IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Bruce A. Hake, et al.

Plaintiffs,

v.

Carroll County, Maryland, by its Board of County Commissioners, et al.

Defendants.

Case No. 1:13-cv-01312-WDQ

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Index of Exhibits x

I. STATEMENT OF UNDISPUTED MATERIAL FACTS 1

II. DEFENDANTS' MOTION IS IMPROPERLY FILED AND SHOULD BE STRICKEN 4

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR ESTABLISHMENT CLAUSE CLAIMS FOR PROSPECTIVE RELIEF 5

A. *Galloway* does not moot Plaintiffs' claims for prospective relief 5

B. Carroll County prayers are delivered by elected legislators 6

1. The identity of the speaker has always been relevant 10

2. There is a common sense difference between elected officials and chaplains 15

C. The Board's prayer are often directed to the public 16

D. Carroll County's invocation selection process is unconstitutional 25

E. Carroll County's prayer practice advances and proselytizes Christianity 29

F. Carroll County's prayer practice betrays an impermissible governmental purpose 34

G. Commissioners have signaled disfavor toward nonparticipants 35

IV. PLAINTIFFS ARE ENTITLED TO PERMANENT INJUNCTIVE RELIEF 38

V. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR ESTABLISHMENT CLAUSE CLAIMS FOR RETROSPECTIVE RELIEF 39

VI. DEFENDANTS HAVE NOT MET THEIR BURDEN ON SUMMARY JUDGMENT 42

VIII. DEFENDANTS ARE NOT ENTITLED TO ANY IMMUNITY IN THIS CASE 44

A. Plaintiffs have demonstrated *Monell* policy, practice and custom 45

B. Actions of the individual Commissioners are relevant and competent evidence of the County's unconstitutional prayer practice 47

C. Defendants are *not* entitled to legislative immunity 47

IX. CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). 42, 43

Agostini v. Felton, 521 U.S. 203 (1997). 40

Ahlquist v. City of Cranston, 840 F. Supp. 2d 507 (D. R.I. 2012) 22

Alexander v. Holden, 66 F.3d 62 (4th Cir. 1995) 48

Am. Humanist Ass'n v. City of Lake Elsinore, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014). 47

Atheists of Fla., Inc. v. City of Lakeland, 713 F.3d 577 (11th Cir. 2013) 13, 14, 26, 29

Austin v. Paramount Parks, Inc., 195 F.3d 715 (4th Cir. 1999). 46

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996). 48

Berkley v. Common Council, 63 F.3d 295 (4th Cir. 1995) 48

Bogan v. Scott-Harris, 523 U.S. 44 (1998) 48, 49

Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979) 14, 15

Burns v. Reed, 500 U.S. 478 (1991). 48

Cady v. Arenac County, 574 F.3d 334 (6th Cir. 2009) 48

Canell v. Lightner, 143 F.3d 1210 (9th Cir. 1998) 43

Carey v. Piphus, 435 U.S. 247 (1978). 41, 42

Carter v. VNA, Inc., 2013 U.S. Dist. LEXIS 107017 (D. Md. 2013). 5

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 5

Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982). 7, 49

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290 (D.C. Cir. 2006) 39

Christian v. Cecil County, 817 F. Supp. 1279 (D. Md. 1993). 48

Christopher Phelps & Assocs., LLC v. Galloway, 492 F.3d 532 (4th Cir. 2007) 38

CMR D.N. Corp. & Marina Towers Ltd. v. City of Phila., 703 F.3d 612 (3d Cir. 2013) 39

Colo v. Treasurer & Receiver General, 378 Mass. 550 (1979) 14, 15

Committee for First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992) 41

Connick v. Thompson, 131 S. Ct. 1350 (2011) 46

Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421 (4th Cir. 2007) 41, 42

Doe v. Franklin County, 2013 U.S. Dist. LEXIS 80033 (E.D. Mo. 2013) 7, 49

Doe v. Parish of St. Tammany, 2008 U.S. Dist. LEXIS 31222 (E.D. La. 2008) 41

Doe v. Pittsylvania County, 842 F. Supp. 2d 906 (W.D. Va. 2012) .... passim

Doe v. Pittsylvania County, 842 F. Supp. 2d 927 (W.D. Va. 2012) 15, 39, 40

Doe v. Tangipahoa Parish Sch. Bd., 631 F. Supp. 2d 823 (E.D. La. 2009) 13

Does 1-7 v. Round Rock Indep. Sch. Dist., 540 F. Supp. 2d 735 (W.D. Tex. 2007) 39

Edwards v. Aguillard, 482 U.S. 578 (1987) 7

EEOC v. Washington Suburban Sanitary Comm'n, 666 F. Supp. 2d 526 (D. Md. 2009) 45

Eichenlaub v. Twp. of Indiana, 385 F.3d 274 (3d Cir. 2004) 43

Elrod v. Burns, 427 U.S. 347 (1976). 38

Engel v. Vitale, 370 U. S. 421 (1962) 9

Etheridge v. Norfolk & W. Ry. Co., 9 F.3d 1087 (4th Cir. 1993) 40

F.E.R. v. Valdez, 58 F.3d 1530 (10th Cir. 1995) 41

Family Life Church v. City of Elgin, 2007 WL 2790763 (N.D. Ill. 2007)... 41

Farrar v. Hobby, 506 U.S. 103 (1992) 42

Floyd v. Laws, 929 F.2d 1390 (9th Cir. 1991)... 41

Forrester v. White, 484 U.S. 219 (1988) 49

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000)............................ 18

Gearlds v. Entergy Servs., 709 F.3d 448 (5th Cir. 2013). 9

Government of the Virgin Islands v. Lee, 775 F.2d 514 (3d Cir. 1985) 48

Gravel v. United States, 408 U.S. 606 (1972) 49

Green v. Haskell County Bd. of Comm'rs, 568 F.3d 784 (10th Cir. 2009) 47

Gross v. SES Americom, Inc., 225 F.R.D. 169 (D. Md. 2004) 5

Guindon v. Twp. of Dundeee, 488 Fed. Appx. 27 (6th Cir. 2012). 48

Hake v. Carroll County, 2014 U.S. Dist. LEXIS 40476 (D. Md. 2014). 39, 40

Hansen v. Bennett, 948 F.2d 397 (7th Cir. 1991) 48

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 48

Hector v. Weglein, 558 F. Supp. 194 (D. Md. 1982) 47

Henson v. Honor Committee of U. Va., 719 F.2d 69 (4th Cir. 1983) 42

Hinrichs v. Bosma, 410 F. Supp. 2d 745 (S.D. Ind. 2006) 39

Hinrichs v. Speaker of the House of Representatives, 506 F.3d 584 (7th Cir. 2007) 15

Hobart v. City of Stafford, 2010 WL 3419660 (S.D. Tex. 2010) 45

Hobart v. City of Stafford, 916 F. Supp. 2d 783 (S.D. Tex. 2013). 47

In re Grand Jury, 821 F.2d 946 (3d Cir. 1987) 45

Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly, 590 F.3d 725 (9th Cir. 2009) 41

International Salt Co. v. United States, 332 U.S. 392 (1947). 38

Irwin v. Gavit, 268 U.S. 161 (1925). 50

Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989) 18

Jiminez v. All Am. Rathskeller, Inc., 503 F.3d 247 (3d Cir. 2007) 47

Jones v. Angelone, 94 F.3d 900 (4th Cir. 1996) 40

Jones v. Hamilton County Gov't, 530 Fed. Appx. 478 (6th Cir. 2013). 14, 26, 29

Jones v. Hamilton County, 891 F. Supp. 2d 870 (E.D. Tenn. 2012) 25

Joyner v. Forsyth County, 2009 U.S. Dist. LEXIS 105360 (M.D. N.C. 2009) 39, 42

Joyner v. Forsyth County, 653 F.3d 341 (4th Cir. 2011). .... passim

Karcher v. Daggett, 466 U.S. 910 (1984). 38

Kensington Volunteer Fire Dep't, Inc. v. Montgomery County, 684 F.3d 462 (4th Cir. 2012) 48

Kentucky v. Graham, 473 U.S. 159 (1985). 45

Kobe v. Haley, 2013 U.S. Dist. LEXIS 113193 (D. S.C. 2013). 48

Kurtz v. Baker, 630 F. Supp. 850 (D.D.C. 1986).......... 15, 49

Lee v. Weisman, 505 U.S. 577 (1992).......... 7

Lincoln v. Page, 109 N.H. 30 (1968).......... 14, 15

Lynch v. Donnelly, 465 U.S. 668 (1984).......... 7

Lytle v. Doyle, 326 F.3d 463 (4th Cir. 2003) 46

Marsh v. Chambers, 463 U.S. 783 (1983) .... passim

McCray v. Md. DOT, 741 F.3d 480 (4th Cir. 2014) 5

McCreary County v. ACLU, 545 U.S. 844 (2005).......... 35, 47

McGowan v. Maryland, 366 U.S. 420 (1961).......... 16

McMillian v. Monroe County, 520 U.S. 781 (1997).......... 46

McReady v. O'Malley, 804 F.Supp.2d 427 (D. Md. 2011) 5

Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003).......... 41

Mezu v. Morgan State Univ., 269 F.R.D. 565 (D. Md. 2010).......... 5

Midwest Media Prop., LLC v. Symmes Twp., 503 F.3d 456 (6th Cir. 2007).......... 41

Milwaukee Deputy Sheriffs Ass'n v. Clarke, 2008 U.S. Dist. LEXIS 12662 (E.D. Wis. 2008).......... 42

Monistere v. City of Memphis, 115 F. App'x 845 (6th Cir. 2004) 46

Mulholland v. Government County of Berks, Pa., 706 F.3d 227 (3d Cir. 2013). 46

Mullin v. Sussex County, 861 F. Supp. 2d 411 (D. Del. 2012). 15, 30, 46

Murray v. Buchanan, 720 F.2d 689 (D.C. Cir. 1983).......... 15

N. Carolina Civ. Liberties Union Leg. Found. v. Constangy, 947 F.2d 1145 (4th Cir. 1991). 10

National People's Action v. Wilmette, 914 F.2d 1008 (7th Cir. 1990). 39

Newdow v. Eagen, 309 F. Supp. 2d 29 (D.D.C. 2004) 15

Nguyen v. CNA Corp., 44 F.3d 234 (4th Cir. 1995). 44

O'Connor v. Washburn Univ., 416 F.3d 1216 (10th Cir. 2005) 41

Owen v. Independence, 445 U.S. 622 (1980) 48

Parnell v. Waldrep, 538 F. Supp. 1203 (W.D. N.C. 1982).......... 47

Pelphrey v. Cobb County, 495 F. Supp. 2d 1311 (N.D. Ga. 2007).......... 25, 42

Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008) .... passim

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).......... 46

PeTA v. Rasmussen, 298 F.3d 1198 (10th Cir. 2002) 41

Price v. City of Charlotte, 93 F.3d 1241 (4th Cir. 1996) 41

Rendelman v. Rouse, 569 F.3d 182 (4th Cir. 2009).......... 39, 40

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 40

Roach v. Stouffer, 560 F.3d 860 (8th Cir. 2009).......... 48

Rossignol v. Voorhaar, 316 F.3d 516 (4th Cir. 2003) 44

Rubin v. City of Burbank, 101 Cal. App. 4th 1194 (Cal. App. 2d Dist. 2002) 15

Rubin v. City of Lancaster, 710 F.3d 1087 (9th Cir. 2013) 14, 26, 29, 30

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 27

Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) 15

Schmidt v. Contra Costa County, 693 F.3d 1122 (9th Cir. 2012).......... 48

Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005).......... passim

Snyder v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1998) 15, 25, 35

Society of Separationists v. Whitehead, 870 P.2d 916 (Utah 1993) 15

Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987).......... 46, 47

Steele v. Van Buren Public School Dist., 845 F.2d 1492 (8th Cir. 1988).......... 18

Stone's Auto Mart, Inc. v. City of St. Paul, Minn., 721 F. Supp. 206 (D. Minn. 1989) 45

Town of Greece v. Galloway, 572 U.S. ___, 2014 U.S. LEXIS 3110 (2014). .... passim

Trustees of the Heating, Piping & Refrigeration Pension Fund v. Milestone Constr. Servs., 2014 U.S. Dist. LEXIS 2895 (D. Md. 2014). 43

Turner v. City Council, 534 F.3d 352 (4th Cir. 2008) .... passim

United States v. Brewster, 408 U.S. 501 (1972). 49

United States v. Bumpers, 705 F.3d 168 (4th Cir. 2013) 9

United States v. Fareed, 296 F.3d 243 (4th Cir. 2002) 9

United States v. W.T. Grant Co., 345 U.S. 629 (1953) 18

Van Orden v. Perry, 545 U.S. 677 (2005) 42

Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) 47

Williams v. Griffin, 952 F.2d 820 (4th Cir. 1991) 41

Wynne v. Town of Great Falls, 376 F. 3d 292 (4th Cir. 2004) .... passim

Yniguez v. Arizona, 975 F.2d 646 (9th Cir. 1992) 41

Zinna v. Bd. of County Comm'rs, 2008 U.S. Dist. LEXIS 41204 (D. Colo. 2008). 46

RULES

FED. R. CIV. P. 56(c) 5

Local Rule 105.2.c 4

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. 1 .... passim

OTHER AUTHORITIES

All Souls Church Unitarian, http://www.all-souls.org/worship 28

Atheist and Agnostic People Welcome, Unitarian Universalist Association (Nov. 8, 2013), http://www.uua.org/beliefs/welcome/atheism/index.shtml. 28

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Greg Epstein, *Humanist Community at Harvard*, http://harvardhumanist.org/greg-epstein/ 29

History of the Chaplaincy, Office of the Chaplain of the United States House of Representatives, http://chaplain.house.gov/chaplaincy/history.html 15

House Officers, http://kids.clerk.house.gov/high-school/lesson.html?intID=41 28

Penny Edgell, Joseph Gerteis, Douglas Hartmann, *Atheists As "Other": Moral Boundaries and Cultural Membership in American Society*, Am. Soc. Rev. Vol 71, 211 (2006). 28

Pierce, Ulysses G. B. (Ulysses Grant Baker), 1865-1943. Papers, 1903-1950: A Finding Aid., Andover-Harvard Theological Library, http://oasis.lib.harvard.edu/oasis/deliver/~div00646 28

Secular Coalition for America, *Congressman Comes Out as Nontheist, Wins Re-election! Secular Coalition Congratulates Rep. Pete Stark of California,* (November 5, 2008). 29

The Pew Forum on Religion & Public Life, *News Release, July 24, 2003: Many Wary of Voting For an Atheist or a Muslim,* 1, 10-14 (2003). 28

INDEX OF EXHIBITS

March 16, 2011 – Frazier Proposed Prayer Policy……………………………………….…Exhibit 1

March 28, 2011 – FFRF Letter…………………………………………………………...Exhibit 2

March 29, 2011 – Shoemaker Proposed Prayer Policy…………………………………...Exhibit 3

April 4, 2011 – Roush Email / Barbara Weller……………………………………...…Exhibit 4

April 4, 2011 – Howard Email in Support of Christian Prayer…………………………...Exhibit 5

April 18, 2011 – Board Proposed Prayer Policy…………………………………………Exhibit 6

April 19 2011 – Email Agenda Proposed Policy…………………………………………Exhibit 7

April 19, 2011 – BOC Agenda (Invocation Policy)………………………………………Exhibit 8

April 21, 2011 – BOC Minutes (Invocation Policy)……………………………………...Exhibit 9

April 2011 – Public Support of Prayer Emails…………………………………………...Exhibit 10

May 2, 2011 – Prayer Schedule Email…………………………………………………..Exhibit 11

February 22, 2012 – Invitation to Constitution Class Email……………………………Exhibit 12

February 23, 2012 – Grady Email………………………………………………………Exhibit 13

February 28, 2012 – Rothschild Email Constitution Class……………………………...Exhibit 14

February – March 2012 – Public response to Constitution Class and Prayer…………...Exhibit 15

March 3, 2012 – Rothschild Email Constitution Class…………………………………Exhibit 16

March 15, 2011 – Email to Commissioners in support of Legislative Prayer…………..Exhibit 17

April 27, 2012 – Email from Rothschild to Pastor Chris………………………………..Exhibit 18

May 3, 2012 – Email invitation for Commissioner Frazier's Prayer Meetings…………Exhibit 19

May 2012 – Email Responses to Frazier's Prayer Meetings……………………………Exhibit 20

May 6, 2012 – Howard Email to Frazier re: Prayer Meetings……………………….…Exhibit 21

May 7, 2012 – Howard and Frazier re: Prayer Meetings………………………………..Exhibit 22

May 11, 2012 – Howard Email to Kym re: Prayer Meetings…………………………...Exhibit 23

May 13, 2012 – Howard and Rothschild Email re: Prayer Meetings…………………...Exhibit 24

May 14, 2012 - Howard and Rothschild Email re: Prayer Meetings Part II………….....Exhibit 25

May 14, 2012 – Frazier Email re: Prayer Meetings……………………………………..Exhibit 26

May 24, 2012 – FFRF Letter re: Prayer Meetings………………………………………Exhibit 27

May 30, 2012 – Rothschild Email re: Establishment Clause……………………..…….Exhibit 28

May 31, 2012 – Rothschild Email re: Establishment Clause Part II……………………Exhibit 29

Smith Declaration………………………………………………………………………..Exhibit 30

Hake Declaration………………………………………………………………………....Exhibit 31

Graybill Declaration...……………………………………………………………………Exhibit 32

Ridgely Declaration.……………………………………………………………………...Exhibit 33

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs refer to and incorporate by reference their Statement of Undisputed Facts ("SUF") as if fully stated herein. To briefly summarize, on December 8, 2010, Carroll County began opening its Board meetings with sectarian Christian prayers delivered by the Commissioners on a rotating basis. (SUF ¶11, ¶19). This practice was instituted by the five Commissioners in this suit at the first meeting they took office. (*Id.*). Each Commissioner is Christian. (*Id.* at ¶¶12-18). Not a single prayer from December 2010 until present has been a non-Christian prayer or has been delivered by a non-Christian. (*Id.* at ¶62). Not one prayer has mentioned a non-Christian deity. (*Id.* at ¶59). Many of the prayers are expressly Christian and invoke "Jesus" or "Savior." (*Id.* at ¶10, ¶58, ¶61, ¶134).[1] The prayers often proselytize Christianity and preach conversion. (*Id.* at ¶¶74-79,¶81,¶83-89,¶¶91-92,¶143,¶170).

The prayers are delivered to the public and the Board. (*Id.* at ¶9). The Board's only written policy, which was adopted at the December 8, 2010, meeting, and which remains in place today, states that the Board "will open its meetings with the Pledge of Allegiance followed by a prayer." (*Id.* at ¶19, ¶¶183-185). Citizens were regularly asked stand for the Pledge and to remain standing for the prayer. (*Id.* at ¶¶20-57). Commissioners frequently direct the public to join with phrases such as "Let us pray," "join" or "bow our heads." (*Id.* at ¶52, ¶54, ¶¶64-66, ¶68, ¶¶71-72, ¶80, ¶82). Many of their prayers, by their express terms, are directed to, and are for the benefit of, the public. (*Id.* at ¶52, ¶73, ¶¶85-90, ¶92). Rather than solemnize Board meetings, many prayers serve as a platform for addressing controversial topics that have nothing to do with County business (such as same-sex marriage and 9-11 attacks). (*Id.* at ¶76,¶81,¶83,¶¶85-87). At the February 9, 2012, meeting, Frazier delivered a Christian prayer, which referred to same-sex marriage as an "attack" on American values. (*Id.* at ¶81). Howard and Rothschild debated Plaintiff Smith and Rothschild likened "atheism or humanism" to the "Gestapo." (*Id.* at ¶104).

The Board has placed the topic of legislative prayer on its agenda several times over the years. (*Id.* at ¶19, ¶166, ¶184). Citizens sent letters of support and disapproval of the Commissioners' Christian prayers and Commissioners responded. (*Id.* at ¶93, ¶95, ¶¶100-101, ¶113-114).

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[1] From 2011-2012, approximately 40% of the prayers made explicit references to "Jesus" or "Savior" (or both). (SUF ¶58). Overly Christian prayers continued on a regular basis through 2013 and 2014. (*Id.* at ¶61, ¶134).

On March 28, 2011, Freedom From Religion Foundation ("FFRF") informed the Board that the Commissioner-delivered prayers violate the Establishment Clause. (*Id.* at ¶95). On March 29, Shoemaker suggested "one approach" to a new policy would be to "invit[e] clergy from local churches to participate." (*Id.* at ¶96). Rothschild forwarded the FFRF letter to opposing counsel. They responded on April 4, 2011: "there should be no problem with FFRF if the county commissioners meet for prayer before the actual session begins." (SUF ¶97). They suggested: "the prayer time with the commissioners as individual rather than as legislators could even be scheduled in the meeting chamber 15 minutes or so before the gavel falls." (*Id.*). They also recommended the Board consider a policy, "where citizens from various religious groups in the jurisdiction are invited to volunteer to pray." (*Id.*) They concluded: "while responding to the FFRF might be fun . . . [i]gnoring FFRF and correcting the problem as discussed above to conform to current Fourth Circuit case law would be your best option." (*Id.*).

The County attorney presented a proposed legislative prayer policy to the Board, which the Board placed on its agenda for the April 21, 2011, Board meeting. (*Id.* at ¶102). Ironically, the proposal provided: "The prayer shall not be listed or recognized as an agenda item . . . and shall be offered shortly before the opening gavel that officially begins the meeting." (*Id.*). At the April 21 meeting, the Board discussed the "policy regarding opening invocations before meetings." (*Id.* at ¶103). Ultimately, the Commissioners eschewed adopting this policy, or any other policy presented to them. (*Id.* at ¶134).

On March 7, 2012, AHA sent a letter to the Board informing it that Commissioner-delivered Christian prayers were unconstitutional. (*Id.* at ¶112). The Commissioners continued to deliver sectarian Christian prayers. (*Id.* at ¶133). On May 1, 2013, Plaintiffs filed the above-captioned lawsuit. (*Id.* at ¶135). The Commissioners continued to deliver sectarian Christian prayers, even after the Court issued a preliminary injunction. (*Id.* at ¶141). The day after the injunction, Frazier delivered a sectarian Christian prayer in express defiance of the order. (*Id.* at ¶¶142-143). On March 27, 2014, after Frazier delivered the prayer, the Board issued a statement on the County's website, informing citizens that "the court is ordering the Board to stop offering any prayers in the name of Jesus," and that "the Board will vigorously pursue the matter to its end." (*Id.* at ¶145). Later that day, Frazier posted a message on her

public Facebook page, thanking citizens for their support of her stand for Christian prayers. (*Id.* at ¶146). Many citizens responded to her post, and "shared" it on their own pages. (*Id.* at ¶¶147-148). The next day, Frazier wrote another public Facebook message regarding her Christian prayer, which also elicited public support and replies. (*Id.* at ¶149). On March 30, Frazier and opposing counsel were featured on Fox News to defend Frazier's Christian prayer. Frazier declared, "we could not say the words, 'Jesus Christ' or 'Savior,' and . . . we've been fighting for our citizens over this." (*Id.* at ¶150). A citizen posted on Frazier's Facebook, along with a link to the Fox News video, thanking her for her stand for Christian prayer. Frazier replied: "I appreciate you taking a stand with me!" (*Id.* at ¶151) (*See also* SUF ¶165).

On March 30, Rothschild wrote the following message on his public Facebook page, along with a link to Frazier's Fox News interview: "ROBIN BARTLETT FRAZIER: Portrait of a true American heroine. THIS IS WHAT PRINCIPLED LEADERSHIP LOOKS LIKE! Contact Robin and thank her for her stand in support of our Constitution & Judeo-Christian principles." (*Id.* at ¶152). In the evening, Rothschild wrote another public message: "Carroll County Commissioners . . . FIRST in standing firm in support of Christian prayer. . . . Praise God." (*Id.* at ¶154). Frazier's husband also wrote on his public Facebook wall: "Please Pray for my wife Robin! . . . Time to Fight! Please help us!" (*Id.* at ¶155). Citizens formed a group specifically to support Frazier's stand for Christian prayers. (*Id.* at ¶156).

At the April 1 meeting, Rothschild's campaign treasurer delivered a hostile speech about the lawsuit followed by a sectarian Christian prayer. (*Id.* at ¶¶157-159). At the next meeting on April 3, several citizens spoke in favor of the Commissioners' Christian prayers. (*Id.* at ¶¶160-163). The Board placed its prayer practice on the agenda for the April 8 meeting. At the beginning of the meeting, six citizens argued in favor of the Commissioners' sectarian Christian prayers and several delivered such prayers themselves. (*Id.* at ¶¶166-167). One remarked: "if anyone considers or thinks they can escape God, he is denying himself and is a very foolish person." (*Id.*). A majority of the Board voted in favor of a temporary resolution that provided that Roush would deliver the prayers in "his capacity as President of the Board" and in his absence, Shoemaker would deliver the prayers. Frazier and Rothschild opposed the resolution. (*Id.* at ¶169). Before voting, Rothschild delivered a long speech in support of Christian

prayer, which quoted Bible passages and made repeated references to "Son of God." The speech was followed by "Amen!" from the audience. (*Id.* at ¶170). That evening, Frazier delivered a campaign speech at an event organized by Michelle Jefferson's group, "We The People Carroll County Maryland." (*Id.* at ¶¶171-175). Frazier told citizens: "what [the judge] said was we couldn't use the words Jesus Christ or Savior, and that's what threw me over the edge." (*Id.*). One citizen asked what they, as "citizens [could] do to support [her] stand on prayer?" Frazier answered: "you do whatever is on your heart to do . . . [W]e always have an open mic for whatever anybody wants to talk about." (*Id.*). At the April 10 meeting, several citizens indeed advocated in favor of the Commissioners' practice of praying in Jesus' name and in opposition to the resolution. Two delivered Christian prayers. (*Id.* at ¶¶176-180).

On May 5, the Court lifted the injunction in light of *Town of Greece v. Galloway*, 572 U.S. ___, 2014 U.S. LEXIS 3110 (2014). (*Id.* at ¶182). At the May 8 meeting, the Board placed the prayer resolution on its agenda and unanimously voted in favor of "revert[ing] back to the Board's prior practice." (*Id.* at ¶¶183-85). Frazier was the first to deliver a prayer after the repeal and prayed in Jesus' name. (*Id.* at ¶186).

Plaintiffs are religiously diverse. Hake is a practicing Catholic and Smith is a Lapsed Catholic. Graybill is a Humanist and member of AHA. Ridgely is a Deist. As a result of Defendants' practice, Plaintiffs feel unwelcome at Board meetings and like political outsiders in their own community. They feel their County is advancing not only Christianity, but also a narrowly conservative and fundamentalist Christian view that is hostile and judgmental of outsiders, including them. (*Id.* at ¶¶2-4, ¶187).

II. DEFENDANTS' MOTION IS IMPROPERLY FILED AND SHOULD BE STRICKEN

At the outset, Plaintiffs object to Defendants' motion for summary judgment on the grounds that it is improperly filed. Local Rule 105.2.c provides in part: "if both parties intend to file summary judgment motions, counsel are to agree among themselves which party is to file the initial motion." This Court's scheduling order emphasizes: "the provisions of Local Rule 105.2.c apply" and that "[t]he court will demand compliance with the Local Rules." (Dkt. 38). Defense counsel never once contacted Plaintiffs' counsel to schedule and agree upon the timing and filing of the summary judgment motions.

Failure "to adhere to this Local Rule" warrants "striking a party's []motion for summary judgment." *Carter v. VNA, Inc*., 2013 U.S. Dist. LEXIS 107017, *20 (D. Md. 2013). *See also*, *McReady v. O'Malley*, 804 F.Supp.2d 427, 438 n.5 (D. Md. 2011) (striking motion filed in violation of Local Rule 105.2.c); *Mezu v. Morgan State Univ*., 269 F.R.D. 565, 585 (D. Md. 2010) (same).

Their timing is also questionable. Defendants filed their motion approximately one week after being served discovery. Motions for summary judgment are not due until September 22, 2014. (Dkt. 38). The discovery and status report deadline is August 25, 2014. In the status report, the parties are to inform the Court "[w]hether any party intends to file a dispositive pretrial motion." (*Id.*). Defendants failed to do this and failed to confer with Plaintiffs' counsel about their motion. Although discovery is not *necessary* for Plaintiffs to prove their case for the reasons set forth below, at a minimum, the Court should postpone ruling on Defendants' motion until after discovery has been completed so that Plaintiffs are given with the opportunity to supplement their motion with any newly-discovered evidence. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery"); *McCray v. Md. DOT*, 741 F.3d 480, 483 (4th Cir. 2014) (same). To comply with L.R. 105, Plaintiffs file their cross-motion for summary judgment now, *see Gross v. SES Americom, Inc*., 225 F.R.D. 169, 170 (D. Md. 2004) (105.2.c requires "filing a single memorandum in support of their cross-motion . . . and in opposition"), but without waiving the right to submit further evidence to the Court upon completion of discovery.

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR ESTABLISHMENT CLAUSE CLAIMS FOR PROSPECTIVE RELIEF.

Plaintiffs are entitled to summary judgment because the material facts are undisputed and they are entitled to judgment as a matter of law, *infra*. FED. R. CIV. P. 56(c). Under Rule 56, the Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See Celotex*, 477 U.S. at 322.

A. *Galloway* does not moot Plaintiffs' claims for prospective relief.

The Court in *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) held that legislative prayers are unconstitutional if they "advance any one . . . faith or belief." In *Galloway*, the Supreme Court

reinforced this critical aspect of *Marsh* that a legislative prayer practice is unconstitutional if it is "'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" 2014 U.S. LEXIS 3110 at *31 (citing *Marsh*, 463 U.S. at 794-95). The Court emphasized that "[t]he inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* at *36-37. *See Pelphrey v. Cobb County*, 547 F.3d 1263, 1281-82 (11th Cir. 2008) (the *Marsh* Court "weighed all of the factors that comprised the practice") (citing *Marsh*, 463 U.S. at 793-95). The Court in *Marsh*, as in *Galloway*, considered a variety of "factors to determine whether the legislative prayers had been exploited to advance one faith. The Court weighed the chaplain's religious affiliation, his tenure, and the overall nature of his prayers." *Id.* at 1271. *See Galloway*, 2014 U.S. LEXIS 3110 at *30-36 (looking to a variety of factors). The Court's ultimate inquiry is "to determine whether the prayer practice . . . fits within the [*Marsh*] tradition." *Id.* at *20. *Marsh* "indeed, requires an inquiry into the prayer opportunity as a whole." *Id.* at *34.

Pursuant to the *Marsh-Galloway* "fact sensitive" analysis, a legislative prayer practice transgresses the Establishment Clause if, *inter alia*, any of the following factors are present: (1) the practice proselytizes *or* advances *or* disparages "any one faith or belief"; (2) the prayers are delivered by the elected legislators; (3) the legislators encourage the public to participate; (4) the prayers are directed to the public or are for the public's benefit; (5) the selection process is exclusive, categorically prohibits certain faiths from delivering prayers, or is otherwise based on an "impermissible motive"; (6) the prayers denigrate nonbelievers or religious minorities, threaten damnation, preach conversion, or coerce or intimidate others; (7) the practice betrays an impermissible governmental purpose; or (8) the practice does not comport with the tradition of solemn, respectful, legislative prayers allowed by *Marsh*, *infra.* The presence of any one of these factors is sufficient to render the practice unconstitutional. *Id* at 1277-78. *See Marsh*, 463 U.S. at 793-95. Certainly, the presence of all of these factors, as is the case here, is beyond sufficient to find a prayer practice unconstitutional, *infra.*

B. Carroll County prayers are delivered by elected legislators.

A fair reading of *Marsh* and *Galloway* leads to the inescapable conclusion that legislative prayers

are far more likely to be unconstitutional when delivered by elected legislators. In *Marsh*, the Court "granted certiorari limited to the challenge to the practice of opening sessions with prayers by a state-employed clergyman." 463 U.S. at 786. In upholding the practice, the Court relied almost exclusively on the fact that "Nebraska's practice is consistent with the manner in which the First Congress viewed its chaplains." *Id.* at 794 n.16. The Court only contemplated two possible options for legislative prayers, neither of which are presented here.[2] Indeed, the Eighth Circuit explicitly recognized the distinction between clergy-delivered prayers and legislator-delivered prayers and the Supreme Court's decision in *Marsh* reinforced that aspect of the ruling. 675 F.2d 228, 232 (8th Cir. 1982). The court reasoned: "Here, *no speech* activity by *any legislator* is at issue . . . Nor is the independence of any individual legislator threatened by this action. **Individual prayer by legislators is not at issue.**" *Id.*

The court went on to recognize the unique role of a chaplain, explaining, "tax-paid chaplains have been upheld, for example, in the context of military bases, where the nature of the government service would restrict free exercise rights if a chaplain was not provided. It is at least conceivable that the same rationale might apply in some cases to legislative service." *Id.* at n.9. *See also Doe v. Franklin County*, 2013 U.S. Dist. LEXIS 80033, *10-11 (E.D. Mo. 2013) (in *Marsh* "'no speech activity by any legislator [was] at issue.'"). The Supreme Court agreed with the Eighth Circuit's point as to the unique role of the chaplain in upholding the practice in *Marsh.*[3] Subsequent Supreme Court cases further reinforce *Marsh's* limited applicability to prayers by religious leaders and citizens.[4] As the Court ruled in *Galloway*, "[t]he tradition reflected in *Marsh* permits **chaplains** to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths." U.S. LEXIS 3110 at *30.

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[2] *See* 463 U.S. at 795 n.18 ("several states choose a chaplain who serves for the entire legislative session. In other states, the prayer is offered by a different clergyman each day. Under either system, some states pay their chaplains and others do not.").

[3] *See Marsh*, 463 U.S. at 787 ("the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid **chaplain**"); *id.* at 790 ("[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a **chaplain**"); *id.* at 791 n.12 ("in the 1820's, Madison expressed doubts concerning the **chaplaincy practice**"); *id.* at 793 ("guest **chaplains** have officiated at the request of various legislators and as substitutes"); *id.* at 794 ("[t]he Continental Congress paid its **chaplain**").

[4] *See Lee v. Weisman*, 505 U.S. 577, 585 (1992) ("we upheld . . . prayer offered by a **chaplain**"); *Edwards v. Aguillard*, 482 U.S. 578, 583, n.4 (1987) ("opening a session with a prayer by a **chaplain** paid by the State did not violate the Establishment Clause"); *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (same).

The fact that ministers rather than legislators were delivering the prayers was highly significant to the Court's analysis in *Galloway*, for it was concerned with imposing a rule "for legislatures to require **chaplains** to redact the religious content from their message." *Id.* at *27-28. *See also id.* at *28 (Court could not "seek to require *ministers* to set aside their nuanced and deeply personal beliefs"); *id.* at *30-31 ("The tradition reflected in *Marsh* permits *chaplains* to ask their own God for blessings"); *id.* at 43-44 ("By inviting *ministers* to serve as *chaplain* for the month, and welcoming them to the front of the room *alongside civic leaders*, the town is acknowledging the central place that . . . *religious institutions* [] hold") (emphasis added in each).

Implicit and explicit in the Court's decision is a strong distinction between prayers by the elected legislators and prayers by clergy. For instance, the Court expressly declared that:

> **The analysis would be different if town board members** directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, **came not from town leaders but from the guest ministers**.

Id. at *39-40 (emphasis added). The Court continued, "[i]n no instance did **town leaders** signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished." *Id.*

The Court reasoned, "[t]o hold that invocations must be nonsectarian would force the **legislatures** . . . to act as supervisors and censors of religious speech, a **rule that would involve government in religious matters to a far greater degree** than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact." *Id.* at *27. If legislatures merely *editing or approving* prayers raises constitutional concerns, it is *a fortiori* more unconstitutional for legislators to actually *deliver* the prayers. In upholding Greece's practice, the Court stressed: "Greece [i.e. the council members] neither reviewed the prayers in advance of the meetings **nor provided guidance as to their tone or content** . . . The town instead left the guest clergy free to compose their own devotions." *Id.* at *10. Such is manifestly *not* the case here, as the government itself is *prescribing* a religious orthodoxy through the delivery of *its own* of Christian prayers.

And indeed, the Court reiterated: "***Our Government*** is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Id.* at *27 (emphasis added) (citing *Engel v. Vitale*, 370 U. S. 421, 430 (1962)). The Court then noted: "It would be but a few steps removed from that prohibition for **legislatures to require chaplains** to redact the religious content from their message . . . **Government** may not mandate a civic religion . . . any more than it may prescribe a religious orthodoxy." *Id*. In relying upon *Engel* in *Galloway*, the Court reaffirmed the idea the First Amendment was added to the Constitution to "stand as a guarantee that neither the power nor the prestige" of the government "would be used to control, support or influence the kinds of prayer **the American people can say** -- that the people's religions must not be subjected to the pressures of government for change each time a new political administration is **elected to office**." *Engel*, 370 U.S. at 429-30. The Court acknowledged that the government "is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." *Id.*

As the Court ruled in *Engel* and as is equally applicable today: "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of **writing** or sanctioning official prayers and leave that purely religious function to the **people themselves** and to those the people choose to look to for religious guidance." *Id.* at 435.[5]

Significantly, Defendants readily concede the distinction between clergy-prayers and legislator-prayers. (Dkt.41-1 p.14). Defendants also relied extensively upon it in opposing the injunction:

> . . . but remember *Joyner*, Your Honor, was **outside ministers**, okay, and I do think you have to take -- whenever you have an Establishment Clause analysis, you really, in these prayer cases, have three potential fact patterns, okay? *Joyner* was the outside ministers invited in to pray, okay? **That's a different analysis**. The paid chaplain would be the second analysis. That would be a different model . . . . And then the third model that you have is what we have here, is the

[5] Even "assuming it is dictum" the Court must "give serious consideration to this recent and detailed discussion of the law by a majority of the Supreme Court." *Gearlds v. Entergy Servs*., 709 F.3d 448, 452 (5th Cir. 2013). This Court "is 'bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent.'" *United States v. Fareed*, 296 F.3d 243, 247 (4th Cir. 2002) (citation omitted). *See also Walton v. Johnson*, 440 F.3d 160, 170 n.10 (4th Cir. 2006) (same). Regardless, the Court's distinction between clergy-prayers and legislator-prayers is not dicta but is the analysis and rationale upon which *Marsh* and *Galloway* rest. Dispensing "with Supreme Court analysis . . . is risky business." *United States v. Bumpers*, 705 F.3d 168, 173 (4th Cir. 2013).

commissioners speaking[.]

(Dkt. 48, Tr. M-13 ¶¶1-10). Defendants later stressed: "when you look at the Fourth Circuit cases -- *Joyner* particularly, okay -- it really focussed [sic] on the ministers who were being invited. It focussed [sic] on people from the outside." (*Id.* at M-20¶¶23-25-M-21¶¶1-2). They continued: "*Joyner* is a different scenario. The Forsyth County situation there in North Carolina was dealing with the dynamic of the outside ministers coming in." (*Id.* at M-21¶¶24-25–M-22¶1). They added: "we're in a much different situation from *Joyner*, where, in *Joyner* . . . there was a process whereby outside ministers, private citizens, were selected were given the floor . . . In this case, we are speaking exclusively about elected legislators [.]" (*Id.* at M-25 ¶¶16-20).

1. <u>**The identity of the speaker has always been relevant.**</u>

The vast majority of the courts, including the Fourth Circuit, have deemed the identity of the speaker (i.e. clergy versus legislators) either a critical or relevant part of the legislative prayer analysis. Fourth Circuit cases also highlight the narrow applicability of *Marsh* to prayers by religious leaders. *See Wynne v. Town of Great Falls*, 376 F. 3d 292, 297 (4th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005) ("In *Marsh*, the Court upheld the Nebraska legislature's practice of opening each session with a nonsectarian prayer led by a chaplain"); *N. Carolina Civ. Liberties Union Leg. Found. v. Constangy*, 947 F.2d 1145, 1147 (4th Cir. 1991). For instance, in *Constangy*, the court opined that "[f]or a judge to engage in prayer in court entangles governmental and religious functions to a much greater degree than a chaplain praying before the legislature." *Id.* at 1149.

In *Wynne*, the Fourth Circuit struck down a practice that allowed individual council members to deliver the prayers. 376 F.3d at 302. The court held that *Marsh* "does not, however, provide the Town Council, or any other legislative body, license to ***advance its own religious views***." *Id.* (emphasis added). This "conclusion accords with the" Supreme Court's "intent to confine its holding in *Marsh* to the specific 'circumstances' before it" – *inter alia*, prayer by a chaplain "directed only ***at*** the legislators themselves." *Id.* (i.e. not "by" the legislators).

A year later, the Fourth Circuit decided *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 279 (4th Cir. 2005), *cert. denied*, 546 U.S. 937 (2005), which involved outside religious

leaders. The board invited religious leaders from a diverse array congregations throughout Chesterfield County to give invocations and the county required the prayers be nonsectarian. *Id.* In upholding the practice and distinguishing it from *Wynne*, the Fourth Circuit ruled, "Chesterfield, unlike Great Falls, did not invite the citizenry at large to participate during its invocations." *Id.* at 284.[6]

In *Turner v. City Council*, 534 F.3d 352, 355 (4th Cir. 2008), *cert. denied*, 555 U.S. 1099 (2009) the Fourth Circuit held that **"[t]he identity of the speaker, and the responsibility for the speech, was, in that case [*Simpson*], less clearly attributable to the government than the speech here, because the speakers there were not government officials."** (emphasis added).

In its most recent decision, the Fourth Circuit intimated that the identity was not "dispositive" but nevertheless noted that "[t]he proximity of prayer to official government business can create an environment in which the government prefers — or appears to prefer — particular sects or creeds at the expense of others." *Joyner v. Forsyth County*, 653 F.3d 341, 347 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). The dissenting opinion, which is arguably more consistent with *Galloway*, elevated the role of the "identity" in the analysis, contending that prayers by legislators are far more likely to be unconstitutional than prayers by citizens and religious leaders, as was the case in *Joyner*. The dissent, like the majority in *Galloway*, articulated the following principle guiding his opinion: "we should not constitutionally mandate that any governmental body supervise the content of prayers given by **private individuals**." *Id.* at 365 (Niemeyer, J., dissenting). The dissent explained: "In determining what it means to 'advance' one religion or faith over others, the touchstone of the analysis should be whether the ***government*** has placed its imprimatur, **deliberately or by implication**, on any one faith or religion. *See Marsh*, 463 U.S. at 792-94. More is necessary than to find that religious leaders selected to offer prayers were of one denomination." *Id.* at 362 (italics in original). He found it significant that the county "has not picked any particular prayer—sectarian or not—nor has it favored any particular prayer." *Id.* at 366.

The dissent also highlighted the fact that the court in *Simpson* characterized *Wynne* as holding

[6] Furthermore, the court reasoned, "[t]he County has no ability to dictate selection; the clergy itself controls it by choosing to respond or not." *Id.* at 286. Chesterfield "was not affiliated with any one specific faith by opening its doors to a very wide pool of clergy." *Id.*

that "a Town Council's practice explicitly advancing exclusively Christian themes to be unconstitutional." *Id.* at 362 (citing *Simpson*, 404 F.3d at 282). Contending that the *Joyner* policy was more similar to *Simpson* than to *Wynne*, the dissent opined that in *Simpson*, Chesterfield County had

> established a first-come, first-serve policy for religious leaders to give invocations. But the County did decline to allow a Wiccan to offer an invocational prayer. Even though the **governmental entity exercised this limited control**, we approved the County's policy, based mostly on the general inclusiveness of its policy and its neutrality generally in **selecting leaders** to deliver prayers.

Id. Importantly, the dissent distinguished the type of practice in *Joyner*, which is nearly identical one upheld in *Galloway* (citizen-led prayers), from the type of practice struck down in *Wynne* and that should be struck down in case (legislator-led prayers), *infra.* These distinguishing factors apply with equal force here with respect to distinguishing Carroll County's practice from *Galloway.* Notably, these distinguishing factors do not hinge on the sectarian/non-sectarian content of the prayers.

First, the dissent explained that the county in *Joyner* had a "proactively inclusive policy of allowing all religious leaders in the County to deliver invocations." *Id.* at 362. He noted, "[b]y contrast, however, in *Wynne*" the Town Council "refused to allow prayers associated with other religions. In that circumstance," the Council's actions "affiliated the Council with one specific faith." *Id.*

Second, Niemeyer asserted that allowing *citizens* to deliver prayers "on a first-come, first-serve basis, **eliminate[ed] any opportunity for County officials to assert preferences**." *Id.* at 363. The Court in *Galloway* found similar reasoning persuasive, *supra.* In *Wynne*, in contrast, "the Town Council [members themselves] insisted upon invoking the name 'Jesus Christ,'" which the dissent agreed was "decidedly inconsistent with *Marsh*." *Id.* at 362 (quoting *Wynne*, 376 F.3d at 301).

Third, the dissent found it significant that "the County exercised **no editorial control** over the invocations beyond that required by *Marsh*. It did not even request to review prayers before religious leaders offered them." *Id.* at 363. This practice is a far cry from the practice here and in *Wynne* where the elected *County* leaders are writing, editing, and delivering the prayers.

For the above reasons, the dissent did not believe that it mattered that "most of the prayers offered were in fact Christian prayers," because, unlike in *Wynne* (and here), "the nature of the prayer

was not determined by the County[.]" *Id.* at 363. The "frequency of Christian prayers **was not the wish or preference of Forsyth County**." *Id.* The "frequency of Christian prayer was, rather, the product of . . . the **choices of the religious leaders** who responded out of their own initiative to the County's invitation." *Id.* The county in *Joyner*, unlike Carroll County, "provided the most inclusive policy possible, but it could not control . . . which denominations' religious leaders chose to accept the County's invitation." *Id.* Thus, "sectarian references were the product of free choice and **religious leaders' composing their own invocations**, without any control or review of content by the County." *Id.*

Relying upon the Fourth Circuit cases above, the court in *Doe v. Pittsylvania County*, 842 F. Supp. 2d 906, 914 n.4 (W.D. Va. 2012), found a legislative prayer practice unconstitutional in large part because legislators were delivering the prayers. The court contended that the case before it was easy to decide because the *government itself* was delivering the prayers. It explained that cases where "the **government officials did not do the praying themselves**, but rather called upon religious leaders from local congregations to deliver the invocations," were much "more difficult cases." *Id.* Where the elected officials are delivering the prayers: "the Board impermissibly wraps the power and prestige of the [] County government around the personal **religious beliefs of individual Board members**." *Id.* at 914.

All other courts that have ruled on legislative prayer have placed a far more central and dispositive emphasis on the identity of the speaker as well as the selection of the speaker (as did the dissent in *Joyner*). These cases are in accord with *Galloway*. To determine whether a prayer practice has unconstitutionally "'been exploited to proselytize or advance any one or to disparage any other faith or belief'" the Eleventh Circuit applies a three-factor test expressly analyzing "[(1)] the identity of the invocational speakers, [(2)] the selection procedures employed, and [(3)] the nature of the prayers." *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 591 (11th Cir. 2013); *Pelphrey*, 547 F.3d at 1273, 1277. *See also Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823, 840 (E.D. La. 2009) ("*Marsh* teaches us that sectarian references do not inherently violate the Establishment Clause; rather, important factors inform the constitutionality of legislative prayer practice: the identity of the speaker, the selection of the speaker, the method and process of selection, and the nature of the prayers.").

In *Pelphrey*, the question presented was identical to *Galloway*: whether allowing "volunteer leaders of different religions, on a rotating basis, to offer invocations with a variety of religious expressions violates the Establishment Clause," where the majority, but not all, of the speakers were Christian and many of the prayers sectarian. 547 F.3d at 1267-77. In upholding the practice, the court relied heavily on the fact that "[t]he **commissions do not compose** or censor the prayers." *Id*.

Likewise, in *Rubin v. City of Lancaster*, 710 F.3d 1087, 1097 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 284 (2013), the Ninth Circuit upheld the practice of allowing citizens and clergy to deliver prayers primarily because the city's policy provided that "[n]either **the council nor the clerk** may 'engage in any prior inquiry, review of, **or involvement in**, the content of any prayer to be offered.'" (emphasis added). The court held that the relevant inquiry is "whether the City itself has taken steps to affiliate itself with Christianity." *Id.* at 1097. The court concluded that "[w]hatever the content of the prayers or the denominations of the prayer-givers, **the *City* chooses neither**." *Id.* at 1098 (italics in original).

Indeed, in the first legislative prayer case, *Lincoln v. Page*, 109 N.H. 30, 31 (1968), the court upheld the practice on grounds very similar to *Galloway*, *supra*, noting: "The invocation at the opening of the town meeting by a guest clergyman is not composed, selected or approved by the defendants. **The invocation is not pronounced by a town officer**." *Id.* Similarly, *Colo v. Treasurer & Receiver General*, 378 Mass. 550, 554 (1979), upheld "legislative chaplains" on the ground that "[t]he prayers offered are brief, the content unsupervised by the State, and attendance completely voluntary." (emphasis added). This fact was also relevant in the first federal appellate case on the issue. In *Bogen v. Doty*, 598 F.2d 1110, 1113 (8th Cir. 1979), the Eighth Circuit held that "permitting clergymen to compose their own prayers for delivery at a government-sponsored gathering" was constitutionally permissible.

Finally, there is virtually no case authority to support legislator-delivered prayers. The overwhelming majority of legislative prayer cases involved prayers by chaplains, clergy or citizens and not elected officials.[7] Only one federal case upheld such a practice, and it is patently distinguishable

[7] *See Galloway*, 2014 U.S. LEXIS 3110; *Marsh*, 463 U.S. 783 (chaplains selected based on "performance and personal qualities"); *Jones v. Hamilton County Gov't*, 530 Fed. Appx. 478, 488-89 (6th Cir. 2013) (clergy and citizens "from a variety of faith traditions"); *Rubin*, 710 F.3d at 1090 (same); *Lakeland*, 713 F.3d at 591-92 (same); *Joyner*, 653 F.3d 341 (same); *Pelphrey*, 547 F.3d at 1266 (same); *Hinrichs v. Speaker of the House of Representatives*, 506 F.3d 584 (7th

from the case here. *Turner*, 534 F.3d at 353-56. The policy in *Turner* was upheld solely because it *required* the prayers to be nonsectarian, thus ensuring the government did advance or proselytize any one religion as prohibited by *Marsh*. *Id.* ("The restriction . . . is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith."). Nevertheless, even there, the court indicated that prayers by legislators are more likely to violate the Establishment Clause than prayers by citizens and clergy. *Id*. at 355. Tellingly, the three other cases involving legislator-delivered prayers each held the practice unconstitutional. *Wynne*, 376 F.3d at 294; *Doe v. Pittsylvania County*, 842 F. Supp. 2d 927, 931 (W.D. Va. 2012); *Pittsylvania*, 842 F. Supp. 2d at 914; *Mullin v. Sussex County*, 861 F. Supp. 2d 411 (D. Del. 2012).

2. There is a common sense difference between elected officials and chaplains.

There is a fundamental distinction between making chaplains available to legislators as a service for them and legislators leading prayers at public meetings. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 296-97 (1963) (Douglas, J., concurring) ("There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties . . . Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example"). Even before *Galloway*, Plaintiffs argued as they do today that "common sense dictates that such prayers [by legislators] are even more egregiously unconstitutional than those offered by private citizens, due to the elevated level of direct governmental entanglement and endorsement with religion involved." (Dkt.19, p.3). Defendants ask the Court to place chaplains on the same footing as legislators. But a chaplain is employed expressly for *religious* functions.[8] Legislators are not: "Congress shall make no law respecting an establishment of religion[.]"

Cir. 2007) (guest clergy); *Simpson*, 404 F.3d at 278-79 (same); *Newdow v. Eagen*, 309 F. Supp. 2d 29 (D.D.C. 2004), *dismissed other grounds*, 2004 U.S. App. LEXIS 15816 (D.C. Cir. 2004) (chaplains); *Snyder v. Murray City Corp*., 159 F.3d 1227, 1232 (10th Cir. 1998) (volunteer clergy and citizens); *Kurtz v. Baker*, 630 F. Supp. 850, 856 (D.D.C. 1986), *rev'd on other grounds*, 829 F.2d 1133 (D.C. Cir. 1987) (guest chaplains); *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983) (chaplains); *Bogen*, 598 F.2d 1110 (unpaid clergy). *See also Rubin v. City of Burbank*, 101 Cal. App. 4th 1194 (Cal. App. 2d Dist. 2002) (volunteer clergy and private citizens); *Society of Separationists v. Whitehead*, 870 P.2d 916, 930 (Utah 1993) (private citizens); *Colo*, 378 Mass. at 551 ("Visiting ministers of various faiths" and "chaplains."); *Lincoln*, 109 N.H. at 32 (ministers by invitation).

[8] *See History of the Chaplaincy*, Office of the Chaplain of the United States House of Representatives, http://chaplain.house.gov/chaplaincy/history.html (last visited June 3, 2014); *Chaplain's Office*, United States Senate,

U.S. CONST. AMEND. 1. This means "that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government." *McGowan v. Maryland*, 366 U.S. 420, 563-64 (1961) (Douglas, J., dissenting). *See also Simpson*, 404 F.3d at 287 (noting the difference between "the selection of a cleric [and] the selection of a county assessor").

After Frazier used the County's email system to invite County employees to her voluntary monthly prayer meetings in a County Office Building, Howard told a reporter: "A commissioner-led group . . . takes on a different meaning . . . County staff may feel an obligation to participate or may feel uneasy if they attend a meeting and choose not to continue. Given the personal nature of prayer and religion, this situation would most likely not be appropriate." (SUF ¶123). Howard is right. And his reasoning applies with equal force to the Commissioner-led legislative prayers.

In leading prayers, the Commissioners have demonstrated yet another reason why legislator-led prayer can endanger Establishment Clause protections. The Commissioners have repeatedly used their prayer-leadership role not to solemnize their meetings and promote a spirit of inclusion, but to promote their political views on divisive topics, often having nothing to do with Board business, such as same-sex marriage and the 9-11 terrorist attacks. (*Id.* at ¶76,¶81,¶83,¶¶85-87). Such entanglement of religion, politics, and government – under the ostensible claim of solemnization – offends the respectful standards set forth in *Marsh* and *Galloway*.

C. The Board's prayers are often directed to the public.

The County's prayer practice is further unconstitutional because the Commissioners' prayers are often directed to the public. Both *Marsh* and *Galloway* make abundantly clear that legislative prayers are unconstitutional if they are directed to the public. The Court in *Galloway* made this point explicit: "The analysis would be different if town board members directed the public to participate in the prayers." 2014 U.S. LEXIS 3110 at *39. The Court explained that the audience

> for these invocations is not, indeed, the public but lawmakers themselves . . . [T]he prayer exercise [i]s "an internal act" directed at the [] Legislature's "own members," [citation omitted] rather than an effort to promote religious observance among the public.

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http://www.senate.gov/reference/office/chaplain.htm (last visited June 3, 2014).

Id. at *38. The court in *Wynne* similarly held that legislative prayers violate the Establishment Clause when they encourage others, who are not legislators, to participate. 376 F.3d at 301 n.7. The court looked to the actions of certain council members and concluded that the practice, which allowed council members to deliver prayers, was unconstitutional. *Id.* The court found it significant that one "Council member urged the Town's citizens to get involved in the prayer controversy, and a large number of the Town's citizenry and church leaders obviously felt that they had enough personal investment in the Council's 'Christian prayer' to organize petitions and draft resolutions in support of it." *Id.*

The facts in this case, as to the County directing and encouraging citizens to pray, are far more egregious than those in *Wynne* and certainly more egregious than in *Galloway.* The evidence clearly shows a pattern and practice of prayers directed to the public, *infra.*

<u>(1) Citizens Expected to Stand:</u> First, citizens were instructed to stand for the Pledge and then to remain standing for the prayer in at least 31 Board meetings, and in many of these meetings, the Commissioners expressly asked the public to stand for the prayer itself. (SUF ¶¶20-57). For instance, at the December 8, 2010 meeting, after the Pledge, Rothschild instructed: "Remain standing please, we have [to say] a brief prayer." He then instructed: "Bow our heads" and concluded in "Jesus' name." Frazier announced, "you may be seated." (*Id.* at ¶52). Indeed, Defendants' only written policy states that the Board "will open its meetings with the Pledge of Allegiance followed by a prayer." (*Id.* at ¶19).

As previously noted, the Court in *Galloway* held that "[t]he analysis would be different if town board members directed the public to participate in the prayers . . . Although board members themselves stood, . . . they at no point solicited similar gestures by the public." 2014 U.S. LEXIS 3110 at *39-40. And in *Galloway*, the respondents only pointed to "several [such] occasions[.]" *Id.* More importantly, "[t]hese requests, however, **came not from town leaders but from the guest ministers**." *Id.* In this case, County leaders, rather than guest ministers, *regularly* request citizens to stand or bow their heads.

It is deeply disturbing that each Commissioner has sworn, under penalty of perjury, that since serving as a Commissioner, every meeting began with the prayer before the Pledge. (Dkt. 47-2, Exh. E).[9]

[9] In May and June 2013, each Commissioner signed a sworn affidavit stating that the Pledge is always delivered after the prayer. (Dtk.16-1 - Dkt.16-5, ¶4). They each did so a second time on April 17, 2014. (Dkt.39-1, Exh. 2 ¶2).

It is even more disconcerting that they have each signed *several* sworn statements to this effect. The record shows that over 30 meetings began with the Pledge before the prayer. (SUF ¶¶20-57). Even after Plaintiffs brought these meetings to Defendants' attention on May 1 (Dkt.40-29), each Commissioner, on May 8, 2014, signed third a sworn affidavit testifying: "Since I have been serving as a Commissioner, each official meeting commences with the following items, in this order: a. Call to Order (gavel). b. Legislative Prayer. c. Pledge of Allegiance. (All are asked to stand)." (Dkt. 47-2, Exh.1 ¶2).

Even if Defendants claim that they currently recite the Pledge after the prayer, their only written policy calls for the prayer after the Pledge, and despite numerous opportunities to formally change this policy, they have not done so, indicating an unwillingness to permanently change their practice. In fact, long before this lawsuit commenced, opposing counsel strongly recommended the Board change the policy to one where "prayer time with the commissioners as individual rather than as legislators" be held "15 minutes or so before the gavel falls." (SUF ¶97). The County attorney also proposed a written policy the Board, discussed on April 21 2011, which provided: "The prayer . . . shall be offered shortly before the opening gavel that officially begins the meeting, just prior to the Pledge." (*Id*. at ¶¶102-103). Despite these recommendations, Defendants kept the 2010 policy intact, and voted to retain it as recently as May 2014. (*Id.* at ¶184). It is well settled that the voluntary cessation of an unconstitutional practice does not moot injunctive relief where, as here, the government can simply revert back to its old ways. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). *See Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 833-34 (11th Cir. 1989) ("the School District voluntarily ceased the practice of having pregame religious invocations delivered by Protestant ministers, and it implemented the equal access plan. However, the equal access plan was merely implemented by the school principals. It was not a formal policy. . . [Thus,] the controversy concerning the prior invocation practices is not moot.").[10] The standard "for determining whether a case has been mooted by the defendant's voluntary conduct is stringent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). A case is only moot "'if subsequent events made it absolutely clear that the allegedly wrongful behavior

[10] *See also Steele v. Van Buren Public School Dist.*, 845 F.2d 1492, 1494 (8th Cir. 1988) ("The district's and [teacher's] disavowal of intent to resume prayers in band class is not sufficient to moot the case.").

could not reasonably be expected to recur.'" *Id*. (citation omitted). The party asserting mootness bears the "'heavy burden" of proof. *Id.* It is not at all clear that Defendants will not go back to requesting citizens to stand for the prayer as soon as this lawsuit is over. The fact that each Commissioner has falsely stated under oath a fact as material as this renders any statements they might make to the contrary, unbelievable. And their unwillingness to change the language of their 2010 policy, despite numerous opportunities to do so, is strong evidence of their intent to revert back to their old ways.

(2) Other Requests For Citizens to Join Prayer: Second, Commissioners frequently direct the public to join them in the prayers with phrases such as "Let us pray," "join" or "bow our heads." (SUF ¶52, ¶54, ¶¶64-66, ¶68, ¶¶71-73, ¶80, ¶82).[11] For instance, at the December 8, 2010 meeting, Rothschild asked citizens to "bow" their heads after asking them to stand for the prayer. On January 18, 2011, Rothschild instructed again: "Bow your heads for a brief prayer." (*Id.*). On March 31, 2011, Shoemaker concluded the prayer: "in Jesus' name I pray, in my individual capacity on behalf of no one else unless they wish to join." (*Id.* at ¶73). In *Wynne*, the Fourth Circuit held that the prayers were unconstitutionally directed to the public where "citizens customarily participated in the prayers by standing and bowing their head." 376 F.3d at 301 n.7. In *Galloway*, the Court indicated that *occasional* requests, with language such as "Let us join our hearts and minds together in prayer" and "Those who are willing may join me now in prayer[,]" are not unconstitutional *if* such "requests, however, [come] not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations," but that the "analysis [is] different" where, as here, such requests are made by the "board members." 2014 U.S. LEXIS 3110 at *38-40.

(3) Prayers Directed to Public and for Public's Benefit: Third, many of the prayers, by their

[11] *See, e.g.*, December 8, 2010 ("remain standing please" "Bow our heads") (Rothschild); December 16, 2010 ("Let's pray" "We pray these things, I pray these things, in Jesus' name amen") (Frazier) (citizens remained standing); January 4, 2011 ("In Jesus' name we pray, amen") (Frazier) (citizens remained standing); January 11, 2011 ("Let us pray") (Roush) (citizens remained standing); January 18, 2011 ("Bow your heads [please] for a brief prayer") (Rothschild) (citizens remained standing); January 27, 2011 ("Let us pray" "We pray these things, I pray these things, in Jesus' name, amen") (Frazier) (citizens remained standing); February 17, 2011 ("Let us pray") (Roush) (citizens remained standing); March 31, 2011 ("in Jesus' name I pray, in my individual capacity on behalf of no one else unless they wish to join.") (Shoemaker) (citizens remained standing); January 19, 2012 ("Let us pray") (Roush, the "Lord's Prayer"); March 6, 2012 ("Let us pray.") (Roush) (citizens bowed their heads with the Commissioners) (*Id.*).

terms, are directed to, or are for the benefit of, the public. For instance, at the April 11, 2013, meeting, Rothschild delivered a long prayer regarding controversial budget matters. (SUF ¶89). He asked that the Lord "guide all of us" and said that the "Bible talks in many places about integrity" while implying that other Commissioners' lacked it. (*Id*). It was apparent that this "prayer" was a political speech to the public. As Howard duly remarked: "You know I have to say, at the risk of jeopardizing civility I think it's highly inappropriate to use a prayer to make a political speech but I'll let that, I think that was absolutely ridiculous but anyhow. Very self-serving." (*Id.*) Frazier also uses her prayers to make political statements to the public. For example, her February 9, 2012 prayer expressed to the public, the Board's opposition to a same-sex marriage bill introduced in Annapolis. (*Id.* at ¶81). The following are a sample of other Board prayers clearly directed to the public or for its benefit:

- October 11, 2012: "Lord as we enter this election season, we ask that you **help our citizens** understand the truth [inaudible] the selection of candidates for public office to those who are honoring to you and lead our country in a [inaudible] direction that is pleasing to you. In the name of my Savior, I pray, amen." (SUF ¶86).

- November 13, 2012: ". . . I know citizens are asking the question, after this election there are many people who are pleased and many people that are not pleased but among those that are not pleased people are asking the question, does God still care about America, Lord? And of course Lord, **we know that, and I know the correct question is, does America still care about God?** And Lord I feel that some of the decisions made by the people of our Country and our County and our State serve to legitimize policies and place leaders in positions of authority in America that advocate policies that are opposed by most of the major religions in the world today . . . So Lord, for my prayer today, I **raise, elevate all our citizens up to you** . . ." (*Id.* at ¶87).

- May 8, 2012: "Dear Lord, as I look back on the last ten years or so in our Country I think about 9-11 and the terrible things that happened . . . Lord I ask that um, you use these horrible events as a **teaching tool for all of us**. That . . . **we** recognize these things as potentially one way of you shaking us and telling us, wake up, wake up, that we might learn from these things and humble ourselves and seek your blessings and revive our faith in you that our Country may be returned to your good graces and protection. I offer this prayer **on behalf of [all] people** . . ."(*Id.* at ¶83).

- September 20, 2012: "Lord, we just experienced the anniversary of the 9-11 attacks a little over a week ago, and Lord, I pray **that all of us learned the correct lessons** from those attacks. We heard speeches about rebuilding stronger . . . but Lord, I believe that there is a more important lesson that we need to learn on behalf of our Country. And that's that we, respect you Lord, we submit to you Lord, and pursue godly ways and respect your blessing and protections for the United States of America, oh Lord and **I pray that all people of the United States will recognize that those attacks might be one way of you just kinda shaking us and saying wake up folks and return to the principles that, are pleasing to you Lord** . . ." (*Id.* at ¶85).

- July 5, 2012: ". . . this Country has afforded all of us freedom . . . Lord, we ask that you guide all elected officials **and all citizens all across the Country that all of us might** make decisions to preserve these freedoms and ensure that our Country is managed and run and **occupied by all of us** in a way that's pleasing to you, in Jesus' name I pray. I offer this prayer on behalf of **all citizens**[.]" (*Id.* at ¶84).
- December 6, 2012: "And Lord . . . I ask that you help **all of us to keep in mind** the true meaning of this season of Christmas that we remember what it really stands for." (*Id.* at ¶88).
- December 17, 2013: "Heavenly father, given this Christmas season, I ask for your guidance, wisdom and protection . . . and **to all of our friends and neighbors** regardless of their persuasion I pray the following, that the spirit of Christmas will bring **you** peace, that the love of Christmas will provide **you** love and that the knowledge of Christmas will bring **you** comfort and hope, in the name of my personal Savior, amen." (*Id.* at ¶92).
- February 8, 2011: "Bless our community, Oh Lord. In Jesus' name I pray, amen." (*Id.* at ¶69).

The June 13, 2013 prayer was obviously directed to the veteran citizens at the meeting who were there to receive an Infantry Proclamation:

> . . . and Lord also as we talk to you this day between Memorial Day and July 4th I ask, I raise up our veterans to you and ask for blessings for them for good health and I ask that you might elevate all of us up to you Lord that we may remember the great sacrifices they made to protect our ways of life and our God-given rights that come from you Lord, and I ask these blessings upon our veterans, in the name of my personal Savior, I pray, amen.

(SUF ¶90). On March 27, 2014 Frazier delivered a Christian prayer that was directed to the public:

> Many of **you** may know there was a lawsuit against us not to open in prayer and there was an injunction, . . . and I think that is an infringement on my First Amendment right for free speech and free religion . . . I'm not gonna give up those rights, but out of respect for my **colleagues**, I'm not sure how strongly they feel about it. I'm willing to go to jail over it . . . [sectarian prayer]

(*Id.* at ¶143). On her Fox News interview, Frazier declared, "[w]e heard that the injunction had come in and . . . we could not say the words, 'Jesus Christ' or 'Savior,' and, I was the next person up to pray. . . . **[W]e've been fighting for our citizens over this**." (*Id.* at ¶150).

The above are just a sampling of the prayers directed to the public. While ***one or two*** remarks that stray "from the rationale set out in *Marsh*" do "not despoil a practice that on the whole reflects and embraces our tradition," 2014 U.S. LEXIS 3110 at *34, the record here reveals a pattern of prayers directed to the public, and are thus outside the rationale of *Marsh*.

<u>(4) Prayer on the Agenda:</u> As further evidence of the fact that the prayers are directed to the public is that Defendants have repeatedly made "legislative prayer" an agenda item to be debated at their

public meetings. (SUF ¶19, ¶145, ¶166, ¶¶183-184). The prayer is also expressly listed on the County's "Ten Governing Principles." (*Id.* at ¶19). In *Wynne*, the court found that prayers were impermissibly directed to the public where the town "listed the prayers" on "its agenda of public business." 376 F.3d at 301 n.7. Indeed, the fact that Defendants' repeatedly put the prayer practice up for public debate is alone problematic. *See Ahlquist v. City of Cranston*, 840 F. Supp. 2d 507, 522 (D. R.I. 2012) (most "troubling" aspect of the school's unconstitutional actions was its decision to hold "four open meetings to consider the fate of the [Prayer] Mural"). The County created "a situation where a loud and passionate majority encouraged it to vote to override the constitutional rights of a minority." *Id.* at 523. (*See* SUF ¶93, ¶¶95-96, ¶¶100-101, ¶¶112-113, ¶¶147-149, ¶151, ¶¶156 -180).

(5) Encouraging Citizen Involvement in Prayer Controversy: Fifth, as in *Wynne*, the Commissioners have "urged the [County's] citizens to get involved in the prayer controversy, and a large number of the [County's] citizenry and church leaders obviously [feel] that they had enough personal investment in the [Board's] 'Christian prayer[.]'" 376 F.3d at 301 n.7. In addition to making prayer the topic of public debate by placing it on the agenda, *supra*, the Commissioners regularly respond to citizen letters in favor of (or in opposition to) their Christian prayers, further engaging the public in the prayer controversy. (SUF ¶93, ¶95, ¶¶100-101, ¶113-114, ¶125, ¶132).[12]

The Commissioners have actively encouraged citizens to support them in their stand for Commissioner-delivered Christian prayers. Before the Court issued the preliminary injunction, Rothschild wrote an article entitled "OBSERVATIONS FROM THE COURTROOM: THE DANGEROUS SLIPPERY SLOPE OF PRAYER RESTRICTIONS." (SUF ¶¶138-140). The article criticized Plaintiffs' beliefs and belittled their objections to the Board's prayers. (*Id.*). He also urged "everyone to pray" for the Board's practice. (*Id.*). On March 27, after Frazier delivered a sectarian prayer in defiance of the injunction, the Board issued a formal statement on the County's website,

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[12] A citizen emailed the Board on April 3, 2011: "[I] support of your decision to open the public meetings with a word of prayer. . . . Carroll County is a great place to live . . . because of the conservative beliefs that come from strong Christian values[.]" Howard responded: "Kent, God has blessed us with the opportunity to serve, a strong faith and supporters like you!" (*Id.* at ¶100). After the Board received AHA's letter, a pastor emailed the Board in support of their "Jesus" prayers. (*Id.* at ¶113). Rothschild replied: "Pastor Chris- Thank you for your support. It is important for elected officials to hear from and receive support from Christian Conservatives. The left is very shrill." (*Id.* at ¶114).

informing citizens that "the court is ordering the Board to stop offering any prayers in the name of Jesus," and that "the Board will vigorously pursue the matter to its end." (*Id.* at ¶145). Later that day, Frazier wrote on her public Facebook page: "I just wanted to say thank you for all the expressions of love, support and encouragement that I have received all day long." (*Id.* at ¶146). Many citizens responded to her post, and "shared" it on their own pages. (*Id.* at ¶¶147-148).[13] The next day, Frazier wrote another Facebook post: "The Carroll County Republican Central Committee Voted Thursday night in support of my and the Board of Carroll County Commissioners' right to pray . . . I appreciate the support of my colleagues." (*Id.* at ¶149). Many citizens "liked" and commented on this post and Frazier thanked these citizens for their support. (*Id.*). On March 30, Frazier went on Fox News to publicly defend her Christian prayer. (*Id.* at ¶150). A citizen posted on Frazier's Facebook, along with a link to the Fox News video, thanking Frazier for her stand for Christian prayer. Frazier responded: "I appreciate you taking a stand with me!" (*Id.* at ¶151). On April 7, another citizen wrote on Frazier's Facebook: "Stay strong and know the Lord is guiding you. We have your back and support all the way!!!" Frazier replied: "Thank you! Please invite your friends, especially those in Manchester and Taneytown, to like our page and follow along. Primary elections will be here before you know it!" (*Id.* at ¶165).

Rothschild wrote the following on his public Facebook page on March 30, along with a link to Frazier's Fox News interview: "ROBIN BARTLETT FRAZIER: Portrait of a true American heroine. THIS IS WHAT PRINCIPLED LEADERSHIP LOOKS LIKE! Contact Robin and thank her for her stand in support of our Constitution & Judeo-Christian principles. [email addresses]." (*Id.* at ¶152). Rothschild shared the link and his comment to several other Facebook pages including "Maryland Campaign for Liberty" and "Hartford County Republican Women." (*Id.* at ¶153). Rothschild later posted another public message: "Carroll County Commissioners . . . FIRST in standing firm in support of Christian prayer . . . Praise God[.]" (*Id.* at ¶154). Frazier's husband also wrote on his public Facebook

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[13] One wrote: "there are no words to describe the sincere admiration I have for you Robin. You are the standard we need to hold ourselves to. God bless you. psalm 91 protection..." Frazier replied: "Thanks Carol." (SUF ¶147). Several "shared" Frazier's post. One wrote: "I'm so proud of you for standing up for our rights hang in there!!"(*Id.* at ¶148).

wall: "Please Pray for my wife Robin! . . . Time to Fight! Please help us!" (*Id.* at ¶155). Citizens organized a group solely to support Frazier's stand for Christian prayers. (*Id.* at ¶156).

As a result of the Commissioners' actions, many citizens attended Board meetings to voice their support for the Board's *Christian* prayers. At the April 1 meeting, Rothschild's campaign treasurer delivered a hostile speech about the lawsuit and delivered a sectarian Christian prayer. (*Id.* at ¶¶157-159). At the April 3, several citizens spoke in favor of the Commissioners' Christian prayers. (*Id.* at ¶¶160-163). Michelle Jefferson, who hosted Frazier's campaign event, directed her remarks to the Plaintiffs. She called the case a "witch-hunt" and lamented: "I strongly suggest you leave my commissioners alone and I strongly suggest you guys pray in Jesus' name." (*Id.* at ¶163). The fourth speaker called one of the Plaintiffs "a vile and miserable excuse for a human being." (*Id.* at ¶164).

The Board placed its legislative prayer practice on the public agenda for the April 8 meeting to vote on a resolution that would temporarily suspend sectarian Christian prayers. Due to the fact that the preliminary injunction already prohibited such prayers, their decision to put this on the agenda and make it a topic for debate unnecessarily embroiled the public even further in the prayer controversy. Predictably, citizens in fact turned up for the purpose of supporting the Board's Christian prayers. Six spoke in favor of the Commissioners' Christian prayers and several delivered such prayers themselves. (*Id.* at ¶¶166-167). Before the vote, Rothschild delivered a lengthy speech to defend Christian prayers, which quoted Bible passages and made references to "Son of God." (*Id.* at ¶170). Rothschild told citizens: "this resolution asks me to refuse to acknowledge the Son of God" and concluded: "I cannot and will not sign a document that formally binds me to an act of disobedience against my Christian faith." (Dkt. 40-3, Exh.3). The speech was followed by "Amen!" from the audience. (SUF at ¶170).

Frazier delivered a campaign speech later that evening and strongly defended her sectarian Christian prayer. (*Id.* at ¶¶171-175). One citizen asked what they, as "citizens [could] do to support [her] stand on prayer?" Frazier answered: "you do whatever is on your heart to do . . . [W]e always have an open mic for whatever anybody wants to talk about." (*Id.*). At the next meeting on April 10, several citizens indeed spoke in favor of the Board's "Jesus" prayers and in opposition to the April 8 resolution.

Two delivered sectarian Christian prayers with one declaring: "I pray that you would come upon men and women here bring them back to truth in Jesus' name amen." (*Id.* at ¶¶176-180).

In view of the above, the government officials in this case, as in *Wynne*, unquestionably urged the citizens to get involved in the prayer controversy, which renders "untenable," any statement "that the prayers at issue here were 'only and for the benefit of the Council members.'" 376 F.3d at 301 n.7. In a very real sense, the Board "has directed Christian prayers at - and thereby advanced Christianity to - the citizens in attendance at its meetings and the citizenry at large." *Id.*

D. Carroll County's invocation selection process is unconstitutional.

A legislative prayer practice can be unconstitutional based on its selection process alone. *See Marsh*, 463 U.S. at 793-94; *Pelphrey*, 547 F.3d at 1277-78; *Snyder*, 159 F.3d at 1234 ("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."); *Simpson*, 404 F.3d at 282; *Jones v. Hamilton County*, 891 F. Supp. 2d 870, 886 (E.D. Tenn. 2012) ("Even when operating under a facially neutral policy, a legislature may not select invocational speakers based on impermissible motives or sectarian preferences."). The *Marsh* Court "weighed all of the factors that comprised the practice, including . . . the selection of the clergy." *Pelphrey*, 547 F.3d at 1281-82 (citing *Marsh*, 463 U.S. at 793-95).

The Court in *Galloway* followed suit. It upheld Greece's practice largely because its selection process was inclusive. Specifically, the Court found that:

> The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. . . . The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. . . .

U.S. LEXIS 3110 at *9-10. Unlike Carroll County, the town "welcome[d] a prayer by any minister or layman who wished to give one." *Id.* at *34-35. A key fact the Court's ruling relied upon was that "any member of the public is welcome in turn to offer an invocation." *Id.* at *41.

In *Pelphrey*, the Eleventh Circuit affirmed the district court's ruling that the county's invocation selection process was unconstitutional because representatives of "certain faiths were categorically excluded." 448 F. Supp. 2d at 1373-74, *affirmed*, 547 F.3d at 1277-79. Notably, the Eleventh Circuit

rejected the county's argument that "the selection process is immaterial when the content of the prayer is constitutional," because, it noted, "[t]he central concern of *Marsh* is whether the prayers have been exploited to created an affiliation between the government and a particular belief or faith." *Id*. at 1281.

In concluding that a county's prayer practice was unconstitutional, the court in *Pittsylvania* relied in large part on the fact that "[n]o member of the public is afforded an opportunity to offer a prayer." 842 F. Supp. 2d at 914. The court reasoned, "[b]y offering only Christian prayers, the Board has not attempted to create a public forum in which all are welcome to express their faiths. Rather, by praying to only one deity, the Board impermissibly wraps the power and prestige of the . . . government around the personal religious beliefs of individual Board members." *Id.* The same is true here.

Recent federal circuit cases in the Sixth, Ninth and Eleventh Circuits (all 2013) emphasize the importance of an all-inclusive, citizen-delivered invocation policy. *See Jones*, 530 Fed. Appx. at 488 ("[t]he County's procedures for selecting potential invocation speakers are not discriminatory and allow any bonafide religious organization to participate."); *Rubin*, 710 F.3d at 1090 ("selection process does not discriminate against any faith"); *Lakeland*, 713 F.3d at 592 ("Lakeland's current process. . . is even more expansive and inclusive than that found constitutional in *Pelphrey*").

The selection process has also been a key factor in the Fourth Circuit cases. *See Simpson*, 404 F.3d 285. For instance, in *Joyner*, the court agreed "that the policy 'does many things right,' such as 'striv[ing] to include a wide variety of speakers from diverse religious faiths' and encouraging potential prayer leaders not to disparage other faiths.'" 653 F.3d at 353. *See also id.* at 365-66 (Niemeyer, J., dissenting) ("the County's policy for legislative prayer is totally neutral, proactively inclusive, and carefully implemented so that the County, in no manner, could be perceived as selecting, or expressing a preference for a particular religious leader, a particular religion or denomination.").

In stark contrast to the above cases and especially *Galloway*, Carroll County has not "made reasonable efforts" to be inclusive. 2014 U.S. LEXIS 3110 at *34. In fact, its official prayer practice only allows the five Christian Commissioners to deliver prayers. This practice is necessarily exclusive and does not "welcome a prayer by any minister or layman who wished to give one." *Id.*

It is readily apparent that the County's selection process is far more exclusive than the practice in *Marsh* as it categorically excludes *unpopular minority religions*. The invocation-givers in *Galloway* and *Marsh* were selected based on neutral criteria with the goal of inclusiveness. In *Marsh*, the Court went out of its way to note that "Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him" and not for his "religious views." 463 U.S. at 793. *See Joyner*, 653 F.3d at 362 (Niemeyer, J., dissenting) (noting that the chaplain in *Marsh* "had given broad, inclusive prayers over those years."). Defendants' argument "ignores *Marsh's* insight that ministers of any given faith can appeal beyond their own adherents." *Simpson*, 404 F.3d at 287.

Significantly, there was no legislative prayer practice before the five Christian Commissioners took office. (SUF ¶¶11-12). They knew that in selecting *themselves*, all the prayers would be Christian, at least for their four-year terms and most likely beyond. In homogenous conservative communities such as Carroll County, a majoritarian election process practically guarantees that minority faiths such as Muslims, Jews, Hindus and Humanists will not be included. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304 (2000) ("the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.").

Defendants readily concede this point, further evidencing their *intent* to exclude such faiths from their practice. They admit: "people with those [minority] religious beliefs may well be less likely to win office, thereby making it less likely they will have opportunity to then participate in a practice like Carroll County's, where prayers are offered by the legislators themselves. . . . [T]he political reality is that adherents of those [majority] faiths are often more likely than others to succeed politically in certain locales." (Dkt. 47-1 p.38). Defendants argued at the hearing: "we have people of faith that are elected to office" and their prayers "will be concluded with a prayer in Jesus' name," and that "it is likely that there will be people of Christian faith on the Commission." (Tr.M-18 ¶¶8-15).

Contrary to Defendants' assertion, it is not "self-evident that in choosing a chaplain, a governing body" is selecting a person they believe is "representative of the body or its constituency." (Dkt. 47-1 p.38). Defendants note that the U.S. House has appointed "two Unitarians, one Universalist" and "two

Roman Catholics." (Dkt. 47-1 p.37). The Senate has also employed two Unitarian Chaplains.[14] "Many Unitarian Universalists who are atheist or agnostic also identify as Humanist."[15] It can hardly be said that the Unitarian or Roman Catholic chaplains were appointed because they were "representative" of all members of the House. Rather, as in *Marsh*, they were appointed because of their personal ability to appeal to many faiths. Indeed, the U.S. Government's website clearly states: "Chosen as individuals, Chaplains are not representatives of any religious body or denominational entity."[16]

Even if a Muslim or Atheist defeats all odds and manages to secure a spot on Carroll County's exclusive, all-Republican Christian Board, they would have little incentive to deliver a non-Christian, or non-theistic invocation, lest they face losing a re-election. "Legislators, by virtue of their instinct for political survival, are often loath to assert in public religious views that their constituents might perceive as hostile or nonconforming." *Marsh*, 463 U.S. at 798 n.5 (Brennan, J., dissenting). Defendants recognize this and in fact, make it part of their argument. They stress that the "voters who elected those outrageous legislators to office, [] can just as easily remove them from office." (Dkt. 47-1 p.25). Of course, the odds of an Atheist or Muslim winning a Carroll County election are slim to none. Atheists have been labeled the most "hated minority in America."[17] Even after the September 11 attacks, a study revealed that while a significant number of Americans would be reluctant to vote for a well-qualified candidate if he or she were Muslim (38%), many more expressed reservations about voting for an Atheist (52%).[18] To date, only one member of Congress has been *openly* Atheist, which wasn't until

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[14] https://www.senate.gov/artandhistory/history/common/briefing/ Senate_Chaplain.htm (June 3, 2014).

[15] *Atheist and Agnostic People Welcome*, Unitarian Universalist Association (Nov. 8, 2013), http://www.uua.org/beliefs/welcome/atheism/index.shtml. *See also All Souls Church Unitarian*, http://www.all-souls.org/worship; *Pierce, Ulysses G. B. (Ulysses Grant Baker), 1865-1943. Papers, 1903-1950: A Finding Aid.*, Andover-Harvard Theological Library, http://oasis.lib.harvard.edu/oasis/deliver/~div00646 (last visited June 3, 2014).

[16] *House Officers*, http://kids.clerk.house.gov/high-school/lesson.html?intID=41 (last visited June 8, 2014).

[17] Penny Edgell, Joseph Gerteis, Douglas Hartmann, *Atheists As "Other": Moral Boundaries and Cultural Membership in American Society*, Am. Soc. Rev. Vol 71, 211 (2006).

[18] The Pew Forum on Religion & Public Life, *News Release, July 24, 2003: Many Wary of Voting For an Atheist or a Muslim,* 1, 10-14 (2003). *See also Faith on the Hill: The Religious Composition of the 113th Congress*, Pew Research Religion & Public Life Project (Nov. 16, 2012), http://www.pewforum.org/2012/11/16/faith-on-the-hill-the-religious-composition-of-the-113th-congress/ ("the greatest disparity, however, is between the percentage of U.S. adults and the percentage of members of Congress who do not identify with any particular religion. About one-in-five U.S. adults describe themselves as atheist, agnostic or 'nothing in particular' . . . But only one member of the new Congress, Kyrsten Sinema (D-Ariz.), is religiously unaffiliated").

2007.[19] More illuminating is the fact that former Rep. Barney Frank (D-Mass) publically declared his homosexuality in the 1980s but did not admit to being an Atheist until *after retiring* from office.[20] Frank's situation is not unique. While appearing to support paid chaplains as President, shortly after his presidency, Madison wrote that the "appointment of Chaplains to the two Houses of Congress [is not] consistent with the Constitution." *Id*. at 807 (Brennan, J., dissenting). In short, it is far more likely for Atheist or Muslim to be *appointed* as Chaplain than it is for one to be *elected* to office.[21]

Finally, it is significant that the Board rejected counsel's recommendation to adopt a policy "where citizens from various religious groups in the jurisdiction are invited to volunteer to pray." (SUF ¶¶96-97). Defendants' unwillingness to adopt a more inclusive policy is strong evidence of their impermissible motive in selecting themselves as the invocation-givers. *Id.* at 793-94.

E. Carroll County's prayer practice advances and proselytizes Christianity.

As previously noted, the Court in *Galloway* reiterated that a legislative prayer practice must not be "'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" 2014 U.S. LEXIS 3110 at *31 (citing *Marsh*). The Court emphasized that "[t]he inquiry remains a fact-sensitive one." *Id.* at *36-37. The Court stressed that its ruling, "[did] not imply that no constraints remain on its content." *Id.* at *29-30. Rather, courts "remain free to review the pattern of prayers over time to determine whether they comport with the tradition of **solemn, respectful prayer** approved in *Marsh*." *Id.* at *41. *Marsh* therefore "requires—in an effort to preserve respect for a mutual exercising of religions—that government not permit religious speech that proselytizes, advances one religion over another, or disparages other religions." *Joyner*, 653 F.3d at 366 (Niemeyer, J., dissenting).

Recent federal appellate cases interpreting *Marsh*, each of which is entirely consistent with *Galloway*, reaffirm the "advance or proselytize" test. *Jones*, 530 Fed. Appx. at 488; *Rubin*, 710 F.3d at 1094; *Lakeland*, 713 F.3d at 591. The Sixth, Ninth and Eleventh Circuits each concluded that the

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[19] Secular Coalition for America, *Congressman Comes Out as Nontheist, Wins Re-election! Secular Coalition Congratulates Rep. Pete Stark of California,* (November 5, 2008).

[20] *Barney Frank: I'm A 'Pot-Smoking Atheist'* (Aug. 5, 2013), http://washington.cbslocal.com/2013/08/05/barney-frank-im-a-pot-smoking-atheist/.

[21] It is worth noting that Harvard University has a Humanist Chaplain. Greg Epstein, *Humanist Community at Harvard*, http://harvardhumanist.org/greg-epstein/ (last visited June 3, 2014).

respective prayer practices passed this test because the government entities in those cases allowed any citizen or clergy, regardless of their faith, to deliver invocations on an all-inclusive basis.[22]

The Fourth Circuit cases also make abundantly clear that legislative prayers must not "proselytize" *or* "advance" any one particular religion. *See Joyner*, 653 F.3d at 353-54; *Wynne*, 376 F.3d at 298-300 ("'[P]roselytize' and 'advance' have different meanings and denote different activities."). A Third Circuit district court and the Fourth Circuit expressly rejected Defendants' interpretation of this aspect of the *Marsh* test. The court in *Wynne* explained that "[a]dvancement could include 'conversion' but it does not necessarily contain any 'conversion' or 'proselytization' element." *Id.* To "interpret 'advance' as merely a synonym for 'proselytize,' would most certainly render the word 'advance' meaningless, and would force us to ignore the *Marsh* Court's use of the disjunctive[.]" *Id.* (citing *Marsh*, 463 U.S. at 794). The court added that "[n]ot 'all prayers' 'advance' a particular faith.'" *Id.* at 301 n.6. *See also Mullin v. Sussex County*, 861 F. Supp. 2d 411, 427 (D. Del. 2012) ("advancement of religion is distinct from proselytization."). If the Court in *Galloway* wanted to overrule the "advance" part of the *Marsh* test, it would have done so. Instead, it reaffirmed it twice. 2014 U.S. LEXIS 3110 at *26 & *31.

Regardless, Defendants' prayers advance *and* proselytize Christianity to the exclusion of other religions. The prayers are exclusively Christian. Not a single prayer has referred to a non-Christian deity or has been delivered by a non-Christian. (SUF ¶62). One Commissioner openly defied the injunction, delivering a prayer in Jesus' name, saying she was "willing to go to jail" over it. (*Id.* at ¶143). Another delivered a lengthy speech in opposition to the injunction, quoting Bible passages and making repeated references to "Son of God." (*Id.* at ¶170).[23] In addition, the Commissioners have made numerous statements to the public in strong support of the Board's *Christian* prayers. On March 27, after Frazier delivered her sectarian prayer, the Board issued a formal public statement informing citizens that "the court is ordering the Board to stop offering any prayers in the name of Jesus," and that "the Board will vigorously pursue the matter to its end." (*Id.* at ¶145). Rothschild wrote on his public Facebook page:

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[22] For example, the Ninth Circuit in *Rubin* made a point to observe that at least four invocations were "given by a self-identified 'metaphysicist,' one was given by a Sikh, and another by a Muslim." 710 F.3d at 1090, 1097.

[23] He did so after telling citizens: "[if] the court opinion is unfavorable to us, I will likely read a firm statement to the public . . . [T]hose who are suing will find my statement infinitely more 'objectionable' than any prayer." (SUF ¶139).

"Carroll County Commissioners . . . FIRST in standing firm in support of Christian prayer." (*Id.* at ¶154). In her campaign speech, Frazier announced: "what [the judge] said was we couldn't use the words Jesus Christ or Savior, and that's what threw me over the edge." (*Id.* at ¶174). Rothschild wrote: "I, for one, will likely not pray in a way that forces me to deny Christ." (*Id.* at ¶139).

While "[p]rayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion," they are unconstitutional if they, over time, "'advance any one . . . faith or belief.'" 2014 U.S. LEXIS 3110 at *31. In upholding Greece's practice, the Court emphasized: "Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content **but by welcoming ministers of many creeds**." *Id.* at *23. The Court cited recent examples of such prayers and observed that Congress included prayers by a Dalai Lama (who prayed to "Buddha,"), a Rabbi, a Hindu leader, and an Imam (who prayed to "Muhammad"), among others. *Id.* at *24. Like Congress, Greece went out of its way to invite "a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess . . . was granted" an opportunity as well. *Id.* at *12. In stark contrast, Carroll County's prayers are delivered solely by Christians and it has made no efforts whatsoever to be inclusive.

Though *Galloway* does require governments to go out of their way to find non-Christian leaders outside their borders, they must have some safeguards in place to ensure that one religion is not being advanced over others. In *Galloway*, that was accomplished by allowing citizens of all faiths to deliver prayers on an inclusive, nondiscriminatory basis. *Id.* at *34. That Greece's prayers ended up being mostly Christian was not a product of the *Town's* actions, as is the case here. *Id.* at *35.

In addition to *advancing* Christianity through a practice by which exclusively Christian prayers are delivered by all Christian Commissioners, the prayers also *proselytize* Christianity, preach conversion and threaten damnation. Such prayers include, *but are not limited* to the following:

- February 9, 2012 (referring to same-sex marriage): "Dear heavenly father, . . . Especially since we are under such great attack we pray Lord we really need your help, your discernment your guidance in figuring out how to deal with things that are coming down from Annapolis that attack the very America that we know and love . . . and we ask these things in Jesus' name amen." (SUF ¶81)

- May 8, 2012: "Dear Lord . . . I think about 9-11 and the terrible things that happened . . . And, Lord I ask that um, you use these horrible events as a teaching tool for all of us . . . [T]hat we recognize these things as potentially one way of you shaking us and telling us, wake up, wake up, that we might learn from these things and humble ourselves and seek your blessings and revive our faith in you that our Country may be returned to your good graces and protection. . . ." (SUF ¶83)

- September 20, 2012: ". . . Lord, we just experienced the anniversary of the 9-11 attacks . . . and Lord, **I pray that all of us learned the correct lessons from those attacks.** We heard speeches about rebuilding stronger, we heard speeches about overcoming evil, we heard speeches about triumphing, but Lord**, I believe that there is a more important lesson that we need to learn on behalf of our Country. And that's that we, respect you Lord, we submit to you Lord, and pursue godly ways and respect your blessing and protections for the United States of America, oh Lord and I pray that all people of the United States will recognize that those attacks might be one way of you just kinda shaking us and saying wake up folks and return to the principles that, are pleasing to you Lord**, and, I pray that all of us would, keep our, keep our focus on that Lord and move our counties, our State and our Country Lord in the direction of a way in which pleases you Lord, and have your blessing for the United States of America. . . ." (SUF ¶85)

- October 11, 2012: ". . . Lord as we enter this election season, we ask that you help our citizens understand the truth [inaudible] the selection of candidates for public office to those who are honoring to you and lead our country in a [inaudible] direction that is pleasing to you. In the name of my Savior, I pray, amen." (SUF ¶86)

- November 13, 2012: "Dear Lord . . . I know citizens are asking the question, after this election there are many people who are pleased and many people that are not pleased but among those that are not pleased people are asking the question, does God still care about America, Lord? **And of course Lord, we know that, and I know the correct question is, does America still care about God**? And Lord I feel that some of the decisions made by the people of our Country and our County and our State serve to legitimize policies and place leaders in positions of authority in America that advocate policies that are opposed by most of the major religions . . . So Lord, for my prayer today, I raise, elevate all our citizens up to you, . . . **Lord, I ask that you touch their hearts and that they introspectively look at their own lives, look at their values and beliefs, and adjust their leadership to move their decisions back in the direction which will place us in your favor Lord.** Because we know as a Country that if we expect your blessings, **Lord we have to show respect for your teachings.** In the name of my personal Savior, amen." (SUF ¶87)

- April 25, 2013: ". . . and now Lord I just ask for your guidance as we move through the rest of this day and because **there is power in the Lord's name, I pray in Jesus' name**, amen." (SUF ¶91)

- December 6, 2012: ". . . that we might make wise decisions that are pleasing to you Lord and reflect the values that you've taught us . . . **I ask that you help all of us to keep in mind the true meaning of this season of Christmas that we remember what it really stands for** and that . . . we manage ourselves in a way which is pleasing to you. . ." (SUF ¶88)

- July 5, 2012: " . . . we ask that you guide us Lord, we ask that you guide all elected officials and all citizens all across the Country that all of us might make decisions to preserve these freedoms and ensure that our Country is managed and **run and occupied by all of us in a way that's pleasing to you, in Jesus'** name I pray. . ." (SUF ¶84)

- April 11, 2013: ". . . The Bible talks in many places about integrity. I ask that you instill upon each of us a sense of integrity **that we do your will and not man's will**, that we define success, we define honest, **we define righteousness using your definition and not the ways of man**. I ask Lord that you help each of us to focus on your way, that we may focus more on doing what is right for the people, doing what's right for our Constitution and our County and that each of us worry less about prevailing on particular budget matters. . . In Jesus name I pray amen." (SUF ¶89)

- March 27, 2014: "Before I pray today, I just want to say a couple things . . . [W]e just can't use certain words like Jesus and Lord and Savior and I think that is an infringement on my First Amendment right for free speech and free religion . . . I'm willing to go to jail over it. I **believe it is a fundamental of America and if we cease to believe that our rights come from God we cease to be America and we've been told to be careful but we're going to be careful all the way to Communism** if we don't start standing up and saying no so I say no to this ruling . . . [A]nd actually this might be a **good opportunity to demonstrate how our founding fathers and leaders all throughout our history have upheld the idea that we are a nation based on biblical principles.** We're one nation under God and we believe that that is where our inalienable rights come from and they're delineated and those are the rights that we need to stand up for. . . . the Lord Jesus Christ. . . Let thy blessings guide this day and forever through Jesus Christ in whose blessed form of prayer I conclude my weak petitions. Our Father." (SUF ¶143)

- December 22, 2011 (Howard): "Heavenly father, at this most special and holy time of the year, thank you for the many blessings . . . please grant this board the wisdom, the discernment, and strength to do your will and be true servants of your people. . ." (SUF ¶78)

- December 17, 2013: "Heavenly father, given this Christmas season, . . . [T]o all of our friends and neighbors regardless of their persuasion I pray the following, . . . that the knowledge of Christmas will bring you comfort and hope, in the name of my personal Savior, amen." (SUF ¶92)

- December 8, 2011 (prayer a minute and a half long): "Dear heavenly father . . . during this Christmas season . . . I pray that you will help us to have the courage and the strength to stand against those things that would compromise our constitutional and personal rights and the values that make our nation great . . . and may everything we do today be pleasing to you. I pray these things in Jesus' name. Amen." (SUF ¶76)

- December 13, 2011: "Lord, we thank you for this Christmas season. We thank you for the spirit of Christmas that you give to us and to our citizens . . . [W]e know through you all things are possible. . . . In the name of my savior I pray. Amen." (SUF ¶77)

- July 28, 2011 (prayer about a minute long): ". . . We pray and elevate our legislatures to you in Washington, D.C. . . . We ask that you guide our country and return us to the principles that are honoring to you. I pray in the name of my personal savior, amen." (SUF ¶75)

- January 11, 2012: ". . . we ask for your blessings upon our citizens and we ask that you bless America and return her to a set of values which is pleasing to you as we start this new year 2012. In the name of my Savior, I pray, amen." (SUF ¶79)

- May 5, 2011: "Heavenly father, . . . We ask that you—for blessings for enemies, that they may find peace in their hearts. I offer this prayer on behalf of people of all faiths and all beliefs. In the name of my savior I pray, amen." (SUF ¶74).
- April 8, 2014: ". . . In JOHN 14:6 the Son of God says, 'I am the way and the truth and the life. No one comes to the Father except through me.' In MATTHEW chapter 10 verse 32 and 33, the Son of God says, quote, 'Whoever acknowledges me before others, I will also acknowledge before my Father in heaven. **But whoever disowns me before others, I will disown before my Father in heaven**.'" . . . "The Son of God said render unto Caesar what is Caesar's and to God what is God's. However, in this particular case, I must confess: I'm having a very difficult time telling what belongs to God and what belongs to Caesar." . . . "For these reasons, I humbly and respectfully declare that I cannot and will not sign a document that formally binds me to an act of disobedience against my Christian faith." (SUF ¶170)

These are hardly the type of inclusive "solemn" prayers permitted by *Marsh*. To the contrary, "the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, [and] preach conversion" and are therefore unconstitutional. *Galloway*, 2014 U.S. LEXIS 3110 at *29-30. Although *one or two* stray remarks by *private citizens* do not taint an otherwise solemn and inclusive prayer practice, *id.* at *34, that most certainly is not the case here.

F. Carroll County's prayer practice betrays an impermissible governmental purpose.

A legislative prayer practice is also unconstitutional if it "betray[s] an impermissible government purpose." *Id.* at *34. The prayer must have a "permissible ceremonial purpose." *Id.* at *44-45. It lacks such a purpose if it is used as an "opportunity to proselytize." *Id.* at *37. Likewise, if "the pattern and practice of ceremonial, legislative prayer is [used as] a means to coerce or intimidate others," it lacks such a permissible purpose as well, and is therefore unconstitutional. *Id.* at *41.

As the preceding sections make clear, Defendants have "a pattern of prayers that over time denigrate [and] proselytize, [and therefore have] an impermissible government purpose." *Id.* at *34. The record shows prayers that have as their predominant purpose, conversion of Christianity. Many others are used to convey a controversial political message, such as opposition to same-sex marriage or to Barrack Obama's election, or certain budget matters. Some prayers are used to intimidate Atheists or Muslims, such as those that refer to 9-11 as a lesson from Jesus, those that liken Godless-ness to Communism, and those that remind people of "all faiths" to remember the "true" meaning of Christmas. Some prayers are highly personal. (SUF ¶70, ¶72). Furthermore, the prayers have proven to be divisive

rather than unifying. (SUF ¶93, ¶¶95-96, ¶¶100-101, ¶¶112-113, ¶¶147-149, ¶151, ¶¶156 -180).

Courts can also "infer [an improper] purpose from . . . public comments" of the legislators and their supporters. *McCreary County v. ACLU*, 545 U.S. 844, 862-63 (2005) (citations omitted). In this case, the Commissioners' statements undoubtedly reveal that their purpose in delivering Christian prayers is to advance their own religious views rather than merely solemnize the meetings. For instance, at the March 31, 2011 meeting, Shoemaker ended the prayer: "in Jesus' name I pray, in my individual capacity on behalf of no one else unless they wish to join." Afterwards, Howard responded, amidst laughter among the Commissioners: "It's as good of fine print as I've ever seen. [Responding to another commissioner] You did [miss something]. You missed an excellent opportunity to celebrate our constitutional right." (SUF ¶73). In a 2012 email, Rothschild told a supporter, "our opponents" are attempting to "purge God from government. That is why I fight them." (*Id.* at ¶132). In another 2012 email, Rothschild wrote to an objector: "America's only chance for recovery is if our leaders and citizens return to common sense biblical principles." (*Id.* at ¶125).

An impermissible purpose may also be found in the selection process itself. *See Marsh*, 463 U.S. at 793-94.[24] In *Snyder*, the court duly observed that *Marsh* "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." 159 F.3d at 1234. It is clear that Defendants' purpose in selecting themselves as the invocation-givers is to ensure only Christian prayers are delivered, *supra.* Defendants admit that it is highly unlikely non-Christians will be elected to the Board. Rothschild's public statement declaring: "Carroll County Commissioners . . . FIRST in standing firm in support of Christian prayer" (SUF ¶154) confirms that the Board's selection of the Commissioners is to "establish a particular religion as the sanctioned or official religion of the legislative body." *Id.*

G. Commissioners have signaled disfavor toward nonparticipants.

Finally, Carroll County's prayers are unconstitutional because government leaders have signaled

[24] Unlike here, the plaintiffs in *Galloway* conceded there was no impermissible purpose in Greece's selection practice. 2014 U.S. LEXIS 3110 at *48 (Alito, J., concurring).

disfavor toward nonparticipants and have suggested that their stature in the community is diminished because of their minority religious views. (SUF ¶¶2-4, ¶187). In *Galloway*, the Court explained, "[i]n *no instance* did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished." 2014 U.S. LEXIS 3110 at *40 (emphasis added). Such a practice of course, "would violate the Constitution, but that [was] not the case before [the] Court." *Id.*

For one thing, Defendants have selectively applied their rules for public comment to freely allow citizens to deliver Christian prayers and remarks that attack the plaintiffs and their views, while strongly opposing citizens who don't share their religious views, *supra*. (SUF ¶¶157-181). They have also shown disrespect towards those who do not participate in their prayers. At the February 9, 2012 meeting, Frazier delivered a sectarian Christian prayer in which she referred to the Maryland same-sex marriage bill as an "attack" on American values. (SUF ¶81). Plaintiff Judy Smith did not participate in the prayer. After the prayer, the Board held public comments. Smith was the first to speak. (*Id.* at ¶104). As she began talking, the Commissioners did not appear to be paying attention. She remarked: "None of you are looking at me." (*Id.*). Frazier interrupted: "I was writing." Another said: "Me too." (*Id.*). Smith responded: "The thing is, you can't do two things at once." Frazier replied: "I can." (*Id.*). The Commissioners testified: "It is our common practice not to engage a public citizen in any type of debate during this period, especially when the citizen has not violated any of the published restrictions" and that "[w]e typically will briefly thank the citizens for sharing their thoughts, even when we vehemently disagree with the words a citizen has spoken." (Dkt. 39-1 Exh.4). However, Rothschild and Howard responded aggressively to Smith's remarks and debated her. (SUF ¶104). Rothschild declared:

> . . . There is one set of values systems that wants one position on the marriage bill and there's a second set of values systems that takes a different position on the marriage bill. And what one group tries to do is say you have no right to oppose us [raising voice] because your value system is perhaps based on religion and therefore you're bringing religion into the argument. So they try to silence us, this **Gestapo** type [inaudible], they try to silence us by, or those that oppose us are arguing that their value system is based on religion but their value system is perfectly okay because it's based on some other value system. I don't know what it is, whether it's secularism or **atheism or humanism**, I don't know what it is but I summarily reject the idea that any one value system should have a voice and the other value system should be silenced. That's tyranny.

Rothschild's statement equating "atheism or humanism" to the Gestapo, and Frazier's statement likening Godless-ness to "communism" (*Id.* at ¶143) further signals disfavor towards such persons who do not participate in their prayers. Rothschild's prayers calling 9-11 a "wake up" call to citizens to "return to the principles that are pleasing to" Jesus, *supra*, send a hostile message to Atheists and Muslims and "suggest that their stature in the community [is] diminished." *Galloway*, 2014 U.S. LEXIS 3110 at *40. Rothschild has also signaled disfavor towards Catholics who object to legislative prayers. (Dkt. 40-14, Exh. 12). Additionally, on March 4, 2014, Rothschild publicly declared: "in the event the court opinion is unfavorable to us, I will likely read a firm statement to the public each time it is my turn to pray. Unfortunately, I predict, with a fairly high level of certainty, that those who are suing will find my statement infinitely more 'objectionable' than any prayer." (*Id.* at ¶139). As promised, after the Court issued the injunction, Rothschild delivered a lengthy speech that he undoubtedly ***intended*** to offend and intimidate non-participants. (*Id.* at ¶170).

The Commissioners regularly respond approvingly to emails from supporters of their prayers and other religious endeavors. Yet they either ignore emails from those in opposition or respond in a hostile and demeaning manner. Rothschild responded to two citizens who supported the Board's religion: "Our elected commissioners and other officials throughout America need to hear more words of encouragement from patriots like you. I assure you, our opponents are extremely active, vocal, and shrill . . . The presence of God is readily apparent throughout our U.S. and State (Md) Constitutions." (SUF ¶111). On April 27, 2012, Rothschild responded to a supporting pastor, following receipt of AHA's letter: "Pastor Chris- Thank you for your support. It is important for elected officials to hear from and receive support from Christian Conservatives. The left is very shrill . . . Those that seek to expunge God from our culture fail to understand the fact that it is only our belief in 'unalienable rights from God' that separate a constitutional republic from a tyrannical 'mob-ruled' democracy." (SUF ¶114). On May 30, 2012, a citizen sent the Commissioners an email with the subject line: "Rejecting A.U. [Americans United for Separation of Church and State]." Rothschild replied: "I don't believe our opponents are interested in any reasonable interpretation of the Establishment Clause... Rather, they seek

to misuse it in pursuit of their real agenda... To purge God from government. That is why I fight them." (SUF ¶132). In contrast, after FFRF sent a letter opposing the Board's prayers, Roush suggested that they "**not** respond to the FFRF letter." (SUF ¶99). It appears the other Commissioners agreed. On May 13, 2012, a citizen emailed the Commissioners opposing Frazier's prayer meetings. (SUF ¶124). Rothschild responded: "I am absolutely convinced that far too many of the crises within our society and created by government are a direct result of leaders that have directly ignored common sense principles that are part of America's Judeo-Christian heritage. I believe America's only chance for recovery is if our leaders and citizens return to common sense biblical principles." (*Id.* at ¶125). After the citizen asked Rothschild to clarify "which biblical principles" he thought "the government should follow[,]" Rothschild wrote: "Deuternomy- Those that obey my commandments will be lender nations. The Debtor shall be slave to his master." (SUF ¶¶127-129). (*See also* SUF ¶107).

The above references illustrate that those who object to the Board's prayers are treated differently from those who support them. For this reason, and for the numerous other reasons described in detail above, Defendants' prayer practice is unconstitutional and must be enjoined.

IV. PLAINTIFFS ARE ENTITLED TO PERMANENT INJUNCTIVE RELIEF.

Once "a constitutional violation has been found, a district court has broad discretion to fashion an appropriate remedy." *Karcher v. Daggett*, 466 U.S. 910, 910 (1984) (Stevens, J., concurring). *See also International Salt Co. v. United States*, 332 U.S. 392, 400-401 (1947) ("[district courts] are invested with large discretion to model their judgments to fit the exigencies of the particular case."). A party seeking a permanent injunction must show: "'(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved[.]'" *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (citation omitted). Plaintiffs easily satisfy the first element because a violation of First Amendment rights "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Chaplaincy of Full Gospel Churches v. England*, 454

F.3d 290, 303 (D.C. Cir. 2006). Second, "injunctions are especially appropriate in the context of first amendment violations because of the inadequacy of money damages." *National People's Action v. Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990). The balance of hardships decidedly weighs in Plaintiffs' favor. *Newsom v. Albemarle County Sch. Bd.*, 354 F. 3d 249, 261 (4th Cir. 2003); *Pittsylvania*, 842 F. Supp. 2d at 937 ("there can be no . . . harm to the Board from conducting its meetings in a manner consistent with the Establishment Clause").[25] The final element is met because "upholding constitutional rights serves the public interest." *Newsom*, 354 F. 3d at 261.

The Court has several options as to how to craft the injunction. It can require the County to adopt an all-inclusive policy identical to the one in *Galloway.* It can prohibit the *Commissioners* from delivering legislative prayers. Or, it can simply enjoin the practice as it is currently implemented.[26]

V. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR ESTABLISHMENT CLAUSE CLAIMS FOR RETROSPECTIVE RELIEF.

Plaintiffs are entitled to summary judgment on their claims for nominal damages and retrospective declaratory relief based on the law at the time the lawsuit commenced. *See Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009); *CMR D.N. Corp. & Marina Towers Ltd. v. City of Phila.*, 703 F.3d 612, 622 (3d Cir. 2013) ("Claims for damages are retrospective in nature—they compensate for past harm. By definition, then, such claims 'cannot be moot'"); *Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735, 746 (W.D. Tex. 2007) ("[a] claim for nominal damages survives even when intervening changes in the law have mooted claims for injunctive or declaratory relief.").

This Court agreed that, based on the undisputed facts in the record at the time of the filing of this suit, the County's prayer practice violated the Establishment Clause pursuant to well-settled Fourth

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[25] As this Court ruled, "the Commissioners do not have an individual right to deliver sectarian prayers at the opening of Board meetings." *Hake v. Carroll County*, 2014 U.S. Dist. LEXIS 40476, *12 (D. Md. 2014). This is unaffected by *Galloway.* Despite the Commissioners' extensive rhetoric, such as, "this decision is really a victory for . . . Free Speech" "our First Amendment rights were upheld" and "It's nice to have our Maryland Constitution affirmed as well," (SUF ¶185), *Galloway* merely held that the Establishment Clause *was not* violated by Greece's practice. It did not hold citizens have a *right* to pray at meetings, and it most certainly did not hold that legislators had this "Free Speech" right.

[26] *See, e.g.*, *Joyner v. Forsyth County*, 2009 U.S. Dist. LEXIS 105360, *25 (M.D. N.C. 2009) ("enjoin[ing] the continuation of the Policy as it is now implemented."); *Hinrichs v. Bosma*, 410 F. Supp. 2d 745, 752 (S.D. Ind. 2006) ("The injunction leaves the Speaker and the House considerable latitude in deciding how to comply with the Establishment Clause").

Circuit jurisprudence. *See Joyner*, 653 F.3d at 344-49, *cert. denied*, 132 S. Ct. 1097 (2012) (practice unconstitutional because prayers invoked "Jesus" and "Savior" and "[n]one of the prayers mentioned non-Christian deities."); *Wynne*, 376 F. 3d at 299-300, *cert. denied*, 545 U.S. 1152 (2005) (practice unconstitutional where prayers were led by council members on a regular basis and often mentioned "Jesus" or "Savior"); *Pittsylvania*, 842 F.Supp.2d at 931 (the "Supreme Court and Fourth Circuit have made it very clear that [a] Board's practice of routinely opening its meetings with Christian prayer violates the Establishment Clause."). *See also Turner*, 534 F.3d at 353; *Simpson*, 404 F.3d at 278. This Court properly noted that the "Fourth Circuit case law 'sets out clear boundaries' for legislative prayer." *Hake*, 2014 U.S. Dist. LEXIS 40476 at *17 (citing *Joyner*, 653 F.3d at 349). The Court found that the "prayers invoked by Commissioners before Board meetings advance one religion to the exclusion of others," in violation of the Establishment Clause. *Id.* at *20, *23-24 (citing *Joyner*, 653 F.3d at 353 n.15). Yet in the face of such "clear boundaries," Defendants continued to pray in the name of "Jesus" and "Savior," even after this Court issued enjoined them from doing so. At the time of said actions, Defendants' practice undeniably violated the Establishment Clause as defined by the Fourth Circuit. *See Jones v. Angelone*, 94 F.3d 900, 906 (4th Cir. 1996); *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993) ("A decision of a panel of this court becomes the law of the circuit").[27]

Defendants do not dispute the validity of the facts on the record relied upon by this Court in ruling in favor of Plaintiffs on their preliminary injunction motion, nor do they present any new facts disputing or undermining the facts in the record at the time of the ruling. Therefore, *at a minimum*, Plaintiffs are entitled to summary judgment on their retrospective relief claims.

It is firmly established that nominal damages remedy past constitutional violations irrespective of new or changed circumstances (factual or legal) that might render moot, injunctive relief. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989) (case not moot where plaintiff was entitled to damages pursuant to expired ordinance); *Rendelman*, 569 F.3d at 187 (even "if a plaintiff's injunctive relief claim has been mooted, the action is not moot if the plaintiff may be 'entitled to at least nominal damages.'")

[27] Deference to a court's previous decisions "reflects a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

(citation omitted); *Mellen v. Bunting*, 327 F.3d 355, 364-65 (4th Cir. 2003) (same); *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991) (same); *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 590 F.3d 725 (9th Cir. 2009) (monetary damages precluded mootness despite passage of new legislation); *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 461 (6th Cir. 2007) ("The existence of this damages claim preserves the plaintiffs' backward-looking right to challenge the original law and to preserve a live case or controversy over that dispute."); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1221 (10th Cir. 2005) ("nominal damages is an appropriate remedy for a violation of the Establishment Clause" and "[u]nlike the claims for injunctive and declaratory relief, this claim is not mooted"); *Committee for First Amendment v. Campbell*, 962 F.2d 1517, 1526 (10th Cir. 1992) ("Neither the showing of the film . . . nor the subsequent enactment of the 1991 policy erases the slate concerning the alleged First Amendment violations . . . Therefore, the district court erred in dismissing the nominal damages claim which relates to past (not future) conduct"); *Doe v. Parish of St. Tammany*, 2008 U.S. Dist. LEXIS 31222, *14 (E.D. La. 2008) ("[p]laintiffs should be awarded nominal damages as a result of the violation of the Establishment Clause present with the initial display without modification, which prompted this suit."); *Family Life Church v. City of Elgin*, 2007 WL 2790763 *5 (N.D. Ill. 2007) ("the corrective action can [not] retroactively erase injuries already incurred" so "plaintiff's claim for alleged damages . . . survives"). The same is true with respect to declaratory relief.[28]

By "making the deprivation of such rights actionable for nominal damages" the law "recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). *See also Price v. City of Charlotte*, 93 F.3d 1241, 1246 (4th Cir. 1996) ("the rationale for the award of nominal damages being that federal courts should provide some marginal vindication for a constitutional violation"); *Floyd v. Laws*, 929 F.2d 1390, 1403 (9th Cir. 1991) ("she

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[28] While "a declaratory judgment is generally prospective relief, in some situations it has been recognized as retrospective." *PeTA v. Rasmussen*, 298 F.3d 1198, 1203 n.2 (10th Cir. 2002) (citing *F.E.R. v. Valdez*, 58 F.3d 1530, 1533 (10th Cir. 1995)). In *F.E.R.*, the Court found that the plaintiffs' claim for an injunction was mooted by a return of property, but their claim for declaratory relief was not moot because it was "similar to their claim for damages" and required the court "to determine whether a past constitutional violation occurred." 58 F.3d at 1533. *See also Yniguez v. Arizona*, 975 F.2d 646, 647 (9th Cir. 1992) ("A plaintiff's pursuit of nominal damages provides a sufficiently concrete interest in the outcome of the litigation to confer standing to pursue declaratory relief and thereby prevents mootness.").

was legally entitled to judgment with a mandatory nominal damages award of $ 1.00 as a symbolic vindication of her constitutional right."). Moreover, if a plaintiff's constitutional rights were violated, a court has *no discretion* to deny the plaintiff nominal damages. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992); *Covenant Media*, 493 F.3d at 429 n.4; *Henson v. Honor Committee of U. Va*., 719 F.2d 69, 72 n.5 (4th Cir. 1983) ("the deprivation of [constitutional rights] creates an independent right to seek, at a minimum, nominal damages"); *Pelphrey v. Cobb County*, 495 F. Supp. 2d 1311, 1319 (N.D. Ga. 2007) ("a court is obligated to award nominal damages").

Nominal damages are appropriate in legislative prayer cases specifically. *See, e.g.*, *Joyner*, 2009 U.S. Dist. LEXIS 105360 at *25, *affirmed*, 653 F.3d 341 ("allow[ing] the recovery of nominal damages and attorney's fees"); *Pelphrey*, 547 F.3d at 1282 (awarding nominal damages for partial victory on challenge to legislative prayer practice); *Pelphrey*, 495 F. Supp. 2d at 1319 ("a plaintiff who vindicates a right under the Establishment Clause . . . is entitled to an award of nominal damages"). Indeed, nominal damages are particularly important in Establishment Clause cases such as this, where plaintiffs take on a substantial risk of public distain knowing they will not "recover significant damages." *Milwaukee Deputy Sheriffs Ass'n v. Clarke*, 2008 U.S. Dist. LEXIS 12662, *4 (E.D. Wis. 2008).

As Justice O'Connor powerfully put it: "Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent." *Van Orden v. Perry*, 545 U.S. 677, 747 (2005) (dissenting). An award of nominal damages "recognizes the importance to organized society that those rights be scrupulously observed," even if there are subsequent changes in the law or facts that render the other claims moot. *Carey*, 435 U.S. at 266. Accordingly, Plaintiffs' are entitled to summary judgment for their nominal damages claim, irrespective of their claim for injunctive relief.

VI. DEFENDANTS HAVE NOT MET THEIR BURDEN ON SUMMARY JUDGMENT.

The party moving for summary judgment has the burden of demonstrating that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 157 (1970). Defendants have failed to *prove* there is no

disputed issue of material fact in support of their defense.[29] First, Plaintiffs dispute that "[t]he Board opens its public meetings with an official, ceremonial prayer." (Dkt. 47-1 p.4). Insofar as the word "ceremonial" is a legal conclusion and not a fact, Plaintiffs concede this is not a material "*fact*."[30] Second, Plaintiffs dispute that the prayers "are offered for the benefit of the Board." (*Id.*). As discussed above, the evidence shows that the prayers are routinely offered for the benefit of the public. Third, Plaintiffs dispute that "[t]hose attending the meetings may participate in the prayers at their own discretion, with no penalties for non- participation." (*Id.*). Defendants' only "evidence" of this is their Exhibit 1, which does not prove citizens have not been treated differently for not participating. As the moving party, Defendants bear the burden of proving each of these facts. *Adickes*, 398 U.S. at 160; *Trustees of the Heating, Piping & Refrigeration Pension Fund v. Milestone Constr. Servs*., 2014 U.S. Dist. LEXIS 2895, *10 (D. Md. 2014). Plaintiff Smith has indeed been treated differently for not participating. The Commissioners have also allowed prayer-supporters to hijack their meetings to make damning and hostile remarks about those who don't participate in the prayers (SUF ¶181). "[T]o allow a speaker to try to hijack the proceedings . . . impinge[s] on the First Amendment rights of other would-be participants." *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004).

Fourth, Plaintiffs dispute Defendants' assertion that "[t]he Board's only official prayer policy is found in its Ten Governing Principles." (Dkt. 47-1, p.5). Plaintiffs concede this is Defendants' only "written" policy on prayer. However, an "official" "policy" may include an unwritten policy as well. *See Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998) (for the "purpose of an Establishment Clause violation, a state policy need not be formal [or] written."); *Joyner*, 653 F.3d at 348; *Wynne*, 376 F.3d at 295-96 n.2. Fifth, Plaintiffs dispute Defendants' claim that "[i]n practice the prayers are delivered before the Pledge of Allegiance, thus allowing citizens to arrive late to miss the prayer, but participate in the Pledge." (*Id.* at p.5). The evidence clearly shows that the Commissioners have delivered many prayers

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[29] Defendants incorrectly state Graybill is a member of the "Plaintiff American Humanist Society." (Dkt. 47-1 p.4).

[30] The term "ceremonial" is vague. By asserting that their prayers are "ceremonial," Defendants are not claiming that the prayers are meaningless and/or nonreligious. In fact, the Commissioners claimed that their right to say the prayers was a matter of religious freedom to them, for which at least one of them was willing to go to jail.

after the Pledge and have asked citizens to stand for both.[31]

Finally, and perhaps most importantly, Plaintiffs dispute that "[t]he prayers are held to solemnize the proceedings." (*Id.* at p.4). The Commissioners are using their position to exalt their particular religion, which is not a solemnizing purpose, *supra*. Many of the prayers are poorly guised political speeches, anything but respectful in their character, and this serves to divide rather than unite and solemnize, *supra*.[32]

Regardless of these disputes, Defendants are not entitled to judgment as a matter of law, *infra.*[33]

VII. DEFENDANTS ARE NOT ENTITLED TO ANY IMMUNITY IN THIS CASE.

True to form, Defendants once again claim they are entitled to legislative immunity for their prayers (Dkt. 47-1 pp.6-27), despite the unanimous rejection of this defense by the courts. At this juncture, it is appropriate to remind the Court that opposing counsel made repeated demands to the Plaintiffs and to this Court to join the Commissioners in their *individual capacities*. (*See* Dkt. 15-2). Oddly, they claimed that not suing the Commissioners for personal liability would deny them "the opportunity to properly present the individual defenses that would vindicate them in this litigation." (*Id.* at p.2). Apparently ignoring the complete absence of any individual capacity claims, opposing counsel has decided to raise those personal defenses anyway. From this it is clear that they are far more interested in getting a judicial ruling on their legislative immunity argument than they are interested in the principles underlying the defense itself (avoidance of personal liability). Defendants know that their argument must fail because the Commissioners are sued in their official capacities only. In their motion to dismiss, they agreed: "The individual Commissioners have additional defenses that **can only be raised in their individual capacities**—defenses of both absolute and qualified official immunity—that

[31] Moreover, the Board meetings are not consistently scheduled and there is no obvious way for a citizen to avoid the prayer other than arriving significantly late (and potentially missing part of the meeting). All "reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion." *Nguyen v. CNA Corp*., 44 F.3d 234, 237 (4th Cir. 1995).

[32] Nevertheless, this is not a "material" fact for Defendants' defense because even if one of its purposes is to solemnize, the practice can still violate the Establishment Clause pursuant to *Galloway* for numerous other reasons, *supra*.

[33] Notably, these disputed facts *do not* foreclose summary judgment for Plaintiffs. *See Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (when faced with cross-motions for summary judgment, court "review[s] each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law.").

they believe would vindicate them in this suit. Those interests cannot be realized unless the Commissioners are named individually." (*Id.* at p.7). Although Plaintiffs see no value in litigating this issue further, they, out of an abundance of caution, provide the analysis below.

A. Plaintiffs have demonstrated a *Monell* policy, practice and custom.

There is a critical distinction between *challenging* the actions of individual Commissioners to hold them *personally liable*, and *using* their actions and statements as *evidence* of a government policy or practice. Defendants' statement that "[a]ny aspect of this litigation targeting anything other than Carroll County policy or custom targets the county commissioners in their individual capacities, not official capacities[,]" (Dkt.47-1 p.6) is both circular and irrelevant. For the actions of the Commissioners comprise of the County policy and practice being challenged. *See Hobart v. City of Stafford*, 2010 WL 3419660, *2 (S.D. Tex. 2010) ("the testimony of Council members is reasonably calculated to lead to the discovery of admissible evidence. It is relevant, at the very least, to whether there existed a custom or usage having the force of state law"); *Stone's Auto Mart, Inc. v. City of St. Paul, Minn.*, 721 F. Supp. 206, 211 (D. Minn. 1989) ("The motivation of the council members is precisely what is at issue and, therefore, is discoverable."). Individual-capacity "suits seek to impose personal liability." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). There is simply no such thing as "targeting" the Commissioners in their "individual capacities" without seeking to hold them personally liable.[34]

In addition, Defendants erroneously contend that there are only two bases upon which *Monell* liability may attach: (1) a written policy or (2) a custom (which must be widespread and permanent). (Dkt. 47-1 pp.6-7). However, *Monell* liability may attach in many ways including through, *inter alia*: (1) an express policy (written or unwritten); (2) the decisions of a person with final policymaking authority; (3) an omission that "manifest[s] deliberate indifference to the rights of citizens;" *or* (4) a practice that is "persistent and widespread" so as to constitute a "custom or usage with the force of law." *Lytle v. Doyle*,

[34] Even if the Commissioners were entitled to immunity, which they clearly are not, that would *not* necessarily shield them from discovery. *In re Grand Jury*, 821 F.2d 946, 958 (3d Cir. 1987) ("we do not believe that the needs of state legislators for confidentiality justify the creation of a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause."); *EEOC v. Washington Suburban Sanitary Comm'n*, 666 F. Supp. 2d 526, 532 (D. Md. 2009); *Pittsylvania*, 842 F. Supp. 2d at 920 ("there is no absolute 'evidentiary privilege for state legislators for their legislative acts.'").

326 F.3d 463, 471 (4th Cir. 2003) (citations omitted). *See Monistere v. City of Memphis*, 115 F. App'x 845, 852 (6th Cir. 2004) (affirming *Monell* liability where the city operated under "unwritten" "policy"). A municipality may even be liable for "a single decision" of a policymaking official. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) (plurality); *Austin v. Paramount Parks, Inc*., 195 F.3d 715, 728 (4th Cir. 1999). Indeed, "liability may result from adoption or ratification of actions of a single commissioner by other members of the Board." *Zinna v. Bd. of County Comm'rs*, 2008 U.S. Dist. LEXIS 41204, *8 (D. Colo. 2008). This has been true in legislative prayer cases specifically. *See Pelphrey*, 547 F.3d at 1282. "Custom may also be established by evidence of knowledge and acquiescence." *Mulholland v. Government County of Berks, Pa*., 706 F.3d 227, 237 (3d Cir. 2013).

Defendants go on to misleadingly quote two Supreme Court cases for their assertion that "[a]bsent a written policy, *Monell* applies **only** if Plaintiffs 'prove the existence of a widespread practice . . ." (*Id.* at pp.6-7). Instead, in *McMillian v. Monroe County*, 520 U.S. 781, 796 (1997), the Court cited *Praprotnik* for the notion that "'[e]gregious attempts by local governments to insulate themselves from liability for unconstitutional policies are precluded' by allowing plaintiffs to prove that 'a widespread practice' has been established by 'custom or usage' with the force of law.'" Neither case held that such was the *only* way to prove *Monell* liability absent a written policy. *See also Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011).[35] Defendants then state: "It is less common for a legislative policymaking body . . . to be liable without a formally-adopted written policy[.]" (*Id.*). But almost every legislative prayer case has focused on the *actual practice* and not simply a written policy if there even is one. *See, e.g.*, *Galloway*, 2014 U.S. LEXIS 3110 at *9-10; *Joyner*, 653 F.3d at 348; *Wynne*, 376 F.3d at 295-96 n.2, *Pittsylvania*, 842 F. Supp. 2d at 926-27; *Pelphrey*, 547 F.3d at 1278-81 ("prayers were unconstitutional based on the [unwritten] selection procedures"); *Mullin*, 861 F. Supp. 2d at 416

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[35] Defendants also severely misquote Fourth Circuit precedent, holding that the *Monell* liability test is "stringent." (*Id.* at p.9). The Fourth Circuit in the case they cite actually held that "the substantive requirements for establishing municipal liability for *police misconduct* are stringent." *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987) (emphasis added). The court's statement was predicated on the fact that the plaintiff attempted to prove liability under the most tenuous basis for *Monell* liability, which is a "deficient training policy." *Id. See Connick*, 131 S. Ct. at 1359-60. Prior to making that statement, the court discussed each of the *many* ways liability can attach under *Monell*. Indeed, it recognized a much lower standard of proof for actions more analogous to this one. *Spell*, 824 F.2d at 1387.

(unwritten practice unconstitutional). Defendants' blanket statement that, "[n]o one Commissioner can make a policy or custom to which *Monell* attaches," is also seriously flawed. (*Id.* at p.10). This ignores the fact that a policy or custom can be established by the other Commissioners' knowledge and acquiescence,[36] or upon delegation to one Commissioner as the prayer-giver.[37]

B. Actions of the individual Commissioners are relevant and competent evidence of the County's unconstitutional prayer practice.

The statements and actions of the individual Commissioners are relevant and competent evidence of an impermissible County policy for Establishment Clause purposes. *Wynne*, 376 F.3d at 301 n.7. In *Wynne*, for example, the Fourth Circuit had no qualms looking to the actions and statements of individual council members in determining that the prayer practice was unconstitutional. *Id.* A critical factor of the *Galloway* analysis is whether the prayers "betray an impermissible government purpose." 2014 U.S. LEXIS 3110 at *34. In discerning this purpose, it is appropriate, if not necessary, to look to the statements and actions of the individual Commissioners. *See McCreary*, 545 U.S. at 862-63; *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 800-01 (10th Cir. 2009). In *Green*, a county board approved a monument featuring the Ten Commandments and Mayflower Compact. *Id*. at 790. Although the board members did not originally state why they approved the monument, two of the three board members later defended the monument making statements such as: "The good Lord died for me. I can stand for him. And I'm going to." "I'm a Christian and I believe in this." "I won't say that we won't take it down, but it will be after the fight." *Id*. at 801. The court held the monument was unconstitutional based largely on the "[n]umerous quotes from these commissioners." *Id*. *See also Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *23-24 (C.D. Cal. 2014).

C. Defendants are *not* entitled to legislative immunity.

Defendants incorrectly assert that *Plaintiffs* "bear the burden of persuading the Court that

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[36] *See Hector v. Weglein*, 558 F. Supp. 194, 200 (D. Md. 1982) ("A municipal policy or custom can be inferred from the acts or omissions of municipal supervisory officials"); *Jiminez v. All Am. Rathskeller, Inc*., 503 F.3d 247, 250 (3d Cir. 2007) ("government policymaker is responsible by action or acquiescence for the policy or custom."); *Parnell v. Waldrep*, 538 F. Supp. 1203, 1205 (W.D. N.C. 1982) (a county and its board of commissioners held liable under § 1983 for knowledge and acquiescence); *Hobart v. City of Stafford*, 916 F. Supp. 2d 783, 794 (S.D. Tex. 2013).
[37] *See Spell*, 824 F.2d at 1387; *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983); *Hobart*, 2012 WL 1327785.

legislative immunity does not apply to anything they seek in this litigation." (Dkt. 47-1 p.3). Yet it is well settled that "[t]he burden is on [the government] Defendants to establish the existence of absolute legislative immunity."*Guindon v. Twp. of Dundeee*, 488 Fed. Appx. 27, 33 (6th Cir. 2012). The Court has clearly held that "the official seeking absolute immunity bears the burden of showing that such immunity is justified." *Burns v. Reed*, 500 U.S. 478, 486 (1991). The Court made this point clear even in cases relied upon by Defendants. *See Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982) ("The burden of justifying absolute immunity rests on the official asserting the claim.").[38]

Defendants' *entire* legislative immunity argument (Dkt. 47-1 pp.6-28) is irrelevant because such immunity does not apply to the County or the official-capacity claims. *See Owen v. Independence*, 445 U.S. 622, 637-638 (1980); *Kensington Volunteer Fire Dep't, Inc. v. Montgomery County*, 684 F.3d 462, 469 (4th Cir. 2012); *Alexander v. Holden*, 66 F.3d 62, 67-68 (4th Cir. 1995); *Berkley v. Common Council*, 63 F.3d 295, 300 (4th Cir. 1995). "Legislative immunity only extends to defendants sued in their individual capacities." *Kobe v. Haley*, 2013 U.S. Dist. LEXIS 113193, *16-17 (D. S.C. 2013).[39]

Defendants place great emphasis on the fact that legislative immunity is a bar to a court's subject matter jurisdiction. Tellingly, not a single legislative prayer case, *including those involving legislator-delivered prayers* (*Wynne* and *Turner*), has ever been dismissed on legislative immunity grounds. Defendants then argue that no federal *appellate* court "denied legislative immunity to legislative prayers offered by a legislator." (*Id.* at p.13). This is simply untrue. Instead, *not a single federal appellate court* or any court for that matter, has *granted* legislative immunity in a legislative prayer case. The Fourth Circuit reached the merits of two cases involving legislator-delivered prayers. If it thought legislative immunity applied to such prayers, it would have dismissed *Turner* and *Wynne sua sponte*, as it would

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[38] *See also Hansen v. Bennett*, 948 F.2d 397, 401 (7th Cir. 1991) ("'the government official seeking [legislative] immunity . . . has the burden'") (citation omitted); *Government of the Virgin Islands v. Lee*, 775 F.2d 514, 524 (3d Cir. 1985) (same); *Christian v. Cecil County*, 817 F. Supp. 1279, 1287 (D. Md. 1993).

[39] *See also Schmidt v. Contra Costa County*, 693 F.3d 1122, 1131 (9th Cir. 2012) (same); *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009); *Cady v. Arenac County*, 574 F.3d 334, 342 (6th Cir. 2009) ("absolute immunity . . . is unavailable in an official-capacity action"). None of the cases cited by Defendants in their footnote (Dkt. 47-1 pp.26-27) support the conclusion that legislative immunity shields official capacity claims. More recent Supreme Court cases affirmatively settle the issue that legislative immunity does not apply to official capacity claims. *See Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 677, n* (1996).

lack jurisdiction to reach the merits. In a very real sense, it denied legislative immunity in both cases.

This is not an open question. Federal courts have *expressly* and *unanimously* rejected legislative immunity in legislative prayer cases. *See Kurtz*, 630 F. Supp. at 856 (rejecting legislative immunity to prayer practices of Congress because "legislative prayer does not provide meaningful input into . . . legislative decision making."). In *Franklin County*, 2013 U.S. Dist. LEXIS 80033 at *10-11, Kenneth Klukowski, opposing counsel here, launched the same defense. The court held that there was "no precedent" to support it. *Id.* A court within this jurisdiction squarely held that legislative prayers are "beyond the scope of legislative immunity." *Pittsylvania*, 842 F. Supp. 2d at 916-18. The court reasoned, in "*Joyner*, *Turner*, *Simpson*, and *Wynne*, the Fourth Circuit recently decided four legislative prayer cases . . . and neither legislative immunity nor privilege precluded the court from reaching the merits." *Id.* at 921. The court added that such "immunity only extends to Board members sued in their individual capacities." *Id.* at 916. In *Marsh*, the Eighth Circuit expressly held that legislative immunity did not apply. 675 F.2d at 231-33. The Supreme "Court left undisturbed the Eighth Circuit's decision rejecting the extension of legislative immunity to legislative prayer." *Pittsylvania*, 842 F. Supp. 2d at 916-20.

Defendants are patently incorrect in stating that "the Court of Appeals implied legislative immunity might attach if a legislator were offering the prayers." (*Id.* at p.14). The Supreme Court has construed the legislative capacity narrowly, holding that it "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *United States v. Brewster*, 408 U.S. 501, 528 (1972). Unlike the relevant Establishment Clause test, *supra*, legislative immunity "turns on the nature of the act, rather than . . . the official performing it." *Bogan*, 523 U.S. at 54. Under this functional test, "the identity of the actor" is irrelevant. *Forrester v. White*, 484 U.S. 219, 229 (1988).[40] In *Marsh*, the Eighth Circuit applied this "functional test" and held that the prayer "bears no substantive relation to the process of enacting legislation." 675 F.2d at 232.[41] Accordingly, Defendants' are not entitled to judgment as a matter of law.

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[40] *See Gravel v. United States*, 408 U.S. 606, 618 (1972) ("the Speech or Debate Clause applies . . . [to] aides").

[41] The Court in *Galloway* made the same observation: the "prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time." 2014 U.S. LEXIS 3110 at *43-44.

CONCLUSION

Justice Oliver Wendell Holmes wrote that he was not "troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law." *Irwin v. Gavit*, 268 U.S. 161, 167 (1925). In this case, as we see via the well-documented actions of the Defendants over the course of years, the line has been repeatedly and consistently crossed. County Commissioners rather than private citizens deliver exclusively Christian prayers that are often directed to, and are for the benefit of, the public. The Board has taken steps to embroil citizens in the prayer controversy and Commissioners have made firm statements to the public in support of the Board's "Christian" prayers. The prayers frequently proselytize Christianity, preach conversion and threaten damnation. The selection process is inherently exclusive and is designed to categorically exclude unpopular minority religions and ensure all prayer-givers are Christian. The prayers have proven to be divisive, disrespectful of other viewpoints, and anything but solemnizing. For the foregoing reasons, Plaintiffs respectfully request the Court to grant their motion for summary judgment and to deny or strike the Defendants' motion for summary judgment. Respectfully submitted,

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