

FREEDOM FROM RELIGION *foundation*

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May 11, 2017

Sent via U.S. Mail and Email: commission@eustis.org

The Honorable Robert Morin
Mayor
10 N. Grove St.,
Eustis, FL 32726

Re: Constitutional problems with Eustis invocations and censorship

Dear Mayor Morin and City Commissioners:

I am writing on behalf of members of the Freedom From Religion Foundation, to object to the City Commission's treatment of secular opening invocations and to the unconstitutional censorship of legitimate criticism in official government forums, including on Facebook pages. FFRF is a nationwide nonprofit organization, which protects the constitutional separation of state and church. FFRF represents more than 28,000 nonreligious members nationally including more than 1,400 members in Florida and a local chapter, the Central Florida Freethought Community. Please share this letter with the Commission

We understand that on May 4, 2017, the National Day of Prayer, a board member of CFFC gave a secular invocation to solemnize the meeting. He did this as part of the Commission's invocation policy. His invocation was well spoken and in keeping with the policy. It focused on inclusivity, reason, and compassion, all of which are critical to a functioning democratic government. The full text of that invocation is appended to this letter.¹

What followed was certainly not in keeping with the policy. Commissioner Sabatini gave a second invocation, which appears to be the first time the Commission has allowed this. Sabatini instructed all present to "stand" and "bow your heads." He then addressed a prayer to his "Lord," to "live in your name," and asked for the strength "to live like your son, Jesus Christ, amen." This second invocation was clearly meant to, in Sabatini's words, "answer . . . radical militant atheists."

During that meeting Sabatini also suggested, in a clear effort to keep out future secular invocations, that prayer givers be restricted on the basis of residency. We also understand that Sabatini or his staff have been deleting comments critical of his behavior off official government-maintained public forums, such as Sabatini's official government Facebook page.

These events and suggestions raise four distinct constitutional problems for the Commission:

1. Sabatini's corrective prayer violated the Constitution.
2. Commissioners giving prayers in general violates the Constitution.
3. Restricting prayer opportunity on the basis of residency violates the Constitution.
4. Censoring critical comments on official government Facebook pages violates the Constitution.

Each of these issues will be addressed in turn and will need to be addressed by the City Commission at the earliest possible opportunity.

¹ The text of Sabatini's corrective prayer is also appended. Video of all the relevant exchanges is available at <https://youtu.be/VHX5o4Vvk4sk>.

Sabatini's corrective prayer violated the Constitution.

The Supreme Court recently 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. In that case, 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 delivered the opening 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 Supreme 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 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. 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.

Sabatini's "answering" prayer was clear and deliberate differential treatment. It denigrated the secular invocation and did so deliberately. This violates the central principle of *Greece v. Galloway*: no discrimination against minorities. Sabatini's corrective prayer amounts to a policy or practice that discriminates against minorities because it was only done against a minority group Sabatini disagreed with: Secularists. He did not—indeed, he *would* not—dare to correct a Christian prayer.

Sabatini's treatment of the secular invocation violated these strictures. Sabatini represented to every non-Christian that this Commission does not "welcome a prayer by any minister or layman who wished to give one," but only welcomes those who can meet Sabatini's religious sensibilities—which are not part of the official policy. Sabatini's second prayer was not meant to further the idea of many "united in a community of tolerance and devotion," it was divisive.

Commissioners giving prayers in general violates the Constitution.

The Court in *Galloway* only approved opening a neutral forum for others, including non-Christians and atheists, to give invocations. "Our Government is prohibited from prescribing prayers to be recited in our public institutions." *Galloway*, 134 S. Ct. at 1822 (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)). Local government officials should not be in the business of writing and offering prayers themselves. The Supreme Court's full point, stated more than 50 years ago, is worth reiterating:

the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State . . . the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

Engel v. Vitale, 370 U.S. 421, 430 (1962).

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

Courts post-*Greece* agree with this interpretation. The Sixth Circuit recently explained: “Legislator-led prayer at the local level falls far afield of the historical tradition upheld in *Marsh* and *Town of Greece*.” *Bormuth v. Cnty. of Jackson*, 849 F.3d 266 (6th Cir. 2017) (*Rehearing en banc granted, decision vacated and stayed*).

Restricting prayer opportunity on the basis of residency violates the Constitution.

Residency requirements are inherently discriminatory against minority religions, thereby violating the principles above.

Courts have repeatedly held that residency requirements on First Amendment rights, such as religion and speech, are invalid under the Equal Protection Clause. In an Equal Protection case involving a fundamental right, such as free speech, the government must have a compelling government interest in burdening that right. “When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest.” *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986), *citing Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *NAACP v. Button*, 371 U.S. 415, 438 (1963). Obviously, discriminating against unpopular speech is not a compelling interest.

In *Buckley v. Am. Constitutional Law Found., Inc.*, the Supreme Court held unconstitutional Colorado’s requirement that circulators of initiative petitions be registered Colorado voters. 525 U.S. 182 (1999). In *Nader v. Brewer*, the Ninth Circuit concluded that a “residency requirement nevertheless excludes from eligibility all persons who . . . live outside the state of Arizona. Such a restriction creates a severe burden on . . . out-of-state supporters’ speech, voting and associational rights.” 531 F.3d 1028, 1036 (9th Cir. 2008). *See also Nader v. Blackwell*, 545 F.3d 459, 475 (6th Cir. 2008) (rule requiring petition circulators to be Ohio residents was a violation of First Amendment rights.); *Chandler v. City of Arvada*, 292 F.3d 1236, 1238-39, 1241-42 (10th Cir. 2002) (holding same); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) (speech residency requirement was a substantial burden on First Amendment rights, not narrowly tailored to serve a compelling interest, and thus was unconstitutional). In each of these cases the freedom of speech was burdened by residency requirements and those requirements were found to be unconstitutional.

In 2015, FFRF filed a federal lawsuit in cooperation with the ACLU against Franklin County, Indiana over a residency requirement in the county’s display policy. The County quickly amended its policy to remove the residency requirement and settled the lawsuit. This Commission’s proposal is similarly unconstitutional.

Censorship of criticism on Sabatini’s official Facebook page is unconstitutional.

We understand that Sabatini maintains two Facebook pages, a personal page that is of no relevance here, and an official government page. This second page,³ is clearly meant to be Sabatini’s official government page, listing his full name and title, “Anthony Sabatini, Eustis City Commissioner Seat #2,” alongside his official portrait and a picture of Eustis City Hall. This second page only deals with official government issues and business. It lists Sabatini as a “politician,” includes his political affiliation, political views, “current office,” and the official Eustis website.⁴

It is our understanding that Sabatini or his staff have been deleting comments from this official page that are critical of his actions regarding the prayers. We understand that these comments were only deleted for the viewpoint they expressed and not for some other reason, such as being obscene.

³ <https://www.facebook.com/SabatiniForEustis>.

⁴ <https://www.facebook.com/pg/SabatiniForEustis/about/>.

Censoring critical comments is a textbook violation of citizens' First Amendment rights:

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. ... government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional.

Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 828-29 (1995), citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994); *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983).

The Supreme Court continued, "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 828-29.

Sabatini allows discussion of this issue on his page. Indeed at the time of this writing, his most recent post is to a local article that he gave a grossly misleading introduction: "Radical militant atheist's planned speech at last week's Eustis City Commission meeting was answered by a simple Christian prayer--and now they're furious."⁵ These are Sabatini's own words and do not appear in the story. Clearly, he believes his "Christian prayer" was an "answer" to the legitimate secular invocation given according to policy.

Sabatini may either allow all comments or none. He does not get to pick and choose which citizens he will censor on his official Facebook page. Nor can he ban, as we understand he has, citizens from his page for disagreeing with him.

The fact that the forum is online is irrelevant, as Justice Kennedy explained: "minds are not changed in streets and parks as they once were"; instead, "the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media." *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 802-03 (1996) (Kennedy, J., concurring in part and dissenting in part).

Last year, one of our frequent partners, American Atheists, settled a similar case against a county sheriff in Tennessee; the case cost the county \$41,000.⁶

These battling invocations show that mixing religion and government is divisive.

Commissioners are free to pray privately or to worship on their own time in their own way. They do not need to worship on taxpayers' time. The Commission ought not lend its power and prestige to religion by enforcing prayer. Our nation is founded on a godless Constitution, whose only references to religion in government are exclusionary, such as "no religious test shall ever be required" for public office. U.S. Const. art. VI. The United States was the first nation to adopt a secular constitution, investing sovereignty in "We the People," not a divine entity. The framers did not think it necessary to pray during the four-month Constitutional Convention. We fail to see why it is necessary for the Commission to pray to complete its daily business.

Overall, 23% Americans identify as nonreligious.⁷ That 8 point increase since 2007⁸ and 15 point jump since 1990 makes the "nones" the fastest growing identification in America.⁹ If the Commission wishes to

⁵ <https://www.facebook.com/SabatiniForEustis/posts/447256818958478>. Should this be deleted we can provide a copy.

⁶ See "Atheists Reach \$41,000 Settlement with Tennessee County Sheriff," (August 11, 2016) available at <https://www.atheists.org/2016/08/atheists-reach-41000-settlement-with-tennessee-county-sheriff/>

hear Christian prayers, it must also be prepared to hear Muslim, Hindu, Buddhist, Native American, and yes, even atheist invocations too. The Commission must accept whatever form the invocation takes, or it must do away with the practice altogether.

Finally, Sabatini and the other Christians on the commission would do well to remember that Jesus was suspicious of people who need to be seen publicly praying. He condemns public prayer as hypocrisy in the Sermon on the Mount:

And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. Verily I say unto you, They have their reward. But thou, when thou prayest, enter into thy closet, and when thou hast shut the door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly. Matthew 6:5-6.

Jesus' point was simple: People who wish to *be seen praying* are hypocrites.

Conclusion

We urge the Commission to drop prayers altogether. It will create a more inclusive, productive environment for everyone and avoid the hypocrisy of public piety. If the Commission continues to insist on prayers, it has no power or authority to regulate the content of those opening remarks or to schedule multiple prayers to make up for what some deem inadequate. It may not schedule rebuttal prayers and may not permit commissioners to give their own prayers. Finally, it must halt Sabatini's unconstitutional censorship in an official government forum opened for public comment. He must also readmit all those whom he has banned. I look forward to your prompt written response.

Sincerely,



Andrew L. Seidel
Staff Attorney

Transcript of the secular invocation:

Mayor and Commissioners,

I'm honored and grateful to be here to address you today on behalf of the Central Florida Freethought Community and freethinkers here in Eustis.

This day, in many quarters, Reason is being celebrated. Today is the National Day of Reason which seeks, among other things to "promote the development and application of reason", a worthy goal that is radically inclusive.

It is through reason that, more than 2200 years ago, with nothing more than shadows and a little geometry, Eratosthenes was able to show that the Earth was indeed a sphere and calculate its circumference to within 1%. It is through reason that 300 years ago we began the Enlightenment and struggled our way out of the darkness and superstition of the Middle Ages. Through reason, Einstein made predictions about the cosmos that we are still

⁷ *America's Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

⁸ *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (October 9, 2012), available at <http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx>.

⁹ Barry Kosmin, *National Religious Identification Survey 1989-1990*.

confirming 100 years later. Through reason, we know that we are intimately connected, not only to every other human, but also to every living thing.

Despite the advances of reason, we are all wrong about something. It is a continuous, life-long effort to be “less wrong” and to use new information and reason to achieve that goal. You have the opportunity to do that again tonight. You will receive new information and make decisions about that information. I urge you to exercise empathy to understand how your constituents feel, to use compassion to consider how your decisions will affect them, and to apply reason in the evaluation all of these things.

I’m particularly glad to see that you’re proclaiming Public Service Recognition Week tonight. Public service is often empathy, compassion and reason in action.

So on this, the National Day of Reason, I encourage you to be conscious of your own empathy, compassion and especially reason, be humble in your self-assessment, be judicious in the exercise of your sacred duty as commissioners, and strive always to be “less wrong” through the uninhibited use of reason.

Commissioner Sabatini’s corrective prayer and Facebook post admitting it was an “answer” to what he calls “radical militant atheists”:

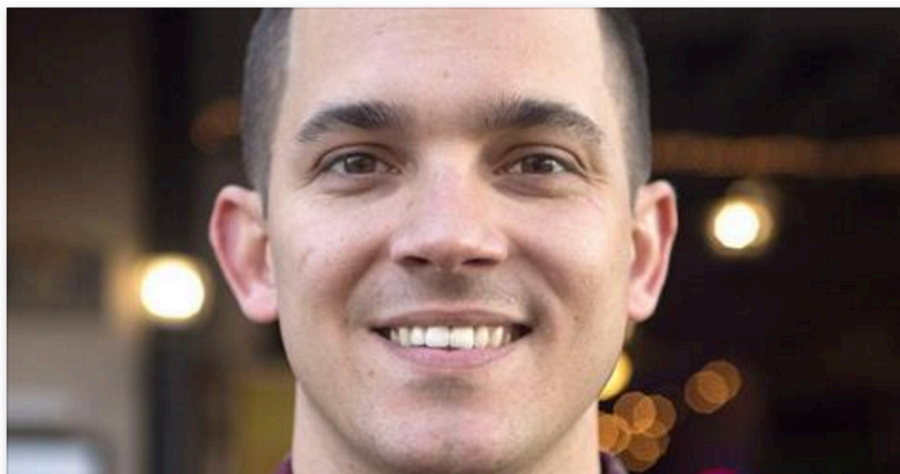
Please bow your heads. Lord, we want to thank you for giving us the strength to come here tonight and be with each other. Giving us the opportunity to do everything we can to accept your grace and live in your ideals, to love one another, to fight to make the world a more beautiful place, to live in your name, to express humility and to treat each other with kindness, to live in the ideals of what you wrote and what you gave us. We appreciate every grace that you’ve put upon us. And with that said, today is National Prayer Day. We ask that you give us strength to continue living in the way that you describe to us. Lord, give us the strength to live like your son Jesus Christ. Amen.



Anthony Sabatini, Eustis City Commissioner Seat #2

May 8 at 9:24am · 🌐

Radical militant atheist's planned speech at last week's Eustis City Commission meeting was answered by a simple Christian prayer--and now they're furious.



Secular invocation sparks controversy at Eustis meeting

EUSTIS — A secular invocation by a member of the Central Florida Freethought Community before a Eustis Commission meeting Thursday sparked

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