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' REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs offer the following Reply Supplemental Memorandum to support their Summary Judgment Motion and to respond to the arguments set forth in Defendants' Supplemental Memorandum (hereafter "D.Br.").[1] At the outset, Plaintiffs point out that Defendants' Supplemental Memorandum was due on November 26 and therefore was untimely filed. Assuming this Court is nevertheless accepting Defendants' untimely brief, Plaintiffs offer this Reply.

Defendants' Supplemental Memorandum can be summarized as a strident attempt to convince this Court to disregard the recent *Hudson* decision and instead adopt a simplistic analysis that would essentially conclude the Supreme Court's *Town of Greec*e decision gave a *carte blanche* for virtually any prayer practice. This argument, while badly flawed, is not surprising, since it is the only plausible defense of Defendants' policy and practice. However, applying the applicable standards from *Marsh* and *Town of Greece*, as articulated in *Hudson*, Defendants are far outside the bounds of permissible legislative prayer practice in numerous ways, as they are dictating the content of their legislative prayers, excluding religious views other than their own, directing their sectarian prayers at the public, denigrating nonbelievers and other religious minorities, and, quite frankly, frequently relishing their role as high-profile Christian culture warriors. As such, it's little wonder that Defendants would prefer that this Court ignore the actual standard set forth in *Town of Greece* and applied in *Hudson*.

I. THE *HUDSON* COURT APPLIED THE STANDARDS SET FORTH IN *TOWN OF GREECE* AND PERSUASIVELY RULED THAT PRAYERS BY COUNTY COMMISSIONERS ARE UNCONSTITUTIONAL.

A. *Hudson* is persuasive authority that fully supports Plaintiffs' post-*Town of Greece* arguments.

Defendants are correct that the applicable standard for reviewing legislative prayers is that set forth by the Supreme Court in *Town of Greece* and *Marsh*. However, in claiming that *Hudson v. Pittsylvania County*, 2014 U.S. Dist. LEXIS 106401 (W.D. Va. Aug. 4, 2014) is inapplicable (D. Br.5),

[1] This Memorandum incorporates by reference all of the arguments, evidence, grounds, and authorities previously filed herein.

Defendants ignore the plain fact that the *Hudson* court directly and persuasively applied those standards in ruling that the commissioner-led prayer practice was unconstitutional. The court explained:

> The Court in *Town of Greece* recognized that "[t]he inquiry [concerning the proper scope of legislative prayer] 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 1825. Considering the facts of this case, which stand in stark contrast to those in *Town of Greece*, the court remains convinced that a modified injunction is appropriate and necessary to remedy a violation of the Establishment Clause.

Id. at *4-5. As discussed in more detail in Plaintiffs' Supplemental Memorandum, the *Hudson* decision is directly on point and supports the conclusion that Defendants' prayer practice cannot survive constitutional scrutiny under *Town of Greece.*[2]

B. The Fourth Circuit would agree with the distinction drawn in *Hudson* and *Town of Greece.*

"Central to the Court's decision in *Town of Greece* is the principle that the government, whether county officials or courts, ought not dictate the content of prayers offered at local government meetings." *Hudson*, 2014 U.S. Dist. LEXIS 106401 at *4. No one disputes that prior to *Town of Greece*, the identity of the invocation speaker was not "*dispositive*" of a prayer practices' unconstitutionality.

However, the *Town of Greece* decision makes clear that government officials must not dictate the content of the legislative prayers, meaning they must not deliver the prayers themselves. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014) ("Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content"); *id.* at 1820-21 ("[Congress] acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds."); *id.* at 1822 ("To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers . . . to act as supervisors and censors of religious speech, a rule that would involve

[2] Defendants erroneously assert that Plaintiffs cite *Hudson* "to attempt to craft a new argument making a distinction between paid chaplains . . . invited clergy . . . or legislators themselves offering opening legislative prayers (as in Carroll County)." (D.Br.2). There is nothing "new" about Plaintiffs' argument; Plaintiffs cite *Hudson* to support the very position they have always maintained since *Town of Greece*: there is a distinction between prayers by elected legislators and those by outsiders and clergy.

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.* ("It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.").

The Court in *Town of Greece* further indicated that prayers by local legislators are far more likely to violate the Establishment Clause than prayers by citizens and clergy:

> 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. . . . 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 1826 (emphasis added). The Court reiterated: "***Our Government*** is prohibited from prescribing prayers to be recited in our public institutions[.]" *Id.* at 1822 (emphasis added) (citing *Engel v. Vitale*, 370 U. S. 421, 430 (1962)). As such, it is highly likely that the Fourth Circuit would agree with *Town of Greece* and *Hudson* that there is a distinction between prayers by commissioners and prayers by outsiders or clergy.

Indeed, the Fourth Circuit has already indicated that it recognizes a distinction between legislative prayers by outsiders and prayers by elected legislative officials. *See Wynne v. Town of Great Falls*, 376 F. 3d 292, 297 (4th Cir. 2004). In *Wynne*, for instance, the Fourth Circuit struck down a practice that allowed individual council members to deliver the prayers. *Id.* 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). A year later, the Fourth Circuit decided *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 279 (4th Cir. 2005), which involved prayers by citizens from a diverse array of religious congregations throughout Chesterfield County. In upholding

the practice and distinguishing it from *Wynne*, the Fourth Circuit ruled, "[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.*

In *Turner v. City Council*, 534 F.3d 352, 355 (4th Cir. 2008), 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). The dissent, like the majority in *Town of Greece*, 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) (emphasis added).

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. 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 (emphasis added).

As Plaintiffs pointed out in their Memorandum in Support of Summary Judgment (Dkt. 51-1 pp.13-15), 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. For example, 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 outside 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 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).[3]

Accordingly, *Hudson* is entirely consistent with the applicable caselaw both before and after *Town of Greece* and it is highly likely that the Fourth Circuit will uphold the *Hudson* ruling.[4]

II. CARROLL COUNTY COMMISSIONERS COMPLETELY DICTATE THE CONTENT OF THE COUNTY'S LEGISLATIVE PRAYERS.

Defendants agree that "[c]entral to the Court's decision in *Town of Greece* is the principle that the government, whether county officials or courts, ought not dictate the content of prayers offered at local government meetings." *Hudson*, 2014 U.S. Dist. LEXIS 106401 at *4. (See D.Br.2-3). But they have it exactly backwards when they boldly claim: "there are no facts in the instant case showing that the Carroll County government dictates the content of any opening legislative prayers[.]" (D.Br.3). This statement makes no sense in light of the fact that Defendants acknowledge that they alone choose the content of the prayers that they alone recite them; there is no suggestion that any party other than Defendants select the prayers. (Dkt. 46 D. Mem. S.J. p.5) ("The Board opens its public meetings with an official, ceremonial prayer delivered by the Commissioners on a rotating basis, with each Commissioner praying in a manner consistent with his or her own private religious beliefs."); (*Id.* at pp. 11-12) ("the Commissioners readily concede that their practice of rotating through the five Commissioners, giving

[3] Indeed, in the first legislative prayer case, *Lincoln v. Page*, 109 N.H. 30, 31 (1968), the court upheld the practice 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."

[4] Defendants rely on a pre-*Town of Greece* injunction issued by the district court in *Joyner* for the proposition that prayers by legislators are consistent with *Town of Greece.* (D.Br.5 fn.2). The injunction barring sectarian prayers was lifted after *Town of Greece*. However, the *Joyner* ruling also provided: "the Court will lift the injunction ***without prejudice to the plaintiff*** presenting a proper case should such exist to demonstrate that the defendant's prayer policy presents **a constitutional violation in light of Town of Greece**[.]" (Exh. 2, Dkt. 69-2) (emphasis added).

each the opportunity to pray if he chooses, and if so, to have sole discretion on how to pray consistent with that Commissioner's personal beliefs, is a custom for purposes of *Monell*."); (Dkt. 15-2 D. Mem. MTD p.4) ("If *Monell* liability attaches to anything in this suit, it is only to a custom of rotating opportunities for prayer or silent reflection among the individual Commissioners."); (Dkt. 16 p.7) ("The Commissioners rotate the prayer opportunity").[5]

In *Hudson*, the court explained, "[f]irst and foremost, unlike in *Town of Greece*, where invited clergy and laypersons offered the invocations, the Board members themselves led the prayers in Pittsylvania County." *Id.* at *4-5 (emphasis added). Thus, "in contrast to *Town of Greece*, where the town government had no role in determining the content of the opening invocations at its board meetings, **the government of Pittsylvania County itself, embodied in its elected Board members, dictated the content of the prayers opening official Board meetings**." *Id.* (emphasis added). The same is true with Carroll County's practice. Plaintiffs have "a right to attend public meetings of the Board and see [their] local government in action without being subjected to prayers delivered by Board members to their preferred deity." *Pittsylvania*, 842 F. Supp. 2d at 935.

The courts have been unanimous in holding that prayers delivered by government officials at government meetings are government speech. *See Turner*, 534 F.3d at 355-56 (prayers delivered by city council members before a legislative meeting were government speech despite the council members taking "personal responsibility" for the content of their prayers). Nothing in *Town of Greece* changes this conclusion.[6] Defendants have not pointed to a single case that holds that prayers by legislators are

[5] The Court has already rejected Defendants' argument that the prayers are delivered in the Commissioners' personal capacities. (ECF Dkt. 34) ("the legislative prayers delivered at the County's Board meetings are government speech, rather than prayers given in a personal capacity"). *See also Hake v. Carroll County*, 2014 U.S. Dist. LEXIS 112572, *11-12 (D. Md. Aug. 13, 2014) ("Judge Quarles reasoned that the legislative prayers at issue are properly classified as government speech, not as speech given in a personal capacity").

[6] Defendants point to two sentences in the entire *Town of Greece* decision in a desperate attempt to support their Commissioner-led legislative prayer practice (D.Br.4): "[f]or members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are

not attributable to the legislative body. The conclusion is inescapable that the content of Carroll County's Commissioner-led prayers are determined by the County, and are thus unconstitutional.

In addition to the fact that Carroll County completely dictates the contents of its legislative prayers, which is alone unconstitutional, looking to the actual content reveals a pattern of prayers that advance and proselytize Christianity. In *Hudson*, it was sufficient that the prayers were delivered by the legislators to take them outside the protection of *Marsh* and *Town of Greece*. Here, the practice is even more egregiously unconstitutional because there is "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose[.]" *Town of Greece*, 134 S. Ct. at 1824. (See Dkt. 51-1 pp. 29-34).

III. THERE IS NO OPPORTUNITY FOR PERSONS OF ALL FAITHS TO OFFER INVOCATIONS AT CARROLL COUNTY BOARD MEETINGS.

The only way a non-Christian citizen may deliver the opening invocation at a Carroll County legislative meeting is to be elected onto the all-republican five-Commissioner Board. In *Hudson*, the court confirmed this is not a real opportunity at all. The court found, "because the Pittsylvania County Board members themselves served as exclusive prayer providers, **persons of other faith traditions had no opportunity to offer invocations**. Put simply, the Pittsylvania County Board of Supervisors involved itself 'in religious matters to a far greater degree' than was the case in *Town of Greece*." *Hudson*, 2014 U.S. Dist. LEXIS 106401 at *4-5 (citing *Town of Greece*, 134 S. Ct. at 1822). In this case, as in *Hudson*, persons of other faith traditions have no formal opportunity to offer invocations.

It is disingenuous at best to try and distinguish the present case from *Hudson*. But Defendants do just that, claiming, "[t]here are opportunities for persons of all faiths to offer legislative prayers in Carroll County since persons of any faith or no faith are permitted to run for office." (D.Br.6). The same was true in *Hudson*; persons of any faith or no faith can *run for office* in Pittsylvania County. But that

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without denying the right to dissent by those who disagree." *Town of Greece*, 134 S.Ct. at 1826. Yet the Court there was merely suggesting that prayer might ***reflect*** the commissioners' values; nothing in the opinion sanctions a full commissioner-led prayer practice.

does not change the fact that an invocation policy that only allows those few persons *elected to office* to deliver the invocations is a discriminatory policy that practically guarantees that minority religions will not be represented. Even Defendants admitted that: "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).[7] And as Plaintiffs previously pointed out, the odds of an Atheist being elected to office – especially in Carroll County – is slim to none. (Dkt. 51-1 pp. 28-29).

In contrast, Town of Greece "welcome[d] a prayer by any minister or layman who wished to give one." 134 S. Ct. at 1824. In fact, "a minister or layperson of any persuasion, **including an atheist**, could give the invocation." *Id.* at 1816. Carroll County's policy, unlike Greece's policy, does not allow "any member of the public . . . to offer an invocation reflecting his or her own convictions." *Id.* at 1826. Far from it. Its official prayer practice only allows the five Christian Commissioners to deliver prayers. This practice is necessarily exclusive. "[T]he majoritarian process . . . guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced[.]" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304 (2000).

A bigger problem with Defendants' prayer practice is underscored by their statement: "The decision as to which Commissioners will participate in the Commissioners' rotating prayers and, therefore, if or how they will pray, is ultimately determined by Carroll County voters on Election Day." (D.Br.6). As such, rather revealingly, Defendants are essentially admitting that their prayer preferences should become a factor, perhaps even a divisive one, in municipal elections. This would directly contradict the message of *Town of Greece*, which noted that legislative prayer should be a serious,

[7] Defendants further 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).

solemnizing occurrence. Carroll County citizens should not be put in the position of having to vote for religious leaders as representatives of their County government, which is constitutionally required to be secular. *See Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989) (the Establishment Clause requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions.").

Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Bd. of Educ*., 333 U.S. 203, 212 (1948). In this situation, "where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration." *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797 (1973).

Though *Town of Greece* does not 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 *Town of Greece*, that was accomplished by allowing citizens of any faith, including atheists, to deliver prayers on an inclusive, nondiscriminatory, basis. 134 S. Ct. at 1824. The Court could not fault the town for the fact that the majority of the prayers were Christian because this was a product of *availability.* In Greece, "all the houses of worship listed in the local Community Guide were Christian churches" and there were "no synagogues[.]" *Id.* at 1828 (Alito, J., concurring). In stark contrast, there are many non-Christian churches and synagogues within Carroll County lines. (See Dkt. 54 P. Reply Mem. SJ p.17).

Wynne is also illustrative. "In Great Falls, 'the *Town Council* insisted upon invoking the name 'Jesus Christ' in an exclusive manner in prayer 'in which the Town's citizens participated.'" *Simpson*, 404 F.3d at 283 (citing *Wynne*, emphasis added). "*Town leaders* made plain that *they* intended to begin meetings with elements of what can only be described as Christian worship." *Id.* (citing *Wynne*, emphasis added). The same is true of Carroll County. The *Commissioners*, who are all Christian, rather than private citizens, insist on delivering Christian prayers. This exclusively Christian practice is not the

product of private choice but the product of the government's deliberate choice to keep its practice exclusively Christian.

IV. CARROLL COUNTY'S PRAYERS ARE UNDOUBTEDLY DIRECTED TO THE PUBLIC AND FOR THE PUBLIC'S BENEFIT.

A. The pre-discovery evidence demonstrated that Carroll County's prayer practice is impermissibly directed to the public and is for its benefit.

Prior to discovery, Plaintiffs set forth numerous examples of how Defendants' prayer practice is impermissibly directed to the public and for its benefit, and thus, violative of the Establishment Clause under *Town of Greece*. (See Dkt. 51-1 pp.16-25). For instance, 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).[8] Moreover, the Commissioners frequently direct the public to join them in the prayers with phrases such as "Let us pray," "join" or "bow our heads." (Dkt. 51-1 p.17, p.19). Both *Town of Greece*, 134 S. Ct. at 1826, and *Wynne*, 376 F.3d at 301 n.7, confirm that such actions render a prayer practice unconstitutional.

Likewise, many of the prayers, by their terms, are directed to, or are for the benefit of, the public. (*Id.* at p.19). The pre-discovery record provides numerous examples of such prayers. As further evidence of the fact that the prayers are directed to the public is that Defendants have listed "prayer" on their official agendas and have repeatedly made "prayer" an agenda item to be publicly debated at their public meetings. (SUF ¶19, ¶145, ¶166, ¶¶183-184). The prayer is also expressly listed on the County's "Ten Governing Principles." (SUF ¶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.

[8] At the December 8, 2010, meeting, for example, 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' written policy stated that the Board "will open its meetings with the Pledge of Allegiance followed by a prayer." (*Id.* at ¶19).

Discovery proved additional instances of such efforts, including numerous biased press releases and letters issued to the public to garner support for the County's Christian prayer practice.

Finally, the pre-discovery record reveals that Defendants have gone out of their way to engage the citizenry in the prayer controversy. (Dkt. 51-1 pp.22-25). In *Wynne*, 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." 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. (*E.g.*, SUF ¶93, ¶95, ¶¶100-101, ¶113-114, ¶125, ¶132). Discovery simply strengthened the evidence already on the record by providing even more evidence of impermissible efforts to engage the citizenry in the prayer controversy and efforts to garner public support for Christian prayers.

In an attempt to rebut the overwhelming evidence against them, Defendants merely point to their self-serving Affidavits, stating that the prayers are for the benefit of the Commissioners. (D.Br.7). In *Wynne*, the town council similarly stated that the prayers "were 'only and for the benefit of the Council members.'" *Id*. But the Fourth Circuit admonished, "[g]iven the record evidence and unchallenged factual findings of the district court, that contention is simply untenable." *Id.* The same is true here.

It bears emphasis that in those very Affidavits, Defendants swore, 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] Yet 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

[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 - 16-5, ¶4). They each did so a second time on April 17, 2014. (Dkt.39-1, Exh. 2 ¶2).

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). Consequently, the Court should not take any self-serving statements made by Defendants at face value.

B. The newly discovered evidence supports the conclusion that Defendants' prayer practice unconstitutionally advances Christianity and is directed to the public.

As discussed above and in Plaintiffs' Supplemental Memorandum, the newly discovered evidence simply reinforces the evidence already on the record. Specifically, the newly discovered evidence further Plaintiffs' assertions that, *inter alia*: (1) The Commissioners are unconstitutionally advancing and promoting Christianity; (2) The purpose of Defendants' prayer practice is to promote and proselytize Christianity, rather than to solemnize their meetings, which is unconstitutional under *Town of Greece*; (3) Defendants' prayer practice is unconstitutionally directed at the public and seeks public involvement; (4) The Commissioners have, and continue to, engage the public in the prayer controversy; and (5) The Commissioners manifest a discriminatory and hostile attitude towards atheists and others who oppose their Christian prayers.

The Court in *Town of Greece* instructed courts to take into account the complete context in which legislative prayers are delivered. 134 S. Ct. at 1825 ("The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed."). The Court in *Marsh v. Chambers*, 463 U.S. 783, 793-95 (1983), as in *Town of Greece*, also "weighed all of the factors that comprised the practice." *Pelphrey v. Cobb County*, 547 F.3d 1263, 1281-82 (11th Cir. 2008). The Court in *Town of Greece* reiterated that *Marsh* "indeed, requires an inquiry into the prayer opportunity as a whole." 134 S. Ct. at 1824. The relevant context and setting includes other efforts by the County to advance religion and Christianity in particular.

What Defendants cast as "ordinary community activities" (D.Br.15) are a series of Carroll County Board-sponsored events in which overtly Christian prayers played a predominant role. *Marsh* and *Town of Greece* create a very limited ***exception*** to the Establishment Clause, which allow legislative

meetings to open with invocations designed to solemnize meetings and be for the sole benefit of the legislative body. *See, e.g.*, *Edwards v. Aguillard,* 482 U.S. 578, 583, n.4 (1987) ("The *Lemon* test has been applied in all cases since its adoption in 1971, ***except*** in *Marsh*"); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013) (the "Supreme Court has not extended the *Marsh* ***exception***"); *Joyner*, 653 F.3d at 349 ("'the ***exception*** created by *Marsh* is limited'") (citation omitted); *Doe v. Indian River Sch. Dist*., 653 F.3d 256, 259, 275 (3d Cir. 2011) (where the issue was "whether a school board may claim the ***exception*** established for legislative bodies in *Marsh*, or whether the traditional Establishment Clause principles . . . apply" the court concluded that "*Marsh's* legislative prayer ***exception*** does not apply"); *Card v. City of Everett*, 520 F.3d 1009, 1014 (9th Cir. 2008) ("*Marsh* . . . should be construed as carving out an ***exception*** to normal Establishment Clause jurisprudence.") (internal quotation omitted); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1276 (11th Cir. 2008) ("the Supreme Court has never expanded the *Marsh* ***exception***"); *Coles by Coles v. Cleveland Bd. of Educ*., 171 F.3d 369, 376, 379 (6th Cir. 1999) ("the unique and narrow ***exception*** articulated in *Marsh*"); *Jager v. Douglas County Sch. Dist*., 862 F.2d 824, 829, n.9 (11th Cir. 1989) ("*Marsh* created an ***exception*** to the *Lemon* test only for such historical practice."); *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985) (referring to *Marsh* as an "**exception**" to *Lemon*).[10]

[10] *See also Weisman v. Lee*, 908 F.2d 1090, 1094-96 (1st Cir. 1990) (Bownes, J., concurring) (twice referring to "the **exception** to [*Lemon*] delineated in *Marsh*."); *Doe v. Tangipahoa Parish Sch. Bd*., 631 F. Supp. 2d 823, 835 (E.D. La. 2009) (*Marsh* is "a narrow ***exception***"); *Bats v. Cobb County*, 410 F. Supp. 2d 1324, 1328 (N.D. Ga. 2006) (*Marsh* is an "**exception**"); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002) (same); *Wynne v. Town of Great Falls*, 2003 U.S. Dist. LEXIS 21009, *10 (D.S.C. 2003) (*Marsh* created an "***exception*** in Establishment Clause law"); *Metzl v. Leininger*, 850 F. Supp. 740, 744 (N.D. Ill. 1994) (referring to "*Marsh* court's narrow 'historical ***exception'*** to traditional Establishment Clause jurisprudence."); *Albright v. Board of Educ. of Granite School Dist*., 765 F. Supp. 682, 688 (D. Utah 1991) (*Marsh* is an "**exception**"); *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331, 346 (N.D. Iowa 1989) (explaining that the plaintiffs sought to "escape the *Lemon* test by invoking the *Marsh* ***exception***" and concluding that "the *Marsh* ***exception*** is not controlling."); *Jewish War Veterans v. United States*, 695 F. Supp. 3, 11, n.4 (D.D.C. 1988) ("[t]he Supreme Court has applied the *Lemon* framework in all but one establishment clause case. The ***exception*** was *Marsh*."); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 142, n. 38 (N.D.N.Y 1988) (the "*Lemon* test has been applied by the Supreme Court in all cases subsequent to its formulation with one exception. In *Marsh* . .

Outside of that unique exception, the Establishment Clause decisively prohibits the government from endorsing, sponsoring, or delivering prayers. *See, e.g.*, *Santa Fe v. Doe*, 530 U.S. 290, 313 (2000) (prayer in public school unconstitutional); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (same); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (same); *Cf. Allegheny*, 492 U.S. at 604 n.53 (opining that *Marsh* would not apply to a governor's proclamation). *See also Wynne*, 376 F.3d at 302 ("in the more than twenty years since *Marsh*, the 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."); *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1147- 49 (4th Cir. 1991) (prayers by judge unconstitutional)[11]; *Mellen v. Bunting*, 327 F.3d 355, 368-69 (4th Cir. 2003) (prayers by military official unconstitutional); *Warner v. Orange County Dep't of Prob*., 115 F.3d 1068, 1076 (2d Cir. 1997) (refusing to apply *Marsh* to compulsory A.A. program); *Cammack v. Waihee*, 932 F.2d 765, 772 (9th Cir. 1991) (refusing to apply *Marsh* to Good Friday holiday); *Jager v. Douglas Cnty. Sch. Dist*., 862 F.2d 824, 828 (11th Cir. 1989) (*Marsh* "has no application to" school prayers); *Carter v. Broadlawns Medical Center*, 857 F.2d 448, 453 (8th Cir. 1988) (declining to extend *Marsh* to hospital chaplaincy program).

. the Court carved out a narrow ***exception*** to the prohibitions of the establishment clause"); *cf. Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) ("the Court is carving out an ***exception*** to the Establishment Clause.") (emphasis added in each).

Other courts discussing *Marsh* have highlighted its *sui generis* and one-of-a-kind nature. *See, e.g*., *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 n.10 (2005) (describing *Marsh* as a "special instance[]"); *Rubin*, 710 F.3d at 1091 n.4 (since "*Marsh*, legislative prayer has enjoyed a 'sui generis status' in Establishment Clause jurisprudence."); *Simpson*, 404 F.3d at 281 ("*Marsh*, in short, has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines."); *Coles*, 171 F.3d at 381 ("*Marsh* is one-of-a-kind"); *Snyder v. Murray City Corp*., 159 F.3d 1227, 1232 (10th Cir. 1998) (en banc) ("the constitutionality of legislative prayers is a sui generis legal question"); *Jones v. Hamilton Cnty.*, 891 F. Supp. 2d 870, 885 (D. Tenn. 2012) (same); *Graham v. Central Community Sch. Dist.*, 608 F. Supp. 531, 535 (S.D. Iowa 1985) ("*Marsh* decision is a singular Establishment Clause decision.").

[11] *See also ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 494-95 (6th Cir. 2004) (declining to apply *Marsh* in ruling a judge's Ten Commandments display violated Establishment Clause pursuant to *Lemon*).

While these other Board-sponsored actions are not directly challenged in this litigation, such efforts are surely relevant to the Court's analysis in determining whether the prayer practice is impermissibly directed to the public and whether the prayers have the effect of advancing or proselytizing Christianity. They are part of the setting in which the legislative prayers are delivered, which the Court in *Town of Greece* made clear, must be part of the analysis, *supra.* The Federal Rules of Evidence broadly define "relevant," as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Such evidence of Defendants' other actions in promoting and proselytizing Christianity tend to make it more probable that they are doing so in their prayer practice, and that their actions may be perceived by objective observers as attempting to establish Christianity as the official religion for Carroll County, than it would be without the evidence, which is all Rule 401 requires.

Of course, even without the newly discovered evidence, Defendants' prayer practice is unconstitutional. The court in *Hudson* found the Pittsylvania prayer practice unconstitutional even without the abundance of evidence present in this case. It was enough that the prayers were delivered by the board members and were sometimes directed to the public, *supra.*

C. It is irrelevant whether the Commissioners' actions in engaging the public in the prayer controversy and garnering public support for their Christian prayers occurred after Plaintiffs sent the County a letter.

In their Exhibit 3, Defendants state: "all of the items in the Exhibit list submitted to this Court by the Plaintiffs (with the exception of a 9/11 Commemorative Ceremony in 2011) are items that directly relate to the political and constitutional prayer controversy ignited by Plaintiffs' March 8, 2012 letter to Carroll County[.]" (Dkt. 69-3 p.1). This is simply not true, but, more importantly, it is relevant.

For instance, on May 16, 2011, the Commissioners received an email from a citizen named Russell Dick who urged them to discontinue their practice of including prayer in government meetings because the prayers made him feel unwelcome in his own community. (Exhibit 1; D. 48-49). Moreover,

the 9/11 Ceremony held in 2011 was not the only event that preceded Plaintiffs' letter. Defendants held a Christmas Tree Lighting Ceremony in 2011 in which Commissioner Frazier delivered a proselytizing Christian speech. (SSUF ¶2). The Biblical Marriage Proclamation was issued several months prior to AHA's letter. (SSUF ¶4).

In any event, it is irrelevant that many of the events transpired after Plaintiffs sent Defendants a cease-and-desist letter. (Notably, Plaintiff American Humanist Association was not the only organization to warn Defendants of their unconstitutional prayer practice; similar letters were sent by the Freedom From Religion Foundation and the Americans United for Separation of Church and State). Surely, the letter was not the *cause* of many of the events and actions set forth in the Supplemental Statement of Undisputed Facts. Defendants held numerous "Prayer" breakfasts independent of Plaintiffs' letter, and Defendants continued their practice of holding Christian-themed Tree Lighting Ceremonies in which proselytizing Christian prayers were delivered, independent of the letter.

More importantly, even if Plaintiffs' letter and the present litigation generated some public controversy, Defendants went out of their way to engage the citizenry further in the prayer controversy and to garner public support for *Christian prayers*. In *Wynne*, the record was relatively thin with regard to evidence of the town councilmembers impermissibly engaging the citizenry in the prayer controversy. In fact, the Fourth Circuit only relied on only *one example* of *one* town councilmember who made such statements. 376 F.3d at 301 n.7. And importantly, that councilmember only made such statements *after* the plaintiff publicly spoke out against the town's prayer practice. As the district court explained:

> In late 2000, Plaintiff raised an objection to Town Council's reference to Jesus, Christ, or Jesus Christ in its prayers. She proposed that the prayer's references be limited to "God" or, alternatively, that members of different religions be invited to give prayers. Mayor Starnes responded to the effect that: "This is the way we've always done things and we're not going to change."
> 12. Thereafter, members of several Christian churches and Christian ministers presented letters and petitions to Town Council, indicating that the church members supported and encouraged a Council decision to continue its practice of opening Town Council meetings with "Christian" prayer. The letters also noted that the church members were in opposition to allowing "an alternative prayer to a self-proclaimed 'witch.'"

Wynne v. Town of Great Falls, 2003 U.S. Dist. LEXIS 21009, *5-6 (D.S.C. Aug. 21, 2003). It was based on this evidence alone that the Fourth Circuit found, "a Council member urged the Town's citizens to get involved in the prayer controversy[.]" 376 F.3d at 301 n.7.

Likewise, in *Joyner*, the court found one prayer "particularly salient to th[e] lawsuit." 653 F.3d at 344. That invocation was delivered by a private citizen but was impermissible because "the Chair of the Board asked the audience to stand for the prayer. At that point, the commissioners and most of the audience stood and bowed their heads." *Id.*

There is far more evidence in both the pre-discovery record and the post-discovery record of impermissible efforts to engage the citizenry in the case *sub judice* than that present in *Wynne* and *Joyner*. *A fortiori*, Carroll County's prayer practice is unconstitutional.

V. CARROLL COUNTY'S PRAYER PRACTICE DENIGRATES NONBELIEVERS AND RELIGIOUS MINORITIES AND SIGNALS DISFAVOR TOWARD NONPARTICIPANTS.

In *Town of Greece*, the Court held that if the "practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," it "fall[s] short" of constitutionality. 134 S. Ct. at 1823. *See also id.* at 1824. The Court added that if "legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course." *Id.* at 1826. Finally, the Court stressed that the "analysis would be different if" "town board members . . . singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity[.]" *Id.* at 1826. Turning to the facts, the Court found that "[n]othing in the record indicates that town leaders ***allocated benefits and burdens*** based on participation in the prayer, or that citizens were ***received differently*** depending on whether they joined[.]" *Id.* (emphasis added). 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." *Id.* (emphasis added). Such a practice of course, "would violate the Constitution, but that [was] not the case before [the] Court." *Id.*

In so ruling, the Court did not suggest that in order for a practice to be found unconstitutional on

such grounds, there must be evidence that *litigants* faced *direct* discrimination as a result of their minority religious beliefs. Instead, the Court said that evidence that "signals" disfavor towards nonparticipants may be sufficient to find a prayer practice unconstitutional. *Id.* In this case, there is both direct and indirect evidence of such treatment towards nonparticipants.

Defendants are simply wrong in stating that "there is no aversion or bias against minority faiths by Carroll County Commissioners." (D.Br.7). In fact, Commissioner Rothschild referred to those nonparticipants as the "enemies" and even alluded to them as "village idiots." (SSUF ¶8). In a 2012 email, Rothschild told a supporter, "our opponents" are attempting to "purge God from government. That is why I fight them." (SUF ¶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). On April 10, 2014, Frazier responded to a supporter stating "Last time I served as a Commissioner, late 1990's, the WWJD - what would Jesus do? Was still popular. I agree, how things have changed in one decade. We need to stand firm today or we will lose our country. I will pray for you and put your name on our church prayer list. May God give you strength and peace in the midst of the storm!" (SSUF ¶69).

Rothschild delivered a sectarian Christian speech at a Board meeting in opposition to the injunction (SUF ¶170) after publicly warning citizens: "[t]hose who are suing will find my statement infinitely more 'objectionable' than any prayer." (SUF ¶139).[12] Rothschild made a public statement on social media declaring: "Carroll County Commissioners . . . FIRST in standing firm in support of Christian prayer" (SUF ¶154). In his March 4, 2014, article "OBSERVATIONS FROM THE COURTROOM: THE DANGEROUS SLIPPERY SLOPE OF PRAYER RESTRICTIONS," Commissioner Rothschild questioned Plaintiff Hake's sincerely held Catholic beliefs and alluded to the Plaintiffs as his "political enemies." (SUF ¶138).

[12] 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).

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[.]" Commissioner Howard responded: "Kent, God has blessed us with the opportunity to serve, a strong faith and supporters like you!" (*Id.* at ¶100).

Commissioner Frazier recently issued a letter to the public, stating in part: "We ARE one Nation Under God. When we cease to acknowledge that, we will no longer be America, the home of the free. We must be ever vigilant and willing to take a stand when our freedoms and the freedoms of future generations are threatened." (SSUF ¶¶80-82). On July 13, 2014, Frazier responded to a citizen who opposed the Board's prayers, stating in part: "It is because elected officials don't have enough guts to stand up for what's right and for what's constitutional that we have drifted so far from the law that many folks don't know what the law is. I thank God that elected officials across America can continue to pray for guidance to serve the people who have placed in them their trust. Blessed is the nation whose God is the Lord." (SSUF ¶97).

Rothschild responded to citizens who supported the Board's prayers stating in part: "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, stating: "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).

Viewing the evidence objectively, it is difficult to conceive how a reasonable non-theist (Atheist/Agnostic/Humanist) or nonparticipant would perceive such statements by the Commissioners as anything but hostile to their beliefs. Such statements certainly "signal disfavor toward nonparticipants" and "suggest that their stature in the community [is] in any way diminished." 134 S. Ct. at 1826.

In addition to this evidence, there is also evidence that government "leaders allocated benefits and burdens based on participation in the prayer," and "that citizens were received differently depending on whether they joined[.]" *Id.* 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. Both the pre-discovery record and post-discovery record confirm this practice.[13]

Defendants have also 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. (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.*). Despite their written policy of not debating with citizens during the public comment period (Dkt. 39-1 Exh.4), 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

[13] This Court has already determined that such correspondences between the Commissioners and the public are relevant to the *Town of Greece* analysis. *See Hake v. Carroll County*, 2014 U.S. Dist. LEXIS 112572, *24-25 (D. Md. Aug. 13, 2014) ("Plaintiffs' request is relevant because it seeks to establish the degree of complaints that Defendants' received, and whether Defendants responded to any complaints.").

> 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.

Beyond these (and many other) statements by the Commissioners, the prayers themselves signal disfavor to those citizens who do not share their religious views. For instance:

- 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)

- 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)

- 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 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)

- 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)

Rothschild's statement equating "atheism or humanism" to the Gestapo, and Frazier's statement likening Godless-ness to "communism" (SUF ¶143) clearly signal 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, equally send a hostile message to Atheists and Muslims and "suggest that their stature in the community [is] diminished." *Town of Greece*, 134 S. Ct. at 1826.

The above conclusively demonstrates that Defendants' prayer practice unconstitutionally denigrates religious minorities and nonparticipants and signals disfavor to those who do not subscribe to their religious views. Contrary to Defendants' assertion, Plaintiffs have not claimed that the "mere presence of repeated Christian prayers" (D.Br.9) is the reason Defendants' prayer practice violates the Establishment Clause under *Town of Greece.* As shown above, the record is replete of examples of the Commissioners impermissibly advancing and proselytizing Christianity, as well as denigrating and signaling disfavor towards nonparticipants. Again, however, such facts merely support Plaintiffs' argument that Carroll County's prayer practice is even more unconstitutional than the practice struck down in *Hudson*. It is sufficient, even without this evidence, that the prayers are delivered by the Commissioners on an exclusive basis and that the Commissioners dictate the content of the prayers.

VI. CONCLUSION

Defendants' prayer practice is far outside of the permissible prayer tradition upheld in *Marsh* and *Town of Greece*, falling into a category that can accurately be described as zealously pro-Christian and hostile to other beliefs. Defendants' prayers are selected and recited by the Commissioners, directed at the public, exclusive rather than inclusive – and all of this occurs in a context where the Commissioners have berated religious minorities and others who object to their conduct. Indeed, contrary to the spirit of both *Marsh* and *Town of Greece*, Defendants have undertaken to utilize the apparatus of government to give their personal religious beliefs a platform in the community.[14]

[14] While Plaintiffs are clearly entitled to at least nominal damages for Defendants' pre-*Town of Greece* sectarian prayer practice, they are also entitled to injunctive relief. As in *Hudson*, this Court may tailor such relief to meet the exigencies of this case.

In view of the above, and for the reasons set forth in Plaintiffs' memoranda in support of their Cross-Motion for Summary Judgment, Plaintiffs respectfully request that the Court grant their Cross-Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment.

Respectfully submitted,

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