

**In the United States Court of Appeals
For the Seventh Circuit**

ANTHONY HINRICHS, ET AL., PLAINTIFFS-APPELLEES

v.

BRIAN BOSMA, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE HOUSE OF
REPRESENTATIVES OF THE INDIANA GENERAL ASSEMBLY, DEFENDANT-APPELLANT

**On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:05-cv-00813
The Honorable David F. Hamilton, District Judge**

BRIEF FOR THE DEFENDANT-APPELLANT BRIAN BOSMA

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ORAL ARGUMENT REQUESTED

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JURISDICTION

Defendant-appellant Brian Bosma contests plaintiffs-appellees' standing to bring this Establishment Clause action. If plaintiffs-appellees have standing, the district court had jurisdiction of the case under 28 U.S.C. § 1331 and this Court has jurisdiction over this consolidated appeal of the district court's Final Declaratory Judgment and Permanent Injunction (No. 05-4604) and Entry on Post-Judgment Motions (No. 05-4781), both of which are final orders under 28 U.S.C. § 1291. The district court's declaratory judgment was entered on November 30, 2005, and defendant-appellant timely filed his notice of appeal on December 14, 2005; the district court's Entry on Post-Judgment Motions was entered on December 28, 2005, and defendant-appellant timely filed his notice of appeal on December 29, 2005.

STATEMENT OF THE ISSUES

- I. Whether taxpayers lack standing to challenge legislative prayers with which they have no contact on the alleged ground that the prayers are “sectarian” and discriminate in favor of a particular faith.
- II. Whether the Establishment Clause permits those offering invocations in a state legislature to pray in accordance with conscience, where conscience compels them to invoke the name of Jesus Christ or another deity.

INTRODUCTION

In *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), the Supreme Court upheld legislative prayer on the ground that the practice was instituted by the authors of the Establishment Clause and “ever since * * * has coexisted with the principles of disestablishment and religious freedom.” Assuming a federal court has jurisdiction of this dispute, the issue here is whether *Marsh* invalidates “sectarian” legislative prayers—in particular, those referring to Jesus Christ—despite the uncontroverted historical evidence that American legislative prayers have always included such references, and despite the entanglements of religion and government that would result if civil courts were required to parse prayers to distinguish “sectarian” from “nonsectarian” invocations. As shown below, the Establishment Clause does not forbid legislative prayers that refer to Jesus Christ.

STATEMENT OF FACTS

For 188 years, the Indiana House of Representatives (the “House”) has opened its daily proceedings with prayer. App. 130A. This tradition is codified in House Rule 10.2, which requires that an invocation be given daily before the opening of official business. App. 130A, 352A; see also *Marsh*, 463 U.S. at 789 n.11 (citing Indiana House Rule 10). Prior to this lawsuit, the only significant limitations on such prayers were those imposed by conscience. Because many (but

not all) of those offering prayers have been Christians, many of the legislative prayers have invoked the name of Jesus.

The legislative invocation is frequently given by visiting clergy who volunteer to pray and are nominated by a representative. App. 126A-127A. To nominate clergy, representatives fill out a “Minister of the Day” form listing dates when the clergy are available, and House staff members schedule their visit. Representatives sometimes sponsor clergy who do not share their own religious affiliation, and no minister who has requested sponsorship has been turned down. App. 177A. Invocations are also frequently given by representatives. *Ibid.* No legislative business takes place until the prayer is finished, and no one is required to remain in the House chamber during the prayer. App. 126A, 131A.

The invocation is traditionally delivered from the stand of the Speaker of the House. App. 127A. Unless he has sponsored the Minister of the Day, the Speaker does not know the identity of the minister until a few minutes before he introduces him or her. App. 177A. Moreover, neither the Speaker nor the sponsoring representative knows in advance the content of the prayer. *Ibid.* In a letter sent to visiting clergy before their scheduled visits, a House staff member provides logistical details, notes that the “[t]he invocation is to be a short prayer asking for guidance and help in the matters that come before the members,” and suggests (but does not require) that the minister “strive for an ecumenical prayer.” App. 135A.

When a representative gives the invocation, he or she receives no guidance from anyone associated with the House. Moreover, no one associated with the House has ever advised, corrected, or admonished a minister or representative about the religious content of any invocation, and no one has ever indicated that he could not pray in accordance with his conscience. As the district court observed, “the Speaker does not monitor or supervise the content of the prayers that are offered.” App. 12A, 55A. Thus, although the decision to have prayer is attributable to the House, the content of the prayers is not. App. 237A-239A.

During the 2005 House session, the invocation was delivered by a wide array of clergy, including several priests and Protestant ministers, a rabbi, and an imam. Many prayers referenced Christian terms such as “Jesus,” “Christ,” or “Savior,” while others invoked names such as “God,” “Lord,” “Lord God,” “Almighty God,” “Father,” “Heavenly Father,” “Yahweh,” “the God of Abraham, Isaac and Jacob,” “Buddha,” and “Zen masters.” At least one prayer addressed no specific deity. App. 168A (“We must be liberated from ourselves”).

Of the 45 prayers offered during the 2005 session for which text is available, 29 prayers referenced Jesus or Christ. App. 8A. On one occasion, following the Pledge of Allegiance, the Speaker reintroduced the visiting lay minister and stated: “I understand he has a wonderful singing voice and is going to bless us with a song,” after which the minister sang the traditional African-American spiritual,

“Just a Little Talk with Jesus.” App. 129A. The song was not part of the prayer practice challenged by plaintiffs below.

The costs associated with these prayers are *de minimis*. Like other constituent mail, the letter sent to clergy scheduled to deliver invocations costs \$.54 per mailing (including postage). App. 127A. Before a session commences, House members sometimes take photographs with clergy scheduled to give the invocation. These photographs, which likewise “are provided as constituent services,” App. 127A, cost \$.68 per print and are mailed at a cost of \$1.60 per print. Some clergy decline the photographs, generating no cost to the House. App. 128A. A thank-you letter is sometimes sent to visiting clergy at a cost of \$.54 per mailing.

When a representative prays, by contrast, the House incurs “no expenses for the invocation other than the normal expenses associated with operating the House.” App. 6A. Those expenses include streaming video on the Internet, which costs \$112.85 per hour. Each prayer lasts no more than a few minutes.

STATEMENT OF THE CASE

Plaintiffs-appellees (“plaintiffs”) are Indiana citizens who object to the use of tax funds for what they deem “sectarian” prayers. They filed this lawsuit in the district court, seeking to enjoin such prayers. They have not challenged the invocations *per se*, or the system by which people are selected to pray. Rather,

their challenge is limited to the *content* of the prayers. In particular, plaintiffs complain that many prayers in the House are Christian in orientation and for that reason (they say) violate the Establishment Clause.

After a bench trial, the district court held that plaintiffs had taxpayer standing to bring suit and entered a permanent injunction in their favor. App. 1A-2A. On the standing question, the court acknowledged that no plaintiff had “direct contact with the legislative prayers,” that the outlays here were “obviously very modest,” and that “the cost of the prayers would not decrease if the objectionable language were removed.” App. 14A-15A, 19A. Recognizing that the plaintiff in *Marsh* was a legislator who challenged the entire Nebraska chaplaincy, the court nonetheless found “no principled distinction between taxpayer standing in *Marsh* and in this case.” App. 17A. In the court’s view, the “measurable disbursements” for “letters and photographs” and “web-streaming time” supported taxpayer standing here under *Doremus v. Board of Education*, 342 U.S. 429 (1952). App. 17A, 26A.

On the merits, the court ruled that *Marsh* did not support the House’s practice. Emphasizing that the chaplain there had characterized his prayers as “nonsectarian” and “removed all references to Christ,” the court reasoned that the “clear implication” of *Marsh* is that “explicitly Christian or explicitly Jewish” legislative prayers are unconstitutional. App. 31A. According to the court, *Marsh*

established a “boundary” between “inclusive and non-sectarian prayer,” which is constitutional, and “exclusive and sectarian prayer,” which is not. *Id.* at 49A.

Based on this reasoning, the district court enjoined the Speaker “from permitting sectarian prayers to be offered as part of the official proceedings of the House.” App. 1A. If the Speaker chose to continue prayers, the injunction directed him to

advise all persons offering such prayers (a) that the prayers must be non-sectarian and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief, and (b) that the prayers should not use Christ’s name or title or any other denominational appeal.

App. 1A-2A.

Thus, for the first time in nearly two centuries, content-specific restrictions were placed on prayers delivered in the House, and clergy and representatives were no longer free to pray solely in accordance with conscience. Ministers of several backgrounds have stated that, under the terms of the injunction, they cannot pray as their conscience requires. See App. 179A-199A (affidavits of Lutheran, Orthodox, and non-denominational ministers), 340A. Moreover, the injunction carries the full force of law: any minister or representative held to act in contempt of the order would be subject to fines and imprisonment.

Mindful of these stakes, the Speaker moved to amend the judgment on the ground that it provided insufficient guidance on the meaning of “sectarian” prayers. The district court denied the motion, however, stating: “[T]he Christian

tradition is familiar to most of the audience of the prayers, and to the court. If the Speaker or those offering prayers seek to evade the injunction through indirect but well understood expressions of specifically Christian beliefs, the audience, the public, and the court will be able to see what is happening.” App. 78A-79A.

The court nonetheless purported to adopt a “pragmatic definition that addresses when prayers are sectarian in a Christian manner”—a “reasonable person” approach to determining whether the prayer was Christian. App. 77A-78A. At a minimum, the court reasoned, “[p]rayers are sectarian in the Christian tradition when they proclaim or otherwise communicate the beliefs that Jesus of Nazareth was the Christ, the Messiah, the Son of God, or the Savior, or that he was resurrected, or that he will return on Judgment Day or is otherwise divine.” App. 78A. By contrast, “[i]f those offering prayers in the Indiana House of Representatives choose to use the Arabic Allah,” or “the Hebrew Elohim,” “or any other language’s terms in addressing the God who is the focus of the non-sectarian prayers contemplated in *Marsh v. Chambers*, the court sees little risk that the choice of language would advance a particular religion or disparage others.” *Id.* at 77A.

The Speaker also requested that the injunction be limited to prohibiting the expenditure of public funds on the prayers, so as to continue the practice without public expense. The court denied this request as well, reasoning that a taxpayer

injury “may also be remedied by enjoining the unconstitutional practice, especially where the constitutional issues do not depend on the expenditure of public funds.” *Id.* at 65A-66A.

After the district court’s decision but before the 2006 legislative session commenced, the Speaker’s staff contacted several ministers to invite them to offer an invocation. These ministers, however, indicated “that they could not in good conscience offer prayer in the House within the parameters of the District Court’s injunction.” App. 340A. Rather than enforce an order that required him to discriminate among clergy, which he believes would be unconstitutional, the Speaker suspended prayer. He refused to “actively or passively censor[] prayers by informing clergy and members of the House that they cannot pray in accordance with the dictates of their conscience in the event that they cannot comply with the theological guidelines issued by the Court.” *Ibid.*

Citing principles of comity, federalism, and the substantial authority casting doubt on the court’s ruling, the Speaker moved for a stay of the injunction pending appeal. The court denied the motion, reasoning that the injunction did not require the Speaker to cancel prayer and that fidelity to his understanding of the Establishment Clause trumped interests of federalism and comity. App. 92A.

A divided panel of this Court denied a similar request. The majority emphasized the “tentative nature of [its] analysis,” but denied the stay based on its

preliminary assessment of the merits and the “temporary injury” involved. App. 106A, 122A. Judge Kanne dissented, explaining that the Speaker had “powerful arguments” for reversal, and that “the recognized status of legislative prayer as holding its own unique place in our nation’s history makes it difficult, if not impossible, to say that the Speaker lacks a significant probability of success on the merits.” App. 123A. He also emphasized that “deference cautions that we as federal judges should move prudently in this very sensitive area of constitutional law, which includes being reluctant to interfere with a state’s internal spiritual practices.” App. 124A.

SUMMARY OF ARGUMENT

For the first time in American history, a court has prohibited state legislators and their invited guests from praying in the name of Jesus Christ, on pain of being found in contempt of court. The district court reached this result notwithstanding the Supreme Court’s decision in *Marsh*, which upheld legislative prayer on the ground that “[t]he unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states gives abundant assurance that there is no real threat” from such prayer of “the establishment the Founding Fathers feared.” 463 U.S. at 795.

According to the district court, “the foundation of *Marsh*” is a “boundary” between “inclusive and non-sectarian prayer,” which is permissible, and “exclusive

and sectarian prayer,” which is not. *Marsh*, however, did not purport to turn on any such distinction. The sole appearance of the term “nonsectarian” in *Marsh* was a reference to the chaplain’s own description of his prayers, and the Court did not suggest that removing Jesus’ name was *required*. Indeed, the “unbroken practice” of legislative prayer on which *Marsh* relied has always included explicitly Christian prayers. The district court’s reading of *Marsh* thus cannot be squared with either the reasoning of the Court’s opinion or the history on which it relied. Moreover, it is particularly inappropriate to read *Marsh* as invalidating as “sectarian” a prayer tradition in which ministers from all religious traditions are invited to pray, and a wide variety of ministers have done so.

Not only is it improper to read *Marsh* as requiring the removal of references to Jesus from legislative prayers, but such a reading also puts *Marsh* on a collision course with several lines of Supreme Court precedent. Any attempt to distinguish between “sectarian” and “nonsectarian” prayer requires the court (and those executing its orders) to make controversial theological judgments about what sorts of prayers pass muster. But numerous Supreme Court decisions forbid courts (and other public officials) to make such determinations, which “entangle” the state in theology and establish a government-approved religious orthodoxy. Moreover, the judicial oversight necessary to administer the court’s injunction is unworkable, creates serious free speech problems, and constitutes a grave affront to the internal

workings of a co-sovereign legislature—undermining principles of federalism and comity.

The district court’s injunction is even more extraordinary given that these plaintiffs lack standing to sue. None of them has direct contact with the prayers at issue, and they do not challenge the practice of prayer *per se* or the manner in which people are chosen to pray. Their sole alleged “injury” is paying taxes to support the legislature—a generalized injury, and one that will not be redressed by a decision in their favor. Indeed, it is undisputed that there is *no cost* to the practice of prayer given by legislators, and that the (*de minimis*) cost of prayer by visiting clergy will not decrease if plaintiffs prevail.

Moreover, even if plaintiffs could satisfy Article III, several factors warrant denial of standing on prudential grounds. Plaintiffs rely solely on generalized grievances to challenge a longstanding internal practice of the legislative branch of a sovereign entity. Others, such as legislators who hear the prayers or clergy who have been prevented from praying (if any existed), would be far better suited to claim that the practice discriminates in favor of Christianity. And there is no judicially manageable standard for distinguishing “sectarian” from “nonsectarian” prayers. For all these reasons, the decision below should be reversed and the injunction vacated.

ARGUMENT

This Court reviews the district court's decision to issue injunctive relief for an abuse of discretion, but exercises *de novo* review over the legal conclusions that support the injunction. *Christ Universal Mission Church v. City of Chicago*, 362 F.3d 423, 425-426 (7th Cir. 2004). There are no factual issues on appeal, as the facts were stipulated or otherwise undisputed below.

I. Plaintiffs Lack Standing To Bring This Lawsuit.

To establish Article III standing, plaintiffs must prove that they personally have suffered an actual injury that is traceable to the defendant and redressable by a favorable decision. See *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982). Even if plaintiffs satisfy Article III, moreover, they “may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.” *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 99-100 (1979). As explained below, plaintiffs have failed to satisfy the requirements of either Article III or prudential standing doctrine.

A. Plaintiffs Lack Article III Taxpayer Standing

State taxpayer standing in establishment cases is governed by *Doremus v. Board of Education*, 342 U.S. 429 (1952), which denied taxpayer standing to challenge Bible reading in the public schools. Because *Doremus* involved “no allegation that *this activity* is supported by any *separate tax* or paid for from any *particular appropriation* or that it adds any sum whatever to the cost of conducting the school,” the plaintiffs had no “direct and particular financial interest” sufficient to support standing. *Id.* at 433, 435 (emphasis added). Standing requires that state taxpayers demonstrate a “direct dollars-and-cents injury” based on “a measurable appropriation or disbursement of [public] funds occasioned *solely* by the activities complained of.” *Id.* at 434 (emphasis added).¹

Doremus compels a denial of standing here. At the outset, there can be no dispute that plaintiffs lack standing to challenge prayers delivered by *members* of the House. Plaintiffs have stipulated that when a representative prays, the House incurs “no expenses for the invocation other than the normal expenses associated with operating the House.” App. 6A. As in *Doremus*, there is no “measurable appropriation or disbursement of [public] funds occasioned solely by the activities

¹ Cf. *Flast v. Cohen*, 392 U.S. 83, 87, 102 (1968) (federal taxpayers challenging “taxation for religious purposes” must establish (1) “a logical link between th[eir] status [as taxpayers] and the type of legislative enactment attacked,” and (2) “a nexus between that status and the precise nature of the constitutional infringement alleged”).

complained of.” 342 U.S. at 434. For this reason alone, the decision below must be vacated as to House members.

Furthermore, the remaining expenditures are not only *de minimis*, but the amount of money spent on religious activity would not decrease even if plaintiffs prevailed. The district court acknowledged that the cost of the prayers is “rather trifling” and “obviously very modest,” and the mailings and photographs at issue are routinely provided as “constituent services.” App. 240A, 19A. (Indeed, the total annual expense, to which plaintiffs contribute a tiny fraction as taxpayers, is \$448.38. App. 19A.) Moreover, plaintiffs disclaim any desire to enjoin all legislative prayer, and they acknowledge that the content of an invocation has no bearing on its cost to them.

This Court’s decision in *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006), confirms that standing should be denied here. Writing for the Court, Judge Posner explained the marginal-cost requirement for taxpayer standing:

Imagine a suit complaining that the President was violating the [establishment] clause by including favorable references to religion in his State of the Union address. The objection to his action would not be to any expenditure of funds for a religious purpose; and though an accountant could doubtless estimate the cost to the government of the preparations, security arrangements, etc., involved in a State of the Union address, that cost would be no greater merely because the President had mentioned Moses rather than John Stuart Mill. In other words, the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero.

Id. at 995. In the same way, the “marginal cost” of the violation alleged here is zero, and the expenditures here are no more “traceable” to particular expenditures than are presidential speeches to White House appropriations. Just as taxpayers suffer no greater injury if an objectionable presidential speech mentions “Moses rather than John Stuart Mill,” so too the taxpayer-plaintiffs here suffer no greater injury if the prayers reference Jesus rather than God. Any injury plaintiffs suffer remains the same regardless of the content of the prayer.

Indeed, recognizing standing here would expand *Doremus* and *Flast*: a merits ruling in favor of those plaintiffs would have decreased the tax money spent on *religious activity*; here it would not. Moreover, plaintiffs have challenged no specific appropriation, let alone one “occasioned *solely* by [the invocations].” See *Doremus*, 342 U.S. at 434 (emphasis added). Thus, if ever there were a case involving an acceptable, “incidental expenditure of tax funds in the administration of a[] * * * statute,” *Flast*, 392 U.S. at 102, this is it. See *Chao*, 433 F.3d at 996 (expenditures that support government officials “speak[ing] favorably of religion” are “incidental”).

Noting that the above-quoted passage from *Chao* is “dictum,” the stay panel dismissed it on the ground that it simply “repeat[s] the rule that taxpayers who cannot trace a challenged practice to *any* expenditure are without standing.” App. 111A. This passage from *Chao*, however, cannot be so limited. By its terms, it

requires some “*incremental* cost to the taxpaying public *of the alleged violation*.” 433 F.3d at 995 (emphasis added). In that regard, moreover, the passage is consistent with *Doremus*, and with the Supreme Court’s admonition that taxpayer standing is at best a narrow (and tenuous) exception to the usual rules barring reliance on generalized grievances as an injury. See, e.g., *Valley Forge*, 454 U.S. at 481 (describing “the rigor with which the [Establishment Clause] exception * * * ought to be applied”); *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (requiring “strict compliance” with plaintiffs’ “burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable”). Given the *de minimis* amounts at issue and the absence of any causal link between the alleged violation and plaintiffs’ tax burden, the district court’s view of taxpayer standing is anything but “narrow,” and it is plainly incorrect.

The stay panel also suggested that our position “would mean that taxpayers are without standing to challenge the erection of a large stone cross on public land if it theoretically could be replaced with a secular monument of the same price.” App. 9A. But in that hypothetical, a merits ruling for the taxpayers would actually decrease public funding for religious activity; here it would not. Unlike *Doremus* and *Flast*, where the plaintiffs made blanket challenges to public funding of Bible reading and religious schools, respectively, this case involves a challenge to public funding of particular prayers. Our point is not just that plaintiffs’ overall tax

burden would not decrease if they prevailed, but that the taxes they pay *for religious activity* would not decrease.

Finally, the district court erroneously relied on *Marsh* in concluding that plaintiffs have standing to sue. Standing was not contested in *Marsh*, and the Court (in a footnote) noted only that “Chambers, as a member of the legislature and as a taxpayer whose taxes are used to fund the chaplaincy, has standing to assert his claim.” 463 U.S. at 786 n.4. Because Chambers had standing *as a legislator* to challenge the prayers themselves, the logical reading of this footnote is that he had standing *as a taxpayer* to challenge the appropriation for the chaplaincy. That appropriation plainly amounted to a “direct dollars-and-cents injury” based on “a measurable appropriation or disbursement of [public] funds occasioned solely by the activities complained of.” *Doremus*, 342 U.S. at 434. Here, by contrast, the plaintiffs assert only taxpayer standing, and the prayers are not the subject of any “particular appropriation.” *Id.* at 433. Thus, plaintiffs have failed to establish Article III standing.

B. Alternatively, This Court Should Deny Standing on Prudential Grounds.

Even where plaintiffs satisfy the requirements of Article III, the Supreme Court has repeatedly held that plaintiffs may lack standing under prudential principles. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004);

Valley Forge, 454 U.S. at 464-465. Several factors govern whether there is prudential standing, and these factors confirm that standing should be denied here.

First, standing fails on prudential grounds in cases involving “questions of broad social import where no *individual* rights would be vindicated.” *Gladstone, Realtors*, 441 U.S. at 100 (emphasis added). This is just such a case. As the Court recognized in *Marsh*, the practice of legislative prayer “is deeply embedded in the history and tradition of this country,” and “has become part of the fabric of our society.” 463 U.S. at 786, 792. “The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake.” *Newdow*, 542 U.S. at 11. The practice of legislative prayer—which, unlike the Pledge of Allegiance (*id.* at 6), dates to the Founding—easily qualifies as a matter of “great national significance.”

Nor does plaintiffs’ taxpayer claim implicate *individual* rights. Plaintiffs have no contact with the House’s legislative prayers, and they are not required to participate in them. Moreover, in contrast to the Free Exercise Clause, the Establishment Clause is not designed to protect individual rights. See, e.g., *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1962) (noting “[t]he distinction between the two clauses” and noting that only the Free Exercise Clause “secure[s] religious liberty in the individual by prohibiting any invasions thereof

by civil authority”); *Marsh*, 463 U.S. at 802 (Brennan, J., dissenting). Thus, granting plaintiffs relief would vindicate no individual rights.

Second, prudential standing doctrine “‘bar[s] adjudication of generalized grievances more appropriately addressed in the representative branches.’” *Newdow*, 542 U.S. at 12 (citation omitted). This prohibition is particularly salient here. A taxpayer “injury” is the quintessential “generalized grievance,” and any complaint about the manner in which prayers are conducted in the House may be addressed to its members.

Third, denying standing on prudential grounds is warranted “to limit access to the federal courts to those litigants best suited to assert a particular claim.” See *Gladstone, Realtors*, 441 U.S. at 100; accord *Valley Forge*, 454 U.S. at 474. Here, the parties “best suited” to assert an injury from the prayers might be (1) legislators who are present during the prayers, as in *Marsh*; (2) others (*e.g.*, staff) who are present during the prayers; or (3) clergy who have been denied the right to offer a “nonsectarian” prayer. Plaintiffs do not fit within any such group. Accordingly, they should not be “allowed to control the litigation.” *Chao*, 433 F.3d at 991. Cf. *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004) (suit challenging legislative prayer brought by party excluded from praying); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (*en banc*) (same).

Finally, considerations of federalism and comity strongly militate against exercising jurisdiction here. As this Court has recognized, *Marsh* “derive[s] partly from the traditions of the nation and of the states and partly from a degree of deference to the internal spiritual practices of another branch of government or of a branch of the government of another sovereign.” *Van Zandt v. Thompson*, 839 F.2d 1215, 1219 (7th Cir. 1988). Asking a state legislator to divine what prayers a “reasonable person” would say are “inclusive”—and to impose that standard on those who pray on the legislative floor—is an extraordinary imposition on the inner working of a co-sovereign lawmaking body.

Indeed, federal courts cannot police the line between “sectarian” and “nonsectarian” prayer in state legislatures without micromanaging their affairs and usurping their autonomy. As the Fourth Circuit has explained, “too much judicial fine-tuning of legislative prayer policies risks unwarranted interference in the internal operations of a coordinate branch.” *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 286-287 (4th Cir. 2005). Judge Kanne has expressed a similar sentiment: “[f]ederalism concerns demand that we recognize the important interest the Indiana General Assembly has in conducting its internal practice of legislative prayer unfettered by a federal court’s injunction—even one narrowly drawn.” App. 124A.

That enforcing the injunction requires the court to attempt the impossible—to make theological judgments as to the meaning and significance of prayers—only compounds the intrusiveness of the injunction. In the absence of clear, workable standards for governing state legislators’ conduct, federal court interference with the internal workings of state legislatures is entirely unjustified. See Michael W. McConnell, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 186 (1998) (“[c]ourts are particularly likely to defer to the judgments of representative bodies when there are no judicially manageable standards for decisionmaking”). All of these factors confirm that the Court should deny standing on prudential grounds, even if it finds that plaintiffs have satisfied Article III.

The district court erroneously relied on prudential principles *limiting* standing to find that standing existed here. App. 98A (“it is *prudent* to recognize standing for taxpayer plaintiffs in this case”) (emphasis added). In its view, although others who have actual contact with the prayers may have standing, taxpayers who lack such contact are appropriate proxies, since those who hear the prayers “could reasonably expect to pay a stiff price for standing up for their rights.” App. 99A.

This turns standing doctrine on its head. To begin with, “[t]he assumption that if [the plaintiffs before the court] have no standing to sue, no one would have standing, is not a reason to find standing.” *Valley Forge*, 454 U.S. at 489 (citation

omitted). The exercise of the judicial power is “a tool of last resort,” and “[the] claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing.” *Id.* at 474, 487. Moreover, it should be plain that prudential *limits* on standing—which *restrict* the range of permissible plaintiffs—cannot logically justify prudential *expansion* of standing.

In a case such as this, the Court “must have ‘due regard to the fact that [it] is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.’” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). The members of the House have concluded that the prayers at issue are constitutional (App. 373A-377A), and no member of the House (or anyone who works there) has seen fit to challenge them. Plaintiffs are not present during the prayers, and their tax burden would not be affected if they were granted relief. Yet, based on their “taxpayer” status, plaintiffs ask the federal courts to regulate a practice that has existed without challenge for 188 years—by policing prayers offered on the legislative floor for any hint of “sectarian” language. In these circumstances, the Court should deny standing on prudential grounds even if it found that plaintiffs had satisfied Article III.

II. The Establishment Clause Does Not Require State Legislatures To Censor Prayers That Invoke The Name Of Jesus Christ, But Rather Allows Them To Permit Guest Clergy And Legislators To Pray In Accordance With Conscience.

The district court also erred in ruling in plaintiffs' favor on the merits. In sustaining the practice of legislative prayer in *Marsh*, the Supreme Court found it dispositive that the Congress that drafted the First Amendment did not view legislative prayers as a violation of the Establishment Clause. The Court explained that "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer," and that just "three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights." 463 U.S. at 787-788. Observing that the enactments of the Congress that framed the First Amendment are "weighty evidence of its true meaning," and that "an unbroken practice * * * is not something to be lightly cast aside," the Court explained:

No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be cast aside. 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. * * * [And] it would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.

Id. at 788, 790-791 (citations omitted). The Court thus concluded that legislative prayers are not even a "step toward establishment," but rather are a "tolerable

acknowledgment of beliefs widely held among the people of this country,” “whose institutions presuppose a Supreme Being.” *Id.* at 792 (citations omitted). And ironically, in explaining that Congress’s longstanding prayer tradition “has also been followed consistently in most of the states,” the Court approvingly cited Indiana House of Representatives Rule 10—the very rule at issue in this case. 463 U.S. at 788-789 n.11.

The Court in *Marsh* also rejected arguments that appointing a single Presbyterian chaplain for 16 years straight, or the Judeo-Christian content of his prayers, condemned Nebraska’s practice of legislative prayer notwithstanding its historical pedigree. As to the latter point, the Court noted that “[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.” *Id.* at 794-795.

Citing this latter passage of dictum and a footnote stating that the chaplain in *Marsh* had characterized his prayers as “nonsectarian” and “removed all references to Christ,” the district court reasoned that the “clear implication” of *Marsh* is that “explicitly Christian or explicitly Jewish” legislative prayers are unconstitutional. App. 31A. According to the court, “the foundation of *Marsh*” is a constitutional “boundary” between “inclusive and non-sectarian prayer,” which may be offered in

legislative settings, and “exclusive and sectarian prayer,” which may not. *Id.* at 49A. As explained below, however, this reading of *Marsh* is untenable for at least four reasons. First, the prayer tradition sustained in *Marsh* has *always* included prayers invoking Jesus’ name. Second, the Court in *Marsh*, while cognizant that legislative prayers sometimes reference Jesus, did not say that such prayers were unconstitutional, but rather focused on the legislature’s motivation and whether it was exploiting the overall opportunity for prayer as a means of proselytizing. Third, contrary to the district court’s analysis, this reading of *Marsh* finds no support in the Court’s subsequent decision in *Allegheny*. Fourth, the district court’s analysis contravenes *Marsh*’s warning that courts should not “embark on a sensitive evaluation or * * * parse the content of a particular prayer” (463 U.S. at 795)—a warning rooted in several lines of controlling Supreme Court precedent.

A. The Historical Tradition of Legislative Prayer Sustained in *Marsh* Indisputably Includes Prayers That Invoked Jesus’ Name.

Whatever outer limit *Marsh* might place on the content of legislative prayer, this much is clear: prayer that comports with the “unique history” of Congress’s practice is constitutional. 463 U.S. at 792. Moreover, it is historically indisputable that prayers in Congress have routinely invoked Jesus Christ’s name—from the Continental Congress to the Congress of today.

The district court referenced prayer in the Continental Congress and Samuel Adams’ famous statement that “he was no bigot, and could hear a prayer from a

gentleman of piety and virtue, who was at the same time a friend to his country.” App. 53A. What the court did not relate, however, was that Adams was responding to delegate John Jay, who opposed legislative invocations on the ground that Anglicans, Congregationalists, Presbyterians, Quakers, and Anabaptists—notably, all Christian denominations—“were so divided in religious sentiments” that they “could not join in the same act of worship.” See *Marsh*, 463 U.S. at 791; Edward F. Humphrey, *Nationalism and Religion in America, 1774-1789*, 410 (1924). Adams rebutted Jay’s assertion and nominated Jacob Duché, a local Anglican minister, to pray. Duché obliged, opening with an appeal to the “Lord, our heavenly father, King of Kings and Lord of lords,” and concluding: “All this we ask in the name and through the merits of Jesus Christ thy son, Our Saviour, Amen.”² Ironically, then, the Adams quotation that the district court relied upon actually facilitated a prayer that the court would have declared “sectarian” and unconstitutional. See also Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 217 (1986)

² See 25 Paul H. Smith, et al., eds., *Letters of Delegates to Congress, 1774-1789* 551-552 (Library of Congress, 1976-2000), available at http://memory.loc.gov/cgi-bin/query/D?hlaw:20:./temp/~ammem-_sJb9. The full text of Duché’s prayer is set forth in the Selected Historical Materials (“SHM”) that we have lodged with the Court. See SHM 3. See also Annotation, 1 J. Continental Cong. 27 (Sept. 7, 1774) (recording the giving of the prayer and a vote to thank Duché “for performing divine Service, and for the excellent prayer”).

(noting that the Continental Congress “sprinkled its proceedings liberally with the mention of God, Jesus Christ, [and] the Christian religion”).

The practice of invoking Jesus’ name did not end with the Continental Congress. The first Senate Chaplain, Samuel Provoost, and the second Senate Chaplain, William White, were both Episcopal bishops obligated by oath of ordination to follow the Book of Common Prayer. See *The Proposed Book of Common Prayer* (1786 American edition);³ *The Book of Common Prayer* (1789 American edition);⁴ Article VIII, I *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* 103 (2d ed. 1954) (SHM 6). Bishop White, who was elected in 1790 and served until 1800, described his practice as follows:

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* 322 (1939) (Letter to Rev. Henry D. Johns, Dec. 29, 1830) (SHM 9).

Notably, every prayer that White listed either appealed to Jesus or contained other Christian references. *A Prayer for Congress*, for example, closes by stating:

³ available at <http://www.anglicanonline.org/resources/bcp.html>.

⁴ available at <http://justus.anglican.org/resources/bcp/1789/1790/index.htm>.

“These and all other necessities, for [the Members of Congress], for us, and the whole Church, we humbly beg in the Name and mediation of Jesus Christ, our most blessed Lord and Saviour.” See *Book of Common Prayer* (1789 American ed.) (SHM 12).⁵ In short, those “who wrote the First Amendment Religion Clauses” and established the tradition of legislative prayer (*Marsh*, 463 U.S. at 788)—whose “actions reveal their intent” in drafting the Establishment Clause, and whose views were dispositive in *Marsh* (*id.* at 790)—routinely heard prayers offered in Jesus’ name.

The practice of praying in Jesus’ name continued in Congress throughout the nineteenth and twentieth centuries. For instance, a representative 1861 prayer petitioned “that the disorders of the land may be speedily healed * * * and that Thy Church and Kingdom may flourish in a larger peace and prosperity, for Thy Son, our Savior, Jesus Christ’s sake.” Cong. Globe (July 4, 1861); see also Cong. Globe, 36th Cong., 2d Sess. 1-2 (1860) (Senate: “[F]orgive us and heal our land,

⁵ See also SHM 13, 14 (A Collect for Peace, ending “through the might of Jesus Christ our Lord”; A Collect for Grace, ending “through Jesus Christ our Lord”; A *Prayer for the President of the United States, and all in civil authority*, ending “through Jesus Christ our Lord”; A *Prayer for all Conditions of Men*, ending “[a]nd this we beg for Jesus Christ’s sake”; A *General Thanksgiving*, ending “through Jesus Christ our Lord; to whom with thee and the Holy Ghost, be all honour and glory, world without end”; A *Prayer for St. Chrysostom*, including a reference that “when two [or] three are gathered together in thy Name, thou will grant their requests” (cf. Matthew 18:20); “The Grace of our Lord Jesus Christ, and the love of God, and the fellowship of the Holy Ghost, be with us all evermore” (quoting 2 Corinthians 13:14).

for Jesus' sake. Amen."); (House: "Unto Thee we come, trusting in the atonement of our Lord and Savior, Jesus Christ, and in the sanctifying influence of the Holy Spirit * * * Will it please Thee, for Christ's Sake, to grant us Thy special aid"). Representative prayers in 1904 likewise petitioned God "in Christ's name" to help the nations "fulfill the whole law of Christ," and quoted Christian scripture: "Thou shall name Him Jesus the Saviour, for He shall save my people from their sins. * * * In Christ Jesus we ask it and offer it." Edward E. Hale, *Prayers Offered in the Senate of the United States in the Winter Session of 1904*, 16 (1904) (quoting Matthew 1:21) (SHM 16).

Similarly, in 1947, Senate Chaplain Peter Marshall asked the "Lord Jesus" to "put [His] arm around [the Senators] to give them strength" and concluded, "we humbly ask in Jesus' name." *The Prayers of Peter Marshall* 129 (1954) (SHM 18). Senate Chaplain Edward Elson continued "the first day tradition of the Senate" of praying the Lord's prayer in unison. See *Prayers by Chaplain Edward L.R. Elson, 96th and 97th Congresses, 1979-1981*, Sen. Doc. No. 97-39, at 1 (1983) (SHM 20). And in 1983, when *Marsh* was decided, numerous prayers were offered in Jesus' name. See, e.g., *Prayers Offered by the Chaplain of the Senate of the United States—Reverend Richard C. Halverson*, Sen. Doc. 98-43, at 23 (1984) (concluding "in the matchless name of Jesus, the Humble Servant of all") (SHM

24). Indeed, on April 20, 1983, the day that *Marsh* was argued, Chaplain Halverson closed his prayer, “in the name of Jesus, Savior and Lord.” *Ibid.*

Nothing has changed in the 21st century. In 2005, the last full calendar year, dozens of congressional prayers ended in Jesus’ name. One visiting House chaplain concluded his prayer: “Lord, we love You. You are the way, the truth, and the life. Help us lead others to know You and Your peace. We proclaim to all that Jesus is Lord, in whose name we pray. Amen.” 151 Cong. Rec. H5257-05 (June 28, 2005) (SHM 25). Another concluded: “We make our prayer in the name above every name, the name of Jesus Christ our Lord. Amen.” *Id.* at H3439-03 (May 18, 2005) (SHM 26). A third concluded: “Father, may they experience what it really means to be in peace because of a relationship with You through Your Son Jesus, for it is in Jesus’ name we pray. Amen.” *Id.* at H1899-03 (Apr. 13, 2005) (SHM 27). And just last week, a prayer in Congress concluded: “In Jesus’ Name, I pray. Amen.” 152 Cong. Rec. H1983-03 (May 3, 2006) (SHM 28).

In sum, as one commentator has observed, “from America’s earliest days to the present time, the prayers delivered by [congressional] chaplains have been true sacral prayers, and many of them, true Christian prayers. Indeed, within the last six years alone, over two hundred and fifty opening prayers delivered by congressional chaplains have included supplications to Jesus Christ.” Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev.

2083, 2104 (1996) (footnotes omitted); see also *Newdow v. Bush*, 355 F. Supp. 2d 265, 285 n.23 (D.D.C. 2005) (noting that “the legislative prayers at the U.S. Congress are overtly sectarian,” and that the history of inauguration prayers shows that they “have frequently been sectarian, with references to ‘Jesus Christ our Lord’ and ‘the Father, * * * the Son, * * * , and the Holy Ghost’”).

Aware of this history, the Court in *Marsh* expressly repudiated the view that prayers like those offered in the early Congresses amounted to proselytizing or sectarian favoritism. While acknowledging that those who instituted legislative prayer came from varied religious backgrounds, the Court explained that they “did not consider opening prayers as a proselytizing activity or as symbolically placing the government’s ‘official seal of approval on one religious view.’” 463 U.S. at 792 (citation omitted). *Marsh* itself therefore forecloses the argument that prayers of the sort offered in the early Congresses—which uniformly invoked Jesus’ name—are unduly “sectarian” or “proselytizing.”

Shortly after *Marsh*, moreover, the D.C. Circuit upheld Congress’s tradition of legislative prayer against an argument similar to that adopted by the district court. The D.C. Circuit explained that there was “no tenable basis for a claim that the very congressional practice deliberately traced by the Court in *Marsh* should be subject to further review,” and that the challenge to that practice did not even “raise a substantial constitutional question.” *Murray v. Buchanan*, 720 F.2d 689,

690 (D.C. Cir. 1983) (per curiam). The stay panel and the district court discounted *Murray* on the ground that the court there did not expressly “mention or rely upon the content of the prayers.” App. 117A, 42A. But the plaintiffs in *Murray* specifically argued that prayer in Congress “systematically advance[d] a particular religious viewpoint,” and that the Senate Chaplain invoked Jesus and Christian tenets in his prayers. See App. 391A; 129 Cong. Rec. S5187 (April 26, 1983) (prayer ending with “[w]e pray in the name of Jesus, Savior and Lord. Amen.”). Moreover, the court stated that it had “reviewed the parties’ presentations” but remained “persuaded that the complaint * * * ha[d] no vitality.” 720 F.2d at 690.

That the court did not find it necessary to engage in lengthy analysis thus does not mean that that the issue was not considered and decided. To the contrary, it confirms that the explicitly Christian content of the prayers—which fit comfortably within the “‘unambiguous’ history” of the prayers upheld in *Marsh*—was not of concern in light of the Supreme Court’s decision in *Marsh*. *Ibid*.

This Court should reach the same conclusion here. The “unambiguous and unbroken history of more than 200 years” upon which *Marsh* relied includes volumes of congressional prayers that make reference to Jesus, and the Court held that this tradition could not be “cast aside.” 463 U.S. at 792, 795. The prayers

offered in the Indiana legislature are not meaningfully distinguishable from the prayers offered in Congress. That fact alone requires reversal.⁶

B. *Marsh* Focused On Whether the Overall Opportunity for Prayer Was Exploited for Purposes of Proselytizing, Not On the Content of Particular Prayers.

Quite apart from the content of the congressional prayers on which *Marsh* relied, the district court’s reading of that decision is unsupportable for another reason. Although the Court there approved prayers that omit any reference to Jesus, it did not suggest that this was constitutionally *required*. Rather, the Court expressed concern (in dictum) only with situations where “the prayer *opportunity* has been *exploited* to proselytize or advance any one, or to disparage any other, faith or belief.” *Id.* at 794-795 (emphasis added). As the Tenth Circuit held in addressing a challenge to city council prayers, “*all* prayers ‘advance’ a particular faith or belief in one way or another.” *Snyder*, 159 F.3d at 1234 n.10 (emphasis added). At most, therefore, “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.” *Ibid.*

⁶ Indeed, this Court has rejected as “too crabbed” any reading of *Marsh* that “limit[s] this tradition to the specific practices that date back to the enactment of the Bill of Rights.” *Van Zandt*, 839 F.2d at 1219. It follows *a fortiori* that *Marsh* covers practices that *do* date back to the enactment of the Bill of Rights.

Allowing ministers to invoke the name of Jesus is not in any meaningful way exploiting the prayer opportunity to “proselytize” or to disparage other faiths, let alone aggressively so. The most recent decision involving this issue, *Pelphrey v. Cobb County*, 410 F. Supp. 2d 1324 (N.D. Ga. 2006), is instructive. There, as here, the plaintiffs sought to enjoin “‘sectarian’ prayers—and in particular, those that refer to ‘Jesus,’ ‘Jesus Christ,’ or ‘Christ.’” *Id.* at 1325. There, as here, guest clergy were invited to pray without regard to religion. There, as here, a “majority of religious leaders who accepte[d] the invitation [were] Christian,” but “persons belonging to the Jewish and Muslim faiths * * * offered the prayer.” *Id.* at 1326. And there, as here, a majority of the prayers referred to Jesus by name. *Id.* at 1327 n.3; App. 8A.

The court rejected the argument that *Marsh* bars legislative prayers that invoke Jesus’ name. “[T]he only reference to the ‘sectarian’ or ‘nonsectarian’ content of the prayers in the *Marsh* majority’s opinion can be found in a footnote relating how Chaplain Palmer had described his invocations,” the court stated, and “a reading of *Marsh* that reduces the majority’s holding to a mere ‘sectarian’ litmus test[] ignor[es] the reasoning and nuances of the Court’s decision in favor of a bright line rule.” 410 F. Supp. 2d at 1329 n.6, 1337.

The court went on to explain that although “[s]upplcations to an identified deity were therefore within the Court’s contemplation as it authored its holding” in

Marsh, the Court “did not articulate a clear proscription against overt sectarian references.” *Id.* at 1337. Thus, *Marsh* requires “focusing on the practice as a whole” and “deems the purposeful preference of one religious view to the exclusion of others as the primary evil to be avoided in the arena of legislative prayer.” *Id.* at 1338, 1339. Only “[w]here the invocation of sectarian concepts or beliefs, viewed from a cumulative perspective, reaches a certain level of ubiquity and exclusivity” might “the appearance of a legislative preference for one particular faith” become “constitutionally intolerable.” *Id.* at 1339.

As *Pelphrey* recognizes, *Marsh* distinguished prayers from use of the overall prayer *opportunity* to “exploit” others and convert them to a particular faith, but it did not require omitting references to Jesus from legislative prayers. This Court should read *Marsh* the same way. To be sure, as in *Pelphrey*, a majority of the prayers here refer to Jesus. But the opportunity to pray is open to all clergy; the legislature exercises no control over the content of the prayers; people from many faiths, including Jews and Muslims, have prayed; and there is no basis for any suggestion that the Speaker has encouraged proselytizing. App. 127A. The district court’s suggestion that the prayer opportunity here has “consistently been used to advance the Christian religion” is therefore unsupported by the record. App. 33A.

Reading *Marsh* to require monitoring of the content of prayer is particularly inappropriate in a case such as this one, where several dozen ministers representing

numerous faiths have the opportunity to pray at most only once per session. The Court in *Marsh* upheld the prayers even though a single Presbyterian chaplain had delivered every invocation for 16 years straight. Here, by contrast, any risk of religious favoritism is minimized by the fact that no one—let alone a government-paid chaplain—has a monopoly on the forum. The ministers are chosen from the “Minister of the Day” forms on an essentially first-come, first-served basis, and no minister who has sought to pray has been turned down. App. 177A.

In that respect, this case is similar to *Simpson*, in which the Fourth Circuit recently sustained a county board’s practice of prayer. The court emphasized the significance of having a range of outside speakers deliver prayers. A selection process in which ministers are “self selected,” resulting in “prayers being given by a wide cross-section of the [jurisdiction’s] religious leaders,” the court explained, is “in many ways more inclusive than that approved by the *Marsh* Court.” 404 F.3d at 285, 286. Such facts undercut the suggestion that the prayers are “affiliated with any one specific faith.” *Id.* at 286. The same is true here.⁷

⁷ The court below stressed that the county in *Simpson* had directed clergy to avoid invoking Jesus’ name. App. 37A. But that fact merely reinforces the proposition that prayers that make no mention of Jesus fall within the safe harbor of *Marsh*.

Moreover, the Supreme Court has repeatedly held that where the government permits various speakers to present their viewpoints, the government is not endorsing the religious content of any speech that results—even if the speech is “proselytizing.” See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-117 (2001); *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 841 (1995).

C. *Allegheny* and the Other Authorities Relied Upon by the District Court Do Not Support Its Decision.

The district court relied on a handful of other decisions that are likewise distinguishable on several grounds. First, the court erroneously reasoned that its reading of *Marsh* was supported by *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), which involved the validity of religious holiday displays. At issue in *Allegheny* were a courthouse creche display and a menorah and Christmas tree display outside another public building. Noting that “the creche stands alone: it is the single element of the display on the Grand Staircase,” the Court held that the exclusive placement of a Christian symbol in a public building amounted to “a preference for Christianity.” *Id.* at 573, 598. By contrast, the Court upheld the display of the menorah and Christmas tree, in part because it conveyed a more pluralistic message. See *id.* at 613-621 (Blackmun, J.).

In dictum, the Court in *Allegheny* distinguished *Marsh*, noting (as the Court in *Marsh* had noted) that the chaplain there had “removed all references to Christ” from his prayer and suggesting that the history of legislative prayer “can[not] justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith.” *Id.* at 603. But this statement merely confirmed what *Marsh* had settled—legislative prayer delivered by a single paid chaplain who makes no reference to Jesus is clearly constitutional. Moreover, as explained at length above, *Marsh* approved a prayer tradition that has always

included explicitly Christian prayers, and it would be wholly inappropriate for a lower court to read *Allegheny* as overruling, *sub silentio*, this aspect of *Marsh*. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts should not “conclude our more recent cases have, by implication, overruled an earlier precedent,” but rather “should follow the case which directly controls”).

Read as a whole, then, *Allegheny* at most indicates that where one chaplain or religious display has exclusive access to a “forum,” the government must take steps to ensure that the messages of various faiths are represented. Here, several dozen clergy representing an array of faith traditions—Jewish, Muslim, Eastern, as well as Christian—have prayed, and no one who has asked to pray has been turned down. Thus, there is no basis to conclude that the prayers here “have the effect of affiliating the government with any one specific faith.” 492 U.S. at 603. See *Pelphrey*, 410 F. Supp. at 1340-1341, 1344.

Nor does the Fourth Circuit’s decision in *Wynne* compel affirmance of the decision below. The court there invalidated prayer at certain city council meetings. But the council there “*insisted* upon invoking the name ‘Jesus Christ,’ to the exclusion of deities associated with any other particular religious faith.” 376 F.3d at 301 (emphasis added). The council “never invoked a deity associated with any specific faith other than Christianity,” and the mayor insisted, “‘we’re not going to

change.” *Id.* at 295, 300 n.5. The result was an exclusively Christian and “very church environment” with “a lot of ‘Amens’” and “hallelujahs.” *Id.* at 295.

The House’s invocation practice, by contrast, is open to ministers of every stripe, and clergy from numerous traditions have prayed. The Speaker “does not monitor or supervise the content of the prayers.” Moreover, “[n]o cleric or Representative has ever been admonished, corrected, or advised in any way about the religious content of the prayer that he or she delivered.” App. 12A, 55A. *Wynne* is inapposite on these grounds alone.⁸ In sum, the cases cited by the district court do not support its decision.⁹

⁸ Further, the council in *Wynne* invited the citizens to participate, and the council penalized objectors by removing them from the agenda. *Id.* at 295, 301 n.7. Neither of these factors is present here. See App. 373A-377A (Ind. House Res. No. 1 (2006) (describing the invocation “as an opportunity to * * * seek divine guidance on behalf of the House”)); *Simpson*, 404 F.3d at 289 (Niemeyer, J., concurring) (“when a governmental body engages in prayer for itself and does not impose that prayer *on the people*, the governmental body is given greater latitude than when the government imposes prayer *on the people*” (emphasis added)).

⁹ The court below also relied upon an unpublished Ninth Circuit decision, *Bacus v. Palo Verde Unified School District Board of Education*, 52 Fed. App’x 355, 2002 WL 31724273 (9th Cir. 2002), which invalidated a school board’s invocation practice on the ground that it favored Christianity. But no non-Christian ministers offered invocations in that case. *Id.* at 356-357. In addition, the court disclaimed any ruling on *legislative* prayer. See *id.* at 356 (“we need not decide whether the prayers ‘in the Name of Jesus’ would be a permissible solemnization of a legislature-like body, provided that the invocations were, as is traditional in Congress, rotated among leaders of different faiths, sects, and denominations”).

Similarly, in *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194 (2002), the city council received ministers from only one ministerial association, which had few

D. Several Lines of Supreme Court Precedent Prohibit Civil Courts From Making the Entangling Theological Distinctions Necessary to Distinguish “Sectarian” From “Nonsectarian” Prayer.

The district court not only erred in interpreting *Marsh* (and *Allegheny*) to require a constitutional distinction between “sectarian” and “nonsectarian” prayer, but it also failed to appreciate the independent constitutional problems created by such an interpretation. In particular, distinguishing between different prayers entangles the courts in controversial theological matters that First Amendment bars them from addressing. The Court in *Marsh* was well aware of this difficulty when it declined to engage in any “sensitive evaluation” of prayer or to “parse [its] content” (463 U.S. at 795), but that is precisely what the injunction here requires.

Indeed, any attempt to draw a line between “sectarian” and “nonsectarian” prayer—a *doctrinal* line—requires courts to interpret different faiths and to make controversial judgments about what aspects of those faiths are most important to their adherents. For example, enforcing the injunction here requires the court to decide that a prayer is sufficiently “inclusive” to “outsiders.” App. 12A. But to make such a judgment, the court must first determine what religious beliefs the prayer reflects, and then whether those beliefs “exclude” others’ beliefs about the nature of God (which requires determining what *others* believe). How is the court

non-Christian members. See *id.* at 1198 (noting that the group had “no Moslem, Buddhist, Hindu, or Bahai members”).

to decide whether a prayer reflects “a broad spectrum of faith” (*ibid.*) without delving into matters of doctrine? And how broad must the spectrum be?

The district court’s post-judgment ruling only compounded the problem. Observing that “the Christian tradition is familiar,” the court assumed that it could simply adopt a “pragmatic definition that addresses when prayers are sectarian in a Christian manner”—a “totality of the circumstances” or “reasonable person” approach to defining “sectarian.” App. 77A-79A. But a court’s declaring how a “reasonable person” should understand her faith is highly problematic, to say the least.

As explained below, reading *Marsh* as the district court read it would violate several separate strands of the Supreme Court’s First Amendment jurisprudence. For example, it would violate numerous decisions holding that courts may not resolve doctrinal matters or analyze the importance of particular tenets to any religious tradition. Similarly, it would violate the Court’s free speech doctrine, which teaches that viewpoint discrimination is unconstitutional even in nonpublic forums. This Court should avoid any reading of *Marsh* that creates such serious constitutional difficulties.

1. The Supreme Court has repeatedly emphasized that civil courts may not resolve matters of religious doctrine. An instructive example from the “church autonomy” context is *Presbyterian Church in the United States v. Mary Elizabeth*

Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), which involved a property dispute between a local church and a denomination. The Georgia courts resolved that case in favor of a local church by applying a “departure from doctrine” approach and concluding that the denomination had “substantially abandoned” the tenets of its faith. *Id.* at 443. The Supreme Court reversed, however, explaining that it was “wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions.” *Id.* at 445-446. “First Amendment values are plainly jeopardized when * * * litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the * * * dispute, the hazards are ever present of inhibiting the free development of religious doctrine.” *Id.* at 449.

The Court’s discussion in *Hull Church* of what is entailed in determining that a church has departed from its doctrine is particularly relevant to the question whether a civil court may determine whether a prayer is sufficiently “nonsectarian” to be offered in a legislature. As the Court explained:

[Under the departure-from-doctrine element,] the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the departure-from-doctrine element * * *

requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

Id. at 449-450.

So too here. Determining whether a prayer is “inclusive” or “nonsectarian” entails determining both the doctrinal meaning of the prayer and whether that meaning differs significantly from the religious beliefs of others (which, again, requires ascertaining their beliefs). And as the record here confirms, such a ruling inhibits clergy from offering prayers in accordance with conscience and creates a powerful incentive to conform to the government-imposed orthodoxy. See App. 182A, 186A, 190A, 340A. For these reasons, administration of the injunction below is beyond a civil court’s authority. Accord *Serbian Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 713 (1976) (“religious controversies are not the proper subject of civil court inquiry”); *Jones v. Wolf*, 443 U.S. 595, 604 (1979) (invalidating any approach that “would require the civil court to resolve a religious controversy”).

2. Similarly, in several free exercise decisions, the Supreme Court has held that civil courts are incompetent to conduct comparative analyses of different faiths. A leading example is *Thomas v. Review Board*, 450 U.S. 707 (1981), in which a Jehovah’s Witness challenged Indiana’s denial of unemployment compensation benefits. Indiana argued that the Jehovah’s Witness was ineligible

because he turned down work building military equipment. When the Jehovah's Witness asserted that his faith barred him from manufacturing weapons, the state replied that such work was not inconsistent with the Jehovah's Witnesses' faith, citing the fact that another Jehovah's Witness believed that "such work was 'scripturally' acceptable." *Id.* at 715. The Indiana courts agreed, but the Supreme Court reversed, explaining that "[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, *and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses.*" *Ibid.* (emphasis added); see also *id.* at 716 ("Courts are not arbiters of scriptural interpretation.").

In crafting the injunction here, the district court implicitly endorsed judicial competence to resolve religious "intrafaith differences." The court asserted that "the Christian tradition is familiar to * * * the court," and it applied a "reasonable person" standard to "address when prayers are sectarian in a Christian manner." App. 77A, 78A. This is plainly unconstitutional. To declare that a prayer is "nonsectarian," the court must conclude that it is consistent with the "common faith" of a broad class of adherents—that it appeals to the lowest common Judeo-Christian denominator. Further, weighing the importance of religious differences to people of different faiths is akin to judging the "centrality" of a religious belief to a broader religious tradition. Cases such as *Thomas* emphatically teach that

such analysis “is not within the judicial function.” 450 U.S. at 716; accord *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs * * * to a faith”).

Enforcing the injunction here in anything like a neutral manner is also highly unworkable, if not impossible. Indeed, the district court’s own examples reveal the futility of trying to draw a “sectarian”-“nonsectarian” line. The court described the prayers offered on March 17 and April 28, 2005, as “fall[ing] squarely within the tradition of non-sectarian legislative prayers permitted by *Marsh*.” App. 12A. Both of these prayers, however, included appeals to God as “Father,” which itself reflects a personal, and probably trinitarian, conception of God. Indeed, one of the plaintiffs here objects to “Father” because it implies the existence of a “Son.” App. 328A.

The district court failed to explain how a prayer that embodies a conception of God as personal and fatherly does not “endorse Christianity in general.” App. 73A. But it may be even more “sectarian” than that. Within Christianity, there are substantial differences of opinion on the nature of the Trinity. Many liberal Protestants would not describe the Trinity as “Father, Son, and Holy Spirit.” Instead, citing scriptures such as John 4:24, they would argue that “God is spirit,” and they would describe the triune God in gender-neutral terms, such as “Creator, Savior, and Spirit.” Cf. Karen Armstrong, *A History of God: The 4,000-Year*

Quest of Judaism, Christianity and Islam 382-383 (1993). By contrast, many Catholics and conservative Protestants would decline to use gender-neutral terms to address God. Such an understanding of God would be inconsistent with their understanding of the Bible and church tradition. Cf. Paul Johnson, *The Quest for God: A Personal Pilgrimage* 48-49 (1996). And this is to say nothing of the views of sects such as Christian Scientists, who understand God in a purely impersonal, metaphysical sense. See Mary Baker Eddy, *Science and Health with Key to the Scriptures* 331 (2000 ed.). In the face of such deep-seated religious differences, the court's decree that a theologically controversial, gender-specific reference to God as "Father" is unlikely to make anyone feel like "insiders" or "outsiders" is unrealistic. App. 8A, 12A.

Indeed, plaintiffs themselves cannot agree on what constitutes nonsectarian prayer. All insist that references to "Jesus," "Christ," and "Savior," are forbidden, and the court below agreed. But what about "Lord" or "Father"? One plaintiff believes it is acceptable depending on the context (App. 316A), but another is uncomfortable with those terms (App. 329A). Moreover, while three plaintiffs have no objection to "Creator," a fourth expressed concern if the term is used to suggest divine involvement on behalf of individuals. App. 330A. Another plaintiff candidly stated: "To the extent that [a prayer] includes any reference to a deity that is offensive to another, you verge on being sectarian." App. 316A.

The district court also frowned on the use of “indirect but well understood expressions of specifically Christian beliefs.” App. 79A. But again, the very prayers it cited as exemplary violate this standard. For example, the prayer on April 28, 2005, “may we remember that we are called to serve and not to judge” (App. 171A) was plainly a reference to Jesus’ familiar challenge to “judge not, lest ye be judged” (Matthew 7:1 (King James Version)). The fact that the cleric did not provide citations to chapter and verse does not diminish the fact that this was a “well understood expression[] of specifically Christian beliefs.” App. 79A.

The district court further indicated that clergy may refer to God as “Allah” or “Elohim,” because this is simply a “choice of language.” App. 77A. But this statement is extremely controversial. “[S]ome Muslim scholars feel that ‘Allāh’ should not be translated, because they perceive[] the Arabic word to express the uniqueness of ‘Allāh’ more accurately than the word ‘god’, which can take a plural ‘gods’, whereas the word ‘Allāh’ has no plural form.”¹⁰ Understood in this manner, use of the word “Allah” might well “exclude” those who do not share a Muslim conception of God. Indeed, one of the plaintiffs here has asserted that “there definitely would be a sectarian prayer if it referenced only Allah.” App. 283A.

¹⁰ <http://en.wikipedia.org/wiki/Allah>.

Concerning *Elohim*, one leading authority states that “[m]ost often [*Elohim*] is a plural of majesty for *Israel’s* ‘God,’” *Harper Collins Bible Dictionary* 737 (rev. ed. 1996) (emphasis added), and another states that “the widespread usage in Hebrew of this plural form * * * was almost certainly encouraged by *the belief in the Israelite God as the only one of significance in Israel* and therefore as the sum and total of all deity,” *Dictionary of the Bible* 334 (rev. ed. 1963) (emphasis added). Thus, the use of *Elohim* may, to some, connote the superiority of the Jewish conception of God, which might well be viewed as “sectarian” to those of other views.

In short, theological distinctions are not amenable to evaluation under a simplistic test borrowed from the world of torts. And faith is too complex, too subtle, and too diverse to be evaluated through a “reasonable person” prism—even if the Constitution permitted such an evaluation, which it does not. The constitutional way to show respect for people of all religious traditions is to let everyone pray in accordance with conscience.¹¹

¹¹ The injunction also contravenes the Supreme Court’s school prayer decisions, which hold that public school officials may not regulate the content of prayers. *E.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992). These cases do not implicate legislative prayer—as *Marsh* makes clear, the public schools raise particular Establishment Clause concerns that are absent in legislative settings. 463 U.S. at 792 (legislative prayer involves “adult[s], [who] presumably [are] not readily susceptible to ‘religious indoctrination’”); accord *Weisman*, 505 U.S. at 596-597. But an important part of the *rationale* for these decisions is that public officials (including judges) are “without power to prescribe by law any

2. The district court’s injunction also violates the First Amendment’s command of viewpoint neutrality. The House’s “Minister of the Day” policy, under which no minister has ever been denied the opportunity to pray, is a “nonpublic forum.” See *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46-49 (1983). And it is well established that, even in administering a nonpublic forum for “official business,” the government may not discriminate on the basis of viewpoint, including religious viewpoint. *Id.* at 46, 48; see *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

The district court’s injunction unquestionably discriminates among religious viewpoints. Those of the view that prayer must invoke the name of a specific deity

particular form of prayer.” *Engel*, 370 U.S. at 430; see *id.* at 429 (the Founders recognized that “one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government’s placing its official stamp of approval upon one particular kind of prayer”); *Weisman*, 505 U.S. at 589 (prayer is “too precious to be either proscribed or prescribed by the State”).

Thus, just as *Marsh* settled the constitutionality of legislative prayer, *Engel* and *Weisman* establish that judges may not regulate the content of prayers that *are* permitted. Indeed, citing *Engel* and *Weisman*, the federal government has stated that “where students are entitled to pray, public schools may not restrict or censor their prayers on the ground that they might be deemed ‘too religious’ to others. The Establishment Clause prohibits state officials from making judgments about what constitutes an appropriate prayer, and from favoring or disfavoring certain types of prayers—be they ‘nonsectarian’ and ‘nonproselytizing’ or the opposite—over others.” U.S. Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003); see 20 U.S.C. § 7904(b). This reasoning confirms that the district court erred in reading *Marsh* to forbid the offering of “sectarian” invocations in the House.

are barred from offering invocations; those of the view that God may be addressed in a generic way are permitted to pray. Christians who invoke the name of Jesus, and Hindus who invoke the name of Vishnu, are excluded; but Jews praying to Elohim or Muslims praying to Allah are included. This is precisely the sort of government-imposed orthodoxy the First Amendment was designed to prevent.

Indeed, the district court's injunction is a direct violation of *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001), which held that the First Amendment does not permit the government, in controlling access to its property, "to distinguish between speech from a religious viewpoint and religious prayer, instruction or worship." *Id.* at 570. In so holding, the court explained that "such distinctions, the Supreme Court has indicated, ultimately would be beyond a court's competence to administer" and "would entangle the Village with religion to an impermissible degree." *Id.* at 570 (collecting authorities). Moreover, the state may not "inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith." *Ibid.*

This is an *a fortiori* case under *DeBoer*. If courts are not competent to distinguish between groups that pray and those that otherwise address civic issues from religious viewpoints, then plainly courts cannot administer a distinction based on differences between *prayers*.

Indeed, every component of the First Amendment—the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause—compels this conclusion. As the Supreme Court explained in *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981), distinctions between prayer or worship and other sorts of religious speech lack “intelligible content.” Moreover, administering such distinctions requires “inquir[ing] into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith,” which “would tend inevitably to entangle the State with religion in a manner forbidden by our cases.” *Ibid.*

4. While acknowledging that the issue “is deserving of more plenary and respectful study on the merits review,” the stay panel discounted these precedents on the ground that they reflected only “Justice Brennan’s view in his dissent in *Marsh*.” App. 120A. As explained above, however, *Marsh* did not purport to bar “sectarian” prayers, and the congressional prayers that informed that decision have routinely referred to Jesus.

Moreover, the majority in *Marsh* did not address, let alone express disagreement with, Justice Brennan’s position that “it is simply beyond the competence of government, and inconsistent with our conceptions of liberty, for the State to take upon itself the role of ecclesiastical arbiter.” 463 U.S. at 821. That view is supported by a long line of cases (including many joined by Justices

in the *Marsh* majority), and the fact that it appeared in Justice Brennan’s dissent does not necessarily mean that the majority rejected it. If anything, the majority agreed with this aspect of his views, for it warned courts not “to parse the content of a particular prayer.” *Id.* at 794-795.

Even if *Marsh* were ambiguous in that regard, however, substantial precedent makes clear that *Marsh* should not be read to *create* constitutional difficulties by requiring courts to distinguish between “sectarian” and “nonsectarian” prayers. To the extent that there is any conflict between *Marsh*’s dictum and the direct holding of numerous Supreme Court decisions (and we think they are in agreement), this court should follow the latter. See *Pelphrey*, 410 F. Supp. 2d at 1339 (“a *per se* proscription on any reference to a deity acknowledged by one faith, or any belief unique to that faith, would force courts into precisely the position the Supreme Court cautioned against in *Marsh* and *Lee*—in effect, requiring them to assume the role of regulators and censors of legislative prayer”). As Justice Souter explained in *Weisman*, no “subject [is] less amenable to the competence of the federal judiciary, *or more deliberately to be avoided where possible,*” than “comparative theology.” 505 U.S. at 616-617 (emphasis added).

The stay panel and the district court also noted that the Speaker’s staff circulates a letter to visiting clergy suggesting that they “strive for an ecumenical

prayer.” App. 86A, 121A, as if the injunction is but a court-ordered version of the same request. But the Speaker has never suggested that clergy pray in a manner inconsistent with their conscience, let alone insisted that they avoid referring to Jesus or other deities. The staff letter was nothing more than a suggestion to be respectful to those present in the legislative setting, which is a far cry from a binding federal court injunction.

Even then, moreover, the letter was sent only to visiting clergy, not to representatives who prayed. As the district court acknowledged, “the Speaker does not monitor or supervise the content of the prayers that are offered,” and “[n]o cleric or Representative has ever been admonished, corrected, or advised in any way about the religious content of the prayer that he or she delivered.” App. 12A, 55A. Indeed, the record shows that, prior to the decision below, all visiting clergy were able to pray in accordance with their conscience, and there is no evidence that anyone altered any prayer to comply with the letter. See App. 129A. Visiting clergy thus understood the staff letter as nothing more than a request for an attitude of respect toward all those present.

By contrast, the evidence is also undisputed that many clergy would *not* be able to pray under the terms of the injunction. App. 182A, 186A, 190A. Indeed, as shown in the Speaker’s affidavit submitted in the stay briefing, several ministers contacted by the Speaker’s office indicated “that they could not in good conscience

offer prayer in the House within the parameters of the District Court’s injunction.” App. 340A. Moreover, the Speaker has affirmed that he refuses to “actively or passively censor[] prayers by informing clergy and members of the House that they cannot pray in accordance with the dictates of their conscience in the event that they cannot comply with the theological guidelines issued by the [district] Court.” App. 338A. The record is therefore clear that the Speaker does not (and will not) interfere in any way with the offering of prayers in the House.

Finally, the district court erroneously concluded that the analysis presented above would mean that there are “no limits on legislative prayer, apart perhaps from intentional discrimination in the selection of volunteer clergy from different religious faiths.” App. 48A. Not so: public officials remain free to regulate prayer on any *secular* and *neutral* basis. The cases discussed above hold that courts (and those carrying out their orders) may not discriminate among prayers on any *religious* basis. We acknowledge that this is a substantial limitation on the ability of public officials (and courts) to regulate the content of legislative prayer. But that limitation leaves room for regulation on neutral, non-doctrinal grounds, such as whether the prayers are too long or expressly incite to violence.

* * * * *

Nothing in the reasoning of *Marsh* bars invoking Jesus’ name in legislative prayers. To the contrary, the historical tradition on which the Court relied in that

case has always included explicitly Christian prayers. And a reading of *Marsh* that necessitates a distinction between “sectarian” and “nonsectarian” prayers entangles civil courts and other public officials in theological questions, in violation of numerous Supreme Court precedents. What is more, the judicial oversight necessary to administer the court’s injunction is both unworkable and a grave affront to the internal workings of a co-sovereign legislature.

CONCLUSION

For the foregoing reasons, the district court’s judgment should be reversed and remanded with instructions to vacate the injunction and declaratory judgment.

Respectfully submitted.

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**CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(a)(7)**

Pursuant to Fed. R. App. P. 32(a)(7), counsel for defendant-appellant hereby certifies that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with proportionally spaced font. The length of this brief is 13,687 words.

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CIRCUIT RULE 31(e)(1) CERTIFICATION

Pursuant to Cir. R. 31(e)(1), counsel for defendant-appellant hereby certifies that a digital version of defendant-appellant's brief has been furnished to the court, including portions of the Appendix available electronically. The following documents were not available electronically:

- (1) Affidavits in Support of Defendant-Appellant (175A-199A)
- (2) Affidavit of Brian Bosma, Jan. 31, 2006 (337A-338A)
- (3) Reply Affidavit of Brian Bosma, Feb. 7, 2006 (339A-340A)
- (4) Selected Historical Documents

Dated: May 10, 2006

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CERTIFICATE OF SERVICE

Counsel for defendant-appellant hereby certifies that on May 10, 2006, two copies of the Brief and Required Short Appendix of Appellant, and one copy of the Separate Appendix and Selected Historical Documents, as well as a digital version containing the brief, were delivered by U.S. Mail to

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Cir. R. 30(d), counsel for defendant-appellant hereby certifies that all materials required by Cir. R. 30(a) and (b) are included in the Appendix to defendant-appellant's brief.

Dated: May 10, 2006

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