UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA

THOMAS JOSEPH COLEMAN, III,	§	
and	§	
BRANDON RAYMOND JONES,	§	No. 1:12-cv-190
	§	
Plaintiffs,	§	Mattice / Lee
	§	
-v-	§	JURY DEMAND
	§	
HAMILTON COUNTY GOVERNMENT	§	
TENNESSEE,	§	
	§	
Defendant.	§	

BRIEF OF LAW ON THE MERITS OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION – SUPPLEMENT

PLAINTIFFS, through counsel, and pursuant to this Court's Order (Doc. 54) state:

Preliminary Statement:

Plaintiffs suggest the law on legislative prayer is not restricted to only a *Marsh* analysis. Rather, given the ambiguity of *Marsh*, and the most recent decisions from the sister Circuits and decisions of the Supreme Court, this Court should consider the facts in this case through the lenses of other Supreme Court decisions.

Factual Basis:

The videos speak for themselves, and this Court can discern the facts therefrom. In addition, this Court heard testimony from an atheist (Jones), a humanist (Coleman), and a muslim (Lahan). The bulk of the evidence from these three witnesses reveals each person felt alienated and excluded.

The testimony from the defendant's sole witness revealed she drew the list (pursuant to the policy enacted July 3, 2012) from sources such as a source with yellow pages, the internet, and from a member of the Commission.

The resolution referred to past prayer practices (Doc. 38-1 at 4). The resolution continued to reference the past instances as a continuation of its intentions in the newly crafted policy. (Id.). There is nothing in the resolution to indicate any repeal of past practices. (Id., *in passim*).

Discussion:

1. This Court should review the history of the Commission's actions prior to July 3, 2012:

Although the *Lemon* test has come under criticism and increasing scrutiny in recent years, the Supreme Court has not rejected it, and lower courts continue to apply it when deciding Establishment Clause disputes. *See Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770-774 (2001), *cert. denied*, 534 U.S. 1162, 152 L. Ed. 2d 117, 122 S. Ct. 1173 (2002); *Books v. City of Elkhart, Ind.*, 235 F.3d 292, 301 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058, 149 L. Ed. 2d 1036, 121 S. Ct. 2209 (2001); *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 305-08 (6th Cir. 2001).

> In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed at the third stage, we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the *Establishment Clause* and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.

McCreary County v. ACLU, 545 U.S. 844, 873-874 (2005).

Lemon said that government action must have a secular purpose, and a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective. *See* 545 U.S. at 874.

In *McCreary County*, the defendant modified its exhibits (contained Ten Commandments) and its statement of purpose for the display after it was sued. *See Id.* at 871. *See also ACLU of Tenn., Inc. v. Rutherford County, TN*, 209 F. Supp. 2d 799, 808 (M.D. Tenn. 2002) (defendant changed display after being sued). The statement of purpose did not repeal the past resolutions. *See* 545 U.S. at 871. In the instant case, the defendant's only motivation to change its practices was this lawsuit. However, unlike *McCreary County*, there was not only a lack of an attempt to repeal any past practices, but the current defendant's resolution actually *embraced* the past practices. The videos show no change in the manner in which the defendant's meetings begins, and the prayers remain especially sectarian.

2. Defendant's attempt at equal access to a meeting is another "sham:"

Defendant makes much assertion that the policy of July 3rd is an attempt to give all parties equal access to their meeting. The First Amendment requires that a practice must be invalidated if it is entirely motivated by a purpose to advance religion. *See Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). The effect prong has been held to prohibit speech that a reasonable observer would think is an endorsement of religion by the government. *See County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989); *and Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999).

In Americans United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992), the defendant had a long history of allowing anyone to use its public square to display sectarian religious displays. *See* 980 F.2d at 1544-46. However, the defendant had no connection with the private religious group at issue (Chabad House). *See Id.* In fact, the use of the square was one based on passive permission, and no connection existed between the City defendant and Chabad House. *See Id.* Consequently, the 6th Circuit held a reasonable person

would not find such passive permission, with the lack of ties to the private organization, was an endorsement of religion. *See Id.*

In the case at issue before this Court, the defendant provides the forum for the public prayer, gives gifts to the prayer givers, asks persons in the audience to stand, and gives its meeting time to include prayers. Moreover, the defendant pays an employee (Chris Hixson) to create a list (and a commission member who requested Hixson to include a congregation). Unlike the public square in *Americans United*, the Commission chamber is a controlled access forum, with metal detectors. Additionally, the prayer givers are limited to the very list created by the defendant's employee. Consequently, the reasonable observer cannot help but to see the practice for what it is: and endorsement of religion.

3. Defendant's attempt at equal access
to a meeting is a "fool's errand:"

The appellate courts have held attempts at equal access are contrary to the Constitution. "A secular state, it must be remembered, is not the same as an atheistic or antireligious state." *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). "A secular state establishes neither atheism nor religion as its official creed." *Id.* (we have held Establishment Clause gives no preference even for religion over non-religion). Neutrality is the purpose of the Establish Clause. *See McCreary County v. ACLU*, 545 U.S. 844, 880-81 (2005). "This is no time to deny the prudence of understanding the Establishment Clause to require the government to stay neutral on religious belief, which is reserved for the conscience of the individual." *Id.* at 881.

The effect of the defendant's policy leaves out pagans, wiccans, atheists, and all other individuals. Moreover, and to have more discussion *supra*, the manner in which the defendant selects those worthy to give the prayers cannot, to any reasonable observer, be neutral.

4. Defendant's manner at equal access policy has been tried in other circuits:[1]

The facts in the instant case are nearly exact as those in the 2nd Circuit. In *Galloway v. Town of Greece*, 681 F.3d 20, 23-24 (2nd Cir. 2012), the defendant town had employees draft a list of invitee clergy responsible for giving the prayers before each city board meeting. *See Id.* The resulting list contained only Christian clergy and organizations, and the subsequent prayers (2/3rds of them) contained references to Jesus Christ, Your Son, and in Jesus' name we pray. *See Id.* The defendant attempted to have a practice that would accept any volunteer to give the prayers and not police the content of the prayer. *See Id.* at 24-26. One prayer given called those in opposition "ignorant of the history" of the prayers. *See Id.* at 25. *See also McCreary County v. ACLU*, 545 U.S. 844, 880-81 (2005) (monotheistic invocation of God is not permitted because non-monotheistic religions cease to be religions recognized by the Religion Clauses of the First Amendment).

The 2nd Circuit held that the defendant's method virtually ensured all prayer givers were giving a Christian viewpoint. *See Galloway* at 27-28. The defendant town did not set forth that all persons regardless of affiliation could volunteer. *See Id.* To be sure:

> The town's process for selecting prayer-givers virtually ensured a Christian viewpoint. Christian clergy delivered each and every one of the prayers for the first nine years of the town's prayer practice, and nearly all of the prayers thereafter. In the town's view, the preponderance of Christian clergy was the result of a random selection process. The randomness of the process, however, was limited by the town's practice of inviting clergy almost exclusively from places of worship located within the town's borders. The town fails to recognize that its residents may hold religious beliefs that are not represented by a place of worship within the town. Such residents may be members of congregations in nearby towns or, indeed, may not be affiliated with any congregation. *The town is not a community of religious institutions, but of individual residents, and, at the least, it must serve those residents without favor or disfavor to any creed or belief.*

[1] Plaintiffs have cited and quoted the facts in *Joyner* in great detail. This brief shall focus on the 2nd Circuit case on point.

Id. at 30-31 (emphasis added).

The defendant's weak attempt at inclusiveness fails in light of *Galloway*. Chris Hixson uses a random method devoid of any truly empirical method at the selection of those deemed "established" and "eligible" members of a congregation. This Court can take judicial notice of the demographics of the population in Hamilton County, and can use its own common sense to know that the bulk of the congregations in Hamilton County are Christian. The defendant fails to see that individuals are excluded, and Chris Hixson could not name any coven nor could she state she gave an invitation to the Chattanooga Free Thought organization officered by the plaintiffs.

5. Defendant's argument at history fails in face of actual history:[2]

Justice Sandra Day O'Conner lambasted Justice Kennedy in the Supreme Court's only review of the meaning of *Marsh*, which counters the position taken by the defendant.

> The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had removed all references to Christ. Thus, *Marsh* plainly does not stand for the sweeping proposition Justice Kennedy apparently would ascribe to it, namely, that all accepted practices 200 years old and their equivalents are constitutional today.
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> …
>
> Justice Kennedy's reading of *Marsh* would gut the core of the *Establishment Clause*, as this Court understands it. The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically.
>
> …

[2] Defendant appears to have argued the Declaration of Independence drew its authority from the Christian god. However, "…the Declaration of Independence holds that the authority of government to enforce the law derives from the consent of the governed." *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005) (dicta).

> Although Justice Kennedy's misreading of *Marsh* is predicated on a failure to recognize the bedrock *Establishment Clause* principle that, regardless of history, government may not demonstrate a preference for a particular faith, even he is forced to acknowledge that some instances of such favoritism are constitutionally intolerable.

County of Allegheny v. ACLU, 492 U.S. 573, 603-07 (1989).

The Supreme Court also noted the divisive nature of religion in the manner taken by the defendant Hamilton County Government. Thomas Jefferson and James Madison both disparaged religion's entanglement in government. *See McCreary County v. ACLU*, 545 U.S. 844, 878 (2005) (Jefferson refused to issue Thanksgiving Proclamation; Madison objected to Virginia's requirement to "donate" money to religion). The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society. *See* 545 U.S. at 876.

> We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the *Establishment Clause* to require the government to stay neutral on religious belief, which is reserved for the conscience of the individual.

Id. at 881.

In the case at bar, the near creepiness of those standing and breaking into a seemingly spontaneous chant when one prayer giver invoked the Lord's Prayer intimidated those who chose to remain seated. The plaintiffs and Lahan testified about the feeling they had when they had to object in silence at the prayers when they remained seated. To begin a publicly open governmental meeting in such a manner turned the meeting into a religious ceremony.

Conclusion:

The policy is a clear sham to force in name what is a violation of the Constitution in substance. The actions of the defendant ensure an exclusive Christian view in the prayers. The policy changed nothing. The defendant's actions turned what is to be a government meeting that deals with issues that affect all residents of Hamilton County into a church service. Nothing in history justifies the proselytization seen here. To the contrary, the bloody history of America as observed by the Supreme Court compelled the Supreme Court to prevent such conduct. This Court too should prevent such conduct and grant the preliminary injunction.

Respectfully submitted,

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Certificate of Service:

I certify I delivered a copy of this Brief to all persons listed on the Court's ECF/CM system this 5th day of August 2012.

/s/ Robin Ruben Flores