

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

BATS A/K/A/ GARY PELPHREY,  
EDWARD BUCKNER, ROBERTO  
MORAES, WESLEY CROWE, JEFFREY  
SELMAN, MARIE SHOCKLEY, and  
ROBERTA "BOBBI" GOLDBERG,

Plaintiffs,

v.

COBB COUNTY, GEORGIA; SAM  
OLENS, in his official capacity as  
Chairman of the Cobb County  
Commission and in his individual  
capacity; and PHILIP T. "MURRAY"  
HOMAN, in his official capacity as  
Chairman of the Cobb County Planning  
Commission and in his individual  
capacity,

Defendants.

CIVIL ACTION FILE  
NUMBER: 1:05-CV-2075 (RWS)

**PLAINTIFFS' BRIEF SUPPORTING THEIR PROPOSED  
INJUNCTION AND ISSUANCE OF NOMINAL DAMAGES**

The Court, in its September 8, 2006 Order, directed the Plaintiffs to submit filings addressing (1) the appropriate scope of injunctive relief; (2) which Defendants should be made subject to the injunction; (3) what measure of nominal damages should be assessed and; (4) which Defendants should be held liable for nominal damages. *Pelphrey v. Cobb County*, Civ. No. 1:05-CV-2075, 2006 WL 2590594, \*15 (N.D. Ga. Sept. 8, 2006). Taking into account the Court's ruling on Summary

Judgment, the Plaintiffs have attached a proposed injunction and are submitting this brief in support of the proposed injunction.

**I. The Scope of the Injunction**

The injunction proposed by the Plaintiffs is attached as Exhibit 1. It primarily would do two things. First, Section One of the injunction would prevent the exclusion of prayer givers based upon his or her religious identify. This provision in the injunction simply tracks the ruling issued by the Court in its September 8, 2006 Opinion: "In the view of this Court, not even 'the spacious boundaries set forth in *Marsh* [,]' Simpson, 404 F.3d at 284, can accommodate a practice that categorically excludes these faiths from the invocation opportunity on the basis of their religious identity." *Pelphrey*, 2006 WL 2590594, \*14

Second, to ensure that the Defendants adhere to Section One, Section Two of the injunction sets out simple and basic procedures that the County must employ. The main focus of these procedures is the creation of the master list of prayer givers because the constitutional violation occurred during this step of the selection process. *Id.* The injunction would require that the county set up policies that allow persons to self-nominate or be nominated and then placed on a master list of prayer givers.

Section Two, in part, would crystalize basic procedures. In the past, for example, some prayer givers, such as Imam Taufique, have nominated themselves to be added to the list. (Defs' Response to Pls.' Statement of Material Facts ¶ 2; Martin Dep. 25:3-26:3). Others on the list of prayer givers have been nominated by Commissioners. (Martin Dep. 13:14-14:1 (Q: Do commissioners ever make suggestions about members of clergy to add to your lists? A: Yes, at times.)) But, not all clergy or faith or belief representatives identified by County employees or suggested by County citizens were added to the list. *Pelphrey*, 2006 WL 2590594, \*14.

This section of the injunction would simply amend the current process to require that the policy is uniform and applies to all persons who self-nominate or are nominated, regardless of his or her religious identity. One would expect that the Defendants would welcome such a process, especially because the County is currently engaged in a post-ruling process of developing written guidelines for prayer giver selection.<sup>1</sup> Ex. 2 (October 12, 2006 letter from Walbert to Garrett).

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<sup>1</sup> Of course, that the Defendants may be changing their practice after this Court's Order does not moot this case or make the injunction unnecessary. As this Court recognized:

[I]t is well-established that a defendant's voluntary cessation of a challenged practice does not deprive the federal courts of power to determine the legality of the practice. *See Ala. v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1131 (11th Cir.2005). Rather, [v]oluntary

Section Two of the injunction would also simply require that the county randomly choose from the list so as to not favor any one religion over another or to create the perception that the government is affiliated with one religion.

The net impact of the proposed injunction is to allow persons to be selected for giving the invocation without religious bias.

**II. The Injunction Should Apply to the Defendants and To Those Within the Scope of Federal Rule of Civil Procedure 65 (d).**

Federal Rule of Civil Procedure 65 (d) sets out the proper scope of an injunction. An injunction is binding upon “the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Fed. R. Civ. Pro. 65(d).

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cessation of a challenged practice will only moot a case if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. ” *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)).

*Pelphrey*, 2006 WL 2590594, \*15; *see also Jaeger v. Douglas County Sch. Dist.*, 862 F.2d 824, 833-34 (11<sup>th</sup> Cir. 1989) (finding that the case was not moot because it was not absolutely clear that the Defendants would not revert back to their prior practice). Here, the cessation is not even voluntary, but is a consequence fo this Court’s order.

The Court, in its September 8, 2006 Opinion, held that the prayer practice of the Cobb County Planning Commission was unconstitutional. *Pelphrey*, 2006 WL 2590594, \*14. In particular, it held that the practice used to choose the prayer givers violated the Establishment Clause. *Id.* The injunction therefore, should apply to the Planning Commission, through its Chief Officer, Chairman Homan and his successors, as it is the Planning Commission whose practice violated the Constitution. Furthermore, the injunction should apply to any employees, servants, and agents who actually perform the task of choosing and inviting clergy to give the prayers.

The injunction should also apply to Cobb County, through its Chief Officer, Commissioner Sam Olens and his successors. The Cobb County Board of Commissioners exert significant control over the Planning Commission and its employees participate in the selection of prayer givers for Planning Commission meetings. At a minimum, the County and its employees are "in active concert or participation with" the Planning Commission.

The application of an injunction to those "in active concert or participation" is designed to extend the scope of injunctive relief to afford full relief and protection of the court. As such, it even extends to "prohibited acts through aiders and abettors," even if they were not parties to the original proceeding. *Regal Knitwear Co.*

*v. National Labor Relations Bd.*, 324 U.S. 9, 14 (1945) (citing Rule 65). A "joint effort," even by "legally distinct[]" parties falls squarely within the scope of a protective injunction under Rule 65. *Lindland v. United States Wrestling Assoc.*, 227 F.3d 1000, 1005-06 (7<sup>th</sup> Cir. 2000) (analyzing "active concert" provision and finding that injunctive relief is "binding" on both United States Olympic Committee and USA Wrestling because contrary ruling would "frustrate the injunctions effectiveness").

The selection of prayer givers at County meetings is a "joint effort" of the Planning Commission and Board of Commissioners.<sup>2</sup> Employees of the Board of

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<sup>2</sup> The Board of Commissioners and Planning Commission could also be considered "extensions" of each other, as the Board of Commissioners has control over the activities of the Planning Commission. RONALD I. MIRVIS, J.D., ANNOTATION, *Who, under Rule 65(d) of the Federal Rules of Civil Procedure are "in active concert or participation with parties to action so as to be bound by order granting injunction" with parties to action so as to be bound by order granting injunction*, 61 ALR Fed 482 § 3 (1983). First, the Planning Commission is merely an advisory committee, created by the Board of Commissioners and their main powers and duties to "prepare and recommend for adoption" zoning ordinances, resolutions, and county maps to the Board of Commissioners. COBB COUNTY, GA., CODE § 134.62 (2006), Ex. 3 (County Ordinances governing the Planning Commission). The Planning Commission's determinations are binding unless approved by the Board of Commissioners itself. In addition, the Planning Commission members are "political appointees" of the members of the Cobb County Board of Commissioners. Each Board of Commissioner "appoints one member to the commission" and "[e]ach member appointed by a member of the board of commissioners shall serve concurrently with and at the pleasure of the appointing commissioner's term of office and until a successor is appointed. COBB COUNTY, GA., CODE § 134.64 (2006), Ex. 3. As the Planning Commission members can be removed simply at the request of the Board members, the Board of Commissioners, in effect, can direct the affairs of the Planning Commission.

Commissioners, not employees of the Planning Commission, currently schedule the prayer givers for the Planning Commission meetings. Previously, Ms. Richardson, an employee of the County Clerk's Office, invited clergy to give prayers at Planning Commission meetings and thus no longer chooses the prayer givers. (Richardson Dep. at 5:1-19.) Ms. Richardson is no longer employed in that position and no longer schedules prayer givers for Planning Commission meetings. (*Id.* at 14:16-17.)

After this Court's Order on Summary Judgment, Ms. Martin, who has chosen clergy for the Board of Commissioners invocations for several years, took on the role of choosing clergy for the invocations at Planning Commission meetings. Ex.2 (Oct. 12, 2006 Letter from David Walbert). Ms. Martin works in the County Manager's office, and is thus employed by the Board of Commissioners. (Martin Dep. 4:11-25 (Q: So you work for the County Commissioners? A: Yes.)) Yet, she is tasked with choosing the prayer givers for the Planning Commission. Ex. 2. Ms Martin will create and use the same master list and use the same procedures for choosing clergy from that list for both the Board of Commissioners and the Planning Commission. *Id.*

The Planning Commission's prayer practice is now totally and completely intertwined with the Board of Commissioners' prayer practice. And, County Commission employees perform the tasks for the Planning Commission. Therefore, the County Commission, for whom Ms. Martin works, must be equally enjoined

from violating the Constitution.

### III. Nominal Damages

“The great weight of authority holds that when it is determined that the plaintiff’s federally protected rights were violated but there is no evidence of actual injury, nominal damages *must* be awarded.” MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 16.5 (3d Ed. 1997). The constitutional rights of the Plaintiffs were violated, *Pelphrey*, 2006 WL 2590594, \*14, and they are entitled to nominal damages of \$1.00 per Plaintiff, for a total of \$7.00. *Carey v. Piphus*, 435 U.S. 247, 267 (1978) (identifying that nominal damages are commonly \$1.00); *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5<sup>th</sup> Cir. 1980)(granting a Plaintiff \$1.00 in nominal damages); *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575, 581 (M.D. Fla. 1994) (same).

The nominal damages should be assessed against the County, as Ms. Richardson, who engaged in the unconstitutional acts, was an employee of the County and she performed these acts in the course of her employment as the delegated decision-maker for these decisions for the County. (Richardson Dep. 5:1-16 (Q:And it’s your job then—it was your job to identify and invite clergy to the planning commissioner meetings? A: Correct.); *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986) (“If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of

official government policy as that term is commonly understood.”).

**IV. Conclusion**

For the foregoing reasons, the Plaintiffs ask the Court to issue the attached injunction and to grant the Plaintiffs \$7.00 in nominal damages.

DATED: This the 17<sup>th</sup> day of October, 2006.

Respectfully submitted,

/s/ Margaret F. Garrett

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**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 17<sup>th</sup> day of October, 2006.

Respectfully submitted,

/s/ Margaret F. Garrett  
Margaret F. Garrett

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)  
) Defendants. )  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that **Plaintiffs' Brief Supporting Their Proposed Injunction and Issuance of Nominal Damages** was electronically filed with the Clerk of Court using the CM/ECF system, which serves notification of such filing to counsel of record, The counsel of record are:

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DATED: This the 17<sup>th</sup> day of October, 2006.

Respectfully submitted,

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