IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

CENTER FOR A SUSTAINABLE COAST and JEFF KILGORE, Plaintiffs, v. GLYNN COUNTY, GEORGIA, a political subdivision of the State of Georgia and COMMISSIONERS, SAMMY TOSTENSEN, CAP FENDIG, WAYNE NEAL, BILL BRUNSON, ALLEN BOOKER, DAVID O'QUINN, WALTER RAFOLKSI, Individually, in their official capacities, and CHURCH WARDENS AND VESTRYMEN OF THE EPISCOPAL CHURCH OF THE TOWN OF FEDERICA, CALLED CHRIST CHURCH. Defendants.	CIVIL ACTION FILE NO. CE21-01136

Plaintiffs' Response in Opposition to Defendants' Motions to Dismiss

I. Introduction

Glynn County violated, and continues to violate, the U.S. Constitution's Establishment Clause by providing financial aid and other unique benefits to Christ Church, in furtherance of a project the Church undertook in order to advance its religious mission and expand its "capacity for ministry."

II. Nature of Claim

Plaintiffs Center for a Sustainable Coast and Jeffrey Kilgore filed an *Amended Complaint for Injunctive Relief and Damages* alleging that Glynn County violated and continues to violate the U.S. Constitution's Establishment Clause. This amended pleading doesn't include any other claim for relief.

III. Standard of Review

In deciding a motion to dismiss for failure to state a claim under O.C.G.A. § 9-11-12(b)(6), "all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor."[1] The motion shall be denied unless the complaint's allegations "disclose with certainty" that the plaintiff "could not possibly introduce evidence" to support the alleged claim.[2]

Glynn County's motion to dismiss included materials outside the pleadings. A trial court reviewing a motion for failure to state a claim can either exclude matters outside the pleadings or treat the motion as one for summary judgment.[3] If a court treats it as a motion for

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[1] *Anderson v. Flake,* 267 Ga. 498, 501 (1997).

[2] *Anderson v. Flake,* 267 Ga. 498, 501 (1997).

[3] *Smith v. Chemtura Corp.*, 297 Ga. App. 287, 289 (2009).

summary judgment, "the court must give the nonmoving party at least 30 days notice to prepare evidence in opposition to summary judgment."[4]

Glynn County also raised a facial challenge to plaintiffs' standing. When review a facial challenge under O.C.G.A. § 9-11-12(b)(1), the court must accept as true the complaints' allegations.[5]

IV. State Courts Have Jurisdiction to Hear Claims Under § 1983 for Deprivation of Constitutional Rights

Section 1983 authorizes a claim for relief against any person who, under color of state law, causes a deprivation of rights secured by the U.S. Constitution.[6]

The Fourteenth Amendment creates rights enforceable against the states "according to the same standards that protect … against federal encroachment."[7] Rights provided by the Bill of Rights — including the Establishment Clause — are enforceable under § 1983.[8]

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[4] *Smith v. Chemtura Corp.*, 297 Ga. App. 287, 289 (2009).

[5] Pinnacle Benning LLC v. Clark Realty Capital, LLC, 314 Ga. App. 609, 618 n. 37 (2012) (citation omitted).

[6] 42 U.S.C. § 1983.

[7] *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010) *citing Malloy v. Hogan,* 378 U.S. 1, 10 (1964).

[8] *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 782 (2010) *citing Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 8 (1947).

Counties are suable under § 1983,[9] and are subject to liability when the final policy maker's decision violates constitutional rights.[10] Section 1983 claims can be filed in state court,[11] and state law governs whether an official has authority to make final policy for the local government.[12] But the "elements of, and defenses to" a § 1983 claim "are defined by federal law."[13]

When a § 1983 action is filed in a state court, state statutes that change the outcome "based solely on whether the claim is asserted in state or federal court" are pre-empted by the Supremacy Clause.[14] Because state law cannot alter the basis for liability, local governments cannot assert sovereign immunity as a defense in a § 1983 claim.[15]

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[9] *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004) *citing Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 692 (1978).

[10] City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).

[11] *Maine v. Thiboutot*, 448 U.S. 1, 11(1980); *Felder v. Casey*, 487 U.S. 131, 138–39 (1988).

[12] McMillian v. Monroe County, 520 U.S. 781 (1997).

[13] *Howlett v. Rose,* 496 U.S. 356, 375 (1990).

[14] *Felder v. Casey*, 487 U.S. 131, 138–39 (1988).

[15] *Howlett v. Rose,* 496 U.S. 356 (1990).

V. Plaintiffs Have Standing

"[U]nder federal and Georgia law, standing requires '(1) an injury in fact; (2) a causal connection between the injury and the causal conduct; and (3) the likelihood that the injury will be redressed with a favorable decision.'"[16]

Plaintiff Jeffrey Kilgore has taxpayer standing to bring this lawsuit and plaintiff Center for a Sustainable Coast has associational standing.

An association has standing to bring suit on behalf of its members when:

- its members would otherwise have standing to sue in their own right
- the interests it seeks to protect are germane to the organization's purpose, and
- neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[17]

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[16] *Sons of Confederate Veterans v. Newton Cty. Bd. of Commissioners*, 360 Ga. App. 798, 803 (2021) *citing Granite State Outdoor Advertising, Inc. v. City of Roswell*, 283 Ga. 417, 418 (1) (2008) (relying upon *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (other citations omitted).

[17] *Aldridge v. Georgia Hosp. & Travel Ass'n*, 251 Ga. 234, 236, 304 S.E.2d 708, 710 (1983) *citing Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

The Center meets this three-part test because (a) Plaintiff Jeffrey Kilgore is a member of Plaintiff CSC[18] and as discussed below he has standing, (b) challenging the misuse of taxpayer money is germane to CSC's mission, which includes "ensuring the responsible use . . . of coastal Georgia's . . . economic resources,"[19] and (c) no individual member's participation is necessary to adjudicate plaintiffs' § 1983 claim.

Jeffrey Kilgore is a Glynn County resident and taxpayer.[20] A County-resident's "status as a taxpayer generally affords him standing to seek to enjoin the unlawful expenditure of public funds."[21] This is because local taxpayers have a personal interest in the sum made up from taxes and the public expenditure of those funds.[22]

Plaintiffs challenge two unlawful expenditures in this case: 1) the initial inequitable land transfer where the County conveyed property worth more than it received and 2) the ongoing expenditure of County funds in furtherance of the road relocation project.

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[18] S*ee* Pls.' 2d Am. Compl. ¶ 1; Pl. Am. Compl. for Inj. Relief, ¶ 2.

[19] *Id*.

[20] Pls.' 2d Am. Compl. ¶ 1.

[21] *Williams v. DeKalb Cty.*, 308 Ga. 265, 272 (2020); accord *City of Atlanta v. Columbia Pictures Corp.*, 218 Ga. 714, 717 (1963).

[22] *City of Atlanta v. Columbia Pictures Corp.*, 218 Ga. 714, 717 (1963).

In its permit application to fill wetlands for the road, Glynn County notified the Corps of Engineers that the Frederica Road Realignment Project is funded by the County government.[23] Taxpayer standing to challenge these expenditures is well-established. For the initial land transfer, citizens and taxpayers of a County have standing to seek cancellation and rescission of a contract that illegally disposed of County property.[24]

And as to the ongoing road relocation project, County taxpayers have standing to challenge expenditures for activities that violate the Establishment Clause, even if the expenditures at issue are limited to the use of County resources "in the form of materials and personnel time" in furtherance of the challenged practice.[25]

Glynn County continues the use of personnel time and other resources to construct the new portion of Frederica Road, which constitutes a sufficient expenditure to sustain this challenge.

Plaintiffs establish "the 'direct and immediate' interest necessary to confer standing to challenge the constitutionality" of an alleged Establishment Clause violation when they are taxpayers and residents

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[23] Pl. Am. Compl. for Inj. Relief, ¶ 58.

[24] *Malcom v. Webb*, 211 Ga. 449, 455 (1955).

[25] *Pelphrey v. Cobb Cty., Ga.*, 547 F.3d 1263, 1267 (11th Cir. 2008).

of the County, and the County expended public funds to further the activity (even if only materials and personnel time).[26]

Williams v. Dekalb County is consistent with *Malcom* and *Pelphrey* and does *not* suggest that taxpayers lack standing to challenge County expenditures as violations of the Establishment Clause. The *Williams* plaintiff lacked standing because he did not challenge a specific expenditure, but rather, he challenged the enforcement of a "compensation ordinance," and the county commissioners did not play a role in enforcing that statute.[27] The court noted that the plaintiff "has not alleged that, *after* the passage of the ordinance, the commissioners performed or could forbear any official acts pertaining to the execution of the ordinance or the appropriation or disbursement of public funds they receive as salaries," and thus, no injunctive relief could issue against the commissioners as to the enforcement of the already-passed ordinance.[28]

In other words, the court dismissed claims against the commissioners because the plaintiff's harm wasn't redressable by a favorable decision.[29]

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[26] *Pelphrey v. Cobb Cty., Ga.*, 547 F.3d 1263, 1280-81 (11th Cir. 2008).

[27] *Williams v. DeKalb Cty.*, 308 Ga. 265, 273-74 (2020).

[28] *Id.* at 274.

[29] *Id.*

Here, plaintiffs don't challenge a generally applicable statute, but rather, the County's choices to transfer its property to a church at a financial loss to the County and to relocate a road for the benefit of that same church. Both acts are discrete decisions made by the County, for which the County retains sole discretion. Thus, unlike in *Williams*, redressability does *not* undermine Plaintiffs' taxpayer standing in this case.

The County's reliance on *Gaddy v. Georgia Department of Revenue* is similarly misplaced. A taxpayer's claim to an increased tax burden may be too "speculative" to sustain taxpayer standing when challenging a *state* expenditure,[30] but that has never held true for a municipal taxpayer challenging a local expenditure. For this reason, the *Gaddy* court's determination that the use of *state* employee time to process the filings of tax credits did not constitute a sufficient "expenditure" to sustain taxpayer standing[31] does not foreclose Plaintiffs' claim that the use of *municipal* employee time is a sufficient expenditure to sustain Mr. Kilgore's taxpayer standing.

Finally, a plaintiffs' harm can be redressed under § 1983 not only by injunction but also by nominal damages. In *Uzuegbunam v.*

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[30] *Gaddy v. Georgia Dep't of Revenue*, 301 Ga. 552, 556 (2017).

[31] *Id.* at 558.

Preczewski, the U.S. Supreme Court held that "an award of nominal damages by itself can redress" an injury.[32] The Court observed that "a single dollar often cannot provide full redress, but the ability 'to effectuate a partial remedy' satisfies the redressability requirement."[33] In reaching this decision, the Court explained that "the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights," such as the First Amendment violations alleged in *Uzuegbunam*.[34]

Plaintiffs CSC and Jeffrey Kilgore have standing to challenge Glynn County's unconstitutional public funding for the Frederica Road realignment.

VI. The County's Actions Violate the Federal Establishment Clause

The Establishment Clause — which bars the government from making any "law respecting an establishment of religion" and was "made applicable to the states" by the Fourteenth Amendment —

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[32] *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796, 209 L. Ed. 2d 94 (2021).

[33] *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801, 209 L. Ed. 2d 94 (2021).

[34] *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800, 209 L. Ed. 2d 94 (2021).

limits the government's ability to fund religious activities.[35] The Supreme Court explained that for the Founders of our Nation, laws respecting "the 'establishment' of a religion connoted . . . financial support . . ."

Directing a government "subsidy exclusively to" a religious organization "that is not required by the Free Exercise Clause" conveys an impermissible message of "state sponsorship of religious belief."[36] In a concurring opinion, Justice Blackmun explained that financial aid violates the Establishment Clause when the government engages "in preferential support for the communication of religious messages."[37]

Here, Christ Church undertook a master planning process that determined additional parking was needed to increase the number of congregants and expand the "capacity for ministry."[38] The Church explained that its governing board "began considering how Christ Church could best respond to God's call to serve our community and make room for a growing congregation and its mission."[39]

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[35] U.S. CONST. amend. I; Everson v. Bd. of Educ., 330 U.S. 1, 5 (1947).

[36] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (plurality opinion).

[37] Id. at 28 (Blackmun, J., concurring).

[38] Pls.' 2d Am. Compl. ¶ 9; *see also id.* ¶ 10; Pls' Am. Compl. for Inj. Relief, ¶¶ 9 and 10.

[39] Pls' Am. Compl. for Inj. Relief, ¶ 10.

The Church concluded that shifting Frederica Road will allow for parking that doesn't require crossing the road and for space to expand its facilities and its mission.[40] The expanded space will include a new sanctuary that "allows service sizes to expand substantially" and "more parishioners and worshipers to come together and celebrate the Word."[41] For these reasons, the Church requested that Glynn County undergo the land swap and road relocation.[42]

Under a Memorandum of Agreement, the County and Church exchanged three-acre parcels.[43] The County received land to build the new road and the Church received land to expand its campus on the southwest side of Frederica Road.[44] Before the land exchange, the parcel where the new road is to be built was deed restricted requiring its use "for church purposes or otherwise left undeveloped."[45] In the Church's Frequently Asked Questions, the Church stated that "the nature of the exchange ensures that the land is being used for the

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[40] Pls.' 2d Am. Compl. ¶ 11; *see also id.* ¶ 12; Pls' Am. Compl. for Inj. Relief, ¶¶ 11 and 12.

[41] Pls.' 2d Am. Compl. ¶ 12; Pls' Am. Compl. for Inj. Relief, ¶ 12.

[42] *See* Pls.' 2d Am. Compl. ¶ 13; Pls' Am. Compl. for Inj. Relief, ¶ 13.

[43] Pls' Am. Compl. for Inj. Relief, ¶ 18.

[44] Pls' Am. Compl. for Inj. Relief, ¶¶ 42-43.

[45] Pls.' 2d Am. Compl. ¶¶ 19-20; Pls' Am. Compl. for Inj. Relief, ¶ 44.

benefit of Christ Church to…allow for program and ministry growth…"[46]

And even though the land conveyed to the Church is uplands with a higher value than the land conveyed to the County, both parcels were stated to have the same value.[47] Regardless of funding to construct the road, the land swap "was required for the road to be shifted"[48] and has the effect of aiding and advancing religion. These allegations plausibly show that Glynn County is violating the Establishment Clause. Plaintiffs have further pled facts sufficient to find that the true purpose behind the land exchange and road relocation project is to advance Christ Church's religious interests.[49]

The County acknowledges that "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts."[50] Such fact-sensitive challenges are not good candidates for dismissal at this stage of litigation, where the parties have yet to undergo discovery to uncover

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[46] Pls.' 2d Am. Compl. ¶¶ 19-20; Pls' Am. Compl. for Inj. Relief, ¶ 44.

[47] Pls.' 2d Am. Compl, ¶ 21; Pls' Am. Compl. for Inj. Relief, ¶ 23.

[48] Pls.' 2d Am. Compl. ¶ 15; Pls' Am. Compl. for Inj. Relief, ¶ 15.

[49] Pls' Am. Compl. for Inj. Relief, ¶¶ 16-17.

[50] Cnty. MTD at 17 (citing *Glassroth v. Moore*, 335 F.3d 1282, 1288 (11th Cir. 2003).

the relevant facts. This is because "[k]nowledge of the particular facts and specific circumstances is essential to a determination of whether the governmental acts in question are religiously neutral."[51]

Regardless, the County doesn't even attempt to demonstrate that Plaintiffs "would not be entitled to relief under any state of provable facts,"[52] but instead, simply provides its own merits analysis based on limited facts.[53] Conducting a merits analysis is not proper at this stage of the case. All that is presently at issue is "whether, under the assumed set of facts, a right to some form of legal relief would exist."[54]

The County cannot meet this exacting standard. The Plaintiffs pled facts supporting a conclusion that the County's actions violate the Establishment Clause, first, because the County is providing *direct financial aid* to a church using taxpayer funds, second, because the County's *purpose* is to advance religion and, third, because the *effect* of the County's actions are to advance religion. Any one of these conclusions is sufficient for Plaintiffs to prevail on their Establishment Clause claims.

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[51] *Selman v. Cobb Cty. Sch. Dist.*, 449 F.3d 1320, 1323 (11th Cir. 2006).

[52] *Norman*, 310 Ga. at 130.

[53] *See* Cnty. MTD at 16-21 (analyzing pre-discovery facts under *Lemon* test).

[54] *Northway v. Allen*, 291 Ga. 227, 229 (2012) (quoting *Charles H. Wesley Educ. Found. v. State Election Bd.,* 282 Ga. 707, 714 (2007)).

When reflecting upon the historical practices that led the United States' Founders to pass the federal Establishment Clause, the Supreme Court has repeatedly noted that "financial support" of a church or religious activity is one of "the three main evils against which the Establishment Clause was intended to afford protection."[55] For this reason, government funding specifically targeted to aid a religious institution violates the federal Establishment Clause.

The government "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[56]

In addition to alleging that Glynn County provided financial aid to Christ Church by conveying property of greater value than it acquired,[57] Plaintiffs alleged that "Glynn County provided other financial aid to Christ Church in shifting Frederica Road away from the Church, including time and resources spent by County officials to undertake the Frederica Road Realignment Project."[58] These actions

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[55] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[56] *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947).

[57] Pls.' 2d Am. Compl. ¶¶ 21 and 25; Pls' Am. Compl. for Inj. Relief, ¶ 46.

[58] Pls.' 2d Am. Compl. ¶ 26; Pls' Am. Compl. for Inj. Relief, ¶ 47.

by the County are the type of financial support prohibited by the Establishment Clauses.[59]

This Court is vested with authority to determine the constitutionality of the County's actions made in furtherance of the ongoing road relocation project, including assessing the legality of the land exchange itself.

Despite the predominantly religious purpose behind the land exchange and project requested by Christ Church, the County argues the Church's request also served a secular purpose.[60] The County offers evidence outside of the complaint to support its contention.[61] Even if this Court were authorized to consider the County's evidence at this stage of the litigation, that evidence would merely highlight the open and fact-intensive question of whether the County's stated purpose is genuine or a sham. Such an open question must be resolved in Plaintiffs' favor for the purposes of a motion to dismiss.

The government's stated purpose behind its actions "has to be genuine, not a sham, and not merely secondary to a religious

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[59] *See* Pls.' 2d Am. Compl. ¶¶ 36-37; Pl. Am. Compl. for Inj. Relief, ¶ 60.

[60] *See* Cnty. MTD at 18-19.

[61] *See id.* at 18 (citing Cnty. MTD Ex. B).

objective."[62] Even prior to conducting discovery, there is already ample reason to believe that the County's claim that it is relocating the road "to improve safety and historic preservation"[63] is simply a sham, or a *post hoc* justification for actions the County decided to take in order to aid Christ Church. As to safety, the County never performed a traffic study or associated accident analysis to determine whether there was a safety problem to begin with.[64] And over a recent five-year period, from January 2014 to September 2019, there was only one reported accident in the project area, and that accident did not result from a deficiency that this project would fix.[65]

As to historic preservation, it is unclear how digging up an existing road, which itself is a piece of the area's history, advances that purpose at all.[66] A Court need not credit the government's stated purpose when it is implausible.

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[62] *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Edwards v. Aguilard*, 482 U.S. 578, 586–87, 590, 594 (1987); *Stone v. Graham*, 449 U.S. 39, 41 (1980)).

[63] Cnty. MTD at 18.

[64] Pl. Am. Compl. for Inj. Relief, ¶ 51.

[65] *Id.*

[66] Pl. Am. Compl. for Inj. Relief, ¶ 52.

In *McCreary County v. American Civil Liberties Union of Kentucky*, the Supreme Court "declined to credit Alabama's stated secular rationale of 'accommodation' for legislation authorizing a period of silence in school for meditation or voluntary prayer, given the implausibility of that explanation in light of another statute already accommodating children wishing to pray."[67]

Finally, even if this Court ultimately determines that the County did not undertake the land swap and road relocation project for an impermissible religious purpose, "the propriety of a legislature's purposes may not immunize from further scrutiny a law [or action] which . . . has a **primary effect** that advances religion . . . ."[68] A "governmental subsidy directed at religious institutions . . . conveys a message of endorsement."[69]

By the same token, government support of a religious institution through direct funding, rather than a subsidy, conveys endorsement. Plaintiffs have pled facts showing Glynn County is violating the

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[67] *McCreary Cty., Ky. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 864, 125 S. Ct. 2722, 2735, 162 L. Ed. 2d 729 (2005) discussing *Wallace v. Jaffree*, 472 U.S. 38, 57 (1985).

[68] *Nyquist*, 413 U.S. at 774 (emphasis added).

[69] *Utah Gospel Mission*, 425 F.3d at 1261 (citing *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305–06 (2000); *Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989)).

Establishment Clause,[70] and it would be error to dismiss this case on a motion to dismiss.

VII. Christ Church is Properly Joined as a Necessary Party

Section 1983 defendants can be sued for both monetary and injunctive relief.[71] Plaintiffs allege that Glynn County violated the Establishment Clause by exchanging parcels with Christ Church and that the County continues to violate the Establishment Clause by making public expenditures to realign Frederica Road.

Plaintiffs request injunctive relief to invalidate and void the land exchange and to stop ongoing construction. Christ Church has interests that would be impaired by such relief. Even if the land exchange isn't rescinded, the parcel conveyed to Christ Church has a temporary easement for traffic until the realigned road is open to the public.[72] Injunctive relief to stop construction on the parcel conveyed to the County would impair Christ Church's interest in the parcel it acquired.

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[70] Pl. Am. Compl. for Inj. Relief, ¶ 61.

[71] *Los Angeles Cty., Cal. v. Humphries*, 562 U.S. 29, 37 (2010) *citing Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978).

[72] Pl. Am. Compl. for Inj. Relief, ¶ 42.

Under O.C.G.A. § 9-11-19(a)(2), a person who is subject to service of process must be joined as a party if they claim an interest relating to the subject of the action and are so situated that the disposition of the action may impair the ability to protect that interest. This is true even if there is no claim against the person.[73]

VIII. Conclusion

Plaintiffs plausibly alleged that they are entitled to relief under § 1983, and Defendants' motions to dismiss should be denied.

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[73] *Hall v. Oliver*, 251 Ga. App. 122, 123, 553 S.E.2d 656, 657 (2001).

Certificate of Service

I certify that I served this *Response to Defendants' Motions to Dismiss* by emailing counsel of record a copy in portable document format (PDF) and showing in the subject line of the email message the words "STATUTORY ELECTRONIC SERVICE" in capital letters.

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