No. 12-11613

In the United States Court Of Appeals
for the Eleventh Circuit

Atheists of Florida, Inc., et al,

Plaintiffs-Appellants,

v.

City of Lakeland, Florida, et al,

Defendants-Appellees,

On Appeal from the United States District Court
for the Middle District of Florida
No. 8:10-cv-01538-EAK-MAP (Honorable Elizabeth A. Kovachevich)

Brief of *Amicus Curiae* Americans United for Separation of Church and State in Support of Appellants

---

Ayesha N. Khan
Gregory M. Lipper
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW; Suite 850E
Washington, DC 20005
(202) 466-3234 (phone)
(202) 898-0955 (fax)
lipper@au.org

Counsel for Amicus Curiae

Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, the following individuals and organizations have an interest in the outcome of this appeal:

Americans United for Separation of Church and State – *amicus curiae*

Atheists of Florida, Inc. – Plaintiff-Appellant

Bondi, Pam – Attorney General of the State of Florida

Fields, Gow – Defendant-Appellee

GrayRobinson, P.A. – Counsel for Defendants-Appellees

Hatcher-Bolin, Kristie – Counsel for Defendants-Appellees

Husby, Eric O. – Counsel for Plaintiffs-Appellants

Khan, Ayesha N. – Counsel for *amicus curiae*

Kovachevich, Elizabeth A. – Judge, U.S. District Court for the Middle District of Florida

Lipper, Gregory M. – Counsel for *amicus curiae*

Miller, Mark N. – Counsel for Defendants-Appellees

Wachs, EllenBeth – Plaintiff-Appellant

Table of Contents

Table of Citations

Cases

Statutes & Rules

Other

Islamic Center of Lakeland,
http://www.facebook.com/pages/Islamic-Center-of-Lakeland/279405818771151 5

Islamic Center of Polk County,
http://www.icopc.org/ 5

Cary McMullen, *A Home for Hindus*, The Ledger (June 12, 2004),
http://www.theledger.com/article/20040612/NEWS/406120304?p=1&tc=pg 5

Welcome to Temple Beth Shalom, Temple Beth Shalom,
http://www.bethshalompolk.org/index.html..... 5

Interest of Amicus Curiae

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C.[*] Its mission is twofold: (1) to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United was founded in 1947 and has more than 120,000 members and supporters across the country.

Although recognizing that the U.S. Supreme Court has permitted legislative bodies to open their meetings with prayers in some circumstances, Americans United works to ensure that such prayers do not "have the effect of affiliating the government with any one specific faith or belief." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 603, 109 S. Ct. 3086, 3106 (1989) (quotation marks and citations omitted). Americans United was

---

[*] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that no party's counsel authored this brief in whole or in part; and that no party, party's counsel, or person other than *amicus curiae*, its members, or its counsel, contributed money intended to fund the preparation or submission of this brief.

The Appellants and Appellees have consented to the filing of this brief.

counsel in this Court's recent legislative-prayer case, *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008), and has participated as counsel or *amicus curiae* in legislative-prayer cases across the country, including *Galloway v. Town of Greece*, __ F.3d __, 2012 WL 1732787 (2d Cir. May 17, 2012) (counsel); *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011) (counsel); *Doe v. Indian River School District*, 653 F.3d 256 (3d Cir. 2011) (*amicus*); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004) (*amicus*); and *Mullin v. Sussex County*, No. 1:11-cv-00580-LPS (D. Del. May 15, 2012) (counsel).

Statement of Issues

1. Whether the Establishment Clause permits a legislative body to, for twenty-five years, solicit exclusively Christian clergy to deliver prayers that often contain overt references to Christianity and refer to no other religion.

2. Whether, under 42 U.S.C. § 1983, a local government is liable for an unconstitutional prayer policy when, for twenty-five years, members of its governing body witnessed exclusively Christian clergy deliver prayers that often contained overt reference to Christianity and referred to no other religion.

Statement of Facts

From 1985 until March 2010, the City of Lakeland invited Christian clergy—and Christian clergy alone—to deliver prayers before each biweekly meeting of the Lakeland City Commission. Although some of these prayers were nonsectarian, many were overtly Christian—featuring repeated references to "Jesus Christ," the "Heavenly Father," and "the Father, the Son, and Holy Spirit." Every denominational prayer was Christian; no prayer referred to any other religion.

A. The Original Policy

1. The City's selection of Christian clergy.

Until approximately March 2010, the City's legislative prayers were governed by policies and procedures ("Original Policy") that "had been handed down for generations." Doc. 41-1 (Thomas Dep.) at 100:13–14. Under the Original Policy, the Secretary to the City Commission coordinated the selection of clergy to open Commission meetings with prayers. *See* Doc. 39-1 (Hoffman Dep.) at 7:8–12, 13:13–23. For each meeting, the Secretary chose clergy from an official "congregational list." *See, e.g.*, Doc. 40-1 (Terry Dep.) at 27:21–22; Doc. 39-1 (Hoffman Dep.) at 17:24–18:5.

Until 1985, the congregations list contained numerous Christian denominations and one Jewish temple. *See* Doc. 39-1 (Hoffman Dep.) at 23:21–25 ("Q. … [A]m I correct that all of those listed denominations that were in alphabetical order were Christian? A. Yes. Well, except for the Temple Emmanuel."). When the Jewish temple's rabbi retired in 1985, he was not replaced on the City's list. *See id.* at 24:17–19. Thus, by 1985, the list of eligible speakers was exclusively Christian, and each and every invited clergy during that time was Christian. *See, e.g.*, *id.* at 23:21–24:16; Doc. 54 (Order) at 4.

During this period, the City did not seek to expand its list to include clergy from non-Christian denominations. City officials did not consult the yellow pages. *See* Doc. 39-1 (Hoffman Dep.) at 36:1–3; Doc. 42-1 (Gill Dep.) at 21:15–20. They did not search the Internet. *See* Doc. 42-1 (Gill Dep.) at 21:21–22. They did not check with the Chamber of Commerce. *See id.* at 21:23–25. And they did not send invitations. *See id.* at 22:1–3.

Had City officials reached for the Yellow Pages or surveyed the Internet, they would have found more religious diversity than was reflected on the congregations list—including a Hindu temple, a Muslim mosque, and several Jewish synagogues. *See* 43-2 at 3; Doc. 43-3 at 3; Doc.

43-4 at 1, 3, 5; Doc. 45-4 at 45, 56, 78; Doc. 45-5 at 59, 79; Doc. 45-6 at 45. Indeed, when the City finally expanded its congregations list in spring 2010—based on the City Attorney's legal advice—it identified and invited speakers from "well over 600 religious organizations, including but not limited to a Jewish synagogue, a Muslim mosque, Jehovah's Witness meeting halls, Unitarian churches, and a Hindu temple." Doc. 34 (City's Mot. for S.J.) at 6.

Many of the local non-Christian congregations have existed for years, if not decades. Temple Beth Shalom was founded in 1982; both Muslim congregations date back to at least the 1990s; the Swaminarayan Hindu Temple was under construction in 2004, and its congregation existed well before then. *See* Islamic Center of Lakeland, http://www.facebook.com/pages/Islamic-Center-of-Lakeland/279405818771151 (all websites last visited May 14, 2012); Islamic Center of Polk County, http://www.icopc.org/ (click tab labeled "About Us"); Welcome to Temple Beth Shalom, Temple Beth Shalom, http://www.bethshalompolk.org/index.html (click link labeled "Temple Beth Shalom Brochure (doc) HERE"); Cary McMullen, *A Home For Hindus*, The Ledger (June 12, 2004), http://www.theledger.com/article/20040612/NEWS/406120304?p=1&tc=pg. Speakers

from these non-Christian entities, however, were not invited under the Original Policy.

2. The City's prayers are consistently Christian.

Many of the City Commission prayers referred to "Jesus Christ" or featured other explicit references to Christianity. Although some prayers were nondenominational, every denominational prayer was Christian. For instance, of the twenty-one prayers delivered between May 18, 2009 and March 2010, twelve referred specifically to Christianity:

Date	*Christian Content*
6/1/09	"Our Heavenly Father, we come to you in the name of Jesus Christ."
7/20/09	"[I]n Jesus' name."
8/17/09	"[I]n Jesus' name."
9/8/09	"[I]n Jesus' name."
11/2/09	"[I]n the name of Jesus."
11/16/09	Thanked God and Jesus.
12/7/09	Delivered in the name of Jesus and the Heavenly Father.
12/21/09	"[I]n His Holy Son Jesus' name."
1/4/10	Asked for "the wisdom of Solomon, courage of Daniel, heart of David, perseverance of Job, encouragement of Barnabas, and the fortitude of Paul"—and then closed "in Jesus' name."
1/19/10	"[I]n the name of the Father, Son and Holy Spirit."

Date	*Christian Content*
3/1/10	Called upon Jesus to assist the government.
3/15/10	Called "Jesus' name," and invoked it at least three times.

See Doc. 46 (Pls. Mot. for S.J.) at 9–11, *cited by* Doc. 54 (Order) at 23, 34.

Several witnesses elaborated on the prayers' overtly Christian content. John Kieffer, who attended multiple Commission meetings during the time of the Original Policy, recalled multiple, "Evangelical" Christian prayers. *See* Doc. 33-1 (Kieffer Dep.) at 57:12–18, 58:5–7, 71:4–10, 75:22–76:1, 81:22–25. Plaintiff Wachs, who has watched and listened to Commission meetings "for years," testified that the prayers were consistently Christian and that the prayers sometimes stated, "this is a Christian city" and "our destiny needs to be fulfilled as a Christian city." Doc. 32-1 (Wachs Dep.) at 24:5–6, 69:4–9; Doc. 32-2 (Wachs Dep.) at 119: 9–12.

Finally, witness Robert Curry testified that he attended several Commission meetings in 2010 and had watched others on the Internet. *See* Doc. 31-1 (Curry Dep.) at 63:7–65:5. He observed, "These prayers in Lakeland can go on for three, four, five minutes in length. It's almost like being in church." *Id.* at 74:12–15.

3. The City's practice of inviting Christian speakers to deliver Christian prayers continues for 25 years.

Christian prayers—delivered by Christian clergy—have populated the City's meetings for decades. The City Manager acknowledged that the pre-2010 procedures were "a practice of the organization that had been handed down for generations." Doc. 41-1 (Thomas Dep.) at 100:13–14. And the current Mayor testified, "[t]he practice of the invocation of the city commission predates my birth." Doc. 35-1 (Fields Dep.) at 33:2–4.

The Mayor described the inclusion of prayers as "commission policy," *id.* at 33:4–5, and this policy remained consistent over time. When she began coordinating the prayers in 1985, the Secretary received the congregations list from her predecessor. *See* Doc. 34 (City's Mot. for S.J.) at 3. Each successive Secretary was instructed to follow the same procedures as did her predecessor, and those procedures did not change until spring 2010. *See id.* at 3–5.

B. The Replacement Policy (March 2010–Present)

In March 2010, the plaintiffs asked the City Commission to replace its opening prayers with a moment of silence. Although the City rejected this request, the City Attorney advised the City to "refresh" the list of eligible

clergy; this guidance arose from his "understanding of the applicable law." Doc. 38-1 (McCausland Dep.) at 12:18–13:1, 21:4–7.

As a result, the City identified and invited speakers from "well over 600 religious organizations, including but not limited to a Jewish synagogue, a Muslim mosque, Jehovah's Witness meeting halls, Unitarian churches, and a Hindu temple." Doc. 34 (City's Mot. for S.J.) at 6. These changes ("Replacement Policy") took effect in approximately March 2010, *see* Doc. 34 (City's Mot. for S.J.) at 6, and were codified on August 2, 2010, *see* Doc. 47-4 (Resolution). In the year following the adoption of the Replacement Policy, the prayer-givers included a Jewish Cantor, a Jewish Rabbi, and a Muslim Imam. *See* Doc. 54 (Order) at 6; Doc. 43-6 (2011 invocation schedule) at 1.

Even after the City adopted the Replacement Policy, many of the prayers contained extensive references to Christianity. For instance, on June 21, 2010, a Christian speaker invoked "the name of Jesus Christ, who is our Savior and incoming King," and delivered a prayer lasting five minutes. *See* Doc. 46 (Pls' Mot. for S.J.) at 12, *cited by* Doc. 54 (Order) at 23, 34.

C. The District Court Decision

Plaintiffs filed suit against the City and the Mayor in July 2010. They challenged both the Original Policy and the Replacement Policy under the federal and state constitutions. *See* Doc. 1 (Complaint) ¶ 1. In October 2011, both sides moved for summary judgment on the federal Establishment Clause and state-constitutional claims. Doc. 30 (Mayor's Mot. for S.J.); Doc. 34 (City's Mot. for S.J.); Doc. 46 (Pls' Mot. for S.J.).

The City argued that the Replacement Policy was materially similar to the policy upheld by this Court in *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008). *See* Doc. 34 (City's Mot. for S.J.) at 15–23. As for the Original Policy, the City argued only that the plaintiffs' challenge to the Original Policy was mooted by the adoption of the Replacement Policy, *id.* at 12–15; the Replacement Policy, suggested the City, made "the identifiable religious affiliation of the speakers … more diverse and reflective of the diversity present in Polk County." *Id.* at 18, 22.

The district court agreed with the City that the Replacement Policy was materially similar to the policy at issue in *Pelphrey*. *See* Doc. 54 (Order) at 21–25. With respect to the Original Policy, the district court concluded that Plaintiffs' challenge was not moot, because there was no assurance

"that the City of Lakeland will not revive its challenged practice." Doc. 54 (Order) at 27.

But the district court also upheld the Original Policy on the merits. Twenty-five years of Christian prayers by Christian clergy did not violate the Establishment Clause, held the district court, because the City's exclusion of non-Christians did not result from an "impermissible motive" and because the City invited "a vast array of denominationally and culturally heterogeneous Christian organizations." *Id.* at 30, 31 (quotation marks omitted). Moreover, although the Christian clergy regularly invoked Jesus Christ and even declared Lakeland "a Christian city," Doc. 32-1 (Wachs Dep.) at 119:9–24, the district court concluded that "[n]one of the prayers attempt to convert anyone to Christianity, disparage other religions or beliefs, or otherwise encroach upon *Marsh*'s boundary of constitutional impermissibility." Doc. 54 (Order) at 34.

Finally, the district court concluded that the plaintiffs failed to establish that their claims arose from a municipal policy, *id.* at 27, even though the Original Policy reflected "a practice of the organization that had been handed down for generations," Doc. 41-1 (Thomas Dep.) at 100:13–14, and the Commissioners were aware of the content the prayers and the

identity of the clergy—by virtue of their attendance at twenty-five years of Commission meetings in which Christian clergy delivered Christian prayers.

Summary of Argument

Although the plaintiffs' appeal challenges the district court's rulings as to both the Original Policy and Replacement Policy, and seeks to reinstate claims under both the federal and state constitutions, *amicus* focuses on the federal Establishment Clause challenge to the Original Policy. For twenty-five years under the Original Policy, City Commission meetings featured exclusively Christian clergy delivering predominantly Christian prayers. These practices resulted in less diversity—and promoted Christianity more directly—than the scheme upheld by this Court in *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008).

This Court in *Pelphrey* did not issue local governments a license to favor a single religion. Rather, *Pelphrey* involved practices "that allow[ed] volunteer leaders *of different religions*, on a rotating basis, to offer invocations *with a variety of religious expressions*." *Id.* at 1266 (emphasis added). Ultimately, the Court in *Pelphrey* held that the Establishment Clause "allow[s] a county to invite clergy from diverse faiths to offer a

wide variety of prayers at meetings of its governing body." *Id.* at 1273 (quotation marks omitted).

But *Pelphrey*'s combination of diverse speakers and diverse prayers was not in the City's Original Policy. For twenty-five years, the City identified and invited exclusively Christian clergy, who in turn typically delivered prayers that were exclusively Christian. All the while, non-Christian clergy were a phonebook away; upon adopting the Replacement Policy, City identified and invited speakers from "well over 600 religious organizations, including but not limited to a Jewish synagogue, a Muslim mosque," and "a Hindu temple." Doc. 34 (City's Mot. for S.J.) ¶ 17.

In upholding the Original Policy, the district court relied on reasoning foreclosed by this Court and many others. For instance, the district court held that the City could present Christian-only clergy delivering Christian-only prayers because the City did not act with an impermissible motive to exclude other religions. But the Establishment Clause requires more than a pure motive: "when one creed dominates others—regardless of a town's intentions—constitutional concerns come to the fore." *Galloway v. Town of Greece*, __ F.3d __, 2012 WL 1732787, at *10 (2d Cir. May 17, 2012). Indeed, the Supreme Court's decision in *Marsh v.*

Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983), and this Court's decision in *Pelphrey* examined the government's motives only after first concluding that the challenged practices did not promote a single faith to the exclusion of others.

In addition, the district court refused to acknowledge the pattern of Christian prayers at City meetings, and mistakenly assumed that—no matter how consistently and overtly the prayers invoke one and only one religion—courts may intervene only in the case of actual proselytization. But the Establishment Clause prohibits not just proselytization, but "advancement" more generally. Christianity is advanced by twenty-five years worth of Christian prayers delivered by Christian clergy, even if audience members are not formally asked to convert. As a result, this and other courts have recognized the need to determine whether legislative prayers consistently refer to a single religion, and to act accordingly when they do.

Not only did the district court overlook the Original Policy's consistent promotion of Christianity, it also downplayed the Commissioners' awareness of the Original Policy. At Commission meetings, Commissioners would have witnessed the effects of the Original

Policy: Christian clergy regularly delivered Christian prayers; no other religions were represented in clergy or content. After seeing this pattern for twenty-five years, the Commissioners knew all they needed to know.

Although the Establishment Clause treats legislative prayers uniquely, "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." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 603, 109 S. Ct. 3086, 3106 (1989) (quotation marks and citations omitted). The Original Policy's combination of Christian speakers and Christian prayers did just that.

Argument

The district court erred in upholding the Original Policy. When a city invites only Christian clergy for twenty-five straight years, and those Christian clergy deliver primarily Christian prayers—and no prayers from any other religion—that city demonstrates an official preference for Christianity. The plaintiffs were entitled to summary judgment that the Original Policy violates the Establishment Clause; at a minimum, the City was not entitled to summary judgment on this claim.

I. The Original Policy Unlawfully Promoted Christianity.

The Court must evaluate the City's prayers "as a whole," considering factors such as "the identity of the invocational speakers, the selection procedures employed, and the nature of the prayers." *Pelphrey*, 547 F.3d at 1277, 1278. In *Pelphrey*, "[t]he diversity of the religious expression … support[ed] the finding that the prayers, taken as a whole, did not advance any particular faith." *Id.* at 1278. But under the Original Policy, the City's use of exclusively Christian clergy to deliver predominantly Christian prayers served to advance Christianity and Christianity alone.

A. Legislative Bodies May Not Present Exclusively Christian Prayers By Exclusively Christian Clergy.

In upholding the City's practices under the Original Policy, the district court underestimated the emphasis on religious diversity set forth by the Supreme Court in *Marsh v. Chambers* and *County of Allegheny v. ACLU*, by this Court in *Pelphrey v. Cobb County*, and by other decisions applying these principles.

For one, the Original Policy contravenes the most basic guidance from the U.S. Supreme Court. In *Marsh*, the Supreme Court held that legislative bodies may open their meetings with prayers if "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" and if the practices "harmonize[d] with the tenets of some or all religions." 463 U.S. at 792, 794–95, 103 S. Ct. at 3336, 3337–38 (emphasis added). Likewise, the Supreme Court has cautioned 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*." *Cnty. of Allegheny*, 492 U.S. at 603, 109 S. Ct. at 3106 (emphasis added, quotation marks omitted).

This Court's decision in *Pelphrey* reinforces that the Original Policy's Christian-only approach did not suffice. In the opening sentence, the Court explained that "[t]he key issue in th[e] appeal is whether the practice of two county commissions that allow volunteer leaders *of different religions*, on a rotating basis, to offer invocations *with a variety of religious expressions* violates the Establishment Clause." *Pelphrey*, 547 F.3d at 1266 (emphasis added). Although most of the speakers and prayers at issue were Christian, *Pelphrey* turned on the presence of meaningful diversity across every dimension:

- *Diversity of speakers:* Although most of the speakers were Christian, prayers were also delivered by Jewish and Muslim clergy. *See id.* at 1266.
- *Diversity of sources:* The county compiled its speakers list "from several sources, including the Yellow Pages, the internet, and business cards" and included "diverse religious institutions, including a mosque and three synagogues." *Id.* at 1267, 1278.
- *Diversity of prayers:* Although most of the prayers referred to Christianity, others invoked "Allah," "Mohammed," and "the Torah." *Id.* at 1278.

Thus, although many of the speakers and prayers at issue in *Pelphrey* were Christian, other faiths were included too.

This diversity of speakers and prayers—lacking under the City's Original Policy—was key to the Court's decision to uphold many of the practices challenged in *Pelphrey*. The "diversity of speakers" led the Court to conclude that "the County did not exploit the prayers to advance any one religion." *Id.* at 1277. And the resulting "diversity of the religious expressions" led the Court to conclude that "the prayers, taken as a whole, did not advance any particular faith." *Id.* at 1278. The Court ultimately

concluded that the Establishment Clause "allow[s] a county to invite *clergy from diverse faiths to offer a wide variety of prayers* at meetings of its governing body." *Id.* at 1273 (emphasis added, quotation marks omitted).

Other courts have likewise upheld legislative prayers only when they featured some combination of diverse speakers and diverse prayers—a combination missing for twenty-five years under the City's Original Policy. In *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011) (Wilkinson, J.), the Fourth Circuit enjoined a practice in which prayers were delivered exclusively by Christian clergy and in which most prayers referred to Jesus Christ. *See id.* at 345, 353. Writing for the court, Judge Wilkinson distinguished these Christian-only practices from those at issue in *Pelphrey*, where "the diverse references …, viewed cumulatively, did not advance a single faith." *Id.* at 353 (quotation marks omitted).

Likewise, in *Galloway*, the Second Circuit enjoined a policy in which "Christian clergy members have delivered nearly all of the prayers relevant to [the] litigation," and "[a] substantial majority of the prayers in the record contained uniquely Christian language"—including "references to 'Jesus Christ,' 'Jesus,' 'Your Son,' or the 'Holy Spirit.'" 2012 WL 1732787, at *2, 3. The Second Circuit, moreover, reversed a lower-court decision on which

the district court in this case relied. *See* Doc. 54 (Order) at 18, 24–25, 31, 34 (citing *Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010)).

Other decisions have also policed *Pelphrey*'s line between religious diversity and exclusive Christianity:

- In *Doe v. Tangipahoa Parish School Board*, 473 F.3d 188 (5th Cir. 2006) (opinion of Barksdale, J.), *vacated for lack of standing*, 494 F.3d 494 (5th Cir. 2007) (en banc), the Fifth Circuit enjoined a practice in which the prayers were "overtly Christian [in] tone" and in which there was "no evidence that an adherent of any non-Christian faith was permitted to offer a prayer presenting a different message." *Id.* at 203.
- In *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), the Fourth Circuit enjoined a practice that "invok[ed] the name 'Jesus Christ,' to the exclusion of deities associated with any other particular religious faith." *Id.* at 301.
- In *Bacus v. Palo Verde Unified School District*, 52 F. App'x 355 (9th Cir. 2002), the Ninth Circuit enjoined a policy in which most prayers were delivered by "the same individual" and never by "individuals of other religions." *Id.* at 356–57.

- In *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006), *vacated for lack of standing*, 506 F.3d 584 (7th Cir. 2007), the Seventh Circuit maintained the injunction of a practice in which predominantly-Christian clergy regularly delivered Christian prayers ending "in Christ's name." *Id.* at 395, 401–02.
- In *Mullin v. Sussex County*, No. 1:11-cv-00580-LPS (D. Del. May 15, 2012), the district court issued a preliminary injunction given the likelihood that "the Council's practice of opening each meeting with a recitation of [the] distinctly Christian Lord's Prayer violates the Establishment Clause because it constitutes government endorsement of the Christian faith." *Id.* at 21.

With twenty-five years of Christian clergy delivering Christian prayers, the City's Original Policy suffered from the same problems.

Courts have upheld practices only when, as in *Pelphrey*, there was a meaningful combination of diverse prayers and diverse prayergivers. *See, e.g.*, *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 279, 284 (4th Cir. 2005) (Wilkinson, J.) (prayers were delivered by Christian, Muslims, and Jews); *Rubin v. City of Lancaster*, 802 F. Supp. 2d 1107, 1115 (C.D. Cal. 2011) (prayers delivered by "members of various faiths"). Yet

religious diversity—also central to *Pelphrey*—was missing from the City's practices for twenty-five years under the Original Policy.

B. *Under the City's Original Policy, There Was Diversity of Neither Speakers Nor Prayers.*

Under the Original Policy, the City invited only Christian clergy, who regularly delivered prayers overtly referring to Christianity. This consistent preference for Christianity impermissibly "affiliated the government with [a] specific faith or belief." *Pelphrey*, 547 F.3d at 1271 (quotation marks omitted).

1. Christian-only speakers.

For twenty-five years under the Original Policy, the City chose clergy from a list populated exclusively by Christians; no other denominations were invited. By producing a system in which in which "Christian clergy delivered each and every one of the prayers," the City "virtually ensured a Christian viewpoint." *Galloway*, 2012 WL 1732787, at *8.

It is telling what happened once the City—based on the City Attorney's "understanding of the applicable law," Doc. 38-1 (McCausand Dep.)—recognized the need to invite clergy from religions other than Christianity. Upon adopting the Replacement Policy in March 2010, the City identified and invited speakers from "well over 600 religious

organizations," including a Jewish synagogue, Muslim mosque, and Hindu temple. Doc. 34 (City's Mot. for S.J.) at 6. And in the year following its adoption in March 2010, the speakers included a Jewish Cantor, a Jewish Rabbi, and a Muslim Imam. *See id.* With this religious diversity available to the City once it decided to look, the Establishment Clause did not permit the City to maintain a Christian-only approach.

In nonetheless upholding the substance of the selection procedures under the Original Policy, the district court committed several legal errors.

First, the district court incorrectly downplayed the significance of the City's Christian-only environment, by reading too much significance into statements from the lower-court's opinion in *Pelphrey v. Cobb County*, 448 F. Supp. 2d 1357, 1371 (N.D. Ga. 2006). According to the district court, the Establishment Clause permitted the City to use a rotating list of entities that "were exclusively Christian" because "diversity … has never been the *sine qua non* of constitutional legitimacy." Doc. 54 (Order) at 18, 30 (quotation marks omitted). However one might have interpreted the lower court's opinion in *Pelphrey*, the decision on appeal emphasized religious diversity: this Court asked "whether the practice of two county commissions that allow volunteer leaders *of different religions*, on a rotating

basis, to offer invocations *with a variety of religious expressions* violates the Establishment Clause." *Pelphrey*, 547 F.3d at 1266 (emphasis added).

Nor, as the district court concluded, did the Original Policy facilitate the necessary diversity by hosting speakers from a "vast array of denominationally and culturally heterogeneous Christian organizations." Doc. 54 (Order) at 31. The Establishment Clause "guarantee[s] religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Cnty. of Allegheny*, 492 U.S. at 590, 109 S. Ct. at 3099 (quotation marks omitted). Thus, in enjoining unlawful legislative prayers, courts have reiterated that "[t]he Establishment Clause is not limited to preferences for particular Christian denominations." *Hinrichs v. Bosma*, No. 195-CV-0813, 2005 WL 3544300, at *5 (S.D. Ind. Dec. 28, 2005), *stay denied* 440 F.3d 393 (7th Cir. 2006), *vacated for lack of standing*, 506 F.3d 584 (7th Cir. 2007).

Second, the district court erred in dwelling on the question of motive, concluding that even with a Christian-only speaker lineup drawn from a Christian-only list, the only relevant inquiry "is whether the selection of a given speaker was based upon an impermissible motive." Doc. 54 (Order) at 30 (quotation marks omitted). *Pelphrey* illustrated that a permissible

motive is necessary but not sufficient: before turning to the question of motive, this Court first concluded that "the County did not exploit the prayers to advance one faith" because "[t]he speakers … represented a wide cross-section of the County's religious leaders" and "the prayers included references from Christianity and other faiths." *Pelphrey*, 547 F.3d at 1277–78. Only after determining that the prayers featured the necessary religious diversity did *Pelphrey* then consider—in a separately numbered section—whether the government's procedures were "motivated by an improper motive." *Id.* at 1278. Indeed, considering motive alone—notwithstanding effect—would have overlooked the Supreme Court's admonition that the Establishment Clause also "prohibits government *from appearing* to take a position on questions of religious belief." *Cnty. of Allegheny*, 492 U.S. at 593–94, 109 S. Ct. at 3101 (emphasis added, quotation marks omitted).

The Second Circuit's recent decision in *Galloway v. Town of Greece* confirms that the absence of discriminatory motive does not salvage the City's Original Policy of inviting only Christian clergy who delivered Christian prayers. In *Galloway*, the Second Circuit rejected the argument that a permissible motive excused a Christian-only scheme: "*Marsh* did not

speak of scienter. Rather, it held as it did after rejecting the argument that aspects of the prayer practice had the *effect* of giving preference to particular religious views." *Id.* at *8 n.3 (emphasis in original). But "when one creed dominates others—regardless of a town's intentions—constitutional concerns come to the fore." *Id.* at *10.

Third, the district court incorrectly assumed that the inclusion of other faiths was beyond the City's capability. According to the district court, "[t]he City need not have scoured the land for religious groups that cannot be shown to have existed within its boundaries at the relevant time." Doc. 54 (Order) at 32. Of course, a government seeking to present legislative prayers must recognize that "its residents may hold religious beliefs that are not represented by a place of worship within the town." *Galloway*, 2012 WL 1732787, at *8.

In any event, the City could have included non-Christian clergy even without retaining the services of Sherlock Holmes. When it finally adopted the Replacement Policy, the City identified and invited speakers from "well over 600 religious organizations, including but not limited to a Jewish synagogue, a Muslim mosque, Jehovah's Witness meeting halls, Unitarian churches, and a Hindu temple." Doc. 34 (City's Mot. for S.J.) ¶ 17. And as

discussed above on page 5, many local non-Christian congregations were established years if not decades ago; under Federal Rule of Evidence 201(b), the Court may take judicial notice of their longtime presence. *See, e.g.*, *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of New York*, 311 F.3d 534, 540 & n.1 (2d Cir. 2002) (history of Lincoln Center); *Bethel Conservative Mennonite Church v. C.I.R.*, 746 F.2d 388, 392 (7th Cir. 1984) ("history and beliefs of Mennonites"). Even at the time of the Original Policy, then, there was no reason for the City's Christian-only approach.

2. Christian-only prayers.

Perhaps the City's use of exclusively Christian speakers drawn from an exclusively Christian list would have been permissible if these exclusively-Christian speakers had delivered prayers that were nondenominational or representative of many multiple religions. The Supreme Court upheld the practices at issue in *Marsh*, even though all prayers were delivered by a Christian chaplain, "because the particular chaplain had removed all references to Christ." *Cnty. of Allegheny*, 492 U.S. at 603, 109 S. Ct. at 3106(quotation marks and citations omitted).

But the City did not use this more pluralistic approach. Under the Original Policy, the exclusively Christian clergy regularly invoked Jesus

Christ and used other overtly Christian language, and never referenced another religion or deity. For instance, of the twenty-one prayers delivered between May 18, 2009 and March 2010, twelve referred directly to Christianity. Prayers were delivered "in Jesus' name," "in the name of Jesus," "in his Holy Son Jesus' name," and "in the name of the Father, Son and Holy Spirit." Speakers announced that, "Our Heavenly Father, we come to you in the name of Jesus Christ" and asked Jesus to assist the government. They called upon "the wisdom of Solomon, courage of Daniel, heart of David, perseverance of Job, encouragement of Barnabas, and the fortitude of Paul"—and closed "in Jesus' name." *See* Doc. 46 (Pls. Mot. for S.J.) at 9–11, *cited by* Doc. 54 (Order) at 23, 34. Although some of the other prayers were not explicitly Christian, Doc. 54 (Order) at 34, no prayer that did invoke a specific religion mentioned any faith other than Christianity. These regular and overt references to Christianity "create[d] an affiliation between the government and a particular belief or faith." *Pelphrey*, 547 F.3d at 1281.

The district court improperly refused to acknowledge the overtly Christian nature of the City's prayers, asserting that their content was irrelevant unless they "attempt[ed] to convert anyone to Christianity [or]

disparage other religions or beliefs." Doc. 54 (Order) at 34. Contrary to the district court's assertion, courts may not ignore when a government body's prayers are exclusively Christian. Accordingly, in *Pelphrey* this Court reviewed the content of the county's prayers and observed that "[s]ome prayers included references to 'Jesus Christ,' but others referenced 'Allah,' 'Mohammed,' and the Torah," such that "the prayers, taken as a whole, did not advance any particular faith." *Id.* at 1278. And *Pelphrey* cited approvingly the Fourth Circuit's decision in *Wynne*, which noted that the government in that case "insisted upon invoking the name 'Jesus Christ,' to the exclusion of deities associated with any other particular religious faith." 376 F.3d at 301.

Several other recent decisions confirm that legislative bodies are not immune from judicial review when they present Christian-only prayers. As the Second Circuit recently explained, "We need not embark on a sensitive evaluation or parse the content of a particular prayer to recognize that most of the prayers at issue here contained uniquely Christian references and that prayers devoid of such references almost never employed references unique to some other faith." *Galloway*, 2012 WL 1732787, at *9 (citation and quotation marks omitted). Relying on this Court's decision in *Pelphrey*, the

Second Circuit also observed that "other circuits that have addressed the issue, while acknowledging the limits on 'parsing' prayers, have consistently looked to the substance in this fashion." *Id.* at *9 n.6 (citing *Pelphrey*, 547 F.3d at 1277–78).

If courts could not consider whether legislative prayers invoked a single religion, they could not enforce the Establishment Clause against legislative bodies such as the City Commission. In the recent case of *Mullin v. Sussex County*, the court relied on *Pelphrey* and explained that this type of analysis is necessary "to assess whether [the challenged prayer] advances one particular faith." *Mullin*, No. 1:11-cv-00580-LPS, slip op., at 18 n.14. As Judge Wilkinson explained for the Fourth Circuit, "to shut our eyes to patterns of sectarian prayer in public forums [] is to surrender the essence of the Establishment Clause and allow government to throw its weight behind a particular faith. *Marsh* did not countenance any such idea." *Joyner*, 653 F.3d at 351.

If the content of the City's prayers had been ambiguous, the Court would need to exercise caution so as to avoid arbitrating ecclesiastical disputes. *See Pelphrey*, 547 F.3d at 1267 (declining to decide "[w]hether invocations of 'Lord of Lords' or 'the God of Abraham, Isaac, and

Mohammed' are 'sectarian'") (quotation marks omitted). But the Court need not ignore the content of prayers that are expressly and unambiguously denominational. It takes no degree in divinity to know that the terms "Jesus Christ," "His Holy Son Jesus," and "the Father, Son and Holy Spirit" are Christian and Christian alone.

Finally, the district court incorrectly concluded that a pattern of consistently Christian prayers raised no Establishment Clause concerns unless those prayers were expressly proselytizing. According to the district court, "some prayers … reference 'Jesus Christ,'" but they were permissible because they did not "attempt to convert anyone to Christianity, disparage other religions or beliefs, or otherwise encroach upon *Marsh*'s boundary of constitutional impermissibility." Doc. 54 (Order) at 34.

Even the unique doctrine governing legislative prayer, however, considers more than proselytization. The Establishment Clause prohibits legislative bodies from using their prayers "to proselytize *or advance any one*, or to disparage any other, faith, or belief." *Marsh*, 463 U.S. at 794–95, 103 S. Ct. at 3338 (emphasis added). As the court recently explained in *Mullin*, "advancement of religion is distinct from proselytization," and "Plaintiffs need not show proselytization in order to prove advancement."

Id. at 22. Ultimately, "[a]dvancement *could* include conversion but it does not necessarily contain any conversion or proselytization element." *Wynne*, 376 F.3d at 300 (emphasis in original). A Good Friday mass may not proselytize, but it certainly advances a particular religion.

And many of the City Commission prayers transcended the more ceremonial type of religious expression contemplated in *Marsh*. For instance, Plaintiff Wachs testified that one prayer asserted that "this is a Christian city and this—our destiny needs to be fulfilled as a Christian city." *See* Doc. 32-1 (Wachs Dep.) at 69:4–9; Doc. 32-2 (Wachs Dep.) at 119:9–12. Another witness testified, "These prayers in Lakeland can go on for three, four, five minutes in length. It's almost like being in church." Doc. 31-1 (Curry Dep.) at 74:12–15. Even more than "a solitary reference to Jesus Christ," this persistently Christian language "did not evoke common and inclusive themes." *Joyner*, 653 F.3d at 349, 350 (quotation marks omitted).

II. The Commissioners' Presence During Christian Prayers Delivered by Christian Clergy Produced Knowledge Of and Acquiescence In the Original Policy.

In finding no evidence "that policymaking officials … were ever aware that non-Christian religious organizations were being allegedly

excluded prior to March 2010," Doc. 54 (Order) at 29, the district court overlooked that anyone who attended the Commission meetings—such as the Commissioners themselves—would have observed the combination of Christian clergy delivering Christian prayers. The Commissioners are the City's policymakers, Dkt 44-1 (Exhibit 1 to Koos Aff.) § 5, and a municipal policy or custom arises from "a persistent and wide-spread practice" of which policymakers have "actual or constructive knowledge." *Depew v. City of St. Marys*, 787 F.3d 1496, 1499 (11th Cir. 1986). Here, the identity of the speakers (Christian clergy) and the content of their prayers (Christian, no other faith) would have been apparent to anyone who attended biweekly Commission meetings during that time—including and especially the Commissioners themselves.

Plaintiffs established the necessary policy or custom even if they were required to demonstrate that the Commissioners were aware of the Original Policy's nuts-and-bolts. Among other things, "a longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it." *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir. 1991). For instance, in *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), a

teacher's practice of reserving class time for silent prayer "was sufficiently systematic to be considered a pattern or custom for which the [School] Board may be held accountable." *Id.* at 1294.

Here, the Original Policy's selection process arose from "a practice of the organization that had been handed down for generations." Doc. 41-1 (Thomas Dep.) at 100:10–14. Testimony confirmed that the selection practices and procedures were unchanged over decades: "Q. As far as you know, has the process changed at all since you were involved in any way? A. I don't believe it's ever been changed, no." Doc. 39-1 (Hoffman Dep.) at 30:16–19. *See, e.g.*, *Berg v. Cnty. of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000) (municipal custom where inferior employee "followed the practices and procedures which had been in effect at the time she started working"); *Bordanaro v. McLeod*, 871 F.3d 1151, 1156 (1st Cir. 1989) (affirming finding of municipal liability where prevalence of police officers breaking down doors without a warrant "proved that such an unconstitutional custom was the way things [were] done and had [been] done") (quotations omitted, alterations in original). After several decades, these practices established a municipal custom of promoting Christianity—for which the City is now liable.

Conclusion

The district court's judgment should be reversed.

Respectfully submitted,

/s/ Gregory M. Lipper

Ayesha N. Khan
Gregory M. Lipper
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW; Suite 850E
Washington, DC 20005
(202) 466-3234 (phone)
(202) 898-0955 (fax)
lipper@au.org

May 18, 2012

Certificate of Compliance

This brief was prepared in Microsoft Word, Book Antiqua, 14-point font. According to the word count function and in accordance with the computation rules set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the brief contains 6,676 words.

/s/ Gregory M. Lipper
_____
Gregory M. Lipper

Certificate of Service

On May 18, 2012, I served a copy of this *amicus* brief, by Federal Express, on the following counsel of record:

Eric O. Husby
LAW OFFICE OF ERIC HUSBY
2001 W Cleveland Street
Tampa, FL 33606
(813) 251-3337

Mark N. Miller
Kristie Hatcher-Bolin
GRAYROBINSON, PA
1 Lake Morton Drive
Lakeland, FL 33801-5359
(863) 284-2200

Pam Bondi
OFFICE OF THE ATTORNEY GENERAL
3507 E. Frontage Road
Suite FL-2
Tampa, FL 33607-7013
(813) 287-7900

/s/ Gregory M. Lipper
_____
Gregory M. Lipper