IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

JANET JOYNER and CONSTANCE LYNN BLACKMON, Plaintiffs, vs. FORSYTH COUNTY, NORTH CAROLINA Defendant.	CASE NO. 1:07cv00234

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR RELIEF FROM THE ORDER ENJOINING THE CONTINUATION OF THE INVOCATION POLICY OF THE FORSYTH COUNTY BOARD OF COMMISSIONERS AS IMPLEMENTED [RULE 60(B)(5), Fed.R.Civ.P.]

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In support of its Motion for Relief from the Order Enjoining the Continuation of the Invocation Policy of the Forsyth County Board of Commissioners as Implemented, brought pursuant to Fed. R. Civ. P. 60(b)(5), defendant Forsyth County, North Carolina (hereinafter "County"), respectfully submits the following:

STATEMENT OF THE CASE

Plaintiffs Janet Joyner and Constance Lynn Blackmun (hereinafter "Plaintiffs") brought suit pursuant to 42 U.S.C. § 1983, asserting that the practice of allowing distinctive theological content in prayers delivered to open public meetings of the Forsyth County Board of Commissioners violated the United States Constitution (hereinafter Constitution). Am. Compl., ECF No. 38. Specifically, Plaintiffs alleged that the County's failure to limit the theological content of the prayers or to censor the prayer givers so as to prevent religious expression identified with a particular religion - particularly Christianity - rendered such practice an unconstitutional endorsement of a particular religion. *Id.*

STATEMENT OF THE FACTS

The relevant facts are set forth in the Recommendation of United States Magistrate Judge, ECF No. 95. Prior to the entry of this Court's injunction, the Forsyth County Board of Commissioners held regular Board meetings accompanied by an opening invocation delivered by local clergy. *Id.* at 1-2. The Board initially allowed invocations pursuant to an unwritten policy, but on May 14, 2007, the Board adopted a written prayer

Policy, App. to Mot. Summ. J., ECF No. 65-2 (hereinafter "Policy"). Plaintiffs agreed in open court that, for purposes of this Court's ruling regarding injunctive relief, their claims were limited to the Board's practice after the written Policy became effective. Recommended Ruling, ECF No. 95 at n1.

The Policy establishes a selection process pursuant to which invitations to deliver opening invocations are extended to local clergy whose names are compiled from all religious congregations, regardless of their religious perspective, which have an established presence in the local community of Forsyth County, as listed in the phone book, with the chamber of commerce, or identified via an internet search. *Id.* at 3. Responding clergy are scheduled on a first-come, first-served basis. *Id.* at 4. The Circuit Court described the selection process as a "neutral," "take-all-comers" practice "striving to include a wide variety of speakers from diverse religious faiths." *Joyner v. Forsyth County*, 653 F.3d 341, 353 (4th Cir. 2011) (quoting the Magistrate's finding). The Policy expressly permits the invocation speaker to deliver an invocation consistent with the dictates of his or her conscience and prohibits County officials from engaging in a prior inquiry, review of, or involvement in the content of the invocation. Recommended Ruling, ECF No. 95 at 5. The Policy directs the Chair of the Board to "invite only those [attendees] who wish to do so to stand" for the invocation and the Pledge of Allegiance. *Id.*

The Magistrate Judge found that the prayers delivered at board meetings frequently contained at least one theological reference distinct to Christianity, such as

Jesus, Jesus Christ, Christ, Savior, or the Trinity. *Id.* at 6. Focusing almost exclusively on the frequency of uniquely Christian references, the Magistrate concluded that such recurring references impermissibly affiliated the County with a specific faith. *Id.* at 16. In light of Plaintiffs' request for "an injunction prohibiting Defendant from allowing sectarian[1] prayers at its board meetings" the magistrate recommended the County be enjoined from continuing the Policy as implemented. *Id* at 16.

This Court conducted a *de novo* review. In an order that focuses on the repeated inclusion of distinctly Christian content in the prayers, this Court concluded the County practice was unconstitutional as implemented in light of prior precedent in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), and *Simpson v. Chesterfield County Board of Supervisors,* 404 F.3d 276 (4th Cir. 2005). Order, ECF No. 99. This Court noted that the County could continue with its practice in all other respects if it chose to censor the content of the prayers to ensure only "non-sectarian" prayers are delivered or included "other elements of diversity and inclusiveness." *Id.* at 4. This Court granted Plaintiffs' Motion for Summary Judgment, declared the County's

[1] The terms "sectarian" and "non-sectarian" are vague and their meaning is subject to dispute. *See Town of Greece v. Galloway*, 572 U.S. ---, ---, 134 S.Ct. 1811, 1822 (2014) (noting "[t]here is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian" and calling the difficulty of "sifting sectarian from nonsectarian speech" an exercise in "futility"). But during the course of this litigation, the reviewing courts appear to have adopted the definition proffered by the Plaintiffs. Support Brief to Motion for Summary Judgment, ECF No. 64, at n.2 (A "sectarian" prayer has been defined as one that uses ideas or images identified with a particular religion) (citing *Lee v. Weisman*, 505 U.S. 577, 588 (1992)).

invocation Policy, as implemented, to be a violation of the Establishment Clause of the Constitution, and enjoined the County from continuing the policy as implemented. *Id.*

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed this Court's order. *Joyner*, 653 F.3d 341. In doing so, the Circuit Court interpreted relevant Supreme Court and Circuit precedent to conclude that legislative prayers, to be constitutional, must "embrace a non-sectarian ideal." *Id.* at 347. The Circuit Court went on to declare "[o]ur cases have hewed to this approach, approving legislative prayer only when it is nonsectarian in both policy and practice." *Id.* at 348. The Circuit Court stated that "legislative prayer must strive to be nondenominational so long as that is reasonably possible – it should send a signal of welcome rather than exclusion." *Id.* at 349. Applying this "nonsectarian" standard to the facts of this case, the Circuit Court concluded that too many of the prayers "not only invoked Jesus' name . . . but also . . . invoked specific tenets and articles of faith of Christianity" so as to cross the constitutional line established within the circuit. *Id.* at 350.

On May 5, 2014, the U.S. Supreme Court handed down its opinion in *Town of Greece v. Galloway*, which upheld a legislative prayer practice wherein an overwhelming majority of the opening prayers given at a public meeting contained distinctively Christian references. *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014).

STATEMENT OF THE QUESTION

Whether the Supreme Court's decision in *Town of Greece v. Galloway* renders the prospective application of the injunction burdening the implementation of Forsyth County's invocation Policy inequitable in light of a substantial change in the law?

STANDARD FOR RELIEF PURSUANT TO RULE 60(B)(5)

This Court retains jurisdiction to dissolve an injunction when decisional law changes so as to render legal what the injunction was designed to prevent. *Agostini v. Felton*, 521 U.S. 203, 214 (1997) (finding that changes in Establishment Clause jurisprudence warranted relief from a permanent injunction). This Court's inherent authority to modify an injunction is encompassed in Rule 60(b)(5) of the Federal Rules of Civil Procedure. *Thompson v. U.S. Dept. of Housing & Urban Authority,* 404 F.3d 821, 826 (4th Cir. 2005) ("It has long been recognized that courts are vested with the inherent power to modify injunctions they have issued."). Relief from a judgment or order is appropriate when "the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Forsyth County bears the burden of establishing that a change in the law warrants relief from the injunction. *Horne v. Flores*, 557 U.S. 433, 447 (2009) ("The party seeking relief bears the burden of establishing that changed circumstances warrant relief.") (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992)); *Thompson*, 404 F.3d at 827 (same). The U.S. Supreme Court has

warned that "[a] court errs when it refuses to modify an injunction or consent decree in light of such changes." *Agostini*, supra, at 215.

ARGUMENT

I. *Town of Greece v. Galloway* substantially changed the law on legislative prayer as previously interpreted by the U.S. Court of Appeals for the Fourth Circuit.

The injunction burdening Forsyth County enjoins one thing – permitting "frequent" references that are distinctive to a particular faith, such as Christianity, to be expressed during opening prayers at public meetings of the Forsyth County Board of Commissioners. The injunction was based upon application of Fourth Circuit precedent interpreting Supreme Court decisions set forth in *Marsh v. Chambers*, 463 U.S. 783 (1983), and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). The Fourth Circuit's interpretation of the limits imposed by the Constitution on the theological content of legislative prayers has now been expressly rejected by the U.S. Supreme Court in *Town of Greece*, 134 S.Ct. at 1818-24. The Supreme Court has now made clear that the enjoined action does not violate the Constitution. Therefore, this Court's order is now clearly inconsistent with binding U.S. Supreme Court precedent, thus requiring this Court to dissolve its previously entered injunction. *Horne*, 557 U.S. at 447 ("Federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate federal law or does not flow from such a violation.") (citing *Milliken v. Bradley*, 433 U.S. 267, 282 (1977))

A. *Town of Greece* abrogated the interpretation of the dictum in *Allegheny County v. ACLU* relied upon to limit the theological content of public prayers.

When affirming this Court's order of injunction, the U.S. Court of Appeals for the Fourth Circuit cited relevant precedent within the circuit and the dictum in *Allegheny* in support of its finding "requiring legislative prayers to embrace a non-sectarian ideal." *Joyner*, 653 F.3d at 347. The Circuit Court considered *Marsh v. Chambers*, 463 U.S. 783 (1983), the only Supreme Court precedent to have directly considered a challenge to legislative prayers at that time, and determined that "efforts at ecumenism were essential to the Court's holding." *Id.* The Circuit Court accepted *Allegheny's* recasting of the facts and rationale of *Marsh* so as to conclude that "[t]he legislative prayers involved in *Marsh* did not violate [the Establishment Clause] *because* the particular chaplain had 'removed all references to Christ.'" *Id.* at 348 (citing *Allegheny*, 492 U.S. at 603) (emphasis in the original). It was this misunderstanding of the law that dictated the injunction in this case. Indeed, the Circuit Court relied nearly exclusively on the repeated Christian references in the prayers in concluding that Forsyth County's prayer practice must be enjoined. *Id.* at 352 ("We looked at the district court's factual findings about the frequency with which the council "invoked 'Jesus,' 'Jesus Christ,' 'Christ,' or 'Savior'" in determining whether the prayer actually did proselytize or advance a particular sect.")

But the Supreme Court has now expressly rejected the dictum in *Allegheny* upon which this Court relied and clarified that the holding of *Marsh* cannot be limited to prayers that are generic or nonsectarian. As the Supreme Court clearly stated:

> The contention that legislative prayer must be generic or nonsectarian derives from dictum in *County of Allegheny*, 492 U.S. 573, that was disputed when written and has been repudiated by later cases.… Four dissenting Justices disputed that endorsement could be the proper test.… … The Court sought to counter this criticism by recasting *Marsh* to permit only prayer that contained no overtly Christian references ….
>
> ….
>
> This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content.… Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed.…
>
> ….
>
> To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.

Town of Greece, 134 S.Ct. at 1821-22.

Not only has the Supreme Court clearly rejected the *Allegheny* dictum, it also clarified that the government cannot limit the theological content of the prayers and must permit prayers to contain content distinctive to the prayer giver's faith. As the Supreme Court stated: "[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.* at 1822-23. This represents a clear and substantial change in the law upon which this Court based its injunction, is binding on this Court, and renders the prospective enforcement of the injunction unjustifiable.

B. *Town of Greece* abrogated Fourth Circuit precedent finding that permitting repeated exposure to legislative prayers with distinctly Christian content violates the Constitution.

Plaintiffs' Complaint alleged offense at observing repeated Christian references during the opening invocations at County Board public meetings. Am. Compl., ECF No. 38 at 12. Considering the alleged divisiveness that stemmed from exposure to the offensive message, the Magistrate recommended the imposition of the injunction. Recommended Ruling, ECF No. 95 at 7. ("[The prayers with frequent Christian references] alienate those whose beliefs differ from Christian beliefs and divides citizens along religious lines.") Indeed the Circuit Court's concluding paragraph in affirmation of the injunction noted that "[t]o plant sectarian prayers at the heart of local government is a prescription for religious discord." *Joyner*, 653 F.3d at 355.

But the Supreme Court has now made clear that Plaintiffs' offense and concerns regarding discord and divisiveness do not justify finding a constitutional violation. The relevant material facts in *Town of Greece* and the case at bar are strikingly similar. In both cases the prayers were challenged because, most often, the prayer givers chose to deliver prayers with distinctly Christian references. Am. Compl., ECF No. 38; *Town of Greece*, 134 S.Ct. at 1817-18. In both cases the challengers claimed that being exposed to Christian prayers at a local public meeting constituted impermissible coercion. Am. Compl., ECF No. 38 at 11; *Town of Greece*, 134 S.Ct. at 1824-25. In both cases, the challengers demanded an injunction that would limit the theological content of prayers as the remedy to avoid exposure to "sectarian" prayers at public meetings. Recommended

Ruling, ECF No. 95 at 8; *Town of Greece*, 134 S.Ct. at 1817. And in both cases, the Circuit Courts concluded that the mere presence of repeated Christian prayers was sufficient to create an effective governmental endorsement of Christianity in violation of the Constitution. *Joyner*, 653 F.3d 341, 354-55; *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2nd Cir. 2013), *rev'd*, 134 S.Ct. 1811 (May 5, 2014).

Faced with nearly identical claims about the divisive impact of distinctively Christian prayers at public meetings, the Supreme Court expressly rejected the contention that such concerns supported the finding of a constitutional violation. Indeed, the Court rejected the contention that a faith specific prayer is divisive:

> Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion.…
> ….
> Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.

Town of Greece, 134 S.Ct. at 1823.

Similarly, in response to the claims that the prayers offended them and made them feel excluded and disrespected, the Court responded "Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum …." *Id.* at 1826. The Court further noted that "in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not

hear and in which they need not participate." *Id.* at 1827. In the present case, then, Plaintiffs' claims of offense and coercion no longer justify the injunction imposed upon Forsyth County.

The Supreme Court also dismissed the applicability of the "endorsement" test by refusing to even consider the test in the context of legislative prayer, despite the Circuit Courts' reliance upon it to justify an injunction that effectively limits the theological content of legislative prayers. Compare *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2nd Cir. 2013) and *Town of Greece*, 134 S.Ct. 1811 (2014). The Supreme Court's *Town of Greece* decision undermines the very basis of the injunction burdening Forsyth County and, therefore, dictates that this Court dissolve the injunction.

II. The prospective application of the injunction requires Forsyth County to either abandon a historic practice expressly approved by the Supreme Court or engage in unconstitutional manipulation of religious expression.

When this Court enjoined Forsyth County, the order noted that the County could avoid violating the injunction by censoring the prayers to ensure "sectarian" references are purged. Order, ECF No. 99 at 4 (citing *Turner v. City Council of Fredericksburg, Virginia*, 534 F.3d 352, 356 (4th Cir. 2008) (upholding the decision of a city council to "provide only nonsectarian legislative prayers")). The Supreme Court's decision in *Town of Greece* has substantially changed the law of this Circuit. Prior to *Town of Greece*, the U.S. Court of Appeals for the Fourth Circuit determined that public bodies could require that legislative prayers be "nonsectarian." In response to claims that Supreme Court

precedent in *Lee v. Weisman*, 505 U.S. 577 (1992), prevented the government from mandating "nonsectarian" prayers, the Fourth Circuit ruled, "We do not read *Lee* as holding that a government cannot require legislative prayers to be nonsectarian." *Turner*, 534 F.3d at 355. But in *Town of Greece*, the Supreme Court applied *Lee* to the context of legislative prayers and noted that the "[g]overnment may not mandate a civic religion that stifles any but the most generic references to the sacred any more than it may prescribe a religious orthodoxy." 134 S.Ct. at 1822. The Court clarified that the Constitution requires that a prayer giver be permitted to address "his or her God or gods as conscience dictates," even when praying publicly. *Id.* at 1822-23.

Additionally, this Court suggested the County could avoid the burden of the injunction by including "other elements of diversity and inclusiveness." Order, ECF No. 99 at 4. This suggestion tracked closely with the recommendations of the U.S. Court of Appeals for the Second Circuit suggesting the Town of Greece could overcome the impact of having such a majority of professed Christians delivering prayers by taking steps to promote a diversity of views. See *Galloway v. Town of Greece*, 681 F.3d 20, 30-33 (2nd Cir. 2013), *rev'd*, 134 S.Ct. 1811 (May 5, 2014). The Supreme Court expressly rejected this suggestion as well:

> That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote "a 'diversity' of religious views' would require the town 'to make wholly inappropriate judgments about the number of religions it should sponsor and the relative frequency with

> which it should sponsor each," a form of government entanglement with religion that is far more troublesome that the current approach.

Town of Greece, 134 S.Ct. at 1824 (citing *Lee*, 505 U.S. at 617 (Souter, J., concurring)). The Court explained that diversity is not established by censoring the way people choose to pray. Rather, true diversity is achieved by including a variety of creeds. As the Court stated:

> The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds.

Id. at 1820-21. Forsyth County implemented its Policy so as to include any creed with an established presence in the community, and cannot be enjoined because the County permitted visiting clergy to express themselves in a distinctly religious idiom.

The only way Forsyth County can comply with the injunction is to abandon what the Constitution permits or to do what the Constitution forbids. An injunction that prevents an act that does not violate federal law warrants relief. *Horne*, 557 U.S. at 447 ("federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation) (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)). And an injunction that requires the County to take action explicitly proscribed by the Supreme Court in a subsequent case must be modified. "A court errs when it refuses to modify an injunction or consent decree in light of such changes." *Agostini*, 521 U.S. at 215 (overturning a permanent

injunction pursuant to a Fed. R. Civ. P. Rule 60(b)(5) motion due to changes in Establishment Clause jurisprudence) See *Railways Employees v. Wright*, 364 U.S. 642, 647 (1961) ("[T]he court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong" (internal quotations marks omitted)). *Town of Greece* substantially changes the law underlying this Court's entry of its injunction, thus rendering further application of the injunction inequitable.

III. The allegations giving rise to the injunction fail to meet the new standard for challenging the content of legislative prayers.

In *Town of Greece* the Supreme Court clarified that the standard governing the content of legislative prayer is not dependent upon the theological content of the prayers, but is focused on the purpose of legislative prayers. The Court noted:

> The relevant constraint [on content] derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serve that legitimate function.

Id. at 1823. The Court went on to caution only against prayer practices that, over time, clearly demonstrate that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion. *Id.* This standard constitutes a substantial change in the law as previously applied in the Fourth Circuit. Previously the Fourth Circuit declared that even "sectarian" prayers that were non-denigrating, non-threatening, and that do not preach conversion are impermissible proselytizing and advancement.

Joyner, 653 F.3d at 352 ("[W]e looked at the district court's factual findings about the frequency with which the council 'invoked 'Jesus,' 'Jesus Christ,' 'Christ,' or 'Savior'' in determining whether the prayer actually did proselytize or advance a particular sect"). In light of *Town of Greece*, that is clearly not the correct standard.

Furthermore, the prayers in the record do not support, and Plaintiffs do not even allege, a pattern of invocations that denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion. See ECF Nos.38-4, 64. And without such a showing, a court order enjoining the content of prayers is not warranted. *Town of Greece*, 134 S.Ct. at 1824 ("Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation").

Although the Supreme Court did warn against practices that discriminate based on religious perspective, *Town of Greece*, 134 S.Ct. at 1823, both this Court and the Circuit Court found that the Policy of Forsyth County is nondiscriminatory. *Joyner*, 653 F.3d at 353 (describing the selection process to be a "neutral," "take-all-comers" practice); Recommended Ruling, ECF No. 95 at 7 (noting the Policy as "striving to include a wide variety of speakers from diverse religious faiths").

Therefore, there are no facts in this case to justify an injunction in light of the guidance provided by the Supreme Court in *Town of Greece*. Consequently, the injunction burdening Forsyth County is unsupportable and should be dissolved.

CONCLUSION

On May, 5, 2014, the Supreme Court issued a dispositive decision upholding the constitutionality of legislative prayers that include frequent references that are distinct to a particular faith. This decision substantially changed the law governing legislative prayers in the Fourth Circuit. In light of this change, continuing the prospective application of the order enjoining the implementation of the prayer Policy of the Forsyth County Board of Commissioners is inequitable, and Forsyth County requests the injunction be dissolved and relief granted pursuant to Fed. R. Civ. P. 60(b)(5).

Respectfully submitted this the 13th day of June, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2014, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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