

action to sponsor sectarian prayers at Cobb County government meetings; and requiring the Defendants, their successors, and assigns to advise anyone conducting a prayer as part of the City Council meeting that sectarian prayers are not permitted.

The Defendants have a practice of opening each Cobb County government meeting with a sectarian prayer. This practice violates the Establishment Clause of the First Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment of the United States Constitution; Article I, section II, paragraph VII of the Georgia Constitution; and Article I, section I, paragraph 3 of the Georgia Constitution. *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005) (ruling that legislative prayers that include sectarian references violate the Constitution); *Rubin v. Burbank*, 124 Cal. Rptr. 2d 867 (Cal. App. 2003) (concluding that a legislative prayer practice violated the constitution because the prayers included sectarian references); *Bacus v. Palo Verde Unified Sc. Dist. Bd. Of Educ.*, 52 Fed. Appx. 335, 357 (9th Cir. 2002) (holding a legislative prayer practice unconstitutional even where only about 20 percent of the prayers included sectarian references).

FACTUAL STATEMENT

Plaintiffs Pelphrey, Buckner, Moraes, Crowe, and Selman are all residents and taxpayers of Cobb County, Georgia. *See* V. Compl. at ¶¶ 4, 5, 6, 8, 9, 15. All of them have attended Cobb County government meetings in the past and plan to

attend meetings in the future. *See* V. Compl. at ¶¶ 4, 5, 6, 8, 9, 15. The Plaintiffs also watch these meetings on the Cobb County government website, which can be found at <http://www.cobbcommunications.org/tv23_video_on_demand.htm>. *See* V. Compl. at ¶¶ 5, 6, 8, 9, 13, 20.

The County has a “long standing practice of openings its commission meetings with a prayer.” *See* V. Compl. at ¶¶ 22 & 63 & ex. B. The County Manager identifies, chooses, and invites clergy members to give the invocation at Commissioner meetings. *See* V. Compl. at ¶¶ 23 and exs. C & D. At Commissioner meetings, Chairman Olens begins each meeting by stating: “for all those who wish to do so, please rise for the invocation and the pledge.” V. Compl. at ¶¶ 26 & ex. A. All of the Commissioners then stand at their desk and bow their heads. *See Id.* The vast majority of the prayers given at Commissioner meetings invoke the name of Jesus, Jesus Christ, or Christ.¹ *See* V. Compl. at ¶¶ 24, 27-43, & ex. A. For example:

- May 10, 2005 - “In Jesus’ name we pray, Amen,” V. Compl. at ¶ 27;
- April 28, 2005 - “For its in the name of Jesus we pray,” V. Compl. at ¶ 28
- January 25, 2005 - “We offer ourselves in the name of Jesus, our Christ,” V. Compl. at ¶ 29 & ex. A at tr. num. 4346;

¹ No sectarian references other than Christian references have been made at Cobb County Commission, Zoning, or Planning meetings. V. Compl. at ¶¶ 25 & 61.

- January 11, 2005 - "I pray in Christ's name. Amen," V. Compl. at ¶ 30 & ex. A at tr. num. 4258;
- November 9, 2004 - "Send us thy Holy Spirit, endow us, baptize us, and keep us this day ...in the jubilous name of the father, son and holy spirit of a living God. Amen," V. Compl. at ¶ 31 & ex. A at tr. num. 3815;
- October 26, 2004 - "In your son's name," V. Compl. at ¶ 32 & ex. A at tr. num. 3750;
- September 14, 2004 - "This is our prayer and this is my prayer in the name of my Lord and Savior Jesus Christ," V. Compl. at ¶ 33 & ex. A at tr. num. 3479;
- August 10, 2004 - "We ask it in Jesus' name," V. Compl. at ¶ 34 & ex. A at tr. num. 3270;
- June 8, 2004 - "In the name of Jesus, we ask God. . . ," V. Compl. at ¶ 35 & ex. A at tr. num. 2454;
- April 13, 2004 - "The Father, Son & Holy Spirit," V. Compl. at ¶ 36 & ex. A at tr. num. 2063;
- March 9, 2004 - "We make our prayer this day, through your son, Jesus Christ our Lord, we pray," V. Compl. at ¶ 37 & ex. A at tr. num. 1482;
- January 27, 2004 - "The man Jesus Christ . . . we ask you Lord Jesus . . . I thank you Jesus in your holy name . . . In your name Jesus we pray," V. Compl. at ¶ 38 & ex. A at tr. num. 0982;
- January 13, 2004 - "In Christ's name," V. Compl. at ¶ 39 & ex. A at tr. Num, 0885;
- December 9, 2003 - "in the name of Jesus," V. Compl. ¶ 40 & ex. A at tr. num. 0765;
- August 27, 2003 - "in the name of Jesus we ask the Lord," V. Compl. at ¶ 41 & ex. A at tr. num. 0485;
- July 8, 2003 - "these . . . blessings we ask in your son Jesus' name," V. Compl. at ¶ 42 & ex. A at tr. Num. 0656; and
- May 13, 2003 - "through your son Jesus Christ our Lord, we pray," V. Compl. at ¶ 43 & ex. A at tr. num. 0378.

The same practice takes place at the Commissioner Zoning meetings. Again, the vast majority of the prayers invoke the name of Jesus, Jesus Christ, or Christ. *See* V. Compl. at ¶ 44-58 & ex. A. For example:

- July 9, 2005 - "I make this prayer in Christ's name," V. Compl. at ¶ 44;
- May 17, 2005 - "In the wonderful name of my Lord and Savior, Jesus Christ," V. Compl. at ¶ 45;
- March 15, 2005 - "We pray for the Commissioners that they will have the wisdom of Solomon and the compassion of Christ . . . We pray that we will be a country that honors you and your laws and your love . . . We pray Father that you help us to see that you are the sovereign Lord of the Universe. . . In Jesus name. Amen," V. Compl. at ¶ 46 & ex. A at tr. num. 4551;
- February 15, 2005 - "in Christ's name. Amen," V. Compl. at ¶ 47 & ex. A at tr. num. 4458;
- October 19, 2004 - "Father we ask that everything that takes place in here both in word and deed will bring glory and praise and honor to you. In Jesus' name. Amen," V. Compl. at ¶ 48 & ex. A at tr. num. 3673;
- August 17, 2004 - "in the precious name of your son, Jesus," V. Compl. at ¶ 49 & ex. A at tr. num. 3334;
- July 20, 2004 - "For I ask in Christ's name we pray," V. Compl. at ¶ 50;
- June 15, 2004 - "We pray in the name of Christ," V. Compl. at ¶ 51 & ex. A at tr. num. 2599;
- May 4, 2004 meeting, Pastor Greg Walton said: "In Jesus' name we pray," V. Compl. ¶ 52 & ex. A at tr. num. 2297;
- April 20, 2004 - "In Jesus Christ's name I pray," V. Compl. ¶ 53 & ex. A at tr. num. 2209;
- April 6, 2004 - "we ask these blessings in the name of our Lord and Savior, Jesus Christ," V. Compl. ¶ 54 & ex. A at tr. num. 1142;
- March 16, 2004 - "In the name of Jesus we pray," V. Compl. ¶ 55 & ex. A at tr. num. 1624.

- February 17, 2004 meeting the prayer ended with “for this we pray in the name of Jesus,” V. Compl. ¶ 56;
- December 2, 2003 - “in Jesus’ name,” V. Compl. at ¶ 57;
- February 18, 2003 - “We ask it now in Jesus’ name,” V. Compl. at ¶ 58 & ex. A at tr. num. 0000.

The Deputy Clerk has the duty of identifying, choosing, and inviting clergy to give the invocation at Cobb Planning Meetings. *See* V. Compl. at ¶ 62 & ex. D.. At Planning Committee Zoning and Variance Hearings, Chairman Homan introduces the clergy person who was chosen to make the prayer. In his introduction, he often notes that the prayer is a “custom” of the Planning Commission. V. Compl. at ¶ 63. The Planning Commissioners bow their heads, but remain in their seats during the prayer. *Id.* The majority of the prayers invoke Jesus, Jesus Christ, or Christ. V. Compl. at ¶ 60, 64-75 For example:

- July 7, 2005 - “In Christ’s name,” V. Compl. at ¶64;
- June 7, 2005 - “We pray that the spirit of Jesus Christ, our Lord and Savior will direct everything that is 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,” V. Compl. at ¶ 65;
- April 5, 2005 - “In Christ’s name,” V. Compl. ¶66 & ex. A at tr. num. 5070;
- March 1, 2005 - “In the name of Jesus we pray. Amen,” V. Compl. at ¶67 ex. A at tr. num. 5013;
- February 1, 2005 - “We pray this through thy son Jesus Christ. Amen,” V. Compl. at ¶ 68 & ex. A at tr. num. 4921;
- November 2, 2004 - “I ask these things through your precious son, Jesus Christ name,” V. Compl. at ¶ 69 & ex. A at tr. num. 4764;

- August 3, 2004 - "We pray in Jesus name. Amen," V. Compl. at ¶ 70 & ex. A at tr. num. 3173;
- July 6, 2004 - "In Jesus' precious name," V. Compl. at ¶71 & ex. at tr. num. 2839;
- May 4, 2004 - "In Jesus name we pray," V. Compl. at ¶72 & ex. A at tr. num. 2297;
- April 6, 2004 - "We ask these blessings in the name of our Lord and Saviour, Jesus Christ," V. Compl. at ¶ 73 & ex. A at tr. num. 1142;
- March 2, 2004 - "in the name of your son Jesus Christ, we pray," V. Compl. at ¶ 74 & ex. A at tr. num. 1334;
- February 3, 2004 - "for all that is done today in Jesus' name," V. Compl. at ¶75.

The Plaintiffs object to the sectarian prayers at Cobb County government meetings because they invoke a specific God—a Christian God—to the exclusion of all other Gods. *See* V. Compl. ¶ 16. The Plaintiffs are offended and often feel repressed by this practice. *See Id.* Each time they attend a government meeting the Plaintiffs are affronted by the Defendants' overtly Christian prayers and subject to unavoidable and unwelcome religious message sponsored by the County. *See Id.* Mr. Pelphrey believes that the government's use of sectarian prayer is demeaning to his religion. The prayers cause the other Plaintiffs to feel like outsiders in their own community and unwelcome at government meetings. *See Id.* Furthermore, they are offended because the sectarian prayers are an unconstitutional endorsement of religion and because the prayers trivialize religion. *See id.*

Mr. Selman has voiced his objection to the sectarian references in the prayers on several occasions. He has spoken with Chairman Olens, Commissioner Tim Lee, and Bob Ott of the Planning Commission and asked each person to remove the sectarian references in the prayers. *See* V. Compl. at ¶¶ 76 & 77. And, on March 25, 2003, Mr. Selman and Mr. Crowe both formally addressed the County Commission to ask the Commission to remove the sectarian references. *See* V. Compl. at ¶¶ 8 & 11. In addition, attorneys from the ACLU both wrote to and spoke with the County Attorney and asked her to stop the prayers. *See* V. Compl. at ¶ 78. The County rejected these requests. *See* V. Compl. at ¶78 & exs. E, F & G.

The ACLU of Georgia also made requests to the Chairman Olens and the County Attorney that the Cobb prayer practice be modified so as to remove the sectarian references. After our first request, the County responded in a letter that asserted that “there does not seem to be any sentiment among the current Commissioners favoring changing our practice” V. Compl. at ¶78 & ex. E. Another request to omit sectarian references in the prayers was denied in September 2003 and again recently in September 2004. *See* V. Compl. at ¶ 78 & ex. F & G.

ARGUMENT AND AUTHORITY

A preliminary injunction is appropriate when the movant establishes: (1) a substantial likelihood of success on the merits; (2) a threat of irreparable injury; (3) that Plaintiff’s injury outweighs any harm an injunction may cause Defendants; and

(4) that granting the injunction would not disserve the public interest. *Teper v. Miller*, 82 F.3d 989, 992 n.3 (11th Cir. 1996). Plaintiffs satisfy each requirement.

I. The Plaintiff is Substantially Likely to Prevail on the Merits.

A. The Plaintiffs Have Standing to Challenge the Sectarian Prayers.

Because the Plaintiffs' standing – based on both their personal injuries and their status as taxpayers – is clear in this case, this brief will offer only a concise statement on standing.

In *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1107-08 (11th Cir. 1983), the plaintiffs were found to have standing where the “underlying motivations of the plaintiffs . . . can be described as either a spiritual belief or a commitment to separation of church and state” and where they are also “subjected to unwelcome religious exercise or were forced to assume special burdens to avoid them.” Thus, in *Rabun County*, one plaintiff was held to have standing where he “suffer[ed] spiritual harm” from being forced to view “unwanted religious symbolism.” *Id.*; see also *Saladin v. City of Milledgeville*, 812 F.2d 687, 692-93 (11th Cir. 1987) (finding standing where the plaintiffs' were offended by receiving stationary that had a seal with the words “Christianity” on it, even though the word was not legible on the documents, because the plaintiffs had "direct contact with the offensive conduct.").

All of the Plaintiffs in this case are residents and taxpayers of Cobb County, and all of the Plaintiffs attend Cobb County government meetings and watch the meetings on the internet.² See V. Compl. at ¶¶ 4, 5, 6, 8, 9, 15. Each time they attend a meeting or watch a meeting on the internet, the Plaintiffs come into direct and unwelcome contact with government-sponsored sectarian religious messages. See V. Compl. at ¶ 16. The sectarian prayers are offensive to them. *Id.*; *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1145 (4th Cir. 1991) (“By placing its imprimatur on the particular kind of belief embodied in any prayer, the state necessarily offends the sensibilities not only of nonbelievers but of devout believers among the citizenry who regard prayer ‘as a necessary private experience.’”). That Mr. Selman and Mr. Crowe were offended by the sectarian prayers was made clear to the Cobb Commission when they formally addressed the Commission at the

²In *Harvey v. Cobb County*, 811 F. Supp. 669, 675 (N.D. Ga. 1993), the Eleventh Circuit affirmed that a plaintiff who asserted only that his job as an attorney, “on occasion” required him to enter the State Courthouse had standing to challenge a Ten Commandments display. See also *Books v. Elkhart*, 235 F.3d 292 (7th Cir. 2000) (went to the Courthouse to pay a parking ticket, attend council meetings, talk to the City Council Clerk, and have his deposition taken by the City Attorney in the case had standing); *Suhre v. Haywood County*, 131 F.2d 1083 (4th Cir. 1997) (visited the courtroom five times and had attended four meetings at the courthouse had standing); *Washegesic v. Bloomington Pub. Schs.*, 33 F.3d 679 (6th Cir. 1994) (entered the school building for events open to the public had standing); *Doe v. County of Montgomery, Ill*, 41 F.3d 1156 (7th Cir. 1994) (used the courthouse to attend council meetings; get absentee ballots; to serve jury duty; and litigate lawsuits had standing).

March 25, 2003 meeting. *See* V. Compl. at ¶¶ 8 & 11. Furthermore, Mr. Selman’s offense was also made clear when he repeatedly asked Cobb County government officials to alter their prayer practices to eliminate the sectarian references. V. Compl. at ¶¶ 76-77. Accordingly, the Plaintiffs have standing to challenge the prayers.

The Plaintiffs also have taxpayer standing. The Cobb County expends County funds on the sectarian invocations given at their government meetings that would otherwise not be spent on the government meetings. *Doremus v. Board of Education*, 342 U.S. 429, 433 (1952). First, employee time is spent on identifying clergy, choosing which clergy are suitable to give the invocations, inviting the clergy to the meetings, and sending the clergy information about the meetings. V. Compl. at ex. D (One aspect of the Deputy Clerk’s position “is to invite clergy to deliver invocations at Planning Commission hearings”); V. Compl. at ex. C (The County Manager is charged with the duty of inviting clergy to Commissioner meetings). Second, the County must pay for the cost of sending letters to the clergy who are invited. Such a task includes the cost of printing letters, envelopes, and postage. V. Compl. at ex. C & ex. D. Thus, the Plaintiffs also have taxpayer standing.

B. The Prayer Practice Violates the Establishment Clause.

The Establishment Clause of the First Amendment of the United States Constitution states that “Congress shall make no law respecting an establishment

of religion.” U.S. Const. Amend. I. This “prohibition against the establishment of religion applies to the states through the Fourteenth Amendment.” *McCreary County v. ACLU*, 125 S. Ct. 2722, 2728 n. 2, 545 U.S. ___ (2005); *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)).

The primary test that the Supreme Court applies to Establishment Clause cases is the *Lemon* test. *McCreary*, 125 S. Ct. at 2734-36; *Lemon v. Kurtzman*, 403 U.S. 602, 620-21 (1971). For government action to survive this test, “the challenged practice must have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion.” *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003).

According to the Eleventh Circuit, the endorsement test is part of the second prong of *Lemon* test: “The effects prong asks whether . . . the practice under review in fact would convey a message of endorsement or disapproval to an informed reasonable observer.” *Glassroth*, 335 F.2d at 1297.³

³ The prayers also violate the more stringent *Larson* test. Although *Lemon* is the test regularly used by the Courts, “as our citations of *Board of Education v. Allen*, 392 U.S. 236, 88 (1968), and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), indicated, the *Lemon v. Kurtzman* ‘tests’ are intended to apply to laws affording a uniform benefit to *all* religions and not to provisions . . . that discriminate *among* religions.” *Larson v. Valente*, 456 U.S. 228, 256 (1992). In cases where the government “clearly grants denominational preferences . . . that rule must be invalidated unless it is justified by a compelling government interest, and unless it is clearly fitted to further that interest.” *Id.* at 246-47; *Adair v. England*, 183 F. Supp. 2d 31, 49 (D.D.C. 2002), (applying strict scrutiny where “the Navy, through

The sectarian prayer practice cannot survive the *Lemon* test.

1. Marsh Does Not Apply to Sectarian Prayer

In the limited circumstance of nonsectarian legislative prayer, the Supreme Court has applied the test in *Marsh v. Chambers*, 463 U.S. 783 (1983). *Marsh*, however, is “one-of-a-kind” and limited to the narrow facts of that case. *Coles v. Cleveland Bd. Of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999) (calling *Marsh* a “historical abberation”); *see also Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004) (noting the “Supreme Court’s apparent intent to confine its holding in *Marsh* to the specific ‘circumstances’ before it—a nonsectarian prayer preceding public business, directed only at the legislators themselves”); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Al. 2002) (stating that the Court in *Marsh* “concentrated on the very specific nature of the facts in that case), *aff’d by* 335 F.2d 1202 (11th Cir. 2003); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1232 (10th Cir. 1998) (“[T]he evolution of Establishment Clause jurisprudence indicates that the constitutionality of legislative prayers is a *sui generis* legal question.”); *Simpson v. Chesterfied County Bd. Of Supervisors*, 292 F. Supp. 2d 805, 815

its policies and practices, is favoring chaplains of liturgical Christian faiths over those of non-liturgical Christian faiths.”); *ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tx. 1984) (holding that the County Commissioners’ erection of three Latin-style crosses and a Star of David as part of a war memorial failed to meet strict scrutiny). Here, Cobb displays a denominational preference - explicitly Christian prayers - and, thus, the more stringent test applies.

(E.D. Va. 2003) (“*Marsh* is applicable only in narrow circumstances.”). Indeed, the Supreme “Court has never found its analysis applicable to any other circumstances; rather the Court has twice specifically refused to extend the *Marsh* approach to other situations.” *Wynne*, 376 U.S. at 302.

In *Marsh*, the Supreme Court upheld nonsectarian legislative prayers because of their “unique history.” *Marsh*, 463 U.S. at 791. But, “standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees.” *Id.* at 790. Thus, the Court went on to examine the prayers themselves and whether any aspects of the prayers violated the Constitution: “We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause.” *Id.* at 792.

One feature examined was the content of the prayer. The Court made clear that the Chaplain had previously “removed all references to Christ” from his prayers. *Id.* at 793 n.14.⁴ Accordingly, the Court found that there was “no indication

⁴Other cases, in other contexts, have also acknowledged that references to Jesus, Jesus Christ, or Christ are sectarian references. *Lee v. Weisman*, 505 U.S. at 588, 589 (“nonsectarian prayer” has no “explicit references to . . . Jesus Christ, or to a patron saint.”); *Coles v. Cleveland Bd. Of Educ.*, 171 F.2d 369, 373 (6th Cir. 1999) (“[T]he prayers in this case were clearly sectarian, with repeated references to Jesus and the Bible.”); *Doe v. Santa Fe. Indep. Sch. Dist.*, 168 F.3d 806, 822 (5th Cir. 1999) (“A nonsectarian, nonproselytizing prayer that, for example, invokes the name of Buddha or Mohammed or Jesus or Jehovah is an obvious oxymoron.”), *aff’d* 530 U.S. 290 (2000); *Washegesic*, 33 F.3d at 684 (“Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect. . . .”); *Stein v.*

that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Id.* at 794-95. *Marsh*, thus, only applies to *nonsectarian* legislative prayer that does not “symbolically plac[e] the government’s ‘official seal of approval on one religious view.’” *Id.* at 792 (internal citations omitted).

The Supreme Court, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), expounded on its decision in *Marsh* and explained that the nonsectarian nature of the prayers was central to the Court’s holding: “However history may affect the constitutionality of nonsectarian references to religion by the government, **history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.**” *Allegheny*, 492 U.S. at 603 (emphasis added). The Court further stated:

Indeed, in *Marsh* itself, the Court recognized that not even the unique history of legislative prayer, can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. **The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had ‘removed all references to Christ.’**”

Id. at 603 (internal citations omitted) (emphasis added); *see also id.* at 630-31 (O’Connor, J., concurring) (“It is the combination of the longstanding existence of

Plainwell Community ch., 822 F.2d 1406, 1410 (6th Cir. 1987) (invocations that “employ the language of Christian theology and prayer” do not pass the *Marsh* test).

practices . . . **as well as their nonsectarian nature** that leads me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs.”) (emphasis added); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (stating that “our constitutional tradition . . . has ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present, and indeed even when no ersatz, ‘peer pressure’ psycho-coercion is present—where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Rules of the world are known to differ (for example, the divinity of Christ).”).

This passage in *Allegheny* can mean only one thing – legislative prayers that refer to Jesus, Christ, or Jesus Christ affiliate the government with “one specific faith or belief” and are thus unconstitutional regardless of the unique history of legislative prayer generally. *Allegheny*, 492 U.S. at 603.

Lower courts have consistently held that *Marsh* does not permit sectarian legislative prayers. *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005) ; *Rubin v. Burbank*, 124 Cal. Rptr. 2d 867 (Cal. App. 2003); *Bacus v. Palo Verde Unified Sc. Dist. Bd. Of Educ.*, 52 Fed. Appx. 335, 357 (9th Cir. 2002).

Most recently, the Fourth Circuit, in *Wynne*, 376 F. 3d at 292, held that sectarian legislative prayers were not saved by *Marsh*. The facts in *Wynne* are indistinguishable from the case at bar. In *Wynne*, the Council “always opened with prayer.” *Id.* at 292. The opening prayer “frequently refers to Jesus, Jesus Christ, Christ or Savior in the opening or closing portion” of the prayer. *Id.* Each prayer, however, referenced “Jesus, Jesus Christ, or Christ” only once. *Id.* at 300. The Court found that these prayers “stand in sharp contrast” to the prayers in *Marsh*, where the prayers were “characterized as ‘nonsectarian’ and ‘civil,’” and where “the chaplain had affirmatively ‘removed all references to Christ.’” *Id.* at 298 (*quoting Marsh*, 463 U.S. at 793 n.14). The Great Falls’ invocations had the effect of affiliating the government with one faith - Christianity - and thus, “do not fall within the category of legislative prayers justified by the ‘unique history’ discussed in *Marsh*.” *Id.* at 299. Accordingly, the court found that “the Town Council clearly ‘advanced’ one faith, Christianity, in preference to others in a manner decidedly inconsistent with *Marsh*.” *Id.* at 301.

The Council in *Bacus*, also “almost always offered the invocation, always ‘in the name of Jesus.’” 52 Fed. Appx. at 357. Thus, “*Marsh* . . . would not save the practice.” *Id.* To the contrary, “praying ‘in the name of Jesus’ to commence its meetings necessarily has the effect of ‘making adherence to a religion relevant’ to the

plaintiffs' 'standing in the political community.'" *Id.*

In *Rubin*, "only about 20 percent of the volunteers providing the legislative prayer mentioned Jesus Christ in the invocation." 124 Cal Rptr. 2d at 873. The Court explained that even though the majority of the prayers did not mention Jesus, the practice violated the First Amendment: "We interpret *Marsh* to mean that *any* legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause." *Id.* Therefore, the invocation "offered to Jesus Christ violated the Establishment Clause because it conveyed the message that Christianity was being advanced over other religions." *Id.*

In accordance with *Wynne*, *Bacus*, and *Rubin*, Cobb County's prayer practice is unconstitutional. The Cobb County government "always opens with a prayer," and the prayers "frequently refer to Jesus, Jesus Christ, Christ, or Savior," *Wynne*, 376 F. 3d at 292, 300; V. Compl. at ¶¶ 21, 40, & 57. Accordingly, *Marsh* cannot save these sectarian prayers.

Because the case at bar involves *sectarian* legislative prayers, *Marsh* does not apply. *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005) (ruling that *Marsh* does not apply to sectarian legislative prayers); *Rubin v. Burbank*, 124 Cal. Rptr. 2d 867 (Cal. App. 2003) (same); *Bacus v. Palo Verde Unified Sc. Dist. Bd. Of Educ.*, 52 Fed. Appx. 335, 357 (9th Cir. 2002) (same). Being unable to

survive strict scrutiny, as required by *Larson* or any of the three prongs of *Lemon*, the practice is unconstitutional.

2. The Prayer Practice Violates the *Lemon* test.

a. The Prayers Serve A Religious Purpose.

The purpose prong of the *Lemon* test says that “government action must have a ‘secular purpose.’”⁵ *McCreary*, 125 S. Ct. at 2736 “The secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” *Id.*; *Turner v. Habersham*, 290 F. Supp. 2d 1362, 1369 (N.D. Ga. 2003). “[W]here a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity.” *Mellen v. Bunting*, 327 F.3d 355, 373 (4th Cir. 2003). That is why “an act so intrinsically religious as prayer” cannot meet the secular purpose prong of the *Lemon* test. *Id.* (quoting *Constangy*, 947 F.2d at 1150).

The Eleventh Circuit, in *Karen B. v. Treen*, explained:

Prayer is perhaps the quintessential religious practice for many of the world’s faiths, and it plays a significant role in the devotional lives of most religious people. Indeed, **since prayer is a primary religious activity in itself**, its observance in public school classrooms has, if

⁵ The purpose analysis is important because “[m]anifesting a purpose to favor one faith over another, or adherence to religion generally clashed with the understanding reached . . . after decades of religious war that liberty and social stability demand religious tolerance that respects the religious views of all citizens” *McCreary* 125 S. Ct. at 2735 (internal citations omitted).

anything, a more **obvious religious purpose** than merely displaying a copy of a religious text in the classroom.

653 F.2d 897 (11th Cir. 1981), *aff'd without opinion by* 455 U.S. 913 (1982) (emphasis added). Indeed, observance of prayer itself “implies a religious purpose” and “implies that no secular purpose can be satisfied.” *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983) *aff'd sub nom. Wallace v. Jaffree*, 472 U.S. 38 (1985) (finding that there was no secular purpose where the intent was to allow for prayer); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981) (“[T]he invocation of assemblies with prayer has no apparent secular purpose.”).

Even if the County had a legitimate secular purpose, “the unmistakable message of the Supreme Court’s teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests.” *Holloman v. Harland*, 370 F.3d 1252, 1286 (11th Cir. 2004); *see also Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (holding that the School District lacked a secular purpose because “even if its purpose is not strictly religious, [its purpose] is sought to be accomplished through readings without comment from the Bible.”); *Constangy*, 947 F.2d at 1149-50 (rejecting the argument that prayer in a courtroom served the secular purpose of “solemnify[ing] and dignify[ing] the atmosphere in court and to remind those in attendance of the court’s search for truth and justice.”). Indeed, the principles established in government sponsored prayer cases would be “meaningless if the use

of prayer may be justified on grounds that it promotes secular virtues.” *Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980).

Here, the government is sponsoring a sectarian prayer before every public government meeting. This quintessential religious activity serves no secular purpose. Even if it did, however, “attempting to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose.” *Holloman*, 370 F.3d at 1287.

b. The Prayers Have An Impermissible Religious Effect.

The effects prong of the *Lemon* test asks whether “the ‘principal or primary effect’ of a challenged law or conduct is to ‘advance or inhibit religion.’” *See King v. Richmond County*, 331 F.3d 1271, 1278 (11th Cir. 2003). According to the Eleventh Circuit, application of this prong requires the court to apply the endorsement test: “The effects prong asks whether . . . the practice under review in fact would convey a message of endorsement or disapproval to an informed reasonable observer.” *Glassroth*, 335 F.2d at 1297. A reasonable observer would perceive endorsement where the government is sponsoring Christian prayer at government meetings.

As explained above, “prayer is perhaps the quintessential religious practice.” *Treen*, 653 F.2d at 901; *Holloman*, 370 F.3d at 1286. Indeed, “prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object.” *Treen*, 653 F.2d at 901. “The primary effect of prayer is the

advancement of ones religious beliefs." *Jaffree v. Wallace*, 705 F.2d at 1534-35; *Collins*, 644 F.2d at 762.

The government may not sponsor sectarian prayer because it sends the message that it endorses and supports the religious message and activity. Government sponsorship of these prayers "involves the state in advancing the affairs of religion." *Jaffree*, 705 F.2d at 1535. Indeed, "[t]he Supreme Court and this circuit have indicated that such prayer activities cannot be advanced without the implication that the state is violating the establishment clause." *Id.*; *Holloman*, 370 F.3d at 1286 ("To explicitly call for prayer requests, invoke a moment of silence for prayer with the phrase 'let us pray' and actually hold such a moment of silence, and sometimes conclude with "Amen" has the effect of both endorsing religious activity, as well as encouraging or facilitating its practice."); *Mellen*, 327 F.3d at 375 ("The Establishment Clause prohibits a state from promoting religion by authoring and promoting prayer for its citizens"); *Constangy*, 947 F.2d at 1151 (finding that when a judge "proceeds to recite a prayer in court, clearly the court is conveying a message of endorsement of religion.").

Government sponsored sectarian prayers are an even clearer violation of the Establishment Clause, as the Establishment Clause "certainly means at the very least that government may not demonstrate a preference for one particular sect or creed

(including a preference for Christianity over other religions).” *Allegheny*, 492 U.S. at 605. Cobb County’s practice of sponsoring Christian prayers at its government meetings, therefore, cannot meet the requirements of the second prong of the *Lemon* test.

C. The Prayers Entangles the Cobb County Government and Religion.

“The excessive entanglement component of the *Lemon* test has been interpreted to mean that ‘some governmental activity that does not have an impermissible religious effect may nevertheless be unconstitutional, if in order to avoid the religious effect government must enter into an arrangement which requires it to monitor the activity.’” *Nartowicz v. Clayton County School Dist*, 736 F.2d 646, 649-50 (11th Cir. 1984) quoting *Americans United for Separation of Church and State v. School District of the City of Grand Rapids*, 718 F.2d 1389, 1400 (6th Cir.1983).

The County takes the role of inviting clergy to the Cobb County government meetings to recite a prayer. V. Compl. ¶¶ 23, 60 & exs. C & D. The choosing of “appropriate” clergy members to give the prayer constitutes impermissible government entanglement.

Furthermore, the fact that the County involved itself in an issue that has caused controversy for religious reasons is an important factor in showing improper entanglement. The mere act of taking a position in a religious dispute amounts to

improper government entanglement with religion. For example, in *Bell v. Little Axe Independent Sch. Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985), a school board involved itself in the locally controversial question of the use of school buildings for prayer meetings. The court found:

[not] only was the issue controversial within the community, the school board was faced to address it in an attempt to resolve these conflicts. This only further embroiled local government in an issue that had already divided a community along religious lines. The district court found excessive entanglement inescapable in this context, and we agree.

766 F.2d 1391, 1407 (10th Cir. 1985). Here, Cobb County has acted similarly. It has placed itself in the center of a religious debate. Instead of having a nonsectarian prayer, it has taken the side of Christians in a religious debate and sponsored and endorsed Christian religious practices and exercises.

The practice of sponsoring sectarian prayers at Cobb County government meetings is not saved by the *Marsh* test and violates the *Lemon* test. The sectarian prayers are unconstitutional.

II. The Plaintiff will Suffer Irreparable Harm if the Prayers Are Continued.

The second factor for the Court to determine is whether the Plaintiff will suffer irreparable harm absent a preliminary injunction. The answer is simple: “The loss of First amendment freedoms for even minimal periods of time [] unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-74

(1976). This is true for both free speech and Establishment Clause violations. *ACLU v. Rutherford County*, 209 F. Supp. 2d 799, 813 (M.D. Tenn. 2002) (applying this concept to a Ten Commandments display dispute); *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667, 678 (E.D. Ky. 2000) (same).

III. Granting the Injunction Will Not Cause Substantial Harm to Others.

An injunction ordering the County to refrain from sectarian references in its government legislative prayers will not cause harm to the County or to others. *See e.g. Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 911 (N.D. Miss. 1995). The injunction should be granted because “compared to the effects of the possible First Amendment violation that will be incurred by the Plaintiff if we fail to enter an injunction, the County’s harm is clearly inconsequential.” *Kimbley*, 199 F. Supp. 2d at 875; *Pulaski County*, 96 F. Supp. 2d at 701-02.

IV. Enjoining the Sectarian Prayers is in the Public’s Interest.

“The protection of First Amendment rights and vindication of constitutional violations is always in the public’s interest.” *Rutherford County*, 209 F. Supp. at 812; *O’Bannon*, 110 F. Supp. 2d at 858-59; *Harlan County*, 96 F. Supp. 2d at 679; *Pulaski County*, 96 F. Supp. 2d at 701-02.

CONCLUSION

For the foregoing reasons, a preliminary injunction should be entered against the Defendants as set forth in Plaintiffs’ Motion for a Preliminary Injunction.

DATED: This the 10th day of August, 2005.

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(Georgia Bar No.: 744878)
Margaret Garrett
(Georgia Bar No. 255865)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

)
GARY BATS PELPHREY,)
EDWARD BUCKNER)
ROBERTO MORAES) Civil Action
WESLEY CROWE) File No. _____
JEFFREY SELMAN,) _____
)
Plaintiffs,)
)
v.) Complaint for Declaratory
) and Injunctive Relief
) and Nominal Damages
COBB COUNTY, GEORGIA;)
SAM OLENS, , in his official)
capacity as Chairman of the Cobb)
Commission and in his)
individual capacity,)
MURRAY HOMAN, in his official)
capacity as Chairman of the Cobb)
County Planning Commission)
and in his individual capacity,)
Defendants.)
_____)

CERTIFICATE OF SERVICE

I hereby certify that I have, on this date, served a copy of the foregoing Plaintiff's Motion for Preliminary Injunction and Plaintiff's Memorandum in Support of Preliminary Injunction by depositing a true and correct copy of the same in the U.S. Mail postage prepaid, addresses to counsel of record for the Defendants as follows:

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100 Cherokee Street, Suite 595
Marietta, GA 30090

DATED: This the 10th day of August, 2005.

Respectfully submitted,

Margaret F. Garrett

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capacity as Chairman of the Cobb)
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MURRAY HOMAN, in his official)
capacity as Chairman of the Cobb)
County Planning Commission)
and in his individual capacity,)
Defendants.)

CERTIFICATE OF COMPLIANCE WITH TYPE / STYLE LIMITS

This brief is filed in Book Antigua 13 point type and complies with LR 7.1(D).

DATED: This the 10th day of August, 2005.

Respectfully submitted,

Margaret F. Garrett

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County Planning Commission)	
and in his individual capacity,)	
Defendants.)	

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Come now, Plaintiffs Gary Bats Pelphrey, Edward Buckner, Roberto Moraes, Wesley Crowe, and Jeffrey Selman, file this Motion for a Preliminary Injunction for ordering the Defendants, their successors, assigns, those persons in active concert or participation with them, and all other persons within the scope of Fed. R. Civ. P. 65, from knowingly and intentionally allowing sectarian prayers at County

government meetings, making any further expenditures of public funds, and taking any further action to sponsor sectarian prayers at Cobb County government meetings; and requiring the Defendants, their successors, and assigns to advise anyone conducting a prayer as part of the City Council meeting that sectarian prayers are not permitted.

The Plaintiffs believe that the case law and evidence is sufficiently clear that no argument is necessary. However, Plaintiffs would welcome the opportunity for a short oral argument if the Court deems such helpful.

DATED: This the 10th day of August 2005.

Respectfully submitted,

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(Georgia Bar No. 744878)
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