

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 ANDREW M. TOBIN, SPEAKER OF THE
ARIZONA HOUSE OF REPRESENTATIVES, ANDY BIGGS,
PRESIDENT OF THE ARIZONA STATE SENATE, AND
MIKE HUBBARD, SPEAKER OF THE ALABAMA
HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Representative Andrew M. Tobin is the Speaker of the Arizona House of Representatives. Senator Andy Biggs is the President-Elect of the Arizona State Senate. Speaker Tobin and President-Elect Biggs will serve as the presiding officers of the Fifty-First Arizona Legislature, which is the elected lawmaking authority of the State of Arizona for the years 2013 and 2014. Pursuant to the Constitution and laws of Arizona, as well as the Rules of their respective chambers, they are responsible for overseeing the daily conduct of legislative business.²

Legislative prayer has a long history in Arizona. The daily sessions of the constitutional convention were opened in prayer. *See, e.g., The Records of the Arizona Constitutional Convention of 1910*, at 1 (John S. Goff ed., 1991) (account of the opening prayer of first day of the Convention). Since Arizona achieved statehood in 1912, both legislative chambers have opened their daily proceedings with prayer. Currently, the opening prayer is a part of the daily order of legislative business. *See* Ariz. House Rule 7 (50th Leg. 2012);

¹ The parties consented in writing to the filing of this brief *amici curiae*. The written consent of the parties has been placed on file with the Clerk of the Court. No counsel for a 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 *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

² *See generally*, Ariz. Const art. IV, pt. 2, § 8; Ariz. Rev. Stat. § 41-1102; Ariz. House Rule 4 (50th Leg., 2012); Ariz. Senate Rule 2 (50th Leg. 2012).

Ariz. Senate Rule 16(A) (50th Leg. 2012) (Orders of Business for each chamber). The Arizona Legislature does not have a paid chaplain. The practice in the Arizona House and Senate is for opening prayers to be offered by either members or guests of the legislature. The schedule for prayer-givers is coordinated through the respective Offices of the Speaker and the President. There is no specific requirement for the content of prayers—aside from a general rule that proper order and decorum should be maintained—and prayers from a wide variety of faith traditions have been offered.

Representative Mike Hubbard is the Speaker of the Alabama House of Representatives. As Speaker he serves as the presiding officer of the 105-member chamber. Speaker Hubbard’s duties include presiding over the daily legislative sessions of the House. Ala. House Rule 5. By rule, the Alabama House opens its daily sessions with prayer. *Id.* at R. 6 (Order of Business). Prayers are generally offered by members of the public and are scheduled through the Office of the Speaker *Pro Tempore*. Prayers from a broad array of faith traditions have been offered. Like Arizona, Alabama’s constitutional convention began each day with an opening prayer.³

As the presiding officers of their respective legislative chambers *Amici* are concerned that the decision of the United States Court of Appeals for the Second Circuit will have a detrimental effect on the practice of legislative prayer by creating uncertainty

³ *Official Proceedings of the Constitutional Convention of the State of Alabama* (1901), http://www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901_proceedings_vol1/1901.html.

and introducing new requirements that will prove unworkable for deliberative bodies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Legislative prayer is a ubiquitous practice with roots that date back to the very beginning of lawmaking in this country. The vast majority of state legislatures open their daily sessions with some sort of prayer. In *Marsh v. Chambers*, this Court recognized the unique role prayer plays in lawmaking and concluded that Nebraska's practice of opening legislative sessions with an invocation delivered by a paid chaplain posed "no real threat" of unconstitutional establishment of religion.

The decision of the Second Circuit is inconsistent with *Marsh*. Without this Court's intervention it represents a sea change in the way the prayer practices of state legislatures and other deliberative bodies are reviewed by the courts. In stark contrast to this Court's approach in *Marsh*, the Second Circuit's decision below applies detailed inquiries into the selection process of prayer-givers, the content of prayers offered, and actions as well as inactions of the deliberative body—the Town of Greece.

The Second Circuit's departures from *Marsh* lead to a confusing opinion that offers no guidance to deliberative bodies seeking to continue the longstanding practice of legislative prayer. For example, the decision suggests that deliberative bodies should issue official guidelines and warnings to prayer-givers—a practice this Court did not recommend in *Marsh*. The decision claims that the use of inclusive

language—like the words “we” and “our”—is constitutionally problematic because it presumes a religious homogeneity among those present. And the decision suggests that deliberative bodies must take action to ensure that there is no “predominance” of prayers from any one faith.

Requirements such as these would transform the historic and current practice of legislative prayer into a rigid, government-superintended, ceremonial function. Faced with such stark options, some deliberative bodies may well decide to end legislative prayers rather than delve into the business of managing their form and content. Indeed, one state legislative chamber—the Hawaii Senate—has recently done just that.

The *Marsh* decision recognizes that—absent clear abuses—a practice predating the First Amendment does not conflict with the rights guaranteed by the provision. The Second Circuit’s decision, on the other hand, presents significant new problems for First Amendment freedoms. Increased official oversight of religious speech does violence to both the practice of legislative prayer and First-Amendment freedoms. Indeed, as the nation continues to grow legislative prayer has served to enhance individual liberty by providing a dynamic expression of the tremendous diversity of faiths that make up the greater body politic.

ARGUMENT

I. THE PRACTICE OF OPENING LEGISLATIVE BUSINESS WITH PRAYER REMAINS A CONSTANT FEATURE OF LAWMAKING IN THE UNITED STATES

In *Marsh v. Chambers*, this Court recognized that the practice of “opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.” 463 U.S. 783, 786 (1983). It reached this conclusion “[i]n light of the unambiguous and unbroken history of more than 200 years” of both the federal Congress and the legislatures of the states. *Id.* at 792. In a review of the practices of the state legislatures, this Court cited to a brief filed by the National Conference of State Legislatures (“NCSL”) as *Amicus Curiae*. *Id.* at 793, n.11 (citing Brief for the NCSL as *Amicus Curiae* Not Supporting Either Party, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23)). The NCSL Brief presented a survey of all state legislatures—apart from the Nebraska Legislature. That survey found that “[a]ll legislative bodies open their sessions with a prayer except for the Massachusetts Senate, which does so only occasionally.” NCSL Brief at 2. The NCSL Brief went on to note that the authority to open in prayer is “usually found in the rules of the legislative body and is most commonly contained in the rule providing for the order of business.” *Id.*

Thirty years after *Marsh*, the practice of legislative prayer remains a strong one. A 2002 NCSL survey concluded that “[a]lmost all state legislatures still use an opening prayer as part of their tradition and

procedure.”⁴ The leading manual on state legislative procedure includes opening prayer in the “general order of business” and calls the practice an “essential procedure established by usage” of state legislatures. P. Mason, *Manual of Legislative Procedure* (“*Mason’s Manual*”) §710 (2010); compare *Marsh*, 463 U.S. at 789, n. 11 (citing *Mason’s Manual* § 586(2) (1979)).

II. THE OPINION BELOW SEVERELY RESTRICTS THE ABILITY OF STATE LEGISLATURES AND OTHER DELIBERATIVE BODIES TO CONTINUE THE PRACTICE OF LEGISLATIVE PRAYER

In *Marsh* this Court upheld the Nebraska Legislature’s practice of beginning legislative sessions with prayers delivered by a chaplain from a specific religious denomination with public funds. The decision of the Second Circuit, by contrast, finds that the Petitioner Town’s practice of opening prayers delivered by volunteers violates the Establishment Clause. The Second Circuit’s approach cannot be reconciled with *Marsh*.

A. THE OPINION MATERIALLY DEPARTS FROM THIS COURT’S GUIDANCE IN *MARSH V. CHAMBERS*

The Second Circuit concluded that the Town’s prayer practice impermissibly endorsed a particular religious viewpoint. It offered three general

⁴ NCSL, *Inside the Legislative Process: Prayer Practices*, Tab 5, pt. 7, at 154 (2010 ed.), <http://www.ncsl.org/documents/legismgt/ilp/02tab5pt7.pdf>.

“considerations” in support of its conclusion: (1) the prayer-giver selection process; (2) the content of the prayers offered; and (3) the “contextual actions (and inactions) of prayer-givers and town officials.” *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2d Cir. 2012). None of these considerations find support in this Court’s decision in *Marsh*.

First, the Second Circuit asserted that “[t]he town’s process for selecting prayer-givers virtually ensured a Christian viewpoint.” *Id.* at 31. “In our view,” the Second Circuit explained, “whether a town’s prayer-selection process constitutes an establishment of religion depends on the extent to which the selection process results in a perspective that is substantially neutral amongst creeds.” *Id.* (emphasis added). In *Marsh*, the prayer-giver selection process consisted of the biennial selection of a chaplain that resulted in the same individual, from a specific Christian denomination, being appointed as chaplain and delivering the prayers for over 16 years. *Marsh*, 463 U.S. at 784-85. The *Marsh* selection process was significantly less “random” than the volunteer rotation condemned by the Second Circuit; and it resulted in significantly less religious diversity. *Cf. Galloway*, 681 F.3d at 31.

Second, the Second Circuit made a detailed evaluation of the content of the prayers offered by volunteers to open Town meetings. The Court noted that “[a] substantial majority of the prayers in the record contained uniquely Christian language.” *Id.* at 24. It also noted that other prayers “spoke in more generically theistic terms.” *Id.* For the Second Circuit, the distinction between specific and more general religious language was constitutionally significant. *Id.*

at 31. Yet, the Court admitted 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.” *Id.* at 31-32. Having raised specific concerns regarding the language of the prayers, the Court purported to stop short of basing its ruling exclusively on that basis. “[W]e need not determine whether any single prayer at issue here suffices to give such an indication of establishment, since we find that on the totality of the circumstances presented the town’s prayer practice identified the town with Christianity in violation of the Establishment Clause.” *Id.* at 32. As a whole, the Second Circuit’s searching examination and detailed discussion departs from this Court’s careful warning about judicial review of the content of prayers.

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 794-95.

The Second Circuit’s third consideration—what it called the “contextual actions (and inactions) of prayer-givers and town officials”—is also a departure from *Marsh*. *Galloway*, 681 F.3d at 30. As previously noted, the Court admitted that the record did not contain evidence of prayers “offensive in the way identified as problematic in *Marsh*.” *Id.* at 31-32. Nevertheless, the Court faulted the Town for not warning prayer-givers

to avoid proselytizing or disparaging other faiths. *Id.* at 32. The *Marsh* decision, of course, requires no such warning and would limit any official oversight to instances where the opportunity to give a prayer is being exploited. *Marsh*, 463 U.S. at 794-95.

Even more strangely, the Second Circuit went on to decry the tendency of prayer-givers to “sp[ea]k in the first-person plural: let ‘us’ pray, ‘our’ savior, ‘we’ ask, and so on.” *Galloway*, 681 F.3d at 32. But this is exactly the kind of prose this Court declined to parse in *Marsh*. In fact—as Justice Stevens noted in his dissent—the Nebraska chaplain also employed the first-person plural tense: “[Y]our son brought life to the whole world moving our hearts to praise your glory. . . ;” “[w]e celebrate the great event of our redemption;” We are reminded of the price he paid. . . .” *See Marsh*, 463 U.S. at 823, n.2 (Stevens J., dissenting)) (emphasis added). The Second Circuit’s assertion that the use of such language is “relevant, and worthy of weight,” *Galloway*, 681 F.3d at 32, is yet another proof that it was applying a standard separate and apart from *Marsh*.

To be sure, unity despite differences is part of the value of legislative prayer. The practice is not an ancient tradition that blindly presumes religious uniformity. From the Founding, legislative prayer has provided shared moments of solemnization by individuals of different faiths. To take this Court’s example, Samuel Adams responded to calls to abandon legislative prayers as being too divisive by saying that “he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.” *See Marsh*, 463 U.S. at 792. Then, as now, the multiplicity of faiths is reason

to maintain the practice of legislative prayer not to abandon it.

**B. THE OPINION BELOW IS VAGUE,
CONTRADICTIONARY, AND PROVIDES AN
UNWORKABLE STANDARD**

In addition to its abandonment of this Court's guidance in *Marsh*, the Second Circuit's decision should be addressed by this Court for the sheer amount of confusion it would inflict upon legislatures and other deliberative bodies. The decision shifts its rationale from one consideration to the other, frequently noting that no one consideration is dispositive.

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. As the foregoing indicates, a municipality cannot—in our judgment—ensure that its prayer practice complies with the Establishment Clause simply by stating, expressly, that it does not mean to affiliate itself with any particular faith. Nor can a municipality insulate itself from liability by adopting a lottery to select prayer-givers or by actively pursuing prayer-givers of minority faiths whose members reside within the town. Similarly, there is no substantive mixture of prayer language that will, on its own, necessarily avert the appearance of affiliation.

Galloway, 681 F.3d at 33 (notes omitted). The suggestion that this passage offers even “limited guidance” is a bold one. The Court essentially attaches

a disclaimer to each of the areas it detailed as a problem for the Town: “This will not necessarily fix the problem.” This equivocation contrasts sharply with this Court’s lapidary language in *Marsh*. “To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.” *Marsh*, 463 U.S. at 792 (emphasis added). Certainly it is true that Establishment Clause inquiries entail a specific review of the facts and circumstances of the challenged practice. But the overall context, an “unbroken practice for two centuries,” is no stranger to the American polity. In the absence of concrete abuses, legislative prayer offers “no real threat” of impermissible Establishment. *Id.* at 794. The Second Circuit’s searching review of the practices of the Town fails to treat legislative prayer as a venerable practice approved by “the men who wrote the First Amendment Religion Clause. . . .” *Id.* at 789.

Another difficulty created by the Second Circuit’s approach is the suggestion that the Establishment Clause requires government actors to strive to balance the number of prayer-givers from various religious traditions.

In the town’s view, the preponderance of Christian clergy was the result of a random selection process. The randomness of the process, however, was limited by the town’s practice of inviting clergy almost exclusively from places of worship located within the town’s borders. The town fails to recognize that its residents may hold religious beliefs that are not

represented by a place of worship within the town.

Galloway, 681 F.3d at 31. It is unworkable to require a deliberative body to engage in the sensitive task of balancing multiple prayers from religious traditions. Nothing in the *Marsh* decision suggests such a requirement. And—like the parsing of the religious content of prayers—it increases the risk that governmental authority will be entangled in the religious views of individual citizens.

C. THE OPINION BELOW IMPAIRS THE ABILITY OF DELIBERATIVE BODIES TO ACCOMMODATE AND ADVANCE RELIGIOUS PLURALISM

The Second Circuit's approach is also unworkable because it raises new barriers to the accommodation of the diverse range of religious views necessarily entailed in lawmaking at the state and local level. Many of the Second Circuit's criticisms focus on the difficulties of the practice of involving members of the public in the opening-prayer process. The Court even goes so far as to suggest that it would be easier to not involve volunteers from the public.

People with the best of intentions may be tempted, in the course of giving a legislative prayer, to convey their views of religious truth, and thereby run the risk of making others feel like outsiders. Even if all prayer-givers could resist this temptation, municipalities with the best of motives may still have trouble preventing the appearance of religious affiliation. Ours is a society splintered, and joined, by a wide a

constellation of religious beliefs and non-beliefs. Amidst these many viewpoints, even a single circumstance may appear to suggest an affiliation. To the extent that the state cannot make demands regarding the content of legislative prayers, moreover, municipalities have few means to forestall the prayer-giver who cannot resist the urge to proselytize. These difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer, but they are not grounds on which to preclude its practice.

Galloway, 681 F.3d at 34. Citing similar concerns, one state legislative body has recently abandoned the practice of legislative prayer.⁵

There is another approach. Consistent with this Court's decision in *Marsh*, deliberative bodies should (1) recognize the important role legislative prayer plays in the lawmaking process; (2) provide an opportunity for prayer-givers to invoke divine blessing in their own words and from their own tradition; and (3) limit the official hand of restraint to those rare occasions when an individual exploits the opportunity by assailing the religious traditions of others. Unlike the approach of the Second Circuit, *Marsh* harmonizes the venerable practice of legislative prayer with the diverse range of religious views and backgrounds. The practice of legislative prayer does not continue "without regard to

⁵ See Kerry Picket, *Hawaii Senate becomes first legislative body to end daily prayer*, Washington Times, Jan. 21, 2011, <http://www.washingtontimes.com/blog/watercooler/2011/jan/21/hawaii-senate-becomes-first-legislative-body-end-d/>

the problems posed by a pluralistic society.” *Marsh*, 463 U.S. at 791. It continues to flourish because it gives expression to faith differences.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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