UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

THOMAS JOSEPH COLEMAN, III, and BRANDON RAYMOND JONES,	)	
Plaintiffs,	)	**Case No.: 1:12-CV-190**
v.	)	**Mattice / Lee**
HAMILTON COUNTY GOVERNMENT TENNESSEE,	)	
Defendant.	)	

HAMILTON COUNTY'S SUPPLEMENTAL BRIEF ADDRESSING THE STANDARD FOR EVALUATING A FACIAL CHALLENGE AND WHETHER THE COURT NEEDS TO ADDRESS THE CONTENT OF LEGISLATIVE INVOCATIONS

Defendant Hamilton County, Tennessee ("Hamilton County") submits this post-hearing Supplemental Brief pursuant to this Court's order dated July 26, 2012.

SUMMARY

The motion pending before this Court seeks prospective relief to "halt the prayer activities" at Hamilton County Commission meetings. On July 3, 2012, Hamilton County adopted a resolution which "specifically repealed" and "replace[d] any prior practice of the Hamilton County Commission concerning opening invocations" and set forth a comprehensive policy outlining operational standards for conducting invocations while also ensuring governmental neutrality toward the content of invocations. [R. 38-1 at 5, ¶1 and 8, ¶7-10] Plaintiffs, however, allege that the very existence of the policy constitutes a violation of the First Amendment of the Constitution simply because it does not ban invited speakers from offering an audible prayer or solemnizing message that recognizes the existence of a deity.

The sole question before the Court, then, is whether an invocation policy that permits invocation speakers to reference or acknowledge a divine being is constitutional. A facial challenge to the invocation policy requires Plaintiffs to establish that no set of circumstances exists under which the policy would be valid. *United States v. Solerno*, 481 U.S. 739, 745 (1987). This they cannot do when the policy permits the very relief demanded—a moment of silence—and does not require any invocation consistent with a particular faith tradition or any acknowledgment of religion whatsoever.

In light of the current posture of the pending motion, this Court need not make any ruling concerning the content of an invocation, but a review of the facts of *Marsh v. Chambers*, 463 U.S. 783 (1983), makes plain that the inclusion of explicit Christian references in legislative prayers does not render the prayers unconstitutional. Dicta in some decisions from the United States Court of Appeals for the Sixth Circuit have referred to the *Marsh* chaplain's self-characterization of his prayers as "nonsectarian," but no decision from the Sixth Circuit has invalidated an invocation due to the Christian content or "sectarian"[1] nature of the prayers. In fact, a closer examination of the Sixth Circuit cases demonstrates wide disagreement about the very meaning of the term "sectarian." In light of this disagreement, the Sixth Circuit has heeded the instruction of *Marsh* and refused to evaluate the content of prayers. *See Chaudhuri v. State of Tennessee*, 130 F.3d 232, 236-37 (6th Cir. 1997) (facing a complaint directed at both "sectarian" and "nonsectarian" prayers at a college graduation as well as a challenge by a dissenting judge regarding the characterization of the prayers as "Christian," the court

[1] It is worth noting that the act of labeling a person's sincere religious expression as "sectarian" is problematic and may connote bigotry. *See Mitchell v. Helms*, 530 U.S. 793, 828-29, (2000) (noting that hostility to aid to "sectarian" institutions has a shameful pedigree that the Court disavows); *see also Colorado Christian University v. Weaver*, 534 F.3d 1245, 1258 n.5 (10th Cir. 2008) (noting "the term 'sectarian' imparts a negative connotation" and recognizing that "the Supreme Court has not used the term in recent opinions except in quotations").

recognized that even a "nonsectarian" prayer is offensive to some but refused to parse the content of prayers) (citing *Marsh*, 463 U.S. at 794-95).

It is one thing for a court to opine on the constitutionality of the fact that prayers occur before meetings of deliberative public bodies, *see Marsh*, but quite another to sit in judgment on how or to whom a person must pray. To the extent Plaintiffs ask this Court to issue decrees and guidelines about the theological context in which words may or may not be used in prayer, they seek relief that may be beyond the jurisdiction of this Court. Before a court can define the content of government sanctioned prayers, it must satisfy itself that the matter is justiciable and does not invoke the political question doctrine. *See ACLU v. Natl Security Agency*, 493 F.3d 644, 658-59 n.19 (6th Cir. 2007) (courts need to ensure that the request is not barred under the political question doctrine as a prerequisite to Federal Court subject matter jurisdiction). Judicial management of the content of legislative prayer intrudes upon the discretion of legislative bodies to govern the internal operations of their meetings. Additionally, there are no judicially discoverable and manageable standards available to this Court to parse the content of prayers. *See Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012) (noting that the absence of judicially discoverable and manageable standards constitutes a nonjusticiable political question).

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION AND MAY DO SO WITHOUT OPINING ON THE CONTENT OF LEGISLATIVE PRAYERS.

Plaintiffs' eagerness to move for preliminary injunction has simplified the analysis for the Court in two notable ways. First, injunctive relief is prospective only. Therefore, the only question before the Court is the constitutionality of the County's resolution governing invocations at the start of legislative meetings. Claims regarding the constitutionality of

practices prior to the adoption of the resolution are moot for the purposes of the prospective relief sought by the current motion. (*See* R. 39 at 6, Def's. Br. in Opp'n. to Mot. for Prelim. Inj., Sect. III). The demand for prospective relief narrows the scope of the question before the Court.

Second, the challenge to the County's invocation policy is clearly a facial challenge. *See Bowen v. Kendrick*, 487 U.S. 589, 601 (1988) (Supreme Court notes that considering the validity of a statute without the benefit of a record to see how it has been applied constitutes a facial challenge). The stipulated facts demonstrate that the Hamilton County invocation policy was adopted on July 3, 2012. The record does not reflect how the policy will be implemented over time. The absence of a meaningful record leaves the court no choice but to consider the demand for prospective relief to be a facial attack on the invocation policy.

By bringing a facial challenge, Plaintiffs have the burden of proving that no set of circumstances exists under which the policy would be valid. *Solerno*, 481 U.S. at 745. Plaintiffs have failed to meet that burden. The Hamilton County invocation policy permits moments of silence, short solemnizing messages that need have no religious content, and diverse prayers offered consistent with a variety of faith traditions represented by volunteers. Based on the record before the Court, there is no way to determine ahead of time the types of invocations that will be given, how often the invocations may make references that are unique to a particular faith tradition, or the variety of faith perspectives that will be represented.[2] Because the County does not censor or review the invocations, it is conceivable that the policy will be regularly implemented with a moment of silence, consistent with the demands of the Plaintiffs. An invocation policy that may be implemented without including any religious expression cannot be found to violate the Establishment Clause on its face.

[2] The Hamilton County practice is valid irrespective of the variety of faith traditions represented by the volunteer speakers or the references that may be unique to a particular faith tradition.

Due to the speculative nature of anticipating every circumstance under which a statute or policy may be implemented, the Sixth Circuit Court of Appeals has warned against issuing injunctions on facial challenges. *Warshak v. United States*, 532 F.3d 521, 528-29 (6th Cir. 2007) ("Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncements on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.") (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). This case demonstrates the point. A host of cases have considered the constitutionality of the practices adopted by Hamilton County and found them to be constitutional. (*See* R. 39 at 17, Def's. Opp'n. to Mot. for Prelim. Inj.). Indeed, the only case to enjoin the application of a policy substantially similar to Hamilton County's went out of its way to strike down only the *implementation* of the policy, finding it problematic only after reviewing a record covering years of application and determining that "sectarian" references became too frequent. *See Joyner v. Forsyth County*, 653 F.3d 341, 349 (4th Cir. 2011) (noting that infrequent references to specific deities are insufficient to make out a constitutional case). Notably, the court upheld the policy on its face. 653 F.3d at 353.

The standard for evaluating a facial challenge does not require this Court to opine upon the content of the invocations that may be given in accord with the policy, and there is no reason for the Court to address the content of invocations because Plaintiffs have not sought such relief. Despite extensive questioning by the Court, the Plaintiffs' testimony made clear that they are offended by the very existence of a policy that permits anyone to open public meetings with a prayer or message which simply acknowledges the existence of a divine being. Indeed, Plaintiffs found a simple reference to "divine Providence"—a term appearing in the Declaration of Independence—to be offensive even when the context failed to identify any particular deity and

even when the reference occurred during a short solemnizing statement that did not even constitute a prayer. Asserting such broad, all-encompassing objections, the only remedy sought by Plaintiffs is the forced cessation of all audible prayers or acknowledgments of the divine, irrespective of the generic nature of the references. This Court therefore need not issue instructions on exactly what combinations of words with potential religious connotations may or may not be acceptable on the floor of a legislative chamber.

II. MARSH CLEARLY APPROVED LEGISLATIVE PRAYERS THAT ARE EXPLICITLY CHRISTIAN, AND THERE IS NO AUTHORITY IN THE SIXTH CIRCUIT COURT OF APPEALS HOLDING DISTINCTIVELY CHRISTIAN PRAYERS UNCONSTITUTIONAL.

As more fully set out in Defendant's opposition brief, in *Marsh* the Supreme Court set forth the standard for evaluating the constitutionality of legislative prayer practices. (R. 39 at 8-15, Def's. Opp'n. to Mot. for Prelim. Inj.). *See also American Civil Liberties Union of Kentucky v. Mercer County*, 432 F.3d 624, 639 (6th Cir. 2005) (reaffirming the validity of *Marsh* as upholding the constitutionality of legislative prayers). The explicitly Christian nature of the prayers was noted by the *Marsh* majority and was the subject of objection by the dissent. *Marsh*, 463 U.S. at 793 n.14, 800 n.9, and 823. *Marsh* is the only Supreme Court opinion to address the subject of legislative prayers, and in the years that followed several justices issued conflicting dicta concerning the "sectarian" or "Christian" nature of the prayers offered in *Marsh*.[3]

[3] Notably, in 1989 Justice Blackmun issued a plurality opinion in *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989), wherein he characterizes the holding of *Marsh* as only addressing the prayers made after the *Marsh* chaplain removed references to Christ. This seems inaccurate in light of the sixteen year record of the Nebraska legislature and the reference to the prayer books that detail prayers replete with explicitly Christian references to Christ, Jesus, Savior, etc. as well as the historical analysis performed by the *Marsh* court. Later, in a separate concurring opinion, Justice O'Connor noted that she believed that nonsectarian legislative prayers would not constitute an endorsement of religion when applying the second prong of the *Lemon* test, but Justice O'Connor does not purport to alter the *Marsh* standard. Finally the contradiction between the facts of *Marsh* and dicta of Justice Blackmun in *Allegheny* was expressly clarified in

In light of the conflicting dicta, this Court should rely upon the facts and rationale of *Marsh* itself. *See American Civil Liberties Union of KY v. McCreary County*, 607 F.3d 439, 447 (6th Cir. 2010) (the Sixth Circuit notes that Supreme Court dicta is not binding on lower courts when later statements of the Court undermine its rationale). To assist this Court in understanding the true nature of the prayers under review in *Marsh*, Hamilton County attaches exhibit 1 and requests judicial notice of the prayers of Rev. Palmer as published by the Nebraska Legislature, which prayers constitute a part of the record on which *Marsh* was decided. Both the Supreme Court and the Sixth Circuit have recognized the relevancy of these prayer books in analyzing legislative prayer issues. *Marsh*, 463 U.S. at 789 n.1; *American Civil Liberties Union of OH v. Capitol Square Review and Advisory Board*, 243 F.3d 289, 300 n.8 (6th Cir. 2001).

Prior to this case, no court within the Sixth Circuit has had opportunity to apply *Marsh* in a legislative prayer context. Because of the unique focus of *Marsh* on legislative prayers, the Sixth Circuit's acknowledgment of *Marsh* has constituted nonbinding dicta;[4] nevertheless, it is instructive to review the ways *Marsh* has been addressed by the circuit court. Before addressing those decisions, however, it is worth noting that no Sixth Circuit opinion has found that *Marsh* stands for the proposition that distinctively Christian prayers are unconstitutional.

The first substantive discussion of *Marsh* by the Sixth Circuit was in a much different context—invocations at a high school graduation. *Stein v. Plainwell Community Schools*, 822

2005 by Chief Justice Rehnquist who noted that the prayers reviewed by the court in *Marsh* were explicitly Christian, and the self-censorship of Reverend Palmer in *Marsh* did not result in the removal of explicit references to Christ until more than a year after the suit was filed. *Van Orden v. Perry*, 545 U.S. 677, 688 n.8 (2005).

[4] In *United States v. McMurray*, 653 F.3d 367, 376 (6th Cir. 2011), the Sixth Circuit reaffirms the Black's Law Dictionary definition of obiter dictum and notes its non binding nature. *See also In Re Lopez*, 292 B.R. 570, 575 (E.D.Mich. 2003) (court reiterates that language found in a Sixth Circuit case that is not relied upon to reach the court's decision is non-binding dicta).

F.2d 1406, 1408-09 (6th Cir. 1987). Rather than noting the *Marsh* Court's finding that the prayers of Rev. Palmer were often explicitly Christian, the *Stein* court relied upon Rev. Palmer's self-description of his prayers as "nonsectarian" and consistent with an "American civil religion" to support its contention that it would be constitutionally permissible to impose "civil" invocations at high school graduation ceremonies. *Id.* 1408-10.[5] However, this application of *Marsh* is of no use to this Court because both *Stein* and the notion that the government can impose a civil religion were invalidated by the Supreme Court in *Lee v. Weisman*, 505 U.S. 577, 590 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted").

In 1992 the Sixth Circuit cited to *Marsh* for the proposition that the history and ubiquity of a practice impacts the application of the *Lemon* test. *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992).[6] Because the *Grand Rapids* case addressed the validity of a holiday display on public property, the court looked to Justice O'Connor's understanding of the endorsement test as set forth in her concurrences in both *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984), and *Allegheny*, 492 U.S. at 630-31. But noting how Justice O'Conner would apply the second prong of the *Lemon* test to a nonsectarian legislative prayer does not address the standard established in *Marsh* for analyzing legislative

[5] In *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 683 (6th Cir. 1994), the Sixth Circuit cites to *Stein's* characterization of *Marsh* and quotes the case extensively for the proposition that religion clauses found in the First Amendment seek to ensure an "equal liberty of conscience for all." It is striking to note that Hamilton County's invocation policy extends an equal liberty of conscience by permitting a diverse group of invited speakers to give an invocation consistent with the dictates of their own conscience, whereas Plaintiffs demand that the county censor religious expression.

[6] In *City of Grand Rapids*, the court was considering the application of the endorsement test, but the Sixth Circuit recognized that the endorsement test is an analytical tool for applying the second prong of the *Lemon* test., *Mercer*, 432 F.3d at 635.

prayers. S*ee Capitol Square*, 243 F.3d at 305-06 (Sixth Circuit affirming that the *Lemon* test does not apply to legislative prayer cases); *supra* n.1. Because Justice O'Connor was clearly aware that the ubiquitous prayers offered before legislative bodies have historically been distinctively Christian, her use of the term "nonsectarian" raises questions about whether she defines explicitly Christian prayers as "nonsectarian."

While the prior treatment of *Marsh* by the Sixth Circuit offers little guidance to this Court, the case of *Chaudhuri v. State of Tennessee (Chaudhuri I),* 886 F.Supp. 1374, 1387 (M.D. Tenn. 1995), *aff'd* 130 F.3d 232 (6th Cir. 1997), provides valuable insight. Chaudhuri complained of prayers given by school officials at university events. Like Plaintiffs in this case, Chaudhuri took offense at all prayers, irrespective of their classification as Christian, sectarian, or nonsectarian. Like Plaintiffs, Chaudhuri even complained about how he felt when an audience spontaneously began reciting what is commonly known as the Lord's Prayer. Because the case did not address legislative prayers, the District Court conducted a traditional establishment clause analysis, but the court's treatment of complaints surrounding the content of the prayer is instructive: "Plaintiff has challenged the offering of both sectarian and nonsectarian prayers. Heeding the Court's warning in *Marsh*, however, this Court will not focus on the content of the prayer." *Chaudhuri I,* 886 F.Supp. at 1387. The district court upheld the prayer practice, and the Sixth Circuit affirmed the district court in *Chaudhuri v. State of Tennessee (Chaudhuri II),* 130 F.3d 232 (6th Cir. 1997). In *Chaudhuri II*, the panel judges could not agree as to the classification of the prayers. The dissent noted that the prayer set out in the opinion was filled with theological terms that were explicitly Christian. *Id.* at 241 n.2. The majority acknowledged that the prayers included theological concepts that were not shared by Chaudhuri, but then refused to render their decision based on the content of the prayer stating:

> [t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for judges to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id. at 237 (*quoting Marsh*, 463 U.S. at 794-95).

After *Chaudhuri II*, the Sixth Circuit has repeatedly affirmed the vitality of *Marsh*, but has stopped categorizing the nature of the prayers reviewed in *Marsh*. *See Coles v. Cleveland Board of Education*, 171 F.3d 369, 380-383 (6th Cir. 1999) (a divided panel found that the *Marsh* analysis was not the proper standard for reviewing prayers given before the Cleveland school board); *Capitol Square*, 243 F.3d at 300 (e*n banc* court notes that *Marsh* remains good law and provides an extensive analysis as to the historical role of religion in the United States); *American Civil Liberties Union of OH Foundation v. Ashbrook*, 375 F.3d 484, 495 (6th Cir. 2004) (declining to adopt a historical analysis as used in *Marsh* to evaluate a public display of the Ten Commandments); *Mercer*, 432 F.3d at 639 (citing to *Marsh* while noting "[o]ur Nation's history is replete with government acknowledgment and in some cases, accommodation of religion").

While other courts' discussions of the Supreme Court's treatment of legislative prayers in *Marsh* may provide limited guidance to this Court, the foundation for any analysis regarding the constitutionality of a public invocation policy remains the facts and analysis set forth in *Marsh*. In the present case, the application of *Marsh* is straightforward. Hamilton County permits invocations consistent with historical practices explicitly upheld in *Marsh*. Indeed, if 16 years' worth of legislative prayers—many of which were explicitly Christian—from the same state-paid Presbyterian chaplain were constitutionally permissible, the invocations contemplated by Hamilton County must more easily be found constitutional. In contrast to the less neutral and diverse practice approved in *Marsh*, the Hamilton County policy contemplates uncensored

invocations from a wide variety of unpaid[7] volunteers who may come from innumerable philosophical or religious belief systems and who are scheduled through a neutral selection policy. Plaintiff has offered no evidence or even asserted that Hamilton County has acted with impermissible motives to exploit the invocation opportunity to proselytize or disparage any religion. In such circumstances, *Marsh* makes clear that "it is not for judges to embark on a sensitive evaluation or to parse the content of a particular prayer." 463 U.S. at 794-95. Accordingly, Plaintiffs' facial challenge to Hamilton County's policy and request for a preliminary injunction should be rejected.

III. THE IMPOSSIBILITY OF DETERMINING WHAT LANGUAGE IS "SECTARIAN" MAY RENDER THE ISSUE NONJUSTICIABLE.

It is one thing for a court to opine as to the constitutionality of allowing prayers to take place before deliberative public bodies, *see Marsh*, but it is quite another to sit in judgment on how or to whom a person must pray. To the extent Plaintiffs ask this Court to regulate the theological content of invocations and theological context in which words may be used in an invocation, it may be beyond the jurisdiction of this Court.[8] This is a threshold issue that cannot be waived.

There is no clear line separating "sectarian prayers" from "nonsectarian prayers" or "sectarian solemnizing statements" from "nonsectarian solemnizing statements." By way of illustration, if a general reference to "God" is nonsectarian, would a general reference to "Allah"

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[7] Plaintiffs attempt to equate the paid chaplain of *Marsh* with the Commission's past practice of thanking speakers with a nominal token. Aside from the fact that no such tokens are contemplated or provided under the new policy, [R. 38-1, p. 8, ¶6], a nominal token of appreciation cannot render a practice unconstitutional when paying a state employee for 16 years to offer legislative prayers was not unconstitutional in *Marsh.*

[8] A jurisdictional challenge to the court's ability to judge the content of prayers was not examined in *Marsh* or any other legislative prayer case to the County's knowledge, but "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436, 1448 (2011).

be deemed sectarian simply because some cultures use that term for "God"? And would all references to Jesus automatically be deemed sectarian? What if a prayer referenced Jesus but was not directed to him or "in his name"? What if a statement was not a prayer at all but nevertheless mentioned Jesus? Would it depend on whether the statement referred to Jesus as a deity or simply as a wise teacher who urged people to love their neighbors as themselves? What if the statement alluded—or arguably alluded—to Jesus but did not name him by name? Or what if the statement used a different name for Jesus such as "Lord"—a term that a number of different religions might use? What if the reference to Jesus were only as an epithet or exclamation of surprise, much like "Oh my God!" or "Good God Almighty!"? What if a statement—or even a prayer—on the eve of the Martin Luther King holiday quoted Martin Luther King quoting Jesus? What if the statement quoted Martin Luther King quoting Jesus, but it was not clear that Jesus was the source of the quote? Would it be acceptable to quote Jesus so long as the quote was not attributed to Jesus? Would that depend on how well known the quotation is and whether or not most people would know that the quote came from Jesus? Would the impact of "other names" for Jesus depend on the intent of the invocation speaker? And what about seemingly generic references to "God" if, in reality, some groups, such as Wiccans, worship either a "goddess" or perhaps multiple divine beings? These questions are only the tip of the iceberg and could go on eternally. There simply is no rule of law under which a judge can objectively select one level of theological specificity versus another.

Though several have tried, no federal court has developed standards for distinguishing "sectarian" prayers from "nonsectarian" prayers, and indeed, they cannot do so. (R. 39 at 18-22, Def's. Opp'n. to Mot. for Prelim. Inj.). In his concurrence in *Lee v. Weisman,* Justice Souter warned that even asking the question of what is "sectarian" invites judges to engage in

comparative theology, a subject to be avoided because it is outside the competence of the federal judiciary. 505 U.S at 616-17. The Eleventh Circuit evaluated legislative prayers and noted that it would not know where to begin to demarcate the boundary between sectarian and nonsectarian expression. *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263, 1272 (11th Cir. 2008). The *Pelphrey* court concluded that "[w]hether invocations of 'Lord of Lords' or 'God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law." *Id*. at 1267.

Similarly the U.S. Court of Appeals for the Second Circuit concluded that drawing a line between sectarian and nonsectarian prayers runs into "two sizable doctrinal problems." *Galloway v. Town of Greece*, 681 F.3d 20, 28 (2nd Cir. 2012) (*petition for rehearing en banc pending*). First, a state-imposed requirement that all legislative prayers be nondenominational begins to sound like the establishment of "an official or civic religion" in violation of Supreme Court precedent. *Galloway*, 681 F3d at 29 (*citing Lee*, 505 U.S. at 590). "The second difficulty with the simple sectarian/nonsectarian approach seemingly adopted by some circuits is that the touchstone of our analysis must be *Marsh*, which is hard to read, even in light of *Allegheny*, as saying that denominational prayers, in and of themselves, violate the Establishment Clause." *Id*.

The Sixth Circuit provides no guidance. In *Chaudhuri II*, the panel judges could not agree as to whether the prayers were "sectarian," "nonsectarian," or even "Christian." *See supra* sec. II. Likewise, in *Capital Square* the judges disagreed over the "sectarian" classification of the Ohio state motto. 243 F.3d 301-05, 315. Further muddying the waters is the Sixth Circuit's use of the term "sectarian purpose" as a synonym for "religious purpose." *See Mercer*, 432 F.3d at 631.

The Supreme Court has recently reaffirmed that "the political question doctrine is implicated when there is a lack of judicially manageable standards for resolving the question before the Court." *Zivotofsky*, 132 S. Ct. at 1428 (quoting *Nixon v. United States*, 506 U.S. 224, 228, 113 S.

Ct. 732, 735 (1993)) (internal citation and quotation marks omitted). For this Court to attempt to draw a line between what prayer language is acceptably "nonsectarian" and what language is unacceptably "sectarian" may require this Court to trespass into areas beyond its judicial expertise. The Supreme Court is particularly clear in recognizing the lack of judicially-manageable standards where religious matters are concerned. (See Def's. Opp'n. to Mot. for Prelim. Inj., 21). Federal courts cannot second-guess decisions of clergy on matters of "faith and doctrine." *Kedroff v. St. Nicolas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116, (1952). This principle was recently employed to recognize a ministerial exception to federal employment laws. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702–07 (2012). When a clergyman determines certain prayer language to be appropriate or required by his faith, it is a question of faith beyond the reach of the courts. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872). When political leaders invite a person to offer an invocation, it transgresses the limits of the courts' jurisdiction for any judge to draw lines determining what language is "sectarian" and what is "nonsectarian."

"According to entrenched Supreme Court precedent, disputes that do not lend themselves to resolution under judicially manageable standards present nonjusticiable political questions." Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274, 1275 (2006). If courts cannot decide a case based on legal principles, then it is beyond the Article III jurisdiction of the courts to decide it because the ability to articulate a judgment in legal terms is every bit as much an element of a "case or controversy" as standing, ripeness, and the absence of mootness.

If this Court satisfies itself that it has jurisdiction to issue a ruling that regulates the content of legislative prayers, and should this Court choose to enjoin certain legislative prayers based on

the theological context of the words being used, there is yet another hurdle to overcome. Any such injunction must clearly articulate an objective standard to guide Hamilton County as to what is and is not permissible. *See* Fed. R. Civ. P. 65(d)(1) ("Every order granting an injunction . . . must . . . describe in reasonable detail . . . the act or acts restrained or required."). As is evident from the discussion above, the Court could not simply rely upon a vague description like "sectarian." Neither should the Court ban certain words in a prayer because the import of the words depends entirely upon the context in which they are used, e.g., a reference to Jesus may be a quote from a respected historical figure, or it may exalt Jesus as deity depending on context. If esteemed judges of the Sixth Circuit cannot agree on the theological import of words uttered in a prayer or a state motto, how can this Court expect Hamilton County to fare any better, absent explicit guidance? Yet, such explicit guidance is an impossibility—a reality demonstrating the nonjusticiable nature of the question at issue. Accordingly, no injunction should issue.

CONCLUSION

The issue pending before the Court on the request for injunctive relief is straightforward. Does the Hamilton County invocation policy violate the constitution on its face simply because it permits invited speakers to offer a prayer or solemnizing message that acknowledges a divine being? The answer is no, and the injunction should be denied. The Court need not and should not address which legislative prayers may violate the constitution based upon their content.

This the 8th day of August, 2012.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by U.S. Mail to the following: None

This the 8th day of August, 2012.

/s/ Stephen S. Duggins