

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 1

CAROLE BEATON,

Plaintiff and Appellant,

v.

CITY OF EUREKA, FRANK JAGER,
Mayor, DOES 1-10,

Defendants and Respondents.

Court of Appeal No.

A143621

Humboldt County Case No.:

DR130058

Appeal from a Judgment of the
Superior Court, County of Humboldt
Honorable W. BRUCE WATSON Presiding

APPLICATION OF THE FREEDOM FROM RELIGION FOUNDATION
FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
APPELLANT CAROLE BEATON

and

AMICUS CURIAE BRIEF OF THE FREEDOM FROM RELIGION
FOUNDATION IN SUPPORT OF APPELLANT CAROLE BEATON

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The Freedom From Religion Foundation respectfully requests leave to file the attached *amicus curiae* brief in support of Appellant Carole Beaton in the above-captioned matter. California Rules of Court, Rule 8.200(c)(1) provides that, “[w]ithin 14 days after the last appellant’s reply brief is filed or could have been filed under rule 8.212, whichever is earlier, any person or entity may serve and file an application for permission of the presiding justice to file an *amicus curiae* brief.” The final Appellants’ reply brief was filed on April 8, 2015, meaning that this application and proposed brief are timely if filed on or by April 22, 2015.

This brief has not been authored, in whole or in part, by counsel for either party. No monetary contribution has been made to the preparation or submission of this brief other than the *amicus curiae*, its members or its counsel. The Foundation contends that many of the arguments and citations made in the attached proposed brief will not be presented by the parties in the case before the Court.

INTERESTS OF AMICUS CURIAE

The Freedom From Religion Foundation, a national nonprofit organization based in Madison, Wisconsin, is the largest national association of freethinkers, representing over 22,000 atheists and agnostics, including more than 3,250 in California. The Foundation’s two purposes are to educate the public about nontheism and to defend the constitutional separation between state and church.

The Foundation’s interest in this case arises from its position that all prayers at government meetings violate the Establishment Clause of the First Amendment to the United States Constitution and similar protections in state constitutions. For this reason, the Foundation has worked to end prayers at legislative meetings throughout its history. The Foundation was originally formed in 1976 explicitly to protest prayers at the Madison

(Wisconsin) Common Council. The Foundation sued the Wisconsin State Legislature in 1978 to stop paid legislative prayer. *Gaylor v. Risser*, No. 78-C-146 (W.D. Wis. 1983) (dismissed after *Marsh v. Chambers*, 463 U.S. 783 (1983)). Legislative prayer is a common complaint citizens and members bring to the Foundation's attention. Since 1989, the Foundation has written letters of complaint objecting to government prayer to more than 300 legislative entities, involving nearly every state, including California. Foundation members have frequently been plaintiffs in lawsuits challenging government prayers, including in this case. The Foundation brought a suit over this matter in California, which was settled in the Foundation's favor. *Freedom From Religion Found. v. City of Pismo Beach*, No. CV-130541 (Cal. Super. 2014) (ending the practice of praying at meetings and abolishing a city chaplain position).

Dated: April 22, 2015

Respectfully submitted,

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Case

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ARGUMENT SUMMARY

The City of Eureka’s hosting of prayer at its city council meetings is unconstitutional. The California Constitution contains extensive, robust protections of the separation of church and state. It forbids the use of the government’s “prestige and power” to bolster religion, and prohibits preference and discrimination in favor of religion. When a government body gives its support to a certain prayer-giver, of a certain religious sect, from a certain religious congregation, it lends its “prestige and power” to religion over nonreligion. This is a substantial benefit given to the religious that is not, and could not be, afforded to the nonreligious. It indicates the government’s preference for religion over nonreligion and its discrimination against nonbelievers. There can be no secular justification for continuing to host legislative prayer. Prayer does not accomplish the purpose of solemnizing government occasions: prayers only solemnize for the religious – they exclude everyone else. Eureka’s government-endorsed prayers must therefore cease.

This Court should ignore the U.S. Supreme Court’s poorly-considered cases *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Greece v. Galloway*, 134 S. Ct. 1811 (2014), and instead apply the stricter provisions found in California law, which are not paralleled in federal law.

When dealing with government prayer, the Supreme Court has consistently ignored legal principles and treated history as dispositive. California courts do not need to and should not follow suit. Government practices, like prayer, that co-existed with Congress’s passage of the First Amendment or other amendments are not automatically constitutional – as the Sedition Act of 1798 and segregation illustrate. Even if *Marsh*’s originalist interpretation accurately reflected the framers’ views on government prayer, which it did not, that interpretation can be incorrect – as Eighth Amendment jurisprudence shows. And sometimes, a long history

is simply a longstanding injustice – as the Supreme Court’s treatment discrimination against gay, black, and female citizens demonstrates.

Marsh’s recitation of history is unsound. It missed significant facts and distorted others. *Marsh* relied on congressional chaplaincies but overlooked the divisiveness that office engendered. *Marsh* relied on the First Congress’s approval of chaplaincies to discern the framers’ intent, but ignored framers’ legal opinions against government prayer. *Marsh* relied on colonial prayers that were given years before the Constitution and First Amendment were adopted but minimized the fact that the framers did not pray during the Constitutional Convention when composing our godless Constitution.

Finally, *Marsh* and *Greece* wrongly subjugate fundamental rights to majority rule. Majority will does not trump rights. This country’s rapidly shifting religious demographics should force a revisiting of the “tolerable acknowledgment” argument.

This Court should not allow the federal government’s mistakes to be incorporated into California law, and should strike down the practice of legislative prayer in order to protect the rights of conscience of its citizens.

ARGUMENT

I. THE CALIFORNIA CONSTITUTION’S NO AID AND NO PREFERENCE CLAUSES GIVE BROAD PROTECTION TO THE SEPARATION OF CHURCH AND STATE, AND PROHIBIT THE GOVERNMENT’S SPONSORSHIP OF PRAYER AT ITS MEETINGS.

The California Constitution states that “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion.” Art. I § 4 (“No Preference Clause”). In addition, the government is prohibited from “grant[ing] **anything** to or in aid of any religious sect, church, creed, or sectarian purpose.” Art. XVI § 5 (emphasis added) (“No Aid Clause”). These broad provisions clearly partition church and state beyond the separation required in the federal Establishment Clause. Under these clauses, prayer at government meetings is a benefit the government gives to religion that elevates the religious over the nonreligious, in violation of the California Constitution.

A. The No Aid Clause prohibits the “prestige and power” of the government from being used to advance religion, rendering government sponsorship of prayer unconstitutional.

The No Aid Clause of the California Constitution is “expansive.” *Paulson v. City of San Diego*, 294 F.3d 1124, 1130 (9th Cir. 2002). It “is so broad that state or local governments need not provide a financial benefit or tangible aid in order to violate the provision; they violate it by doing no more than lending their ‘prestige and power’ to a ‘sectarian purpose.’ ” *Id.* (citing *Feminist Women’s Health Ctr., Inc. v. Philibosian*, 157 Cal.App.3d 1076, 203 Cal. Rptr. 918, 920–22, 927 (1984)). “[E]ven a government act that has a secular purpose can violate article XVI, section 5, if it also has a

direct, immediate, and substantial effect of promoting a sectarian purpose.”
Id.

The section is “the definitive statement of the principle of government impartiality in the field of religion,” and “[a]n examination of the debates of the constitutional convention which drafted the Constitution of 1879 indicates that the provision was intended to insure the separation of church and state and to guarantee that the **power, authority**, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes.” *Calif. Educ. Facilities Auth. v. Priest*, 12 Cal. 3d 593, 604, 526 P.2d 513, 520 (1974) (citation omitted) (emphasis added).

These principles have never been applied to prayer at government meetings, and should now be incorporated. Neither the Ninth Circuit’s decision upholding a prayer policy in *Rubin v. City of Lancaster*, 710 F.3d 1087 (2013), nor this Court’s indication that nonsectarian prayer would be permissible in *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194, 124 Cal. Rptr. 2d 867 (2002), mentioned the No Aid Clause. This failure to apply the “expansive” nature of the California Constitution’s protections against the establishment of religion and the cases’ reliance almost entirely on federal law, contrary to “the rule of not deciding federal constitutional questions when state law may be determinative,” means this Court should not take either ruling as an automatic approval of the City of Eureka’s practices here. *Barnes-Wallace v. City of San Diego*, 607 F.3d 1167, 1175 (9th Cir. 2010). Application of the No Aid Clause to prayer at government meetings makes it clear that lending the power and prestige of the government to invocations is unconstitutional.

(1) *Providing for prayer at government meetings (a) gives a benefit to religion that is not available to secular institutions and individuals, and (b) that benefit is direct, immediate, and substantial.*

Tests enumerated by the California Supreme Court and the Ninth Circuit to analyze No Aid Clause claims require that to be constitutional, aid to religion must be equally available to both secular and sectarian institutions, and the aid can provide “no more than an incidental benefit to religion.” *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1079 (9th Cir. 2012) (holding that the leasing of public land to the Boy Scouts was permissible in part because the leases were equally available to secular groups, and the benefits to the religious purposes of the Boy Scouts were incidental); *see also Calif. Statewide Communities Dev. Auth. v. All Persons Interested*, 40 Cal. 4th 788, 801, 152 P.3d 1070, 1077 (2007) (“(1) The bond program must serve the public interest and provide no more than an incidental benefit to religion; (2) the program must be available to both secular and sectarian institutions on an equal basis . . .”); *Priest*, 12 Cal. 3d 593 (1974) (upholding enabling of sectarian institutions to borrow money through the state at a cost below the marketplace’s in part because the statute’s benefit towards sectarian institution was incidental to its larger goal of advancing educational institutions, and the below-market rate was available to sectarian and non-sectarian private colleges.)

(a) Solemnizing public meetings with prayer gives the benefits of the power and prestige of the government to religious citizens and organizations, a benefit not equally available to secular citizens and organizations.

Unlike the leases in *Barnes-Wallace*, the bonds in *Statewide Communities*, and the discounted loan rate for educational institutions in *Priest*, the chance to open a public meeting by appealing to a higher power through prayer is not an opportunity equally available to the religious and

the secular. The non-religious do not pray or say invocations as a matter of course. The opportunity to officiate government prayer is therefore a benefit afforded to the religious that is not, and *could* not be, afforded to the nonreligious. The Eureka City Council proves this is the case because it does not offer the opportunity to the nonreligious as it does to the religious. The City maintains a list of local congregations from which it solicits prayer-givers. This invitation is a benefit not available to the nonreligious, who do not have “religious congregations with an established presence in the community” who could offer up “an eligible member of the clergy/religious leader” to lead prayer. (Resp’t Br. Ex. A).

(b) *Government-sponsored prayers provide a direct, immediate, substantial benefit to religion.*

The prayers clearly have a direct and immediate effect on meeting attendees, who must sit and listen to a prayer directed at them. Prayer at government meetings also lends the “power and prestige” of the government, a substantial benefit, to prayer, an “inherently religious” activity. *Paulson*, 294 F.3d at 114; *Wallace v. Jaffree*, 472 U.S. 38, 72 (1985). When 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).

Eureka’s hosting of prayer evidences its approval of that inherently religious practice: “In light of the fact that the legislative invocation given at the [] City Council meeting took place on government property, was authorized by the long standing policy of the city council, was part of the official agenda of the council meeting, and was for the purpose of calling for spiritual assistance in the work of the legislative body, we are satisfied that it was not ‘private speech.’ . . . [A]n objective observer familiar with

the City's policy and implementation would likely perceive that the invocation carried the City's seal of approval. *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194, 1207, 124 Cal. Rptr. 2d 867, 875-76 (2002).

This endorsement of religion is a benefit to religion. It allows religion to co-opt the power and prestige of the government, elevating it to a special, preferred status. The fact that Eureka only asks members of a religion to give prayers demonstrates this bestowal of prestige upon religion. The invocation policy allows prayer-givers to use a privileged forum at the beginning of a public meeting to exercise their religion with the stamp of approval of the government. Eureka invites the clergy for the express purpose of giving prayers, arranging for them not to speak on a topic of their choice, but to *pray at* citizens, conferring legitimacy on each prayer-giver, their denomination, and their place of worship. Any reasonable observer under these circumstances would view the prayers as conferring Eureka's approval.

The effects of Eureka's sponsorship of prayers are also substantial because of Eureka's proximity to its citizens: "The proximity of prayer to official government business can create an environment in which the government prefers—or appears to prefer—particular sects or creeds" in violation of "the clearest command of the Establishment Clause." *Joyner v. Forsyth County, N.C.*, 653 F.3d 341, 347 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097. As a local body of government, Eureka and its prayers are especially coercive. Participation is often required for citizens desiring local government action, and "participation in local government is a cornerstone of American democracy." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J. concurring). By contrast, there is often little direct citizen participation in a state legislature: "Legislators . . . may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect." *Marsh v. Chambers*, 463 U.S. 783,

796 n.2 (1983) (Brennan, J., concurring). Eureka’s citizens are required to come before the council on important civic matters ranging from public comment to obtaining licenses or variances. Outing oneself as a nonbeliever in a religious community could harm the business for which one is seeking a license. FFRF frequently observes the harsh treatment many people receive from their communities when they make a public showing of their nonbelief.¹ The effect of government prayers on citizens is far greater and more injurious at the local level, and the benefit religion receives from the government’s support is correspondingly more substantial.

B. Hosting prayer at government meetings evidences a preference for religion over nonreligion and discriminates against nonbelievers.

While Eureka correctly points out that “the Establishment Clause of the California Constitution creates no broader protection against the establishment of religion than the Establishment Clause of the United States Constitution,” the California Supreme Court “has never had occasion to definitively construe the no-preference clause of article I, section 4.” *Barnes-Wallace*, 704 F.3d at 1082; *E. Bay Asian Local Dev. Corp. v. State of California*, 24 Cal. 4th 693, 719, 13 P.3d 1122, 1139 (2000). Had the state wished to provide protections identical to the federal constitution, it could have stopped after creating the California Establishment Clause, whose language mirrors the federal Establishment Clause. Instead, it built on those protections and added that “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed.” Cal. Const. Art. I, § 4, cl. 1. This Court should recognize that under this provision, Eureka’s prayer practices unconstitutionally demonstrate the City’s

¹ See, e.g., Stephen Hudak, *Mayor orders police to remove man who wouldn’t stand for Pledge of Allegiance*, ORLANDO SENTINEL, Aug. 29, 2014, available at <http://bit.ly/1yR7oLL> (“Winter Garden Mayor John Rees

preference for religion over nonreligion, and discrimination against the nonreligious, in conflict with the “established principle that the government must pursue a course of complete neutrality toward religion.” *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). “[T]he use of such prayers provides direct and exclusive benefit to one religion ‘in the intangible form of prestige and power’ . . . and discriminates against those who prefer other religions or no religion.” *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 913, 809 P.2d 809 (1991) (Mosk, J., concurring) (citation omitted).

The City’s claims that invocations “bind[] people of varying faiths together in the common purpose of requesting wisdom, solemnity, and blessing,” and presumably therefore do not favor the religious, do not hold up to close scrutiny. (Resp’t Br. 17).

First, “requesting wisdom, solemnity, and blessing” from an implied higher power is not an appropriate action for a secular government, as it evidences *no* secular purpose. Requesting guidance from a god or gods is a purely religious act. The nonreligious do not share in this purportedly “common purpose.”

Solemnizing meetings is one of the government’s justifications for these prayers. (Resp’t Br. Ex. A). While solemnizing a public meeting is a secular activity, prayer is not the only way to solemnize a public meeting. Beating a gavel, pledging allegiance, calling for order, or having a moment of silence are just some of the ways to solemnize a public meeting without involving religion. Eureka’s insistence on using prayer as its method to solemnize its meetings demonstrates a preference for religion over nonreligion.

For nonadherents and nonreligious citizens, government prayer not only fails to solemnize governmental proceedings, it defeats that purpose. Invoking a god or gods in whom many citizens may not believe to bring

“wisdom” and “blessing” alienates those citizens and, to them, confers an air of insult or even sacrilege upon the proceedings, rather than solemnity.

Even nonsectarian prayer practices exclude nonbelievers from the solemnization of meetings. In addition, not all sects agree on public worship. James Madison recalled “a project of a prayer . . . intended to comprehend & conciliate College Students of every Christian denomination,” but recognized that the project “must have failed, notwithstanding its winning aspect from the single cause that many sects reject all set forms of Worship.” Letter to Edward Everett, March 19, 1823.

It is not just the nonreligious who are excluded and offended by these prayers. Many devout Christians take Jesus’ Sermon on the Mount seriously and find public, governmental prayer a form of hypocrisy, not solemnization: “[W]hen you pray, do not be like the hypocrites, for they love to pray standing in the synagogues and on the street corners to be seen by others. . . . when you pray, go into your room, close the door and pray to your Father, who is unseen.” Matthew 6:5-6 (*NIV*). Thus, to those who find public prayer—nonsectarian or otherwise—sacrilegious, and to nonbelievers, even nonsectarian prayer fails to solemnize government meetings.

According to the American Religious Identification Survey, 18% of California citizens are not religious—over 5 million people. Barry A. Kosmin and Ariela Keysar, *American Religious Identification Survey* (2008). Eureka’s insistence on foisting prayers on this significant portion of individuals instead of finding a neutral way to solemnize its meetings places the demands of the majority over neutrality towards religion, discriminating against nonbelievers in favor of believers.

These demographics are changing worldwide, and countries similar to the U.S. are beginning to recognize that prayer is exclusionary to nonbelievers—the Canadian Supreme Court recently unanimously ruled

against legislative prayer, recognizing that it created a “distinction, exclusion and preference based on religion,” which “turned the meetings into a preferential space for people with theistic beliefs,” who “could participate in municipal democracy in an environment favourable to the expression of their beliefs. Although non-believers could also participate, the price for doing so was isolation, exclusion and stigmatization.”

Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, ¶ 120 (Can.).²

II. THE COURT SHOULD NOT RELY ON *MARSH* AND *GREECE* (A) BECAUSE THEY DO NOT APPLY TO THE CALIFORNIA CONSTITUTION’S NO PREFERENCE AND NO AID CLAUSES, AND BECAUSE THEY: (B) WRONGLY TREAT HISTORY AS DISPOSITIVE; (C) RELY ON FLAWED HISTORY; AND (D) ALLOW DEMOGRAPHICS TO TRUMP CONSTITUTIONAL RIGHTS.

A. The California Constitution’s No Preference and No Aid clauses have no parallel in the federal Constitution.

The Supreme Court’s cases on government prayer, *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Greece v. Galloway*, 134 S. Ct. 1811 (2014), analyze the federal Establishment Clause only. The California Constitution’s No Preference Clause and No Aid Clause have no federal parallel. Supreme Court cases are thus inapposite in analyzing cases brought under California’s broader protection of the separation of church

² “[T]he questions of neutrality, coercion, minority religions, and what it means to promote religion [in *Saguenay* and *Greece v. Galloway*] are remarkably similar.” Dahlia Lithwick, *Amen, Canada! The Canadian Supreme Court, unlike the United States’ Supreme Court, understands that sectarian prayer is sectarian*, SLATE, April 17, 2015, available at slate.me/1K5Q1is.

and state, as is *Rubin v. Lancaster*, 710 F.3d 1087 (9th Cir. 2013), which did not address the No Aid Clause.

B. The historical arguments relied on by the government here and in *Marsh* and *Greece* are outliers because courts do not allow history to trump legal principles in any other context.

Marsh and *Greece* are outliers. “[I]f the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.” *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting). “[I]f 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). This is because *Lemon* requires the application of legal principles, something *Marsh* avoided. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Marsh* abandoned legal principles in favor of distorted history, granting government prayer constitutional immunity because it pre-dates the First Amendment.

Unlike every other Establishment Clause decision, *Marsh* and *Greece* abjured the defining principle of Establishment Clause jurisprudence: “the principle that the ‘First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.’” *McCreary Cnty., v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

Courts rarely elevate history over principles in constitutional interpretation. As James Madison put it: “Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered *a blind veneration* for antiquity . . . ?” THE FEDERALIST NO. 14 (James Madison) (emphasis added).

The Supreme Court ignored Madison and upheld legislative prayer based on what it mistakenly described as an “unambiguous and unbroken history of more than 200 years.” 463 U.S. at 792. *Marsh* is “based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause.” Michael McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988). *Marsh*’s “blind veneration” for history rather than legal principles, and *Greece*’s sanctioning of that reasoning, is unique and unjust.

Eureka suggests that this Court should similarly blindly venerate history to the exclusion of legal principles, absurdly citing the story of Protestant and Catholic clergy alternating prayer at the California Constitutional Convention to “illustrat[e] that there was religious harmony” over prayer at the convention. (Resp’t Br. 5-6 (citing *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 931, 933 (1991) (Panelli, J. dissenting)). Relying on history in this case would be perpetuating the blind veneration of a historical practice without regard for legal principles, the notion that the government must be neutral towards religion, and the modern understanding of diversity that includes more than just different sects of Christianity in its definition of “religious harmony.”

(1) Legislation adopted contemporaneously with the First Amendment is not automatically constitutional.

Marsh erred in relying on government prayer that occurred contemporaneously with an amendment’s adoption to hold that the prayers complied with that amendment. The framers passed other legislation contemporaneously with the First Amendment that clearly violated it, such as the Sedition Act. *Marsh* “noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where

freedom of speech, press and religion [were discussed and this Court] saw no conflict with the Establishment Clause . . .” *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (discussing *Marsh*). The Sedition Act of 1798 was passed seven years after the First Amendment was ratified. At least **twenty-four** members of the Congress that proposed the First Amendment were members of the Congress that passed the Sedition Act. Others occupied higher federal posts, including John Adams who was President of the Senate that proposed the First Amendment but signed the Sedition Act into law as President of the United States.

Under the *Marsh* rationale, this history should “lea[d] us to accept the interpretation of the First Amendment draftsmen who saw” the Sedition Act as conforming to the First Amendment. 463 U.S. at 791. Yet, the Sedition Act is now universally condemned, both “in the court of history” and “by Justices of this Court.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). Government prayer’s co-existence with the First Amendment’s passage cannot save it.

In *Brown v. Board of Education*, the Supreme Court heard “reargument . . . largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868” including exhaustive coverage of “then existing practices in racial segregation, and the views of proponents and opponents of the Amendment.” 347 U.S. 483, 489 (1954). But *Brown* did not use the rampant history of segregation at the time of the Fourteenth Amendment’s passage to determine the constitutionality of school segregation; instead it applied a legal principle to contemporary circumstances:

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life

throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Id. at 492-93. Had the Court treated history as dispositive, *Brown* would have been another *Plessy*. Instead, the Court applied legal principles, and segregation was declared unconstitutional.

(2) History may clearly show the framers’ interpretations of amendments, but courts are not bound to treat those interpretations as dispositive.

Marsh treated what it thought was the framers’ interpretation of the First Amendment as dispositive, but the Supreme Court disregarded original interpretations of the Eighth Amendment, which would permit the execution of children over the age of seven because the framers thought it legal. The Court, in an opinion by Justice Kennedy, rejected this interpretation after “considering history.” *Roper v. Simmons*, 543 U.S. 551, 560 (2005). Instead, Justice Kennedy “referr[ed] to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual.” *Id.* at 561 (citations and quotations omitted). Justices Stevens and Ginsburg concurred, noting that “[i]f the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children” but “that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text.” *Id.* at 579 (Stevens, J., concurring).

(3) A longstanding practice can simply be a longstanding violation, not a valid exercise of government power.

Legalized discrimination against gay citizens was, until very recently, deeply rooted in this nation’s history and tradition. *See Bowers v. Hardwick*,

478 U.S. 186, 194 (1986) (upholding criminalization of sodomy), *overruled* by *Lawrence v. Texas*, 539 U.S. 558 (2003). Chief Justice Burger’s entire concurrence in *Bowers* argues that history validates discrimination against gay persons:

[H]omosexual conduct ha[s] been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

Id. at 196-97 (1986) (Burger, C.J., concurring).

Writing for the Court, Justice Kennedy rejected this history in favor of the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Lawrence*, 539 U.S. at 572. The Supreme Court has continued to protect the rights of gay citizens in spite of the long history of legal oppression. *See United States v. Windsor*, 133 S. Ct. 2675 (2013) (excluding same-sex partners from legal definition of spouse “violates basic due process and equal protection principles applicable to the Federal Government”).

Some of the Supreme Court’s most precarious decisions venerated history. *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (emphasis added below) relied on:

- “[*T*he legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither . . . slaves, nor their descendants . . . were then acknowledged as a part of the people” *Id.* at 407.
- “. . . *the following are truths which a knowledge of the history of the world, and particularly of that of our own country,*

compels us to know . . . that the introduction of that race . . . was not as members of civil or political society, but as slaves, as property in the strictest sense of the term.” *Id.* at 475 (Daniel, J., concurring).

- “By the references above given it is shown, from the nature and objects of civil and political associations, ***and upon the direct authority of history***, that citizenship was not conferred by the simple fact of emancipation” *Id.* at 479-80 (Daniel, J., concurring).
- “[*T*he history of the Confederation and Union affords evidence to attest the existence of this ancient law [that a master may reclaim his bondsman].” *Id.* at 496 (Campbell, J., concurring).

When the Court upheld laws limiting work hours for women but not men, it did so partly because, “history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present.” *Muller v. Oregon*, 208 U.S. 412, 421 (1908). *See also Bradwell v. Ill.*, 83 U.S. 130, 141 (1872) (citing the “historical fact[s]” that the right to practice law was never “established as one of the fundamental privileges and immunities of [woman]” and that the “family organization, which is founded in the divine ordinance . . . is repugnant to the idea of a woman adopting a distinct and independent career.”)

Conversely, the most enduring Supreme Court decisions, like *Brown*, reject the “blind veneration” of history. This Court should similarly focus not on history, but on legal principles.

C. The “malleability and elusiveness” of history tainted *Marsh’s* historical analysis: it missed significant historical facts and misconstrued the facts it relied on to reach erroneous conclusions.

Posterity condemns decisions that treat history as dispositive because of history’s “malleability and elusiveness.” *McDonald v. Chicago*, 130 S. Ct. at 3117 (Stevens, J., dissenting). Much history eluded *Marsh*, and the few historical facts in the opinion were distorted to reach subjective and incorrect historical conclusions.

(1) *The “elusiveness” of history: Marsh omits significant historical facts.*

While “the world is not made brand new every morning,” history is not static. *McCreary*, 545 U.S. at 866. New historical evidence undermines constitutional interpretation based on partial history. For instance, *Marsh* erroneously concluded that the framers did not “perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church.” 463 U.S. at 793. But John Quincy Adams wrote that people believed *precisely* that:

Mr. Sparks, the Unitarian[’s], ... election as chaplain to the House of Representatives ... has been followed by unusual symptoms of intolerance. Mr. Hawley, the Episcopal preacher at St. John’s Church, ... preached a sermon of coarse invective upon the House, who, he said, by this act had voted Christ out-of-doors; and he enjoined all the people of his flock not to set their feet within the Capitol to hear Mr. Sparks. ... Patterson, a member from the State of New York, moved that the House should proceed to the choice of another Chaplain....

John Quincy Adams, *5 Memoirs of John Quincy Adams*, 458-9 (Charles Francis Adams ed., Lippincott & Co. 1875).

Even the first chaplain election was divisive:

In our congress, however, they sometimes set religion at nought [*sic*]. When a vote was taken for a chaplain... there were three votes given for Matthew Lyon and one for Tom Paine. ... and where such contempt is expressed for religion, what care would be taken to preserve it?

Theodore Dwight, *President Dwight's Discussions of Questions discussed by the senior class in Yale College in 1813 and 1814*, 114, 229 (Jonathan Leavitt, New York, 1833). The votes for Lyon and Paine, both critics of religion, were a condemnation of congressional chaplains.

(2) *The “malleability” of history: Marsh minimized and distorted history to reach erroneous conclusions.*

Many historical facts eluded *Marsh*, but the Court also minimized and misconstrued the few facts it identified to reach incorrect conclusions. *Marsh* used “what historians properly denounce as ‘law office history,’ written the way brief writers write briefs, by picking and choosing statements and events favorable to the client’s cause.” Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 842 (1985). *Marsh* relied almost exclusively on two misconstrued historical facts, both of which were resurrected in *Greece*: (a) the First United States Congress approving a bill for congressional chaplains and (b) a colonial tradition of prayer, including prayer at the First Continental Congress.

(a) *Marsh* relied on the First Congress approving chaplaincies to discern their views on government prayer, but ignored the framers’ stated legal opinions against government prayer.

The term “framers” is convenient shorthand, but too often disguises the fact that those men rarely all agreed. Just as some framers opposed the

unconstitutional Sedition Act of 1798 but could not stop its enactment, some framers opposed legislative prayers. James Madison, the Father of the Constitution and the Bill of Rights, opposed both, and *Marsh*'s treatment of his legal opinion exemplifies its mistreatment of history.

Madison's *Virginia Resolution* condemned the Sedition Act and his *Detached Memorandum* condemned congressional chaplains and prayers stating, "[t]he establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles." Elizabeth Fleet, Madison's "Detached Memoranda," 3 WM. & MARY QUARTERLY 534 (1946). He was equally critical of "religious proclamations" by the government, calling them "shoots from the same root." *Id.*

Madison's legal opinion opposing chaplains was relegated to a footnote in *Marsh*. 463 U.S. at 791 n.12. The Court does not always discount Madison's legal opinions, quite the opposite: his *Virginia Resolution* was discussed at length in the Court's interpretation of the First Amendment in *New York Times v. Sullivan*, 376 U.S. at 273-76.

Curiously, *Marsh* ignored Madison's opinion on chaplains while citing his vote on and passage of an appropriations bill generally. 463 U.S. at 787 n.8. The bill approved chaplains, but was not about chaplains — it authorized salaries for government officials, including those voting on the bill. Act of Sept. 22, 1789, ch. 17, 1 Stat. 70. Madison specifically condemned the chaplaincy section writing that ". . . it was not with my approbation, that the deviation from it took place in Congress when they appointed Chaplains, to be paid from the National Treasury." Letter to Edward Livingston (July 10, 1822).

Partly from passage of the appropriations bill, *Marsh* concluded that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer." 463 U.S. at 791. The more reasonable conclusion: Congress acted in simple self-interest. The men

voting on the bill had been serving at their own expense. No doubt they paid more attention to the salaries attached to the positions than the legality of the chaplaincy buried in the fourth of seven sections. This comports with the low attendance at the prayers: “[T]he Reverend Ashbel Green, . . . one of the chaplains for eight years from 1792 on, complained of the thin attendance of members of Congress at prayers. He attributed the usual two-thirds absences to the prevalence of freethinking.” A.P. Stokes, *I Church and State in the United States*, 457 (Harper & Brother, 1950).

The First Congress “saw no real threat to the Establishment Clause” because they did not look for one. The First Congress approved chaplains and prayers without vetting them through the First Amendment, which had just been written, but would not be ratified or have any legal effect for another two years.

This interpretation is supported by the discussion on government prayer, in the form of presidential proclamations of thanksgiving that followed the appropriation bill vote. Opponents of government prayer relied on the Constitution and law while proponents relied on “holy writ,” the Bible, and prayers at the Continental Congress.

Thomas Tucker (S.C.) thought:

[T]he House had no business to interfere in a matter [prayer] which did not concern them. Why should the President direct the people to do what, perhaps, they have no mind to do? . . . it is a business with which the Congress have nothing to do; it is a religious matter, and, as such, is proscribed to us.

I *Annals of Cong.* 950, Sept. 25, 1789. Roger Sherman (Conn.) countered Tucker. Sherman “justified the practice of thanksgiving . . . as warranted by a number of precedents in holy writ; for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple . . . This example, he thought, worthy of Christian

imitation . . .” *Id.* The only other speaker in favor, Elias Boudinot (N.J.) relied on pre-Constitutional “precedents from the late Congress,” a mistake *Marsh* repeated as discussed below. *Id.*

Madison and Tucker are the only framers to offer legal opinions on government prayer. Both thought it unconstitutional. *Marsh’s* conclusion that “the First Amendment draftsmen . . . saw no real threat to the Establishment Clause” is wrong. 463 U.S. at 791.

(b) *Marsh’s reliance on pre-Constitutional prayers is illogical and historically inaccurate.*

Like Mr. Boudinot, *Marsh* and *Greece* mistakenly relied on the Continental Congress’s prayers. 463 U.S. at 787-91; 134 S.Ct. at 1832-33. First, it is illogical to base constitutional interpretation on prayers given fifteen years before the Constitution was ratified and seventeen years before the First Amendment was ratified. The colonies had not declared independence; we were still part of Great Britain. The prayers’ legality could not possibly be determined when the document, legal system, and country constraining them had not yet been invented.

Second, the pre-Constitutional prayers were not an outpouring of piety; they were a political expedient. John Adams recorded the prayers as a political calculation. He wrote that during dinner with Samuel Adams and fellow-delegate Joseph Reed, Reed said “we were never guilty of a more Masterly Stroke of Policy, than in moving that Mr. Duché might read prayers.” John Adams’s Diary (Sept. 10, 1774), in 1 *Letters of Delegates to Congress 1774-1789*, at 60 (Paul H. Smith ed., 1976).

Finally, the colonial prayer tradition was not unbroken as *Marsh* claimed. 463 U.S. at 792. After reaping the political benefit of the first prayer, the Continental Congress had no further prayers for eight months, until May 11, 1775. 1 J. of the Continental Cong. (1775) Vol. II, 13. The

sporadic prayers given between March 1, 1781, and June 21, 1789, occurred under the Articles of Confederation. The Articles were seriously defective and replaced by the Constitution after eight years. Whereas the Articles hardly recognized the separation between church and state, the Constitution fully incorporated that separation.

Significantly, there were no prayers at the Constitutional Convention. *Marsh* minimizes this fact, calling it “an oversight.” 463 U.S. at 824 n.6. *Marsh* quotes Ben Franklin’s prayer proposal, mistakenly claiming it was rejected for a lack of funds. *Id.* Funding was part of the debate, but Franklin himself noted that prayer was rejected because, “The Convention, except three or four persons, thought Prayers unnecessary.” 1 *The Records of the Federal Convention of 1787*, at 452 n.15 (Max Farand ed., 1911). The framers purposefully drafted our entirely godless and secular Constitution without divine appeal.

This Court should not uphold religious privilege in a “blind veneration for antiquity” but stand with posterity and eliminate legislative prayer altogether as the Constitution requires.

D. As a result of elevating history over principle, *Marsh* and *Greece* subjugate fundamental rights to majority rule.

In addition to ignoring neutrality — the defining principle of Establishment Clause jurisprudence — and placing selective history above principle, *Marsh* and *Greece* failed by allowing demographics to trump fundamental rights.

Marsh betrays the purpose of the Bill of Rights by finding that legislative prayer is “simply a tolerable acknowledgment of beliefs widely held among the people of this country.” 463 U.S. at 792. Practices are not constitutional simply because their underlying beliefs are widely held. The Supreme Court has repeatedly affirmed that “fundamental rights may not be

submitted to vote; they depend on the outcome of no elections.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304-05 (2000) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)). Indeed, “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *Barnette*, 319 U.S. at 638. Put simply, “we do not count heads before enforcing the First Amendment.” *McCreary*, 545 U.S. at 884 (O’Connor, J., concurring).

The City of Eureka asserts that “legislative prayer brings individuals of varying backgrounds together.” (Resp’t. Br. 25). *Greece* claimed that prayers “provide particular means to universal ends.” 134 S.Ct. at 1823. This is patently false. Prayer may bring *religious* individuals of varying backgrounds together, but it is innately divisive. Religion only solemnizes events for its adherents. For nonadherents, government prayer simply excludes. Prayer cannot be called “universal” when it tells nonbelievers their nonreligious views are wrong. It “sends the ancillary message to . . . nonadherents ‘that they are outsiders, not full members of the political community and accompanying message to adherents that they are insiders, favored members of the political community.’” *Santa Fe*, 530 U.S. at 309-10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

A growing number of people, including the plaintiff, are excluded by prayer, not brought together with their fellow citizens. Although popularity is legally irrelevant, the “beliefs” underlying prayer are rapidly declining. Almost 20% of Americans are now nonreligious, up from 15% in 2007, and 8% in 1990. Pew Research Center, “Nones on the Rise: One-in-Five Adults Have No Religious Affiliation,” *The Pew Forum on Religion & Public Life*, 13 (October 9, 2012); Barry Kosmin, *National Survey of Religious*

Identification (1990). The three-fold increase from 20 to 61.5 million adults since 1990 makes “nones” the fastest growing self-identification and the second largest group after Roman Catholics. *Id.* (percentages applied to U.S. Census population estimates). One-third of Americans under 30 consider themselves nonreligious while less than one-in-ten over 65 consider themselves nonreligious. *Id.* at 10. For the first time, less than half the country (48%) is Protestant. *Id.* at 13. The number of self-identifying U.S. atheist and agnostics is more than triple the number of Mormons, and equal to Jews, Muslims, Hindus, and Buddhists *combined*. *Id.* at 9, 13.

Including prayer at government meetings makes it clear that the government body in question approves of the practice. Citizens are compelled to come before the Eureka City Council on important civic matters, to participate in important decisions affecting their livelihoods, property, children, and quality of life. It is coercive and intimidating for citizens who are nonreligious to come to a public meeting and be required to either make a public showing of their nonbelief or show deference to a religious sentiment they do not believe in, but which their city council members clearly do.

Greece suggests, “[M]embers of the public are [not] dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest . . . Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed.” *Greece*, 134 S.Ct. at 1827.

These suggestions are ridiculous. Proposing that an appropriate remedy for a nonreligious person is to segregate herself from the rest of the community only serves to publicly exclude the nonbeliever and increase her

feeling of alienation. Suggesting that everyone in the community will react kindly to a public display of non-adherence is belied by social science.³ Nonbelief is still widely stigmatized in this country, as FFRF is well aware.⁴ The Canadian *Saguenay* decision is again instructive:

[W]hen Mr. Simoneau went to meetings of the municipal council, he had to choose between remaining in the chamber and conforming to the City's religious practice, excluding himself from the practice by refusing to participate in it, and physically excluding himself from the chamber for the duration of the prayer. If he chose to conform to the council's practice, he would be acting in direct contradiction with his atheistic beliefs. If he chose to exclude himself from the prayer either by refusing to participate in it or by leaving the chamber, he would be forced to reveal that he is a non-believer. . . . Such interference constitutes an infringement of the complainant's freedom of conscience and religion. . . [T]he attempt at accommodation provided for by the City in the By-law, namely giving those who preferred not to attend the recitation of the prayer the time they needed to re-enter the council chamber, far from tempering the discrimination, exacerbated it.

Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, ¶ 121-22 (Can.).

E. *Marsh* and *Greece*'s reasoning is unsound, and this Court should not rely on it.

Marsh and *Greece* repudiate all settled legal doctrine by treating history as dispositive, ignoring constitutional principles, and placing the beliefs of a shrinking majority over the rights of religious minorities. California should not adopt the Supreme Court's flawed reasoning, and

³ Phil Zuckerman, *Atheism, Secularity, and Well-Being: How the Findings of Social Science Counter Negative Stereotypes and Assumptions*, SOCIOLOGY COMPASS, Vol. 3 Issue 6, 949-971 (2009).

⁴ See Hudak; Goodnough; Bauchman, *supra* note 1; see also, e.g., Freedom From Religion Foundation, *Sharing the Crank Mail*, FREETHOUGHT TODAY, March 2015, available at bit.ly/1aTOPUL.

instead should look to legal principles, which make it clear that government sponsorship of prayer is unconstitutional.

CONCLUSION

This Court should correct the federal government’s “blind veneration” of an incomplete and flawed history, and refuse to incorporate it into California law. To adopt the federal government’s reasoning would gut the California Constitution of the broad protections it currently offers all of its citizens, and affirm the favored position of the religious over the nonreligious.

This Court should instead apply the higher standards embodied in those broad state constitutional protections to end a longstanding historical violation. We ask that you “strik[e] down all official legislative invocations.” *Marsh*, 463 U.S. at 818 (Brennan, J., dissenting). By ruling against legislative prayer, this Court can provide for the freedom of conscience of *all* California citizens.

Dated: April 22, 2015

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