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 AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The League of California Cities (the League) is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee (the Committee), comprised of 24 city attorneys from all regions of California. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The League's intent as *amicus curiae* is to provide the Court with the perspective of local legislative bodies that choose to open their public meetings with a prayer as upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983). The League takes no position as to whether local legislative bodies should or ought to incorporate prayers in their meetings. But those bodies that opt to do so should be provided with clear guidance from this Court as to how to adopt and implement a

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

constitutional prayer policy or practice. The Second Circuit's *ad hoc* approach in this case provides no such guidance. In a recent survey conducted on behalf of a League member, 212 of 400 California cities indicated that they currently have a formal prayer policy or informal prayer practice. The League has an interest in its member cities having the discretion to adopt and implement an invocation policy pursuant to *Marsh*, free from the constant threat of litigation inherent in the Second Circuit's standard. For that reason, the League urges the Court to reverse the Second Circuit ruling and adopt the standard for constitutionally valid legislative invocations articulated by the Ninth Circuit in *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013). *See also Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008). The Ninth Circuit standard remains true to *Marsh* and provides clear guidance as to how a legislative body may lawfully adopt and implement a prayer policy if it chooses to do so.

SUMMARY OF ARGUMENT

More than three decades ago, this Court held in *Marsh v. Chambers*, 463 U.S. 783 (1983), that opening sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country and is consistent with the Establishment Clause of the First Amendment to the United States Constitution. In so doing, this Court stated that "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id*. at 794.

The *Marsh* Court clearly distinguished between the prayer opportunity and the content of the prayer itself. That distinction provides a workable framework within which a legislative body may adopt and implement a prayer policy because providing broad access to the invocation forum is properly within a legislative body's control, while regulating the content of an invocation is not. The Second Circuit ignored this distinction, as well as the *Marsh* Court's focus on the legislative body's conduct in providing invocation opportunities rather than the content of invocations. Instead, the Second Circuit's test for legislative prayer directly conflicts with this Court's holding in *Marsh*.

Under the Second Circuit's test, the constitutionality of a legislative prayer practice is determined based upon its effect—*i.e.*, the issue is whether the identity of the speaker and the content of his or her speech would convey an official affiliation to a reasonable objective observer. From a practical perspective, this departure from *Marsh* effectively prohibits legislative prayer because it forces a legislative body to either run the risk that one religious group or message will be overrepresented and trigger an Establishment Clause violation, or engage in the constitutionally offensive practice of selecting prayer-givers based upon religious affiliation or prayer content.

The League urges the Court to reject the Second Circuit's test as constitutionally unnecessary and practically infeasible. Rather, if a jurisdiction elects to permit legislative prayer, its legislative body should be able to rely on *Marsh* and know that such practice is

constitutional as long as the legislative body does not exploit the prayer opportunity.

ARGUMENT

I. THE CONSTITUTIONALITY OF A LEGISLATIVE PRAYER PRACTICE IS DETERMINED BASED UPON THE LEGISLATIVE BODY'S CONDUCT, NOT THE CONDUCT OF PRAYER-GIVERS OR THE CONTENT OF PRAYERS.

The First Amendment to the United States Constitution, applicable to states by virtue of the Fourteenth Amendment to the United States Constitution, provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion…" (the Establishment Clause). More than three decades ago, this Court held in *Marsh* that the opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country and does not violate the Establishment Clause. *Marsh*, 463 U.S. at 792. After an extensive review and analysis of the history of legislative prayer, the Court ultimately held that legislative prayer does not violate the Establishment Clause, reasoning that:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment'

> of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among people of this country.

Id. at 792.

After holding that legislative prayer in general is constitutional, the *Marsh* Court then considered whether any of the following three specific aspects of the Nebraska Legislature's practice violated the Establishment Clause: (i) the fact that a clergyman of only one denomination (Presbyterian) was selected for sixteen years; (ii) the fact that the chaplain was paid at public expense; and (iii) the fact that the prayers were in the Judeo-Christian tradition. *Marsh*, 463 U.S. at 792-793.

The Court quickly disposed of any concern related to the chaplain's sixteen-year tenure because the evidence indicated that the chaplain was reappointed based upon his performance and personal qualities, not his religious views. *Id.* at 793. The Court also quickly disposed of any concern related to the fact that the chaplain was paid at public expense because such remuneration was grounded in historic practice initiated by the same Congress that drafted the Establishment Clause. *Id.* at 794.

Lastly, the Court disposed of any concern related to the fact that the prayers were in the Judeo-Christian tradition because, in the words of the Court, "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or

belief." *Id.* This was true regardless of the fact that the prayers were explicitly Christian for fifteen of the chaplain's sixteen-year tenure. *Id.* at 793-94. Although the Court did observe in a footnote that the chaplain had removed all references to "Christ" after receiving a complaint from a legislator, that fact was neither material to nor mentioned in the Court's holding. The Court refused to "embark on a sensitive evaluation or to parse the content of a particular prayer" because it found that the prayer opportunity had not been exploited to proselytize or advance any one, or to disparage any other, faith or belief. *Id.* at 793 n. 14.

The plain and unambiguous holding in *Marsh* makes it clear that a plaintiff must make a threshold showing that a legislative body has exploited the prayer opportunity to proselytize or to disparage a particular faith or belief before, and as a condition precedent to, a court reviewing the content of a particular prayer. *Id.* at 794. While the *Marsh* Court did not explicitly state what constitutes exploitation of the prayer opportunity, it did provide the standard by which exploitation is determined. When the *Marsh* Court considered whether the selection of a single Presbyterian clergyman by the Nebraska Legislature for sixteen years constituted an exploitation of the prayer opportunity, it looked at the reason for the clergyman's long tenure. The *Marsh* Court found that the clergyman's extended tenure did not constitute an exploitation of the prayer opportunity because the evidence indicated that he was reappointed based upon his performance and personal qualities, not his religious views. *Id.* at 793. This necessarily means that a legislative body exploits the prayer opportunity

only if its policy, practice and/or conduct purposefully and intentionally proselytizes, advances or disparages a faith or belief.

II. THE SECOND CIRCUIT'S DECISION IS A DEPARTURE FROM *MARSH* AND IMPROPERLY REQUIRES LEGISLATIVE BODIES TO SELECT PRAYER-GIVERS BASED UPON RELIGIOUS AFFILIATION OR PRAYER CONTENT.

A. The Second Circuit's Decision Is A Departure From *Marsh*.

The Second Circuit acknowledged that "[…] *Marsh* did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), for Establishment Clause cases." *Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012) (*citing Marsh*, 763 U.S. at 793-95). Instead, *Marsh* established that legislative prayer is constitutionally permissible—and the prayer content is of no concern to judges—unless there is evidence that the legislative body exploited the prayer opportunity to proselytize, advance or disparage a faith or belief. *Marsh*, 463 U.S. at 794. In some respects, the Second Circuit's decision remained true to *Marsh*. For example, the Second Circuit expressly stated that it did "[…] not hold that [Greece] may not open its public meetings with a prayer or invocation." *Galloway*, 681 F.3d at 33. Additionally, it expressly did not "[…] hold that any prayers offered in this context must be blandly 'nonsectarian.'" *Id.* at 33-34. The Second Circuit explained that such a requirement, in addition to

exceeding *Marsh*, risked establishing a "civic religion" of its own. *Id.*

However, the Second Circuit erred in stating: "[w]hat we do hold is 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." *Id.* at 34. According to the Second Circuit, such a situation existed in Greece because the predominance of prayers offered were associated with a particular creed. *Id.* This constituted a fundamental departure from *Marsh* because it shifted the determinative issue from whether Greece actually exploited the prayer opportunity to whether a reasonable objective observer under the totality of the circumstances would perceive an affiliation with a particular religion.

B. The Second Circuit's Decision Improperly Requires Legislative Bodies to Select Prayer-Givers Based Upon Religious Affiliation or Prayer Content.

The Second Circuit stated that it was not "[…] adopting a test that permits prayers in theory but makes it impossible for a town in practice to avoid Establishment Clause problems." *Id.* However, it also recognized that "[…] municipalities with the best of motives may still have trouble preventing the appearance of religious affiliation." *Id.* "These difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer,

but they are not grounds on which to preclude its practice." *Id.*

As a practical matter, the Second Circuit's decision gives two options to a legislative body that desires to incorporate legislative prayers in its public meetings. First, it may implement a prayer policy and practice that allows all individuals and congregations to give a prayer, and not specifically schedule prayer-givers based upon religious affiliation or prayer content. However, under the Second Circuit's holding, the legislative body would risk an unintentional constitutional violation if the content of all or a majority of prayers given were so similar that a reasonable objective observer would perceive a religious affiliation, regardless of whom the legislative body invites to participate.

This after-the-fact analysis provides no degree of practicality or certainty to the legislative body. The Second Circuit found that although Greece had accepted any volunteer prayer-giver and shown no religious animus, the town had violated the Establishment Clause. *Galloway*, 681 F.3d at 32. This holding flies in the face of *Marsh's* determination that the Nebraska Legislature had neither exploited the prayer opportunity nor violated the Establishment Clause because the same paid Presbyterian chaplain had delivered explicitly Christian prayers over a sixteen year period. The prayer practice in *Marsh* would therefore fail under the Second Circuit's reasonable objective observer test.

Under the Second Circuit's rubric, the second option available to a legislative body is to manipulate the

prayer-giver selection process and/or the content of prayers in order to ensure that a reasonable objective observer would not perceive a religious affiliation. In fact, this is the only option the Second Circuit provides to achieve any degree of insulation against Establishment Clause violations. However, this option requires a legislative body to do precisely what is forbidden by *Marsh*: exploit the prayer opportunity by selecting prayer-givers based upon religious affiliation or prayer content.

C. Selecting Prayer-Givers Based Upon Religious Affiliation or Prayer Content Is Itself Unconstitutional.

The First Amendment to the United States Constitution, which is applicable to states by virtue of the Fourteenth Amendment to the United States Constitution, provides, in pertinent part, that "Congress shall make no law … abridging the freedom of speech …" (the Free Speech Clause). The analytical framework for evaluating the regulation of speech on government property is known as "forum analysis." *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1098 (9th Cir. 2003) (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Cornelius v. NAACP*, 473 U.S. 788, 800 (1985)). Under this rubric, constitutional permissibility depends on the forum in which the speech takes place: the government has little authority to regulate speech in a public forum, it has more authority to regulate speech in a limited public forum, and it has the most authority to regulate speech in a non-public forum. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011) (*citing Perry Educ. Ass'n*, 460 U.S. at 44-46).

However, the Free Speech Clause restricts only government regulation of private speech—it is wholly inapplicable to government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (*citing Johanns v. Livestock Marketing Ass'n.*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech ... is exempt from First Amendment scrutiny"); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n. 7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression")).

Therefore, a Free Speech Clause analysis must begin with a determination as to whether private or government speech is at issue. *Pleasant Grove City*, 555 U.S. at 467. If government speech is at issue, the Free Speech Clause is inapplicable and no further analysis is necessary. *Id*. If private speech is at issue, the forum analysis must be used and the forum in which the speech takes place must be determined—*i.e.*, public forum, limited public forum or nonpublic forum. *ACLU of Nev.*, 333 F.3d at 1098. Once the forum is determined, the constitutional standard applicable to that forum must be applied in order to determine constitutionality. *Id.*

1. Legislative Prayers Constitute Private Speech For Purposes of the Free Speech Clause.

As the Free Speech Clause restricts only government regulation of private speech—not government speech—the character of the speech at issue (*i.e.*, whether it is private or government speech) must be determined at the threshold. *Pleasant Grove*

City, 555 U.S. at 467. This is determined by considering four factors (the Private Speech Factors) that differentiate between private and government speech. *Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008). The Private Speech Factors, which were originally developed by the Fourth Circuit, include:

> (1) the central "***purpose***" of the program in which the speech in question occurs; (2) the degree of "***editorial control***" exercised by the government or private entities over the content of the speech; (3) the identity of the "***literal speaker***"; and (4) whether the government or the private entity bears the "***ultimate responsibility***" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

Id. (emphasis added) (*citing Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618-619 (4th Cir.), *reh'g en banc denied*, 305 F.3d 241 (4th Cir. 2002); *Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir. 2000)). Applying the Private Speech Factors, it is clear that a prayer delivered to open a legislative body's meeting pursuant to *Marsh* constitutes private speech.

For example, in *Ariz. Life Coalition, Inc.,* 515 F.3d at 968, the Ninth Circuit held that a nonprofit organization's message displayed on state-issued specialty license plates constituted private speech. *Id.* Regardless of the fact that the state authorized

issuance of the specialty license plates, the court held that the state had not adopted as its own the messages displayed thereon. *Id.* In holding that the message displayed on state-issued specialty license plates constituted private speech, the court considered and applied each of the Private Speech Factors. *Id.* at 965-968. Specifically, the court found as follows: (i) the ***purpose*** of allowing organizations to obtain specialty license plates with their logo and motto was to provide a forum in which organizations could exercise their First Amendment rights; (ii) while the state determined whether an organization met the statutory guidelines for gaining access to the specialty license plate forum, the state did not exercise ***editorial control*** over the content of the message—the organization determined the substantive content of its message; (iii) messages conveyed through specialty license plates were primarily private speech, notwithstanding the fact that the state may have technically been the ***literal speaker***, because of the connection of any message on the plate to the driver or owner of the vehicle; and (iv) the organization, rather than the state, bears ***ultimate responsibility*** for the content of the speech because, if it wants to convey a certain message through the state's specialty license plate program, the organization must take the affirmative step of submitting an application. *Id.* at 965-968.

As in *Ariz. Life Coalition*, application of the Private Speech Factors establishes that invocations delivered at the opening of a legislative body's public meetings constitute private speech as long as: (i) the primary purpose of the legislative prayer is to open the public meetings; (ii) the legislative body exercises no editorial

control over the content of the prayers; (iii) the prayer-giver—not the legislative body—is the literal speaker; and (iv) the prayer-giver bears ultimate responsibility for the content of his or her prayer.

The first factor the Court must consider is the central purpose of the program in which the speech in question occurs. *Ariz. Life Coalition, Inc.*, 515 F.3d at 964. The "program" for the purpose of this factor is the legislative body's prayer practice specifically, not its public meetings generally. *See id.* at 965 (rejecting an argument that the purpose of specialty license plates was to identify a vehicle and its owner and instead finding that the purpose was to provide individuals "the opportunity to identify themselves with individualized messages via these specialized plates"). The purpose of legislative prayer is to continue an "[…] unambiguous and unbroken history of more than 200 years [and] there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Marsh*, 463 U.S. at 792. This supports a finding that legislative prayers constitute private speech.

The second factor the Court must consider is the degree of editorial control exercised by the government or private entities over the content of the speech. *Ariz. Life Coalition, Inc.*, 515 F.3d at 964. As long as a legislative body merely establishes guidelines for gaining access to the legislative prayer forum, but does not exercise any editorial control whatsoever over the content of the legislative prayers, this factor supports a finding that legislative prayers constitute private speech.

The third factor the Court must consider is the identity of the literal speaker. *Ariz. Life Coalition, Inc.*, 515 F.3d at 964. Like the specialty license plates in *Ariz. Life Coalition* (where the court found that this factor supported a finding that a message contained on a state-issued specialty license plate constituted private speech), the prayer-giver is the literal speaker. This is true regardless of the fact that the legislative body provides the forum—like the state provided the forum (*i.e.*, the specialty license plate) in *Ariz. Life Coalition*. This supports a finding that legislative prayers constitute private speech.

The fourth factor the Court must consider is whether the government or the private entity bears the ultimate responsibility for the content of the speech. *Ariz. Life Coalition, Inc.*, 515 F.3d at 964. As long as a legislative body's prayer practice provides that only those who accept an invitation or request to give a legislative prayer are scheduled to do so, each prayer-giver bears the ultimate responsibility for his or her legislative prayer. Because, like the specialty license plates in *Ariz. Life Coalition* (where the court found that the organization, rather than the state, bore ultimate responsibility for the content of the speech because, if it wanted to convey a certain message through the state's specialty license plate program, the organization had to take the affirmative step of submitting an application), such a prayer giver has taken the affirmative step of accepting the invitation or requesting to give the prayer. This supports a finding that legislative prayers constitute private speech.

2. A Legislative Body's Public Meetings Constitute A Limited Public Forum.

Having determined that legislative prayer given prior to a legislative body's public meetings constitute private speech for purposes of the Free Speech Clause, the forum analysis must be used and the forum in which the speech takes place must be determined—*i.e.*, public forum, limited public forum or nonpublic forum. *ACLU of Nev.*, 333 F.3d at 1098. All stages of a legislative body's public meetings constitute a limited public forum. *See White v. Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("…meetings, once opened, have been regarded as public forums, albeit limited ones") (*citing Madison School Dist. v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976); *Hickory Fire Fighters Ass'n, Local 2653 v. City of Hickory*, 656 F.2d 917, 922 (4th Cir. 1981)); *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010) ("the entire city council meeting held in public is a limited public forum"). "…[G]overnment entities establish limited public forums by opening property 'limited to use by certain groups or dedicated solely to the discussion of certain subjects.'" *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2984 n. 11 (2010) (*quoting Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)).

Because legislative prayers are necessarily given within a limited public forum (*see*, *e.g.*, *Norse v. City of Santa Cruz*, 629 F.3d at 975), a legislative body lawfully only would be permitted to impose restrictions that are: (i) reasonable in light of the purpose served by the forum; and (ii) viewpoint neutral. *Alpha Delta Chi-Delta Chptr v. Reed*, 648 F.3d 790, 797 (9th. Cir. 2011)

(*citing Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

3. Selecting Prayer-Givers Based Upon Religious Affiliation or Prayer Content Would Constitute An Impermissible Viewpoint-Based Restriction.

As legislative prayers are given within a limited public forum, any restriction imposed by the legislative body must be viewpoint neutral. *Id.* "Viewpoint discrimination is […] an egregious form of content discrimination, and occurs when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction [on speech]." *Id*. at 800 (internal quotations and citations omitted). "[W]here the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint rather than a subject matter." *Ariz. Life Coalition, Inc.*, Inc., 515 F.3d at 972 (*citing Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 971 (9th Cir. 2002)). "One thing is clear, 'once the government has chosen to permit discussion of certain subject matters, it may not then silence speakers who address those subject matters from a particular perspective.'" *Ariz. Life Coalition, Inc.*, Inc., 515 F.3d at 972 (*quoting Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003)).

In order to satisfy the Second Circuit's reasonable objective observer test, a legislative body would be required to select prayer-givers based upon religious affiliation or prayer content in order to ensure no perception of religious affiliation. This necessarily

discriminates based upon viewpoint because it would result in the exclusion of prayer-givers from overrepresented groups as opposed to merely regulate when, where and if a legislative prayer is given. A correct application of *Marsh*, however, avoids this problem by focusing on the legislative body's conduct and not the religious beliefs of prayer-givers or the content of legislative prayers. The Ninth Circuit recently provided such an application of *Marsh* in *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013) *petition for cert. filed* July 17, 2013 (No. 13-89).

III. THE NINTH CIRCUIT HAS CORRECTLY APPLIED *MARSH* AND HAS REFUSED TO CONSIDER THE CONTENT OF PRAYERS OR IDENTITY OF PRAYER-GIVERS IN THE ABSENCE OF AN EXPLOITATION OF THE PRAYER OPPORTUNITY.

In a comprehensive, scholarly and insightful judicial analysis of *Marsh*, the Ninth Circuit in *Rubin v. City of Lancaster* rejected the argument that a city's prayer practice, when viewed in context, violated the Establishment Clause because the majority of prayers were Christian. *Id.* at 1097. In *Rubin*, the City of Lancaster for years had an informal practice of opening its city council meetings with a citizen-lead prayer. *Id.* at 1089. In 2009, the city adopted a formal policy that established a two-step process for soliciting prayer-givers. *Id.* First, the city clerk compiled a list of local congregations by searching the *Yellow Pages*, Internet and newspaper and consulting the local chamber of commerce. *Id.* All congregations located within the city were eligible to be on the list and the clerk made no inquiry concerning the faith, denomination or belief

of any person or congregation asking to be placed on the list. *Id.* Second, the city clerk mailed an invitation to each person or congregation appearing on the list to open a city council meeting with a prayer. *Id.* The city exercised no control over the content of prayers and no person who offered to pray had ever been turned down. *Id.* Between the date the city formally adopted its prayer policy in 2009 and the date the plaintiffs filed their complaint, twenty (or 77%) of prayers were given by Christians and each referred to Jesus by name. *Id.* at 1090.

Explicitly rejecting the reasonable objective observer test applied by the Second Circuit in this case, the Ninth Circuit explained that "[b]ypassing the reasonable observer, the *Marsh* Court instead trained its analysis not only on history but on the *government's* actions." *Id.* at 1096 (emphasis in original); *see also Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008). The Ninth Circuit concluded that "[…] the question in this case is not simply whether, given the frequency of Christian invocations, the reasonable observer of Lancaster's city-council meetings would infer favoritism toward Christianity. Rather, it is whether the City itself has taken steps to affiliate itself with Christianity." *Id.* at 1097. Responding to the plaintiffs' argument that the frequency of Christian prayers had the effect of advancing Christianity, the Ninth Circuit explained that "[t]his argument misconceives the focus of our inquiry. Whatever the content of the prayers or the denomination of the prayer-givers, the City chooses neither." *Id*. at 1098.

The Ninth Circuit correctly focused on whether the legislative body had exploited the prayer opportunity

by itself having taken steps to affiliate with Christianity. Not only is this test mandated by *Marsh*, it affords a legislative body the opportunity to adopt and implement a prayer policy without either (i) the constant risk of unintentionally violating the Establishment Clause because of the overrepresentation of a particular faith, or (ii) exploiting the prayer opportunity by selecting prayer-givers because of their religious affiliation in order to ensure diversity sufficient to convince the reasonable objective observer that the legislative body is not affiliating itself with a particular faith. In the words of the Ninth Circuit, "[t]he [legislative body] cannot control which religious congregations settle within its limits. Nor can it compel leaders of those congregations to accept its invitations." *Id.* at 1099. Ultimately, "[w]hatever the content of the prayers or the denomination of the prayer-givers, the [legislative body] chooses neither." *Id.* at 1099; *see also Pelphrey*, 547 F.3d at 1263.

CONCLUSION

The *Marsh* Court drew a clear distinction between the prayer opportunity and the content of prayer. This distinction provides a workable framework within which a legislative body may adopt and implement a constitutional prayer policy because although the prayer opportunity is within a legislative body's control, the faith of prayer-givers and the content of the prayers are not.

The Second Circuit ignored this distinction. Under the Second Circuit's test, the constitutionality of a legislative prayer practice is determined based upon its

effect—*i.e.*, whether the practice would convey an official affiliation to a reasonable objective observer. This departure from *Marsh* effectively prohibits legislative prayer because it forces a legislative body to either run the risk of an unintentional Establishment Clause violation, or engage in the constitutionally offensive practices of selecting prayer-givers based on their religious beliefs or regulating the content of their prayers.

The League urges the Court to reject the Second Circuit's test as constitutionally unnecessary and practically infeasible. Rather, a legislative body that chooses to permit legislative prayer should be able to rely on *Marsh* and know that its policy is constitutional as long as the legislative body itself does not exploit the prayer opportunity.

Respectfully submitted,

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