite 2
Willliamsburg, Virginia 23185
(757) 253-0026

Counsel for Amicus Curiae
THE RUTHERFORD INSTITUTE