UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND

Bruce A. Hake *et al.*,	Case No. _____ WDQ13CV1312
Plaintiffs,	
v.	
Carroll County, Maryland, *et al.*,	
Defendants.	

BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

The Board (the "Board") of Commissioners (the "Commissioners") of Carroll County, Maryland (the "County"), regularly opens its public meetings with official Commissioner-delivered sectarian prayers (the "Sectarian Prayers"). As will be shown herein, this practice (the "Sectarian Prayer Practice") is in clear violation of the Establishment Clause of the First Amendment to the United States Constitution, which, as applied to the State of Maryland (and its political subdivisions) by the Fourteenth Amendment thereof, prohibits any state action "respecting an establishment of religion." Applying the well-settled law from a line of cases decided by the Fourth Circuit Court of Appeals, the facts establish that the Sectarian Prayer Practice violates this constitutionally required separation of church and state. In view of this significant, repeated and continuing violation, Plaintiffs respectfully request that this court grant their motion for a preliminary injunction enjoining the Sectarian Prayer Practice.

As will be discussed in greater detail below, this Court should issue a preliminary injunction prohibiting the Defendants' unconstitutional Sectarian Prayer Practice because: (1) the Plaintiffs will suffer

irreparable harm if the injunction is denied and their constitutional rights continue to be violated; (2) the Defendants will suffer no harm if the injunction is granted and they must, as is already their duty, comply with the Constitution; (3) under the Fourth Circuit Court of Appeals' existing precedent on point, the Plaintiffs are likely to succeed on the merits; and (4) the issuance of the injunction is, as a vindication of constitutional rights, inherently in the public interest.

II. STATEMENT OF FACTS

The Board is the County's legislative body and is composed of the five elected Commissioners. The Board meets in open general session on average more than once per week. Its meetings are open to the public and are a primary means for County citizens to observe and participate in the business of local government. Board meetings are broadcast on local television and video recordings are posted on the Board's website.

A review of the recordings of its meetings shows that it is the Board's practice to open every public general session Board meeting by leading the audience in an official prayer, delivered by a Commissioner. Each Commissioner does so on a rotating basis.

The Commissioners have a written policy which, under the heading "Affirmation of Our Values," calls for starting each Board meeting with the "Pledge of Allegiance followed by a prayer."

The prayers delivered by the Commissioners are frequently Christian in nature, making expressly sectarian references. A review of the video recordings of Board meetings during 2011 and 2012 reveals that on at least 54 separate occasions, Sectarian Prayers were delivered containing the Christian references identified in the following list on the dates identified: 1/4/2011 ("Jesus"); 1/18/2011 ("Jesus"); 1/19/2012 (the Lord's Prayer); 1/25/2011 ("Savior"); 1/27/2011 ("Jesus"); 2/8/2011 ("Jesus"); 2/15/2011 ("Jesus"); 2/22/2011 ("Jesus"); 3/3/2011 ("Jesus"); 3/22/2011 ("Jesus"); 3/29/2011 ("Jesus"); 3/31/2011 ("Jesus");

4/14/2011 ("Jesus"); 4/26/2011 ("Jesus"); 5/3/2011 ("Jesus"); 5/12/2011 ("Jesus"); 5/19/2011 ("Jesus"); 6/16/2011 ("Jesus"); 7/21/2011 ("Jesus"); 7/28/2011 ("Savior"); 8/9/2011 ("Jesus"); 9/1/2011 ("Jesus"); 9/29/2011 ("Jesus"); 10/6/2011 ("Jesus"); 10/31/2011 ("in Jesus, my Savior's name, I pray"); 11/3/2011 ("Savior"); 12/8/2011 ("Jesus"); 12/13/2011 ("Savior"); 1/11/2012 ("Savior"); 1/24/2012 ("Jesus"); 2/9/2012 ("Jesus"); 2/16/2012 ("Savior"); 3/1/2012 ("Savior"); 3/21/2012 ("Jesus"); 4/5/2012 ("Savior"); 4/16/2012 ("Jesus"); 4/24/2012 ("Savior"); 5/29/2012 ("Savior"); 6/7/2012 ("Jesus"); 6/28/2012 ("Jesus"); 7/5/2012 ("Jesus"); 7/19/2012 ("Jesus"); 8/14/2012 ("Jesus"); 8/28/2012 ("Jesus"); 9/1/2011 ("Jesus"); 9/4/2012 ("Jesus"); 9/13/2012 ("Jesus"); 9/20/2012 ("Savior"); 10/4/2012 ("Jesus"); 10/11/2012 ("Savior"); 10/25/2012 ("Savior"); 11/13/2012 ("Savior"); 11/29/2012 ("Jesus"); and 12/6/2012 ("Savior").

During this period, none of the official prayers delivered by the Commissioners mentioned non-Christian deities or used non-Christian language.

On March 7, 2012, the American Humanist Association ("AHA") sent a letter (the "AHA Letter") to the Board following a report from a local citizen about the Sectarian Prayers, informing the Commissioners that the Board's prayer practice was unconstitutional. Following receipt of the AHA letter, which clearly explained to the Commissioners the Fourth Circuit's cases expressly holding that sectarian legislative prayers are unconstitutional, the Commissioners have continued unabated to willfully violate the Establishment Clause.

On March 31, 2011, Commissioner Shoemaker led the Board's prayers. In his conclusion, he said "in Jesus' name I pray, in my individual capacity on behalf of no one else unless they wish to join." Afterwards, Commissioner Howard responded, amidst laughter among the Commissioners, by saying: "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." The Commissioners' mockery of the Establishment Clause, a fundamental pillar of our secular democracy, as "fine print" is a telling indication of the intent of the Board to promote its preferred religion regardless of the law. The spurious reference to the official Sectarian Prayer Practice as being an issue of the Commissioners' individual right to freedom of speech and/or exercise of religion likewise shows oddly proud ignorance of (or disregard for) the law. *See* Turner v. City Council of the City of Fredericksburg, 534 F. 3d 352 (4th Cir. 2008) (holding that city council member had no First Amendment right to deliver a sectarian prayer as part of a council meeting), *cert. denied*, 129 S. Ct. 909 (2009).

III. A PRELIMINARY INJUNCTION IS WARRANTED

This Court has discretion to order preliminary injunctive relief after considering the following four factors: (1) likelihood of the plaintiff suffering irreparable harm if an injunction is not issued, (3) whether the balance of equities tips in the plaintiff's favor, (3) whether an injunction is in the public interest, and (4) likelihood of the plaintiff's success on the merits. *See e.g.* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

If all four elements of the test are met, a preliminary injunction should be issued. As discussed in more detail below, each element is satisfied. First, a violation of Plaintiffs' First Amendment rights, as is alleged here, "constitute[s a] *per se* irreparable" harm. Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978), citing Elrod v. Burns, 427 U.S. 347 (1976). Second, the Defendants are in contrast "in no way harmed by issuance of a preliminary injunction which prevents [them from continuing a practice that] is likely to be found unconstitutional." Newsom ex rel. Newsom v. Albemarle County Sch. Bd., 354 F. 3d 249, 261 (4th Cir. 2003). Third, "upholding constitutional rights surely serves the public interest." Giovani Carandola, Ltd. v. Bason, 303 F. 3d 507, 521 (4th Cir. 2002). Finally, Plaintiffs are likely to

succeed on the merits because the Fourth Circuit has already held that sectarian legislative prayers violate the Establishment Clause. *See* Joyner v. Forsyth County, N.C., 653 F. 3d 341, 347 (4th Cir. 2011), *cert. denied* 132 S. Ct. 1097 (2012).

A. **Plaintiffs will suffer irreparable harm if an injunction is not granted.**

The Supreme Court has held that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod at 373. The Fourth Circuit has consistently upheld this maxim. *See* Newsom at 261; Giovani at 520–21; and Johnson at 995 (holding that First Amendment violations are a *per se* irreparable harm). This principle applies equally to the Establishment Clause as it does to the other clauses of the First Amendment. *See e.g.* Doe v. Pittsylvania County, Va., 842 F.Supp.2d 927, 934 (W.D. Va. 2012) (holding that county board's sectarian prayer practice violated the Establishment Clause and issuing an injunction against it), citing Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 303 (D.C. Cir. 2006) (holding that an allegation of "a violation of the Establishment Clause . . . is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination").

In Chaplaincy of Full Gospel Churches, the District of Columbia Circuit Court of Appeals addressed the issue of irreparable harm in the Establishment Clause context, and emphasized the *per se* nature of the irreparable injury attendant to an Establishment Clause violation. The court initially contrasted an Establishment Clause claim from other First Amendment violations:

> [T]he pertinent liberty [in an Establishment Clause claim] is protection against government imposition of a state religion or religious preference. This protection, unlike other First Amendment rights that are variants of the freedom to express oneself, requires no affirmative conduct on the part of the individual before its guarantees are implicated by government action.

Id. at 302. The court went on to stress that the harm associated with an Establishment Clause violation

occurs *immediately* upon the government's endorsement of religion:

> [W]hile we have required individuals seeking a preliminary injunction on First Amendment grounds to demonstrate a likelihood that they are engaging or would engage in the protected activity the governmental action is purportedly infringing, we have done so only in the context of free expression, where the relevant constitutional protection is not implicated without some corresponding individual conduct that faces a danger of chilling. *But the Establishment Clause is implicated as soon as the government engages in impermissible action.* Where, as here, the charge is one of official preference of one religion over another, such governmental endorsement "sends a message to nonadherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Lynch v. Donnelly, 465 U.S. 668, . . . This harm . . . occurs merely by virtue of the government's purportedly unconstitutional policy or practice establishing a religion, without any concomitant protected conduct on the movants' part.

Id. (emphasis added).

In reversing the district court's denial of a preliminary injunction, concluding that irreparable harm necessarily flowed from an Establishment Clause violation, the D.C. Circuit explained:

> Because, when an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place—without any corresponding individual conduct—then to the extent that the government action violates the Establishment Clause, First Amendment interests are "threatened and in fact being impaired." . . . And because of the inchoate, one-way nature of Establishment Clause violations, which inflict an "erosion of religious liberties [that] cannot be deterred by awarding damages to the victims of such erosion," [Am. Civil Liberties Union of Ill. v.] City of St. Charles, 794 F.2d 265, 275 (7th Cir. 1986), we are able to conclude that where a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination.

Id. at 303.

Accordingly, it is clear in this case that the Plaintiffs are likely to suffer irreparable harm if denied preliminary relief. The Commissioners meet several times a month and routinely open meetings with a Christian invocation delivered by one of its members. The Plaintiffs have had direct contact with these Christian prayers, and have been forced to directly and personally confront government-promoted

Christianity in violation of the Establishment Clause. They are made to feel like outsiders, excluded from participation in their own local government, which instead should be welcoming to all citizens. They are left to question whether they would be treated fairly if they were to engage with the Board. In short, they are harmed by this violation of their rights, and, in the absence of a preliminary injunction, they will continue to suffer irreparable harm because their First Amendment freedoms will continue to be violated.

B. **Defendants will not suffer any harm if an injunction issues.**

A government entity "is in no way harmed by issuance of a preliminary injunction which prevents it from . . . [acting in a way] which is likely to be found unconstitutional." Newsom at 261. In this case, enjoining the Defendants from continuing a sectarian legislative prayer practice that, as discussed below, is likely to be found unconstitutional does not harm them; they would, after all, merely be required to meet their pre-existing duty to act in compliance with the Constitution.

Because Plaintiffs are suffering a *per se* irreparable harm and the Commissioners are suffering no harm at all, the balance of equities clearly tips decisively in favor of the Plaintiffs and awarding the injunction they request.

C. **Upholding Constitutional Rights is Always in the Public Interest**

The Fourth Circuit has made clear that "upholding constitutional rights surely serves the public interest." Bason at 521. The public has no legitimate interest in seeing its government favor Christianity despite the constitutional mandate of separation of church and state. The Board will not in any way be hindered in its otherwise lawful operations by the issuance of an injunction.

Because the Plaintiffs have alleged that the Defendants are violating the Plaintiff's rights under the Establishment Clause, this element of the test is clearly met.

D. **Plaintiffs are likely to succeed on the merits because the law is clear that sectarian legislative prayers violate the Establishment Clause.**

Having shown that Plaintiffs will suffer irreparable harm to their constitutional rights if an injunction is not issued, that the Defendants would suffer no harm in meeting their existing duty to comply with the Constitution, and that upholding constitutional rights is always in the public interest, all that remains is to show that the Plaintiffs are likely to succeed on the merits of their claim.

In interpreting the Establishment Clause, the Supreme Court has made clear the general principle that the "First Amendment has erected a wall between church and state" and that this "wall must be kept high and impregnable." Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 18 (1947). To do so, "the Constitution mandates that the government remain secular." County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989). Religion, on the other hand, "must be a private matter for the individual, the family, and the institutions of private choice," not the state. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

Applying these general principles underpinning our secular government to the particular issue of legislative prayer, the Supreme Court concluded that such prayers are permissible only so long as they do not "advance any one . . . faith or belief." Marsh v. Chambers, 463 U.S. 783, 794-95 (1983). In Allegheny, the Court made clear that Marsh could not be read to "justify . . . legislative prayers that have the effect of affiliating the government with any one specific faith or belief" and emphasized the critical importance of the fact that the chaplain in Marsh "had removed all references to Christ" from his official prayers for lawmakers. *Id.* at 603.

The Fourth Circuit Court of Appeals has followed the command of Marsh and Allegheny and confirmed that "sectarian" legislative prayers are unconstitutional. *See* Joyner. It should be noted that Marsh is to be read narrowly and legislative prayers carefully circumscribed. As the court noted in Wynne, the Supreme Court "has never found its analysis applicable to any other circumstances; rather, the Court has twice specifically refused to extend the Marsh approach to other situations." Wynne at 302, citing Lee

at 596 and Allegheny at 603.

In Joyner, the court noted the "divisive drawbacks of sectarianism" and rejected a policy that resulted in repeated sectarian invocations. *Id.* at 354. The court warned that sectarian prayer "rends communities and does violence to the pluralistic and inclusive values that are a defining feature of American public life" and that to "plant sectarian prayers at the heart of local government is a prescription for religious discord." *Id.* at 347, 355. It concluded that "[s]ectarian prayers must not serve as the gateway to citizen participation in the affairs of local government" because "[t]o have them do so runs afoul of the promise of public neutrality among faiths that resides at the heart of the First Amendment's religion clauses." *Id.* at 343.

Warning of the "subtle or not-so-subtle pressures non-Christian citizens of the County felt to participate in the sectarian exercise," the Joyner court made clear that this an unacceptable burden in a secular democracy, stating instead that that "citizens should come to public meetings confident in the assurance that government plays no favorites in matters of faith but welcomes the participation of all." *Id.* at 355. This is consistent with the Supreme Court's emphasis on the Establishment Clause as a bulwark against any estrangement between citizens and their government on the grounds of religion. *See* Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) (stating that the "Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community" and that unconstitutional governmental "[e]ndorsement of religion sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community").

In applying this rule to the particular facts in that case, the Joyner court recognized the obvious: references to Jesus Christ are sectarian in nature because they are to "a deity in whose divinity *only* those

of the Christian faith believe." *Id.*, quoting Wynne v. Town of Great Falls, South Carolina, 376 F. 3d 292, 300 (4th Cir. 2004). Many of the county board's prayers in Joyner referred to "Jesus," "Jesus Christ," "Christ," or "Savior" and "[n]one of the prayers mentioned non-Christian deities." *Id.* at 344. The court concluded that such prayers "repeatedly suggest [that] the government has put its weight behind a particular faith [and therefore] transgress the boundaries of the Establishment Clause." *Id.* at 349. *See also* Wynne v. Town of Great Falls, S. Carolina, 376 F. 3d 292, 298, 301 (4th Cir. 2004) (holding that legislative prayers that "frequently contained references to Jesus Christ" and "Savior" are unconstitutional because they "clearly advance one faith, Christianity, in preference to others" in violation of the Establishment Clause).

The facts in this case are remarkably similar to those in Joyner and Wynne. On more than fifty occasions in the past two years, the Commissioners have delivered Christian prayers making express sectarian references to Jesus Christ. None of the prayers have invoked any other deities. These repeated sectarian prayers establish a clear pattern: Christianity has a favored place in County government, as officially expressed by its Commissioners as part of their public meetings. This preference for and advancement of Christianity is a violation of the separation of church and state.

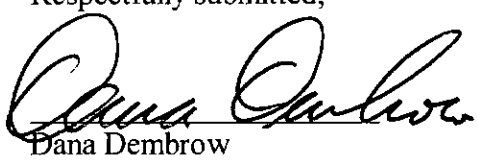
In summary, as was the case in Joyner and Wynne, the Plaintiffs in this case are likely to prevail on their claim that the Commissioners' Sectarian Prayer Practice is unconstitutional because it is well-settled Fourth Circuit law that such prayers are inconsistent with the Establishment Clause.

Accordingly, Plaintiffs are entitled to a preliminary injunction.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the preliminary injunction prohibiting the Defendant's Sectarian Prayer Practice.

Respectfully submitted,



Dana Dembrow
Bar No. 00854

Attorneys for the Plaintiff:

William Burgess
American Humanist Association
1777 T Street, N.W.
Washington, D.C. 20009
Telephone: (202) 238-9088
E-Mail: bburgess@americanhumanist.org

Dana Dembrow
1226 Canterbury Drive
Sykesville, Maryland 21784
Telephone: (410) 795-1502
E-Mail: danadembrow@aol.com

Stephen Pickard
Law Offices of Stephen R. Pickard, P.C.
115 Oronoco Street
Alexandria, Virginia 22314
Telephone: (703) 836-3505
E-Mail: srpickard@aol.com