No. 12-798

In The Supreme Court of the United States

MARTIN COUNTY AND MARTIN COUNTY BOARD,
Petitioner,

v.

ANNE DHALIWAL
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Seventeenth Circuit

BRIEF FOR RESPONDENT

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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?

PARTIES TO THE PROCEEDING

The Defendants-Appellees below, who are the Petitioners before this Court, are Martin County, West Carolina and Martin County Board.

The Plaintiff-Appellant below, who is the Respondent before this Court, is Anne Dhaliwal.

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The opinion of the United States District Court for the Northern District of West Carolina is unreported but may be found on pages 27 through 29 of the appellate record. (R. at 27–29). The opinion of the United States Court of Appeals for the Seventeenth Circuit is also unreported but may be found on pages 32 through 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 38). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2000).

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 AND STATUTORY PROVISIONS INVOLVED

An excerpt from the First Amendment of the United States Constitution is included in the Appendix of this brief.

STATEMENT OF THE CASE

A. Board Meetings

The Martin County Board holds two public meetings per month. (R. at 12). In 1985, the Board implemented a practice of opening each meeting with a prayer or invocation. (R. at 27). One of the Board members commences each meeting by introducing the selected clergy. (R. at 2–5). For Christian chaplain, the Board members request the audience to stand, singling out any non-participants. *Id.* The Board proceeds directly from the invocation into the official meeting, offering the audience no distinction between the two. *Id.*

For citizens unable to attend, Martin County maintains videos and minutes of each meeting on its website for public access. (R. at 12). The videos are archived and can be viewed at anytime. *Id.* The online videos chronicle every aspect of the meeting including the prayer. *Id.*

Town citizens address the Board during the open comments portion of the meetings. (R. at 7, 13). During this time, the Board asks the individual to approach the podium microphone and allows the speaker five minutes to voice their concerns. (R. at 7). The Board responds immediately to the speaker with suggestions or commitments for future actions. *Id.*

B. Christian Prayers

Generally, the prayers given at the Martin County Board meetings are Christian. (R. at 13). The Board refuses to instruct the clergy or prevent faith specific references within the prayers. (R. at 13). However Martin County's lenient approach results in sermon-like invocations. (R. at 2–5). In 2011, countless Board meeting prayers incorporated excessive references to Christian deities and doctrines. (R. at 2–5). The Board's policy regarding the

content of the prayers ensures overtly sectarian invocations and offends the non-Christian audience members. (R. at 2–5, 13).

C. Clergy Selection

Volunteers working for the Board privately solicit clergy within Martin County to lead a prayer at one of the Board's meetings. (R. at 10). The volunteers record the interested congregations on an alphabetical list. *Id.* In preparation for the upcoming meeting, the Board selects a prayer giver from the alphabetical list of local clergy. *Id*. Although a conflict of interest, Board members may invite clergy from the congregation they regularly attend. (R. at 6). Chairman Gregg Doorley shows preference for his congregation by requesting his pastor to lead prayers. *Id*. The Martin County Board maintains no systematic procedures for selecting prayer leaders and no rules to prevent a conflict of interest. (R. at 6, 10).

D. The Dhaliwals

Shortly after moving to Martin County, Anne Dhaliwal attended Martin County Board meetings from May 2011 to September 2011. (R. at 13). On September 9, 2011, Manpreet Dhaliwal voiced his concerns to an uncooperative Chairman Gates. *Id.* During his open comment, Mr. Dhaliwal requested the Board cease the practice of commencing each meeting with openly sectarian prayers. *Id*. The Board commented that Mr. Dhaliwal's request was unusual but stated they would consider his request. *Id.* Following the September meeting, the Board ignored Mr. Dhaliwal's request. *Id*. On October 20, 2011, Ms. Dhaliwal wrote a letter, addressed to Chairman Benjamin Gates, reiterating Mr. Dhaliwal's concerns and requesting a meeting. *Id*. Chairman Gates ignored Ms. Dhaliwal's letter, claiming the Board only addresses requests made during the open comments section of the meetings. (R. at 10). Selectively adhering to its own policies, the Board effectively discriminated against the Dhaliwals. *Id*. The

Martin County Board continued to open its meetings with faith-based prayers, disregard the complaints, and create a futile pursuit for the Dhaliwals. (R. at 14).

E. Proceedings

Protecting her First Amendment right, Anne Dhaliwal filed suit against Martin County and the Martin County Board requesting that the court declare the prayers given at the Board meetings in violation of the U.S. Constitution and enjoining Martin County from permitting the prayer practice to continue or ordering the Board to censor the content of the prayers. (R. at 14–15). Martin County filed a motion to dismiss, claiming Dhaliwal did not assert a claim for which relief is possible. (R. at 10). On Martin County's motion to dismiss, the United States District Court for the Northern District of West Carolina rejected Dhaliwal's claim for an Establishment Clause violation. Relying on *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), the district court stated the practice is not coercive or a danger to Dhaliwal's rights under the First Amendment. (R. at 28–29).

Anne Dhaliwal appealed the district court's dismissal. (R. at 31). The United States Court of Appeals for the Seventeenth Circuit performed an analysis, which looked beyond *Marsh* to the subsequent Establishment Clause violation cases. (R. at 32–34). Settling on the "totality of the circumstances" test from *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2nd Cir. 2012), the Seventeenth Circuit concluded Martin County's prayer practice constituted a violation of the First Amendment Establishment Clause. (R. at 32–33). Accordingly, the appellate court reversed the district court's judgment and remanded the case. *Id.*

Martin County filed the petition for certiorari, and this Court granted certiorari certifying two questions for argument: (1) Did the appeals court apply the correct legal standard; and (2)

Does the Martin County legislative prayer practice violate the First Amendment Establishment Clause? (R. at 37).

SUMMARY OF THE ARGUMENT

I.

The district court erred in applying the *Marsh* one factor historical analysis. The historical analysis merely focuses on one insignificant feature of the prayer practice, that it's historic. Reviewing only one aspect of a potential Establishment Clause violation is insufficient. One factor evaluations result in the impermissible approval of unconstitutional practices. Thus, the historical analysis leads to inequitable verdicts, burdening the judicial system.

The Seventeenth Circuit properly broadened its analysis to the "totality of the circumstances." The totality standard is especially practical for fact specific cases because it objectively reviews all aspects of a potential Establishment Clause violation. Features of the practice may not individually constitute a violation. However when viewed in its entirety, the practice brazenly violates the First Amendment. Therefore the totality standard is the only functional test resulting in impartial judgments.

II.

Martin County's prayer practice is unconstitutional because it endorses Christianity and affiliates the Board with one religion, disfavoring all others. The Board makes no effort to (1) neutralize the content of the prayers; (2) modify its clergy selection procedures; (3) separate itself from the messages within the prayers; and (4) refrain from requesting audience participation in the prayer. Viewed in total, the Board's practice disregards the Establishment Clause and infringes upon Anne Dhaliwal's First Amendment rights. Left unrestrained, Martin

County's practice will create insurmountable public policy concerns and unravel the fabric of our nation.

ARGUMENT

I. THE CORRECT LEGAL STANDARD, APPLIED BY THE SEVENTEENTH CIRCUIT, IS TO ANALYZE THE "TOTALITY OF THE CIRCUMSTANCES"

The drafters of the Bill of Rights created the First Amendment's Establishment Clause to prevent the government from creating and maintaining one national religion. U.S. CONST. amend. 1. *See generally Everson v. Bd. of Educ.*, 330 U.S. 1, 10–13 (1947) (discussing the original purpose of the clause). Since 1947, this Court continues to mold its interpretation of the Establishment Clause. *Id.* In *Everson v. Board of Education*, the Court proclaims a wall should separate religion and the government. *Id*. Justice Blackmun concludes the Establishment Clause prohibits the government from aiding or advancing any particular religion in *County of Allegheny v. ACLU*, 492 U.S. 573, 590–91 (1989). Additionally, this Court cautions any government entity, with or without intent, appearing to prefer one religion over others will violate the Establishment Clause. *Id. at* 597. The government may not (1) discriminate against individuals based on their religious preferences; (2) assign governmental authority to any church or other divine institution; and (3) partake in considerable association with a religious institution. *Id.* Lastly, the Establishment Clause protects and embraces every citizen's freedom to choose one religion, many religions or non-religion. *See McCreary Cnty. v. ACLU*, 545 U.S. 844, 859 (2005); *accord Zeiman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (maintaining world peace requires understanding and respect for diverse religions).

A. The Three Part Test From *Lemon* Provides the Foundation for the Proper Legal Standard

There are primarily four tests to determine whether a violation of the Establishment Clause exists. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (establishing a 3 prong test); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (evaluating the historical reference only); *Allegheny*, 492 U.S. at 594 (creating the "endorsement test"); *Galloway*, 681 F.3d at 30 (developing the "totality of the circumstances" test). In *Lemon*, 403 U.S. at 612, this Court established its first test for an Establishment Clause violation, evaluating two state statutes providing financial aid to religious private schools. *Id.* Chief Justice Burger provides a systematic three prong test to determine a violation of the First Amendment. *Id.* The practice must (1) contain a "secular legislative" motive; (2) not promote or restrain religion as its primary purpose; and (3) not lead to unrestrained "entanglements" of government and religion. *Id.* To be deemed constitutional, a practice must satisfy all three parts of the *Lemon* test. *Id.*

After 1971, the Court utilized the three part test in numerous First Amendment cases. *See McCreary*, 545 U.S. at 859–63 (utilizing the first prong of the *Lemon* test to rule two Ten Commandment displays unconstitutional); *Bowen v. Kendrick*, 487 U.S. 589, 602–17 (1988) (using the *Lemon* test to uphold a congressional statute); *Edwards v. Aguillard*, 482 U.S. 578, 585–90 (1987) (invalidating a Louisiana statute with the *Lemon* test). Although never overturned or invalidated, the *Lemon* test possesses no practical application in today's fact specific cases, and this Court has not applied the test for decades. *Lynch v. Donnelly*, 465 U.S. 668, 678–79 (1984).

B. The Totality Standard from *Galloway* is Practical, Equitable and Promotes Legal Efficiency

Almost two decades after *Lemon*, this Court again formulated a standard for violations of the Establishment Clause in *County of Allegheny*, 492 U.S. at 594. Expanding on the third prong of the *Lemon* test, this Court embraced the "endorsement test" and examined the crèche and

menorah displays in their contextual locations on government property to determine if they gave the impression of endorsing or rejecting a particular religion. *Id.* Refining the *Lemon* test's intent-based analysis, the reasonable person standard set forth in *Allegheny* examined the practice from an audience perspective, making the endorsement standard easily applicable to diverse cases. *See id*. (concluding a government action, regardless of intent, must not appear to associate the government with any particular religion); *Lynch*, 465 U.S. at 678–79 (recognizing only a fraction of any audience will perceive the intended message while others understand the "objective" meaning).

Historical relevance, which led to the holding in *Marsh*, was only one aspect evaluated with the endorsement standard. *Allegheny*, 492 U.S. at 603 (applying the *Marsh* standard would legitimize any unconstitutional practice merely because of its traditional significance). *Contra Marsh*, 463 U.S. at 786 (upholding legislative prayer because the practice is firmly rooted in the customs of the United States). However in *County of Allegheny*, 492 U.S. at 603, this Court emphasized history alone will not validate an unconstitutional practice. Thus, a one factor analysis is not appropriate for Establishment Clause violation cases. *Id*. Potential violations must be reviewed as a whole not based on one feature alone. *Id.*

Following *Allegheny*, the United States Court of Appeals for the Second Circuit applied an endorsement style "totality of the circumstances" standard in *Galloway*, 681 F.3d at 30. The Second Circuit reviewed the prayer practice of the town meetings using the reasonable person's standard. *Id*. at 22. Although no one feature was unconstitutional, the court held the entire practice gave rise to an Establishment Clause violation. *Id*. at 26. Supporting its ruling, the Second Circuit noted three issues: (1) the "prayer-giver selection process"; (2) the substance of the prayers; and (3) the "actions and inactions" of prayer leaders and Board members. *Id*. at 30.

The court illustrated the ease of applying the totality standard: if a reasonable person views the prayers and concludes the government affiliates, endorses, promotes, or "disparages" one religion, the practice is unconstitutional. *Id*. at 31. The *Galloway* standard is the most functional and reasonable test for possible violations of the Establishment Clause. *See id*. at 30 (noting the impracticability of applying a strict legal test to fact specific cases); *See also Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (rejecting the concept of a test replacing "legal judgment" in Establishment Clause violation cases).

C. The Historical Analysis Set Forth in *Marsh* is Inadequate and Should Not Be Adopted

Six years before developing the endorsement standard, a member of the Nebraska legislature challenged the constitutionality of opening each session with a prayer. *Marsh*, 463 U.S. at 784–85. Focusing on the historical significance of the practice, this Court held the drafters of the Establishment Clause opened their own sessions with a similar prayer and certainly did not view it as a violation of the First Amendment. *Id*. at 787-88. Therefore, the Court validated Nebraska's legislative prayer practice. *Id*. at 791.

While deciding *Marsh*, the Court looks at a very narrow set of facts. *Galloway*, 681 F.3d at 24. The Court concluded the prayers were not favoring or "proselytizing" one religion over others and as a result, refused to apply the precedential *Lemon* test. *Marsh*, 463 U.S. at 794–95. Instead, the analysis focused on only the historical relevance of the practice. *Id*. The decision did not delve into analyzing the content of the prayers. *Id*. Justice Stevens asserts the Court avoids the content because it is unable to account for the numerous faith-based references within the prayers. *Id*. at 823. *Marsh* does not provide guidance regarding any additional factors, such as the limitations of Establishment Clause and the constitutionality of content within the prayers. *Id*. at 794–95.

The *Marsh* standard analyzes only one aspect of the many utilized in the *Allegheny* "endorsement test." *Allegheny*, 492 U.S. at 603. According the Justice Brennan, the obsession with history led this Court to overlook the essence of prayer. *Marsh*, 463 U.S. at 797. By definition, prayers are unmistakably religious. *Id*. As a result, the *Marsh* standard will lead to a government's blatantly unconstitutional act being overlooked based on the unbalanced reliance of a one factor analysis. The largest pitfall of *Marsh* is six years following the decision this Court decided to forego the *Marsh* standard in deciding *Allegheny*, 492 U.S. at 594. Therefore, *Marsh* is an unrepeatable verdict applied to a fact intensive case with no significant precedential value. *See McCreary Cnty.*, 545 U.S. at 860 (alluding to *Marsh* is a specially made verdict that permitted a practice even though the motive was "presumably religious"); *See also Lynch*, 463 U.S. at 695 (dismissing *Marsh* as the sole inconsistency in Establishment Clause violation cases).

This Court established the *Lemon* test to systematically evaluate violations of the Establishment Clause. *Lemon*, 403 U.S. at 612. After the *Lemon* test proved difficult to apply, Chief Justice Burger attempted to resolve the constitutionality of legislative prayer using merely history. *Marsh*, 463 U.S. at 784–85. Recognizing a one factor analysis was insufficient, Justice Blackmun molded the third prong of the *Lemon* test into the "endorsement test" in *Allegheny*, 492 U.S. at 594. Echoing the *Allegheny* test, the Second Circuit developed the comprehensive and workable totality test in *Galloway*, 681 F.3d at 30. The *Galloway* test is simple: when viewed in its entirety by a reasonable person, the practice must not advance or condemn any faith or belief. *Id*.

II. MARTIN COUNTY'S LEGISLATIVE PRAYER PRACTICE VIOLATES THE FIRST AMENDMENT ESTABLISHMENT CLAUSE THEREBY UNLAWFULLY REVOKING DHALIWAL'S FUNDAMENTAL RIGHT

According to *Marsh*, 463 U.S. at 791, the government may open legislative sessions with a prayer. However in *Allegheny*, 492 U.S. at 597, Justice Blackmun clarifies the government may not use the prayer practice to endorse or advance one religion. Additionally, the Establishment Clause prohibits government appearance of favoring or criticizing any religion. *Id.* No government entity may interfere with the freedoms provided by the Establishment Clause, such as the right to a religious preference without discrimination. *McCreary Cnty.*, 545 U.S. at 859.

A. Martin County's Prayer Practice Requires an Analysis Under the Totality Standard

To evaluate a potential violation of the First Amendment Establishment Clause, four primary tests exist: the *Lemon* three prong test, the *Marsh* historical analysis, the *Allegheny* "endorsement test," and the *Galloway* totality standard. *See generally Galloway*, 681 F.3d at 14–30 (providing a history of Establishment Clause violation cases). This Court abandons the *Lemon* test after struggling to apply it to modern fact intensive cases. *Lynch*, 465 U.S. at 678-79. The *Marsh* historical analysis proves inadequate and inapplicable to this case. *See id*. at 695 (discussing *Marsh* and its lack of precedential value). Therefore the Martin County Board's prayer practice must be evaluated using the totality standard from *Galloway* and the very similar endorsement analysis set forth in *Allegheny*. *Galloway*, 681 F.3d at 29.

B. The Aggregate of Martin County's Prayer Practice Constitutes a Violation of the Establishment Clause

Viewed comprehensively, Martin County's prayer practice is problematic. First, the references within the prayers held at the Martin County Board meetings are overtly sectarian and offensive. *See Galloway*, 681 F.3d at 30 (evaluating the substance of the invocations). The Martin County Board opens the majority of their meetings with Christian faith-based prayers.

(R. at 13). In 2010, Christian clergy led the invocation over eighty-one percent of the time. *Id.* From May to September 2011, non-Christian chaplain led only two prayers. *Id.* Additionally, all but one prayer incorporated excessive sermon-like references to Christian deities and doctrines. (R. at 2–5). Three Martin County prayer presenters were particularly offensive to non-Christian audience members. *Id.* Incorporating the audience, Father Samuelson's directed his invocation to "Our Heavenly Father." (R. at 2). Reverend Hector Ramirez assumed the audience's beliefs were similar to his own when he used "us," "our" and "we" extensively throughout his prayer. (R. at 4). Julie Lane outrageously requested clarity while "we" continue to construct the Lord's kingdom. (R. at 4).

The Board does nothing to prevent discrimination by censoring the content of the invocations, and as a result, the unrestrained references clearly derogate non-Christian religions. *Compare Lee v. Weisman*, 505 U.S. 577, 588 (1992) (observing prayers with faith intensive references are frequently viewed as antagonistic), *with Galloway*, 681 F.3d at 31 (asking audience members to pray in the name of Christian deities is a loaded request), *and Wynne v. Town of Great Falls*, 376 F.3d 292, 300 (4th Cir. 2004) (invoking gods specific to one faith is prejudicial). Martin County's predominantly Christian prayer practice places governmental approval on one religion, isolating Anne Dhaliwal and other non-Christians. *Galloway*, 681 F.3d at 31–32; *See also Zeiman*, 536 U.S. at 720 (allowing only prayers of Protestant faith discriminated against non-Protestants).

Second, Martin County's clergy selection procedures are arbitrary and produce skewed results. *See Galloway*, 681 F.3d at 30. (reviewing the process for choosing clergy). In an affidavit submitted to the Seventeenth Circuit, Chairman Benjamin Gates vaguely describes the procedures. (R. at 10). According to Gates, volunteers send letters to clergy within the county

inviting them to participate in the prayer. *Id*. After the clergy responds with interest, their name is included on the alphabetical list held by Martin County. *Id*. Once a month, the Board selects the next month's chaplains from the alphabetical list and sends a letter requesting their attendance. *Id.*

Choosing clerics within Martin County substantially limits the diversity of the prayers and ensures non-Christian religions will be ignored. *See Galloway*, 681 F.3d at 27 (selecting clergy within the town resulted in exclusively Christian prayer leaders). Additionally, Martin County's lack of formal procedures provides no guidance for selecting and inviting clergy. (R. at 10). The non-public invitations sent to a few local clergy, selected by the Board's volunteers, restrict the list of potential prayer leaders, leaving the diverse community misrepresented. *See Galloway*, 681 F.3d at 27 (publicizing the opportunity to lead invocations is a more acceptable method). Martin County's unsystematic and informal selection process supports a violation of the First Amendment. *Id*.

Third, the Martin County Board's conduct aligns the town officials with the messages contained in the prayers. *See id*. at 32 (examining the activities of the clerics and Board members). The Board offers the audience no explanation regarding the purpose of the prayer or distinction between the meeting and invocation. (R. at 2–5). One of the Martin County Board members begins each session by asking the audience to stand for the Christian based prayers. *Id*. However for the non-Christian invocations, the Board member merely offers the option to stand if the audience prefers. *Id.*

The Martin County Board's refusal to offer clarification affiliates the Board with the Christian prayers. *See Galloway*, 681 F.3d at 30 (disassociating the prayers from the meetings is the Board's responsibility). Further, the Board requests Dhaliwal's and other attendees'

participation in the Christian prayers and places non-believers in a state of inner turmoil. *See id.* at 32 (recognizing the audience's difficult position). Non-Christian attendees, such as Dhaliwal are confronted with the dilemma of abandoning their own beliefs or publicly disregarding the request of the Board. *Id.* Anne Dhaliwal's and other reasonable attendees' participation in the meeting is subject to their standing for the prayer. *Id*. This pressure to conform is the type of discrimination experienced by the drafters of the First Amendment and the very rationale underlying the Establishment Clause. *Everson*, 330 U.S. at 10–13. The Martin County Board's requests to stand for the prayers show preference to the Christian faith, pressures the audience to favor Christianity, discriminates against individuals with contrary beliefs and violates the Establishment Clause. *See Galloway*, 681 F.3d at 32–33 (illustrating the attendee's reasonable inferences resulting from the Board member's request).

Through overtly Christian references within the prayers, unsystematic selection procedures and conduct of the members, the Martin County Board expresses a preference for Christianity. *Id*. at 30. Viewed in its entirety by a reasonable person, the invocations align the Board with one religion, violating the Establishment Clause. *Id*. Pressuring Dhaliwal to suppress her own beliefs for purposes of participating in the meetings, the Martin County Board denies her fundamental right to practice any religion without government discrimination. *See Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) (noting the First Amendment religion clauses have a symbiotic relationship, protecting each citizen's right to select their own beliefs and to reject the predominant religion).

C. Public Policy Concerns Support Adopting the Totality Standard

In *Marsh*, the Court evades the *Lemon* test by focusing on a one factor analysis and approves a practice with conspicuous spiritual motives. *McCreary Cnty*., 545 U.S. at 860. In

Lynch, 465 U.S. at 695, Justice Brennan asserts *Marsh* uniquely deviated from the typical evaluation of Establishment Clause cases. The *Marsh* analysis is distinctive, and although frequently referenced, this Court has never repeated the analysis in any subsequent cases. *See id.* (applying *Marsh* analysis to no other cases and anticipating no future departures from the accepted standards). The facts of the *Marsh* case, evaluated by the standards developed in *Lemon*, *Allegheny* and *Galloway*, prove to be a violation of the Establishment Clause. *See Marsh*, 463 U.S. at 796 (disapproving *Marsh* under the *Lemon* test); *See also Allegheny*, 492 U.S. at 594 (developing the *Lemon* test's third prong into the "endorsement test"); *Galloway*, 681 F.3d at 30 (progressing from the "endorsement test" to the similar totality standard). The *Marsh* opinion forms an exception to precedent and shockingly approves a violation of the First Amendment. *Marsh*, 463 U.S. at 796. As a result, the *Marsh* standard promotes an unjust and inconsistent judicial system full of arbitrary verdicts. *Id.*

Incorporating *Lemon* and *Allegheny*, the totality standard of *Galloway* fairly and objectively evaluates the entire situation. *Galloway*, 681 F.3d at 30. Martin County does not censor the prayers and is unable to control every word spoken by the selected clergy. (R. at 10). As a result, the constitutionality of the prayer practice should not be judged solely on the content of the prayers. *See Galloway*, 681 F.3d at 34 (holding individually, the features of the invocation practice did not constitute a violation, but viewed in total, the practice is unconstitutional). However, Martin County is able to control other aspects of the practice, such as the chaplain selection process and preventing their behavior from associating the Board with the prayers. *Id.* The totality standard allows Martin County and other government entities to offset aspects outside of their control with ones inside their control, resulting in predictability in the law. *See id.* (indicating the excessive Christian based references within the prayers were not enough to

violate the Establishment Clause). Thus, the "totality of the circumstances" test provides equitable judgments and encourages efficiency in the judicial system.

Society demands predictability and structure within the law. *Teague v. Lane*, 489 U.S. 288, 331 (1989). Precedent is crucial in the United States judicial system because it promotes efficiency and provides the structure by which citizens are able to predict the outcome of their behaviors. *Id*. More importantly, precedent ensures individuals receive fair treatment without arbitrary, unreliable verdicts. *Id*. While the *Marsh* standard undermines the American legal system, the *Galloway* totality test advances society's interests.

CONCLUSION

Religious freedoms are the first fundamental rights secured by the drafters of the Bill of Rights. The First Amendment promises all citizens the right to choose their own beliefs without government interference. Martin County, through its prayer practice, is promoting Christianity at the expense of all other religions and unlawfully violating Anne Dhaliwal's First Amendment rights. For the preceding reasons, Dhaliwal requests this Court affirm the Seventeenth Circuit's judgment.

Respectfully submitted,

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March 7, 2014

CERTIFICATE OF SERVICE

I, Katie Neidig, Counsel for Respondent certify this brief has been prepared and served upon all opposing counsel in compliance with the Rules of the Freshman Moot Court Competition.

_____

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CERTIFICATE OF COMPLIANCE

I certify the Brief for Respondent contains 4,268 words, starting from the beginning (first word) of the statement of the case section and ending with the end (last word) of the conclusion.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Katie Neidig

APPENDIX

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

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.