



**AMERICANS
UNITED**
*for Separation of
Church and State*

1301 K Street NW

Suite 850, East Tower

Washington, DC 20005

(202) 466-3234 phone

(202) 466-3353 fax

americansunited@au.org

www.au.org



FAX TRANSMISSION MEMO

To: Members of the Hays County Commissioner's Court **Date:** 6/19/2012

Company/Organization: Hays County Commissioner's Court

Fax #: 512-393-2248

Pages: 5

From: Ian Smith, Staff Attorney

Subject: Sectarian Prayer to Open Commissioner's Court Meetings

THIS TRANSMISSION IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR INDIVIDUALS TO WHOM IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, OR AN ATTORNEY WORK PRODUCT AND EXEMPT FROM DISCLOSURE. If the reader is not the intended recipient or an employee or agent responsible for delivering the transmission to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone or return the original transmission to us by mail. Thank you.



**AMERICANS
UNITED**

*for Separation of
Church and State*

1301 K Street NW

Suite 850, East Tower

Washington, DC 20005

(202) 466-3234 phone

(202) 466-3353 fax

americansunited@au.org

www.au.org



June 19, 2012

Dr. Bert Cobb, County Judge
1 Debbie Ingalsbe
2 Mark Jones
3 Will Conley
4 Ray Whisenant
Hays County Commissioner's Court
111 E. San Antonio St., Ste. 300
San Marcos, TX 78666
Fax (512) 393-2248

RE: Sectarian Prayer to Open Commissioner's Court Meetings

Dear Members of the Hays County Commissioner's Court:

Americans United wrote to you on April 27, 2012 regarding a constitutional violation. We asked you to provide an official response addressing our concerns on or before May 27, 2012. More than two weeks have passed since that deadline, and we still have not heard from you. Please let us know when we can expect a response. If we do not receive a response to our letter within the next fourteen days, we will be forced to consider further action.

Very Truly Yours,

Ian Smith, Staff Attorney

encl: April 27, 2012 letter



**AMERICANS
UNITED**
*for Separation of
Church and State*

1301 K Street NW

Suite 850, East Tower

Washington, DC 20005

(202) 466-3234 phone

(202) 466-3353 fax

americansunited@au.org

www.au.org



April 27, 2012

Dr. Bert Cobb, County Judge
Debbie Ingalsbe
Mark Jones
Will Conley
Ray Whisenant
Hays County Commissioner's Court
111 E. San Antonio St., Ste. 300
San Marcos, TX 78666
Fax: (512) 393-2248

RE: Sectarian Prayers to Open Commissioner's Court Meetings

Dear Members of the Hays County Commissioner's Court:

We have received a complaint regarding the Hays County Commissioner's Court's practice of opening its meetings with sectarian Christian prayer. We have viewed recordings of the thirteen prayers offered at Court meetings between January 3, 2012, and April 10, 2012, and have found that ten—nearly seventy-seven percent—were sectarian Christian prayers that invoked the name of Jesus Christ. We write to inform you that your prayer practice is in violation of the Establishment Clause of the First Amendment to the U.S. Constitution, and to ask that you bring your prayer practice into constitutional compliance by either ending the practice altogether or by revising your prayer policy to allow only nonsectarian prayer.

The U.S. Supreme Court has concluded that prayers at the opening of legislative sessions are constitutionally permissible if—but only if—they do not use language specific to one religion. *Compare Marsh v. Chambers*, 463 U.S. 783, 793 n.14, 794-95 (1983) (upholding prayers at legislative sessions where prayer-giver had “removed all references to Christ” and “there was no indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief”), *with Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (explaining 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.”).

Accordingly, federal and state courts have struck down sectarian prayers before legislatures and other representative public bodies. *See, e.g., Joyner v. Forsyth Cnty.*, 653 F.3d 341, 347-50 (4th Cir. 2011) (holding that opening prayers that reference Jesus Christ are unconstitutional and send message that government endorses one religion over others), *cert. denied*, 132 S. Ct. 1097 (Jan. 17, 2012); *Hinrichs v. Bosma*, 440 F.3d 393, 394-96 (7th Cir. 2006) (concluding that plaintiffs were likely to succeed on merits of their challenge to Indiana House's practice of opening its meetings with “overtly sectarian prayer”), *abrogated on other grounds by Hinrichs v. Speaker of the House*, 506 F.3d 584, 585 (7th Cir. 2007); *Wynne v. Town of Great Falls*, 376 F.3d 292, 301-02 (4th Cir. 2004) (prayers in the name of Jesus “are simply not constitutionally acceptable legislative prayer like

Your voice in the battle to preserve religious liberty

that approved in *Marsh*"); *Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867, 873 (Cal. App. 2002) (holding references to "Jesus Christ" in prayers that opened city council meetings unconstitutional); see also *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355, 357 (9th Cir. 2002) (school board's practice of ending prayers "'in the Name of Jesus' displays the government's allegiance to a particular sect or creed," namely Christianity, and therefore violates principle that "one religious denomination cannot be officially preferred over another"); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998) ("The genre [of prayer] approved in *Marsh* is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose" and "typically involves nonsectarian requests for wisdom and solemnity . . ."). The Fifth Circuit, which has jurisdiction over Texas, has not yet definitively ruled on this issue, but the last time the court examined the issue, it concluded, in a panel decision, that *Marsh* forbids sectarian prayer. See *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 200-05 (5th Cir. 2006) (opinion of Barksdale, J.); *id.* at 208-11 (Stewart, J., concurring in part and dissenting in part). That decision was vacated and the case dismissed on standing grounds when the court reheard the case *en banc* (494 F.3d 494 (5th Cir. 2007)), but it remains the Fifth Circuit's only statement on the merits of this issue.

To be sure, in *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008), one circuit adopted a more permissive view, concluding that individual sectarian prayers at legislative meetings are permitted so long as the government body's prayer practice, when viewed as a whole, does not "advance or disparage a [religious] belief," "affiliate the government with a specific faith," or "demonstrate a [government] preference for one particular sect or creed." *Id.* at 1271-72 (quoting *Allegheny*, 492 U.S. at 605) (second alteration in original). In *Pelphrey*, the court upheld a county commission's practice of allowing "volunteer leaders of different religions, on a rotating basis, to offer invocations with a variety of religious expressions." 547 F.3d at 1266. The invited clergy represented a "variety of faiths, including Christianity, Islam, Unitarian Universalism, and Judaism," and the clergy gave "diverse prayers," which included references not only to "Jesus" but also to "Allah," "God of Abraham, Isaac, and Jacob," "Mohammed," and "Heavenly Father." *Id.* Even if *Pelphrey's* minority view of the law were correct (it is not), this would not save your prayer practice, as we understand that the Commissioner's Court invites only Christian clergy to deliver the prayers.

We note that even nonsectarian prayers raise important concerns. The citizens of Hays County adhere to a diverse array of religious traditions and beliefs. Prayers associated with the Judeo-Christian tradition tend to exclude and alienate people of minority faiths as well as nonbelievers, sending them the message that the Court does not represent their interests or welcome their points of view in debates over matters of concern to the community. Accordingly, because the Court is a representative body for *all* Hays County residents, regardless of their faith, we urge you to consider eliminating the prayers altogether, in order to make all commissioners and their constituents feel equally welcome. If, however, you insist on maintaining the practice of offering prayers before meetings, the Court must take action to ensure that its prayer practice is nonsectarian.

We would appreciate a response to this letter within thirty days that advises us of your plans. You may contact Ian Smith at (202) 466-3234 or ismith@au.org if you have any questions about this request.

Very truly yours,



Ayesha N. Khan, Legal Director

Alex J. Luchenitser, Associate Legal Director

Ian Smith, Staff Attorney

