No. 12-696

In The
Supreme Court of the United States

TOWN OF GREECE, NEW YORK,

Petitioner,

v.

SUSAN GALLOWAY, ET AL.,

Respondents.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional provisions

INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for amici, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007). The ACLJ regularly litigates in the area of free speech (including the scope of government speech, *e.g.*, *Pleasant Grove*) and religious liberty (including the Establishment Clause and standing to sue thereunder, *e.g.*, *Lamb's Chapel*; *Hein*).

SUMMARY OF ARGUMENT

This amicus brief makes two points: (1) proper application of the government vs. private speech doctrine shows that the challenged prayers are private speech, and (2) the assertion of offended observer standing on which this lawsuit rests is inconsistent with Article III's limits on federal subject matter jurisdiction.

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[1]The parties in this case have consented to the filing of this amicus brief. Blanket letters of consent are on file with the Court. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

1. This Court has emphasized the "crucial difference between government speech . . . and private speech" for purposes of Establishment Clause analysis. *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 302 (2000). Identifying speech as governmental or private can be obvious, but in some cases drawing the distinction can seem daunting. When a particular instance of expression emerges from a mix of both government and private input – e.g., vanity license plates, or student performances at a public school event – proper analysis requires the Court *to analyze separately the component parts* of the activity in question, rather than attempt to attach a blanket label to the entire activity. Such an analysis, applied to this case, shows that the religious content to which the respondents object is the constitutionally protected *private* speech of the guest speakers, not the speech of the town.

2. Offended observer standing – the sole basis for federal court jurisdiction in the present lawsuit – cannot be reconciled with Article III. To be sure, there are situations where exposure to objectionable content can be genuinely coercive – e.g., in compulsory education or in prisons. Absent such coercion, however, merely taking offense at what one hears or sees is insufficient to trigger a constitutional injury that could give rise to standing. Hence, the present suit fails for want of subject matter jurisdiction.

ARGUMENT

The speech to which respondents object is the private, constitutionally protected speech of invited individuals, not the government speech of the petitioner town. Moreover, respondents lacked

standing even to bring this challenge, as they assert no more than "offended observer" standing.

I. THE SPEECH TO WHICH RESPONDENTS OBJECT IS PRIVATE SPEECH, NOT GOVERNMENT SPEECH.

A. The Distinction Between Government Speech and Private Speech is Crucial.

This Court has held that the Establishment Clause applies to the states by virtue of the Fourteenth Amendment. *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947). But the Fourteenth Amendment only restricts *state action*. *See* U.S. Const. amend. XIV ("No State shall . . ."). Thus, while "government speech must comport with the Establishment Clause," *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009), the religious speech of *private parties*, by contrast, is constitutionally protected, *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981). "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Id. (citations omitted; emphasis in original).

A key question in any litigation over religious speech, therefore, is whether the challenged speech is that of the government or of private parties. "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality).[2] Moreover, merely *allowing* private speech does not convert it into government speech: "The proposition that [government bodies] do not endorse everything they fail to censor is not complicated." *Id.*

To be sure, even undisputed *government* action that entails expression with religious content does not necessarily run afoul of the Establishment Clause. Examples include this Court's declaration that "We are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); a municipal display of a Nativity scene, *Lynch v. Donnelly*, 465 U.S. 668 (1984); and a state display of the Ten Commandments, *Van Orden v. Perry*, 545 U.S. 677 (2005). *A fortiori*, where the speech is private, not governmental, an Establishment Clause challenge is that much more likely to fail. *Capitol Square*; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

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[2]Amicus agrees with petitioners that the "endorsement test" represents a failed jurisprudential experiment under the Establishment Clause. That the language quoted from *Mergens* employs vocabulary associated with this failed endorsement approach does not detract from the larger principle, however, that the distinction between governmental and private action is vital to the preservation of liberty and constitutional rights. *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

B. To Draw the Line between Government Speech and Private Speech, the Component Parts Must Be Analyzed Separately.

In their brief in opposition to certiorari, respondents relied upon lower court cases holding that invocations at government meetings are "government speech," Opp. at 30. Application of the government speech doctrine here, however, leads to the conclusion that the challenged prayers are private speech. Thus, wholly apart from the question whether the *public forum doctrine* affirmatively would require equal access to private persons to offer invocations, the *Establishment Clause* analysis must take into account the fact that the challenged prayers are the speech of private parties, not the town.

"There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech," *Pleasant Grove*, 555 U.S. at 470, but, as in *Pleasant Grove*, "this case does not present such a situation," *id.* The prayers or invocations (there was no requirement that the speech be a prayer) were given by private parties. The town did not control, suggest, review, or edit the prayers or invocations in any way. Moreover, anyone may offer the invocation or prayer. All of this is undisputed. Pet. App. 3a-4a.

Even if this case were regarded as involving "mixed speech" of government and private parties, *e.g.*, *West Va. Ass'n of Club Owners v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (where private parties and the government both play roles in an event or activity, the situation entails "mixed" or "hybrid speech"),

respondents' challenge here is to the *privately chosen content*. While some lower courts have described complicated tests for identifying private versus governmental speech, *e.g.*, *Sons of Confederate Veterans v. Commissioner of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002) (referring to four-factor test used in other circuits, but describing those factors as not necessarily "an exhaustive or always-applicable list"), this Court has never embraced that model. Moreover, such "four-factor tests" needlessly complicate matters. There is no necessity to apply a blanket "government" or "private" label to the entirety of the interplay between governmental and private actors. A famous artist's speech does not become government speech just because the artist delivers that address at the commencement exercises of a state school. The remarks of a business owner or environmental activist do not count as government speech just because they are invited participants in a government-sponsored panel discussion. In all such cases, a court should *examine the component parts* separately to determine whether the particular content in question is government speech.

To illustrate this approach, consider a public school talent show. Is a student performer's rendition of the song, "Amazing Grace," private speech or government speech (the latter raising Establishment Clause questions)? Rather than collapsing together the school's involvement and the student's role, a court should examine the components. Thus, the school is the one that chooses to have a talent show; that determines which students are eligible; that sets the date, time, and length of the program; that sets the

parameters for performance genres (songs? skits? dance?). Each of these decisions is state action – and, if communicative, government speech – subject to whatever constitutional limits might apply. But what about the song itself? If the school picks the song, then yes, that content is government speech. If the school provides a limited menu of song options (or identifies a theme), then the delineation of that list (or theme) is state action, but the student's voluntary selection within those parameters is a private choice (as with the vehicle owner who chooses from a state-provided list of commemorative license plate options). If the school leaves the choice entirely to the student (albeit subject to limitations on length, decency, defamatory content, and so forth), then the song selected is the student's speech. In this way, the analysis trains in upon the identity of the actor making the relevant content choice, rather than attempting to make a global judgment about the entire production.

C. Respondents Object to Private Speech.

In the present case, such component-based analysis confirms that the challenged speech is private, not government, speech.

The town is the entity that decided to have invocations, to allow guest speakers to offer those invocations, and to open the process to anyone interested, while inviting all area clergy to fill the remaining slots. Neither the respondents nor the Second Circuit apparently find fault thus far. Indeed, they must concede that under *Marsh v. Chambers*, 463 U.S. 783 (1983), the town could have *hired* a *single* clergyman to handle *all* the invocations. Having rotating, unpaid, private guest "invokers" is plainly

less problematic under the Establishment Clause.

What the Second Circuit disapproved, rather, was the *content* of the prayers, and in particular the frequency of Christian references. This, however, was entirely the doing of the guest prayer-givers, with no input from the town. That the local demographics frequently yield guest speakers who are Christian is no more unconstitutional than that the same demographics frequently yield elected officials and municipal staff who are Christian. The decisive, undisputed point is that the composition of the particular invocations was completely the work of the private speakers. *Compare Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005) (finding government speech where the "message . . . is from beginning to end the message established by the . . . Government"). The content of the invocations was private speech, not government speech, and the Establishment Clause analysis must proceed on that basis.

II. RESPONDENTS' ASSERTION OF "OFFENDED OBSERVER" STANDING DOES NOT SUFFICE TO SATISFY ARTICLE III.

Respondents' standing in this case rests upon personal objection and hurt feelings. In other words, this is a case of "offended observer" standing. Never has this Court approved anything like such a wide-open concept of access to federal adjudication. Indeed, to the extent this Court has addressed the issue at all, it has firmly repudiated such limitless theories of Article III standing. Therefore, since "the record discloses that the lower court was without jurisdiction this court will notice the defect, although

the parties make no contention concerning it." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (internal quotation marks and citation omitted). Indeed, this "obligation to notice defects in . . . subject matter jurisdiction assumes a special importance when a constitutional question is presented," *id.* at 541-42, as in this case. This Court should therefore reverse the decision of the Second Circuit and remand for dismissal of this lawsuit for lack of standing.

A. Article III Requires an Injury in Fact.

It is now well settled that to bring a claim in federal court, a plaintiff must satisfy the "irreducible constitutional minimum" of standing, namely, by demonstrating the following three elements:

> (1) an "injury in fact" that is "concrete" and "actual or imminent";
> (2) a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant"; and,
> (3) "redressability – a substantial likelihood that the requested relief will remedy the alleged injury in fact."

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (internal quotation marks, editing marks, and citations omitted); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998).

The respondents do not claim that they are local taxpayers and do not invoke municipal taxpayer standing. *Compare Crampton v. Zabriskie*, 101 U.S.

601, 609 (1880); *see also ASARCO v. Kadish*, 490 U.S. 605, 613 (1989) (referencing *Crampton*). Instead, they assert only that each respondent "objects to, is offended by, and feels unwelcome at Board meetings because of" the town's alleged "alignment with Christianity through the Board's persistent presentation of Christian prayers." Cplt. ¶¶ 7, 8.[3] No other injury is asserted.

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[3]The relevant passages from the Complaint provide:

> 7. Plaintiff Susan Galloway is a citizen of New York and has resided in Greece since 2000, and in the greater-Rochester area for 30 years. . . . Ms. Galloway has attended numerous Town Board meetings in the past (beginning in 2005 when a friend ran for a position on the Board) – including meetings on January 16, 2007, September 18, 2007, and October 16, 2007, all of which featured a sectarian opening prayer. And Ms. Galloway plans to attend future Town Board meetings. She is Jewish, and objects to, is offended by, and feels unwelcome at Board meetings because of, the Town Board's alignment with Christianity through the Board's persistent presentation of Christian prayers.
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> 8. Plaintiff Linda Stephens is a citizen of New York and has resided in the Town of Greece since 1970. . . . She has attended numerous Town Board meetings in the past (beginning in 2001 when she was concerned about a "Frisbee golf" course that had been erected in a local park) – including the September 18, 2007, November 20, 2007, and January 15, 2008, Town Board meetings, all of which were opened with sectarian prayers. And she plans to attend future Town Board meetings. She is an atheist, and objects to, is offended by, and feels unwelcome at Board meetings because of, the Town Board's alignment with Christianity through the Board's persistent presentation of Christian prayers.
>
> Cplt. ¶¶ 7, 8.

B. Personal Objection or Feeling Offense, without More, Is Not an Injury in Fact.

A claim of personal offense or dismay, without more, fails the first requirement of standing, namely, a showing of injury in fact. As this Court has stated in no uncertain terms, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107. Plaintiffs in such cases

> fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 485-86 (1982) (emphasis omitted).

Recognition of "offended observer" standing would not only run directly contrary to this Court's teaching set forth above, it would also be profoundly inconsistent with Article III law.

For example, allowing "personal offense" to suffice would render irrelevant the entire body of taxpayer standing precedents. In that area of case law the usual rule, set forth in *Frothingham v. Mellon*, 262 U.S. 447 (1923), is that federal and state taxpayers cannot sue to challenge the use of tax money. This Court recognized a narrow exception to that rule in

Flast v. Cohen, 392 U.S. 83 (1968), which allows taxpayers to sue only to challenge specific, legislatively authorized expenditures of funds in alleged violation of the Establishment Clause. *See Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007); *ACSTO v. Winn*, 131 S. Ct. 1436 (2011). However, this Court has carefully and repeatedly insisted upon maintaining firm limits to that exception. For one thing, suits alleging violations of *other* clauses are not permitted. *E.g.*, *United States v. Richardson*, 418 U.S. 166 (1974) (no taxpayer standing to sue under Statement and Account Clause); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (no taxpayer standing to sue under Incompatibility Clause); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) (no taxpayer standing to sue under Commerce Clause). Suits under the Establishment Clause, meanwhile, are carefully bounded. Thus, challenging the exercise of authority outside of the taxing and spending authority is not allowed. *See Valley Forge* (no taxpayer standing to bring Establishment Clause challenge to exercise of federal power under Property Clause, as opposed to Taxing and Spending Clause). Suits challenging the *use* of funds, as opposed to specifically authorized legislative spending, are not allowed. *Hein*. Suits challenging tax *credits* instead of *expenditures* are not allowed. *ACSTO*.

In short, the *Flast* exception has repeatedly been confined to its facts.

Yet "offended observer" standing would largely cast those limits to the wind. As here, plaintiffs would not need to claim taxpayer status. As here, they would not need to allege a specific legislative authorization of an expenditure. Indeed, as here, they would not need to

allege government spending at all. The taxpayers in *Valley Forge* could have had standing after all, just by visiting the location in question and alleging, as in this case, "object[ion]," "offen[se]," and "feel[ing] unwelcome" because of what they regarded as a message of "alignment with Christianity." Cplt. ¶¶ 7, 8. Ditto for the taxpayers in *Hein* and *ACSTO*. In short, the carefully bounded *Flast* exception would be a pointless irrelevancy.

This Court has never adopted offended observer standing as sufficient under Article III. That this Court has adjudicated *on the merits* cases that rested upon that theory of standing in the lower courts is beside the point. "'The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions – even on jurisdictional issues – are not binding in future cases that directly raise the questions.' *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted)." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006).

Although lower courts have commonly recognized offended observer standing as a special rule for Establishment Clause cases, *see City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., dissenting from denial of certiorari), this Court is obviously not bound by those precedents.

C. There Is No Need to Create a Special Establishment Clause Exception to the Rule against "Hurt Feelings" Standing.

Nor should there be special privileges for Establishment Clause plaintiffs: "there is absolutely

no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992). As *Valley Forge* held, litigants' "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487 (footnote omitted). *Accord Lujan*, 504 U.S. at 573-74 ("generally available grievance about government" is insufficient for standing); *Valley Forge*, 454 U.S. at 483 ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning").

Respondents may protest that absent standing here, no one could sue even for egregiously unconstitutional government acts. But this argument proves far too much. The hypothetical downside of a lack of offended observer standing is by no means unique to Establishment Clause claims. Flagrant violation of the Nobility Clause, U.S. Const. art. I, § 9, cl. 8, for example – say, by the President or Congress conferring knighthood on Bruce Springsteen – would not give standing to offended observers either. Importantly, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger*, 418 U.S. at 227. *Accord Valley Forge*, 454 U.S. at 489 (quoting same language in denying standing to bring Establishment Clause claim). "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England

town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418 U.S. at 179.

Moreover, worst case scenarios have a way of generating political consequences. As this Court observed in *Richardson*, "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. *Id.* And if worst case hypotheticals sufficed to overturn limits on standing, then *Valley Forge*, *Hein*, and *ACSTO* should have come out the other way, as little imagination is needed to conjure up unconstitutional government land transfers, workshops on religion, or expressly religiously preferential tax credits.

D. This Is Not a Case of Coerced Exposure to Objectionable Matter.

A different rule may well apply under Article III where the offended observer is coerced, in the legal sense, to view or hear the objectionable matter. Thus a program of mandatory "reeducation" – brainwashing – could give rise to an injury in fact, not so much because of the objection to the exposure as because of the *coercion* involved.

Here, however, the government requires no exposure to speech at all – attendance at town board meetings is purely voluntary. Nor does the government engage in indirect coercion, for example by requiring citizens to hear the invocations as a condition upon access to generally available public benefits like use of a park or highway, receipt of municipal services, or admission to local public schools or their programs. Nor is this a

case of mandatory indoctrination of minor children compelled to attend a government-run school. *Compare Lee v. Weisman* 505 U.S. 577, 597 (1992) (contrasting effectively mandatory school event with government session "where adults are free to enter and leave with little comment and for any number of reasons"). Nor does this case involve prisoners or others genuinely unable to avoid exposure to objectionable speech. Such cases raise concerns that go well beyond the all-too-common disagreement, however visceral or sincere, that a citizen feels upon viewing government action that is personally objectionable. "People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Id.* Nor does such disagreement, whether couched as an objection, an offense, or a feeling, rise to the level of an Article III injury.

* * *

"Offended feelings" standing, while a boon for "'cause mongers,'" *Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 373 (7th Cir. 1997), is a bad idea whose time has not come. This Court should reverse the judgment of the Second Circuit and remand for dismissal for lack of standing.

CONCLUSION

This Court should reverse the judgment of the Second Circuit.

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