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 *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Establishment Clause protects citizens participating in local town board meetings—such as citizens seeking business or zoning permits or advocating for particular legislative policies—from being asked to participate in sectarian prayers.

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INTEREST OF AMICI CURIAE[1]

Amici are Members of Congress in the U.S. House of Representatives.[2] *Amici* are bound by an oath to support and defend the Constitution. The House opens its proceedings with legislative prayer and that historic practice was relied upon by the Court in *Marsh* v. *Chambers*, 463 U.S. 783 (1983). The Court found this historic practice poses "no real threat" under the Establishment Clause. *Id.* at 795. *Amici* are supportive of the traditional form of legislative prayer practiced in the House. This case, however, presents a different type of prayer practice that occurs in a different setting and context. *Amici* have an interest in how the Court considers those differences. *Amici* also have an interest in ensuring that this case is not, as advocated by certain *amici* supporting Petitioner, used to displace longstanding Establishment Clause jurisprudence that concerns practices other than legislative prayer.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, as indicated by letters of consent filed with the Clerk of this Court.

[2] The Members of the House of Representatives who are joining the brief are listed in Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

Relying on the tradition of legislative prayer in the U.S. Congress, the Court in *Marsh* v. *Chambers*, 463 U.S. 783, 791–92 (1983), rejected a challenge to legislative prayer in Nebraska, holding that invoking "Divine guidance" to solemnize the legislative function is consistent with the historic traditions of the U.S. Congress and is otherwise a "tolerable acknowledgment of beliefs widely held among the people of this country."

Amici agree with the holding in *Marsh*. *Marsh* correctly held that opening a legislative session with prayer delivered for the legislators poses "no real threat" under the Establishment Clause. *Id.* at 795. *Marsh* was also correct to hold that the courts should not parse the content of legislative prayer unless there is an "indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95.

This case, however, presents a setting and context very different from that considered in *Marsh*. The tradition of legislative prayer discussed in *Marsh* involves relatively brief invocations delivered for legislators to open proceedings that private citizens attend only as passive observers. The House also takes care to ensure that prayers do not cross the line of "advancing" one religion or "disparaging" another. *Id.* The Greece Town Board is not a purely legislative body, however, and its citizens do not observe its proceedings in a purely passive capacity. Rather, the Board makes quasi-adjudicatory

decisions regarding the property rights of individual citizens appearing before it (*e.g.*, by granting or denying business licenses and zoning permits) and the citizens advocate their views directly to the Board on legislative issues. Private citizens are therefore active participants in Board meetings. Further, and also unlike in *Marsh*, the sectarian prayers at issue here were directed *at* those citizens and, in many instances, the citizens were asked to participate in those prayers.

The Court should recognize these important differences and apply *Marsh* in a manner that ensures that the Establishment Clause protects citizens who are participating in important government functions—whether town board meetings, federal agency hearings, or court proceedings—from being asked to participate in sectarian prayers. Whether such practices are deemed to "advance" religion under *Marsh*, or to be "coercive" under *Lee* v. *Weisman*, 505 U.S. 577 (1992), they violate the Establishment Clause. This protection does not undermine the ability of local town boards or other government entities to open their sessions with prayer. Rather, it simply requires that they refrain from asking private citizens participating in important government functions to take part in sectarian prayers.

The Court also should decline the requests of several *amici* in support of Petitioner to use this case to overrule *County of Allegheny* v. *ACLU,* 492 U.S. 573 (1989), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *See, e.g.*, Members of Cong. Supporting Pet'r Br. at 8–32; Ctr. for Constitutional Jurisprudence Br. at 16–19; Am. Civil Rights Union Br. at 4–5, 17.

There is no need for the Court to do so because *Allegheny* and *Lemon* do not concern legislative prayer. This case also does not implicate the *Allegheny* "endorsement" test because it involves a context in which the risk of coercion clearly exists. This case therefore does not present the very different question of when, even if no such coercion is present, a prayer practice violates the Establishment Clause because it is so overtly sectarian that it is deemed to "endorse" under *Allegheny*, or "advance" under *Marsh*, one particular religion over another.

Finally, we disagree with the narrow "coercion" test proposed by Petitioner and *amici* in support of Petitioner because it would sanction government endorsements of religion in a broad range of contexts, including requiring citizens participating in important government functions to take part in sectarian prayer so long as they are free to leave those functions. Respectfully, this puts the burden in the wrong place. Our citizens should not be encouraged to reduce their participation in our democratic institutions to avoid having to take part in sectarian prayers. Rather, the long tradition of legislative prayer in this country can be preserved in a manner tolerant of the beliefs of all our citizens.

ARGUMENT

I. THE SETTING AND CONTEXT IN WHICH "LEGISLATIVE" PRAYER IS CONDUCTED IS CRITICAL UNDER *MARSH*

Marsh addressed a challenge by a member of the Nebraska State Legislature to prayers delivered by a

state-employed chaplain who was paid out of public funds. Relying on the historic practice of legislative prayer before the U.S. Congress, the Court rejected that challenge because of the "unique history" of "legislative prayer" in the United States. 463 U.S. at 790–91.

Marsh considered three "features" of the Nebraska practice. *Id.* at 792–93. The first two features are not relevant here; they concerned the use of a single chaplain from one denomination and the taxpayer funding of that chaplain. The third feature—the content of the prayers—was not deemed problematic because "there [was] no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95. On this record, the Court held that legislative prayer that "invoke[s] Divine guidance on a public body . . . is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 791–92.

Because the history of legislative prayer in the U.S. Congress was critical to the Court in *Marsh*, it is important to understand the setting and context of those practices before applying *Marsh* here. Congress is a legislative body that does not adjudicate the rights of the individual citizens who observe its deliberations, and the public does not participate in those deliberations. The public is not even allowed on the floor of the House during legislative sessions. Clauses 1 through 5 of Rule IV of the Rules of the House of Representatives ("House Rules"), 113th Cong., 1st Sess. (2013) (only certain enumerated persons acting in official capacities and

who possess official designations are admitted to the Hall of the House). "All others are rigidly excluded—not only from where Congress sits, but from most adjoining rooms as well." U.S. Capitol Historical Soc'y, *We, the People: The Story of the United States Capitol* 123 (16th ed., 2011). House Members also cannot introduce or recognize citizens who are observing from the spectator gallery. Clause 7 of House Rule XVII.

Consistent with the fact that attending citizens are mere passive observers, prayers in the House are delivered for the Representatives themselves, not those citizens. *See* Office of the Chaplain, U.S. House of Reps., *Chaplain Brochure*, http://chaplain.house.gov/chaplaincy/chaplain_brochure.pdf (last visited Sept. 18, 2013) ("The Chaplain prays daily for the Members of the U.S. House of Representatives and for the Nation, and ministers to the spiritual needs of the congressional community."); *see also* Indiana and Other States Br. at 17 (prayers are offered "to an elected assembly"); *c.f.* U.S. Senators Supporting Pet'r Br. at 2 ("Instead of debate, senators reflect on their duty to represent every constituent, mindful of the Nation's core values and their need for divine assistance in carrying out their responsibilities."). Similarly, the Nebraska legislative prayer at issue in *Marsh* was characterized as "an internal act that is . . . directed at the governmental unit itself or its own members." *Chambers* v. *Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980).

The setting and context of local board meetings is decidedly different. Town boards typically perform quasi-adjudicatory functions that affect the property

rights of the individual citizens in attendance (*e.g.*, granting or denying business licenses and zoning permits). The meetings also typically allow citizens to participate actively in debates over legislative issues (*e.g.*, ordinances of general applicability). In New York, for instance, "[v]irtually all of a town's discretionary authority rests with the town board. . . . The town board, therefore, exercises both legislative and executive functions." N.Y. Dep't of State, *Local Government Handbook* 61 (6th ed., 2009), *available at* http://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf. *See also Alexander* v. *Holden*, 66 F.3d 62, 65 (4th Cir. 1995) ("Local government bodies often undertake actions in different capacities, including executive, administrative, legislative, and even judicial."); William H. Baker et al., *Critical Factors for Enhancing Municipal Public Hearings*, 65 Pub. Admin. Rev. 490, 493 (Issue 4, July/Aug. 2005) (survey of city administrators found "[z]oning changes, land development, and budget matters constituted about three-fourths of all . . . public hearings"); *Diva's Inc.* v. *City of Bangor*, 411 F.3d 30, 40–42 (1st Cir. 2005) (holding that city council members acted in quasi-judicial capacity when deciding on special amusement zoning permit for plaintiff); *Omnipoint Corp.* v. *Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 408–09 (3d Cir. 1999) (discussing cases and holding that zoning board acted in quasi-judicial capacity when denying Omnipoint's application for a special exception under the Pennsylvania Municipalities Planning Code); *Dotzel* v. *Ashbridge*, 438 F.3d 320, 323, 327 (3d Cir. 2006) (holding municipal board members acted in a

quasi-judicial capacity when ruling on permit applications).

Rather than being passive observers, the citizens attending a local board meeting therefore often "conduct business directly with the Board." United States Br. at 23–24. *See also* Resp't Br. at 5–6 (citizens attend town board meetings to air their grievances, to seek to rezone property, and to petition to obtain special use permits); Brian Adams, *Public Meetings and the Democratic Process*, 64 Pub. Admin. Rev. 43, 44–45 (Issue 1, Jan./Feb. 2004) (stating that over 97% of cities hold public hearings to seek citizen comment about local issues). They tend to be "avid proponents [or] opponents of a measure affecting them personally," and speak "only when much is at stake for them or when they have a passionate belief about an issue." Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, Planning Theory & Practice 419, 424 (Dec. 2004).

These differences are important under *Marsh*. Citizens observing House deliberations do not participate in those deliberations and the legislative prayers are not directed at them. This, in turn, means that any sectarian references in the short prayers given to open House deliberations cannot reasonably be said to have "coercive" effects. Moreover, the House Chaplain is careful to instruct guest prayer-givers that the "prayer must be free from . . . sectarian controversies" and cautions them that the House is comprised of "Members of many different faith traditions." Resp't Br. at App. 2a. This helps to ensure that the prayers do not cross

the line of "endorsing" or "advancing" one religion or "disparaging" another.

By contrast, when citizens appear before a local town board to participate in its deliberations—whether to protect their individual property rights or to advocate a particular legislative outcome—there is a clear risk of coercion if they are asked to participate in sectarian prayers. In this context, they are left with the choice of either feigning participation in those prayers or potentially offending officials in power by leaving or arriving conspicuously late to avoid them. This is not a choice they should have to make under the Establishment Clause.

Lee is instructive in this regard. The Court emphasized that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support *or participate in religion or its exercise*, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" 505 U.S. at 587 (emphasis added and citations omitted). Guided by this principle, the Court in *Lee* struck down a high school graduation prayer practice where "subtle coercive pressures exist[ed,] . . . where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation [in the prayer]," *id.* at 588, and where:

> public pressure, as well as peer pressure, [is placed] on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.

> This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise.

Id. at 593.

The Court in *Lee* specifically distinguished this coercive atmosphere from the legislative prayer practices at issue in *Marsh* because "[t]he atmosphere at the opening of a session of a state legislature [is such that] adults are free to enter and leave with little comment for any number of reasons." *Lee*, 505 U.S. at 597.

The setting and context of the "legislative" prayer at issue in this case present the same risk of coercion present in *Lee*. The citizens who attend Greece Town Board meetings are often active participants in those meetings, advocating for particular town policies or to protect their individual property rights. Pet'r App. 3a ("Residents and town employees attend Town Board meetings to monitor and participate in these aspects of town governance."); Resp't Br. at 5–6 (describing active participation of citizens in both the public forum and public hearing portions of the meetings); United States Br. at 23 ("Town Board differs from Congress because some members of the public attend Board meetings to conduct business directly with the Board rather than simply to observe the proceedings."); *id.* at 23–24 (showing

towns are authorized to issue special-use permits for various land-use purposes and may require the request to be presented to the Board at a hearing convened by the Board). They are, therefore, not simply passive observers "free to enter and leave with little comment for any number of reasons," *Lee*, 505 U.S. at 597.

The prayers at Greece Town Board meetings are also distinguishable from those in *Marsh* because the citizens at the Board meetings were often asked to participate in the prayers. *See* Pet'r App. 3a ("Prayer-givers have often asked members of the audience to participate by bowing their heads, standing, or joining in the prayer"); Resp't Br. at 23 (prayer-giver faces assembled citizens with his or her back to the Board); J.A. 36a (requesting that all present join in). Prayer-givers asked the audience to stand or "bow our heads" (J.A. 72a), as well as to join together in reciting the Lord's Prayer (J.A. 56a). Prayer-givers also invited the board and the audience to attend specific church events. J.A. 45a–46a, 64a–65a. One even criticized citizens who had objected to the prayers as an "ignorant" "minority." J.A. 108a.

We do not suggest that the presence of sectarian content in legislative prayer, standing alone, violates the Establishment Clause. *Marsh* permits a broad range of prayer practices so long as "the prayer opportunity has [not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794–95. In this regard, the United States explains that the "historical practice on which this Court relied in *Marsh* . . . has included a great number of sectarian references" and that the

"government must allow the prayer-giver to deliver the prayer in accordance with his own religious beliefs." United States Br. at 20–21. The United States also argues that "[c]ourts should not be in the business of parsing the theological content or meaning of particular prayers." *Id.* at 24.

We agree with the United States that traditional legislative prayer has sometimes included sectarian references and that the courts should not be in the business of parsing theological content. However, the practices of the Greece Town Board were not problematic merely because the prayers contained sectarian content. Rather, they were problematic under *Marsh* and *Lee* because citizens actively participating in an important government function were asked to participate in those sectarian prayers. Even Petitioner concedes that the Establishment Clause can be violated if a citizen is "required to participate in [prayer] or assent to the views expressed." Pet'r Br. at 39; *see also Lee*, 505 U.S. at 597 (given the setting and context, there was "no alternative but to submit" to the "state-sanctioned religious exercise").

II. THIS CASE DOES NOT REQUIRE THE COURT TO OVERTURN LONGSTANDING PRECEDENT THAT DOES NOT CONCERN LEGISLATIVE PRAYER

Various *amici* in support of Petitioner urge the Court to use this case to overturn longstanding precedent, including *Allegheny* and *Lemon*. *See*, *e.g.*, Members of Cong. Supporting Pet'r Br. at 2. The Court should decline this invitation for three principal reasons.

First, this case concerns whether a particular prayer practice violates *Marsh* and *Lee*. There is no reason to overrule *other* precedents that do not concern legislative prayer. *See, e.g.*, *Lee*, 505 U.S. at 586–87 (where "controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel[led] the holding," the Court did "not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon* v. *Kurtzman*").

Second, the situations that concern these *amici* in support of Petitioner—such as the crèche displays in *Allegheny* or the Ten Commandments displays in *McCreary County* v. *ACLU*, 545 U.S. 844 (2005)—present different considerations than legislative prayer. *Marsh* recognized the unique historic role of legislative prayer and therefore declined to apply Establishment Clause jurisprudence developed in other contexts. There is no reason to revisit that decision in this case.

Third, the "coercion test" advocated by *amici* in support of Petitioner is not consistent with the opinions upon which it purports to rest. Justice Kennedy's *Allegheny* opinion articulated "two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; *and* it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (emphasis added) (quoting *Lynch* v. *Donnelly,* 465 U.S. 668, 678 (1984)).

Amici in support of Petitioner do not actually apply these "two limiting principles," but rather replace them with a "single workable test" (*e.g.*, Members of Cong. Supporting Pet'r Br. at 9) that appears to discard the second principle. As a result, even "[w]here the overwhelming predominance of prayers offered are associated, often in an explicitly sectarian way, with a particular creed, and where the town takes no steps to avoid the identification, but rather conveys the impression that town officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate in them," Pet'r App. 26a, certain *amici* in support of Petitioner would deem those facts irrelevant—apparently for the sole reason that citizens can simply leave if they disagree. As Justice Kennedy explained in his *Allegheny* opinion, the Establishment Clause requires a court to consider whether such a practice provides "direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or *tends to do so*.'" *Allegheny,* 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (emphasis added) (quoting *Lynch,* 465 U.S. at 678). Moreover, *Lee* rejects the notion that simply giving citizens the option to leave an important government-sponsored function to avoid sectarian prayer saves the practice under the Establishment Clause. 505 U.S. at 588.

This one-prong test also puts the burden in the wrong place. Under this proposed test, a town board would presumably be free to *endorse* a particular religion and ask its citizens to *participate* in prayers of that faith—so long as those in attendance were free to leave once the prayers commenced and the town did not actually attempt to "convert" them.

E.g., Members of Cong. Supporting Pet'r Br. at 35. This notion not only conflicts with *Marsh* and *Lee*, but also would weaken participation in our democratic institutions by shifting the burden to the public to avoid participating in government functions in order to avoid having sectarian prayers directed at them.

In the end, there is simply no need to use this case to overturn other precedents because all sides agree that *Marsh* articulates the general rule applicable to legislative prayer cases; they only differ on *how* it should be applied. We do not disagree with the United States that *Marsh* contemplates limited judicial review of traditional legislative prayer, but this case concerns different practices and those differences matter under *Marsh* and *Lee*. When citizens participating in important government functions are asked to participate in sectarian prayers, there is a legitimate question regarding whether the practice violates the Establishment Clause (*e.g.*, whether the government had sanctioned a recurring coercive practice as opposed to an isolated occurrence). This inquiry does not create "chaos" (Members of Cong. Supporting Pet'r Br. at 8, 12), but simply reflects the fact that this is a "sensitive area" where the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion." *Lynch*, 465 U.S. at 679; *Salazar* v. *Buono*, 559 U.S. 700, 722 (2010) ("To date, this Court's jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules."). Other cases may present more difficult facts—such as if there is no coercive element but the prayer practice nonetheless

is so overtly sectarian that it crosses the line of "endorsing" or "advancing" a particular religion—but this case does not.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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APPENDIX A

The following Members of the United States House of Representatives currently serving in the 113th Congress have joined this brief as *amici curiae* in support of Respondents Susan Galloway and Linda Stephens.

These Members of Congress are the Honorable:

1. Rep. Jerrold Nadler
2. Rep. John Conyers, Jr.
3. Rep. Robert C. ("Bobby") Scott
4. Rep. Theodore E. Deutch
5. Rep. George Miller
6. Rep. Alcee L. Hastings
7. Rep. Robert E. Andrews
8. Rep. Michael M. Honda
9. Rep. Diana DeGette
10. Rep. Mark Takano
11. Rep. Eleanor Holmes Norton
12. Rep. Keith Ellison