No. 12-696

# In the Supreme Court of the United States

TOWN OF GREECE, NEW YORK,
*Petitioner*,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,
*Respondents*.

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

BRIEF *AMICUS CURIAE* OF THE SOUTHERN BAPTIST CONVENTION ETHICS & RELIGIOUS LIBERTY COMMISSION IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE* [1]

*Amicus* The Ethics & Religious Liberty Commission ("ERLC") is the public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with about 16 million members in over 45,000 local churches.

Southern Baptists care about citizen participation in government, from City Hall to Congress. A section in the SBC statement of faith says: "Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love …." [2]

Southern Baptists care about religious liberty and freedom of conscience. Another section in the statement of faith says: "God alone is Lord of the conscience... Church and state should be separate… A free church in a free state is the Christian ideal…."

Baptists believe that God grants religious freedom as a fundamental human right, and Government should recognize it, as in our First Amendment. The

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[1] No counsel of a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief under Sup. Ct. R. 37.2. (blanket consents filed June 5 and 12, 2013).

[2] *Baptist Faith and Message*, 2000, Articles XV, XVII at Appendix 1a, 2a. *See* http://www.sbc.org/bfm/bfm2000.asp

Constitution's safeguard for religious liberty provides a legal environment that fosters freedom to exercise individual conscience in matters of religious faith.

The Ethics & Religious Liberty Commission exists to help churches understand the moral demands of the gospel, to apply Christian principles to moral and social problems and questions of public policy, and to promote religious liberty in cooperation with the churches and other Southern Baptist entities. ERLC has offices at Leland House on Capitol Hill in Washington, DC, and in Nashville, Tennessee. Dr. Russell D. Moore is President.

Your *amicus* is concerned about the Establishment test applied by the Second Circuit that a town's selection process for legislative invocations must "result in a perspective that is substantially *neutral* amongst creeds." (*emph. added*) Such a vague, subjective, unworkable "neutrality" test makes judges the "prayer police," called to scrutinize the content of legislative prayers. This task threatens the religious liberty of participants in civic councils. It also threatens to sink judges in a quagmire of endless litigation over prayer parsing, a job beyond their judicial competence and constitutional powers. Your *amicus* asks this Court to reverse the Second Circuit and to affirm the summary judgment in favor of the Town entered by the trial court.

## SUMMARY OF THE ARGUMENT

Judges cannot parse the content of invocations given prior to legislative meetings. Content is reviewed only if the speaker exploits the invocation opportunity

for proselytizing or disparagement of another faith. *See Marsh v. Chambers*, 463 U.S. 783, 794–5 (1983). A speaker's invocation may express a religious point of view, but the government's action in allowing an invocation amounts to a "tolerable acknowledgment of beliefs widely held" concerning the solemnizing of a meeting with an appeal to Providence. *Id.*

Where a prayer may be made publicly, regulation of that prayer's content would violate the Establishment Clause by imposing a state-defined orthodoxy of "neutrality," an imposition prohibited by *Lee v. Weisman,* 505 U.S. 577, 590 (1992). Under such orthodoxy, judges determine the terms and phrases that may (or may not) be used to refer to deities and even which deities may (or may not) be addressed. This is a false, hostile "neutrality" that categorically excludes religions that use prohibited terms, violating the right of all persons to be treated equally by the government, regardless of religious belief.

The Second Circuit, below, notes these sensitive issues, but bluntly deems the prayers offered for the Town of Greece as too Christian for the state orthodoxy to allow. *See Galloway v. Town of Greece*, 681 F.3d 20, 31 (2d Cir. 2012). Worse, it calls for government to manufacture a process that results in public "perspective of substantial neutrality" between differing faiths, *id*. at 31, even when no relevant person actually holds such differing beliefs in the community, *id.* at 33 n.9. This converts the tolerable acknowledgement of a speaker's belief (approved by *Marsh*) into a show of the beliefs that are tolerable to the state's orthodoxy (prohibited in *Lee*).

In the legislative meeting context, an invocation is not a government message. It joins a small number of instances where government may allow religious exercises (such as military chaplains), because the context cures any concern about establishment. Even if the prayer were a government message, the Establishment Clause does not require (and the Free Exercise Clause does not permit) judges to evaluate these prayers for "neutrality." Courts must allow a speaker to invoke Providence according the speaker's conscience, using personal beliefs – or lack thereof. This Court should reinforce the freedom to pray according to the dictates of conscience, a freedom inherent in this Court's opinion in *Marsh v. Chambers*.

## ARGUMENT

### 1. An invocation given by an unpaid "chaplain" at the opening of a meeting of a legislative or deliberative body is not an Establishment of Religion, because a non-government speaker is in a limited public forum.

#### A. Prayer by a chaplain is not government speech.

Americans have long recognized that invocations at legislative meetings – even when they open the meeting, and use religious language – are not, without more, the words of the government. In September 1774, John Adams wrote to his wife about a debate before the Continental Congress, a debate that is not very different from the one before this Court:

> When the Congress first met, Mr. Cushing made a motion that it should be opened with prayer. It was opposed by Mr. Jay, of New York, and Mr. Rutledge, of South Carolina, because we were so divided in religious sentiments, some Episcopalians, some Quakers, some Anabaptists, some Presbyterians, and some Congregationalists, that we could not join in the same act of worship. Mr. Samuel Adams arose and said he was no bigot, and could hear a prayer *from a gentleman of piety and virtue*, who was at the same time a friend to his country …. therefore he moved that Mr. Duche, an

> Episcopal clergyman, might be desired to read prayers *to the Congress*, tomorrow morning.[3]

In 1854, the House Judiciary Committee also rejected the idea that chaplains were praying a state message at the opening of legislative sessions. Like Adams, the Committee understood the prayers were made *in* Congress, but were not prayers *of* Congress:

> If there be a God who hears prayer … there never was a deliberative body that so eminently needed the fervent prayers *of righteous men* as the Congress …. If wisdom from above … be given in answer to the prayers *of the pious*, then Congress need those devotions, as they surely need to have their views of personal importance daily chastened ….[4]

Like Samuel Adams in 1774, the 1854 House report recognized that invocations speak to the government, from outside the government. Invocations do not exist to affirm the state or its views of religion; they frequently proclaim other, eternal kingdoms, apart from this temporal government. Early chaplains

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[3] Charles Francis Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams, During the Revolution* 37-8 (1876) (emph. added)(letter of September 16, 1774), quoted in 1 Anson Stokes, *Church and State in the United States 449* (1950).

[4] *Chaplains in Congress and in the Army and Navy*, H.R. Rep. No. 124, 33rd Cong., 1st Sess. (1854) (emph. added), quoted by 2 Robert C. Byrd, *The Senate 1789-1989* 301 (1980).

attacked Congress' lack of respect for the sabbath,[5] and delivered repeated "insults" to the body during services organized by the chaplaincy.[6]

### B. *Marsh* judged the context, not the content of prayers.

Thus, this Court's opinion in *Marsh v. Chambers,* 463 U.S. 783 (1983), joined a long-standing affirmation that an invocation at a deliberative assembly, even by a compensated clergyman,[7] "is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the

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[5] 2 Robert C. Byrd, *The Senate 1789-1989* 301 (1980) (describing Chaplain John Brackenridge's attack on Congress's violation of Sabbath in 1814).

[6] 1 Anson Stokes, *Church and State in the United States 499-505* (1950) (describing various "insults" to the government delivered at Sunday services in the House chambers, then organized by the chaplain.) *Cf. Snyder v. Murray City Corp.*, 159 F.3d 1227, 1229 (10th Cir. 1998) (even a "political harrangue" would not lose prayerful character).

[7] Your amicus notes that Baptists have faithfully questioned the practice of paying legislative chaplains from the public fisc (and continue to do so), but having the office is not an establishment, so long as the chaplain speaks his or her conscience. *See, e.g.,* John Leland, *Writings of the Late Elder John Leland* 118 (L.F. Greene ed., 1845) ("If legislatures choose to have a chaplain, for Heaven's sake, let them pay him by contributions, and not out of the public chest.")

people of this country."[8] The tradition is part of the "fabric" of the Nation.[9]

The ruling in *Marsh* depended on context, not content. "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." [10] In a legislative meeting – be it Congress, a state legislature, or a town council – single speakers do not convey a government message. At the federal level, the Constitution grants wide latitude to decisions by legislators concerning the scope of debates.[11] In lesser deliberative meetings, Americans recognize the deeply ingrained ideal that the cure for disagreement is more speech, not less. So, without judicial requirements, congressional chaplains have long tried to accommodate requests from other religious (and non-religious) voices.[12] And Respondents in this case have "expressly abandoned the argument that [Petitioner] intentionally discriminated against non-Christians in its selection of prayer-givers[,]" because the Town allows any citizen to give an invocation.[13]From the

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[8] *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

[9] *Id*.

[10] *Id.* at 794–5.

[11] *See* U.S. Const. Art. 1, § 6, cl. 1.

[12] 2 Robert C. Byrd, *The Senate 1789-1989* 305 (1980) (congressional chaplain arranges numerous 'guest' chaplains).

[13] *Galloway*, 681 F.3d at 26 and 31.

Founding to the present, it has been neither bigotry nor an establishment of religion in the United States to allow invocations to be given according to the speaker's conscience.

The Second Circuit, below, errs by judging the invocation speech using tests outside the deliberative-body context. This context is starkly different from those involving displays of the Ten Commandments, or even graduation prayers, which some claim erroneously, in our opinion, place the government in a position of adopting a particular message. In legislative debates, no person familiar with our traditions can assume that a single speaker is offering the "official" view. Surely, no other speaker at a council meeting requires a disclaimer about the ownership of his views. The context of legislative prayers, like the context of military chaplains, prevents any reasonable observer from presuming state sponsorship or endorsement of the speaker's message. Thus, the Second Circuit errs in attempting to regulate the content of invocations to avoid the perception of affiliation with the state.

### C. A limited public forum establishes freedom of speech, not affiliation with religious viewpoint.

This Court's doctrine protecting free speech from censorship in a limited public forum provides an additional ground for upholding legislative prayer. These prayers were offered by private citizens—as opposed to paid chaplains in a limited public forum created by government for the lawful purpose of acknowledging the beliefs of the community, and solemnizing the work of the legislature. The Second

Circuit did not address this issue, and instead engaged in a content-based analysis of the legislative prayers without regard to the free-speech rights of the private citizens praying, implicitly assuming that the prayers of private citizens must be attributed to the state. Thus, the Second Circuit created a test that burdens private prayer-givers' free-speech rights. The Second Circuit's approach overlooks the "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." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

This Court has repeatedly recognized that "a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (citing *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46, n.7 (1983)); *see Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (forum limited to student groups). That is the case here: the Town opened a forum for legislative prayers at Town Board meetings in which any private citizen could participate; the prayers offered in that forum were therefore a form of constitutionally protected speech.

When the government allows religious speech in a public forum, it does not endorse any or all messages or establish religion. It establishes freedom. There is no tacit imprimatur of state approval on one or all speakers. *Id*. at 274-275. Although the Second Circuit discounted the effectiveness of disclaimers of endorsement, this Court has often suggested this

method for governments which are concerned about public misunderstanding. Disclaimers are almost always to be preferred over discrimination against speakers due to religious content of their speech. *Id.* at 275, n. 14. As mentioned above, no disclaimer is necessary in this case because no exploitation of the prayer opportunity has occurred by these non-government speakers.

**2. A court cannot require a "perspective that is substantially neutral amongst creeds" without unconstitutionally comparing the content of the prayer with a state-established concept of neutrality.**

Given the history and context of legislative prayers, the Second Circuit goes too far in attempting to regulate the speaker's exercise of speech and religion in legislative meetings. The lower court believes it improper for an individual's speech to "convey their views of religious truth …"[14] and says constitutionality depends on a process that *results* in "a perspective that is substantially neutral amongst creeds."[15] This would convert private speech and religious exercise into government speech, using a civil religion that is offensive to many citizens, including many Baptists.

This Court has long recognized that the judiciary is not competent to decide theological matters for

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[14] *Galloway,* 681 F.3d at 34.

[15] *Id.* at 31.

believers. Justice Miller's writing for the Court in 1871, noted:

> In this country, the full and free right to entertain any religious belief … is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect …. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith … as the ablest men in each are in reference to their own. [16]

Furthermore, this Court noted in *Lee v. Weisman* that the government's requiring religiously "neutral" prayers would be tantamount to "compos[ing] official prayers."[17]

Yet, in the case below, the Second Circuit tasks government officials with the Constitutionally impossible task of balancing competing theologies so as to create a "perspective that is substantially neutral amongst creeds."[18] It cautions that a "single circumstance" [19] by a person who "convey[s] their views of religious truth" can result in an unconstitutional

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[16] *Watson v. Jones*, 80 U. S. 679, 728-9 (1871).

[17] *Lee v. Weisman,* 505 U.S. 577, 588 (1992) (*quoting Engel v. Vitale,* 370 U.S. 421, 425 (1962))

[18] *Galloway,* 681 F.3d at 31.

[19] *Id*. at 34.

practice.[20] Thus, something more than absolutely impartial selection may be required, especially if there is insufficient religious diversity in the community to satisfy the government.[21]

Governments must conclude, as the Second Circuit plainly hopes they will, that legislative prayer is full of "difficulties"[22] requiring active balancing by government in order to avoid judicial scrutiny. If a speaker references a "sectarian" term for God, or states non-neutral attributes, or references a specific divinity *in a single circumstance,* the prayer selection process must be altered to render the required "neutral" perspective. [23] Thus, judges become the arbiters of this new orthodoxy of "neutrality," setting standards by which deities may be addressed in public prayers.

Of course, such impulses have existed for almost as long as prayers have been given. King Darius, the Mede, was also concerned about civic religion in an ancient incident involving the prayers of government employees and a den of lions. *See* Daniel 6:1, *et seq*. There, too, public prayers were allowed, if directed to the government's watered-down deity. *Id.* It is a questionable improvement that the Second Circuit

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[20] *Id*.

[21] *Id*.at 33 n.9.

[22] *Id*. at 34.

[23] *Id.*

would punish prayers to the wrong gods by casting officials into a mere den of lawyers. *Cf.* Daniel 6:12. [24]

However, there is no reason to suppose modern American judges are any improvement over ancient kings in identifying, measuring and balancing religious creeds. Can the town council determine that it has neutralized a Catholic prayer with a Baptist prayer? Apparently not, as the Second Circuit makes no such analysis below. Can an imam neutralize a Christian prayer, even though Islam reveres Christ as a prophet? Or does true neutralization require an atheist or pagan invocation? Is the Seventh Day Adventist's position on Christ the relevant factor for offset, or is it the belief, shared with Judaism, that God's Sabbath is on Saturday? Do the offsets require equal ratios? The lower court says absolute impartiality in selection may not be enough.[25] Thus, the test requires government officials to identify religious doctrines, to determine where the doctrines differ, to measure the degree of those differences, and then to harmonize them in a neutral presentation. If an offsetting believer cannot be found, governments must find someone willing to give the "neutral" opinion.[26] Every step requires a judge to make theological decisions that should be made by individuals.

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[24] This Court's rules *are* an improvement; furious with the crisis caused by the overbroad rule on public prayer, Darius eventually remanded his judges to the den. *Cf.* Daniel 6:24.

[25] *Galloway,* 681 F.3d at 33 n.9.

[26] *Id.* at 31.

No judge can, or should, make such decisions. *Watson*, 80 U.S. at 729. As Justice Souter observed, "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." [27]

Yet these difficulties are not hypothetical. Standards adopted in several circuits now allow prayer to be studied for "neutrality." [28] The courts have been totally unable to develop workable definitions of "nonsectarian" or "neutral."[29] In addressing this issue, the Eleventh Circuit correctly notes: "[w]hether invocations of 'Lord of lords' or 'the God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law."[30]

### 3. Every prayer expresses a particular religious viewpoint and is therefore not "neutral" as to religion.

A newly-established 'neutral' orthodoxy would necessarily favor some religions and offend others, because *every* prayer adopts or presupposes particular

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[27] *Lee,* 505 U.S. at 616–17 (Souter, J., concurring).

[28] *See Joyner v. Forsyth Cnty.,* 653 F.3d 341 (4th Cir. 2011); *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006); *Snyder v. Murray City Corp.*,159 F.3d 1227 (10th Cir. 1998)

[29] *See Pelphrey v. Cobb Cnty.,* 547 F.3d 1263, 1272 (11th Cir. 2008).

[30] *Id.* at 1267.

religious beliefs or viewpoints. This "neutrality" or "toleration" is offensive to true religious freedom. Early American Baptist John Leland observed in his 1820 Short Essays on Government:

> Government should protect every man in thinking and speaking freely, and see that one does not abuse another. The liberty I contend for is more than toleration. The very idea of toleration is despicable; it supposes that some have a pre-eminence above the rest to grant indulgence; whereas all should be equally free, Jews, Turks, Pagans and Christians. Test Oaths and established creeds should be avoided as the worst of evils.[31]

More recently, Kenneth Klukowski observed that many religions are excluded by such limitations, causing an "Establishment Clause train wreck." He writes:

> 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. …

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[31] John Leland, *Virginia Chronicle*, in *Writings of the Late Elder John Leland* 118 (L.F. Greene ed., 1845), *quoted by* 1 Anson Stokes, *Church and State in the United States* 355 (1950).

> 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.[32]

When this Court convenes with a simple prayer, "God save this honorable court" it makes specific religious statements that are in accord with some religious beliefs and in conflict with others. Far from being "neutral" as to religious belief, this prayer presupposes a personal God who hears and answers 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 a 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.

In *Kerr v. Farrey* The Seventh Circuit discussed the logical problem inherent in attempting to understand any prayer as "neutral" as to religion:

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

> 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.[33]

Theistic presuppositions also conflict with certain forms of Buddhism that reject the notion of a personal creator God.[34]

The distinction between monotheistic religious beliefs and other religious beliefs undermines the idea that references to "God" in the generic do not "advance"

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

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

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 adapt to the state orthodoxy of "neutrality."

Finally, forcing prayer to conform to a state orthodoxy of "neutrality" discriminates against those religious beliefs that require prayer in a form prohibited by 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,* "[i]t 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."[35]

The Second Circuit recalled Justice Goldberg's admonition about the concept of neutrality in *Abington v. Schempp*:

> [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but

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[35] *Lee*, 505 U.S. at 596.

> of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. [36]

Justice Burger also recognized the dangers of a brooding secularism masquerading as "neutrality"—a "hostile neutrality," if you will. He counseled in *Walz* that the "play between the joints" in the Religion Clauses was better thought of as "benevolent neutrality."

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. [37]

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[36] *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

[37] *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970).

Accommodating diverse prayer-givers is benevolent neutrality. Banning all prayer-givers for the sake of avoiding offense, or mandating a watered-down civil religion to take the place of the Kingdom of God and our Constitutionally-guaranteed freedom of religion according to the dictates of conscience – this is malevolent neutrality. The result is the same as religious hostility—a naked public square, devoid of religious freedom.

In the same vein, Prof. Stephen L. Carter notes, "the more that a nation chooses to secularize the principal contact points between government and people … the more it will persuade many religious people that a culture war has indeed been declared, and not by the Right." [38]

## CONCLUSION

In our American public meetings, we are no bigots, and can hear a prayer from a person of piety and virtue, who is at the same time a friend to his country.

New attempts to promote "civic religion" or "religious neutrality" must establish the judiciary as the arbiters of the "neutral" orthodoxy. These 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*. The Eleventh Circuit Court of Appeals adopted

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[38] Stephen L. Carter, *God's Name in Vain: The Wrongs and Rights of Religion in Politics* 2 (2000).

this principle of freedom of conscience in *Pelphrey v. Cobb County*.[39] Unfortunately, three other circuits have adopted a civic orthodoxy, where government may replace individual conscience.[40]

The Second Circuit Court of Appeals has now gone farther, creating an especially pernicious hostile "neutrality," hinting that the Town of Greece might need to manufacture religious diversity for any citizen to give one of the invocations at regular meetings. Trying to create "neutral" invocations at legislative meetings harms the Free Exercise rights of the religious person. A person wishing to give an invocation must be able to pray according to the dictates of that person's conscience without the prayer police scrutinizing the content of the prayer.

This Court should reverse the Second Circuit, affirm the judgment of the trial court in favor of the Petitioner, and reaffirm simple truth of *Marsh*, that prayer by the governed for their government does not establish religion, but establishes freedom: "to secure the blessings of liberty for ourselves and our posterity." *U.S. Const. Preamble*.

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[39] *See Pelphrey v. Cobb Cnty.,* 547 F.3d 1263, 1272 (11th Cir. 2008).

[40] *See Joyner v. Forsyth County,* 653 F.3d 341 (4th. Cir. 2011); *Hinrichs v. Bosma,* 40 F.3d 393 (7th Cir. 2006); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1236 (10th Cir. 1998)(permitting regulation of prayer by an "agent" of government).

Respectfully submitted,

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# APPENDIX

# APPENDIX

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**Baptist Faith and Message, 2000**
Article XV
The Christian and the Social Order

All Christians are under obligation to seek to make the will of Christ supreme in our own lives and in human society. Means and methods used for the improvement of society and the establishment of righteousness among men can be truly and permanently helpful only when they are rooted in the regeneration of the individual by the saving grace of God in Jesus Christ. In the spirit of Christ, Christians should oppose racism, every form of greed, selfishness, and vice, and all forms of sexual immorality, including adultery, homosexuality, and pornography. We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick. We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death. Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love. In order to promote these ends Christians should be ready to work with all men of good will in any good cause, always being careful to act in the spirit of love without compromising their loyalty to Christ and His truth.

**Baptist Faith and Message, 2000**
Article XVII
Religious Liberty

God alone is Lord of the conscience, and He has left it free from the doctrines and commandments of men which are contrary to His Word or not contained in it. Church and state should be separate. The state owes to every church protection and full freedom in the pursuit of its spiritual ends. In providing for such freedom no ecclesiastical group or denomination should be favored by the state more than others. Civil government being ordained of God, it is the duty of Christians to render loyal obedience thereto in all things not contrary to the revealed will of God. The church should not resort to the civil power to carry on its work. The gospel of Christ contemplates spiritual means alone for the pursuit of its ends. The state has no right to impose penalties for religious opinions of any kind. The state has no right to impose taxes for the support of any form of religion. A free church in a free state is the Christian ideal, and this implies the right of free and unhindered access to God on the part of all men, and the right to form and propagate opinions in the sphere of religion without interference by the civil power.