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

BRIEF OF AMICI CURIAE DR. DANIEL L. AKIN; DR. DARRELL L. BOCK; DR. D.A. CARSON; DR. C. STEPHEN EVANS; DR. WAYNE GRUDEM; DR. JAMES M. HAMILTON; DR. H. WAYNE HOUSE; DR. PETER A. LILLBACK; DR. R. ALBERT MOHLER, JR.; AND J. MICHAEL THIGPEN IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are theologians and scholars, who are concerned about the argument made by Respondents (Plaintiffs below) before the district court and the Second Circuit 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 reverse the Second Circuit's decision below and make clear that the Religion Clauses of the First Amendment do not require legislative invocations to be religiously "neutral" prayers.

Dr. Daniel L. Akin is President of and Professor of Preaching and Theology at Southeastern Baptist Theological Seminary. Dr. Akin received his Bachelor of Arts from The Criswell College, a Master of Divinity

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[1] All parties of record consented to the filing of *amicus* briefs in support of either or neither party and such consents are on file with the Court. *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 Baptist Theological Seminary, and a Doctorate of Philosophy from the University of Texas at Arlington. Dr. Akin also served as Executive Editor of *The Southern Baptist Journal of Theology*.

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SUMMARY OF THE ARGUMENT

In *Marsh v. Chambers*, this Court affirmed the constitutionality of legislative invocations and held that courts shall not 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. While recognizing these problems with the imposition of religious "neutrality," the Second Circuit nevertheless proceeded to parse the content of the Town of Greece's prayers and to demand that the Town of Greece either impose 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 reverse the decision below 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 impermissibly 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 Memorial Presbyterian Church,* 393 U.S. 440, 445–46 (1969) ("[I]t [is] wholly

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[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"); *Colorado Christian University 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.').").

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 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. Therefore, while courts may 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. "[T]he skills required to address such questions … require some expertise in specialized disciplines such as theology, Biblical studies, comparative religion, or the history or philosophy of religion, rather than in constitutional law." Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralistic Society*, 40 Creighton L. Rev. 517, 550 (2007). 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. As Justice Kennedy observed in *Lee v. Weisman,* "[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 County, 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.

Just this year, the Ninth Circuit recognized these problems in its decision in *Rubin v. City of Lancaster:*

> Second, the very act of deciding—as a matter of constitutional law, no less—who counts as a "religious figure" or what amounts to a "sectarian reference" not only embroils judges in precisely those intrareligious controversies that the Constitution requires us to avoid, but also imposes on us a task that we are incompetent to perform. *See Lee*, 505 U.S. at 616–17 (Souter, J., concurring). Rubin and Feller ask us to forbid

mention of Jesus, since he is clearly a religious figure. Ostensibly, the same is true of "Allah," "Muhammad," or "Buddha." But do more generic religious appellations also cross the line? "Heavenly Father" strikes some as comfortably ecumenical*, see, e.g., Simpson*, 404 F.3d at 284, yet several sects reject the "fatherhood of God," *see generally, e.g.*, Elizabeth A. Johnson, *She Who Is: The Mystery of God in Feminist Theological Discourse* (2002), and some reject even the idea of a heavenly deity, *see generally, e.g.*, Paul Harrison, *Elements of Pantheism: Religious Reverence of Nature and the Universe* (2004). Other seemingly "safe" Judeo-Christian monikers, such as "Lord," "Jehovah," "Abraham," and "Moses," are no less problematic. *See Joyner*, 653 F.3d at 364 (Niemeyer, J., dissenting) ("[A]dherents to the Hindu or Muslim religions could assert that they are offended by prayers in the Judeo-Christian tradition, which the majority has deemed to be nonsectarian and nonoffensive."). Even within the Judeo-Christian tradition, some deific titles that seem ecumenical turn out not to be. *See id.* ("[I]n *Simpson,* we labeled as nonsectarian references to 'Lord of [l]ords,' and "King of [k]ings.' … Yet, those phrases refer to Jesus in the New Testament. *See* Revelations, 19:15."). As these few examples show, "[s]imply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology." *Lee*, 505 U.S. at 616–17 (Souter, J., concurring). We "can hardly imagine a subject less amenable to the competence of the federal judiciary, or

> more deliberately to be avoided where possible." *Id*. Thus, we avoid it here.

Rubin v. City of Lancaster, 710 F.3d 1087, 1100–01 (9th Cir. 2013) (brackets and ellipses in the original).

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 that are not universally accepted,[3] 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

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[3] "All prayer involves an element of worship, for it always entails the lower addressing the higher, and this higher assumes, in the mind of the believer a particular form conforming to a particular faith." Phillip Zaleski & Carol Zaleski, *Prayer: A History* 305 (2005).

> 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."[4] 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

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[4] "When we pray to God there are things, each of huge importance, implicit in our action. First there is the acknowledgement that God, albeit all powerful and the creator of the universe, is not an impersonal force or source of energy or colossal agent of nature, but is an actual being, who can be addressed in a meaningful way. Prayer is directed to a personal God, who receives it and listens to it—and who may answer it." Paul Johnson, *The Quest for God: A Personal Pilgrimage* 184 (1996).

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.

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. Likewise, a person who believes that all prayers must include the name "Allah" would be

prohibited from praying under this forced "neutrality."[5] 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" impermissibly 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 in *Pelphrey v. Cobb County* and the Ninth Circuit Court of Appeals in *Rubin v. City of Lancaster*, however, recognizing the threat to religious liberty described herein, adopted this principle of freedom of conscience.

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[5] *See, e.g.,* Shaikh Abdullah ibn Abi Zayd al-Qayrawani, *The Risala: A Treatise on Maliki Fiqh* 1.1a ("The belief that Allah is One is the fundamental basis of Islam, and when Divine Unity is expressed, the name "Allah" must be used. It is not permissible to say, 'There is no god but the Almighty" or use any other names except Allah.").

In its decision below, the Second Circuit Court of Appeals, while recognizing this the threat to religious liberty posed by judging the content of prayers, nevertheless proceeded to mandate that the Town of Greece either impose a state orthodoxy of "neutrality" or manufacture the perception of diversity contrary to *Marsh* and *Lee*. The Second Circuit's decision fails to allow private speakers, including theologians and scholars such as *Amici,* who desire to pray to do so according to the dictates of their own consciences without regard to the content of their prayers. To protect religious liberty and freedom of conscience, the Court should reverse the decision below and reinforce the freedom to pray according to the dictates of conscience that is inherent in this Court's opinions in *Marsh v. Chambers* and *Lee v. Weisman.*

Respectfully submitted,

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