

No. 11-546

In the Supreme Court of the United States

FORSYTH COUNTY, NORTH CAROLINA,
Petitioner,

v.

JANET JOYNER, *et al.*,
Respondents.

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

**BRIEF OF *AMICI CURIAE* DR. CLINTON E.
ARNOLD, DR. DARRELL L. BOCK, DR. WAYNE
GRUDEM, DR. H. WAYNE HOUSE, THE
LOUISIANA COLLEGE CASKEY SCHOOL OF
DIVINITY, AND J. MICHAEL THIGPEN
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

This amicus brief is filed on behalf of the following Christian theologians, who research, teach and write on theological matters pertaining to the Christian faith.

Dr. Clinton E. Arnold is Professor of New Testament Language and Literature and Chairman of the Department of New Testament at the Talbot School of Theology. Dr. Arnold received his Bachelor of Arts from Biola University, a Masters of Divinity from the Talbot School of Theology, and a Doctorate of Philosophy in New Testament Exegesis from the University of Aberdeen. Dr. Arnold was president of the Evangelical Theological Society and is a member of the *Studiorum Novi Testamenti Societas* (International Society for New Testament Studies), the Society of Biblical Literature, the Institute for Biblical Research, and the Translation Oversight Committee of the English Standard Version of the Bible. Dr. Arnold has written 10 books and approximately 100 articles and is the general editor of the 20-volume *Zondervan Exegetical Commentary on the New Testament*.

Dr. Darrell L. Bock is Research Professor of New Testament Studies and Professor of Spiritual

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. All parties of record 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.

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. 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 the 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 Research Professor of Theology, Law and Culture at Faith Evangelical Seminary and an Adjunct Professor of Theology and Apologetics at Veritas Evangelical Seminary. 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.

The **Louisiana College Caskey School of Divinity** exists to train coming generations of Christian leaders to correctly handle the word of truth, to preach the word, to emphasize the great truths of the Christian faith in their preaching and teaching, to share the gospel passionately with the lost, and to model outstanding Christian character. Students, graduates and officials of the school are, and will continue to be, routinely called upon to provide invocations in public settings and before deliberative public bodies in various states and localities. It is their belief that they must be able to pray in accordance with the dictates of their own consciences, and in the name of Jesus Christ.

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.

These theologians and this divinity school are concerned about the Fourth Circuit's decision because theologians and pastors are often called upon to pray before governmental bodies. Left undisturbed, the Fourth Circuit's decision would require them to either recite a government-composed or approved prayer that is in their opinion theologically unsound or forfeit the opportunity to pray. These theologians believe that it is not the role of the government to compose, censor or evaluate their prayers but is rather each private individual's responsibility to pray according to the dictates of his or her own conscience.

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. Indeed, this Court later in *Lee v. Weisman* noted that regulating an invocation'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 those deities that may be addressed. This judicially-arbitrated civic orthodoxy would require judicial establishment of some terms or deities as prohibited, categorically excluding certain religions that require the use of those terms and violating the mandate of the Establishment Clause that all persons be treated equally by the government, regardless of religious creed. 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.

This Court's decision in *Marsh* permits invocations that specifically reference Jesus or the name of any other deity. The holding in *Marsh* was not premised on the content of the invocations at issue. Indeed, as Chief Justice Rehnquist later noted, the invocations at issue in *Marsh* were explicitly Christian. Furthermore, invocations at the U.S. Congress—the very invocations whose unique history this Court looked to in *Marsh*—often explicitly reference Jesus or Jesus Christ. Neither did *Marsh* define sectarian or non-sectarian. Rather, *Marsh* is clear that courts cannot parse the content of a legislative invocation. To hold otherwise ignores that all invocations “advance” faith by assuming the existence of a supreme power. *Marsh* is only concerned with situations where the invocation opportunity has been exploited to proselytize or disparage.

The Fourth Circuit's decision in the present case invalidating legislative invocations because they contain references to Jesus and tenets of Christianity violates the principles established by this Court in *Marsh* and which were further amplified in *Lee v. Weisman*. Moreover, the Fourth Circuit's decision is at direct odds with the Eleventh Circuit's decision in *Pelphrey v. Cobb County*, which explicitly permits such legislative prayers, creating an irreconcilable conflict among the circuit courts. This Court should grant the *cert* petition in order to resolve this conflict and reaffirm the principles espoused in *Marsh* and *Lee*, making clear that legislative invocations that reference Jesus or any other deity are constitutional and that government should not have any role in

composing, censoring or evaluating the particular prayers of private speakers before legislative bodies.

ARGUMENT

I. COURTS CANNOT PARSE THE CONTENT OF AN INVOCATION AND DETERMINE WHETHER THE INVOCATION IS RELIGIOUSLY “NEUTRAL” WITHOUT CONSIDERING THE CONTENT OF THE INVOCATION AND COMPARING IT WITH AN ESTABLISHED ORTHODOXY OF NEUTRALITY.

In *Marsh v. Chambers*, this Court 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 v. Chambers*, 463 U.S. 783, 794–95 (1983). Thus, while it is permissible for courts to consider whether an opportunity for legislative invocation is disparaging or proselytizing, they are prohibited from considering the theological nature of the invocation. *Lee v. Weisman* went so far as to suggest that the government’s requiring “nonsectarian” invocations 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)).

In the present case, the Fourth Circuit majority, and the district court below, did exactly what *Marsh* and *Lee* prohibit. These judges evaluated and parsed the content of specific prayers offered by private religious leaders. Despite *Marsh*’s admonition to the

contrary, the majority undertook an extensive line-by-line review of the content of invocations offered over several years. *Joyner v. Forsyth County*, 653 F.3d 341, 349–50 (4th Cir. 2011). Based upon this examination, the majority found the county’s invocation practice unconstitutional because the legislative prayers, spoken by private religious leaders, often referenced Jesus and specific Christian tenets. *Id.* at 354.

The Fourth Circuit majority found the prayers unconstitutional even though the county had undertaken “a hands-off approach to the actual content of the prayers” and that its policy on its face was neutral. *Id.* at 343. Moreover, the majority recognized that the Plaintiffs, the listeners of the invocations, “were not coerced.” *Id.* at 355.

Simply put, contrary to *Marsh* and *Lee*, the Fourth Circuit majority opinion impermissibly places the government in the position of “regulat[ing] the language of prayer.” *Id.* at 356 (Niemeyer, J., dissenting). Preventing invocations that reference Jesus while allowing invocations that mention “God,” “Allah,” or “Our Father” 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, civic orthodoxy, setting standards by which deities may be addressed in public invocations. The 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 civic 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 civic 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, incredibly 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 what religious terms are “acceptable” and which are not. The 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 invocation at legislative assemblies of every level would lead to judicial chaos. *Id.*

Not only would parsing the content of legislative invocations lead to the establishment of a state orthodoxy, 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). 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 and benefits as the price of resisting

conformance to state-sponsored religious practice.” *Lee*, 505 U.S. at 596.

In *Doe v. Tangipahoa Parish Sch. Bd.*, “schoolchildren and their parents” brought suit against a school board because of “a Christian prayer.” *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823, 825, 831 (E.D. La. 2009). In *Tangipahoa*, “[t]he School Board ... opened its meeting with an invocation since 1973; board members, teachers, students, and invited clergy have delivered the prayers, which often have referred to Jesus or other Christian themes.” The court observed that the invocations in *Marsh* were “offered in the Judeo-Christian tradition, [but] the Supreme Court refused to examine their content because: 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. ...” *Id.* at 839–40 (internal cites omitted). The court in *Tangipahoa* went on to explain that “[a]ttempts to apply a sectarian/non-sectarian ‘bright line’ test by evaluating prayer content first ‘needlessly puts federal courts in the position of drawing the constitutional (and theological) line between sectarian and non-sectarian prayer’ in violation of Supreme Court precedent.” *Id.* at 840 n.23 (quoting *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 122 (5th Cir. 2006) (Clement, J., concurring in the judgment in part and dissenting in the judgment in part)).

Ultimately, attempts to promote “civic religion” or “religious neutrality” must establish the judiciary as the arbiters of the civic orthodoxy. This civic orthodoxy would necessarily favor some religions over others. The only way to avoid this establishment and to remain

truly neutral is to follow the guidance of *Marsh*: refusing to consider the content of any invocation and permitting each person to pray according to the dictates of conscience.

II. *MARSH V. CHAMBERS* DOES NOT MANDATE THAT INVOCATIONS BE FREE OF “SECTARIAN” REFERENCES.

The Fourth Circuit majority misreads Supreme Court precedent, including *Marsh* and *Lee*, in incorrectly holding that all governmental invocations must be nonsectarian in order to pass constitutional muster. *Joyner*, 653 F.3d at 342. The majority claims that it is imposing this nonsectarian requirement in an attempt to impose a “public neutrality among faiths.” *Id.* at 343. Rather than accomplishing neutrality, by dictating what words a private religious leader may or may not pray actually evidences a hostility to religion, which the First Amendment prohibits. *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part).

The guidance provided by the Fourth Circuit majority opinion to governmental bodies and religious leaders such as *amici* is confusing at best. While requiring legislative prayers be “non-sectarian,” the Court fails to define what constitutes a “sectarian” versus “non-sectarian” prayer. Moreover, the majority informs that the “legislative prayer must strive to be nondenominational so long as that is reasonably possible.” *Joyner*, 653 F.3d at 349. The opinion, however, does not define “nondenominational” nor provide any guidance under what circumstances such a prayer would be “reasonably possible.” The majority

further advises that “[i]nfrequent references to specific deities standing alone, do not suffice to make out a constitutional case.” *Id.* The opinion leaves unanswered how many references to a specific deity would be permissible—one or two, but not three or four? These so-called “clear boundaries,” developed by the majority, raise more questions than they answer. They undoubtedly require courts to conduct a “sensitive evaluation” and to “parse” through prayers of private religious leaders using highly subjective standards in contradiction to this Court’s precedent.

Marsh is clear, however: courts cannot parse the content of an invocation before a “legislative [or] other deliberative public bod[y]” unless the invocation opportunity had been exploited to advance or disparage a belief. *Marsh*, 463 U.S. at 786, 794. While *Marsh* does note in a footnote that the chaplain subsequently removed all references to Christ in his invocations, *id.* at 793 n.14, “the Court never held that the prayers in *Marsh* were constitutional because they were ‘nonsectarian.’ Nor did the Court define that term.” *Pelphrey*, 547 F.3d at 1271. As the Eleventh Circuit explained, “[t]o read *Marsh* as allowing only nonsectarian prayers is at odds with the clear directive by the Court that the content of a legislative prayer ‘is not of concern to judges where ... there is no indication that the prayer opportunity has been exploited to proselytize or advance any one ... faith or belief.’” *Id.* (quoting *Marsh*, 463 U.S. at 794–95).

To argue that *Marsh* mandates whitewashed legislative invocations that do not regularly reference a particular deity is to interpret the opinion in *Marsh* divorced from the actual facts of *Marsh*. In *Van Orden v. Perry*, Chief Justice Rehnquist’s opinion observed,

“In *Marsh*, the prayers were often explicitly Christian....” *Van Orden v. Perry*, 545 U.S. 677, 688 n.8 (2005) (plurality opinion).

In *Newdow v. Bush*, the court pointed out that the invocations given before the U.S. Congress—the historical basis for the ruling in *Marsh*—are “sectarian.” *Newdow v. Bush*, 355 F. Supp. 2d 265, 285 n.23 (D.D.C. 2005) (“the legislative prayers at the U.S. Congress are overtly sectarian”) (quoting S. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 n.118 (1996) (noting that, from 1989 to 1996, “over two hundred and fifty opening prayers delivered by congressional chaplains [] included supplications to Jesus Christ”). This current Congressional practice follows a long, historical tradition established prior to our nation’s founding. The first invocation before the Continental Congress, given by the Congress’ chaplain, Jacob Duché, on September 7, 1774, and recorded by Charles Thomson, the secretary of the Continental Congress, concludes, “All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Saviour. Amen.” Reverend Jacob Duché, *First Prayer of the Continental Congress*, Office of the Chaplain (November 11, 2011), <http://chaplain.house.gov/archive/continental.html>. The Continental Congress’ first thanksgiving proclamation called the people to “humble and earnest supplication that it may please God through [the] merits of Jesus Christ” to forgive their sins and bless the governments of the states. 9 *Journals of the Continental Congress, 1774–1789*, 855 (1777) (Worthington Chauncey Ford ed., 1907), available at <http://memory.loc.gov/l1/l1jc/009/0100/01030855.gif>.

Similarly, when the House of Representatives sought to request that volunteer chaplains from the community provide the opening invocation, the House passed a resolution stating, “[W]hereas the great vital and conservative element in our system is the belief of our people in the pure doctrines and divine truths of the Gospel of Jesus Christ, it eminently becomes the representatives of a people so highly favored to acknowledge, in the most public manner, their reverence for God: Therefore—Be it resolved, That the daily sessions of this body be opened with prayer.” H. Journal, 35th Cong., 1st Sess. 58 (1857).

In *Pelphrey* itself, the invocations offered before the Cobb County Commission and the Cobb County Planning Commission often “ended with references to ‘our Heavenly Father’ or ‘in Jesus’ name we pray.’” *Pelphrey*, 547 F.3d at 1267. “Prayers also contained occasional references to the Jewish and Muslim faiths, such as references to Passover, Hebrew prayers, Allah, and Mohammed.” *Id.* Applying *Marsh*, the Eleventh Circuit upheld these prayers because there was no exploitation of the invocations to advance or disparage a belief since persons of different faiths were permitted to give the invocation without censorship.

The *Pelphrey* court observed that “[t]he Tenth Circuit also has stated that *Marsh* does not categorically prohibit prayers that invoke ‘particular concept[s] of God.’” *Id.* at 1273 (quoting *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233–34, 1234 n.10 (10th Cir. 1998)). In *Snyder*, the Tenth Circuit noted that “all prayers ‘advance’ a particular faith or belief in one way or another. The act of praying to a supreme power assumes the existence of that supreme power. ... Rather what [*Marsh*] prohibited ... is a more

aggressive form of advancement, i.e., proselytization.” *Snyder*, 159 F.3d at 1234 n.10.

Likewise, in *Simpson v. Chesterfield County Bd. of Supervisors*, the Fourth Circuit found that *Marsh* allows “a county to invite clergy from diverse faiths to offer ‘a wide variety of prayers’ at meetings of its governing body. The invocations upheld there included ‘wide and embracive terms’ such as ‘Lord God, our creator,’ ... ‘the God of Abraham, Isaac and Jacob,’ ‘the God of Abraham, of Moses, Jesus, and Mohammad,’ [and] ‘Heavenly Father’” *Pelphrey*, 547 F.3d at 1273 (internal cites omitted) (quoting *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005)). In upholding the constitutionality of these invocations, the *Simpson* court noted that if it were to invalidate the broad range of invocations at issue, while *Marsh* upheld sixteen years of invocations by one chaplain from one denomination, it “would achieve a particularly perverse result ... push[ing] localities intent on avoiding litigation to select only one minister from only one faith. ... This would have the consequence of making America and its public events more insular and sectarian rather than less so.” *Simpson*, 404 F.3d at 287.

CONCLUSION

For the foregoing reasons, this Court should grant the requested writ of certiorari.

Respectfully submitted,

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