

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

American Humanist Association,
Lauren Graybill, Bruce A. Hake,
Cornelius M. Ridgely, and Judy Smith

Plaintiffs,

v.

Carroll County, Maryland, by its Board of
County Commissioners, consisting of its chair,
Doug Howard, and Robin B. Frazier, Richard S.
Rothschild, David H. Roush, and Haven N.
Shoemaker, Jr.,

Defendants.

Case No. 13CV1312

Memorandum of Law in Support of the Plaintiffs' Motion for Contempt / Show Cause

I. INTRODUCTION AND RELEVANT FACTS

The Plaintiffs file this memorandum of law in support of their motion for contempt on the grounds that the above-captioned Defendants have willfully violated this Court's injunction order twice since it has been issued.

On March 25, 2014, this Court granted the Plaintiffs' motion for a preliminary injunction, ordering as follows: "The County will be preliminarily enjoined from continuing its current practice of frequently opening its Board meetings with sectarian prayers. In accord with the injunction approved by the Fourth Circuit in *Wynne*, the County will be enjoined, during the pendency of this case, 'from invoking the name of a specific deity associated with any specific faith or belief in prayers given at [Board] meetings.' *Wynne*, 376 F.3d at 302." (Dkt. 34; Dkt. 35) (hereafter "Injunction Order"). On March 27, 2014, after vocally objecting to the Injunction Order, Commissioner Robin Frazier delivered a sectarian Christian prayer at a Board meeting that mentioned "Jesus" several times, in violation of this Court's Injunction Order. Commissioner Frazier delivered the following prayer:

Before I pray today, I just want to say a couple things. Many of you may know there was a lawsuit against us not to open in prayer and there was an injunction, if I'm saying the right word, that came down that said that oh we could pray but we 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 and I think it's a wrong ruling and just as if just as I wouldn't give up my guns or I wouldn't allow my children to be palm scanned or I wouldn't give up my property rights with Plan Maryland 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. 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 but today instead of praying in my own words I'm gonna pray in the words of George Warshington [sic] and give one of his prayers and 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. So in opening today then I'm going to read this prayer from George Warshington [sic]:

Oh Lord our God, most mighty and merciful Father, I, thine unworthy creature and servant, do once more approach thy presence. Though not worthy to appear before thee, because of my natural corruptions and the many sins and transgressions which I have committed against thy divine majesty; yet I beseech thee, for the sake of him in whom thou art well pleased, the Lord *Jesus Christ*, to admit me to render thee deserved thanks and praises for thy manifold mercies extended toward me: for the quiet rest and repose of the past night; for food, raiment, health, peace, liberty, and the hopes of a better life through the merits of thy dear son's bitter passion. And, oh kind Father, continue thy mercy and favor to me this day, and ever hereafter; propose all my lawful undertakings; let me have all my directions from thy *Holy Spirit* and success from thy bountiful hand. Let the bright beams of thy light so shine into my heart, and enlighten my mind in understanding thy blessed word, that I may be enabled to perform thy will in all things, and effectually resist all temptations of the world, the flesh and the devil. Preserve and defend our rulers in church and state. Bless the people of this land, be a father to the fatherless, a comforter to the comfortless, a deliverer to the captives and a physician to the sick. Let thy blessings guide this day and forever through *Jesus Christ* in whose blessed form of prayer I conclude my weak petitions. Our Father.

(Hake Decl. at ¶¶3-4) (Smith Decl. at ¶¶3-4) (Ridgely Decl. at ¶¶3-4) (Graybill Decl. at ¶¶3-4).

And <http://carrollcountymd.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1949&AgendaID=1792&FileFormat=pdf&Format=Agenda&MediaFileFormat=wmv> (accessed April 1, 2014).¹

(emphasis added).

¹ The Court may take judicial notice of these comments and proceedings pursuant to Fed. R. Evid. 201(b) because they are “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” See also *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of official information posted on a governmental website, the accuracy of which was undisputed); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025, n.2 (9th Cir. 2006) (taking judicial notice of the city's records which were either filed with the clerk as a certified public record, or could be accessed on the city's “official website”).

Then, on April 1, 2014, the County authorized a citizen to deliver a sectarian prayer mentioning “Jesus” at the official Board meeting, also violating this Court’s order. (Hake Decl. at ¶¶5-7) (Smith Decl. at ¶¶5-7) (Ridgely Decl. at ¶¶5-7) (Graybill Decl. at ¶¶5-7). And,

<http://carrollcountymd.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1955&AgendaID=1795&FileFormat=pdf&Format=Agenda&MediaFileFormat=wmv> (accessed April 1, 2014).

The substance of this prayer is as follows:

Good morning Commissioners. I want to talk about the court injunction that prohibits you from praying in the name of *Jesus Christ*. My comments are directed to Judge Quarles. I suspect he or his plaintiffs’ attorneys is watching to make sure you don’t say a prayer to Jesus Christ. Your honor, where do you get the authority to dictate to these commissioners or to anybody else who can pray to or what name they can use for their deity? When the political lovecut (?) judges like you overturn abortion laws, we Christians were deeply concerned about the mass murder that would be unleashed in this country but we were told we must be tolerant and if you don’t want an abortion then don’t get one. When the courts overturned marriage laws and allowed people of the same sex to get married, we Christians were told we must be tolerant of homosexuality. Now we have you, Judge Quarles, forbidding Christian conservative county commissioners from praying in the name of Jesus Christ. I ask your honor, why did you apply a different standard to Christians? Why can’t the lack view (?) be tolerant of our prayers *for Jesus Christ*? The judge may have prevented you commissioners from praying to Jesus Christ, but I want you to know that we, the citizens of Carroll County, are not gonna stand for it.

We are overruling Judge Quarles’ objection by offering this prayer on your behalf: Heavenly father, I stand here this morning and ask your blessing on our five county commissioners. They were elected by the People of Carroll County to conduct the business of local government and they open their meetings with a prayer asking for your guidance. They have received a court Order from a misguided judge who forbids them from praying in the name of your son, Jesus Christ. This Order discriminates against Christians and is a gross violation of our commissioners’ First Amendment Constitutional rights. Therefore I ask you to bless their proceedings today and bless the case about Christian prayer before the Supreme Court *and I ask for these blessings in Jesus’ name. Amen.*

(*Id.*) (emphasis added). These two prayers were delivered in violation of the Court’s order.

II. THE DEFENDANTS WILLFULLY VIOLATED THIS COURT'S INJUNCTION ORDER AND SHOULD BE PUNISHED BY CONTEMPT

The Fourth Circuit has stated: “When the nature of the relief and the purpose for which the contempt sanction is imposed is remedial and intended to coerce the contemnor into compliance with court orders or to compensate the complainant for losses sustained, the contempt is civil; if, on the other hand, the relief seeks to vindicate the authority of the court by punishing the contemnor and deterring future litigants’ misconduct, the contempt is criminal.” *Buffington v. Baltimore County*, 913 F.2d 113, 133 (4th Cir.1990). *See also Hicks v. Feiock*, 485 U.S. 624, 631 (1988). The same conduct can nonetheless give rise to both civil and criminal contempt, “justify[ing] a court in resorting to coercive and to punitive measures.” *United States v. United Mine Workers of America*, 330 U.S. 258, 299 (1947).

In this case, the Plaintiffs primarily seek civil contempt in order to coerce the Defendants into compliance with the Injunction Order and also to compensate the Plaintiffs for the violation of the constitutional rights. However, the Plaintiffs also seek an order of criminal contempt to punish the Defendants for their willful violation of the Injunction Order.

A. Civil Contempt

To establish civil contempt, the movant must show by clear and convincing evidence: (1) that there exists a valid order or decree of which the alleged contemnor had actual or constructive knowledge; (2) that the order was in the movant’s “favor”; (3) that the alleged contemnor violated the terms of the decree and had knowledge (at least constructive knowledge) of such violations; and (4) that the movant suffered harm as a result. *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir.2000) (quoting *Colonial Williamsburg Found. v. The Kittinger Co.*, 792 F.Supp. 1397, 1405–06 (E.D.Va.1992), *aff’d*, 38 F.3d 133, 136 (4th Cir.1994). *See also Consolidated HVAC, Inc. v. All State Plumbing, Inc., No.*

CCB-04-2741, 2006 WL 2563367, at *2 (D. Md. Aug. 30, 2006) (finding defendant in contempt and awarding plaintiff its attorney's fees and costs). *See also Columbia Gas Transmission Corp. v. Mangione Enterprises of Turf Valley, L.P.*, 964 F.Supp. 199, 203 (D. Md. 1996) (awarding attorney fees based on finding of contempt for failure to comply with terms of injunction).

Willfulness is not an element, *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949), but the order must be clear, specific, and unambiguous. *In re General Motors Corp.*, 61 F.3d 256, 258 (4th Cir.1995) (the order must “set forth in specific detail an unequivocal command”) (citation omitted).

As set forth below, each of the elements of civil contempt can be established in this case.

1) The Defendants had knowledge of this Court’s Order

There is no question that the Defendants had knowledge of this Court’s Injunction Order, which is a valid and unambiguous order. Commissioner Frazier, prior to delivering the sectarian prayer on March 27, 2014, mentioned the injunction and the specific terms of it. In fact, Commissioner Frazier acknowledged prior to delivering the prayer: “I think it’s a wrong ruling and just as if just as I wouldn’t give up my guns or I wouldn’t allow my children to be palm scanned or I wouldn’t give up my property rights with Plan Maryland 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.” (Hake Decl. at ¶¶3-4) (Smith Decl. at ¶¶3-4) (Ridgely Decl. at ¶¶3-4) (Graybill Decl. at ¶¶3-4).² The Defendants also issued a formal announcement on March 27 after the prayer was delivered, specifically stating that they “disagree with the current Fourth Circuit case law,” upon which this Court’s Injunction Order was based. (Exhibit 1). Therefore, the first element is satisfied.

² See also, <http://carrollcountymd.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1949&AgendaID=1792&FileFormat=pdf&Format=Agenda&MediaFileFormat=wmv> (accessed April 1, 2014).

2) The Injunction Order was in the Plaintiffs' favor

Second, the Injunction Order was in the Plaintiffs' favor, as the Court found the Defendants' prayer practice, as described in the complaint, violated the Establishment Clause and issued a preliminary injunction against the Defendants. Thus, the second element is met.

3) The Defendants violated the terms of the Injunction Order and had knowledge of such violations

It is undeniable that the Defendants violated the terms of the Injunction Order at the March 27, 2014 meeting, *supra*. A Commissioner gave a prayer mentioning "Jesus" several times, after publicly announcing that the Injunction Order prohibited her from doing so.

The same is true for the Defendants' actions at the April 1, 2014 meeting. There, the Defendants authorized a citizen to deliver a sectarian Christian prayer at their official Board meeting. There is no question the Defendants had the authority to stop this person from delivering a prayer at *their* Board meeting. They also had the ability clarify to the public, after the prayer was delivered, that it was not endorsed or supported by the Board. This Court's Injunction Order provides in part: "In accord with the injunction approved by the Fourth Circuit in *Wynne*, the County will be enjoined, during the pendency of this case, 'from invoking the name of a specific deity associated with any specific faith or belief in prayers given at [Board] meetings.' *Wynne*, 376 F.3d at 302."

The Fourth Circuit has held that for purposes of legislative prayer, it matters not whether private citizens or council members themselves deliver the prayers. *Joyner v. Forsyth County*, 653 F.3d 341, 350-51 (4th Cir. 2011). For instance in *Joyner*, the Fourth Circuit issued a permanent injunction after finding a county's prayer practice that authorized private citizens to deliver sectarian prayers unconstitutional. *Id.* The court rejected the county's argument that the practice could be saved by the

fact that the council members did not deliver the prayers. *Id.* The court explained that this argument misses “the forest for the trees.” *Id.* It reasoned: “With respect to *Wynne*, the Board is right to observe that the prayers were delivered by members of the town council. *See Wynne*, 376 F.3d at 294. But that fact was not dispositive. It was the governmental setting for the delivery of sectarian prayers that courted constitutional difficulty, not those who actually gave the invocation.” *Id.* The court found that the county’s arguments regarding *Simpson* were “equally unpersuasive.” *Id.* The court reasoned, “[o]nce again, the important factor was the nonsectarian nature of the prayer, not the identity of the particular speaker. . . . Indeed, we never once mentioned that fact in analyzing whether the prayers met constitutional muster.” *Id.*

It is also worth pointing out that the Fourth Circuit in *Joyner* found that a particular prayer by a citizen rather than council member was unconstitutional, in addition to the county’s prayer practice as a whole. *Id.* at 349 (“The December 17, 2007 prayer — the prayer that led to the plaintiffs’ amended complaint — clearly crossed the constitutional line.”).

In fact, it would be an incredibly odd position for the Defendants to argue at this point that there is any distinction between a member of the public delivering a prayer and the commissioners themselves delivering the prayer. From the outset of this case, it has been the Defendants’ position, and remains the Defendants’ position, that when the commissioners are delivering the prayers, they are acting in their *private* capacity as citizens rather than as government officials. Of course, this Court properly rejected this argument, (Dkt. 34 p.8), noting: “However, if the Plaintiffs were to prevail in this action, an order directing Carroll County to prohibit official sectarian prayers at Board meetings would afford complete injunctive relief. The County may regulate the content of legislative prayers if they are considered

government speech. [citation omitted]. The prayers here are properly classified as government speech, and not speech given in a personal capacity.”

As such, the third element is also met.

4) The Plaintiffs Suffered Harm as a Result of the Violations of the Injunction Order

Finally, the Plaintiffs suffered irreparable harm as a result of the Defendants’ repeated violations of this Court’s Injunction Order. In rendering its written opinion, this Court already acknowledged that the Plaintiffs are suffering irreparable harm as a result of the Defendants’ sectarian prayers, which violate the Establishment Clause. By violating the Injunction Order, the Defendants are continuing to willfully violate the Establishment Clause, therefore continuing to irreparably harm the Plaintiffs. *See Newsom v. Albemarle County Sch. Bd.*, 354 F. 3d 249, 261 (4th Cir. 2003). *See also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (an allegation of “a violation of the Establishment Clause” is “sufficient, without more, to satisfy the irreparable harm prong”); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) (*Duncanville I*) (when “Establishment Clause rights have been infringed, the threat of irreparable injury” is “adequately demonstrated.”); *Parents’ Assoc. of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2nd Cir. 1986); *ACLU v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986); *S.D. v. St. Johns County Sch. Dist.*, 632 F. Supp. 2d 1085, 1096 (M.D. Fla. 2009).

Accordingly, because all four factors weigh in the Plaintiffs’ favor, the Court should find the Defendants in civil contempt and award appropriate relief.

B. Criminal Contempt

Because the evidence shows that the Defendants *willfully* violated the Court's Injunction Order, criminal contempt is also appropriate. *See Richmond Black Police Officers Ass'n v. City of Richmond, Va.*, 548 F.2d 123, 127 n.3 (4th Cir. 1977) ("For instance, where a party violates a court order, or as here, a consent decree, then 18 U.S.C. § 401(3) . . . gives the district court substantive criminal contempt power."); see *id.* ("In this case, while the district court clearly treated the allegedly contemptuous conduct as 'willful,' no offense against the United States or against a state was charged, and therefore 18 U.S.C. § 3691 is inapplicable."). The Plaintiffs request that the Court pursue the procedural requirements of Fed. R. Crim. P. 42(a)(2) by referring the matter to the United States Attorney for prosecution. Fed. R. Crim. P. 42(a)(2).³

III. THE COURT MAY IMPOSE FINES ON THE DEFENDANTS FOR VIOLATING THE INJUNCTION ORDER

The Court has authority to issue this order of contempt pursuant to 18 U.S.C.A. § 401(3); Fed. R. Civ. P. 70. In particular, 18 U.S.C.A. § 401(3) states that "[a] court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as . . . Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." This Court may impose fines in civil contempt proceedings for either or both of two purposes: to coerce defendant into compliance with the court's order or to compensate the complainant for losses sustained. *In Re: Grand Jury Subpoena.*, 690 F.Supp 1451, 1453 (D. Md. 1988). The "appropriate remedy for civil

³ If that office declines to accept the case, then the Court must appoint a private prosecutor to bring the criminal contempt case. Fed. R. Crim. P. 42(a)(2); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (concluding that federal courts possess inherent authority to initiate "contempt proceedings for disobedience of their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt"); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 537-38 (D. Md. 2010). If brought, the burden of proof is beyond a reasonable doubt. *Id.*

contempt is within the court's broad discretion.” *In re Gen. Motors Corp.*, 61 F.3d 256, 259 (4th Cir. 1995).

A violation of an injunction or court order may be punishable as a criminal contempt, in addition to a civil contempt. *United States v. United Mine Workers*, 330 U.S. 258, 299 (1947). A court may find criminal contempt where a party willfully and deliberately defies a court’s order, and the court can impose punitive sanctions for the purpose of vindicating the authority and dignity of the court. *Id.* at 303.

Plaintiffs seek an order requiring Defendants to pay fines in the amount of \$30,000 for Defendants’ willful and deliberate defiance of the Injunction Order. These fines may be characterized as civil because they are intended to coerce the Defendants into complying with the Court’s order and are intended to compensate the Plaintiffs’ for the violation of their constitutional rights. *See Bell v. Little Axe Independent School Dist.*, 766 F.2d 1391, 1408 (10th Cir. 1985) (“For the reasons set out below, we believe that plaintiffs are entitled to recover compensatory damages for the loss of the inherent value of their rights under the Establishment Clause, even if they are unable to demonstrate consequential injury.”); *Warnock v. Archer*, 380 F.3d 1076, 1079 (8th Cir. 2004) (affirming trial court’s order of \$1,000 “in compensatory damages” for Establishment Clause violation). *See also Mickens v. Winston*, 462 F. Supp. 910, 913 (E.D. Va. 1978), *aff’d*, 609 F.2d 508 (4th Cir. 1979) (compensatory damages may be awarded without proof of actual injury since “official racial segregation is inherently injurious . . .”). Compensatory damages for claims brought under § 1983 for violations of constitutional rights “may include not only out-of-pocket loss and other monetary harms, but also such injuries as ‘impairment of reputation . . . personal humiliation, and mental anguish and suffering.’” *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

The Plaintiffs also seek an order requiring the Defendants to pay civil fines in the amount of \$10,000 for each additional time they violate the Court's Injunction Order.

However, should the Court determine part of this fine is criminal, as noted above, it may pursue procedural requirements of Rule 42.

IV. CONCLUSION

In view of the above, the Plaintiffs respectfully request that the Court issue the Motion for Contempt or in the alternative, an Order to Show Cause: (1) why Defendants should not be held in contempt for failing to comply with the Injunction Order entered by this Court on March 25, 2014; (2) why Defendants should not be ordered to comply immediately with their obligations under the Injunction Order; (3) why Defendants should not be ordered to pay fines in the amount of \$30,000 for their willful and deliberate defiance of the Injunction Order and an additional fine of \$10,000 for each future infraction; and (4) why Defendants should not be ordered to compensate Plaintiffs for their reasonable attorneys' fees and costs in connection with this proceeding, together with any other relief the Court deems proper.

Dated April 1, 2014

s/ Monica L. Miller

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