No. 12-696a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2012

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 THE RESPONDENT

Nadine Rodriguez

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether First Amendment Establishment Clause analysis should be governed by *Galloway v. Town of Greece,* 681 F.3d 20 (2012) and the "totality of circumstances approach?"

II. Whether application of the governing legal standard and its progeny render the petitioner's legislative prayer unconstitutional under the First Amendment Establishment Clause?

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TABLE OF AUTHORITIES

OPINION BELOW

The opinions of the District and Appeals Courts have not been reported but appear in the record.

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.*

JURISDICTION

The court of appeals entered judgment on February 1, 2013. R. 34. Petitioner filed his petition for writ of certiorari on February 7, 2013. R.35. This Court granted the petition on May 20, 2013. R. 37. This Court's jurisdiction rests on 28 U.S.C. § 1254 (1) (2000).

STATEMENT OF THE CASE

A. Factual Background

Mrs. Dhaliwal and her family moved to Martin County in April of 2011. R. 13. A month later, Mrs. Dhaliwal took interest and began actively participating in the County's politics by attending its weekly Board meetings. R.13. While in attendance, she noticed a pattern of the meetings being opened with prayers. R.7. She learned the County board adopted the prayer practice in 1990. R. 12. A vast majority of these prayers, with the exception of two, were Christian-led and contained references to Christian tenets. R.13. As an adherent to Sikhism, Mrs. Dhaliwal does not believe in converting or preaching the gospel to people, thus these practices made her feel uncomfortable. R. 7. She and her husband respectfully voiced multiple concerns regarding the sectarian prayers. R.7, 9. None of their concerns were heeded. R.9. Rather, they were told their request for a neutral practice forbidding sectarian reference was unusual. R.8.

The Board does not limit the content of the prayers. R.10. Its only instruction is that invocations be less than five minutes, while limiting its selection process to be within the borders of Martin County, which is predominately Christian. R.10. 13. Furthermore, Martin County's prayer practice requires all attendees to stand during Christian-led prayers but not during the non-Christian-led prayers. R. 12, 13. As a result, Mrs. Dhaliwal feels that she and other attendees are forced to partake in prayers in order to participate in the Board meetings. R.13. As a minority, Mrs. Dhaliwal feels unwelcomed and an outsider in her community, since she does not adhere to the same belief. R.14. Additionally, Martin County's letter inviting clerics to give the invocation illustrates its preference and endorsement of Christianity. R. 6. Mrs. Dhaliwal raises constitutional concerns regarding the Martin County's prayer practice and its government endorsement of Christianity. R.14. She maintains that Martin County explicitly endorses Christianity as the preferred religion and

B. Procedural Background

Mrs. Dhaliwal brought a civil action under 42 U.S.C. §1983 against Martin County Board asserting a violation of her First Amendment right. R.14. She moved for a declaratory judgment stating Martin County's prayer practice violates the Establishment Clause and an injunction to enjoin it from allowing sectarian prayers at its meetings. R.14. The district court denied Mrs. Dhaliwal's claim and granted Martin County's motion to dismiss based on *Marsh v. Chambers*, finding the prayer practices did not infringe on attendees' religious freedom, thus did not violate the constition. R.28-29. Mrs. Dhaliwal appealed the judgment of the district court. The Court of Appeals, which applied the "totality of the circumstances" approach endorsed in *Galloway v. Town of Greece*, reversed the decision and concluded Martin County's prayer practice violated the Establishment Clause. R.33. This Court granted certiorari. R.37.

SUMMARY OF THE ARGUMENT

I.

The governing legal standard for Establishment Clause case analysis is *Lemon* and its progeny. Using *Lemon*, the United States Supreme Court has held the practice of opening governmental meetings with an invocation is constitutional, so long as it does not endorse a particular preference for a religion or coerce an individual to take part in religious activities against their beliefs. To ensure that prayer practices fall within the safeguards of the First Amendment and align with *Lemon*, the United States Supreme Court held prayers must be non-sectarian in nature to pass constitutional scrutiny.

II.

Martin County's Board practice of opening its meetings with an invocation violates the First Amendment Establishment Clause. Its narrow process has and will continue to cause overwhelming Christian-led invocations, which illustrates a government endorsement of religion by preferring Christianity over other creeds. Furthermore, the practice forces attendees, such as Mrs. Dhaliwal, to adhere to a faith that she does not believe in and causes minorities to feel excluded and unwelcomed in their community.

Argument

I. THE PRACTICE OF OPENING GOVERNMENT MEETINGS WITH AN INVOCATION IS GOVERNED BY THE LEGAL STANDARDS IN *LEMON* AND ITS PROGENY

The practice of opening government meetings with legislative prayer as an invocation is governed by the legal standards promulgated by this Court in *Lemon* in order to ensure that individual's constitutional rights are not infringed upon. Non-sectarian legislative prayers ensure the protection of free exercise of religion, while safeguarding against government endorsement of religion, which could potentially coerce an individual into participating in a religious exercise. See *Lee v. Weisman*, 505 U.S. 577, 604 (1992).

A. Tensions within the First Amendment

The assurances set forth in the United States Constitution are the cornerstone of which the United States of America was founded. *See Sch. Dist. of Abington Twp v. Schempp*, 374 U.S. 203, 212-13 (1963). The Establishment Clause and Free Exercise Clause were incorporated into the Constitution in order to fasten religious freedom; however, the distinction between the two is evident and cannot be ignored. *See Lee,* 505 U.S. at 604. The purpose of the Establishment Clause is to forbid "government speech endorsing religion," while the Free Exercise Clause allows "private speech endorsing religion." *Santa Fe Indep. Sch. Dist. v. Doe,* 590 U.S. 290, 301 (2000); *accord Marsh v. Chambers*, 463 U.S. 783, 800 (1983).

Our history illustrates the struggle between permitting the free exercise of religion and crossing the line to a violation of the Establishment Clause. *Compare McCreary Cnty v. Am. Civil Liberties Union of Ky*, 545 U.S. 844, 880 (2005) (holding display of Ten Commandments at county courthouse is unconstitutional), *with Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (finding Texas' display of Ten Commandments holds secular purpose and is thus constitutional).

The difficulty of striking a balance between the Establishment and Free Exercise Clauses has now materialized in legislative prayer cases. *See Turner v. City Council,* 534 F.3d 352 (4th Cir. 2008.), *cert denied,* 555 U.S. 1099 (2009). Ultimately, it is possible to protect against government-established religion without sacrificing individual freedom of religion rights. *See Joyner v. Forsyth Cnty,* 653 F.3d 341 (4th Cir. 2011.), *cert. denied,* 123 S. Ct. 1097 (2012) (holding legislative prayers constitutional if non-sectarian). However, it is imperative that the principles of the Establishment Clause are not taken lightly, since its principle purpose was to avoid the destruction of our government by unionizing with religion. *See Engel v. Vital,* 370 U.S. 421, 428 (1962).

B. *Lemon* and its progeny provides the governing legal standard

In 1971, the Court articulated the three-prong *Lemon* test to determine if a statute or practice violates the Establishment Clause of the First Amendment. *See Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971). In order to survive constitutional scrutiny, the challenged statute or practice must have a secular purpose; the primary effect cannot advance nor inhibit religion; and it cannot foster excessive entanglement. *See Lee,* 505 U.S. at 602. The factors in the *Lemon* test are now regarded as "helpful signposts" and its basic principles are still utilized by the Court. *See Van Orden*, 545 U.S. at 685.

The Court in *County of Allegheny v. American Civil Liberties Union,* expanded the effect prong of the *Lemon* test to consider whether the contested government action has the purpose or effect of "endorsing or disapproving" certain religious beliefs. 492 U.S. 573, 592 (1989). In *Allegheny*, the American Civil Liberties Union sought to enjoin the county from displaying a crèche in its courthouse and a menorah in front of the City-County building. *See id.* at 578. In determining the constitutionality of these symbols, the Court considered whether they conveyed

or attempted to convey the message that a particular religious belief was preferred. *Id.* at 592-97. In doing so, the Court sought to ensure that no one felt alienated and unwelcomed into his or her "political community." *Id.* at 594. The Court held that the crèche, standing alone conveyed a religious message, which violated the Establishment Clause. *Id.* at 597. By contrast, the menorah withstood judicial scrutiny because it recognized "cultural diversity." *Id.* at 597-618. Thus, the Court ruled that the test to determine whether a legislative practice violated the Establishment Clause is to ask whether it has the effect of "endorsing religious beliefs." *Id.* at 594.

The Court in *Lee* further expanded the definition of "effect" under the *Lemon* analysis to prohibit those acts which cause citizens to feel coerced to participate in religious activities against their beliefs. *See Lee,* 505 U.S. at 596. In *Lee,* a student and her father sought to prohibit her middle school from including invocations at public school graduations. *Id.* at 582. The Court ruled that the test to determine whether government practices had the effect of endorsing religion is to inquire whether it pressures anyone to support or participate in religion or its exercise. *Id.* at 585. They held that by forcing students to stand and maintain respectful silence, the school publicly pressured and coerced them to endorse a religion. This, the Court ruled, violated the Establishment Clause. *See id.*

Martin County's practice of opening their Board meetings with sectarian prayers similarly violates the Establishment Clause when considered in light of *Allegheny* and *Lee*. By opening each meeting with prayers that contain specific Christian references, the Board conveys the message that Christianity is the majority religious preference over any other belief. *See Joyner v. Forsyth Cnty*, 653 F.3d 341, 354 (4th Cir. 2011). When Mrs. Dhaliwal participates in County affairs, the county's prayers serve as a reminder that her Sikh religion is secondary to Christianity. This is the specific harm condemned by the Court. *See Allegheny,* 492 U.S. at 621.

Furthermore, Martin County has established a forum at a government-sponsored event, which is similar to a state decree of religion. *See Lee,* 505 U.S. at 577. Mrs. Dhaliwal, a citizen of Martin County, is pressured to participate in sectarian prayers in order to participate in the Board meetings. *Id.* at 591. Not only can she not exercise her political right to participate in her community legislation without fear of repercussion due to her minority beliefs, but she is made to feel like an outsider and unwelcome in her own community. *See Lynch v. Donnelly,* 465 U.S. 668, 687 (1984). This is the specific harm condemned by the Court. *See Lee*, 505 U.S. at 594.

Collectively, the endorsement test applied in *Allegheny* and the coercion test applied in *Lee* supply the controlling test for evaluating the case at hand. Both of these principles establish that overtly sectarian prayers are unconstitutional under the Establishment Clause because sectarian prayers can, and do, in the instant case, show a governmental body's endorsement of one religion and cause a citizen to feel coerced into participating in offensive religious activities. *See id.* at 577.

C. *Marsh* Precluding Sectarian Prayer

There has been a single occurrence in which the Court has deviated from the basic principles set forth in *Lemon. See Marsh*, 463 U.S. at 789. In *Marsh*, the Court held that the state's legislative practice of opening with an invocation did not violate the Establishment Clause because they did not "exploit, proselytize, or advance" any one religion. *See id.* at 792. The *Marsh* Court itself recognized that "historical patterns" do not support the violation of the constitutional provisions set forth in the First Amendment. *See id.* at 789. The fact that *Marsh* does not adhere to any of the "formal tests" that have controlled our Establishment Clause analysis suggests that it is an "exception to the Establishment Clause" rather than "reshaping the doctrine" for sectarian legislative prayer. *Id.* at 795. Thus, the decision in *Marsh* should be

viewed as a "narrow and careful opinion" regarding the application of the constitutionality of legislative prayer to only allow non-sectarian prayer. *Id.*

The practice of opening legislative meetings with non-sectarian prayers was found constitutional in *Marsh,* when the Court noted the prayers in *Marsh* were formed within the safeguards of the First Amendment because the particular chaplain had "removed all references to Christ." *Allegheny,* 492 U.S. at 602; *Hinrich v. Bosma,* 440 F.3d 393 (7th Cir. 2006), *vacated,* 506 F.3d 584 (7th Cir. 2007) (dismissing for loss of standing). Thus, *Marsh* must be read to hold that the only constitutional legislative prayers are those that are non-sectarian. *See id; see also Turner v. City of Council,* 534 F.3d 352, 356 (4th Cir. 2008) (holding board's policy to only allow non-sectarian prayer constitutional); *Wynne v. Town of Great Falls,* 376 F.3d 292 (4th Cir. 2004.), *cert denied,* 545 U.S. 1152 (2005) (holding legislative prayers constitutional so long as they do not discriminate against views of others).

Various lower courts have affirmed *Allegheny's* reading of *Marsh* precluding sectarian prayer. In *Joyner v. Forsyth County,* the court held the county's prayer practices displayed a preference for Christianity, thus unconstitutional. 653 F.3d at 344; *see also Stein v. Plainwell Community Sch.,* 822 F.2d 1406, 1409 (6th Cir. 1987) (holding *Marsh* permits only nonsectarian prayers). The Forsyth County Board instructed all guest clerics to maintain a "spirit of respect" for those attending the meetings and they sought to be inclusive by limiting the amount of times any one religious leader could deliver the invocations to two meetings per year. *Id.* Nonetheless, the court found that, in order to survive constitutional scrutiny, legislative prayer must "strive to be nondenominational." *Id.* at 348.

Similarly, in *Hinrich v. Bosma,* the court found invocations given at Indiana House meetings unconstitutional because they were sectarian. 404 F.3d 393, 395 (7th Cir. 2006). A

taxpayer raised the issue of whether Christian prayers at official Indiana House meetings violated the Establishment Clause. *Id.* Despite attempts to diversify guest clerics, the majority of the invocations given at Indiana House referenced Christian deity, thus the Court found that they violated the First Amendment. *See id.*

Conversely, there are some circuit courts that do not read *Marsh* as permitting only nonsectarian prayers. The court in *Pelphrey v. Cobb County* found some prayers by the Planning Commission unconstitutional based on the selection procedures. 547 F.3d 1263, 1277 (11th Cir. 2008). In *Pelphrey*, the court considered whether the selection process was based on an "impermissible motive," and if the prayers advanced a single religion. *Id.* The court in *Pelphrey* ruled only certain prayers to be unconstitutional because the selection procedure excluded some faiths from presenting the invocation. *Id.* Pelphrey read *Marsh* as only allowing judges to examine the content of prayers when they are used to "exploit or proselytize" any one belief over another, however, no high court has affirmed this reading. *Id.* at 1275.

A more recent circuit court decision has implemented a new approach for examining whether legislative prayer violates the Establishment Clause. In *Galloway v. Town of Greece*, the court reversed a summary judgment that favored the Town of Greece, in order to apply a "totality of circumstances approach." *Galloway v. Town of Greece*, 681 F.3d 20 (2nd Cir. 2012) *cert. granted,* 133 S. Ct. 2388 (U.S. May 20, 2013) (No. 12-696.) The court looked at the prayer selection process to consider the content of the prayers, and evaluate whether a sectarian act violated the Establishment Clause. *Id.* at 29. The court held that if a legislative prayer conveys to a "reasonable observer" that there is a preference for religious beliefs, those prayers violate the Establishment Clause. *Id.*

Although some lower courts do not explicitly read *Marsh* as only allowing non-sectarian

prayers and have implemented other measures of examining the constitutionality of sectarian prayers, the Supreme Court has applied *Marsh* to only allow those prayers that are non-sectarian. *See Lee* 505 U.S. 577, *Allegheny* 492 U.S. 573. Thus, these are the legal standards the Court must incorporate in the case at hand. The application of *Marsh* as precluding sectarian prayers has not failed in protecting the fundamental rights allocated by the United States Constitution and the Court should not deviate from those standards now. Therefore, the Court should apply the *Lemon* and its progeny to conclude that Martin County's prayer practice violates the Establishment Clause.

II. MARTIN COUNTY'S PRACTICE OF OPENING GOVERNMENTAL MEETINGS WITH AN INVOCATION VIOLATES THE ESTABLISHMENT CLAUSE.

The constitutional harm of allowing sectarian prayer is that it has the effect of endorsing a preference for one religion and coercing individuals to participate in religious exercises against their beliefs. Under the expanded effect prong of the *Lemon* test, the Supreme Court has ruled governmental practices cannot endorse religion by conveying or attempting to convey the message that a particular religious belief is preferred and it cannot pressure anyone to support or participate in religion or its exercise. *See Cnty of Allegheny v. Am. Civ. Liberties Union,* 492 U.S. 573, 592 (1989); *Lee v. Weisman,* 505 U.S. 577, 585 (1992). Furthermore, the Court in *Marsh* prohibited the selection of speakers based on the "impermissible motive" of preferring certain beliefs to others. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Thus, Martin County's prayer practice must be viewed as a government endorsement of religion and a violation of the First Amendment's Establishment Clause.

A. Martin County's selection process results in overwhelmingly Christian prayer

The process employed by the governmental agency in soliciting guest clerics to deliver the opening invocation serves a vital role in determining the constitutionality of the challenged practice. *See Joyner v. Forsyth Cnty*, 653 F.3d 341 (4th Cir. 2011.), *cert. denied*, 123 S. Ct. 1097 (2012); *Simpson v. Chesterfield Cnty Bd. of Supervisors*, 404 F.3d 276 (4th Cir), *cert. denied*, 546 U.S. 937 (2005). By analyzing the means of selection and provided guidance, the Court is able to determine if the prayers strive to be nonsectarian and whether the practice has the effect of endorsing and coercing individuals to adhere to one belief over another. *See Joyner*, 653 F.3d at 342.

For instance, the courts have rendered the practice of legislative prayers unconstitutional if the result of a narrow selection process leads to an overrepresentation to the majority of speakers or prayers being Christian. *See Galloway v. Town of Greece*, 681 F.3d 20 (2nd Cir. 2012) *cert. granted,* 133 S. Ct. 2388 (U.S. May 20, 2013) (No. 12-696.) (finding town's process of selecting prayer-givers essentially ensured a Christian viewpoint because process was limited to places of worship within predominately Christian borders); *see also Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1277 (finding prayers unconstitutional because planning commission categorically excluded non-Christian leaders). However, a broad selection process does not necessarily secure the practice of legislative prayers within the safeguards of the First Amendment, especially in a community that is overtly Christian. *See, e.g., Joyner,* 653 F.3d at 342 (finding prayer unconstitutional despite utilizing various resources such as Yellow Pages, internet research, and personal consultations to formulate congregational database).

Moreover, courts have held legislative prayer practices unconstitutional in instances where the government actions offer minimal guidance. *See, e.g., Galloway,* 681 F. 3d at 30

(finding County's selection process unconstitutional when it failed to inform prayer givers that invocations were not to be exploited as effort to convert others). Where there is minimal diversity in who delivers the opening invocation, the lack of guidance will often lead to the conveyance that one belief is preferred over another, since similar speakers will reference the same religious tenets, thus the content will lack diversity. *See id.* Conversely, the court has held prayer practices constitutional where guest clergy were instructed to refrain from using sectarian references. *See Simpson,* 404 F.3d at 278 (holding County's prayer practice constitutional based on selection process which involves letter directing clerics to avoid invoking name of Jesus Christ); *see also Turner v. City Council*, 534 F.3d 352 (4th Cir. 2008.), *cert denied,* 555 U.S. 1099 (2009) (affirming that Council's decision to open legislative meetings with non-sectarian prayers does not violate Establishment Clause).

Based on these parameters, Martin County's selection process had, and will continue to have, the effect of endorsing one religion and coercing individuals into participating in those practices. The selection process employed by Martin County consists of sending form letters to congregations within its community informing clerics of the opportunity to deliver the opening prayer. R.12. Once a congregation has expressed interest in delivering the invocation, it is added to a list and will be notified when to deliver the prayer. R.12. Although the County sought to include most congregations within their community, this is not enough. *See Galloway,* 681 F.3d at 30 (finding prayers unconstitutional because they are overwhelming Christian despite good faith effort to be inclusive). This selection process was limited to the borders of Martin County, which is overwhelmingly Christian. R.13. Thus, such a narrow search will exclude minority religions not located within the borders of the community. *See id.* The fact that Martin County limits its selection process to its own borders will inherently ensure Christian speakers, and will

appear as if it or the Board prefers Christianity to any other belief. *See id.* Thus, the selection process employed by Martin County will result in Christian-dominated speakers and prayers that violate the Establishment Clause.

Furthermore, Martin County's policy of limiting invocations to less than five minutes and providing no guidance as to the content of the invocation has led to overtly Christian prayers. R. 10. Out of the annual forty-six County board meetings, thirty-five of them were given by Christian clerics compared to the eight non-Christian clergy in 2010 and the two in 2011. R. 13. An overwhelming number of Christian speakers gave almost entirely sectarian prayers that referenced Christian tenets, such as "we just pray," "we seek your love," "our Lord Jesus Christ," and spoke on behalf of Martin County as a whole. R. 2. By contrast, the non-Christian clergy contained little to no sectarian references. R. 13. Although Martin County claims to offer no instructions on the content of the prayer, its invitation to clerics shows otherwise. R. 6. Martin County directly solicits and endorses a preference for Christianity by stating it would be "honored to have a prayer in the Lord Jesus's name before its sessions." *See id.* at 22; R.6. This prayer practice will have the effect of endorsing and coercing attendees, such as Mrs. Dhaliwal, to adhere to a belief in which they do not follow and violate their constitutional rights. *See Wynne v. Town of Great Falls,* 376 F.3d 292 (4th Cir. 2004.), *cert denied,* 545 U.S. 1152 (2005) (finding prayers unconstitutional because they invoked "Jesus Christ" to exclusion of other deities, thus advanced preference for Christianity over other religious beliefs).

Likewise, Martin County's practice of having attendees stand and bow their heads before the invocation does and will continue to force individuals, such as Mrs. Dhaliwal, to either participate in religious exercises against their beliefs or appear to show disrespect. *See id.* (finding town's physical participation practice of standing and bowing heads places non-

adherents in uncomfortable and coerced position to follow endorsed creed); *see also, Joyner* 653 F.3d at 344 (arguing County's overwhelming Christian atmosphere made plaintiffs feel unwelcomed in community and forced into endorsing Christianity by standing and bowing heads during prayers). In the instant case, during most, if not all Christian-led prayers, attendees were directed to stand prior to the invocation. R.12. The instruction to stand for Christian-led prayers did not change despite the changes in Chairperson rotations. However, attendees were given an option to stand, if they pleased, during the few non-Christian-led invocations. R.3, 5. These practices convey to Mrs. Dhaliwal that Martin County endorses Christianity and expects her to follow the majority religion as well. *See Galloway*, 681 F.3d at 32. This is a violation of her constitutional rights. *See Lee,* 505 U.S. at 585.

Martin County's limited outreach to congregations within its borders and its minimal guidance on the permitted content of prayers has and will continue to invariably lead to overtly Christian prayers, which violates the First Amendment Establishment Clause.

B. Martin County's Policy Implementation renders their practice of prayer unconstitutional

Religion is a sacred and central part of an individual, and the government advancement or endorsement of a particular faith risks offending those citizens who adhere to a different belief. *See Joyner,* 653 F.3d at 356. This is the very harm the Establishment Clause seeks to avoid. Thus, notwithstanding the good intentions of a governmental policy seeking to diversify its speakers and limit the content, if the implementation shows otherwise, the prayer practice is unconstitutional. *Id.* at 354.

For instance, courts have held that, although governmental agencies may seek to solicit in good faith a variety of religious leaders to lead their invocations, if the end result illuminates a government preference for one religion over another by having only one faith represented in who

actually appears to give invocations, the practice is unconstitutional. *See id.* at 343 (holding government practice unconstitutional despite Board's policy to only allow a leader to speak twice a year and never for consecutive meetings because they had frequent Christian references); *see also Wynne v. Town of Great Falls,* 376 F.3d 295, 302 (4th Cir. 2004) (holding council member's invocations unconstitutional due to their sectarian references). However, if the prayer policy is successful in its implementation of creating a diverse clergy, it is more likely to withstand scrutiny because it sustains itself from government endorsement of religious preference. *See Simpson v. Chesterfield Cnty Bd. of Supervisors,* 404 F.3d 276 (4th Cir), *cert. denied,* 546 U.S. 937 (2005) (finding diversity with County's list of available congregational speakers reflects the Board's requirement that prayers be non-sectarian and is thus constitutional).

Likewise, the courts have also held prayer practices unconstitutional if they convey a preference for one religion, despite the governmental agencies effort to withdraw themselves from reviewing the content. *See Joyner,* 653 F.3d at 343 (finding practice unconstitutional despite language of policy and the boards "hands off" approach in reviewing content because the prayers references specific tenets of Christianity); *see also Galloway,* 681 F.3d at 30 (stating, despite efforts to explain nature of its prayer program to attendees, Board cannot compensate for overwhelming and specific sectarian Christian prayers). Thus, despite reasonable efforts to implement a sound policy which seeks to neutralize the invocation, if the content still associates the government with a preferred religious belief, it is unconstitutional. *Id* In the instant case, although Martin County may claim to diversify their religious speakers by incorporating invocations led by three rabbis and one by an imam, the vast majority of invocations were delivered by Christian ministers. R. 13. In fact, during Mrs. Dhaliwal's presence in the Board

meetings, Martin County only had two non-Christian leaders give the invocation out of a five-month period. Although Martin County asserts that it made a good faith effort to expand who delivers the opening invocation, it is not enough. *See Galloway,* 681 F.3d at 30. Since the majority of prayers are Christian-oriented, they convey the message that the county government prefers Christian religion to other religions. R. 14. This is the constitutional harm that the Establishment Clause forbids. *See Allegheny,* 492 U.S. at 592 (affirming government endorsement test forbids appearance of conveying or attempting to convey a favored religion).

Thus, when Martin County's process and policy is scrutinized under the endorsement and coercion analysis set forth by *Lemon* and its progeny, its legislative prayer practice must be found unconstitutional. Although Martin County sought to diversify their religious speakers by extending an invitation to all congregations within their community to deliver the invocation, it does not hinder the fact that majority of prayers delivered reference Christianity and are sectarian in nature. Thus, this Court should find Martin County's prayer practice unconstitutional because it endorses religion by conveying that Christianity is preferred and forces attendees to follow its beliefs.

CONCLUSION

First, *Lemon* and its progeny should be the governing legal standards to conclude that Martin County's prayer practice violates the First Amendment Establishment Clause. These basic principles have been continuously utilized by the Courts in determining the constitutionality of governmental practices by ensuring they do not have the effect of advancing religious preference or forcing individuals to participate in religious activities against their beliefs. *Marsh* has been the single instance in which the Court has deviated from the basic principles set forth in *Lemon.* Nonetheless, the Court held practices of opening legislative

meetings permissible, so long as they are non-sectarian. Therefore, the Court should apply the *Lemon* and its progeny to conclude that Martin County's prayer practice violates the Establishment Clause.

Based on these parameters, Martin County's prayer practice is unconstitutional because its narrow selection process had, and will continue to have, the effect of endorsing one religion and coerces individuals, such as Mrs. Dhaliwal, into participating in religious practices. Its practice of requiring attendees to stand during Christian-led prayers forces attendees to adhere to Christianity. Furthermore, the practice makes minorities feel uncomfortable and unwelcomed in their community. This is the very harm the Constitution forbids.

In conclusion, the Court should find Martin County's practice of opening governmental meetings with overwhelming Christian-led prayers unconstitutional under the First Amendment Establishment Clause. The prayers show Martin County's endorsement for Christianity as the preferred religious belief and forces attendees to adhere to the same beliefs.

PRAYER

For these reasons, Respondent prays the Court apply *Lemon* and its progeny and find that Martin County's prayer practice violates the First Amendment Establishment Clause.

_____

Nadine Rodriguez
Counsel for Respondent

CERTIFICATE OF SERVICE

Counsel for Respondent certifies that this brief has been prepared and served on all opposing counsel.

_____

Nadine Rodriguez
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the brief contains _____words starting from the beginning (first word) of the statement of the case section ending with the end (last word) of the conclusion. I declare under penalty of perjury that the forgoing is true and correct.

_____

Nadine Rodriguez
Counsel for Respondent