No. 10-1232

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JANET JOYNER and CONSTANCE LYNN BLACKMON

Plaintiffs-Appellees,

vs.

FORSYTH COUNTY, NORTH CAROLINA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of North Carolina
Winston-Salem Division

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF APPELLANT AND URGING REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTEREST OF *AMICUS*[*]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Institute attorneys appear regularly before this Court as counsel and as amicus and are interested in the present case as the result of having served as counsel of record for plaintiff Hashmel C. Turner, Jr., in the legislative prayer case of *Turner v. City Council of the City of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008).

SUMMARY OF ARGUMENT

The District Court's Order (the "Order") affirming the Magistrate Judge's Recommendation (the "Magistrate's Recommendation") marks the first federal court decision to invalidate a facially neutral legislative prayer policy based solely on the *frequency* of references to deities commonly associated with Christianity in the prayers of neutrally selected prayer-givers. The District Court's conclusions are unprecedented. They abandon the practice of historical deference to the

[*] Pursuant to Fed. R. App. P. 29(a), *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief.

legislative branch in the conduct of its own business by ignoring the necessity of a threshold finding of improper motivation, exploitation or proselytization, or disparagement of one faith over another. *Marsh v. Chambers*, 463 U.S. 783 (1983); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004). Instead, the Magistrate and District Court jumped headlong into the parsing of the content of prayers and the discerning of the "effects" of that content, the latter being reminiscent of the second prong of *Lemon v. Kurtzman*, 403 U. S. 602 (1971) (which has never been applied to legislative prayer cases). In doing so, the lower courts have misapplied this Circuit's legislative prayer precedents in *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 285 (4th Cir. 2005), and *Turner v. City Council of the City of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008), in part, by failing to recognize the "latitude retained by legislatures" in structuring the manner and means used for legislative prayer. The District Court's departure from *Marsh* and the precedents of this Circuit, and its erroneous standard of review, should be reversed.

ARGUMENT

I. THE PRAYERS DELIVERED UNDER FORSYTH'S PRAYER POLICY COMPORT WITH THE STANDARD ANNOUNCED BY THE U. S. SUPREME COURT IN *MARSH v. CHAMBERS* AND APPLICABLE FOURTH CIRCUIT PRECEDENTS

The U.S. Supreme Court's first and only decision on legislative prayer, *Marsh v. Chambers*, 463 U.S. 783 (1983), states unequivocally that:

> [t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id. at 794-795. The *Marsh* decision makes it clear that the judicial review of legislative prayer content is predicated on "whether the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief"[1] and whether the prayer selection policy arose from some "impermissible

[1] *Marsh*, 463 U.S. at 794-95; *see also Wynne v. Town of Great Falls,* 376 F.3d 292, 297-98 (4th Cir. 2004) ("The *Marsh* Court emphasized, however, that the legislative prayer at issue there did not attempt to 'proselytize or advance any one, or to disparage any other, faith or belief."…."[A] legislative body cannot… 'exploit' [a] prayer opportunity to 'affiliate' the Government with one specific faith or belief…" (citing *Marsh,* 463 U.S. at 794-95)); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 283 (4th Cir. 2005) ("[T]he Court stated that a practice would remain constitutionally unremarkable where 'there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or disparage any other, faith or belief.'"(citing *Marsh,* 463 U.S. at 794-95)); *Turner v. City Council of the City of Fredericksburg*, 534 F.3d 352, 356 (4th Cir. 2008); ("[The City's prayer policy] is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith."); *see also*, *Doe v. Tangipahoa Parish Sch. Bd.,* 473 F.3d 188, 212 (5th Cir. 2006) (Clement, J., concurring in the judgment in part and dissenting in the judgment in part) ("The *Marsh* Court's focus was – as ours should be – not on the content of the prayer but on the practices and motivations behind the prayer opportunity. Under *Marsh,* a plaintiff must first show that a prayer opportunity was exploited for an impermissible purpose before the prayer's content becomes relevant. . . . The *Marsh* Court's instruction not to reject prayer based on content alone is clear – unless the prayer opportunity has been shown to exploitive, the content of the prayer is irrelevant."), *vacated on reh'g en banc,* 494 F.3d 494 (5th Cir. 2007); and *John Doe #2, et. al., v. Tangipahoa Parish Sch. Bd., et. al.,* 631 F.Supp.2d 823, 836 (E.D. La. 2009) ("Lower courts have ever since tried to

motive." *Id.* at 794 (emphasis added).[2] If neither of those two factual predicates are the case, "*it is not for us* [the courts] *to embark on a sensitive evaluation or to parse the content of a particular prayer*." *Marsh,* 463 U.S. at 794-795 (emphasis added).

In the present case, the District Court approved a Magistrate's finding which concluded the Establishment Clause was violated because "the evidence shows that prayers delivered at Board Meetings from 5/29/07- 12/15/08, frequently contained at least one reference to Jesus, Jesus Christ, Christ, Savior, or the Trinity…and only seven of the thirty-three prayers recorded during this period did not contain such references." Magistrate's Recommendation at 7. It also found that County's legislative prayer program violated the Establishment Clause because "the prayers offered in the implementation of the Policy here did not reflect diversity and inclusiveness, and instead were divisive and had the *effect* of affiliating the Government with one particular belief." Order, pp. 4-5 (emphasis added). This is new law borne of a fundamental misreading of *Marsh*, and of *Simpson* and *Turner*.

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determine how to apply this language, and what sorts of limitations *Marsh* meant to place on legislative prayer. Exploitation and proselytizing hold the answer.")

[2] *Pelphrey v. Cobb County,* 547 F.3d 1263, 1279 (11th Cir. 2008) (applying the "impermissible motive" language of *Marsh*); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998) (en banc) (The kind of prayer "that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine.")

Like the prayers at issue in this case, "*Marsh* considered, and found constitutionally acceptable, the fact that the prayers in question fit broadly within 'the Judeo-Christian tradition.'" *Simpson*, 404 F.3d at 283 (citing *Marsh*, 463 U.S. at 793). In reviewing *Marsh*, and the Supreme Court's approval of legislative prayer solely by "the minister from one denomination to the exclusion of other clerics," the *Simpson* Court acknowledged *Marsh*'s recognition of the need for judicial deference in adjudicating policies relating to legislative prayer:

> *Indicating the latitude retained by legislatures*, however, the [Supreme] Court did not remand for a determination as to whether there had been . . . an "impermissible motive." Instead it simply noted that the Nebraska legislature had not strayed beyond permissible bounds.

Simpson, 404 F.3d at 285 (emphasis added). The *Simpson* Court further noted that the reasoning in *Marsh* was based "heavily upon congressional precedent," finding that

> Congress's own method of selecting the prayer giver has not remained constant. *Marsh* noted that although Congress has usually appointed its chaplains, like the Nebraska legislature, it has for some time 'abandoned th[at] practice . . . in favor of inviting local clergy to officiate." This latter system, also part of what the Court saw as a practice "continuing without interruption" since the First Congress, mirrors the system adopted by Chesterfield County.

Id. (citations omitted).

Similar deference to the legislative prerogative was recognized by Justice Sandra Day O'Connor in *Turner*, 534 F.3d at 356. Declaring that "the

Establishment Clause does not absolutely dictate the form of legislative prayer," Justice O'Connor continued:

> In *Marsh*, the legislature employed a single chaplain and printed the prayers he offered in prayerbooks at public expense. By contrast, the legislature in *Simpson* allowed a diverse group of church leaders from around the community to give prayers at open meetings. . . . The prayers in both cases shared a common characteristic: they recognized the rich religious heritage of our country in a fashion that was designed to include members of the community, rather than to proselytize.

Turner, 534 F.3d at 356.

In the present case, the Magistrate's findings indicate that Forsyth County did exactly what Congress and Chesterfield County did in *Marsh* and *Simpson*. Forsyth County developed a neutral database of community religious leaders from the broadest possible sources and invited such persons to deliver a legislative prayer at the start of a County Board meeting. Magistrate's Recommendation, pp. 3-4. The prayers were to be given by "those responding on a first-come, first-serve basis." *Id*. Each prayer-giver was directed to pray in accordance with "the dictates of [the leader's] conscience," with a warning that "the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different that that of the invocational speaker" to maintain a "spirit of respect and ecumenism." *Id*. at 4. The Policy further directed the Board Clerk "to make every reasonable effort that a variety of eligible speakers are included for the Board meeting, and no speaker is

to be scheduled for consecutive meetings or at more than two meetings in any calendar year." *Id*. at 4-5.

Rather than determining whether the Board's legislative prayer policy was neutral and not exploitative – the appropriate method of review followed in *Marsh*, *Simpson* and *Turner* – the Magistrate and District Court looked beyond the Policy to a practice *Marsh* explicitly warned against: the "parsing of the content of prayer" and the enumeration of associations with a particular religion. *Marsh*, 463 U.S. at 794-95. [3] Remarkably, the decisions below made no finding that the Board had adopted a policy, selected religious leaders to pray in a manner that proselytized," "exploited" the prayer opportunity, or "disparaged" other faiths. Instead, they chart new law by determining in the absence of any such findings that the "effects" of the Board policy affiliated the Board with the religious views expressed in the individually-promulgated and expressed prayers by a broad cross-section of community religious leaders.

II. THE ERROR IN THIS CASE ARISES FROM A MISREADING OF STANDARDS APPLIED IN THIS COURT'S LEGISLATIVE PRAYER PRECEDENTS.

The fundamental error of the courts below arises from the different posture of this case, as compared to the posture of *Simpson* and *Turner*. In the these cases,

[3] *See also Pelphrey* , 547 F.3d at 1277 ; *Doe v. Indian River Sch. Dist.*, No. 05-120-JJF (D. Del. Feb. 21, 2010); *cf. Chauduri v. State of Tennessee*, 130 F. 3d 232, 236 (6th Cir. 1997) (non-legislative prayer).

prayer-givers (one a Wiccan, and the other a council member) challenged their exclusion as prayer-givers by a local government legislative body. In each of those cases, this Court found no constitutional injury and sustained the validity of the legislative prayer programs on grounds that the speech was government speech and the *governmental motivation* behind each of the programs was aimed at providing a diverse and inclusive program of legislative prayer. In doing so, this Court did not promulgate rigid, exclusive *constitutional requirements* for the structuring of a municipality's legislative prayer program to pass constitutional muster. Instead, the Court approved considerable legislative latitude in such programs so long as they were not improperly motivated and allowed for diversity and inclusiveness. That notwithstanding, and although diversity and inclusiveness are constitutionally beneficient criteria, the Supreme Court has never mandated such criteria for a legislative prayer program to be valid. *Turner,* 534 F.3d at 356. Indeed, the *Simpson* Court noted that in *Marsh*, the Supreme Court approved legislative prayer that had been offered *for years* solely by "the minister from one denomination to the exclusion of other clerics." *Simpson*, 404 F.3d at 285.

The present case involves a challenge by those who must listen to legislative prayer opening a County Board meeting. In deciding this differently positioned case, the decisions below have mistakenly transformed criteria allowing for substantial play in the joints and legislative discretion, justifying the exclusion of a

prayer-giver into a far broader, and less appropriate, application that acts instead to impose limits on legislative authority in the conduct of the legislature's own business. Diversity and inclusiveness are taken to an entirely new level and apparently applied to the aggregate of legislative prayers (spoken by a diverse population of neutrally selected speakers) to impose a new judicial mandate that there be no adverse religious "effect" from all prayers, notwithstanding the fact that the recitals in the Magistrate's recommendation make clear that there was no impermissible motivation in the County's legislative prayer program and that it was structured to be diverse and inclusive. Absent evidence of proselytization or disparagement of a particular faith, the inquiry should end without this new level of review that is without precedent.

The District Court's holding on the "effects" of the legislative prayer policy is highly problematic. It appears to be based on dicta from the plurality decision in a case involving the display of a Christmas crèche in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989). The *plurality opinion* there stated in passing that legislative prayers may not "have the effect of affiliating the government with any one specific faith or belief." *Id.* at 603. But the *Allegheny* plurality's reasoning does not diminish *Marsh*'s threshold requirement as to "whether a prayer proselytize[d] or disparage[d] any other faith or belief" in order to determine the constitutionality of legislative prayer. *Marsh,* 463 U.S. at 794-

795.[4] More importantly, this Court previously distinguished *Allegheny*'s applicability to a legislative prayer policy in *Simpson* by acknowledging that "*Allegheny* concerned religious holiday displays, referencing *Marsh* to confirm that *Marsh* did not apply in that context. Nothing in *Allegheny* suggests that it supplants *Marsh* in the area of legislative prayer." *Simpson*, 404 F.3d at 281 n. 3. Finally, the Magistrate's reference to *Allegheny*'s statement that "at the very least the government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)" is contradicted by facts found in his recommendation. *Allegheny*, 492 U.S. at 605. The recitals in the Recommendation evidence a prayer policy that is non-discriminatory and inclusive, crafted with *Marsh* and this Circuit's legislative prayer precedents in mind, and a good-faith effort to solicit potential prayer-givers from as broad a cross-section of community theological perspectives as possible. *See* Magistrate's Recommendation, pp. 3-5

This Circuit's decision in *Wynne*, 376 F.3d at 297-98, also illuminates the Magistrate's and District Court's failure to apply the law properly. In the *Wynne* case, the District Court made explicit findings that "the Town Council insisted

[4] The *Marsh* Court "rejected the claim that an Establishment Clause violation was presented because the prayers had once been offered in the 'Judeo-Christian tradition' and recognizing instead that '[i]n *Marsh*, the prayers were often explicitly Christian…." *Van Orden v. Perry*, 545 U.S. 677, 688 n. 8 (2005) (Rehnquist, C.J., (plurality)) (citing *Marsh*, 463 U.S. at 793-94 n. 14.")

upon invoking the name 'Jesus Christ,' to the exclusion of deities associated with any other particular religious faith, at Town Council meetings in public prayers in which the Town's citizens participated." *Wynne*, 376 F.3d at 301. By taking these actions, the Town Council clearly "advance[d]" one faith, Christianity, in preference to others, in a manner decidedly inconsistent with *Marsh*." *Id*. The Court noted that the legislative prerogative did not go so far as to "provide the Town Council, or any other legislative body, license to advance its own religious views in preference to all others, as the Town Council did here." The decision in *Wynne* properly found that "*Marsh* does not permit legislators to do what the district court, after a full trial, found the Town Council of Great Falls did here — that is, to engage, as part of public business and for the citizenry as a whole, in prayers that contain explicit references to a deity in whose divinity only those of one faith believe." The facts in the present case are far removed from the Council's intentional advancement of a particular religion in *Wynne*; the facts of this case show that the Board followed the neutral legislative prayer policies adopted in *Marsh*, *Simpson* and *Turner* in its legislative prayer policy and its implementation.

By analyzing the theological content of the prayers, before undertaking a threshold inquiry into the text of the policy and the motivations behind the enactment of the policy (as *Marsh* requires), the District Court, in effect,

improperly and unfairly creates a vicarious liability for the content of individually promulgated prayers to the County. But in this case, and in *Simpson*, the County Boards not only adopted and implemented a neutral and inclusionary policy, they also disclaimed any responsibility for the speech of prayer-givers. *See* Forsyth's Prayer Policy; *Simpson*, 404 F.3d at 286 ("Chesterfield has likewise made plain that it was not affiliated with any one specific faith by opening its doors to a very wide pool of clergy."). Why then should Forsyth County be forced to bear the consequences that flow from chance that some prayer-givers may elect to participate in offering prayers while others may decline to do so, or that an individually promulgated prayer may include sectarian content, while others may not? The answer is found in *Simpson*, 404 F.3d at 283:

> Moreover, any particular cleric who leads an invocation in Chesterfield is self-selected…. [T]he Chesterfield Board does not even know the names of clerics, since invitations are sent to congregations, addressed only to the 'religious leader.' The County has no ability to dictate selection; the clergy itself controls it by choosing to respond or not[5]

To go beyond this into the discernment of "effects" ignores the holding in *Simpson* that "[n]othing in *Allegheny* suggests that it supplants *Marsh* in the area of

[5] *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981). These cases all involved multiple speakers with diverse backgrounds and messages and where no reasonable person would expect the parties' views to espouse government endorsement of any particular religion.

legislative prayer." *Simpson*, 404 F.3d at 281 n.3. *Marsh* still sets the standard for legislative prayer and the lower courts in this case simply departed from that standard.

III. THE PRECEDENTS IN OTHER CIRCUITS SUPPORT REVERSAL OF THE DISTRICT COURT'S REASONING IN THIS CASE.

The precedents in other circuits also support reversal of the District Court's decision. In *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008), the Eleventh Circuit rejected a challenge similar to that made by the plaintiffs in this case. The Court applied *Marsh* and refused to "parse the content of a particular prayer" absent evidence of "proselytiz[ing] or "disparag[ing]" prayer or remarks. Despite the pains taken by Forsyth to adhere to *Marsh* and mirror the behavior permitted and forbidden in *Pelphrey*, the Magistrate nevertheless rejected *Pelphrey*, stating that it "is not consistent with Fourth Circuit cases to the extent that it declines to consider the content of legislative prayer to determine whether the prayer advances any faith or belief." Magistrate's Recommendation at 13.[6]

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[6] The Magistrate's Recommendation goes on to state:

> This Court is bound by *Wynne* and *Simpson*, and therefore the Court rejects Defendant's argument that the content of its prayer should not be examined unless the Court first determines that the Board's prayer opportunity has been exploited to proselytize, advance, or disparage any one faith or belief. If that were the rule in the Fourth Circuit, *Simpson* would never have considered the content of the prayer.

Likewise, other courts have concluded that reviewing the content of legislative prayers first without a predicate finding of impermissible motivation skews the order of review and intrudes too far in reviewing policies reserved to a coordinate branch of government. *Id.* at 16 n. 4. In *John Doe #2,* 631 F.Supp.2d at 839, the Court stated that "the constitutional permissiveness of *Marsh*-context prayer is measured strictly by notions of exploitation and proselytizing." In *Doe v. Indian River Sch. Dist.,* No. 05-120-JJF at 43 (D. Del. Feb. 21, 2010), the Court ruled that "[b]ecause the School Board has not exploited its Prayer Policy to proselytize or advance religion, the Court may not do anything further." Moreover, the fact that a prayer policy could have an unintended effect, such as allowing a sectarian prayer, does not render the policy unconstitutional when there is no motive to advance or prefer a particular religion, or to proselytize. As Judge Farnan recognized in the *Indian River* case:

> [T]he Court cannot agree that the brief sectarian references in many of the Board members' prayers renders *Marsh* inapplicable. If the Court were to accept Plaintiffs' view, a reference to a particular religious deity in any prayer offered in a legislative or deliberative body would automatically render the practice unconstitutional. This conclusion cannot be squared with the reasoning of *Marsh*.

Id. at 28. Indeed, in some religiously homogonous areas of the country, a neutral prayer policy, even with affirmative disclaimers, would inexorably produce the

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Magistrate's Recommendation at 16.

"effects" the District Court found so abhorrent. Are school boards and legislatures in homogenous areas of Utah or New York City to be proscribed from legislative prayer solely on the basis of demographics? The answer is that *Marsh* presents a reasonable methodology for judicial review of legislative prayer that should be followed. Under that rationale, Forsyth County's facially neutral, and neutrally implemented, legislative prayer policy survives review. Its prayer policy is neutral and non-discriminatory. Nor is there any evidence to indicate that any prayer-giver "proselytized" or "exploited" his or her opportunity to pray, or that any faith was "disparaged," or that the County Board of Supervisors participated in doing so, or enacted or implemented the policy to do so.

In sum, whatever remaining value the "effects" prong of *Lemon v. Kurtzman*, 403 U. S. 602 (1971), may have in constitutional jurisprudence, it does not, and should not, apply in legislative prayer cases. The District Court's novel and mistaken attempt to engraft the "effect" test into cases involving legislative prayer cases has not been followed in other legislative prayer cases and should be rejected here. The decisions in this Circuit in *Wynne, Simpson* and *Turner* make clear – as the Court in *Pelphrey* recognized from afar – that the law in "[t]he Fourth Circuit…forbid[s] judicial scrutiny of the content of prayers absent evidence that the legislative prayers have been exploited to advance or disparage religion." *Pelphey,* 547 F.3d at 1274.

CONCLUSION

The history and tradition of this country plainly grant legislative bodies the discretion to formulate and implement legislative prayer policies, and it is manifestly clear that the federal courts should not intrude into that process or assume an inappropriate role in theological engineering. As Justice Souter aptly remarked, "I can hardly imagine a subject less amenable to the competence of the federal judiciary [than comparative theology], or more deliberately to be avoided where possible." *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring). The District Court's cart-before-the-horse framework for evaluating legislative prayer controversies fails to square with the Supreme Court's standard for restrained judicial intervention into the practices of a coordinate branch of government and the practice of legislative prayer. Because the District Court's disposition in this case is mistaken as a matter of law, and short-sighted as a matter of constitutional policy, this Court should reverse the Order permanently enjoining Forsyth County's legislative prayer policy and reverse its award of attorney's fees to the plaintiffs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 4,384 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s James J. Knicely
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Dated: May 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2010, I electronically filed the foregoing Brief of *Amicus Curiae* The Rutherford Institute in Support of Appellant and Urging Reversal with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record herein; I further certify that on this date I caused bound copies of the foregoing brief to be sent via First Class U.S. mail, postage prepaid, to the following counsel of record:

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