**No. 10-1232**

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**IN THE**

# United States Court of Appeals

**FOR THE FOURTH CIRCUIT**

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JANET JOYNER and CONSTANCE LYNN BLACKMON,
*Plaintiffs-Appellees*,

v.

FORSYTH COUNTY, NORTH CAROLINA,
*Defendant-Appellant*.

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On Appeal from the United States District Court for the
Middle District of North Carolina

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## AMICUS BRIEF OF THE FOUNDATION FOR MORAL LAW, SUPPORTING REVERSAL

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May 26, 2010

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**
**DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS**

No. 10-1232

JOYNER v. FORSYTH COUNTY, NORTH CAROLINA

Pursuant to FRAP 26.1 and Local Rule 26.1, the Foundation for Moral Law, who is *amicus curiae*, makes the following disclosure:

*Amicus curiae* Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation No other law firm has appeared on behalf of the Foundation in this or any other case in which it has been involved. This case does not arise out of a bankruptcy proceeding.

**CERTIFICATE OF SERVICE**

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I certify that on May 26, 2010, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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## STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

*Amicus Curiae* Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God. The Foundation promotes a return to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, the recitation of the Pledge of Allegiance, and other public acknowledgments of God.

The Foundation has an interest in this case because it believes that the prayer by or before legislative and other policy-making bodies constitutes one of the many public acknowledgments of God that have been espoused from the very beginning of the United States as a nation. The Foundation believes that the government should encourage such acknowledgments of God because He is the sovereign source of American law, liberty, and government. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the Forsyth County prayer policy violates the Establishment Clause of the First Amendment.

## SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this *amicus* brief.

## SUMMARY OF ARGUMENT

The action of the Forsyth County Board of Commissioners of allowing or sponsoring prayer before the beginning of its meetings follows a longstanding policy of federal, state, and local governmental bodies that long predates the First Amendment to the United States Constitution and in no way violates the Establishment Clause of the First Amendment because the policy does not conflict with the text of that Amendment, particularly as it was historically defined by common understanding at the time of the Amendment's adoption.

This Court exercises judicial authority under the United States Constitution, and it should do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The text of the Establishment Clause states that "Congress shall make no law respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). When these words are applied to the prayers and policies at issue, it becomes evident that they do not dictate religion to anyone and do not represent any form of an establishment. The First Amendment was intended to protect

religious freedom, but the district court's decision misuses the Establishment Clause as it was intended by its Framers.

When courts distinguish between sectarian and nonsectarian prayers, they embark upon a slippery slope of entanglement with religion, prefer some religions over others, and engage in theological exercises in which they have neither expertise nor jurisdiction. Moreover, voluntary prayers offered at the beginning of legislative deliberations respects those citizens who believe in God and the power of prayer in society and government while still respecting the right of nonbelievers to refrain from participation.

## ARGUMENT

> *This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clauses.*

*Van Orden v. Perry*, 545 U.S. 677, 692-93, (2005) (Thomas, J., concurring).

### I. THE CONSTITUTIONALITY OF THE PRAYERS AT THE BEGINNING OF FORSYTH COUNTY BOARD OF COMMISSIONERS MEETINGS SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court ruled that the prayers offered before the meetings of the Forsyth County Board of Commissioners violate the Establishment Clause of the First Amendment, although the court never even quoted the language of the salient constitutional text. The court also quoted and cited *Marsh v. Chambers,* 463 U.S. 783 (1983), to the effect that "nonsectarian" prayers before deliberative bodies do not violate the First Amendment. In determining whether this distinction between sectarian and nonsectarian purposes is valid, we should first look to the Constitution itself.

#### A. The Constitution is the "supreme Law of the Land."

The Constitution itself and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oaths of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id. Amicus* respectfully submits that this Constitution and the solemn

oath thereto should control, above all other competing powers and influences, including the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

*Gibbons v. Ogden*, 22 U.S. 1, 188 (1824). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in

adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853). The words of the Constitution are neither suggestive nor superfluous: "In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

The U.S. Supreme Court recently affirmed this approach in *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague,* 282 U.S. 716, 731 (1931); see also *Gibbons v. Ogden,* 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: "Constitutional rights are enshrined with the scope they

were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821.

### B. The various and conflicting court-created tests create a confusing labyrinth that contradicts the text of the Constitution.

By adhering to court-created tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead mechanically decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. Reliance upon precedents alone is a poor and improper substitute for the concise language of the Establishment Clause, because attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible.

James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

*The Federalist No. 62* (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause suffers such incessant changes that it "leaves courts, governments, and believers and nonbelievers alike confused . . . ." *Van Orden*, 545 U.S. 677, 694 (Thomas, J., concurring). This

Court, for example, has bemoaned the Supreme Court's Establishment Clause jurisprudence as "marked by befuddlement and lack of agreement." *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky., v. ACLU of Kentucky*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting). The text of the First Amendment is that consistent principle that should be the measure of the Forsyth County prayer policy.

## II. THE FORSYTH COUNTY PRAYER POLICY IS NOT A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. The Forsyth County prayer policies and the prayers offered do not violate the Establishment Clause because they are not "law[s] respecting an establishment of religion."

### A. The Definition of "Religion"

It seems axiomatic that the courts cannot determine what is or is not an establishment of religion, without defining the term "religion" itself. And yet, in the courts' myriad Establishment Clause rulings, the courts have conspicuously

skirted their obligation to define religion. Without that definition, determining whether an action constitutes an establishment of religion is impossible.

The original definition of "religion" was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions' proposed amendments to the Constitution, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[1] In all these instances, "religion" was defined as:

> **The duty which we owe to our Creator, and the manner of discharging it.**

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *Founders' Constitution* at 82; *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13.

[1] Later in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the U.S. Supreme Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. *See Torcaso*, 367 U.S. at 492 n.7.

According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. The Court thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, was "within the legitimate scope of the power of . . . civil government." *Id.* In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.").

The Forsyth County prayer policy undoubtedly permits a "religious" exercise before County meetings, but as the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H. Rep. No. 83-1693 (1954). From its

inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983).

To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 678 (emphasis added). Prayers given at or before county meetings by anyone, whether offered in the Name of Jesus Christ or not, do not constitute a "religion" under the First Amendment as defined by the Framers of the Amendment.

**B. The Definition of "Establishment"**

Likewise, the County cannot be said to have "establish[ed]" a religion through its prayer policy. "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (citation omitted). Use of government force to coerce belief in particular religious tenets or

participate in the worship of a particular ecclesiastical denomination is characteristic of a government establishment of religion.

In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong*. 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy. They noted that the Framers' understanding of the term "establishment of religion" was based upon the establishment of religion that they had experienced in the mother country, England, where King Henry VIII broke away from the Catholic Church in 1534 and formally declared himself "the only supreme head in earth of the Church of England." The House Judiciary Committee declared that any establishment of religion

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these*.

H.R. Rep. No. 33-124 (1854) (emphasis added). At the time of its adoption, therefore, "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. 709, 7290 (2005) (Thomas, J., concurring) (citations omitted).

The prayers before the meetings of the Forsyth County Board of Commissioners do not involve either the coercion or the financial support that would constitute an establishment of religion. The Policy adopted by the Board in 2007 simply says "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." The prayer is not listed as an agenda item, and no person in attendance "shall be required to participate in any prayer that is offered." The prayer takes place "[s]hortly before the opening gavel that officially begins the meeting and the agenda/business of the public," and the Board Chairman is to "invite only those who wish to do so to stand for" the invocation and Pledge of Allegiance. The wide variety of pastors who are invited to give this invocation receive no compensation or reimbursement for doing so. Clearly, this policy involves neither coercion nor financial support for religion.

This court should not change the meaning of government coercion from the use or threat of actual force or the imposition of penalties to the subjective influences of "social pressure" and psychological coercion. Social pressure and psychological coercion are beyond the courts' ability to adjudicate with expertise, and they are beyond the scope of the First Amendment.

"Establishment," like "religion," clearly has been expanded far beyond its original context. *Amicus* urges this Court to interpret and apply the term "establishment" in its "just and natural" meaning and thus recognize that the County prayer policy and prayers offered do not even remotely entail an "establishment" of religion.

## III. DISTINGUISHING "SECTARIAN" FROM "NONSECTARIAN" PRAYERS FAVORS SOME RELIGIONS OVER OTHERS AND LEADS TO A JUDICIAL QUAGMIRE IN WHICH THE COURT HAS NEITHER JURISDICTION NOR EXPERTISE TO NAVIGATE.

The magistrate judge's recommendation, adopted by the district court, concluded that "nonsectarian" prayer at the beginning of meetings of deliberative bodies is constitutional but "sectarian" prayer is not. The magistrate's recommendation stated:

> In *Marsh v. Chambers,* 463 U.S. 783 (1983), the Supreme Court held that "nonsectarian legislative prayer does not violate the Establishment Clause." *Simpson [v. Chesterfield County Bd. of Supervisors,* 404 F.3d 276 at 282 (4th Cir. 2005)].[2]

[2] A quick reading of this sentence could leave the impression that the words in quotations above are from the Supreme Court in *Marsh* when, in fact, the

Slip op. at 13. *Marsh* upheld the constitutionality of a legislative prayer practice that was in many ways more narrowly "sectarian" than the prayer practice in Forsythe County. Nebraska's unicameral legislature employed a chaplain to lead in prayer every day the legislature was in session, except for a few occasions on which guest pastors gave invocations. The same Presbyterian pastor had been employed and re-employed every legislative session for sixteen years and was paid a salary of $319.75 per month. Noting that the Continental Congress engaged in prayer and that the Congress of 1789 voted to employ a chaplain just three days before it adopted the First Amendment, the Court declared that "their actions reveal their intent," *Marsh* at 790, and ruled that such legislative prayers did not violate the Establishment Clause. The Court did note that Rev. Palmer had previously given explicitly Christian prayers but ceased doing so in 1980 after the objection of a Jewish legislator, *id.* at 793 n.14, but the Court did not say the previous explicitly Christian prayers were unconstitutional.

The prayers before the Forsyth County Commission are far more diverse than those upheld in *Marsh.* Different pastors are invited to pray at different times, and no attempt is made to dictate what the prayer must or must not include.

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statement appears nowhere in *Marsh.* Rather, the statement is quoted from *Simpson* in which this Court interpreted *Marsh.* While *Marsh* did hold that the nonsectarian legislative prayer in that case did not violate the Establishment Clause, it did not say the converse, that sectarian legislative prayer *does* violate the Establishment Clause.

Those who lead in prayer are not paid for doing so. Some prayers include the Name of Jesus Christ, but others do not.

Ultimately, trying to divine and enforce a distinction between prayers that are "sectarian" and those that are "nonsectarian"—in addition to having no basis in the text of the First Amendment—is an exercise fraught with practical, theological, and philosophical problems which judges and public officials are unequipped to resolve. James Madison, a primary author of the First Amendment, recognized this danger in 1784 when he spoke against religious assessments, a proposal in the Virginia House of Burgesses to impose a tax, the proceeds of which were for the support of "Christian" clergy. Madison's notes from one of his speeches on the religious assessments bill were as follows:

> 3. What is Xnty [Christianity]? Courts of law to Judge. ...
> 7. What sense the true one for if some doctrines be essential to Xnty those who reject these, whatever name they take are no Xn [Christian] Society?
> 8. Is it Trinitarianism, Arianism [an heretical doctrine that Christ was divine but not equal to the Father], Socinianism [similar to Unitarianism]? Is it salvation by faith or works also, by free grace or by will, &c, &c.
> 9. What clue is to guide Judge thro' this labyrinth when ye question comes before them whether any particular society is a Cn society?

James Madison, 1784, reprinted by Norman Cousins, *In God We Trust* 302-04 (Harper and Brothers 1958). Madison's point was that if the State of Virginia was going to give the proceeds of this assessment to "Christian clergy," then the State of Virginia would have to define who is and who is not a Christian. If a Roman

Catholic priest asked for his share of the subsidy, should he receive it? Some Protestants in Madison's time would have denied that Roman Catholics are Christians. Would an Arian or a Socinian be defined as a Christian for subsidy purposes? What about a person who believes salvation is by works rather than by faith? Madison's point is that judges and state officials have neither the jurisdiction nor, in many instances, the competence to determine who is and who is not a Christian.

Judges, legislators, commissioners, councilmen, and other public officials face similar difficulties if they are required to distinguish between sectarian and nonsectarian prayers.[3] First, what is "sectarian?" A "sect" is defined as "a

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[3] Indeed, if Forsyth County were to prohibit invocational speakers from referring to Jesus Christ, they might run afoul of the Supreme Court's ruling in *Lee v. Weisman*, 505 U.S. 577 (1992). In that case, a school official invited a rabbi to give a prayer at a middle school graduation but also gave the rabbi a copy of the "Guidelines for Civic Occasions," and advised that his prayer should be nonsectarian. The Court noted:

> Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," *Engel v. Vitale,* 370 U.S. 421, 425, 82 S. Ct. 1261, 1264, 8 L.Ed.2d 601 (1962), and that is what the school officials attempted to do.

subdivision within a larger religious group." *The American Heritage Dictionary of the English Language* (Houghton Mifflin 1969, 1976) defines "sect" as "A group of people forming a distinct unit within a larger group by virtue of certain refinements or distinctions of belief or practice" and "sectarian" as "Pertaining to

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*Id.* at 587-88. The plurality opinion in *Weisman* held that a public school official may not invite a religious leader to pray at graduations and then dictate to the religious leader the content of his or her prayer. In all probability the official's intent was to ensure that the rabbi's prayer would be appreciated by all and offensive to few or none. But it is every bit as much a dictation of the content of prayer for a public official to tell a clergyperson he/she *may not* pray in the Name of Jesus Christ, as to tell the clergyperson he/she *must* pray in the Name of Jesus Christ. A far better approach is to adopt a fair and neutral method of selecting invocation leaders and then leave the content to the invocation leader's discretion. This is exactly what Forsyth County has tried to do.

Justice Scalia's dissent in *Weisman* contains some practical advice that may be of help in resolving this case:

> Another happy aspect of the case is that it is only a jurisprudential disaster and not a practical one. Given the odd basis for the Court's decision, invocations and benedictions will be able to be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.

*Id*. at 644-45 (Scalia, J., dissenting).

or characteristic of a sect or sects." *Black's Law Dictionary, 7th Ed.* (West 1999) defines "sectarian" as "Of or relating to a particular religious sect."

Using these definitions, Christianity, Judaism, Islam, Buddhism, and others are religions, not sects. Sects within Christianity would include Roman Catholicism, Lutheranism, Methodism, Presbyterianism, etc; sects within Judaism might include Reformed, Conservative, and Orthodox; sects within Islam might include Sunni and Shiite; sects within Buddhism might include Zen, Mahayana, and others.

Using the Name of Jesus Christ in a prayer would not be "sectarian" by this definition. Using the Anglican *Book of Common Prayer*, the Augsburg Confession of Lutheranism, the Catechism of the Roman Catholic Church, or other such documents might be sectarian. But if a policy singles out Christianity and prohibits prayer in the Name of Jesus but does not prohibit prayer in the name of the God of Abraham, Isaac, and Jacob, that policy discriminates against the Christian religion.

And if we define a prayer "in the Name of our Lord and Savior Jesus Christ" as sectarian, how about a prayer that just mentions Jesus? Or a prayer in the name of "the Messiah of Israel"? What about a prayer that contains phraseology from the Old or New Testament? Would a prayer be sectarian if it does not mention Jesus Christ but incorporates elements of Christian theology like the grace of God,

intercession, providence in history, miraculous power, or answers to prayer? Do county commissioners have the jurisdiction or competence to "parse" these prayers? Do judges? If judges even try to involve themselves in these issues, they risk fostering the excessive entanglement of government with religion that, according to *Lemon v. Kurtzman,* 406 U.S. 602 (1971), the Establishment Clause was intended to avoid.

Those who pray in the Name of Jesus Christ generally do not do so to proselytize; they do so out of obedience to God and His commands as they understand them. Jesus said,

> Verily, verily, I say to you, Whatever ye shall ask the Father in my name, he will give it you. Hitherto ye have asked nothing in my name: ask, and ye shall receive, that your joy may be full. (*John* 16:23-24 (KVJ).)

Many have interpreted this and other passages as commands to pray in the Name of Jesus. The *Catechism of the Catholic Church* 702 (Doubleday Edition 1995) provides, "There is no other way of Christian prayer than Christ. Whether our prayer is communal or personal, vocal or interior, it has access to the Father only if we pray 'in the name' of Jesus." Lutheran scholar Francis Pieper, in his four-volume *Christian Dogmatics*, vol. III, p. 80 (Concordia Publishing House 1953, 1970), states, "[P]rayer presupposes justifying faith. Only faith in the forgiveness of sins for Christ's sake makes prayer a prayer "in the name of Christ," and only prayer in the name of Christ has God's command and promise (John 16:23; 14:13-

14)." And writing from a Calvinist Presbyterian perspective, Robert L. Dabney in his *Systematic Theology* 713 (Banner of Truth 1871, 1995), writes that praying in the Name of Jesus is part of the very definition of prayer: "Prayer is an offering up of our desires unto God for things agreeable to His will, *in the name of Christ*, with confession of our sins, and thankful acknowledgement of His mercies." (Emphasis added.) Many more statements from various Christian traditions and denominations could be similarly cited. Taken together they represent a large portion of Christianity. Of course, other Christians hold a different view and believe it is permissible to lead in prayer without mentioning Jesus Christ.

We see, then, that large numbers of Christians believe, based on the Bible and the teachings of their respective denominations, that all prayer must be in the Name of Jesus. A clergyman or other person who holds this belief would violate his own conscience, what he or she perceives to be the command of God, and the doctrine of his or her church, if he or she were to pray without using the Name of Jesus Christ. Inviting a member of the clergy to pray before a county commission meeting but telling that person that he/she may not pray in the Name of Christ, forces that clergyperson to either (1) decline the invitation to pray, or (2) disobey the perceived command of God and of his or her religious faith.

Some claim prayers that are addressed to Jesus Christ send a message of exclusion to those who do not believe in Christ, telling them that they are not fully

part of the community. But in just the same way, forbidding a person from leading in prayer because that person believes prayer must be in the Name of Jesus, sends a similar message of exclusion to that person, telling him or her that he or she is not fully part of the community. The Constitution does not give judges the authority or the capacity to take a side.

## IV. OPENING INVOCATIONS AT THE MEETINGS OF DELIBERATIVE BODIES RESPECT THOSE WHO BELIEVE PRAYER IS NECESSARY FOR THE WELL-BEING OF SOCIETY.

In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Supreme Court upheld a released-time program whereby public schools released students from classes for a set period of time to enable them to attend religious instruction at their respective churches. Justice Douglas wrote for the Court:

> We are a religious people whose institutions presuppose a Supreme Being. . . . *When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.* For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

*Id.* at 313-14 (emphasis added).

Many, perhaps most Americans, believe God is real and that His favor is essential for the well-being of society. For them, prayer is not just a "feel-good" exercise; it is directly linked to the welfare of the community, county, state, and

nation. Their belief deserves recognition. Voluntary prayer before Forsyth County Board of Commissioners meetings provides a good civics lesson for all: The minority respects the majority by allowing the prayer to take place, and the majority respects the minority by not requiring them to join in the prayer.

## CONCLUSION

"When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn*., 545U.S. 469, 523 (2005) (Thomas, J., dissenting). As Justice Frankfurter stated, "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have written about it." *Graves v. O'Keefe,* 306 U.S. 466, 491-92 (1939) (Frankfurter, J. concurring). When a clash exists between court-created tests and the plain language of the First Amendment, the proper solution is to fall back to the foundation, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the district court's decision below should be reversed, and that this Court should base its ruling upon the plain language of the First Amendment as intended by its Framers.

Respectfully submitted this 26th day of May, 2010,

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**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

No. 10-1232

JOYNER v. FORSYTH COUNTY, NORTH CAROLINA

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## CERTIFICATE OF SERVICE

I hereby certify that on this 26th 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 *Amicus Curiae* Foundation for Moral Law, and further certify that I electronically served and/or mailed this same date the required copies to counsel for the parties:

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