RECORD NO. 10-1232

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

JANET JOYNER AND CONSTANCE LYNN BLACKMON,
Plaintiffs-Appellees,

v.

FORSYTH COUNTY, NORTH CAROLINA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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/s/ J. Michael Johnson
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May 18, 2010
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STATEMENT OF JURISDICTION

Premising subject matter jurisdiction on 28 U.S.C. §§ 1331 and 1343, Plaintiffs-Appellees, Janet Joyner and Constance Lynn Blackmon, sued Forsyth County, seeking declaratory and injunctive relief and nominal damages. *See* Joint Appendix, filed herewith, at p. 34 (hereinafter abbreviated "App. [page #]"). Plaintiffs asserted that religious invocations before the opening of Forsyth County Board of Commissioners' meetings violated the Establishment Clause of the First Amendment to the Constitution of the United States (as applied to the states through the Due Process Clause of the Fourteenth). App. 34; 48. Plaintiffs alleged that 42 U.S.C. § 1983 entitles them to relief. *Id.*

After considering the parties' cross-motions for summary judgment, the Magistrate Judge recommended that Plaintiffs' motion be granted and Defendant's motion denied. App. 914. On January 28, 2010, the District Court issued an Order (App. 934) and Judgment (App. 940) that: granted Plaintiffs' motion for summary judgment; denied Defendant's motion for summary judgment; declared Defendant's invocation policy unconstitutional as implemented; and enjoined itsfurther implementation. On February 24, 2010, the County timely filed its notice of appeal to the District Court's final judgment disposing of the parties' claims. App. 942. This Court thus has appropriate appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Defendant-Appellant respectfully submits the following particular issues for review:

1) Whether the District Court erred in finding Defendant's policy, as implemented, violated the Establishment Clause.

2) Whether the District Court erred by being the first federal court to effectively declare that all sectarian references in legislative prayer are inherently unconstitutional.

3) Whether the District Court correctly interpreted and applied *Marsh v. Chambers*, 463 U.S. 783 (1983), and its progeny.

4) Whether the District Court erred by placing undue emphasis on the content of particular prayers in contravention of *Marsh*.

5) Whether the District Court erred by failing to correctly distinguish the present case from this Court's three previous legislative prayer cases, *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292 (4th Cir. 2004), *cert. denied,* 545 U.S. 1152 (2005), *Simpson v. Chesterfield County Bd. of Sup'rs,* 404 F.3d 276 (4th Cir. 2004), *cert. denied,* 126 S.Ct. 426 (2005), and *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352 (4th Cir. 2008), *cert. denied,* 129 S.Ct. 909 (2009).

6) Whether the District Court engaged in an inappropriate legal analysis regarding the classification of the speech at issue, since Plaintiffs made only Establishment Clause claims and not Free Exercise and Free Speech claims.

7) Whether the District Court correctly applied the required four-factor test for speech analysis in this Circuit, and/or reached the correct conclusion on the issue.

8) Whether the District Court erred by failing to acknowledge the legislative deference due to Defendant and other public bodies on the invocations matter.

STATEMENT OF THE CASE

The outcome of the case at bar will have a direct and immediate effect upon the long-established practices and traditions of countless public bodies throughout this region, and potentially beyond. This appeal presents several important issues and concerns, and includes a specific question that has never previously been addressed by this Honorable Court: *Does the First Amendment's Establishment Clause require a legislative body to censor the names of particular deities from invocations, if those invocations are offered before a meeting, in a designated public forum, by a diverse pool of visiting religious leaders who volunteer in response to an open, equal invitation?*

While the ruling of the District Court answered that question affirmatively, the Defendant-Appellant contends that no such censorship is required pursuant to the Supreme Court's seminal ruling, *Marsh v. Chambers*, 463 U.S. 783 (1983), and the subsequent decisions issued by this Court. In *Marsh,* the Supreme Court famously held that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country" and clearly constitutional. *Id.* at 796. *Marsh* further clarified: "The content of the prayer is *not of concern* to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to

embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 794-795 (italics added).

Although they actually attended only one meeting of the Forsyth County Board of Commissioners, Plaintiffs-Appellees commenced this action on March 30, 2007, because they claimed to be offended observers and alleged that 16 out of 26 invocations offered before the Board meetings in the previous year included a "sectarian" Christian reference. App. 4, at ¶9; App. 5, at ¶17. On May 14, 2007, the Board adopted a written invocations policy ("the Policy") that codified, but did not change, its previous practices.[1] Concerned the Policy would allow for uncensored invocations by private speakers in the Board's designated public forum,[2] Plaintiffs amended their lawsuit to challenge the written policy. App. 34.

Following extensive discovery, the parties' cross-motions for summary judgment and oral argument, the U.S. Magistrate Judge recommended on November 9, 2009 ("the Recommendation," App. 914), that Plaintiffs' motion should be granted and Defendant's motion denied. *Id.* On January 28, 2010, the U.S. District Court for the Middle District of North Carolina adopted the

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[1] As summarized by Plaintiffs' lead counsel: "[O]ur contention is the County's prayer practice and policy hasn't changed, Your Honor. They just put into writing their policy...." App. 864.

[2] As conceded in Plaintiffs' Brief in Support of Motion for Summary Judgment: "The Board provides the public forum ... [for the] clergy to pray." App. 160.

Recommendation in full, and issued an Order (App. 934) and Judgment (App. 940), declaring the Board's invocation Policy, as implemented, violated the Establishment Clause, and enjoining the further implementation of the Policy. Thereafter, Defendant timely filed its Notice of Appeal. App. 942.

STATEMENT OF THE FACTS

THE BOARD

Forsyth County, North Carolina, is one of the 100 counties of the State of North Carolina designated in N.C.G.S. § 153A-10. App. 142, at ¶8. Defendant exercises its power as a county through its elected Board of Commissioners. *Id.* In furtherance of its duties, the Board holds meetings twice monthly on the fifth floor of the Government Center, 201 N. Chestnut Street, in Winston-Salem, North Carolina. *Id.* at ¶9. The Board also conducts four "briefing" meetings each month, where no formal action is taken, but upcoming items are reviewed. *Id.* All Board meetings are open to the public and publically noticed. *Id.* The only Board meetings that are not open to the public are the Board's occasional, statutorily-allowed executive sessions. App. 514, at 11-16.

THE BOARD'S INVOCATION POLICY AND PURPOSE

Like virtually every other public body in America, "the Board has long maintained a tradition of solemnizing its proceedings by allowing for an opening prayer before each meeting, for the benefit and blessing of the Board." *See* App.

520 ("Resolution Adopting a Policy Regarding Opening Invocations Before Meetings of the Forsyth County Board of Commissioners," and attached Policy). Desiring to continue its tradition, on May 14, 2007, the Board voted "to adopt [a] formal, written policy to clarify and codify its invocation practices." *Id.* at ¶3. The resulting Policy expressly acknowledged that "such prayer before deliberative public bodies has been consistently upheld as constitutional by American courts, including the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit," and quoted from much of this long-established body of case law. App. 520-522.

COMPLETE NEUTRALITY OF THE POLICY

The Policy made the Board's intentions crystal clear and Plaintiffs produced zero evidence to refute what was expressly stated, and ensured by application. Specifically, "the Board intends, and has intended in past practice, to adopt a policy that does not proselytize or advance any faith, or show any purposeful preference of one religious view to the exclusion of others." App. 522. Further, the Policy expressly stated it "is not intended, and shall not be implemented or construed in any way, to affiliate the Board with, nor express the Board's preference for, any faith or religious denomination. Rather, this policy is intended to acknowledge and express the Board's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Forsyth

County." App. 525, at ¶9. The Policy also specifically affirmed: "The Board recognizes its constitutional duty to interpret, construe, and amend its policies and ordinances to comply with constitutional requirements as they are announced; and . . . accepts as binding the applicability of general principles of law and all the rights and obligations afforded under the United States and North Carolina Constitutions and statutes." App. 522. The Board intended to, and did, follow its Policy closely. *See, e.g.*, App. 503, at 12-15; App. 533-534; App. 553, at 20-2; App. 554-556.

OPEN INVITATION TO <u>ALL</u> RELIGIOUS LEADERS IN THE COMMUNITY SERVED

To ensure both diversity and absolute neutrality, the Policy provided that the invocations be voluntarily delivered by a wide and diverse pool of all of Forsyth County's religious leaders, on a rotating basis. App. 523, at ¶4; *See also, e.g.*, App. 503, at 16-19; App. 512, at 15-19. As Commissioner Whisenhunt, the Board's Chair from 2004-08, summarized:

> [The Policy] clarifies that our clerk is to invite <u>*everyone*</u> *from the community*, <u>*every*</u> *faith*, <u>*every*</u> *belief* and to send them letters inviting them to come and do [the] invocation, and she is to send those letters out once a year. She is to use the Yellow Pages, any form that she can find that verifies any faith, and she is to – she is *to make sure that* <u>*everyone*</u> *in the community has been included*. And they are asked to respond and they would be allowed to come on a first come/first serve basis.

App. 489, at 11-23 (emphasis added here).

When asked, "Is it your testimony or your understanding that the true intent of that policy was to indeed select from among a wide range of the county's

religious leaders or clergy?," Commissioner Whiteheart answered decisively, "Yes, all those that were a part of the Forsyth County religious family." App. 534, at 20-25. When asked, "And so it is your testimony that you have tried, and those working with you have tried, to include everyone that you could find that was an established religious congregation in the county of Forsyth?" Mrs. Jane Cole, Board Clerk from 1979-2008, affirmed, "We have tried our very best." App. 557, at 5-17. Mrs. Cole later reiterated, ". . . I wanted to be all-inclusive and diverse and that meant that we needed to contact every congregation and every religion possible in the county." App. 560, at 9-11.

Accordingly, an open invitation (*see* App. 561), addressed to the "Religious Leader" of every identifiable faith group in Forsyth County, was mailed countywide at least once annually by the Board Clerk. App. 523, at ¶4. The Clerk compiled and maintained her address list primarily by utilizing the alphabetical and generic listing for all "churches," "congregations," or other religious assemblies in the annual Yellow Pages phone book(s) published for Forsyth County, research from the Internet, and consultation with local chambers of commerce. *Id.*; App. 539, at 13-22; App. 569, at 17-20. In December 2008, for example, the invitation letter was mailed to a full spectrum of approximately 600 local groups/ congregations. *Id.*

All religious congregations with an established presence in the local

community of Forsyth County were eligible to be, and indeed were, included in the Congregations List. App. 523, at ¶4(b); App. 846. *No one was excluded,* because the Policy provided the safeguard that any such congregation could confirm its inclusion by specific written request to the Clerk. App. 523, at ¶4(b); App. 494, at 4-9. The Board showed no favoritism or preference at any time between religious faiths, or even specifically between religion and non-religion. *See, e.g.,* App. 494; 530; 579-580. (When asked hypothetically if a "Church of Satan" congregation had an established presence in the county, Board members and clerks affirm that such congregation would be given equal treatment and opportunity under the Policy. The same equal treatment and opportunity would be afforded any "religious congregation that meets in [a] living room" and requests inclusion on the Congregations list.) App. 494, at 4-9.

Importantly, no Board member or Board employee has ever engaged in any inquiry with regard to the specific religious demographics of Forsyth County, nor how many established congregations might exist in the county for any particular faith or religious denomination. App. 505-507; App. 558, at 17-22; App. 559, at 21 – App. 560.

MANY RELIGIONS HAVE PARTICIPATED

As expected, the record shows a wide array of religious leaders from diverse backgrounds and perspectives has participated in the Board's invocation

opportunity, including, but not limited to, leaders of the Jewish faith, the Muslim faith, the Mormon faith, the Unitarian Universalists, Scientologists, Moravians, Baptists, Methodists, Quakers, Wesleyans, Presbyterians, Seventh Day Adventists, African Methodist Episcopalians, Lutherans, Nazarenes, Independents, and numerous other denominations and non-denominations. *See, e.g.*, App. 559, at 9-17; App. 584-586; App. 589-591.

THE BOARD HAD NO INVOLVEMENT IN PRAYER CONTENT OR EDITORIAL CONTROL

As the Policy and the Clerk's annual invitation letter specified, all respondents to the invitations were scheduled on a first-come, first-serve basis to deliver an invocation before an upcoming Board meeting, and no person was ever compensated for the service. App. 524, at ¶¶4(f) and 5; App. 561. The Policy is also clear that "[n]either the Board nor the Clerk shall engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered by an invocational speaker." App. 524, at ¶7. In fact, the Board exercised no editorial control whatsoever, and engaged in no "inquiry, edit, or review of the content of an[y] invocation prior to its delivery," nor has it ever "censored or controlled what [wa]s said by the invocation speaker[s]." App. 504, at 24 – App. 505. The Board imposed no restriction on any religious viewpoint, and with its written Policy, the Board *specifically and expressly denied* any endorsement or affiliation with the particular religious beliefs or views of guest invocation speakers. App. 525, at ¶9.

THE PRE-MEETING INVOCATION EXERCISE WAS COMPLETELY VOLUNTARY

The Board went to great lengths to ensure that no citizen, nor even any individual Board member, was ever compelled to participate in, attend, or observe the invocation. App. 523, at ¶¶1-4. The invocation was always offered *before* a Board meeting, and was intended to be offered for the benefit of the Board. *Id.*; App. 491, at 18-20; App. 501, at 1-3. The invocation was thus separate, and pursuant to the Policy, was not listed or considered as an agenda item for a meeting or as part of the public's business. App. 523, at ¶2; App. 544-545.

SUMMARY OF THE ARGUMENT

One would be hard-pressed to imagine a more favorable set of facts for a defendant in an Establishment Clause case than those presented here. The Forsyth County Board's invocations Policy and practice were *clearly* constitutional in light of the legislative prayer exception long recognized by the Supreme Court in *Marsh*. In fact, the Policy at issue here offered even further protections and safeguards than the practice upheld in *Marsh*, and closely resembles invocations policies that have been recently reviewed and specifically upheld by other federal district and appellate courts.

The District Court's decision to grant declaratory and injunctive relief to the Plaintiffs-Appellees must be overturned because the court not only interpreted and applied *Marsh* incorrectly, it also misinterpreted and failed to distinguish this

Circuit's previous legislative prayer cases, *Wynne, Simpson* and *Turner*. The District Court further erred by engaging in an unnecessary speech classification analysis, and then reached the wrong conclusion in the analysis by failing to correctly apply the prevailing four-factor test.

Plaintiffs-Appellees produced no evidence below that the Board crossed any constitutional line with its invocations practice. Instead, the Board's carefully drafted and followed Policy offered a virtual *gold standard* of neutrality and inclusion. By design and in actual practice, it expressly opened the door for participation of *every faith tradition*, on an equal and rotating basis, and showed neither favoritism nor hostility to any. Clearly, the prayer opportunity in Forsyth County was never "exploited" by the Board in any way, and there is not a scintilla of evidence to suggest otherwise. The District Court thus erred in finding an Establishment Clause violation and allowing an injunction and the recovery of nominal damages and fees. The Judgment and Order below should thus be overturned, and summary judgment granted instead to the Defendant-Appellant.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review on an appeal of a summary judgment order is *de novo*. *E.J. Sebastian Associates v. Resolution Trust Corp.*, 43 F.3d 106, 108 (4th Cir. 1994) (*citing EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992)). In

reviewing the decision of the District Court, this Court applies the same legal standard applicable below. Summary judgment is appropriate only when no genuine issue of material fact exists (*Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991); *Miller v. FDIC*, 906 F.2d 972, 973-74 (4th Cir. 1990)), and "should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950). A court considering a motion for summary judgment must view all facts and draw all reasonable inferences from the evidence before it in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

While the standard of review for decisions pertaining to injunctive relief is generally abuse of discretion, (*Va. Carolina Tolls, Inc. v. Int'l Tool Supply, Inc.*, 984 F.2d 113, 116 (4th Cir. 1993); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley,* 756 F.2d 1048, 1054 (4th Cir. 1985)), the decision below to enjoin the Defendant from continuing its invocation Policy, as implemented, was based upon the District Court's interpretation of the applicable constitutional law. Conclusions of law are subject to a *de novo* review. *Roanoke Cement Co., L.L.C. v. Falk Corp.*, 413 F.3d 431, 433 (4th Cir. 2005); *Commodity Futures Trading Com'n v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187 (4th Cir. 2002); *In Re Finney,* 992

F.2d 43 (4th Cir. 1993); *In re Green*, 935 F.2d 568 (4th Cir. 1991); *see also Va. Carolina Tolls,* 984 F.2d at 116.

II. DISCUSSION OF ISSUES

This Board's invocation practice is covered by the *Marsh* legislative prayer exception, and is clearly constitutional under that controlling standard. Plaintiffs failed to carry the burden of proof in their Establishment Clause claim to demonstrate that the Board's "prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh,* 463 U.S. at 794-795. In fact, *this record proves the opposite*: that ALL viewpoints have been openly welcomed and invited by the Board, and invocations offered before its meetings have been no less routine and constitutional than the prayers lawfully presented before the United States Congress and countless other national, state, and local public bodies throughout our nation's history.

Because the prayer opportunity at Board meetings here has never been exploited and the Board never, in any way, advocated for or preferred any religious or non-religious view over another, nor discriminated against any, there was no need for the court "to embark on a sensitive evaluation or to parse the content of a[ny] particular prayer[s]." *Id.* at 795. The Board's Policy allowed for a voluntary, solemnizing, pre-meeting invocation, delivered by a rotating, diverse pool of religious leaders who responded to an open, community-wide invitation to

offer the service. *There can be no more neutral and inclusive method than literally sending an identical invitation to every religious group listed in the local phonebook,* and the Policy's implementation was obviously well within the boundaries set by *Marsh* and its progeny.

A. THE DISTRICT COURT INCORRECTLY INTERPRETED AND APPLIED *MARSH v. CHAMBERS* AND ITS PROGENY.

Citing *Marsh,* the District Court's Order correctly observed: "The Supreme Court has recognized that 'legislative prayers' which open or solemnize Government meetings such as meetings of the Forsyth County Board of Commissioners are part of a rich history and tradition in this country and are constitutional." App. 935. However, the Order failed to specifically acknowledge the *Marsh* Court's key instruction to avoid "parsing content" of particular prayers (463 U.S. at 794-95), and the Recommendation noted the instruction (at App. 926), but failed to correctly interpret and apply it.

1. The District Court ignored the instruction of the Supreme Court.

When the District Court concluded that the County Board could either discontinue its invocations or allow only for non-sectarian legislative prayers (App. 937), it erred by becoming the first federal court to effectively declare that all sectarian references in a legislative prayer are inherently unconstitutional.[3] This is

[3] The Court also noted that "other types of legislative prayer may be constitutional" if "other elements of diversity and inclusiveness" are involved.

an overly simplistic approach that ignores the instruction of the Supreme Court in *Marsh*. To date, *no federal appellate circuit has mandated only non-sectarian invocations*.[4]

The Supreme Court has never commanded removal of sectarian references from legislative prayer, because the practice is constitutional—particularly where different persons of varying creeds take turns offering the invocations. In *Marsh,* the Court upheld the Nebraska legislature's prayer policy despite the facts that: a clergyman of only one denomination (Presbyterian) was selected for 16 consecutive years; the chaplain was paid at public expense; and the prayers were in the Judeo-Christian tradition. *Marsh,* 463 U.S. at 793. While a footnote (*Id.*, n.14) states that the chaplain voluntarily removed all direct sectarian references after a certain point, that self-censorship was not indicated by the Court to be a necessity, nor a primary reason for the Court's overall decision. Indeed, the majority in *Marsh* provided no comment on the non-sectarian content of the Nebraska chaplain's prayers, and attributed no significance to the chaplain's voluntary

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App. 937. However, the court suggested an impossible standard if the County's policy here is insufficient. Here, there was a truly open and equal opportunity invitation to literally *all* religious leaders, specifically and expressly "'designed to include members of the community, rather than to proselytize.'" *Id.* (District Court *quoting Simpson v. Chesterfield County Bd. of Supervisors,* 404 F.3d 276, 285 (4th Cir. 2005)).

[4] *See infra* Part II(A)(3).

decision to self-censor.[5] Rather, the *Marsh* Court specifically reviewed centuries of legislative prayers that *did* mention sectarian deities and beliefs,[6] and favorably cited to the traditions of the Congress. To this day, prayers offered before Congress often contain explicit sectarian (and, incidentally, most often specifically Christian) references.[7] This is understood to be a logical function of the nation's demographics,[8] rather than an improper attempt to establish any particular religion.

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[5] The descriptions of the prayers as "nonsectarian," "Judeo Christian," and having "elements of the American civil religion" were provided by the chaplain himself, rather than the Court. *Marsh*, 463 U.S. at 793 n. 14. Importantly, this reference to the actual text of the prayers related only to the plaintiff's argument that prayers "in the Judeo-Christian tradition" should be declared unconstitutional. The Supreme Court explicitly rejected that argument. *Id.* at 793-95.

[6] *E.g.*, the dissent in *Marsh* noted the Court's review of overtly sectarian prayers in various state legislatures, including Massachusetts and Kansas. *Marsh,* 463 U.S. at 818, n. 38. Moreover, as Chief Justice Rehnquist recounted 22 years later, "In *Marsh*, the prayers were often explicitly Christian . . . ." *Van Orden v. Perry,* 545 U.S. 677, 688 n.8 (2005) (Rehnquist, C.J., plurality) (citing *Marsh,* 463 U.S. at 793-94 n. 14).

[7] *See, e.g., Newdow v. Bush,* 355 F.Supp.2d 265, 285 n. 23 (D.D.C.2005) (acknowledging that "the legislative prayers at the U.S. Congress are overtly sectarian"); S. Epstein, *Rethinking the Constitutionality of Ceremonial Deism,* 96 COLUM. L. REV. 2083, 2104 at n.118 (1996) (noting that, from 1989 to 1996, "over two hundred and fifty opening prayers delivered by congressional chaplains [ ] included supplications to Jesus Christ").

[8] According to a recent Gallup Poll, "[m]ore than 8 out of 10 Americans identify with a Christian faith." *See* http://www.gallup.com/poll/103459/questions-answers-about-americans-religion.aspx. (Poll taken 12/24/07). The demographics of Forsyth County, North Carolina, are apparently similar. However, it is an important fact that although the Plaintiffs here made the unfounded allegation that

Instead of proscribing any and all sectarian references, the plain language of *Marsh* sets forth the opposite proposition and clear standard for lower courts: Absent *exploitation* of the prayer opportunity, "[t]he content of the prayer[s] is not of concern to judges." *Marsh,* 463 U.S. at 794-795. As explained more fully in Section II(A)(4) herein, no evidence of exploitation was presented to the court below.

2. The District Court misinterpreted the precedents of this Court.

The District Court failed to distinguish the present case from the Fourth Circuit's three previous legislative prayer decisions. However, neither *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292 (4th Cir. 2004), *cert. denied* 545 U.S. 1152 (2005), nor *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 281 (4th Cir. 2004), *cert. denied,* 126 S.Ct. 426 (2005), nor *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352 (4th Cir. 2008), *cert. denied,* 129 S.Ct. 909 (2009), offers direct guidance for the specific situation presented here.

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more than 9 out of 10 of the churches listed in the county's phone book (and thus the Board's Congregations List) are Christian (App. 41, ¶35), the Board itself: had no such knowledge or information; had no particular interest in such information; and, moreover, never discussed the County's religious demographics nor made any inquiry into the same. *See, e.g.,* App. 149, ¶36; App. 505-507; App. 558 at 17-22; App. 559 at 21 – App. 560. The record is clear (at these citations and elsewhere) that the religious demographics of Forsyth County, *whatever* they may actually be, had no bearing on the development and/or implementation of the Board's invocation Policy.

In Establishment Clause litigation, facts are regarded as particularly important and must be reviewed and considered carefully.[9] Even a slight distinction in the records of two apparently similar cases can dictate a different outcome for each.[10] As the Supreme Court has made clear, "[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one." *Lee v. Weisman*, 505 U.S. 577, 597 (1992)). "[T]he inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678. This "'delicate and fact-sensitive' inquiry is evident in the area of legislative prayer, which the Supreme Court, in *Marsh*, excepted from the traditional analysis under the Establishment Clause." *Pelphrey v. Cobb County,* 547 F.3d 1263, 1269 (11th Cir. 2008) (citing *Lee*, 505 U.S. at 597).

a. The* Wynne *case should not have been applied here.

The Fourth Circuit's three previous legislative prayer cases were incorrectly applied by the court below. For example, when the Recommendation discussed *Wynne* (App. 927-928), it failed to acknowledge why the outrageous circumstances presented there had almost *nothing* in common with the specific facts at issue here.

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[9] *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (". . . [A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.")

[10] *Compare, e.g., Van Orden v. Perry,* 545 U.S. 677 (2005), which upheld a Ten Commandments display in Texas, and *McCreary County v. ACLU,* 545 U.S. 844 (2005), which, on the same day, struck down a Ten Commandments display in Kentucky.

In *Wynne,* a small town council clearly crossed the constitutional line and unquestionably *exploited* its prayer opportunity when it: "steadfastly refused" to invoke any "deity associated with any specific faith other than Christianity" (370 F.3d at 300, n.5); intentionally "advance[d] its own religious views in preference to all others" (*Id.* at 302); and had council members publicly denigrate and "ostracize" those who refused to participate in their prayers (*Id.* at 298).[11] Equally important is the fact that the town council followed a practice whereby ***council members themselves*** delivered the "insistently sectarian" prayers. *Id.* at 294 (quoted characterization from *Simpson,* 404 F.3d at 283).

The Recommendation noted that the *Wynne* Court relied upon dicta in *Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573 (1989), in its application of *Marsh.* The Recommendation opined (App. 928):

> The *Wynne* court construed *Allegheny* to have clarified that the prayer in *Marsh* was upheld only because the chaplain had removed all references to Christ. [*Wynne*] at 299. Thus the prayer did not violate the 'nonsectarian maxim' that the Establishment Clause at least means neither a state nor the federal government can prefer one religion over another. *Id.* Invocations that have the 'effect of affiliating the government with any one specific faith or belief' do not 'fall within'

[11] There are other important distinctions as well, including but not limited to the facts that the town council in *Wynne* made its prayers an official agenda item and "part of the public business" (*Id.* at 301); openly declared its intent that "the Town's prayers are not just for the council members but for all of the Town's citizens," and thus prayers were "directed at" the citizenry (*Id.* at 301, n.7). As shown in the Statement of Facts herein above, the Forsyth County policy provided for the opposite.

the category of legislative prayer discussed in *Marsh*. *Id.* (internal citations omitted).

But this is not a precise quote from *Wynne*, as it leaves out the *Allegheny* Court's important descriptive word "particular" in the phrase, "because the **particular** chaplain had removed all references to Christ." That distinction is crucial to a logical understanding of the case law. In *Marsh,* the Supreme Court affirmed: "We granted certiorari limited to the challenge to the practice of opening sessions with prayers by a State-employed clergyman." *Marsh,* 463 U.S. at 786. **And this is the key that was missed by the District Court:** If *only one,* government-paid chaplain delivers every prayer (as in *Marsh*), or if the prayers are delivered *only by* government officials (as was the policy in *Wynne* and *Turner*), there is an obvious and inherent risk that the invocations may have the "effect of affiliating the government with [ ] one specific faith or belief" or may tend to show "the government's allegiance to a particular sect or creed." *Wynne,* 376 F.3d at 299 (quoting *Allegheny,* 492 U.S. at 603).

On the other hand, as in a case like the one at bar— when invocations are allowed by a wide pool of volunteer, self-selected citizens, in a designated public forum for such private speech, prior to a public meeting and not as an official agenda item— there is no such risk that the invocations may have the "effect of affiliating the government with [ ] one specific faith or belief" or may tend to show "the government's allegiance to a particular sect or creed." The views expressed

are solely those of the guest speaker, and are not previously edited, approved, prescribed or censored by the government.

b. The **Simpson** *case should have been distinguished on its facts.*

The District Court also failed to recognize that *Simpson* differed in this important way. While the Chesterfield County Board utilized a wide pool of invited clergy as its guest invocation speakers, that board specifically *denied* the intention to create an open forum for private speakers (*see Simpson v. Chesterfield County Bd. of Sup'rs,* 292 F.Supp.2d 805, 806 (E.D. VA. 2003)), and instead maintained a degree of "content-control" over what was said by the guests (*Id.* at 823), mandating, in part, that the prayers could *only* be delivered by representatives of Judeo-Christian or monotheistic religions. *Simpson,* 404 F.3d at 280, 284. In those particular circumstances, *unlike* the case at bar, there was again an understandable, inherent risk that the invocations may have had the "effect of affiliating the government with [ ] one specific faith or belief" or might tend to show "the government's allegiance to a particular sect or creed" (*i.e.,* at a minimum, the county's expressed preference for monotheism). In such circumstances, it makes sense that the *Simpson* Court would expect safeguards such as "a divine appeal [that is] wide-ranging, tying its legitimacy to common religious ground," and invocations that should "transcend denominational

boundaries," and "highlight beliefs widely held," etc., as articulated by the Court. App. 928 (*citing Simpson,* 404 F.3d at 284).[12]

If the Chesterfield County Board's policy—which limited the pool of invocation speakers strictly to leaders of monotheistic religions—was worthy of commendation by this Court for its "openness to [ ] ecumenism [that] is consonant with our character both as a nation of faith and as a country of free religious exercise and broad religious tolerance," (*Simpson* 404 F.3d at 284), then the Forsyth County Board's even <u>*more inclusive*</u> and <u>*completely unlimited*</u> policy must be applauded and upheld.

c. ***Forsyth County's open-invitation policy offers a gold standard of inclusion and government neutrality.***

While it may be recognized as a legal "safe harbor" for a legislative body to enact a "nondenominational-only" prayer policy because that would fit "squarely within the range of conduct permitted by *Marsh* and *Simpson,*" (*Turner,* 534 F.3d at 356)—a truly open policy that allows for <u>uncensored</u> invocations by an <u>unlimited</u> pool of guest religious leaders is <u>clearly constitutional</u>. As this Court recently affirmed in *Turner*, "the Establishment Clause does not absolutely dictate the form of legislative prayer." *Id.* Indeed, "the [*Marsh*] Court stated that a

[12] It is worthy of note that the *Simpson* Court's apparent concern was validated just two months later by the Supreme Court's majority opinion in *McCreary,* which rejected the view that the Establishment Clause allows government to prefer monotheistic faiths to other religions. *McCreary,* 545 U.S. at 879-81.

practice would remain constitutionally unremarkable where 'there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Simpson,* 404 F.3d at 283 (*quoting Marsh,* 463 U.S. at 794-95).

The District Court failed to acknowledge the deference that is provided to legislative bodies on this matter in general, and erred specifically by finding that the selected sectarian references by guest invocation speakers in this case "display a preference for Christianity over other religions by the government" and "affiliate the Board with a specific faith or belief." App. 929. The record shows precisely the opposite. Not only is this Board's annual invitation letter sent blindly, addressed to the unnamed "religious leader" of literally every religious group of every diverse tradition in the county (*see, e.g.,* App. 523, ¶ 4)—which includes at least a full spectrum of approximately 600 local religious congregations (*e.g.,* App. 569; App. 654-697)—the letter includes this important admonition to every guest:

> This opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. *To maintain a spirit of respect and ecumenism, the Board requests only that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker.*

E.g., App. 524 (emphasis added here); App. 563, 565.

The Policy makes the Board's intentions crystal clear and Plaintiffs produced zero evidence to refute what is expressly stated for all to see: "The Board

intends, and has intended in past practice, to adopt a policy that does not proselytize or advance any faith, or show any purposeful preference of one religious view to the exclusion of others." App. 522. The Policy also clearly states it "is not intended, and shall not be implemented or construed in any way, to affiliate the Board with, nor express the Board's preference for, any faith or religious denomination. Rather, this policy is intended to acknowledge and express the Board's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Forsyth County." App. 525. It is unrefuted that the Board intended to, and did, follow its Policy closely. *See, e.g.*, App. 503 (lines 13-19); App. 533-534; App. 553 (line 20) – 556.

Unlike the situations in *Wynne* and *Turner* (where legislative prayers were delivered exclusively by council members themselves), and *Simpson* (where prayers were delivered by guests selected exclusively from monotheistic creeds), in Forsyth County, ***ALL* views and philosophies are equally welcomed.** Again, as Commissioner Whisenhunt, the Board's Chair from 2004-08, summarized:

> [The Policy] clarifies that our clerk is to invite *everyone from the community*, *every faith*, *every belief* and to send them letters inviting them to come and do [the] invocation, and she is to send those letters out once a year. She is to use the Yellow Pages, any form that she can find that verifies any faith, and she is to – she is *to make sure that everyone in the community has been included*. And they are asked to respond and they would be allowed to come on a first come/first serve basis.

App. 489 (emphasis added here). In fact, no one is excluded, because any

congregation can confirm its inclusion by specific written request to the Clerk. App. 523 (¶4(b)); App. 494. The evidence is clear that this Board showed no favoritism or preference at any time between religious faiths, or even specifically between religion and non-religion. *See, e.g.*, App. 494 (lines 4-15); App. 530; App. 579-580.

It is difficult, if not impossible, to conceive of a more fair, neutral or inclusive invocation policy. Since "the Establishment Clause does not absolutely dictate the form of legislative prayer," this is surely "within the range of conduct permitted by *Marsh*." *Turner*, 534 F.3d at 356. The District Court erred by finding otherwise.

3. The District Court contradicted the findings of the other federal courts.

Challenges to sectarian invocations are a new phenomenon,[13] and other courts have thus far declined these extraordinary requests to impose a blanket censor upon prayer content. To date, no federal appellate court has mandated only non-sectarian invocations. As the Eleventh Circuit recently summarized:

> The taxpayers erroneously contend that several other circuits have read *Marsh* to permit only nonsectarian prayer. A review of the prece-

[13] "There had been virtually no litigation or legal authority concerning the constitutionality of sectarian legislative prayer until the last six years." R. Luther III & D. Caddell, *Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands a "Practice Focused" Analysis*, 48 SANTA CLARA L. REV. 569, 571 (2008).

dents of our sister circuits establishes that they have ***not*** reached a consensus on the permissibility of sectarian references in legislative prayers. Two of the circuits [**the Fourth Circuit** and the Tenth Circuit] read *Marsh* as we do. The remaining four circuits have not reached a decision about sectarian references in legislative prayers.

Pelphrey v. Cobb County, Ga., 547 F.3d 1263, 1272 (11th Cir. 2008) (emphasis added).[14]

The Eleventh Circuit agreed with the *Simpson* Court that "a practice would remain constitutionally unremarkable" where there is no evidence of exploitation— even when the *Simpson* case record acknowledged usage of terms such as "'Lord God, our creator,' 'giver and sustainer of life,' 'the God of Abraham, Isaac and Jacob,' 'the God of Abraham, of Moses, Jesus, and Mohammad,' 'Heavenly Father,' 'Lord our Governor,' 'mighty God,' 'Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator.' " *Simpson,* 404 F.3d at 284.

As in the case at bar, the plaintiffs in *Pelphrey* challenged an invocation policy that allowed for a rotating body of visiting clergy to offer a prayer before county commission meetings. The court found no merit in the plaintiffs' legal

[14] "[Like the Fourth Circuit,] [t]he Tenth Circuit also has stated that *Marsh* does not categorically prohibit prayers that invoke 'particular concept[s] of God.' *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233-34, 1234 n. 10 (10th Cir.1998) (en banc). . . . Contrary to the taxpayers' argument, the Fifth Circuit, the Seventh Circuit, and the Ninth Circuit have not decided the constitutionality of sectarian references in legislative prayers." *Pelphrey* at 1273-74.

arguments, and, because of the context of the invocations, was unconcerned that the vast majority of the prayers happened to be Christian in nature. *Id.* at 1277. The court determined:

> [T]he Court never held that the prayers in *Marsh* were constitutional because they were "nonsectarian"..... The "nonsectarian" nature of the chaplain's prayers was one factor in [the Court's] fact-intensive analysis; it did not form the basis for a bright-line rule.... The taxpayers argue that *Allegheny* requires us to read *Marsh* narrowly to permit only nonsectarian prayer, **but they are wrong.** *Allegheny* does not require that legislative prayer conform to the model in *Marsh*. *Allegheny* instead reiterates the lesson of *Marsh* that legislative prayers should not "demonstrate a [government] preference for one particular sect or creed ....." *See Allegheny*, 492 U.S. at 605, 109 S.Ct. at 3107. When legislative prayers do not "have the effect of affiliating the government with any one specific faith or belief," *id.* at 603, 109 S.Ct. at 3106 (citation omitted), "it is not for [the court] to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh,* 463 U.S. at 795, 103 S.Ct. at 3338.

Pelphrey, 547 F.3d at 1271-72 (bold typeface added).

The most recent federal district courts to review this issue have similarly been influenced by Fourth Circuit precedent, and have refused to prohibit sectarian legislative prayers. In *John Doe #2, et al. v. Tangipahoa Parish Sch. Bd., et al.*, 631 F.Supp.2d 823 (E.D. La., June 24, 2009), a prayer policy (nearly identical to Forsyth County's, allowing for uncensored invocations) was upheld as facially constitutional:

> The Fourth Circuit has stopped short of holding that *Marsh* commands that legislative prayer must be nonsectarian. [*Citing Turner, Wynne* and *Simpson* cases.] The Tenth Circuit, like the Fourth, also focuses on whether the prayer opportunity has been exploited, but has

> concluded that *Marsh* does not prohibit prayers that invoke "particular concept[s] of God." [*Quoting Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir.1998) (en banc)]

631 F.Supp.2d at 836-37.

In *Doe v. Indian River School Dist.*, --- F.Supp.2d ----, 2010 WL 623530 (D.Del., Feb. 21, 2010), another board's policy, which allowed for uncensored invocations, was upheld. The court there examined this Circuit's decision in *Turner,* as well as *Pelphrey* and *Tangipahoa,* and determined it "agrees with those courts that have concluded that *Marsh* did not intend to authorize only nonsectarian legislative prayer." *Doe v. Indian River,* 2010 WL 623530 at *12.[15]

Clearly, these various other courts have all interpreted this Circuit's precedents very differently than the District Court below. The court simply erred by finding that the inclusion of sectarian references by guest invocation speakers in Forsyth County rendered the Board's neutral invocations policy unconstitutional. Moreover, it is clear the focus by the Plaintiffs and the District Court on the

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[15] The court further noted: "Indeed, if Plaintiffs' theory were correct, similar prayers recently given in the United States House of Representatives would also violate the Establishment Clause. *See* 108 Cong. Rec. H4767 (daily ed. June 23, 2004) (prayer of Rev. Dr. Jack Davidson) ('Endow our leaders with wisdom and knowledge, that by Your power, they will make God-pleasing decisions for the welfare of our citizens; through Jesus Christ Your Son Our Lord, who lives and reigns with You and the Holy Spirit, one God, world without end. Amen.'); 109 Cong. Rec. H1899 (daily ed. April 13, 2005) (prayer of Dr. Curt Dodd) ('Father, may they experience what it really means to be in peace because of a relationship with You through Your *Son* Jesus, for it is in Jesus' name we pray. Amen.')." *Doe v. Indian River,* 2010 WL 623530 at *fn 137.

specific content of particular prayers delivered from May 29, 2007-December 15, 2008, "r[an] afoul of the *Marsh* Court's directive that courts not 'embark on a sensitive evaluation or ... parse the content of a particular prayer.'" *Id.* (*quoting Marsh,* 463 U.S. at 794-95, 103 S.Ct. 3330; *accord Pelphrey,* 547 F.3d at 1271).

4. The District Court erred by placing undue emphasis on the content of specific invocations.

The Plaintiffs here produced no evidence whatsoever that the Forsyth County Board engaged in any exploitation of its invocation opportunity, or showed any favoritism towards any religion or religious leader, at any time, in any way. This is because *no such evidence exists.* Absent such evidence— <u>or</u> a policy that on its face suggests a governmental preference for a particular religion (*e.g.,* where legislators themselves are the prayer-givers as in *Wynne* and *Turner,* or where a particular creed is officially established and preferred as in *Simpson*)— no court should scrutinize the word choices of volunteers who sign up to pray. The District Court erred by doing exactly that.

The Supreme Court could not make its admonition more clear: "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh,* 463 U.S. at 794-795. As this Court has previously noted, "[i]f *Marsh* means anything, it is

clear that the Establishment Clause does not scrutinize legislative invocations with the same rigor that it appraises other religious activities." *Simpson,* 404 F.3d at 287.

B. THE DISTRICT COURT'S SPEECH ANALYSIS WAS BOTH UNNECESSARY AND INCORRECT.

The erroneous opinion below hinged largely on the District Court's determination that the invocations before the Forsyth County Board should be classified as "government" rather than "private" speech. This speech analysis by the court was unnecessary, and the final conclusion incorrect.

1. Speech analysis was unnecessary under these facts.

Absent a claim by a plaintiff of viewpoint discrimination in a legislative prayer case, speech analysis is not triggered. Neither the Supreme Court in *Marsh,* nor this Court in *Wynne,* sought to determine whether the speech in question was government or private. Such an inquiry was unnecessary because those cases, **like the present case**, involved no allegations of viewpoint discrimination by an individual claiming he was himself barred from speaking in a designated forum for speech (prayer). In other words, *Marsh* and *Wynne*, like the case at bar, were merely Establishment Clause cases.

On the other hand, the government vs. private speech analysis *was* necessary in *Simpson* and *Turner* because, **unlike the present case**, the plaintiffs in both those cases alleged the challenged policies excluded them from speaking/express-

ing their own preferred religious viewpoint.[16] In other words, because *Simpson* and *Turner* involved Free Exercise and Free Speech claims (in addition to Establishment Clause claims), there was a reason for those courts to evaluate what *type* of speech was at issue.[17]

2. The District Court failed to recognize private speech is at issue.

The District Court not only engaged in an unnecessary analysis—it also reached the wrong conclusion. Unlike the three previous legislative prayer cases decided by this Circuit, this case involves private rather than government speech. While the Recommendation acknowledged "[t]he Fourth Circuit has adopted a four-factor test for determining when speech may be attributed to the government,"

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[16] *See, e.g., Simpson,* 404 F.3d at 280 (Plaintiff "alleged that her exclusion from the list amounted to a violation of the Establishment Clause.... [and] her rights under the Free Exercise and Free Speech Clauses [ ], as well as Equal Protection."); *Turner,* 534 F.3d at 354 ("Turner filed this suit, claiming that the Council's prayer policy was an unconstitutional establishment of religion, and that it violated his Free Exercise and Free Speech rights.")

[17] *See, e.g., Turner,* 534 F.3d at 356 (all emphasis added here): "Appellant also argues that the prayer policy violates his Free Exercise and First Amendment rights. As *Simpson* explained: '**<u>[T]his issue</u> turns on the characterization of the invocation as government speech**.... [The invocation is not] intended for the exercise of one's religion.... The context and to a degree, the content, of the invocation segment is governed by established guidelines by which the [government] may regulate the content of what is not expressed.' *Simpson,* 404 F.3d at 288 (internal citations omitted)....; *see also Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 833 ('[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker.') Turner was.... given the chance to pray on behalf of the government [as an elected official, as part of the meeting agenda]."

it applied the test incorrectly. App. 923.

a. The four-factor test shows private speech is at issue here.

This Court most recently explained its test as follows:

> In order to determine whether the speech in question is government or private speech, we consider: (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.

Turner, 534 F.3d at 354 (internal citations omitted).

Applying those factors, the *Turner* Court concluded the legislative prayer at issue there was government speech. *Id.* Here, the court below failed to recognize that applying the same test should have yielded precisely the opposite result.

i) First factor

In its consideration of factor one, the Recommendation stated matter-of-factly: "Here, as in *Turner*, the central purpose of Board meetings is to conduct the business of government." App. 924. But that analysis was too simplistic. While in *Turner* (and in *Wynne*) an opening prayer was delivered only by city council members, as an agenda item and "an official part of every Council meeting" (*Turner*, 534 F.3d at 353-54)— in Forsyth County, the invocation was delivered by guest religious leaders, before the meeting, and not as part of the agenda.

The District Court dismissed these features of the Forsyth County policy as mere "form over substance" (App. 924, at n.2), but they are important and deliberate distinctions. In fact, the challenged policy expressly states and makes clear precisely the opposite of what the District Court suggested. It begins:

> 1. In order to solemnize proceedings of the Forsyth County Board of Commissioners, it is the policy of the Board to allow for an invocation or prayer to be offered before its meetings for the benefit of the Board.
>
> 2. The prayer shall not be listed or recognized as an agenda item for the meeting **so that it may be clear the prayer is *not* considered a part of the public business.**
>
> 3. No member or employee of the Board or any other person in attendance at the meeting shall be required to participate in any prayer that is offered.

See App. 169, at ¶¶ 1-3 (emphasis added here).

ii) Second factor

The District Court misstated and misapplied the second factor of the speech test as well. While the *Turner* Court summarized this factor as "the degree of 'editorial control' exercised by the government or private entities over the content of the speech," (*Turner*, 534 F.3d at 354), the District Court omitted the phrase "or private entities" from its summary of the test. App. 923. The omitted phrase is important, and again, the clear distinctions with *Turner* were overlooked.

The *Turner* Court found it important that "the Council itself exercises substantial editorial control over the speech in question, as it has prohibited the

giving of a sectarian prayer. While Turner is the literal speaker, he is allowed to speak only by virtue of his role as a Council member." *Id.* at 354-55. In Forsyth County, the facts are *opposite*, in that the Board showed it exercised **zero** editorial control over the invocations, which were provided by private citizens, by open invitation, on a voluntary, rotating basis.

The District Court plainly acknowledged this by finding: "The Board's Policy prescribes that neither the Board nor its Clerk shall make prior inquiry into, review, or have involvement in the content of any prayer. [App. 170, at ¶ 7.] *Plaintiffs fail to show* that Defendant has violated that provision and involved itself in the content of prayer delivered by local clergy." App. 924 (emphasis added). However, the court then erroneously dismissed this crucial fact based on two inconsequential items: 1) that the Board chairperson delivered three (nonsectarian) invocations in the past (when a scheduled religious leader failed to show); and 2) that the Board's Clerk "plays a central role in **the process** which results in the [private] individuals' presence at Board meetings." *Id.* (emphasis added).

But these lesser facts should not have been dispositive. First, even when the Board chair delivered the three default invocations, she did so in her individual capacity, and still the Board engaged in no prior inquiry, review, or involvement in the content. Unlike in *Turner,* no policy of the Board dictated the content of what she might say (her decision to provide only a nonsectarian invocation, as she did,

was entirely her own), and she was not "allowed to speak only by virtue of h[er] role as a Council [Board] member" as in *Turner*. (Here, the written policy is silent on the matter of what occurs when a clergy member fails to show, and she merely stepped in spontaneously to fill the void. App. 829.) Regardless, this point became moot after her invocation on May 12, 2008. As the Chair stated clearly in her non-refuted testimony, "I think I gave the prayer on two occasions, and we no longer do that. If we do not have someone from the community, then we just don't do that." *Id.*

Second, just because the Board Clerk mailed out the annual invitations blindly to every religious group in the county, and simply scheduled the invocation speakers on a first-come, first-serve basis as they *voluntarily responded* and *self-selected* for the duty—the Clerk's minor involvement in the ***scheduling process*** was very different than her exercising any "degree of 'editorial control'" over ***the content*** of what any private person might say. Clearly, because the Board exercised—by design and in practice—absolutely no editorial control over the **content** of the invocations that were delivered by guest religious leaders, there should have been no doubt that the second factor of the speech test showed this was private speech. The District Court erred in finding otherwise.

iii) Third factor

The third required factor of this Circuit's speech test was not applied by the District Court at all. But that factor, "the identity of the 'literal speaker,'" is certainly important here, and is yet another glaring distinction between this case and *Turner*. It bears repeating that in *Turner* (as in *Wynne*), the city council maintained a policy that specifically required opening prayers to be delivered *only* by council members themselves, as an agenda item and "an official part of every Council meeting." *Turner*, 534 F.3d at 353-54.

But in Forsyth County, the Board's Policy provided **the opposite**: a pre-meeting invocation, delivered by guest religious leaders, and not as part of the agenda or public business. These are express, written provisions of the Policy. *See* App. 169. Accordingly, there is simply no question that the "literal speaker" in this case is a private citizen, and not the government entity itself. The court below should have addressed this third factor directly, and stated this obvious conclusion.

iv) Fourth factor

Finally, on factor four, in Forsyth County, the facts showed unequivocally that the "'ultimate responsibility' for the **content** of the speech" at issue was that of the invocation speaker rather than the Board. The District Court missed this obvious fact as well. Instead, the court again compared *Turner* out of context. It noted, "the Fourth Circuit in *Turner* acknowledged that the speakers 'take some

responsibility' for their prayers. *Id.,* 534 F.3d at 355. Yet the court found that 'given the focus of the prayers on government business at the opening of the Council's meetings,' the prayers at issue were government speech. *Id.*" App. 924.

But again, while that analysis may make sense in *Turner*— which reviewed the facts of a case in which "Council members are the only ones allowed to give the Call to Order [and prayer]," (*Id.*)— it presented a crucial distinction with the facts at issue here. In Forsyth County, the Board's written policy expressly ***dis***avows any and all responsibility for the content of the speech. It states, in part:

> 7. Neither the Board nor the Clerk shall engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered by an invocational speaker.
>
> * * *
>
> 9. This policy is not intended, and shall not be implemented or construed in any way, to affiliate the Board with, nor express the Board's preference for, any faith or religious denomination. Rather, this policy is intended to acknowledge and express the Board's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Forsyth County.

See App. 170-171.

Importantly, as the District Court plainly acknowledged, "Plaintiffs fail to show that Defendant has violated that provision and involved itself in the content of prayer delivered by local clergy." App. 924. If this is true—and it certainly is— then the "'ultimate responsibility' for the content of the speech" at issue ***had*** to be that of the invocation speaker rather than the Board. Any other finding would defy

logic and ignore the record facts.

b. Consideration of the Simpson *case does not change this analysis.*

As shown above, a straightforward application of this Court's four-factor test clearly indicates that this unique case involves private speech in a designated public forum for such speech. Among its other errors is the fact that the District Court failed to acknowledge the Plaintiffs' important concession that, with its invocation policy, "[t]he Board provides the public forum .... for the clergy to pray." App. 160 (excerpt from Docket No. 64, Pls.' Brief in Support of Mot. for Summ. J., p.21). Neither *Turner,* nor any other previous Fourth Circuit case, dictates a different conclusion.

The District Court cited only *Simpson* as additional support for its finding of government speech. App. 925. But the court overlooked the important distinctions there as well. First, with regard to the matter of speech classification, this Court's decision in *Simpson* includes only three short paragraphs at the very end of the otherwise detailed opinion. *Simpson,* 404 F.3d at 288. There, the panel gave only passing approval of the magistrate judge's conclusion regarding the type of speech at issue. *Id.* But a close review of the magistrate's analysis there shows an important oversight, and key differences with the instant case.

The magistrate in *Simpson* applied the **wrong test**. Instead of the required four-factor test, the magistrate utilized a mere two-part test, and reviewed only the

"purpose and effect" of the speech at issue. *Simpson,* 292 F.Supp.2d 805, 819 (E.D. Va. 2003).[18] The judge was influenced by the fact that "[t]he context, and to a degree, the content of the invocation segment is governed by established guidelines by which the Board may regulate the content of what is or is not expressed when it 'enlists private entities to convey its own message.'" *Simpson,* 404 F.3d at 288 (quoting the magistrate judge, *Simpson,* 292 F.Supp.2d at 819 (quoting *Rosenberger,* 515 U.S. 819, 833 (1995)).

In this case, the facts, and thus the result, are very different. While the policy in *Simpson* was arguably discriminatory and permitted only its specifically preferred "adherents of 'the American civil religion' to participate in giving invocations," which was "interpreted and applied by the Board as referring *only* to the monotheistic faiths of the Judeo-Christian tradition," *Simpson,* 292 F.Supp.2d at 817 (emphasis in original), the opposite is true here. As shown in this record and summarized above, the Forsyth County Board literally opens its doors to *everyone,*[19] and provides no similar restrictions, mandates, or editorial control over

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[18] The "purpose and effect" analysis is the test provided by *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971), for general Establishment Clause analysis. Analysis of a legislative prayer case is governed instead by *Marsh v. Chambers,* 463 U.S. 783 (1983).

[19] As the policy here shows on its face, and as the Board officials affirmed in their deposition testimony, there is no such Judeo-Christian or "monotheistic only" restriction at issue here. *See, e.g.,* the Board Chairperson (App. 507):

what the volunteer religious leaders may say. Here, it is each speaker's own, unfettered message that is being expressed, rather than the government "enlisting

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> *Q*: So if an established religious congregation of any sort in Forsyth County believed in more than one God, would they have an equal opportunity to provide the invocation as those who believe in only one God?
> *A*: Yes.
>
> *Q*: Is that a distinction you would have contemplated with this policy?
> *A*: Absolutely not.

See also, e.g., the Board Clerk, who has sole responsibility for sending the annual invitations to the area's "religious leaders" and scheduling the respondents on the first-come, first-serve basis (App. 556-557):

> *Q*: In making the congregation [mailing] lists, both before the current policy and after its adoption, did you ever intentionally exclude any established religious congregation for any reason?
> *A*: No.
>
> *Q*: And so is it your testimony that you have tried, and those working with you have tried, to include everyone that you could find that was an established religious congregation in the county of Forsyth?
> *A*: We have tried our very best.

Board officials further affirmed that diverse religious leaders have delivered the invocations, such as clergy from the Mormon, Jewish, Universalist, and Muslim faiths. (App. 559). In fact, a Muslim imam offered a prayer on May 14, 2007, the same night that the Board's written policy was formally enacted. App. 498. Plaintiffs' counsel conceded at oral argument that "[O]ur contention is the County's prayer practice and policy hasn't changed, Your Honor. They just put into writing their policy. . . ." Transcript of Summ. J. proceedings (App. 864).

private entities to convey *its* message," as that distinction is explained in *Rosenberger*.[20]

Another key distinction between the *Simpson* case and the current case is the presence of a designated public forum. Here, it was ***undisputed*** that a public forum was at issue. While the Chesterfield Board argued that it did *not* intentionally or by its actions create a public forum for private speech (*Simpson,* 292 F.Supp.2d at 806)— Defendant-Appellant here specifically showed *the opposite*. Importantly, the Plaintiffs in this case do not refute, but rather, have ***conceded*** this point. (*See, e.g.,* App. 160: "The Board provides the public forum .... for the clergy to pray.")

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20 Importantly, *Rosenberger* affirms the Board's position in this case. There, the Supreme Court held that a university engaged in unconstitutional viewpoint discrimination by enforcing a policy that denied a student organization equal funding for printing costs of its newspaper publication because it was religious in nature. 515 U.S. at 819. The Court explained in its reasoning that the case was about "the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. .... It does not follow, however, ... that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles." 515 U.S. at 833-34 (internal citations omitted). Here, the Board has in similar fashion facilitated the speech of private persons in an unfettered way.

According to the district court in *Simpson,* "[i]f the invocation constitutes any type of forum, it must be viewed as a limited public forum" and thus analyzed in that way. *Simpson,* 292 F.Supp.2d at 820. The district court in *Simpson* suggested no forum was at issue there because the government program was "content-controlled," (*Id.* at 823), but it nevertheless hedged its bet and held in the alternative that if "the invocation segment constitutes a limited or designated public forum" then the Board's policy violated the Wiccan plaintiff's free speech rights because the Board engaged in viewpoint discrimination by denying her request to offer a prayer. *Id.* at 822.

The case at bar should have been easily distinguished from those circumstances. Not only was it an *undisputed* fact here that a public forum was created, Defendant showed there was zero "content-control" at issue. Unlike in *Simpson,* guest invocation speakers in Forsyth County were permitted and were "free to offer the invocation according to the dictates of [their] own conscience." *See* Policy, App. 524. As affirmed by the District Court, "[t]he Board's Policy prescribes that neither the Board nor its Clerk shall make prior inquiry into, review, or have involvement in the content of any prayer [, and] Plaintiffs fail to show that Defendant has violated that provision and involved itself in the content of prayer delivered by local clergy." App. 924. Moreover, unlike the Wiccan plaintiff in *Simpson,* the Plaintiffs in the present case never made any claim or allegation of

viewpoint discrimination or exclusion from the forum. Indeed, unlike the Wiccan plaintiff in *Simpson,* the Plaintiffs here never asked to be included in the invocation invitation list, nor claimed eligibility for the same as local religious leaders. In this case, the Policy's limitation of eligible invocation speakers to the "religious leaders" of any and all "established religious congregations in Forsyth County" (*see* Policy, App. 523), is clearly viewpoint neutral and unquestionably reasonable and constitutional.

c. There can be no argument that the four-factor test was abrogated.

While neither the district nor appellate courts in *Simpson* made any mention of the four-factor test, *Turner*—which was decided by this Court three years later—clearly affirmed (or reaffirmed) the four-factors as the appropriate and applicable test to determine "whether the speech in question is government or private speech." *Turner,* 534 F.3d at 354. Since *Turner* is the latest pronouncement on the issue in this Circuit, it clearly applies. As discussed above, unlike the application of the test in that case (Council members-only, delivering formal agenda/public business prayers), the facts of this unique, first-of-its-kind case dictate a very different result. Clearly, under both the letter and spirit of this Court's four-factor test, the speech at issue here is private in nature. The District Court erred by suggesting otherwise.

CONCLUSION

The Plaintiffs-Appellees produced no evidence here that the Defendant Board crossed any constitutional line with its invocations practice. Instead, as noted above, its carefully drafted and followed Policy offered a virtual *gold standard* of neutrality and inclusion. By design and in actual practice, it expressly opened the door for participation of every diverse faith tradition in the community, on an equal and rotating basis, and showed neither favoritism nor hostility to any. It included, *by design*, an array of religious leaders from diverse backgrounds and perspectives. *E.g.*, App. 559; 584-586; 589-591.

Clearly, the prayer opportunity was never "exploited" here in any way, and there was not a scintilla of evidence to suggest otherwise. The District Court erred in finding an Establishment Clause violation, issuing an injunction against the Policy as implemented, and allowing for the recovery of nominal damages and attorney fees. Instead, the Defendant-Appellant was entitled to summary judgment, rather than the Plaintiffs-Appellees. For all of the reasons cited herein, Defendant-Appellant respectfully requests that the Judgment and Order of the District Court be overturned and the injunction lifted, and that it be declared that the Defendant's invocation Policy, as implemented, does not violate the Establishment Clause.

Respectfully submitted, this 19th day of May, 2010.

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STATEMENT REGARDING NEED FOR ORAL ARGUMENT

Defendant-Appellant, Forsyth County, North Carolina, hereby requests an opportunity for oral argument because the County believes it would be useful to the Court to help clarify, develop, and resolve the important constitutional issues in this appeal that will directly affect countless public bodies throughout the region. Moreover, the case involves at least one issue of first impression in this Circuit with regard to the specific parameters of legislative prayer. *See supra* p.3 (Statement of the Case).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1232 **Caption:** Janet Joyner, et al. v. Forsyth County, North Carolina

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(s) J. Michael Johnson

Attorney for Defendant-Appellant

Dated: May 18, 2010

FILING AND MAILING CERTIFICATE

I hereby certify that on this 19th day of May, 2010, I mailed to the Clerk's Office of the United States Court of Appeals for the Fourth Circuit the required copies of this Brief of Appellant and Joint Appendix, and further certify that I electronically served and then mailed this same date the required copies to opposing counsel:

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