No.

10-3635

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSAN GALLOWAY and LINDA STEPHENS, *Plaintiffs-Appellants*,
v.
TOWN OF GREECE and JOHN AUBERGER, in his official capacity as Town of Greece Supervisor, *Defendants-Appellees*.

On Appeal from United States District Court for the Western District of New York, No. 08-CV-6088

BRIEF AMICUS CURIAE OF FOUNDATION FOR MORAL LAW, ON BAHALF OF DEFENDANTS-APPELLEES

March 23, 2011

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CORPORATE DISCLOSURE STATEMENT

No. 10-3635

Galloway v. Town of Greece

Amicus curiae Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*.

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March 23, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions & Statutes

Other Authorities

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law[1] (the Foundation) is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God, especially when exercised by public officials. The Foundation encourages the judiciary and other branches of government to return to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, the recitation of the Pledge of Allegiance, and other public acknowledgments of God. The Foundation has filed several amicus briefs in federal circuit courts around the country defending the constitutionality of public prayer in legislative bodies.

The Foundation has an interest in this case because it believes that the prayer by or before legislative and other policy-making bodies constitutes one of the many public acknowledgments of God that have been espoused from the very

[1] Pursuant to Rule 29(c)(5), Fed. R. App. P., *Amicus* states: No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

beginning of the United States as a nation without violating the United States Constitution. The Foundation believes that the government should encourage such acknowledgments of God because He is the sovereign source of American law, liberty, and government. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the practice of the Town of Greece, New York, of opening its Board meetings with prayer violates the Establishment Clause of the First Amendment.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

It is the responsibility of this Court, and any court exercising judicial authority under the United States Constitution, to do so based on the text of the document from which that authority is derived and to which the oath of office is sworn. A court forsakes its duty and its oath when it rules based upon case "tests" rather than the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the "supreme Law of the Land." U.S. Const. art. VI. Accordingly, the controlling "test" to be applied to the facts of this case is the text of the Establishment Clause, not simply judicial opinions.

The text of the Establishment Clause states that "Congress shall make no **law** respecting an **establishment** of **religion**." U.S. Const. amend. I (emphasis added). When these words of the law are applied to the Town of Greece Board meeting prayers, it becomes evident that none of the prayers offered at Board meetings are laws, they do not dictate religion, and they do not respect an "establishment of religion." While the opinion in *Marsh v. Chambers* compels the same result in this case—that the prayers at issue are constitutional—the supreme law of the land dictates that the prayers are constitutional because they do not violate the words of the Constitution, not simply because they comport with a judicial opinion on the Constitution.

When courts and local officials attempt to distinguish between sectarian and nonsectarian prayers and censor out the former, as Plaintiffs-Appellants believe must be done, they embark upon a slippery slope of entanglement with religion, prefer some religions over others, and engage in theological exercises in which they have neither expertise nor jurisdiction. Moreover, voluntary prayers offered at the beginning of legislative deliberations respects those citizens who believe in God and the power of prayer in society and government while still respecting the right of nonbelievers to refrain from participation.

ARGUMENT

> *This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clauses.*

Van Orden v. Perry, 545 U.S. 677, 692-93, (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF THE OPENING PRAYERS AT TOWN OF GREECE BOARD MEETINGS SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

Plaintiffs-Appellants claim that the prayers offered by local clergy and citizens at the beginning of Board meetings of the Town of Greece violate the Establishment Clause of the First Amendment. The district court did an admirable job of applying *Marsh v. Chambers*, 463 U.S. 783 (1983), to this case and, in the end, correctly concluded that the prayers offered at Town Board meetings and the relevant policy did not violate the Constitution. *Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010).[2] But the court never actually applied the words of the Constitution to the case. *Amicus* submits that the court below should be affirmed, but that the constitutional analysis that is more faithful to the law and the judicial oath is the never-amended text of the Establishment Clause as it was understood at the time of its ratification.

[2] Likewise, Defendants-Appellees did an excellent job in their original brief of explaining why they should prevail under *Marsh* and other relevant cases.

A. The Constitution is the "supreme Law of the Land."

The Constitution itself and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oaths of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto should control, above all other competing powers and influences, including the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend

> to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853). The words of the Constitution are neither suggestive nor superfluous: "In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

The U.S. Supreme Court affirmed this approach in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 2788 (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

United States v. Sprague, 282 U.S. 716, 731 (1931); see also *Gibbons v. Ogden,* 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821.

B. *Marsh v. Chambers*, like all Establishment Clause cases, is merely an opinion interpreting and applying the law, but it cannot supplant the law itself.

In most, but not all, cases concerning the Establishment Clause of the First Amendment, courts apply the aptly named *Lemon* test, crafted by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to judge whether the practice in question is constitutionally permissible. Perhaps because of the "persistent criticism"[3] and noticeable shortcomings of *Lemon* and its progeny,[4] the

[3] *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005).

[4] Courts of appeal have repeatedly expressed frustration with the difficulty in applying Establishment Clause jurisprudence. For example, this Court has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence," *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), "marked by befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Tenth Circuit opined that there is

Supreme Court has declined several times since its inception to follow the three-part test. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding in part the constitutionality of the Religious Land Use and Institutionalized Persons Act (RLUIPA)); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding high school graduation prayer unconstitutional because of "coercion" on students to attend and participate); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (upholding constitutionality of cross displayed by private entity on Ohio Capitol grounds); *Larson v. Valente*, 456 U.S. 228 (1982) (holding unconstitutional state law imposing regulations upon certain religious organizations). As the district court noted below, *Marsh* was a departure from "the test ordinarily used in Establishment Clause cases" and under which "it seems clear that legislative prayer would not pass." *Galloway v. Town of Greece*, 732 F. Supp. 2d at 221 & n.42. Instead of stretching the *Lemon* test in some implausible manner to permit the practice of legislative prayer, the Supreme Court ignored *Lemon*, recognized in *Marsh* that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," *Marsh*, 463 U.S. at 786, and fashioned another test for "legislative prayer" cases.

Even though the *Marsh* test is much closer to the constitutional text, swapping one judicial rule (*Lemon* et al.) for another one still obscures the only

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"perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

law at issue. The Supreme Court has invented these interchangeable, substitutionary Establishment Clause tests precisely because it has rejected the idea that the constitutional text has a plain, objective meaning. In *Lemon*, the Supreme Court stated that it could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," and that "[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines" delineating what is constitutionally permissible or impermissible. 403 U.S. at 612. *See also Lynch v. Donnelly,* 465 U.S. 668, 678-79 (1984) ("[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed."). It is the High Court's penchant for "drawing lines" with no guiding criteria instead of following the words of the law in the First Amendment that is the primary problem with Establishment Clause jurisprudence.

The judiciary's abandonment of "fixed, *per se* rule[s]" results in the haphazard application of judges' own complicated substitutes for the law. James Madison observed in *The Federalist Papers* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases changes so often and is so incoherent that "no man . . . knows what the law is today, [or] can guess what it will be tomorrow," "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ."[5] *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky., v. ACLU of Kentucky*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting). With each new variation on amorphous judicial "tests," court opinions only exacerbate the lack of "categorical absolutes" in Establishment Clause jurisprudence.

The text of the Establishment Clause contains a definite and straight-forward meaning to which the judicial oath of office requires adherence in this case. *See Marbury*, 5 U.S. at 180. As Justice Thomas has observed, "When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not

[5] Not surprisingly, district courts also routinely observe that the Supreme Court's Establishment Clause jurisprudence is "convoluted, obscure, and incapable of succinct and compelling direct analysis," *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); "mystif[ying] . . . inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005); and "utterly standardless," *Newdow v. Congress*, 383 F.3d 1229, 1244 n.22 (E.D. Cal. 2005).

hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. New London*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting).

II. THE PRAYERS OFFERED AT THE TOWN OF GREECE BOARD MEETINGS ARE NOT "LAW[S] RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. The practice of the Town of Greece starting its board meetings with prayer does not violate the Establishment Clause because it is not a "law respecting an establishment of religion."

A. Public prayer and prayer policies are not "laws."

About 25 years before the ratification of the First Amendment, Sir William Blackstone, in his influential commentaries, had defined a "law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." 1 William Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Several decades later, Noah Webster's 1828 Dictionary stated that "[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in

original). Alexander Hamilton explained what is and is not a law in *Federalist No. 15*:

> It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.

The Federalist No. 15 (Alexander Hamilton), at 72 (Carey & McClellan eds. 2001).

In the present case, the Board of the Town of Greece may be a legislative or deliberative body, but its practice of opening with a prayer is hardly a "law" as defined above. The Town has "no written policy concerning prayer at Board meetings," it does not censor or preview prayers, and, while local clergy are usually invited to give the prayers, the Town permits prayers given by any that wish to pray. *Galloway*, 732 F. Supp. 2d at 197. Without even examining its *practice* of opening prayers at Board meetings, the Town has passed "no law" whatsoever about its opening prayers, whether it be to direct its Board members, staff members, or citizens. There is, therefore, no "command [as to] what shall be done," *Blackstone*, *supra*, nor this there any "penalty or punishment for disobedience," Federalist No. 15, *supra*.

Nor could the Board's practice of opening with prayer be considered a "law" in the traditional sense. Prayers and invocations are by nature words directed to

God and not to those physically in attendance. One cannot obey or disobey another's prayer. Similar to an executive Thanksgiving proclamation, the legislative prayer "has not the force of law, nor was it so intended." *See Richardson v. Goddard*, 64 U.S. (How.) 28, 43 (1859) ("The proclamation . . . is but a recommendation. . . . The duties of fasting and prayer are voluntary, and not of compulsion . . . . It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor"). In short, "[w]ords do not coerce." *Books*, 401 F.3d at 870 (Easterbrook, J., dissenting). However effective or allegedly offensive prayers offered at Board meetings may be to Appellants and others, they do not rise to the level of a "law" under the First Amendment.

B. Public prayer does not "respect[] an establishment of religion."

Just as they do not constitute a law, prayer at Town Board meetings do not "respect[]," *i.e.*, concern or relate to, "an establishment of religion" under the Establishment Clause.

1. The Definition of "Religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions' proposed amendments to the Constitution, and was echoed by the United States Supreme Court in

Reynolds v. United States, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[6] In each instance, "religion" was defined as:

> **The duty which we owe to our Creator, and the manner of discharging it.**

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 The Founders' Constitution 82 (Phillip B. Kurland & Ralph Lerner eds. 1987); *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16. Three states also included this definition of religion in their proposed amendments to the Constitution during ratification debates, demonstrating that Virginia's definition was the prevailing definition of the term.

[6] The U.S. Supreme Court later reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will"). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,[7] quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting). Sixteen years later in *Everson*, the Supreme Court noted that it had

> previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 Act for Establishing Religious Freedom].

Everson, 330 U.S. at 13.

The *Everson* Court emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout

[7] *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. *Id*. at 12. Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. *See* Madison, *Memorial and Remonstrance*, *supra*. For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his dissent in *Everson* which was joined by Justices Frankfurter, Jackson, and Burton. *See id.* at 64. Thus, the United States Supreme Court has repeatedly recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16.

The prayers offered by local clergy and citizens at Town of Greece Board members do not rise to the level of "religion" properly defined under the First Amendment. Although the prayers offered may be the discharge of the speaker's own *religious* duty to God, one prayer is not itself a whole *religion.* Various religious exercises and elements may together comprise a complete religion, but an independent exercise of one such element, however *religious* or *sectarian* or *Christian*, does not a religion make.

On September 25, 1789, the very day that "final agreement was reached on the language of the Bill of Rights," the U.S. House of Representatives "resolved to

request the President to set aside a Thanksgiving Day to acknowledge 'the many signal favors of Almighty God.'" *Marsh*, 463 U.S. at 788 n.9 (citations omitted).

> Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and *opening prayers* as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states.

Id. at 788-89 (footnote omitted) (emphasis added). Thus, textually *and* historically, it cannot be reasonably held that the Town Board's opening prayers are an attempt to dictate the duties that citizens of the Town of Greece owe to the Creator and the manner in which they should discharge those duties. Consequently, the challenged prayers are not laws respecting an establishment of "religion." U.S. Const. amend I.

2. The Definition of "Establishment"

The Establishment Clause does not broadly prohibit all legislative laws regarding religion or religious activity: it proscribes "laws[] respecting an *establishment* of religion." *Id.* (emphasis added). Even if legislative or deliberative-body prayers could be considered "laws" or "religion" under the First Amendment—which they are not—the prayers at Town of Greece Board meetings are still not an "establishment" of religion.

An "establishment" of religion, as it was widely understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a

state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." 2 Joseph Story, *Commentaries on the Constitution* § 1871 (1833). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that *Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience*." 1 *Annals of Cong*. 757 (1789) (Gales & Seaton's ed. 1834) (emphasis added).

At the time of its adoption, therefore, "[t]he text [of the Establishment Clause] . . . meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they existed in the various states." Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 690 n.19 (1992). "[E]stablishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter*, 544 U.S. at 729 (Thomas, J., concurring) (quotations and citations omitted). The House Judiciary Committee

in 1854 offered a poignant summary of an "establishment" of religion in a report on the constitutionality of chaplains in Congress and the Army and Navy:

> What is an establishment of religion? It must have a creed, defining what a man must believe; it must have rites and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these*.

H.R. Rep. No. 33-124 (1854) (emphasis added).

Public prayers offered at legislative and government meetings do not amount to or even approach an "establishment" of religion. Prayers at Town of Greece Board meetings, regardless of to Whom or in Whose Name they are offered, and regardless of the denominational affiliation of the prayer-giver, do not set up a coercive religious orthodoxy. No one is compelled by policy or practice to offer, participate in, agree with, or attend the prayers. There are no penalties for nonparticipation. No taxes have been levied to support one denomination or faith over another.

As is often the case in litigation concerning public prayer, Plaintiffs-Appellants urge the courts to command the Town of Greece to become "prayer censors" at their Board meetings. The court below noted the Plaintiffs-Appellants' contention "that prayers may only refer to a 'generic God,' and must not refer to any particular deity or to any religious belief, such as the Holy Trinity, that is specific to a particular religion or group of religions." *Id.* To this end, argue

Plaintiffs-Appellants, "the Town must instruct potential prayer-givers to give inclusive ecumenical prayers." *Id.* The court below interpreted this requirement to be "a condition or term of the invitation" to open Board meetings with prayer. *Id.* at 243 n.69. But if the Town Board must censor or at least forewarn those giving prayers that "sectarian" or other religious references must be left out, then such a practice would ironically bring the Board *closer* to an establishment of religion than the current prayer practice. Under the current practice, the prayer-giver from the community is given complete latitude to pray as their conscience directs: the right to the free exercise of their religion, if you will. The district court correctly noted that "the policy requested by Plaintiffs would . . . impose a state-created orthodoxy." *Id.* at 243. Such Town (and judicial) censorship would smack more of an official religious establishment of "non-sectarianism" than the current prayer practice and would require the School Board to "enforce the legal observation of it by law, [and] compel men to worship God in [a] manner contrary to their conscience." 1 *Annals of Cong*. 757 (1789). No court or legislative body should be so excessively entangled with religious expression that it becomes the gatekeeper of acceptable prayers, especially prayers acceptable only to the subjective whims of one or two religious non-adherents.

III. DISTINGUISHING "SECTARIAN" FROM "NONSECTARIAN" PRAYERS FAVORS SOME RELIGIONS OVER OTHERS AND LEADS TO A JUDICIAL QUAGMIRE IN WHICH THE COURT HAS NEITHER JURISDICTION NOR EXPERTISE TO NAVIGATE.

At trial and before this Court, Plaintiffs-Appellants argue that the "Christian" and "sectarian" nature of most (but not all) of the prayers given renders the Town Board's prayer practice unconstitutional. *See Galloway*, 732 F. Supp. 2d at 209 ("Plaintiffs maintain that all sectarian legislative prayer violates the Establishment Clause, and that only 'non-sectarian, broadly inclusive prayers are constitutionally permissible'"); Appellants' Br. at 48 (stating that "[t]he Town of Greece persists in violating the Establishment Clause through its reliance on exclusively Christian prayer-givers who deliver overwhelmingly Christian prayers"). The court below rejected this argument and demonstrated well that *Marsh* "does not require that legislative prayer be non-sectarian. To the contrary, *Marsh* upheld the constitutionality of legislative prayer, thereby specifically carving out a unique exception to the *Lemon* test, based primarily if not exclusively on the long history of legislative prayer in Congress, which is often overtly sectarian." 732 F. Supp. 2d at 241. The court also noted that, despite Plaintiffs-Appellants' assertion below that prayers should be "non-sectarian," "most of the prayers that Plaintiffs maintain are sectarian are indistinguishable from prayers that they say are non-sectarian." *Id.* An "establishment of religion," as explained

above, is much easier to define than a few people's subjective and conflicting notions of what prayers "offend" them as "too sectarian."

Marsh upheld the constitutionality of a legislative prayer practice that was in many ways more narrowly "sectarian" than the prayer practice in the Town of Greece. Nebraska's unicameral legislature employed a chaplain to lead in prayer every day the legislature was in session, except for a few occasions on which guest pastors gave invocations. As the court below noted comparatively, in *Marsh*, "a single clergyman of a single Christian denomination had been the chaplain of the Nebraska legislature for sixteen years." *Id.* at 242. Noting that the Continental Congress engaged in prayer and that the Congress of 1789 voted to employ a chaplain just three days before it adopted the First Amendment, the *Marsh* Court declared that "their actions reveal their intent," *Marsh* at 790, and ruled that such legislative prayers did not violate the Establishment Clause. The Court did note that Rev. Palmer had previously given explicitly Christian prayers but ceased doing so in 1980 after the objection of a Jewish legislator, *id.* at 793 n.14, but the Court did not say the previous explicitly Christian prayers were unconstitutional.

The prayers before the Town of Greece Board are far more diverse than those upheld in *Marsh.* Different pastors are invited or permitted to pray at different times, and no attempt is made to dictate what the prayer must or must not

include. Those who lead in prayer are not paid for doing so. Some prayers include the Name of Jesus Christ, but others do not.

Ultimately, trying to divine and enforce a distinction between prayers that are "sectarian" and those that are "nonsectarian"—in addition to having no basis in the text of the First Amendment—is an exercise fraught with practical, theological, and philosophical problems which judges and public officials are unequipped to resolve. James Madison, a primary author of the First Amendment, recognized this danger in 1784 when he spoke against religious assessments, a proposal in the Virginia House of Burgesses to impose a tax, the proceeds of which were for the support of "Christian" clergy. Madison's notes from one of his speeches on the religious assessments bill were as follows:

> 3. What is [Christianity]? Courts of law to Judge. ...
> 7. What sense the true one for if some doctrines be essential to [Christianity] those who reject these, whatever name they take are no [Christian] Society?
> 8. Is it Trinitarianism, Arianism [an heretical doctrine that Christ was divine but not equal to the Father], Socinianism [similar to Unitarianism]? Is it salvation by faith or works also, by free grace or by will, &c, &c.
> 9. What clue is to guide Judge thro' this labyrinth when ye question comes before them whether any particular society is a [Christian] society?

James Madison, 1784, reprinted by Norman Cousins, *In God We Trust* 302-04 (Harper and Brothers 1958). Madison's point was that if the State of Virginia was going to give the proceeds of this assessment to "Christian clergy," then the State

of Virginia would have to define who is and who is not a Christian. If a Roman Catholic priest asked for his share of the subsidy, should he receive it? Some Protestants in Madison's time would have denied that Roman Catholics are Christians. Would an Arian or a Socinian be defined as a Christian for subsidy purposes? What about a person who believes salvation is by works rather than by faith? Judges and state officials have neither the jurisdiction nor, in many instances, the competence to determine who is and who is not a Christian.

Judges, legislators, commissioners, councilmen, and other public officials face similar difficulties if they are required to distinguish between sectarian and nonsectarian prayers. First, what is "sectarian?" A "sect" is defined as "a subdivision within a larger religious group." *The American Heritage Dictionary of the English Language* (Houghton Mifflin 1969, 1976) defines "sect" as "A group of people forming a distinct unit within a larger group by virtue of certain refinements or distinctions of belief or practice" and "sectarian" as "Pertaining to or characteristic of a sect or sects." *Black's Law Dictionary, 7th Ed.* (West 1999) defines "sectarian" as "Of or relating to a particular religious sect."

Using these definitions, Christianity, Judaism, Islam, Buddhism, and others are religions, not sects. Sects within Christianity would include Roman Catholicism, Lutheranism, Methodism, Presbyterianism, etc; sects within Judaism might include Reformed, Conservative, and Orthodox; sects within Islam might

include Sunni and Shiite; sects within Buddhism might include Zen, Mahayana, and others.

Using the Name of Jesus Christ in a prayer would not be "sectarian" by this definition. Using the Anglican *Book of Common Prayer*, the Augsburg Confession of Lutheranism, the Catechism of the Roman Catholic Church, or other such documents might be sectarian. But if a policy singles out Christianity and prohibits prayer in the Name of Jesus but does not prohibit prayer in the name of the God of Abraham, Isaac, and Jacob, that policy discriminates against the Christian religion.

And if we define a prayer "in the Name of our Lord and Savior Jesus Christ" as sectarian, how about a prayer that just mentions Jesus? Or a prayer in the name of "the Messiah of Israel"? What about a prayer that contains phraseology from the Old or New Testament? Would a prayer be sectarian if it does not mention Jesus Christ but incorporates elements of Christian theology like the grace of God, intercession, providence in history, miraculous power, or answers to prayer? Do Town Board members have the jurisdiction or competence to "parse" these prayers? Do judges? If judges even try to involve themselves in these issues, they risk fostering the excessive entanglement of government with religion that, according to *Lemon v. Kurtzman*, the Establishment Clause was intended to avoid.

Those who pray in the Name of Jesus Christ generally do not do so to "proselytize"; they do so out of obedience to God and His commands as they understand them. Jesus said,

> Verily, verily, I say to you, Whatever ye shall ask the Father in my name, he will give it you. Hitherto ye have asked nothing in my name: ask, and ye shall receive, that your joy may be full. (*John* 16:23-24 (KVJ).)

Many have interpreted this and other passages as commands to pray in the Name of Jesus. The *Catechism of the Catholic Church* 702 (Doubleday Edition 1995) provides, "There is no other way of Christian prayer than Christ. Whether our prayer is communal or personal, vocal or interior, it has access to the Father only if we pray 'in the name' of Jesus." Lutheran scholar Francis Pieper, whose four-volume systematic theology text *Christian Dogmatics* (Concordia Publishing House 1953, 1970) has been used in seminaries to train thousands of Lutheran pastors, states, "[P]rayer presupposes justifying faith. Only faith in the forgiveness of sins for Christ's sake makes prayer a prayer 'in the name of Christ,' and only prayer in the name of Christ has God's command and promise (John 16:23; 14:13-14)." Pieper, 3 *Christian Dogmatics* at 80. And writing from a Calvinist Presbyterian perspective, Robert L. Dabney in his *Systematic Theology* 713 (Banner of Truth 1871, 1995), writes that praying in the Name of Jesus is part of the very definition of prayer: "Prayer is an offering up of our desires unto God for things agreeable to His will, *in the name of Christ*, with confession of our sins, and

thankful acknowledgement of His mercies." (Emphasis added.) Many more statements from various Christian traditions and denominations could be similarly cited. Taken together they represent a large portion of Christianity. Of course, other Christians hold a different view and believe it is permissible to lead in prayer without mentioning Jesus Christ.

We see, then, that large numbers of Christians believe, based on the Bible and the teachings of their respective denominations, that all prayer must be in the Name of Jesus. A clergyman or other person who holds this belief would violate his own conscience, what he or she perceives to be the command of God, and the doctrine of his or her church, if he or she were to pray without using the Name of Jesus Christ. Inviting a member of the clergy to pray before a Town Board meeting but telling that person that he/she may not pray in the Name of Christ, forces that clergyperson to either (1) decline the invitation to pray, or (2) disobey the perceived command of God and of his or her religious faith.

Some claim prayers that are addressed to Jesus Christ send a message of exclusion to those who do not believe in Christ, telling them that they are not fully part of the community. But in just the same way, forbidding a person from leading in prayer because that person believes prayer must be in the Name of Jesus sends a similar message of exclusion to that person, telling him or her that he or she is not fully part of the community. The Town Board has chosen the side of religious

freedom in prayer, but the Constitution does not give judges the authority or the capacity to veto or alter that decision.

IV. OPENING INVOCATIONS AT THE MEETINGS OF DELIBERATIVE BODIES RESPECT THOSE WHO BELIEVE PRAYER IS NECESSARY FOR THE WELL-BEING OF SOCIETY.

In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Supreme Court upheld a released-time program whereby public schools released students from classes for a set period of time to enable them to attend religious instruction at their respective churches. Justice Douglas wrote for the Court:

> We are a religious people whose institutions presuppose a Supreme Being. . . . *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. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Id. at 313-14 (emphasis added).

Many, perhaps most Americans, believe God is real and that His favor is essential for the well-being of society. For them, prayer is not just a "feel-good" exercise; it is directly linked to the welfare of the community, county, state, and nation. Their belief deserves recognition. Voluntary prayer before Town of Greece Board meetings provides a good civics lesson for all: The minority respects

the majority by allowing the prayer to take place, and the majority respects the minority by not requiring them to join in the prayer.

CONCLUSION

The district court should be affirmed for the simple reason that prayers offered at Town of Greece Board meetings do not violate the text of the Establishment Clause: "Congress shall make no law respecting an establishment of religion."

Respectfully submitted this 23rd day of March, 2011.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 10-3635

GALLOWAY v. TOWN OF GREECE

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March 23, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2011, I electronically filed the foregoing with the Clerk of the Court using the ECF system, and that I have served electronically the following attorneys of record registered with the ECF system:

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