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BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

TO: Federal Open Market Committee DATE: May 23, 1988

FROM: Normand Bernard NB. SUBJECT: FOMC Brief in Melcher Lawsuit

Attached are a memorandum from Messrs. Bradfield and Patrikis and a copy of their related brief on behalf of the Committee. The brief conveys the Committee's opposition to a review by the Supreme Court of the lower court decision to dismiss Senator Melcher's lawsuit.

Attachments

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DATE: May 23, 1988

TO: Federal Open Market Committee

SUBJECT: Opposition to petition for Supreme Court review in Melcher lawsuit.

FROM: Messrs. Bradfield & Patrikis

FOR INFORMATION ONLY

Attached is a copy of the brief filed on behalf of the FOMC to Senator Melcher's March 17, 1988, petition to the Supreme Court seeking review of the lower court decision dismissing the Senator's lawsuit against the FOMC. The brief, which was filed on Monday, May 16, argues that there is no reason for the Supreme Court to review the lower court's determination that the Senator is not a proper party to bring a lawsuit challenging the constitutionality of the FOMC. The brief argues that further review of this decision is not warranted. In particular, we argued that under established principles it is clear that hearing the suit would improperly interfere with the legislative process, since Senator Melcher's real dispute is with his colleagues in the Senate, who passed the law setting up the FOMC and who have declined to amend it.

We have been advised by the Solicitor General's Office in the Department of Justice, which represents the Government in the Supreme Court, that we can expect a decision before the Court's current term ends in June on whether or not the Court will hear the case.

cc: Reserve Bank General Counsels

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No. 87-1546

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE HONORABLE JOHN MELCHER, MEMBER,
UNITED STATES SENATE, PETITIONER

v.

FEDERAL OPEN MARKET COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly ordered dismissal of this suit brought by petitioner, a United States Senator, alleging that the Act of Congress governing the selection of certain members of the Federal Open Market Committee violates the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1546

THE HONORABLE JOHN MELCHER, MEMBER, UNITED STATES SENATE, PETITIONER

v.

FEDERAL OPEN MARKET COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 836 F.2d 561. The opinions of the district court addressing justiciability (Pet. App. 15a-26a) and the merits (Pet. App. 33a-47a) are reported at 644 F. Supp. 510.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50a-51a) was entered on December 18, 1987, and a timely petition for rehearing was denied on March 4, 1988 (Pet. App. 53a). The petition for a writ of certiorari was filed on March 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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STATEMENT

1. The Federal Open Market Committee (FOMC) is part of the Federal Reserve System. Its function is to direct the purchase and sale of securities in the open market by Federal Reserve Banks. These open market transactions are one means by which the Federal Reserve System implements monetary policy. *FOMC* v. *Merrill*, 443 U.S. 340, 343-344 (1979).

The FOMC has twelve members. Seven of those are the members of the Board of Governors of the Federal Reserve System (12 U.S.C. 263(a)), who are appointed to office by the President, by and with the advice and consent of the Senate. 12 U.S.C. 241. The remaining five members of the FOMC are selected by the boards of directors of the 12 regional Federal Reserve Banks from among the presidents and the first vice presidents of those Banks. 12 U.S.C. 263(a). The regional Federal Reserve Banks are private corporations whose stock is owned by member commercial banks. The member banks in each region select six members of the board of directors of the Federal Reserve Bank for that region, and the Board of Governors of the Federal Reserve System selects the other three members. Each board of directors of a regional Reserve Bank in turn selects the president and the first vice president of that Bank, subject to the approval of the Board of Governors. 12 U.S.C. 341, 248(f).

2. a. Petitioner, a United States Senator, brought this suit in the United States District Court for the District of Columbia to challenge the official participation in the affairs of the FOMC by the five members who are selected by the boards of directors of the regional Federal Reserve Banks. Petitioner contended that, under the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2,[1] all voting members of the FOMC must be appointed by the President, by and with the advice and consent of the Senate. Petitioner sought an injunction prohibiting the five Reserve Bank members from voting at meetings of the FOMC or serving as its chairman or vice chairman. See Pet. 6-7. Respondents moved to dismiss the complaint on the grounds that petitioner does not have standing to sue and that the court should in any event decline to entertain the suit in the exercise of its equitable discretion under *Riegle* v. *FOMC*, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). As petitioner concedes (Pet. 8 n.5), this case is essentially identical to *Riegle*, and the court of appeals ultimately ordered dismissal of the case on the authority of *Riegle* (see Pet. App. 10a-11a). For these reasons, we explain the circumstances of that case here.

In *Riegle*, as here, a Senator challenged the method for selecting the five Reserve Bank members of the FOMC. Senator Riegle contended that he had standing in his capacity as a Senator, because the service of the five Reserve Bank members of the FOMC deprived him of his right to vote on whether the Senate should give its advice and consent to the appointment of FOMC members (656 F.2d at 877). The court of appeals held that this interest

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[1] The Appointments Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or the Heads of Departments.

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satisfied the Article III standing requirements as articulated by this Court (*id.* at 877-879), although it acknowledged that there was "room for argument" on that question (*id.* at 879). At the same time, the court recognized that the plaintiff's status as a legislator "raise[d] separation-of-powers concerns," because a legislator often has remedies within the Legislative Branch and a suit by a legislator seeking a judicial remedy for the same alleged injury could intrude the courts into internal legislative matters (*ibid.*). The court concluded, however, that these separation-of-powers concerns, which had been articulated in a number of its prior decisions addressing the standing of Members of Congress under Article III, should be given expression through a doctrine of equitable discretion, rather than standing. Under that doctrine, a suit in which a legislator-plaintiff satisfies Article III's standing requirements must nevertheless be dismissed if the legislator could obtain substantial relief from his fellow legislators through the legislative process (*id.* at 879-882). Certain language in the *Riegle* opinion suggested that a court should not dismiss a suit in the exercise of its equitable discretion if there is no private plaintiff who would have standing to sue (*id.* at 881-882), but the court there expressed the view that private persons having a significant interest in open market operations and prime lending rates would have the requisite standing to challenge the composition of the FOMC (*id.* at 881).

After *Riegle* was decided, a group of private businesses and individuals whose interests were the same as those of the hypothetical plaintiffs mentioned by the panel in *Riegle* brought an action challenging the method of appointing the Reserve Bank members of the FOMC and seeking the same relief as had Senator Riegle. However, the District of Columbia Circuit held, contrary to the speculation by the *Riegle* panel, that those private parties

did not satisfy Article III standing requirements. *Committee for Monetary Reform* v. *Board of Governors of the Federal Reserve System*, 766 F.2d 538 (D.C. Cir. 1985).

b. Following the decision in *Committee for Monetary Reform*, the district court in the instant case denied respondents' motion to dismiss on justiciability grounds (Pet. App. 15a-26a). The court first reexamined the Article III standing of a Member of Congress in light of this Court's intervening decisions in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), and *Allen* v. *Wright*, 468 U.S. 737 (1984), and held that petitioner has standing to challenge the method of selecting the Reserve Bank members of the FOMC because it deprives him of his right to vote in connection with the Senate's advice and consent function (Pet. App. 17a-21a). The district court also declined to dismiss this suit in the exercise of its equitable discretion. The court felt impelled by *Riegle* "to conclude that equitable discretion may not appropriately be applied to deny standing to [petitioner,]" because by virtue of the decision in *Committee for Monetary Reform*, there is no private plaintiff with standing to sue to enforce the Appointments Clause (*id.* at 26a; see generally *id.* at 21a-26a).

After it denied respondents' motion to dismiss, the district court, in a separate opinion, rejected petitioner's constitutional claim on the merits. It held that the five members of the FOMC who are selected by the Federal Reserve Banks are not "Officers of the United States" for purposes of the Appointments Clause and therefore need not be appointed in conformity with that Clause. Pet. App. 33a-47a. The court accordingly granted respondents' motion for summary judgment and dismissed the action (*id.* at 47a, 48a).

3. The court of appeals affirmed the judgment of dis-

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missal without reaching the merits, holding that *Riegle* required the district court to dismiss the suit in the exercise of its equitable discretion (Pet. App. 1a-11a). The court reasoned (*id.* at 4a):

> *Riegle* involved a challenge identical to that advanced by Senator Melcher * * *. Senator Riegle had brought to the courthouse what amounted to a dispute properly within the domain of the legislative branch. Senator Riegle's attempt to win in court what he had sought and failed to obtain from his colleagues in Congress was viewed by the *Riegle* court as triggering highly sensitive concerns over the appropriate provinces of the Article I and Article III branches.

In the court's view, those same concerns are present here (*id.* at 9a).

The court of appeals acknowledged petitioner's argument that in light of *Committee for Monetary Reform*, it appeared that there might be no private party who would have standing to sue; but the court held that, even if this was so, the suit must be dismissed under *Riegle*, because the intimations in *Riegle* that the scope of a district court's equitable discretion to dismiss a suit depended on whether a private party would have standing to raise the claim were dicta (Pet. App. 4a-9a). The court explained (*id.* at 7a):

> [T]he separation-of-powers concerns informing the doctrine of equitable discretion are, upon reflection, entirely unaffected by the ability of a private plaintiff to bring suit. As *Riegle* itself recognized, those concerns are implicated by the judiciary's resolution of issues that are appropriately left to the legislative arena.

The panel made clear that the statement in its opinion "disapproving *Riegle's* intimation in dicta ha[d] been separately circulated to and approved by the entire court, and thus constitutes the law of the circuit" (*id.* at 9a n.3). And the panel also expressed its agreement with Judge Edwards' statement of concern in his brief concurring opinion as to whether the doctrine of equitable discretion fashioned by the court in *Riegle* "'is a viable doctrine upon which to determine the fate of constitutional litigation.'" *Id.* at 9a n.4 (quoting *id.* at 10a (Edwards, J., concurring)).[2] But, like Judge Edwards, the panel recognized that *Riegle* is binding circuit precedent unless and until it is overruled (*ibid.*).[3]

ARGUMENT

The court of appeals correctly ordered dismissal of petitioner's suit challenging the method for selecting the five Federal Reserve Bank members of the Federal Open Market Committee. Serious separation-of-powers questions would be raised if Article III courts were to entertain suits brought by individual Members of Congress who are dissatisfied with the laws passed by Congress. Any doubt about whether the proper basis for a court's refusal to entertain such a suit is constitutional standing requirements, or instead "equitable discretion" informed by those requirements, does not warrant this Court's review of this case, because the judgment below is correct under either rubric. Nor does the court of appeals' holding that a district court should not entertain a suit brought by a single Member of Congress in these circumstances conflict

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[2] Judge Edwards was a member of the panel in *Riegle*.

[3] Because the court of appeals ordered the action dismissed on equitable discretion grounds, it ordered that the "opinion" of the district court—presumably meaning both the opinion on the merits and the opinion addressing petitioner's capacity to sue—be vacated (Pet. App. 9a, 50a).

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with any decision of this Court or any other court of appeals. The Court denied review when presented with the same issue in *Riegle*,[4] and there is no reason for a different disposition here.

1. In our view, petitioner does not have standing under Article III of the Constitution to bring this suit challenging the manner in which the five Federal Reserve Bank members of the FOMC are selected. The "core component" of standing under Article III is that the plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" (*Allen* v. *Wright*, 468 U.S. at 751; see also *Valley Forge*, 454 U.S. at 472). The plaintiff's injury, moreover, must be " 'distinct and palpable' " (*Allen* v. *Wright*, 468 U.S. at 751, quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)) and must give rise to a personal stake in the outcome, rather than " 'generalized grievances about the conduct of government or the allocation of power in the Federal System.' " *United States* v. *Richardson*, 418 U.S. 166, 173 (1974) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968)).

Through these requirements, the prerequisite of standing assures that legal questions will be resolved "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"; and it "reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order," so that the exercise of judicial power is " 'more than a vehicle for the vindication of the value interests of concerned by-

[4] See also *Reuss* v. *Balles*, 584 F.2d 461 (D.C. Cir.), cert. denied, 439 U.S. 997 (1978) (affirming the dismissal, on standing grounds, of a similar suit brought by a Member of the House of Representatives).

standers.' " *Valley Forge*, 454 U.S. at 472-473 (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Standing requirements of course take on added significance when an exercise of judicial power would "affect[] relationships between the coequal arms of the National Government," because " 'repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either.' " *Valley Forge*, 454 U.S. at 473-474 (quoting *United States* v. *Richardson*, 418 U.S. at 188 (Powell, J., concurring)).

In this case, petitioner asserts an interest in having the open market operations of the Federal Reserve System conducted by Officers of the United States who are appointed in conformity with the Appointments Clause of the Constitution. However, petitioner's interest in having the Nation's affairs conducted in a manner that is consistent with the Constitution is not unique to him; it is an interest shared by the people generally. The District of Columbia Circuit held in *Committee for Monetary Reform* that private persons, even those whose monetary interests might be affected by the FOMC's operations, do not have standing to challenge the method for selecting the Reserve Bank members of the FOMC. There is no reason why petitioner's status as a representative of the people should give him standing that the people themselves do not have. At bottom this interest asserted by petitioner is merely the " 'generalized interest of all citizens in constitutional governance.' " *Valley Forge*, 454 U.S. at 483 (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974)).

It would be especially inappropriate to give a Member of Congress, solely because of his status as such, a special right to attack the constitutionality of a law that Congress itself has enacted. Any "injury" suffered by the Member

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on account of the enactment of an unconstitutional law is the product of the legislative process in which he is a participant, and the Member therefore may seek redress within that process by urging his colleagues to repeal the law. As to him, in addition to the considerations weighing against standing of other citizens, there is the fact that he is attempting to use the courts to circumvent legislative processes directly available to him to resolve what is in part a difference in view between him and his congressional colleagues. See *McClure* v. *Carter*, 513 F. Supp. 265, 270-271 (D. Idaho), aff'd mem., 454 U.S. 1025 (1981); cf. *Southern Christian Leadership Conference* v. *Kelley*, 747 F.2d 777, 781 (D.C. Cir. 1984).[5]

Petitioner argues, however, that the Senate's constitutional responsibility for deciding whether to give its advice and consent to the appointment of an Officer of the United States furnishes a sufficient basis for this suit, because the Reserve Bank FOMC members' "exercise of the power to vote or act as chairman of the [FOMC] deprives [petitioner] of his *own* constitutional role in the appointment process" (Pet. 6 (emphasis in original)). However, neither the Appointments Clause nor any other provision of the Constitution gives petitioner a personal constitutional right to vote on a particular appointment. Unlike the provisions of Article I of the Constitution dealing with the expulsion and exclusion of Members of Congress (see *Powell* v. *McCormack*, 395 U.S. 486 (1969)), the

[5] Thus, even if petitioner, by virtue of his status as a Member of Congress, were thought to have suffered a distinct "injury" as a result of 12 U.S.C. 263(a), that injury would be traceable to the actions of his colleagues who passed the law and have repeatedly declined to change the structure of the FOMC. See *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977), citing *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

Appointments Clause does not confer rights on individual Senators; it expressly gives the power of advice and consent to "the Senate" (Art. II, § 2, Cl. 2) as a collective body, not to the individual Members of which the Senate is "composed" (Art. I, § 3, Cl. 1). See *United States* v. *Ballin*, 144 U.S. 1, 7 (1892) ("Power is not vested in any one individual, but in the aggregate of the members who compose [the House]").[6]

There is no occasion here to decide whether, contrary to the government's submission in *Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987), the Senate itself would have standing to challenge the actions of persons (the FOMC members) who have been vested with responsibilities under a duly enacted law. The Senate has not chosen to bring such a suit, and indeed there is no indication that the Senate as a whole shares petitioner's personal view that all members of the FOMC should be appointed by the President with the advice and consent of the Senate, much less that the Constitution requires that result. Indeed, Congress has consistently declined to enact proposals to revise the membership of the FOMC.[7] But whatever the position

[6] Compare Art. I, § 3, Cl. 1 ("each Senator shall have one Vote"); Art. I, § 6, Cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services * * *. They shall * * * be privileged from Arrest * * * and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

[7] Bills have been regularly introduced in Congress either to abolish the FOMC or to alter its composition by removing the Reserve Bank representatives or adding the Secretary of the Treasury as a member. See, *e.g.*, H.R. 5597, 99th Cong., 2d Sess. (1986); H.R. 4497, 99th Cong., 2d Sess. (1986); S. 10, 99th Cong., 1st Sess. (1985); H.R. 1470, 99th Cong., 1st Sess. (1985); H.R. 1469, 99th Cong., 1st Sess. (1985); H.R. 5459, 98th Cong., 2d Sess. (1984); H.R. 586, 98th Cong., 1st Sess. (1983); H.R. 773, 97th Cong., 1st Sess. (1981); H.R. 5066, 97th Cong., 1st Sess. (1981); H.R. 8223, 96th Cong., 2d Sess. (1980); H.R. 7001, 96th Cong., 2d Sess. (1980); S. 2540, 94th Cong., 1st Sess.

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of the Senate on the constitutional issue might prove to be, petitioner, as an individual Member of the Senate, does not have standing to bring a lawsuit to advance the interests of the Senate as a body (see *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 544-545 (1986)), at least in the absence of a resolution passed by the Senate that authorizes him to represent its interests. *Karcher* v. *May*, No. 85-1551 (Dec. 1, 1987); compare *Barnes* v. *Kline*, 759 F.2d 21, 23 & n.3 (D.C. Cir. 1985), vacated as moot *sub nom. Burke* v. *Barnes, supra; United States* v. *AT&T*, 551 F.2d 384, 391, 394 n.16 (D.C. Cir. 1976).

2. The court of appeals acknowledged in this case, as it did in *Riegle*, the sensitive separation-of-powers considerations that counsel an Article III court to refuse to entertain a suit brought by an individual Member of Congress challenging a law that was duly enacted by Congress; and as in *Riegle*, the court recognized that the individual Member's proper remedy is through the legislative process, by urging his colleagues to repeal the challenged provision. But the court below gave expression to these separation-of-powers concerns by ordering that this action be dismissed under the doctrine of equitable discretion that it had fashioned in *Riegle*, rather than resting its order of dismissal directly on Article III standing requirements. Although we adhere to the view expressed in our brief opposition to the certiorari petition in *Riegle* (at 9) that standing principles furnish the preferable way in which to

(1975); H.R. 11, 93d Cong., 1st Sess. (1973); H.R. 11, 92d Cong., 1st Sess. (1971); H.R. 11, 91st Cong., 1st Sess. (1969); H.R. 11, 90th Cong., 1st Sess. (1967). None of these bills has mustered sufficient support to be reported out of committee, and only one of these recent bills prompted congresional hearings. See *To Modernize the Federal Reserve System: Hearings on H.R. 7001 Before the Subcomm. on Domestic Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 2d Sess. (1980).

analyze the propriety of entertaining suits by individual Members of Congress, the fact that the court below chose a different formulation does not warrant review by this Court. Whatever the proper label, the court of appeals was clearly correct in dismissing this suit based on separation-of-powers concerns.

Moreover, there appears to be little difference in practical application between the equitable discretion doctrine of *Riegle* and Article III standing principles. In fact, the two approaches are deliberately quite closely aligned: the court in *Riegle* borrowed from its prior standing decisions when it articulated the equitable discretion doctrine (656 F.2d at 879-881), and the very purpose of that doctrine is to respect the "highly sensitive concerns over the appropriate provinces of the Article I and Article III branches" (Pet. App. 4a) that underlie the standing doctrine. See, *e.g.*, *Valley Forge*, 454 U.S. at 473-474.

It is significant as well that the result reached in this case is consistent with the results in similar cases in the District of Columbia Circuit dismissing suits brought by congressional plaintiffs on the basis of "equitable discretion," "remedial discretion," or more traditional justiciability concerns such as standing or political question.[8] Other courts, including this Court, also have used various for-

[8] See, *e.g.*, *Moore* v. *House of Representatives*, 733 F.2d 946, 954 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *Crockett* v. *Reagan*, 720 F.2d 1355, 1356 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1175 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983); *Gregg* v. *Barrett*, 771 F.2d 539, 545 (D.C. Cir. 1985); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985); *United Presbyterian Church in the U.S.A.* v. *Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984); *Daughtrey* v. *Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978); *Metcalf* v. *National Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977); *Harrington* v. *Bush*, 553 F.2d 190, 214 (D.C. Cir. 1977).

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mulations to dismiss similar claims.[9] The experience to date in the District of Columbia Circuit does not suggest any need for intervention by this Court to prevent that court from intruding into the political process by entertaining suits brought by individual Members of Congress.

In addition, the panel in this case, with the approval of the full court, took steps to assure that the equitable discretion doctrine closely parallels standing principles by making clear that a court's obligation to dismiss a suit under *Riegle* does not depend upon whether a private plaintiff would have standing to sue (Pet. App. 8a-9a & n.3). Compare *Valley Forge*, 454 U.S. at 489 (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. at 227) (" '[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing' "). For these reasons, the manner in which the District of Columbia Circuit has disposed of this and other suits brought by individual Members of Congress does not present an issue of substantial practical importance warranting the Court's attention at this time.

3. a. Petitioner contends (Pet. 12), however, that the court of appeals' dismissal of this suit conflicts with the holding in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), that a state legislator had standing to challenge the legislature's

[9] *Goldwater* v. *Carter*, 444 U.S. 996, 997-1002 (1979) (Powell, J., concurring in the judgment) (ripeness); *id.* at 1002-1006 (Rehnquist, J., concurring in the judgment) (political question); *McClure* v. *Carter*, 513 F. Supp. 265, 269 (D. Idaho) (standing), aff'd mem., 454 U.S. 1025 (1981); *Ameron, Inc.* v. *U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (standing), modified on other grounds, 809 F.2d 979 (3d Cir. 1986), cert. granted, No. 87-163 (Mar. 21, 1988); *Holtzman* v. *Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (political question and standing), cert. denied, 416 U.S. 936 (1974).

practice of beginning each day with a prayer led by a chaplain paid out of the state treasury. This contention is without merit. In *Marsh*, the Court expressed its agreement with the Eighth Circuit's decision that the plaintiff had standing as a member of the legislature and as a taxpayer whose taxes were used to fund the chaplaincy (463 U.S. at 786 n.4). The plaintiff's standing in *Marsh* as a taxpayer of course has no relevance here, and in any event *Marsh* applied settled principles in holding that "[a] taxpayer clearly has standing to challenge the expenditure foundation of such a practice because of the nexus between his taxpayer status and the Establishment Clause claim." *Chambers* v. *Marsh*, 675 F.2d 228, 231 (8th Cir. 1982), citing *Flast* v. *Cohen*, 392 U.S. 83 (1968).

Furthermore, the premise of the plaintiff's standing as a legislator in *Marsh* was wholly different from that advanced by petitioner here. The Eighth Circuit, whose ruling this Court endorsed, did not purport to expound an expansive theory of legislator standing. It based its ruling on the fact that the plaintiff "squarely confront[ed]" the prayer at the beginning of the legislative session "on a daily basis" (675 F.2d at 231). Thus, the plaintiff's status as a legislator was significant for standing purposes only because it gave him a right to be present on the floor of the legislative chamber when the challenged prayer was delivered. In this respect, the legislator's standing to protect his First Amendment rights resembled the standing of school children to challenge the recitation of state-sponsored prayer in their classrooms. See, *e.g.*, *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963).

b. Petitioner also errs in contending (Pet. 13) that the decision below conflicts with *Dennis* v. *Luis*, 741 F.2d 628 (3d Cir. 1984). The plaintiffs in *Dennis* were eight members of the legislature of the Virgin Islands—a ma-

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jority of that 15-member body. They alleged that the governor had improperly made a recess appointment of an individual whose nomination had been submitted to the legislature for its advice and consent but had been rejected by the legislature. The court of appeals declined to dismiss the suit on equitable discretion grounds, observing: "While we respect the thoughtful analysis in the opinion written by Judge Robb in *Riegle*, we are not bound by the articulated doctrine, and we decline at this time to adopt it" (*id.* at 633). However, the court went on to observe, in a passage not quoted by petitioner: "Furthermore, even if we were to apply the standard articulated in *Riegle*, we believe that we would not be required to dismiss this suit" (*ibid.*). The court explained that "[i]n at least two critical aspects" *Dennis* was "the polar opposite of the *Riegle* case" (*ibid.*): first, the plaintiffs in *Dennis* complained of actions by the Executive Branch of the Virgin Islands Government, not of their colleagues in the legislature, as in *Riegle*, and they therefore did not have a remedy within the legislative process; second, while the Senator in *Riegle* complained that there was no mechanism that furnished the Senate with an opportunity to consider whether to give its advice and consent to an appointment, the plaintiff legislators in *Dennis* relied on a statute that did give the legislature such an opportunity but allegedly had been flouted by the Executive Branch (*id.* at 633-634). Because this case is identical to *Riegle*, the factors that led the Third Circuit to distinguish *Riegle* from *Dennis* serve to distinguish this case as well.[10]

There are two further distinctions between *Riegle* (and this case) and *Dennis* that were not stressed by the Third Circuit. The plaintiffs in *Dennis* constituted a majority of the legislative body, while *Riegle* and the instant suit were

[10] This is not to say that we believe that the distinctions identified by the Third Circuit in *Dennis* are sufficient to permit an Article III court to entertain such a suit—at least if brought by Members of Congress, as distinguished from members of a state or territorial legislature.

each brought by a single Senator without any indication that he represented the views of a majority of the Senate. Moreover, *Dennis* was brought by members of a territorial legislature, not a Member of the Congress of the United States, and *Dennis* therefore involved the separation of powers in a territorial government established under an Act of Congress, not the separation of powers of the United States Government that is mandated by the Constitution itself.[11] We note as well that the Third Circuit in

[11] Compare *Coleman* v. *Miller*, 307 U.S. 433 (1939). In *Coleman*, a state court had entertained a suit brought by members of the state legislature who claimed that the institutional action of their body in passing on a proposed constitutional amendment was illegally "overridden and virtually held for naught" by the tie-breaking vote of the lieutenant governor (*id.* at 438). This Court, by a 5-4 vote, held that the interest of the legislators, which was "treated by the state court as a basis for entertaining and deciding the federal questions," was "sufficient to give the Court jurisdiction to review that decision" (*id.* at 446). However, *Coleman* does not stand for the broad proposition that *all* legislators have standing to bring an action in *federal* court on the basis of an asserted injury to their legislative responsibilities. In particular, *Coleman* did not involve a suit brought by Members of Congress, and, like *Dennis*, it therefore did not implicate the separation of powers between the Legislative and Judicial Branches under the United States Constitution. Moreover, in *Coleman*, all of the state legislators who claimed that their votes against the constitutional amendment had been nullified by the participation of the lieutenant governor in the vote—an asserted majority of the body—joined the claim (*ibid.*). As noted in the text, *Dennis* likewise was brought by a majority of the members of the legislative body, not, as here, a single Member. Moreover, in this case, unlike *Coleman* and *Dennis*, petitioner can make no claim that any action of the Senate or of Congress was nullified by respondents; instead it is petitioner who seeks to set "for naught" a law that was passed by the legislative body of which he is a Member.

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Dennis stated only that it was declining to adopt the equitable discretion doctrine of *Riegle* "at this time" (741 F.2d at 633); the Third Circuit did not rule out the possibility that it might adopt the *Riegle* approach in the future, and it has not had occasion to revisit the question since. For all of these reasons, there is no conflict between the decision below and the holding in *Dennis* that warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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