

No. 11-546

**In the
Supreme Court of the United States**

FORSYTH COUNTY, NORTH CAROLINA,
Petitioner,

v.

JANET JOYNER AND CONSTANCE LYNNE BLACKMON,
Respondents.

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

**BRIEF OF THE FAMILY RESEARCH COUNCIL
AND 15 MEMBERS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
AS AMICI CURIAE IN SUPPORT OF
PETITIONERS**

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November 30, 2011

QUESTIONS PRESENTED

As presented by Petitioner, this case presents the following questions:

1. Whether the Establishment Clause compels the government to parse the content of legislative prayers to eliminate “sectarian” references.

2. Whether the “frequent” presentation of legislative prayers that include a “sectarian” reference violates the Establishment Clause.

In addition, this case presents the following jurisdictional question:

3. Where public funds are not expended to hire a chaplain, whether legislative immunity and/or the political-question doctrine deprive courts of subject-matter jurisdiction over policies governing legislative prayer.

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INTERESTS OF *AMICI CURIAE*¹

The Family Research Council (“FRC”) is a 501(c)(3) nonprofit public-policy organization headquartered in Washington, D.C. Founded in 1983, FRC advocates policies that protect and strengthen family rights and autonomy. FRC’s Center for Religious Liberty is focused on advancing religious liberty in the United States through promoting an understanding of the Establishment Clause and Free Exercise Clause consistent with their original meaning.

Remaining *amici* are 15 Members of the United States House of Representatives and the Congressional Prayer Caucus Chairman, Randy Forbes, who recognize the value of legislative prayer in Congress’s daily sessions and meetings of legislative bodies at all levels of government. Those Members are listed in the Appendix to this brief.

¹ William H. Hurd and Kenneth A. Klukowski authored this brief for *amici curiae*. No counsel for any party authored any part of this brief and no one apart from *amici* contributed funds for its preparation or submission. All parties consented to the filing of this brief, and were timely notified.

REASONS FOR GRANTING THE WRIT

One of the thornier issues in American constitutional jurisprudence involves the practice of opening legislative sessions with prayer. As this Court has recognized, such legislative prayer is “part of the fabric of our society,” *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), and dates back to the same First Congress that proposed the Establishment Clause and, indeed, to the same week. *Id.* at 790-91. This Court has held that such legislative prayer is perfectly compatible with the Establishment Clause, at least where “the prayer opportunity” has not been “exploited to *proselytize* or *advance* any one, or to *disparage* any other, faith or belief.” *Id.* at 794-95 (emphasis added). Today, the practice of opening legislative meetings with prayer remains a vibrant and cherished part of our public life.

Even so, some citizens are offended by legislative prayer, either because they object to *any* prayer in government settings or because they disagree with the theological concepts inherent in the particular prayers that are offered. Their right to participate in the affairs of government is no less important than the right of those who welcome those prayers. And, to correct what they perceive – rightly or wrongly – as an infringement of that right, these offended citizens have brought a number of lawsuits over the years, with one of the most recent being the one decided below, *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011).

Courts have responded to these lawsuits in varying ways, sometimes allowing legislatures more freedom, sometimes less. In a split decision, a majority of the three-judge panel below reached for what it

undoubtedly regarded as an appropriate compromise; however, in so doing, the court based its decision on an analysis that is unsustainable intellectually, sharply at odds with other circuits and highly divisive.

In *Joyner*, the Fourth Circuit essentially said that: (i) impermissible advancement occurs when the prayers that are offered over a period of time largely display the same “sectarian” viewpoint, and (ii) that this violates the Establishment Clause even where that “sectarian” content is the result of the religious composition of the community and a neutrally-administered process of selecting speakers to offer prayer.

Using a “sectarian” yardstick to measure the constitutionality of legislative prayers is highly problematic because (i) all prayers are “sectarian” to some degree, and (ii) establishing a “cutoff” point where prayers become “too sectarian” draws the courts into a thicket where they must make religious judgments, a task for which they are ill-equipped. Another approach must be found.

I. THE COURT SHOULD GRANT CERTIORARI AND CLARIFY THAT COURTS SHOULD NOT ADJUDICATE WHETHER LEGISLATIVE PRAYER IS “SECTARIAN.”

A. There Is No Readily Manageable Boundary between “Sectarian” and “Non-Sectarian” Prayer.

The Fourth Circuit decision is predicated on the assumption that some prayers are “sectarian” while others are not. In one passage, for example, the Fourth Circuit discussed the importance of “requiring

legislative prayers to embrace a *non-sectarian ideal*.” Cert. Pet. App. 15a (emphasis added). And the court said “[i]t was the governmental setting for the delivery of *sectarian* prayers that courted constitutional difficulty.” *Id.* at 22a (emphasis added).

Contrary to the Fourth Circuit’s assumption, there is no neat division between “sectarian” and “nonsectarian” prayers. *All* prayers are “sectarian” to some degree because all prayers necessarily reflect theological concepts that are not universally shared. For example:

- While some may see Christianity as a single faith, the term covers a multiplicity of denominations and sects with divergent beliefs and practices. Thus, a Protestant who hears a Catholic priest invoke the Virgin Mary would likely say that the prayer is sectarian, because Protestants typically do not address prayers to Jesus’s mother.
- Offering a prayer “in the name of Jesus Christ” typically would be acceptable to both Catholics and Protestants – and would not be viewed as sectarian by either group – but such a prayer would surely be regarded as sectarian by most Jews, who do not recognize Jesus as either the promised Messiah or as divine. Muslims, who regard Jesus as a prophet but not as divine, would likely react similarly.
- In the United States, a prayer addressed to “Allah” would be viewed as sectarian by most Christians and Jews. Even though “the Arabic word ‘Allah’ is used for ‘God’ in Arabic translations of Jewish and Christian scriptures,” *Hinrichs v. Bosma*, No. 1:05-cv-

0813-DFH-TAB, 2005 U.S. Dist. LEXIS 38330, at *20 (S.D. Ind. Dec. 28, 2005), *vacated on jurisdictional grounds*, 506 F.3d 584 (7th Cir. 2007) (*en banc*), most Americans would view a prayer spoken in English, but addressed to “Allah,” as intended to convey a belief that the Koran is the word of God and that Mohammed is his Prophet.

- Christians, Jews and Muslims might find common ground in a prayer addressed to the “God of Abraham,” but even such an inter-faith effort would be viewed as sectarian by adherents of other religions – such as Hinduism and Buddhism – that lie outside any version of the Abrahamic tradition.

At first glance, the solution might be to excise from legislative prayer *any* name or title by which the Deity might be known. But, even that step would not make the resulting prayers “non-sectarian.” Important theological concepts still would be conveyed. A prayer addressed to “God” would display an implicit belief in monotheism, a concept that polytheistic religions do not accept. Indeed, the reference to “God” rather than “Goddess” also may carry theological ideas disfavored by some neo-pagan religions. *See, e.g.*, <http://dianic.faiithweb.com/dianics.htm> (discussing “Dianics,” a “goddess-centered nature religion”).

A seemingly neutral appeal to the “Creator” would fare no better, since not every religion teaches that the creator of the universe hears and responds to human prayer. There is the deism of the Enlightenment, which regards God as a “watchmaker . . . who established the laws of nature in the material universe at the time of creation and then left it alone.” *ACLU v.*

McCreary County, 354 F.3d 438, 452 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005) (citation omitted). For such deists, prayers reflect a misunderstanding about God’s nature. There are also “non-theistic” religions that deny the existence of a creator, even as a watchmaker. *See Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (“Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”).

Viewed against this religious diversity, the terms “sectarian” and “non-sectarian” do not represent objective categories or analytical tools. Instead, these terms represent conclusions reached by other means, with the term “sectarian” assigned to prayers that are deemed *too specific* in theological content, and the term “non-sectarian” assigned to prayers deemed *general enough* to be judicially acceptable.

Recognizing how these terms are actually used raises questions about *where* to draw the line, *how* to do so, and *whether* courts should be in this line-drawing business at all. It is a path fraught with pitfalls, and courts should not “embark on a sensitive evaluation or . . . parse the content of a particular prayer.” *Marsh*, 463 U.S. at 795.

B. Proscribing the Name of Jesus in Legislative Prayer is Especially Problematic.

The Fourth Circuit appears to believe that the line between “sectarian” and “non-sectarian” prayer must be drawn where the general Judeo-Christian tradition diverges into its specifically Christian component, or at

least where that Christian component has achieved what the court views as undue prevalence.

ACLU's counsel argued below that *any* mention of Jesus's name creates a constitutional violation. *See* Joyner C.A. Br. 26-30. The Fourth Circuit did not go that far, suggesting that legislative prayers that *sometimes* mention Jesus are acceptable, while those that mention him *too often* are not. "*Infrequent* references to specific deities, standing alone, do not suffice to make out a constitutional case." Cert. Pet. App. 19a (emphasis added). "As a practical matter, courts should not be in the business of policing prayers for the *occasional* sectarian reference – that carries things too far." *Id.* at 24a (emphasis added).

The "Jesus-counting" approach suggested by the Fourth Circuit is problematic for several reasons, including the fact that its criteria are so vague as to be judicially unmanageable. Cert. Pet. 27-28. But, more fundamentally, it is unclear jurisprudentially why the Fourth Circuit drew the line where it did. Perhaps the Fourth Circuit was motivated by its own sense of civility, feeling that, in a society where the Christian leaning of audiences can no longer be safely assumed, prayers ought not be overtly Christian. Yet, even if such a line would satisfy the current plaintiffs, there is no guarantee that it would satisfy future plaintiffs, who may take offense even at more general prayers.

1. The Naming of Jesus in a Prayer Is Often a Matter of Religious Obligation, Not a Matter of Insensitivity or Discourtesy.

Amici recognize that it is now customary among some Christians to abstain from mentioning Jesus when offering prayers before groups likely to include people from other faiths. The argument is made that simple courtesy requires such abstention; however, the Constitution gives us a bill of rights, not a book of manners. The fact that some may regard it as “impolite” or even “offensive” to mention Jesus before a mixed-faith group does not mean doing so violates the Establishment Clause, even when offering a legislative prayer.

Besides, it is not rudeness or insensitivity that leads many Christians to invoke Jesus whenever they pray. Their *faith* requires them to do so. Many Christians believe their prayers will not be acceptable to God unless offered in the name of Jesus Christ. This belief is found in the doctrinal statements of various Christian denominations and in the writings of Christian thinkers. *See, e.g., Westminster Confession of Faith*, ch. XXI, para. 3 (1646); 3 John Calvin, *Institutes of the Christian Religion*, ch. XX, § 18.²

² This belief is rooted, in part, in various passages of the New Testament. *See, e.g., John* 14:13-14; 15:16; 16:23-24. Moreover, many Christians believe that abstaining from naming Jesus in a prayer, so as to be socially-acceptable or politically correct, would be akin to the sin of the apostle Peter, who, on the night Jesus was arrested, repeatedly denied knowing him. *See Matthew*

Modern religious scholars have made the same point as well. *See, e.g.*, James Montgomery Boice, *Foundations of the Christian Faith: A Comprehensive & Readable Theology* 488-89 (rev. ed. 1986). Nor has this point escaped the attention of this Court. *See Marsh*, 463 U.S. at 820 (Brennan, J., dissenting) (“Some would find a prayer not invoking the name of Christ to represent a flawed view of the relationship between human beings and God.”).

Certainly, there are Christians who do not feel that they must speak Jesus’s name whenever they pray aloud, and who do not equate silence about Jesus during prayer with denying or disowning him. But the point is not to debate which view of the Christian faith is more authentic. *See Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981) (“[I]t is not within the judicial function and judicial competence to inquire [which religious adherent] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”). The point is that asking Christians to abstain from offering a “Jesus prayer” is not so simple as some assume, and, for many Christians, it is a tremendous burden.

Moreover, denying Christians the opportunity to offer a legislative prayer unless they agree to keep silent about Jesus carries its own set of problems under both the Establishment and Free Exercise Clauses. Unfortunately, the Fourth Circuit has rushed headlong into that constitutional thicket. True, it has

26:69-75. For Christians, disowning Jesus is a serious matter with potentially eternal consequences. *See id.* 10:33.

not ruled that Christians may *never* offer a legislative prayer in the name of Jesus. Yet, it has effectively created a “quota” for such “Jesus prayers” – the parameters of which no one knows – but beyond which Forsyth County may not let Christians go without fear of judicial penalty.

2. Jesus Is an Important Historical Figure, Recognized by Many Non-Christians for His Moral Teachings.

Christianity teaches that Jesus was both divine and human. See “Athanasian Creed,” in *New Dictionary of Theology* 180 (Sinclair Ferguson *et al.* eds. 1988). And though his divine nature is not recognized by non-Christians, there are many who nevertheless regard him as a great moral teacher. Islam, for example, does not accept the Christian concept of a triune God – Father, Son and Holy Ghost – yet teaches that Jesus was a prophet and miracle-worker. John L. Esposito, *The Oxford Dictionary of Islam* 158 (2004).³

Thomas Jefferson confided to a friend that he did not accept the divinity of Christ, but nevertheless viewed himself as a follower of Jesus because of Jesus’s “*human excellence.*” Letter to Dr. Benjamin Rush, Washington, D.C., April 21, 1803 (emphasis in original). Jefferson even compiled a work entitled, *The Life and Morals of Jesus of Nazareth Extracted Textually from the Gospels*. Known as *The Jefferson Bible*, it is a narrative told by New Testament clippings cut and pasted by Jefferson to present many

³ See also, e.g., Koran 5:75, 19:30-35.

details of Jesus's life and teachings, but omitting miracles and the resurrection.

Mahatma Gandhi, a Hindu, described Jesus as “one of the greatest teachers humanity has ever had” and boldly wrote that “he belongs not solely to Christianity, but to the entire world; to all races and people, it matters little under what flag, name or doctrine they may work, profess a faith, or worship. . . .” Mahatma Gandhi, “What Jesus Means to Me,” *The Modern Review*, Oct. 1941, *republished at* [http:// www.sacred-living.org/gandhi-what-jesus-means-to-me](http://www.sacred-living.org/gandhi-what-jesus-means-to-me).

Given such high regard for Jesus even among non-Christians, it would not be surprising to hear his name *mentioned* in a prayer, even where the prayer is not *offered* in his name. One might hear references to Jesus in a variety of circumstances where his teachings – such as mercy, reconciliation and care for the needy – may be germane to public policy.⁴ Surely it cannot be that merely mentioning Jesus in a legislative prayer creates a constitutional concern. Just as a speaker might, in an appropriate setting, invoke the memory of other figures whose example and moral teachings he wishes to set before an assembly in prayer – *e.g.*, Moses, Dietrich Bonhoeffer, Gandhi, Martin Luther King, Mother Teresa – so too, he may wish to invoke the memory of Jesus because of his example and moral teachings.

⁴ See, *e.g.*, *Matthew* 5:7 (“Blessed are the merciful: for they shall obtain mercy.”); *id.* 5:9 (“Blessed are the peacemakers: for they shall be called the children of God.”); *id.* 25:34-45 (care for the hungry, the sick, strangers in the land, prisoners and others in need); *Luke* 6:31 (“Do unto others as you would have them do unto you.”); *id.* 10:30-37 (parable of the good Samaritan).

Viewed in this light, the Fourth Circuit's approach becomes even more problematic. Parsing legislative prayers for references to Jesus requires courts either to engage in viewpoint discrimination by limiting *all* references to Jesus, or to engage in the sometimes complex task of discerning whether a particular reference to Jesus involves his divine aspect as recognized by Christians, or his role as a moral teacher as recognized almost universally. Surely, this is a thicket that courts must avoid.

3. Proscribing the Name of Jesus Is Inconsistent with Original Intent and the Analytical Approach Followed in *Marsh*.

Any constitutional condemnation of legislative prayer based on references to Jesus runs afoul of the methodology used in *Marsh*. Critical to the Court's reasoning was the fact that the *same* Congress that proposed the Establishment Clause also arranged for its sessions to begin with prayers, and that it hired a chaplain to offer those prayers:

It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Marsh, 463 U.S. at 790-91 (emphasis added).

No one familiar with the religious history of the United States can doubt that the prayers offered by early congressional chaplains mentioned Jesus Christ. Bishop William White, for example, was appointed Senate Chaplain in 1790. See http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm. He later wrote about the prayers he offered:

My practice, in the presence of each house of congress, was in the following series: *the Lord's prayer*; the collect Ash Wednesday; that for peace; that for grace; the prayer for the President of the United States; the prayer for Congress; the prayer for all conditions of men; the general thanksgiving; St. Chrysostom's Prayer; *the grace of the Lord Jesus Christ*, etc.

Bird Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episcopal Church of the State of Pennsylvania* (1939) 322 (Letter to Rev. Henry V.D. Johns, Dec. 29, 1830) (emphasis added).

“[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent.” *Marsh*, 463 U.S. at 790. Following the same mode of analysis used in *Marsh* – original intent as illuminated by original practice – it is difficult to see how prayers mentioning Jesus are too specific in theological content to be constitutionally acceptable.

To use original intent as a guide to acceptable theological *specificity* does not mean, however, that

prayers with Christian *content* enjoy a degree of constitutional protection not afforded to prayers of other faiths. Just as a “Jesus prayer” should not be condemned as unconstitutional when offered in a legislative setting, neither should a Jewish rabbi’s prayer be condemned when offered to “Adonai” (Hebrew for “Lord”) or when quoting the Torah or Talmud; nor should a Muslim imam’s prayer be condemned when offered to “Allah” or when quoting the Koran or Hadith. Indeed, the record shows that those invited by Forsyth County to offer prayers according to the dictates of their own faith, have included not just Christian clergy, but Jewish and Muslim leaders as well. *See* Cert. Pet. 11.

C. The Approach Followed by the Fourth Circuit Breeds Divisiveness.

Whenever institutions of government take action touching on matters of religion, there is a potential for divisiveness as well as resentment and alienation on the part of those whose scruples are offended by that action. When long-established practices are challenged for allegedly violating the Establishment Clause, the resentment and alienation felt by plaintiffs often is articulated in their complaint and considered by the court in adjudicating the matter. Such was the case here. *See* Cert. Pet. 5, App. 32a.

Less obvious to courts – and typically not part of the proceedings – are the resentment and alienation that would be felt by members of the public who are not parties to the case, but who nevertheless would be offended if the court struck down a cherished practice. This is not to say that constitutional decision-making should be based on measuring the degree to which

citizens might be offended by the potential outcomes. If, however, courts are to consider divisiveness in support of a plea to invalidate a government practice, they also should take into account the divisiveness that such a decision would cause.

The decision below is divisive. Although not the court's intention, it will be seen by some as relegating the name "Jesus" to a category of boorish words not to be uttered in polite company. It prohibits – or artificially limits – in legislative settings the type of prayer that many Christians believe is spiritually necessary. Moreover, the decision departs dramatically not only from the *original* understanding of the Establishment Clause, but also from the understanding that many Americans *continue* to hold. When the Constitution is, in effect, amended by judicial decision in an area of great sensitivity – and at the urging of a disaffected minority – citizens opposed to the change understandably feel that they are, to borrow Justice O'Connor's phrase, "outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

II. THIS COURT'S JURISPRUDENCE PROVIDES READY ALTERNATIVES TO THE FLAWED "SECTARIAN" APPROACH USED BY THE FOURTH CIRCUIT.

This Court's jurisprudence offers at least three alternatives to decide this case, each of which avoids the constitutional thicket stemming from the Fourth Circuit's approach. This Court should grant the petition, determine which route best resolves this case, and implement a workable rule going forward.

A. Legislative Immunity and/or the Political Question Doctrine Preclude Judicial Oversight of Legislative Prayer Where Public Funds Are Not at Issue.

The most direct approach is for the Court to conclude that legislative immunity and/or the political question doctrine preclude any judicial oversight of legislative prayers, at least where public funds are not at issue.

1. Legislative Immunity

Perhaps the best known example of legislative immunity is the federal Speech and Debate Clause.⁵ Although the Clause only mentions Members of Congress, the Court has explained that it reflects an older and larger principle of legislative immunity that is not limited to federal legislators. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), a case involving *state* legislators, the Court explained:

In 1689, the [English] Bill of Rights declared in unequivocal language: “That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned *in any Court* or Place out of Parliament.”

Freedom of speech and action in the legislature was taken as a matter of course by those who

⁵ “The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place.” U.S. Const., art. I, § 6.

severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. . . .

Id. at 372-73 (citations omitted) (emphasis added).

In *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), the Court held that members of a city council enjoy the same immunity as state legislators and Members of Congress:

Because the common law accorded local legislators the *same absolute immunity* it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that *local legislators are likewise absolutely immune* from suit under § 1983 for their legislative activities.

Id. at 49 (emphasis added). Thus, Forsyth County's Commissioners enjoy legislative immunity.

Legislative immunity sweeps broadly. It precludes suits for damages and for injunctive relief. *See, e.g., Supreme Court v. Consumers Union of United States*, 446 U.S. 719, 731 (1980). It applies not just to speeches on the floor, but whenever legislators are engaged in legislative activity. *See, e.g., United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007). Such activity includes the policies by which legislatures select individuals to offer prayer at their meetings as well as the policies by which they may or

may not choose to supervise the content of those prayers. Their choices are protected by legislative immunity.

Where legislative immunity applies, federal courts lack subject-matter jurisdiction. *E.g.*, *Browning v. Clerk, U.S. House of Reps.*, 789 F.2d 923, 931 (D.C. Cir. 1986) (dismissing case for lack of subject matter jurisdiction because challenged actions were protected by legislative immunity). Questions of subject-matter jurisdiction may be raised at any time and may be raised *sua sponte* by the court. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 93 (1998). Thus, legislative immunity furnishes a path for this Court to reverse the decision below and formulate a rule precluding federal courts from exercising judicial oversight of legislative prayers, at least where public funds are not at issue.

Applying legislative immunity in this context may seem inconsistent with *Marsh*, which appears to authorize – albeit reluctantly – some degree of judicial scrutiny into prayer content. *Marsh*, 463 U.S. at 794-95. Yet, *Marsh* can be distinguished. First, *Marsh* deals with legislative prayers said by a chaplain paid with *public funds*. *Id.* at 784. In Forsyth County, the expenditure of public money was not an issue. Cert. Pet. 18. Second, the chaplain in *Marsh* was appointed biennially, 463 U.S. at 784, and, thus may be viewed as a government official. As such, he did not enjoy the same immunity as *members* of the legislature. See *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881) (allowing judgment against the Sergeant-at-Arms, but not against defendant Members of the House). Third, the issue of legislative immunity was not decided by the Court in *Marsh*. In sum, *Marsh* does not preclude

the Court from deciding that legislative immunity applies.

2. Political Question Doctrine

Application of the political question doctrine would also preclude judicial review of the content of legislative prayers. In *Baker v. Carr*, 369 U.S. 186 (1962), this Court recognized several hallmarks of disputes that are properly left to the political branches, and that federal courts lack jurisdiction to consider. They include, *inter alia*, “[1] a textually demonstrable constitutional commitment of the issue to a coordinate branch of government; or [2] a lack of judicially discoverable and manageable standards for resolving it; or . . . [3] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . .” *Id.* at 217.

Of these factors, the one that counsels most directly against federal court jurisdiction here is the “lack of judicially discoverable and manageable standards.” Again, there are no readily available legal principles for defining “sectarian” or for ascertaining which theological premises are sufficiently inclusive to render prayers “nonsectarian.” *See supra* Part I.A. “Whether invocations of ‘Lord of Lords’ or ‘God of Abraham, Isaac, and Mohammed’ are ‘sectarian’ is best left to theologians, not courts of law.” *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1267 (11th Cir. 2008).

Two additional *Baker* factors also would be clearly implicated if the legislative prayers of Congress were

before the Court.⁶ Judicial intervention in the internal processes of Congress would demonstrate “a lack of respect due [a] coordinate branch[] of government.” *Baker*, 369 U.S. at 217. Moreover, there is a “textually demonstrable constitutional commitment of the issue to a coordinate branch of government.” *Id.* The issue here involves the conduct of legislative activity, which is wholly committed to Congress under the Speech and Debate Clause, *see supra* Part II.A.1, and under the clause committing to each house of Congress the exclusive power “to determine the rules of its proceedings.” U.S. Const. art. I, § 5, cl. 2. There are no textual prohibitions on the types of prayers those rules may allow.

In sum, federal courts should not sit in judgment of prayers offered in Congress, and they likewise should not sit in judgment of prayers offered before a state assembly or county board. *See, e.g., Colgrove v. Green*, 328 U.S. 549, 553-56 (1946) (plurality opinion of Frankfurter, J.) (discussing political-question obstacles to justiciability in case involving state-level political actions). The political question doctrine applies to the activities of the Forsyth County Board of Commissioners involving legislative prayer.

⁶ This point must be noted because in *Marsh*, although this Court was considering the constitutionality of prayer in the Nebraska legislature, it was primarily upon the facts of Congress’s establishing legislative prayer that the Court found legislative prayer acceptable under the Establishment Clause. *See* 463 U.S. at 787-90.

B. The Tenth Circuit Furnishes a Basis to Construe the Meaning of “Advance” as Used in *Marsh* and to Reverse the Decision Below.

The Fourth Circuit decision creates a split with other circuits, various aspects of which are discussed by the Petitioner. *See* Cert. Pet. 7. To supplement that discussion, the split with the Tenth Circuit is what this Court meant when it discussed legislative prayer not being used to “advance” religion.⁷

As the Tenth Circuit correctly reasoned, “all prayers ‘advance’ a particular faith or belief in one way or another.” *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998). Thus, this Court must have used the term in *Marsh* in a special way, requiring something more than what is meant by advancement under the *Lemon* test⁸ – a test that *Marsh* did not use. The Tenth Circuit read the term “advance” to mean “*aggressively advocate*[] a specific religious creed,” *id.* (emphasis added), a formulation that leaves undisturbed much of what the *Lemon* test would forbid. In commenting on *Snyder*, another court provided this helpful analysis:

[T]he Tenth Circuit appeared to read the inclusion of the “or advance” clause as an attempt by the Supreme Court to “blur” the

⁷ *See Marsh*, 463 U.S. at 794-95 (“The content of [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, or to disparage any other, faith or belief.”).

⁸ *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

otherwise confined lines around the periphery of the proselytization prohibition and ensure that actors would not skirt the impact of its holding in *Marsh* by omitting only the overt calls to conversion that are customarily understood as “proselytizing” efforts.

Bats v. Cobb Cnty., 410 F. Supp. 2d 1324, 1334 (N.D. Ga. 2006), *aff’d sub nom. Pelphrey*, 547 F.3d at 1269.

Notwithstanding its favorable citation of *Snyder*, *see* Cert. Pet. 26a, the Fourth Circuit failed to focus on the Tenth Circuit’s view that what is required is not merely the *Lemon*-like “advancement” of a particular faith or belief, but “aggressive advocacy” of that faith or belief. The Fourth Circuit did not find the Forsyth County prayers to be problematic because of aggressive advocacy, but because they referred to Jesus more often than the court thought was acceptable. *Id.* at 28a (“Almost four-fifths of the prayers delivered after the adoption of the policy referenced Jesus Christ. None of the prayers mentioned any other deity.”). Thus, there is a conflict between the Fourth and Tenth Circuits, which the Court should resolve.

In so doing, the Court should adopt the Tenth Circuit’s interpretation of “advancement” in order to avoid importing into legislative prayer jurisprudence elements of the *Lemon* test that the Court in *Marsh* implicitly concluded do not apply. *See Marsh*, 463 U.S. at 800-01 (Brennan, J., dissenting) (criticizing majority for not using *Lemon* and noting that “if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be

unconstitutional.”). Given the absence of aggressive advocacy in the prayers at issue, adopting the Tenth Circuit’s approach would lead to a ruling in favor of Forsyth County.⁹

C. Under the Neutral Policy Used in Forsyth County, Any “Advancement” Cannot Be Attributed to the Government.

Assuming *arguendo* that the prayers said in Forsyth County involve “advancement” within the meaning of *Marsh*, there is still no constitutional violation because any such advancement is a result of private action. The *government* has not “exploited the prayer opportunity” to bring about that advancement.

In *Mitchell v. Helms*, 530 U.S. 793 (2000), a plurality of this Court noted that, “[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of *neutrality*, upholding [a program] that is offered to a broad range of groups or persons *without regard to their religion*.” *Id.* at 809 (emphasis added). The Forsyth County policy is neutral in that it offers the opportunity for legislative prayer to a broad range of religious leaders – as broad

⁹ Such an outcome would bypass – rather than resolve – the problem of labeling prayers “sectarian” or “non-sectarian” (a problem present in *Snyder* and *Marsh*). Failure to reach that issue, however, is not necessarily a drawback, since “courts [should] avoid reaching constitutional questions in advance of the necessity of deciding them.” *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988).

as the population of the county – without regard to sect or denomination.¹⁰

It was not neutrality alone, however, that led the *Mitchell* plurality to decide that any advancement of religion would not be attributed to the government there. It was also the presence of “private choice.” *Id.* at 812. Here, too, the policy of Forsyth County passes muster because prayer content was left to the discretion of the religious leaders who offered them. Cert. Pet. 3-4. Thus, in the words of *Mitchell*, “neutrality and private choices together eliminated any possible attribution [of advancement] to the government.” *Id.* at 810.¹¹

Nor can impermissible advancement of religion be found in the fact that four-fifths of the legislative prayers in Forsyth County mentioned Jesus. Such “Jesus-counting” was essential to the reasoning employed by the Fourth Circuit. However, this Court has made it clear that, when neutrality and private choice are present, the fact that a broadly-available program leads to a “lop-sided” result does not signal an Establishment Clause violation. In upholding a school

¹⁰ Although the school aid program at issue in *Mitchell* was also offered to non-religious participants, the analogy still holds because limiting the opportunity to offer prayer to religious participants is implicit in the very concept of prayer.

¹¹ See also *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011); *Agostini v. Felton*, 521 U.S. 203, 223-27 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10, 12 (1993); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 486-88 (1986).

voucher program in *Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002), the Court said:

The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. . . . [S]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

(Internal quotations and citation omitted). Similarly, the fact that most religious leaders who offered legislative prayers in Forsyth County mentioned the name “Jesus” does not create a constitutional problem. A reasonable observer, familiar with the neutrality of the governing policy, would recognize that the prevalence of “Jesus prayers” does not convey government favoritism of Christianity over any other faith, but merely reflects the demographics of Forsyth County. For their legislative prayers to invoke the name of Jesus – and to do so frequently – does not violate the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted on the questions presented by Petitioner and the jurisdictional question raised by *amici*.

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November 30, 2011

APPENDIX

APPENDIX

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Appendix A: List of *Amici Curiae* 1a

APPENDIX A

A total of 15 Members of the House of Representatives in the Congress of the United States have joined this brief as *amici curiae*. These Members are the Honorable:

Rep. Spencer Bachus of the 6th District of Alabama

Rep. Stephen Fincher of the 8th District of Tennessee

Rep. J. Randy Forbes of the 4th District of Virginia

Rep. Virginia Foxx of the 5th District of North
Carolina

Rep. Louie Gohmert of the 1st District of Texas

Rep. Vicky Hartzler of the 4th District of Missouri

Rep. Bill Huizenga of the 2nd District of Michigan

Rep. Steve King of the 5th District of Iowa

Rep. John Kline of the 2nd District of Minnesota

Rep. Doug Lamborn of the 5th District of Colorado

Rep. Mike McIntyre of the 7th District of North
Carolina

Rep. Joe Pitts of the 16th District of Pennsylvania

Rep. Tim Walberg of the 7th District of Michigan

2a

Rep. Joe Walsh of the 8th District of Illinois

Rep. Frank R. Wolf of the 10th District of Virginia