

In the
UNITED STATES COURT FOR APPEALS FOR THE FOURTH CIRCUIT

CYNTHIA SIMPSON,

Appellee,

v.

CHESTERFIELD COUNTY BOARD OF SUPERVISORS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

APPELLEE'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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INTRODUCTION

This case challenges the Chesterfield County Board of Supervisors' practice of inviting religious leaders from all local Christian, Jewish and Muslim congregations to deliver invocations at meetings, while excluding members of all other faiths. The panel opinion upheld this practice. In counsel's opinion, rehearing *en banc* is warranted because:

1. The panel opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeal.

The panel opinion holds that in the context of legislative prayer, the Establishment Clause permits a government to make distinctions among its citizenry based solely on religion. This astounding proposition has not, to counsel's knowledge, been espoused by any other federal court. The panel's opinion is in conflict with *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989); *Torcaso v. Watkins*, 367 U.S. 488 (1961); and *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004).

2. The proceeding involves one or more questions of exceptional importance.

The question of whether *Marsh v. Chambers*, 463 U.S. 783 (1983), authorizes Chesterfield County's departure from a basic premise of the First Amendment - that one religion may not be officially preferred over another - is one of exceptional importance.

ARGUMENT

I. THE PANEL ERRED IN FINDING THAT THE ESTABLISHMENT CLAUSE ALLOWS GOVERNMENTAL DISCRIMINATION AMONG CITIZENS OF DIFFERENT RELIGIONS.

A. The Panel Opinion Erroneously Holds that *Marsh v. Chambers* Permits Religious Discrimination.

"[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Supreme Court has repeatedly and consistently reaffirmed that this principle lies at the heart of the Establishment Clause. See cases cited in Appellant's Opening Br. at 11-15.

Indisputably, Chesterfield County has breached "this bedrock Establishment Clause principle." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 605 (1989). It issues invitations to deliver prayers to all Christian, Muslim, and Jewish religious leaders in the County. It refuses to issue invitations to Native Americans, Hindus, Buddhists, Sikhs, Wiccans, and others. A clearer demonstration of official preference for some religions over others could hardly be imagined.

The purported justification for this barefaced discrimination is *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld the Nebraska legislature's opening prayers. But such a reading of *Marsh* conflicts with the Supreme Court's own understanding of that case. The Court has explained that "in

Marsh itself, the Court recognized that not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating government with any one specific faith or belief." *Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 603 (1989) (citation omitted). Thus, as this Court has recognized, *Marsh* did not create a legislative prayer exception to the "bedrock Establishment Clause principle" that one religion may not be preferred over another. *Wynne v. Town of Great Falls*, 376 F.3d 292, 299 (4th Cir. 2004) (quoting *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 605 (1989)).

On the contrary, the *Marsh* Court approved the Nebraska legislative prayers only because the legislature did *not* demonstrate a preference for one religion over another. First, as *Allegheny* explained, the chaplain in *Marsh* had "removed all references to Christ" from his prayers. 463 U.S. at 793 n.14. Second - and more directly relevant here - Nebraska's legislative chaplain was retained for sixteen years only "because his performance and personal qualities were acceptable to the body appointing him," and *not* based on "an impermissible motive." *Id.* at 793. In other words, the *Marsh* chaplain was a Presbyterian, but he was not chosen *because* he was a Presbyterian. He was chosen for religiously neutral reasons.

This stands in sharp contrast to Chesterfield County's prayer policy, which explicitly chooses some religious leaders to give prayers *because* they are Christian, Jewish, or Muslim and excludes all others *because* they are not of those religions. The impermissible motive that was lacking in *Marsh* is evident on the face of the Chesterfield policy. But the issue of Chesterfield's impermissible motive is simply ignored by the panel opinion. It is difficult to imagine what *Marsh* could have meant by "impermissible motive" if not the deliberate preference of some religions over others. Certainly, neither the Board nor the panel opinion offers any alternative explanation.

The panel opinion insists that Chesterfield County's method of choosing its prayer-givers "is in many ways more inclusive than that approved by the *Marsh* Court." Slip Op. at 13. This is a logical fallacy that turns *Marsh* on its head. As *Marsh* recognized, there is nothing "un-inclusive" about selecting a chaplain who happens to be Presbyterian, as long as he is chosen according to religiously neutral criteria and delivers nonsectarian prayers. Choosing a chaplain who happens to be Presbyterian is no less inclusive than choosing a police chief who happens to be Presbyterian, because there is no deliberate exclusion of other faiths.

Chesterfield County's scheme is not "more inclusive" simply because more prayer-givers or more denominations are involved.

Under that logic, Chesterfield could limit the prayer-givers to Roman Catholics and Methodists, and still be "more inclusive" than the Nebraska legislature, which only had a Presbyterian. What makes a selection process "inclusive" or "exclusive" is not the number of available slots, but whether the slots are filled on a religiously exclusive basis.

It is of no moment that Chesterfield County deliberately prefers a *group* of religions (Christianity, Judaism, and Islam) rather than one particular religion. See, e.g. *Larson, supra* (invalidating statute that discriminated against religions that solicit more than 50% of their funds from nonmembers); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally . . . aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"); *Lee v. Weisman*, 505 U.S. 577 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted"). As Madison recognized, "the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects." Memorial and Remonstrance Against Religious Assessments, reprinted in

Everson v. Bd. of Educ., 330 U.S. 1, 63 (1947) (appendix to dissenting opinion of Rutledge, J.). Thus, the panel's observation that "[t]he Judeo-Christian tradition is, after all, not a single faith but an umbrella covering many faiths" does not mitigate Chesterfield's religious discrimination. The same authority that can establish Judeo-Christian monotheism, in exclusion of all other faiths, may establish with the same ease Christianity -- or for that matter Islam -- in exclusion of all other religions.

B. The Concurring Opinion Erred in Holding that Chesterfield County's Religious Discrimination is Permissible Because the Prayer is Only for the Benefit of the Board.

Relying solely on the deposition testimony of one of the Chesterfield County supervisors, the concurring opinion declares that "the Chesterfield County Board of Supervisors engages in Prayer for itself and *not for the people.*" Slip Op. at 21 (Niemeyer, J., concurring) (emphasis in original). The concurrence concludes that since the Board is selecting someone to pray only for its own benefit, it may choose whomever it wishes. But regardless of how the Board conceives of the prayer's purposes, the record demonstrates it is a public and official act. The Board may not discriminate on the basis of religion when it engages in official business.

This is not a case in which members of the Board privately meet before a meeting and privately choose a clergyperson to lead

them. Instead, the County Clerk - as part of her official duties - compiles a list of religious groups, sends out invitations, and schedules religious leaders to give prayers at meetings. J.A. 63, 213-17. The prayer is noted on the agenda as an item of official business. J.A. 100. As the panel opinion notes, the prayer takes place at the beginning of the portion of the meeting which "includes most of the substantive work requiring public hearings, and also provides an opportunity for citizens to address the Board." Slip Op. at 3. Under these circumstances, the prayer can only be understood as official, governmental business. Religious discrimination in the conduct of such business impermissibly "demonstrate[s] the government's allegiance to particular sect[s] or creed[s]." *Allegheny*, 492 U.S. at 603.

II. THE PANEL ERRED IN REJECTING SIMPSON'S EQUAL PROTECTION CLAIM.

For much the same reasons that it violates the Establishment Clause, Chesterfield County's exclusion of religious leaders who are not of the "Judeo-Christian tradition" violates the Equal Protection Clause of the Fourteenth Amendment. "[T]he Religious Clauses - the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, . . . and the Equal Protection Clause as applied to religion - all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not

affect one's legal rights or duties or benefits."¹ *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

Under equal protection analysis, religion is a suspect classification. See *Roller v. Gunn*, 107 F.3d 227, 233 (4th Cir. 1997) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)) (listing "race, religion, or alienage" as "inherent suspect distinctions"). It follows that Chesterfield County's religious discrimination is permissible only if narrowly tailored to achieve a compelling state interest. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

As Chesterfield County has no legitimate interest - much less a compelling one - in discriminating against members of minority faiths, the County's discriminatory policy violates the Equal Protection Clause. Chesterfield has argued that it has an interest in ensuring that the prayers be in the "Judeo-Christian tradition." But this is not so much a justification as a tautology: Chesterfield's reason for discriminating against minority religions is its desire to prevent minority religious expression at Board meetings. The County may not justify its preference for certain religions by expressing a preference for certain religions.

To be sure, the County has a legitimate interest in ensuring that the prayers are within the boundaries set forth by the

¹ Thus, the Free Exercise Clause is yet another alternative grounds for affirmance.

Supreme Court, namely, that they are nonsectarian, that they do not serve "to proselytize or advance any one, or to disparage any other, faith or belief," *Marsh*, 463 U.S. at 794-95, and that they serve "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly*, 465 U.S. 668, 693(1984) (O'Connor, J., concurring). But there is no reason to believe - and no evidence in the record - that members of minority faiths are more likely to breach such parameters. Cf. *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1228 (10th Cir. 1998) (noting that prayer-givers at Murray City council meetings "various members of Judeo-Christian congregations, Zen Buddhists, and Native Americans"); see also Expert Report of Diana L. Eck, Ph.D., J.A. 364 (noting that religious minorities such as Muslims, Hindus, Buddhists, Jains, and Native Americans have offered prayers at the U.S. House of Representatives and state legislatures).

The panel rejected the Equal Protection claim because, it found, the invocations are government speech. But even when pure government speech is involved, the government may not choose its messengers based on their religion. For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court held that the government could prohibit family planning clinics that receive Title X federal funds from offering information about abortion. The Court reasoned that the delivery of information had essentially been transformed into government speech, and the government thus

retained control over its content. 500 U.S. at 193-94. But the government's ability to control its message would not authorize the government to dole out the funds on the basis of religion. No one suggests, for example, that the government could limit Title X funds to entities whose religious beliefs prohibit abortion, and to exclude those whose religious beliefs allow the procedure. The government could ensure that recipients followed the rule - no discussing abortion - but it could not discriminate on the basis of religion to do so. Similarly, Chesterfield County may not discriminate on the basis of religion in deciding who may give a non-sectarian prayer for the purpose of solemnizing a meeting.

CONCLUSION

The panel opinion holds that the special circumstances of legislative prayer allow a government to deviate from the bedrock Establishment Clause principle that one religion may not be favored over another. This radical departure should be reviewed by the full Court of Appeals. The appellee therefore respectfully requests that her Petition for Rehearing En Banc be granted.

Dated: April 26, 2005

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and accurate copies of the foregoing Petition were mailed, first class postage prepaid, on this 26th day of April, 2005, to:

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