No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The statement of the parties to the proceeding and the corporate disclosure statement included in the petition for a writ of certiorari remain accurate.

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REPLY BRIEF FOR PETITIONER

Respondents concede that the circuits are divided over the proper legal standard to apply in evaluating the constitutionality of legislative prayer (Opp. 1, 19), but Respondents nonetheless claim that all courts of appeals "agree" that some variation of an amorphous "totality of the circumstance" test applies. *Id.* at 1, 10. To the contrary, there is now an even deeper split between those circuits that engage in a wide-ranging inquiry into whether legislative prayer practices have an impermissible "effect" on a reasonable observer (*id.* at 11, 28), and those that instead conduct the limited inquiry mandated by this Court's precedents, asking only whether a prayer opportunity has been "exploited" to proselytize, or to advance or disparage a particular faith. *Marsh v. Chambers,* 463 U.S. 783, 794-95 (1983).

Unable to show that no circuit conflict exists, Respondents instead distort the record and rely on allegations not deemed relevant by the court of appeals. But their brief in opposition fails to identify any impediment to this Court's review of the important question presented. Certiorari should be granted.

I. THE CIRCUIT CONFLICT HAS DEEPENED SINCE THE PETITION WAS FILED

The conflict among the circuits regarding the proper standard for evaluating legislative prayer practices has deepened since the petition was filed. In *Rubin v. City of Lancaster*, No. 11-56318, 2013 WL 1198095, at *7 (9th Cir. Mar. 26, 2013), the Ninth Circuit explicitly held that this Court's decision in *Marsh* "require[s] a different inquiry" from that employed by the Second Circuit below and by the

Fourth Circuit in *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011), *cert denied*, 132 S. Ct. 1097 (2012).

There is a stark difference between the law in the Second and Fourth Circuits on one hand, and the law in the Ninth Circuit on the other, which Respondents characterize as adopting "a novel standard"—thus acknowledging a circuit split. Opp. 24. The *Rubin* court evaluated legislative prayer practices based on whether "'*the government* has placed its imprimatur, deliberately or by implication, on any one faith or religion'"; this inquiry does not "*pivot on the practice's effect on the disapproving listener*." 2013 WL 1198095, at *7 (second emphasis added) (quoting *Joyner*, 653 F.3d at 362 (Niemeyer, J., dissenting)). The Ninth Circuit's test thus examines "the *government's* reasons" for adopting a particular prayer practice, irrespective of the message the practice "might have conveyed." *Id.* at *8.

By contrast, the analysis employed by the Second and Fourth Circuits *expressly* pivots on the practice's effect on the listener. In the decision below, the Second Circuit evaluated the Town's prayer practice by asking whether an "ordinary, reasonable observer" would have understood it to "conve[y] the view that the [Town] favored or disfavored certain religious beliefs," and by examining whether such an observer would have understood the Town's practice as endorsing "particular religious beliefs." Pet. App. 19a. The Fourth Circuit's analysis similarly hinges on whether the challenged prayer practice aligns the government with a particular religious group in the eyes of a reasonable observer. *Joyner*, 653 F.3d at 348, 354-55. This "observer-based 'frequency' analysis," which invalidates "any legislative-prayer prac-

tice that, from the vantage point of the prayers' listeners, has resulted in too large a proportion of sectarian invocations from one particular religious group," is foreign to the Ninth Circuit. *Rubin*, 2013 WL 1198095, at *7.

Respondents attempt to minimize the conflict between the Ninth Circuit and the Second and Fourth Circuits by ignoring the portion of *Rubin* that conflicts with the decision below. *Rubin* was not, as Respondents contend, about whether the government had "'taken every feasible precaution'" to "'ensure its own evenhandedness.'" Opp. 20 (quoting *Rubin*, 2013 WL 1198095, at * 9). Rather the question was whether a government that had adopted a neutral prayer-giver selection policy could nonetheless violate the Establishment Clause if "as it happens, most of the volunteers [are] Christian and [give] Christian invocations." 2013 WL 1198095, at *10.

According to *Rubin*, the answer is "no." Focusing on the prayers' content and the prayer-givers' religion "misconceives the focus" of the inquiry because "[w]hatever the content of the prayers or the denominations of the prayer-givers, the [government] chooses neither." *Id.* That the facially neutral policy produced predominantly Christian prayers and prayer-givers was an immaterial "function of local demographics" and the choices of private parties who responded to the government's invitation to pray. *Id.* (internal quotation marks omitted).

The court below reached the opposite conclusion. Like the Ninth Circuit, the Second Circuit confronted a facially neutral prayer-giver selection policy, expressly finding "no evidence" that the Town would not "have accepted any and all volunteers who asked to give the prayer." Pet. App. 20a. Unlike the Ninth

Circuit, however, the Second Circuit held that the Town had affiliated itself with Christianity by failing "to consider how its prayer practice would be perceived by those who attended Town Board meetings" and by failing to do more to diversify the religious identities of its prayer-givers when its facially neutral policy produced a "steady drumbeat" of what the court called "sectarian Christian prayers." *Id.* at 22a.

Grasping for ways to harmonize the cases, Respondents distort the holding below, claiming that it was not the "homogeneity of viewpoints reflected by the invocations that doomed the Town's practice," (Opp. 22 (internal quotation marks omitted)), but rather the Town's process for selecting prayer-givers, the lack of any disclaimers, and actions by Town officials conveying the impression that prayer-givers spoke on the Town's behalf. *Id.* at 22-23; *see also id.* at 16-17.

Respondents' claim that the case below turned on these factors is revisionist history. The Second Circuit stated that "a municipality cannot . . . ensure that its prayer practice [is constitutional] simply by stating, expressly, that it does not mean to affiliate itself with any particular faith." Pet. App. 24a. Neither could it satisfy the Constitution by adopting a lottery to select prayer-givers, nor even by actively pursuing prayer givers of minority faiths. *Id.* at 24a-25a.[1] Moreover, the Second Circuit did not question the facial neutrality of the Town's prayer selection

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[1] The Second Circuit went so far as to assert that there may be no constitutional means of selecting prayer-givers "where a town is so much of one creed that even such [random or inclusive] approaches would . . . nonetheless yield prayer-givers overwhelmingly of that creed." Pet. App. 25a n.9.

process; rather, the problem was that it did not "*resul[t]* in a perspective that [was] substantially neutral *amongst creeds*." *Id.* at 20a (emphases added). *Rubin* rejected this exact inquiry. 2013 WL 1198095, at *10.

To be sure, the court below said that by denominating prayer givers as Town chaplains and by participating in prayers, Town officials contributed to the impression that prayer-givers spoke on the Town's behalf.[2] But the *reason* the Second Circuit thought those factors relevant was because of the message they potentially conveyed to listeners, not because they illuminated the "government's reasons" for adopting the prayer practice. *Cf. Rubin*, 2013 WL 1198095, at *8. Indeed, the Second Circuit found no basis to question the legitimacy of the Town's reasons for adopting its prayer practice. Ultimately, Respondents cannot conceal the reality that the Second Circuit invalidated the Town's practice using a legal standard rejected by the Ninth Circuit. Whereas the government's purpose in adopting a particular prayer practice is dispositive in the Ninth Circuit, the Second Circuit invalidates prayer practices in which "one creed dominates others—*regardless of a town's intentions*." Pet. App. 22a. (emphasis added).

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[2] Respondents erroneously assert that the opinion below faulted the Town for "denominating *Christian* prayer-givers as Town chaplains." Opp. 23 (emphasis added). The Second Circuit made no such distinction. *See* Pet. App. 23a. Respondents further distort the record, alleging that the Town selectively bestowed the title of "Chaplain of the Month" on Christian prayer-givers. Opp. i. The record, however, shows that after September 2005, that phrase was usually not used for any prayer-givers. *See* Galloway Summ. J. Exs. 578-629. Moreover, nothing in the court of appeal's decision turns on this alleged fact.

Respondents also cannot hide the preexisting circuit conflict between the Eleventh Circuit's decision in *Pelphrey* and the Second and Fourth Circuits. Like the Ninth Circuit, the Eleventh Circuit faithfully applies *Marsh*, makes no reference to the supposed message a particular prayer practice conveys, and holds that legislative prayer practices are constitutional absent an indication that "the legislative prayers have been exploited to advance one faith." *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1271 (11th Cir. 2008). The Eleventh Circuit recently affirmed this analysis in *Atheists of Florida*, *Inc. v. City of Lakeland*, upholding a prayer practice upon finding no evidence "that [the government] attempted to exploit the prayer opportunity to proselytize or advance or disparage any one faith or belief." No. 12-11613, 2013 WL 1197772, at *14 (11th Cir. Mar. 26, 2013).

Respondents deny the existence of this conflict, arguing that the Eleventh Circuit, like the Second and Fourth, employs a totality of the circumstances approach that weighs "all of the factors that comprised the practice." Opp. 12 (internal quotation marks and emphasis omitted). Not so. The Eleventh Circuit adheres to *Marsh*, which it explained examines "the chaplain's religious affiliation, his tenure, and the overall nature of his prayers" only *for the purpose of* determining "whether the legislative prayers [have] been exploited" to advance a religious agenda. *Pelphrey*, 547 F.3d at 1270, 1278; *see also Lakeland*, 2013 WL 1197772. Unlike the Second and Fourth Circuits, neither the Eleventh nor the Ninth Circuit employs a freewheeling "totality of the circumstances" approach that asks whether "a reasonable objective observer" might conceivably believe that any aspects of a prayer practice conveyed an en-

dorsement of a particular religion. Pet. App. 26a; *see Joyner*, 653 F.3d at 354-55.

Respondents also err in arguing that the circuits' differing results stem from "material factual differences" rather than "a conflict in legal principle." Opp. 15. Their argument rests on facts that played no role in the courts of appeals' decisions. *Id.* at 15-18 (citing district court opinions, pleadings, and record evidence). On the facts actually relied on by the courts of appeals, *Pelphrey* and the case below are substantively indistinguishable: Each addressed (i) facially neutral prayer practices (ii) involving uncensored prayers (iii) delivered by private volunteers that (iv) produced prayer-givers that were primarily Christian and prayers that more often than not contained Christian content. Pet. 13-14 (cataloging similarities). The courts of appeals reached opposite conclusions not because of factual distinctions but because they applied different legal tests.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

Respondents also attempt to portray this Court's precedents as "harmonious" and the decision below as "faithful to all of" them. Opp. 25. But the Second Circuit relied on its perception of tension between *Marsh* and dicta from *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), as its justification for adopting a legal standard that is at odds both with *Marsh* and with the balance of this Court's Establishment Clause cases.

The court below acknowledged that *Marsh* prohibits legislative prayer only where "'the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or be-

lief.'" Pet. App. 12a (quoting *Marsh*, 463 U.S. at 794-95). The court further conceded that "[t]he prayers in the record were not offensive in the way identified as problematic in *Marsh*: they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." *Id.* at 21a. Nonetheless, the court concluded that, "in light of *Allegheny*," (*Id.* at 20a-21a n.6), the Town's prayers were unconstitutional because "most of the prayers . . . contained uniquely Christian references" and "prayers devoid of such references almost never employed references unique to some other faith." *Id.* at 20a. In the Second Circuit's view, even absent evidence of exploitation, legislative prayers may be held unconstitutional if a reasonable observer could conclude that they contained too many Christian references. This approach (Pet. App. 21a-22a) is foreign to the standard enunciated in *Marsh*.

Respondents read *Marsh* as permitting only those prayer practices that are "truly even-handed," such as those that "involve[] random scheduling processes" or "affirmative[] disclaim[ers]." Opp. 17. But in *Marsh*, the prayers were all delivered by a paid Presbyterian minister who had served for sixteen years as legislative chaplain and whose prayers were "often explicitly Christian." *Marsh*, 463 U.S. at 793 & n.14. There was no random scheduling, no affirmative disclaimer, and no variation in the prayers' sectarian content until one year after the lawsuit commenced. Yet the Nebraska legislature's prayer practice was deemed constitutional because there was no evidence that the state exploited the prayer opportunity to proselytize, or to advance or disparage a particular faith. *See id.* at 794-95. That approach differs markedly from the test adopted by the court below, under which even municipalities "with the

best of motives may still have trouble preventing the appearance of religious affiliation" under an observer-based effects test. Pet. App. 26a-27a; *cf. Marsh*, 463 U.S. at 786 (declining to apply effects-based *Lemon* test). The court of appeals' (and Respondents') narrow view of permissible prayer practices turns the *Marsh* presumption of constitutionality on its head; *Marsh* itself would have been decided differently under their test.

Respondents also err in arguing that "no circuit has perceived the conflict that [P]etitioner posits" between *Marsh* and *Allegheny*. Opp. 28-29. To the contrary, the decision below stated that "[v]arious circuit court decisions, drawing on the Court's language in *Allegheny*, have questioned the validity of all forms of 'sectarian' prayers." Pet. App. 14a. Indeed, the Fourth and Seventh Circuits have concluded "that the Supreme Court's opinion in *Allegheny* 'read *Marsh* as precluding sectarian prayer.'" *Joyner*, 653 F.3d at 352 (quoting *Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006)). The decision below disagreed with these cases "[t]o the extent that" they "preclude[] all legislative invocations that are denominational in nature," but concluded that, "in light of *Allegheny*," courts may consider "the substance of the prayers under challenge." Pet. App. 15a, 21a n.6. On the other end of the spectrum, the Ninth Circuit recently held that *Allegheny* "did not—because, in dicta, it *could* not—supplant *Marsh* or restrict its scope." *Rubin*, 2013 WL 1198095, at *6. The perceived tension between *Marsh* and *Allegheny*, in brief, has led to considerable disagreement about the extent to which courts can police the content of legislative prayers.

That confusion persists despite this Court's unequivocal statement in *Lee v. Weisman*, 505 U.S. 577 (1992), that "it is no part of the business of government to compose official prayers." *Id.* at 589 (internal quotation marks omitted). Because Respondents read *Marsh* and *Allegheny* to permit the government to purge explicitly denominational content from legislative prayers, they conclude that it is "illogical to assert that *Lee* bars government officials from crafting the prayers"—so long as they proceed with a "light touch." Opp. 27. The frightening prospect of state officers acting as official censors of prayers delivered voluntarily by private citizens (or even paid chaplains) has no basis in this Nation's traditions or this Court's jurisprudence. *See Lee*, 505 U.S. at 592; *Engel v. Vitale*, 370 U.S. 421, 430 (1962). This Court should grant certiorari to reaffirm this country's "unambiguous and unbroken history" of legislative prayer. *Marsh*, 463 U.S. at 792.[3]

III. THE PETITION PRESENTS A QUESTION OF NATIONWIDE IMPORTANCE

The question presented is one of nationwide importance. The Second Circuit's own words—warning that the difficulties associated with crafting a prayer practice that passes its test "may well prompt municipalities to pause and think carefully before adopting legislative prayer"—confirm the breadth of its potential ramifications. Pet. App. 27a.

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[3] Respondents make no attempt to rebut Petitioner's showing that the decision below conflicts with this Court's limited public forum jurisprudence. Instead, they argue only that the question is not preserved. Opp. 29. But Petitioner pressed this claim before the Second Circuit, Pet. C.A. 39 n.16, and it is therefore properly presented.

Respondents contend that the Second Circuit's decision says nothing about the constitutionality of the prayer practice used in the U.S. House of Representatives. But as they see it—and as the Second Circuit's test declares—that question turns on whether non-Christian guest clergy routinely deliver prayers, whether the percentage of prayers with sectarian references—however defined—falls below some unspecified threshold, and whether Members of Congress ever participate in the prayers offered. Opp. 32-33.

None of those things matters under *Marsh*, however, which held that the constitutionality of facially neutral legislative prayer practices turns on the government's motives and should be easy to determine. And for decades it was. *See* Pet. 26-27. That changed with the Fourth Circuit's adoption of an observer-based standard in 2004. *See Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004). Today, notwithstanding *Marsh*, the "reasonable-observer" test that reigns in the Second and Fourth Circuits means that everything is up for grabs. Indeed, the Second Circuit admits that its test can "give only limited guidance to municipalities that wish to maintain a legislative prayer practice." Pet. App. 24a. Given this candor, it is not surprising that one state senate has abandoned legislative prayer entirely and that the prayer practices of at least six municipalities have recently been attacked in five different circuits. Pet. 26-27 & n.6.

Legislatures deserve clarity about whether daily conduct that is deeply rooted in their history is unconstitutional. With the circuits in disarray, only

this Court can provide that certainty. Further review is warranted.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[4] Respondents argue that the Court should deny the petition because the district court has not yet had an opportunity to fashion an appropriate injunction. Opp. 35-36. The question that has divided the circuits involves the legal test for judging the constitutionality of legislative-prayer practices, and that question has been finally resolved by the decision below. Nothing about the remedial proceedings will affect the rule of liability adopted by the Second Circuit or change the scope of the existing circuit conflict.