GOD SAVE THE UNITED STATES AND THIS HONORABLE COURT: NAVIGATING THROUGH THE MARSH AFTER *JOYNER V. FORSYTH COUNTY, NORTH CAROLINA*, 653 F.3D 341 (4TH CIR. 2011)*

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I. INTRODUCTION

Almost thirty years ago, the Supreme Court held, in *Marsh v. Chambers*, that Nebraska's practice of opening its legislative sessions with prayer did not violate the Establishment Clause of the United States Constitution.[1] This clause provides that "Congress shall make no law respecting an establishment of religion . . . ."[2] *Marsh* is a significant case in the jurisprudence of the Establishment Clause, as the Court refused to apply the traditional tests for government-sponsored prayer to legislative prayer.[3] The creation of a new test for determining the constitutionality of legislative prayer, one which allowed such prayer to avoid unconstitutionality in some instances, was probably necessary for its survival, as Justice Brennan was likely correct in observing that "if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause."[4] Presumably, the Court felt the need to adopt a new test with respect to legislative prayer, given its acceptance at the time of our nation's founding and its inability to satisfy the Establishment Clause tests in use at the time.[5] As clearly as *Marsh* stands for the proposition that

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1. 463 U.S. 783, 793 (1983).
2. U.S. CONST. amend. I.
3. *See* Scott W. Gaylord, *When the Exception Becomes the Rule: Marsh and Sectarian Legislative Prayer Post*-Summum, 79 U. CIN. L. REV. 1017, 1019 (2011); *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) ("[T]he Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.").
4. *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting); *see also id.* at 797-801 (analyzing the prayer policy of the Nebraska Legislature under the *Lemon* test and finding it unconstitutional).
5. The most common Establishment Clause "test" can be found in *Lemon v. Kurtzman*, in which the Court stated, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not

legislative prayer is not unconstitutional per se, it is equally clear that the interpretation of *Marsh* by other courts has been fractured and inconsistent.[6] Given that the Supreme Court has found legislative prayer historically important enough to exempt it from the more stringent Establishment Clause tests, it is important to clearly establish its boundaries so as to protect it from illegitimate attacks.

This Note will argue that, in *Joyner v. Forsyth County, North Carolina*, the United States Court of Appeals for the Fourth Circuit misinterpreted Supreme Court precedent in holding that sectarian legislative prayer was a violation of the Establishment Clause per se. It will also argue that the content of legislative prayers, as opposed to the identities of the speakers or the policies for choosing them, is not the determining factor in examining possible Establishment Clause violations. For these reasons, the holding of the Fourth Circuit in *Joyner* was incorrect.

Section II of this Note will provide an overview of the relevant case law regarding legislative prayer, including Supreme Court precedent and cases from certain courts of appeals applying that precedent. Next, Section III will specifically examine the opinion of the United States Court of Appeals for the Fourth Circuit in *Joyner*. Finally, Section IV will analyze why the majority in *Joyner* was incorrect to hold that the legislative prayer policy at issue violated the Establishment Clause, how the court should have applied precedent to come to a different result, and the effects that *Joyner* will have on legislative prayer in the future.

II. BACKGROUND

A summary of the relevant cases that have dealt with legislative prayer is necessary to understand the decision rendered by the court in *Joyner*. This summary will begin by examining the only Supreme Court

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foster 'an excessive government entanglement with religion.'" 403 U.S. 602, 612-13 (1971) (citations omitted). When government action discriminates among religions, the "test" to apply is found in *Larson v. Valente*, in which the Court held that action granting preferences to certain denominations "must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest." 456 U.S. 228, 247 (1982) (citations omitted).

6. *See* Robert Luther III, "*Unity Through Division": Religious Liberty and the Virtue of Pluralism in the Context of Legislative Prayer Controversies*, 43 CREIGHTON L. REV. 1, 3 (2009) (footnotes omitted) ("Today, 'Establishment Clause jurisprudence, including cases interpreting Marsh [v. Chambers], remains complex and unresolved' and recent decisions from the United States Courts of Appeal have proven no exception to this rule."); Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly, 506 F.3d 584, 585 (7th Cir. 2007) (holding that plaintiffs were without standing to challenge sectarian legislative prayer); Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494, 499 (5th Cir. 2007) (en banc) (same). *Compare* Pelphrey v. Cobb County, Ga. 547 F.3d 1263, 1272 (11th Cir. 2008) (holding that courts may not parse the content of prayers containing sectarian references unless the prayer opportunity has been exploited), *with* Wynne v. Town of Great Falls, S.C., 376 F.3d 292, 298-99 (4th Cir. 2004) (holding that prayers containing references to Jesus Christ necessarily "promoted one religion over all others").

case dealing exclusively with legislative prayer, *Marsh v. Chambers*, and then move onto cases out of the United States Courts of Appeals for the Fourth and Eleventh Circuits. Cases from these two circuits will be discussed because they deal with legislative prayer policies most similar to the policy at issue in *Joyner*, while the cases from the Fourth Circuit are also discussed to distinguish them from *Joyner* in showing that it was wrongly decided.

A. *Marsh v. Chambers*

In its first opportunity to decide the constitutionality of a legislative prayer policy, the Supreme Court faced the issue of whether the Nebraska Legislature's practice of opening its legislative sessions with a chaplain-led prayer violated the Establishment Clause.[7] The chaplain was chosen every two years by the Executive Board of the Legislative Council and paid with public funds.[8] By the time the Nebraska Legislature was enjoined from engaging in its "established chaplaincy practice" by the United States Court of Appeals for the Eighth Circuit, the chaplain position had been filled by the same Presbyterian minister for sixteen consecutive years.[9]

The Supreme Court began its analysis by examining the practice of legislative prayer around the time the Constitution was ratified.[10] It noted that the Continental Congress had opened its sessions with prayers given by a paid chaplain and that one of the first items of business taken up by the First Congress was "adopt[ing] the policy of selecting a chaplain to open each session with prayer."[11] The Court also observed that the final language of the Bill of Rights, in which the Establishment Clause is found, was agreed upon just "three days after Congress authorized the appointment of paid chaplains" and reasoned that the authors of the Establishment Clause did not view legislative prayer as a violation of that clause.[12] The Court then noted that "[t]he Establishment Clause does not always bar a state from regulating conduct simply because it 'harmonize[s] with religious canons.'"[13]

Shifting its attention to the characteristics of Nebraska's chaplaincy practice, the Court held that filling the chaplain position with the same Presbyterian minister for sixteen years did not violate the Establishment Clause, as the minister was reappointed on account of his "performance and

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7. *Marsh*, 463 U.S. at 784.
8. *Id.* at 784-85.
9. *Id.* at 786.
10. *See id.* at 786-92.
11. *Id.* at 787-88.
12. *Id.* at 788.
13. *Id.* at 792 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961) (Frankfurter, J., concurrring)).

personal qualities," not to advance the beliefs of his church.[14] As to the claim that the prayers were unconstitutional because they were in the Judeo-Christian tradition, the Court stated that "[t]he content of 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."[15] In other words, without a showing that the Nebraska Legislature's legislative prayer opportunity was used to promote, criticize, or recruit for a particular faith, the Court would not "parse the content of a particular prayer."[16]

B. The Fourth Circuit's Pre-*Joyner* Interpretation of *Marsh*

In its first case dealing with the constitutionality of legislative prayer, *Wynne v. Town of Great Falls, South Carolina*, the Fourth Circuit held that prayers recited before town council meetings violated the Establishment Clause.[17] Although there was no formalized prayer policy, the prayers were given by town council members and were exclusively Christian in nature, even after the plaintiff had requested that the prayers be nonsectarian.[18] The court distinguished the case from *Marsh* by pointing out that the prayers at the town council meetings "frequently contained references to Jesus Christ."[19] The court read *Marsh* to stand for the proposition that only nonsectarian prayer, prayer containing no references to any particular faith's tenets, was permissible under the Establishment Clause.[20] The court found support for this interpretation in dicta from another Supreme Court case, *County of Allegheny v. ACLU Greater Pittsburg Chapter*,[21] which stated that the prayers at issue in *Marsh* were constitutional "because the particular chaplain had removed all references to Christ."[22] Also of significance, the court differentiated between advancing and proselytizing a particular faith in finding that, although the prayers given at the town council meetings did not *proselytize* Christianity, they did *advance* that particular faith.[23]

In the next Fourth Circuit case to deal with legislative prayer, *Simpson v. Chesterfield County Board of Supervisors*, the court upheld a legislative prayer policy in the face of an Establishment Clause challenge from a self-

14. *Id.* at 793-94.
15. *Id.* at 794-95.
16. *Id.* at 795.
17. 376 F.3d 292, 298 (4th Cir. 2004).
18. *Id.* at 294-95.
19. *Id.* at 298 (internal quotation marks omitted).
20. *Id.*
21. 492 U.S. 573 (1989).
22. *Wynne*, 376 F.3d at 299 (quoting *Allegheny*, 492 U.S. at 603) (internal quotation marks omitted).
23. *Id.* at 300-01.

proclaimed "witch" who was not allowed to give an invocation at county board meetings.[24] The prayer policy at issue, which was adopted in 1984 shortly after the Supreme Court decided *Marsh*, required that invocations be nonsectarian in nature and not be used to advance, proselytize, or disparage any particular faith or belief.[25] The invocations were given by religious leaders from around the community, who were sent invitations to participate and chosen on a first-come, first-serve basis.[26] There were 235 congregations on the list used to send out invitations to religious leaders.[27] Although a large number of the congregations on the list were traditional Christian churches, Jewish, Islamic, Mormon, and Jehovah's Witness congregations were included, and invocations had been given by Jewish and Islamic religious leaders.[28]

The court based its decision to uphold the legislative prayer policy on its inclusiveness, its intended benefit for the legislative body alone, and the nonsectarian nature of the invocations,[29] even though some invocations made references to "the God of Abraham, Isaac and Jacob" and "the God of Abraham, of Moses, Jesus, and Mohammed."[30] In fact, the letter sent to the religious leaders was changed, after litigation began, to direct them "to avoid invoking the name of Jesus Christ . . . ."[31] The court, despite its admiration of the prayer policy's inclusive nature, also upheld the decision to deny a practitioner of Wicca the chance to give an invocation, relying on *Marsh*'s acceptance of choosing a religious leader from one sect to give all invocations.[32] Specifically, the reason for refusing to allow the plaintiff to give an invocation was that the invocations were "traditionally made to a divinity that is consistent with the Judeo-Christian tradition, a divinity that would not be invoked by practitioners of witchcraft."[33] The court thereby rejected the idea that "the identity of the prayer-giver, rather than the content of the prayer, was what would 'affiliat[e] the government with any one specific faith or belief.'"[34] These two cases provide support for the theory that, prior to deciding *Joyner*, the Fourth Circuit had misinterpreted the requirements of constitutional legislative prayer set out in *Marsh*, thereby making its incorrect decision in *Joyner* understandable, but not excusable.

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24. 404 F.3d 276, 284-85 (4th Cir. 2005).
25. *Id.* at 278.
26. *Id.* at 279.
27. *Id.*
28. *Id.*
29. *Id.* at 283-84.
30. *Id.* at 284.
31. *Id.* at 279.
32. *Id.* at 285.
33. *Id.* at 280.
34. *Id.* at 286 (quoting County of Allegheny v. ACLU Greater Pittsburg Chapter, 492 U.S. 573, 603 (1989)).

C. *Pelphrey v. Cobb County, Georgia*

In *Pelphrey v. Cobb County, Georgia*, the issue facing the United States Court of Appeals for the Eleventh Circuit was whether the legislative prayer policies of two county commissions, which allowed volunteer religious leaders to give invocations on a rotating basis, violated the Establishment Clause.[35] Until 2005, the two county commissions, the Cobb County Commission (County Commission) and the Cobb County Planning Commission (Planning Commission), had different methods for choosing the religious leaders who would give invocations.[36] The County Commission selected speakers from a list which contained most of the congregations in the area, with the clergy being selected at random and prohibited from giving an invocation at consecutive meetings.[37] The Planning Commission, on the other hand, selected its speakers out of the phone book, but Islamic, Jewish, Mormon, and Jehovah's Witness congregations were crossed out, and no religious leaders from any of those religions were invited to give an invocation.[38]

Since 2005, however, the two commissions had used the same master list of congregations to randomly select clergy to give invocations at commission meetings.[39] Under the commissions' policies, prayers were given by religious leaders from a wide variety of faiths.[40] In the ten years preceding the Eleventh Circuit's decision, roughly seventy percent of the prayers given contained references to Christianity, often by concluding the prayer with mention of Jesus, but prayers also contained occasional references to deities or tenets of other religions, such as Passover, Allah, and Mohammed.[41]

The Eleventh Circuit began its analysis of the issue by stating that it could not inquire into the content of legislative prayers "unless 'the prayer opportunity ha[d] been exploited' to advance or disparage a belief . . . ."[42] The court then noted that *Marsh* does not require legislative prayers to be nonsectarian to avoid violating the Establishment Clause, as such a position would conflict with *Marsh*'s holding that a legislative prayer's content is only of concern in certain situations.[43] Moreover, the fact that the chaplain

35. Pelphrey v. Cobb County, Ga., 547 F.3d 1263, 1266 (11th Cir. 2008).
36. *Id.* at 1267.
37. *Id.*
38. *Id.* at 1267-68.
39. *Id.* at 1268.
40. *Id.* at 1266.
41. *Id.* at 1267.
42. *Id.* at 1271 (quoting Marsh v. Chambers, 463 U.S. 786, 794 (1983)).
43. *Id.* (quoting *Marsh*, 463 U.S. at 794-95); *see also* Snyder v. Murray City Corp., 159 F.3d 1227, 1233-34 n.10 (10th Cir. 1998) ("[T]he mere fact a prayer invokes a particular concept of God is not enough to run afoul of the Establishment Clause."). Although this statement was made in a

in *Marsh* had removed all references to Christ from his prayers was delegated to a footnote in the Court's opinion.[44] To the Eleventh Circuit, the nonsectarian nature of the chaplain's prayers in *Marsh* was just one factor used by the Supreme Court in upholding Nebraska's legislative prayer policy.[45]

The court then concluded that the county commissions did not exploit their legislative prayer policies by having Christian speakers offer most of the prayers, as speakers from other religions also offered prayers.[46] The court then intimated that prayers having the effect of undermining public participation by people of all religions through their "exclusively sectarian nature" would violate the Establishment Clause.[47] However, it concluded that the content of the prayers at issue did not advance any particular religion because the tenants of particular religions were usually mentioned only briefly at the end of the prayers and tenants of multiple religions were mentioned.[48] Conversely, the court did find that the method for choosing the religious leaders to give invocations used by the Planning Commission before 2005 violated the Establishment Clause "because it 'categorically excluded' certain faiths."[49] It would only be a few years before the Fourth Circuit would decide *Joyner v. Forsyth County, North Carolina*, a strikingly similar legislative prayer case.

III. EXPOSITION OF THE CASE

In the case of *Joyner v. Forsyth County, North Carolina*, the United States Court of Appeals for the Fourth Circuit was again faced with the issue of whether a legislative prayer policy violated the Establishment Clause.[50] The court came to a different decision than the Eleventh Circuit did in *Pelphrey*, holding that the prayer policy was exploited to advance Christianity at the expense of other religions, and was therefore unconstitutional, because a large majority of the prayers contained references to Christian tenets.[51] The Fourth Circuit clearly felt that this

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footnote, its placement was likely a result of the fact that the case did not involve an issue of whether sectarian references were prohibited in legislative prayer.

44. *Id.* (quoting *Marsh*, 463 U.S. at 793 n.14).
45. *Id.*
46. *Id.* at 1277.
47. *See id.* at 1273 (quoting Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 283 (4th Cir. 2005)).
48. *Id.* at 1277-78.
49. *Id.* at 1278-79 (quoting Pelphrey v. Cobb County, Ga., 448 F. Supp. 2d 1357, 1373 (N.D. Ga. 2006)).
50. 653 F.3d 341, 345 (4th Cir. 2011).
51. *Id.* at 350.

result was required by its prior interpretations of *Marsh*'s requirements for upholding legislative prayer in *Wynne* and *Simpson*.[52]

A. Facts and Procedural Posture

The Forsyth County Board of Commissioners (Board), the elected governing board of the county, held bi-monthly meetings, which began with a prayer.[53] Before 2007, the Board decided on who would give this invocation by mailing letters out to the religious leaders of all established congregations in the area, offering them the opportunity to give the invocation on a first-come, first-serve basis.[54] These letters informed the clergy that they could give the invocation in accordance with their own conscience, but requested that the opportunity not be exploited to proselytize or disparage any particular religion.[55] The Board did not allow any particular religious leader to give consecutive invocations or give more than two invocations in a calendar year.[56] When an invocation was given, the Board Chair would introduce the religious leader giving the invocation and invite those present who wished to stand to do so.[57]

Between January 2006 and February 2007, around half of the prayers given contained phrases mentioning Jesus, most of which were at the conclusion of the prayers.[58] In March 2007, three county residents who had attended the Board's meetings brought suit to enjoin sectarian prayers from being given in the future.[59] After the filing of the lawsuit, the Board formalized its prayer policy, which stated that no one would be forced to participate in any prayer and that the prayers were not intended to affiliate the Board with, or show its preference for, any particular religion.[60] However, from May 2007 to December 2008, around four-fifths of the prayers contained references to Jesus, usually in the prayers' closings, and no non-Christian deities were mentioned.[61] After hearing a Board meeting prayer that contained several references to tenets of Christianity, two of the residents amended the lawsuit to contain new factual allegations, such as the increase in the frequency of Christian references in the prayers.[62] Both the residents and the Board filed for summary judgment.[63]

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52. *Id.* at 348-49.
53. *Id.* at 343.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 344.
61. *Id.*
62. *Id.* at 345.
63. *Id.*

The magistrate judge found that the prayers given after the prayer policy was formalized displayed the Board's preference for Christianity over other religions and affiliated the Board with that religion.[64] The district court made the same findings and issued both a declaratory judgment that the prayer policy violated the Establishment Clause and an injunction preventing the Board from continuing the prayer policy, a decision from which the Board appealed.[65]

B. The Majority Opinion

The majority of the Fourth Circuit panel held that the use of Christian tenets in a large majority of the prayers at issue in *Joyner* rendered the Board's prayer policy unconstitutional, affirming the district court's declaratory judgment and injunction.[66] Moreover, the court held the prayer policy to be unconstitutional, despite the fact that the policy itself was neutral, because the implementation of the policy allowed for sectarian references that made some citizens uncomfortable.[67]

After explaining that legislative prayer was not unconstitutional per se, the court noted that legislative prayer policies would violate the Establishment Clause if they officially preferred one religious denomination over another.[68] The court extrapolated from this rule to come to the conclusion that legislative prayer is constitutional *only* if the prayers do not contain sectarian references, but at the same time stated that occasional sectarian references would not violate the Establishment Clause.[69] In the majority's opinion, *Marsh* required this conclusion because the chaplain's removal of all references to Christ from his prayers was what convinced the *Marsh* Court to determine that the policy did not advance, proselytize, or disparage a particular religion.[70]

The court found additional support for this reading of *Marsh* in a subsequent Supreme Court case, *Allegheny*, dealing with the constitutionality of a nativity scene and menorah on public lands, in which the Court said that the prayers at issue in *Marsh* were constitutional because all references to Christ had been removed.[71] The Fourth Circuit also noted that its prior decisions concerning legislative prayer, *Wynne*, *Simpson*, and

64. *Id.*
65. *Id.*
66. *Id.* at 350.
67. *Id.* at 353-54.
68. *Id.* at 347 (quoting Larson v. Valente, 456 U.S. 228, 244 (1982)).
69. *Id.* at 349 (emphasis added).
70. *Id.* at 348 (quoting Marsh v. Chambers, 463 U.S. 783, 793 n.14, 794-95 (1983)).
71. *Id.* (quoting County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989)).

Turner v. City Council of Fredericksburg, Virginia,[72] had only approved legislative prayer when "it [was] nonsectarian in both policy and practice."[73] Because roughly four-fifths of the prayers given before the Board's meetings contained references to tenets of Christianity, its legislative prayer policy violated the Establishment Clause.[74]

Forsyth County argued that nonsectarian prayers were only required in *Wynne* and *Simpson* because the prayers were given only by town council members in *Wynne* and the prayer policy in *Simpson* allowed only religious leaders from monotheistic religions.[75] The *Joyner* court refused to distinguish the case before it from *Wynne* or *Simpson* because it viewed the content of the prayers and their governmental setting, not the identity of the speaker, to be the dispositive factors in their analysis under the Establishment Clause.[76] More specifically, the *Joyner* court interpreted *Wynne* and *Simpson* to stand for the proposition that sectarian legislative prayers are prohibited, regardless of the policy behind them, because they proselytize or advance a particular faith or belief.[77] The court, however, correctly rejected the idea that courts may never "parse the content of a particular prayer," as such a rule would prohibit courts from properly deciding Establishment Clause disputes concerning legislative prayer.[78] The court then noted that *Marsh* only prohibited the parsing of individual prayers when the "prayer opportunity ha[d not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[79]

While Forsyth County argued that the prayer policy should have been upheld in light of the decision in *Pelphrey*, the court distinguished that case by noting that, in *Pelphrey*, some invocations had been given by non-Christian speakers[80] and that some had contained references to tenets of religions other than Christianity.[81] Finally, the court refused to uphold the legislative prayer policy solely because the policy was neutral in choosing speakers and did not seek to establish the Board's affiliation with, or preference for, any religion because the Board only sought to prohibit the speakers from proselytizing or disparaging, but not advancing, a particular religion.[82] To the court, such a policy runs the risk of favoring the predominant religion "at the expense of religious minorities" living in the

72. 534 F.3d 352 (4th Cir. 2008).
73. *Joyner*, 653 F.3d at 348-49.
74. *Id.* at 349-50.
75. *Id.* at 350.
76. *Id.* at 350-51.
77. *Id.* at 350 (quoting Marsh v. Chambers, 463 U.S. 783, 794-95 (1983)).
78. *Id.* at 351 (quoting *Marsh*, 463 U.S. at 795).
79. *Id.* at 351-52 (citations omitted) (quoting *Marsh*, 463 U.S. at 794-95).
80. *Id.* at 352 (citing Pelphrey v. Cobb County, Ga., 547 F.3d 1263, 1277 (10th Cir. 2008)).
81. *Id.* (quoting *Pelphrey*, 547 F.3d at 1266).
82. *Id.* at 353-54.

area.[83] However, the court intimated that Forsyth County need only remove the ability of religious leaders to give sectarian invocations in order to bring its legislative prayer policy within constitutional bounds.[84]

C. The Dissenting Opinion

Circuit Judge Paul V. Niemeyer, the author of the dissenting opinion, believed that the majority was incorrect to "analyze and judge the content of each prayer" because the fact that a majority of the prayers given were Christian was "insufficient to support the conclusion that Forsyth County was advancing Christianity."[85] The dissent criticized the majority's use of *Allegheny* to support the idea that the nonsectarian nature of the prayers at issue in *Marsh* was necessary for them to withstand an Establishment Clause attack, on the grounds that *Allegheny*'s discussion of legislative prayer was merely dicta.[86] It also criticized the singling-out of a December 2007 prayer that invoked that name of Jesus and other Christian tenants, viewing it as the kind of inquiry prohibited by *Marsh*.[87] In contrast to that prayer, Judge Niemeyer noted that, although many of the prayers concluded with an appeal to Jesus, the majority of the prayers' content was devoid of sectarian references.[88]

In turning to what is required for one religion or faith to be advanced over others, Judge Niemeyer held that the analysis should center on "whether the *government* has placed its imprimatur, deliberately or by implication, on any one faith or religion."[89] Judge Niemeyer did not believe that this standard was met simply because those chosen to give legislative prayers were all members of one religion, given that *Marsh* allowed one particular Presbyterian chaplain to almost exclusively give invocations for sixteen years.[90] The dissent's opinion focused not on the identity of the prayer-giver alone, but on whether the prayers, as a whole, advanced a particular religion, which the broad, inclusive prayers at issue in *Marsh* did not do.[91] In terms of Fourth Circuit precedent, the dissent noted that the prayers in *Wynne* advanced a particular religion because only Christian prayers were allowed, while the policy in *Simpson* did not violate the Constitution mostly because of its inclusiveness and neutrality in

83. *Id.* at 354.
84. *See id.*
85. *Id.* at 359 (Niemeyer, J., dissenting).
86. *Id.* at 360.
87. *Id.* at 361.
88. *Id.* at 360-61.
89. *Id.* at 362.
90. *Id.*
91. *Id.*

selecting religious leaders to give the prayers, but also because of the nonsectarian nature of the prayers.[92]

The dissent identified four characteristics of the Board's legislative prayer policy demonstrating that Forsyth County did not exploit the prayer policy to advance a particular religion: (1) the policy was neutral and inclusive, as all religious leaders of established churches were invited to give an invocation, but prohibited from giving consecutive invocations or more than two invocations per calendar year; (2) the invocations were scheduled on a first-come, first-serve basis; (3) the Board did not have any control over the content of the invocations; and (4) the Board informed the religious leaders that they could not give invocations that proselytized or disparaged any particular religion.[93] To the dissent, the fact that most of the prayers given were Christian did not mean that Forsyth County was advancing Christianity because the nature of the prayers was a result of an inclusive policy, the religious demographics of the area, and the religious leaders' free choice, not the wish of Forsyth County to advance one religion over others.[94] The dissent then argued that the Establishment Clause "does not require legislative bodies to undertake the impossible task of monitoring and prescribing appropriate legislative prayers for religious leaders to offer as invocations," nor does it require that such prayers be nonsectarian.[95] In short, the dissent argued that the neutrality and inclusiveness of the Board's prayer policy prevented Forsyth County from being perceived as establishing its preference for "a particular religious leader, a particular religion or denomination, or a particular prayer," thereby placing the policy within the permissible bounds set out by *Marsh*.[96]

IV. ANALYSIS

The Fourth Circuit's decision in *Joyner* created a circuit split on the issue of whether a legislative prayer policy is unconstitutional when the prayers given contain sectarian references. More importantly, the *Joyner* court was incorrect in holding that the inclusive legislative prayer policy at issue was in violation of the Establishment Clause merely because a majority of the prayers given contained references to tenets of Christianity. Such a holding is troublesome because it limits the ability of a legislative body to fully exercise its right to open its meetings with prayers, a right that has it basis in over two hundred years of history. This section will discuss (1) how the *Joyner* court misunderstood and misapplied *Marsh* in reaching

92. *Id.*
93. *Id.* at 362-63.
94. *Id.* at 363.
95. *Id.* at 365.
96. *Id.*

its incorrect decision, (2) how a correct understanding and application of precedent would have led the court to reach a correct result, and (3) the negative effects that *Joyner* will have in both future Establishment Clause cases dealing with legislative prayer and the meetings of legislative bodies that choose to open those meetings with prayer.

A. The Decision in *Joyner* Was Incorrect Due to a Misunderstanding and Misapplication of *Marsh*

It is clear in reading the majority opinion in *Joyner* that the court read *Marsh* to stand for the proposition that legislative prayer is only constitutional if the prayers are of a nonsectarian nature, regardless of the identity of the prayer-giver.[97] By hinging an Establishment Clause challenge concerning legislative prayer on whether particular legislative invocations contain sectarian references, the *Joyner* court ignores the fact that the *Marsh* Court viewed the Nebraska Legislature's rationale for having the same Presbyterian minister give invocations for sixteen years as being relevant to the policy's constitutionality.[98]

For instance, one could imagine the *Marsh* Court invalidating the policy of the Nebraska Legislature if it was determined that the same clergyman had been continually reappointed because a majority of the legislators attended the church over which he presided, even if the prayers he gave were nonsectarian in nature. In such a scenario, it could be argued that the recurring reappointment of the same minister advanced a particular religion over all others, thereby causing the prayer policy to violate the Establishment Clause. Such a scenario serves to highlight that there are several factors to consider in determining whether a legislative prayer policy violates the Establishment Clause, including the purpose of the policy, the identities of those giving the prayers, the method in which those giving the prayers are chosen, and the content of the prayers given.

1. Marsh *Does Not Require Legislative Prayers To Be Nonsectarian*

Instead of focusing specifically on whether or not a legislative prayer contained sectarian references, the *Marsh* Court primarily concerned itself with whether the opportunity to give an invocation before a legislative session was being "exploited to proselytize or advance any one, or to

97. *Id.* at 347-48.

98. *See* Marsh v. Chambers 463 U.S. 783, 793 (1983) ("We . . . can[not] perceive any suggestion [in this case] that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that [the clergyman] was reappointed because his performance and personal qualities were acceptable to the body appointing him.")

disparage any other, faith or belief."[99] Indeed, the *Marsh* Court thought the presence of this exploitation, rather than the presence of sectarian references in legislative prayers, would justify a more thorough judicial examination of the prayers' content.[100] Although the process for determining whether a prayer policy has or has not been exploited for an impermissible purpose must involve examining the content of the prayers in some degree, determining what percentage of the prayers contain sectarian references or the number of sectarian references in each prayer or singling-out certain prayers deemed to be the most egregious violations of the Establishment Clause requires a finding of impermissible exploitation beforehand.

Support for the idea that sectarian prayers are not unconstitutional per se can be found in the fact that although the chaplain of the Nebraska Legislature had removed all references to Jesus Christ in his prayers, the Court only felt the need to mention that fact in a footnote of its opinion.[101] Not only that, but that particular footnote comes in a section of the majority opinion that does nothing more than list the aspects of the Nebraska Legislature's prayer policy that allegedly violated the Constitution, not the section of the opinion where the Court comes to the conclusion that the prayers did not advance, proselytize, or disparage any particular religion.[102] While the *Marsh* Court did not indicate exactly why sectarian references in legislative prayers would not necessarily render them unconstitutional, such a holding makes sense practically, given the difficulty that can be present in determining whether certain references are actually sectarian in nature.[103]

In supporting its view that *Marsh* requires prayers to be nonsectarian to avoid violating the Constitution, the *Joyner* court relied on language from *Allegheny*, in which the Court stated that "[t]he legislative prayers in *Marsh* did not [violate the Constitution] because the particular chaplain had

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99. *Id.* at 794-95.

100. *Id.*

101. *Id.* at 793 n.14.

102. *See id.* at 793-95.

103. *See* Pelphrey v. Cobb County, Ga., 547 F.3d 1263, 1272 (11th Cir. 2008) ("We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions . . . ."); Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 284 (4th Cir. 2005) (upholding policy requiring legislative prayers to be nonsectarian that nevertheless allowed references to "the God of Abraham, Isaac, and Jacob," "the God of Abraham, of Moses, Jesus, and Mohammed," and the "King of Kings"); Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1586 (2010) (arguing that references to "God" are sectarian because not all religions center around "God"); Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517, 522 (2007) ("Every prayer, by its very nature, reflects and conveys a particular system of beliefs about the nature of ultimate reality and is thus 'sectarian.'"); *cf.* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1002-03 (2010) (stating that the sectarian nature of a prayer depends on, inter alia, the prayer's theological content, the demographics of the community in which the prayer is given, and the traditions of various religions).

'removed all references to Christ.'"[104] However, because legislative prayer was not at issue in *Allegheny*, the statement by the Court in that case concerning *Marsh*'s holding was merely dictum[105] and is therefore not binding on lower courts.[106] Although Supreme Court dicta should not be totally dismissed as having no persuasive authority,[107] the dicta from *Allegheny* should not have been taken as authoritative in *Joyner* for three reasons: (1) the *Marsh* Court neither expressly stated or implied that sectarian prayers would necessarily violate the Establishment Clause; (2) the content of legislative prayers is only one factor in determining whether those prayers are constitutional; and (3) *Allegheny* and *Marsh* were decided under different Establishment Clause tests, as only the latter specifically dealt with legislative prayer.[108]

If sectarian references were as fatal to legislative prayers examined under the Establishment Clause as the *Joyner* court would have everyone believe, it would be expected that the sectarian references present in *Marsh* would have been given a more thorough analysis in the majority opinion. Indeed, if *Joyner*'s reasoning had been applied in *Marsh*, the *Marsh* Court would have likely upheld the prayers given to the Nebraska Legislature after 1980, while finding that the Establishment Clause was violated when the prayers contained references to Jesus Christ.[109] In fact, the *Joyner* court's reliance on *Wynne* and *Simpson* in holding that *Marsh* only allows for nonsectarian legislative prayer disregarded its own more recent precedent, which stated that "the Establishment Clause does not absolutely dictate the form of legislative prayer."[110] It should also be noted that, in addition to the fact that congressional chaplains have given Christian prayers throughout their history, between 1990 and 1996, over 250 opening

104. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989) (quoting *Marsh*, 463 U.S. at 793 n.14).

105. Dictum has been defined as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it." United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988).

106. *See id.* ("[W]hat is at stake in distinguishing holding from dictum is that dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject.").

107. *See* Fouts v. Md. Cas. Co., 30 F.2d 357, 359 (4th Cir. 1929) ("[D]icta of the United States Supreme Court should be very persuasive."). *But cf.* Wright v. Morris, 111 F.3d 414, 419 (6th Cir. 1997) ("*Where there is no clear precedent to the contrary*, we will not simply ignore the [Supreme] Court's dicta.") (emphasis added).

108. *See* Gaylord, *supra* note 3, at 1036 (noting that *Allegheny* interpreted *Marsh* according to a test that the *Marsh* majority explicitly rejected, the same test argued for by Justice Brennan in dissent).

109. For an example of a holding that took such an approach, see Pelphrey v. Cobb County Ga., 547 F.3d 1263, 1278-79 (11th Cir. 2008) (holding that inclusive prayer policy was constitutional while holding that prior prayer policy, in which certain religious denominations were excluded from consideration in choosing religious leaders to give prayers, was unconstitutional).

110. Turner v. City Council of Fredericksburg, Va., 534 F.3d 352, 356 (4th Cir. 2008).

prayers given by congressional chaplains contained references to Jesus Christ.[111]

An interesting aspect of the *Joyner* court's opinion, given its view of incompatibility between constitutional legislative prayer policies and sectarian prayers, was that it stated that "[i]nfrequent references to specific deities, standing alone, do not suffice to make out a constitutional case."[112] This statement was as close as the majority came to adopting the more appropriate analysis of the requirements in *Marsh* that was adopted by the majority in *Pelphrey*. The *Joyner* majority made no attempt to explain when references to specific deities cease to be infrequent, but drawing such a line is irrelevant in light of the factual scenario presented in *Joyner*, which involved a neutral, inclusive legislative prayer policy, thereby making even frequent references to specific deities unproblematic with respect to the Establishment Clause.[113]

2. Legislative Prayer Must Be Examined Holistically in Determining Its Constitutionality

As stated above, the test to be applied to legislative prayers and their policies in determining whether they violate the Establishment Clause deals with whether they have been "exploited to proselytize or advance any one, or to disparage any other, faith or belief."[114] The content of legislative prayers cannot alone be examined in order to determine whether such exploitation has occurred,[115] as the effect of, or purpose behind, the content of prayers cannot be fully understood without first understanding the purpose of allowing the prayers in the first place or the methods through which those giving the invocations are chosen. This is not to say that the content of the prayers is completely irrelevant to the determination of whether the prayer opportunity has been exploited for an impermissible purpose. Rather, prayer content is but one factor that courts should take into account in determining whether an impermissible exploitation of legislative prayer is present, and one could certainly imagine a case where sectarian references in legislative invocations are the factor that tips the

111. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2104 (1996) (citing examples).

112. Joyner v. Forsyth County, N.C., 653 F.3d 341, 349 (4th Cir. 2011).

113. The *Joyner* court's statement about infrequent references to specific deities being unproblematic would be more persuasive if the prayer policy was more closely akin to the one at issue in *Marsh*, where only one person was giving the invocations, or in *Simpson*, where invocations had to be made to a divinity consistent with the Judeo-Christian tradition.

114. Marsh v. Chambers, 463 U.S. 783, 794-95 (1983).

115. The same can be said of the identity of the person called upon to give those prayers. *See Marsh*, 463 U.S. at 793. (holding that the Nebraska Legislature's use of one Presbyterian minister to give most of its legislative invocations did not violate the Establishment Clause).

scales of an Establishment Clause analysis of legislative prayer in favor of unconstitutionality.

Moreover, if the sectarian content of the prayers alone can establish that a prayer opportunity has been exploited to *advance* one religion over all others, it is unclear why prohibiting an otherwise qualified person from giving an invocation because of her religious beliefs is not enough to establish that a prayer opportunity has been exploited to *disparage* a particular religion.[116] Indeed, if denying a practitioner of Wicca from giving a legislative prayer because her beliefs are inconsistent with the Judeo-Christian tradition is not a disparagement of Wicca, it is hard to imagine what *would* classify as the disparagement of a particular religion, short of badmouthing that religion in a legislative prayer. This example serves to highlight one of the problems with focusing solely on the content of legislative prayers in determining whether they are constitutional: courts fail to examine the impermissible motives behind the establishment of a prayer policy or determinations as to who may give the invocations.

A much more extensive evaluation of a legislative prayer policy, including the method for choosing those giving the prayers, the legislative body's reasons for adopting the policy, the religious demographics of the surrounding area, the content of the prayers given, and the extent of the editorial control held by the legislative body over that content will no doubt result in a more accurate determination as to whether such a policy advances, proselytizes, or disparages a particular religion. Indeed, this type of analysis led the *Joyner* dissent to conclude that the legislative prayer policy adopted by Forsyth County did not violate the Establishment Clause by advancing Christianity at the expense of other religions, even though a majority of the prayers given contained references to Christian tenets.[117]

Taking the prayer policy at issue in *Joyner* in its entirety, it is clear that Forsyth County did not exploit it in order to advance, proselytize, or disparage any particular religion. In fact, the hands-off approach taken by Forsyth County with respect to choosing who would give the invocations and what those individuals would say in the invocations ensured that exploiting the prayer opportunity would be very difficult, so long as the policy was adhered to. Forsyth County could not guarantee that any

116. *See* Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 286 (4th Cir. 2005) (upholding policy allowing leaders of religious denominations that worship a deity consistent with the Judeo-Christian tradition to give legislative invocations, but denying that opportunity to a practitioner of Wicca); Steven G. Gey, *Rewriting the Establishment Clause for One Nation Under (a) God*, 41 TULSA L. REV. 737, 756 (2006) (arguing that cases like *Simpson* will lead to the result that "[t]he government's sectarian preference for the majority's faith will be deemed 'common and inclusive,' which . . . means that dissenters will be invited to join the religious majority in celebrating its 'common' faith"). *But see Simpson*, 404 F.3d at 279 (noting that Islamic imams had given invocations).

117. *Joyner*, 653 F.3d at 362-63 (Niemeyer, J., dissenting).

particular meeting would be opened with an invocation by a religious leader from any particular denomination. It could not deny the opportunity to pray to any religious leader from a congregation on its extremely inclusive list of congregations in the area. It could not have religious leaders remove sectarian references from their prayers, regardless of what religion they practiced, so long as a particular religion was not advanced, proselytized, or disparaged, nor could it require religious leaders to add religious tenets to their prayers. However, the *Joyner* court claimed that the prayers advanced Christianity solely on account of the sectarian references to tenets of that religion present in a majority of the prayers.[118]

At this point, examining what actions would constitute an advancement of a particular religion would be helpful. At the time *Marsh* was decided, the word "advance" was defined, in the sense of "advancing a particular religion," as "to accelerate the progress or hasten the development of," "to raise in rank or position," or "to bring forward for notice, consideration, or acceptance."[119] In contrast, "proselytize" was defined as "to convert from one religion, belief, [or] opinion . . . to another."[120] While the Fourth Circuit would likely define "advance" as "to bring forward for notice, consideration, or acceptance," given its holding in *Joyner*, that definition sets too low a threshold for impermissibly advancing a particular religion, considering the history of sectarian references in legislative prayers throughout the history of the United States, of which the *Marsh* Court was no doubt aware.

The other two definitions of "advance," however, in the context of "advancing a particular religion," include intent on the part of a speaker to further that particular religion at the expense of all others, which is likely what the *Marsh* Court had in mind when it prohibited prayers that advance a particular religion. An example will provide further clarification: while invoking Jesus's name in the closing of a prayer would most certainly "bring forward for notice" a tenet of Christianity, it would be a far cry to say that the invocation was intended to "accelerate the progress of" that religion. In contrast, a legislative invocation containing numerous Christian references and conveying the idea that Christianity is the one "true" religion would most certainly advance that religion over all others in the sense which *Marsh* forbids.

It is clear then that the prayers at issue in *Joyner*, as a whole, did not come anywhere close to "advancing" Christianity at the expense of other religions. Although a majority of the prayers given contained references to tenets of Christianity, usually in the form of Jesus's name, these references

118. *Id.* at 352 (majority opinion).
119. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 30 (1981 unabridged ed.).
120. *Id.* at 1821.

were brief and were usually made in the opening or closing of the prayers, not where or to what degree one would expect to find them if they were said to be "advancing" Christianity. The *Joyner* court placed emphasis on one particular prayer, given in December 2007, in condemning the Board's prayer policy as unconstitutional,[121] but this kind of singling-out is precisely what is prohibited by *Marsh*, unless a court can point to an overall exploitation of the prayer opportunity.[122] Even if the Board *was* seeking to advance Christianity through its legislative prayer policy, the policy would not have guaranteed the desired result, as it required religious leaders from all denominations be invited to give an invocation, required that the religious leaders who accepted that invitation be scheduled on a first-come, first-serve basis, and did not prevent non-Christian religious leaders from invoking the tenets of their own religions, provided that doing so was not an exploitation of the prayer opportunity. Not only that, but the Board allowed religious leaders to give the invocations, rather than have its own members give them, in a further attempt to make it clear to all that it was not favoring or promoting one religion over another.

Indeed, the Board clarified, after the initial lawsuit was filed, that the legislative prayers were "not intended, and should not be implemented or construed in any way, to affiliate the Board with, nor express the Board's preference for, any faith or religious denomination."[123] Instead, the goal of the prayer policy was to "acknowledge and express the Board's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Forsyth County."[124] Based on these reasons, an examination of the Board's legislative prayer policy should have resulted in a finding that the policy did not result in an impermissible advancement of Christianity by the Board, and the main reason the *Joyner* court found such advancement to be present was its misunderstanding and misapplication of *Marsh*.

B. The *Joyner* Court Was Incorrect in Not Distinguishing *Wynne* and in Distinguishing *Pelphrey*

Along with misinterpreting *Marsh*, failing to give effect to several key differences between the prayer policy examined in *Wynne* and the prayer policy at issue led the *Joyner* court to decide the case before it incorrectly. Although *Wynne* was correctly decided, the reasoning behind the decision was flawed, as it included the first decree by the Fourth Circuit that *Marsh*

121. *Joyner*, 653 F.3d at 344.
122. *See id.* at 361 (Niemeyer, J., dissenting).
123. *Id.* at 344 (majority opinion).
124. *Id.*

did not sanction sectarian prayer in any situation.[125] While the sectarian nature of the prayers was one factor that led to the unconstitutionality of the prayer policy in *Wynne*, it was neither dispositive nor sufficient. Although not discussed in the court's reasoning, the town council, whose members were Christian and gave all the prayers, refused to entertain the idea of having members of different religions give prayers.[126] Moreover, when Wynne declined to stand during one of the prayers, she was "called out" by one of the council members for her non-participation, thereby disparaging her religious beliefs.[127] It was the combination of the identities of the prayer-givers, the refusal to allow non-Christians to give prayers, and the sectarian references contained in the prayers that led the prayer policy at issue in *Wynne* to cross the line into unconstitutionality. Unfortunately, the Fourth Circuit hung its decision on the last factor alone.

The differences between the policy examined in *Wynne* and the one at issue in *Joyner* are readily apparent. Forsyth County invited religious leaders from all religious denominations to give invocations and made sure to establish a scheduling procedure that would allow for no bias.[128] In addition, there was no evidence in *Joyner* that anyone attending the Board's meetings was disparaged against for being non-Christian. Religious leaders gave the prayers in *Joyner* so as to avoid giving the citizens in attendance the impression that the ideas being espoused in the prayers were necessarily those of the Board. Although undoubtedly clouded by what it believed to be *Marsh*'s requirements for constitutional legislative prayer, the *Joyner* court should have seen *Wynne* for what it truly was, a situation where the sectarian nature of the prayers, *combined with several other significant factors*, advanced Christianity, and decided the case before it differently based on the inclusive, neutral prayer policy at issue.

If the *Joyner* court felt the need to draw similarities between a previously decided case and the case before it, *Pelphrey* would have easily made the most sense. Both cases involved prayer policies that invited religious leaders of a wide variety of faiths to give invocations. Both policies included provisions to prevent the same religious leader from giving consecutive invocations. Both resulted in a majority of Christian ministers being chosen to give invocations. In these two cases, a large majority of the invocations given contained references to tenets of Christianity, while some prayers contained no sectarian references.

There were differences between the two cases, however. In *Pelphrey*, the religious leaders selected to give the invocation were chosen randomly from a compiled list by county officials, rather than on a first-come, first-

125. Wynne v. Town of Great Falls, S.C., 376 F.3d 292, 301-02 (4th Cir. 2004).
126. *Id.* at 295.
127. *Id.*
128. *Joyner*, 653 F.3d at 343.

serve basis.[129] However, that aspect of *Pelphrey*, in which the prayer policy at issue was upheld, would not have been as effective as a first-come, first-serve policy in ensuring that no bias went into choosing religious leaders to give invocations. Another difference between the two cases was that in *Pelphrey*, some invocations contained references to religions other than Christianity,[130] presumably when invocations were given by religious leaders who were not Christian.

However, it was these sparse references to tenets of religions other than Christianity, as well as the fact that religious leaders from non-Christian religions had given invocations, that led the *Joyner* court to distinguish *Pelphrey*.[131] It is unclear why the Fourth Circuit seemed willing to accept the outcome in *Pelphrey* merely because tenets of Judaism and Islam were briefly uttered in a small minority of the prayers given, especially after it spent so much effort in stating that *Marsh* prohibits sectarian legislative prayer. Putting the validity of sectarian legislative prayer aside, the *Joyner* court still failed to explain how a few non-Christian sectarian references transform a majority of prayers containing Christian sectarian references from an advancement of Christianity into a permissible legislative prayer policy. Similarly, if non-Christian sectarian references can have such an effect, it is unclear as to why prayers that contain no sectarian references could not have the same effect.

Presumably, the Fourth Circuit would claim that the prayers in *Pelphrey* containing references to religions other than Christianity legitimized the prayer policy at issue in that case simply because they did not advance Christianity. It cannot be the case that the legitimizing power of those invocations came from their advancement of a religion other than Christianity, as that would be unconstitutional under *Marsh*. Because prayers containing no sectarian references likewise do not advance Christianity, their presence should have been enough for the Fourth Circuit to validate the prayer policy at issue in *Joyner*. Either way, the Fourth Circuit, in *Joyner*, should have reached the same conclusion as that reached by the Eleventh Circuit in *Pelphrey*, given the numerous similarities between the two cases and the fact that the main difference between the two cases was the product of chance, given that non-Christian religious leaders were invited to give invocations in *Joyner*, but failed to accept.

C. *Joyner* Will Have Negative Consequences on the Ability To Give Legislative Prayers

129. Pelphrey v. Cobb County Ga., 547 F.3d 1263, 1268 (11th Cir. 2008).
130. *Id.* at 1267.
131. *Joyner*, 653 F.3d at 353.

Forsyth County appealed the decision of the Fourth Circuit to the Supreme Court of the United States,[132] which declined to hear the case.[133] The Supreme Court should have heard the case, as the Fourth Circuit's decision in *Joyner* created a circuit split with the Eleventh Circuit on the narrow issue of whether prayers containing sectarian references can be given when a legislative prayer policy is neutral and inclusive. Another reason to have heard the case is that the *Joyner* court misinterpreted and misapplied the Court's holding in *Marsh* in a way that imposes unnecessary burdens on legislative bodies that wish to show respect to a wide variety of religious denominations by allowing religious leaders to give invocations according to their conscience.

One problem with *Joyner* is that it does not adhere to *Marsh*'s command that courts should not "parse the content of a particular prayer" unless "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[134] *Joyner*, in contrast with *Marsh*, would seemingly allow courts to parse the content of legislative prayers upon the utterance of just one sectarian reference if one focuses on *Joyner*'s holding that sectarian references are intrinsically unconstitutional, as it stands to follow that one sectarian reference is an impermissible advancement of a particular religion. Such a result would render a legislative body's ability to open its sessions or meetings with legislative prayer almost meaningless, as the smallest reference to a tenet of a particular religion would allow courts to subject the prayer policy to judicial scrutiny and invalidation. Such a result follows, however, from a view that the content of legislative prayers is the key to their constitutionality, even though *Marsh* indicates that the identity of the prayer-giver is also relevant, as are the methods for choosing the prayer-givers and a legislative body's purpose behind employing a legislative prayer policy in the first place.

An even more disturbing consequence of *Joyner* is that, for legislative prayer policies to be held constitutional, at least in the states falling under the purview of the Fourth Circuit, they must explicitly prohibit the prayer-givers, whether members of the legislative body or religious leaders in the community, from including sectarian references in their prayers. However, this type of "religious censorship" runs contrary to Supreme Court

132. *Forsyth County Commissioners Appeal Prayer Case to US Supreme Court*, DIGTRIAD.COM (Oct. 27, 2011, 11:24 PM), http://www.digtriad.com/news/article/196730/57/US-Highest-Court-Asked-To-Take-Forsyth-County-Prayer-Case.

133. Wesley Young, *U.S. Supreme Court Declines Forsyth County Prayer Appeal*, WINSTON-SALEM JOURNAL (Jan. 17, 2012, 11:35 PM), http://www2.journalnow.com/news/2012/jan/17/11/us-supreme-court-rejects-forsyth-county-prayer-app-ar-1822847/.

134. Marsh v. Chambers, 463 U.S. 783, 794-95 (1983).

precedent[135] and has been attacked by both those lending support to the idea of legislative prayer[136] and those who think legislative prayer does more harm than good.[137] Also, forcing legislative bodies to require that only nonsectarian legislative prayers be given to open their sessions or meetings will likely defeat the reasons for the enactment of the prayer policy in the first place, especially if the policy is neutral and inclusive.[138] Indeed, some religious leaders would likely refuse to give legislative invocations if they were prohibited from mentioning tenets of their religion, thereby "effectively barring [religious leaders] from praying at all."[139] This result would prevent a legislative body from fully honoring the religious diversity of the area through its legislative prayer policy.

Somewhat connected to this last point, requiring legislative prayers to be nonsectarian in order to pass constitutional muster fails to take into account the religious demographics of the community in which the prayers are given. The *Joyner* court saw this as a positive, arguing that the failure to prohibit sectarian prayer would "inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein."[140] At least one legal scholar opposed to legislative prayer has acknowledged that the extent to which a prayer is sectarian in nature depends, in part, on the "makeup of the community in which [it] is given."[141] Under this view, a prayer containing a single reference to Jesus Christ may not be considered sectarian when it is given in a community that is overwhelmingly Christian, but *Joyner* would still prohibit such a prayer as an impermissible

135. *See* Engel v. Vitale, 370 U.S. 421, 425 (1962) ("[T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that . . . it is no part of the business of government to compose official prayers for any group . . . to recite as a part of a religious program carried on by the government."); Lee v. Weisman, 505 U.S. 577, 588 (1992) (citing *Engel*, 370 U.S. at 425) (stating that school officials could not force a Rabbi to give a nonsectarian prayer).

136. *See* Robert Luther III & David B. Caddell, *Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands A "Practice Focused" Analysis*, 48 SANTA CLARA L. REV. 569, 571-72 (2008) ("Legislative bodies that refuse to allow those who are permitted to pray the right to mention specific deities of their choosing—Jesus, Allah, Jehovah, or others—in their prayers undermines diversity and the free speech rights of these individuals, and, in turn, renders these traditionally solemn occasions meaningless."); Luther, *supra* note 6, at 13 ("[L]ocal governmental bodies certainly do not, and should not, have the discretion to control the type of prayer an individual seeks to offer if that individual has been given the opportunity to pray.").

137. *See* Lund, *supra* note 103, at 1020-21 (noting that, unlike other groups who disagree with what the government says, sectarian prayer-givers forced to give nonsectarian prayers cannot avail themselves of a "democratic override" to change such a policy and that, even if such a solution were available, it would contradict Supreme Court precedent concerning the Religion Clauses).

138. *See* Joyner v. Forsyth County, N.C., 653 F.3d 341, 344 (4th Cir. 2011) (prayer policy enacted to "acknowledge and express the Board's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Forsyth County").

139. Delahunty, *supra* note 103, at 526.

140. *Joyner*, 653 F.3d at 354.

141. Lund, *supra* note 103, at 1002.

advancement of Christianity. These community demographics play a more important role than usual when a legislative body achieves neutrality and inclusivity in its prayer policy by inviting religious leaders from the community to give the invocations, as they help to explain how the presence of sectarian references to tenets of certain religious denominations in legislative invocations can be the result of the views of the religious leaders, rather than an impermissible intent by the legislative body.

V. CONCLUSION

In *Joyner v. Forsyth County, North Carolina*, the United States Court of Appeals for the Fourth Circuit was faced with deciding the constitutionality of a legislative prayer policy that produced prayers containing references to tenets of Christianity more often than not. The Fourth Circuit incorrectly decided the case due to its misunderstanding and misapplication of the relevant Supreme Court precedent, which led it to determine that sectarian legislative prayer was unconstitutional per se. A faithful interpretation of that precedent, however, would have led the Fourth Circuit to the conclusion that the sectarian prayers at issue did not violate the Establishment Clause, as they did not advance Christianity at the expense of any other religion, in part because those giving the prayers were local religious leaders allowed to speak on a first-come, first serve basis. The holding in *Joyner* is in direct conflict with that of the United States Court of Appeals for the Eleventh Circuit in *Pelphrey v. Cobb County, Georgia*. Although the Supreme Court of the United States denied Forsyth County's writ of certiorari, this circuit split sets the stage for the Court to intervene and clarify its holding in *Marsh v. Chambers*. Given the trouble the Court went to in allowing legislative prayer in the first place, it makes sense for the Court to now decide how far that right actually extends.