

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Danville Division

JANE DOE,

Plaintiff,

v.

PITTSYLVANIA COUNTY, VIRGINIA and
BOARD OF SUPERVISORS OF
PITTSYLVANIA COUNTY, VIRGINIA

Defendants.

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Civil No. 4:11-cv-00043

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Every meeting of the Pittsylvania County Board of Supervisors is opened with a prayer delivered by a Board Member. Notwithstanding well-established law barring official sectarian prayer at legislative meetings, the prayer is almost always explicitly Christian. When counsel for plaintiff Jane Doe objected to this unlawful practice, the Board not only refused to stop, but at the very next meeting, nearly every Board member delivered a Christian prayer, leading the audience that evening in five separate sectarian invocations. These prayers violate the “clearest command” of the Establishment Clause of the First Amendment to the U.S. Constitution, that “one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). As the U.S. Court of Appeals for the Fourth Circuit recently explained in holding sectarian legislative prayer unconstitutional, “Faith is as deeply important as it is deeply personal, and the government should not appear to suggest that some faiths have it wrong and others got it right.” *Joyner v. Forsyth County*, ___ F.3d ___, 2011 WL 3211354, *8 (4th Cir. July 29, 2011). The plaintiff seeks a preliminary injunction to protect this fundamental principle of

religious liberty by prohibiting the defendant from engaging in this unconstitutional practice during the pendency of this lawsuit.

FACTS

Defendant Pittsylvania County Board of Supervisors (“Board”) is the governing body of defendant Pittsylvania County, Virginia, a political subdivision of the Commonwealth of Virginia. (Verified Compl. ¶¶ 4-5.) The Board meets twice a month, and opens with an invocation delivered by a member of the Board of Supervisors. (Verified Compl. ¶¶ 6-7.) At nearly every meeting, this prayer is explicitly Christian in nature; that is, it invokes the name of “Jesus Christ” “Jesus” or “Christ.” (Verified Compl. ¶ 8; Ex. 1 ¶ 6, Glenberg Decl.) For example, the prayer delivered on August 17, 2010 was as follows:

Gracious heavenly father, we thank you for the opportunity to address you, and thank you O Lord, because you made all of this possible. You are our God, you are our King, you are the reason we are here. God, without you, and Jesus, without you, there would be no life on earth, and we would not be able to sit down and express our Christian values before the good people of Pittsylvania County. Amen .

(Verified Compl. ¶ 8; Ex. 1 ¶ 7, Glenberg decl.) The audience is asked to stand while the prayer is delivered. The supervisors and the audience bow their heads. (Verified Compl. ¶ 9.)

Except in case of illness or infrequent scheduling conflicts, plaintiff Jane Doe, a Pittsylvania County resident, has attended every Board meeting since October 2008, because she believes it is important to observe and understand the workings of her local government. She intends to continue attending every meeting. (Verified Compl. ¶ 10.) Jane Doe objects to the Board’s practice of opening its meetings with Christian prayer because she does not subscribe to the particular faith promoted by the Board’s opening prayers. Ms. Doe believes that the prayers convey to her and other non-Christian citizens the message that they are not welcome at Board meetings. Ms. Doe also believes that the prayers create a perception that the Board is unlikely to

treat non-Christians fairly because they do not follow the Board's preferred faith. As a result of the sectarian prayers, Ms. Doe feels like an outsider in her own community. Plaintiff, as a citizen and resident of Pittsylvania County is entitled to attend meetings of her Board of Supervisors without being subjected to prayers that advance and prefer one religion, Christianity, to the exclusion of other religions that do not recognize the deity of Jesus, including but not limited to Judaism, Islam and Hinduism. (Verified Compl. ¶ 11.)

After reading about *Joyner v. Forsyth County*, ___ F.3d ___, 2011 WL 3211354, *8 (4th Cir. July 29, 2011), in which the Fourth Circuit held sectarian legislative prayer unconstitutional, Ms. Doe alerted the American Civil Liberties Union (ACLU) of Virginia to the Board's unconstitutional prayers. On Tuesday, August 16, 2011, the ACLU of Virginia sent an email to each of the Board members, with a copy to the County Attorney, explaining that the precedents of the Supreme Court and the Fourth Circuit Court of Appeals prohibit legislative meetings from being opened with sectarian prayers, and asking the Board to cease its practice of such prayers. (Verified Compl. ¶ 12; Ex. 1 ¶ 8.) At the Board's meeting that same evening, after Board members had received the ACLU of Virginia's email, Supervisor William Pritchett delivered a Christian prayer. Unprecedentedly, each of the other supervisors then said their own prayers, five out of seven of which were explicitly Christian. (Verified Compl. ¶ 13; Ex. 1 ¶ 8.) Board Chairman Tim Barber declared, according to news reports, "We're going to have a minority tell us we can't pray?" and "If they want to challenge it in court, I say challenge it in court." (Verified Compl. ¶ 13.)

At the Board meeting on September 6, 2011, more than 200 people gathered to demonstrate their support for the delivery of prayers to Jesus Christ at Board meetings. Prior to roll call, Supervisor Coy E. Harville delivered a Christian prayer. Following public comment,

during which more than a dozen people spoke in favor of sectarian prayers, the Board passed a resolution pertaining to opening invocations at Board meetings. (Verified Compl. ¶ 14 and Ex. A.)

The resolution moves the prayer, which was previously listed on the agenda between Roll Call and the Pledge of Allegiance, to before the Roll Call, and provides that “[t]he prayer shall not be listed or recognized as an agenda item for the meeting or as part of the public business.” Nonetheless, the prayer is still an official activity of the Board of Supervisors. Among other things, the resolution provides that (a) the purpose of the prayer is “to solemnize proceedings of the Board of Supervisors”; (b) the prayer is “for the benefit of the Board of Supervisors”; (c) the prayer shall be delivered by members of the Board of Supervisors, on a rotating basis; and (d) “the Chairperson shall introduce the invitational speaker.” (Verified Compl. ¶ 15 and Ex. A.) Further, although the resolution provides that “no prayer should proselytize or advance any faith, or disparage the religious faith or non-religious views of others,” supervisors at the September 6, 2011 Board meeting stated their intention to continue praying in the name of Jesus Christ. (Verified Compl. ¶ 16 and Ex. A.)

ARGUMENT

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). In this case, all of these factors weigh heavily in the plaintiff’s favor.

I. THE PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

A. Sectarian Legislative Prayers Are Unconstitutional.

The Supreme Court held in *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) that the Establishment Clause permits a legislative body to invoke divine guidance before engaging in public business. “In recognizing the value of invocations, [however,] *Marsh* did not suggest that there are no limits on the practice of legislative prayer.” *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 283 (4th Cir.2005). The Supreme Court’s subsequent decision in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), clarified its holding in *Marsh*. *Allegheny* explained that the prayers in *Marsh* were acceptable only because they did not “have the effect of affiliating the government with any one specific faith or belief . . . because the particular chaplain ‘removed all references to Christ.’” *Id.* at 603 n.52.

In light of *Marsh* and *Allegheny*, the Fourth Circuit has repeatedly held that sectarian legislative prayer constitutes an “advancement” of a particular faith in violation of the Establishment Clause. In *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), the court invalidated a town council’s practice of having a councilmember open meetings with a Christian prayer. The court found that:

The invocations at issue, which specifically call upon Jesus Christ, are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather, they embody the precise kind of “advancement” of one particular religion that *Marsh* cautioned against.

376 F.3d at 301-02. The court further explained that “[w]hereas the prayers approved of in *Marsh* had been “nonsectarian” and “civil,” the prayers at issue in *Wynne* “contained references to ‘Jesus Christ,’ and thus promoted one religion over all others, dividing the Town’s citizens

along denominational lines.” *Id.* at 298-99. The court accordingly held that the town’s opening prayer practices were unconstitutional.

In *Simpson*, the Fourth Circuit affirmed that sectarian legislative prayers are constitutionally unacceptable. There, the court upheld the Chesterfield County Board of Supervisors’ policy of inviting only Christian, Jewish, and Muslim clergy to deliver opening invocations at meetings. The county’s policy was sufficiently inclusive, the court held, because it specifically prohibited sectarian prayers. The policy “track[ed] the language of *Marsh*, stat[ing] that each ‘invocation must be *non-sectarian* with elements of the American civil religion and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief.’” 404 F.3d at 278 (emphasis added). Further, the county, “seeking to avoid the slightest hint of sectarianism, revised its invitation letter to the clergy” and began directing clergy “to avoid invoking the name of Jesus Christ . . .” *Id.* at 279. As the court explained, “When we gather as Americans, we do not abandon all expressions of religious faith. Instead, our expressions evoke common and inclusive themes and forswear, as Chesterfield has done, the forbidding character of sectarian invocations.” *Id.* at 287.

In *Joyner v. Forsyth County*, ___ F.3d ___, 2011 WL 3211354 (4th Cir. July 29, 2011), the Fourth Circuit continued to insist that legislative meetings must not be opened with sectarian prayer. There, a county board of commissioners invited clergy from all of the local congregations to deliver prayers. The result was that “almost four-fifths of the prayers referred to ‘Jesus,’ ‘Jesus Christ,’ ‘Christ,’ or ‘Savior.’” *Id.* at *3. The court held that this practice was unconstitutional because it “resulted in sectarian invocations meeting after meeting that advanced Christianity and that made at least two citizens feel uncomfortable, unwelcome, and unwilling to participate in the public affairs of Forsyth County.” *Id.* at *13. “[C]itizens should

come to public meetings confident in the assurance that government plays no favorites in matters of faith but welcomes the participation of all." *Id.* at *14. Sectarian prayers at government meetings undermine one of the main purposes of the Establishment Clause: to prevent division of the populace along religious lines. "To plant sectarian prayers at the heart of local government is a prescription for religious discord. In churches, homes, and private settings beyond number, citizens practice diverse faiths that lift and nurture both personal and civic life. But in their public pursuits, Americans respect the manifold beliefs of fellow citizens by abjuring sectarianism and embracing more inclusive themes." *Id.*

B. The Board's September 6, 2011 Resolution Does Not Cure the Unconstitutionality of the Sectarian Opening Prayers.

The resolution adopted by the Board of Supervisors on September 6, 2011 (attached to the Verified Complaint as Exhibit A), seeks to disguise an official, government-sponsored prayer as private, individual speech. It further seeks to bring its sectarian prayers within the category of legislative prayers approved by *Marsh* by declaring that "no prayer should proselytize or advance any faith, or disparage the religious faith or non-religious views of others." These efforts are futile. As in *Wynn* and *Joyner*, the Board here is engaging in unconstitutional, sectarian legislative prayer.

Legislative prayers are government speech. There is not "a single case in which a legislative prayer was treated as individual or private speech." *Turner v. City Council*, 534 F.3d 352, 355 (4th Cir. 2008), *cert. den.* 129 S. Ct. 909 (2009). *See also Simpson*, 404 F.3d at 288 (holding that legislative prayers are government speech). The Pittsylvania County prayers are no different. The prayers are "are authorized by a government policy and take place on government property at government-sponsored . . . events." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000). Only Board of Supervisors members are authorized to deliver the prayer; they are

permitted to do so only by virtue of their role as supervisors. And “the Chairperson of the Board of Supervisors shall introduce the invitational speaker, and invite only those who wish to do so to stand for those observances of and for the Board of Supervisors.”

The Board’s decision to remove the invocations from meeting agendas and to schedule them before the gavel that signifies the start of official business does not insulate the prayers from constitutional scrutiny by somehow rendering them stand-alone events, separate and distinct from Board meetings themselves. Rather, the prayers are part and parcel of the official gathering, regardless of whether they take place before or after the gavel, or are documented in meeting agendas. But for the Board’s meetings, the invocations would not occur at all, as their express purpose is to solemnize the meetings. If a Board meeting were cancelled, for instance, surely the invocation would be cancelled too.

Thus, it is of no moment that the Board insists, in its resolution, that the Board member delivering the prayer shall do so “in his or her capacity as a private citizen.” The prayers are undertaken by government officials at government functions. They are government speech.

Nor are the prayers saved by the resolution’s provision that “no prayer should proselytize or advance any faith, or disparage the religious faith or non-religious views of others.” The Board members have made clear their intention to continue to engage in sectarian prayers, and the Fourth Circuit has held that such prayers, *per se*, advance the particular faith with which they are affiliated. *See Wynne*, 376 F.3d at 301-02 (Legislative prayers that “specifically call upon Jesus Christ . . . embody the precise kind of ‘advancement’ of one particular religion that Marsh cautioned against.”

II. THE PLAINTIFF WILL SUFFER IRREPARABLE HARM ABSENT PRELIMINARY RELIEF.

The plaintiff attends nearly every meeting of the Pittsylvania County Board of Supervisors. The sectarian prayers delivered at each meeting make the plaintiff feel like a member of a disfavored class in the eyes of her government because the government endorses religious beliefs that she does not share. The prayers convey to her and other non-Christian citizens the message that they are not welcome at Board meetings. The plaintiff also believes that the prayers create a perception that the Board is unlikely to treat non-Christians fairly because they do not follow the Board's preferred faith. As a result of the sectarian prayers, plaintiff feels like an outsider in her own community.

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). In Establishment Clause cases, the injury of government endorsement of religion “occurs merely by virtue of the government's purportedly unconstitutional policy or practice establishing a religion, without any concomitant protected conduct on the movants' part.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (6th Cir. 2006). Thus, “where a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination.” *Id.* at 303.

Because the plaintiff suffers ongoing injury in the form of the Board's endorsement of religion, the irreparable injury prong of the preliminary injunction standard is satisfied.

III. THE BALANCE OF EQUITIES FAVORS THE PLAINTIFF

While the plaintiff suffers irreparable injury for as long as sectarian prayers continue to be used to open Board meetings, the County will suffer no harm to its legitimate interests if preliminary relief is granted. The County may continue to solemnize its meeting by opening

with a moment of silence or a nonsectarian prayer. Any wish of the County to endorse Christianity as part of Board meetings is not a legitimate governmental interest but a Constitutional violation.

IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

Courts have repeatedly recognized that the vindication of First Amendment rights is a significant public interest. *See, e.g., Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (“upholding constitutional rights surely serves the public interest.”); *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (“[I]njunctions protecting First Amendment freedoms are always in the public interest.”); *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005); *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) (“Vindicating First Amendment freedoms is clearly in the public interest.”); *Chabad of Southern Ohio v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) (“the public interest is served by preventing the violation of constitutional rights.”).

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court issue a preliminary injunction enjoining the defendant from reciting or endorsing any sectarian prayer before, during or after any Pittsylvania County Board of Supervisors meeting.

Respectfully submitted,

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