No. 13-0123

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2013

Martin County and
Martin County Board,

Petitioners,

v.

Anne Dhaliwal,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SEVENTEENTH CIRCUIT

BRIEF FOR PETITIONERS

Steven E. Gilmore
Counsel for Petitioners
One Camino Santa Maria
San Antonio, Texas 78228
Telephone: (210) 123-4567

March 7, 2014

QUESTIONS PRESENTED

I. Did the appeals court apply the correct legal standard?

II. Does the Martin County legislative prayer practice violate the First Amendment Establishment Clause?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Pages**

United States Constitutional Provisions

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of West Carolina is unreported but may be found on pages 27-29 of the appellate record. (R. at 27-29). The opinion of the United States Court of Appeals for the Seventeenth Circuit Court is likewise unreported but may be found at page 32-34 of the appellate record (R. at 32-34).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on February 1, 2013. (R. at 34). Petitioner filed his petition for writ of certiorari on February 7, 2013. (R. at 36). This Court granted the petition on May 20, 2013. (R. at 37). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2012).

STANDARD OF REVIEW

A district court's fact findings and the reasonable inferences to be drawn from them are reviewed for clear error. Its legal conclusions are reviewed *de novo*.

CONSTITUTIONAL PROVISION

The First Amendment of the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Martin County is located in the State of West Carolina. (R. at 11). The Martin County Board is comprised of five elected members serving staggered four-year terms. (R. at 10). In keeping with national custom, the Martin County Board maintains the practice of beginning each public legislative session with an invocation delivered by member of a local clergy. (R. at 18). The prayer-giver selection process is wholly inclusive and welcoming by allowing the prayer-givers to volunteer to deliver the invocations by self-selection. (R. at 10 & 18). The Martin County Board encourages any congregation or religious group in the community to participate in the invocation practice, and Martin County Board assumes no involvement or control in the content of the invocations delivered at the public session. (R. at 18). The resulting invocations featured diverse references to various religious beliefs, though many briefly contained specific Christian tenets consistent with the character of religious congregations in Martin County. (R. at 28). On some occasions prior to the delivery of the invocation, the Board offered a simple request that attendees stand throughout the invocation and subsequent formalities. (R. at 2-5).

Respondent, Anne Dhaliwal, hereinafter referred to as "Dhaliwal," resident of Martin County and the State of West Carolina, is a practicing Sikh and regular attendee of the Martin County Board meetings. (R. at 7 & 9). Despite having participated for months without complaint, Dhaliwal and her husband have requested that the Martin County Board discontinue its adherence to this historically accepted national tradition of legislative invocation. (R. at 20 & 28). Dhaliwal cites offense at the amount of Christian religious leaders delivering the invocations, as well as offense to the Judeo-Christian references included in the invocations. (R. at 14). Though Dhaliwal is certainly welcome to participate in delivering a legislative invocation on behalf of the Sikh faith, Ms. Dhaliwal's statements and correspondence did not express any

such interest; nevertheless, Mrs. Dhaliwal has levied a claim that her religion has not been represented in the legislative invocation process. (R. at 9 & 14). Dhaliwal asserts that these factors amount to a violation of the Establishment Clause by demonstrating a preference for a religion to which she does not subscribe, and has caused her offense. (R. at 19).

Dhaliwal's complaint to the Northern District Court of West Carolina sought, among other relief, to compel Martin County to censor the content of the invocations delivered before the legislative meeting. (R. at 14-15). The district court determined that no relief could be granted on this claim, reasoning that the prayer practice in Martin County had not infringed upon the religious freedom of its citizens. (R. at 28-29). This ruling was reversed and remanded by the United States Court of Appeals for the Seventeenth Circuit. (R. at 33). The United States Supreme Court granted the Petition for Writ of Certiorari by Martin County on May 20, 2013. (R. at 37-38). Martin County now respectfully requests this Court uphold the constitutionality of Martin County's legislative invocation practice. (R. at 35).

SUMMARY OF THE ARGUMENTS

I.

The Supreme Court in *Marsh* established the leading inquiry into the constitutionality of a legislative prayer practice. The Seventeenth Circuit adopted a legal standard from the Second Circuit's opinion in *Galloway*, which is inconsistent with the standard established by the Supreme Court in *Marsh*. In *Marsh*, this Court created a limited inquest into the prayer practice to determine whether the prayer opportunity had been exploited to proselytize or advance a single religion, or to disparage any other. The two questions considered by this Courtin *Marsh* were: 1) whether the governing body selected the prayer-giver by result of an impermissible motive; and 2) whether the prayer practice had been exploited to proselytize or advance a single

religion, or to disparage any other. The *Galloway* court exceeds the limits prescribed by this Court in *Marsh* by examining individual aspects of the prayer practice together in totality, regardless of the presence of any impermissible motive or evidence that the prayer opportunity had been exploited. The totality of circumstances standard in *Galloway* is an unduly harsh guideline that results in an effective prohibition of legislative prayer. To require broad and complete diversity among faiths would be realistically unachievable and unduly burdensome for the majority of our Nation's local councils and legislatures. Furthermore, requiring wholly nonsectarian invocations would amount to establishing an unconstitutional civic religion or an endorsement of a vague theism. The Supreme Court in *Marsh* and our Nation's founders did not envision such effective prohibition as is essentially required by the standard in *Galloway*.

II.

The prayer practice in Martin County is permissible under *Marsh* and the Establishment Clause because Martin County has neither exploited the prayer opportunity to advance, proselytize, or disparage any religion, nor utilized any impermissible motive in the selection of the prayer-givers. Without proof of exploitation or an impermissible motive, the prayer practice and the content of the invocations must not be subjected to any rigorous judicial scrutiny. Alternatively, the Martin County prayer practice should still be permissible under the standard employed in *Galloway*, provided that standard is still limited to the prayer opportunity exploitation and impermissible motive threshold required by this Court in *Marsh*.

Further, Martin County does not exercise any control over the prayer content, or review the prayer content prior to delivery. Exercising a police role over the content of the invocations would represent an unconstitutional establishment of religion by the governing authority. Additionally, Martin County does not prohibit any person or religious congregation from

delivering the legislative invocation. As a result, there is not sufficient evidence present to controvert realities and practicalities of the invocational practice in Martin County; therefore, there are no sufficient grounds available to render Martin County's invocational practice unconstitutional.

ARGUMENT

I. THE SEVENTEENTH CIRCUIT APPLIED AN INCORRECT LEGAL STANDARD

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. 1. This Court addressed the relationship between the Establishment Clause and legislative invocations in *Marsh v. Chambers*, 463 U.S. 783 (1983) to determine whether the practice had violated the Establishment Clause by affiliating the Nebraska State Legislature with the Christian religion. *Id.* at 784. Absent indication that a given prayer practice has been exploited to proselytize or advance a single religion, or to disparage any other, and lacking evidence of an impermissible motive in the selection of the prayer-giver, this Court reasoned that such a legislative prayer practice would not violate the Establishment Clause. *Id*. at 794-95. In light of this Nation's continuous and persistent history of utilizing legislative invocations, this Court concluded that the prayer practice implemented by the Nebraska State Legislature had not violated the Establishment Clause. *Id*. at 792.

In *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (2013), however, the Second Circuit considered whether the town board's legislative prayer practice, *measured in its totality according to a reasonable observer*, created an appearance that the town disfavored or gave preference to certain religious faiths. *Id*. at 29. The Second Circuit inquired as to three elements to be viewed in the totality of circumstances: 1) the prayer-giver

selection process; 2) the content of the invocations; and 3) the contextual actions of the prayer-givers and board members with regard to the invocations. *Id.* at 30. The court determined that the particular prayer practice in the Town of Greece violated the Establishment Clause because the predominance of Christian prayer-givers, the presence of sectarian content in the prayers, and the contextual actions of the prayer-givers and board members would impress upon a reasonable observer the notion that town is affiliated with Christianity. *Id*. at 30-34. This test established by the Second Circuit exceeds the bounds of this Court's standard in *Marsh*, wherein this Court declined to embark on a sensitive review of the prayer content and rejected the primary effects prong set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), which was analogous to the reasonable observer requirement outlined in *Galloway*. *Marsh*, 463 U.S. at 795; *see also Lynch v. Donnelly,* 465 U.S. 668, 679 (1984) (noting this Court's refusal to apply the *Lemon* test in *Marsh*). Any standard such as that employed by the Seventeenth Circuit is necessarily incorrect because unwarranted incursions into the content of the prayers and the contextual effects are impermissible, according to this Court in *Marsh,* and unconstitutional as a result. *Marsh*, 463 U.S. at 794.

A. *Marsh* provides the controlling standard acknowledging the constitutionality of sectarian content in legislative invocations, provided the prayer opportunity has not been exploited to proselytize or advance a single religion, or to disparage any other,or that an impermissible motive has not been evinced by the selection of the prayer-giver

This Court in *Marsh* set forth that the prayer content may not be parsed, and that sectarian content is not itself sufficient to violate the Establishment Clause where there is no evidence that the prayer opportunity has been exploited. *See Marsh*, 463 U.S. at 792, 794-95. This standard permits a wide range of constitutionally acceptable prayers that may be offered in a legislative invocation scheme, including those that include sectarian references. *Pelphrey v.*

Cobb Cnty., 547 F.3d 1263, 1273 (11th Cir. 2008). Indeed, many courts, including the Second Circuit in *Galloway*, have acknowledged that *Marsh* did not prohibit sectarian content in legislative invocations. *Galloway*, 681 F.3d at 32-34; *Pelphrey*, 547 F.3d at 1270-71. The confusion regarding this Court's stance on sectarian content in *Marsh* stems, not from the body of the majority opinion, but solely from a footnote mentioning that the prayer-giver had removed references to Christ after 1980. *Marsh*, 463 U.S. at 793, n.14. This fact was evidently not material to this Court's decision, as this Court considered and took no umbrage with our Nation's lengthy history of legislative invocations including sectarian references. *Id*. at 792. Further, Chief Justice Burger's majority opinion does not limit the scope of the Court's inquest to the period after 1980, but considers the duration of the prayer-giver's 16-year appointment and from the inception of the prayer practice itself. *Rubin v. City of Lancaster*, 710 F.3d 1087, 1092 (9th Cir. 2013) *cert. denied before judgment*, 134 S. Ct. 284 (2013). Satisfied that sectarian content alone was insufficient to satisfy a violation of the Establishment Clause, this Court stated with certainty that no evidence existed to suggest that the prayers before the Nebraska State Legislature served to advance, proselytize, or disparage religion. *Marsh*, 463 U.S. at 795.

In addressing the subject of the prayer-giver selection process, this Court was equally exacting in determining that the Presbyterian minister's continued reappointment over his 16-year tenure as Nebraska's legislative prayer-giver did not arise from any impermissible motive. *Marsh*, 463 U.S. at 793-94. Rather, the minister's reappointment was due to his exceptional performance at the post. *Rubin*, 710 F.3d at 1112.Without proof of an impermissible motive in selecting the prayer-giver, this Court reasoned that the appointment of a Presbyterian, an adherent to a religion that is itself a sect within a sect of Protestant Christianity, did not arise to an impermissible motive in violation of the Establishment Clause. *Id*.; *cf. Engel v. Vitale*, 370

U.S. 421, 428 (1962) (remarking upon the diversity of faiths even within Christianity).

B. The Second Circuit in *Galloway* created an inappropriately more expansive guideline by parsing the content and examining the contextual effects of the invocations to determine whether a prayer practice had created the appearance of an official establishment of religion

In *Galloway*, the Second Circuit went to lengths to create a more articulated inquiry into the peculiarities of a legislative invocation practice in its totality by embarking on an inquiry into the prayer-giver selection process, the content of the prayers, and the contextual actions of the prayer-givers and board members with regard to the prayers. *Galloway*, 681 F.3d at 30. The court considered this examination to be within the ambit of the Supreme Court's edict in *Marsh*, while viewing this more expansive investigation as a study of the prayer practice in the totality of circumstances as it would appear to a reasonable observer. *Id*. at 30, 32. Other circuits have applied similar tests while arriving at divergent, if not contradictory results. *Compare Joyner v. Forsyth Cnty.*, 653 F.3d 341, 353-55 (4th Cir. 2011) (considering the entirety of the practice and determining that sectarian prayer content does amount to an advancement of religion); *with Pelphrey*, 547 F.3d at 1277–78 (examining three factors of the invocation practice, including prayer content, and determining the sectarian content of the invocations does not amount to advancement of religion). At odds with this standard, this Court in *Marsh* laid out a purposefully narrow and limiting prerequisite threshold to determine when the judiciary could begin to examine the very circumstances the "totality" inquiry seeks to probe at the starting point of its investigation. *Rubin*, 710 F.3d at 1095-96. There must be evidence that the prayer practice has been exploited to proselytize or advance a single religion, or to disparage any other *before* the court can begin to parse the content of the invocations. *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823, 839-40 (E.D. La. 2009).

Likewise, an impermissible motive cannot be revealed solely by the predominantly

Christian identity of the prayer-giver(s); otherwise the practice held constitutional in *Marsh* would have been found unconstitutional. *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1247 (10th Cir. 1998). Evidence of an impermissible motive seems to require more affirmative and prejudicial steps taken by the legislative body or its agents to ensure the persistence of a given sectarian view. *Cf. Pelphrey*, 547 F.3d at 1281 (determining the Planning Commission of Cobb County had ensured a Christian viewpoint in a rotating scheme of various legislative prayer-givers by striking the names and religious congregations that did not comport with their own views). No such affirmatively prejudicial steps were taken in the prayer practice of either *Marsh* or *Galloway*, yet the Second Circuit still saw fit to rule the selection process unconstitutional merely because the local legislature solicited volunteer prayer-givers from within the confines of the town in which they governed. *Galloway*, 681 F.3d at 30-31. This conclusion is inescapably problematic because a city cannot dictate which religious congregations are allowed to settle within its limits. *Rubin*, 710 F.3d at 1099. If the *Galloway* standard requires, as it appears, that a selection process pull from a broad diversity of faiths, any local legislature could be made to solicit volunteers beyond its sphere of control in the event local that religious demographics violate this diversity requirement. *Cf. Joyner*, 653 F.3d at 354 (declining to consider the limited religious demographic argument). Such a requirement would be unduly harsh and contrary to the decision in *Marsh* where diversity of faiths represented was not required, regardless of local religious demographics. *Rubin*, at 710 F.3d at 1098; *Marsh*, 463 U.S. at 793-94.

C. A legislative body or other public authority may not control the content of an invocation or prohibit the speaker from using sectarian content, nor may a legislative body coerce attendees into participating in religious observance

Part of this Court's rationale in *Marsh* for requiring such a narrow inquiry into the prayer practice arose from concern over the extent of government's authority to dictate the content of

the legislative prayer. *Marsh*, 463 U.S. at 798 (Brennan, W., dissenting); *see generally Lee v. Weisman*, 505 U.S. 577, 601 (1992) (stressing the necessity of keeping legislative invocations free of governmental control). In *Lee,* this Court did not equivocate on matters concerning government's role in controlling the content of the legislative invocations. *Id*. at 600-602; *see also Engel*, 370 U.S. at 428 (concluding that the Establishment Clause forbids governmental authorship concerning the content of legislative invocations). It is important to note that this Court did not conclude that chaplain had removed those sectarian references at the express command of the legislative body. *Marsh*, 463 U.S. at 793, fn. 14. *Lee* states in explicit terms that the government may not impose a non-sectarian requirement upon the legislative prayer-givers. 505 U.S. at 588; *see also Galloway*, 681 F.3d at 29 (following the decision in *Lee*, requiring a nonsectarian standard in the prayer practice would have the effect of establishing a national civic religion or vague theism, which would violate the Establishment Clause).

Moreover, this Court was concerned in *Lee* with the risk of coercion particular to prayer exercises in a school setting. *Lee*, 505 U.S. at 592; *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 307 (1963) (recognizing the increased concern with regard to shielding the impressionable conscience of school children from the effects of subtle coercive pressures stemming from religious observance). This concern is distinct with regard to the school setting, as opposed to a legislative environment, as in *Marsh*, where the adult attendees would be free to come and go as their conscience dictates. *Lee*, 505 U.S. at 593, 597. *Galloway* ignores this distinction in considering the contextual actions and effects of the legislative prayer practice on a reasonable objective observer, and arrives at a conclusion that essentially finds rational, able-minded adults effectively incapable of excusing themselves to the dictates of their conscience during moments of legislative invocation. *Galloway*, 681 F.3d at 32-33. This conclusion sells

short the intellectual capacity and individuality of adults attending a legislative session, prepared to engage in the noble and high-minded activities of politics and governance. *Cf. Marsh*, 463 U.S. at 792 (noting that adults can participate in civic exercise without concern that they may be indoctrinated as a result of pious observances made in their presence). For this reason, *Galloway's* inquiry into the contextual actions and effects of the legislative prayer practice on the objective observer, an analysis not permitted by this Court in *Marsh*, represents an overly broad and expansive examination of the legislative prayer practice. *See Marsh*, 463 U.S. at 815 (Brennan, W., dissenting) (acknowledging this Court's decision not to consider the effects of prayer practice on the detached observer).

D. Public policy considerations are best addressed by the continued application of the legal standard established by this Court in *Marsh*

The Second Circuit concedes the difficulty of overcoming the test it established by offering an ominous statement that effectively discourages local legislatures from embracing any legislative prayer practice. *Galloway*, 681 F.3d at 33. This conclusion is directly at odds with the historical analysis provided by this Court in *Marsh*. 463 U.S. at 786-93. The history of legislative invocations, including those invocations featuring stray sectarian references, is embedded in the fabric of our sociopolitical identity. *Id*. at 786. Further, requiring full diversity in the selection of prayer-givers presents a different set of policy concerns because a legislative body is simply at the mercy of its jurisdiction's religious demographics, and is unable to ensure complete diversity as a matter of practicality. *See generally Rubin* 710 F.3d at 1098 (remarking on the unavoidable effect of religious demographics on efforts to ensure a diverse representation of beliefs).

II. MARTIN COUNTY'S LEGISLATIVE INVOCATION PRACTICE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The prayer practice in Martin County is sufficiently within the ambit of the constitutional

inquiry established by this Court in *Marsh* because the prayer opportunity has not been exploited, and, therefore, does not violate the Establishment Clause. (R. at 10 & 18). Further, the prayer practice in Martin County does not feature an impermissible motive in the prayer-giver selection process. *Id.* Absent evidence of exploitation of the prayer practice or an impermissible motive, this Court has established that the content of the prayers should not be parsed and the prayer practice itself should be ruled constitutional. *Marsh*, 463 U.S. at 792, 794-95. In the alternative, the prayer practice in Martin County, but for the misapplication of the standard by the Seventeenth Circuit in making an unwarranted inquiry into the specific content the contextual effects of the invocations, should satisfy the legal standard set forth by the Second Circuit in *Galloway*. *Galloway*, 681 F.3d at 30-31.

A. Under *Marsh*, Martin County's legislative prayer practice is constitutional because the prayer opportunity has not been exploited to proselytize or advance a single religion, or to disparage any other, and there is no impermissible motive in the selection process

In *Marsh* this Court established that a prayer practice is not subject to judicial scrutiny unless it can be shown that the prayer opportunity has been exploited to proselytize or advance a single religion, or to disparage any other, or that an impermissible motive could be found in the prayer-giver selection process. *Marsh*, 463 U.S. at 784. Rather than creating a bright line rule, this standard constructs a minimum threshold requirement that must be reached before the content of the legislative invocations can be examined. *Tangipahoa*, 631 F. Supp. 2d at 839-40. In order for the content to be parsed, or for the selection process to be examined, Dhaliwal must first show that the prayer opportunity has been exploited, or that an impermissible motive exists in the prayer-giver selection process. *Id.* Dhaliwal has not met this threshold in order for this Court to scrutinize the prayer content, therefore the content of the Martin County invocations and the contextual effects are immaterial and the prayers cannot be parsed. (R. at 19-20).

It is also essential to note that this Court in *Marsh* did not create a legal basis to establish a frequency-based limitation to determine whether any set amount of sectarian references would amount to an advancement of religion. *See Joyner*, 653 F.3d 341 (analyzing frequent and pervasive references to Christ in the invocations). A frequency-based test sets the judiciary on a doomed expedition into the content of the invocations because, absent evidence that the prayer opportunity has been exploited to proselytize or advance a single religion, or to disparage any other, this Court should remain unconcerned with mere references to sectarian aspects of religion or the contextual effects of the prayer practice in Martin County. *See, e.g., Pelphrey*, 547 F.3d 1263 (concluding that this Court in *Marsh* permits sectarian content because parsing the content is prohibited absent evidence that the prayer opportunity has been exploited); *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005) (determining that numerous sectarian references alone do not amount to an exploitation of the prayer opportunity).

As opposed to the mere frequency of sectarian references, this Court should consider whether the local legislature has taken any affirmative steps to affiliate the legislature or its jurisdiction with Christianity. *Rubin*, 710 F.3d at 1097. In so doing, this Court should find that Martin County has not taken any affirmative steps to affiliate the county with any religion because Martin County employs a neutral and inclusive selection process, where prayer-givers are volunteer participants. (R. at 10). In comparison to the prayer practice and prayer-giver selection process considered in *Marsh*, the prayer practice and selection process in Martin County is significantly more inclusive of diverse religious faiths. (R. at 16); *Marsh*, 463 U.S. at 793-94. As this Court deemed the prayer practice and selection process in *Marsh* to be within the bounds of constitutionality, it follows that this Court should also determine the prayer practice in Martin County to be constitutional. *Marsh*, 463 U.S. 783.

B. Alternatively, Martin County's prayer practice should still be constitutional under the totality of circumstances standard employed in *Galloway*, provided the inquiry is limited to the threshold requirement established in *Marsh*

Without reaching the baseline requirement for scrutiny under *Marsh*, the *Galloway* standard calls for an inquiry into the totality of circumstances of a legislative prayer practice, including the prayer-giver selection process, the specific content of the invocations, and the contextual effects of the actions of prayer-givers and board members upon a reasonable observer. *Galloway*, 681 F.3d at 30. If the *Galloway* inquiry is limited to the threshold requirement established in *Marsh*, this Court should be able to determine Martin County's prayer practice constitutional because the there is no evidence that the threshold requirement set by *Marsh* has been met. *Rubin*, 710 F.3d at 1095-96. Without meeting the threshold requirement, the content of the prayers, the selection process, and the contextual effects in Martin County cannot be subjected to rigorous judicial scrutiny. *Id.* There is no impermissible motive in Martin County's prayer-giver selection process because the prayer-givers are unrestricted volunteers who participate by self-selection, nor has Martin County attempted to exploit the prayer process by advancing, proselytizing, or disparaging any religion. (R. at 10 & 18). With regard to the effects upon a reasonable observer, it is important to note that such an observer must be cognizant of our Nation's unique history of legislative prayer; therefore, such an observer should be aware that Martin County's practice is well within our national tradition of solemnizing public occasions. *See, e.g., Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (considering the knowledge possessed by a reasonable observer); *Lynch*, 465 U.S. at 693 (considering the benefits of solemnizing public occasions); *Marsh*, 463 U.S. at 791 (considering our Nation's unique history of legislative prayer). It is evident that the Seventeenth Circuit simply misapplied the *Galloway* standard by parsing the content and considering other aspects of

the practice from the outset, and, but for this misapplication, it stands to reason that the Martin County invocations should be within the sphere of permissible legislative prayers. (R. at 28-29).

C. The Board in Martin County is not required to exercise any control over the content of the legislative invocations, nor does the prayer practice coerce attendees into participating in a religious ceremony

The prayer-givers and their invocations in Martin County have been entirely free from control or restriction on the part of the local legislature. (R. at 10 & 18). This practice is consistent with this Court's ruling in *Lee*, where this Court made clear that government is prohibited from exerting control over the content of the invocations, even to restrict the invocations to nonsectarian content. *Lee*, 505 U.S. at 588; *See also Engel*, 370 U.S. at 425 (declaring that government has no place in composing prayer content). Therefore, it cannot be expected for Martin County to control or restrict the prayer-givers from speaking according to the dictates of the prayer-giver's own conscience. *Rubin*, 710 F.3d at 1089.

Moreover, the presence of sectarian references delivered by an individual prayer-giver at the fore of a legislative session does not amount to an attempt at coercing attendees into participating in any religion or its exercise. *See Marsh*, 463 U.S. at 792 (noting that attendees of a legislative session are not presumed to be susceptible to religious indoctrination or peer pressure); *see also Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 600 (1989) (noting that legislative prayer does not necessarily urge attendees to engage in religious practice). Sectarian invocations are still within the permissible range of language permitted by *Marsh*. *See Turner v. City Council of City of Fredericksburg, Va., 534, 536 F.3d 352* (4th Cir. 2008) (noting that prayers in *Marsh* included sectarian references and were still within the permissible range). Therefore, there can be no coercion because the attendees at the Martin County legislative sessions are free to come and go as they please, and are certainly able to excuse themselves from

participating in the invocations as their own consciences dictate. (R. at10 & 18).

CONCLUSION

As established by this Court in *Marsh*, the minimum threshold requirements to begin determining whether a prayer practice has violated the Establishment Clause are: 1) whether Martin County has exploited the prayer opportunity; and 2) whether an impermissible motive is present in the selection process. Due to Dhaliwal's inability to meet this threshold, this Court, consistent with its ruling in *Marsh*, should uphold that parsing the content of the invocations is prohibited, and that this Court should not consider the contextual effects of the practice. Martin County has neither coerced the attendees of its legislative sessions into participating in religious observance, nor has Martin County censored the content of the invocations or prohibited anyone from participating in the delivery of the invocations, Dhaliwal included. As a result, this Court should uphold the constitutionality of Martin County's legislative prayer practice. Further, this Court should find that Martin County's prayer practice is entirely consistent with our Nation's unique history of legislative prayer as discussed in this Court's historical analysis in *Marsh*. Nevertheless, should this Court consider the Martin County prayer practice in its totality, as outlined by the Second Circuit in Galloway, the inquiry should still be limited to the minimum threshold requirement, thus permissible under the Establishment Clause.

PRAYER

For these reasons, Petitioners prays this Court reverse the decision of the court below.

Counsel for the Petitioners

CERTIFICATE OF SERVICE

Counsel for Petitioners certifies that this brief has been prepared and served on all opposing counsel in compliance with the Rules of the Freshman Moot Court Competition.

Counsel for the Petitioners

CERTIFICATE OF COMPLIANCE

Counsel for Petitioners certifies that this brief has been prepared in compliance with the Rules of the Freshman Moot Court Competition and is between 4,200 and 4,800 words.

Counsel for the Petitioners