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

KENNETH A. KLUKOWSKI
Counsel of Record
FAMILY RESEARCH COUNCIL
801 G Street N.W.
Washington, D.C. 20001-3729
Telephone (202) 637-4617
Facsimile (202) 393-2134
kklukowski@frc.org

Attorney for Amici Curiae Members of Congress

August 2, 2013

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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]

Amici curiae are 85 Members of Congress in the United States House of Representatives, and are individually named in the Appendix to this brief. This group is bipartisan and multi-faith.

These elected Representatives regard legislative prayer as important for policymaking bodies, both to solemnize official occasions and to seek God's blessing and guidance in making consequential decisions. Each Member also represents municipalities—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.

Moreover, *amici* are concerned over the growing exclusion of longstanding and historically-accepted acknowledgments of the Divine and expressions of religious faith in this Nation—whether religious speech or passive displays. Congress now regularly sees its actions set at naught by an erroneous view of the Establishment Clause. This case is merely the latest example proving that the Establishment Clause framework often employed in recent years by this Court is fundamentally flawed, and should be replaced by an objective standard that comports with the

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[1] No counsel for any party authored this brief in whole or part, and no one apart from *amici curiae* or their counsel made a monetary contribution to its preparation or submission. All parties consented to the filing of this brief, and were timely notified.

original meaning, longstanding application, and historical understanding of the First Amendment.

SUMMARY OF ARGUMENT

This case offers the Court the opportunity to restore a workable and principled test for the Establishment Clause. Although this should have been an easy case under *Marsh v. Chambers*, 463 U.S. 783 (1983), it instead became one of several circuit splits over the appropriate test for government actions intersecting religion. These circuit splits have arisen because of irremediable flaws in the endorsement test that this Court narrowly adopted in *County of Allegheny v. ACLU, Greater Pittsburgh Ch.*, 492 U.S. 573 (1989), which was a revision prompted by the unworkability of the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon*/endorsement test should be replaced with the coercion test advocated by four dissenting Justices in *Allegheny*.

The endorsement test has completely subsumed the three-pronged *Lemon* test, and has proved as unworkable in practice as it is unsound in principle. This Court has issued a series of narrowly-divided and splintered decisions that have confused the lower courts, baffled the public, and incentivized government officials to suppress legitimate religious expression in order to avoid the costs and hazards of litigation. Although this Court declined to apply *Lemon* to legislative prayer in *Marsh*, the court below invalidated Petitioner's legislative-prayer practice as a religious endorsement, confirming that the endorsement test will bedevil the First Amendment until it is replaced with a workable, principled, and objective test.

Scholarly commentators are as divided as the Court about the proper interpretation of the Establishment Clause, but widely agree about one thing: The endorsement test does not represent either a correct interpretation of the Constitution or a workable basis for a coherent jurisprudence. There is no hope that anyone will figure out how to clarify the endorsement test so as to avoid the serious problems that it has manifestly generated during its short and troubled life.

Stare decisis does not require continued adherence to the endorsement test. The Court should therefore abandon the *Lemon*/endorsement test in favor of the Establishment Clause's traditional understanding, which was grounded in the Constitution's text, history, and earlier precedent.

Such a test simply requires government to refrain from coercing participation in any religion or religious exercise, or from effectively creating a state religion. This coercion test was implicitly utilized by the Court in *Marsh*, and should be expressly adopted as the test for the Establishment Clause.

ARGUMENT

Legislative prayer jurisprudence has gone seriously awry. Rather than doing so of its own accord, the disarray in the lower courts is the direct and predictable result of the endorsement test, with its insurmountable subjectivity and latent hostility toward even benign and historically-accepted acknowledgments of faith.

The endorsement test narrowly adopted in *County of Allegheny v. ACLU, Greater Pittsburgh Ch.*, 492 U.S. 573 (1989), has created enormous confusion and uncertainty, which has been aggravated by the splintered decision in *Van Orden v. Perry*, 545 U.S. 677 (2005). The endorsement test is encompassed in the question presented in this case, as it was applied by the court below to invalidate Petitioner's practice. *See* Pet. i.

The Court should resolve the various circuit splits over the appropriate test for evaluating whether any governmental action intersecting religion violates the Establishment Clause, including legislative prayers. Specifically, the Court should set aside the "endorsement test"—as five Justices have urged in recent years—and instead adopt the "coercion test." Under the coercion test, "government may not coerce anyone to support or participate in any religion" or otherwise directly benefit religion to such a degree as to effectively establish a national religion. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part). Petitioner convincingly explains why the endorsement test is fundamentally flawed, Pet. Br. 40–50, and why the coercion test is correct, *id.* at 35–40.

The lower courts have been unable to apply the endorsement test consistently in this case and countless others, and scholarly literature strongly suggests they will never be able to do so. This Court itself implicitly suggested as much through its unwillingness or inability to apply the test in *Van Orden*. *See* 545 U.S. at 681 (plurality opinion); *id.* at 700 (Breyer, J., concurring in the judgment). The four

Justices who dissented from adopting the endorsement test in 1989 were correct, and the time has come for the Court to recognize they were right.

I. CONGRESS HAS AN INTEREST IN A SINGLE COHERENT ESTABLISHMENT CLAUSE RULE THAT PROTECTS LONGSTANDING AND TRADITIONAL PUBLIC ACKNOWLEDGMENTS OF FAITH.

A. Congress opens its daily sessions with legislative prayer, a practice that is fully consistent with the Establishment Clause. *Marsh v. Chambers*, 463 U.S. 783, 792–95 (1983). When the House Chaplain or a guest offers prayer in the House, he stands on the Speaker's Rostrum and faces both the Members and the citizen audience, making no distinction and apparently involving everyone.[2] As *amici* asserted when supporting Town of Greece's petition for certiorari, Chaplains say "we" and/or "Let us pray" 97% of the time, implicitly including everyone. [Cert-Stage] Brief of Members of Congress 22. Even in today's religiously-diverse culture, a majority of prayers include Christian references. *Id.* at 20. And 97% of modern prayer-givers are Christian. *Id.* at 9. When a guest offers prayer, the Chaplain gives no instruction to avoid faith-specific language.

Congress' longstanding prayer practice would fail under the tests promulgated by the Second Circuit in this case and the Fourth Circuit in previous cases. *Id.* at 7–23, 25–26. In these cases, the Court of Appeals

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[2] *See, e.g.*, House Prayer, http://www.c-spanvideo.org/program/HouseSession5423 (July 11, 2013).

invalidated prayer practices as endorsements of Christianity. Pet. App. 16–17a, 20–23a; *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 355 (4th Cir. 2011). At minimum, it is imperative this Court reverse the Second Circuit, and in so doing correct the Fourth Circuit as well.

B. But there are many other areas where Congress has acted on matters intersecting religion, which are also imperiled by the judiciary's recent jurisprudence. A Federal war memorial in the Mojave Desert was held unconstitutional as an endorsement of Christianity, and saved only by transferring the plot of land where the memorial sat to a private veterans' organization. *Salazar v. Buono*, 130 S. Ct. 1803, 1813–14, 1819, 1821 (2010) (plurality opinion). After 24 years of litigation, another congressionally-sanctioned memorial—the Mt. Soledad Veterans Memorial—has been invalidated as an endorsement of Christianity in its current form, and is now undergoing modifications in an attempt to save it. *See Trunk v. San Diego*, 629 F.3d 1099, 1103, 1124–25 (9th Cir. 2011).

Other matters pertaining to faith codified in Federal law by Congress have likewise been challenged over the past decade as endorsements of religion. These include the National Motto, 36 U.S.C. § 302, the National Day of Prayer, 36 U.S.C. § 119, and the Pledge of Allegiance, 4 U.S.C. § 4. Even the Chief Justice of this Court has been sued because of traditional language said when administering the President's Oath of Office at Inaugurations. *See Newdow v. Roberts*, 603 F.3d 1002, 1006 (D.C. Cir. 2010).

Amici do not regard disposing of these cases on threshold issues or divestiture of ownership as a viable defensive strategy. At some point plaintiffs with justiciable cases may emerge and receive final judgment on the merits, imperiling these longstanding creations of Congress.

C. The Capitol itself has many features expressing religious messages that could likewise be jeopardized by this national trend. The words of the National Motto—"In God We Trust"—are emblazoned in bronze above the Speaker's Rostrum in the House.[3]

Such religious messages are also found in Congress' artwork. In the Capitol Rotunda, Congress showcases Pocahontas converting from her native faith to Christianity with a large painting commemorating her baptism.[4] Another painting of the Pilgrims sailing to America emphasizes an open Bible and prayer, with "God with us" inscribed in the picture.[5] And Congress appropriated funds to construct and decorate myriad

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[3] U.S. House of Reps., History, Art & Archives, What's in the House Chamber?, The Rostrum & U.S. Flag, http://history.house.gov/Exhibitions-and-Publications/House-Chamber/Rostrum-Flag/.

[4] "The Baptism of Pocahontas," *in* Architect of the Capitol, Explore Capitol Hill, http://www.aoc.gov/capitol-hill/historic-rotunda-paintings/baptism-pocahontas.

[5] "Embarkation of the Pilgrims," *in id.*, http://www.aoc.gov/capitol-hill/historic-rotunda-paintings/embarkation-pilgrims.

such religious displays throughout Washington, D.C., including paintings of Jesus.[6]

Amici Members of Congress desire these Federal statutes and their creations—including Congress' legislative prayers—squarely upheld on the merits as fully consistent with the Establishment Clause. For the reasons set forth herein, each of these Acts, actions, and displays could be unconstitutional under the endorsement test, but would be upheld under the coercion test. The latter is the test the Constitution requires.

II. ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN CHAOS REGARDING THE TEST THE CONSTITUTION REQUIRES.

A. Petitioner has ably explained the three-way circuit split over the proper test for legislative prayer. Pet. 10–15. The Second Circuit below invalidated Petitioner's prayer practice under a totality-of-the-circumstances application of the endorsement test. Pet. App. 16–17a, 20–23a. The Fourth Circuit has likewise recently examined legislative prayer under the endorsement test in four cases spanning seven years, most recently in 2011. *See Joyner*, 653 F.3d at 355. But the Ninth and Eleventh Circuits rightly reject applying the endorsement test to legislative prayer. *Rubin v.*

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[6] For example, in the stairway next to the Great Hall at the Justice Department, there is a prominent oil painting of Jesus Christ, holding his right hand toward to the viewer, apparently inviting the viewer to take his hand. *See* Library of Congress, Prints & Photographs Online Catalog, http://www.loc.gov/pictures/item/2010720202/.

City of Lancaster, 710 F.3d 1087, 1093–97 (9th Cir. 2013); *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1267, 1271 (11th Cir. 2008).[7]

But it would be a disservice to the law to mischaracterize legislative prayer as *sui generis*; its constitutionality is determined by evaluating it under the Establishment Clause. The Establishment Clause should have a single workable test, which applies regardless of whether the challenged government action is legislative prayer, other religious speech, or a passive display.

B. Just over twenty years ago, in a 5-4 opinion, this Court adopted a novel test for judging the constitutionality of state actions touching religion, one that asks "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." *Allegheny*, 492 U.S. at 592. Justice O'Connor had previously articulated and advocated the view underlying this test, which is that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). This theory was

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[7] Another circuit split is whether *Marsh* permits only nonsectarian prayers. However, there are no legal principles by which courts can reliably distinguish "sectarian" prayers from "nonsectarian." 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).

devoid of support in America's history or law prior to that time.

The novel test produced confusion from the outset. Applying this new endorsement test, the *Allegheny* Court invalidated a nativity display in a county courthouse 5-4, but upheld a menorah display outside the courthouse by a different 6-3 majority. *Id.* at 578–79, 601–02, 620. This began a series of narrow and controversial rulings employing a subjective and unworkable test that is without historical foundation.

The Court implicitly recognized the endorsement test's unworkability in 2005, holding a Ten Commandments display at the Texas State Capitol did not violate the Establishment Clause. *Van Orden*, 545 U.S. at 681 (plurality opinion). Four Justices emphasized that applying the endorsement test would lead to the destruction or removal of a longstanding monument with religious imagery sacred to many Americans, *see id.* at 688–89,[8] a result that would astound the Framers and ratifiers of the Establishment Clause and is not remotely required by the early precedents of this Court. The plurality instead reasoned that the display should be evaluated "both by the nature of the monument and by our Nation's history." *Id.* at 686.

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[8] These Justices also noted approvingly, "So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia." *Van Orden*, 545 U.S. at 689 (plurality).

Similarly, Justice Breyer explained that the Constitution "does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* at 699 (Breyer, J., concurring in the judgment) (citations omitted). Concurring in the judgment, Justice Breyer maintained that in "difficult borderline cases" there is "no test-related substitute for the exercise of legal judgment." *Id.* at 700. Accordingly, there is now no clear governing rule or rationale.

C. Subsequent to *Van Orden*, a 2-2-1 circuit split has developed regarding which test governs the Establishment Clause. The Fourth and Eighth Circuits have applied Justice Breyer's legal judgment test. *See ACLU Neb. Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 777–78, 778 n.8 (8th Cir. 2005) (*en banc*) (upholding Ten Commandments display); *Myers v. Loudon Cnty. Pub. Schs.*, 418 F.3d 395, 408 (4th Cir. 2005) (upholding daily Pledge of Allegiance recitations).[9] The Sixth and Tenth Circuits, by contrast, continue to apply the endorsement test. *See ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005) (upholding courthouse Ten Commandments display); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 (10th Cir. 2009) (upholding official city seal displaying

[9] In *Myers*, the Fourth Circuit looked to *Van Orden* even though the case involved speech, not displays. This highlights the current confusion regarding the applicable law, and the need for a uniform test for all Establishment Clause claims.

three crosses). Illustrating the extent of the confusion among the circuits, the Ninth Circuit was unable to discover which test should apply in a cross case, and purported to apply *both* tests. *See Trunk*, 629 F.3d at 1105, 1109, 1117–18.

This confusion is thus not limited to legislative prayer. It is instead generated by a faulty test governing the Establishment Clause. Legislative prayer will be adequately safeguarded only by this Court adopting a workable and principled test.

III. THE PRIMARY CAUSE OF THE CHAOS REGARDING THE ESTABLISHMENT CLAUSE IS THE UNWORKABLE, UNPREDICTABLE, AND UNGROUNDED ENDORSEMENT TEST.

The current chaos in Establishment Clause jurisprudence is primarily due to the endorsement test, which has divided this Court and confused the lower courts. It has met with widespread criticism across a broad spectrum of scholars, and confounded both the general public and officials seeking to abide by the Constitution.

The Nation's odyssey began with the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, the Court crafted a three-pronged test, holding that government action touching religion is invalid unless (1) it has a secular purpose, (2) its primary effect "neither advances nor inhibits religion," and (3) it does not excessively entangle government with religion. *Id.* at 612–13.

It quickly became clear that adopting the *Lemon* test was a mistake. Just two years later, the Court held *Lemon*'s prongs "are no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Members of the Court regularly criticized *Lemon*. *See, e.g.*, *Aguilar v. Felton*, 473 U.S. 402, 426–30 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108–12 (1985) (Rehnquist, J., dissenting); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 768–69 (1976) (White, J., concurring).

A. The *Lemon* test has morphed into the endorsement test, subsuming *Lemon*'s three prongs.

Lemon's unworkability and other manifest flaws led this Court to revise it into the endorsement test, which began as a restatement of *Lemon*'s second prong—the effects prong (whether government action has the effect of advancing religion). *Allegheny*, 492 U.S. at 592. When the Court narrowly adopted the endorsement test it was thus one of three tests employed under *Lemon* to determine whether the Establishment Clause was violated. But it has since subsumed the other two prongs of *Lemon* as well.

In 1997, the Court made *Lemon*'s third prong (excessive entanglement) merely one factor in determining whether a reasonable observer would conclude government is endorsing religion. In *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997), the Court relegated the entanglement prong to part of the effects prong. The Court later reaffirmed that *Agostini* thereby reduced *Lemon* to a two-step inquiry. *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2002) (plurality opinion);

see also id. at 844–45, 848 (O'Connor, J., concurring in the judgment).

Eight years later the Court likewise melded the first *Lemon* purpose—the purpose prong—into the endorsement test. "By showing a purpose to favor religion, the government sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . ." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting in turn *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring))) (ellipses in the original, internal quotation marks omitted). As discussed in Part II.B, *supra*, this statement from *Lynch* is the rationale upon which the endorsement test is predicated: An observer's subjective belief that government is endorsing religion violates the Establishment Clause *because* nonbelievers would feel that they are not full members of the community. Justice O'Connor's *Lynch* concurrence was incorporated into the heart of the Court's holding in *Allegheny*, and is the essential core of the endorsement test. *See Allegheny*, 492 U.S. at 594. Likewise, the 5-4 majority in *McCreary* held that the purpose prong of *Lemon* is violated when the government's purpose has the effect of making nonbelievers feel like outsiders; if a government action lacks a primarily secular purpose, then its purpose is one that endorses religion.

In joining the three-Justice plurality opinion, Justice O'Connor (joined by Justice Breyer) wrote separately to emphasize the limits of her agreement with the plurality regarding their inquiry into purpose.

"The purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer." *McCreary*, 545 U.S. at 883–84 (O'Connor, J., concurring) (citing the *Lynch* concurrence). Although Justice O'Connor joined the majority opinion, which rested upon the purpose prong of *Lemon*, by her concurrence Justice O'Connor clarified that she regards the government's purpose as just another factor in determining whether the government is endorsing religion, similar to how the endorsement test expanded to absorb entanglement in *Agostini*. The reasonable observer had theretofore been the hypothetical observer for the effects prong. Thenceforth, now too "[t]he eyes that look to purpose belong to an 'objective observer.'" *Id.* at 862 (majority opinion) (citations omitted).

The fifth vote in *McCreary*, therefore, is correctly understood as saying that whether the first prong of *Lemon* is satisfied is achieved through precisely the same test as the second prong. This then is regarded as the holding of the Court, *see Marks v. United States*, 430 U.S. 188, 193 (1977), as there were not five Justices agreeing that the Establishment Clause is violated by the original *Lemon* test's purpose prong separate from finding that a reasonable observer would believe government is endorsing religion.

Whether discussing purpose, effect, or entanglement, then, the bottom line after *Allegheny*, *Agostini*, *Mitchell*, and *McCreary* is that the Establishment Clause is violated when government endorses religion. *Lemon* can be restated as follows: A government action violates the Establishment Clause if it (1) lacks a primarily secular purpose, thus having

a purpose that gives the appearance of endorsing religion, (2) a hypothetical reasonable observer thinks the government is endorsing religion, thereby having the effect of advancing religion, or (3) excessively entangles government with religion, thereby giving the appearance of endorsing religion.

The end result, in sum, is that what began as a tripartite inquiry in *Lemon* is now a singular inquiry about endorsement. The *Lemon* test has been entirely subsumed into the endorsement test, which was the test applied by the Second Circuit below.

B. *Marsh*, *Van Orden*, and other decisions of this Court confirm that the *Lemon*/endorsement test is unworkable.

1. The Court declined to apply *Lemon* in *Marsh*. *See Marsh*, 463 U.S. at 791–95. Dissenting Justices in *Marsh* noted that legislative prayer would be invalidated under the *Lemon* test, with Justice Brennan concluding, "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Id.* at 800–01 (Brennan, J., dissenting) (footnote omitted).

The Court was correct in eschewing the *Lemon* test, and Justice Brennan was correct in observing that legislative prayer would not survive *Lemon*. This is because the *Lemon* test is unjustifiably hostile to religious faith and expression. Legislative prayers would not fail under *Lemon* because such prayers are unconstitutional. Rather, they would fail because

Lemon is not the test the Establishment Clause requires.

2. Since 1989 when the Court revised *Lemon* with the endorsement test, the Court's attempts to apply the endorsement test have resulted in splintered and narrowly-divided decisions. The results have been unpredictable, with the Court's narrow or fractured opinions eliciting vigorous dissents. This occurs both when a government action is upheld under the test, *see, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (plurality opinion); *id.* at 772–75 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 800 n.5 (Stevens, J., dissenting), as well as when the Court invalidates the action, *see, e.g.*, *Santa Fe*, 530 U.S. at 302; *id.* at 318 (Rehnquist, C.J., dissenting).

Even Members of the Court supporting an endorsement principle do not agree on its proper application. For example, Justice Stevens rejected Justice O'Connor's reasonable observer as a "legal fiction." *Pinette*, 515 U.S. at 800 n.5 (Stevens, J., dissenting). This "ideal human" in Justice O'Connor's theory "knows and understands much more than meets the eye." *Id.* This fictional character "comes off as a well-schooled jurist, a being finer than the tort-law model. With respect, I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context." *Id.*

3. These divisions within the Court culminated in *Van Orden*, where the Court was unable to agree on a majority opinion. Justice Breyer advocated a new "legal judgment" test for "borderline" cases, in that case

certain imprecisely-defined "passive displays." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment). This attempt at a new formulation is itself a sign that the endorsement test is not settled law and should be explicitly abandoned.

But the Court should not adopt Justice Breyer's legal judgment test, as it is no test at all; it would make every Establishment Clause challenge subject to the personal predilections of federal judges. It is even more subjective than the endorsement test, giving every judge *carte blanche* to say, "I know it when I see it," with no limiting guidance.

Such an *ad hoc* approach is unsustainable. The legal judgment approach further evinces that the *Lemon*/endorsement test must be replaced, but would not provide an acceptable replacement. The Court should instead adopt a test consistent with the original meaning and purpose of the Establishment Clause, and capable of predictably producing correct results.

C. The endorsement test has created the same hopeless disarray in the lower courts as the first iteration of *Lemon*.

In order to determine whether a display endorses religion, the endorsement test asks how the display would appear to an "objective" or "reasonable" observer, "one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary*, 545 U.S. at 862 (citations and internal quotation marks omitted); *see also Pinette*, 515 U.S. at

777 (O'Connor, J., concurring in part and concurring in the judgment).

It is anyone's guess what this really means. For example, the circuit courts have split when applying the endorsement test to materially indistinguishable displays. The Ten Commandments in *Mercer* were displayed inside a county courthouse, alongside other documents of legal and historical import. 432 F.3d at 626. The Sixth Circuit held this display was not an endorsement of religion. *Id.* at 635–39. Then the Tenth Circuit considered a Ten Commandments display erected alongside secular monuments on a county courthouse lawn. *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 787–89 (10th Cir. 2009). Applying the same endorsement test, the Tenth Circuit invalidated the display. *Id.* at 804–09.[10] These two displays should stand or fall together under the same test. If anything, the display invalidated in *Green* should have been upheld, as it was *outside* the courthouse, whereas the display upheld in *Mercer* was *inside* the courthouse. Such conflicting and counterintuitive outcomes underscore judicial inability to apply the endorsement test in a predictable manner.

The disarray in the lower courts is not a recent development. For example, shortly after *Allegheny* upheld the display of a menorah outside a public building, the Second Circuit invalidated a similar

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[10] *En banc* was denied 6-6; the dissenters argued *Van Orden* controls. *See Green*, 574 F.3d 1235, 1235–39 (10th Cir. 2009) (Kelly, J., dissenting from denial of reh'g *en banc*).

display because of slight factual differences. *Kaplan v. City of Burlington*, 891 F.2d 1024, 1028 (2d Cir. 1989).

The lower courts were also quick to issue split decisions that conflicted with one another. For example, the year after *Allegheny*, a divided Fourth Circuit invalidated displaying a crèche, holding religious images are permissible only when offset by surrounding non-religious images. *See Smith v. City of Albermarle*, 895 F.2d 953, 955–58 (4th Cir. 1990). The very same day, a divided Sixth Circuit interpreted the endorsement test differently, permitting a stable scene used for nativity reenactments if accompanied by a prominent written disclaimer of any intent to convey a religious message. *ACLU of Ky. v. Wilkinson*, 895 F.2d 1098, 1103 (6th Cir. 1990).

It is no accident that the case law developed in the wake of *Allegheny* has been at best confusing and at worst incoherent. The endorsement test is fatally flawed by the subjective discretion that reviewing courts must exercise in determining what a "reasonable" observer would perceive and feel, and on what basis those perceptions and feelings would arise. As a result of this insoluble confusion, federal courts "remain in Establishment Clause purgatory." *Mercer*, 432 F.3d at 636.

D. Scholars across the spectrum agree that the endorsement test itself is the cause of the chronic confusion in the courts.

Further wrestling with either the original *Lemon* test or the endorsement test is unlikely to produce a workable refinement. Both tests have been subjected to

withering criticism from a broad range of scholars. Most scholars fall into one of two groups: Accommodationists believe modern doctrine puts too many restrictions on religious expression and images in public places, and strict separationists believe the opposite. *See* Klukowski, *supra*, at 224–27.

These scholars—who agree on little else about the Establishment Clause—share the view that this test is unworkable and inconsistent with the Constitution. As one scholar said of *Lemon*, the "Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices." LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 163 (1986).

1. Professor McConnell, one leading accommodationist, concluded after *Allegheny* that the "Court's conception of the First Amendment more closely resemble[s] freedom *from* religion . . . than freedom *of* religion. The animating principle [is] not pluralism and diversity, but maintenance of a scrupulous secularism in all aspects of public life . . . ." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116 (1992) (footnote omitted) ["McConnell, *Crossroads*"].

Although Justice O'Connor designed the endorsement test to achieve consistent results, *see Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment), McConnell opined "this goal of consistency is the test's greatest failing," McConnell, *Crossroads*,

supra, at 148. First, "endorsement" is not workable, because "[w]hether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no 'neutral' position, outside the culture, from which to make this assessment." *Id.* The "concept of 'endorsement' therefore provides no guidance to legislatures or lower courts about what is an establishment of religion." *Id.*

McConnell attributes this to a flawed approach to the Religion Clauses. Establishment Clause jurisprudence has become so far divorced from this Court's longstanding precedents that it would be unrecognizable, not only to the Framers, but also to earlier courts. "[I]t is like stepping into a time warp to read the establishment clause opinions of the 1940's, 1950's, and 1960's." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 933 (1986) ["McConnell, *Coercion*"]. Showcasing how far our jurisprudence has strayed from the Clause's historical purpose, McConnell asks, "Was it really Justice Brennan . . . who told us that, in deciphering the first amendment, 'the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers?'" *Id.* (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

Professor Smith focuses on the endorsement test's ahistorical roots: "If the possibility of separating church and state presented eighteenth century Americans with a genuine option, the separation of politics and religion, or of government and religion, did not." Steven

D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 966 (1989). Smith explains, "Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues. [Thus], Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out." *Id.*

Smith explains the failure to begin with a proper understanding of the Establishment Clause has led to the current judicial quagmire. "Far from eliminating the inconsistencies and defects that have plagued establishment analysis, the [endorsement test] introduce[s] further ambiguities and analytical deficiencies into [Establishment Clause] doctrine." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267 (1987).

2. The endorsement test likewise fares poorly among separationists. Professor Tribe criticized Justice O'Connor's *Lynch* concurrence, saying the "Court dispensed at a stroke with what should have been its paramount concern: from *whose perspective* do we answer the question whether an official crèche effectively tells minority religious groups and non-believers that they are heretics, or at least not similarly worthy of public endorsement?" Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 611 (1985) (footnote omitted). Professor Mark Tushnet concurs,

saying Justice O'Connor's conclusion in *Lynch* that the crèche at issue was not an endorsement of religion "came as a surprise to most Jews." Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712 n.52 (1986).

Professor Shiffrin charges that the endorsement test falsely frames a facially-neutral test with the appearance of equal treatment. Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 63 (2004). Shiffrin also criticizes Justice O'Connor's conclusion that the Pledge of Allegiance is constitutional, citing this as an example of the failure of the endorsement test to stop religious establishments. *See id.* at 67–76.

Professor Gey criticizes the endorsement test's subjectivity. "In contrast to Justice Brennan, whose *Schempp* standard focuses on the objective facts of government aid to religion, Justice O'Connor converts the analysis of Establishment Clause issues into a question of subjective perceptions." Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 477. Like McConnell, Gey argues that "[t]he obvious problem with any approach that measures constitutional compliance by the *appearance* of compliance is that every individual perceives the world differently, depending on factors such as the individual's background, prejudices, sensitivity, and general personality." *Id.* at 478–79 (emphasis added). In sum, "any hypothetical 'objective' observer is only as objective as its creator wants the observer to be." *Id.* at 479.

3. Academics' assessment of the endorsement test has not improved with time. Professor Choper later opined:

> [L]ower courts, struggling to give it content, have succeeded only in producing ad hoc fact-laden decisions that are difficult to reconcile. Another unwise feature of the test, more serious because not curable, is its grounding of a constitutional violation on persons' reactions to their sense that the state is approving of religion. . . [S]ince its effect is to grant an inappropriately broad discretion to the judiciary, the endorsement approach proves unworkable . . .

Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & POL. 499, 510 (2002). Scholars across the spectrum continue to criticize the test. *See, e.g.*, PATRICK M. GARRY, WRESTLING WITH GOD: THE COURTS' TORTUOUS TREATMENT OF RELIGION 57–69 (paperback ed. 2007); Scott W. Gaylord, *When the Exception Becomes the Rule:* Marsh *and Sectarian Legislative Prayer Post-*Summum, 79 U. CIN. L. REV. 1017, 1053 (2011). Confusion reigns, and will continue to reign until this Court changes course.

E. The endorsement test has spawned excessive litigation producing a chilling effect.

The confused state of the law has a chilling effect on First Amendment interests, producing *in terrorem* effects on public officials deciding whether to permit religious speech or images in public. Government

officials cannot reasonably predict *ex ante* which actions will be held constitutional. To avoid the specter of costly litigation, officials—especially at the local level where resources are scarce—will simply deny requests that some could allege have a religious element. A test facilitating such oppressive apprehension cannot be reconciled with the foundational values protected by the First Amendment.

As Justice Kennedy predicted at the outset, the endorsement test has led to outcomes evincing "hostility [toward religion] inconsistent with our history and our precedents." *Allegheny*, 492 U.S. at 655 (Kennedy, J.). Ubiquitous expressions and displays of widely-held beliefs integral to our national fabric are regularly beset by hostile attacks divorced from the historical understanding of the Establishment Clause.

While many challenges fail on jurisdictional or procedural grounds, prudent public officials are understandably reluctant to rely on threshold issues to protect them, especially with the prospect of significant litigation costs. The path of least resistance, and due regard for taxpayers, will often counsel erring on the side of banning religious speech or symbols. In that way, even if in no other, the existing jurisprudence operates to suppress religious imagery in ways that go well beyond what this Court has ever indicated is legally required or appropriate.

IV. PRINCIPLES OF JUDICIAL RESTRAINT AND *STARE DECISIS* DO NOT PROTECT THE *LEMON*/ENDORSEMENT TEST.

Four Terms ago in *Citizens United* the Court held that *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), "was a significant departure from ancient First Amendment principles. We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*." *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (internal citation and quotation marks omitted). The Court proceeded to overrule *Austin* and part of *McConnell v. FEC*, 540 U.S. 93 (2003).

The Constitution and the Nation are better off for this Court's restoring First Amendment principles under the Free Speech Clause, and the Court should do likewise here to restore First Amendment principles under the Establishment Clause. A straightforward application of this Court's reasoning in *Citizens United* compels the conclusion that the endorsement test and its originating *Lemon* test should be overruled.

Stare decisis requires precedent be upheld "unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." *Citizens United*, 558 U.S. at 362. This case demonstrates such error.

A. The endorsement test is the archetypal unworkable test.

Among the foremost reasons for admitting that adopting a decision was error is that the rule has

proven unworkable. *Stare decisis* does not require the Court to revise the theoretical basis of a prior decision "in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009).

If *amici*'s brief proves only one point, it is that the endorsement test from *Allegheny* is manifestly unworkable. And the reason the Court was narrowly persuaded to adopt the endorsement test is that the original *Lemon* test was unworkable—as seen in the Court's refusal to apply *Lemon* in *Marsh*. The *Lemon*/endorsement approach is indeed a textbook illustration of an unworkable test, commending itself to law professors across the legal spectrum as an example for students of an irredeemable and unsalvageable test, one that never should have been adopted. For that reason alone, the Court should overrule the endorsement test.

B. Other *stare decisis* factors likewise counsel this test should be overruled.

"Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Id.* at 792–93.

The endorsement test is of recent vintage, adopted twenty-four years ago. And it supplanted the *Lemon* test, which was only eighteen years old. What is rooted in antiquity, by contrast, is Congress' legislative-prayer practice. That practice—materially similar to the Town

of Greece's—is older than the Republic, but as demonstrated below cannot survive the endorsement test.

Nobody seriously relies on the endorsement test, either for legislative prayer or anything else. They do not because they cannot; this test revolves around a hypothetical observer who selectively is aware of certain facts but ignorant of others, and as seen in the cases cited above leads to different courts reaching diametrically opposed conclusions regarding essentially-identical facts.

Nor should there be serious doubt that *Allegheny* was well-reasoned. The Court's fractured conclusions forbidding the crèche but allowing the menorah was just the beginning, as again the case law discussed in Part III shows. A test under which public officials cannot know *ex ante* whether their speech or display will survive is not well-reasoned.

These arguments against *stare decisis* apply with particular force in this case. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United*, 558 U.S. at 363 (internal citation and quotation marks omitted).

C. It is necessary to articulate a general rule to produce a well-reasoned opinion in this case.

The judiciary's practice of avoiding unnecessarily broad constitutional rulings cannot trump this Court's "obligation faithfully to interpret the law. . . [The Court] cannot embrace a narrow ground of decision

simply because it is narrow; it must also be right." *Id.* at 375 (Roberts, C.J., concurring). That is why in this case the Court should not carve out an *ad hoc* rule justifying legislative prayer, and instead uphold these prayers under a general establishment rule.

"When constitutional questions are indispensably necessary to resolving the case at hand, the court must meet and decide them." *Id.* (citation and internal quotation marks omitted). It is "indispensably necessary" to a well-reasoned opinion here that the Court not only affirm Petitioner's legislative-prayer practice is constitutional; the Court must articulate a rule of law governing the Establishment Clause under which Petitioner's practice passes muster. Rather than rest upon legislative prayer's "unique history," the Court should adopt a clear rule that explains *why* legislative prayer is consistent with the Constitution's text and history.

D. Overruling the endorsement test promotes predictable legal principles, reliance on judicial decisions, and the integrity of the judicial process.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

The Establishment Clause's tumultuous course since the endorsement test's adoption is the polar opposite of "consistent development." That in part is

why the test has fostered no reliance, and since the fictional "reasonable observer" in each case bears a striking resemblance to the presiding judge—often deciding cases contrary to other judges in similar cases—the endorsement test undermines, rather than contributes to, the integrity of the judicial process.

The Court has greater latitude to overturn precedent in constitutional cases. *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring) (citing *United States v. Scott*, 437 U.S. 82, 101 (1978)). Congress cannot fix this situation by statute; the Court adopted a deeply-flawed test, and only the Court can replace it.

In balancing the "importance of having constitutional questions *decided* against the importance of having them *decided right*," the Court "must keep in mind that *stare decisis* is not an end in itself. It is instead 'the means by which [the Court ensures] that the law will not merely change erratically, but will develop in a principled and intelligible fashion.'" *Id.* at 378 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)). The Establishment Clause thus requires a test that reliably produces comprehensible results. The endorsement test does not.

E. Retaining the endorsement test does more to damage the rule of law than advance it.

"[I]f adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished." *Id.* at 379. This case presents an "unusual circumstance when fidelity to" precedent does more to damage the "constitutional ideal" of the rule of law "than to advance it." *Id.* at 378.

Accordingly, restoring the "intrinsically sounder doctrine established in prior cases" will "better serv[e] the values of *stare decisis* than would following" the errant precedent. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995).

V. THIS COURT SHOULD REPLACE THE DEFICIENT *LEMON*/ENDORSEMENT TEST WITH THE HISTORICALLY-GROUNDED COERCION TEST DEFENDED BY FOUR JUSTICES IN *ALLEGHENY* AND IMPLICITLY APPLIED IN *MARSH*.

The Court should therefore restore order to its Establishment Clause jurisprudence. The legal question of the proper test is squarely presented, and the appropriate alternative rule is ready at hand:

> [G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."

Allegheny, 492 U.S. at 659 (Kennedy, J.) (quoting *Lynch*, 465 U.S. at 678) (brackets in the original).

A. The coercion test defended by four Justices in *Allegheny* comports with the original meaning and historical justifications of the Establishment Clause.

This coercion principle was at the heart of the First Congress' deliberations when they were formulating

religious liberty protection in what would eventually become the First Amendment. At its ratification convention for the Constitution, Virginia proposed:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefor all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience.

Proposed Amendment, *in* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 56 (2d ed. 2006). Two other states proposed almost identical language. *Id.* So the first such language revolved entirely around coercion, as the ratifiers' focus was on freedom of conscience.

In the First Congress, James Madison from Virginia—heavily involved in the aforementioned convention—introduced: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 ANNALS OF CONG. 434 (1789). This language—again primarily focused on protecting against government coercing anyone against their conscience—was referred to committee.

On August 15, 1789, the full House took up the issue. The ensuing debate includes:

> Mr. Carroll—As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . . Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and *enforce the legal observation of it* by law, nor *compel* men to worship God in any manner contrary to their *conscience*. . . [This is because some states feared the] power of Congress to make all laws necessary and proper to carry into execution the Constitution and the laws made under it, enabled them to make laws of such a nature as might *infringe the rights of conscience*, and establish a national religion . . . . [Mr. Huntington] hoped, therefore, the amendment would be made in such a way as to *secure the rights of conscience*, and a free-exercise of the rights of religion, but not to patronise those who professed no religion at all. Mr. Madison . . . believed that the people feared one sect might obtain pre-eminence, or two combine together, and establish a religion to which they would *compel others to conform*.

1 ANNALS OF CONG. 757–59 (1789) (emphases added). The theme throughout the debates is protecting persons from government compulsion, violating their conscience on religious matters.

This is consistent with the vast body of literature known to the First Congress. *See, e.g.*, JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785) ("The Religion then of every man must be left to the conviction and conscience of every

man; and it is the right of every man to exercise it as these may dictate. . ."); *see also* MCCONNELL, *supra*, at 36–43 (collecting sources). The historical understanding is that the Federal Government violates the Establishment Clause by coercing any person to participate in a religious exercise or profess support for a belief that his conscience does not embrace.

B. *Marsh* is easily understood as having applied this coercion test.

This coercion test is implicitly the rule the Court employed in *Marsh*. Courts are to look for evidence of an "impermissible motive" or exploitation to proselytize a single faith or disparage other faiths. *Marsh*, 463 U.S. at 793–95. Where these are absent, the prayer practice is constitutional.

Coercion is foundational to this inquiry. Proselytizing—*i.e.*, calling on your audience to change religions—is almost never coercive. However, it could be when someone with the voice of government publicly calls on citizens to convert to the governmental-speaker's religion at the outset of a policy discussion. It could intimidate nonbelievers into thinking their petitions will be disfavored if they refuse to comply.[11] Likewise, hearing the government condemn your personal faith in such a setting might cross the line, giving rise to the same fears.

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[11] Alternatively, proselytizing one religion can be government so directly benefiting that religion as to effectively establish a state religion.

Thus, when a court asks whether there is evidence of government exploiting the prayer opportunity to proselytize or disparage, that court is essentially asking, "Is government coercing anyone through these prayers?" *Marsh* applied the coercion test.

C. Replacing the endorsement test with the coercion test will harmonize the Establishment Clause with the remainder of the First Amendment.

1. This case is an appropriate vehicle for revisiting both the first *Lemon* test and the current endorsement test. The Court declined to apply *Lemon* in *Marsh*, and the dissenting Justices in *Marsh* correctly noted that legislative prayer would not survive *Lemon*. This is not because legislative prayer violates the Establishment Clause; it is rather because the *Lemon* test is not the test the Establishment Clause requires. Yet now *Lemon* has reared its head in legislative-prayer jurisprudence, and is centrally implicated in this case.

Specifically, the version of *Lemon* at issue in this case is the endorsement test. First the Fourth Circuit, and now the Second Circuit, have made the endorsement test the controlling rule in legislative prayer cases. The propriety of the endorsement test is inextricably implicated in this case. The Court should do more than hold the endorsement test never applies to legislative prayer cases, and instead hold that the endorsement test never applies in *any* Establishment Clause case. The endorsement test and its underlying *Lemon* test should be explicitly abandoned.

2. The endorsement test was a novelty when Justice O'Connor devised it in her *Lynch* concurrence, 465 U.S. at 687–91, and would never have been adopted were it not for the manifest unworkability of the *Lemon* test's initial formulation. The endorsement test was unprecedented when the Court narrowly adopted it in *Allegheny*. That adoption was clearly a mistake, as Justice Kennedy demonstrated in his *Allegheny* dissent. The test immediately produced conflicting results in almost indistinguishable cases. And since *Van Orden* rejected, modified, or muddied the endorsement test sixteen years later, Establishment Clause jurisprudence has become so riddled with inconsistencies and uncertainties as to render it all but incoherent. The current train wreck involving legislative prayer is the latest and perhaps most egregious example. The endorsement test is unworkable, divorced from longstanding principles, and not the kind of settled law that can engender substantial reliance.

Twenty-four years of experience have richly confirmed Justice Kennedy's initial diagnosis, and provided a wealth of reasons to return to the long-established principles that he and the other dissenters defended: "Government may not coerce anyone to support or participate in any religion or its exercise" or "give direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so." *Allegheny*, 492 U.S. at 659 (Kennedy, J.) (citation, internal quotation marks and alterations omitted).

There is perhaps no element of Establishment Clause jurisprudence that has deviated further from

the historical purpose of the Clause than the endorsement test. Replacing the recently-minted endorsement test would correct an unnecessary and unhelpful deviation. Not so long ago, government coercion was central to this Court's understanding of religious establishment. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The "Court's decision to abjure coercion as an element of an establishment clause claim essentially was without explanation." McConnell, *Coercion*, *supra*, at 935.

The Court's adoption of the endorsement test in 1989 formalized this deviation. Restoring coercion as the requisite principle of Establishment Clause violations would bring the law back to the purpose it was meant to serve when our Nation began, a purpose with which this Court was perfectly comfortable through most of its history.

3. The coercion test would also effectuate an underlying principle running throughout the several rights secured by the First Amendment: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Forbidding government coercion of thought and expression is the principle underlying the First Amendment. *See, e.g.*, *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013). That principle is the core and overriding concern of the Religion Clauses—safeguarding religious

liberty—holding that public acknowledgements of religion do not offend the Establishment Clause absent coercion or official establishment. That is why the coercion test is the one the Establishment Clause requires.

This approach—rather than the endorsement test—is consistent with the original meaning and historical purpose of the First Amendment. It harmonizes the Establishment Clause with the other provisions of the First Amendment. It is perfectly capable of principled and consistent application by the courts. And its restoration will prevent reasonable observers from concluding that this Court's jurisprudence "border[s] on latent hostility toward religion." *Allegheny*, 492 U.S. at 657 (Kennedy, J.).

CONCLUSION

The judgment of the Court of Appeals should be reversed, and this Court should replace the *Lemon*/endorsement test with the historically-grounded coercion test supported by four Justices of the Court twenty-four years ago.

Respectfully submitted,

KENNETH A. KLUKOWSKI
Counsel of Record
FAMILY RESEARCH COUNCIL
801 G Street N.W.
Washington, D.C. 20001
Telephone (202) 637-4617
Facsimile (202) 393-2134
kklukowski@frc.org

Attorney for Amici Curiae
Members of Congress

August 2, 2013

APPENDIX

APPENDIX

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Appendix A: List of Members of the House of Representatives joining in the *amici curiae* brief 1a

APPENDIX A

Eighty-five (85) Members of the United States House of Representatives currently serving in the 113th Congress have joined this brief as *amici curiae* in support of Petitioner Town of Greece. This group is bipartisan, and represents a variety of faiths.

These Members of Congress are the Honorable:

1. Rep. Robert B. Aderholt of Alabama
2. Rep. Michele Bachmann of Minnesota
3. Rep. Andy Barr of Kentucky
4. Rep. Kerry L. Bentivolio of Michigan
5. Rep. Gus M. Bilirakis of Florida
6. Rep. Rob Bishop of Utah
7. Rep. Diane Black of Tennessee
8. Rep. Marsha Blackburn of Tennessee
9. Rep. Kevin Brady of Texas
10. Rep. Jim Bridenstine of Oklahoma
11. Rep. Mo Brooks of Alabama
12. Rep. Paul C. Broun of Georgia
13. Rep. Tom Cole of Oklahoma

14. Rep. Chris Collins of New York
15. Rep. Doug Collins of Georgia
16. Rep. K. Michael Conaway of Texas
17. Rep. Kevin Cramer of North Dakota
18. Rep. John A. Culberson of Texas
19. Rep. Ron DeSantis of Florida
20. Rep. Jeff Duncan of South Carolina
21. Rep. Blake Farenthold of Texas
22. Rep. Stephen Fincher of Tennessee
23. Rep. Chuck Fleischmann of Tennessee
24. Rep. John Fleming of Louisiana
25. Rep. Bill Flores of Texas
26. Rep. J. Randy Forbes of Virginia
27. Rep. Jeff Fortenberry of Nebraska
28. Rep. Virginia Foxx of North Carolina
29. Rep. Trent Franks of Arizona
30. Rep. Scott Garrett of New Jersey
31. Rep. Phil Gingrey of Georgia
32. Rep. Louie Gohmert of Texas
33. Rep. Bob Goodlatte of Virginia
34. Rep. Tim Griffin of Arkansas

35. Rep. Gregg Harper of Mississippi
36. Rep. Andy Harris of Maryland
37. Rep. Vicky Hartzler of Missouri
38. Rep. Jeb Hensarling of Texas
39. Rep. Richard Hudson of North Carolina
40. Rep. Tim Huelskamp of Kansas
41. Rep. Randy Hultgren of Illinois
42. Rep. Bill Johnson of Ohio
43. Rep. Sam Johnson of Texas
44. Rep. Walter B. Jones of North Carolina
45. Rep. Jim Jordan of Ohio
46. Rep. Mike Kelly of Pennsylvania
47. Rep. John Kline of Minnesota
48. Rep. Doug LaMalfa of California
49. Rep. Doug Lamborn of Colorado
50. Rep. James Lankford of Oklahoma
51. Rep. Robert E. Latta of Ohio
52. Rep. Bill Long of Missouri
53. Rep. Mike McIntyre of North Carolina
54. Rep. Mark Meadows of North Carolina
55. Rep. Luke Messer of Indiana

56. Rep. Jeff Miller of Florida
57. Rep. Markwayne Mullin of Oklahoma
58. Rep. Randy Neugebauer of Texas
59. Rep. Kristi Noem of South Dakota
60. Rep. Alan Nunnelee at Mississippi
61. Rep. Pete Olson of Texas
62. Rep. Steven Palazzo of Mississippi
63. Rep. Stevan Pearce of New Mexico
64. Rep. Robert Pittenger of North Carolina
65. Rep. Joseph R. Pitts of Pennsylvania
66. Rep. Ted Poe of Texas
67. Rep. Mike Pompeo of Kansas
68. Rep. Bill Posey of Florida
69. Rep. Tom Price of Georgia
70. Rep. Tom Reed of New York
71. Rep. Phil Roe of Tennessee
72. Rep. Todd Rokita of Indiana
73. Rep. Keith Rothfus of Pennsylvania
74. Rep. Matt Salmon of Arizona
75. Rep. Steve Scalise of Louisiana
76. Rep. Austin Scott of Georgia

77. Rep. Adrian Smith of Nebraska
78. Rep. Steve Southerland of Florida
79. Rep. Michael R. Turner of Ohio
80. Rep. Tim Walberg of Michigan
81. Rep. Daniel Webster of Florida
82. Rep. Brad Wenstrup of Ohio
83. Rep. Lynn Westmoreland of Georgia
84. Rep. Joe Wilson of South Carolina
85. Rep. Rob Woodall of Georgia