No. 12-696

IN THE
Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

GALLOWAY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE JEWISH SOCIAL POLICY ACTION NETWORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

The Jewish Social Policy Action Network ("JSPAN") is a membership organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one. In Europe, especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion or worse. Those who emigrated to America in the nineteenth and twentieth centuries found that here one could be both a Jew and an American, a Catholic and an American, even an atheist and an American. JSPAN believes that the gift of church-state separation bestowed on us by the Founding Generation is essential to all our fundamental freedoms and that therefore great care must be taken that there be no erosion of the separation of church and state principles embodied in the Establishment Clause.

JSPAN's interest in this case stems directly from the experience of its members, many of whom have lived at times in small towns or other communities where there were few other Jews. They have been subjected personally to coercive pressures to conform or stifle themselves when local governments have begun their proceedings with prayer, often prayer with a distinctly Christian message, but almost always with a message that is offensive to nonbelievers.

1. A letter of consent from each of the parties has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

JSPAN's members have also witnessed the hostility of local communities when a Jewish family objected to being proselytized by legislative prayer. Most of these cases never get the notoriety of Samantha Dobrich, whose family had to flee their home in predominantly Christian Georgetown, Delaware, based on an outpouring of hatred, after her parents objected to a graduation prayer. Their offense against community norms was in approaching the Indian River School Board and asking it to consider more generic, less exclusionary prayers rather than one in which the local minister proclaimed that Jesus was the only way to the truth. *See* Neela Banerjee, *Families Challenging Religious Influence in Delaware Schools,* New York Times, July 29, 2006.

As if they were entering a religiously-gated community, American Jews have felt hostility when they objected to governmental obeisance of the community's predominant faith. Such experiences have been well documented in sociological literature since the 1950's. *See, e.g.*, Eugene J. Lipman & Albert Vorspan, *A Tale of Ten Cities—The Triple Ghetto in American Religious Life*, 231-52 (1962 ed.). But they are not unique to Jews and are well documented in the stories of those who sought to be free from government coercion in matters of religion. *See, e.g.,* Sydney E. Ahlstrom, *A Religious History of the American People* 926-29, 954 (1972); Wayne R. Swanson, *The Christ Child Goes to Court* 20-21 (1990); and Robert S. Alley, *Without a Prayer: Religious Expression in Public Schools* 84-89, 96, 107-08 (1996); s*ee also* Denyse Clark, *Parrot's Death Latest Threat To Woman In Prayer Case*, The Herald (Rock Hill, S.C.), Aug. 17, 2004 at 1A, available at 2004 WL 89767 (describing the repeated harassment and death threats directed to the plaintiff in *Wynne v.*

Town of Great Falls, 376 F.3d 292 (4th Cir. 2004), after she sued to enjoin her town council from opening its meetings with sectarian prayers).[2]

SUMMARY OF ARGUMENT

Legislative prayer, particularly by local government bodies, coerces members of religious minorities to participate in exercises of the dominant denomination. Allowing a town council to begin its meeting by invoking Jesus Christ's guidance eviscerates the First Amendment's guarantee for the members of religious minorities that come before that council for decisions on their rights. Justice Brennan recognized this evil in his dissent in *Marsh v. Chambers*, 462 U.S. 783 (1983). The Establishment Clause embodies the principles of separation and neutrality toward religion; *Marsh* ignored these and should thus be overturned.

Even if the Court declines to overrule *Marsh*, it should not extend *Marsh*'s holding to apply to prayer before local government bodies. Although America as

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2. *Amicus* has first-hand experience as its Church/State Policy Center includes several attorneys who have represented parties in Establishment Clause cases, including the attorney who drafted the original complaint resulting in this Court's decision in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), and who was personally threatened for his involvement in the case. The Schempp family received threatening letters, some filled with excrement, and others inviting them to "move to a Heathen country." Stephen D. Solomon, *Ellery's Protest* 206-07 (2007). In addition, the children of one of the plaintiffs in that case were beaten on their way home from school, and their house was firebombed. Alley, *Without a Prayer, supra*, at 98.

a whole is religiously diverse, many local communities are homogenous, dominated by a single denomination. Legislative prayers in such communities often turn sectarian and coerce members of religious minorities to participate or at least to remain silent, lest they face virulent (and sometimes violent) backlash.

This Court should draw on the wisdom of our country's founders who recognized that within small communities there exists a great risk that the majority will be able to oppress a minority. *Marsh* should be limited so that local governments do not become a tool for coercing religious minorities.

ARGUMENT

I. *Marsh v. Chambers* was wrongly decided and should be overruled.

The Court erred in *Marsh* when it upheld the Nebraska State Legislature's practice of employing a chaplain who opened every legislative session with prayer. That decision was contrary to Establishment Clause doctrine and its underlying purposes, and it has been undermined by subsequent Supreme Court decisions.

Justice Brennan noted in his *Marsh* dissent, "The principles of 'separation' and 'neutrality' implicit in the Establishment Clause" serve several purposes: guaranteeing "the individual right to conscience,'" preventing the state from "interfering in the essential autonomy of religious life,'" preventing "the trivialization and degradation of religion by too close an attachment" to

government; and assuring that "essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena." 462 U.S. at 803-05. Noted Catholic priest and theologian John Courtney Murray, S.J., agrees: "religion itself . . . has been benefited by our free institutions, by the maintenance, even in exaggerated form, of the distinction between church and state." Murray, *We Hold These Truths* 83 (2005 ed.).

Marsh ignored these important doctrinal principles by carving a narrow portal in the wall of separation for state legislative prayer. Previously, the Court had 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 prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Similarly, the Court had characterized the neutrality implicit in the Establishment Clause as a bulwark against the historical tendency for "powerful sects or groups [to] bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963). *Marsh* disregarded these considerations; legislative prayer was allowed to "intrude[] on the right to conscience by forcing some legislators to participate in a 'prayer opportunity' with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate." *Marsh*, 463 U.S. at 808 (Brennan, J., dissenting).

More recent cases have undermined *Marsh*. *See, e.g.*, *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573 (1989). The Court in *Allegheny County* limited *Marsh*'s reasoning to the congressional authorization of legislative prayer existing at the time it produced the Bill of Rights. *Id.* at 602. Later, the Court distinguished between the "influence and force" of a public school graduation and the opening of a session of a state legislature. *Lee v. Weisman*, 505 U.S. 577, 597 (1992). Prayer during the former was not sanctioned by *Marsh* because "the student was left with no alternative but to submit." *Id.* The *Allegheny County* majority also noted that even legislative prayer's "unique history" cannot "justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" *Id.* at 603 (citations omitted).

But drawing an arbitrary line between "sectarian" and "nonsectarian" prayers is unworkable. Although references to "Christ" are certainly affiliated with one specific faith, courts are left to struggle over whether other references—God the Father, Messiah, or Lord—are sectarian. *Engel*, which struck down a nonsectarian prayer that simply referenced "Almighty God," teaches that efforts to develop even vaguely worded, milquetoast, nondenominational prayers can run afoul of the Establishment Clause. 370 U.S. at 422. And the Court similarly held in *Lee* that the State could not sponsor "generically theistic prayers where it could not sponsor nonsectarian ones" in the public school setting. 505 U.S. at 610. Rather than treating all legislative prayer as *sui*

generis, the Court should overturn *Marsh*, using the same test as with any other alleged Establishment Clause violation.

II. Even if the Court declines to overrule *Marsh*, it should not extend *Marsh*'s holding to include prayer at the local and county level.

A. Although America is religiously diverse, a large number of local communities are dominated by a particular denomination.

Scholars have noted that the United States, as a whole, is arguably the single most religiously diverse society in the world. *See* Diana Eck, *A New Religious America: How A "Christian Country" Has Become The World's Most Religiously Diverse Nation* (2001). But sociological studies of religious adherence in the United States belie any suggestion that America has become more religiously integrated. *See* Barry A. Kosmin & Ariela Keysar, *Religion in a Free Market* 124 (2006). Rather, faith traditions have become localized, and local communities are often dominated by a particular faith tradition or denomination, and at times even becoming a "religious enclave." *See, e.g., Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 690 (1994).

"Since colonial times the adherents of the various religious traditions and groups in America have not been randomly distributed across the country." Kosmin & Keysar, *supra*, at 105. Instead, they have settled in a patchwork pattern that includes more than 89,000 units of local government below the state level according to the

Census Bureau in 2012. U.S. Census Bureau, 2012 Census of Governments: Organization Component Preliminary Estimates, Table 2: Local Governments by Type and State, available at http://www2.census.gov/govs/cog/2012/formatted_prelim_counts_23jul2012_2.pdf (last visited on September 13, 2013). The figures below show that "[t]he geography of religion in the United States consists of a vast panoply of denominations scattered unevenly across the national landscape." Barney Warf & Mort Winsberg, *The Geography of Religious Diversity in the United States*, 60(3) The Prof'l Geographer 413, 414-15 (2008). As Warf and Winsberg note (and Figure 6 illustrates), "[o]ften counties with the highest proportions of adherents are relatively small in population size and have relatively few denominations[.]" *Id.* Further, "a single tradition or denomination still dominates most rural counties." Kosmin & Keysar, *supra*, at 121.[3]

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3. Warf & Winsberg's maps show that many rural counties are dominated by a particular tradition.

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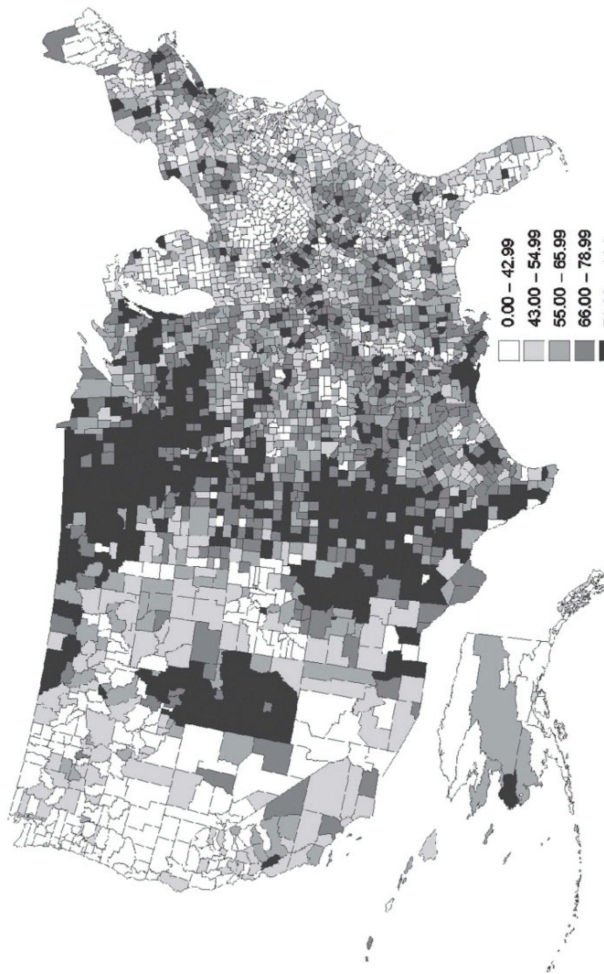

Figure 1 *Religious adherents as percentage of total county population, 2000. Intervals contain equal numbers of counties. (Source: Glenmary and Polis data.)*

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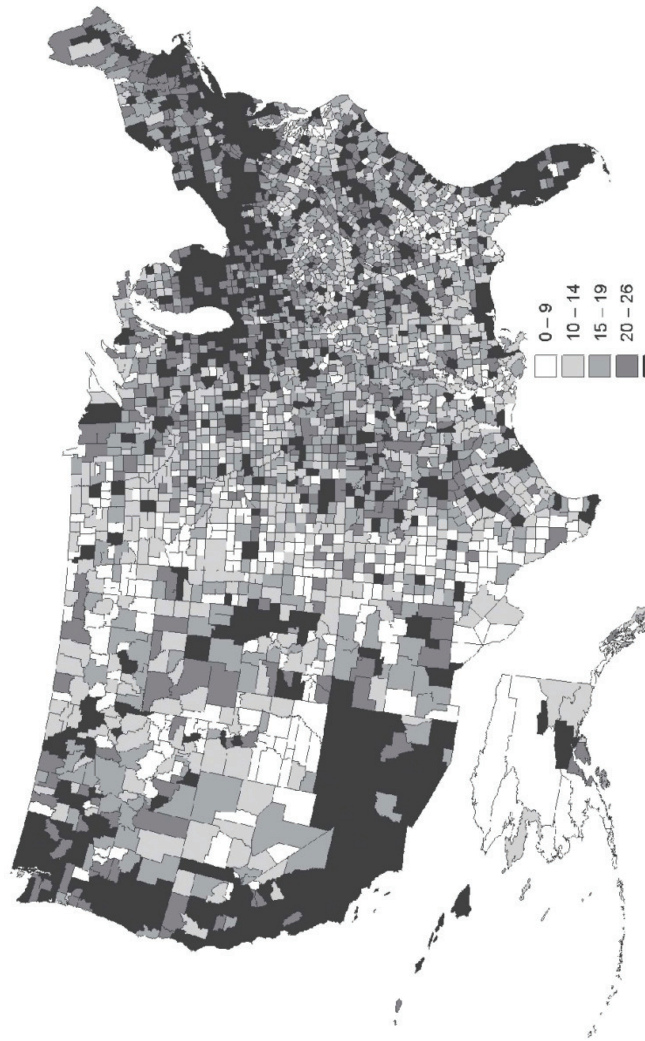

Figure 2 *Number of denominations per county, 2000. Intervals contain equal number of counties. (Source: Glenmary data.)*

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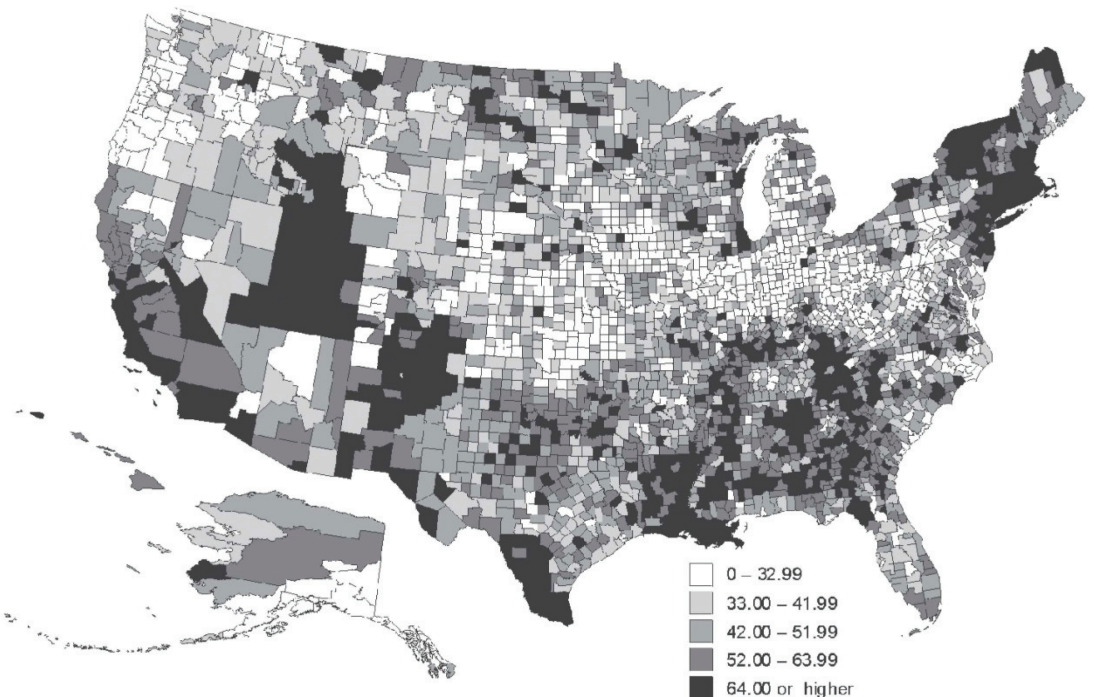

Figure 5 *Share of total adherents in each county's largest denomination, 2000. Intervals contain equal number of counties. (Source: Authors, using Glenmary data.)*

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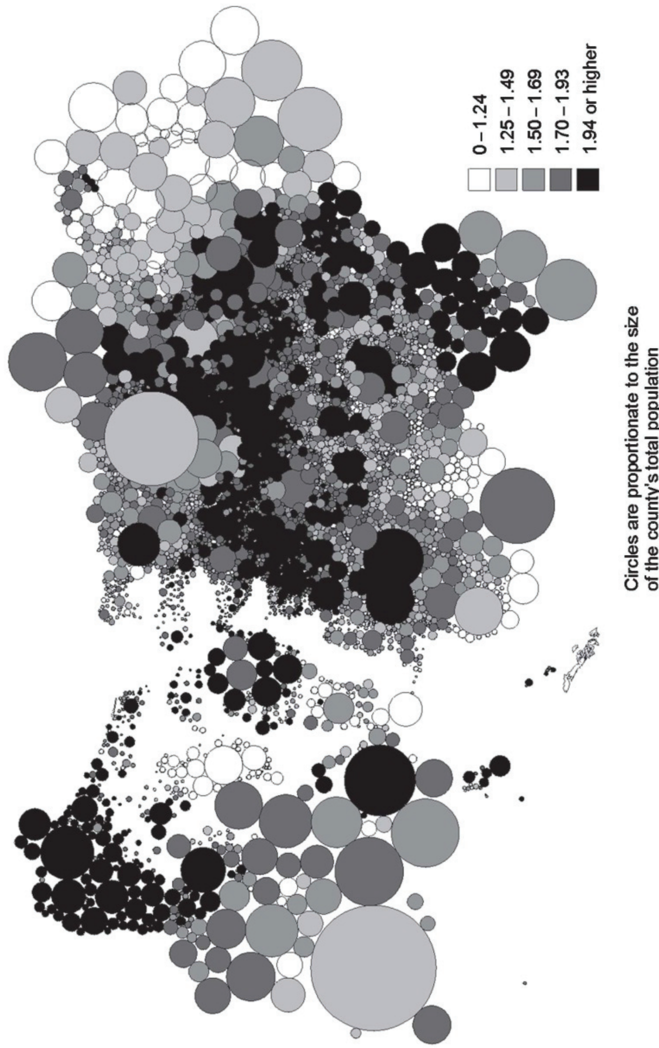

Figure 6 *Shannon index of religious diversity in 2000, Dorling cartogram. Intervals contain equal numbers of counties. (Source: Glenmary and Polis data.)*

And religious demographics are shifting. According to a 2013 survey by the Public Religion Research Institute, over the last few decades, church attendance rates have been falling and the number of religiously unaffiliated Americans—those who identify as atheistic, agnostic, or claim no formal religious affiliation—now represent 20% of the population. *See* Tannenbaum Center for Interreligious Understanding, *What American Workers Really Think About Religion: Tannenbaum's 2013 Survey of American Workers and Religion*, at 3 n.1 (citing PRRI, *Religion, Values, and Immigration Reform Survey* 2013). Christianity has the most adherents, but the proportion of the population that can be classified as Christian has declined in recent years. *See* Kosmin & Keysar, *supra*, at 24. Even within Christianity, denominations diverge widely both in practice and in regional dominance.[4]

4. The following maps were taken from Polis Center at Indiana University-Purdue University Indianapolis, Digital Atlas of America Religion, http://www.religionatlas.org (last visited on September 13, 2013).

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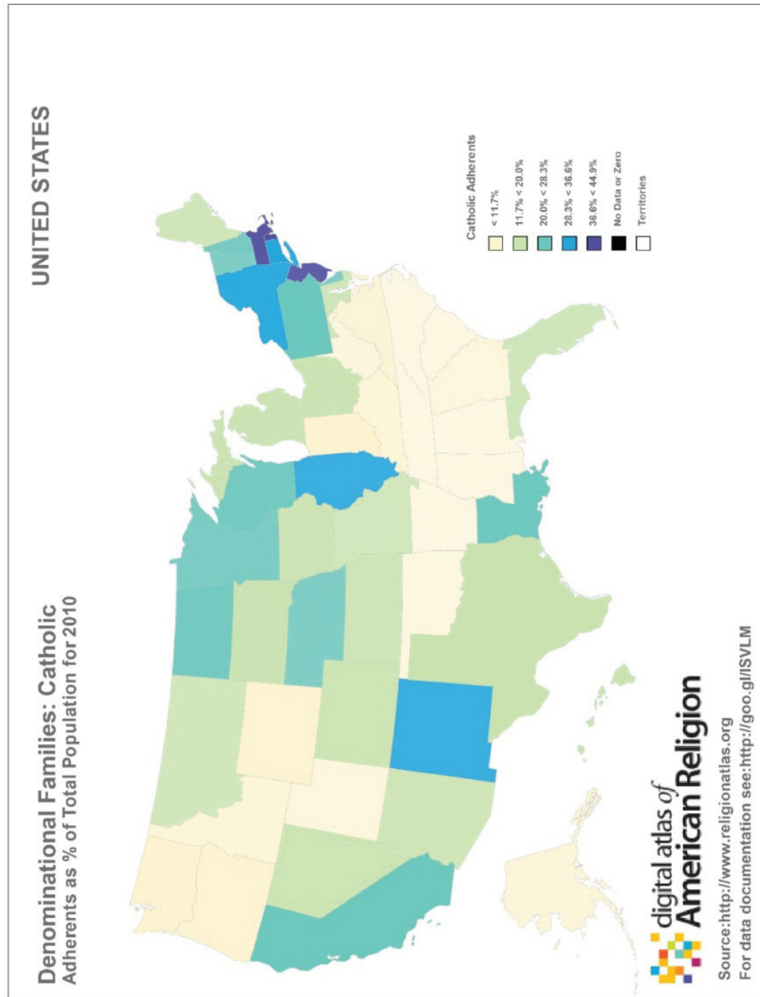

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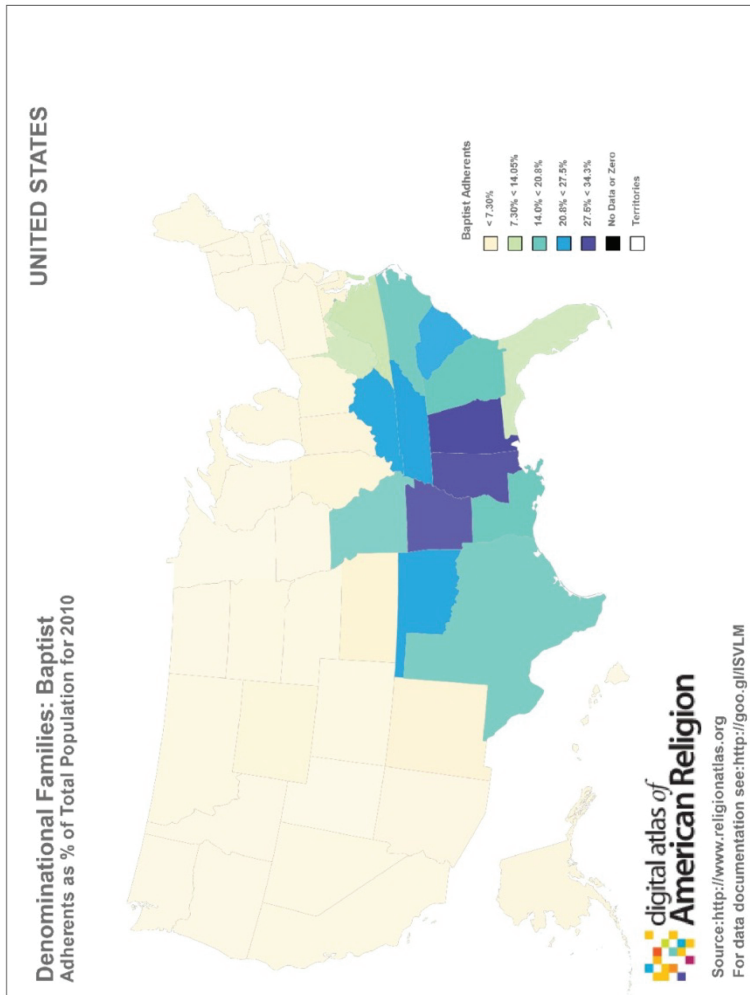

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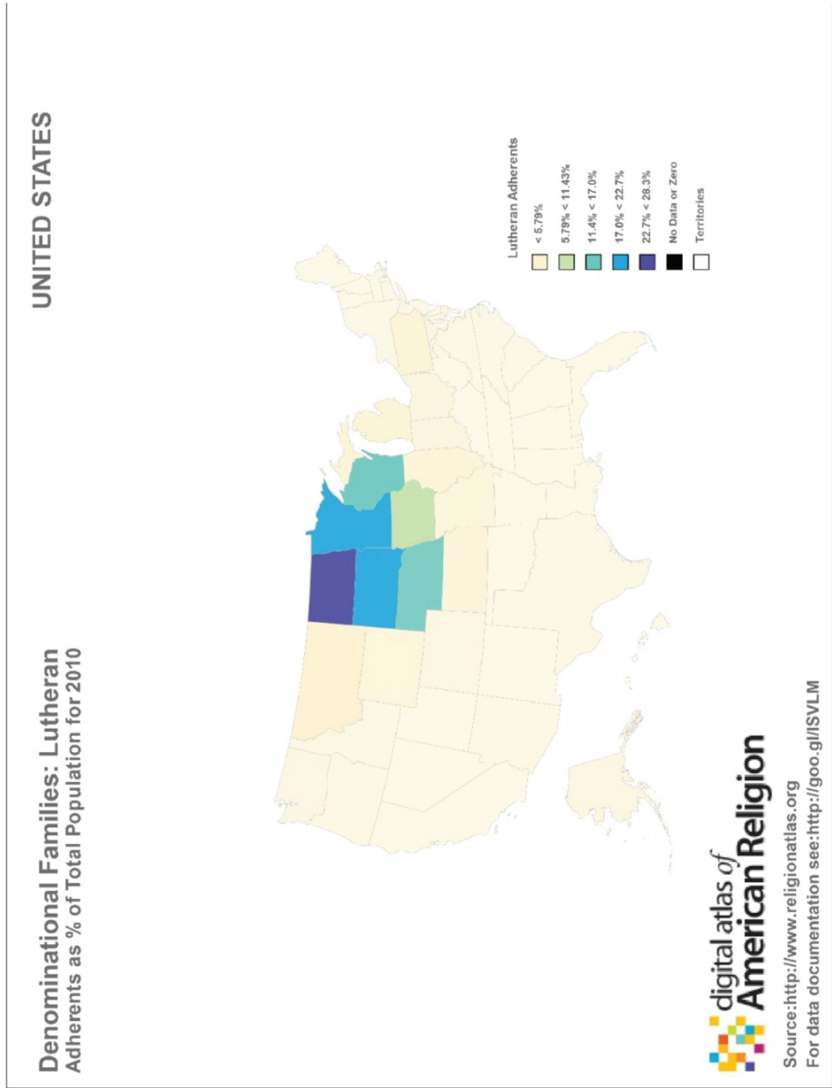

Amicus does not take issue with the right of people to build their homes in the presence of others who share their values and their faith. As Justice Kennedy observed in *Kiryas Joel,* "People who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all American citizens enjoy, so long as they do not use those rights to establish their religious faith." 512 U.S. at 730. American citizens also enjoy the right to migrate and settle in new communities where they might be minorities. *See generally Saenz v. Roe*, 526 U.S. 489 (1999); *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). The cost of exercising that right should not be the sacrifice of their rights of equal respect to the preferences of a dominant local religious denomination.

B. Legislative prayers generally, and those used by the Town of Greece, often turn sectarian, creating an environment of coercion for the members of religious minorities in the local community.

Although the Town of Greece did not adopt a policy that exclusively allowed Christian prayers, the prayer before the Town Council meetings often turned sectarian in practice. As noted by the court below, roughly two thirds of the prayers in the record contained references to "Jesus Christ," "Jesus," "Your Son," and the "Holy Spirit." The sectarian nature of township-sponsored prayer is not unique to Greece. As discussed in a Fourth Circuit case, a Council Member who led the prayer before Town Council meetings would typically end with "In Christ's name we pray." *See Wynne,* 376 F.3d at 294. The Cobb County (Georgia) Commission as well as the Cobb

County Planning Commission opened their meetings with prayers, 70 percent of which ended with references to "our Heavenly Father" and "Jesus' name." *See Pelphrey v. Cobb County,* 547 F.3d 1263, 1267 (11th Cir. 2008).[5] And this Court has indeed recognized that *Marsh*'s holding cannot save "contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief." *County of Allegheny*, 492 U.S. at 603.

Local governmental bodies have enormous power over the rights of their citizens. Often, town councils, school directors, and zoning boards adjudicate rights in ways that involve mostly unreviewable matters of discretion. Within local communities, especially those dominated by a particular denomination, legislative prayer cannot help but have a coercive effect on religious minorities going before such bodies. For example, if a nonbeliever or member of a non-Christian religious minority went in front of the Board of Zoning Appeals for the Town of Greece, she would face seven residents of Greece who have real power over her. As the town's Code notes, the Board "affects the lives and property of many residents." *See* Greece Code §55-2. Confronting the prayer practices of the Board, she would find herself coerced to participate—or at least to refrain from objecting—when the Board of Zoning Appeals begins with a prayer in Jesus Christ's name or the name of a generic deity in which she does not believe.

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5. The 11th Circuit ruled that the prayers of the commissions were governed by *Marsh* since each commission was a legislative body under Georgia law. *Id.* at 1275. But this ignores the administrative and quasi-judicial functions performed by local governmental bodies. State legislatures are solely legislative in function. But town councils and county commissions often perform blended functions, like creating laws, hearing testimony, and adjudicating residents' rights under those laws.

After all, her property is at stake. This coercion is exactly what the Establishment Clause should prevent.

As Charles C. Haynes, senior scholar at the First Amendment Center, noted: "There are communities largely of one faith, and despite all the court rulings and Supreme Court decisions, they continue to promote one faith." *See* Neela Banerjee, *Families Challenging Religious Influence in Delaware Schools,* New York Times, July 29, 2006. When religion is permitted to play a role, even a ceremonial one, it can have devastating effects on the lives of members of religious minorities trying to live and work in a manner that does not cause them to stand out.

C. Allowing such prayers will either unleash local communities to isolate and exclude minorities with sectarian public devotions or place government in the difficult position of policing prayers to make certain that they are nonsectarian.

If the Court does not overrule *Marsh* or limit prayer to the State legislative level, it will be left with a dilemma. Either it will impose no limits on the scope of legislative prayer or it will place federal courts, local officials, and communities in the difficult business of distinguishing between acceptable and unacceptable prayer practices.

As a representative of American Jews, *amicus* is familiar with an extensive history of exclusion. The law has come a long way since the days, within the lifetime of some of our members, when it was not uncommon to see signs proclaiming "Jews and dogs not admitted." Harold Earl Quinley & Charles Young Glock, *Anti-Semitism*

in America viii (1979). As a result of such experiences, Jews have been sensitive to more subtle, but nonetheless real, expressions that they or other minority groups are unwanted as members of clubs, societies or neighborhoods.[6] Sectarian legislative prayer is one important symbolic way in which local communities can convey to outsiders of any minority faith, or to nonbelievers, that they are unwelcome. This Court should not countenance turning the clock back by authorizing xenophobia in the form of unregulated legislative prayer at the local level.

The alternative approach is equally problematic. It assigns to the federal courts the role of prayer police. This Court, which has unsuccessfully grappled for decades with the difficult task of trying to draw lines between acceptable and unacceptable expressions of prayer, was correct when it stated the federal judiciary has no business in "compos[ing] official prayers for any group of the American people to recite as part of a religious program carried on by government[.]" *Lee*, 505 U.S. at 588. Nor should such a task be entrusted to the legislative or executive branch. *See, e.g., Engel,* 370 U.S. at 422.

There is no such thing as a "nonsectarian" prayer to a nonbeliever, and any "sectarian" prayer is bound to

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6. Deed restrictions prohibiting the sale of land to Jews were widespread and still exist, although they are no longer enforceable. Indeed, when Chief Justice Rehnquist purchased his summer home in Vermont in 1974, the deed provided that "none of the conveyed property shall be leased or sold to any member of the Hebrew race." "'No Jews' deed restriction could have been removed," The Lewiston Sun Journal, p. 1, July 31, 1986; Alan S. Oser, *Unenforceable Covenants are in Many Deeds*, New York Times (August 1, 1986).

exclude someone of a different belief who may not wish to pray "in Jesus' name," or "in the name of the Father, the Son and the Holy Ghost," or in the name of a single deity. By the same token, many Americans will find prayers stripped of any specific reference to be meaningless or even theologically pernicious. As Justice Brennan observed in his dissent in *Marsh*, prayer is "serious business." 413 U.S. at 819. Only a bright line rule will take courts out of the business of serving as a board of censors on the content of legislative prayers. A doctrine that limits *Marsh* to the state and national legislatures has at least the virtue of constraining the number of occasions where federal courts will be called on to act as prayer police. But the best bright line rule—as Justice Brennan observed—is to make no exception from the Establishment Clause for legislative prayer.

D. Refusing to extend *Marsh* to townships and county governments will limit the coercive effect of legislative prayer.

1. Greater diversity at the state and national level restrains those who would overstep the current boundaries for legislative prayer.

In his classic essay on the role of factions in democratic society, James Madison wrote:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number

> of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

Federalist Paper No. 10, *The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection* (1787).

Madison's wisdom explains one reason why, at the state level, the existence of religious diversity prevents *Marsh* from being turned into a tool of religious coercion. Adherents to a particular denomination or faith tradition do not form a majority in any state except Utah.[7]

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7. *See* the following map, which was taken from the Digital Atlas of American Religion, http://www.religionatlas.org.

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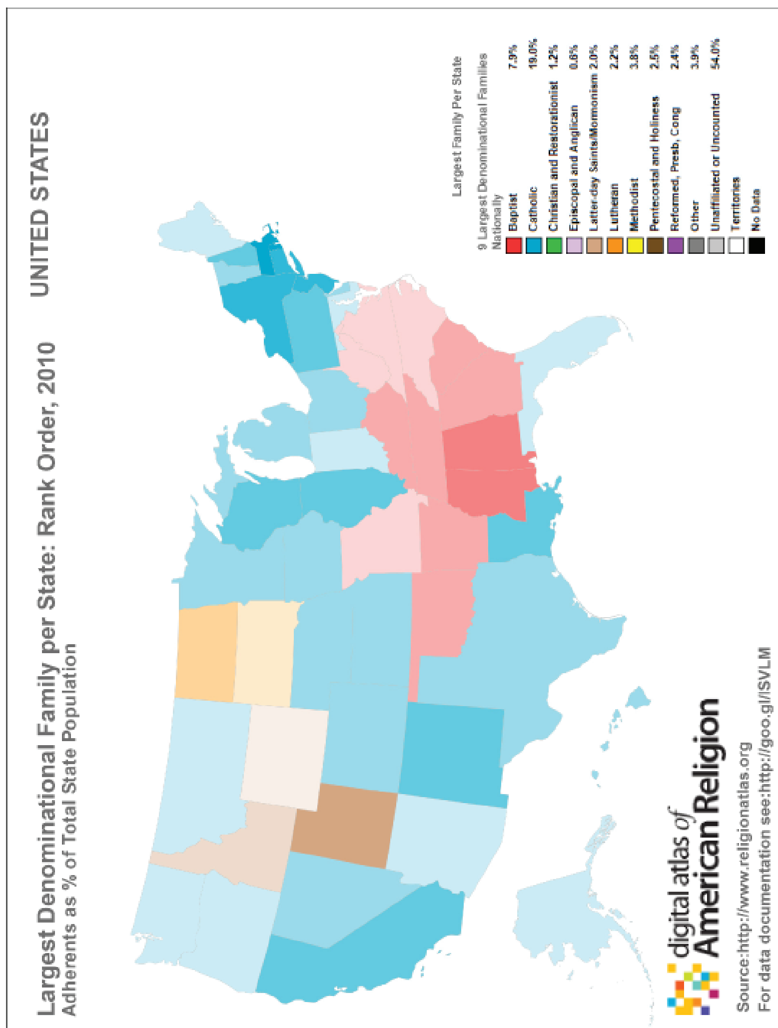

Additionally, significant differences exist in religious profiles among regions. *See* Mark Silk and Andrew Walsh, *One Nation, Divisible* 2 (2008). Silk and Walsh explain that the Middle Atlantic has higher proportions of Catholics, Jews, and Muslims than one would expect based upon its population size. *Id.* at 2-3. Generally, the South is dominated by Baptists and evangelical and mainline Protestants. *Id.* at 5-7. The Pacific states have a high Catholic concentration, but the Pacific Northwest leads the nation in percentage of people that are religiously unaffiliated. *Id.* at 7-9. The Mountain West has many Catholics and a high Mormon concentration. *Id.* at 10-11. Finally, the Midwest is generally balanced, but Jews, Mormons, and members of Eastern religions are underrepresented. *Id.* at 11-12.

At the state and national level, the number of religious faiths constituting a significant portion of the population acts as a natural restraint on the ability of one faith to impose its will on even small religious minorities. In addition, greater public scrutiny at the state and national level makes any religious endorsement more easily detectible. The same cannot be said when a minister or a member of the zoning board invokes Jesus Christ in prayer before a governmental meeting in a predominately evangelical town.

2. Individual citizens who object to legislative prayer are more likely to face subtle forms of retaliation if they do so at the local level because they have personal claims or interests being voted on by those whose prayers they oppose.

Local governmental bodies can impose unique and subtle forms of coercion on religious minorities. Being

asked to bow one's head for a favorable zoning ruling may seem innocuous, but it should not happen under our Establishment Clause. Nor should children who attend a school board meeting have to endure official prayer before the vote on their application to reinstate the prom.

CONCLUSION

Marsh has not cured the communal divisiveness that legislative prayer spawns; nor has it offered any protection for religious minorities or nonbelievers. It should be overturned, not to prevent state legislators from praying, something they remain free to do before or after conducting their official duties, but to avoid the type of harms Justice Brennan articulated in his dissent.

If not overturned, *Marsh* should be limited in application to legislative prayer only at the state or national level where its harmful effects can be limited by the lack of denominational dominance, something not present at the local government level.

Respectfully submitted,

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