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 OF BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, AND REV. GRADYE PARSONS, STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The **Baptist Joint Committee for Religious Liberty** (BJC) serves fifteen Baptist entities, including national and regional conferences and conventions, working together to promote religious liberty for all through strong support of the principles of no establishment and free exercise. Grounded in the historical experience of Baptists, whose religious freedom struggles figured prominently in the fight for disestablishment in the American colonies, the BJC recognizes that religion and religious liberty are best served when government neither seeks to promote nor inhibit religion, but leaves religion to its own merits and the voluntary efforts of adherents.[1]

The BJC, which focuses exclusively on religious liberty and church-state issues, believes that religious freedom requires noninterference by the State in matters of faith and doctrine, and that the government has an affirmative duty to avoid any sponsorship of religion. Since its inception in 1936, the BJC has defended the constitutional boundaries between the institutions of religion and government in the U.S. Congress, the courts, and at the state and local levels. The BJC has filed amicus curiae briefs in more than one hundred cases in the courts, including

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. All parties have consented to the filing of this brief through letters of consent on file with the Clerk of this Court.

most of the U.S. Supreme Court's cases dealing with religious liberty.

The BJC serves individuals and churches throughout the country. Due to the congregational autonomy of individual Baptist churches, the BJC does not purport to speak for all Baptists. The BJC's constituents are active participants in all levels of national, state, and local government and therefore have a direct interest in the constitutionality of government-sponsored prayer at each of these levels.

The **General Synod of the United Church of Christ** is the representative body of the national setting of the United Church of Christ (UCC). The UCC was formed in 1957, by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has 5,200 churches in the United States, with a membership of approximately 1.1 million.

The General Synod of the UCC, various settings of the UCC, and its predecessor denominations, have a rich heritage of promoting religious freedom and tolerance. Believing that churches are strengthened, not weakened, by the principle of the separation of church and state, the UCC has long acknowledged its responsibility to protect the right of all to believe and worship voluntarily as conscience dictates, and to oppose efforts to have government at any level support or promote the views of one faith community more than another. At its twentieth gathering, the General

Synod continued this legacy by encouraging the involvement of the United Church of Christ in a national campaign to promote the principle of the separation of church and state and the proper role of religion in society.

The **Reverend Gradye Parsons,** as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 1,850,000 active members in 10,260 congregations organized into 173 presbyteries under the jurisdiction of 16 synods.

The Presbyterian Church's first constitution, adopted in 1788, stated that "the rights of private judgment, in all matters that respect religion," are "universal and unalienable" and should not be "aided by the civil power." Two centuries later, in 1988, the General Assembly reiterated this view, stating that "[r]eligious expression by the government itself or sponsored by the government threatens religious liberty."

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretive body for the denomination, and it is the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Town of Greece begins its town meetings with a communal prayer involving both government officials and its citizens. In challenging this practice, respondents focus primarily on the effect that petitioner's prayer practice has on the dissenters who do not share the Christian beliefs frequently conveyed by those prayers, persuasively demonstrating the pressure felt by religious minorities to conform and participate. But these prayers also infringe the rights of Christians who, like *amici*, believe that prayer is a voluntary, individual act of worship between the prayer-giver and God. In the views of these Christians, decisions regarding whether to pray—and, if so, when and how—must be made voluntarily by each person based on his or her own conscience, and not by the government. It is because of—not in spite of—the importance of prayer and religion that *amici* object to petitioner's "fusion of governmental and religious functions."[2]

Group prayer in a government forum violates a person's freedom to worship according to his or her own conscience. Although people of faith often pray collectively—for example, in churches, synagogues, and mosques—they make a voluntary decision to do so, exercising their constitutional right to form a congregation of persons who have the same approach to worshiping God. In contrast, attendees at a town meeting have not agreed to join a government-

[2] *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (internal quotation marks omitted).

formed congregation. They come to participate in local government, not communal prayer. By opening a government meeting with an exercise of religious devotion, petitioner impermissibly transforms a political assembly into a religious congregation.

I. The First Amendment protects a person's freedom to choose when and how to worship God. The Religion Clauses of the First Amendment grew out of the Framers' understanding of religious worship as a voluntary expression of individual conscience. The Framers sought to protect religious freedom and the voluntary nature of religious devotion by "preventing a fusion of governmental and religious functions."[3] The Religion Clauses "mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State," and therefore "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."[4]

The "liberty of conscience" in matters of religion has long been recognized as a natural right held by all persons. During the seventeenth century, both religious leaders and political theorists advanced arguments for separating church and state as a way to protect each person's liberty of conscience. Under these views, each person has the freedom to decide how to worship based on his own views of what is necessary to achieve salvation, and

[3] *Id.* (internal quotation marks omitted).

[4] *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

the government cannot compel the person to perform or participate in religious acts.

The Founders were heavily influenced by these religious and secular arguments for religious freedom. They viewed liberty of conscience as an inalienable right, and intended for the First Amendment's Religion Clauses to protect that right. To James Madison, for example, religion "must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."[5] During the late eighteenth century, views like Madison's were held by "nearly every politically active American writing on the subject of religion and the state."[6] Indeed, "[l]iberty of conscience . . . was the central value invoked by the states that proposed constitutional amendments on the question of religion, and the purpose that underlay the Establishment Clause when it was enacted."[7] To the Framers, the liberty of conscience was a delicate freedom that demanded strong protection from even the slightest intrusions by the government.

II. Petitioner's practice of beginning a participatory local government meeting with a communal prayer infringes the liberty of conscience of not just religious minorities, but also of Christians who believe that worship should be voluntary. The practice exerts, at a minimum, "subtle coercive

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[5] James Madison, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 1 (1785).

[6] *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 378 (2002).

[7] *Id.* at 351.

pressure" on meeting participants to participate in prayer.[8] Participants who would dissent from the government-sponsored prayer have no choice but to do so conspicuously, and risk compromising their standing before the Board, which could impair their ability to defend their personal interests. The Establishment Clause protects a citizen from being forced to choose between participating in local government and worshiping God according to his or her conscience.

Seeking to avoid these principles, petitioner argues this case is controlled by *Marsh v. Chambers*.[9] But nothing in *Marsh* permits a town meeting to function as a forum for government-led communal prayer. *Marsh* upheld a state legislature's substantially different "chaplaincy practice" under which the legislative body employed a chaplain to minister to its *own* members' religious needs without engaging the citizenry at large in the government's chosen prayer. Indeed, the history on which *Marsh* relies concerns an internal debate among delegates to the Continental Congress and the accommodation reached among themselves. Petitioner cites no separate history that justifies local governments forming for *others* an implied religious congregation.

Petitioner ignores the ways in which local board meetings "differ fundamentally from state legislative bodies."[10] Unlike state and national legislatures, local government bodies typically

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[8] *Lee*, 505 U.S. at 588.

[9] 463 U.S. 783 (1983).

[10] *Pelphrey v. Cobb*, 547 F.3d 1263 (11th Cir. 2008) (Middlebrooks, J., dissenting).

operate in a participatory manner, and thus the intended audience of a prayer service is not limited to elected representatives. Unlike state and national legislatures, local government bodies frequently decide individualized matters that *require* participation, such that a citizen may have no realistic choice but to attend the meeting—and any associated prayer. A passive visitor in the gallery of the U.S. Congress is simply in a different position than a citizen preparing to speak before a town board.

These are distinctions that make a constitutional difference. The Court should reject petitioner's attempt to redefine the Religion Clauses, and should instead reaffirm the Founders' understanding that prayer is an expression of voluntary religious devotion, not the business of the government.

ARGUMENT

I. The Establishment Clause Protects Liberty of Conscience and Genuine Religious Faith.

The First Amendment protects the rights of individuals and faith communities to engage in religious worship as a voluntary expression of individual conscience, and prohibits the government from interfering with those rights. Specifically, the Establishment Clause prevents the government from advancing or privileging religion and from violating the consciences of those who have different religious beliefs or no religious belief at all, while the Free Exercise Clause prevents the government from

burdening or interfering with religious practice. The Religion Clauses collectively reflect the Founders' intent to allow people of faith to practice their religion as they see fit without interference from the government.

Petitioner fundamentally confuses the proper relationship between church and state, and would deprive individuals of their freedom of conscience. In petitioner's view, its practice of opening participatory town meetings with explicitly Christian prayers complies with the Establishment Clause because the practice does not "coerce anyone to *adopt* a particular tenet or belief" or "condition[] any governmental benefits on participation."[11] In other words, petitioner would remove all constraints on the government's ability to sponsor faith-specific religious exercises so long as it does not compel actual belief or overtly punish citizens who refuse to participate. Petitioner's view disregards the history of the Establishment Clause, which demonstrates that the Founders intended much more robust protection for an individual's liberty of conscience.

A. A Religious And Secular Consensus on Rights of Conscience Forms The Historical Backdrop To The Establishment Clause.

Prominent religious and political thinkers in the seventeenth century developed the idea that an individual's liberty of conscience limits the authority of the state. Reacting to the religious strife and civil discord plaguing Europe in this era, these writers

[11] Pet. Br. 39, 40 (emphasis added).

advanced theories of individual conscience, religious toleration, and the proper division between the civil and religious spheres. Particularly influential among them were the English Baptists, the American preacher and Founder of the First Baptist Church in America Roger Williams, and the political philosopher John Locke.[12] All began with the fundamental premise that true religious faith is a voluntary exercise of individual free will that must be shielded from government interference.

In the early seventeenth century, English Baptist pamphleteers argued that a strict separation of religious and worldly affairs must be maintained because God alone has authority in matters of religion. As one pamphlet put it, "[k]ings and magistrates are to rule temporal affairs by the swords of their temporal kingdoms, and bishops and ministers are to rule spiritual affairs by the word and Spirit of God . . . and not to intermeddle one with another's authority, office, and function."[13] These Baptists also argued that the state cannot force a person to worship against his conscience because such insincere worship is "most abominable" and "not acceptable to God."[14] According to these early Baptists, civil law could not compel performance of religious acts, for "if the intent of the law were to make me come to church to worship God, and not of

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[12] *See, e.g.*, Feldman, *supra*, at 357-72.

[13] Religious Peace: Or a Plea for Liberty of Conscience (1646), reprinted in TRACTS ON LIBERTY OF CONSCIENCE AND PERSECUTION: 1614-1661, at 23 (Edward Bean Underhill ed., Hadley Press 1846) (hereinafter TRACTS ON LIBERTY OF CONSCIENCE); *see also id.* at 99 ("There is but one Lord, and one Lawgiver, over his church.").

[14] *See, e.g.*, Persecution for Religion Judg'd and Condemn'd (1615), reprinted in TRACTS ON LIBERTY OF CONSCIENCE, at 104.

faith, [then] the intent of the law were to compel me to sin."[15]

These views influenced Roger Williams, who left England for the Massachusetts Bay Colony and advocated there for a "wall of separation between the garden of the church and the wilderness of the world."[16] Williams recognized that government sponsorship degrades religion's purity and integrity, because genuine faith must be arrived at independently, through one's own free will.[17] In Williams' view, "true religion does not need the support of carnal weapons."[18] Williams viewed a strict separation of church and state as necessary to permit religious faith to flourish in the face of the corrupting influence of worldly affairs.[19] For voicing such "new and dangerous opinions," Williams was expelled from Massachusetts in 1635.[20]

But over the next century, these "dangerous" ideas took hold. The view that liberty of conscience must be protected from government interference was not only adopted by religious thinkers, but also by

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[15] *Id.* at 105.

[16] Roger Williams, "Mr. Cotton's Letter Lately Printed, Examined and Answered," in Perry Miller, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 98 (1962).

[17] Roger Williams, The Bloudy Tenent, Of Persecution for Cause of Conscience (1644), reprinted in 3 COMPLETE WRITINGS OF ROGER WILLIAMS (Samuel L. Caldwell ed., 1963).

[18] *Id.* (quoted in Conrad H. Moehlman, THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 60 (1951)).

[19] *See* Baptists and the American Experience 16 (James E. Wood, Jr., ed., 1976).

20 1 Isaac Backus, A HISTORY OF NEW ENGLAND BAPTISTS 131 & n.2 (1871). A decade later, in 1644, Williams founded Rhode Island, a colony committed to religious toleration. Edwin S. Gaustad, ROGER WILLIAMS 13, 59-60, 70 (2005).

political theorists, including John Locke.[21] In Locke's view, "the care of souls is not committed to the civil magistrate."[22] Religious matters were therefore an exception to Locke's famous social compact, because individuals cannot surrender to government the power to compel in religious matters. Locke instead agreed with the Baptists that compelling others to engage in worship was "to command them to offend God."[23] In short, like the Baptists and Williams before him, Locke sought "to distinguish exactly the business of civil government from that of religion," and to clarify that the domain of the former does not extend to the "care . . . of every man's soul," which "belongs to himself, and is to be left to himself."[24]

B. The Establishment Clause Incorporates Robust Protection For Individual Conscience.

As this Court has recognized, there is a direct line from thinkers such as Roger Williams to the adoption of the Establishment Clause.[25] Judge

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[21] *See* Feldman, *supra*, at 368 (noting that Locke's arguments for liberty of conscience could be "heard . . . clearly in some of the Baptist pamphlets").

[22] John Locke, A LETTER CONCERNING TOLERATION 49 (Kerry Walters ed., 2013).

[23] *Id.* at 66.

[24] *Id.* at 48, 60.

[25] *See, e.g.*, *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 214 (1963) ("views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated . . . in the Federal Constitution"); *Engel v. Vitale*, 370 U.S. 421, 434 n. 20 (1962) (recognizing Williams as "one of the earliest exponents of the doctrine of separation of church and state"); *Lee*, 505 U.S. at 609 n.11 (Blackmun, J., concurring) (noting Williams' influence on the adoption of the Establishment Clause).

Michael McConnell observes that "the evangelical position ultimately coalesced with the secular liberal position," recognizing that "voluntary religious societies—not the state—are the best and only legitimate institutions for the transmission of religious faith and, with it, virtue."[26] And by the time of the Establishment Clause's enactment, "some version of Locke's basic view of the nature of the liberty of conscience had been formally embraced by nearly every politically active American writing on the subject of religion and the state."[27]

Like Locke, the Framers understood the liberty of conscience to mean, above all, a right not to be compelled to support or participate in religious activities at odds with one's personal beliefs.[28] And like Williams, they recognized that religious liberty and the flourishing of genuine religious faith depend on a strict division between the roles of government and religion.[29] These views are most clearly evident in the writings of James Madison and Thomas

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[26] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1442-43 (1990).

[27] *See* Feldman, *supra,* at 378; *see also* McConnell, *supra*, at 1430-31 (noting the depth of Locke's influence on the Framers).

[28] *See* Feldman, *supra,* at 398-412.

[29] *See Engel*, 370 U.S. at 431 (stating that the Establishment Clause is based on "the belief that a union of government and religion tends to destroy government and to degrade religion"); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

Jefferson, two of the most important political figures in the enactment of the Religion Clauses.[30]

James Madison explained that religion "must be left to the conviction and conscience of every man" and that "religion is wholly exempt from [civil society's] cognizance."[31] He warned that government interference with the practice of religion was "an offence against God" and a violation of the natural rights of man.[32] Madison also identified the danger to religion itself, writing that an established religion would "weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits."[33]

Thomas Jefferson's writings reflect a similar recognition of the primacy of individual conscience in matters of religion. He famously wrote that "no man can conform his faith to the dictates of another. The life and essence of religion consists in the internal persuasion or belief of the mind."[34] And Jefferson further cautioned that government-sponsored

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[30] *See* McConnell, *supra*, at 1455 ("No other political figure played so large a role in the enactment of the religion clauses as Jefferson and Madison.").

[31] James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 1 (1785).

[32] *Id.* at ¶¶ 1-4.

[33] *Id.* at ¶ 6.

[34] Thomas Jefferson, Notes on Locke and Shaftesbury (1776), reprinted in 1 THE PAPERS OF THOMAS JEFFERSON 544, 545 (Julian P. Boyd ed., Princeton Univ. Press 1950).

religion "tends . . . to corrupt the principles of that very religion it is meant to encourage."[35]

Although the Framers broadly agreed that the liberty of conscience was an inalienable right, the Constitution lacked an express provision protecting that right.[36] This omission proved controversial, and ratifying conventions in every state but one proposed an amendment that explicitly protected the freedom of conscience.[37]

Like the proposals at the state ratifying conventions, early drafts of the Religion Clauses debated by Congress explicitly referenced "rights of conscience."[38] Although the final formulation of the First Amendment omitted an explicit reference to "conscience," there is no historical evidence that any substantive change was intended. Rather, the omission reflects the understanding that the Establishment and Free Exercise Clauses adequately protect the liberty of conscience.[39]

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[35] Thomas Jefferson, THE VIRGINIA ACT FOR ESTABLISHING RELIGIOUS FREEDOM (1786).

[36] Even without such a provision, however, Article VI barred the use of a "religious test" as a qualification for office. Joseph Story explained that the purpose of this clause was "to cut off for ever every pretence of any alliance between church and state in the national government." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1841 (1833).

[37] Feldman, *supra*, at 401-02.

[38] See, e.g., 1 Annals of Cong. 451 (June 8, 1789) (Joseph Gales ed., 1834) ("The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.").

[39] *See* Feldman, *supra*, at 404 ("The reasons for the Senate's omission of the reference to conscience are not clear. What is certain is that the notion of liberty of conscience was not being abandoned; rather, protection of free exercise and a ban on

As history demonstrates, the Founders understood the Establishment Clause to protect each person's liberty of conscience in a way that is fundamentally inconsistent with petitioners' view of the clause. On the floor of the First Congress, Rep. Daniel Carroll explained that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of government hand."[40] Debates in Pennsylvania further illustrate that liberty of conscience was understood to protect individuals from being "compelled contrary to their principles and inclination to *hear* or support the clergy of any one religion."[41] And Jefferson condemned pressure to "*frequent* or support any religious worship, place, or ministry whatsoever."[42] Petitioner's notion that the government may lead citizens assembled for official purposes in Christian prayer offends the Framers' basic understanding of the liberty of conscience that they had committed to protect "in the fullest latitude."[43]

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establishment, taken together, were thought to cover all the ground required to protect the liberty of conscience.").

[40] 1 Annals of Cong. 757 (Aug. 15, 1789) (Joseph Gales ed., 1834).

[41] Feldman, *supra*, at 398 (emphasis added) (quoting PETITION AGAINST CONFIRMATION OF THE RATIFICATION OF THE CONSTITUTION, Jan. 1788); *see also id.* ("[N]o man ought, or of right can be compelled to *attend* any religious worship." (emphasis added) (quoting Timothy Meanwell, Phila. Indep. Gazetteer, Oct. 29, 1787)).

[42] Thomas Jefferson, THE VIRGINIA ACT FOR ESTABLISHING RELIGIOUS FREEDOM (1786).

[43] Letter from James Madison to George Eve (Jan. 2, 1789), available at http://www.constitution.org/jm/17890102_eve.htm.

II. Prayer At Local Government Meetings Violates The Establishment Clause.

The Establishment Clause protects the liberty of conscience by prohibiting the sort of government-sponsored prayer at issue in this case. Immediately before conducting its official business, the Town of Greece invites a prayer-leader to face the assembled participants and offer a prayer, usually Christian, on the assembled citizens' behalf. This state-sponsored, faith-specific, communal worship achieves an impermissible "fusion of governmental and religious functions."[44] It asks anyone who disagrees with petitioner's views on the appropriate venue, timing, and content of prayer to "pray in a manner her conscience will not allow."[45] And it demeans genuine faith by placing the power of the state behind a particular creed. Establishment Clause precedent and principles bar this practice.

A. Petitioner's Prayer Practice Violates The Establishment Clause By Infringing The Rights Of Conscience Of Those In Attendance.

Petitioner's practice of beginning a participatory local government meeting with a prayer service violates the Establishment Clause because it improperly infuses the work of government with religion, and impermissibly compromises the rights of conscience of citizen participants. As respondents correctly explain, when municipalities unite a town meeting with communal

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[44] *Larkin*, 459 U.S. at 126.

[45] *Lee*, 505 U.S. at 593.

worship, the dissenting citizen is put on the horns of a dilemma: jeopardize access to the most accessible and participatory level of government, or compromise one's conscience by joining insincerely in prayer. But this dilemma is not limited to non-Christians; many Christians believe, as *amici* do, that their freedom of conscience is violated when they are pressured to participate in government prayer, because such acts of worship should only be performed voluntarily.

The Establishment Clause protects the right of both Christians and non-Christians to participate in local government without joining others in prayer. As Madison recognized, each person has an inalienable freedom of conscience, which requires that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[46] By opening its town meetings with a prayer in which the citizenry is asked to join the government officials in praying to God (and often specifically to Christ), petitioner violates the freedom of conscience of each attendee for whom a town meeting is neither the time nor place for communal prayer, or who has theological differences with the government-deputized prayer-leader.

Petitioner's prayer practice cannot be reconciled with the Establishment Clause by characterizing participation in it as voluntary. As the Court held in *Lee v. Weisman*, "overt religious exercise[s]" are not permitted in state-sponsored communal events where "subtle coercive pressure

[46] James Madison, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 1 (1785).

exists," even though participation is formally optional.[47] In *Lee*, the Court held that prayer at a graduation ceremony violated the Establishment Clause even though no student was compelled to believe the prayer-giver's message, or would have been punished for refusing to take part. Rather, the Court recognized that when the government exerts pressure on an individual "to pray in a manner her conscience will not allow," it violates the core value the Establishment Clause was enacted to protect.[48]

This conclusion follows directly from the Framers' recognition that the freedom of conscience is "of peculiar delicacy" and therefore required protection from even "the gentlest touch of government hand."[49] Just as the Framers understood that citizens should not be made to "frequent" worship services,[50] so too would they have seen the danger in government bringing devotional exercises directly to citizens assembled for official

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[47] 505 U.S. at 588; *see also Engel*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the *indirect* coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." (emphasis added)).

[48] *Lee*, 505 U.S. at 593.

[49] 1 Annals of Cong. 757 (Aug. 15, 1789) (Rep. Daniel Carroll) (Joseph Gales ed., 1834). To be sure, *Lee* was a case concerning minors. But while the Court found that the dangers to "freedom of conscience" were "heightened" in the school context, it did not adopt a formalistic bright line between children and adults. 505 U.S. at 592 (noting that the Court's concern about protecting conscience was not "limited to the context of schools," even if they were "most pronounced there"). Nothing in the Founders' conception of the freedom of conscience—which was "of peculiar delicacy"—suggests that adults are immune from subtle coercive pressures.

[50] Thomas Jefferson, THE VIRGINIA ACT FOR ESTABLISHING RELIGIOUS FREEDOM (1786).

purposes. As the Court explained in *Lee*, "if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."[51]

Petitioner's prayer practice exerts, at a minimum, "subtle" and "indirect" pressure on those who disagree with the practice. The prayer-leader actually faces (and gives instructions to) the assembled citizens rather than the Board members.[52] Attendance is sparse (generally ten non-Board participants), and Board members identify participants by their first names.[53] Participants who would dissent from petitioner's worship service therefore have no choice but to do so conspicuously. If they come to advocate for their beliefs and defend their personal interests (as they have the right to do), they must decide whether to risk their standing before the council by broadcasting their objection to the prayer.

In sum, "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[54] But in the Town of Greece, that is precisely the price of exercising one's right to participate in local government. This choice directly undercuts the Framers' objective of "ensur[ing] that

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[51] 505 U.S. at 592.

[52] *See* Resp. Br. 8-9.

[53] *See* http://tinyurl.com/publicforums (Board member calling up a citizen at the 0:35 mark of the video, and saying "Welcome, Joe," without the citizen introducing himself).

[54] *Lee*, 505 U.S. at 596.

religious dissenters *could participate in government* fully and equally."[55] By flouting this tenet, petitioner's prayer practice violates the Establishment Clause.

B. *Marsh* Does Not Exempt Petitioner's Prayer Practice From Ordinary Establishment Clause Principles.

Petitioner contends that *Marsh* controls the outcome of this case because it upheld a "legislative prayer" practice, and petitioner considers its practice to be "legislative prayer." That sort of context-free formalism misunderstands *Marsh*, undercuts Establishment Clause values, and contravenes this Court's precedent.[56] Regardless of whether petitioner labels its practice as "legislative prayer," it is nothing like the practice upheld in *Marsh*.

In *Marsh*, the Court recognized the sensitive nature of government involvement in prayer. It upheld prayers before legislative sessions, offered for the legislators themselves—elected representatives who have voluntarily sought and appointed a chaplain to provide the guidance of prayer. *Marsh* cannot be unmoored from the tradition of chaplaincy that has played a central role in accommodating the religious needs in distinctive governmental settings. *Marsh* does not create a sweeping exception to the Establishment Clause permitting unbounded government-led religious devotion, including faith-specific government-sponsored prayer in participatory town meetings. Petitioner seeks a view

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[55] Feldman, *supra*, at 351 n. 26 (emphasis added).

[56] *See Lee*, 505 U.S. at 595 (rejecting defense of prayer practice as "formalistic in the extreme").

of *Marsh* and the Establishment Clause that is unprecedented and unjustified in this Court's jurisprudence.

1. *Marsh* considered a practice under which the Nebraska Legislature employed a chaplain to minister to its Members as they performed their duties. Although Members represent their constituents' interests, citizens do not participate in the internal functioning of the Nebraska Legislature.[57] Thus, as the record in *Marsh* established, the chaplain's prayers were "an internal act" directed to the Legislature's "own members," and lacked "significant impact on anyone else."[58] The practice instead was cognizant of and reflected the collective religious needs of the Members themselves; for example, the chaplain "removed all references to Christ" to account for the beliefs of a Jewish legislator.[59]

The "unique history" of this practice—which provided the basis for upholding it[60]—is instructive. *Marsh* identifies a tradition stemming from the Continental Congress and discusses in detail the debate over prayer between delegates at that Congress.[61] John Jay and John Rutledge objected to opening their session with prayer because "*we*"—*i.e.*, the delegates—"were so divided in religious sentiments, some Episcopalians, some Quakers, some Anabaptists, some Presbyterians, and some

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[57] *See* R. Neb. Unicameral Leg. 2, § 3.

[58] *Marsh v. Chambers*, 504 F. Supp. 585, 588 (D. Neb. 1980).

[59] *Marsh*, 463 U.S. at 793, n. 14.

[60] *Id.* at 791.

[61] *Id.* at 791-92.

Congregationalists."[62] Meeting this objection, "Samuel Adams arose and said *he* was no bigot," and *he* "could hear a prayer from a gentleman of piety and virtue."[63]

This historical vignette strikingly highlights the inward-looking nature of the debate over prayer before a session of Congress. Opponents focused on the internal religious diversity among the delegates; Samuel Adams answered with his personal view that he would not take offense to "hear[ing]" a prayer he might disagree with. It is unsurprising and admirable that this eminent group could accommodate their differences and seek Divine guidance for their important task, without compromising their own conscience and beliefs. But this history does not suggest that the Founders put aside their views on liberty of conscience and presumed to form an implied religious congregation for *others*.

The tradition of legislators viewing their chaplain as a resource for their own religious needs has continued throughout the practice's "unique history." When Congress considered objections to the practice in the 1850s, it rejected the notion that it had established "a national chaplaincy," and thought employing a chaplain to serve the religious needs of Members was no different than "hav[ing] officers who attend to the private secular business of the

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[62] Charles F. Adams, FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE, ABIGAIL ADAMS, DURING THE REVOLUTION 37 (1876) (emphasis added).

[63] *Id.* (emphasis added).

members."[64] Congress has likewise followed the tradition of striving for consensus in chaplaincy matters. For example, in the U.S. House of Representatives, where internal matters are typically governed by the majority party, the chaplain is jointly selected by both parties.[65] The chaplain has "an ecumenical ministry," and strives to "serve all the Members"—not the Nation at large—whether they are "Roman Catholic, Jewish, or Protestant," affiliated with another religion, or "not affiliated with any religious group."[66] This process of selecting a legislative chaplain further demonstrates both the inward-looking nature of the legislative prayer practice upheld in *Marsh*, and the legislators' ability to ensure that the chaplain offers prayers that meet their own religious needs—two factors that are absent in petitioner's prayer practice.

The legislative chaplaincy practice upheld in *Marsh* reflects the Nation's longstanding

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[64] S. Rep. 32-376, at 2-3 (1853) ("The chaplain is an officer of the house which chooses him, and nothing more."); *see also* H.R. Rep. 33-124, at 7 (1854) (stating that Members of Congress "surely need to have their views of *personal* importance daily chastened by the reflection that they are under the government of a Supreme Power" (emphasis added)). Senator Robert Byrd much later observed that the chaplain's prayers "could often help members who were caught up in their own immediate battles to put the nation's needs into perspective." 2 Robert C. Byrd, THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 305 (1991).

[65] Memorandum from James D. Ford, Chaplain of the U.S. House of Representatives, to the Chaplain Nominating Committee of the House of Representatives (June 8, 1999).

[66] *Id.* at 1. When a new chaplain was selected in 2000, candidates were specifically told about the "ecumenical" nature of the ministry, and asked of their comfort working with the "many religious groups *that we have in Congress*." House Chaplain Selection Committee, Final Report, Attachment 13 (Jan. 2000) (emphasis added).

accommodation of specific religious needs without combining the religious with the political or compromising the consciences of individual citizens. In other limited contexts, such as the military, prisons, and government hospitals, the government may facilitate voluntary religious practice through government-supported chaplains to meet the religious needs of those who, by reason of deployment or confinement, have limited access to opportunities for worship or pastoral care.[67] Far from supporting the faith-specific prayers at issue in this case, these chaplaincy practices underscore an important limit on government involvement in religion. The chaplain may perform his duties according to his specific faith in contexts in which participation is strictly voluntary.[68] Outside of this context, chaplains must recognize and respect the environment of religious pluralism in which they function.[69] Chaplains in these government settings—unlike many of the prayer-leaders at

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[67] *See, e.g.*, *Theriault v. Silber*, 547 F.2d 1279 (5th Cir. 1977) (prison chaplaincy); *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (military chaplaincy); *Carter v. Broadlawns Medical Center*, 857 F.2d 448 (8th Cir. 1988) (hospital chaplaincy). *See generally* Ira C. Lupu and Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. Va. L. Rev. 89 (2007).

[68] *See, e.g.*, *Anderson v. Laird*, 466 F.2d 283, 298 (D.C. Cir. 1972) (Leventhal, J., concurring) ("[T]he special case of the military permits Government aid for religious worship—assuming the core element of voluntarism on the part of the attending military personnel."); AR 165-1 Army Chaplain Corps Activities, § 2-1(b) (2009) ("Participation in religious activities is voluntary"); SECNAV Instruction 1730.7D Religious Ministry Within the Department of the Navy, 6.c (2008) ("Attendance at divine services shall be voluntary").

[69] *See, e.g.*, DoD Instruction 1100.22, "Policy and Procedures for Determining Workforce Mix," Enclosure 4, Section 1(e)(2)&(3) (Apr. 12, 2010); SECNAV Instruction 1730.7D, 5.e.2.

petitioner's town meetings—respond to the needs of those they serve and are sensitive to the lack of consensus on how to pray among even Protestants, much less Protestants, Catholics, Jews, and Muslims, and can tailor their prayers accordingly.[70]

2. Petitioner cites no separate "unique history" or tradition justifying its prayer practice, relying exclusively on its analogy to the chaplaincy practice upheld in *Marsh*. But petitioner's practice is hardly analogous, in part because local board meetings "differ fundamentally from state legislative bodies."[71] Unlike Congress and every state legislature, virtually all local governments hold "open meetings" in which citizens are invited to participate and comment on local issues.[72] In fact, local government has been uniquely participatory since the Founding: de Tocqueville memorably observed that "[t]own meetings are to liberty what primary schools are to science; they bring it within the people's reach."[73]

Local board meetings directly affect citizens in a way that legislative meetings do not. The issues

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[70] *See* Army Chaplain Corps Requirements, http://www.goarmy.com/chaplain/about/requirements.html (last visited Sept. 21, 2013) (requiring Army chaplain to be "[s]ensitive to religious pluralism" and "provide for the free exercise of religion by all military personnel").

[71] *Pelphrey*, 547 F.3d at 1288 (Middlebrooks, J., dissenting); *see also id.* (extending "the legislative prayer exception beyond the Congress or state legislatures" causes *Marsh*'s "historical justification [to] disappear").

[72] *See* 4 Eugene McQuillin, MUNICIPAL CORPORATIONS § 13:10 (3d ed. 2011); Brian Adams, *Public Meetings and the Democratic Process*, 64 Pub. Admin. Rev. 43, 44-45 (2004).

[73] Alexis de Tocqueville, DEMOCRACY IN AMERICA 46 (Bruce Frohnen ed., 2002).

involved are more personal: local government typically considers zoning, land development, and local budget matters, so participants often have strong personal stakes in the issues being decided.[74] At the same time, the "localized nature" of these decisions may make officials more "susceptible to community pressures, political influences, and personal bias."[75] That is particularly true given that Board members may know the participating citizens personally.[76]

Thus, when such a meeting opens with prayer, the religious dissenter is in a far different position than a passive spectator in the anonymous setting of a visitor's gallery. Since the meeting is participatory and communal, the prayer is not an internal matter among legislators representing distant constituents. In fact, in the Town of Greece, prayer-leaders turn their backs to the Board and face—and give instructions to—the participants.[77] In this setting, participants who would dissent from petitioner's worship service have no choice but to do so conspicuously. If they come to advocate for their beliefs and defend their personal interests, they must decide whether to risk showing disrespect to the Board members by refusing to participate in the communal prayer service the Board instituted. As a practical matter, citizens have "no real alternative

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[74] *See* William H. Baker et al., *Critical Factors for Enhancing Municipal Public Hearings*, 65 Pub. Admin. Rev. 490, 493 (2005).

[75] M. Dennison, *Dealing with Bias and Conflicts of Interest*, ZONING NEWS (Nov. 1994), available at http://www.rhdc.org/sites/default/files/Dealing_With_Bias.pdf.

[76] *See* http://tinyurl.com/publicforums.

[77] *See* Resp. Br. 8-9, 11.

which would . . . allow[] [them] to avoid the fact or appearance of participation."[78]

3. Finally, the *Marsh* Court signaled that the accommodation it upheld was not without limits. The Court held that it need not concern itself with the content of the prayers "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."[79] In other words, even in finding an acceptable context for prayer in a government setting, the Court remained concerned about the "clearest command" of the Establishment Clause, that government may not prefer one religion over another.[80] *Marsh* recognized that factual circumstances will inform the appropriate level of judicial inquiry in each case. Petitioner cannot simply label its practice "legislative prayer" and ignore the differences between its prayers and the ones offered in *Marsh*.

In sum, decisions by members of Congress and state legislatures to employ a chaplain that would invoke Divine guidance on their behalf does not suggest—and *Marsh* did not hold—that government may assume the authority to lead citizens in faith-specific communal prayer as a component of a participatory government meeting.[81]

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[78] *Lee*, 505 U.S. at 588.

[79] *Marsh*, 463 U.S. at 794-95.

[80] *Larson v. Valente*, 456 U.S. 228, 244 (1982).

[81] Declining to extend *Marsh* to municipal government meetings would also be consistent with this Court's approach in other areas, where it has recognized that differences between levels of government call for different treatment in the law. *See Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (distinguishing municipal taxpayer standing based on the

CONCLUSION

Petitioner's fundamental mistake is captured by its view of communal prayer as a "ceremonial acknowledgement[] of religion."[82] Holding aside the pressure it places on non-believers and religious minorities, to many Christians prayer cannot be reduced to mere "ceremony." Rather, prayer is an act of communication with God that is profound, personal, and—crucially—voluntary.

The Religion Clauses of the First Amendment respect the individual, voluntary nature of prayer by allowing each person to worship God as dictated by his or her own conscience, and by prohibiting the government from interfering with this right. Petitioner's practice of opening town meetings with a faith-specific, communal prayer violates the Establishment Clause because it infringes the freedom of conscience guaranteed to each person.

"peculiar relation of the corporate taxpayer to the [municipal] corporation"); *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (rejecting immunity for municipalities because, unlike qualified immunity for state officials, there was "no tradition of immunity for municipal corporations").

[82] Pet. Br. 39.

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