

No. 12-696

IN THE
Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

**BRIEF OF MEMBERS OF CONGRESS AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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January 7, 2013

QUESTION PRESENTED

Whether 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.

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INTEREST OF *AMICI CURIAE*¹

Since its creation, the United States House of Representatives has begun its daily sessions with prayer. Both chambers of the First Congress passed resolutions to hire a salaried chaplain, whose foremost duty is to open each session with a formal invocation seeking the blessing of God on the people's elected Representatives as those leaders discharge their official duties.

Amici curiae are 49 Members of Congress in the United States House of Representatives, and are individually named in the appendix to this brief. These elected Representatives regard legislative prayer as important for policymaking bodies, both to solemnize official occasions and to seek God's blessing, wisdom, and guidance in making consequential decisions. Each Member also represents municipalities, school districts, and counties—not unlike Petitioner Town of Greece—and part of a sovereign State, each of which is governed by a body that practices legislative prayer at the outset of its meetings and sessions.

These legislative prayer practices are imperiled by the Second Circuit's decision, which is just the latest and most deeply-flawed decision in a growing line of recent legislative prayer cases. These Members and

¹ Kenneth A. Klukowski authored this brief for *amici curiae*. No counsel for any party authored this brief in whole or part, and no one apart from *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and received at least ten days' notice.

their constituents would benefit from this Court granting the petition to clarify what forms of legislative prayer are consistent with the Constitution.

INTRODUCTION

In this Court's sole examination of legislative prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court determined the constitutionality of legislative prayer as practiced in Nebraska and nationwide primarily by analyzing Congress' legislative prayer practice. The Court looked approvingly to legislative prayer dating to the Founding, in the Continental Congress, Constitutional Convention, and First Congress which drafted the Establishment Clause. While no written prayers from the First Congress survive, other contemporaneous public prayers suggest the sort of content found in early legislative prayers. Similar prayers are offered in Congress today. If the Second Circuit's rule were correct, then Congress would have been violating the Constitution for more than two centuries.

The Second Circuit crafted an unprecedented totality-of-the-circumstances approach, resulting from a multifactor analysis of prayer content and prayer-giver religious affiliation. Applying this test, the panel invalidated Petitioner Town of Greece's prayer practice, holding it was an endorsement of Christianity.

However, Congress' longstanding legislative prayer practice violates all three factors utilized by the Second Circuit. The overwhelming majority of congressional prayers—97%—are offered by Christians. The majority of these prayers include identifiably Christian content,

including references to Jesus, the Holy Spirit, salvation, and Bible verses, such that they would be deemed overwhelmingly sectarian and therefore unconstitutional. And almost all of these prayers from the 112th Congress—again 97%—use first-person plural pronouns.

With its novel test, the Second Circuit deepened a three-way circuit split. The Fourth Circuit likewise does not permit frequent sectarian references in legislative prayer, but for very different reasons. Consequently, Congress' centuries-old practice would also be invalid under the Fourth Circuit's rule. However, Congress' prayers would easily survive under a very different reading of *Marsh* adopted by the Eleventh Circuit.

This Court should grant the petition for certiorari to clarify the proper standard for legislative prayer.

REASONS FOR GRANTING THE PETITION

I. THIS COURT DETERMINED THE CONSTITUTIONALITY OF LEGISLATIVE PRAYER IN *MARSH V. CHAMBERS* PRIMARILY BASED ON CONGRESS' LEGISLATIVE PRAYER PRACTICE DATING TO THE FOUNDING.

When examining the constitutionality of legislative prayer in a case involving the Nebraska legislature, the Court based its analysis primarily on Congress' legislative prayer practice. The Court began with the Continental Congress and Constitutional Convention. *See Marsh v. Chambers*, 463 U.S. 783, 787 (1983). Like his Senate counterpart, the House Chaplain is an

officer of the United States House of Representatives, established pursuant to authority granted by the Constitution. U.S. CONST. art. I, § 2, cl. 5. The Court in *Marsh* examined the history of the House and Senate creating their chaplaincies, and paying these clergy with salaries drawn from the Treasury. *See Marsh*, 463 U.S. at 788–89. The Court expressly noted that early discussions of having a Chaplain specifically contemplated a person who would offer prayers, *see id.* at 787 n.6, and prayers are the foremost feature of the Chaplain’s public communication and literature. *See U.S. HOUSE OF REPS., CHAPLAIN’S OFFICE BROCHURE, available at* http://chaplain.house.gov/chaplaincy/chaplain_brochure.pdf.

Even when the Court considered the factual specifics of the case in *Marsh*, Congress’ practice was the touchstone against which the Nebraska legislature’s practice was evaluated. Nebraska’s sixteen-year retention of Robert Palmer—a Presbyterian minister—as Chaplain was constitutional because Congress also had a long history of retaining chaplains of a single denomination. *Marsh*, 463 U.S. at 793–94. Nebraska paying Reverend Palmer a salary for his services was acceptable under the Establishment Clause because Congress—not to mention other legislative bodies—has a long history of paying its Chaplains a salary. *Id.* at 794; *see also id.* at 788 n.7 (quoting relevant text from 1 Stat. 71 (1789)). Nebraska’s legislative “prayers in the Judeo-Christian tradition” did not offend the Establishment Clause, *id.* at 795, because of their “historical background,” *id.* at 793.

Comparing any challenged legislative prayer practice to Congress' longstanding practice is thus central to a proper analysis of legislative prayer. The first prayer offered in the Continental Congress is showcased on the House Chaplain's website today. This prayer clearly violates the Establishment Clause under the Second Circuit's analysis, as Reverend Jacob Duché (1) presumed to pray for everyone present, (2) proclaimed that the God to whom he prayed reigns over every nation on earth, (3) declared that the leaders of America sought to be "dependent only on Thee," (4) asked this God to "direct the councils of this honorable assembly," (5) prayed that God would "crown them with everlasting glory in the world to come," and (6) closed by saying, "All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Savior."²

Although no written records of legislative prayers offered in the First Congress survive, other public prayers and religious declarations from that period suggest the sort of content likely included in the legislative prayers of the Framing era. In 1798, President John Adams—who previously as Vice President presided over the Senate when the Establishment Clause was adopted—issued a proclamation asking that God, in "His infinite grace, through the Redeemer of the World, freely to remit all our offenses, and to incline us by His Holy Spirit to that sincere repentance and reformation which may

² Rev. Jacob Duché, First Prayer of the Continental Congress (Sept. 7, 1774), *available at* <http://chaplain.house.gov/archive/continental.html>.

afford us reason to hope for his inestimable favor.” H.R. MISC. DOC. NO. 210, 269 (1896). The following year, upon the death of George Washington, a prayer before Congress included beseeching God that they all “may obtain unto the resurrection of life, through Jesus Christ our Lord; at whose second coming in glorious majesty to judge the world . . . those who sleep in him shall be . . . made like unto his glorious body.” Henry Lee III, *in* AN AMERICAN PRAYER BOOK 58–59 (Christopher L. Webber ed., 2008) (quoting *Philippians* 3:21).

Using Congress’ modern legislative prayer practice as the baseline does not change the analysis. As shown below, in recent years the House Chaplain and guest chaplains have continued to offer prayers similar to those at the Founding, attended by all the factors the panel below identified as unacceptable under the Establishment Clause.³ Unless Congress has been violating the Constitution since its ratification, the Second Circuit’s test is error. In either event, this Court’s review is warranted.

³ Petitioners also argue that prayers offered by private citizens may enjoy additional protection under public-forum doctrine. Pet. 23–25. While that argument would not apply to the prayers in Congress offered by an official Chaplain, it might apply to the many prayers offered by guest chaplains.

II. CONGRESS' LONGSTANDING LEGISLATIVE PRAYER PRACTICE WOULD BE UNCONSTITUTIONAL UNDER THE SECOND CIRCUIT'S MULTIFACTOR TEST.

Congress' legislative prayer practice examined approvingly in *Marsh* would be held unconstitutional under the Second Circuit's analysis.⁴

The Office of the Chaplain section of the official website of the U.S. House of Representatives includes a Prayer Archive, consisting of every prayer offered in the House since Mar. 27, 2000.⁵ Examining the prayers of the recently-concluded 112th Congress provides a large sample of modern legislative prayers. There were 304 prayers offered in the House of Representatives during the 112th Congress, 179 (59%) from the House Chaplain, and 125 (41%) from guest chaplains.⁶ Significant observations can be drawn from an analysis of these prayers to conclude that the Second Circuit's multifactor test for evaluating legislative prayers cannot be the test the Constitution requires.

⁴ As *amici curiae* are Members of the House of Representatives, this brief focuses on legislative prayer in the House. *Amici* are aware of no material distinction between prayers in the House versus prayers in the Senate, and both Senate Chaplain Barry Black and his Chief of Staff Alan Keiran frequently offer prayers in the House.

⁵ Office of the Chaplain, U.S. House of Reps., Prayer Archive, <http://chaplain.house.gov/archive/index.html>.

⁶ All citations to the House Chaplain's website should be regarded as last visited Dec. 13, 2012, when the most recently recorded prayer was offered Dec. 7, 2012.

The district court below was correct in finding that “legislative prayer in Congress . . . is often overtly sectarian.” Pet. App. 127a. Indeed, this Court has found the same. *Marsh*, 463 U.S. at 793 & n.14; *Van Orden v. Perry*, 545 U.S. 677, 688 n.8 (2005) (plurality opinion of Rehnquist, C.J.). Notably, the dissenters in *Marsh* likewise found Congress’ prayers unconstitutional in part because Congress’ prayers are sectarian. *See Marsh*, 463 U.S. at 800 (Brennan, J., dissenting); *id.* at 823 & n.2 (Stevens, J., dissenting). Legislative prayers in Congress are overwhelmingly Christian, either in the self-professed religious identity of the prayer-giver, or in the content of the prayers, or both. Such prayers are “deeply embedded in the history and tradition of this Country.” *Id.* at 786 (majority opinion).

The Second Circuit articulated three factors for finding legislative prayers violate the Establishment Clause. Pet. App. 17a–20a. Congress’ longstanding practice would not survive under any of these three factors. This Court should grant certiorari to review this multifactor analysis.

A. With only rare exceptions, legislative prayers in Congress are offered by self-identified Christians.

As one factor, the court of appeals below held that an unacceptable proportion of the prayers offered in the Town of Greece were offered by self-identified Christians. Pet. App. 17a. Yet the proportion of Congress’ prayers offered by self-identified Christians is even greater.

The House has had sixty Chaplains since the First Congress assembled in 1789. Of those, there have been seventeen Presbyterians, twenty-one Methodists, two Unitarians, one Universalist, four Episcopalians, two Congregationalists, one from the Disciples of Christ, one Lutheran, two Roman Catholics, eight Baptists, and one nondenominational Christian.⁷ The current Chaplain is Reverend Patrick J. Conroy, a Roman Catholic priest who has served since May 25, 2011,⁸ during the 112th Congress.⁹ Thus, depending on how one defines the term “Christian,” at least 57 of 60 House Chaplains—95%—are identifiably Christian.¹⁰

The guest chaplains that frequently offer prayers—41% in the 112th Congress—are likewise overwhelmingly Christian. Of the 304 prayers in the 112th Congress, only eight were offered by non-Christians: seven Jewish rabbis, and one Muslim imam. Therefore 296 prayers—97%—were offered by Christians.

This Court should grant certiorari to reaffirm both that Congress is free to appoint a Chaplain of its choice

⁷ Office of the Chaplain, U.S. House of Reps., History of the Chaplaincy, <http://chaplain.house.gov/chaplaincy/history.html>.

⁸ Office of the Chaplain, U.S. House of Reps., The Chaplain of the House, <http://chaplain.house.gov/chaplaincy/index.html>.

⁹ The House Chaplain during the first five months of the 112th Congress was Reverend Daniel P. Coughlin, also a Roman Catholic priest. See History of the Chaplaincy, *supra* note 7.

¹⁰ See FRANK S. MEAD & SAMUEL S. HILL, HANDBOOK OF DENOMINATIONS 231–36 (9th ed., Abingdon Press 1990).

regardless of the clergyman's religion, and also that Congress' practice whereby most prayers are offered by Christians does not offend the Establishment Clause.

B. The majority of legislative prayers in Congress include explicit Christian content.

Another factor the Second Circuit held indicated an Establishment Clause violation is prayer content that is identifiably Christian, if multiple prayers over time gives the “impression [of a] steady drumbeat of often specifically sectarian Christian prayers,” Pet. App. 19a, rather than isolated sectarian prayers. Looking at the prayer content the court of appeals enumerated as problematic, the list includes: (1) Jesus Christ, (2) the Holy Spirit, (3) the Trinity, (4) salvation, and (5) Christian holidays. *See id.* at 6a, 18a. The Second Circuit held that such language, taken under “the totality of the circumstances . . . identifie[s] the [government] with Christianity in violation of the Establishment Clause.” *Id.* at 19a. Otherwise stated, the test is “whether what [the government] does, in context, reasonably can be seen as endorsing a particular faith or creed over others,” or similarly “affiliating” the government with Christianity. *Id.* at 22a.¹¹

¹¹ This endorsement test, which was narrowly adopted in *County of Allegheny v. ACLU, Greater Pittsburgh Ch.*, 492 U.S. 573, 592 (1989), is one variation of the second prong of the test from *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). This Court in *Marsh* declined to apply the *Lemon* test to legislative prayers, as petitioner's counsel ably explains. Pet. 11–12, 13, 18.

1. It is common for prayers in the House to mention Jesus Christ. Combining the references to “Jesus,” “Christ,” “Your Son,” and similar references, 40 of the 304 House prayers invoke the name of Jesus.

Some prayers are unadorned invocations, such as, “In Jesus Christ’s name, we pray. Amen.”¹² Others include statements of Christian beliefs regarding Jesus, such as, “Restore our Nation’s historic faith that we might pray ‘God bless America’ with integrity. We ask these things in the name of our Lord and Savior, Jesus Christ.”¹³ Still others might combine it with biblical references or historical content, such as this reference to the Framers:

Lord, we ask You to protect our Nation and help us to remember, “With God, all things are possible.” Help us to be one Nation under God. Forgive us of our sins and for the times we have not trusted in You. As George Washington closed his prayer in April of 1789, “Grant our

¹² Rev. Wallace Shepherd, House Prayer, 112th Cong. (May 11, 2011), *available at* <http://chaplain.house.gov/archive/index.html?id=1565>. Variations in spelling and capitalization in prayer quotations are to be attributed to the varying authorship of the prayers, as all the quotations herein are precisely as recorded in the Prayer Archive, unless noted otherwise. All documentation pertaining to the analysis that follows in this brief and substantiating the statistics included herein are on file with the author of the brief, and counsel for *amici* will furnish this documentation to the Court upon request.

¹³ Rev. Dr. David Anderson, House Prayer, 112th Cong. (Feb. 8, 2012), *available at* <http://chaplain.house.gov/archive/index.html?id=1747>.

supplication, we beseech thee, through Jesus Christ, our Lord, Amen.”¹⁴

2. Even more common are references to the Holy Spirit. The record shows 62 prayers during the 112th Congress referenced the Holy Spirit.

These can be third-person, such as, “Gracious and loving Father, we . . . ask You to send the Holy Spirit of good counsel and fortitude to all who make the law”¹⁵ Others address the Holy Spirit as God, such as, “Come Holy Spirit, fill the hearts of Your faithful believers . . . that they may be truly open to respond to Your Word”¹⁶

3. Many prayers also invoke the Trinity, with 16 prayers during the past Congress including references to the Trinity.

These can be simple invocations, such as, “In the name of the Father, the Son, and the Holy Spirit, Amen.”¹⁷ Others use language from well-known

¹⁴ Rev. Kenneth Johnson, House Prayer, 112th Cong. (Nov. 28, 2012), *available at* <http://chaplain.house.gov/archive/index.html?id=1862>.

¹⁵ Rev. Jesse Reyes, House Prayer, 112th Cong. (Oct. 13, 2011), *available at* <http://chaplain.house.gov/archive/index.html?id=1688>.

¹⁶ Rev. Daniel P. Coughlin, House Prayer, 112th Cong. (Jan. 5, 2011), *available at* <http://chaplain.house.gov/archive/index.html?id=1510>.

¹⁷ Rev. Aaron Damiani, House Prayer, 112th Cong. (June 25, 2012), *available at* <http://chaplain.house.gov/archive/index.html?id=1811>.

Christian creeds, such as, “Lord, keep this Nation under Your care and guide us . . . through Jesus Christ our Lord, who lives and reigns with You and the Holy Spirit, one God, world without end. Amen.”¹⁸ Still others expound upon each person in the Trinity, such as, “May every family member represented know the love of the Father, the presence of His Son, and the guidance of the Holy Spirit.”¹⁹

4. Still other prayers reference Christian beliefs regarding salvation. Combining references to Jesus Christ as savior with references to being saved from sin, 17 prayers in the last Congress included such language.

Some prayers combine this language with biblical verses. For example: “Heavenly Father, We come to you in Jesus['] name on behalf of this great nation. . . Keep us mindful of your word, ‘Righteousness exalts a nation[,] but sin is a reproach to any people.’ . . . All this we ask in the name of Jesus Christ, your Son, and our Savior.”²⁰

Others reference Jesus in a more exclusive fashion regarding salvation. One prayer begins, “Father, we

¹⁸ Rev. Blake Johnson, House Prayer, 112th Cong. (Mar. 16, 2012), available at <http://chaplain.house.gov/archive/index.html?id=1765>.

¹⁹ Rev. Gene Mills, House Prayer, 112th Cong. (May 25, 2011), available at <http://chaplain.house.gov/archive/index.html?id=1570>.

²⁰ Rev. Rick Postell, House Prayer, 112th Cong. (July 27, 2011), available at <http://chaplain.house.gov/archive/index.html?id=1605> (quoting *Proverbs* 14:34).

thank You for this Nation, and, most of all, Your forgiveness of sins,” then quotes three Bible verses, and concludes, “In the only name through whom man can be saved, Jesus Christ. Amen.”²¹

Still others quote biblical verses on salvation, but those verses do not on their face speak of Jesus saving people from their sins. For example, the Senate Chaplain, offering a prayer as a guest of his House counterpart, invoked biblical language of salvation through faith in Jesus Christ when he prayed:

Challenge us, O God, when, with the abundance of the things we possess, we lose our thirst for the waters of life. Challenge us when we forget that righteousness exalts a nation, but that sin is an equal opportunity destroyer. Challenge us when we fail to join You in Your quest to bring deliverance to captives, the recovery of sight to the blind, and to set at liberty those who are bruised.²²

This last variation should be noted because courts would have to consider context and the theological significance of verses in order to apply this aspect of the Second Circuit’s test in determining whether such

²¹ Rev. Bryan Thiessen, House Prayer, 112th Cong. (Dec. 6, 2011), available at <http://chaplain.house.gov/archive/index.html?id=1714> (quoting *James* 1:5, *Romans* 13:1, *Matthew* 5:44).

²² Rev. Dr. Barry Black, House Prayer, 112th Cong. (Mar. 30, 2012), available at <http://chaplain.house.gov/archive/index.html?id=1777> (referencing *Revelation* 7:17, *Proverbs* 14:34, and *Luke* 4:14-21, respectively).

prayer language should be tallied under the heading of “sectarian Christian,” illustrating yet another flaw in the reasoning of the court below.

5. Some prayers also reference Christian holidays. These prayers are less frequent over a period of time because they are commonly made shortly before the referenced holiday, but are not uncommon during those parts of the year.²³

Such prayers might be plain references, such as, “Fill . . . us with Your peace and joy this Christmas season.”²⁴ Others use more oblique language, as when House Chaplain Patrick Conroy referred to Christmas in one prayer as “this Holy Season of Hope.”²⁵

Still others expound the meaning of the holiday by referencing its scriptural or historical origin, such as a prayer that begins, “Dear Heavenly Father, as we approach the remembrance of Pentecost when the Holy

²³ Notably, Members of Congress occasionally invoke Christian holidays connected with prayer. *See, e.g.*, 158 CONG. REC. H1796 (daily ed. Mar. 29, 2012) (statement of Rep. Gohmert) (reciting an Easter prayer with Christian language including, “O Christ . . . Help us to remember that we are praying to the Conqueror of Death,” and closing the floor statement with, “It is a good prayer, Mr. Speaker, to pray as we head for the Easter recess.”).

²⁴ Rev. Roger Schoolcraft, House Prayer, 112th Cong. (Dec. 7, 2011), *available at* <http://chaplain.house.gov/archive/index.html?id=1715>.

²⁵ Rev. Patrick J. Conroy, House Prayer, 112th Cong. (Dec. 20, 2011), *available at* <http://chaplain.house.gov/archive/index.html?id=1724>.

Spirit descended upon the apostles gathered in prayer, we pray for a new outpouring of Your Spirit upon us today. . . .”²⁶

The Second Circuit’s muddled test is unclear as to what constitutes indicia of an Establishment Clause violation under this heading. Do even vague allusions suffice? Or does the naming of the holiday go on a list of “dirty words” where the Establishment Clause is concerned? Or is the Constitution only violated when the holiday is explained?

Two additional types of content frequently found in Congress’ prayers are of a piece with the five enumerated topics, but were not discussed by the Second Circuit. They nonetheless fit the Second Circuit’s test under a totality of the circumstances, as they “reasonably can be seen as endorsing a particular faith or creed over others” or otherwise “affiliating” the government with Christianity. Pet. App. 22a. They are (6) Christian religious devotion and Christian doctrines aside from salvation,²⁷ and (7) New Testament Bible references.

6. Many prayers expressly invoke other Christian doctrines or expressions of religious devotion. The

²⁶ Rev. Carter Griffin, House Prayer, 112th Cong. (June 7, 2011), available at <http://chaplain.house.gov/archive/index.html?id=1576>.

²⁷ The Fourth Circuit recently held that “invok[ing] specific tenets and articles of faith of Christianity” can render legislative prayers unconstitutional. *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 350 (4th Cir. 2011).

House Prayer Archive includes 50 such prayers that were offered in the House over the past two years.

Some include a pledge to carry out God's will. For example: "Lord, our God and Savior may we respond to Your commands and holy inspirations to build Your kingdom of peace and justice."²⁸

Others assert certain beliefs regarding the power, purpose, or character of God. One such prayer said:

To the One who governs seas and quells the storms, we thank You for authoring each life We come to you on the eve of this election, seeking wisdom from Isaiah 1 Teach us to fear You and keep Your commandments. . . . Let the wretched, poor, pitiful, naked and blind experience the transformation of Your grace so that Your name, O Lord, might be exalted among the nations."²⁹

Others include declarations of religious devotion. These may be simple, such as, "Dear Holy and Righteous Father . . . we come first to humbly submit ourselves before You, acknowledging You as Lord and

²⁸ Rev. Daniel P. Coughlin, House Prayer, 112th Cong. (Mar. 8, 2011), *available at* <http://chaplain.house.gov/archive/index.html?id=1536>.

²⁹ Rev. Stephen Willis, House Prayer, 112th Cong. (Nov. 2, 2012), *available at* <http://chaplain.house.gov/archive/index.html?id=1854>.

Creator.”³⁰ Or they may be elaborate expressions of adoration, such as:

Father God, as the Psalmist says, “I will extol the Lord at all times; His praise will always be on my lips. My soul will boast in the Lord; let the afflicted hear and rejoice. Glorify the Lord with me; let us exalt His name together.” (Psalm 34:1–3). We depend on You, King of Heaven’s armies, to reveal to our Nation’s leaders Your plans . . . Inspire every public servant to seek Your wisdom and pray for Your daily favor This I ask in the Name above every name.”³¹

There are no judicially-manageable standards for drawing lines in such a sensitive area as prayer by which a court can sort these doctrinal or devotional statements, permitting some as benign or inclusive, while barring others as too closely tied to adherents of a single faith. Such an attempt would instead be precisely the sort of “pars[ing] the content” of a prayer that the Constitution forbids. *Marsh*, 463 U.S. at 795.

7. In addition, many prayers reference the Bible for content aside from the subjects already discussed. The Bible was referenced in 46 prayers during the 112th Congress. Some prayers exclusively used verses from the New Testament, arguably associating the prayer with Christianity.

³⁰ Rev. Donna Kafer, House Prayer, 112th Cong. (Nov. 14, 2012), available at <http://chaplain.house.gov/archive/index.html?id=1859>.

³¹ Rev. Dr. Alan Keiran, House Prayer, 112th Cong. (Aug. 7, 2012), available at <http://chaplain.house.gov/archive/index.html?id=1860>.

Some of these verses are directly relevant to formulating public policy. For example: “You say, O God, that from those to whom You have given much, much is expected.”³²

But some involve distinctly Christian religious sentiments, directed toward spiritual or eternal matters rather than public policy. One prayer-giver quotes Jesus, and refers to him as “Master,” saying, “when the day is done may each [Member of Congress] hear the Master say, ‘[W]ell done, good and faithful servant[.]’ Now, Father, with deep respect for the faith traditions of all Members, I offer this prayer in the name of my Lord and Savior, Jesus Christ.”³³

Others string multiple New Testament verses together, such as:

Lord, your word declares “if any man lack wisdom let him ask God that giveth to all men liberally and upbraideth not; and it shall be given him.” We ask for your unmerited favor upon the lives of every elected member In the name of Him who is able to keep us from

³² Rev. Dr. Alan Kieran, House Prayer, 112th Cong. (May 3, 2011), available at <http://chaplain.house.gov/archive/index.html?id=1560> (quoting *Luke* 12:48).

³³ Rev. Dr. John Sloop, House Prayer, 112th Cong. (June 2, 2011), available at <http://chaplain.house.gov/archive/index.html?id=1574> (quoting *Matthew* 25:21).

falling and present us faultless before the presence of His glory with exceeding joy. Amen.³⁴

Yet again, in order to determine whether each citation is a “sectarian Christian” reference, versus a generalized or even patriotic or statesmanlike inspirational reference, would require a federal court to consider various theological questions. Far from being required by the Establishment Clause, such an analysis would be a step toward precisely the sort of establishment of religion the Clause forbids.

* * *

Many prayers include more than one of these features. But even when all such multiple-reference prayers are accounted for, 154 prayers in the House during the 112th Congress were identifiably Christian in their content. Therefore a majority of the prayers offered in Congress are explicitly Christian, just as in the Town of Greece, Pet. App. 7a.

Adherents of other religions likewise frequently use faith-specific references. For example, a Muslim imam included in his prayer: “The Final Prophet of God, Muhammad (peace be upon him), stated: “The leaders of a people are a representation of their deeds.”³⁵ Similar to the Christian prayers examined here, the

³⁴ Rev. Dr. Kathy Jones, House Prayer, 112th Cong. (Dec. 1, 2011), available at <http://chaplain.house.gov/archive/index.html?id=1711> (quoting *James* 1:5, *Jude* 1:24).

³⁵ Imam Nayyar Imam, House Prayer, 112th Cong. (Aug. 2, 2012), available at <http://chaplain.house.gov/archive/index.html?id=1831>.

clergyman invoked the distinctly Islamic belief that Muhammad was a prophet sent by God, used distinctly Islamic phraseology (“peace be upon him” when mentioning Muhammad’s name), and then quoted Islamic scripture.

The Second Circuit’s multifactor test is completely unworkable, transforming federal courts into the role of “ecclesiastical arbiter.” *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1274 (11th Cir. 2008) (citation omitted). This intensive and wide-ranging examination of prayer content is incompatible with *Marsh*. This Court’s review is warranted.

C. Almost all legislative prayers in Congress use the first-person plural pronoun.

Congressional legislative prayers would also be particularly suspect under the Second Circuit designating as a factor weighing against constitutionality the practice of beginning a prayer with any version of, “Let us pray,” or using the term “We” to speak for others. Pet. App. 23a. Language such as “Let us pray” is often found in prayers offered in the House.³⁶ And although this brief focuses on legislative prayer as practiced by the House, the Court should note that the *Congressional Record* reveals that no fewer than 235 prayers in the Senate during the two

³⁶ *E.g.*, Jones Prayer, *supra* note 34.

years of the 112th Congress began with the invitation, “Let us pray.”³⁷

Moreover, the frequency of these objectionable prayers in the House greatly increases when a court considers the use of first-person plural pronouns, such as “We ask these things through Christ our Lord,” since it necessarily carries the connotation that the prayer-giver is speaking for others as well, whether they be Members present in the room, the entire House, all within the sound of the prayer-giver’s voice, or even the Nation as a whole. The vast majority of prayers include such language.³⁸ Only rarely does a person offering a public prayer use only the first-person singular in front of an audience, especially professional clergy who are accustomed to praying on behalf of a congregation from a speaking dais.

In fact, during the two years of the 112th Congress, only ten prayers did *not* use such plural language. Otherwise stated—*97% of prayers in the House* violated this factor designated as indicative of unconstitutionality by the Second Circuit. Given the ubiquity of such language, finding fault with it is nothing short of astonishing; it could be a matter of

³⁷ See The Library of Congress, Thomas, Search the Congressional Record, 112th Congress, <http://thomas.loc.gov/home/LegislativeData.php?&n=Record>, then type “let us pray” in “Enter Search” window.

³⁸ *E.g.*, Rev. Patrick J. Conroy, House Prayer, 112th Cong. (Nov. 18, 2011), *available at* <http://chaplain.house.gov/archive/index.html?id=1706> (“Eternal God, we give you thanks for giving us another day.”).

judicial notice that most prayers include first-person plural language. The Second Circuit's designation was error.

If anything, nominative-case plural pronouns would be even more noxious to the Constitution than, "Let us pray." While the latter is merely an invitation which the hearer may reject, utilizing the former necessarily carries the presumption and implication that the prayer-giver does in fact speak for others. Still more, some prayer-givers use such presumptive language in Congress when proclaiming religious devotion. For example: "May we possess Your talking points, Your heart, and Your mind in the matters of national importance. Finally, we pray, as we were instructed by Your word, for the peace of Jerusalem and throughout the Middle East. May Thy will be done today."³⁹

The Second Circuit's opinion sweeps far too broadly, as with this last factor Judge Calabresi's reasoning proves too much. The vast majority of legislative prayers offered in Congress—and almost certainly throughout the Nation—presume to speak for persons in addition to the prayer-giver, either through inviting others to join the prayer, or by speaking with plural pronouns to include persons in addition to the prayer-giver. The Second Circuit's holding would thus invalidate Congress' longstanding practice. This Court should grant the petition to clarify that such typical language does not offend the Establishment Clause.

³⁹ Mills Prayer, *supra* note 19.

III. THE THREE-WAY CIRCUIT SPLIT CREATED BY THE SECOND CIRCUIT'S DECISION CREATES UNCERTAINTY ABOUT THE CONSTITUTIONALITY OF CONGRESS' LONGSTANDING LEGISLATIVE PRAYER PRACTICE.

The court of appeals' decision also creates a three-way circuit split. Congress' legislative prayer practice would be constitutional under the test in one circuit, unconstitutional under the tests in two circuits—but for different reasons—and it is anyone's guess how Congress would fare in the remaining circuits, including the one with jurisdiction over Capitol Hill. This Court's review is therefore warranted.

It is clear from Parts I & II Congress' legislative prayers would violate the Constitution under Judge Calabresi's rule for the Second Circuit. Congress' longstanding practice would also violate the Establishment Clause in the Fourth Circuit, but under a rationale that is irreconcilable with the Second Circuit. Yet in the Eleventh Circuit Congress' practice would easily pass muster.

One aspect of the Second Circuit's opinion that is novel among the appellate courts is declaring a totality-of-the-circumstances test to determine whether legislative prayers are constitutional. *See* Pet. App. 17a.⁴⁰ This is further complicated by the fact that the

⁴⁰ That the district court below held that a totality of the circumstances confirmed the Town of Greece did *not* violate the Establishment Clause, *see* Pet. App. 129a–130a, confirms the hopelessly unreliable nature of this novel text which is untethered from historical practices or judicially manageable standards.

Second Circuit adopts part of the Fourth Circuit's reasoning, saying, "We agree that 'courts should not be in the business of policing prayers for the occasional sectarian reference.'" Pet. App. 18a n.6 (quoting *Joyner*, 653 at 351). So rather than a practicable standard, the only guidance governmental units have is that isolated sectarian references are probably acceptable, though even that cannot be relied upon as dispositive since the court can look to other prayers offered over a period of time by other prayer-givers.

The resulting problem is further compounded by the reality that there are no objective legal criteria for differentiating sectarian statements from nonsectarian ones. See *Pelphrey*, 547 F.3d at 1267 ("Whether invocations of 'Lord of Lords' or 'God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law."). While there are doctrinal criteria upon which religious professionals make these distinctions, there are no corresponding neutral principles of law that courts are competent to employ to make such theological judgments. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 252-54 (2008).

In the most recent appellate decision preceding the instant case, the Fourth Circuit likewise superimposed the endorsement test onto *Marsh*, as discussed by petitioner. See *Joyner*, 653 F.3d at 355 (declaring unconstitutional prayers that are "government advancement and effective *endorsement* of one faith") (emphasis added); Pet. 5, 7. In *Joyner*, a divided panel of the Fourth Circuit specifically forbade prayers with

“frequent” references to Jesus or specific theological assertions. *Id.* at 343, 349. Violations can even result from “a solitary reference to Jesus Christ.” *Id.* at 349 (citation omitted).

Congress cannot adopt the Fourth Circuit’s rule that government must “strive to be nondenominational . . . [to] send a signal of welcome” and be “proactive in discouraging sectarian prayer,” *id.* at 349, 353, without violating this Court’s command that government cannot in any way “assist in composing prayers,” regardless of whether it is an attempt to achieve legislative prayers that “recognize the common aspects of religions and not the divisive ones.” *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

But as counsel for petitioner explains, *see* Pet. 10–15, the Second Circuit only deepens a circuit split that is reducing legislative-prayer jurisprudence to incoherence. While prayers like those offered in the House are unacceptable in the Second or Fourth Circuits, those same prayers would be acceptable in the Eleventh Circuit, which allows sectarian prayer if the prayer opportunity has not been exploited to proselytize or similarly advance a faith, or disparage another faith. *Pelphrey*, 547 F.3d at 1271; *see also* Pet. 11.

The Second Circuit’s decision exacerbates a situation whereby prayers that are easily acceptable under the Establishment Clause in one circuit would be unconstitutional in another. Thus for *amici*, prayers legal at local government events in one Member’s congressional district are illegal in an identical town meeting in another district. Whatever the Constitution

allows by way of legislative prayer, it should equally allow in all 435 House districts, and well as on Capitol Hill.

This Court should grant review and safeguard congressional prayers by resolving this circuit split.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 7, 2013

APPENDIX

APPENDIX

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APPENDIX A

Forty-nine (49) Members of the House of Representatives in the Congress of the United States have joined this brief as *amici curiae*. This group includes three Members of the 112th Congress who vacated their House seats on Jan. 3, 2013, and four new Congressmen who joined the House on that day. All other *amici* served in the House in both the 112th Congress and the 113th Congress.

These Members of Congress are the Honorable:

Rep. Sandy Adams

Rep. Robert Aderholt

Rep. Michele Bachmann

Rep. Dan Benishek

Rep. Diane Black

Rep. Marsha Blackburn

Rep. Paul Broun

Rep. Kevin Cramer

Rep. Jeff Duncan

Rep. Randy Forbes

Rep. Virginia Foxx

Rep. Trent Franks

Rep. Scott Garrett

Rep. Phil Gingrey

Rep. Louie Gohmert

Rep. Bob Goodlatte

Rep. Morgan Griffith

Rep. Andy Harris

Rep. Vicky Hartzler

Rep. Tim Huelskamp

Rep. Jim Jordan

Rep. Mike Kelly

Rep. Steve King

Rep. Jeff Landry

Rep. James Lankford

Rep. Cynthia Lummis

Rep. Mike McIntyre

Rep. David McKinley

Rep. Mark Meadows

Rep. Luke Messer

Rep. Randy Neugebauer

Rep. Kristi Noem

Rep. Steven Palazzo

Rep. Steve Pearce

Rep. Robert Pittenger

Rep. Mike Pompeo

Rep. Tom Price

Rep. Reid Ribble

Rep. Todd Rokita

Rep. Steve Scalise

Rep. Lamar Smith

Rep. Steve Southerland

Rep. Scott Tipton

Rep. Mike Turner

Rep. Tim Walberg

Rep. Daniel Webster

4a

Rep. Brad Wenstrup

Rep. Allen West

Rep. Lynn Westmoreland