

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JANET JOYNER AND CONSTANCE LYNN BLACKMON,

Plaintiffs-Appellees,

v.

FORSYTH COUNTY, NORTH CAROLINA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

**BRIEF OF AMICUS CURIAE BAPTIST JOINT
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STATEMENT

This brief is filed on behalf of the Baptist Joint Committee for Religious Liberty (“BJC”) as *amicus curiae* in Support of Appellees Janet Joyner and Constance Lynn Blackmon with the written consent of the parties.

I. Interest of the Amicus Curiae

The BJC serves fifteen Baptist entities, including national and regional conferences and conventions, working together to promote religious liberty for all through strong support of the principles of no establishment and free exercise. Grounded in the historical experience of Baptists, whose religious freedom struggles figured prominently in the fight for disestablishment in the American colonies, the BJC recognizes that religion and religious liberty are best served when government neither seeks to promote nor inhibit religion, but leaves it to its own merits and the voluntary efforts of adherents.

The BJC, which focuses exclusively on religious liberty and church-state issues, believes that religious freedom requires noninterference by the State in matters of faith and doctrine, and that the government has an affirmative duty to avoid any sponsorship of religion. Since its inception in 1936, the BJC has defended the constitutional boundaries between the institutions of religion and government in the U.S. Congress, the courts, and at the state and local levels. For example, the BJC supported the U.S. Supreme Court’s “school prayer” decisions

that prohibited government-led prayer and Bible reading in the public schools and worked for passage of the Equal Access Act of 1984 (which guarantees students' right to engage in non-government sponsored religious expression in the public schools), defended its constitutionality, and led efforts to produce guidelines for its proper implementation. While the BJC has supported application of equal access principles for religion in contexts that do not involve governmental sponsorship or promotion of religion, it has also vigorously opposed governmental actions that would create an official or financial connection to religion in violation of no establishment principles. The BJC has filed *amicus curiae* briefs in more than one hundred cases in the courts, including most of the U.S. Supreme Court's cases dealing with religious liberty.

As concerns this case, the BJC serves over one thousand individuals and churches in North Carolina as well as thousands more throughout the Fourth Circuit. Due to the congregational autonomy of individual Baptist churches, the BJC does not purport to speak for all Baptists. The BJC's constituents in North Carolina and throughout the country are active participants in all levels of national, state, and local government and therefore have a direct interest in the constitutional principles governing legislative prayer at each of these levels.

II. Statement of Facts

Appellees Janet Joyner and Constance Lynn Blackmon are citizens and residents of Forsyth County, North Carolina. Document No. 95, Recommendation of United States Magistrate Judge, Nov. 9, 2009, at 6 (“Recommendation”).¹ Forsyth County exercises its authority as a governmental unit through a publicly elected Board of Commissioners. *Id.* at 2. The Board generally meets twice a month in public meetings, which are opened with a prayer, typically delivered by a member of the local clergy. *Id.* Both Ms. Joyner and Ms. Blackmon have attended these meetings. *See id.* at 6.

Pursuant to Forsyth County’s formal written invocation policy, the Board’s clerk compiles a list of religious congregations in the county based on the telephone book, the internet, and discussions with the local chamber of commerce. *Id.* at 3.² Having done so, the clerk is to send letters to the “religious leader” at each congregation, inviting them to deliver an invocation before a Board meeting.

¹ The Magistrate Judge’s Recommendation was subsequently adopted by the district court. *See* Document No. 99, Order, Jan. 28, 2010.

² The Board adopted the policy on May 14, 2007. Previously, the Board had opened their public meetings with a similar prayer practice for a number of years without a formal written policy. The district court’s decision, however, was limited to the Board’s practice after the written policy became effective. Recommendation at 2 n.1.

Id. at 4. Religious leaders who respond to the letter are scheduled to deliver invocations on a first-come, first-served basis. *Id.*

The letter advises religious leaders that they may offer an invocation “according to the dictates of [his or her] own conscience.” *Id.* at 4 (internal quotations omitted). It instructs them not to exploit the prayer opportunity as an effort to convert others to their faith and not to disparage any other faiths or beliefs. *Id.* But the Board’s policy expressly prohibits it from reviewing or having any involvement in the content of the prayers delivered by the religious leaders. *Id.* at 5.

The evidence reviewed by the district court, which included recordings of the Board’s meetings, revealed that between May 29, 2007, after the written policy was implemented, and December 15, 2008, the Board’s invocations frequently contained at least one reference to “Jesus,” “Jesus Christ,” “Christ,” “Savior,” or “Trinity.” *Id.* at 7. All but seven of the 33 prayers recorded during this period contained such references. *Id.* Of those seven prayers, three were delivered by the Board’s chairperson when a local clergyperson was not available. *See id.* None of the prayers invoked a deity associated with a faith other than Christianity. *Id.*

ARGUMENT

I. FORSYTH COUNTY’S POLICY AUTHORIZES SECTARIAN PRAYER IN VIOLATION OF *MARSH v. CHAMBERS* AND ITS FOURTH CIRCUIT PROGENY.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court carved out a narrow exception from general Establishment Clause principles for nonsectarian legislative prayer. This Court’s analysis of legislative prayers like the ones at issue in this case is guided by *Marsh*. See *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005) (applying *Marsh* to a county Board of Supervisors); *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292 (4th Cir. 2004) (applying *Marsh* to a Town Council).

Forsyth County seeks to expand the narrow exception created in *Marsh* in a way that drastically undercuts the Establishment Clause. This effort would not only distort *Marsh* and represent a marked departure from this Circuit’s decisions; it would also harm religious liberty.

The BJC urges this Court to apply strictly *Marsh* and its Fourth Circuit progeny – which only authorize nonsectarian legislative prayers – to the facts of this case. This Court should reject Forsyth County’s plea to adopt the Eleventh Circuit standard, set forth in *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263 (11th Cir. 2008), that overtly sectarian legislative prayer is constitutional because that approach extends *Marsh* far beyond its limited holding, blurring the line between

church and state in an area of Establishment Clause jurisprudence where the threat of entanglement is already considerable.

A. The Constitutional Limits of Legislative Prayer Were Definitively Determined by *Marsh v. Chambers*.

In *Marsh*, the Supreme Court held that the Nebraska state legislature's practice of opening its sessions with a nonsectarian prayer delivered by a state-employed chaplain did not violate the Establishment Clause. 463 U.S. at 794-95. Instead of analyzing the practice under the typical Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court examined the long history of legislative prayer in Congress and in state legislatures and determined that, given the historical record, "there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." 463 U.S. at 792.

Solely because of this "unique history," the Court held that the legislative prayer at issue in *Marsh* – in which the chaplain had "removed all references to Christ" – did not constitute an "establishment" of religion but was instead "simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id.* at 791-93. The Court held that where, as in *Marsh*, "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," the "content of the prayer is not of concern to judges." *Id.* at 794-95.

The Supreme Court has refused to extend its holding in *Marsh* on two occasions, making it clear that the holding was limited to the unique circumstances surrounding nonsectarian legislative prayer and could not be used to justify prayer in other contexts or religious displays on public property that tend to affiliate the government with a particular sect or creed. See *Lee v. Weisman*, 505 U.S. 577 (1992) (refusing to extend *Marsh*'s reasoning to prayers at public school graduations); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) (declining to extend *Marsh* to a creche displayed in a county courthouse). In *Allegheny*, the Court reiterated that *Marsh* endorsed *only* nonsectarian legislative prayers that do not advance or disparage a particular sect:

[I]n *Marsh* itself, the Court recognized that not even the unique history of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle, because the particular chaplain had removed all references to Christ.

Id. at 603 (internal quotations omitted); see also *id.* (“However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.”); *id.* at 605 (it is a “bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith”).

Examining *Marsh* and *Allegheny*, this Court succinctly summarized the state of the law in *Wynne*:

If *Marsh* itself left any question as to whether the Court somehow intended to exempt invocations of deliberative public bodies from this bedrock Establishment Clause principle, the Court made clear in *Allegheny* that it had no such intention. Indeed, the *Allegheny* Court clarified that it only upheld the prayer in *Marsh* against Establishment Clause challenge because the *Marsh* prayer did not violate this nonsectarian maxim – *because* the particular chaplain had removed all references to Christ. The Court in *Allegheny* explained that invocations that have the effect of affiliating the government with any one specific faith or belief or demonstrate the government’s allegiance to a particular sect or creed do not fall within the category of legislative prayers justified by the unique history discussed in *Marsh*.

Wynne, 376 F.3d at 299 (internal quotations omitted; emphasis in original).

Thus, while legislative prayer may be considered a “special case” in Establishment Clause jurisprudence, it remains subject to firm constitutional restrictions. *See Marsh*, 463 U.S. at 794-95; *Allegheny*, 492 U.S. at 603-05; *see also Simpson*, 404 F.3d at 283. At a minimum, legislative prayer must obey the “clearest command of the Establishment Clause”: that “the government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).” *Allegheny*, 492 U.S. at 605 (internal quotations omitted).

As this Court noted in *Simpson*, “In recognizing the value of invocations, *Marsh* did not suggest that there are no limits on the practice of legislative prayer. Rather, the Court stated that a practice would remain constitutionally unremarkable

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.” 404 F.3d at 283 (internal quotation marks omitted).

B. This Circuit Has Consistently Respected the Limits on Legislative Prayer Established in *Marsh*.

In its prior decisions interpreting the constitutionality of legislative prayers, this Court has consistently and reasonably applied the principles articulated in *Marsh* and *Allegheny* to hold that overtly sectarian legislative prayers are unacceptable under the Establishment Clause. Despite Appellant’s argument to the contrary, this case is controlled by the Fourth Circuit’s analysis in *Wynne*, 376 F.3d 292; *Simpson*, 404 F.3d 276; and, *Turner v. City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008), *cert. denied* 128 S.Ct. 909 (2009).

In *Wynne*, the legislative prayers at issue were delivered by town council members at the beginning of public council meetings and frequently contained explicitly Christian references to “Jesus,” “Christ,” “Jesus Christ,” or “Savior.” *Wynne*, 376 F.3d at 294. This Court rejected the town council’s “contention that the *Marsh* Court’s approval of a nonsectarian prayer ‘within the Judeo-Christian tradition’ equates to approval of prayers like those challenged here, which invoke the exclusively Christian deity – Jesus Christ.” *Id.* at 300. The Court also rejected the town council’s argument that to be unconstitutional, legislative prayers must overtly proselytize a particular faith. *Id.* at 300-01. Instead, the Court recognized

that *Marsh* prohibits proselytization and “advancement,” and based on the Supreme Court’s decisions in *Marsh* and *Allegheny*, it interpreted “advancement” as having “the effect of affiliating the government with any one specific faith or belief.” *Id.* at 301 (quoting *Allegheny*, 492 U.S. at 603). Accordingly, the Court held that the prayers at issue in *Wynne* overtly advanced Christianity over other religions and were therefore unconstitutional under *Marsh*:

Marsh does not permit legislators to . . . engage, as part of public business and for the citizenry as a whole, in prayers that contain explicit references to a deity in whose divinity only those of one faith believe. The invocations at issue here, which specifically call upon Jesus Christ, are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather, they embody the precise kind of “advance[ment]” of one particular religion that *Marsh* cautioned against.

Wynne, 376 F.3d at 301-02.

Importantly, in analyzing the town council’s prayers, the *Wynne* court also addressed the *Marsh* pronouncement that courts need not “parse the content of a particular prayer” 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.” 463 U.S. at 794-95. This Court found that “simply rely[ing] on the district court’s factual finding” that prayers contained sectarian references to a Christian deity did not constitute impermissible “parsing” under *Marsh*. *Wynne*, 376 F.3d at 298-99 n.4.

This Court next addressed the constitutionality of legislative prayer in *Simpson*. In that case, the Board of Supervisors of Chesterfield County, Virginia, had instituted a practice in which religious leaders from throughout the county were invited to deliver nonsectarian invocations on a rotating basis. *Simpson*, 404 F.3d at 279. The Board sent letters to religious congregations – which it identified primarily through the local telephone book – asking their leaders to participate in the invocations and then scheduling those who responded to the letters on a first-come, first-served basis. *Id.* A Wiccan citizen of the county asked to be added to the list of religious leaders, and the Board declined, prompting her to file a lawsuit challenging the Board’s decision. *Id.* at 279-80.

Significantly, the Court applied *Marsh* to both the prayers themselves and the process for selecting the clergy who delivered them because, “[a]lthough Simpson aimed much of her challenge at the selection of clergy, the invocations themselves, as part and parcel of the unitary policy under attack, warrant our examination because they are what the general public sees and hears.” *Id.* at 282. This Court distinguished *Wynne* on the grounds that the “insistent sectarianism” of the *Wynne* prayers ran afoul of *Marsh* while the *Simpson* prayers – which used “wide and embracive” religious references and followed the Board’s nonsectarian

prayer policy – passed constitutional muster. *Id.* at 283-84.³ Although *Simpson* upheld a challenge to a legislative prayer practice (one that denied plaintiff's attempt to give the prayer), the policy at issue fell within with the limits on legislative prayer outlined in *Marsh* and *Wynne* because of the nonsectarian character of the prayers and did nothing to advance or approve the kind of sectarian practice at issue in this case.

Most recently, in *Turner*, this Court addressed a city council member's challenge to his council's policy that its opening prayers be nonsectarian. The Court rejected the council member's argument that the government could not require nonsectarian prayers. *Turner*, 534 F.3d at 355-56. Justice Sandra Day O'Connor, sitting by designation and writing for the Court, reasoned that

The Council's decision to provide only nonsectarian legislative prayers places it squarely within the range of conduct permitted by *Marsh* and *Simpson*. The restriction that prayers be nonsectarian in nature is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith.

Id. at 356.

Just as this Court rejected Turner's attempt to turn *Marsh* into an opportunity for unrestrained sectarian prayer in a government meeting, here the

³The *Simpson* court also held that the clergy selection process itself, which resulted in a wide variety of clergy offering nonsectarian prayers, did not tend to affiliate the government with a particular faith. *Id.* at 285-87.

Court should reject Forsyth County’s similar attempt to expand the parameters in *Marsh*.

In sum, this Court’s legislative prayer decisions have recognized that the exception created by *Marsh* is limited to the sort of nonsectarian legislative prayer that solemnizes the proceedings of legislative bodies without advancing or disparaging a particular faith. This narrow application of *Marsh* maintains the integrity of the Establishment Clause while recognizing the unique circumstances surrounding legislative prayer.

C. Applying the Correct Standard, the Legislative Prayers in the Instant Case are Unconstitutional.

The legislative prayers delivered at Forsyth County’s Board of Commissioners’ meetings are clearly unconstitutional under *Marsh* and its Fourth Circuit progeny.

The record in this case indicates that Forsyth County’s twice-monthly Board meetings are open to the public, and that at those meetings, local clergy deliver an opening invocation “according to the dictates of [their] own conscience.” *See supra* at 4. The prayers delivered at Board meetings during the period at issue – May 29, 2007 through December 15, 2008 – frequently contained at least one reference to Jesus, Jesus Christ, Christ, Savoir, or the Trinity and therefore were

indisputably sectarian.⁴ *See id.* Only seven of the 33 prayers delivered during this period did not contain explicitly Christian references. *Id.* Not a single prayer delivered during this period invoked a deity associated with any faith other than Christianity. *Id.*

Forsyth County's legislative prayer practice is unconstitutional under *Marsh*, *Wynne*, and *Simpson*. Like the prayers at issue in *Wynne*, the sectarian invocations at issue here explicitly reference Jesus Christ, a figure in whose divinity only those of one faith believe. The prayers therefore have the effect of affiliating the Board with that one specific faith – Christianity.

Forsyth County nevertheless argues that its prayer practice is constitutional because its clergy selection process represents a “gold standard” of inclusiveness.⁵ Appellant's Br. at 24-27. As both this Court

⁴ As noted *supra* at 10, this Court may properly consider the content of these prayers as part of the factual record without engaging in impermissible “parsing” under *Marsh*.

⁵ While it is certainly not the only constitutionally permissible option, the BJC encourages the use of moments of silence instead of prayers at public meetings. A moment of silence allows the government to avoid the constitutional risks associated with an opening prayer while still allowing an acknowledgement of America's tradition of belief and solemnization of the public business at hand. Such moments of silence have been upheld even in the public school context as long as they are not clearly intended to endorse religion. *Compare Brown v. Gilmore*, 258 F.3d 265, 278 (4th Cir. 2001) (rejecting an Establishment clause challenge to a law mandating a moment of silence in schools); *Bown v. Gwinnett*

recognized in *Simpson* and the magistrate judge noted in this case, no clergy selection process can be constitutionally adequate if the prayers themselves violate the Establishment Clause. *Simpson*, 404 F.3d at 283; Recommendation at 17. This is particularly true where, as here, the general public, and not just the legislators themselves, actually “see[] and hear[]” the prayers. *Simpson*, 404 F.3d at 282.

As the district court points out, the actual prayers delivered before Forsyth County’s Board do not reflect the diversity of the religious leaders who were invited to deliver them.⁶ See Recommendation at 17-18. Importantly, unlike the prayer policy upheld in *Simpson*, Forsyth County does not require the invocations to be nonsectarian, instead allowing the local clergy to deliver the prayer according to the “dictates of [his or her] own conscience.” See Recommendation at 4. Perhaps as a result of this, the invocations in this case do not resemble the wide, embracive prayers in

County Sch. Dist., 112 F.3d 1464, 1474 (11th Cir. 1997) (same) with *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985) (striking down a law mandating a moment of silence due to unrefuted evidence that the legislature intended to endorse religion).

⁶ While the BJC maintains that the Eleventh Circuit’s approach in *Pelphrey* is irreconcilable with the Supreme Court’s holding in *Marsh*, see *infra* at 16-19, Forsyth County’s prayers would still be unconstitutional under the *Pelphrey* reasoning because they lack the diverse religious references that resulted in a finding that Cobb County’s prayers did not advance or disparage a particular religion.

Simpson. The overt sectarian references in Forsyth County’s invocations do not “seek[] to bind peoples of varying faiths together in a common purpose” or acknowledge “the beliefs widely held among the people of this country.”

Snyder v. Murray City Corp., 159 F.3d 1227, 1234 (10th Cir. 1998) (internal quotations omitted). Rather, they have the effect of dividing the citizens of Forsyth County along religious lines.

Just like the prayers at issue in *Wynne*, the legislative prayers in this case have the actual effect of affiliating the Forsyth County Board with the Christian faith and have resulted in the Board advancing Christianity above other belief systems. This marriage of a local government and the Christian faith is directly contrary to the fundamental principle of the Establishment Clause, the “belief that a union of government and religion tends to destroy government and to degrade religion.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962). This Court should not permit such a union to stand.

II. FORSYTH COUNTY’S PROPOSED EXPANSION OF *MARSH* THREATENS RELIGIOUS LIBERTY.

A. *Pelphrey* is Inconsistent with *Marsh* and Cases Interpreting *Marsh* in This and Other Circuits.

Forsyth County and its *amici* urge this Court to abandon its line of precedent under *Marsh* and adopt the approach approved by the Eleventh Circuit in *Pelphrey*. The BJC respectfully suggests that the Court decline that invitation.

In *Pelphrey*, the Eleventh Circuit held that *Marsh* does not prohibit sectarian legislative prayers as long as speakers from a variety of faiths are offered the chance to deliver the invocations. *Compare* 547 F.3d at 1277-78 (finding sectarian prayers before the county commission constitutional due to the “diversity of speakers”) *with id.* at 1281-82 (finding prayers before the county planning commission unconstitutional due to the exclusion of Muslims, Jews, and others). Further, the court held that given diverse speakers and absent any indication that a prayer opportunity has been exploited to advance or disparage a particular faith, the content of legislative prayer is “not of concern to judges.” *Id.* at 1271 (internal quotations omitted). The court determined that the varied religious references used in the county commission’s prayers, although explicitly sectarian, coupled with the commission’s clergy selection process,⁷ did not advance or disparage a particular faith and were thus acceptable under *Marsh*. *Id.* at 1278.⁸

⁷ Although it upheld the revised clergy selection process, the Eleventh Circuit found that the clergy selection process used by the planning commission in 2003 and 2004 was unconstitutional because it categorically excluded clergy of certain faiths based on their beliefs. *Pelphrey*, 547 F.3d at 1281.

⁸ Despite the Eleventh Circuit’s pronouncement that it would not examine the content of prayers absent an indication of exploitation, it did in fact consider the language of the legislative prayers at issue. *See id.* at 1267 (discussing specific references used in the prayers); and *id.* at 1277 (ratifying the district court’s “thorough, meticulous, and well-reasoned” efforts to “evaluate[] the prayers of each commission as a whole and . . . determine whether the prayers had been exploited to affiliate the county with a particular faith”).

As demonstrated above, *Pelphrey* contradicts both Supreme Court authority and this Circuit’s well-reasoned precedent. And, although the other courts of appeal have not had the opportunity to squarely address the question presented here, their reasoning in the context of other legislative prayer cases suggests that, like this Circuit, they read *Marsh* as condoning nonsectarian references and prohibiting divisive sectarian prayer.

For instance, in *Snyder*, the Tenth Circuit recognized that

The genre approved in *Marsh* is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose. That genre, although often taking the form of invocations that reflect a Judeo-Christian ethic, typically involves nonsectarian requests for wisdom and solemnity, as well as calls for divine blessing on the work of the legislative body. When a legislative body prevents its agents from reciting a prayer that falls outside this genre, the legislators are merely enforcing the principle in *Marsh* that a legislative prayer is constitutional if it is “simply a tolerable acknowledgement of beliefs widely held among the people of this country.”

159 F.3d at 1234 (quoting *Marsh*, 463 U.S. at 792).

In denying a motion for a stay filed by the Speaker of the Indiana House of Representatives because he had little chance of success on the merits in opposing a challenge to the House’s practice of sectarian prayer, the Seventh Circuit recognized that in *Allegheny*, the Supreme Court itself read *Marsh* as precluding sectarian prayer. *Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006). The court also noted that, although it had never directly addressed the constitutionality of

legislative prayer, it had “read *Marsh* as hinging on the nonsectarian nature of the invocations at issue there.” *Id.* (collecting cases).

Similarly, in *Bacus v. Palo Verde Unified Sch. Dist.Bd. of Educ.*, 52 Fed. Appx. 355 (9th Cir. 2002), the Ninth Circuit found that the prayers at issue, which almost always invoked “the Name of Jesus,” were unconstitutional under both *Marsh* and traditional Establishment Clause principles. *Id.* at 356.

The reasoning of this Circuit and the Seventh, Ninth, and Tenth Circuits is clearly in line with the Supreme Court’s decision in *Marsh*. The Eleventh Circuit’s decision in *Pelphrey* goes beyond the bounds of constitutionally permissible legislative prayer to do exactly what *Marsh* prohibits: exploit a prayer opportunity to advance a particular religion. The BJC urges this Court to apply binding Supreme Court authority, as well as its own precedents, and reject the Eleventh Circuit’s approach.

B. Forsyth County’s Legislative Prayers Are Government Speech.

Forsyth County’s attempt to avoid the obvious conclusion that the prayers at issue are government speech is unpersuasive. Courts have unanimously applied the Establishment Clause to prayer delivered before legislative sessions, including invocations by private citizens free of editorial control by the legislative body.

See, e.g., Simpson, 404 F.3d at 278. In fact, Forsyth County is unable to identify a single case in which a court treated legislative prayer as private speech.⁹

It is clear that Forsyth County’s prayers meet the test this Court uses to distinguish government and private speech because (1) the prayers were intended to solemnize proceedings before the Board and were unquestionably connected to the Board’s meetings; (2) the Board created the prayer program, invited speakers, provided instructions about the content of the prayers, and had the authority to terminate the program at any time; and (3) the Board chairperson delivered the prayers when a religious leader was not present. Thus, for the reasons set forth more fully in Appellees’ Brief, this Court should hold that these prayers are government speech. *See* Appellees’ Br. at 17-23; *see also Turner*, 534 F.3d at 355.

III. SECTARIAN LEGISLATIVE PRAYER IMPERMISSIBLY ENTANGLES THE GOVERNMENT WITH RELIGION, WHICH IN TURN DEGRADES RELIGION.

A. The Government Cannot Import the “Religious Marketplace” Into Its Official Proceedings.

Even if a local government adopts the most inclusive clergy selection process imaginable, sectarian prayer policies would still hopelessly entangle the state with religion. Forsyth County invites this Court to view its legislative prayer

⁹ Even the Eleventh Circuit’s decision in *Pelphrey*, which Appellant leans on so heavily in the first part of its brief, decisively categorizes prayer before a legislative session as government speech in circumstances nearly identical to those in the present case. 547 F.3d at 1277 (applying the Establishment Clause).

policy as nothing more than an acknowledgement of the county’s religious marketplace in which “all views and philosophies are equally welcomed.” Appellant’s Br. at 26 (capitalization, bold, italics, and underlining omitted). This position ignores the context of this case. As discussed *supra* at Section II.B, the prayer at issue is undeniably government speech, therefore giving the state’s imprimatur to expressions of belief that should exist in a “marketplace” wholly free of the state’s control.

To the extent that such a wide variety of religious views and philosophies exist in Forsyth County, there are many constitutional ways for the County’s private religious entities and individuals to demonstrate that diversity and the welcoming nature of the County.¹⁰ Allowing each religious group to give sectarian prayers as part of government meetings, however, does not comport with any of these scenarios.

¹⁰ Of course, in some contexts, the government may not bar religious viewpoints from representation. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and see generally Religious Expression in Public Life: A Joint Statement of Current Law (2010, Wake Forest University School of Divinity Center for Religion and Public Affairs) (available at <http://divinity.wfu.edu/pdf/DivinityLawStatement.pdf> (last visited July 6, 2010)). This is not an issue here, where the prayers in question are clearly government speech.

In the legislative prayer context, the State has no place attempting to create a religious bazaar where every faith has a booth, a scenario far more likely to foster competition between sects than knit the cohesive “fabric of our society,” the goal of the Supreme Court’s decision in *Marsh*. 463 U.S. at 792. When the religious marketplace is made part and parcel of a legislative proceeding, courts entangle themselves in monitoring and regulating the competition. First, courts must determine whether the government has fostered a constitutionally acceptable level of diversity. *See Pelphrey*, 547 F.3d at 1277-78 (exploring the “diversity of the religious expressions” in Cobb County’s policy). This determination may require a court to assess a locality’s claim that it has reflected the full range of faiths in its jurisdiction. For example, in this case, was it enough for the Board’s clerk to go through the telephone book and do some internet research to compile the list of congregations? Or should the clerk have placed an ad in the newspaper, too?

This inquiry will be especially difficult in small communities. When a public body covers a relatively small area, there is a significant risk that available religious figures will represent only a slice of the range of religious perspective. *Cf.* Federalist No. 10 (describing the heightened dangers of factionalism at the local level). In certain geographical areas, the local government may end up repeatedly endorsing a particular faith – most likely Christianity – at its meetings. Are local communities constitutionally required to reach beyond their borders to

secure religious diversity? And should something as important as Establishment Clause jurisprudence involve, and perhaps even be decided by, the size of the locality's telephone book?¹¹

In the final accounting, such inquiries go far beyond the limited holding of *Marsh*. Further, as this Court recognized in *Simpson*, “[i]t would, of course, be possible for any court to pick fault with any elected body’s selection of clergy,” but “too much judicial fine-tuning of legislative prayer policies risks unwarranted interference in the internal operations of a coordinate branch.” 404 F.3d at 286-87.

Second, even in a constitutional structure allowing sectarian prayers, courts must still enforce limits on proselytization, requiring judges to draw lines in an area that they would be best advised to avoid. Indeed, the *Pelphrey* Court’s avowed reluctance to parse legislative prayer is best served by the *Marsh* rule prohibiting all sectarian references, not one that forces courts to decide whether a sectarian prayer is sufficiently unobtrusive. See 547 F.3d at 1277 (approving the district judge’s “meticulous” examination of the language of the prayers to

¹¹ There are also historical reasons to doubt whether the same legislative prayer analysis applies at the local level. In his *Pelphrey* dissent, Judge Middlebrooks argues that the holding in *Marsh* was based on the unique history of legislative prayer before the United States Congress and state legislatures. 547 F.3d at 1286 (Middlebrooks, J., dissenting). He argues that governments below the state level do not share a similar history and that prayers before such deliberative bodies should therefore be subject to the *Lemon* test, not the *Marsh* exception. *Id.* at 1287. Although it has assumed that *Marsh* applies to city- and county-level governments, this Court has never directly addressed the issue.

determine whether they had “been exploited to proselytize or advance any one, or to disparage any other, faith or belief”) (internal quotations omitted).

The *Pelphrey* approach also permits city and county governments to violate the most basic command of the Establishment Clause by demonstrating a preference for one particular faith over all others at each individual legislative session. The fact that the body may endorse a different sect each time it meets is irrelevant under the Establishment Clause. For the citizen who attends a single town council meeting, the diverse selection process approved in *Pelphrey* offers little comfort. That citizen is exposed to a single sectarian prayer, which may or may not invoke a deity in which she believes, and because the prayer is given as part of the council meeting, she receives the message that the council endorses that prayer and that deity. If she has never attended another council meeting, she may reasonably believe that the town council promotes this particular religion exclusively. She might also think that the price of doing business before the town council is participation in that prayer, or worse, adherence to the particular faith advanced in that prayer.¹²

¹² The nature of legislative sessions distinguishes this case from others in which courts have approved sectarian but inclusive public religious displays. For example, in *Allegheny*, the Supreme Court allowed a public display that included a menorah and Christmas tree. 492 U.S. at 614-621. The Court emphasized that citizens would observe the menorah and tree together and therefore understand that the state had not endorsed either Judaism or Christianity. *Id.* at 617-18. In

In short, sectarian legislative prayer leads to a host of harms that are exactly those that the Establishment Clause aims to prevent. This Court should stay within the limited exception articulated in *Marsh*.

B. The Religion Clauses Are Necessary to Protect Religious Liberty and Prevent Government Degradation of Religion.

Forsyth County's policy also threatens core principles of religious liberty by ignoring the way that the First Amendment's Religion Clauses and Free Speech Clause work together to protect religious freedom. As the Supreme Court has noted, there is a "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (emphasis in original). Religious freedom depends *both* on protecting individual speech and acts of worship from interference by the government and on ensuring that the government does not advance a particular religion, or religion over non-religion.

Historically, the purpose of the Establishment Clause was to separate religion from the hands of government to prevent injury to dissenters, including Christian dissenters. It was the culmination of British and American political thought grounded not only in John Locke's views on religious toleration and

contrast, a typical citizen might observe only one legislative prayer, not a collection of prayers occurring over a number of council meetings.

liberty of conscience, but also in Martin Luther's and John Calvin's theology, as mediated by Roger Williams. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 357-67 (2002). Williams was a Baptist minister who, after being expelled from Massachusetts for heterodoxy, founded Rhode Island in 1644 — creating the first experiment in total freedom of conscience on American soil. EDWIN S. GAUSTAD, ROGER WILLIAMS 13, 59, 70 (2005); BAPTISTS AND THE AMERICAN EXPERIENCE 16-17 (James E. Wood Jr. ed., 1976). Williams maintained that for religious belief to be genuine, people must come to it of their own free will, as coerced belief and punishment of dissent are anathema to true faith. Williams also recognized the dangers inherent in government use of religious sacraments. He argued that freedom of conscience flourishes only when churches act without governmental interference; for governmental sponsorship degrades religion's purity and integrity. See, e.g., ROGER WILLIAMS, *The Bloody Tennant, Of Persecution for Cause of Conscience* (1644), reprinted in 3 COMPLETE WRITINGS OF ROGER WILLIAMS (Samuel L. Caldwell ed., 1963) ("[T]rue religion does not need the support of carnal weapons." (quoted in CONRAD H. MOEHLMAN, THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 60 (1951)).

James Madison echoed Williams' concerns in 1785, when opposing a bill introduced into the General Assembly of Virginia which provided an assessment

for religious teachers. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) (available at http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html (last visited July 6, 2010)). He argued that the proposed government endorsement would “weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.” *Id.* Simply put, government endorsement of a religion undermines its sanctity to both those who follow the religion and those who do not.

Forsyth County’s policy has the effect of affiliating the County with a particular religion – Christianity. This sort of entanglement undermines both government and religion and threatens the very foundation of American religious liberty.

CONCLUSION

For the reasons argued above, the judgment of the district court should be affirmed.

Respectfully submitted,

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1. This brief complies with the type-volume limitations of Fed. R. App. 32(a)(7)(B) because this brief contains 6,317 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 6, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2010, I caused this Brief of *Amicus Curiae* Baptist Joint Committee for Religious Liberty to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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