UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

THOMAS JOSEPH COLEMAN, III, and BRANDON RAYMOND JONES,	)	
Plaintiffs,	)	**Case No.: 1:12-CV-190**
v.	)	**Mattice / Lee**
HAMILTON COUNTY GOVERNMENT TENNESSEE,	)	
Defendant.	)	

DEFENDANT'S BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendant Hamilton County, Tennessee (the "County") submits this brief in opposition to Plaintiffs' motion for a preliminary injunction.

I. STATEMENT OF THE CASE

The ultimate question presented at the preliminary injunction stage is straightforward: Does the First Amendment's Establishment Clause require a legislative body to censor private citizens offering invocations at the beginning of legislative meetings?

Plaintiffs filed this action on June 15, 2012, challenging the practice of invocations at the beginning of legislative sessions for the County Commission of Hamilton County, Tennessee (the "Commission"). The initial complaint named the County as a defendant and also named each individual county commissioner and the county attorney as individual defendants in their official capacity. The prayer for relief sought a declaration that the Commission's "prayer practice" was unconstitutional and also requested a preliminary injunction consistent with a forthcoming motion for preliminary injunction. [R. 1]

Plaintiffs subsequently filed their motion for preliminary injunction on June 24, 2012, requesting the Court "to halt the prayer activities of the defendants pending a final disposition of this matter." [R. 16] Less than a week later, and prior to the deadline for any responsive pleading from the defendants, Plaintiffs filed an amended complaint—as of right—on June 26, 2012. [R. 20] The amended complaint dropped all claims against the individual commissioners and county attorney, leaving the County as the lone remaining defendant. The amended complaint added a challenge to a new draft policy under consideration by the Commission. This new draft policy—not yet adopted at the time by the Commission—proposed to replace the Commission's prior prayer practice with solemnization proceedings designed to promote neutrality and diversity. Again, however, the amended complaint sought a declaration that the Commission's "prayer practice"—apparently including the new solemnization policy—is unconstitutional.

Shortly thereafter, the Commission formally adopted the proposed solemnization policy on July 3, 2012. For the sake of judicial efficiency and economy, the County accepts the first amended complaint as challenging the formally adopted solemnization policy even though the policy had not yet been adopted as of the filing of the first amended complaint.

More recently, Plaintiffs filed a proposed second amended complaint, [R. 27], on July 12, 2012. The proposed second amended complaint adds a claim relating to the alleged removal of Plaintiff Thomas Coleman from a County Commission meeting. The motion for leave to file the second amended complaint, [R. 30], is not yet ripe for decision, but the new proposed claims do not impact the upcoming hearing on Plaintiffs' motion for a preliminary injunction. Instead, the issue for the preliminary injunction hearing is simply whether this Court should ban—during the

pendency of these proceedings—invocations offered by private citizens as contemplated by the Commission's new solemnization policy.

The ultimate question presented here has already been answered by the Supreme Court's seminal ruling, *Marsh v. Chambers,* 463 U.S. 783 (1983), and its progeny. In *Marsh,* the Supreme Court held that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country" and clearly constitutional. *Id.* at 796. The Court further clarified, "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been *exploited* to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.*at 794-795 (emphasis added). Plaintiffs ask this Court to alter more than 235 years of American tradition, ignore the prevailing Supreme Court precedent, and declare that traditional invocations delivered before a legislative body are suddenly a violation of the First Amendment.

To the extent Plaintiffs' complaints arise from the County's practice prior to the implementation of an invocation policy earlier this month, those claims are mooted by the adoption and implementation of that new policy governing invocation practices during Commission meetings. To the extent Plaintiffs complain about the current policy, it is limited to a facial challenge. And that facial challenge must fail in light of clear judicial precedent that not only are invocations before the County Commission constitutional, but the very procedures put forth in the policy have been consistently upheld as facially constitutional by numerous federal district and appellate courts. To the extent Plaintiffs demand the County to exercise control over the content of the prayer by censoring the expression of speakers invited to deliver an invocation, the remedy is unavailable to this court.

This court should deny the motion for preliminary injunction.

II. STATEMENT OF FACTS

Hamilton County is a political subdivision of the State of Tennessee with a commission form of legislative government. The Commission is a duly elected legislative and deliberative body. Prior to July 3, 2012, the Commission had no written policy regarding invocations at the beginning of meetings, but as a matter of practice, Commission meetings opened with prayer offered by a variety of people, including commissioners, clergy, private citizens and staff. A particular prayer might be Christian in nature, but there has never been a requirement for prayers to be Christian, and not all have been.

On July 3, 2012, the Commission adopted a solemnization policy specifically providing that it "shall replace any prior practice . . . concerning opening invocations" at Commission meetings. The policy expresses the Commission's intent "to allow a private citizen to solemnize the proceedings of the . . . Commission . . . [through] an invocation, which may include a prayer, a reflective moment of silence, or a short solemnizing message." In an effort to pursue diversity and neutrality, the policy further provides for leaders of every religious assembly in Hamilton County to receive an invitation to offer the solemnizing invocation on a first-come, first-serve basis. Furthermore, the content of invocations is not censored or reviewed by the Commission in any way except that all speakers are requested not to "proselytize or advance any faith, or disparage the religious faith or non-religious views of others, or exceed five (5) minutes in length."

Additionally, the Commission's new solemnization policy requires a disclaimer on programs or schedules of events published by the Commission. The disclaimer notes, among other things, that "views or beliefs expressed by the invocation speaker have not been previously reviewed or approved by the Commission and do not necessarily represent the religious beliefs

or views of the Commission in part or as a whole." The required disclaimer also advises that no one is required to participate in the invocation and that failure to participate will in no way impact anyone's right to participate in Commission business.

The Commission began implementing and following its new solemnization policy immediately after July 3, 2012. This included compiling a list of all congregations in Hamilton County and sending the leader of each congregation an invitation to present an invocation at a Commission meeting. The list was compiled and invitations sent without regard to the particular creed or belief system of a congregation. Rather, invitations were sent to all known congregations and otherwise complied with the policy. As responses have been received, the County scheduled invocation speakers on a first-come, first-serve basis. Nineteen invocation speakers have already been scheduled from a wide array of religious or philosophical perspectives, including Baptist, Unitarian Universalist, Lutheran, Jewish, Church of God and others, some of whom have belief systems which are not apparent from the name of their congregation. The County does not review or censor the invocations and does not impose any guidelines or limitations on the invocations except that, in accordance with the policy, speakers are requested not to proselytize, not to disparage the beliefs of others, and not to exceed five minutes. Invocations may come in the form of a prayer, a moment of silence, or some other solemnizing message.

At least one of the plaintiffs attended one or more Commission meetings and protested against legislative prayer prior to July 3, 2012. Plaintiffs apparently still object to any invocations offered on the legislative floor after the Commission's adoption of its new solemnization policy.

III. CLAIMS BASED UPON COMMISSION PRACTICES PRIOR TO THE ADOPTION OF ITS JULY 3, 2012 SOLEMNIZATION POLICY ARE MOOT.

The Commission's adoption of a new solemnization policy on July 3, 2012 explicitly and completely repealed and replaced any prior practice relating to prayer or invocations at County Commission meetings. Consequently, all claims based on events prior to the implementation of the new solemnization policy are moot.

It is well-settled that federal courts only have the authority to decide "live" cases or controversies. U.S. Const. Art. III, § 2; *Burke v. Barnes*, 479 U.S. 361, 363 (1987). "Federal courts have no authority to render a decision upon a moot question or to declare rules of law that cannot affect the matter at issue." *NAACP v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001). "Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief." *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986). The repeal, modification or enactment of legislation qualify as such events. *See Kentucky Right to Life, Inc. v. Terry*, 108 F. 3d 637, 644 (6th Cir. 1997) ("Legislative repeal or amendment of a challenged statute while a case is pending on appeal usually eliminates this requisite case-or-controversy because a statute must be analyzed by the appellate court in its present form.") "The test for mootness is whether the relief sought would, if granted, make a difference, to the legal interests of the parties." *McPherson v. Michigan High School Athletic Association, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (quoting *Crane v. Indiana High School Athletic Association*, 975 F.2d 1315, 1318 (7th Cir. 1992) (citations omitted)).

In the present case, the County Commission's enactment of a new solemnization policy necessarily moots all claims based on events occurring before implementation of that policy. If this Court were to issue a decision upon the question of whether the County's prior prayer practice violated the Constitution, the decision would serve no purpose because it would not

affect the parties. An injunction against conduct that no longer occurs and is already precluded by a new legislative enactment would be meaningless. Thus, the requested relief—to the extent it requests a cessation of activities already precluded by new legislative enactment—is no longer available. In other words, it would not "make a difference to the legal interests of the parties." *McPherson*, 119 F.3d at 458. Accordingly, any claims seeking such relief are moot. *See Chaudhuri v. State of Tennessee*, 130 F.3d 232 (6th Cir. 1997) (claims for injunctive and declaratory relief to stop prayers and moment of silence at commencement exercises were moot after university abandoned practice of including verbal prayers at its events); *see also Bench Billboard Co. v. City of Cincinnati*, No. 10-3750 (6th Cir. April 10, 2012) (repeal and replacement of old ordinance regarding the placement of advertisements rendered constitutional challenge to old ordinance moot).

To the extent that Plaintiffs seek a preliminary injunction against Commission prayer practices occurring before implementation of the new solemnization policy, this Court should deny the request motion as moot. The only remaining live controversy before the Court is Plaintiffs' facial challenge to the County's new solemnization policy.

IV. PRELIMINARY INJUNCTION STANDARDS

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 394-95 (1981). It "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original; internal citation omitted).

"A district court must balance four factors when considering a motion for a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction

would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction." *Bays v. City of Fairborn,* 668 F.3d 814, 818-19 (6th Cir. 2012); *Tumblebus Inc. v. Cranmer,* 399 F.3d 754, 760 (6th Cir. 2005). In "First Amendment cases, however, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits . . . because the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the" legislative act in issue. *Bays,* 668 F.3d at 818-19; *see also Hamilton's Bogarts, Inc. v. Michigan,* 501 F.3d 644, 649 (6th Cir.2007). A district court's rejection of a motion for a preliminary injunction is generally reviewed for abuse of discretion, but when there is little or no factual dispute, an injunction decision may be a "purely legal question" reviewed *de novo*. *Id.*

V. PLAINTIFFS DO NOT HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS.

The primary reason for denying Plaintiffs' motion for preliminary injunction is simple: their constitutional analysis ignores history and binding legal precedent which clearly demonstrate the constitutionality of the challenged solemnization policy.

A. History demonstrates the constitutionality of the County's solemnization policy.

With eyes closed to history, Plaintiffs contend legislative prayer violates the First Amendment. Yet, the final language of the complete Bill of Rights—including the First Amendment—was approved by the First Congress on September 25, 1789, just three days *after* those same members of Congress authorized opening prayers in legislative sessions by paid Congressional chaplains. *Marsh,* 463 U.S. at 788. Thus, any suggestion that the First Amendment was intended to ban legislative prayers is intellectually untenable.

The United States Supreme Court recognized this same point when upholding legislative prayers in *Marsh:*

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they just declared acceptable.

Id. at 790. In *Marsh*, the Nebraska Legislature had hired the same Presbyterian minister to pray for its deliberations for 16 years. The plaintiff complained about the Christian nature of the prayers and made much the same arguments that the Plaintiffs are making here, asserting that such prayers violated the Establishment Clause. *Id.*at 793. In rejecting this argument, the Court began by looking to this country's history.

As a part of its historical analysis, the *Marsh* Court reviewed and discussed the opening of the first session of Congress with prayer and concluded that "the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society." *Id. 791-92*. The prayer at the first session of the Continental Congress, in Carpenter's Hall, Philadelphia on September 7, 1774, was delivered by the Rev. Jacob Duché and is exemplary of the prayers reviewed by the Supreme Court. He included these words (emphasis added):

> Be Thou present; O God of Wisdom, and direct the councils of this Honorable Assembly: enable them to settle all things on the best and [surest] of foundations: that the scene of blood may be speedily closed: that Order, Harmony and Peace may be effectually restored, and Truth, and Justice, Religion, and Piety prevail and flourish among the people. Preserve the health of their bodies and the vigor of their minds, shower down on them, and the millions they here represent, such temporal Blessings as Thou seest expedient for them in this world, and crown them with everlasting Glory in the world to come. *All this we ask in the name and through the merits of Jesus Christ, Thy Son and Our Savior, Amen.*[1]

[1] September 7, 1774, *First Prayer in Congress: Beautiful Reminiscence* (Washington, D.C. Library of Congress); William J. Federer, *America's God and Country: Encyclopedia of Quotations* (Coppell, TX Fame Publishing, Inc., 1994), p.137; Gary DeMar, *God and Government: A Biblical and Historical Study* (Atlanta, GA American Vision Press, 1982), Vol. I, p. 108; John S.C. Abbott, *George Washington* (New York, NY Dodd, Mead & Co., 1875, 1917), p.187; Reynolds, *The Maine Scholars Manual* (Portland, ME Dresser, McLellan & Co., 1880).

The content of Rev. Duché's prayer is virtually indistinguishable from the content of the typical opening prayer at any public meeting in America today and entirely consistent with the prayers delivered before the Hamilton County Commission meetings.

Indeed, this nation has enjoyed a long history and tradition of seeking Divine guidance. More than a century ago, the Court acknowledged in *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892), that our nation has maintained a "custom of opening sessions of all deliberative bodies and most conventions with prayer . . ." Recognizing this history and writing for the majority in *Marsh*, Chief Justice Burger concluded that:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.

Id. at 786. By simply following this tradition, government officials run no risk of violating the Constitution.[2] This history and tradition also demonstrate that Plaintiffs do not have a likelihood of success in challenging the Commission's solemnization policy and that their request for a preliminary injunction should accordingly be denied.

B. *Marsh* defined the standard and test for public invocations.

The U.S. Court of Appeals for the Sixth Circuit recognizes that *Marsh* is the touchstone case for evaluating legislative prayer before deliberative bodies. *See Coles v. Cleveland Board of Education*, 171 F.3d 369, 379-80 (6th. Cir. 1999) (noting *Marsh* as the precedent for

[2] In *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984), the Court observed "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." Indeed, "[t]hose government acknowledgments of religion serve, in the only ways reasonably possible in our culture, 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. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.* at 693 (O'Connor, J., concurring).

legislative prayers before deliberative bodies and the host of courts that have applied *Marsh* to a variety of legislative bodies, including county commissions, but holding in a split decision that particular school board meetings were not the type of deliberative body subject to a *Marsh* analysis). After reviewing the historical tradition of legislative prayer, the Court in *Marsh* turned to the specific complaints about the prayers themselves. The Court acknowledged that the prayers were given by the same Christian minister for sixteen years, were exclusively in the Judeo Christian tradition, and that they incorporated frequent and explicit Christian references.[3] But after acknowledging the content, the court began looking for evidence of impermissible motives on the part of the legislative body and established the following standard:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Marsh, 463 U.S. at 794-795.

After *Marsh*, in order to prove legislative prayers violate the First Amendment, a plaintiff must show that the public body at issue has "exploited" its prayer opportunity "to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794. It made no difference in *Marsh* that the challenged prayers were brought "in the Judeo-Christian tradition,"

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[3] The *Marsh* majority opinion notes that for at least fifteen years (1965–80) the prayers of Reverend Palmer, the Presbyterian chaplain appointed by the Nebraska Legislature, were often explicitly Christian. *Marsh*, 463 U.S. at 793 n.14. While the majority made little of the Christian references because the content of the prayers was not relevant to the holding, the dissenters noted the references as a significant aspect of their objection. For example, Reverend Palmer's prayers included "Christological references." *Id.* at 800, n.9 (Brennan, J., dissenting). "The Court declines to 'embark on a sensitive evaluation or to parse the content of a particular prayer.' Perhaps it does so because it would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain." *Id.* at 823 (Stevens, J., dissenting) (internal citations omitted). Yet the prayers of the founding era, just as prayers given before Congress today, are replete with references to Jesus and the Christian faith. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 232 (2008).

because the way in which the prayers were presented—the overall context and prayer practice—was acceptable. *Id.* at 793.

Just as the Nebraska Legislature's practice of having a person open its sessions with prayer did not violate the Establishment Clause, the prayers at the beginning of Hamilton County Commission meetings—offered by private individuals of different denominations and faiths—are constitutional. Given the features of the prayer practice upheld in *Marsh*, the Hamilton County policy easily passes constitutional muster. Indeed, the Hamilton County Commission policy is even more neutral, diverse and inclusive than the Nebraska Legislature's policy approved in *Marsh*, and thus less susceptible to allegations of religious favoritism.

The Hamilton County Commission's policy includes the following features:

- Whereas the Nebraska Legislature employed the same minister for sixteen years, Hamilton County allows leaders from every identifiable religious group in the county an equal opportunity to deliver an invocation. The invitation list includes approximately 550 separate religious assemblies and every faith tradition that assembles within the county, including various denominations of the Christian faith, Muslim, Jewish, Unitarian Universalist, Jehovah's Witness, Mormon … ;
- Whereas the Nebraska Legislature handpicked their chaplain, in Hamilton County no religious favoritism is possible because invocation speakers are non-paid, private citizen volunteers who self-select themselves by responding to an invitation;
- Whereas the Nebraska Legislature never had a non-Christian as a Chaplain, Hamilton County's invocation schedule includes a variety of denominations and diverse religious backgrounds and creeds, including Christian, Jewish, and

Unitarian Universalist;

- While the County informs the invocation speaker of the *Marsh* standard, the County exercises no editorial control over the content of the prayers, leaving the invocations purely reflective of each speaker's own conscience and faith tradition; and
- Hamilton County informs the public—both by the terms of the policy itself and the notice placed on the written agenda—that the content of the prayers are the private expressions of the invocation speaker and a reflection of his or her personal faith tradition.

With *Marsh* as the touchstone, *Coles*,171 F.3d at 379-80, and with *Marsh* upholding a legislative prayer practice less neutral, diverse, and inclusive than the Hamilton County Commission's solemnization policy, Plaintiff's likelihood of success on the merits is negligible. Plaintiffs' request for a preliminary injunction should accordingly be denied.

C. Focusing on the Christian content of legislative prayers ignores the facts and analysis of *Marsh*.

Any suggestion that this Court engage in censoring or editing a private citizen's invocation is troubling. In *Marsh*, the Supreme Court stated that judicial parsing of prayer content should be avoided unless there is evidence the prayer opportunity has been exploited. 463 U.S. at 794–95. And, as noted above, the *Marsh* Court did not consider the mere presence of unique religious references in a prayer to be objectionable – indeed, the dissent in *Marsh* objected that the prayers before the Nebraska Legislature were explicitly Christian. *Id.* at 823 (Stevens, J., dissenting). But recognizing that the prayers were "often explicitly Christian," the majority still concluded the facts there provided "no indication that the prayer opportunity ha[d] been exploited." *Id.* at 793 n.14, 794.

When the *Marsh* Court considered whether a "prayer opportunity" had been exploited, it looked to the process by which the chaplain was chosen to participate in the invocation practice, not the content of the chaplain's prayers. The Court considered such things as "long tenure," the absence of "proof that the chaplain's reappointment stemmed from an impermissible motive," and the chaplain's remuneration in light of historical practices. *Id.* at 793-94.

The majority in *Marsh* noted that the prayers there were exclusively in the "Judeo-Christian tradition," but did not consider that fact important enough to even address, other than in a footnote confirming that the chaplain characterized some of his prayers as "Judeo-Christian" and acknowledged the prayers were often explicitly Christian. *Id*. at 793 n.14. The *Marsh* majority's decision not to consider the content of the chaplain's prayer in light of the dissent's objection is telling and further confirms that "exploitation of the prayer opportunity" analysis does not focus on unique faith references found in the content of prayers.

Plaintiffs ask this Court to eliminate a prayer opportunity solely because speakers have given explicitly Christian prayers. But the dispositive question is whether the prayer opportunity is being exploited. *Id*. at 794. The lesson from *Marsh* is that a prayer opportunity should not be deemed "exploited" merely because prayers name the deity being addressed, regularly include expressions unique to a specific faith tradition, or are consistently presented by a member of one faith tradition. By focusing on whether a legislative prayer policy is neutral rather than the content of particular prayers, courts can safeguard constitutional guarantees without becoming embroiled in ecclesiastical evaluations and the comparative theology necessary to decipher the content of a prayer. The neutrality of the Hamilton County Commission's policy confirms its constitutionality under *Marsh*, thereby again demonstrating that Plaintiffs' motion for a preliminary injunction should be denied for lack of likelihood of success on the merits.

D. Plaintiffs ask this Court to adopt an Establishment Clause standard *Marsh* rejected.

Plaintiffs contend that this Court should apply the Establishment Clause analysis set out in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). [R. 17 at 3] In doing so, they insist—contrary to *Marsh*—that all legislative prayers inherently violate the Establishment Clause. However, the Supreme Court expressly refused to apply the *Lemon* test to legislative prayers, despite the dissenters' objections. *See Marsh* 463 U.S. at 796-97. The Sixth Circuit, sitting *En Banc*, also recognizes that the *Lemon* test is not applicable to evaluating legislative prayers. *See ACLU of Ohio v. Capital Square Review and Advisory Board*, 243 F.3d 289, 305-06 (6th Cir. 2001) ("It is worth mentioning, perhaps, that even the author of the *Lemon* decision, the late Chief Justice Burger, did not see fit to apply the *Lemon* test when he wrote the Court's opinion in the legislative chaplain case"); *see also Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263 (11th Cir. 2008) (noting the Supreme Court in *Marsh* refused to apply the *Lemon* test to legislative prayer); *Snyder v. Murray City Corp.* 159 F.3d 1227, 1332 (10th Cir. 1998) (noting that *Marsh* did not apply the traditional test put forth in *Lemon*, rather "the evolution of the Establishment Clause jurisprudence indicates that the constitutionality of legislative prayers is a *sui generis* legal question").

E. Every court to review the procedures set forth in Hamilton County Commission's policy has found them to be facially constitutional.

The County acknowledges an irreconcilable circuit split—a debate not yet entered by the Sixth Circuit—regarding *as applied* challenges to facially neutral policies such as that adopted by the Hamilton County Commission.[4] But that is not the issue before this Court. With the

[4] In *Marsh*, the Supreme Court upheld a sixteen year practice of one ordained Presbyterian minister delivering invocations that were exclusively in the Judeo-Christian tradition and including frequent explicit Christian references. In reaching this conclusion the Court warned against focusing on the content of prayer. Nevertheless, the Circuit courts that have focused on

mooting of any claims based on prior practice, the only issue presently before this Court is a facial challenge to the Commission's new solemnization policy since there has been insufficient time to establish a record concerning its application. *Cf. Bowen v. Kendrick,* 487 U.S. 589, 600-01 (1998) (challenges to legislation not yet implemented or for which there is not a record of its application are facial challenges). And every court to review the procedures in the Commission's new policy has found them to be facially constitutional.

The policy adopted by the Commission is closely modeled after the practice approved by the U.S. Court of Appeals for the Eleventh Circuit in *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263 (11th Cir. 2008). Cobb County used neutral sources to develop a comprehensive list of the congregations and religious assemblies in the county and extended invitations to the religious leaders to volunteer to deliver an invocation at county commission meetings whereby they were free to speak consistent with their own faith tradition. *Id.* at 1267-68. The *Pelphrey* court found the practice constitutional both facially and as applied noting "The taxpayers would have us

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the content of legislative prayers have reached three separate and irreconcilable results. The Eleventh Circuit has concluded that the frequent inclusion of distinctly Christian references is irrelevant so long as the selection of the invocation speaker provides no evidence that the government had an impermissible motive and thereby exploited the prayer opportunity. *See Pelphrey*, 547 F.3d 1263 (11th Cir. 2008). The Fourth Circuit, on the other hand, concluded that government exploitation is inferred if distinctly Christian references become too frequent and thereby imply government endorsement of Christianity. *See Joyner v. Forsyth County,* 653 F.3d 341 (4th Cir. 2011). Under the Fourth Circuit's approach, the government has an obligation to proactively censor the content of prayer to ensure Christian references don't become too frequent. *Id.* Finally, the Second Circuit's view directly conflicts with both *Pelphrey* and *Joyner*. *See Galloway v. Town of Greece*, 681 F.3d 20 (2nd Cir. 2012) (petition for rehearing *En Banc* pending). In *Galloway*, the Second Circuit concluded that evidence of impermissible motive of government exploitation is irrelevant if, under a totality of the circumstances, a reasonable observer would perceive a government endorsement of Christianity; but the government is prohibited from censoring the content of prayer or manipulating the selection process to ensure the perception of diversity. The most widely adopted perspective is that of the Eleventh Circuit in *Pelphrey*. *See Doe v. Tangipahoa Parish School Board*, 631 F.Supp.2d 823 (E.D.La 2009); *Rubin v. City of Lancaster,* 802 F.Supp.2d 1107 (C.D.Ca 2011) (appeal pending); *Atheists of Florida, Inc. v. City of Lakeland*, 838 F.Supp.2d 1293 (M.D.Fl 2012) (appeal pending).

parse legislative prayers for sectarian references even when the practice of legislative prayers has been far more inclusive than the practice approved in *Marsh*. We decline this role of ecclesiastical arbiter." *Id*. at 1274.

This practice of inviting leaders of local religious assemblies to offer a legislative prayer is widespread and has been upheld by numerous courts. *See Doe v. Tangipahoa Parish School Board*, 631 F.Supp.2d 823 (E.D.La 2009); *Rubin v. City of Lancaster*, 802 F.Supp.2d 1107 (C.D.Ca 2011) (appeal pending); *Atheists of Florida, Inc. v. City of Lakeland*, 838 F.Supp.2d 1293 (M.D.Fl 2012) (appeal pending).

Two Circuit Court decisions have issued conflicting opinions finding that a neutral invitation policy can be problematic if the implementation or application of the policy over a substantial period of time results in frequent instances of the same type of "sectarian" references becoming too frequent. These two opinions are not only irreconcilable with the Eleventh Circuit's decision in *Pelphrey*, but they are inconsistent with each other. Plaintiffs' supplemental brief cites to the decision from U.S. Court of Appeals for the Fourth Circuit, *Joyner v. Forsyth County*, 653 F.3d 341(4th Cir. 2011). But Plaintiffs fail to point out that in that split opinion, even the majority noted that the policy itself was constitutional on its face. The *Joyner* Court only found the policy to be problematic *as implemented*. *Id*. 353-54 (emphasis added).

Although Plaintiff has not referenced the recent decision of the U.S Court of Appeals for the Second Circuit, the relevance of *Galloway v. Town of Greece*, 681 F.3d 20 (2nd Cir. 2012) (petition for rehearing *En Banc* pending) warrants this court's attention. The Second Circuit reviewed an extensive district court opinion that reviewed every relevant case addressing legislative prayer and holding the practice of the Town of Greece constitutional. *See Galloway v. Town of Greece*, 732 F.Supp.2d 195 (W.D.N.Y. 2010) (reversed on appeal with petition for

rehearing *En Banc* pending). It is important to note that the Town of Greece lacked a formal policy and the Second Circuit based its opinion on the totality of the circumstances of its practice as it developed over time. *Id*. at 30. Notably the Second Circuit found the town practice did not adequately represent residents that worshipped outside of the town and the lack of public notice to those attending meetings that the content of the invocation was only representative of the individual invocation speaker's faith tradition. *Id*. at 31-32. The policy adopted by Hamilton County specifically allows for residents that assemble outside the county to have their religious leader added to the invitation list. Additionally, the policy mandates a public disclaimer as recommended by the Second Circuit.

Courts—including those relied upon by Plaintiffs to attack the Commission's policy—have overwhelmingly approved policies such as the Commission's on their face. Thus, again, Plaintiffs' facial challenge to the Commission's new solemnization policy has little likelihood of success on the merits and the request to enjoin private speech under the policy during the pendency of this action should accordingly be denied.

F. The relief sought by Plaintiffs is unavailable.

One more reason the Plaintiffs have little likelihood of success on the merits is that they seek relief that is simply unavailable.

Plaintiffs seek a judicial ruling halting all invocations before the County Commissioners. Alternatively, Plaintiffs' appear to seek an order compelling the County to censor private citizen's speech to ensure that legislative invocations are purged of words deemed too Christian or "sectarian." But the *Marsh* decision puts such a ruling beyond the authority of this Court.

The Supreme Court reaffirmed *Marsh* and added clarity about government involvement in public invocations in *Lee v. Weisman*, 505 U.S. 577, 596-97 (1992). In *Lee*, the Supreme

Court considered whether it was constitutional for a public high school to orchestrate a public invocation as part of graduation ceremonies. The Court distinguished the context of a high school graduation ceremony from that of legislative meeting and found it impermissible to incorporate a government prayer in the context of a public school graduation ceremony. While addressing the government's involvement in the composition of prayers, the Supreme Court admonished the school for regulating the content of prayers by mandating they be "nonsectarian." *Id*. at 588-90. The admonition of *Lee* regarding government regulation of the content of public prayers informs the application of *Marsh*. *See Pelphrey*, 547 F.3d at 1271 (noting *Lee* provides insight about the boundaries of legislative prayer); *see also Galloway*, 681 F.3d at 28-29.

A requirement that prayers be "nonsectarian" or prohibiting Christian prayers would involve the government in mandating how and to whom a person may pray. It would likewise entangle the government in dictating the content of prayers to ensure they are adequately nonsectarian. In essence, this would constitute the establishment of a civil religion.

The Supreme Court has stated that "[t]he suggestion that the 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." *Lee*, 505 U.S. at 591. In *Lee*, the Supreme Court struck down a public prayer policy in part because the government had advised a speaker that prayers should be "nonsectarian." *See Pelphrey*, 547 F.3d at 1270 (*Lee* restricted the role of the government in determining the content of prayer); *Galloway*, 681 F.3d at 28-29 (noting that *Lee* prevents the government from imposing a "nonsectarian" requirement on legislative prayer). The Supreme Court noted that a "nonsectarian" instruction is a means by

which the government impermissibly directs and controls the content of prayers. *Lee, 505 U.S.* at 588.

Although Plaintiffs appear to object to all legislative invocation, at a minimum it seems they are truly asking this Court to impose a "nonsectarian" requirement. Although Plaintiffs' Complaint and brief in support of a Motion for Preliminary Injunction are silent as to the source of Plaintiffs' objections to the prayer policy, the Supreme Court has made clear that asserting the prayers are not sufficiently inclusive does not justify the Government dictating the content of prayer. Mandating "nonsectarian" prayer to foster a sense of inclusiveness is precisely what the *Lee* court found problematic. Justice Kennedy noted:

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake the task for itself.

Id. at 589.

Any requirement that the government limit or eliminate references unique to a faith tradition in prayers presumes the government's ability to discern what those forbidden unique characteristics are. But what metric can a secular court use to judge when an expressed faith becomes too distinctive? How is the court or the County to judge when a prayer is a "Christian prayer" and when it is a "Judeo-Christian prayer?"

Several courts have highlighted the intractable difficulty of enforcing a "nonsectarian" requirement:

> We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the taxpayers have been opaque in explaining that standard. Even the individual taxpayers cannot agree on which expressions are "sectarian." . . . The taxpayers' counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. . . . The

> difficulty experienced by taxpayers' counsel is a glimpse of what county commissions, city councils, legislatures, and courts would encounter if we adopted the taxpayers' indeterminate standard.

Pelphrey, 547 F.3d at 1272; *see also Galloway*, 681 F.3d at 28-29 (noting the line between sectarian and nonsectarian prayers runs into sizable doctrinal issues). This is consistent with Justice Souter's description of the dangers of trying to impose a "nonsectarian" requirement that he termed "nonpreferentialism in his concurrence in *Lee*:"

> [N]onpreferentialism requires some distinction between "sectarian" religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. Simply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.

Lee, 505 U.S. at 616-17 (Souter, J., concurring, joined by Stevens, J. and O'Connor, J.).

The caution expressed in *Marsh* with respect to the "sensitive evaluation" associated with parsing the words of a prayer, *Marsh*, 463 U.S. at 794–95, addresses a concern the Supreme Court has applied in other contexts as well. *See Widmar v. Vincent*, 454 U.S. 263, 269–70 n.6, 272 n.11 (1981) (holding that inquiries into religious significance of words or events are to be avoided); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) (stating that for authorities to troll through a religious institution's beliefs in order to identify whether it is "pervasively sectarian" is offensive and contrary to precedent); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (finding that "the very process of inquiry leading to findings and conclusions" involving religious beliefs may impinge upon First Amendment rights).

Even if a workable standard could somehow be concocted to impose upon prayer givers prohibitions on the use of specific appellations and theological phrasing, implementing such a standard would itself be preferential and "sectarian." This is so because of the inevitably

disparate impact in favoring faiths suited to the form of the designated expression.[5] Or if the terms of such a standard were to require a limit on the number of times certain theological words and names could be used, then the restrictions on distinctive prayers would only arise after the arbitrary "quota" of allowable distinctive references was met, thus meaning different speakers would face different ground rules. This reinforces the wisdom of the Supreme Court's admonition against parsing the content of prayer and imposing a "nonsectarian" requirement.[6] It also demonstrates the inappropriateness of Plaintiffs' request for a preliminary injunction.

VI. THE REMAINING PRELIMINARY INJUNCTION FACTORS ALSO WEIGH AGAINST PRIOR RESTRAINT OF SPEECH IN THE LEGISLATIVE CHAMBER DURING THE PENDENCY OF THIS LITIGATION.

After the Court considers the likelihood—or lack thereof—of Plaintiffs' success on the merits, the remaining factors focus on the potential harms stemming from either granting or denying the proposed injunction. A balancing of the harms in this case again weighs in favor of denying Plaintiffs' motion for a preliminary injunction.

The very nature of the potential harms in this case serves to re-emphasize the critical importance of the first factor—the likelihood or unlikelihood of Plaintiffs' success on the merits. Some harm is inevitable if the Court's injunction decision does not correspond to the final

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[5] *See* Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517, 526–27 (2007) ("Faced with the choice of praying in conformity with a government-imposed standard of orthodoxy or not praying at all, many clergy (to their credit) will choose not to pray at all").

[6] *See* Delahunty, *supra* at 518, 520 n.7 (arguing that "the purported distinction between 'sectarian' and 'non-sectarian prayer is illusory, [and] that the attempt to enforce such a distinction will operate in a discriminatory fashion"); Klukowski, *supra*, note at 252–54 (arguing that there are no judicially manageable standards for defining "sectarianism" generally); R. Luther III & D. Caddell, *Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands a "Practice Focused" Analysis*, 48 SANTA CLARA L. REV. 569, 571–72 (2008) (arguing that courts should "favor the historical and constitutional policy of permitting individuals to choose their own words" when delivering an invocation, because censoring content inevitably "undermines diversity and the free speech rights of these individuals, and in turn, renders these traditionally solemn occasions meaningless").

decision on the merits. Ignoring standing and political question concerns for the moment, a failure to enjoin the anticipated solemnization proceedings at County Commission meetings would result in harm only if the final judgment in this case concludes that the County's solemnization policy is unconstitutional. More particularly, Plaintiff's argument is that the "harm" would be the occurrence of solemnization events at the beginning of County Commission meetings to which they object.

On the other hand, a broader amount of "harm" of constitutional dimensions also necessarily occurs if solemnization proceedings are enjoined during the pendency of this litigation but the final judgment concludes that the solemnization policy is constitutional. In this event, however, the harm takes multiple forms and harms multiple groups of people. First, the legislators would be harmed by a wrongful interference with their legislative proceedings. Separation of power doctrines as well as Speech and Debate clause or similar legislative immunity and independence doctrines counsel against interference with proceedings on the legislative floor. Indeed, there is an enormous difference between (a) the judiciary striking down an ordinary legislative act or statute that governs societal behavior and (b) the judiciary telling a legislative body how to conduct its proceedings on the legislative floor and telling the legislative body what speech is or is not allowed on the legislative floor. The Supreme Court has long instructed that "a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character." *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481 (1896); *Associated General Contractors of America v. City of Columbus,* 172 F.3d 411, 415 (6th Cir. 1999) (quoting same language); *see also McChord v. Cincinnati, N.O. & T.P. Ry. Co.,* 183 U.S. 483 (1902) ("the legislative body of the state or of the municipality, in the exercise of its

legislative discretion, is beyond [the courts'] jurisdiction. . . The fact that . . . the legislative action threatened may be in disregard of constitutional restraints . . . does not affect the question. . . . [L]egislative discretion . . . whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."); *Real Estate Development Co. v. City of Florence*, 327 F.Supp. 513, 515 (E.D. Ky. 1971) (courts are without jurisdiction to "supervise or superintend [the] proceedings" of a municipal legislative body).

In addition to the potential harm to legislators and the legislative process, an injunction in this case—despite the absence of an actual constitutional violation—would also harm citizens who would otherwise speak on the legislative floor. The Commission's new solemnization policy contemplates citizens being allowed to express themselves on the legislative floor during a legislative session. In fact, 19 speakers have already volunteered and been scheduled to offer an invocation according to the terms of their own consciences over the next several months through November of 2012 weeks. Plaintiffs' requested injunction, if granted, would act as a prior restraint on that speech. And finally, the community or public as a whole would also be deprived of their opportunity to solemnize their legislative proceedings in the matter deemed most appropriate by their duly elected representatives.

When all of these potential harms are balanced, the harms associated with erroneously enjoining the County's planned solemnization proceedings are far greater than the potential harm associated with erroneously failing to enjoin the solemnization proceedings. Erroneously entering the injunction would infringe upon the free speech rights of speakers, the legislative independence of the County Commission, and the public interest in conducting legislative proceedings in the manner deemed appropriate by legislative officials. On the other hand, an

erroneous failure to enter the injunction would only "offend" plaintiffs who intentionally came to the legislative proceedings for the purpose of being offended.

Balancing the interests and harms in this case compels a denial of Plaintiffs' request for preliminary injunction.

CONCLUSION

The Supreme Court has already held that legislative prayers are constitutional. It has also warned that the government should not be involved in regulating the content of prayers, since that exercise itself may violate the Constitution. Plaintiffs' challenge is limited to a facial attack on a policy that has been approved by many courts. The motion for preliminary injunction should be denied.

This the 19th day of July, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by U.S. Mail to the following: None

This the 19th day of July, 2012.

/s/ Stephen S. Duggins