No. 12-696

IN THE
Supreme Court of the United States

TOWN OF GREECE,
Petitioner,
v.
SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

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

BRIEF OF *AMICUS CURIAE* REV. DR. ROBERT E. PALMER SUPPORTING PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE*[1]

Rev. Dr. Robert E. Palmer, a Presbyterian minister, was the chaplain of the Nebraska Legislature whose prayers were the subject of this Court's decision in

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and his counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioner and respondents were timely notified of *amicus*'s intent to file this brief. Petitioner's letter consenting to the filing of any *amicus* brief has been filed with the Clerk's office, and respondents' consent to the filing of this brief has been lodged with the Clerk's office.

Marsh v. *Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court held that the Establishment Clause did not prohibit either Rev. Palmer's compensated position as chaplain, his continued reappointment over sixteen years, or the content of the prayers he offered at the start of each legislative workday. *Marsh*, 463 U.S. at 792-795.

The opinion of the Court used the word "sectarian" only once—by quoting Rev. Palmer's own characterization of his prayer practice as "nonsectarian." *Marsh*, 463 U.S. at 793 n.14. That characterization was taken from his deposition, which—like the prayers themselves—is in the record of that case. See Record on Appeal & Cross-Appeal, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (hereinafter "*Marsh* Record"). In his deposition, Rev. Palmer explained that his prayers were simultaneously "nonsectarian" *and* that many were identifiably Christian. He did not mean, and this Court plainly did not take him to mean, that any prayer is "sectarian" unless so drained of religious content as to be of no identifiable religious tradition.[2]

This case and the Court's treatment of it are accordingly of considerable interest to Rev. Palmer. As a defendant in *Marsh*, he is concerned about recent cases, like the Second Circuit's here, which retreat from *Marsh*'s holding. Rev. Palmer believes that legislative bodies which desire to exercise their First Amendment right of solemnly invoking divine guidance should not be impaired by court rulings that inject uncertainty and discourage assemblies from exercising that right. More directly, he believes that his own past practice lies within

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[2] As the Court noted, Rev. Palmer did omit using the name of Jesus Christ itself in 1980 in response to a Jewish legislator's request. *Marsh* v. *Chambers*, 463 U.S. 783, 793 n.14 (1983). But the record of prayers in *Marsh* closed in 1979; the pre-1980 prayers were those challenged and evaluated by this Court. See *infra* pp. 8-9.

the American constitutional tradition, and that it—and other practices like it today and in the future across the Nation—are worth this Court's continued vindication.

The judgment below casts doubt on whether *Marsh* was rightly decided and whether Rev. Palmer's service to the Nebraska Legislature was constitutional. That is because Rev. Palmer's prayer practice was in every way more identifiably Christian than the practice of the Town of Greece appears to be. For the benefit of all legislative assemblies, and of chaplains like Rev. Palmer, this Court should grant review, provide clarity, and affirm the legitimacy of legislative prayer.

SUMMARY OF ARGUMENT

1. When this Court decided *Marsh* v. *Chambers*, there was no doubt that the prayers being challenged were often "explicitly Christian." 463 U.S. at 793 n.14. The record before the Court was replete with Christian prayers, and dissenting justices regarded that as reason enough to strike down Nebraska's practice. But the Court refused. In full knowledge of his prayers' religious content, the Court credited Rev. Palmer's deposition statement that they were "nonsectarian"—a term understood in context to mean that the prayers did not advance a particular sect within the Judeo-Christian tradition (such as Rev. Palmer's own Presbyterianism). Consistent with Rev. Palmer's description, the Court held that his prayers posed no constitutional concerns, so long as "the prayer opportunity has [not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-795.

2. Some courts have departed from *Marsh*'s clear guidance because of a puzzling passage from a later case that had nothing to do with legislative prayer. In *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989), a brief dictum suggested that Rev.

Palmer's prayers were constitutional because, in 1980, he accommodated a Jewish legislator by omitting the name of Jesus Christ in prayers. That observation is contrary to the record of *Marsh* (which closed before 1980 and is full of identifiably Christian prayers) and to its holding (which put prayer content generally off-limits to judges).

Courts that dilute the *Marsh* holding with the *Allegheny* dictum have become active in patrolling prayer content—precisely what *Marsh* forbade.

3. This Court should grant review because this legal disarray chills the exercise of a constitutionally protected right—the right of legislative assemblies across the Nation to begin their sessions with invocations. *Marsh* provided broad scope for such prayers, subject to a narrow exception preventing truly extreme situations. The judgment below reverses that balance, turning ordinary practices into opportunities for full-scale litigation. Legislative prayer is no longer subject to clear legal rules but now depends upon the "legal judgment" of a federal judge. Pet. App. 18a. As the Second Circuit was plainly aware, many towns will simply give up in frustration when faced with so many obstacles. The court even hinted that prudent towns would abandon the plan to have legislative prayer. *Id.* at 27a. Such an assault on constitutional freedom is intolerable, and this Court should grant review to provide much-needed certainty.

ARGUMENT

This Court affirmed the constitutionality of legislative prayer in *Marsh* and expressly declined to scrutinize the content of such prayers. It did so with full knowledge of the highly religious content of Rev. Palmer's prayers, which were in the case's record. In recent years, however, some courts have revised this history. They have ascribed to Rev. Palmer's prayers an essentially non-religious character, and have interpreted *Marsh* as ap-

proving them because of their purported blandness. This double error has generated judicial interference in today's legislative-prayer practices, contrary to this Court's hands-off policy in *Marsh*. The solution is to grant review and reaffirm *Marsh*, which found the content of Rev. Palmer's prayers to be beyond judicial scrutiny despite their unmistakably religious nature, not because of their supposed nondescriptness.

I. THIS COURT UPHELD REV. PALMER'S PRAYERS WITH FULL KNOWLEDGE OF THEIR IDENTIFIABLY CHRISTIAN NATURE

A brief clarification of how *Marsh*'s record and holding interact will help explain, in Part II, how courts have misused that holding and record to undermine *Marsh*.

A. Rev. Palmer's prayers in the *Marsh* record were identifiably Christian

In *Marsh*, Nebraska Senator Ernest Chambers, a legislator and taxpayer, argued that Nebraska's legislative prayer practice was unconstitutional because the chaplain's daily "prayers are in the Judeo-Christian tradition." *Marsh*, 463 U.S. at 793. Senator Chambers's complaint in federal district court emphasized that Rev. Palmer's prayers "have frequent references to the Christian religion," and that Rev. Palmer made "[n]o effort" to drain those prayers of such content. J.A. 2, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (Complaint ¶ 8).

Senator Chambers was correct—Rev. Palmer's prayers were routinely identifiably Christian. The record in *Marsh* contained annual "prayer books," compiling Rev. Palmer's prayers, ending in 1979. *See* 1979 Prayer Book, Exh. 3, *Marsh* Record.[3] The prayers actu-

[3] Originally published in the Nebraska Legislative Journal, Rev. Palmer's prayers were periodically collected and republished as prayer books, which were later made exhibits in the *Marsh* record. *Marsh*, 463 U.S. at 785 n.1.

ally in the record—the ones that Senator Chambers presented to the federal courts for decision—were identifiably Christian. Accordingly, the Court could not have, and did not, put off for a future day the question of whether prayers that clearly come from a specific religious tradition are constitutional when part of a legislative-prayer practice.

One representative example is Rev. Palmer's prayer of April 12, 1977:

> Father in Heaven, we thank You this day for the gift of life. As spring returns to our countryside, we are reminded that the inevitable cycles of Nature are Your creation and no one is exempt. We thank you for the gift of Your Son, whose Resurrection we are celebrating, who is the reason for our hope and source of our joy. Help us now, rejuvenated by the recess, and inspired by Your Son's victory over death, to take up the business of the people and conduct it with justice, equality and love. Amen.

1977-78 Prayer Book at 6, Exh. 2, *Marsh* Record. Similar in make-up is his prayer of February 18, 1977:

> Our Father, as we pray for Your guidance and help, we know that You did not intend prayer to be a substitute for work. We know that we are expected to do our part for You have made us, not puppets, but persons with minds to think and wills to do. Make us willing to think, and think hard, clearly, and honestly, guided by Your voice within us, and in accordance with the light You have given us. May we never fail to do the very best we can. We pray in the knowledge that it all depends upon You. Help us then to work as if it all depended on us, that together we may do that which is pleasing in Your sight. For Jesus' sake. Amen.

Id. at 2. And his prayer of February 14, 1978, is also typical:

> O God, we consider our resources in money, men and land, yet forget the spiritual resources without which we dare not and cannot prosper. Forgive us for all our indifference to the means of grace thou hast appointed. Thy Word, the best seller of all books, remains among the great unread, the great unbelieved, the great ignored. Turn our thoughts again to that book which alone reveals what man is to believe concerning God and what duty God requires of man. Thus informed, thus directed, we shall understand the spiritual laws by which alone peace can be secured, learn what is the righteousness that alone exalteth a nation. For the sake of the world's peace and our own salvation, we pray in the name of Christ, thy revelation. Amen.

Id. at 18.

The predominantly Christian nature of Rev. Palmer's sixteen years of prayers did not go unnoticed by the Court. Indeed, Justice Stevens quoted one such prayer at length to show how identifiably Christian the prayers were. *Marsh*, 463 U.S. at 823-824 & n.2 (Stevens, J., dissenting) (quoting prayer of March 20, 1978).

B. Rev. Palmer's description of his prayers as "nonsectarian" has been taken out of context

The *Marsh* Court also adopted Rev. Palmer's description of his prayers as Christian yet non-sectarian. Rev. Palmer, a defendant in the suit brought by Senator Chambers, provided deposition testimony about the legislative-prayer practice that he administered as chaplain for sixteen years. This Court quoted Rev. Palmer's deposition in a two-sentence footnote:

> Palmer characterizes his prayers as 'nonsectarian,' 'Judeo Christian,' and with 'elements of the Ameri-

> can civil religion.' Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.

Marsh, 463 U.S. at 793 n.14 (citations omitted).

It is not self-evident at first glance what this description really means. As the record reveals, see *supra* Part I.A, the Court was quite correct to observe that Rev. Palmer's "prayers were often explicitly Christian." *Marsh*, 463 U.S. at 793 n.14. But Rev. Palmer's description of *those very prayers* as "nonsectarian" may seem at odds with their "explicitly Christian" content.

One mistaken resolution of the seeming puzzle is to assume that the Court's reference to Rev. Palmer's 1980 accommodation of a Jewish legislator made the prayers "nonsectarian." But that is wrong. After all, the record ended with the 1979 prayers (and Senator Chambers's complaint was filed on December 12, 1979). Nor is there any indication that Rev. Palmer's accommodation either was a matter of binding policy or that omitting Christ's name would on its own be sufficient to render an otherwise "sectarian" Christian prayer automatically "nonsectarian." Nothing in the Court's opinion, or in any dissenting opinion, suggests that the absolute key to the decision was buried in the footnote and took the form of a bare mention of Rev. Palmer's 1980 practice—much less that the Court would rule on that post-litigation modification rather than the *sixteen years* of Rev. Palmer's prayers that were actually challenged.[4]

The objectively correct resolution is, instead, drawn from Rev. Palmer's deposition, which was the source for footnote 14. The deposition makes crystal clear that the

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[4] See also *infra* Part II.A, addressing this inference in *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989).

word "nonsectarian" is not a synonym for "devoid of identifiably Christian theology." Instead, Rev. Palmer called his prayers "non-sectarian" because they did not reflect the beliefs of one Christian "sect" or denomination over another—for instance, his own Presbyterianism. When pressed in his deposition to define a distinctly Christian prayer as "sectarian," he declined:

> I wouldn't say sectarian, but I'd say Christian. * * * [A] sect is not a religion. To me it would be a gross injustice to millions of people around the world were I to say that Islam is a sect or the Jewish faith is a sect or the Christian faith is a sect. In no way is that a sect by any stretch of my imagination or by any jumble of semantics I can imagine. * * * *Non-sectarian is one that does not promote the furtherance of any specific group, cult or division of the Judeo-Christian faith.*

Deposition of Def. Palmer at 7-8, Exh. 5, *Marsh* Record (emphasis added) (hereinafter "Deposition").

Nor was this an idiosyncratic definition. Throughout Rev. Palmer's chaplaincy, Black's Law Dictionary consistently defined "sect" as a group with particular religious doctrines "which distinguish them from others holding *the same general religious beliefs*," and "sectarian" as "[d]enominational" and "pertaining to, and promotive of, the interest *of a sect*," rather than the larger religion as a whole. Black's Law Dictionary 1520, 1521 (rev. 4th ed. 1968) (emphasis added); see also Black's Law Dictionary 1214 (5th ed. 1979) (identical text).

Rev. Palmer was also asked to explain in what sense his prayers were "Judeo-Christian." He replied:

> I mean that heritage which reflects the story of humankind's search for the Almighty in the pages of the Bible that has been, in essence, the heritage

> which is the founding of America's heritage as a nation which calls itself a religious nation.

Deposition at 20-21. And Palmer acknowledged that "you will find Jesus' name throughout these prayers." *Id.* at 8. Rev. Palmer's answers were entirely consistent: his prayers could be Christian, and clearly invoke the Judeo-Christian tradition, without being "sectarian."

This Court's opinion used the word "sectarian" or "nonsectarian" only once—in footnote 14, where it quoted Rev. Palmer as describing the prayers as "nonsectarian." *Marsh*, 463 U.S. at 793 n.14. Given that context, the Court's understanding of that term must be drawn from how Rev. Palmer used it in his deposition.

C. The religious content of legislative prayer is generally of no concern to courts

The holding in *Marsh* is consistent with the case's record. If the Court had wished to hold that a legislative-prayer practice with prayers that are predominantly Christian (or of any identifiable faith) are unconstitutional, it had a ready-made record to establish that point.

But the Court instead rejected the challenge without recourse to any of the standard Establishment Clause "tests." *Marsh* recited the "unambiguous and unbroken history" of legislative prayer and expressed "no doubt" that the practice was constitutional and "part of the fabric of our society." *Marsh*, 463 U.S. at 792-793.

And against the backdrop of a record replete with often "explicitly Christian" prayers, *Marsh*, 463 U.S. at 793 n.14, the Court emphasized that the content of legislative prayers—Christian, non-Christian, or otherwise—was not relevant to the practice's constitutionality. It stated:

> The 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.

Marsh, 463 U.S. at 794-795.[5] Indeed, despite a lengthy chaplaincy of a single minister of a single denomination—Rev. Palmer and his branch of Presbyterianism—this Court rejected the argument "that choosing a clergyman of one denomination advances the beliefs of a particular church." *Id.* at 793.

II. MISUNDERSTANDING *MARSH*'S RECORD HAS LED SOME COURTS TO ABROGATE *MARSH*'S HOLDING

Petitioner is correct that, under *Marsh*, it should not be dispositive whether a legislative prayer is or is not "sectarian." Pet. 9, 20-21. Judicial scrutiny is limited to whether "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-795. The division among the circuits over whether to follow this guidance, see Pet. 11-14, justifies this Court's review. But there is more. Lower courts holding that judges should evaluate the "sectarian" content of a prayer also fail to appreciate what the word "nonsectarian" means in light of *Marsh*'s holding. The Court should also grant review to clarify, and reaffirm, the limited meaning of "sectarian" in the context of legislative prayer.

A. *Marsh*'s holding should trump the *Allegheny* dictum to the extent of any conflict

The source of the confusion among the circuits lies in a brief dictum from this Court's opinion in *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). The dictum stated that the prayer practice in *Marsh* was acceptable "because the particular chaplain

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[5] Indeed, under *Lee* v. *Weisman*, 505 U.S. 577, 590 (1992), prayer content is immune from judicial scrutiny *because* of its religious nature—the opposite of the Second Circuit's approach. See Pet. 17-18.

had 'removed all references to Christ.'" *Id.* at 603 (quoting *Marsh*, 463 U.S. at 793 n.14). It suggested that identifiably Christian prayers were not a "nonsectarian reference[] to religion" but instead impermissibly affiliated the government with Christianity. *Ibid.*

But that dictum—dictum because *Allegheny* involved public holiday displays, not legislative prayer—contradicted the holding in *Marsh* and, as detailed in Part I, *supra*, misrepresented the *Marsh* record.[6] Even the Second Circuit in this case acknowledged that *Allegheny* contradicted *Marsh*. Pet. App. 17a. Yet the dictum has caused some courts to characterize any Christian prayer as impermissibly "sectarian," leading them to strike down any prayer practice in which Christian prayer predominates. See *infra* Part II.C.[7] Those courts line up either behind *Marsh* or behind *Allegheny*. Only this Court's authority to construe its own cases may re-

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[6] Nor was *Marsh* central to the holding in *Allegheny*. The Court mentioned *Marsh* only to respond to Justice Kennedy's separate opinion referencing *Marsh*.

[7] The difficulty in reconciling *Marsh* and *Allegheny* arises in a wide variety of factual contexts. *E.g.*, *Newdow* v. *Rio Linda Union School Dist.*, 597 F.3d 1007, 1035-1038 (9th Cir. 2010) (rejecting challenge to "under God" in the Pledge of Allegiance); *Newdow* v. *Roberts*, 603 F.3d 1002, 1017-1021 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (rejecting challenge to the presidential inaugural ceremony and oath's "So help me God" phrase); *Mellen* v. *Bunting*, 327 F.3d 355, 369-370 (4th Cir. 2003) (striking down Virginia Military Institute's supper prayer); *N.C. Civil Liberties Union Legal Found.* v. *Constangy*, 947 F.2d 1145, 1147-1149 (4th Cir. 1991) (holding unconstitutional a state judge's practice of opening court with prayer); *Freedom from Religion Found., Inc.* v. *Obama*, 705 F. Supp. 2d 1039, 1059-1063 (W.D. Wis. 2010), *vacated on other grounds by* 641 F.3d 803 (7th Cir. 2011) (holding that the National Day of Prayer violates the Establishment Clause); *Freedom from Religion Found., Inc.* v. *Hickenlooper*, No. 10CA2559, 2012 WL 1638718, at *14, 25-26 (Colo. Ct. App. 2012) (invalidating a governor's day-of-prayer proclamation).

solve the question of whether the perceived tension between *Marsh*'s holding and *Allegheny*'s dictum is real, as the court below and other courts have found, and, if so, how that tension should be resolved.[8]

B. The judgment below departs from *Marsh*'s holding—and would require a different outcome in *Marsh* itself

The judgment below demonstrates that the *Marsh*/*Allegheny* split has real consequences. Despite paying lip service to the idea of moving beyond a sectarian-versus-nonsectarian analysis of legislative prayer, the Second Circuit's conclusion rested on the supposedly "sectarian" nature of the prayers offered in the Town of Greece. Pet. App. 14a-17a, 21a. The court's bottom line was that the Establishment Clause was violated by "the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." Pet. App. 22a.

Applying the judgment below to the facts of *Marsh* demonstrates that either the judgment below, or *Marsh* itself, must be wrong. If the prayer practice invalidated by the Second Circuit is unconstitutional, there is no way that the Nebraska practice approved in *Marsh* could survive. *Marsh* involved a single, paid chaplain—an ordained clergyman—for 16 years, see 463 U.S. at 784-785,

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[8] For instance, this Court could read *Allegheny* to abjure "sectarian" legislative prayer as *Marsh* used that terminology. That is, if *Allegheny*'s disapproval of "sectarian" legislative prayer amounts to disapproval of a tool used only for a "specific group, cult or division of" a religion, see Deposition at 8, then it would be consistent with *Marsh*'s preclusion of "exploit[ing]" legislative prayer "to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-795. This is not the approach of the court below—and only this Court's review can instruct the lower courts whether it, or some other resolution, is the correct one.

compared to a constantly rotating cast of unpaid volunteers from many backgrounds here, see Pet. App. 4a-6a. And the ostensibly "sectarian" prayers quoted by the Second Circuit, see Pet. App. 7a, are if anything less "explicitly Christian" than prayers in the *Marsh* record, see *supra* Part I.A.

If Rev. Palmer's prayer practice were subjected to the reasoning of the Second Circuit, that court would strike it down. Presented with the Nebraska practice, it could apply its opinion here to the facts of *Marsh* by adding only the italicized words: Rev. Palmer's practice is "a steady, *sixteen-year* drumbeat of often specifically sectarian Christian prayers" that "associated *the State of Nebraska* with the Christian religion." Pet. App. 22a.

C. The conflict between *Marsh* and *Allegheny* has generated a circuit split

The court of appeals' conclusion is inconsistent with this Court's decision in *Marsh* and deepens a pre-existing circuit split. See Pet. 11-14. Some courts hew closely to *Marsh*. See, *e.g.*, *Pelphrey* v. *Cobb Cnty.*, 547 F.3d 1263, 1271 (11th Cir. 2008) (under *Marsh*, "courts are not to evaluate the content of the [legislative] prayers absent evidence of exploitation"). Other courts, purportedly faithful to *Allegheny*, expressly require precisely what this Court has never permitted: specific governmental parameters for prayer content. The most extreme example may be *Joyner* v. *Forsyth County*, 653 F.3d 341, 348, 353, 355 (4th Cir. 2011), which struck down a predominantly Christian legislative-prayer practice and instructed governments to be "proactive in discouraging sectarian prayer in public settings." And, of course, the judgment below states that a prayer practice that is sectarian may be invalid if, in the "legal judgment" of federal courts, the "totality" of the practice could convey to a reasonable observer that "the town favored or disfavored certain religious beliefs." Pet. App. 17a.

The following chart summarizes how these courts have dealt with the perceived *Marsh*/*Allegheny* division:

Legislative-Prayer Case	**Use of "sectarian" or "nonsectarian"**	**Resolution of *Allegheny* and *Marsh***
Judgment below	Christian references are impermissibly "sectarian." Pet. App. 22a.	*Allegheny* limits *Marsh*. Pet. App. 15a-22a.
Joyner v. *Forsyth County*	Christian references are impermissibly "sectarian." 653 F.3d at 349.	*Allegheny* limits *Marsh*. 653 F.3d at 347-349.
Pelphrey v. *Cobb County*	Whether prayers are "sectarian" or "non-sectarian" is not relevant. 547 F.3d at 1267.	*Marsh*'s historical analysis prevails over *Allegheny*'s dictum. 547 F.3d at 1271.

Only this Court can decide whether its holding in *Marsh* or its dictum in *Allegheny* is the law. The Court should grant review for that purpose.

III. THE JUDGMENT BELOW WILL UNJUSTIFIABLY CHILL CONSTITUTIONALLY PROTECTED LEGISLATIVE PRAYER

Legislative bodies across the United States should retain the constitutional right seen in *Marsh* as "part of the fabric of our society"—the right to "open[] legislative sessions with prayer." 463 U.S. at 492. Decisions like the Second Circuit's here, or the Fourth Circuit's in *Joyner*, cause this right to atrophy. Assemblies have already started to avoid opening sessions with invocations—*not* after freely choosing that path, but because of the ever-present threat of lawsuits. See Pet. 27. As Judge Kelly has observed in a similar context, the disarray in the law means that "governments face a Hobson's choice: forego-

ing [legislative prayer] or facing litigation. The choice most cash-strapped governments would choose is obvious, and it amounts to a heckler's veto." *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1106 (10th Cir. 2010) (Kelly, J., dissenting from denial of rehearing *en banc*).

The Second Circuit shows solicitude for hecklers, but is a demanding and unpredictable taskmaster for towns. *Marsh* accounted for the possibility that a legislative-prayer practice could cross the line and become little more than a tool for proselytizing of a particular sect. 463 U.S. at 794-795. But *Marsh* wisely emphasized that only such extreme circumstances warranted judicial scrutiny of legislative prayers. *Ibid*. Yet, where *Marsh* established a clear rule, the court below requires a full fact-intensive judicial inquiry whenever a complaint is filed, turning long-standing legislative-prayer practices into constitutional imbroglios. And after describing how hard it will be to design or defend a constitutionally-compliant legislative prayer practice, the court below ominously warns that "[t]hese difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer." Pet. App. 27a.

The court below is right about that, at least. A reasonable town attorney in New York, Connecticut, or Vermont, seeking to avoid costly litigation over legislative prayer, is indeed left with a series of questions which yield no satisfactory answer other than "wait and see." How far away must a town look for sufficiently diverse prayer-givers? Petitioner's rational response of using a directory of any religious entity within the town was neutral, but the Second Circuit somehow found that to be an element of "endorsement." Pet. App. 19a-20a. How can a town choose whom to call, and in what order should it call them? Random lotteries and working through business directories are out, the court below says. *Ibid*.; see *id.* at 24a-25a & n.9. Should a town then call no one, instead

allowing the winds of chance to blow chaplains to the podium? What if, as here, adherents of Christianity, or some other religion, most often volunteer?

Petitioner has appropriately focused this court's attention on seventeen of the many cases struggling with the proper interpretation of *Marsh* in this context. Pet. 25-27. Each of the questions listed above, and dozens more like them, suggests that the litigation bonanza will only increase—unless, of course, town attorneys take the Second Circuit's hint and persuade their town councils to abandon the tradition of legislative prayer altogether.

This judicial hostility sharply contrasts with this Court's view that legislative prayer is "deeply embedded in the history and tradition of this country" and is "not something to be lightly cast side." *Marsh*, 463 U.S. at 786 (quotation omitted). That view should be reaffirmed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted.

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January 2013