

Cobb County, 410 F. Supp. 2d 1324, 1336 (N.D. Ga. 2006). In its ruling on the Motion for Preliminary Injunction, the Court highlighted areas that were not yet clear from the record, but if revealed, could demonstrate that the County had run afoul of the Constitution. Having completed discovery, the Plaintiffs are now able to show the Court that the Board of the Commissioner and the Planning Commission have crossed that line.

- **The Court asked whether the prayer practices were inclusive of different faiths or whether the inclusion of non-Christian faiths was merely a “token’ gesture.”** *Id.* at 1347. The Plaintiffs can now show that of the 423 prayers given at Cobb County Board of Commission meetings between January 1988 and August 2005, where the prayer giver’s faith was discernable, 409 (or 97%) were Christian. Parikh Aff. Atts. 1&3. And, of the prayers recorded by the Cobb County Planning Commission from January 1994 through August 2005, 102 of the 111 (or 96%) of all the prayer givers whose faith was identified were Christian. Parikh Affs. Atts. 2 & 4.
- **The Court asked for more information regarding the “mechanics of the selection of clergy.”** *Bats*, 410 F. Supp. 2d at 1346. The Plaintiffs can now demonstrate that the selection process for both the Board of Commissioners and the Planning Commission were skewed towards mainstream Christian clergy and have excluded entire faith groups even when the county had contact information for such groups.
- **The Court noted that the Plaintiffs were only focusing on the content of the prayers given over a 15 month period.** *Bats*, 410 F. Supp. 2d at 1327 n.4. The Plaintiffs have now examined the transcripts of prayers dating back through 1988. From the July 1988 through August 2005, approximately 70% of the prayers given at Board of Commission meetings and 68% of the prayers

given at Planning Commission meetings were clearly and overtly Christian-specific. Parikh Aff. Atts. 1,2,5,6.

FACTS

The Cobb County Board of Commissioners and the Cobb County Planning Commission both have longstanding traditions of holding invocations at their public meetings. *Bats v. Cobb County*, 410 F. Supp.2d 1324, 1325 (N.D. Ga. 2006). Both prayer practices are dominated by Christian clergy and overtly Christian prayers.

Of the prayers recorded by the Cobb County Planning Commission from an from January 1994 through August 2005, **96%** of all the prayer givers whose faith was identified were Christian and **68%** of the prayers given during a the period of August 1995 through August 2005 were clearly and overtly Christian-specific. Parikh Aff. Atts. 2 & 4. At Board of Commissioner meetings, from January 1988 through August 2005, **97%** of the prayer givers whose religious affiliation was discernable, were Christian and from July 1988 through August 2005, approximately **70%** of the prayers given at Board of Commission meetings. Parikh Aff. Atts. 1& 3.

The mechanics of the Board of Commission and Planning Commission are similar. Before each meeting is officially called to order, the Chairman introduces both the prayer giver and the guest who is scheduled to recite the Pledge of Allegiance. Olens Aff. ¶11; Defs.' Resp. To Interrog. #2, #11. The prayer giver then stands at the podium and recites a prayer. Lee Dep. 18:12-17; Amend. Compl. ¶ 28& Ex. 1. Immediately thereafter, another invited guest recites the Pledge of Allegiance

into the microphone. Answer ¶ 63. The members of the Cobb Board of Commissioners stand and bow their heads while the prayer is recited, and the members of the Planning Commission sit and bow their heads. Answer ¶¶ 28, 63. The prayers vary in length—some are just a few sentences, while others run several paragraphs. Exs. D-G. An employee from the Communications Department tapes the meeting, which is then broadcast on TV23 and is posted on the County’s website. Answer ¶¶ 22, 23; Lee Dep. 7:19-23; Martin Dep. 61:14-16; 62:9-22; Richardson Dep. 28:12-14, 28:21-23, 29:1-3.

The Planning Commission and Board of Commissioners also follow a similar processes for choosing prayer givers, but they have different procedures for determining the clergy pool. Ms. Richardson, who until recently, was the Cobb employee responsible for inviting clergy to Planning Commission meetings, primarily used the Yellow Pages and a list of volunteer police and fire department chaplains as her pool of clergy. Richardson Dep. 4:16-25; 5:13-16, 5:17-20, 7:14-8:6. Richardson Aff. ¶ 7. Ms. Richardson would then randomly pick a clergy person or house of worship from those sources and call to see whether someone from that house of worship would attend a meeting and give a prayer. Richardson Dep. 18:7-17. Ms. Richardson said that she tried to vary the prayers among denominations, but several houses of worship repeatedly offer the prayer.

But, Ms. Richardson did not consider all of the faiths listed in the Yellow Pages. Her 2003-2004 copy of the Yellow Pages demonstrates that she categorically dismissed all congregations from the Latter-Day Saints, Jehovah's Witness, and Muslim faiths. Richardson Dep. 11:1-12:16 & E. 4 at 153, 154. Indeed, Ms. Richardson, with one pen-stroke, removed all of those faiths from consideration. *Id.* Ms. Richardson had not even tried to contact any of the faiths before she removed them from consideration. *Id.* at 15:15-21, 17:22-25, 21:1-4. Although, the page from the Yellow Pages that contained the category, "Synagogues," was in her file, it contained no notations and Ms. Richardson had never invited a Rabbi to give the prayer during this time. *Id.* at Ex 4 at 158

Following complaints from citizens and the ACLU, however, Ms. Richardson's copy of the Yellow Pages changed dramatically. The 2005 version no longer had faith groups struck from consideration. Richardson Dep. Ex. 4 at 154 & Ex. 18. Instead, the Muslim faith was "starred" and the Synagogues were each "checked." *Id.* at Ex. 18. And, a Rabbi, for the first time in eleven years, gave a prayer. Ex. D at 234-35. The Jehovah's Witnesses and Latter Day Saints, however, have still not been contacted or represented at a Planning Commission meeting. Richardson Dep. 15:15-21, 17:22-25, 21:1-4.

Ms. Martin, is the County employee who invites clergy to the Board of Commissioner meetings. Martin Dep. 4:17, 5:9-11; Martin Aff. ¶ 3. She creates a

master list of clergy from several sources, including the Yellow Pages, the internet, and flyers she receives in the mail or when attending community events. Martin Dep. 11:23-12:1-25, 13:1-3, 15:4-7; Martin Aff. ¶ 7. Ms. Martin picks clergy or a house of worship from the master list and calls to see if someone from the congregation would be interested in giving the prayer. Martin Dep. 11:1-22. Ms. Martin stated that she looks at the list of clergy who have recently given the prayer when considering which faith group to invite to upcoming meetings, so as to not allow one faith to dominate the list. Martin Dep. 45:16-48:16 & Ex. 5. Yet, an examination of the prayer givers shows that several dominations and specific houses of worship repeatedly give the invocation. Parikh Aff. Attach. 1.

Ms. Martin's master list is almost exclusively Christian. Martin Dep. 11:1-22 & Ex. 8. There is one Mosque—which was inserted into the list in 2004 after an Imam asked Chairman Olens to be added to the list—, three Jewish congregations and a Unitarian on the list. at 25:3-14, 26:7-13, 43:20-45:8, Ex. 7 at 4, & Ex. 8. All of the other faiths on the list are Christian. Parikh Aff. Attach. 1 & 3.. Ms. Martin has excluded a Bahai assembly and a Jehovah's Witness congregation from her list, even though she has contact information for these groups in her files. Martin Dep. 66:21-67:20, 68:1-4 & Ex. 12 at 215, 219.

The diversity of the clergy pools did not improve even after Mr. Selman provided both Commissioner Lee and Planning Commissioner Ott with a list of non-

Christian clergy. Selman Dep. 81:20-82:4, 84:24-85:18. 86:13-88:9, 87:11-16 & Ex. 1. Although Mr. Lee had at one point suggested to Ms. Martin that she add a clergy person to her master list, Mr. Lee placed Mr. Selman's list in a file and never provided the information to anyone. Martin Dep. 13:14-14:4; Lee Dep. 16:20-25, 17:1. Similarly, Mr. Ott did not relay the clergy information to Ms. Richardson. Richardson Dep. 9:5-15 & Ex. 2. Thus, no diversity was added to the clergy pools.

The Plaintiffs in this case are eight Cobb County taxpayers and citizens who have observed the prayer at both Board of Commission and Planning Commission meetings and who are offended by the prayer practice.¹ Selman Dep. 12:12-17; V.

¹ All of the plaintiffs have standing in this case. First, the Plaintiffs have suffered the injury of being forced to participate in (or at least view) a Christian-specific religious practice in order to attend a government meeting. *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1107-08 (11th Cir. 1983). In addition, all of the Plaintiffs are taxpayers and have taxpayer standing. The Plaintiffs have identified specific expenditures that the County spends on the sectarian practice. *Hinrichs*, 400 F. Supp. 2d at 1110 (finding taxpayer standing where the government spent \$448.38 on postage for confirmation letters and thank you notes and on video streaming and recording); *Donnelly v. Lynch*, 525 F. Supp. 1150, 1162 (D.R.I. 1981) (\$20 of taxpayer money spent on creche each year). The expenses of writing confirmation letters alone exceed the annual outlay for the creche in *Donnelly*. The Planning Commission spends approximately \$105.13 each year and the Board of Commissioners spends approximately \$78.84 each year on writing and sending confirmation letters (\$0.64 in supplies for each letter and \$18.75 per hour in labor for the Board of Commissioners and \$21.00 per hour in labor for the Planning Commission). Defs.' Suppl. Resp. To Pls' First Set of Interr. Of course, both assemblies spend even more tax revenue creating thank you notes, calling clergy, and taping and broadcasting the meetings online and on TV23.

Compl. ¶¶ 2,4,5,6,7, 18. They are not requesting that the Commissions stop the invocations all-together, just that they limit the prayers to non-sectarian invocations.

ARGUMENT

The Court should hold that the prayer practices employed by the Cobb County Planning Commission and the Cobb County Board of Commissioners, both of which frequently include overtly Christian-specific prayers, are unconstitutional. Indeed, each Court that has addressed this issue has held that a prayer practice where the prayers are *frequently sectarian* violates the constitution. *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) (striking down a prayer practice that included sectarian prayers approximately 64% of the time); *Wynne v. Town Council of Great Falls*, 376 F.3d 292 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005) (ruling that legislative prayers that frequently include sectarian references violate the Constitution); *Rubin v. Burbank*, 124 Cal. Rptr. 2d 867 (Cal. App. 2003) (holding a legislative prayer practice unconstitutional even where only about 20% of the prayers included sectarian references); *Bacus v. Palo Verde Unified Sc. Dist. Bd. Of Educ.*, 52 Fed. Appx. 335, 357 (9th Cir. 2002) (unpublished opinion) (concluding that a legislative prayer practice violated the constitution because the prayers included sectarian references).

According to the test formulated by the District Court, a legislative prayer practice violates the Establishment Clause where an objective observer, taking

into consideration the history and implementation of the practice, the make-up of the clergy representatives, and the sectarian references in the prayers, would perceive that the government entity prefers one faith over another. *Bats v. Cobb County*, 410 F. Supp. 2d 1324, 1344-45 (N.D. Ga. 2006). Although Plaintiffs believe that *Marsh* is the more appropriate test to apply to legislative prayers, they do believe that the prayer practices employed by the Cobb Commission and Planning Commission violate either test.

The Planning Commission's practice clearly demonstrates a preference for Christianity. First, the vast majority of prayer givers are Christian (96%). Parikh Aff. Atts. 2 & 4. This is likely a result of its invitation process, which removed entire categories of disfavored faiths from consideration. Furthermore, the prayers demonstrate a pattern of Christian-specific prayers. Parikh Aff. Attach. 2 & 6. These factors clearly show a preference, or at a minimum, the appearance of a preference for Christianity.

The practice of the Cobb County Board of Commissioners also violates the District Court's test. Ninety-seven percent of the prayer givers are Christian. *Id.* Attach. 1 & 3. Second, the County's practice of choosing clergy for the Commission meetings has categorically denied certain faiths from being invited to give the prayers. And, third, the majority of prayers given at Cobb County Board of Commission meetings are Christian-specific. *Id.* Attach. 1 & 5.

Accordingly, the Board of Commission practice also violates the test set out by this Court.

The Plaintiffs continue to believe, however, that *Marsh v. Chambers*, 463 U.S. 783 (1983), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), require the application of the more straight-forward standard that was applied by the Fourth, Seventh, and Ninth Circuits, as well as by the California Appellate Court: A government prayer practice that frequently includes Christian-specific prayers is unconstitutional. *Hinrichs*, 440 F.3d 393; *Wynne*, 376 F.3d 292; *Rubin*, 124 Cal. Rptr. 2d 867; *Bacus*, 52 Fed. Appx. 335, 357. At the Preliminary Injunction stage, the Court may have misconstrued the Plaintiffs argument on this point. *Bats*, 410 F. Supp. 2d at 1345. **The Plaintiffs do not assert that the test should be applied so mechanically that one sectarian prayer among a pool of non-sectarian prayers is unconstitutional.** Here the use of Christian-specific prayers is obvious, frequent, and has been prevalent for many years.

The Court can easily craft an order to remedy this constitutional violation. Indeed, numerous courts have already done so in legislative prayer cases. *Hinrichs*, 440 F.3d 393; *Wynne*, 376 F.3d 292; *Rubin*, 124 Cal. Rptr. 2d 867; *Bacus*, 52 Fed. Appx. 335, 357; *see also Simpson v. Chesterfield County Bd. Of Supervisors*, 292 F. Supp. 2d 805, 815 (E.D. Va. 2003) (upholding a prayer practice because the government did limit the prayers to non-sectarian content); *Snyder v. Murray City*

Corp., 159 F.3d 1227, 1232 (10th Cir. 1998) (stating that the legislative body may enforce the parameters of *Marsh*). The Plaintiffs are not requesting a system where prayers are pre-cleared by the government, just simply that the County instruct its clergy representatives to refrain from making sectarian prayers. The Court should follow the lead of the five courts that have already visited the issue.

I. The Cobb County Prayer Practice Creates the Impermissible Appearance of Government Preference for Christianity.

In its Order on the Motion for Preliminary Injunction, the Court set out two ways that a legislative prayer could violate the Establishment Clause. First, the government could *purposefully* exploit the prayer practice to proselytize, advance, or disparage any one faith or belief. *Bats*, 410 F. Supp. 2d at 1346. Second, the government could sponsor a practice that results in “the *impermissible appearance* of an official preference for one sect or creed to the exclusion of others.” *Id.* at 1347 (emphasis added). Here, the Planning Commission and the Board of Commissioners have prayer practices that are dominated by Christian clergy and Christian-specific prayers, which, at a minimum, creates the appearance that these entities prefer Christianity over other faiths and beliefs.

Allegheny condemns “those government practices which send a message that the government harbors some purpose of preferring one religious sect to the exclusion of others.” *Bats*, 410 F. Supp. 2d at 1340-41. Thus, the government may

not create the “impression of a deliberate choice to favor one religious view to the exclusion of others.” *Id.* at 1343. This prohibition “does not merely target the subjective motivations of legislative actors in maintaining an invitational practice, but also condemns those practices, that viewed objectively, send a message of such conscious official preference.” *Id.* at 1334.

To determine whether the policy creates the perception of preference, the court looks to the objective observer, who is aware of “the traditional external signs that show up in the text, legislative history, and implementation” of the prayer practice. *Id.* at 1344-45. The objective observer is also aware of the identity of the prayer giver and whether there is a “diversity in the denominations and faiths represented” by the prayer givers or whether the “diversity” is “merely a ‘token’ gesture.” *Id.* at 1347. Yet another consideration is whether sectarian references are included in the legislative prayer. *Id.* at 1341. The objective observer does not focus on a particular prayer, but instead looks at the “invitational practice as a whole.” *Id.* at 1346.

Both the Cobb County Board of Commissioners and Planning Commission have long-standing traditions of holding prayers at their legislative meetings. Answer ¶24, Defs.’ Resp. To Pls. Interrog. #2. Both practices have been implemented in a manner that prefers Christianity, or at a minimum, that conveys the message that the County prefers Christianity over other religions. This is

demonstrated by the historical and current dominance of Christian clergy representatives and the frequent use of Christian -specific prayers.

A. Defendant Cobb County Planning Commission

1. The Prayers at Cobb County Planning Commission Meetings, Both Historically and Currently, Have Been Predominately Given By Christian Clergy - the attempt at diversity is no more than a token gesture.

In *Hinrich v. Bosma*, 400 F. Supp. 2d 1103, 1106 (S.D. Ind. 2005), the court examined one year of legislative prayers. Out of the fifty-three prayers, forty-one were given by Christian Clergy, one by an Imam, and one by a Rabbi.² *Id.* Ninety-five percent of the prayer givers, whose faith was identified, were Christian, whereas approximately five percent were non-Christian. *Id.* This “diversity,” according to the Seventh Circuit, did not save the practice. *Id.* at 1129-1130.

The *Hinrich* clergy representatives, however, were more diverse than the clergy representing the Cobb County Planning Commission. From the prayers recorded at Cobb County Planning Commission meetings from 1994 through August 2005, **96% of all the prayer givers whose faith was identified were Christian.** Parikh Aff. Atts. 2 & 4.

²Of the remaining 10 prayers, nine were given by Representatives and one by a lay person. *Id.* The religious affiliation of these prayer givers is not noted. *Id.*

From January 1994 through August 2005, only **four** non-Christian clergy gave the prayer before the Cobb County Planning Commission.³ *Id.* A Rabbi gave the prayer on November 1, 1994. *Id.* Almost **four years later**, an Imam gave the prayer. *Id.* Thus, out of the 111 prayers where the faith of the prayer giver was discernable, in an **eleven year period**, only **four** were given by non-Christian Clergy.⁴

Four non-clergy in eleven years cannot be classified as diversity. Indeed, the low number of non-Christian clergy and the infrequency with which they have given the prayer demonstrates that the inclusion of these non-Christian clergy persons are “merely a ‘token’ gesture to avoid judicial intervention.” *Bats*, 410 F. Supp. 2d at 1347. Instead, it demonstrates a clear preference for Christian clergy.⁵

³ During this period, some prayer givers were not clergy, but many of those prayer givers were Christian. The faith was not discernable for only five of the prayer givers. Parikh Aff. Attach. 4.

⁴ Actually, the prayer practice shows not just a preference for Christianity, but for Protestantism. In the period spanning August 1995 through August 2005, only two Catholics gave the prayer: September 3, 2002 ,Ex. D at 128-130, and September 7, 2004 ,Ex. D at 209-211.

⁵ The argument that Christian clergy should dominate the list of invited clergy because Christianity is the majority religion in Cobb fails for two reasons. First, Christian clergy do not merely dominate the list, they are essentially the only faith group invited to give the prayers. Second, “the Establishment Clause was intended in large part to protect religious minorities from religious majorities who might try to harness the power and prestige of the government to advance their sincere religious beliefs.” *Hinrichs*, 400 F. Supp. 2d 1103, 1130 (rejecting the argument that Christian-specific legislative prayers are appropriate because the community is majority Christian).

The Planning Commission's *process* for inviting clergy to give the prayer also favors Christian clergy. First, the notations placed on the main list of clergy used by the Deputy County Clerk demonstrate that, at least from 2003-2004, the County would not even consider inviting certain non-Christian or non-traditional Christian faiths for participation. Richardson Dep. Ex. 4. Second, the Planning Commission refused to add non-Christian clergy who serve Cobb County to the list of potential invitees even when a contact information for such clergy was provided to the County by a Cobb County citizen. Lee Dep. 16:20-25, 17:1, Resp. Interr. #6 & 10.

Sandra Richardson, former Deputy Clerk, primarily used the Yellow Pages to identify clergy in Cobb County.⁶ Richardson Dep. 17:14-18 & Ex. 4. But, she wouldn't invite all of the faith groups listed in the book. Some groups were categorically excluded. Id. Ms. Richardson literally struck out entire sub-categories of "churches,"

⁶Limiting the search for clergy to the Yellow Pages is intrinsically biased towards large, wealthy, well-established, and Christian churches. To advertise in the Yellow Pages, a faith group must go through procedures to place the advertisement and must pay for the advertisement. Thus, the Cobb invocation may only be given by clergy who have the money, time, and resources to buy a Yellow Pages advertisement. And, even faiths with such resources may not choose to have a Yellow Pages advertisement. For example, there is at least one Hindu Temple, one Bahai Assembly, and one Buddhist congregation in Cobb County, yet none appear in the sections of the Yellow Pages used by Ms. Richardson. Parikh Aff. Aff. 6 ; Richardson Dep. Ex. 4. None of these houses of worship have been represented at the Planning Commission meeting, perhaps because of the Commission's mechanism for inviting clergy.

in her 2003-2004 version of the Yellow Pages—the Jesus Christ Latter-Day Saints,⁷ Muslims, Jehovah’s Witnesses, and Jews.⁸ *Id.* These faiths were not struck out because clergy turned down invitations, as Ms. Richardson has no recollection of ever inviting any clergy person from any of those faiths during the period she used this copy of the Yellow Pages. *Id.* at 21:1-4. Instead, these faiths were entirely removed from consideration with one fell-swoop of the pen and were never considered for inclusion.

The 2005-2006 Yellow Pages, which was used by Ms. Richardson after the County Attorney received complaints from the ACLU, looks drastically different. Richardson Dep. Ex. 18. This edition of the Yellow Pages no longer strikes out certain faiths. Instead, the Mosque listed in the book is now bracketed and marked with a star and each Jewish Temples all have a checks by their name. *Id.* This sudden and drastic change in behavior—from striking out these faiths to highlighting

⁷This denomination was struck out in its entirety both in the subsection “Churches- Latter Bay Saints,” and “Churches-Church of Jesus Christ Latter-Day Saints.” Richardson Dep. Ex. 4.

⁸ In addition to being listed under “churches-Jewish” in the Yellow Pages, Jewish faiths are also listed separately under “Synagogues.” It is unlikely that Ms. Robinson ever referenced “synagogues” in her copy of the 2003-04 of the Yellow Pages, as there are no notations made in this section, Ms. Richardson had no recollection of ever inviting a Rabbi during this period, and no Rabbi ever gave the prayer to the Planning Commission during this period. Richardson Dep. 21:1-4.

them—indicates that the inclusion of non-Christian faiths is no more than a ‘token’ gesture to improve their standing in litigation.⁹ *Bats*, 410 F. Supp. 2d

The Planning Commission’s refusal to invite non-Christian clergy even after Plaintiff Selman provided it with a list of non-Christian clergy who serve Cobb County further demonstrates the County’s preference for Christian clergy. Mr. Selman provided the Planning Commission with contact information for the representatives of five non-Christian faiths.¹⁰ Selman Dep. 104:20-105:7, & Ex. 1. The list, however, was never used. Resp. to Interrog. #6, #10. Indeed, the list was not even passed onto Ms. Richardson so that she could extend the clergy invitations. Richardson Dep. 9:5-15 & Ex. 2. If the Planning Commission had a genuine interest in opening its prayer practice to non-Christian faiths, it would have passed on the information regarding non-Christian clergy to Ms. Richardson. This failure to consider non-Christian faiths further demonstrates a preference for Christianity.

⁹The Plaintiffs do not assert that the County must invite each and every house of worship located in Cobb County. Such a task would be impossible. But, the current practice does not achieve the diversity required by the Court or claimed by the Defendants. Indeed, the record shows that the diversity created by the practice consists of five prayers given by non-Christian clergy in the 130 prayers given over the last eleven years.

¹⁰The list included contact information for the Hindu, Muslim, Morman, Athiest, Unitarian, Buddhist, and Jewish faiths. Selman Dep. Ex. 1.

The fact that only five non-Christians have given the prayer in the last 13 years, combined with the fact that the Planning Commission has, until recently limited its invitations solely to mainline Christian faiths, creates the impression that the Cobb Planning Commission favors Christianity.

2. The Majority of Prayers Given At Cobb County Planning Commission Meetings Are Christian-Specific.

In *Lee v. Weisman*, 505 U.S. 577, 588 (1992), the Supreme Court explained that “[s]ectarianism is often the flash point for religious animosity.” This is “understandable, as a prayer which uses ideas or images identified as a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral.” *Id.* Thus, prayers made in the genre of *Marsh* should “evoke common and inclusive themes and forswear...the forbidding character of sectarian invocations.” *Wynne*, 376 F. 3d at 287.

The Indiana House of Representatives violated the Constitution where “29 [of the 45 transcribed prayers] were offered in the name of Jesus, Jesus Christ, the Savior, and/or the Son” and fifteen “avoided endorsing particular sects of beliefs.”¹¹ *Hinrichs*, 400 F. Supp. 2d at 1107-08. Thus, 64% were sectarian and 33% were non-sectarian. In *Wynne*, 376 F. 3d at 292, the prayers were unconstitutional because they

¹¹ One prayer was not characterized as sectarian or non-sectarian, but as disparaging other religions. *Id.*

were “frequently,” although not always, Christian. And, the court in *Rubin*, 124 Cal. Rptr. 2d 867, 873 (Cal. App. 2002), found that the government practice “conveyed the message that Christianity was being advanced over other religions.” where “only about 20 percent of the volunteers providing the legislative prayer mentioned Jesus Christ in the invocation.”

The frequency of explicitly Christian-specific prayers at the Cobb Planning Commission prayers is more frequent than in *Hinrichs* and greatly exceeds that in *Rubin*.¹² **Over a 12 year period, sixty-five percent of the prayers given at the Cobb Planning Commission meetings were Christian-specific.** Parikh Aff. Attachs. 2 &

6. That most of the sectarian prayers in Cobb County are identified as such because they conclude in a phrase such as “in Jesus’ name we pray,” does not save the prayer practice. In *Wynne*, 376 F.3d at 301, the prayers “frequently referred to Christ, [but] did so only once” in each prayer. Yet, this prayer practice was declared unconstitutional.¹³ *Id.* at 301-302.

Similarly, the court in *Hinrich’s*, 400 F. Supp. 2d at 1106, treated prayers with closings in the name of Jesus in the same manner as prayers with more frequent

¹²The *Wynne* Court did not provide the exact number or percentage of sectarian prayers, thus it is unclear whether the Cobb has more or less sectarian prayers than the government in *Wynne*.

¹³ Indeed, the Court outright rejected the Defendant’s argument that the prayers were not sectarian enough to violate *Marsh*. *Id.*

Christian references. There, the “substantial majority” (64%) of the prayers transcribed were “explicitly Christian.” *Id.* The Court listed ten examples of explicitly Christian prayers. Five of the prayers concluded with words, such as “In the Strong Name of Jesus our Savior” and, thus, resemble the majority of the prayers given at Cobb Planning Commission meetings. *Id.* at 1106-1108. The other five examples each contained more than one sectarian reference and resemble some of the other prayers given at the Cobb Planning Commission meeting.¹⁴ *Id.* The prayers that only ended with a sectarian reference were not given less consideration by the *Hinrichs* Court than the even more overtly Christian prayers. Likewise, the Cobb prayers that include one sectarian reference should be treated the same as those with several references.

Indeed, the focus of the evaluation is the “cumulative effect of the legislative prayer practice rather than on the speech constituting an individual prayer.” *Bats*, 410

¹⁴For example, the Prayer given on June 7, 2005 stated: “In the leadership, Father God, and those that have come for businesses, we pray, God that the Spirit of Jesus Christ, our Lord and Savior, will direct everything that’s said and done in this place today . . . These things we ask together in the name of Jesus Christ, our Lord and Savior we pray. Amen.” Ex. D at 238-39. The December 2, 2003 prayer reads: Lord, I ask you in Jesus’ name that you would give them understanding, Lord, beyond just their training and their insights . . . In Jesus’ name I ask that. Amen.” *Id.* at 181-82. The November 4, 2003 prayer contained the following: “Father God, in Jesus’ name we thank you for this day that you have made and be glad in it . . . We ask that you comfort them by the Holy Spirit . . . And we give you the praise and the glory for it. In Jesus’ name. Amen.” *Id.* at 177-178.

F. Supp. 2d at 1338. Thus, the Court should focus on the constant repetition of Christian-specific prayers rather than engage in the “judicial dissection of any ‘particular prayer.’” *Id.* (citing *Marsh*, 463 U.S. at 795).

Furthermore, although giving a prayer “in the name of Jesus” may include only one Christian reference to Jesus, that reference affects the entire meaning of the prayer. It is not an ecumenical prayer that “bind[s] people of varying faiths together.”¹⁵ *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998). This closing makes clear to a reasonable observer that the prayer is Christian, to the exclusion of all other religions. No parsing is necessary as the language is clear.

A reasonable observer is aware that (1) in the last 11 years only four non-Christian clergy have given the prayer at the Planning Commission meetings; (2) the procedure for inviting clergy to represent the County during the invocation is drastically slanted towards inviting Christian clergy and went as far as to categorically dismiss non-Christian and non-traditional Christian faiths; and (3) the majority of the prayers given at Cobb Commission meetings are Christian-specific.

¹⁵The one reference in the closing also transforms all of the prior references in the prayer into Christian-specific references. Each prior reference to God, Lord, or Father in the prayer becomes a Christian-specific reference to God, Lord, or Father. The preceding portions of the prayer cannot be separated from the closing and labeled non-sectarian, as the closing makes clear that the entire prayer—each mention of thanks or request for a blessing—was made to a Christian specific God. The entire content of a prayer made in the name of Jesus is Christian, not just the word “Jesus” in the closing.

With this knowledge, an objective observer would perceive that the Cobb Commission favored Christianity over other faiths.

2. Cobb County Commission

The Cobb County Commission prayer practice, like the Planning Commission practice, also creates the perception that Christianity is the government's preferred faith.

- A. The Prayers at the Cobb County Commission Meetings, both historically and currently, have been predominately given by Christian Clergy.

The Cobb Board of Commissioner meetings are dominated by Christian clergy. Of the **423 prayers givers** who gave a prayer during the period between 1988 and August 2005 and whose faith was discernable, **409 or 97% percent, were Christian.** Parikh Aff. Attachs. 1 & 3. Again, this is even less diverse than in *Hinrichs*, where 95% were Christian clergy. *Hinrichs*, 400 F. Supp. 2d at 1106.

And, the procedures employed for choosing clergy also favor Christian clergy. Ms. Beverly Martin creates a master list of clergy people who serve Cobb County. And, it is from that list that she invites clergy to give the invocation. Martin Dep. Ex. 8. But, Ms. Martin's master list is almost exclusively Christian. Martin Dep. 11:1-22 & Ex. 8. The list includes one Mosque—which was inserted into the list in 2004 after

an Imam asked Chairman Olens to be added to the list¹⁶–, three Jewish congregations, and a Unitarian. *Id.* All of the other faiths on the list are Christian. *Id.* Ms. Martin has excluded a Bahai assembly, a Jehovah’s Witness congregation and a Latter Day Saints Church from her list, even though she has contact information for these groups in her files.¹⁷ Martin Dep. 66:21-67:20, 68:1-4, & Exs. 6,8,12

Perhaps the master list of clergy lacks diversity because of the manner used to create the list. Ms. Martin creates the list using the Yellow Pages, cards and flyers she obtains from events, searching Google for “churches” and looking at the Chamber of Commerce’s page on “churches.” Martin Aff. ¶ 7; Martin Dep. 11:23-12:1,15:4 This procedure is likely to identify traditional and prominent Christian churches, but is unlikely to identify non-Christian and smaller congregations.

Mr. Selman also provided Commissioner Lee with a list of non-Christian clergy who serve Cobb County. Selman Dep. 8:20-82:4, 84:24-85, 86:13-88:9, 87:11-16 & Ex. 1. Mr. Lee, however, simply placed the list into a file and never passed this list onto anyone. Lee Dep. 16:20-25, 17:1. This is particularly troubling because when Mr. Lee

¹⁶Notably, the Imam was also added to the list after the County began receiving complaints from citizens regarding the sectarian nature of the invocations.

¹⁷The list also excludes Jesus Christ Latter Day Saints, Buddhists, Hindus, Christian Scientists, even though they have congregations in Cobb County. See Parikh Aff. ¶ Ex. 6.

wanted to add a minister to the list on another occasion, he passed the clergy person's card onto Ms. Martin.¹⁸ Martin Dep. 13:14-14:4. This demonstrates that Mr. Lee was not interested in diversifying the clergy list.

That Christian prayer givers make up **ninety-seven percent** of the prayer givers, combined with the fact that the Commission's procedure excludes certain faiths and is structured so as to give advantage to Christian faiths, creates the impression that the Cobb Board of Commissioners prefers Christianity to other faiths.

B. The Majority of Prayers Given At Cobb County Planning Commission Meetings Are Christian-Specific.

The frequency of Christian-specific prayers at the Cobb County Board of Commissioners *exceeds* that in *Hinrichs* and in *Rubin*.¹⁹ **From the July 1988 through August 2005, approximately 70% of the prayers given at Board of Commission meetings were overtly Christian-specific.** Parikh Aff. Attachs. 1 & 5. This is even greater than the sixty-four percent of Christian specific prayers recorded in *Hinrichs*, 400 F. Supp. 2d at 1107-08, and the twenty percent cited in *Rubin*, 124 Cal. Rptr. 2d 867.

¹⁸ Mr. Olens has also provided Ms. Martin with clergy information when he wanted the clergy person added to the master list.

¹⁹The *Wynne* Court did not provide the exact number or percentage of sectarian prayers, thus it is unclear whether the Cobb has more or less sectarian prayers than the government in *Wynne*.

The overtly Christian-specific prayers recited at Board meetings range from prayers that are given “in the name of Jesus,”²⁰ to prayers that are pervasively Christian,²¹ to the Lord’s prayer.²²

The prayer practice is dominated by Christian clergy and overtly excludes certain faiths from participation. In addition there is a pattern of giving explicitly Christian prayers. A reasonable observer, aware of these facts, would perceive that the County was endorsing the Christian faith.

II. The Marsh Exception Applies Only to Non-sectarian Legislative Prayers

Though the Planning Commission and the Board of Commissioner prayer practices violate the test formulated by the District Court, the Plaintiffs assert that the appropriate test for legislative prayer is the more straight-forward test applied by the

²⁰Examples include September 20, 2005, October 25, 2005, November 22, 2005. Exs. F 3:12-4:5, 2:1-3:11; Ex. D at 251.

²¹ March 15 2005 (“We pray for these commissioners that they will have the wisdom of Soloman, the compassion of Christ, and the willingness to serve . . . Father I pray a blessing upon this assembly today, and we pray that you bless Cobb County and the great state of Georgia in Jesus’ name.”); February 22, 2005 (“We stand before you, Holy Spirit, conscious of your sinfulness but aware that we gather in your name . . . Guide us by your wisdom, support us by your power, for you are God sharing the glory of the Father and of the Son . . . You live and reign with the Father and the Son, one God, forever and ever. Amen.”); November 9, 2004 (“Send us the Holy Spirit, endow us, baptize us, and keep us this day . . . in th e jubilous name of the Father, Son, and Holy Spirit o fa living God. Amen.” Ex. D at 218, 225-226, 226-37.

²² Examples include the prayers on February 24, 1998; February 2, 1999; July 24, 2001; August 14, 2001. Ex. E 100:14-1-5:5, Ex. D at 3-4, 83-84, 84-85.

Fourth, Seventh and Ninth Circuits, as well as the California Appellate Court. *Hinrichs*, 440 F.3d 393; *Wynne*, 376 F.3d 292; *Rubin*, 124 Cal. Rptr. 2d 867; *Bacus*, 52 Fed. Appx. 335, 357; *see also Stein v. Plainwell Comm'ty Schs.*, 822 F.2d 1406, 1410 (6th Cir. 1987) (holding that prayers violated the *Marsh* test because they “invoked the name of Jesus Christ as the Savior”). The Courts in these cases did not apply a test like that formulated by the District Court, which bears more of a resemblance to the endorsement test than the *Marsh* test. Instead, the Courts have asked whether a legislative prayer practice frequently includes sectarian prayers. *Hinrichs*, 440 F. Supp. 2d at 1151-52.²³

To avoid duplicative briefing, the Plaintiffs refer the Court to their brief in support of their Motion for Preliminary Injunction for their argument that *Marsh* applies only to nonsectarian prayer. The Plaintiffs, however, would like to point out that since this Court's Order on the Plaintiff's Motion for Summary Judgment, yet another Circuit has ruled that the *Marsh* exception only applies to nonsectarian legislative prayer. *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006). **Thus, the Seventh Circuit (*Hinrichs*), the Fourth Circuit (*Wynne* and *Simpson*), the Ninth Circuit (*Bacus*), and the California Appellate Court (*Rubin*)-the only courts to rule**

²³ The Plaintiffs do not argue that if one clergy representative among many uttered a sectarian reference that the practice would violate the Establishment Clause. But, where the use of Christian-specific prayers is frequent, the prayer practice cannot stand.

directly on whether Marsh prohibits sectarian prayers - have all held that *Marsh* applies only to nonsectarian prayer.²⁴ No court has upheld a prayer practice that contains frequent Christian-specific prayers.

In *Hinrichs*, 440 F.3d at 399, the Seventh Circuit held that *Marsh* “hing[ed] on the nonsectarian nature of the invocations at issue there.” Indeed, “the Supreme Court itself has read *Marsh* as precluding sectarian prayer.” *Id.* (citing *Allegheny*, 492 U.S. 573). *Marsh*, *Allegheny*, and *Van Orden v. Perry*, 125 S. Ct. 2854, 2862 n.8 (2005), as well as the lower federal and state court “appear to teach the rule that nonsectarian legislative prayer is constitutionally sound, but sectarian appeals, including those of a sectarian nature, are not.” *Id.* A contrary conclusion would render “nugatory critical facts and limitations expressed by the Supreme Court in *Marsh*, even though the Court itself and many other lower federal courts have found

²⁴*Snyder* considered an easier question than the one before the Court - whether a prayer that “aggressively proselytizes for his particular religious views and strongly disparages other religious views” is prohibited by *Marsh*. *Wynne*, 376 F.3d at 301 n.6, therefore, describes *Snyder*’s discussion of the parameters of *Marsh* as dicta. *Hinrichs*, 400 F. Supp. 2d at 1131 n. 13, found that the *Snyder* decision is consistent with its own ruling, though it noted the limited value of *Snyder*, because the content of the other prayers in that case were not identified. Indeed, if the test were as the District Court sees it, then the *Snyder* Court would have had to examine all of the governments prayers to determine whether inclusion of that one prayer would demonstrate a preference for one religion. Further, the government in *Snyder* would have failed this Courts test because it would have been improperly involved with the government prayer by regulating the content of that prayer.

those points dispositive.” *Id.* at 401. Accordingly, the Court held that the State would not likely prevail in its appeal of the District Court’s ruling that the House of Representatives prayer practice violated the United States Constitution.

In *Cobb*, like in *Hinrichs*, *Wynne*, *Rubin*, and *Baucus*, the legislature sponsors prayers that frequently evoke a Christian-God. Accordingly, the prayer practice violates *Marsh* and is unconstitutional.

III. The Violation Can Easily be Remedied By This Court.

The Fourth, Seventh, Ninth, and Tenth Circuits, as well as a California Appellate Court have issued injunctions or approved government policies mandating that government prayers be nonsectarian. *Hinrichs*, 440 F.3d 393; *Wynne*, 376 F.3d 292; *Rubin*, 124 Cal. Rptr. 2d 867; *Bacus*, 52 Fed. Appx. 335, 357; *Snyder*. 159 F.3d at 1235. Such restrictions do not violate the Establishment Clause. To the contrary, such policies protect against violations of the Establishment Clause.²⁵ Furthermore, the

²⁵ Such a requirement also does not violate the Free Speech Clause. The clergy are government representatives and the invocations are government speech. “[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Capitol Square Review & Advisory Bd. v. Pinette* 515 U.S. 753, 766 (1995) (plurality) (emphasis added). Indeed, “while the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.” *School Dist. v. Schempp*, 374U.S. 203, 226 (1963); compare *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (striking down school prayer given by student representative) with *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (striking

County already places many restrictions on the prayer practice, and requiring clergy to adhere to the Constitution is no more intrusive or entangling than the content restrictions already in place.

In *Wynne*, 376 F.3d at 302, the Fourth Circuit enjoined the Council “from invoking the name of a specific deity associated with any one specific faith or belief in prayers given at Town Council meetings.” Then, in *Simpson*, 404 F.2d at 284, 278, 284 the same court upheld a prayer practice *because* the County has a policy that “track[s] the language of *Marsh*,” and requires that the prayers be “nonsectarian.” The Court held that the government can and, indeed must, limit the prayers to nonsectarian content.

Recently, the Seventh Circuit, in *Hinrichs*, refused to stay an injunction issued, which stated that the Speaker of the House of Representatives must “advise any persons offering such a prayer (a) that it must be non-sectarian . . . and (b) that they should refrain from using Christ’s name or title or any other denominational appeal.” *Hinrichs*, 400 F. Supp. 2d at 1131, *stay denied by* 440 F.3d 393 (7th Cir. 2006). The Ninth Circuit and the California State Appellate Court similarly issued injunctions barring sectarian references. *Bacus*, 52 Fed. Appx. 335, 357 (9th Cir. 2002); *Rubin*, 101 Cal.

down regulation of private party’s speech because it was in a public forum); *and compare Allegheny*, 492 U.S. at 601 (calling for the removal of a government-sponsored creche) *with Snowden v. Town of Bay Harbor Islands*, 358 F. Supp.2d 1178 (S.D. Fla. 2004) (allowing citizen to add nativity scene to public forum).

App. 4th a1194, 1208 (“ordering that the City not permit sectarian prayer at city council meetings and requiring the City to advise those who participate in conducting prayer at city council meetings of this limitation”).

Finally, the Tenth Circuit in *Snyder* explained that “a deliberative body has a right to take steps to avoid the kind of prayer that would run afoul of *Marsh* and the Establishment Clause.” 159 F.3d at 1235. When a legislature decides to hold a prayer in the tradition of *Marsh*, it “has the discretion to prevent a proposed prayer that would be intolerable to that tradition.” *Id.* at 1236; *see also Id.* at 1237 (Lucero, concurring) (“[G]overnment officials operating an open prayer format are inevitably drawn into regulating the content of the prayers offered.”).

The Court, in its Order on the Motion for a Preliminary Injunction, interpreted *Lee* as preventing the County from enforcing the parameters of *Marsh* upon its chosen clergy representatives. *Bats*, 410 F. Supp. 2d at 1342-43. But, *Marsh* is a completely separate test from that in *Lee*—either *Marsh* applies and the County must adhere to the conditions set forth in that case or *Lee* applies and the prayer practice, whether sectarian or non-sectarian, is unconstitutional.

The Court in *Lee v. Weisman*, 505 U.S. at 588, did voice some concern over the government’s suggestion that it could limit public school graduation prayers to nonsectarian content. But, in its application of the coercion test, it was also concerned about other government involvement, such as the school’s role in picking a clergy

person and even in deciding to have a prayer in the first place. *Id.* at 587-88. In the context of *Marsh* where government prayers are permissible, the very government involvement *Lee* discussed—deciding to have a prayer, choosing a prayer giver, and monitoring the prayer—is required. As the Supreme Court and each lower court to address the issue have recognized, monitoring the prayer practice to ensure that the prayer does not “have the effect of affiliating the government with any one specific faith or belief” is a necessary result of having a legislative prayer practice. *Allegheny*, 492 U.S. at 604.

Moreover, the County already places content restrictions upon its chosen clergy representatives. Neither the Planning Commission nor the Board of Commissioners have an official written prayer policy or guidelines, but according to Commissioner Lee, a clergy person would exceed the bounds of permissible prayer if he or she commented on an issue before the Commission, disparaged a citizen or a religion, or spouted obscenities. Lee Dep. 37:3-6, 37:24-38:3, 40:20-24, 41:7-17. This would apply even if a clergy person believed that he was compelled by his religion to speak out on the political issue. It would also apply if the clergy person believed that his religious teachings compelled him to speak out against a commissioner’s behavior or prior votes. Limiting the prayers to nonsectarian content is no more intrusive or entangling than barring political content or comments about

commissioners and citizens. The condition would be just another guideline that the County would place on its own representative.

Injunctions limiting the prayers to non-sectarian content are routinely granted, they do not violate *Lee*, and they are consistent with Cobb's current policy of limiting prayer content. Thus, an injunction should be issued.

CONCLUSION

Because the prayer practices violates the test as formulates by the District Court and the more commonly applied test utilized by other courts, this Court should conclude that the prayer practices utilized by the Cobb Board of Commissioners and Planning Commission are unconstitutional.

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Respectfully submitted,

/s/ Margaret F. Garrett

Gerald R. Weber

Georgia Bar No. 744878

Margaret F. Garrett

Georgia Bar No. 255865

American Civil Liberties Union of Georgia
75 Piedmont Ave. NE, Suite 514
Atlanta, Georgia 30303
Tel: 404-523-6201
Fax: 404-577-0181
Email: gweber@acluga.org
Email: mgarrett@acluga.org