No. 04-1045

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CYNTHIA SIMPSON,
Plaintiff-Appellee

v.

CHESTERFIELD COUNTY
BOARD OF SUPERVISORS,
Defendants-Appellant

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION
In support of *Defendants-Appellants*

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INTEREST OF *AMICUS*

The National Legal Foundation (NLF) is a non-profit corporation dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of the effect it will have on religious liberty and the interpretation of the Establishment Clause. This Brief is filed pursuant to the consent of Counsel of Record for Cynthia Simpson and pursuant to a Motion for Leave to File a Brief *Amicus Curiae*.

ARGUMENT

While this appeal presents several issues, this brief will address only one, namely, why the district court erred when it concluded that this case is not controlled by *Marsh v. Chambers*, 463 U.S. 783 (1983). Had the *Marsh* test been applied, the legislative prayers at issue in this case would have been upheld. This brief will address reasons for the applicability of *Marsh* other than those addressed by Chesterfield County.

I. THE DISTRICT COURT ERRED WHEN IT REFUSED TO APPLY *MARSH* BECAUSE UNDER BOTH THIS COURT'S AND THE SUPREME COURT'S PRECEDENT *MARSH* CONTROLS.

In its opinion below, the district court at times seemed ambivalent as to the applicability of *Marsh v. Chambers*, 463 U.S. 783 (1983) to the instant case. On the

one hand, the district court first noted that this *is* a legislative prayer case. *Simpson v. Chesterfield Co. Bd. of Supervisors*, 292 F. Supp. 2d 805, 809-10 (E.D. Va. 2003). It then noted that "[l]egislative prayer is not unconstitutional, *per se,*" *id*. at 810, and quoted Marsh in support of that proposition:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.
>
> To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "we are a religious people whose institutions presuppose a Supreme Being."

Id. (quoting *Marsh*, 463 U.S. at 792, (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

Ultimately, however, the district court claimed that "the *Marsh* precedent is distinguishable from this case, if not all others that do not involve what *Marsh* refers to as an established chaplaincy practice . . . ." *Simpson*, 292 F. Supp. 2d at 812-813.

The district court also mentioned select cases from both the federal and state courts that had evaluated the applicability of *Marsh* with "mixed success." *Id*. at 813. Of particular relevance to this appeal, the district court, first, inexplicably declined to so much as mention the United States Supreme Court analysis that

sheds the most light on the on-going viability of *Marsh* and, second, described this Court's use of *Marsh* in two self-contradictory ways. This brief will look at each of these issues in turn.

A. The district court erred when it failed to heed *Lee v. Weisman*'s guidance concerning *Marsh* because *Weisman* clearly teaches the applicability of *Marsh* to the instant case.

As an introductory matter, we note that while it is true, as the district court pointed out, that some courts have declined to apply *Marsh*, *see Simpson*, 292 F. Supp. 2d at 813-15 and cited cases, it is also true that *Marsh* has been extensively used. In fact, neither the Supreme Court nor other courts have limited *Marsh's* applicability to the Establishment Clause. *See, e.g., Printz v. United States*, 521 U.S. 898, 905 (1997) (evaluating history of federal use of state executives in law enforcement); *Harmelin v. Michiga*n, 501 U.S. 957, 980 (1991) (evaluating whether punishment was cruel and unusual); *Michel v. Anderso*n, 14 F.3d 623, 631 (D.C. Cir. 1994) (affirming rights of delegates to vote in House of Representatives Committee of the Whole); *Dornan v. Sanchez,* 978 F. Supp. 1315, 1319 (C.D. Cal. 1997) (upholding discovery subpoena rule under Federal Contested Elections Act); *Nat'l Wildlife Fed'n v. Watt* , 571 F. Supp. 1145, 1157 (D.D.C. 1983) (enjoining leasing federal lands for coal mining); *James v. Wat*t, 716 F.2d 71, 76 (1st Cir. 1983) (evaluating Indian Commerce Clause).

And within the Establishment Clause context, *Marsh* has not been limited to

legislative prayer cases. Courts have used *Marsh* to analyze prayer at other deliberative bodies, *e.g., Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ*., 11 F. Supp. 2d 1192, 1196 (C.D. Cal. 1998); public proclamations with "religious" content, *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989); the dating of government documents with "A.D.", *benMiriam v. Office of Pers. Mgmt*., 647 F. Supp. 84, 86 (M.D.N.C. 1986); equal access to schools, *DeBoer v. Vill. Of Oak Par*k, 267 F.3d 558, 569 (7th Cir. 2001); and religious display cases, *e.g., ACLU v. Wilkinso*n, 701 F. Supp. 1296 (E.D. Ky. 1988); *State v. Freedom from Religion Found*., 898 P.2d 1013, 1029, 1043 (Colo. 1996); and *Conrad v. Denve*r, 724 P.2d 1309, 1314 (Colo. 1986). Thus, the district court was simply incorrect to state that *Marsh* is only applicable in a legislative chaplaincy context.

Given the continued use of *Marsh*, we next note the district court's inexplicable silence regarding the *Marsh* analysis in *Lee v. Weisman*, 505 U.S. 577 (1992).[1] In *Weisman*, the Supreme Court noted Marsh's on-going viability and then simply explained why it would not apply *Marsh. Id.* at 596. The *Weisman* Court did not overturn *Marsh*. It did not call *Marsh* an anomaly. It did not criticize *Marsh*. It did not so much as question *Marsh*. The *Weisman* Court merely *distinguished Marsh*.

[1] The district court included two passing references to *Weisman* in its footnotes 3 & 13, but never mentioned *Weisman's Marsh* discussion.

The Court declined to apply *Marsh* in *Weisman* because "[i]nherent differences between the public school system and a session of a state legislature distinguish[ed] [*Weisman*] from *Marsh v. Chambers*." *Id.* (citation omitted). The *Weisman* Court went on to note that, while the invocation and benediction at issue in *Weisman* were *in many regards similar* to the issues considered in *Marsh*, there were obvious differences. *Id.* at 597. Those differences were the age of the people hearing the prayers, the ability to leave if desired, and the context in which they heard the prayers. *Id.* The Court stated that the "decisions in *Engel v. Vitale* and *School Dist. of Abington v. Schempp* require us to distinguish the *public school context*." *Id.* (citations omitted) (emphasis added). Relying primarily on the young age of the school children, the Court found that the "influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Id.* And the Court observed, the "*Marsh* majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there." *Id.* In the instant case all of the differences noted in *Weisman* are absent. In fact, as pointed out above, the district court correctly noted that this *is* a legislative prayer case. *Simpson*, 292 F. Supp. 2d at 809-10. Simply put, *Marsh* controls this case.

Instead of acknowledging *Weisman's* validation of *Marsh*, the district court attempted to articulate principles from other categories of Establishment Clause

cases:

> Both *Lynch* [*v. Donnelly*, 465 U.S. 668] (1984) and *County of Allegheny* [*v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573] (1989) were decided after not only *Lemon* [*v. Kurtzman*, 403 U.S. 602] (1971), but also *Marsh* (1983), and although each case concerned facts not involving legislative prayer, they appear to articulate the most consistent standard for analysis in determining whether any governmental action, including that involved in legislative prayer, is premised on 'impermissible motive."

Simpson, 292 F. Supp. 2d. at 814-15.

Thus, the district court emphasized that *Lynch* and *Allegheny* were decided after *Marsh*, but failed to note that *Weisman* was decided three years after *Allegheny* and eight years after *Lynch*. Furthermore, the district court failed to realize that, as Justice O'Connor has stated, there is no "grand unifying theory" in Establishment Clause jurisprudence and that it is frequently impossible to apply the principles adapted for one category of Establishment Clause cases to another category. *See, e.g., Rosenberger v. Rectors & Visitors*, 515 U.S. 819, 852 (1995) (O'Connor, J., concurri ng).

B. The district Court erroneously concluded that *Marsh* did not apply because it described this Court's use of *Marsh* in two self-contradictory ways, apparently confusing itself.

Perhaps it was the district court's failure to understand *Weisman's* validation of *Marsh* that caused its confusion over this Court's use of *Marsh*. First, the district court quoted this Court from *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) as saying 'the *Lemon* test guides our analysis of Establishment Clause

challenges." *Simpson*, 292 F. Supp. 2d at 812 n.6. This out-of-context quotation would lead one to believe (at least prior to reading the rest of the district court's opinion) that the district court thought that this Court had both applied a straight *Lemon* analysis to the *Mellen* case and foreclosed the application of *Marsh* to any Establishment Clause case. Neither, of course, is true.

First, as the district court went on to acknowledge later in its opinion, this Court in *Mellen* applied a hybrid *Lemon*/coercion test. *Simpson*, 292 F. Supp 2d at 814-15 & n.13 (describing this Court's analysis in *Mellen*). Second, and most importantly here, the district court later acknowledged that the *Mellen* Court "*distinguished Marsh* on the basis that public universities and military colleges, including the college involved, did not 'share' the same or comparable historical context . . . ." *Id*. at 814 (emphasis added).

However, perhaps having failed to take note of *Weisman's* validation of *Marsh*, the district court interacted too superficially with the *Mellen* Court's *Marsh* discussion and treated that discussion as if it stood for the proposition that *Marsh* is never applicable outside of a legislative chaplaincy context. Therefore, this brief will now turn to a careful reading of the *Mellen* Court's *Marsh* discussion.

First, it is important to note that this Court never stated that *Marsh* was limited to a legislative chaplaincy context. This Court did quote the Sixth Circuit as stating that "*Marsh* is one-of-a-kind." *Mellen*, 327 F.3d at 370 (quoting *Coles v.*

Cleveland Bd. of Educ., 171 F.3d 369, 381 (6th Cir. 1999)). However, the *Mellen* Court never adopted that position for itself. Nor did it ascribe that view to the United States Supreme Court. Rather, the *Mellen* Court noted that the Supreme Court has decided that "*Marsh* is applicable only in narrow circumstances."[2] *Id.* at 369. There is all the analytical difference in the world between "one-of-a-kind" and "narrow circumstances."

Furthermore, the Sixth Circuit has not continued to adhere to its view that Marsh is "one-of-a-kind." In ACLU v. Capitol Square Review & Advisory Board, 243 F.3d 289 (6th Cir. 2001), the Sixth Circuit upheld a religious display under Marsh, thereby repudiating any idea that Marsh was limited to its own facts or was "one-of-a-kind." Tellingly, the Sixth Circuit never even mentioned Coles, the case cited by the Mellen Court, in the Capitol Square opinion. Next, it is important to note that the Mellen Court's discussion of Marsh was very limited because this Court easily distinguished the Supper Roll Call prayers at issue in Mellen from Marsh's legislative prayers. Mellen, 327 F.3d at 369-70. However, the district court in the

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[2] Technically, this is not true. As noted above, the Supreme Court used the historical test from *Marsh* in *Printz v. United States*, 521 U.S. 898, 905 (1997) (evaluating history of federal use of state executives in law enforcement); and in *Harmelin v. Michiga*n, 501 U.S. 957, 980 (1991) (evaluating whether punishment was cruel and unusual). This Court's statement no doubt was referring to the approach of the Supreme Court in the Establishment Clause context. However, the point is worth making. The Supreme Court and other courts frequently apply *Marsh* in new contexts, both Establishment Clause and non-Establishment Clause. In addition to other mistakes, the district court overlooked that reality when concluding that, because this Court had declined to apply *Marsh* in *Constangy* and *Mellen,* this Court would not apply to in other contexts. There is nothing in this Court's *Marsh* jurisprudence that prevents it from following other courts and applying *Marsh* in any number of appropriate contexts—including in this case.

instant case read too much into the ease of the analysis in Mellen. Through its citation of North Carolina Civil Liberties Union Legal Foundation v. Constangy, 947 F.2d 1145 (4th Cir. 1991), the Mellen Court, in effect, incorporated the Constangy Court's Marsh discussion. In Constangy, this Court undertook a much more thorough analysis of whether Marsh controlled. Indeed, this Court dedicated three pages of its opinion to that inquiry. 947 F.2d at 1147-49. (Ultimately, this Court decided that the judicial prayers at issue in Constangy did not share the history of ubiquity that legislative prayers possess. Id.)

Understanding this highlights yet again how the district court misunderstood the import of *Mellen*. *Mellen* and *Constangy*, read together, demonstrate that the closer the challenged practice is to legislative prayer, the more seriously this Court considers applying *Marsh*. And as has been repeatedly stated, the practice at issue here *is* legislative prayer.

However, the implication is broader than that. Ms. Simpson and the district court sought to distinguish the facts of the instant case from those in *Marsh* because the invocations offered here are not part of an established chaplaincy program. *Simpson*, 292 F. Supp. 3d at 812-18. To the extent that this difference has any constitutional significance (and *Amicus* agrees with Chesterfield County that it does not, *see* Brief of Appellant at 18-29), this proves too little. Under this Court's *Marsh* jurisprudence, the facts of this case are *close enough*. The facts of *Constangy* were closer than the facts of *Mellen* and the facts of the instant case are vastly closer still. The once-articulated-but-now-repudiated view of the Sixth

Circuit that *Marsh* is "one-of-a-kind" is not binding on this Court (and, again, the *Mellen* Court did not imply that it was); the Supreme Court's view that *Marsh* is applicable in a certain range of facts *is* binding on this Court.[3] As Chesterfield County has pointed out (Brief of Appellant at 18-29), variations in selection methodology are not sufficient to take this case outside that range of application. Once again, the district court should have concluded that *Marsh* controls.

II. THE DISTRICT COURT ERRED WHEN IT HELD THAT THE CHESTERFIELD COUNTY INVOCATION POLICY WAS ANIMATED BY AN IMPERMISSIBLE MOTIVE BECAUSE THE COURT FAILED TO NOTE THE CONNECTION BETWEEN *MARSH* AND *ZORACH V. CLAUSON*.

For all of the above reasons, *Marsh* controls this case. Furthermore, it is clear for the reasons stated in Chesterfield County's brief that under *Marsh*, the invocations must be upheld. However, the district court was also concerned that the County's refusal to allow Ms. Simpson to offer an invocation was animated by an "impermissible motive." *Simpson*, 292 F. Supp. 2d at 817. *Amicus* agrees with Chesterfield County that under the analysis of *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987); and *Snyder v. Murray City Corporation*, 159 F.3d 1227 (10th Cir. 1998), the County may limit its invocations to monotheistic invocations. *Amicus*, therefore, encourages this Court to adopt such a rule for this Circuit. In addition, *Amicus* notes an additional reason why such a rule is proper and to note why such a

[3] See footnote 2 for a discussion of the Supreme Court's expanding use of *Marsh*.

rule does not "disparage," *Simpson*, 292 F. Supp. 2d at 810, Ms. Simpson's religion.

That reason can be found in the much-quoted passage from *Zorach v. Clauson*, 343 U.S. 306, 313 (1952): "We are a religious people whose institutions presuppose a Supreme Being." Our institutions—of which County Boards of Supervisors are surely one—presuppose *a* Supreme Being. They do not presuppose no Supreme Being and they do not presuppose many Supreme Beings. They presuppose monotheism. Therefore, when Chesterfield County limits invocations to those in the monotheistic tradition, the County is not disparaging any other religion; it is simply operating within the very presuppositions of the society of which it is a part.

To the extent that this produces any inequity between monotheistic religions and other religions, that merely brings us full circle: while that may be problematic in other Establishment Clause contexts, there simply is no "grand unified theory" in Establishment Clause jurisprudence and the inequity is not problematic in the legislative prayer context. The various sweeping statements of the United States Supreme Court that may seem to indicate the contrary have repeatedly been recognized as hyperbole. *See especially*, *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

Thus, to the extent that this case requires anything more than a *Marsh*

analysis, *i.e*., to the extent that it needs a "*Marsh* plus" analysis, that "plus" should be *Zorach*. Under a "*Marsh* plus *Zorach*" analysis, legislative prayers, including those legislative prayers that presuppose *one* Supreme Being pass constitutional muster.

Indeed, at one level, this approach need not be labeled "*March* plus," since *Marsh* itself quoted this very passage from *Zorach*. Significantly, *Marsh's* use of *Zorach* should properly be seen as part of the rationale for *Marsh's* holding. Thus, the Chesterfield County invocation policy cannot be problematic.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests this Court to reverse the holding of the district court that the invocation policy violates the Establishment Clause.

Respectfully submitted,
This 24th day of March, 2004

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