No. 12-11613-BB

IN THE

United States Court of Appeals

for the Eleventh Circuit

ATHEISTS OF FLORIDA, INC., and ELLENBETH WACHS,
Plaintiffs- Appellants,

v.

CITY OF LAKELAND, FLORIDA, and MAYOR GOW FIELDS,
Defendants- Appellees,

On Appeal from the United States District Court for the Middle District of Florida

BRIEF OF MEMBERS OF CONGRESS AND THE FAMILY RESEARCH COUNCIL AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE OR VACATUR

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**CERTIFICATE OF INTERESTED PERSONS AND
FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to the Federal Rules of Appellate Procedure, *Amicus Curiae* Family Research Council declares the following:

The Family Research Council has not issued stock to the public, has no parent company, and no subsidiary. No publicly-held company owns 10% or more of its stock, as the Family Research Council is a 501(c)(3) organization. Pursuant to 11th Cir. R. 26.1-1, undersigned counsel certifies that, to the best of his knowledge, the list of persons or entities that have or may have an interest in the outcome of this case is adequately set forth in Appellants' opening brief and the subsequently filed briefs of the other *amici* in this case, except that the aforementioned list should henceforth include the following:

Amici Curiae

Aderholt, Robert B., Member of Congress

Forbes, Randy, Member of Congress and Chairman, Congressional Prayer Caucus

Gohmert, Louie, Member of Congress and former Judge

Jordan, Jim, Member of Congress

Jones, Walter B., Member of Congress

Kelly, Mike, Member of Congress

King, Steve, Member of Congress

Lamborn, Doug, Member of Congress

Lankford, James, Member of Congress

Manzullo, Donald A., Member of Congress

Price, Tom, Member of Congress and Chairman, Republican Policy Committee

Ross, Dennis A., Member of Congress

Scalise, Steve, Member of Congress

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Dated June 25, 2011

Respectfully submitted,

/s/ Kenneth A. Klukowski
Kenneth A. Klukowski

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INTEREST OF *AMICI CURIAE*[1]

The thirteen Members of Congress who joined this brief currently serve in the House of Representatives in the 112th Congress of the United States, and are individually named in the Certificate of Interested Persons. Both Houses of Congress open each day's session with prayer, and these Members regard such legislative prayer as an important activity both to solemnize the occasion and to seek God's blessing on their deliberations and decisions. Each Member also represents various cities, towns, counties, and school districts—as well as part of a sovereign state—the governing body for each one of which likewise begins its sessions with legislative prayer.

The Court's judgment in this case has two significant implications for each Member of Congress joining this brief as *amicus curiae*. For the three Members of Congress on this brief representing citizens in the States of Florida, Georgia, and Alabama, the Court's disposition of this case has immediate implications for legislatures of those three states, and all units of local government situated therein. For all other Members, this Court's decision could impact the legislative prayer practices of the state and local governments of those constituents.

[1] Pursuant to Fed. R. App. P. 29(c)(5), *Amici Curiae* Members of Congress and the Family Research Council certify that no party or counsel for any party authored this brief in whole or in part, and no person other than *amici curiae* contributed any money intended to fund this brief's preparation or submission. All parties have consented to the filing of this brief.

The Family Research Council (FRC) is a 501(c)(3) nonprofit public-policy organization headquartered in Washington, D.C., that since its founding in 1983 analyzes governmental policies that affect families in the United States and educate the American people regarding faith-related issues. FRC's Center for Religious Liberty is dedicated to advancing religious liberty in the United States and educating the public regarding the importance of religious freedom. FRC advocates an understanding of the Establishment Clause and Free Exercise Clause consistent with the original meaning of those First Amendment provisions.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly applied the law of the United States Supreme Court and this Circuit in granting summary judgment in favor of Defendants-Appellees on Plaintiffs-Appellants' claim that the legislative prayer practice before Lakeland City Commissions meetings violates the Establishment Clause of the First Amendment to the United States Constitution.

2. Whether the District Court correctly applied the law of this Circuit and Florida law in granting summary judgment in favor of Defendants-Appellees on Plaintiffs-Appellants' claim that the legislative prayer practice before Lakeland City Commission meetings violates Article I, Section 3 of the Florida Constitution.

3. Whether Mayor Fields is entitled to qualified and legislative immunity.

INTRODUCTION

Although *amici curiae* agree with the City of Lakeland that the Appellees would prevail on the merits under controlling precedent of this Court and the Supreme Court, this Court should nonetheless not reach the merits in this suit. This Court lacks the authority to hear this appeal. The legislative prayer practice challenged here is immune from suit under legislative immunity, and is also nonjusticiable under the political question doctrine. Both of these separation-of-powers doctrines are issues of subject-matter jurisdiction. Therefore although this Court should affirm the lower court if deciding the merits here, this Court should instead dismiss this suit for want of jurisdiction.

SUMMARY OF ARGUMENT

Justiciability and jurisdictional doctrines are rooted in Article III and limit federal judicial power consistent with the separation of powers and the appropriately limited role of the courts. Where jurisdiction is lacking, a court has no constitutional power to declare the law and must dismiss the case at bar.

Although Mayor Fields and the City of Lakeland would prevail on the merits, this Court should not reach those merits. Jurisdiction is a threshold issue that must be verified before looking to the merits, and where jurisdiction is lacking the case must be dismissed without opining on the merits. Two such defects foreclose jurisdiction in this case.

It is of no consequence that the parties here did not raise these jurisdictional bars. Defects in jurisdiction can be raised for the first time on appeal, need not even be raised by a party, and can never be waived or forfeited. Likewise, that the Supreme Court did not examine these jurisdictional issues in *Marsh v. Chambers* does nothing to mitigate this Court's duty to examine those issues, because *Marsh* cannot be taken for the proposition that jurisdiction exists.

The defendants and conduct in this case are protected by legislative immunity. Rooted in pre-colonial English law, legislative immunity is based on separation-of-powers principles. Although textually grounded in the Speech and Debate Clause for Members of Congress, this immunity also extends to state and local legislators, including the Mayor when he is acting in a legislative capacity, and also City personnel acting as agents of elected officials during their legislative business. It protects against both monetary damages and equitable remedies when examining legislative activities, including prayers offered during legislative business meetings of the City Commission.

The issues at bar are also nonjusticiable because they present political questions. There are no judicially discoverable and manageable principles to determine which prayers are acceptable to the Establishment Clause. The argument that *Marsh* only permits nonsectarian prayers is incorrect, but even more significant is that this Court cannot differentiate sectarian prayers from

nonsectarian prayers without making theological judgments. Those judgments would consist of determining which religious beliefs where sufficiently broad and inclusive to be permitted in legislative prayer during a political activity. Such religious evaluations are beyond the competence and purview of the judiciary.

Courts lack subject-matter jurisdiction in cases where either legislative immunity or the political question doctrine apply. Therefore this Court should vacate the lower court's judgment and dismiss the suit for want of jurisdiction.

ARGUMENT

Justiciability doctrines are rooted in Article III of the Constitution and serve to "limit the federal judicial power to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758 (1982) (citation and internal quotation marks omitted). This Court must resolve all justiciability questions before addressing the merits of this case. *See Levy v. Miami-Dade Cnty.*, 358 F.3d 1303, 1305 (11th Cir. 2004). Two justiciability doctrines apply here, and deprive this Court of subject-matter jurisdiction over this appeal.

"The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is

inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95, 118 S. Ct. 1003, 1012 (1998) (citation and internal quotation marks omitted). Before examining the merits, this Court must determine not only that neither legislative immunity nor the political question doctrine deprives it of jurisdiction here, but also that the Middle District of Florida had jurisdiction at the first stage of this litigation. "Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a case under review, even though the parties are prepared to concede it." *Id.* at 95, 118 S. Ct. at 1013 (citation and internal quotation marks omitted).

I. ALTHOUGH THE CITY OF LAKELAND WOULD PREVAIL ON THE MERITS, THIS COURT LACKS JURISDICTION TO REACH THE MERITS OF THIS SUIT.

A. The City would prevail on the merits under *Marsh* and *Pelphrey*.

"The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh v. Chambers*, 463 U.S. 783, 786, 103 S. Ct. 3330, 3333 (1983). The Supreme Court found central to the constitutionality of legislative prayer that the very same week the First Congress proposed the Establishment Clause to the States, both Houses also passed resolutions to employ salaried chaplains who would offer prayers at every daily session of Congress. *See id.* at

790, 103 S. Ct. at 3335. It is incontrovertible that legislative prayer is ubiquitous and widely-accepted, to the point that it is "part of the fabric of our society." *Id.* at 792, 103 S. Ct. at 3336.

Amici Members of Congress and the Family Research Council agree with the City of Lakeland and other supporting *amici* that the City's legislative prayer practice is fully consistent with the Establishment Clause. Judicial review of legislative prayers consists of analyzing "the identity of the invocational speakers, the selection procedures employed, and the nature of the prayers." *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1277 (11th Cir. 2008). Legislative prayer is constitutional unless the opportunity to formulate and deliver those prayers is exploited to proselytize one particular faith or disparage other faiths. *Marsh*, 463 U.S. at 794–95, 103 S. Ct. at 3337–38. Appellants Atheists of Florida and EllenBeth Wachs (collectively "AOF") have not shown how Appellees' policies or practices are inconsistent with *Marsh* and *Pelphrey*. Should this Court reach the merits of the Establishment Clause issue raised in this case, *amici* support Appellees' argument that this Court should affirm the judgment of the Middle District of Florida.

However, this Court should not reach the merits of this suit. Instead, this Court should hold this suit nonjusticiable both due to legislative immunity and as a political question, and dismiss this suit for want of jurisdiction.

B. This Court must consider defects in subject-matter jurisdiction before considering the merits of this appeal.

This Court must decide the threshold issue of whether it has jurisdiction before proceeding to the merits of this appeal. It is of no moment that these issues were not raised below. Jurisdictional issues "can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court," *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 1785 (2002) (citation omitted), or whether "the parties briefed the issue" on appeal. *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1332 (11th Cir. 2005). This Court has an affirmative duty to ensure that all jurisdictional requirements are satisfied before proceeding to the merits. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S. Ct. 1563, 1570 (1999).

It is likewise of no consequence that neither *Marsh* nor this Court's legislative-prayer precedent discussed jurisdiction. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011). The Supreme Court has repeatedly instructed the lower courts not to read silence on jurisdictional questions as license for not fully ventilating any jurisdictional issue raised in a subsequent case. *E.g.*, *Hagans v. Lavine*, 415 U.S. 528, 535 n.5, 94 S. Ct. 1372, 1377 n.5 (1974) ("When questions of jurisdiction have been passed on in prior decisions *sub silentio*, this

Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 73 S. Ct. 67, 69 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.").

The lack of discussion in *Marsh* of jurisdictional issues does not absolve this Court of its duty to ensure it has subject-matter jurisdiction to decide this case. This Court must resolve these questions as threshold issues before entertaining arguments on the issues raised by AOF in their appeal.

II. LEGISLATIVE IMMUNITY DEPRIVES THIS COURT OF JURISDICTION OVER THE PRAYERS AND PRAYER-GIVER SELECTION PROCESS AT ISSUE HERE.

A. Finding legislative immunity here serves the purposes of immunity doctrine and strips this Court of jurisdiction.

Legislative immunity is "an important protection of the independence and integrity of [legislative bodies]." *United States v. Johnson*, 383 U.S. 169, 178, 86 S. Ct. 749, 754 (1966). The protection results from depriving federal courts of subject-matter jurisdiction over suits involving defendants covered by this immunity. Legislative immunity "operates as a jurisdictional bar when 'the actions upon which [a plaintiff] sought to predicate liability were legislative acts.'" *Fields v. Office of Johnson*, 459 F.3d 1, 14 (D.C. Cir. 2005) (en banc) (quoting *Doe v.*

McMillan, 412 U.S. 306, 318, 93 S. Ct. 2018, 2027 (1973) (internal citation and some quotation marks omitted)) (brackets in the original) (affirming dismissal due to lack of subject-matter jurisdiction when legislative immunity applies). The Supreme Court expressly disclaimed the question of whether legislative immunity applies to legislative prayer, *Marsh*, 463 U.S. at 786 n.4, 103 S. Ct. at 3333 n.4, so this is a question of first impression before this Court.

Legislative immunity applies when what is challenged is "an integral part of the deliberative and communicative processes [that comprise] . . . proceedings with respect to the consideration and passage or rejection of proposed legislation." *Smith v. Lomax*, 45 F.3d 402, 405 (11th Cir. 1995) (citation omitted). The immunity ensures a legislative body "will be able to perform *the whole* of the legislative function . . . free of undue interference." *Bryant v. CEO DeKalb Co.*, 575 F.3d 1281, 1304 (11th Cir. 2009) (citing *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502, 95 S. Ct. 1813, 1820 (1975)) (emphasis added). It also serves the purpose of legislative immunity to apply it here, since "a private civil action, whether for an injunction or damages, creates a distraction and forces [the Mayor and personnel] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland*, 421 U.S. at 502, 95 S. Ct. at 1820. Subjecting immunized officials to such a burdensome and taxing process to

vindicate their immunity would defeat the underlying rationale for such immunity. The doctrine must be applied in a fashion consistent with its purpose.

B. Legislative immunity extends to local legislators such as the defendants here.

Perhaps the best known source of legislative immunity is the Speech or Debate Clause of the U.S. Constitution.[2] It has been settled for more than a century that Members of the U.S. House and U.S. Senate are shielded with legislative immunity under this Clause. *See Kilbourn v. Thompson*, 103 U.S. 168, 202–04 (1881). Although the text of the Clause mentions only Members of the federal legislature, the Supreme Court has explained it reflects an older and larger constitutional principle of legislative immunity that extends beyond just elected Members of Congress. In *Tenney v. Brandhove*, a case involving *state* legislators—*not* federal legislators—the Court explained:

> The privilege of legislators to be free from arrest or civil process for what they *do or say* in legislative proceedings has its taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. . . In 1689, the [English] Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned *in any Court* or Place out of Parliament."
>
> Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. . . .

[2] "The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

341 U.S. 367, 372–73, 71 S. Ct. 783, 786 (1951) (citation omitted) (emphases added).

Legislative immunity extends beyond Congress to all levels of government. It applies to state legislators in suits for damages. *Id.* It also extends to local government. *Woods v. Gamel*, 132 F.3d 1417, 1419 (11th Cir. 1998) (citation omitted). "Because the common law accorded local legislators the *same absolute immunity* it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are *likewise absolutely immune from suit* under §1983 for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 49, 118 S. Ct. 966, 970 (1998) (emphases added).The Supreme Court also specifically held that legislative immunity shields these officials not only from monetary damages, but from injunctive relief as well. *Sup. Ct. of Va. v. Consumers Union of U.S.*, 446 U.S. 719, 731–34, 100 S. Ct. 1967, 1974–76 (1980).

It is of no consequence that Mayor Fields is named both in his official capacity and his personal capacity. Federal courts do not distinguish between suing a government official in his official capacity versus his personal capacity when applying legislative immunity; the immunity covers both. *Scott v. Taylor*, 405 F.3d 1251, 1254–55 (11th Cir. 2005). "The purpose of legislative immunity being to free legislators from such worries and distractions, it makes sense to apply the

doctrine regardless of the capacity in which [the Mayor] is sued." *Id.* at 1256. In other words, if those covered by immunity could be sued simply by naming those defendants in an alternative capacity (personal versus official), then they would still have to successfully navigate litigation until final judgment to be able to claim their immunity, placing them in a situation no better than individuals lacking immunity whose only route to success is prevailing on the merits.

The Mayor is implicated in this case only because of his role in presiding over the meetings in which legislative prayers are offered. That is "an integral part" of meetings for "the consideration and passage or rejection of proposed legislation." *Smith*, 45 F.3d at 405. Therefore Mayor Fields is entitled to legislative immunity regardless of the label given him in the complaint.

C. Legislative immunity applies to all actual defendants in this case.

Legislative immunity applies to Mayor Fields for a second reason. Although the Mayor is the chief *executive* of the City of Lakeland, he is entitled to absolute *legislative* immunity when engaged in legislative activities. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193–94 (5th Cir. Unit A June 1981).[3] That is the situation here, where he is sued as Chairman of the Lakeland City Commission, during the meetings of which he allows the challenged legislative prayers.

[3] Cases from the former Fifth Circuit are binding on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

While the Mayor is properly named as a defendant in this case, in examining the immunity of the City this Court should make a specific distinction. AOF have "no cause of action against [City of Lakeland] except through the . . . action[s] of" the Mayor and Commissioners. *Brown v. Crawford Cnty.*, 960 F.2d 1002, 1012 n.17 (11th Cir. 1992). In *Brown*, the defendants were the named County Commissioners and the County itself. *Id.* at 1005. This Court held in that case, where the only actions being challenged were legislative activities of the Commissioners, that the Commissioners' actions covered by legislative immunity, and dismissed the *entire* case, rather than sever the parties, dismiss the officials as defendants, but permit the case to continue against the County. *See id.* at 1012–13.

The actions of choosing a prayer-giver and allowing the prayer to be said are not actions of the City *per se*. They are rather actions of administrative assistants such as Carol Hoffman, Cher Gill, and Traci Terry (in choosing the prayer-givers), *see* Doc. 54 at 2–4, and Mayor Fields (in presiding over the meeting and permitting the prayer). That is why in *Marsh v. Chambers* the defendants were State Treasurer Frank Marsh, Chaplain Robert Palmer, and the Members of the Executive Board of the Legislative Council, all sued in their official capacity, *see Marsh*, 463 U.S. at 785 n.2, 103 S. Ct. at 3333 n.2, rather than the State of Nebraska or the Nebraska legislature. Insofar as this suit is captioned as an action against the City of Lakeland it is unhelpful to this Court, because it is not the action of the City that is

causing the alleged Establishment Clause violation but rather the actions of the City's employees.

The only City action here is that the City "wishes to maintain a tradition of solemnizing its proceedings by allowing for an opening invocation before each meeting, for the benefit and blessing of the Commission," Doc. 54 at 5–6, and the City adopted a "policy that does not proselytize or advance any faith, or show any purposeful preference of one religious view to the exclusion of others," *id.* at 6. This language tracks with *Marsh*, and this Court should find no fault with it. There is no other City action. Although AOF fault the offering of sectarian prayers, that results from private actors and from individual employees, not the City's policy. Thus the only reason the City would be named is as a shorthand reference for employees and agents of the City connected to these legislative prayers, though as shown below those employees also enjoy legislative immunity regarding legislative prayer.

Cities can be sued under 42 U.S.C. § 1983 only in narrow circumstances not present in this suit. In *Monell v. Dep't of Soc. Servs.*, the Supreme Court allowed a Section 1983 claim against the City of New York because it was the municipality's policy that the plaintiffs alleged violated their constitutional rights. 436 U.S. 658, 661 n.2, 98 S. Ct. 2018, 2020 n.2 (1978). Cities "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is

alleged to be unconstitutional implements or executes a [codified policy] or decision officially adopted and promulgated by that body's officers." *Id.* at 690, 98 S. Ct. at 2035–36. Cities can also be sued if a practice not codified in policy has become embedded as a "custom." *Id.* at 690–91, 98 S. Ct. at 2036. The District Court rightly rejected the argument that there is any such custom of allowing prayers that are sectarian, Doc. 54 at 28–29, and so for purposes of determining immunity the Court should regard this litigation as truly against the employees and agents of the City, rather than the City itself.[4]

Thus regarding the City of Lakeland as an actual defendant here runs afoul of the Supreme Court's holding that "a local government may not be sued under § 1983 for an injury inflicted solely be its employees or agents." *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037. The City cannot be liable under a *respondeat superior* theory for the actions of these employees. *Crawford v. Carroll*, 529 F.3d 961, 978 (11th Cir. 2008). This Court should rather regard the improvident naming of the City as a defendant in this case to be a collective reference to the relevant officials and employees of the City aside from the Mayor as they execute the City's policy regarding legislative prayer.

[4] Although not discussed in the District Court, in *Los Angeles County v. Humphries* the Supreme Court extended the "policy or custom" rule in *Monell* to cover claims for injunctive relief. 131 S. Ct. 447, 452 (2010). But again, since the District Court correctly found there is no policy or custom here, the City cannot be sued.

And all such actual defendants are protected by legislative immunity, regardless of whether they are elected officials. "To the extent that a legislator is cloaked with legislative immunity, an adjunct to that legislative body possesses the same immunity." *Ellis v. Coffee Cnty. Bd. of Registers*, 981 F.2d 1185, 1192 (11th Cir. 1993) (citation omitted). Like other forms of absolute immunity, legislative "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester v. White*, 484 U.S. 219, 227, 108 S. Ct. 538, 544 (1988). Under these facts, only Mayor Fields and various administrative personnel employed by the City are being faulted by the AOF, rather than any City action. "Thus, the instant action—seeking prospective relief against [the Mayor and other City personnel] in their official capacities—is not to be treated as a[n] action against the entity." *Scott*, 405 F.3d at 1255.

D. Legislative immunity applies to the conduct challenged in this case.

Appellees cannot be sued for legislative prayers, because these "defendants enjoy legislative immunity protecting them from a suit challenging their actions taken in their official legislative capacities and seeking declaratory or injunctive relief." *Id.* at 1254 (footnote omitted). The focal point of this Court's analysis when deciding legislative immunity is the nature of the actions challenged by the plaintiffs, not the particular identities of the defendants. "Because the applicability of legislative immunity necessarily focuses on *particular acts or functions*, not on

particular actors or functionaries, immunity also extends to legislative acts performed by executive officials *and other non-legislators*." *Bryant*, 575 F.3d at 1305 (citing *Eastland*, 421 U.S. at 507, 95 S. Ct. at 1823) (emphases added). The impetus of this immunity is that the judiciary does not supervise and superintend the legislatures in our democratic republic, and thus what transpires at the heart of the legislative process is beyond the reach of unelected—and thus politically unaccountable—judges. Legislative immunity radiates from the lawmaking process itself, covering all those persons and activities that are a legitimate part of the deliberative proceedings. Therefore in this appeal the immunity covers the Mayor and all other City personnel involved in selecting the prayer-givers and facilitating the prayer practice that transpires entirely during the official legislative proceeding that is the City Commission meeting.

This absolute immunity extends beyond the words spoken by legislators in session to encompass other legislative activities. *United States v. Brewster*, 408 U.S. 501, 509–10, 92 S. Ct. 2531, 2536–37 (1972). Legislative immunity extends to all actions that are an "integral part" of the proceedings of deliberative bodies. *Gravel v. United States*, 408 U.S. 606, 625, 92 S. Ct. 2614, 2627 (1972). The Supreme Court routinely takes opportunities to include additional aspects of legislative proceedings and actions within the ambit of legislative activities, and therefore shielded by legislative immunity. *See*, *e.g.*, *Bogan*, 523 U.S. at 55–56,

118 S. Ct. at 973 (decision to eliminate government employee position); *McMillan*, 412 U.S. at 311–13, 93 S. Ct. at 2024–25 (staff of elected officials assisting those officials); *Johnson*, 383 U.S. at 184–85, 86 S. Ct. at 757–58 (making speeches during session); *Tenney*, 341 U.S. at 377–79, 71 S. Ct. at 788–89 (participating in committee proceedings); *Kilbourn*, 103 U.S. at 204 (voting). This Court often takes occasion to expand on that list of activities protected as an integral part of the deliberative process. *See, e.g.*, *Bryant*, 575 F.3d at 1307 (staff assistant compiling a budget); *Ellis*, 981 F.2d at 1190 (drawing voting precinct lines); *id.* at 1190–91 (investigating voter eligibility); *Yeldell v. Cooper Green Hosp.*, 956 F.2d 1056, 1063 (11th Cir. 1992) (decision of whether to introduce a measure); *Brown*, 960 F.2d at 1012 (zoning and land-use decisions); *Healy v. Town of Pembroke Park*, 831 F.3d 989, 993 (11th Cir. 1987) (voting). This Court should do so again here by holding that legislative prayers are legislative activities for purposes of legislative immunity.

In the final analysis, absolute immunity extends to all "legislative functions," *see Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S. Ct. 2727, 2732 (1982), and so this Court has characterized its precedents as holding that "individual defendants have absolute immunity for conduct furthering legislative duties," *DeSisto Coll., Inc. v. Line*, 888 F.2d 755, 765 (11th Cir. 1989) (citation omitted). Giving an invocation at the outset of official meetings of these

deliberative bodies is of a piece with this list of protected activities, and is easily characterized as conduct pursuant to the legislative duties of the City Commission, as it solemnizes the occasion and sets the tenor for the consideration of the legislative items on the agenda.

Consequently legislative immunity covers the conduct at issue here. "It is precisely the historical *absoluteness* of legislative immunity . . . that precludes this action against [the Mayor] in [his] . . . personal capacit[y]." *Brown*, 960 F.2d at 1012 n15. Legislative immunity confers broad protection for elected officials and their agents regarding activities that are part of City Commission meetings. The legislative prayers offered at the City of Lakeland meetings fall well within the contours of that immunity.

III. THIS COURT LACKS JURISDICTION BECAUSE THE PRAYERS AND PRAYER-GIVER SELECTION PROCESS HERE ARE NONJUSTICIABLE POLITICAL QUESTIONS.

While legislative immunity deprives this Court of jurisdiction to interfere with the prayer-giving part of City Commission meetings by rendering the official words spoken during the meeting categorically nonjusticiable, the political question doctrine additionally deprives this Court of subject-matter jurisdiction to draw lines banning certain prayers as "sectarian" while allowing other prayers as "nonsectarian" during the invocation part of the Commission meetings.

A. The selection of prayer-givers and evaluating whether prayers are sectarian are nonjusticiable political questions.

The political question doctrine likewise precludes judicial review of the legislative prayers offered at Lakeland City Commission meetings. The political question doctrine is a narrow exception to the general rule that federal courts should decide cases presented to them. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012). It arises from the separation of powers. *Aktepe v. United States*, 105 F.3d 1400, 1402 (11th Cir. 1997). Although the parties did not raise the issue of this doctrine below, every federal "court has an independent obligation to make sure that the disposition of the case will not require it to decide a political question." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007) (footnote omitted). That is because federal courts lack subject-matter jurisdiction over political questions. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319 (11th Cir. 2001). Like immunity, this is a threshold issue that cannot be waived and must be resolved before reaching the merits.

It also applies to political actors that are not federal. Principles of federalism and comity cannot countenance reasoning that a federal court could not examine legislative prayers offered in the federal legislature, but then nonetheless claiming federal judicial authority to examine legislative prayers offered by a sovereign state or its political subdivisions. Federal courts cannot sit in judgment of prayers offered in Congress, and likewise should not sit in judgment of prayers offered

before state assemblies or local bodies. *See, e.g.*, *Colgrove v. Green*, 328 U.S. 549, 553–56, 66 S. Ct. 1198, 1200–01 (1946) (opinion of Frankfurter, J.) (discussing political-question impediments to justiciability in a case involving state-level political actions). As with legislative immunity, *see supra* Part II, the political question doctrine applies to political decisions made at the federal, state, and local levels.

"In *Baker v. Carr*, the Supreme Court identified six hallmarks of political questions, any one of which may carry a controversy beyond justiciable bounds. . . For the invocation of the political question doctrine to be appropriate, at least one of these characteristics must be evident." *Aktepe*, 105 F.3d at 1402–03 (citations omitted). Of those six, the factor especially relevant here is if there is "a lack of judicially discoverable and manageable standards for resolving" an issue arising from actions performed by political actors. *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962). This Court has set forth a three-pronged inquiry regarding the core of *Baker*. The prong relevant to the discoverable-and-manageable *Baker* factor asks, "Would resolution of the question demand that a court move beyond areas of judicial expertise?" *Made in the USA Found.*, 242 F.3d at 1312 (citation omitted).

B. There are no judicially discoverable and manageable standards for determining whether a prayer is "sectarian."

Contrary to AOF's argument, *see* Appellant Br. 2, *Marsh* does not require prayers to be nonsectarian. *Pelphrey*, 547 F.3d at 1266, 1267, 1271. Even if *Marsh* were misconstrued in that fashion, the federal courts have never developed judicially-manageable standards for delineating sectarian prayers from nonsectarian prayers, and indeed cannot do so. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 252–55, 268–69 (2008); *see also Pelphrey*, 547 F.3d at 1267 ("Whether invocations of 'Lord of Lords' or 'God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law."). The dictum in *County of Allegheny v. ACLU of Greater Pittsburgh*, 492 U.S. 573, 603, 109 S. Ct. 3086, 3106 (1989), quoted by AOF, *see* Appellant Br. 28, cannot be read in that fashion, since it would set this Court an impossible task.

The Supreme Court has recently reaffirmed that "the political question doctrine [is] implicated when there is a lack of judicially manageable standards for resolving the question before the Court." *Zivotofsky*, 132 S. Ct. at 1428 (quoting *Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732, 735 (1993)) (internal citation and quotation marks omitted). For this Court to attempt drawing a line between what prayer language is sufficiently inclusive to be "nonsectarian" versus

specific enough to be deemed "sectarian" "would require this court to consider areas beyond its judicial expertise." *Made in the USA Found.*, 242 F.3d at 1314.[5]

AOF's argument is predicated on the assumption that some prayers are "sectarian" while others are not. Contrary to this assumption, there is no clear line separating "sectarian prayers" from "nonsectarian prayers." By way of illustration:

- While Atheists of Florida characterizes Christianity as one faith, the reality is that label encompasses multitudinous denominations with divergent beliefs and practices. Thus a Baptist who hears a Presbyterian minister reference in prayer a newborn brought into covenantal blessing with God through baptism might regard such a prayer as sectarian, since Baptists only baptize individuals upon a verbal profession of Christian faith.[6]

- More clearly a matter of judicial notice, either a Baptist or a Presbyterian—or for that matter any Protestant—who hears a Catholic priest pray for the blessing of the Virgin Mary might consider that prayer sectarian, since Protestants typically do not address prayers to Jesus' mother.

[5] The Supreme Court is especially rigorous in recognizing the lack of judicially-manageable standards where religious matters are concerned. Federal courts cannot second-guess decisions of clergy on matters of "faith and doctrine." *Kedroff v. St. Nicolas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116, 73 S. Ct. 143, 154 (1952). This principle was recently employed to recognize a ministerial exception to federal employment laws. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702–07 (2012). When a clergyman determines certain prayer language to be appropriate or required by his faith, it is a question of faith beyond the reach of the courts. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872). When political leaders invite a specific clergyman to offer a prayer, it transgresses this proscription for any judge to draw lines banning certain prayers as "sectarian" while allowing others.

[6] WAYNE GRUDEM, SYSTEMATIC THEOLOGY: AN INTRODUCTION TO BIBLICAL DOCTRINE 967–71, 975–80 (1994).

- While a prayer "in the name of Jesus Christ" would not be regarded as sectarian by either Protestants or Catholics, it would presumably sound sectarian to persons of the Jewish faith.

- However, a prayer referencing Israel as the chosen people of God by virtue of God's blessing given to Jacob could unify Christians along with Jews, but might leave Muslims feeling excluded.

Yet even a prayer to "God" might not pass muster. Such a prayer would seem sectarian to Wiccans, who either worship a goddess—a feminine being rather than a masculine being—or are polytheistic, believing in multiple divine beings.[7] Deists believe in a personal god, but one that created the world and set it in motion, and never interferes in its ongoing activities, and might view a prayer for divine intervention as sectarian.[8] Others, such as Buddhists, are pantheists that do not recognize a personal god.[9] And atheists believe there is no god, and therefore could regard any prayer, of any sort, "sectarian" regardless of content.

There is no rule of law by which a judge can objectively select one level of theological specificity versus another, designating all theological propositions more general than that level to be "nonsectarian," but all theological propositions more specific to be "sectarian" and thus unacceptable under the Establishment

[7] *See* THE POPULAR ENCYCLOPEDIA OF APOLOGETICS 493–95 (Ergun Caner & Ed Hinson eds., 2008).

[8] *See* NORMAN L. GEISLER, BAKER ENCYCLOPEDIA OF CHRISTIAN APOLOGETICS 189–92 (1999).

[9] NEW DICTIONARY OF THEOLOGY: A CONCISE & AUTHORITATIVE SOURCE 488 (Sinclair B. Ferguson et al. eds., 1988).

Clause. "The complex, subtle, and professional decisions as to the composition [of prayers] are essentially professional [theological] judgments, unsuitable for judicial resolution." *McMahon*, 502 F.3d at 1363 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S. Ct. 2440, 2446 (1973)) (internal quotation marks omitted); *see also* Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1469–70 (2005). Although there are well-established theological principles on which such distinctions can be made, there are no corresponding legal principles that a federal judge can discover or apply.

"According to entrenched Supreme Court precedent, disputes that do not lend themselves to resolution under judicially manageable standards present nonjusticiable political questions." Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1275 (2006). If courts cannot decide a case based on legal principles, then it is beyond the Article III jurisdiction of the courts to decide it because the ability to articulate a judgment in legal terms is every bit as much as element of a "case or controversy" as standing, ripeness, and the absence of mootness. It can be frustrating to litigants, as "perhaps more than any other constitutional doctrine, this one recognizes explicitly that a gap can exist between the meaning of constitutional guarantees, on the one hand, and judicially enforceable rights, on the other." *Id.* at 1276. While excessive partisanship in gerrymandering legislative districts violates the Equal Protection

Clause, Justice Scalia wrote in a case before the Supreme Court on exactly those grounds that the Court could not formulate judicially manageable standards to remedy that constitutional violation, *Vieth v. Jubelirer*, 541 U.S. 267, 281, 124 S. Ct. 1769, 1778 (2004) (plurality opinion), and therefore affirmed dismissal of the case under the political question doctrine, *id.* at 305, 306, 124 S. Ct. at 1792.

Judicial line-drawing is fraught with peril where religion is concerned, adding an insurmountable hurdle to the political question analysis. Whatever criteria a court might devise in other contexts, here it would require this Court to consider various religious beliefs, what propositions are entailed by a particular belief expressed in prayer language, how widely-held the belief is, or perhaps how excluded non-adherents are likely to feel. Courts would then decide which beliefs satisfy enough of these factors as to be permitted in prayer, while banning others. Far more problematic than merely a lack of neutral legal principles upon which to make these unseemly designations, federal judges would actually be engaging in a theological police action in the face of two express constitutional prohibitions regarding establishment and free exercise. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 589, 112 S. Ct. 2649, 2656 (1992) ("It is a cornerstone principle of our Establishment Clause jurisprudence that it is no part of the business of government to compose official prayers for any group of the American people . . . .") (citation and internal quotation marks omitted). In other words, the lack of judicial

standards for evaluating sectarianism in legislative prayer is not because judges are incapable of formulating intelligible standards; it is because they cannot formulate such standards without violating the Religion Clauses.

C. This Court lacks subject-matter jurisdiction over political questions.

Whether a case is nonjusticiable on account of the political question doctrine is a jurisdictional inquiry related to standing and mootness doctrines. *See Levy*, 358 F.3d at 1305. Like each of those, "the political question doctrine . . . is a constitutional restraint on the jurisdiction of the federal courts." *McMahon*, 502 F.3d at 1351. And like those doctrines, it rightly delimits the power of an unelected judiciary circumspectly in a democratic republic. Judges apply the law to facts, and leave matters that cannot be resolved on the basis of neutral legal principles to the people and their elected representatives.

"If the case would require the court to decide a political question, it must be dismissed for lack of jurisdiction." *Id.* at 1358. The political question doctrine applies to the legislative prayers at the Commission meetings of the City of Lakeland, so "this case presents a nonjusticiable political question, thereby depriving the court of Article III jurisdiction in this matter." *Made in the USA Found.*, 242 F.3d at 1319. Accordingly, this Court must dismiss the appeal for want of subject-matter jurisdiction.

CONCLUSION

The Court of Appeals should hold the issues raised in this challenge to legislative prayer are nonjusticiable both due to legislative immunity and also as a political question, and therefore vacate the judgment of the Middle District of Florida and dismiss this suit for want of subject-matter jurisdiction.

Respectfully submitted,

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June 25, 2012

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for *amici curiae* affirms and declares as follows:

This brief complies with the type-volume limitation of Fed. R. App. 29(d) and Fed. R. App. P. Rule 32(a)(7) for a brief utilizing proportionally-spaced font, because the length of this brief is 6,852 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Executed this 25th day of June, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2012, I caused the original and six copies of the foregoing to be sent by Next Day service, to the following:

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