No. 10-1232

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

BRIEF FOR AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE, BLUE MOUNTAIN LOTUS SOCIETY, GURU GOBIND SINGH FOUNDATION, HINDU AMERICAN FOUNDATION, AND SIKH COUNCIL ON RELIGION AND EDUCATION AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Jewish Congress who is **amicus**, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
   If yes, identify any trustee and the members of any creditors' committee:

/s/ Evan M. Tager (signature) July 6, 2010 (date)

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1,

Anti-Defamation League who is **amicus**, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
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/s/ Evan M. Tager
(signature)

July 6, 2010
(date)

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1,

Blue Mountain Lotus Society who is **amicus**, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒ NO
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/s/ Evan M. Tager
(signature)

July 6, 2010
(date)

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1,

Guru Gobind Singh Foundation who is **amicus**, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒ NO
   If yes, identify all such owners:

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/s/ Evan M. Tager (signature) July 6, 2010 (date)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Hindu American Foundation who is **amicus**, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
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/s/ Evan M. Tager (signature) July 6, 2010 (date)

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1,

Sikh Council on Religion and Education who is **amicus**, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒ NO
   If yes, identify all such owners:

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are groups of religious minorities who are committed to defending the right to religious freedom.

- The American Jewish Congress was founded in 1918 to protect the civil, political, religious, and economic rights of American Jews.
- The Anti-Defamation League, which was organized in 1913, is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism.
- The Blue Mountain Lotus Society is a Buddhist faith organization and national church devoted to sharing Buddhist teachings.
- The Guru Gobind Singh Foundation is a spiritual center dedicated to creating world-wide awareness of the tenets of Sikhism.
- The Hindu American Foundation is a non-profit, non-partisan organization dedicated to providing a progressive voice for over two million Hindu Americans.
- The Sikh Council on Religion and Education was founded in 1998 to promote the positive role of Sikhs in America as well as uphold the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), amici state that all parties to this action have consented to the filing of this amicus brief.

values of religious freedom, civil rights, human dignity, and justice from the perspective of Sikhism.

All of the *amici* believe that the right to practice religion freely is paramount to a free society. But it is just as important to our democracy to ensure that all religious adherents—including those who are members of minority faiths—may participate equally in civic life and local governance. Those rights are imperiled by the system of legislative prayer at issue in this case. Accordingly, *amici* have a profound interest in providing their views on the resolution of this case—both on behalf of their own members and on behalf of the many other minority religious groups that collectively form the vibrant fabric of American society.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises issues that strike at the heart of our national identity. This Nation, which was established on the principle of religious liberty, has been sustained by active civic involvement from a diverse citizenry. Sectarian religious prayer threatens this foundation. When government is perceived to favor the majority religion, it may "work deterrence" of all other beliefs. *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)). At the very least, those who practice minority faiths will be discouraged—or prohibited, depending on their religious convictions—from attending the legislative sessions. And when they are excluded from local legislative sessions, they are effectively prevented from participating in the civic discourse that often affects them most directly. That exclusion runs contrary to the tenets of the First Amendment, which was designed "to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate." *McCreary County v. Am. Civil Liberties Union*, 545 U.S. 844, 876 (2005).

Countless examples underscore the perils of government's wading in sectarian waters. Drawing from our Nation's earliest days, this concern "need[s] no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists)." *McCreary County*, 545 U.S. at 876. But recent events

from across the world and within our borders have demonstrated that minority religious beliefs remain subject to ridicule and exclusion, and that the rights guaranteed by the First Amendment remain no less imperative today.

In an effort to rescue its policy of sectarian legislative prayer, Appellant Forsyth County self-proclaims its rotational system the "gold standard" of equality. Appellant's Br. 13 (emphasis omitted). But rotating among clergy who, when they engage in sectarian prayer, uniformly invoke the name of a single, majority-approved deity, cannot cure the serious issues of exclusion and conscience that the First Amendment was designed to prevent. To the contrary, the uniformity that has emerged from the County's policies merely underscores the defects of its claim to neutrality.

Political unity cannot withstand government endorsement of religion. The First Congress understood this peril and passed a strong constitutional prohibition "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Even though the majority may prefer to hear its beliefs reinforced in the legislative chamber, support for a particular religious viewpoint "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v.*

Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Thus, practices that "make religion relevant, in reality or public perception, to status in the political community" serve to exclude and denigrate members of minority religions. *Id.* at 692.

Forsyth County's system of legislative prayer thus runs afoul of the First Amendment. By starting the vast majority of legislative sessions with affirmations of majority religious doctrine, Forsyth County deters minority adherents from participating fully in civic society. *See infra* Part I. Sectarian prayer also drives a wedge between the majority and members of religious minorities, creating bouts of intolerance that are far from theoretical. History is replete with examples of intersectarian strife, and although the First Amendment was designed to quell such conflicts, Forsyth County is actively fanning the flames. *See infra* Part II. The county defends its policy as a beacon of equality—because the system nominally rotates among willing area clergy. But in theory and in practice, this approach reinforces majority ideals and violates the rights of citizens who are members of religious minorities. *See infra* Part III.

ARGUMENT

I. Forsyth County's Policy Of Sectarian Religious Prayer Isolates And Excludes Adherents Of Minority Religions.

This Court has held that, when directed toward our similarities and common heritage, ***non***-sectarian legislative prayer "promote[s] common bonds through so-

lemnizing rituals." *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005). But such practices can easily run afoul of the Religion Clauses, because "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971). Accordingly, because sectarian observances in public sessions "produc[e] the divisiveness the Establishment Clause seeks rightly to avoid," those practices are forbidden by the First Amendment. *Simpson*, 404 F.3d at 284.

This case involves Forsyth County's approval of religious prayers that honor the Christian deity. Such observances are precisely the type of intertwining of church and state that the Establishment Clause is designed to prohibit. Meetings that begin with invocations to Jesus Christ force adherents of minority religions to choose between violating their belief systems and abandoning civic involvement. To make matters worse, the practice reinforces the status of the majority religion and fosters enmity against adherents of minority religions, discouraging them from availing themselves of the ostensibly equal—but in practical terms unavailable—opportunity to conduct sectarian invocations.

A. When sectarian religious prayers are used to open legislative sessions, minority religious adherents face crises of conscience that risk excluding them from the civic process.

In Forsyth County, legislative sessions typically begin with the public being asked or invited to stand during the religious invocation. J.A. 918-19. To some, this may seem like a minor imposition, regardless of the religious content of the forthcoming invocation. But to others, submitting to the prayers of another deity is contrary to the tenets of their faith.

Among mainstream minority religions, there are numerous examples. For Jewish believers, the Ten Commandments forbid the recognition of any other deity.[2] Likewise, the Qu'ran instructs Muslims not to pray to any deity besides Allah.[3] The Bahá'í faith instructs adherents to forsake other gods in favor of the one "Everlasting Lord."[4]

Other faiths that do not specifically prohibit prayer to an outside deity nonetheless adhere to beliefs antithetical to the notion of such prayer. Although different sects of Hinduism vary in their specific beliefs, Hindus share core beliefs such as the existence of an all-pervasive Supreme Being and many "deities," manifesta-

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[2] *Exodus* 20:2-3 ("I am the Lord your God, who brought you out of the land of Egypt, out of the house of slavery; you shall have no other gods before me.").

[3] *Holy Qu'ran* 27:26 ("[T]here is no God save [Allah], the Lord of the tremendous Throne.")

[4] *Kitab-i-Aqdas* verse 41 ("For how long will ye worship the idols of your evil passions? Forsake your vain imaginings, and turn yourselves unto God, your Everlasting Lord.").

tions of various aspects of God; *karma*, the belief that each individual creates his own destiny by his thoughts, words, and deeds; *dharma*, divine law that illuminates the path of righteousness; *samsara* and *moksha*, the cycle of rebirth and eventual liberation from that cycle; and the authority of the *Vedas* and other revealed scripture.[5] In short, Hinduism differs substantially from Christianity—and an appeal to Jesus Christ is inconsistent with the dictates of Hindu faith.

The same is true of Buddhism. Buddhists reject the existence of an omnipotent God in favor of a non-theistic unity between the Creator and creation.[6] To Buddhists, the concept of "God" as separate from humanity is anathema.[7]

To any of the above—Jewish, Muslim, Bahá'í, Hindu, or Buddhist citizens—a request to recognize the supremacy of Jesus Christ and to participate in a civic function sanctified in his name is a wrenching burden. To avoid violating their own beliefs, many minority adherents must choose not to attend the legislative sessions held in their own communities when these sessions involve sectarian prayer, or must take extraordinary measures to avoid the portions of meetings that involve legislative prayer by temporarily leaving meetings or entering meetings late—actions that single them out for public attention and even ridicule. For some,

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[5] *See* SATGURU SIVAYA SUBRAMUNIYASWAMI, DANCING WITH SIVA: HINDUISM'S CONTEMPORARY CATECHISM 726-27 (5th ed. 1999).

[6] *See* RICHARD HUGHES SEAGER, BUDDHISM IN AMERICA 159 (1999); ROBERT A.F. THURMAN, ESSENTIAL TIBETAN BUDDHISM 9 (1995).

[7] THURMAN, *supra* note 6, at 9.

skipping meetings or arriving late means missing an opportunity to participate in political decisionmaking. For others, business might be on the line. In many communities, residents are ***required*** to attend board meetings in order to obtain permits to conduct activities such as building a home addition, obtaining a liquor license for a restaurant, or opening a small business.[8] Where such policies exist, sectarian legislative prayer not only denies equal citizenship to members of minori-

[8] In Forsyth County, for example, those who wish to amend the County's zoning map must participate in a public hearing before the Board of Commissioners. *See* City-County Planning Board: The Rezoning Process, http://www.cityofws.org/Assets/CityOfWS/Documents/Planning/DDR/Applications/rezoning_process.pdf (requiring that all County petitions for rezoning appear before the Board of Commissioners); *see also*, *e.g.*, Agenda Summary of Proceedings Before Board of Commissioners from October 26, 2009, http://www.co.forsyth.nc.us/commissioners/documents/10_26_09_Summary.pdf (public hearing conducted before Board of Commissioners on proposed amendment of zoning map). Forsyth County is not alone; many communities require those seeking to rezone property to appear in person before a local board. *See, e.g.*, Sumner County Regional Planning Commission & Zoning Board: Rezoning Property, https://sites.google.com/site/sumnerplanning/planning-commission/rezoning-property (stating that rezoning property requires that an application be submitted to a particular board, after which a public hearing will be convened); City of Cambridge Inspectional Services Department – Zoning Questions, http://www.cambridgema.gov/~Inspect/inspectfaqzoning.html (stating that the board of zoning appeals has the authority to hold public hearings and decide whether to grant or deny an application for variance or special permit). Applicants for liquor licenses also often are required to participate in a public hearing before a board. *See, e.g.*, Cecil County Board of License Commissioners: Frequently Asked Questions, http://www.ccgov.org/dept_liquorbd/FAQ.cfm (stating that an applicant must appear before the local liquor board in a public hearing to present his or her case).

ty religions—it also prevents them from partaking in activities that allow them to be productive members of society.

B. At the very least, sectarian religious prayers deter the religious practice of minority adherents.

Even for those non-Christians who do not feel compelled to skip meetings preceded by Christian sectarian prayer, there can be little doubt that the practice deters their full participation in local governance. To "the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God," government messages that recognize the deity of the majority convey "the clear message that his faith is out of step with the political norm." *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 673-74 (1989) (Kennedy, J., concurring in the judgment in part & dissenting in part). That is why this Court has recognized that "[a]dvancing one specific creed at the outset of each public meeting runs counter to the credo of American pluralism and discourages the diverse views on which our democracy depends." *Simpson*, 404 F.3d at 283.

This case serves as a troubling example of that truth. From the adoption of the Board's policy through December 2008,[9] all of the prayer-giving clergy prac-

[9] Prayers were recorded only until December 2008 to give both parties the chance to question deponents about the content of those prayers prior to the termination of the discovery period.

ticed Christianity, which dominates the local religious scene.[10] J.A. 117-122, 479. These clergy have felt entirely comfortable invoking the specific tenets of Christianity, frequently including the name of Jesus Christ, a distinguishing factor of Christianity that effectively excludes all non-believers.[11]

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[10] Because this case principally seeks injunctive relief, the main issue before the Court is the practice as it currently stands. Indeed, the district court's decision was limited to the practice after the written policy became effective. J.A. 915, 938. *Cf. Christian Legal Soc'y Chapter v. Martinez*, --- U.S. ---, 2010 WL 2555187, at *9 n.6 (June 28, 2010) ("What counts . . . is the parties' unqualified agreement that the all-comers policy *currently* governs. CLS's suit, after all, seeks only declaratory and injunctive—that is, prospective—relief.") (emphasis in original).

[11] In this case, the prayers given in Forsyth County were overtly religious and shared substantial similarities with religious observances. For example, on September 10, 2007, a clergy member announced:

> Let us pray. Dear Heavenly Father, we give You praise and glory and honor and worship, for You alone are worthy. You are our Creator and our Sustainer, and through Your Son Jesus Christ, our Savior. Father, we are thankful for all of our blessings, and we acknowledge that every good thing in our lives comes from You. . . .

J.A. 119. Soon after, on December 17, 2007, another clergy member opined:

> Heavenly Father, tonight we are so grateful for the privilege to pray that is made possible by Your Son and His intercessory work on the Cross of Calvary. And Lord, we think about even a week from tomorrow, Lord, we'll remember that Virgin Birth, and how He was born to die. And we're so grateful tonight that we can look in the Bible and see how You instituted government. . . .

J.A. 121.

At the same time, Forsyth County's endorsement of religion through sectarian legislative prayer also actively discourages non-adherents from equal participation in their religious practices. "When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The promotion of specific Christian principles at the expense of other religions would give any minority believer second thoughts before attempting to lead his community in prayer. That is certainly the case here, as the record does not disclose a single occasion since the enactment of the County's policy in which a minority clergy member has been featured as a prayer-giver.

And that is hardly surprising. Minority adherents have frequently been scorned for their public religious expressions. In 2007, for example, when a Hindu priest was invited to offer (non-sectarian) prayers in the U.S. Senate, he was interrupted by protesters loudly asking for God's forgiveness for allowing the "abomination" of Hindu prayer in the Senate chamber.[12] Moreover, members of various communities have made clear that they would rather have sectarian Christian prayer or no prayer at all. During a public comment period in which residents of a

[12] *See* Michelle Boorstein, *Hindu Groups Ask '08 Hopefuls to Criticize Protest*, WASH. POST, July 27, 2007, at A4.

city of Texas discussed the mayor's habit of beginning each meeting with a prayer, one resident forcefully commented that "[a]ny person or persons offended by the exercise of our faith and our Christian God is welcome to take residence in any nation that is less offensive to their religious preference."[13] In North Carolina, a county commissioner threatened that "[i]f they have a Buddhist who comes in here and prays, I will walk out of here."[14] These and other similar stories would give any minority religious leader pause before attempting to lead his or her community in legislative prayer.

Some may dismiss the concerns of minority religious adherents as minor objections. But when the tenets of religious belief are at issue, it is impossible to tell either party "that 'it's not a big deal' or 'it's de minimis'." *Newdow v. Roberts*, 603 F.3d 1002, 1016 (D.C. Cir. 2010). For this reason, the peril of government meddling in religion is at its apex "where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the World are known to differ (for example, the divinity of Christ)." *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting). Indeed, to allow sectarian endorsement to exist is to chip away at one of the

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[13] Anita Miller, *ACLU Allegations About Council Prayers Bring Sharp Responses*, SAN MARCOS DAILY REC., July 12, 2009.

[14] Shelby Sebens, *Brunswick Commissioners May Abandon Insistence on Prayers*, STAR-NEWS (Wilmington, N.C.), Apr. 14, 2010.

most important reasons that our pluralistic society thrives: tolerance. There is no way to undo the exclusion created when minority religious adherents are subjected to sectarian prayers offered as part of the proceedings of their public institutions. Diverse civic viewpoints that are extinguished from the public discourse by that exclusion often cannot be rekindled.

II. Sectarian Legislative Prayer Divides Communities.

The Framers specifically contemplated the harmful effect of government religious speech when they drafted the First Amendment. Having been deeply stung by the divisiveness that religious intolerance could cause, they craved the freedom permitted by the separation of religion from government.

> By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.

Engel, 370 U.S. at 429. Our Framers recognized "the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power." *Id.* As the Framers knew well, when the Gov-

ernment permits sectarian legislative prayer, it puts its "stamp of approval" (*id.*) on one particular religious viewpoint.

The flip side of granting the "stamp of approval" to some groups is stigmatization of the rest. In fact, those who decline to participate in the worship sessions occasioned by sectarian legislative prayer, by arriving late to a meeting, leaving the room during an invocation, remaining present but seated for a prayer, or simply refusing to bow their heads in supplication, identify themselves to the majority as "outsiders"—or even potential "troublemakers," particularly in the context of lawsuits over legislative prayer.[15]

This case clearly demonstrates the divisions bred by sectarian prayer. After plaintiff Constance Lynn Blackmon filed her suit against Forsyth County in 2007, she received a letter at her home calling her a "Christ hater."[16] In another case recently heard by this Court, a woman attempted to avoid sectarian prayer by arriving late to meetings but was harassed for doing so by council members. *See Wynne v. Great Falls*, 376 F.3d 292, 295 (4th Cir. 2004) (holding sectarian prayer unconstitutional). Other instances show that individuals whose beliefs differ from the ma-

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[15] In such circumstances, "public prayer has effectively aided the monitoring of [the local religious] norm, and in doing so, identified a norm violator who may now be sanctioned." Paul E. McGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 Ariz. St. L.J. 585, 636 (2008).

[16] Editorial, *Prayer Plaintiff Fights for "The System,"* WINSTON-SALEM J., Feb. 14, 2010, at A25.

jority can be subjected to vandalism and threats to their personal safety. In Florida, a Jewish family that sued a school board over the content of prayer given at its meetings returned home to find that their property had been defaced with red paint.[17] Another Jewish family that sued a local school district over pervasive Christian prayers was given such harsh treatment by members of the community that they was forced to leave town.[18] One plaintiff who challenged legislative prayer even returned home to find that someone had broken into her house, beheaded and cut the heart out of her pet bird, and left a note threatening: "You're next!"[19] These examples demonstrate that—far from generating mutual feelings of respect and civic goodwill—sectarian legislative prayer serves only to identify minorities and to subject them to scorn (or worse).

The effects of sectarian divisions can be seen around the world, demonstrating just how harmful religious strife can be to civil society. Innumerable wars have been fought as a result of religious conflict. And violence caused by religious intolerance continues to this day. To put it bluntly, killing in the name of God re-

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[17] Robert Patrick & Laura Green, *Rosenauers' Home, Truck Vandalized: The Jewish Family Suing the Manatee County School Board Over a Prayer Issue Calls Friday's Attack a Hate Crime*, SARASOTA HERALD-TRIB., Apr. 13, 2004, at A1.

[18] Neela Banerjee, *School District Agrees To Pay 2 Jewish Families*, HOUSTON CHRONICLE, Mar. 2, 2008, at 10.

[19] *See* Denyse Clark, *High Priestess Took Chester County Town to Court*, HERALD (Rock Hill, S.C.), Aug. 16, 2005, at 1B.

mains "a major driver of violent conflicts."[20] Just one look at today's world shows that it takes little to unleash the religious intolerance that can fuel interreligious conflict for decades. And when the Government places its official stamp of approval on one particular religion, that intolerance is bound to arise.

III. Permitting Minority Religious Leaders To Take Part In Sectarian Legislative Prayer Does Nothing To Ameliorate Its Harms.

Forsyth County defends its policy of sectarian religious prayer as the "gold standard of neutrality" because non-Christian clergy are also eligible to present invocations under a rotational system. *See* Appellant's Br. 13 (emphasis omitted). But there are two principal problems with this approach. *First*, county residents attend *individual* meetings, at which only a single religious viewpoint is presented. A citizen who wishes to participate in that particular meeting will not be made less uncomfortable by the prospect that some future meeting will present an inoffensive religious message. *Second*, considered as a whole, Forsyth County's invocations will almost entirely reflect its majority religion. Subjecting the government's religious identity to majoritarian influences does not *cure* First Amendment problems; rather, it creates precisely the influences that the Religion Clauses were intended to prevent.

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[20] Gregory F. Treverton et al., "Exploring Religious Conflict," RAND at xi (2005), *available at* http://www.rand.org/pubs/conf_proceedings/2005/RAND_CF211.pdf.

A. The injuries caused at individual meetings cannot be ameliorated by later meetings with a different religious message.

Forsyth County asks this Court to credit its policy of inviting all of the County's 635 clergymen to participate in the invocations program. Appellant's Br. 24-27. But the harm caused by sectarian prayer cannot be papered over in this way.

County residents have the right to participate equally in ***each*** meeting of the County board. A rotational system of sectarian observances makes this impossible. It takes only one instance of exclusionary sectarian prayer to stifle a person's desire to attend or to speak at a board meeting—or any future meetings. Indeed, that was the case here: Plaintiffs needed to attend only one prayer session in order to feel "alienated" and "less inclined to attend future meetings." J.A. 919.[21] And that

[21] Recognizing the impact of these emotions, several courts have indicated that a single instance of offensive sectarian prayer creates sufficient injury to confer standing to sue. *See, e.g.*, *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) ("The question is whether there is proof in the record that Doe or his sons were exposed to, and may thus claim to have been injured by, invocations *given at any . . . meeting*.") (emphasis added); *Bacus v. Palos Verde Unified Sch. Dist. Bd. of Ed.*, 52 F. App'x 355, 356 (9th Cir. 2002) ("As attendees at the meetings, [plaintiffs] have, if the prayers are unconstitutional, suffered 'injury in fact' 'fairly traceable' to the challenged conduct that 'would be redressed' by the declaratory and injunctive relief they seek."); *Freedom from Religion Found., Inc. v. Obama*, 691 F. Supp. 2d 890, 899 (W.D. Wis. 2010) ("[T]he Supreme Court has held or assumed in a long string of decisions that a plaintiff has standing to sue for an establishment clause violation if she is 'subjected to unwelcome religious exercises,' such as prayer or even a 'moment of silence.'") (quoting *Valley Forge Christian Coll. v. Ams. United for the Separation of Church & State, Inc.*, 454 U.S.

was by no means an idiosyncratic overreaction. To the contrary, it is basic human nature that when a community member's exposure to the legislative process is so disaffecting and isolating after just one instance, he or she will be far less willing ever to go back.

Because residents often attend meetings only on a sporadic basis when the agenda includes items of particular interest, any reliance on cases approving of inclusionary policies for religious displays would be misplaced. Unlike a holiday display with a multitude of religious and secular symbols including a Christmas tree, Menorah, candy cane, and crèche,[22] which when observed collectively can dilute any sectarian message, an opening prayer exposes citizens attending that Board meeting to a singular religious message. This message cannot be moderated by subsequent messages which may never be heard by those same citizens (or, if heard, may be for still another religion whose tenets they do not share). In this

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464, 486 n.22 (1982) and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313-14 (2000)) (internal quotation marks and citations omitted).

[22] The leading Supreme Court cases to discuss the issue of religious displays have held that government display of sectarian religious symbols is constitutional only when the display includes symbols from other religions. *Compare Lynch*, 465 U.S. at 671, 681 (finding a sufficient secular purpose in the city's display of a crèche in conjunction with other holiday symbols, including, *inter alia*, Santa Claus, reindeer, candy-striped poles, and cutout figures such as a clown, an elephant, and a teddy bear), *with County of Allegheny*, 492 U.S. at 598 (stating that a holiday display exhibiting only a crèche was unconstitutional because "unlike in *Lynch*, nothing in the context of the display detracts from the crèche's religious message").

vein, the County's argument that a rotating policy mends the discord caused by sectarian prayer is akin to the contention that a giant crucifix on the front lawn of City Hall could be tempered by erecting a menorah in a public park and a statute of Buddha on the outskirts of town. But the Supreme Court has squarely rejected this reasoning.[23] This case presents no occasion for deviating from that rule. Yet—as we discuss below—even if this Court were to evaluate the invocations in the aggregate, the record makes clear that the sheer pervasiveness of Christian sectarian doctrine would leave an impression that the government was endorsing that particular theology.

[23] In *County of Allegheny*, the Court indicated that displays of symbols of other religions that were kept physically separate from the crèche at issue did not "negate the endorsement effect of the crèche." 492 U.S. at 598 n.48. Lower courts have similarly deemed irrelevant symbols that were not adjacent to or integrated with a challenged religious display when determining the constitutionality of that display. *See, e.g.*, *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 493-94 (6th Cir. 2004) (refusing to consider items "posted at different times, by different parties" when addressing constitutionality of courtroom Ten Commandments display); *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 772-73 (7th Cir. 2001) (refusing to consider other monuments on Indiana Statehouse grounds that were not "directly near[by]" challenged Ten Commandments monument); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1303-04 (M.D. Ala. 2002) (refusing to consider items "over seventy feet away with no sign to indicate that they are connected to or related to [challenged Ten Commandments] monument in any way"), *aff'd*, 335 F.3d 1282 (11th Cir. 2003).

B. Even if it were appropriate to focus on the run of public meetings rather than each distinct meeting, Forsyth County's policy of rotational invocations improperly advances the majority religion.

The Bill of Rights was intended to place issues such as religion "beyond the reach of majorities and officials," *W.V. State Bd. of Educ.*, 319 U.S. at 638, in order to avoid the "tyranny of the majority," 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 295 (Arthur Goldhammer trans., Library of America 2004) (1835). But the so-called open invitation policy of Forsyth County works to reinforce the majority, not to curtail its influence. Under that policy, an adherent to any non-Christian religion (and even some Christian denominations) will have frequent reminders of the dominant religious beliefs and will face substantial pressures to fall in line. Consistent with the demographics of the County—where 94 percent of religious congregations are Christian (R.64, at 7-8)—virtually all of the Board meetings will reinforce Christian ideology. Thus, when put into practical context, the notion that rotating among clergy creates a hospitable environment for religious minorities is deeply suspect. A local resident who ascribes to a religious doctrine that is represented by a single congregation within the community could expect her views to be reflected at a biweekly meeting of the county board once every 26 years. The remote prospect of a one-time opportunity to hear a reassuring religious message at a legislative session cannot dull the pain caused by the remaining 99.8% of potentially offensive sessions.

If anything, Forsyth County's policy of encouraging sectarian prayer at its meetings ensures that the majority religious viewpoint is hopelessly entangled with government. The fact that Forsyth County invites private clergy to deliver religious messages does not shield it from constitutional scrutiny; rather, that practice serves only to reinforce the notion that the County has integrated dominant religious beliefs into its own public speech.

Thus, it could not be clearer that the sectarian prayer at issue in this case violates the First Amendment. Nothing about sectarian prayers targeted toward individual faiths "promote[s] common bonds through solemnizing rituals." *Simpson*, 404 F.3d at 284. And when individual meetings are used to highlight differences between religious sects, the predictable consequences are strife and exclusion of the dominant majority at the expense of minority religious adherents. This practice has no place in the public sphere and cannot be squared with the well-established limitations of the First Amendment.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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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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Dated: July 6, 2010

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I hereby certify that, on the 6th day of July, 2010, a true and accurate copy of the foregoing Brief for the *Amici Curiae* was filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users:

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