

No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE, NEW YORK,
Petitioner,

v.

SUSAN GALLOWAY, et al.,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit*

**BRIEF OF *AMICI CURIAE* DR. MARK L. BAILEY;
DR. DARRELL L. BOCK; DR. C. STEPHEN EVANS;
DR. WAYNE GRUDEM; DR. H. WAYNE HOUSE;
DR. PETER A. LILLBACK; DR. R. ALBERT MOHLER,
JR.; FR. RAY RYLAND; AND J. MICHAEL THIGPEN
IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI**

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
HIRAM S. SASSER, III
JUSTIN E. BUTTERFIELD
LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941-4444
kshackelford@libertyinstitute.org

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae are theologians and scholars, who are concerned about the argument made by Appellees (Plaintiffs below) at the district court and accepted by the Fourth Circuit in *Joyner v. Forsyth County, NC*, 653 F.3d 341 (4th Cir. 2011); the Seventh Circuit in *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006); and the Tenth Circuit in *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) that only religiously “neutral” prayers should be permitted as a legislative invocation. *Amici Curiae* assert that there can be no such thing as a religiously “neutral” prayer and that attempts to establish a standard for a religiously “neutral” prayer are contrary to the very concept of prayer and require that the judiciary become arbiters of a state orthodoxy—a task for which any governmental entity is ill suited. *Amici Curiae* believe that the Court should grant Appellant’s petition in order to make clear that the Religion Clauses of the First Amendment do not require legislative invocations to be religiously “neutral” prayers.

Dr. Mark L. Bailey is President of Dallas Theological Seminary and Professor of Bible Exposition. Dr. Bailey received his Bachelor of Arts

¹ All parties of record were timely notified 10 days prior to *Amici*’s intent to file this brief as required by Supreme Court Rule 37.2 and consented to the filing of this *amicus* brief or consented to the filing of *amicus* briefs in support of either or neither party. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

from Southwestern College, his Master of Divinity and Master of Theology from Western Conservative Baptist Seminary, his Doctorate of Philosophy in Bible Exposition from Dallas Theological Seminary, and his Doctorate of Divinity from Dallas Baptist University. Dr. Bailey has written numerous articles and books, including *To Follow Him: The Seven Marks of a Disciple* and *Nelson's New Testament Survey: Discovering the Essence, Background & Meaning About Every New Testament Book*.

Dr. Darrell L. Bock is Research Professor of New Testament Studies and Professor of Spiritual Development and Culture at Dallas Theological Seminary. Dr. Bock received his Bachelor of Arts from the University of Texas, a Masters of Theology from Dallas Theological Seminary, and a Doctorate of Philosophy from the University of Aberdeen. Dr. Bock earned international recognition as a Humboldt Scholar at Tübingen University in Germany. Dr. Bock was president of the Evangelical Theological Society and is editor-at-large for *Christianity Today*. Dr. Bock is also a *New York Times* best-selling author in nonfiction, and his articles have appeared in leading journals and periodicals, including the *Los Angeles Times* and the *Dallas Morning News*.

Dr. C. Stephen Evans is University Professor of Philosophy and Humanities at Baylor University. Dr. Evans received his Bachelor of Arts from Wheaton College and his Doctorate of Philosophy from Yale University in philosophy. Dr. Evans' published works have focused on Kierkegaard, the philosophy of religion, and the philosophy of psychology. Dr. Evans has written numerous articles and fourteen books,

including, most recently, *Natural Signs and Knowledge of God*. Dr. Evans has also served as the Curator of the Howard and Edna Hong Kierkegaard Library, as the Dean for Research and Scholarship at Calvin College, and as the president of the Society of Christian Philosophers.

Dr. Wayne Grudem is Research Professor of Theology and Biblical Studies at Phoenix Seminary. Dr. Grudem obtained a Bachelor of Arts from Harvard University, a Masters of Divinity from Westminster Theological Seminary, and his Doctorate of Philosophy from the University of Cambridge. Dr. Grudem served as the president of the Evangelical Theological Society, the president of the Council on Biblical Manhood and Womanhood, a member of the Translation Oversight Committee for the English Standard Version of the Bible, and as general editor of the *ESV Study Bible*. Dr. Grudem has written more than 100 articles for both popular and academic journals and several books, including *Systematic Theology: An Introduction to Biblical Doctrine* and *Bible Doctrine: Essential Teachings of the Christian Faith*.

Dr. H. Wayne House is Distinguished Professor of Biblical and Theological Studies at Faith Evangelical Seminary, an Adjunct Professor of Theology and Apologetics at Veritas Evangelical Seminary, and President of Christian Perspective International. Dr. House obtained a Bachelor of Arts from Hardin-Simmons University, a Masters of Arts from Abilene Christian University, a Masters of Divinity from Western Seminary, a Doctorate of Theology from Concordia Seminary, and Juris Doctorate from Regent University School of Law. Dr. House formerly was

Professor of Constitutional Law at Trinity Law School and also served as the president of the Evangelical Theological Society. Dr. House has written numerous articles and nearly forty books.

Dr. Peter A. Lillback is President of Westminster Theological Seminary and Professor of Historical Theology. Dr. Lillback is also President of The Providence Forum. Dr. Lillback received his Bachelor of Arts from Cedarville College, his Masters of Theology from Dallas Theological Seminary, and his Doctorate of Philosophy from Westminster Theological Seminary. Dr. Lillback has written numerous articles and books, including *Freedom's Holy Light: With a Firm Reliance on Divine Providence*, *The Binding of God: Calvin's Role in the Development of Covenant Theology*, and *George Washington's Sacred Fire*.

Dr. R. Albert Mohler, Jr., is President of The Southern Baptist Theological Seminary, the flagship school of the Southern Baptist Convention and one of the largest seminaries in the world. Dr. Mohler has been recognized by publications such as *Time* and *Christianity Today* as a leader among American evangelicals. Time.com called Dr. Mohler the "reigning intellectual of the evangelical movement in the U.S." Dr. Mohler is widely sought as a columnist and commentator. He has been quoted in the nation's leading newspapers, including *The New York Times*, *The Wall Street Journal*, *USA Today*, *The Washington Post*, *The Atlanta Journal/Constitution*, and *The Dallas Morning News*. He has also appeared on CNN's "Larry King Live," NBS's "Today Show" and "Dateline NBC," ABC's "Good Morning America," PBS's "The NewsHour with Jim Lehrer," MSNBC's "Scarborough

Country,” and Fox’s “The O’Reilly Factor.” Dr. Mohler is also the Joseph Emerson Brown Professor of Christian Theology at Southern Seminary. He has authored several books and is the editor-in-chief of *The Southern Baptist Journal of Theology*.

Father Ray Ryland is an adjunct professor of theology at Franciscan University of Steubenville and serves as chaplain of the Coming Home Network and of Catholics United for the Faith. Fr. Ryland earned his bachelor’s degree from Phillips University in 1942 and has studied at Harvard Divinity School; the Union Theological Seminary in New York, where he received his master’s of divinity; Columbia University; Virginia Theological Seminary; University of the South; the University of San Francisco; and Marquette University, where he received his Ph.D. in religious studies. Fr. Ryland also received a law degree from the University of San Diego, where he was a professor of theology for over twenty years.

J. Michael Thigpen is Executive Director of the Evangelical Theological Society. Mr. Thigpen received his Bachelor of Arts from The University of North Carolina at Chapel Hill, his Masters of Divinity from Columbia International University, and his Masters of Philosophy from Hebrew Union College. Mr. Thigpen is also a Ph.D. candidate at Hebrew Union College. Mr. Thigpen was a pastor at the New Life Community Church in Cincinnati, Ohio.

SUMMARY OF THE ARGUMENT

In *Marsh v. Chambers*, this Court affirmed the constitutionality of legislative invocations and held that courts cannot parse the content of an invocation unless the invocation opportunity has been exploited to proselytize or disparage. Moreover, this Court, in *Lee v. Weisman*, noted that regulating a prayer's content violates the Establishment Clause by imposing a "civic" orthodoxy of neutrality in which judges would determine the terms and phrases that may or may not be used to refer to deities and even which deities may be addressed. This judicially-arbitrated civic orthodoxy would require that the civil courts decide theological matters, adopt standards of which religious beliefs are "neutral," and establish some terms or deities as prohibited and others as favored—a task that courts have found impossible in practice to perform. Furthermore, courts that impose religious "neutrality" categorically exclude certain religions that require the use of those prohibited terms and violate the mandate of the Establishment Clause that all persons be treated equally by the government, regardless of religious creed. The Second Circuit, below, recognized these problems with the imposition of religious "neutrality" but then proceeded to parse the content of the Town of Greece's prayers and to demand that the Town of Greece either impose just such a state orthodoxy of "neutrality" or manufacture the perception of diversity. The only way to prevent the establishment of a civic orthodoxy—and a gross violation of the Establishment Clause—is to avoid judicial evaluation of the content of any invocation, allowing each person to offer an invocation according to the dictates of conscience. To avoid this violation of the Establishment Clause, the

Court should grant certiorari and reinforce the freedom to pray according to the dictates of conscience that is inherent in this Court’s opinion in *Marsh v. Chambers*.

ARGUMENT

I. For a court to determine that a prayer is religiously “neutral,”² it must consider the content of the prayer and compare it with a state-established orthodoxy of neutrality.

This Court has long held that the judiciary is not competent to decide theological matters. *See, e.g., Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 445–46 (1969) (“[I]t [is] wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions.”). In *Marsh v. Chambers*, this Court recognized the danger of judicial intrusion into prayer and declared, “The content of the prayer is not

² To avoid confusion regarding whether the terms “sectarian” and “nonsectarian” refer to prayers that are or are not religiously “neutral” or, instead, to one sect or denomination of a religion and because the term “sectarian” has a negative connotation, this Brief avoids these terms to characterize religious content. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 793 n.14 (1983) (noting that Rev. Palmer characterized his prayers as “nonsectarian” and “Judeo Christian” and describing some of Rev. Palmer’s prayers as “explicitly Christian”); *Colo.o Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 n.5 (10th Cir. 2008) (“We recognize that the term ‘sectarian’ imparts a negative connotation. *See Funk & Wagnalls New International Dictionary of the English Language* 1137 (comp. ed. 1987) (defining ‘sectarian’ as meaning ‘[p]ertaining to a sect; bigoted.’).”).

of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.” *Marsh*, 463 U.S. at 794–95. Thus, while it is permissible for courts to consider whether an opportunity for legislative prayer is disparaging or proselytizing, they are prohibited from considering the theological nature of the prayer. Furthermore, this Court in *Lee v. Weisman* noted that the government’s requiring religiously “neutral” prayers would be tantamount to “compos[ing] official prayers.” *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

The judiciary is not qualified to decide theological questions. An understanding of American legal theory does not qualify a judge to render opinions on the theology and beliefs of adherents to hundreds of different faiths and sects. As Justice Souter wrote, “I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible” than “comparative theology.” *Lee*, 505 U.S. at 616–17 (Souter, J., concurring).

Furthermore, requiring that prayers be religiously “neutral” logically necessitates that a judicially-sanctioned “civic” religion be established. Such an approach would require judges to determine what terms and phrases may or may not be used to refer to God. Judges would become the arbiters of a new orthodoxy of “neutrality,” setting standards by which

deities may be addressed in public prayers. This Court in *Lee v. Weisman* observed, “[Our] precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.” *Lee*, 505 U.S., at 590.

The establishment of a “neutral” orthodoxy, administered by the judiciary, would be a violation of the Establishment Clause far more egregious than the perceived harm sought to be attenuated. “A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.” *Id.* at 592.

The establishment of a “neutral” orthodoxy would also necessitate that the courts establish some religions or some religious terms as more favored than others. For example, in *Hinrichs v. Bosma*, a district court in the Seventh Circuit found that “[p]rayers are sectarian ... when they proclaim or otherwise communicate the beliefs that Jesus of Nazareth was the Christ, the Messiah, the Son of God, or the Savior, or that he was resurrected, or that he will return on Judgment Day or is otherwise divine,” but prayers are not sectarian if “a Muslim imam [offered] a prayer addressed to ‘Allah.’” *Hinrichs v. Bosma*, No. 1:05-cv-0813-DFH-TAB, 2005 U.S. Dist. LEXIS 38330 (S.D. Ind. Dec. 28, 2005) (order denying a motion to stay).

Likewise, in *Pelphrey v. Cobb County*, the Eleventh Circuit noted that even in that one case, the handful of plaintiffs and their counsel could not agree upon which religious terms are neutral and which are not. That court observed:

We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the [plaintiffs] have been opaque in explaining that standard. Even the individual [plaintiffs] cannot agree on which expressions are “sectarian.” Bats, one of the [plaintiffs], testified that a prohibition of “sectarian” references would preclude the use of “father,” “Allah,” and “Zoraster” but would allow “God” and “Jehovah.” Selman, another [plaintiff], testified, “[Y]ou can’t say Jesus, ... Jehovah, ... [or] Wicca. ...” Selman also deemed “lord or father” impermissible.

The [plaintiffs’] counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. In the district court, counsel for the [plaintiffs] deemed “Heavenly Father” and “Lord” nonsectarian, even though his clients testified to the contrary. At the hearing for oral arguments before this Court, the [plaintiffs’] counsel asserted two standards to determine when references are impermissibly “sectarian.” ... Counsel had difficulty applying either standard to various religious expressions. When asked, for example, whether “King of kings” was sectarian, he replied, “King of kings may be a tough one. ... It is arguably a reference to one God. ... I think

it is safe to conclude that it might not be sectarian.”

Pelphrey v. Cobb Cnty., 547 F.3d 1263, 1272 (11th Cir. 2008). The Eleventh Circuit went on to explain that parsing the terms used in every prayer at legislative assemblies of every level would lead to judicial chaos. *Id.* As that court wryly noted, “Whether invocations of ‘Lord of lords’ or ‘the God of Abraham, Isaac, and Mohammed’ are ‘sectarian’ is best left to theologians, not courts of law.” *Id.* at 1267.

II. Every prayer adopts particular religious beliefs and is therefore not religiously “neutral.”

Not only would parsing the content of legislative prayers lead to the establishment of a state orthodoxy, because every prayer adopts or presupposes particular religious beliefs, this orthodoxy would necessarily favor some religions and offend others. As one law review article observes:

Not all religions are monotheistic. For religions involving multiple gods and/or goddesses, a rule requiring that the prayer giver refrain from naming a deity precludes the offering of a prayer in their normal faith tradition. Second, there are Christian denominations whose doctrinal statements require that prayers invoke the name of Jesus Christ. ...

A rule prohibiting the naming of a particular deity, then, categorically excludes certain religions, and in so doing violates the

Establishment Clause. If the Establishment Clause prohibits the government from doing anything, it prohibits categorically barring the adherents of certain faiths from participating in public events on equal terms with followers of other religions. The government cannot make violating any citizen's religious faith a condition precedent to equal treatment.

Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 Georgetown J.L. & Pub. Pol'y 219, 254–55 (2008).

Even a prayer as simple as “God save this honorable court” makes specific religious statements that are in accord with some religious beliefs and in discord with others. This brief prayer, far from being religiously “neutral,” presupposes one, personal deity who hears and responds to prayer, who intervenes in history, and who has the power to “save this honorable court.” These presuppositions are rejected by polytheistic beliefs, which believe in gods instead of God; by deistic beliefs, which reject the idea that God intervenes in history or responds to prayer; and by atheistic beliefs, which reject the existence of a god or gods altogether.

The Seventh Circuit reached the issues inherent in attempting to understand any prayer as “neutral” in *Kerr v. Farrey*:

The district court thought that the [Narcotics Anonymous] program escaped the “religious” label because the twelve steps used phrases like “God, as we understood Him,” and because the

warden indicated that the concept of God could include the non-religious idea of willpower within the individual. We are unable to agree with this interpretation. A straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being. True, that God might be known as Allah to some, or YHWH to others, of the Holy Trinity to still others, but the twelve steps consistently refer to “God, as we understood Him.” Even if we expanded the steps to include polytheistic ideals, or animalistic philosophies, they are still fundamentally based on a religious concept of a Higher Power. ... Because that is true, the program runs afoul of the prohibition against the state’s favoring religion in general over non-religion.

Kerr v. Farrey, 95 F.3d 472, 479–80 (7th Cir. 1996).

Theistic presuppositions also conflict with certain forms of Buddhism. As one religious scholar noted,

[T]wo varieties at least of Buddhism are very different from theism: the Theravada and Madhyamika, one of the mainstream forms of Mahayana Buddhism. It was not for nothing that the Dalai Lama declared ... “We Buddhists are atheists.”

... [Buddhism] has deep spiritual books and philosophies. But it is still atheist: it rejects the notion of a creator God who will help out with our troubles.

Ninian Smart, *Dimensions of the Sacred: An Anatomy of the World's Beliefs* 27 (1996).

The distinction between monotheistic religious beliefs and other religious beliefs undermines the idea that references to “God” in the generic do not “advance” one form of religious belief or “disparage” another. Indeed, with the multitude of religious beliefs in the United States, it is impossible to craft any prayer that comports with the fundamental beliefs of them all. Demanding that legislative invocations be of this fictional “neutral” form is to ban them altogether or to adopt a state orthodoxy of “neutrality.”

Finally, forcing prayer, rich with theological meaning as each prayer is, to comport with a state orthodoxy of “neutrality” discriminates against those whose religious beliefs require them to pray in a manner inconsistent with that “neutrality.” If praying “in Jesus’ name” is prohibited, then those who believe they must pray “in Jesus’ name” are effectively prohibited from being able to participate in a legislative prayer because their religious views conflict with those of the state. As this Court said in *Lee v. Weisman*, “It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights or benefits as the price of resisting conformance to state-sponsored religious practice.” *Lee*, 505 U.S. at 596.

CONCLUSION

Ultimately, attempts to promote “civic religion” or “religious neutrality” must establish the judiciary as the arbiters of the “neutral” orthodoxy. This orthodoxy would necessarily favor some religions over others. The

only way to avoid this establishment of religion and to remain truly neutral is to follow the guidance of *Marsh*: refusing to consider the content of any prayer and permitting each person to pray according to the dictates of conscience. Unfortunately, the Fourth Circuit Court of Appeals in *Joyner v. Forsyth County, NC*, the Seventh Circuit Court of Appeals in *Hinrichs v. Bosma*, and the Tenth Circuit Court of Appeals in *Snyder v. Murray City Corp.* rejected this principle and instead established a civic orthodoxy. The Eleventh Circuit Court of Appeals, however, recognizing the threat to religious liberty described herein, adopted this principle of freedom of conscience in *Pelphrey v. Cobb County*. In its decision below, the Second Circuit Court of Appeals recognized the threat to religious liberty posed by judging the content of prayers but then proceeded to do precisely that, mandating that the Town of Greece either impose a state orthodoxy of “neutrality” or manufacture the perception of diversity. What was not permitted was to simply allow persons wishing to pray to do so according to the dictates of their own consciences without regard to the content of their prayers. To resolve this fundamental conflict in the courts regarding the nature of religious liberty and freedom of conscience, the Court should grant certiorari and reinforce the freedom to pray according to the dictates of conscience that is inherent in this Court’s opinion in *Marsh v. Chambers*.

Respectfully submitted,

KELLY J. SHACKELFORD

Counsel of Record

JEFFREY C. MATEER

HIRAM S. SASSER, III

JUSTIN E. BUTTERFIELD

LIBERTY INSTITUTE

2001 W. Plano Parkway, Suite 1600

Plano, Texas 75075

Telephone: (972) 941-4444

kshackelford@libertyinstitute.org

Counsel for Amici Curiae