

FREEDOM FROM RELIGION *foundation*

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December 28, 2017

SENT VIA EMAIL & U.S. MAIL:
obhof@ohiosenate.gov

The Honorable Larry Obhof
President of the Ohio Senate
Senate Building, 2nd Floor
1 Capitol Square
Columbus, OH, 43215

Re: Unconstitutional Invocation Practices

Dear Senator Obhof:

I am writing on behalf of the Freedom From Religion Foundation (FFRF), the Northern Ohio Freethought Society (NOFS), and the 23% of Ohioans who are nonreligious¹ to alert you to a serious constitutional violation concerning invocations before the Ohio Senate. FFRF is a national nonprofit organization representing over 30,000 members across the country including over 750 members in Ohio. FFRF's purposes are to protect the constitutional separation between state and church, and to educate the public on matters relating to nontheism.

It is our understanding that NOFS Vice-President Sam Salerno has been corresponding with the office of Senator Mike Skindell for well over a year regarding his request to give a secular invocation to the Senate. On November 15, 2016, Anthony DiMenna, Sen. Skindell's legislative aide, finally replied to Mr. Salerno by email and attached a memo by Clerk of the Senate Vincent L. Keeran. This memo listed the guidelines for Senate invocations. According to these guidelines, an invocation should be "approximately one to two minutes in length," "non-denominational, non-sectarian, and non-proselytizing," and "should avoid contentious subject matter." Please find copy of Mr. Keeran's memo enclosed. In this email, Mr. DiMenna also asked Mr. Salerno to submit a copy of his proposed invocation "so that Senator Skindell can have a copy." Mr. Salerno provided his invocation as requested. Please find the enclosed copy of Mr. Salerno's proposed invocation.

Mr. Salerno heard very little from Sen. Skindell's office over the following months despite repeated phone calls to clarify the status of his request. Finally, on July 17, 2017, Mr. Salerno spoke with Mr. Keeran. We understand that Mr. Keeran informed Mr. Salerno that no decision had yet been reached with respect to his secular invocation, and that Mr. Keeran would have to discuss the matter with you. Mr. Salerno reached out to Sen. Skindell's office for clarification, but received no reply. After a further two months of silence, Sen. Skindell contacted Mr. Salerno by phone on September 19, 2017. We understand that Sen. Skindell told Mr. Salerno that he had spoken with you two weeks prior regarding the invocation, and that you were currently reviewing Mr. Salerno's remarks. After this conversation, Mr. DiMenna forwarded Mr. Salerno an email he had sent to your office on September 5, 2017, which said: "Senator Skindell talked

¹ Robert P. Jones & Daniel Cox, *America's Changing Religious Identity*, PUBLIC RELIGION RESEARCH INSTITUTE (Sept. 6, 2017), available at www.prrri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf.

with President Obhof today at non-voting about having a guest come down for session to give a secular invocation before session. President Obhof said to forward the remarks of our constituent for review. I've attached them to this email." Mr. Salerno has heard nothing from either you or Sen. Skindell since this last contact over three months ago.

Mr. Salerno has met all the requirements that he was told were necessary to deliver the invocation under the guidelines issued by Mr. Keeran. His invocation is brief, non-sectarian, non-denominational, non-proselytizing, and cannot reasonably be called contentious. Nowhere in these guidelines does it state that invocations are to be submitted to the President of the Senate for review and approval.

Mr. Salerno's earnest attempt to deliver a secular invocation to the Senate of his beloved home state has been frustrated at every turn, and he has been forced to jump through hoops that others have not. This blatantly disparate treatment of Mr. Salerno as compared to other invited invocation givers is unconstitutional and discriminatory.

The Senate must allow nonbelievers to give invocations.

As you likely know, the Supreme Court addressed the issue of legislative prayer in *Greece v. Galloway*, 134 S. Ct. 1811 (2014). The Court identified several important elements to the town's invocation practice that, taken together, ensured that the practice did not impermissibly advance one religion over another or promote religion over nonreligion. Over time, the town of Greece "compiled a list of willing 'board chaplains' who had accepted invitations and agreed to return in the future." *Id.* at 1816. But crucially, the town of Greece "at no point excluded or denied an opportunity to a would-be prayer giver." *Id.* If the Senate chooses to continue its prayer practice, it must similarly open its prayers to all comers, including atheists, agnostics, Humanists, and others. In *Galloway*, the town "maintained that a minister or layperson of any persuasion, *including an atheist*, could give the invocation." *Id.* at 1816 (emphasis added). In fact, on July 15, 2014, an atheist citizen actually did deliver a secular invocation at Greece's town board meeting.²

The fact that Greece "represented that it would welcome a prayer by any minister or layman who wished to give one" was a critical factor in the Court's conclusion that the practice in *Galloway* did not violate the Constitution. *Id.* at 1824. The Court clearly stated that the purpose of these invocations must be inclusive: "These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion." *Id.* at 1823. The Supreme Court's decision would have been different had the town used the prayer opportunity to discriminate against minority religions. There can be no "policy or practice of discriminating against minority faiths." *Id.* at 1817. A nonbeliever who requests to give the opening invocation should therefore be allowed to do so. This practice is not just inclusive, but under *Galloway*, it is constitutionally sound.

Please note that FFRF was just recently victorious in a lawsuit that turned on this very proposition. In *Williamson v. Brevard Cty.*, 2017 WL 4404444 (M. D. Fla., September 30, 2017), a federal court ruled that a county board's practice of excluding atheists, agnostics, and secular humanists from offering invocations at board meetings violated the Establishment Clause. The court specifically held that it was unconstitutional for the county to impose a "theism" requirement on invocations. *Id.* at *16. "For a governmental entity to require, or attempt to require, 'religious' content in invocations is, in effect (or, at best, but a step removed from) that

² www.centerforinquiry.net/newsroom/atheist_to_deliver_invocation_at_greece_ny_town_meeting_july_15/.

entity composing prayers for public consumption or *censoring the content of prayers*—in contravention of the principles set forth in the *Town of Greece*.” *Id* at *19 (emphasis added).

The Senate cannot censor the content of invocations.

This was made clear in *Galloway*. Government officials cannot “act as supervisors and censors of religious speech” because doing so “would involve government in religious matters to a far greater degree than... neither editing or approving prayers in advance nor criticizing their content after the fact.” *Galloway*, 134 S. Ct. at 1822. Put another way, the Court explicitly stated: “Our Government is prohibited from prescribing prayers to be recited in our public institutions. . . .” *Id.* (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)). As a government office, the Senate cannot dictate what is said or not said by prayer givers.

Furthermore, the Senate may not arbitrarily impose this “review” requirement on Mr. Salerno. It is unconstitutional discrimination to treat similarly-situated persons differently: “[t]he Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Treating an atheist or nonbeliever who wishes to give an invocation differently from a religious citizen constitutes discrimination.

Conclusion.

The Supreme Court has explained that the purpose of the religion clauses of the First Amendment is “to prevent, as far as possible, the **intrusion** of either [the church or the state] into the precincts of the other.” *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The Senate’s suffocating oversight and systematic delay of Mr. Salerno’s request to give a secular invocation amounts to an “intrusion of government in the constitutional sense” that may “result in establishment of religion.” *Id.* at 634 (“The intrusion of government into religio[n] ... through ... supervision, or surveillance may result in establishment of religion in the constitutional sense when what the State does enthrones a particular sect for overt or subtle propagation of its faith.”)

There is no legitimate excuse for how Mr. Salerno has been treated. We ask that you approve Mr. Salerno’s request and allow him to give his invocation as soon as practicable. We ask for a written response notifying us what corrective action you have taken to address these serious constitutional violations. We look forward to hearing from you.

Sincerely,



Colin E. McNamara, Esq.
Robert G. Ingersoll Legal Fellow
Freedom From Religion Foundation

Enclosures

To: Senate Offices

From: Vincent L. Keeran, Clerk

Re: Opening Prayer Guidelines, Ohio Senate

The following provides guidelines for guest clergy who are invited to provide the prayer at the opening of Senate session. Please share this information with members of the clergy who will be your guest for the opening prayer.

Arrival/Parking

The Senate provides parking for guest clergy in the Statehouse Underground Parking Garage. Upon entering the garage, it is necessary for your guest to take a ticket. Guest clergy will be given a voucher by the Senate Clerk to be used with the ticket when exiting the garage. In the event that the parking garage is full, advise your guest to inform the garage attendant that he or she will be providing the prayer for the Senate. Parking will be available to your guest.

Clergy should report to the Senate Chamber at least fifteen minutes prior to session. These times are as follows:

- Tuesday 1:15 p.m.
- Wednesday 1:15 p.m.
- Thursday 10:45 a.m.

Content/Length

In accordance with the United States Supreme Court ruling regarding prayers offered for public functions, prayers before the Senate should be non-denominational, non-sectarian and non-proselytizing. Prayers should avoid contentious subject matter.

The opening prayer should be approximately one to two minutes in length.

If you have any questions, please contact me at 466-4900.

Secular invocation

Ladies and Gentleman, I'd like to take this opportunity to pay homage to the human mind.

The human mind is the single most incredible device known to mankind. Because of it we have harnessed fire, tools, communication, art, agriculture, writing, language, mathematics, science, indeed all of the modern conveniences of life and ethical morality.

No single thing has done more for the human race than the human mind.

Let us also show gratitude for all of the woman and men before us who have strove for humanitarian efforts to make our country and planet a safer place for all human beings.

Let us commit to the future children of this nation that we will use our care and well thought out reasoning to make this country as great as a place for them as it is to us.

Finally let us be grateful for our Democratic system, for the people by the people