No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE,
Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.

in support of the Petitioner
and supporting reversal

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INTEREST OF *AMICUS CURIAE*[1]

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority on American history and on the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. WallBuilders and its constituents desire to see religion treated as the Framers of the First

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[1] All parties have consented to the filing of this Brief through blanket letters of consent lodged with the Court. No counsel for any party has 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 or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, and their counsel.

Amendment intended and seek to clarify what the establishment of religion really means.

SUMMARY OF THE ARGUMENT

The parties agree that this case is controlled by the test from *Marsh v. Chambers*, 463 U.S. 783 (1983). However, they disagree over how that test operates. The Town believes that under *Marsh*, prayers of deliberative bodies are presumptively constitutional unless the body has an impermissible motive in selecting prayer-givers or the prayers are used to proselytize for or disparage a particular faith. On the other hand, Ms. Galloway and Ms. Stephens (hereinafter "Galloway"), believe that courts must examine the "totality of the circumstances, taking stock of the prayer-giver selection process, the content of the prayers, and the contextual actions (and inactions) of prayer-givers and town officials." (Br. in Opp. 13.)

The Town's version of the *Marsh* test is the correct one and under that test, its prayers pass constitutional muster.

Galloway's version of the test in incorrect because it does not treat *Marsh* as an exception to the main body of Establishment Clause jurisprudence. By failing to recognize that *Marsh* is an exception, Galloway's version of the test ignores the fact that deliberative body prayers are *supposed* to be thoroughgoingly religious and thus will naturally often reflect the views of the majority religion. This, of course, would be problematic under other lines of Establishment Clause cases. But it is not problematic under the correct version of *Marsh*, since that is the whole point of an exception.

Furthermore, Galloway's version of the test incorporates spurious considerations. Her version "backfills" such concepts as the reasonable observer and the totality of the circumstances from other Establishment Clause contexts. It also introduces red herrings, such as the religious nature of

the public interest law firm representing the Town and the presence of children at the Town's meetings.

On the other hand, the Town's version of the *Marsh* test is the correct one. This is so because it is based upon the Framers' understanding of the establishment of religion. Specifically, the Framers' distinguished four concepts: the acknowledgement of religion, the accommodation of religion, the encouragement of religion, and the establishment of religion. In balancing the rights of the religious majority with the rights of religious minorities, the Framers allowed the acknowledgement of religion, the accommodation of religion, the encouragement of religion. Only the establishment of religion is forbidden. The Town's version of the *Marsh* test draws that line in the right place, and under the Town's test, its prayers do not establish religion.

Furthermore, all of these matters apply to the prayers of local deliberative bodies, as much as to the prayers of national and state deliberative bodies.

ARGUMENT

The parties agree that this case is controlled by the test from *Marsh v. Chambers*, 463 U.S. 783 (1983). However, they disagree vehemently over the content of that test.

One is reminded of the old TV show, *To Tell the Truth,* in which two impostors pretend to be a third person. Here only two *Marsh* tests are competing, but were the classic question—"Will the real *Marsh* test please stand up?"—asked, the Town's version would be revealed as the real test and Galloway's would be revealed as the impostor. This Brief will explain why this is so.

I. THE TESTS STATED: THE REAL *MARSH* TEST VS. THE IMPOSTOR *MARSH* TEST.

The Town asserts that the *Marsh* test presumes that legislative prayer is constitutional, absent one of two infirmities (or both). First, the government cannot act with impermissible motive in selecting prayer-givers. Second, the government cannot exploit the prayer opportunity "'to proselytize or advance any one, or to disparage any other, faith or belief.'" (Petr.'s Br. 12 citations to *Marsh* omitted; some internal quotations omitted).)

On the other hand, Galloway asserts that the *Marsh* test requires courts to weighed the "totality of the circumstances, taking stock of the prayer-giver selection process, the content of the prayers, and the contextual actions (and inactions) of prayer-givers and town officials." (Br. in Opp. 13 (internal quotations omitted.)

II. GALLOWAY'S *MARSH* TEST IS THE IMPOSTOR BECAUSE IT IGNORES THE FACT THAT LEGISLATIVE PRAYERS ARE *SUPPOSED* TO BE THOROUGHGOINGLY RELIGIOUS AND BECAUSE IT IMPORTS SPURIOUS CONSIDERATIONS.

A. Galloway's *Marsh* Test Ignores the Fact that Legislative Prayers are Supposed to be Thoroughgoingly Religious When it Refuses to Treat *Marsh* as an Exception to Other Lines of Establishment Clause Jurisprudence.

Critically important to a proper resolution of this case is a recognition that *Marsh* is an *exception* to other Establishment Clause tests. Indeed, this was the very point of Justice Brennan's dissent in *Marsh*:

> The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal "tests" that have traditionally structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.

Marsh, 463 U.S. at 796 (Brennan, J., dissenting).

The implication that follows from this exception ought to be obvious, though it has escaped some courts. As Justice (then Judge) Ginsburg has written:

> The common feature [of all legislative prayer], however, as the Court observed, is the invocation of "Divine guidance." Prayer to open each legislative day, the Court stated, was a religious observance acceptable to the drafters of the first amendment, and is today "part of the fabric of our society."

Kurtz v. Baker, 829 F.2d 1133, 1147 (D.C. Cir. 1987) (Ginsburg, J., dissenting) (citations omitted).

Justice Ginsburg went on to put an even finer point on the implications to be drawn from *Marsh*: "The prayer practice that has existed in legislative assemblies in the United States for 'more than 200 years,' I conclude, is not subject to constitutional assault given the High Court's

recent and resounding declaration." *Id.* (citations omitted).

This latter articulation of the constitutionality of legislative prayer is especially instructive in light of the easily documented proliferation of explicitly Christian prayers in the United States House and Senate. For example, forty-nine Members of the House of Representatives, in their *amicus* brief at the cert. petition stage of this case, documented this overwhelmingly Christian nature of the prayers offered in *recent* sessions of Congress. (Br. of Members of Congress as *Amici Curiae* in Support of the Petition for a Writ of Certiorari, throughout.)

This is not to say that legislative prayers will always be explicitly Christian, of course. It is simply to say that in the typical challenge to legislative prayers, the plaintiff objects to the prayers on this ground. *See*, *Snyder v. Murray City Corp*, 159 F.3d 1227, 1231 (10th Cir. 1998) (*en banc*) ("prayer cases typically arise in a procedural posture that pits an audience member of a particular faith, often a minority religious view, against a government-sanctioned speaker who has recited a prayer, often expressing a majoritarian religious view, during a government-created prayer opportunity.") And it is to say that where the prayers are overwhelmingly Christian, that fact cannot be a ground for holding the prayers violative of the Establishment Clause—not under the real *Marsh* test, that is.

Your *Amicus* will not repeat the statistics supplied by the Representatives' Brief. Rather, your *Amicus* will merely 1) point out that this phenomenon was also true when Justice Ginsburg stated that Congress's chaplain's prayers are unassailable under *Marsh*, and 2) demonstrate this truth in a more visual way. Some older congressional

prayers can be accessed on the Internet in such a way that the researcher can find information more easily than having to locate hard copies of old congressional documents and then reading them cover to cover making tallies of various types of prayers.

Your *Amicus* will suggest just two Internet sources from which one can visually get the sense of how prolific such explicitly Christian prayers have been. First, one can navigate to the following website: http://books.google.com/books?id=z-kTAAAAYAAJ&printsec=frontcover&dq=%22prayers+offered+by+the+chaplain%22&hl=en&sa=X&ei=5FD7UfvYDIPq9ATP5oGQBQ&ved=0CDoQ6AEwAg#v=onepage&q&f=false (last visited Aug. 2, 2013). There one can examine for one's self a digitized copy of the congressionally published book by Edward E. Hale, *Prayers in the Senate: Prayers Offered in the Senate of the United States in the Winter Session of 1904.* One will see that day after day after day after day, for that entire session, *every single* prayer was explicitly Christian.

In Galloway's Question Presented in her Brief in Opposition, she complains that "[m]any of the prayer-givers have elaborated on Christian tenets and celebrated the birth and resurrection of Jesus Christ; one asked attendees to recite the Lord's Prayer in unison." (Br. in Opp. i.) Yet in the pages of *Prayers in the Senate*, one sees that the Chaplain either prayed or led (it is not clear which) the Lord's Prayer virtually every day and (based on the Table of Contents of the book), the Chaplain appeared to have deliberately coordinated his prayers with the Christian calendar, explicitly noting Passion Week and Easter Week.

The second Internet source from which one can visually get the sense of how prolific such explicitly Christian prayers have been—*Prayers Offered by the Chaplain* by Frederick Brown Harris—can be found at the following website: http://archive.org/stream/prayersofferedby00unit#page/n0/mode/2up. Here again,

virtually every prayer offered during the 87th and 88th Senates (1961-1964) was explicitly Christian—perhaps a few could be considered generic Judeo-Christian prayers.

These two sources, with their readily accessible visual images, help one understand just how off-base Galloway's impostor *Marsh* test is: these unendingly Christian prayers are among those that Justice Ginsburg correctly declared unassailable under the real *Marsh* test.

Since Congress's chaplains' prayers pass constitutional muster, the Town's prayers present a much easier case, and they too pass muster.

B. Galloway's *Marsh* Test Imports Spurious Considerations Both by Backfilling Aspects of Other Establishment Clause Tests and by Introducing Red Herrings.

As noted above and as ably argued by the Town, Galloway's *Marsh* test is actually a back-doored Endorsement test. Neither a totality of the circumstances approach nor a reasonable observer test is appropriate. As the *Marsh* majority made clear, as the *Marsh* dissent lamented, and as Justice Ginsburg understood, legislative prayers are per se constitutional, absent the two exceptions the Town has acknowledged (and which are not present in the facts of the instant case—especially in light of the immediately preceding sub-section of this Brief).

However, Galloway exacerbated the just mentioned mistake by introducing additional red herrings. Specifically, Galloway emphasized that the Town is represented by a "'Christ-Centered' legal advocacy organization," and that several of the Town's *amici* were also represented by similar groups. (Br. in Opp. 6 & n.1.) Second, Galloway emphasized that children were sometimes present at the meetings, and this sometimes due to school-related activities.

Both these facts are red herrings.

First, the Town's *post hoc* selection of counsel cannot possibly impact the constitutionality *vel non* of the Town's prayers. Yet Galloway seems to be seeking to—if not legally, at least psychologically—influence this Court's analysis with this fact. Apparently, under Galloway's view, a plaintiff who believes that strict separation is required by the constitution may be represented by a like-minded organization without any significance, but a governmental defendant that believes the constitution does not require strict separation may not be represented by a like-minded organization without risking some new or greater totality-of-the-circumstances constitutional violation.

Second, while the presence of children is constitutionally significant in other Establishment Clause contexts, it is not constitutionally significant in the legislative prayer context. Perhaps Galloway believes the presence of children is a fact unique to *local* legislative bodies. But, of course, it is not. As just one example, the both the United States House of Representatives and Senate frequently have children present during their prayers, and in fact, Congress is "delighted" to have them present at such times even—or perhaps especially—when present for school-related purposes:

> We are delighted that you [as a teacher] are planning a school group visit to the United States Capitol. We look forward to greeting you and your students upon your arrival. . . . . The gallery of the Senate Chamber is open to visitors when the Senate is in session [including, of course, during prayer times]. . . . The House of Representatives Chamber

> gallery is open to visitors when the House is in session [including, of course, during prayer times] . . . .

U.S. Capitol Visitors Center, "Planning a Field Trip to the Capitol," http://www.visitthecapitol.gov/schools-teachers/planning-field-trip-the-capitol (last visited Aug. 2, 2013).

Having shown that Galloway's *Marsh* test is the impostor, this Brief will now show that a major reason that the Town's *Marsh* test is the real one is because it comports with the Framers' intentions.

III. THE TOWN'S *MARSH* TEST IS CONSISTENT WITH THE FRAMERS' DESIRE TO PROTECT THE RIGHTS OF BOTH THE MAJORITY AND THE MINORITY BECAUSE THE TOWN'S PRACTICE *AT MOST* ENCOURAGES RELIGION BUT STOPS FAR SHORT OF ESTABLISHING RELIGION.

A. A Proper Understanding of the Establishment Clause Protects the Rights of the Majority and the Minority.

As noted above, in typical prayer cases, including this one, the rights of the majority and the rights of the minority are pitted against each other. *See*, *Snyder v. Murray City Corp*, 159 F.3d 1227, 1231 (10th Cir. 1998) (*en banc*). The Framers were well aware of the nature of such disputes, and a brief look at some history will be instructive in understanding why the Town's *Marsh* test is the real one and why the Town's prayer practice is wholly permissible under that test and under the

Constitution.

The balancing of the rights of the majority and the minority must never be a matter of "either/or"; it must always be a matter of "both/and." Thus, *The Federalist Papers* reflect the concern about the tyranny of the majority over the minority. For example, in *Federalist 51* we read, "[i]f a majority be united by common interest, the rights of the minority will be insecure." *The Federalist* No. 51, at 161 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981). However, *The Federalist* was equally, if not more, concerned about the tyranny of the minority over the majority. For example, in *Federalist 22*, we read that the "fundamental maxim of republican government . . . requires that the sense of the majority should prevail." *The Federalist* No. 22, at 52 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981). The only exception would be if that sense violated the constitutional protection put in place to protect the minority.

Importantly, as discussed above, the Town's practice does not violate the Establishment Clause under the principles articulated in the real *Marsh* test. Nonetheless, this reality becomes even more clear by examining *how* the Framers protected majorities and minorities in the area of religion. The Framers did so by distinguishing four concepts: the acknowledgement of religion, the accommodation of religion, the encouragement of religion, and the establishment of religion. In deciding how to balance the rights of, and protect against the tyranny of, majorities and minorities, the Framers determined that acknowledge, accommodation, and encouragement of religion would be permitted and that only establishment would be forbidden. And as the following sections will demonstrate, it is clear

that the Town's prayers do not establish religion.

B. True Establishment of Religion is Prohibited.

It is important to remember what the original concept of establishment was all about. The Framers were actually aware of three different ways in which religion could be established, as explained by Justice Joseph Story:

> One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.

Joseph Story, *Commentaries on the Constitution of the United States* § 1866 (Arthur E. Sutherland ed. 1970) (1833).

With such a definition in mind, it is easier to distinguish acknowledgement, accommodation, and encouragement on the one hand from establishment on the other hand. Although some of the historical examples of acknowledgement, accommodation, and encouragement do not directly parallel the facts of the present case, it is important to obtain a fairly full-orbed view of these concepts. This Brief will look at each in turn.

C. Acknowledgment of Religion is Permitted.

One of the most historically accurate explications of the meaning of the Establishment Clause is contained in then-Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). There one reads the following:

> On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day Proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them."

Id. at 100-01 (Rehnquist, J., dissenting) (*citing and quoting* 1 Annals of Cong. 914 (1789)). Justice Rehnquist then documented some of the debate over the resolution, including objections on what today would be called establishment grounds. *Id.* at 101 (Rehnquist, J., dissenting). This shows that the First Congress did not simply engage in inconsistent action. Rather, they heard the minority view and rejected it.

Justice Rehnquist then described some of the final language of the Joint Resolution and quoted the

Thanksgiving proclamation ultimately issued by President Washington:

> Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness." The Presidential Proclamation was couched in these words:
>
> > Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish

> constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.
>
> And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

Id. at 101-03 (Rehnquist, J., dissenting) (*citing and quoting* 1 J. Richardson, Messages and Papers of the

Presidents, 1789-1897, at 64 (1897)). The opening words of this same Thanksgiving Proclamation are these: "Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor . . . ." http://avalon.law.yale.edu/18th_century/gwproc01.asp (last visited Aug. 2, 2011).

Justice Rehnquist also noted the views of the eminent constitutional authority, Thomas Cooley:

> But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State

> government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse . . . .

Thomas Cooley, *Treatise on the Constitutional Which Rest Upon the Legislative Power of the States of American Union*, 470-71 (1868) (quoted in *Wallace,* 472 U.S. at 105-06 (Rehnquist, J., dissenting)). Here Cooley was addressing the acknowledgment of God Himself, which is in fact, what Washington had done. It naturally follows that if government can acknowledge God, it can acknowledge religion; and Justice Rehnquist went on to quote Cooley's discussion of the "public recognition of religious worship." *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) (citation omitted).[2]

In sum, acknowledgement is not a hard concept. It meant then exactly what it means now—to recognize. Government can recognize the reality of God and the importance of religion.

Prayer is perhaps the most obvious way in which a legislative body can acknowledge God and the members' religious beliefs.

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[2] This same quotation from Cooley also supports the concept of encouragement that this Brief will address below.

D. Accommodation of Religion is Permitted.

Government can go a step beyond acknowledging religion. It may accommodate various sects' religious views and acts. This approach was discussed by George Washington. "[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit." Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), *in George Washington on Religious Liberty and Mutual Understanding* 11 (E. Humphrey ed. 1932).

Importantly, this very passage was quoted by Justice O'Connor in her dissent in *City of Boerne v. Flores*. 521 U.S. 507, 562 (1997) (O'Connor, J., dissenting). In *Flores*, Justices O'Connor and Scalia debated whether Washington's sentiment and similar sentiments expressed during the colonial and early national period demonstrate that accommodation is constitutionally *required*. *Cf*. *id*. at 560-64 (O'Connor, J., dissenting) with *id*. at 541-44 (Scalia, J., concurring in part). Significantly, that debate is not implicated by the instant case. Rather, Justices O'Connor and Scalia's point of agreement is implicated here: many historic practices that continue to the present day constitute an accommodation of religion and such accommodation is constitutionally *permitted*. These practices include exemptions from military service and exemptions from oath taking, among others. *Id*. at 560-64 (O'Connor, J., dissenting); *id*. at 541-44 (Scalia, J.,

concurring in part).

But these accommodations can also involve pro-actively providing services and opportunities. Classic examples include military, prison, and legislative chaplains.

Like acknowledgement, accommodation is not a hard concept. It simply means that the government changes what it otherwise might do, whether by granting exceptions or providing services that take into account the religious needs of the people. Prayer at the meeting of deliberative bodies accommodates the religious needs of the members of such bodies. And it is the business of those members to determine what type of prayer meets their needs.

E. Encouragement of Religion is Permitted.

Governments can go yet further and encourage religion. Probably the most famous articulation of the encouragement principle is that found in the Northwest Ordinance, which states: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." http://www.earlyamerica.com/earlyamerica/milestones/ordinance/text.html (last visited Aug. 2, 2013).

However, the Founders did not just talk about encouraging religion; they actually did so. Here one can return to then-Justice Rehnquist's *Wallace v. Jaffree* dissent. There he noted that

> [a]s the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of

> sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church. It was not until 1897, when aid to sectarian education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. This history shows the fallacy of the notion found in *Everson* that "no tax in any amount" may be levied for religious activities in any form.

Wallace, 472 U.S. at 103-04 (Rehnquist, J., dissenting) (footnote and citations omitted).

Justice Rehnquist went on to note even more detail about Jefferson's treaty:

> The treaty stated in part: "*And whereas,* the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . . three hundred dollars, to assist the said Tribe in the erection of a church." From 1789 to 1823 the United States Congress had provided a trust endowment of up to 12,000 acres of land "for the Society of the United Brethren, for propagating the Gospel among the Heathen." The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson. Congressional grants for the aid of religion

> were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. In 1833 Congress authorized the State of Ohio to sell the land set aside for religion and use the proceeds "for the support of religion . . . and for no other use or purpose whatsoever . . . ."

Id. at 104 n.5 (Rehnquist, J., dissenting).

Thus, encouragement goes beyond acknowledging God and religion. It goes beyond accommodating a religious sect's or individual's request for an accommodation. It even goes beyond pro-actively extending accommodations without being asked. It involves looking for ways to encourage the population to engage in religious pursuits. It certainly includes proclamations that encourage such actions. Sometimes the vehicle of encouragement will be one sect; sometimes a different one. The Framers truly believed that "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind . . . ." Therefore, government could encourage religion.

To the extent that prayers at deliberative bodies may suggest to members of the body or to those otherwise in attendance to they should attend to religious duties—even should some members or attendees be disinclined to do so or be offended by the suggestion—government may nonetheless engage in such encouragement.

F. The Historic Concepts Persist in Modern Establishment Clause Jurisprudence.

Although current Establishment Clause jurisprudence has retreated far from some of these last examples, the history lesson sets the stage for an important reality: even though watered down, the concepts of acknowledgement, accommodation, and even encouragement have not fallen out of this Court's Establishment Clause jurisprudence.

For example, the acknowledgement of both God and the role of religion in society continues to be addressed. As noted by the Town, in *Marsh*, the Court upheld Nebraska's legislative chaplaincy program. In so doing the Court noted that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id.* at 792. This principle was reiterated again in *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality), when Chief Justice Rehnquist quoted from the Court's earlier Establishment Clause case, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."

Similarly, the concept of accommodation is alive and well and was discussed by a majority of this Court as recently as 2006 in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423, 435-36 (2006). And well-known articulations of accommodation occur in *Zorach v. Clauson,* 343 U.S. 306, 313-14 (1952) ("When the

state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."); and in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

And, of course, the accommodation quotation from *Zorach* also addresses encouragement: "When the state encourages religious instruction . . . it follows the best of our traditions." These words first appeared in *Zorach*, 343 U.S. at 313-14 (garnering the votes of Vinson, C.J., & Reed, Douglas, Burton, Clark, & Minton, JJ.). Since then the words have been quoted in whole or in part in eleven other Supreme Court opinions.[3]

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[3] *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (Rehnquist, C.J., writing for the plurality, joined by Scalia, Kennedy & Thomas, JJ.); *Board of Educ. v. Grumet*, 512 U.S. 687, 744 (1994) (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ,, concurring); *Cnty. of Alleghenyy v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, White & Scalia, JJ., & Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., & White & Rehnquist, JJ., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., concurring in the judgment in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. 349, 386

G. The Town's Practice Falls Far Short of Establishing a Religion.

The point for the present case is obvious, but important: Wherever on the continuum from acknowledgement to accommodation to encouragement this Court might place the Town's practice of opening its meetings with prayer, that plan does not constitute establishment under the Framers' principles.

While more nuanced tests may be required for certain types of Establishment Clause cases, Galloway's impostor *Marsh* test simply muddies clear water. On the other hand, the Town is correct: because it had no improper motive and because its prayers do not proselytize or disparage, those prayers are constitutional.

IV. *MARSH'S* HISTORICALLY-BASED ANALYSIS APPLIES TO THE PRAYERS OF LOCAL DELIBERATIVE BODIES.

The arguments made in this Brief so far

(1975) (Rehnquist & White, JJ., concurring in the judgment in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting, joined in part by Burger, C.J., & Rehnquist, J.) (opinion applying also to two consolidated cases); *Lemon v. Kurtzman,* 403 U.S. 602, 661 (1971) (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); and *Walz v. Tax Com. of New York*, 397 U.S. 664, 671 (1970) (Burger, C.J., & Black, Stewart, White, & Marshall, JJ.). All but Justice O'Connor's are positive invocations of this proposition. Justice O'Connor noted that the proposition was inapposite as used by appellants.

should be sufficient to demonstrate that the Town's prayers pass constitutional muster. However, courts have sometimes refused to apply *Marsh* to various categories of prayer because they believed—rightly or wrongly—that the prayers at issue did not meet *Marsh's* unique history, long tradition, or widespread practice "requirements." *See*, *e.g.*, *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) ("Put simply, the supper prayer does not share *Marsh*'s 'unique history.' In fact, public universities and military colleges, such as VMI, did not exist when the Bill of Rights was adopted.")

Thus, it is worth pointing out that although data about prayer at local deliberative bodies is harder to come by than information about the national and state legislatures, it is not impossible to find. Your *Amicus* offers a few examples here.

In one dispute arising out of a challenge to a city's prayer policy, thirty-four cities joined together to file an *amicus* brief, seeking to be a voice for some larger number of "dozens" of cities in California that opened their meetings with prayer. Brief *Amicus Curiae* for Thirty-four California Cities at 1, *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194 (Cal. App. 2002) (No. B148288), available at 2001 WL 34131868. Thus, if California itself had more than thirty-four towns including invocations at their meetings in 2002, it is no stretch of reason to think that thousands of cities, towns, and counties throughout the rest of the nation had similar practices.

Statements from several courts serve to further illustrate the practices of the local

governments regarding prayers. For example, Salt Lake City's invocation practice is a venerable one. There the city government's practice of opening meetings with prayer dates back to its inception as a city in 1851. *Society of Separationists v. Whitehead*, 870 P.2d 916, 918, n.1 (Utah 1993).

In upholding a New Jersey town's pre-meeting invocation, the New Jersey Supreme Court explained that "*in the past* meetings were customarily opened with an invocation by local clergy *until June 1976*, when council members individually began giving the invocations. *Marsa v. Wernik*, 430 A.2d 888, 891 (N.J. 1981) (emphasis added). The District Court in Minnesota noted the "[l]ong-time custom and practice" in the United States of opening town meetings with prayer. *Bogen v. Doty*, 456 F. Supp. 983, 984 (D. Minn. 1978).

Other courts simply describe local prayers with generic expressions such as "for many years," *Rubin v. City of Lancaster*, 802 F. Supp. 2d 1107, 1108 (C.D. Cal. 2011), "longstanding practice" *Bats v. Cobb County*, 410 F. Supp. 2d 1324, 1325 (N.D. Ga. 2006) or "long tradition," *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008).

Implicitly, whatever the length of these practices, the courts found them sufficiently long that they did not question whether *Marsh* applied. Similarly, here, there should be no question that the *Marsh* test—that is, the real *Marsh* test—controls. And as already demonstrated, the Town's prayers pass muster under that test.

CONCLUSION

For the foregoing reasons and for other reasons stated in the Town's Brief, this Court should

reverse the judgment of the Second Circuit.

Respectfully submitted,
this 2nd day of August, 2013,

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