

In The  
**United States Court of Appeals**  
For The Fourth Circuit

**JANET JOYNER; CONSTANCE LYNN BLACKMON,**

*Plaintiffs – Appellees,*

and

**MAUCK OSBORNE,**

*Plaintiff,*

v.

**FORSYTH COUNTY, NORTH CAROLINA,**

*Defendant – Appellant.*

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**THE RUTHERFORD INSTITUTE**

*Amicus Supporting Appellant*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR MIDDLE DISTRICT OF NORTH CAROLINA  
AT GREENSBORO**

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**BRIEF OF AMICI CURIAE NORTH CAROLINA FAMILY POLICY COUNCIL,  
PALMETTO FAMILY COUNCIL, THE FAMILY FOUNDATION OF VIRGINIA,  
THE FAMILY POLICY COUNCIL OF WEST VIRGINIA,  
AND THE NORTH CAROLINA PARTNERSHIP FOR RELIGIOUS LIBERTY  
IN SUPPORT OF APPELLANT AND REVERSAL**

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## **INTEREST OF AMICI**

The North Carolina Family Policy Council, Palmetto Family Council, The Family Foundation of Virginia, the Family Policy Council of West Virginia, and the North Carolina Partnership for Religious Liberty (collectively, the “Amici”) are independent, nonpartisan, and nonprofit research and education organizations dedicated to the preservation of religious liberties and traditional family values. Together, the Amici represent thousands of members and contributors, all of whom are constituents of local, municipal, county, state, and national legislatures, councils, and public bodies who stand to be directly affected by this Court’s ruling on legislative prayer.

The Amici’s specific interest in this case concerns the free exercise of religious expression in the legislative context, expression that has been practiced for more than two centuries in this country. The Amici respectfully submit that their substantial experience in matters of religious freedom and expression will aid this Court and that their members’ status as constituents of legislatures and other elected bodies provides a unique perspective which may be useful to this Court.

This brief will focus upon the practice of legislative prayer throughout our nation’s history as well as the religious and sectarian nature of legislative prayer and other government accommodations of religious expression.

## ARGUMENT

This case concerns a policy promulgated by Forsyth County, North Carolina, under which the county's religious leaders are invited to give invocations prior to the opening of county council meetings. Joint Appendix, at pp. 520-522. Appellees challenged the policy on the grounds that the prayers offered were unconstitutionally sectarian. *Id.* at 4-5. The District Court agreed with Appellees and entered an Order enjoining the County from offering prayers containing sectarian references. *Id.* at 931. The County timely noticed this appeal, and the Amici join the County in respectfully requesting this Court to reverse the District Court's Order.

### **I. MARSH V. CHAMBERS COMMANDS A HISTORICAL ANALYSIS IN LEGISLATIVE PRAYER CASES.**

The United States Supreme Court has devised numerous rules and standards under which it analyzes Establishment Clause cases concerning the government's accommodation of religious expression. In many cases, the Court applies a close factual analysis pursuant to the factors set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). However, not all cases are analyzed under Lemon. See generally Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Good News Club v. Milford Central School, 533 U.S. 98 (2001). In some Establishment Clause cases, the Court has relied on a categorical approach, emphasizing context and history to

instruct whether or not the Lemon factors should be applied.<sup>1</sup> See, e.g., Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality opinion) (“[W]e think [the Lemon test] not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.”). Often, in cases where the Lemon factors are not applied, the Court’s analysis relies heavily on the historical foundations of a practice. See, e.g., id. (“[O]ur analysis is driven both by the nature of the monument and by our Nation’s history.”).

This case concerns a local government policy concerning legislative prayer. As such, it should be analyzed not under Lemon but under a historical framework pursuant to Marsh v. Chambers, 463 U.S. 783 (1983). See, e.g., Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 282 (4th Cir. 2005) (“[T]his case squarely presents questions concerning legislative prayer. . . . We therefore proceed to apply the principles of Marsh to the questions presented in this case.”). In Marsh, the Court reasoned that the practice of opening legislative sessions with prayer was “deeply embedded in the history and tradition of this country” and therefore upheld the Nebraska legislature’s practice of beginning each session with prayer offered by a state-paid chaplain. Marsh, 463 U.S. at 786. Reversing the Court of Appeals, which had analyzed the practice under Lemon, the Supreme Court based their decision on the strength of the historical tradition of legislative

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<sup>1</sup> In Hunt v. McNair, 413 U.S. 734 (1973), the Court referred to the Lemon factors as “no more than helpful signposts.” Id. at 741.

prayer and its use concurrently with the adoption of the First Amendment. See id. at 790-91.

Accordingly, because Marsh commands a historical analysis in legislative prayer cases, substantial consideration must be given to the content of legislative prayers historically offered in Congress and elsewhere. The illustrative history of legislative prayer demonstrates that it has very often been undeniably sectarian.

## **II. LEGISLATIVE PRAYER HAS HISTORICALLY BEEN SECTARIAN.**

“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.” Id. at 786. The tradition of legislative prayer originated no later than 1789, when the first Congress elected chaplains,<sup>2</sup> and has continued unbroken through the present day.<sup>3</sup>

The practice of opening sessions of deliberative public bodies with prayer has not been limited to Congress. “[M]ost state legislatures begin their sessions with prayer[.]” Marsh, 463 U.S. at 790 n.11. Likewise, hundreds and potentially thousands of local government bodies across the country, like Forsyth County, open their meetings with prayer.

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<sup>2</sup> See id. at 787-88.

<sup>3</sup> See, e.g., H.R. Res. 1216, 111th Cong. (2010) (congratulating Rev. Daniel P. Coughlin on his 10th year of faithful service as Chaplain of the U.S. House of Representatives).

Prayer has also played an important role in presidential inaugurations throughout our nation’s history.<sup>4</sup> During President Washington’s inauguration, the President and members of Congress “proceeded to St. Paul’s Chapel, where divine service was performed” by the Senate chaplain. 1 Annals of Cong. 29 (Joseph Gales ed., 1789).<sup>5</sup> The tradition of inaugural prayers which began with President Washington’s inauguration has continued into the 21st Century, with two Christian ministers giving prayers at President Obama’s inauguration. See 155 Cong. Rec. S667-02, 667-69 (2009).

Legislative prayers, like those at issue in the instant case, have very often included references to Jesus Christ. “The Continental Congress opened its sessions with prayers by a Christian chaplain and ‘sprinkled its proceedings liberally with the mention of God, Jesus Christ, [and] the Christian religion . . . .’” Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev.

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<sup>4</sup> Inaugural prayers are akin to legislative prayers. See, e.g., Newdow v. Roberts, No. 09-5126, 2010 WL 1815606, at \*13 (D.C. Cir. May 7, 2010) (Kavanaugh, J., concurring) (“[Inaugural] prayers closely resemble the legislative prayers upheld by the Supreme Court in Marsh.”). Indeed, presidential inaugurations are effectively joint sessions of Congress; the leadership and many members of Congress typically attend the ceremonies, the proceedings of which are published in the Congressional Record.

<sup>5</sup> “It is to be noted that this was not a service provided by an Episcopal church to which senators and representatives were invited, but an official service carefully arranged for by both houses of Congress and conducted by their duly elected chaplain.” 1 Anson Phelps Stokes, Church and State in the United States 485 (1950).

2083, 2104 (1996). In the last year alone, at least 23 Congressional prayers have been offered in the name of Jesus Christ,<sup>6</sup> and one study concluded that between 1990 and 1996, over 250 such prayers included supplications to Jesus Christ.

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<sup>6</sup> “In the precious name of Christ we pray. Amen.” 156 Cong. Rec. H3661-03 (2010); “All this we ask in the name of Jesus. Amen.” 156 Cong. Rec. H3313-03 (2010); “This I pray in the name of Your Son, Jesus. Amen.” 156 Cong. Rec. H3205-03 (2010); “It is in the blessed name of our Lord, Jesus Christ, that we lay these requests at Your feet. Amen.” 156 Cong. Rec. H2581-03 (2010); “We thank You for the sacred gift and trust given to us in the Senate, looking to You in all things, through Christ, in whose Name we pray. Amen.” 156 Cong. Rec. S2331-01 (2010); “In Jesus’ name, amen.” 156 Cong. Rec. H2507-02 (2010); “We put our trust in You alone, in Jesus’ name we pray. Amen.” 156 Cong. Rec. H2321-02 (2010); “We pray respecting all faiths, but pray this prayer in the Name of the Lord Jesus Christ. Amen.” 156 Cong. Rec. S757-01 (2010); “These and many other blessings we ask in the name of our Savior, Jesus Christ, Amen.” 155 Cong. Rec. H11796-03 (2009); “I offer this prayer in the name of the One I call Jesus the Christ. Amen.” 155 Cong. Rec. H11519-03 (2009); “In Jesus’ name, amen.” 155 Cong. Rec. H11385-03 (2009); “In Jesus’ name, amen.” 155 Cong. Rec. H11301-02 (2009); “We ask all of this in the name of our Lord and Savior, Jesus Christ. Amen.” 155 Cong. Rec. H10523-02 (2009); “In Jesus’ name we pray. Amen.” 155 Cong. Rec. H10411-03 (2009); “Father, I ask this prayer in the powerful Name of Jesus. Amen.” 155 Cong. Rec. S9761-01 (2009); “We pray these things over this place, this House today, in Jesus’ name. Amen.” 155 Cong. Rec. H9553-03 (2009); “We pray this prayer, respecting all faiths, but we pray this prayer in the name of our Lord and Savior Jesus Christ. Until You come, we pray. Amen.” 155 Cong. Rec. H9345-03 (2009); “And in Jesus’ name we pray. Amen.” 155 Cong. Rec. H8963-03 (2009); “With gratitude to You, most high God, I pray in the name of my Savior, the Lord Jesus Christ, amen.” 155 Cong. Rec. H8587-03 (2009); “In the name of Jesus, I pray. Amen.” 155 Cong. Rec. H7839-03 (2009); “In Jesus’ name we pray. Amen.” 155 Cong. Rec. H7743-01 (2009); “In the Name of Jesus Christ, I pray. Amen.” 155 Cong. Rec. H7253-04 (2009); “We humbly ask all of this in the name of Jesus Christ. Amen.” 155 Cong. Rec. H6907-01 (2009).

Epstein, *supra*, at 2104-05. Indeed, many of the prayers at issue in *Marsh* itself invoked the name of Jesus.<sup>7</sup>

References to Jesus Christ in inaugural prayers have also been historically common. At President Obama’s inauguration, Dr. Rick Warren’s invocation quoted scripture, referred to Jesus in four languages, and closed with the Lord’s Prayer.<sup>8</sup> His prayer mirrored those of Rev. Kirbyjon Caldwell, Rev. Franklin Graham, and Rev. Billy Graham—all of whom prayed in Jesus’ name at each of President George W. Bush’s and President Clinton’s inaugurations<sup>9</sup>—and the

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<sup>7</sup> See, e.g., *Marsh*, 463 U.S. at 823 n.2 (Stevens, J., dissenting) (“Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified.”).

<sup>8</sup> The prayer concluded: “I humbly ask this in the name of the one who changed my life, Yeshua, Esau, Jesus, Jesus, who taught us to pray: Our Father, who art in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done, on Earth as it is in heaven. Give us this day our daily bread, and forgive us our trespasses as we forgive those who trespass against us. And lead us not into temptation but deliver us from evil. For thine is the kingdom and the power and the glory forever. Amen.” 155 Cong. Rec. S667-02, 667 (2009).

<sup>9</sup> “Respecting persons of all faiths, I humbly submit this prayer in the name of Jesus Christ. Amen.” 151 Cong. Rec. S101-05, 105 (2005); “May this be the beginning of a new dawn for America as we humble ourselves before You and acknowledge You alone as our Lord, our Saviour, and our Redeemer. We pray this in the name of the Father and of the Son, the Lord Jesus Christ, and of the Holy Spirit. Amen.” 147 Cong. Rec. S421-05, 422 (2001); “This we pray in the name of the Father, the Son, and the Holy Spirit. Amen.” 143 Cong. Rec. S119-03, 120 (1997); “I pray this in the name of the One who was called Wonderful Counselor, the mighty God, the everlasting Father, and the Prince of Peace. Amen.” 139 Cong. Rec. S55-01, 55 (1993).

prayers offered at every inauguration since at least 1937. Epstein, supra, at 2107-08.

Thus, a review of history, as is required in the context of this case pursuant to Marsh, reveals that legislative and inaugural prayers in the United States have been historically sectarian. Forsyth County's invocation policy, which does not compel but merely allows sectarian prayers, permits nothing more than what Congresses and presidents have allowed—even mandated—for over two centuries.

### **III. THE SECTARIAN NATURE OF A PARTICULAR PUBLIC RELIGIOUS EXPRESSION IS NOT A SUFFICIENT BASIS FOR A FINDING OF UNCONSTITUTIONALITY.**

The District Court found that the sectarian content of many of the prayers offered under Forsyth County's invocation policy rendered the policy unconstitutional. Joint Appendix, at p. 929. However, the sectarian content of a particular public religious expression is not, by itself, a sufficient basis for finding that the expression is unconstitutional.<sup>10</sup> See, e.g., Van Orden, 545 U.S. at 690 (“Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”). An examination of two types of government accommodated religious expression is instructive.

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<sup>10</sup> To conclude otherwise would require a finding that the founders themselves were guilty of Establishment Clause violations, along with most or all 111 Congresses and every president for at least the past 75 years. See Section II, supra.

In County of Allegheny v. ACLU, 492 U.S. 573 (1989), the Supreme Court considered whether the display of a crèche on government property violated the Establishment Clause. In its analysis, the Court found the content of the crèche undeniably sectarian. Id. at 598. See also Lynch v. Donnelly, 465 U.S. 668, 711 (1984) (Brennan, J., dissenting) (the crèche is a “re-creation of an event that lies at the heart of Christian faith”). The Court then continued by applying the Lemon factors, closely analyzing the physical details of the crèche at issue, along with its meaning, its placement, its surroundings, and the words on a banner accompanying it. Id. at 598-601. The Court found the crèche’s display unconstitutional because of its context and setting, not simply because of its sectarian content.<sup>11</sup> Id. at 598 (“[T]he effect of a crèche display turns on its setting.”). Compare Lynch, 465 U.S. at 687 (holding that “notwithstanding the religious significance of the crèche, the [government] has not violated the Establishment Clause” by including a crèche in its annual Christmas display).

Ten Commandments displays are another type of public religious expression the Supreme Court has repeatedly considered. See McCreary County v. ACLU, 545 U.S. 844 (2005); Van Orden, *supra*; Stone v. Graham, 449 U.S. 39 (1980). The Ten Commandments are facially religious. Van Orden, 545 U.S. at 690. They

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<sup>11</sup> This proposition is strengthened by the fact that the Court simultaneously found the display of a Chanukah menorah on government property to be consistent with the Establishment Clause due to its setting and surroundings.

are a sacred text in the Jewish and Christian faiths and are undeniably religious in nature. Stone, 449 U.S. at 41. Yet in McCreary County and Van Orden, the Court simultaneously struck down one instance of government-accommodated display of the Ten Commandments while upholding another. One difference was that the display in Van Orden had “stood apparently uncontested for nearly two generations.” Van Orden, 545 U.S. at 704 (Breyer, J., concurring). Clearly, the religious content of the Ten Commandments was not singularly determinative.

Like crèches and the Ten Commandments, prayers are intrinsically religious. Engel v. Vitale, 370 U.S. 421, 424-25 (1962). Yet, even in cases where the Court has struck down government-sanctioned prayer, it has not fashioned a per se rule of invalidity based on sectarian content. In Engle, the Court considered a ‘non-denominational’ prayer recited before a public school classroom.<sup>12</sup> Id. at 422. Similarly, in Lee v. Weisman, 505 U.S. 577 (1992), the Court analyzed the constitutionality of a ‘nonsectarian’ prayer offered at a public high school graduation. Id. at 594. In neither case did the outcome turn on the sectarian or nonsectarian nature of the prayer at issue. Rather, the Court struck down both prayers out of concern that “prayer exercises in public schools carry a particular risk of indirect coercion.” Id. at 592. Thus, the constitutionality of government-

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<sup>12</sup> The text of the prayer was as follows: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” Id. at 422.

sanctioned prayer, like other forms of public religious expression, does not depend on the sectarian or nonsectarian character of the prayer.<sup>13</sup>

Intrinsically sectarian public religious expressions are not unconstitutional per se, even when the government accommodates their expression. Public crèche displays, Ten Commandment displays, and prayers—all containing undeniably sectarian content—have alternatively been upheld or struck down depending on other factors including context, effect, and historical tradition.

#### **IV. THE SECTARIAN NATURE OF THE PRAYERS OFFERED UNDER FORSYTH COUNTY’S POLICY DOES NOT RENDER THE POLICY UNCONSTITUTIONAL.**

This Court has directly confronted and decided three recent cases involving legislative prayer. In two of those cases, this Court upheld nonsectarian legislative prayer policies as comporting with the principles of Marsh. See generally Turner v. City Council of City of Fredericksburg, Va., 534 F.3d 352 (4th Cir. 2008); Simpson, *supra*. In the third, this Court struck down a local government’s legislative prayer policy on the grounds that the policy “crossed the constitutional line established in Marsh[.]” Wynne v. Town of Great Falls, S.C., 376 F.3d 292, 298 (4th Cir. 2004).

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<sup>13</sup> Indeed, the Marsh Court upheld sectarian prayers. Marsh, 463 U.S. at 823 n.2 (Stevens, J., dissenting) (“Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified.”).

In Wynne, this Court reasoned that prayer offered by legislative bodies, in order to pass constitutional muster, must not include any sectarian content. Wynne, 376 F.3d at 302 (holding that “the district court did not err in . . . enjoining the [government] from invoking the name of a specific deity associated with any one specific faith or belief in prayers given at [public] meetings”) (citations and quotations omitted). The Wynne court gave great weight to the Supreme Court’s elucidation of Marsh in County of Allegheny. Relying on County of Allegheny, the court found that the Supreme Court upheld the legislative prayers at issue in Marsh only because the particular chaplain had, while the Marsh litigation was pending, voluntarily ceased offering sectarian prayers. Id. at 299.

However, County of Allegheny was a crèche case analyzed under the Lemon factors and did not supplant Marsh in the area of legislative prayer. Simpson, 404 F.3d at 281 n.3. Therefore, the dicta in County of Allegheny ascribing Marsh’s holding to the single fact of non-sectarian references should not be persuasive. The Marsh Court did not directly address whether the invocation of Jesus’ name in a legislative prayer was a relevant issue. Marsh, 463 U.S. at 794-95. After considering three other contextual factors,<sup>14</sup> the Court explicitly refused to address the content of the prayers and “embark on a sensitive evaluation or to parse the content of a particular prayer.” Id. at 795.

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<sup>14</sup> The three factors were that the chaplain was a Presbyterian minister, that he had served for sixteen years, and that he was paid from public funds. Id.

Indeed, the majority in Marsh was apparently not dissuaded from approving the legislative prayers at issue by the fact that many of the prayers were, as noted by Justice Stevens, “clearly sectarian.” Id. at 823 (Stevens, J., dissenting). In fact, one of the prayers, cited by Justice Stevens, contained not only a reference to Jesus Christ but alluded to Christ’s crucifixion and redemption of the world.<sup>15</sup> Id. at 823 n.2. (Stevens, J., dissenting) (“Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified.”). Accordingly, the sectarian or nonsectarian character of the prayers at issue in Marsh was not a single determinative factor, and the Amici respectfully submit that to the extent Wynne is read otherwise, such is error.<sup>16</sup> The Amici respectfully request this Court to repudiate such reasoning because, as discussed herein, it is contrary to the Supreme Court’s analysis of government

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<sup>15</sup> This should satisfy the Wynne court’s challenge to cite a case “upholding prayers by legislative or other public bodies that explicitly invoke one religion in preference to others.” Wynne, 376 F.3d at 302.

<sup>16</sup> Even though its reasoning was, in the Amici’s view, flawed, the Wynne court’s holding is still justifiable under Marsh because there were indications, other than references to Jesus Christ, that the prayer opportunity was being used to advance a particular religion. For example, when the plaintiff refused to stand during an invocation, she heard a voice, which she believed was that of a council member, say, “Well, I guess some people aren’t going to participate.” Wynne, 376 F.3d at 295. Furthermore, she was told by her fellow citizens that she wasn’t wanted and should leave town, accused of being a “Satanist,” and threatened with being “burned out.” Id.; see also, Appellant’s brief at pp. 21-22.

accommodated sectarian religious expressions and the historical tradition of legislative prayer.

The District Court relied on Wynne in striking down Forsyth County's invocation policy. Joint Appendix, at p. 927. (citing Wynne for the proposition that the "the town council [in Wynne] violated the Establishment Clause in opening council sessions with prayers that frequently contained references to Jesus Christ"). The District Court found that, like the prayers at issue in Wynne, the content of Forsyth County's prayers do not fall "within the category of legislative prayer justified by the 'unique history' discussed in Marsh and violate[] the Establishment Clause." Id. at 928. However, unlike Wynne, which considered other contextual factors relating to the legislative prayer policy in question, the District Court did not find any contextual facts relevant to its decision. See id. at 929-930. Rather, the court held Forsyth County's policy unconstitutional and enjoined continuation of the policy based solely on its finding of sectarian content within Forsyth County's prayers. Id. at 930. The Amici submit that this holding is inconsistent with Establishment Clause jurisprudence, incorrectly extends the holding of Wynne and does not honor our country's religious heritage, in the way that Marsh instructs.

## CONCLUSION

Sectarian legislative prayer is consistent with the Supreme Court's acceptance in the proper context of government accommodated sectarian religious expression. A per se rule prohibiting the mention of a particular deity is a rigid and formalistic approach which is not mandated by the Court's precedents and which evinces a government hostility to religion and a betrayal of our nations' heritage. See Van Orden, 545 U.S. at 683-84.

Far from establishing a prohibition on sectarian content in legislative prayers, Marsh commands a historical analysis in legislative prayer cases. Such an analysis reveals that legislative prayer has, throughout the history of this country, often contained sectarian content. For over two centuries, Congressional and local legislative sessions, along with presidential inaugurations, have been preceded by sectarian prayers without raising constitutional concerns. The District Court's ruling is squarely opposite. Accordingly, this Court should reverse the Order of the District Court and find Forsyth County's implementation of its legislative prayer policy constitutional.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: May 26, 2010

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*Counsel for Amici*

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 26th day of May, 2010, I caused this Brief of Amici Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 26th day of May, 2010, I caused the required number of bound copies of this Brief of Amici Curiae to be hand-filed with the Clerk of this Court.

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