NO. _____

IN THE

Supreme Court of the United States

FORSYTH COUNTY, NORTH CAROLINA,
Petitioner,

v.

JANET JOYNER AND
CONSTANCE LYNNE BLACKMON,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Board of Commissioners of Forsyth County, North Carolina has long maintained the ubiquitous tradition of solemnizing its proceedings with an invocation before each meeting. The Board invited leaders from every religious congregation in the county to volunteer on a first-come, first-served basis to deliver an invocation consistent with the dictates of each leader's own conscience. Three plaintiffs sued the County, claiming that its failure to proscribe sectarian references in the invocations offended them and violated the Establishment Clause. In a 2–1 decision, the Fourth Circuit found the Board policy to be neutral on its face, but held that the County has an affirmative duty to purge sectarian references from the greater number of invocations.

The following questions warrant review:

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.

PARTIES TO THE PROCEEDING

All the parties in the proceeding are identified in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Forsyth County, North Carolina is not a publicly held entity and does not have parent corporations.

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INTRODUCTION

Legislative bodies at all levels of government in our country have solemnized their proceedings with prayer for well over 200 years, and this Court affirmed the constitutionality of this "deeply embedded" tradition in *Marsh v. Chambers*, 463 U.S. 783 (1983).

In the 28 years since *Marsh*, a fundamental question has emerged regarding legislative prayer: does the Constitution require the government to censor prayer content to exclude sectarian references? The question now looms over deliberative public bodies at every level of government across the country, as circuit courts are hopelessly conflicted on the issue. The resulting confusion has produced a rash of litigation, perplexed government attorneys struggling to advise their clients, and caused many public bodies to simply abandon their long-held invocation traditions for fear of legal challenge.

In this case, the Forsyth County Board of Commissioners invited local leaders of every faith in the county to volunteer on a "first-come, first-served" basis to deliver an invocation consistent with each guest speaker's respective faith tradition. While the Fourth Circuit affirmed that the policy was "neutral and proactively inclusive" on its face, it ruled that the policy was nonetheless invalid "as implemented" because the County did not "proactively discourage" "sectarian references" in prayers offered by the citizen volunteers.

This decision distorts this Court's precedent, imposes an unwieldy requirement that government

police the language of prayers, and conflicts with the Eighth and Eleventh Circuits' decisions holding that substantively identical policies do not violate the Constitution simply because invocations may include "sectarian" references.

Since 2008, federal courts in four other circuits have ruled on the question presented here.[1] The Fourth Circuit conflicts with each one by demanding government regulation of indeterminately-defined "sectarian" references in legislative prayer.

DECISIONS BELOW

The recommendation of the Magistrate Judge is available electronically at 2009 WL 3787754 and reprinted at App. D. The District Court's Order is not reported, but is reprinted at App. B. The District Court's judgment is reprinted at App. C. The Fourth Circuit opinion is reported at 653 F.3d 341 and is reprinted in App. A.

STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion on July 29, 2011. This Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

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[1] *Pelphrey v. Cobb Cnty., Ga.*, 547 F.3d 1263 (11th Cir. 2008); *Doe v. Tangipahoa Sch. Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009); *Galloway v. Town of Greece, N.Y.*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010), *argued,* No. 10-3635 (2d Cir. Sept. 12, 2011); *Rubin v. City of Lancaster, Cal.*, __ F. Supp. 2d __, 2011 WL 2790273 (C.D. Cal. July 13, 2011).

PERTINENT CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ."

STATEMENT OF THE CASE

A. Material Facts

The material facts are undisputed. The Forsyth County Board of Commissioners (the "Board"), an elected deliberative body, holds public meetings twice a month. For decades, the Board maintained the following invocation practice:

- The Board invited leaders of every identifiable religious congregation in the county, irrespective of faith, to give an invocation. This invitation was extended to all local faith groups including, but not limited to, Methodist, Baptist, Greek Orthodox, Catholic, Moravian, Universalist, Ba'hai, Islamic, Jewish, Mormon, Friends/Quaker and Jehovah's Witness.
- Those responding to the invocation were scheduled on a first-come, first-served basis.
- In order to ensure a diversity of speakers, no leader was scheduled for consecutive meetings or for more than two meetings in a calendar year.
- Prior to the official start of the meeting, the Board opened the podium to the scheduled

> citizen volunteer who offered an invocation according to the dictates of his or her own conscience.

App. 6–7a, 38a.

Drawing from the *Marsh* decision, the Board's letter of invitation to the community's religious group representatives closed with the following admonition:

> This opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. To maintain a spirit of respect and ecumenism, the Board requests only that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker.

Id. at 6a.

On May 14, 2007, the Board formalized the legislative prayer policy. App. F. It is undisputed that the written policy codified the Board's prior practice. App. 7a. The policy clarified that the invocations were the private expressions of the speaker and were not representative of the Board's affiliation or preference. App. 4f. The County's policy and its implementation treated religious leaders from all religions identically, and every congregation in the County was invited to participate in the prayer opportunity. App. 50a.

Leaders from diverse viewpoints took the opportunity to offer invocations at public Board

meetings, including leaders of Jewish, Muslim, Unitarian Universalist, Scientologist, and many distinct denominations within the Christian faith. 4th Cir. Jt. App. 559. Many of the invocation speakers chose to close their prayer "in the name of Jesus" or similar expression. Many included references to certain tenets of their respective faiths. *See, e.g.*, App. 20a.

There is no allegation that invocation speakers attempted to proselytize or convert others to a particular faith or disparage the beliefs of others.

B. Course of Proceedings

1. District Court Proceedings

On March 30, 2007, Plaintiffs filed suit claiming alleged injuries arising from having "been offended" by hearing sectarian prayers. Compl. ¶ 7. On January 31, 2008, Plaintiffs amended their complaint to allege that the County's written policy violated the Establishment Clause because it did not discourage or prohibit prayers from including "sectarian" references. Am. Compl. ¶ 49.

The Magistrate Judge acknowledged the *Marsh* decision and the constitutionality of public invocations provided by a government employee. However, the Magistrate noted that different federal circuits have since developed conflicting tests for evaluating invocation practices, and that the Eleventh Circuit was "not consistent with the Fourth Circuit to the extent that it decline[d] to consider the content of legislative prayer to determine whether a prayer advances any one faith or belief." App. 13d n.3. The Magistrate explained that the Fourth Circuit requires a court to consider the content of

prayer first and then consider if the prayer opportunity was exploited. The Magistrate ultimately determined that the invocation policy here was facially neutral but, as implemented, resulted in frequent references to "Jesus," "Christ," or "Savior" by the community volunteers, and thereby the County displayed an unconstitutional preference for Christianity over other religions. *Id.* at 17–18d.

The District Court adopted the recommendation of the Magistrate, granted summary judgment to the Plaintiffs, and enjoined Forsyth County from continuing the invocation policy as implemented. App. 6b.

2. Circuit Court of Appeals Proceedings

On appeal, the Fourth Circuit panel agreed that the County's invocation policy was neutral on its face, App. 29a, but the panel sharply divided on the question of whether it should be upheld as implemented. The panel focused on a single legal question: does the Establishment Clause require the government to edit the content of prayers to eliminate "sectarian references"? The majority found the implementation of the policy unconstitutional because it resulted in "frequent" sectarian references, which, the majority determined, amounted to "government advancement and effective endorsement of one faith." App. 31–32a.

Applying this "frequency" standard, the majority reviewed the content of the prayers delivered in Forsyth County and found them unconstitutional simply because many contained references to Jesus or "specific tenets and articles of faith of

Christianity." App. 21a. The majority rationalized that its decision to parse the content of *all* the prayers did not contravene this Court's instruction in *Marsh* that courts not parse the content of a *particular* prayer. The majority stated that "[r]ather than 'parsing' the details of a particular prayer," it followed circuit practice by "look[ing] at the district court's factual finding about the frequency with which the council 'invoked "Jesus," "Jesus Christ," "Christ," or "Savior"' in determining whether the prayers actually did proselytize or advance a particular sect." App. 25a.

Finally, the majority stated, "[i]t is not enough to contend, as the dissent does, that the policy was 'neutral and proactively inclusive,' when the County was not in any way proactive in discouraging sectarian prayer in public settings." *Id.* at 29a. The court reasoned that "policies that do not discourage sectarian prayer will inevitably favor the majoritarian faith in the community," and for that reason are unconstitutional. *Id.* at 30a.

In his dissent, Judge Niemeyer noted the majority's divergence from this Court's precedent, highlighted a clear conflict among the federal circuits, and noted significant practical problems with the majority opinion:

> [T]he majority has dared to step in and regulate the language of prayer. . . . Such a decision treats prayer agnostically; reduces it to a civil nicety; hardly accommodates the Supreme Court's jurisprudence in *Marsh v. Chambers*, 463 U.S. 783 (1983); and creates a circuit split, see *Pelphrey v. Cobb County, Ga.*,

> 547 F.3d 1263 (11th Cir. 2008) (finding constitutional legislative prayers offered by "volunteer leaders of different religions, on a rotating basis," even though the prayers referenced Jesus; Allah; the God of Abraham, Isaac, and Jacob; Mohammed; and Heavenly Father). Most frightfully, it will require secular legislative and judicial bodies to evaluate and parse particular religious prayers under an array of criteria identified by the majority.

App. 34a.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit held that the Establishment Clause requires the government to prohibit "sectarian" references in legislative prayers. That decision reflects the doctrinal confusion that has developed among the lower courts concerning the proper application of *Marsh*. This confusion has generated a circuit conflict and spurred an increasing number of new challenges to legislative prayer policies nationwide.

As explained by the dissent, the majority decision below conflicts with the holding of *Marsh*, and in so doing, creates new Establishment Clause pitfalls for public bodies. The decision posits an arbitrary and unworkable new "standard" for legislative prayer analysis. If allowed to stand, it will require unmanageable government evaluation of degrees of "sectarianism." This Court should grant review and resolve the conflicts among the lower courts in this *sui generis* category of Establishment Clause

jurisprudence.

I. THE FOURTH CIRCUIT DECISION CREATES A CIRCUIT CONFLICT WITH THE EIGHTH, TENTH, AND ELEVENTH CIRCUITS.

A. The Fourth Circuit decision is in direct conflict with the Eleventh and Eighth Circuits.

The panel decision below is the first binding federal appellate decision to require the government to police the theology of legislative invocations.[2]

The facts in this case are substantively indistinguishable from those in cases reviewed by other courts, including *Pelphrey,* 547 F.3d 1263; *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979); *Rubin v. City of Lancaster, Cal.*, __ F. Supp. 2d __, 2011 WL 2790273 (C.D. Cal. July 13, 2011); *Galloway v. Town of Greece, N.Y.*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010), *argued,* No. 10-3635 (2d Cir. Sept. 12, 2011); and *Doe v. Tangipahoa Sch. Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009). In each of those cases, a local governmental body invited local religious leaders to provide invocations consistent with the dictates of the invocation speaker's own conscience. Offended plaintiffs challenged the respective prayer policies on the ground that some of the invocations included "sectarian" references. But in every case, the courts affirmed that the government is not required to

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[2] *See Pelphrey*, 547 F.3d at 1274 (noting that parsing legislative prayers for sectarian references is a theological exercise that places the government in the role of "ecclesiastical arbiter").

mandate only "nonsectarian" prayers.

1. The majority opinion conflicts with the Eleventh Circuit.

The dissent below notes that the majority opinion "is in direct conflict" with the Eleventh Circuit opinion in *Pelphrey*. App. 54a. In both cases, local religious leaders were invited to participate in the prayer opportunity. In both cases, the invited speakers delivered an invocation consistent with their respective faith traditions. In both cases, prayers most often included explicitly Christian references. But unlike in the case below, the *Pelphrey* court found no constitutional violation.

The facts of *Pelphrey* reveal that "between 1998 and 2005, 96.6 percent of the clergy [that delivered an invocation], to the extent their faith was discernable, were Christian." 547 F.3d at 1267. Additionally, in the decade prior to the court's decision "70 percent of the prayers before the county commission contained Christian references." *Id.* Despite the overwhelming frequency of Christian references, the Eleventh Circuit concluded:

> The taxpayers would have us parse legislative prayers for sectarian references even when the practice of legislative prayers has been far more inclusive than the practice upheld in *Marsh*. We decline this role of "ecclesiastical arbiter" . . . .

Id. at 1274.

The Fourth Circuit majority attempted to distinguish *Pelphrey* by opining that the "sectarian

terms" in the prayers offered in *Pelphrey* were of no moment because, in a period exceeding ten years, Jewish, Unitarian, or Muslim clerics occasionally offered invocations. App. 27a (quoting *Pelphrey*, 547 F.3d at 1266). The majority distinguished the Forsyth County facts by focusing solely on the one year following the written codification of the Board's decades-old invocations practice and noting, "[n]one of the prayers mentioned any other deity" than Jesus, and no "non-Christian religious leader c[a]me forth to give a prayer." App. 28a.

The majority's suggested distinction is meritless because it ignores the facts and the law. First, the majority overlooked the fact that in the years prior to Forsyth County's written codification of its invocation practice, Jewish, Unitarian, Muslim, and Mormon leaders prayed at its Board meetings. Indeed, a Muslim imam gave an invocation on the night the Board codified its policy. 4th Cir. Jt. App. 498.

Second, the majority ignored the reasoning of this Court in *Marsh,* where the same Christian minister offered prayers before the Nebraska Legislature for sixteen years, and no deity inconsistent with the Christian faith was ever referenced. While the Nebraska Legislature's practice was approved in *Marsh*, the majority here implies that Forsyth County—which employed a broader, open invitation policy rather than the single chaplain model of Nebraska—had a constitutional duty to manipulate its selection process to meet some undefined religious diversity quota. *See* App. 53a (Niemeyer, J., dissenting) (noting the majority's rationale leaves the court "with either directing the government to

prohibit sectarian prayer altogether, a position that is not constitutionally required and is in direct conflict with *Pelphrey*, or requiring legislative bodies to establish[] sectarian quotas") (internal citation omitted).

The *Pelphrey* decision has been widely accepted as a correct application of *Marsh*. *See Tangipahoa Sch. Bd.*, 631 F. Supp. 2d at 837 ("The Eleventh Circuit, in a scholarly and insightful opinion, explicitly rejected an argument that *Marsh* permits only nonsectarian prayer; rather, that court cautioned, courts should not evaluate the content of prayer absent evidence of exploitation"); *Galloway*, 732 F. Supp. 2d at 243 ("[T]he Court finds the Plaintiff's proposed non-sectarian policy, which would require Town officials to differentiate between sectarian prayers and nonsectarian prayers, is vague and unworkable, as *Pelphrey* demonstrates"); *Rubin*, 2011 WL 2790273, *6 at n.4 ("As the Eleventh Circuit noted, whether certain references 'are "sectarian" is best left to theologians, not courts of law'" (quoting *Pelphrey*)). The Fourth Circuit majority rejected this common sense position.

2. The majority opinion conflicts with the Eighth Circuit.

Like the Eleventh Circuit, the Eighth Circuit has also held that legislative prayers may contain sectarian references. In *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979), a precursor to this Court's opinion in *Marsh*, the Eighth Circuit affirmed a policy very similar to Forsyth County's. In *Bogen*, a county board invited local clergy to provide the invocations prior to its public meetings. Each of the volunteers happened

to be Christian clergy, and the county board did not review or edit the content of the resulting prayers. The Eighth Circuit found no problem with the sectarian content of the invocations and upheld the prayer policy as constitutional. *Id.* at 1113.

The conflict between these circuits and the majority in the present case is significant. While the Eighth and Eleventh Circuits have left to the private volunteers the business of composing their own invocations, the Fourth Circuit now "require[s] legislative bodies to undertake the impossible task of monitoring and prescribing appropriate legislative prayers for religious leaders to offer as invocations." App. 56a (Niemeyer, J., dissenting).

B. The Fourth Circuit's interpretation of the Marsh standard is in conflict with the Tenth and the Eleventh Circuits.

A difference in the interpretation of one key word—"advance"—in the *Marsh* decision has resulted in a further conflict between the Fourth Circuit and its sister circuits.

In *Marsh*, this Court confirmed that the content of legislative prayer "is not of concern to judges" absent an "indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794–95. It is the Fourth Circuit's interpretation of the word "advance" that has caused a circuit division.

1. The Tenth Circuit's interpretation of *Marsh* is the most widely accepted.

The Tenth Circuit has held that "the kind of

legislative prayer that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine." *Snyder v. Murray City, Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998). The court explained:

> Of course, 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. Nevertheless, the context of the decision in *Marsh* . . . underscores the conclusion that the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause. Rather, what is prohibited by the clause is a more aggressive form of advancement, *i.e.*, proselytization. By using the term "proselytize," the Court indicated that the real danger in the area is [an] effort by the government to convert citizens to particular sectarian views.

Id. at n.10 (internal citations omitted).

The Eleventh Circuit has adopted the logic and rationale of *Snyder* (*see Pelphrey*, 547 F.3d at 1274), and all of the federal district courts that have considered the validity of sectarian references in legislative prayers in the last three years have also adopted the analysis of the Tenth and Eleventh Circuits as the most accurate reading of *Marsh*. *See* s*upra* § I.A.1.

2. The Fourth Circuit's interpretation of *Marsh* creates a circuit conflict.

The Fourth Circuit expressly rejected the Tenth Circuit's rationale in *Snyder* and held instead that sectarian prayers that do not proselytize, disparage, or aggressively advocate may nevertheless "advance" a religious faith in violation of *Marsh*. *Wynne v. Town of Great Falls*, 376 F.3d 292, 301 n.6 (4th Cir. 2004) (rejecting the *Snyder* court's statement and holding that "[n]ot all prayers advance a particular faith. Rather, nonsectarian prayers, by definition, do not advance a particular sect or faith") (internal emphasis and quotation marks omitted). A divided panel of the Fifth Circuit followed the *Wynne* interpretation in *Doe v. Tangipahoa Parish Sch. Dist.*, 473 F.3d 188, 202 (5th Cir. 2006) (holding that legislative prayers that contain explicit references to a deity run afoul of *Marsh*), *vacated en banc on jurisdictional grounds*, 494 F.3d 494 (5th Cir. 2007); as did a divided panel of the Seventh Circuit in *Hinrichs v. Bosma*, 440 F.3d 393, 400 (7th Cir. 2006) (holding that *Marsh* prohibits "sectarian" references in legislative invocations), *vacated en banc on jurisdictional grounds sub nom. Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007).

In the present case, although the Forsyth County record shows a diverse pool of invocation speakers and reveals that no prayers sought to disparage others or convert the audience to a particular faith, the panel majority still found the County's policy unconstitutional as implemented because the prayers in the aggregate "advanced" Christianity. App. 20–

21a, 28a. When similar facts were presented to the Eighth and Eleventh Circuits, the case outcome was different.

This Court should grant review to clarify the proper meaning of the *Marsh* standard and bring uniformity to this muddled area of the law.

II. THE FOURTH CIRCUIT DECISION DISTORTS THIS COURT'S PRECEDENT.

The majority decision below not only relies upon a flawed interpretation of *Marsh,* it distorts the broader Establishment Clause principles that this Court has articulated. As noted by the dissent, the majority opinion requires the government to "step in and regulate the language of prayer," App. 34a, and that decision has striking implications. If allowed to stand, it will ensure widespread confusion among public bodies and jeopardize a long-cherished American tradition.

A. The Fourth Circuit decision is irreconcilable with *Marsh.*

As the only Supreme Court case to directly consider whether a legislative prayer violates the Establishment Clause, *Marsh* acknowledged the long history and tradition of such prayer. "From colonial times through the founding of the republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh*, 463 U.S. at 786. The challenged invocation policy of the Nebraska Legislature was not unlike the policies of countless other legislative bodies across our country. The policy approved by

the *Marsh* Court included the following features:

- Prayers given by a paid government employee carrying out his governmental function;
- Government selection of the prayer giver;
- Prayers by the same individual Christian minister for sixteen years, and in which no non-Christian deity was ever referenced; and
- Prayers that incorporated frequent and explicit sectarian references.[3]

Id. at 784–85.

Given the features of the prayer policy upheld in *Marsh*, the policy of Forsyth County should have been upheld by the court below. The Forsyth County

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[3] The *Marsh* majority opinion notes that for at least fifteen years (1965–80) the prayers of Reverend Palmer, the Presbyterian chaplain appointed by the Nebraska Legislature, were often explicitly Christian. *Marsh*, 463 U.S. at 793 n.14. While the majority made little of the sectarian references because the content of the prayers was not relevant to the holding, the dissenters clearly noted the sectarian references as a significant aspect of their objection. For example, Reverend Palmer's prayers included "Christological references." *Id.* at 800, n.9 (Brennan, J., dissenting). "The Court declines to 'embark on a sensitive evaluation or to parse the content of a particular prayer.' Perhaps it does so because it would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain." *Id.* at 823 (Stevens, J., dissenting) (internal citations omitted). Yet the prayers of the founding era, just as prayers given before Congress today, are replete with references to Jesus and the Christian faith. 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, 232 (2008). All of these invocations, indeed the practice upheld in *Marsh* itself, would be struck down under the Fourth Circuit's formulation.

policy was even more neutral, diverse and inclusive than the Nebraska Legislature's policy, and thus less susceptible to the allegations of sectarian favoritism relied upon below. Consider the comparative features of the policy here:

- [T]he County allowed leaders from every identifiable religious group in the county an equal opportunity to deliver an invocation;
- invocations were offered from a variety of denominations and diverse religious backgrounds and creeds;
- invocation speakers were self-selected, non-paid, private citizen volunteers who responded to an invitation extended to all; and
- the County exercised zero editorial control over the content of the prayers, leaving the invocations purely reflective of each speaker's own conscience and faith tradition.

App. 5–8a.

In his dissent below, Judge Niemeyer noted, "None of the policies in the prior cases approving legislative prayer was as neutral and inclusive as the policy in Forsyth County, and there is no evidence that Forsyth County diverged from its policy in implementing it." App. 51a. His detailed review of the record led to the following conclusion:

> In sum, the County's policy for legislative prayer is totally neutral, proactively inclusive, and carefully implemented so that the County, in no manner, could be perceived as selecting, or expressing a preference for a particular religious leader, a particular religion or

> denomination, or a particular prayer. In this structure, which was meticulously constructed to follow Supreme Court precedent, our intrusion is nothing short of a compromise of the County's effort to maintain an open and neutral policy.

App. 56–57a.

The invocation policy of Forsyth County informed the audience of the purpose of the invocations, permitted the invocations to be presented by private citizens rather than a paid government employee, and opened the opportunity to members of all faith traditions. The majority's failure to approve the Forsyth County policy is irreconcilable with the *Marsh* precedent and creates a new, unworkable standard for review of legislative prayer in the Fourth Circuit.

1. The Fourth Circuit decision requires government parsing and policing of prayer content.

As the dissent noted, a "most frightful" result of the majority's decision is that it "will require secular legislative and judicial bodies to evaluate and parse particular religious prayers under an array of criteria identified by the majority." App. 34a. In *Marsh*, this Court warned that judicial parsing of prayer content should be avoided where there is no evidence the prayer opportunity has been exploited. 463 U.S. at 794–95. And, as noted above, the *Marsh* Court did not consider mere sectarian references a problem. The dissent in *Marsh* objected that the prayers before the Nebraska Legislature were

explicitly sectarian. *See id.* at 823 (Stevens, J., dissenting). The majority noted the prayers were "often explicitly Christian," and yet the majority concluded the facts there provided "no indication that the prayer opportunity ha[d] been exploited." *Id.* at 793–94 & n.14.

The lesson from *Marsh* is that a prayer opportunity should not be deemed "exploited" merely because prayers may name a deity or include expressions of particular faith. By focusing on the context of a legislative prayer policy rather than the content of particular prayers, courts can safeguard constitutional guarantees without becoming embroiled in ecclesiastical evaluations and comparative theology.

The panel majority below inappropriately focused upon particular statements and selected phrases of past invocation speakers in Forsyth County. The court ferreted out "unacceptable" words and phrases while developing ratios and tabulating the number of times that "Jesus" or tenets of the Christian faith were referenced. *See* App. 19–21a, 28a. This subjective inquiry served as the basis of the majority's erroneous decision, and led to its creation of an entirely new Establishment Clause standard that is inconsistent with *Marsh*.

2. The Fourth Circuit decision evaluates legislative prayer by creating a new standard inconsistent with *Marsh*.

The Fourth Circuit decision is irreconcilable with

Marsh because it incorporates the *Lemon* test[4] that was posed by the *Marsh* dissent and rejected by the majority. It also distorts *Marsh*'s historical analysis.

a. The "frequency" standard devised by the Fourth Circuit relies on the "effects" evaluation explicitly rejected by this Court in *Marsh*.

The panel majority erred by concluding that dicta from this Court's opinion in *Cnty. of Allegheny v. ACLU,* 492 U.S. 573 (1989), suggests that the legislative prayers in *Marsh* were regarded as constitutional only because the chaplain allegedly "removed all references to Christ." *See* App. 22a. This is neither the record nor ruling of *Marsh*. *Supra* § II.A. n.4. The majority's conclusion also contradicts findings of its sister circuits. *See, e.g., Pelphrey,* 547 F.3d at 1271 ("The taxpayers argue that *Allegheny* requires us to read *Marsh* narrowly to permit only nonsectarian prayer, but they are wrong").

Based on this faulty premise, the majority below determined that frequent "sectarian" references in legislative prayer impermissibly risk affiliating the government with one specific faith or belief. The majority thus devised a "frequency" test for policing prayer practices, concluding that infrequent "sectarian" references may be constitutionally acceptable, but repeated "sectarian" references to a particular faith tradition in the same venue invalidate an otherwise neutral and inclusive invocations policy. App. 18–19a.

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[4] *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The majority reasoned that "frequent" "sectarian" references constitute "government advancement and effective endorsement of one faith." App. 32a. The Fourth Circuit thereby subverts the *Marsh* standard by adding to it the alien endorsement test.[5]

b. The Fourth Circuit's holding that *Marsh* only validates nonsectarian prayers is erroneous and in direct conflict with the Eleventh Circuit.

The Fourth Circuit relied on dicta in the fractured *Allegheny* opinion to conclude that *Marsh* stands for a proposition that it does not set forth: that only nonsectarian legislative prayers can pass constitutional muster. The prayers of the Nebraska chaplain as well as other legislative prayers considered by this Court contained frequent sectarian references. *Supra* § II.A. n.2*; see also Van Orden v. Perry,* 545 U.S. 677, 688 n.8 (2005) (noting "[i]n *Marsh*, the prayers were often explicitly Christian" and references to Christ were not limited until the year after suit was filed) (Rehnquist, C.J., plurality); *Doe v. Tangipahoa Sch. Bd.*, 473 F.3d 188, 212–13 (5th Cir. 2006) (Clement, J., dissenting) ("If content is determinative, the *Marsh* Court's analysis would be internally conflicted. The content of congressional prayer, referred to by the *Marsh* Court as exemplifying permissible legislative prayer, traditionally has included sectarian references. . . .

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[5] The "endorsement" test was first articulated in *Lynch v. Donnelly*, 465 U.S. 668, 691(1984), as an analytical tool in the application of the "effects" evaluation set forth as the second prong of the *Lemon* test. *Marsh* rejected the *Lemon* test as inapplicable to the review of legislative prayers. *Marsh*, 463 U.S. at 797.

By relying on congressional prayer as a demonstrative example, the *Marsh* Court endorsed the understanding that the sectarian nature of the prayer's content does not render it necessarily constitutionally unsound"), *vacated en banc on jurisdictional grounds*, 494 F.3d 494 (5th Cir. 2007).

As noted above, the panel's reliance on *Allegheny* to reinterpret the holding of *Marsh* also directly conflicts with the Eleventh Circuit's finding in *Pelphrey,* 574 F.3d at 1271. *See also Galloway*, 732 F. Supp. 2d at 225, 242 (neither *Marsh* nor *Allegheny* require nonsectarian prayers for Establishment Clause compliance).

B. The private choices determining the prayer content further deflect concerns of governmental denominational preference.

Denominational preference in legislative prayer was not of concern in *Marsh*, yet the Fourth Circuit relied upon it to find an Establishment Clause violation. It is constitutionally permissible, under *Marsh*, for the government to hire a chaplain from one denomination to devise and present prayers on a continual basis. All the more is it constitutional for the County here to accommodate volunteer clerics self-selected from among every local religious congregation to devise and present prayers on a rotating basis. Here, by design and in its implementation, the County's policy strictly limited its own participation in the invocations. As Judge Niemeyer noted in dissent, and the panel majority failed to countenance, "the nature of the prayer was not determined by the County or by any policy the County adopted or implemented." App. 52a.

Yet the panel majority ruled that because most of the clergy who volunteered to present an invocation could be identified with the Christian faith, the County was advancing or preferring one particular faith to the exclusion of others. App. 30a. This is surely incorrect on at least two levels. First, it is at odds with *Marsh*. Second, it is at odds with the principle employed in this Court's case law dissociating government imprimatur from the choices of private persons responding to neutral government invitations.

This Court has repeatedly ruled that private decisions to avail of opportunities presented in facially neutral government programs are not to be considered as bearing the imprimatur of the government. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (a government-funded sign-language interpreter conveying theological messages in a religious school was not attributable to government because the program neutrally provided access to a broad class of citizens without reference to their religious faith); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (a neutral scholarship program directed state aid to a religious institution because of the independent, private choice of the student, thus no attribution of sectarian messages to the government).

Further, because the County's neutral policy provided equal access to clerics of all faith congregations, the aggregate faith composition of the resulting respondent list is not attributable to the government any more than is the faith of any individual respondent. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (upholding a

neutral education voucher program even though 96% of the students enrolled in religiously affiliated schools, for the "focus again was on neutrality and the principle of private choice, not in the number of program beneficiaries attending religious schools"); *Mueller v. Allen*, 463 U.S. 388, 401 (1983) (upholding constitutionality of state program authorizing tax deductions for educational expenses even though 96% of the program beneficiaries were parents of children in religious schools, stating that "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").

The neutrality and non-attribution principle the foregoing cases propound is relevant here, adapted to *Marsh*'s allowance for invocations at government deliberative sessions. Within that context of permissible legislative prayer, and because of the neutral character of the County's invocation opportunity, government favoritism of one religion cannot logically be inferred.

III. THE FOURTH CIRCUIT DECISION CREATES ENORMOUS PRACTICAL PROBLEMS IMPACTING ALL LEVELS OF GOVERNMENT.

A. There is no workable standard to determine when an invocation is impermissibly "sectarian."

All invocations delivered at Forsyth County Board meetings were presented in the language of the invocation speaker and directed to the deity

represented by his or her respective faith tradition. The content of every prayer—indeed the act of prayer itself—communicates religious affirmations not universally shared. An invocation that is not directed at a particular deity is no prayer at all.

And because a prayer communicates beliefs that may contradict others, all prayer is inescapably "sectarian" in some general sense. *See Snyder*, 159 F.3d at 1234 n.10 ("Of course, 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").

The Fourth Circuit decision assigning to the government the obligation to "proactively discourage" sectarian references in prayers facilely assumes the government's capacity to discern what that forbidden characteristic is. What metric can a secular court use to adjudge how much is too much, when it comes to sectarianism?

The caution this Court expressed in *Marsh* on the "sensitive evaluation" associated with parsing the words of a prayer, *Marsh*, 463 U.S. at 794–95, addresses a concern this Court has applied in other contexts also. *See Widmar v. Vincent*, 454 U.S. 263, 269–70 n.6, 272 n.11 (1981) (holding that inquiries into religious significance of words or events are to be avoided); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) (stating that for authorities to troll through a religious institution's beliefs in order to identify whether it is "pervasively sectarian" is offensive and contrary to precedent); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (finding that "the very process of inquiry leading to

findings and conclusions" involving religious beliefs may impinge upon First Amendment rights).

Indeed, the only two courts to have analyzed the practical implications of enforcing a "nonsectarian" requirement for legislative prayer have highlighted the intractable difficulty of such a task. What constitutes a "sectarian" reference and how could such be policed? The Eleventh Circuit explained:

> We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the taxpayers have been opaque in explaining that standard. Even the individual taxpayers cannot agree on which expressions are "sectarian." . . . The taxpayers' counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. . . . The difficulty experienced by taxpayers' counsel is a glimpse of what county commissions, city councils, legislatures, and courts would encounter if we adopted the taxpayers' indeterminate standard.

Pelphrey, 547 F.3d at 1272. The Western District of New York was similarly perplexed:

> [T]he court finds that Plaintiff's proposed non-sectarian policy, which would require Town officials to differentiate between sectarian prayers and nonsectarian prayers, is vague and unworkable, as *Pelphrey* demonstrates. The instant case illustrates the illusory nature of so-called nonsectarian prayer, since, as shown above, many of the prayers that

> Plaintiffs say are sectarian are indistinguishable from prayers they say are not.

Galloway, 732 F. Supp. 2d at 243.

The record below reveals the same confusion. App. G, H. Unable to articulate a clear definition of "sectarian," Plaintiff Blackmon suggested that the County may need to identify and consult a representative from every conceivable religion to develop a list of "sectarian" references as interpreted by each particular tradition, and further recommends the court employ the assistance of qualified theologians. App. 4–7g.

Even if a standard could be concocted that could somehow stipulate clear prohibitions on specific appellations and theological phrasing, implementing such a standard would itself be preferential and "sectarian" due to its inevitably disparate impact in favoring faiths suited to the form of the expression called for.[6] Or if its terms—following the Fourth Circuit's method—were to require a quantitative analysis of theological words and names, then the restriction on sectarian prayer would only kick in after the annual "quota" of sectarian references was met, meaning different speakers would face different ground rules.

The crusade to excise "sectarianism" from

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[6] *See* Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517, 526–27 (2007) ("Faced with the choice of praying in conformity with a government-imposed standard of orthodoxy or not praying at all, many clergy (to their credit) will choose not to pray at all").

invocations is one that cannot escape self-contradiction. This surely is at least one reason why this Court in *Marsh* did not impose such a requirement.[7]

B. The Fourth Circuit's "frequency" test lacks objective standards and invites endless litigation.

The court below offers no guidance to legislative bodies as to how its "frequency" test is to be administered. The inquiry does not end with the unmanageable task of identifying phrases that have unique religious implications. The test further requires the invention of standards to address elemental questions, such as:

- Must a deliberative body pre-screen prayers to validate their acceptability?
- What is an acceptable ratio or percentage of "sectarian" references?

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[7] *See* Delahunty, *supra* n.7, at 518 (arguing that "the purported distinction between 'sectarian' and 'non-sectarian prayer is illusory, [and] that the attempt to enforce such a distinction will operate in a discriminatory fashion"); Klukowski, *supra* note 3, at 252–54 (arguing that there are no judicially manageable standards for defining "sectarianism" generally); R. Luther III & D. Caddell, *Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands a "Practice Focused" Analysis*, 48 SANTA CLARA L. REV. 569, 571–72 (2008) (arguing that courts should "favor the historical and constitutional policy of permitting individuals to choose their own words" when delivering an invocation, because censoring content inevitably "undermines diversity and the free speech rights of these individuals, and in turn, renders these traditionally solemn occasions meaningless").

- How large does the sample size need to be to meaningfully calculate "frequency?"
- Does the evaluation period reset after a particular length of time, or are "sectarian" references forever barred once the "frequency" threshold is crossed?
- If, over time, "sectarian" references are sufficiently diverse in their distribution to represent multiple faiths, may such individually sectarian references continue indefinitely?

Because the Fourth Circuit did not resolve these issues, it opened the door for the "offended observer" to bring Forsyth County, and countless other public bodies throughout the region, back to court over and over again to litigate standards no one can articulate.

Because of the widespread confusion in the law manifest both in the content of the lower court opinion itself and in the conflict among the circuits, it is impossible to predict *ex ante* which invocations will be held constitutional and which unconstitutional. To avoid the substantial cost and trouble of litigation, many officials will likely abandon this salutary cultural practice whose initiation predates this nation's founding.

CONCLUSION

For the foregoing reasons, Forsyth County respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDICES