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House members file Supreme Court brief in legislative prayer case

Mark Pattison Catholic News Service | Aug. 7, 2013
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Eighty-five members of the House have filed a friend-of-the-court brief at the U.S. Supreme Court on the side of the town of Greece, N.Y., in its bid to continue opening legislative meetings with a prayer.

The brief, prepared by the Family Research Council and filed Aug. 2, said: "Congress has an interest in a single coherent Establishment Clause rule that protects long-standing and traditional public acknowledgments of faith."

In the New York case, the 2nd U.S. Court of Appeals ruled that the town's policy was unconstitutional. Proponents of legislative prayer said the town had a highly inclusive prayer policy and that the appellate court ignored the fact that Greece's prayer policy allowed any volunteer to provide a prayer before meetings, including individuals of no faith.

The Establishment Clause appears in the First Amendment of the Constitution. It states, "Congress shall make no law respecting an establishment of religion." It is followed by the Free Exercise Clause, which says, "or prohibiting the free exercise thereof."

"There is now no clear governing rule or rationale" for determining the constitutionality of legislative prayer, the brief said. Recent court decisions show a three-way split.

Besides the 2nd Circuit's decision in the Greece case, in a 1983 ruling in *Marsh* v. *Chambers*, the Supreme Court said it was constitutional for a chaplain to open Nebraska's legislative sessions with prayer and for that chaplain to be state-supported, overturning the 8th Circuit, which ruled both practices violated the Constitution.

Also, the high court in 2012 refused to review a ruling by the 4th Circuit in *Joyner* v. *Forsyth County* (N.C.); the appeals court ruled that the county's Board of Commissioners "could only open meetings with nonsectarian prayers."

"Congress' long-standing prayer practice would fail under the tests promulgated by the 2nd Circuit in this case and the 4th Circuit in previous cases," the brief said. "There are many other areas where Congress has acted on matters intersecting religion, which are also imperiled by the judiciary's recent jurisprudence."

It said "at minimum" the Supreme Court must "reverse the 2nd Circuit and in so doing correct the 4th Circuit as well."

The brief added, "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 ('In God We Trust'), the National Day of Prayer and the Pledge of Allegiance. 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."

The constitutionality of legislative prayer should be "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," the brief said.

In a 1971 case, *Lemon* vs. *Kurtzman*, the Supreme Court allowed prayer if it passed a three-pronged test: It has a secular purpose, its primary effect "neither advances nor inhibits religion," and it does not excessively entangle government with religion.

But while the brief called the Lemon test "unworkable," it also complained about how the three prongs were "morphed" into an "endorsement test": "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."

Also submitting briefs taking the side of Greece were 34 members of the Senate and 23 state attorneys general.

The case is *Greece, N.Y.* v. *Galloway, Susan, et al.* Americans United for Separation of Church and State is representing Greece residents Susan Galloway and Linda Stephens, who first filed suit in 2008.
