No. _____

In The

Supreme Court of the United States

CYNTHIA SIMPSON,

Petitioner,

v.

CHESTERFIELD COUNTY BOARD OF SUPERVISORS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a local government may, consistent with the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause, invite religious leaders from certain religions to deliver a prayer at legislative sessions, while excluding leaders from all other religions.

LIST OF PARTIES

The Petitioner is Cynthia Simpson, a resident of Chesterfield County, Virginia. The Respondent is the Chesterfield County Board of Supervisors, the governing body for Chesterfield County.

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JURISDICTION

The court of appeals decision denying the petitioners' petition for rehearing *en banc* was entered on May 10, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The United States District Court for the Eastern District of Virginia had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS INVOLVED

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

2. The Fourteenth Amendment states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Since approximately 1984, the Chesterfield County Board of Supervisors has invited local religious leaders to deliver invocations at its legislative sessions. J.A. 561.[1] The county clerk maintains a list of local congregations, and annually sends an invitation letter addressed to the "religious leader" of each congregation on the list. J.A. 92. Most of the congregations on the list come from the local phone book, and county officials occasionally ask the clerk to add congregations to the list. J.A. 214-15, 223-24.

The Board's written policy requires that invocations contain elements of the "American civil religion" and that only representatives of "monotheistic religions" be invited to present them. *See* J.A. 63, 561. The Board expressly interprets this policy to include only Christians, Jews, and Muslims. Persons of these three faiths – which according to the Board comprise the "Judeo-Christian tradition" – are the only persons permitted to present invocations. J.A. 561.[2] Thus, the policy excludes not only the Petitioner but representatives of a broad range of other religions, including Hinduism, Buddhism, Sikhism and many Native American faiths. J.A. 562.

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[1] The abbreviation "J.A." refers to the Joint Appendix in the Court of Appeals. The abbreviation "App." refers to the Appendix to this Petition.

[2] The County has variously described the persons eligible to deliver prayers as leaders of "monotheistic religions," "Judeo-Christian monotheistic religions" and "monotheistic religions consistent with the Judeo-Christian religion." In fact, Jewish congregations were added to the list only after Simpson asked to participate, at the request of the County attorney. J.A. 34-35. It is unclear why the County has deemed Islam to fall within the Judeo-Christian umbrella. It is clear, however, that the County has no intent of welcoming any others into the tent. *See* J.A. 314, 353, 562, 603-07.

Although the County's policy requires invocations to be non-sectarian, non-proselytizing, and non-disparaging of other religions, the majority of the invocations have been overtly and expressly Christian, regularly invoking Jesus Christ by name. J.A. 561.

Cynthia Simpson, a Chesterfield County resident and a leader of the Wiccan faith, asked to be included on the list of persons authorized to present invocations at Chesterfield County Board meetings. The Board denied Simpson's request on the ground that her prayer would not be "made to a divinity that is consistent with the Judeo-Christian tradition." J.A. 21, 562. The Board refused to change course even after Simpson explained that she intended to present a nonsectarian, non-proselytizing invocation that referred to a divinity in very general terms, such as "creator of the universe." J.A. 355, 358.

In the course of explaining the denial of Simpson's request, Board members made disparaging comments about Simpson and her faith. Supervisor Renny B. Humphrey told the press: "I hope she's a good witch like Glinda," and "There is always Halloween."[3] J.A. 314-15. Board Chairman Kelly Miller told the press: "It is a mockery. It is not any religion I would subscribe to. There are certain places we ought not to go, and this is one of them." J.A. 271.

Simpson filed suit in the Eastern District of Virginia. Throughout the litigation, Chesterfield County acknowledged that it had an official policy of excluding all religions save Christianity, Judaism, and Islam from its roster

[3] Ms. Humphrey apologized for these comments at her deposition. J.A. at 320-21.

of congregations invited to deliver prayers. The County insisted, however, that it was entitled to endorse what it called the "American Civil Religion," and to choose prayer-givers who adhered to that religion.

On cross-motions for summary judgment, the district court found that Chesterfield County's policy of excluding all but Christians, Jews and Muslims violated the Establishment Clause. The Fourth Circuit Court of Appeals reversed, finding that Chesterfield's discriminatory policy was legitimized by *Marsh v. Chambers*, 463 U.S. 783 (1983).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Decision Below Is In Conflict With Numerous Decisions Of This Court On An Issue Of Central Importance To Our Nation's Core Values.

The decision below labors to obscure with legal smoke and mirrors what is obvious to even the most unstudied observer: Chesterfield County may, under the Fourth Circuit's interpretation of the Constitution, favor some religions over others. The decision casts aside the principle that lies at the heart of the Establishment Clause: that government may not confer privileges on its citizenry on the basis of religion.

Although Establishment Clause jurisprudence may be beset with conflicting tests, uncertain outcomes, and ongoing debate, one principle has never been compromised: "[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). As this Court recently reaffirmed, the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU of Kentucky*, 545 U.S. ___, 125 S. Ct. 2722, 2733 (2005); *accord id.* at 2746 (O'Connor, J., concurring). Accordingly, this Court has "time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship."[4] *Board of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring).

[4] *See, e.g., Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 604 (1989) ("Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed."); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (plurality opinion) ("If the purpose or effect of a law is to . . . discriminate invidiously between religions, that law is constitutionally invalid."); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (subjecting religious services of Jehovah's Witnesses, but not others, to regulation "is merely an indirect way of preferring one religion over another" and is thus unconstitutional); *Johnson v. Robison*, 415 U.S. 361, 384 (1974) ("[The Constitution] prohibits . . . [government from] discrimnat[ing] invidiously between religions."); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) ("A state may not exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving [public] benefits.") (citation omitted); *Bowen v. Roy*, 476 U.S. 693, 708 (1986) ("The Constitution forbids antagonism by Congress . . . towards any particular religious beliefs."); *United States v. Ballard*, 322 U.S. 78, 87 (1944) ("The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in [the same] position."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . prefer one religion over another."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is

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The Court has been equally firm in rejecting the "truly remarkable view" that "government may espouse a tenet of traditional monotheism." *McCreary*, 545 U.S. at ___, 125 S. Ct. at 2744-45. *See 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.") Nor may government "establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

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placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 216 (1963) ("the Establishment Clause forbids [ ] governmental preference of one religion over another"); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion . . . and it may not aid, foster, or promote one religion or religious theory against another. . . . "); *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970) (upholding availability of property tax exemption to religious organizations because governing statute "has not singled out one particular church or religious group. . . . "); *Gillette v. United States*, 401 U.S. 437, 450 (1971) ("The Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion . . . or to favor the adherents of any sect or religious organization."); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 745-46 (1976) (plurality opinion) ("The Court has enforced a scrupulous neutrality by the State, as among religions. . . . "); *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) (the First Amendment proscribes not only "the preference of one Christian sect over another, but . . . require[s] equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion. . . . ").

The prohibition on religious favoritism was key to the Framers' understanding of the First Amendment and essential to its purposes. *See* Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 190 (1992) (Explaining that "[t]he supporters of constitutional protections for religious freedom were insistent that sect equality is an indispensable element of that freedom.") "The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate. . . ." *McCreary*, 125 S. Ct. at 2722. The Framers "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). Madison explained that "[t]orrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions," and that "equal and complete liberty" is the only remedy against the "malignant influence" of religious dissension. Memorial and Remonstrance Against Religious Assessments, reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 69 (1947) (appendix to dissenting opinion of Rutledge, J.) Thus, government should eschew legislation that "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Id.*

The principle of religious equality is not only mandated by the Establishment Clause, but permeates the Bill of Rights. "[T]he Religious Clauses – the Free Exercise Clause, the Establishment 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." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring). So basic is that principle that this Court has consistently applied strict scrutiny to religious discrimination under all three Clauses. *See Larson v. Valente* (applying strict scrutiny under the Establishment Clause); *Church of Lukumi Babalu Aye v. Hialeah* (applying strict scrutiny under the Free Exercise Clause); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (listing classifications based on "race, religion, or alienage" as "inherent suspect distinctions" requiring heightened scrutiny under the Equal Protection Clause).

Indisputably, Chesterfield County has breached this crucial constitutional mandate. 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, or members of any other religion. A clearer demonstration of official preference for some religions over others could hardly be imagined.

By upholding this policy, the decision below strikes an unprecedented blow at this elemental nondiscrimination principle. Indeed, the Fourth Circuit's decision may represent the first occasion in which a federal appellate court has approved a policy that explicitly positions the members of some religions as "insiders," while making "outsiders" of persons from disfavored faiths.

II. *Marsh v. Chambers* Has Given Rise To Inconsistent Lower Court Interpretations That Must Be Resolved By This Court.

In the Fourth Circuit's view, the nondiscrimination principle described in the preceding section was trumped by the holding in *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld the Nebraska legislature's opening prayers. But this Court has rejected the view that *Marsh* allows religious favoritism. To the contrary, "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).

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. But *Marsh* did not elaborate on what might be an "impermissible" motive, and neither the County nor the Fourth Circuit attempted to define the term in this case.

In Petitioner's view, the context permits only one interpretation: It is impermissible to select a chaplain *because* of his religious affiliation; he or she must be selected according to religiously neutral criteria. If this view is correct, then Chesterfield County's policy is undoubtedly

unconstitutional, because it explicitly selects some prayer givers, and excludes others, because of their religion.

The crux of the Fourth Circuit opinion is that the Chesterfield County policy "is in many ways more inclusive than that approved by the *Marsh* Court." App. 17. 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 *ex*clusion 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, say, Roman Catholics and Methodists, and still be "more inclusive" than the Nebraska legislature, which only had a Presbyterian.

The weaknesses in the Fourth Circuit's interpretation of *Marsh* are highlighted by contrast to the various opinions in *Snyder v. Murray*, 159 F.3d 1227 (10th Cir. 1999), which also dealt with a local legislative body's refusal to allow the plaintiff to give an opening prayer. Like Chesterfield County, Murray City invited local religious leaders to deliver opening invocations. Unlike Chesterfield, however, the Murray City Council included among the invitees "various members of Judeo-Christian congregations, Zen Buddhists, and Native Americans." 159 F.3d at 1228. Snyder wished to deliver a prayer asking God ("if there is a god") to help city council members "see the wisdom of separating church and state and so that they will never

again perform demeaning religious ceremonies." *Id*. at 1229 n.3. The proposed prayer characterized city council members and legislative prayer itself as "hypocritical," "deceptive," and "selfish." *Id*.

The Tenth Circuit posited that *Marsh* imposed two constitutional limits on legislative prayer. First, the content of the prayers must be "within the genre of legislative invocational prayer that 'has become part of the fabric of our society' and constitutes a 'tolerable acknowledgment of beliefs widely held among the people,' " meaning that it must not " 'proselytize or advance any one, or to disparage any other, faith or belief.' " *Id*. at 1233-34, quoting *Marsh*, 463 U.S. at 792, 794-95. Based on this limitation, the court upheld the city's rejection of Snyder's prayer. Snyder's "proposed prayer [fell] well outside the genre of legislative prayers that the Supreme Court approved in *Marsh*" because "aggressively proselytize[d] for his particular religious views and strongly disparage[d] other religious views." *Id*. at 1235. It was therefore permissible for the city to refuse to allow Snyder's prayer, because "[a] deliberative body has a right to take steps to avoid the kind of government prayer that would run afoul of Marsh and the Establishment Clause." *Id*.

The *Snyder* court suggested, however, that the result would have been different if Snyder had been excluded because of his religion. In addition to *Marsh*'s requirement that the *content* of legislative prayers be nonsectarian, the Tenth Circuit explained, a legislative body could not express religious preferences through the *selection* of the prayer givers. "As a second constitutional restriction on legislative prayer, the Court in *Marsh* also warned that the selection of the person who is to recite the legislative

body's invocational prayer might itself violate the Establishment Clause if the selection 'stemmed from an impermissible motive.'" *Snyder* at 1234, quoting *Marsh* at 793. According to *Snyder*, "[t]he [*Marsh*] Court implicitly indicated that the particular motive that is 'impermissible' in this context is a motive in selecting the prayer-giver either to 'proselytize' a particular faith or to 'disparage' another faith, or to establish a particular religion as the sanctioned or official religion of the legislative body." *Id*. at 1234, citing *Marsh* at 793-95. *Snyder*'s conception of "impermissible motive" seems to describe precisely the situation in Chesterfield County, which has, through the selection of its prayer-givers, officially sanctioned "Judeo-Christian monotheism."

The concurring and dissenting opinions in *Snyder* offer quite different understandings of *Marsh*, but, like the majority opinion, both are at odds with the Fourth Circuit's interpretation. The concurrence found Murray City's entire prayer practice unconstitutional. According to the concurrence, it was not permissible for the city to censor the content of prayers of private individuals. But to permit all prayers, including Snyder's, would also be unconstitutional. Inevitably, allowing all comers to deliver prayers, without content regulation, would result in the advancement of some religions and the disparagement of others. "The resulting juxtaposition of aggressive proselytization with the exercise of legislative power violates the Establishment Clause." *Snyder* at 1240. The concurrence went on to observe that "[i]n running a prayer session open to the public, the government will need to identify which members of the public appropriately represent the diverse religious life of the community. That will require a government determination of what creeds and philosophies

are to count as religious." *Id.* at 1240. The concurrence's analysis applies with equal force in the present case. In order to maintain an open prayer session, Chesterfield County must either impose content restrictions on prayers, allow prayer-givers to proselytize, or, as it has in fact done, determine which religions "appropriately represent the diverse religious life of the community." In the view of the *Snyder* concurrence, each of these options violates the Establishment Clause.

The dissenting opinion in *Snyder* also noted the tension inherent in opening the prayer to a variety of private individuals, while at the same time prohibiting certain messages. According to the dissent, "the City cannot have it both ways: it cannot purport to open the reverence period to a broad cross-section of the community without restrictions, while at the same time limiting a particular speaker's access to the reverence period because of its distaste for the speaker's proposed message." *Id.* at 1246-47. Again, this analysis would also serve to invalidate Chesterfield County's prayer practices.

Taken together, the three opinions in *Snyder* and the Fourth Circuit opinion in the present case reflect considerable bewilderment about the scope of *Marsh*, especially when the legislative body does not employ a prayer scheme that mirrors that of the First Congress. It is incumbent upon this Court to resolve the confusion.

CONCLUSION

The decision below undermines the countless cases of this Court holding that government may not favor one religion over another. It also reflects a growing confusion

among the lower courts about the scope of *Marsh v. Chambers*. For these reasons, the Petitioner respectfully requests the Court to grant *certiorari*.

Respectfully submitted,

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