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 ERWIN CHEMERINSKY AND ALAN BROWNSTEIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DAVID M. COOPER
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939

BETH HEIFETZ
Counsel of Record
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
bheifetz@jonesday.com

Counsel for Amici Curiae

September 23, 2013

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

Amici curiae respectfully submit this brief in support of Respondents pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to affirm the judgment of the United States Court of Appeals for the Second Circuit.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law, with a joint appointment in Political Science. He has authored a number of articles concerning the interpretation of the Establishment Clause. *See, e.g.*, Erwin Chemerinsky, *A Fixture on a Changing Court: Justice Stevens and the Establishment Clause*, 106 Nw. U. L. Rev. 587 (2012); Erwin Chemerinsky, *The Future of the Establishment Clause*, 28 Human Rights 16 (2001). He also has served as the Chair of the Elected Los Angeles Charter Reform Commission and was the Vice President for Education at Temple Emanuel in Beverly Hills, California.

Alan Brownstein is a Professor of Law, and Boochever and Bird Chair for the Study and Teaching of Freedom and Equality, at University of California Davis School of Law. He also has written

---

[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are on file with the Clerk's Office.

extensively on Establishment Clause issues. *See, e.g.*, Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger when Both Clauses Are Taken Seriously*, 32 Cardozo L. Rev. 1701 (2011); Alan Brownstein, *Continuing the Constitutional Dialogue: A Discussion of Justice Stevens' Establishment Clause and Free Exercise Jurisprudence*, 106 Nw. Univ. L. Rev. 605 (2012). He is a member of Congregation Bet Haverim in Davis, California, and has served on the Board, and as Vice-President and President, of the synagogue.

These scholars file this brief in support of respondents because they have a strong interest in the proper interpretation of the Establishment Clause, and they believe that Petitioner's arguments in this case – particularly their disregard for the *Lemon* and endorsement tests – would cause substantial problems with this Court's Establishment Clause jurisprudence. Moreover, as prominent members of their respective synagogues, they have an interest in ensuring that local governments treat their co-congregants as citizens of equal worth who deserve the same respect as other residents. In particular, Mr. Brownstein's synagogue is the only synagogue in Yolo County, but some members of his congregation live outside of Davis. If other towns in Yolo County followed the Town of Greece model, members of his congregation would be subject to discrimination with regard to invitations to offer prayers and subject to coercion if they appeared before a local city council to speak during public comment.

Amici support Respondents' argument that this Court's Establishment Clause cases, correctly understood, demonstrate that Petitioner's conduct here was unconstitutional.

SUMMARY OF THE ARGUMENT

This Court and lower courts have relied on the *Lemon* and endorsement tests for decades, and there is no basis for discarding them in this case. Petitioner advocates that this Court ignore the *Lemon* and endorsement tests, while various *amici* suggest that this Court overrule those tests entirely. However, this approach would be legally erroneous and practically disastrous.

First, the *Lemon* and endorsement tests have a strong foundation in precedent that cannot be so readily disregarded. To be sure, these tests are not applied in every Establishment Clause case, but they are applied in a wide variety of cases and they have withstood countless efforts to overrule them. Stare decisis is especially strong given the reaffirmation of these tests over such a long period. Moreover, the tests accurately reflect the Establishment Clause goals of religious liberty and government neutrality with respect to religion, while also proving flexible enough to deal with most factual situations.

Second, these tests play a crucial role in providing lower courts guidance in analyzing Establishment Clause issues. The enormous variety in the settings and government conduct at issue in Establishment Clause cases, and the numerous constitutional values implicated in church-state disputes, make it difficult for any single test to resolve all issues. Nonetheless, courts need, at a minimum, a workable framework for analyzing what

kinds of evidence are relevant and what kinds of considerations are important. Even if the *Lemon* and endorsement tests are imperfect, they at least provide a set of guidelines upon which lower courts can rely. Indeed, lower courts have been using these tests in hundreds of cases, and there is no crisis in Establishment Clause jurisprudence that would require a radical shift in how courts analyze these issues.

Third, there is no other test that can do this job. Petitioner and various *amici* suggest the coercion test, but this test has never been used as the sole basis for holding state action to be unconstitutional. And for good reason: Coercion is simply one type of injury that can arise from conduct that violates the Establishment Clause. However, it is not the only injury; the government cannot establish a state religion regardless of whether it coerces anyone into participating in that religion. As has been recognized in numerous cases adjudicating a wide range of church-state disputes, the Establishment Clause limits government conduct that favors certain faiths over others. A literal coercion test provides no basis for challenging the preferential promotion of favored faiths.

Finally, the conduct at issue here fails constitutional review under any test. As for *Lemon*, the Town's prayer had the effect of advancing one religion because the Town used a method for selecting the prayer-givers that inevitably excluded all non-Christian faiths. Because the prayer-givers were uniformly Christian, and the prayers they offered were distinctively Christian, the favoring of one religion was clear. Similarly, the Town's conduct

violated the endorsement test because an objective person, knowing how the prayer-givers were selected and hearing those prayers, would view it as a government endorsement of Christianity. As for coercion, given the participatory nature of the Town meetings – where residents seek to influence government decisions over matters directly affecting the individuals in attendance – audience members would unavoidably feel pressured to participate in Town-sponsored prayers before meetings.

ARGUMENT

I. THIS COURT SHOULD NOT DISCARD THE WELL-ESTABLISHED *LEMON* AND ENDORSEMENT TESTS FOR DETERMINING AN ESTABLISHMENT CLAUSE VIOLATION

A. The *Lemon* and endorsement tests have a strong basis in precedent.

Decades of precedent support the continued application of the *Lemon* test to adjudicate Establishment Clause disputes. Courts have relied on this test in deciding Establishment Clause cases for over forty years. Moreover, the *Lemon* test was not adopted in a vacuum. The test reflects the accumulated wisdom of the federal courts over years spent considering Establishment Clause issues. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). After considering its decisions in the "past score of years," the Court set forth in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 222 (1963), what later became the purpose and primary effect factors of the *Lemon* test ("The test may be stated as follows: what are the purpose and the primary effect of the [statutory] enactment?"). These "purpose and primary effect factors" formalized

the Court's analysis of prior Establishment Clause cases. *See Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241-43 (1968) (noting that *Schempp* based its test on earlier cases). Several years later, the Court propounded an additional factor for courts to use when analyzing Establishment Clause issues. Recognizing there could be "[n]o perfect or absolute separation" between church and state, courts would also be encouraged to "mark boundaries to avoid excessive entanglement" between church and state. *Walz v. Tax Comm'r of City of New York*, 397 U.S. 664, 670 (1970).

Shortly thereafter, the Court combined the factors in *Schempp* and *Walz* to create the three-factor *Lemon* test: (1) "the statute must have a secular legislative purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) "the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (citations and quotations omitted). The Court has repeatedly embraced the origins of the *Lemon* test in applying its three factors. *See, e.g.*, *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 -73 (1973) ("[T]he now well-defined three-part test that has emerged from our decisions is a product of considerations derived from the full sweep of the Establishment Clause cases."); *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736, 748 (1976) (plurality opinion) ("the Court distilled these concerns into a three-prong test, resting in part on prior case law"); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980) (*Lemon* test factors derived from "the precedents of this Court"); *Wallace v. Jaffree*, 472 U.S. 38, 55 (1985) (in

considering Establishment Clause cases, the Court "has examined the criteria developed over a period of many years").

The three factors of the *Lemon* test reflect the goals of the Establishment Clause: protection of religious liberty and government neutrality with respect to religion. With an eye toward these goals, *Lemon* established that courts should "careful[ly] evaluat[e]" the particular facts of each case due to the fact-intensive nature of religion issues. *Wheeler v. Barrera*, 417 U.S. 402, 426 (1974). Indeed, *Lemon*'s fact-specific inquiry was immediately manifest, in that a companion case to *Lemon* reached an opposite result on the question of excessive entanglement with religion.[2]

---

[2] In *Lemon*, the Court considered two statutes that provided state aid for secular subjects in Catholic schools but simultaneously prohibited state aid for religious subjects. 403 U.S. at 606-07. After identifying the three-factor test, the Court held that, pursuant to the third prong, the statutes "foster[ed] an impermissible degree of entanglement" and were unconstitutional. *Id.* at 615.

In contrast, the Court considered in the companion case of *Tilton v. Richardson*, 403 U.S. 672 (1971), whether federal grants for the construction of academic facilities at private colleges, including religious-affiliated colleges, could be restricted to non-sectarian uses only. The Court found no constitutional violation after it carefully examined the record and determined that there were facts which would "substantially diminish the extent and

The crucial malleability of *Lemon* has allowed the Court to refine it to accommodate different fact scenarios while still preserving its essential framework. In particular, the Court has advanced a *Lemon*-endorsement hybrid test, which has two prongs: (1) under the purpose prong, courts should allow some deference to the government when examining its intent; and (2) under the effects prong, a given governmental act unconstitutionally advances religion if it endorses religion from the viewpoint of an "objective observer, acquainted with the test, legislative history, and implementation of the statute . . . ." *Wallace*, 472 U.S. at 68-76 (O'Connor, J., concurring in the judgment); *see also McCreary v. Am. Civ. Liberties Union of Kentucky*, 545 U.S. 844, 862, 866 (2005) (applying *Lemon*-endorsement test). This hybrid analysis renders *Lemon* more versatile by creating an analytical framework whereby courts are encouraged to review historical facts and context. *Wallace*, 472 U.S. at 69-70, 74-76 (O'Connor, J., concurring in the judgment) ("Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.").

For another example of the flexibility of the *Lemon* test, the Court collapsed the excessive entanglement prong into the primary effect prong in *Agostini v. Felton*, 521 U.S. 203, 218, 232-33 (1997).

(continued…)

the potential danger of the entanglement." *Id.* at 684-89 (plurality opinion).

It found that, "in *Lemon* itself, the entanglement that the Court found 'independently' to necessitate the program's invalidation also was found to have the effect of inhibiting religion." *Id.* at 233 (quoting *Lemon*, 403 U.S. at 620). "Thus, it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect." *Id.* *Agostini* further refined *Lemon* by clarifying the criteria for whether government assistance to schools has the effect of advancing religion: the aid "does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234. But these clarifications did not change the underlying goals, substance, and character of *Lemon*; rather, the Court deftly "recast" *Lemon* to better fit the challenges confronted in addressing public assistance to religious schools. *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (plurality opinion).

Accordingly, the *Lemon* test – along with the endorsement hybrid of that test – has proven to be a flexible and resilient method of analyzing Establishment Clause cases. Indeed, *Lemon* has been used to analyze a wide variety of religious issues, such as the constitutionality of providing state financial assistance to parochial primary and secondary schools, *Nyquist*, 413 U.S. at 761-62; state financial aid to church-affiliated colleges and universities, *Roemer*, 426 U.S. at 748-54; *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 485-86 (1986); school prayer, *Sante Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); and the display of religious icons on government property, *McCreary*, 545 U.S. at 859-65; *Salazar v. Buono*, 559 U.S. 700, 707-08 (2010).

Stare decisis is particularly strong in this context because the *Lemon* test has evolved out of so many cases over such a long time period. "Stare decisis . . . is of fundamental importance to the rule of law. Even in constitutional cases, in which stare decisis concerns are less pronounced, we will not overrule a precedent absent a special justification." *Harris v. United States*, 536 U.S. 545, 556-57 (2002) (plurality opinion) (internal quotation marks and citations omitted). "This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion); *see also, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now.").

To be sure, the Court has not applied *Lemon* or the endorsement test in every Establishment Clause case. Rather, the Court has recognized that certain religion clause issues require application of different tests. For example, the Court found that *Lemon* was inapplicable in dealing with the erection of a passive monument, depicting the Ten Commandments, on the grounds of the Texas State Capitol. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (analysis "driven both by the nature of the monument and by our Nation's history"). The Court likewise did not invoke the *Lemon* or endorsement test when faced with a prayer at a middle school graduation ceremony. *See Lee v. Weisman*, 505 U.S. 577 (1992).

Nonetheless, even in those decisions that do not apply a *Lemon* or endorsement analysis, the Court has repeatedly rejected the idea of repudiating the tests entirely. As recently as 2005, the Court upheld the *Lemon* test despite a request to "abandon" it. *McCreary*, 545 U.S. at 861-65. In addition, the Court has disregarded a series of strongly-worded dissents calling for the repudiation of the *Lemon* test. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (including an entreaty to "drive[] pencils through the creature's heart"); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 750-51 (1994) (Scalia, J., dissenting); *Lee*, 505 U.S. at 644 (Scalia, J., dissenting); *Wallace*, 472 U.S. at 108-12 (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting).

In addition, for nearly forty years, the Court has noted that it has not created nor would it find a single test for religion cases that could serve as a viable alternative to *Lemon*. *See Mitchell*, 530 U.S. at 869 (Souter, J., dissenting) ("In all the years of its effort, the Court has isolated no single test of constitutional sufficiency . . . . Particular factual circumstances control, and the answer is a matter of judgment."); *Grumet*, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in the judgment) ("Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test."); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."). In fact, *Lemon* remains "the only coherent test a majority of the Court has ever adopted," *Wallace*, 472 U.S. at 63

(Powell, J., concurring), and it should not be overturned with no other suitable test to replace it. As Justice Kennedy explained in *Salazar*, "this Court's jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules." 559 U.S. at 722 (plurality opinion).

B. Lower courts rely heavily on the *Lemon* and endorsement tests for guidance.

The guidelines of the *Lemon* and endorsement tests have been invaluable for lower courts when interpreting the Establishment Clause. It is generally acknowledged that "[t]he Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application," and lower courts need clear guidance on how to analyze these difficult issues. *Witters*, 474 U.S. at 485. And *Lemon*'s guidelines also are flexible enough to allow lower courts some discretion in considering a wide assortment of factual issues.

For example, in the past five years alone, more than one hundred district courts have used or cited the *Lemon* test in their analysis of Establishment Clause issues. The diversity of religious issues and factual scenarios lower courts face is staggering. *See, e.g.*, *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, No. 11 Civ. 6026, 2013 WL 1285321, at *10 (S.D.N.Y. Mar. 28, 2013) (holding constitutional the decision to place a steel cross from the World Trade Center site wreckage in the National September 11 Memorial and Museum Foundation); *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405, 414-15 (E.D.N.Y. 2011) (statute regulating labeling

and marketing of food labeled as kosher held constitutional); *C.F. v. Capistrano Unified Sch. Dist.*, 647 F. Supp. 2d 1187, 1193 (C.D. Cal. 2009) (holding overbroad proposed injunction ordering teacher to "refrain from expressing any disapproval of religion while acting in his official capacity as a public school employee"); *Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 577 F. Supp. 2d 731, 751-52 (D.N.J. 2008) (holding policy banning holiday music constitutional as it "prevent[s] an overt endorsement of religion or an improper focus on religious holidays"); *Weinbaum v. Las Cruces Pub. Schs.*, 465 F. Supp. 2d 1182, 1194 (D.N.M. 2006) (emblem with three crosses on it "affixed to . . . maintenance vehicles" constitutional as it "symbolically represent[s] Las Cruces–a uniquely named geopolitical subdivision–rather than an endorsement of Christianity"); *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 934 (S.D. Iowa 2006), *aff'd in part, reversed in part*, 509 F.3d 406 (8th Cir. 2007) (holding unconstitutional organization providing pre-release rehabilitation services to inmates through program based on Evangelical Christianity); *Hansen v. Ann Arbor Pub. Schs.*, 293 F. Supp. 2d 780, 803-06 (E.D. Mich. 2003) (improper for school to invite six clergy panelists, during diversity awareness week, expressing view that homosexuality is consistent with religion); *Boone v. Boozman*, 217 F. Supp. 2d 938, 945-50 (E.D. Ark. 2002) (holding unconstitutional Arkansas student immunization statute recognizing objections only based on tenets or practices of "recognized church or religious denomination"); *Jabr v. Rapides Parish Sch. Bd. ex rel. Metoyer*, 171 F. Supp. 2d 653, 659-61 (W.D. La.

2001) (public school board's manner of distributing Bibles to elementary school students held unconstitutional); *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 912-14 (W.D. Mich. 2000) (school's "Moral Focus Curriculum" that "coincide[s] or harmonize[s] with the tenets of some or all religions, does not necessarily betoken endorsement"); *Forte v. Coler*, 725 F. Supp. 488, 490-91 (M.D. Fla. 1989) (holding constitutional statute exempting religious child care facilities from certain licensing requirements); *Spacco v. Bridgewater Sch. Dep't*, 722 F. Supp. 834 (D. Mass. 1989) (granting preliminary injunction requiring elementary students be reassigned from public school facility leased from Roman Catholic Church); *Am. Civ. Liberties Union of Kentucky v. Wilkinson*, 701 F. Supp. 1296, 1313-14 (E.D. Ky. 1988) (holding constitutional nativity display, consisting of a "rustic stable," on State Capitol grounds, while also holding unconstitutional state's limitation of use of display to nativity pageants); *Cammack v. Waihee*, 673 F. Supp. 1524, 1538 (D. Haw. 1987) (holding constitutional Hawaii statute declaring Good Friday a legal holiday); *Stark v. St. Cloud State Univ.*, 604 F. Supp. 1555, 1563-64 (D. Minn. 1985) (state university's policy permitting students to satisfy teaching requirements at parochial schools unconstitutional). Also, many of those cases apply the endorsement test in conjunction with the *Lemon* test. *See, e.g.*, *Weinbaum*, 465 F. Supp. 2d at 1191-92; *Jabr*, 171 F. Supp. 2d at 663; *Am. Civ. Liberties Union of Kentucky*, 701 F. Supp. at 1309-10.

The *Lemon* and endorsement tests thus provide a workable set of guidelines for lower courts to use in a wide array of religious issues. To discard these tests

would unmoor Establishment Clause jurisprudence from any foundation. As it stands, lower courts use *Lemon* to set the parameters for what facts matter (*i.e.*, those concerning purpose, effect, and entanglement), and therefore what testimony and documentary evidence is relevant. Without *Lemon* or the endorsement test, there is no way for lower courts to organize the compilation of a record, let alone analyze the evidence within it.

II. THE COERCION TEST IS INSUFFICIENT TO BECOME THE SOLE TEST OF ESTABLISHMENT CLAUSE VIOLATIONS

While coercion is a factor to consider, this Court repeatedly has rejected coercion as the sole test for determining compliance with the Establishment Clause. To begin with, most cases have not considered coercion at all, rather (as discussed above) applying some combination of the *Lemon* and endorsement tests. These cases reflect the reality that looking at whether a person was coerced does not always illuminate the ultimate issue of whether the government has taken impermissible steps toward establishing a state religion.

Critically, the narrow coercion test, standing alone, provides no basis for challenging government actions that favor certain religions over others. Yet this Court has recognized repeatedly both in earlier cases and more recent decisions that the prohibition against religious preferentialism is one of the core principles on which the Establishment Clause is grounded. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over

another."). While the language used by different Justices may vary among a wide range of church-state disputes, the commitment to denominational neutrality has remained a bedrock foundation of Establishment Clause jurisprudence.

This concern for religious neutrality, which would be all but entirely ignored by a literal coercion test, has been emphasized in cases evaluating religious accommodations. *See, e.g.*, *id.* at 245 (provision exempting certain faiths but not others from charitable organization registration and reporting requirements unconstitutionally grants "denominational preference"); *Grumet*, 512 U.S. at 722 (Kennedy, J., concurring) ("a religious accommodation demands careful scrutiny to ensure that it does not so burden non-adherents or discriminate against other religions as to become an establishment"); *Estate of Thornton v. Caldor*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (law singling out Sabbath observers for special protection without according protection to the beliefs and practices of other faiths unconstitutionally endorses particular religious beliefs); *Cutter v. Wilkinson*, 544 U.S. 709, 720, 724 (2005) (Religious Land Use and Institutionalized Persons Act does not violate Establishment Clause on its face because it "confers no privileged status on any particular religious sect," but to avoid as applied challenges, it must "be administered neutrally among different faiths"). Neutrality is also a central requirement in decisions reviewing government funding programs. *See, e.g.*, *Mitchell*, 530 U.S. at 829 (plurality opinion) (requiring government aid programs to private schools to award subsidies based on neutral, secular, nondiscriminatory criteria in order to withstand

Establishment Clause review); *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (upholding school voucher program against Establishment Clause challenge because it "is neutral in all respects toward religion").

Neutrality also plays an important role in cases, such as this one, involving government-sponsored prayers and religious displays. *See, e.g.*, *Wallace*, 472 U.S. at 113 (Rehnquist, J. dissenting) (arguing that the Framers designed the Establishment Clause to prevent government "from asserting a preference for one religious denomination or sect over others" or "discriminating between sects"); *Schempp*, 374 U.S. at 216 (accepting that, at a minimum, "the Establishment Clause forbids . . . government preference of one religion over another" while insisting that it has a broader scope); *McCreary*, 545 U.S. at 875-76 (explaining that the Establishment Clause mandates that "the government may not favor one religion over another" in order "to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate").

Furthermore, even in the cases that have looked to coercion, it has been only part of the analysis; those cases have not purported to use coercion as the sole test, to the exclusion of all other factors. As *Lee* stated, ""the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, *or otherwise act in a way which 'establishes a state religion or religious faith, or tends to do so*.'" 505 U.S. at 587 (emphasis added; quoting *Lynch*, 465 U.S. at 678). Moreover, this Court analyzed a prayer before high

school football games under the *Lemon*, endorsement, and coercion tests. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 310-16. Similarly, Justice Kennedy's opinion in *Allegheny* analyzes coercion within the *Lemon* framework, demonstrating that the tests are not mutually exclusive. *See County of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part, dissenting in part) ("I am content for present purposes to remain within the *Lemon* framework . . . ."). In particular, Justice Kennedy analyzed coercion in deciding "whether the 'principal or primary effect' of the challenged government practice is 'one that neither advances nor inhibits religion.'" *Id.* at 656 (quoting *Lemon*, 403 U.S. at 612).

More generally, this Court's Establishment Clause jurisprudence has made clear that context matters in determining how to analyze the government's conduct. *See, e.g.*, *Lee*, 505 U.S. at 597 ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one."). For instance, *Lee* relies on coercion in the context of school prayer at a graduation ceremony because coercion is a concern for school children who are under intense social pressure to conform. *See id.* at 592. On the other hand, *Van Orden* focuses on "the nature of the monument and . . . our Nation's history" because the *Lemon* test (and presumably the coercion test, as well, which goes unmentioned in the opinion) are "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." 545 U.S. at 686 (plurality opinion); *cf. id.* at 693-94 (Thomas, J., concurring) (applying the coercion test). And in a case involving the creation of a school district to encompass a religious group, the Court

relied on "[t]he general principle that civil power must be exercised in a manner neutral to religion." *Grumet*, 512 U.S. at 704; *see also id.* at 728 (Kennedy, J., concurring in the judgment) ("[O]ne such fundamental limitation is that government may not use religion as a criterion to draw political or electoral lines.").

It would be an enormous (and erroneous) departure to suggest that one idea like coercion can decide every case. As Justice O'Connor has explained: "It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. . . . But the same constitutional principle may operate very differently in different contexts." *Id.* at 718 (O'Connor, J., concurring in part and concurring in the judgment). Indeed, there is no one test for the Free Speech Clause or the Fourth Amendment, but rather a number of tests that apply in different contexts. While *Lemon*, at least, is broad enough to cover the Establishment Clause concerns at stake in most cases, coercion fails to do so.

Furthermore, coercion cannot be the sole test because it would leave no separate meaning to the Establishment Cause beyond the protections already mandated by the Free Exercise Clause. As this Court has recognized, "[t]he distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Schempp*, 374 U.S. at 223. And this Court has continued to hold that the government violates the Free Exercise Clause if it coerces persons to be a part of religious observances. *See*

Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 877 (1990) (under Free Exercise Clause, "government may not compel affirmation of religious belief"); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny . . . ."). Accordingly, "a literal application of the coercion test would render the Establishment Clause a virtual nullity." *Lee*, 505 U.S. at 621-22 (Souter, J., concurring).

III. THE ACTIVITY AT ISSUE HERE IS UNCONSTITUTIONAL UNDER ANY TEST

A. The Board meeting prayer is unconstitutional under the *Lemon* and endorsement tests.

Applying the *Lemon* and endorsement tests, the Town of Greece's prayer at Board meetings runs afoul of the Establishment Clause. While Respondents have abandoned an argument regarding intentional discrimination, *see Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012), the effects prong of *Lemon* demonstrates the problem with the Town's actions here.

The effect was to advance the Christian religion because of the method the Town chose for selecting people to offer the prayer. In particular, the Town chose clergy from the religious organizations listed in the Town's Community Guide. *Id.* at 23. The result was that, until 2008, only Christian clergy were invited to give the prayer at the meetings. Indeed, the Town's practice of relying on the Community Guide not only favors Christians over non-Christians,

it also necessarily discriminates between large faiths (*i.e.*, those popular enough to have a congregation and house of worship) and smaller, newcomer faiths with insufficient members to have a local congregation. In addition, the policy discriminates between traditional, organized religions and people who are spiritual, but do not affiliate with any organized faith.

Indeed, if every town used only a directory of congregations located within that town as the source of clergy to be invited to lead prayers, many religions would be left out. There are many towns with minority religious populations that do not have a critical mass large enough to form a congregation within its borders, but attend a house of worship in neighboring communities. Here, for instance, there were two Jewish synagogues just outside the Town, both apparently unlisted in the Community Guide. *See id.* at 24. However, the fact that the Jewish people in the Town of Greece pray in a synagogue outside of the town limits does not allow the Town to pretend that they do not exist.

This discriminatory effect is the inevitable result of the Town's policy, which only recognized the existence of religious individuals affiliated with congregations listed in the Community Guide. And it certainly would not have been difficult to include others, simply by asking for volunteers. In fact, the Town did so after respondents complained – although the Town appears to have stopped inviting non-Christian prayer-givers by the time the record closed in this case. *See id.* at 23.

This Court has recognized that such discrimination between "well established churches"

and "churches which are new and lacking in a constituency" violates the Establishment Clause. *Larson*, 456 U.S. at 246 n.23. Indeed, it directly conflicts with the fundamental principle that government "must be neutral in matters of religious theory, doctrine, and practice" and "may not aid, foster, or promote one religion or religious theory against another." *Epperson v. Arkansas*, 393 U. S. 97, 103-04 (1968); *see also, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) ("[W]e have held that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." (internal quotation marks omitted)). To be sure, neutrality – when taken to its "logical extreme" – could go too far in requiring a "relentless extirpation of all contact between government and religion." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part). However, at a minimum, neutrality requires that the government not involve itself with religion through a process whereby it repeatedly (and inevitably) chooses one particular religion over all others.

For similar reasons, the Town's actions fail when viewed through the lens of the endorsement test. The choice of only Christian clergy to give the prayer at Board meetings, who were selected pursuant to a policy that inevitably produces that result, is an endorsement of Christianity. The nature of the prayers confirms this endorsement, as approximately two-thirds had references particular to Christianity. *Galloway*, 681 F.3d at 24.

Moreover, most of the prayer-givers purported to speak on behalf of the Town and all of the residents, rather than just for the speaker himself or herself. *Id.* at 32. If, for instance, the Board members themselves gave the prayers, and did so only with Christian language virtually every week, then the violation would be clear.[3] The fact that the Board delegated its authority to religious leaders to deliver the uniformly Christian prayers does not change the message delivered to a reasonable observer, which is simply that the Board considers the Town of Greece to be a Christian community in which non-Christians are outsiders whose religious beliefs can be ignored. In this sense, the Town's policy is essentially the same as the government using a loudspeaker from City Hall to offer Christian prayers every Sunday, which plainly would represent an impermissible establishment of religion. In short, an objective observer would view the repeated giving of Christian prayers before official government meetings – by state-selected prayer-givers who act as though they are representing the views of the Town – as an endorsement of Christianity.

---

[3] Indeed, this would be more constitutionally problematic than a Latin cross on City Hall, which is widely recognized as a violation. *See, e.g.*, *Salazar v. Buono*, 559 U.S. at 715 (plurality opinion); *id.* at 747 n.6 (Stevens, J., dissenting); *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part). The Latin Cross is a passive display from which a person can look away, but the prayer is active conduct designed to influence and invite a response (such as standing or bowing one's head) from a captive audience.

B. The Board meeting prayer is unconstitutional under the coercion test.

Applying a full understanding of the coercion test, the Town's actions here are still unconstitutional. To begin with, coercion is not solely, as Petitioner contends, "when an individual is *required* to participate in religious activities." Pet'r Br. at 39. Petitioner's extraordinarily narrow conception of coercion would not cover many clear violations, including a Latin cross on top of City Hall, which obviously does not require anything of the people who see it. In particular, Petitioner's test of coercion suggests that anything goes in a legislative prayer because "the listener may do as he likes." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting). Pet'r Br. at 48. But this is not the law, even assuming *Marsh* were applicable here. *See Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) (accepting a legislative prayer only where it does not "advance any one . . . faith or belief").

More generally, the Constitution forbids the government from taking impermissible steps toward establishing a state religion, regardless of whether it affirmatively requires a person to participate in that religion. For that reason, Justice Kennedy has explained that coercion does not mean "direct coercion" and "need not be a direct tax in aid of religion or a test oath." *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part). Rather, the question is whether there is "some measure of more or less subtle coercion, be it in the form of . . . direct compulsion to observance, or governmental

exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 659-60 (Kennedy, J., concurring in the judgment in part and dissenting in part). As far back as *Engel v. Vitale*, the first school prayer case, this Court recognized that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the officially approved religion is plain." 370 U.S. 421, 431 (1962). Thus, coercion is the inevitable consequence of illegitimate government support for religion.

A person need not actually show that the government coerced him to change his religious beliefs or practices in order to establish a constitutional violation. The problem with religious coercion is not merely that it may succeed, but that when religious individuals defy the state's coercive efforts, they risk burdens and penalties for doing so. That is why a passive accommodation of religion is unlikely to coerce, *see County of Allegheny*, 492 U.S. at 662-63 (Kennedy, J., concurring in the judgment in part and dissenting in part), but affirmative conduct can more readily do so, *see Lee*, 505 U.S. at 596-99.

Even under a more stringent conception of a coercion test, the Town's prayer policy violates the Establishment Clause. Here, the coercive force of the government's conduct is far greater than it was in *Lee*. In *Lee*, the students had little reason to worry that their refusal to participate in the prayer (or not to attend the graduation ceremony at all) would result in unfavorable treatment from school personnel. Here, town residents attend Board meetings to address government decision makers on

matters that may significantly impact their lives and property and as to which the Board has considerable discretionary authority. Thus, citizens would have legitimate concerns that their refusal to join in prayers would risk alienating the very political decision makers they were trying to influence during public comment.

This is the key distinction between this case and *Marsh*.[4] A state legislature enacts general legislation that impacts a large number of people. A town board, in contrast, addresses individual disputes and concerns involving land use and local spending priorities – the kind of decisions which require the exercise of substantial discretion in weighing the competing concerns of relatively small constituencies. Moreover, the members of the audience at a board meeting, unlike a state legislative session, are not only the identifiable subject of the government's decision, they are there to speak to the board on their own behalf. In short, the audience at a town Board meeting is often participating in, not just observing, its government at work. And the cost of political participation cannot be the pressure to participate in a Christian prayer spoken by a person chosen in a manner that excluded other religions. In a setting

---

[4] In any event, *Marsh* did not apply the coercion test, but rested on an historical analysis of the use of a legislative prayer by the U.S. Congress. *See McCreary*, 545 U.S. at 859 n.10 (noting that *Marsh* represented a "special instance[]"). However, for the same reasons that the Board meeting is unlike a state legislative session, it also is unlike a session of the U.S. Congress.

designed to allow and encourage citizens to petition their government, the state is prohibited from asking citizens to participate in religious ceremonies. Petitioning decision makers at public meetings cannot be preconditioned on citizens bowing their heads, standing, or reciting a prayer – or on citizens identifying themselves as unwilling to do so.

Another important distinction between this case and *Marsh* is the repeated exclusion of non-Christian religions and the explicitly Christian nature of the prayers. To be sure, the state legislature in *Marsh* chose a clergyman of one denomination. *See* 463 U.S. at 793. However, there is a significant difference between appointing one person (who necessarily will come from one religious faith), and choosing many different prayer-givers while time and again excluding non-Christian religions. Simply put, there is nothing intrinsically problematic about being asked to listen to prayers of someone else's faith, but it becomes problematic when the message communicated is that the Town supports Christianity and other religions are not welcome – and even more problematic when citizens face pressure to join in the prayers. That is the same reason why a Latin cross atop City Hall is impermissible (while the Ten Commandments as part of a display of many monuments is acceptable, *see Van Orden, supra*): "an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part). If anything, displaying a Latin cross to the audience before every Town Board meeting, unconstitutional as it would be, is less problematic

and implicitly more coercive than beginning every Board meeting with Christian prayers offered by clergy selected through discriminatory invitation procedures.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

DAVID M. COOPER
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939

BETH HEIFETZ
Counsel of Record
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
bheifetz@jonesday.com

Counsel for Amici Curiae

September 23, 2013