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 CHAPLAIN ALLIANCE FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The **Chaplain Alliance for Religious Liberty** ("Chaplain Alliance") is an organization comprised of veteran United States military service members, primarily chaplains. As a prerequisite to accepting a chaplain for service in the United States Armed Forces, the United States requires that a chaplain be "endorsed" by a religious organization to then serve as an official representative of his or her faith group. The Chaplain Alliance is an association of endorsing agencies that works to ensure that chaplains can defend and provide for the freedom of religion and conscience that the Constitution guarantees all chaplains and those whom they serve. The Chaplain Alliance has over 25 endorsing agency members.

A chaplain is "a member of the clergy attached to a chapel, legislative assembly, or military unit." *American Heritage Dictionary*, 148 (3d ed. 1992). This definition neatly captures both the spiritual calling and the vocational service that chaplains pursue with respect to their faith and the faith exercised by their audiences. Chaplains have long navigated these forums with civility and sensitivity to First Amendment principles coupled with welcomed acknowledgment of deity in private and public circles.

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[1] The parties' counsel were timely notified of, and consented to, the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Chaplains routinely receive requests to pray in connection with governmental proceedings, including legislative proceedings, at military commissioning events, the funerals of service members or other public servants, and other governmentally affiliated occasions. Ordinarily, chaplains offer prayers in the name of, and according to, a chaplain's given religious conviction and creed. A chaplain's independence and discretion to offer prayer enables the chaplain to perform his function fully and faithfully without trepidation and in the spirit of religious expression.

The Chaplain Alliance submits this brief out of concern that the observer-based effects test employed by the Second Circuit places the federal courts in a position of overseeing the "totality of the circumstances" of religious actions and expression conducted in connection with government activities. The chaplaincy provides a contrasting model of a historic, constitutionally permissible accommodation of religion—a model that can and should be applied in the context of legislative prayer.

SUMMARY OF ARGUMENT

The reasoning employed by the Second Circuit in *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012) could imperil the ability of chaplains and other clergy to respectfully and faithfully serve in public settings. In contrast to the Second Circuit's erroneous reasoning, the chaplaincy provides an elegant model, created by the Founders and upheld by the courts, of a respectful accommodation of religious belief—a model whose principles can and should be applied to legislative prayer.

Over the past 250 years, military chaplains of diverse faiths have provided spiritual support to service members of every faith and those of no faith at all, while simultaneously remaining faithful to and open about the particular beliefs of his or her denomination or sect. The reasoning of the Second Circuit would upset this graceful balance. A chaplain cannot fulfill his or her duties with the federal courts looking over one shoulder and the "reasonable observer" looking over the other to assess when a religious activity may make a hypothetical observer feel like an outsider.

In addition, the Second Circuit's ruling effectively compels the very result it purports to avoid, requiring the government to parse the beliefs of various religions and deem some religions acceptable and others unacceptable. This display of favoritism may be averted by simply permitting any prayer giver to pray according to the dictates of his or her conscience, so long as the prayer is not exploited to proselytize or to disparage other religions.

ARGUMENT

I. The Second Circuit's reasoning could be applied with equal force to chaplains.

The Chaplain Alliance submits this brief to express concern with the reasoning used by the Second Circuit in evaluating an Establishment Clause challenge using an observer-based effects test. While the Second Circuit's opinion stated that the *conclusion* was limited to the record before the court, *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2d Cir. 2012), the *reasoning* employed by the court could be applied more broadly. The reasoning was based on the court's "taking into account all of these contextual considerations in concert." *Id.* at 33. The court's reasoning is not delineated in any way that limits it to the practice of offering a religious invocation in connection with a town council meeting. Rather, the reasoning could logically extend to any practice connected to a governmental entity, including the chaplaincy, in which people may "convey their views of religious truth, and thereby run the risk of making others feel like outsiders." *Id.* at 34.

This Court should correct the Second Circuit's erroneous reasoning, and the Chaplain Alliance respectfully submits that the chaplaincy provides an appropriate model for legislative prayer. While the military is a unique institution, *see Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986), the chaplaincy is nevertheless an apt model for legislative prayer. Members of this Court have previously recognized parallels between chaplaincy and legislative prayer. *See, e.g.*, *Lee v. Weisman*, 505

U.S. 577, 625-26 (1992) (Souter, J. concurring) (citing *Marsh v. Chambers* and *Katcoff v. Marsh* in the same sentence and noting that federal courts, under their expansive general view of the Establishment clause, have upheld both legislative and military chaplaincy); *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 297-300 (1963) (Brennan, J. concurring) (noting in successive paragraphs that military chaplaincy and legislative prayer share special First Amendment considerations). Accordingly, just as this Court declined to apply the *Lemon* test to a legislative prayer challenge in *Marsh v. Chambers*, 463 U.S. 783 (1983), courts have declined to apply the *Lemon* test to challenges to the military chaplaincy. *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985).

II. The chaplaincy is a historically recognized accommodation of religious activity and expression in connection with government activities.

From before the founding of our nation until the present time, the military chaplaincy has exemplified a constitutionally permissible governmental accommodation of religious belief. For over 250 years, chaplains have exemplified both spiritual ministry and personal heroism, serving, as the Army Chaplain Corps' motto says, *Pro Deo et Patria*: for God and Country. This centuries-old tradition, created by the Founders and recognized as constitutional by the courts, *Katcoff*, 755 F.2d at 227-28, models a respectful accommodation of religious belief that can and should be applied to legislative prayer.

The chaplaincy as an exemplar of respect for and accommodation of religious observance predates the founding of our nation. In 1758, during the French and Indian War, the state of Virginia created and provided regimental chaplains at the request of Colonel George Washington. *See* Anson Phelps Stokes, *Church and State in the United States*, Vol. 1 at 268 (1950), available at http://archive.org/details/churchandstatein012700mbp (last visited July 31, 2013). These chaplains were not forced to suppress their distinct denominational or sectarian beliefs and practices. Rather, it was known and welcomed that they represented not only the official Church of England, but also minority religions including Congregationalists, Anglicans, Presbyterians, and Baptists. *Id.*; *see also* William J. Hourihan, *Pro Deo et Patria: A Brief History of the United States Chaplain Corps* at 3 (2004).

This spirit of accommodation and pluralism continued in the Revolutionary War. *See* Stokes at 268 (noting that on August 16, 1775, the Virginia Convention required that commanding officers "permit Dissenting clergymen to celebrate divine worship, and to preach to the soldiers"). On July 29, 1775, the Continental Congress authorized pay for chaplains and soon thereafter General George Washington ordered that chaplains be procured for the Continental Army. *Katcoff*, 755 F.2d at 225 (citations omitted).

The accommodation of religious exercise through the chaplaincy was no mere wartime exigency. After the adoption of the Constitution, but prior to the ratification of the First Amendment, the First Congress authorized the appointment of a

commissioned Army chaplain. *Id.* (citation omitted). The timing of this event amply demonstrates that the Founders saw the military chaplaincy, like legislative prayer, as a permissible accommodation of religion. "Congress' authorization of a military chaplaincy before and contemporaneous with the adoption of the Establishment Clause is also 'weighty evidence' that it did not intend that Clause to apply to such a chaplaincy." *Id.* at 232 (citation omitted); *see also Marsh*, 463 U.S. at 790 (noting that in the same week that the First Congress passed the Bill of Rights, it hired a chaplain to pray at its meetings, and the Court could not accept the conclusion that "[m]embers of the First Congress . . . intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable").

The Founders' esteem for the chaplaincy proved prescient. Over the following centuries, the chaplains' corps has served at home and abroad, in war and in peace, nurturing the living, caring for the wounded, and honoring the dead. Their legacy exemplifies the First Amendment ideal that the government should accommodate public religious exercise that is pluralistic and respectful, yet in which a minister may be faithful to his or her own beliefs and denominational distinctives. Chaplains serve *all* in need, not only those of like faith, yet they remain true to their own creeds and callings.

For example, four chaplains of diverse faiths willingly gave their lives in the service of God and Country when the *Dorchester* was torpedoed in 1943. *See The Saga of the Four Chaplains*, available at http://www.fourchaplains.org/story.html (last visited July 31, 2013). As the ship sank, the chaplains—a

Methodist minister, a Jewish rabbi, a Dutch Reformed minister, and a Catholic priest—began to tend the wounded, rescue the trapped, encouraged the frightened, and pray for all. When the supply of lifejackets was exhausted, each chaplain gave his to a young soldier. As the overcrowded lifeboats moved away, witnesses observed the four chaplains with arms linked, saying prayers as the *Dorchester* went down in icy waters. The four chaplains were posthumously awarded the Purple Heart, the Distinguished Service Cross, and the Chaplain's Medal for Heroism—an award created specifically in their memory. *Id.*

In a similar showing of valor, Reverend George S. Rentz, a Presbyterian minister who served as a United States Navy chaplain during both World Wars, served his fellow sailors in life and in death. *See USS Rentz*, available at http://www.public.navy.mil/surfor/ffg46/Pages/ourShip.aspx (last visited July 31, 2013). In one engagement, while his ship was under severe aerial attack, Rentz spurned cover to encourage the men, prompting a fellow officer to note that "when the sailors saw this man of God walking fearlessly among them, they no longer felt alone." *Id.* In a subsequent battle, after his ship was sunk, Rentz found himself and others clinging to wreckage inadequate to keep the survivors afloat. In an act of personal heroism and spiritual significance, he ordered a young seaman to take his lifejacket, said a prayer, and then quietly abandoned the float. *Id.* For his selfless act, Chaplain Rentz was posthumously awarded the Navy Cross—the Navy's second highest award for valor—and the United States frigate *USS Rentz* was named in his honor.

On D-Day, June 6, 1944, Catholic chaplain Francis L. Sampson, known as the "paratrooper padre," was the first chaplain to take part in the invasion of France when he parachuted behind enemy lines with the 101st Airborne Division. *See Sampson, Francis L.*, Des Moines Register, Feb. 4, 2008, available at http://www.desmoinesregister.com/article/99999999/FAMOUSIOWANS/712160326/Sampson-Francis-L- (last visited July 31, 2013). Father Sampson landed in a river, into which he then dove repeatedly in order to retrieve his Mass kit. *Id.* He was captured twice by the enemy, cared for his fellow captives, later served in the Korean War and as the Army Chief of Chaplains, and after retirement, served American troops in Vietnam. *Id.*

In April 2013, President Obama awarded the Medal of Honor posthumously to Catholic Chaplain Emil Kapaun for his service and sacrifice during the Korean War. *See Medal of Honor Recipient Chaplain (Capt.) Emil J. Kapaun*, available at http://www.army.mil/medalofhonor/kapaun (last visited July 31, 2013). Chaplain Kapaun exposed himself to enemy fire to care for wounded soldiers and drag them to safety. He refused opportunities to escape from the enemy so he could continue to provide care to fellow prisoners, and he provided spiritual, physical, and moral support to his fellow captives, despite continuous and harsh punishment from his captors. *Id.* One of his last acts was to conduct a forbidden Easter sunrise service for his fellow captives. *Id.*

As illustrated by the foregoing examples, although chaplains serve one of the most religiously diverse organizations in the world, they are not

generic "religious" officers. Rather, they are representatives of specific faith groups.[2] *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004) (noting that chaplains serve simultaneously as "a professional representative of a particular religious denomination and as a commissioned officer"); *accord* United States Army Regulation 165-1, Army Chaplain Corps Activities ("Army Reg. 165-1") § 4-3(a) ("Army chaplains have a dual role as religious leaders and staff officers."), available at http://www.chapnet.army.mil/pdf/165-1.pdf (last visited July 31, 2013).

The chaplaincy thus accommodates the religious pluralism of the American population and simultaneously respects and allows the distinct religious beliefs of the clergy from various faiths. Thus, the chaplaincy stands as an example of a permissible governmental acknowledgment of religion and public religious exercise. This venerable tradition, which mirrors the rule of *Marsh v. Chambers*, models a respectful accommodation of religious belief that can and should be applied to legislative prayer.

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[2] For example, as noted above, Chaplain Sampson parachuted into Normandy with the liturgical items needed to administer Catholic Mass. Likewise, Chaplain Kapaun's final act before his death as a prisoner of war was to conduct a forbidden Easter sunrise service, a liturgy celebrated only by Christian denominations.

III. The Second Circuit's reasoning, if applied in the context of the chaplaincy, would compel chaplains to abstain from their religiously-compelled ministries.

As discussed in the briefs of Petitioner and other *amici*, our nation has a long-standing history of public prayer and other forms of religious acknowledgment and accommodation. The ongoing vitality and workability of this time-tested tradition is demonstrated by the military chaplaincy, whose policies and practices demonstrate an elegant balance of accommodating the belief or unbelief of every service member while simultaneously acknowledging and respecting each chaplain's spiritual beliefs, denominational distinctives, and dictates of conscience.

A. Chaplains provide services to those of diverse faiths but are free to perform these religious duties consistent with their own faiths.

Every chaplain is duty-bound to respectfully provide for the religious needs of all service members, including those who do not share the chaplain's beliefs and those who oppose his beliefs. But chaplains must, as a matter of both law and conscience, make this provision while remaining distinct representatives of their faith groups—representatives who teach, preach, counsel, and advise in accordance with the tenets of their religious beliefs and doctrines. To protect a chaplain's role as a faith group representative, and thereby the chaplain's usefulness to the military, Congress and the military have crafted safeguards to keep chaplains from being forced to engage in ministry

activities that violate their faith group's beliefs. *See, e.g.,* 10 U.S.C. § 6031(a) ("An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member.") (statute for Navy chaplains); U.S. Air Force Instruction 52-101 § 2.1 ("Chaplains do not perform duties incompatible with their faith group tenets."), available at http://static.e-publishing.af.mil/production/1/af_hc/publication/afi52-101/afi52-101.pdf (last visited July 31, 2013); Army Reg. 165-1 § 3-5(b) ("Chaplains are authorized to conduct religious services, rites, sacraments, ordinances, and other religious ministrations as required by their respective faith group. Chaplains will not be required to take part in religious services, rites, sacraments, ordinances, and other religious ministrations when such participation would be at variance with the tenets of their faith."), available at http://www.chapnet.army.mil/pdf/165-1.pdf (last visited July 31, 2013).[3]

The United States Army explains this distinction under the rubric "Perform or Provide." *See* Army Reg. 165-1 § 2-3(b)(1) (noting the obligation of chaplains to "[p]erform or provide religious support that meets the spiritual and religious requirements of the unique military culture"). Under this rubric, a chaplain must "provide" religious resources to any service member who requests such resources,

[3] This commitment to protecting the ability of service members and chaplains to serve their country without denying their faith was embodied recently in the passage of a law mandating the broad accommodation of religious belief. *See* Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239 (section entitled "[p]rotection of rights of conscience of members of the Armed Forces and chaplains of such members.").

regardless of the service member's faith tradition. *Id.* § 3-2(a) ("All Chaplains provide for the nurture and practice of religious beliefs, traditions, and customs in a pluralistic environment to strengthen the spiritual lives of Soldiers and their Families.") For example, if a Hindu soldier asks a Christian chaplain for materials for a Hindu ceremony, the chaplain's duty is to provide the requested resources. Similarly, if the Hindu soldier requests moral counseling, the Christian chaplain will fulfill that need.

However, a chaplain is not required to "perform" religious acts that violate his own religious beliefs. *See id.* at 305(b) ("Chaplains will not be required to take part in religious services, rites, sacraments, ordinances, and other religious ministrations when such participation would be at variance with the tenets of their faith."); *id.* § 3-2(b)(3) ("Chaplains will perform their professional military religious leader ministrations in accordance with the tenets or faith requirements of the religious organization that certifies and endorses them.") (citing Dept. of Def. Directive 1304.19); *see also* 10 U.S.C. § 6031(a) ("An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member.") (statute for Navy chaplains); Air Force Instruction 52-101 § 2.1 ("Chaplains do not perform duties incompatible with their faith group tenets."), available at http://static.e-publishing.af.mil/production/1/af_hc/publication/afi52-101/afi52-101.pdf (last visited July 31, 2013). Therefore, using the above example, if the Hindu soldier requests that the chaplain perform a Hindu ceremony or give religious counsel under the tenets of the Hindu faith, the chaplain is duty-bound and conscience-bound to decline. In fact, as referenced

above, a chaplain who violates the beliefs of his endorsing religious organization by performing the ecclesiastical functions of other religions jeopardizes his status as a chaplain.[4] *See* Dept. of Def. Instruction 1304.28 § 6.5 (stating that the process for separating the chaplain from service begins "immediately" upon the endorser's withdrawal of endorsement), available at http://www.dtic.mil/whs/directives/corres/pdf/130428p.pdf (last visited July 31, 2013).

In sum, the military chaplaincy strikes a graceful and constitutional balance, recognizing the benefit of invoking divine aid and seeking divine wisdom, accommodating the wide diversity of belief and unbelief among the military population, providing chaplains representing a wide spectrum of various beliefs, yet still respecting the spiritual obligations and beliefs of each chaplain and faith group.

B. The Second Circuit's reasoning based on the interpretation of an outside observer is unworkable.

The Second Circuit's reasoning was based on the presumption that the interpretation of a "reasonable observer" is a more reliable arbiter of a governmental

[4] Because the military has neither the authority nor competence to determine whether an individual qualifies as a representative of a particular religious group, it relies on each specific faith group to endorse chaplains to act as its representatives to the members of that faith serving in the Armed Forces. *See* Dept. of Def. Instruction 1304.28 § E2.1.7. If a chaplain ever ceases to represent his religious organization faithfully, the organization can rescind its endorsement, at which point the chaplain ceases to be a chaplain and must separate from the military. *Id*. at § 6.5.

entity's affiliation with religion than whether a person has the liberty to accept, reject, or ignore a religious practice or expression. *See Galloway*, 681 F.3d at 34 (relying on the potential perception of a hypothetical observer rather than the town council's actions or stated purpose and stating that "a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause."). Invoking the ostensibly even-handed concept of "totality of the circumstances," the Second Circuit has set forth mandatory judicial micromanagement of the religious observance of individuals who participate in governmental activities, to manage "the risk of making others feel like outsiders." *Id.*[5]

If applied to a chaplain, this observer-based effects test would be unworkable because it would uproot and replace the source of the chaplain's ministry obligations. As set forth above, a chaplain's guiding principles issue from the long-established dual duty to the entity or agency the chaplain serves and to the dictates of his faith and endorsing religious organization. Under the Second Circuit's

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[5] Contrary to well-established precedent that the courts should not parse the content of particular prayers, *see Marsh*, 486 U.S. at 795, the "totality of the circumstances" scope of review in the Second Circuit's observer-based effects test expressly requires courts to review the content of prayers. *See Galloway*, 681 F.3d at 30 (citing "several considerations" supporting the Second Circuit's conclusion, "including the prayer-giver selection process, *the content of the prayers*, and the contextual actions (and inactions) of prayer-givers and town officials.") (emphasis added).

reasoning, however, a person engaged in religious service to those participating in local government must tailor his or her service to suit the preferences of the non-existent "reasonable observer." A chaplain's criteria for performance of his or her duties would no longer be mandated by the dictates of the chaplain's conscience, but would become subject to the considerations of any number of third parties who are not followers of the chaplain's faith.

A chaplain cannot fulfill his or her duties with the federal courts looking over one shoulder and the "reasonable observer" looking over the other to assess when a religious activity may make a hypothetical observer feel like an outsider.

In addition, under the Second Circuit's reasoning, it appears that what constitutes an "ordinary, reasonable observer" is also subject to judicial determination according to the totality of the circumstances. Therefore, not only would a chaplain have to conform his religious ministry to the preferences of a third party who is not a member of his faith, but he must constantly bear in mind how a "reasonable observer" would be adjudicated by the court.

The elusive "reasonable observer" necessarily changes with the preferences of society. However, in most recognized faith traditions, the doctrines and practices of the faith do not change with the preferences of society. Therefore, as the preferences of society change over time, a gap develops between the requirements to which a chaplain is held by his faith and the boundaries of ministry established by the reasonable observer of the day. It is

inappropriate to force a contemporary "reasonable observer" standard, which necessarily will change with cultural developments, onto the practices of faith traditions that have been carried on for hundreds or even thousands of years.

C. A principled understanding of the Establishment Clause must be grounded in our Nation's enduring practice of religious accommodation.

In its assessment of the Town of Greece's invocation practice, the Second Circuit relied on the observer-based effects test of *Cnty. of Allegheny v. Am. Civ. Liberties Un. Greater Pittsburgh Ch.*, 492 U.S. 573 (1989). That test, which evaluated religious actions or expressions through the lens of a non-existent "reasonable observer," is a failed experiment unique to the past thirty years of federal court jurisprudence, making it known only to contemporary generations.

By contrast, for the entire duration of our nation's history there has been an accepted practice of public prayer and religious acknowledgment and accommodation. A principled approach to the Establishment Clause cannot dismiss history and must focus on whether religious liberty is implicated by the challenged practice. From the earliest days of this nation, the Founders recognized that religious beliefs and practices were a way of life for the American citizenry. The Establishment Clause, in conjunction with the Free Exercise Clause, was created to protect individual liberty by preventing the newly formed federal government from requiring individuals to adhere to any particular faith or

practice. It did not "disestablish" religion,[6] and it was not created to prevent those participating in government activities from expressing their beliefs or participating in religious activities, such as public prayer. Rather, the First Amendment preserved and protected the status quo in which prayer, in connection with government proceedings or activities, was a common and accepted practice. In this sense of preserving the status quo, the First Amendment paralleled the Seventh Amendment provision that "[i]n suits at common law . . . the right of trial by jury shall be preserved."

An inquiry focused on liberty rather than on the sensitivity of the hypothetical observer allows the courts to make an objective assessment of the observers' autonomy to accept, reject, or ignore the prayer, and it insulates the courts from the perilous task of making a judgment about the propriety or benefits of the religious expression and gauging the unknowable effect on the observer. However, the observer-based effects test has clouded Establishment Clause jurisprudence with a subjectivity requirement that inappropriately requires the courts to determine the type and extent of permissible religious actions or expressions. The test should assess whether the practice at issue compels individual participation, not whether a

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[6] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2109 (2003) ("Contrary to popular myth, the First Amendment did not disestablish anything. It prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states. The First Amendment thus preserved the status quo.")

person "feels like an outsider." If a person has the liberty to accept, reject, or ignore the public expression, the expression establishes nothing.

Like legislative prayer, the courts have specifically upheld the constitutionality of the military chaplaincy program. *See, e.g., Katcoff*, 755 F.2d 223. Nevertheless, this Court has rejected the "strict scrutiny" of an alleged First Amendment violation in the military context, allowing the military greater leeway to restrict the religious practices of service members. *Goldman*, 475 U.S. at 507. If the Court upholds the Second Circuit's reasoning, it would be a foreseeably small step from judicial oversight of prayer in connection with government proceedings to similar oversight of chaplains, placing time-honored traditions, beliefs, and practices aside in favor of the contemporary "reasonable observer."

Our nation's effort to accommodate service members' religious needs has been remarkably successful and "follows the best of our traditions." *Zorach* v. *Clauson,* 343 U.S. 306, 314 (1952) (praising the State's efforts to accommodate, and thus respect, the "spiritual needs" of citizens). This affirmation of the validity of accommodating public religious practice and expression is a long-standing principle that has never been overturned and has been quoted and reaffirmed countless times in First Amendment jurisprudence, both before and after the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the "endorsement test" of *Lynch v. Donnelly*, 465 U.S. 668 (1984), and the Second Circuit's observer-based

effects test in this case.[7] As recently as June 2012, this Court and the federal circuit courts of appeals have repeatedly cited *Zorach* in numerous contexts to reaffirm the constitutionality of accommodating citizens' private religious needs and concerns. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (state could, as part of federal program for the disabled, provide sign language interpreter for deaf student at Catholic high school); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145-46 (1987) (accommodating employee's religious practice of not working certain scheduled hours because of religious convictions did not violate Establishment Clause); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (exempting religious organizations from Title VII's prohibition on religious discrimination is constitutional religious accommodation); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970) (state tax exemptions for real property held by religious organizations and used for worship did not violate Establishment Clause); *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599 (4th Cir. 2012) (relying heavily on *Zorach* in upholding a "released time" program of religious instruction for public school academic credit as a valid accommodation of religion).

However, a ruling by this Court that prayer conducted in connection with a governmental entity is subject to review based on whether it may be

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[7] Even though the Second Circuit did not state that it was applying the endorsement test, the substance of the Second Circuit test and the language used to describe it are essentially identical to the endorsement test.

offensive to an outside observer would upset this history of accommodation. The Establishment Clause is no basis for a constitutional claim by an individual who claims to be offended by the acts of other individuals while participating in government activities. Taking offense over what a person sees or hears should not give rise to a constitutional claim in any context and is not evidence of government establishment. Public acknowledgment of religion, whether in invocations of divine guidance or in the activities of a chaplain, pose no threat to religious liberty and are consistent with a principled understanding of the Establishment Clause and its history.

D. The historical analysis of *Marsh v. Chambers* is the appropriate standard.

Contrary to the observer-based effects test applied by the Second Circuit, the appropriate standard for assessing the constitutionality of the Town of Greece's prayer practice is the historical analysis of *Marsh v. Chambers*. In *Marsh*, decided twelve years after creation of the three-part *Lemon* test, this Court upheld the Nebraska Legislature's practice of beginning each of its sessions with a prayer by a chaplain paid by the State with the legislature's approval. 463 U.S. at 795.

Chief Justice Burger wrote the majority opinions for the Court in both *Lemon* and *Marsh*. In *Lemon*, Chief Justice Burger alluded to the history of the historical motivations behind the "Religion Clauses of the First Amendment" and zeroed in on the word "respecting" in the Establishment Clause, finding that "[a] given law might not establish a state

religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." 403 U.S. at 612. Twelve years later, again writing for the Court in *Marsh*, Chief Justice Burger disregarded his own *Lemon* test in the context of legislative prayer. Instead, *Marsh* directly analyzed the Establishment Clause and the historical setting in which it was created (the same historical setting to which Chief Justice Burger alluded in *Lemon*), this time concluding that "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress-their actions reveal their intent." *Id.* at 790. In analyzing the original intent of the Establishment clause, the Court described the practice of opening each legislative session with an invocation as "deeply embedded in the history and tradition of this country." *Id.* at 786.

Based on this historical analysis, *Marsh* established simple rules for assessing the constitutionality of a legislative prayer practice in the face of an Establishment Clause challenge. The Court rejected the idea that allowing prayer in a legislative context showed a preference to the prayer-giver's religious views, *id.* at 793, held that legislative prayer is allowed except where "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief," *id.* at 794-95, and held that courts should not parse the content of particular prayers, *id.* at 795.

Multiple federal circuit courts of appeals have reached the same conclusion as *Marsh*. For example, in *Pelphrey v. Cobb Cnty.,* the Eleventh Circuit followed *Marsh*, holding that "courts are not to evaluate the content of [legislative] prayers absent evidence of exploitation" and refusing to read *County of Allegheny* "narrowly to permit only nonsectarian prayer." 547 F.3d 1263, 1271 (11th Cir. 2008).

In *Rubin v. City of Lancaster*, the Ninth Circuit held that the proper analysis did "not pivot on the practice's effect on the disapproving listener." 710 F.3d 1087, 1096 (9th Cir. 2013). The Ninth Circuit went so far as to state that the Second Circuit's ruling in *Galloway v. Town of Greece* did not apply the proper analysis under *Marsh*. *Id.* at 1095 (recapping the Second Circuit's analysis and stating "[w]e read *Marsh* to require a different inquiry.")

Most recently, in *Jones v. Hamilton Cnty. Gov't, Tenn.*, --- Fed. Appx. ----, No. 12-6079, 2013 WL 3766656 (6th Cir. July 19, 2013), the Sixth Circuit declined to apply the *Lemon* test in the context of legislative prayer and found that a county's prayer policy was constitutional. *Id.* at *9-12. Rather than resorting to a subjective observer-based effects test, the Sixth Circuit applied *Marsh*'s principle that legislative prayer is allowed except where "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at *9 (quoting *Marsh*, 463 U.S. at 794-95).

Marsh and its progeny properly balance accommodation of religion with establishment of religion by permitting the historic practice while

refusing to pass judgment on the content of the prayers. The government avoids Establishment Clause concerns by ensuring that everyone is free to accept, reject, or ignore the counsel of a chaplain without reprisal or penalty.

Similarly, the *Marsh* historical analysis exemplifies that, like the military chaplaincy, legislative prayer is a special context. As mentioned above, members of this Court have previously recognized parallels between chaplaincy and legislative prayer. If one of these contexts becomes subject to a "totality of the circumstances" judicial review every time a third party feels alienated, it is only a small step to apply that reasoning to the other context. If the Court upholds the Second Circuit's observer-based effects test in the context of legislative prayer, the same test could be applied to the chaplaincy with devastating effects to a chaplain's duties.

IV. The Second Circuit's reasoning requires the State to pick and choose between religions and causes an even greater degree of state entanglement.

In an attempt not to prefer one religion over another, the Second Circuit does just that by establishing a brand of civic religion to the exclusion of others. As a result, the Second Circuit's reasoning effectively compels the State to establish preferred religions or religious beliefs.

A. The Second Circuit's reasoning discriminates between religions by effectively outlawing core tenets of some religions and not others.

The Second Circuit's ruling favors one religion over another in two distinct ways. First, the Second Circuit expressed that, to avoid an Establishment Clause violation, the town should have ensured that the prayer givers employ "references unique to some other faith [other than Christianity]." *Galloway*, 681 F.3d at 31. Under the Second Circuit standard, something less than "most of the prayers" may contain "Christian references." *Id.* Second, the observer-based effects test used by the court favors those religious and non-religious beliefs that would not put a non-adherent in an "awkward position." *Id.* at 32. By effectively favoring some religions over others, the Second Circuit institutes the very thing this Court sought to avoid in *Marsh*. Specifically, the *Marsh* Court noted that legislative prayer could not be "exploited to advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 795.

Requiring a chaplain, or any clergy, to pray in a "non-sectarian" or more inclusive manner not only runs afoul of *Marsh*, but also mandates government orthodoxy, a concept that this Court has long disavowed under First Amendment principles. As this Court stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by

> word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 640 (1943); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) (stating discriminating between religions violates "[t]he clearest command of the Establishment Clause"). Indeed, the government, and particularly the judiciary, is ill-equipped to assuming the role of "ecclesiastical arbiter." *See County of Allegheny*, 492 U.S. at 678 (Kennedy, J. dissenting) ("This Court is ill-equipped to sit as a national theology board."); *Pelphrey*, 547 F.3d at 1272 (noting the practical difficulties in drawing the line between "sectarian and nonsectarian expressions").

Nevertheless, the reasoning adopted by the Second Circuit, under the guise of avoiding entanglement with religion, threatens to place the courts in a position of parsing the beliefs of various religions and deeming some religions acceptable and others unacceptable. This is precisely the "particularly perverse result" that courts have sought to avoid. *See Weisman*, 505 U.S. at 581 ("It is a cornerstone principle of our Establishment Clause jurisprudence that '*it is no part of the business of government* to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government.'") (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)) (emphasis added). Indeed, the government is without "any power to prescribe by law any particular form of prayer which to be used as an official prayer in

carrying on any program of governmentally sponsored religious activity." *Engel*, 370 U.S. at 430.

In *Town of Greece* and similar situations, the effect of the Second Circuit's reasoning is to suppress the more traditional or exclusive religions and favor the more progressive or ecumenical religions. *See*, *e.g.*, *Joint Statement of Southern Baptist Concern on Religious Liberty and the United States Military* at 3, May 6, 2013, available at http://www.namb.net/WorkArea/DownloadAsset.aspx?id=12884902744 (last visited July 31, 2013) (noting concern over "the ongoing struggles for evangelical Christian chaplains to pray in public settings as evangelical Christians, in the name of Jesus, which is the only way evangelical Christians believe we can come before God the Father"); Nicola Menzie, *Evangelical Christianity, Catholicism Labeled "Extremist" in Army Presentation*, The Christian Post, April 6, 2013, available at http://www.christianpost.com/news/evangelical-christianity-catholicism-labeled-extremist-in-army-presentation-93353 (last visited July 31, 2013). This picking and choosing is impermissible.

The Second Circuit's reasoning substantially impairs a chaplain from praying according to his or her faith expression by eliminating a critical tenet of that faith expression. Moreover, this reasoning elevates a nonsectarian ideal that demobilizes the progression, expanse, and purity of First Amendment free exercise. *See Engel*, 370 U.S. at 429 (stating "the Government's placing its official stamp of approval upon one particular kind of prayer" is "one of the greatest dangers" prevented by the First Amendment).

B. The Second Circuit's observer-based effects test is a moving target that fosters greater state entanglement with religion.

The Second Circuit's observer-based effects test applied to legislative prayer demonstrates that the endorsement test, misapplied, may serve as a mechanism for religious exclusion. Here, for example, the Second Circuit advocates for the non-sectarian "reasonable observer," to the exclusion of a person who subscribes to Christianity. The Second Circuit's reasonable observer promotes neither civility nor neutrality. Instead, it requires greater State entanglement with religion and compels theological conformity, both of which are in stark contravention of the brilliant plurality of free exercise.[8]

Similar efforts directed against chaplains in the past have been deemed unconstitutional for permitting a religious viewpoint picked as acceptable while suppressing a religious view found unfavorable. *See*, *e.g.*, *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997) (holding unconstitutional President Clinton's attempt to censor chaplains' sermons mentioning pending legislation on partial-birth abortion and noting that a military policy allowing Catholics of one belief on abortion to share that view while ordering Catholics of a contrary belief to remain silent impermissibly "sanctioned one view of Catholicism . . . over another"). Similarly,

[8] The district court noted that "as this case illustrates, the aspiration of many citizens is to eliminate legislative prayer entirely." *Galloway v. Town of Greece*, 732 F.Supp.2d 195, 237 (W.D.N.Y. 2010).

though the court in *Veitch v. England* did not make a constitutional determination on religious viewpoint suppression, the court stated: "Veitch's argument that a chaplain cannot be obliged to preach counter to his or her religious beliefs consistent with the First Amendment is hardly a frivolous claim. Fortunately for us—and unfortunately for Veitch—we need not decide this difficult question." 471 F.3d 124, 127 (D.C. Cir. 2006). The *Veitch* court prudently welcomed the opportunity *not* to serve as an "ecclesiastical arbiter" or adjudicate who is and or who is not, a reasonable observer.

Recognizing the existence of religious discrimination and the resulting inhibition of a chaplain's function, Congress has recently proposed an amendment that would allow chaplains to pray in the name of their specific faith deity. *See* Nat'l Defense Authorization Act Fiscal Year of 2014, HR 1960 PCS § 529(c). This section, which would apply to each branch of the military, provides that "[i]f called upon to lead a prayer outside of a religious service, a chaplain shall have the prerogative to close the prayer according to the traditions, expressions, and religious exercises of the endorsing faith group."[9]

In contrast to the failed experiment of the reasonable-observer effects test, the military chaplaincy provides a model of how legislative prayer can and should work. The military does not create, enforce, or require a generic, non-denominational religion. Rather, it essentially "outsources" the task of providing religious services to a wide array of

[9] Presently, this amendment has passed in the House and has made it through two mark-ups in the Senate.

denominations who endorse ministers to be chaplains. The military does not pick and choose who may be a chaplain so long as a chaplain has the endorsement of his or her faith group.

This is essentially identical to the Town of Greece's prayer practice. The town welcomed anyone to offer a legislative prayer who respected and represented one segment of the community's beliefs. Neither the military nor a town should be enmeshed in determining who may pray and what they may say in their prayers. Rather, outsourcing this task fences State favoritism, both for the religious and non-religious.

This method modeled by the military chaplaincy and adopted by the Town of Greece is superior to the observer-based effects test for two reasons. First, it minimizes governmental involvement in making religious choices and determinations. Rather, the government simply functions as a gatekeeper, permitting anyone who is a minister endorsed by his faith group. Second, it allows for a much more vibrant religious exchange. Neither the military nor a legislative body should mandate bland, generic "nonsectarian" prayers. To do so would actually minimize the religious diversity and pluralism that the First Amendment seeks to protect. The military relies on 240 endorsers to ensure it encourages a multiplicity of faiths, provides for the needs of all service members, and allows for a free marketplace of religious ideas. This is the best course for First Amendment vitality.

CONCLUSION

For the reasons set forth above, the *amicus* respectfully requests this Court to conclude that the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

Respectfully submitted,

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