

FREEDOM FROM RELIGION *foundation*

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Sent via U.S. Mail and Email: jturnbach@twlegal.us

December 23, 2017

James E. Turnbach
Turnbach, Warren, Lloyd, Frederick & Smith, P.C.
200 Chestnut Street
Gadsen, AL 35902

Re: Mayor Gilchrist's quest to display Christian Flag in Glencoe
Open Records Request

Dear Mr. Turnbach:

I am writing again on behalf of the Freedom From Religion Foundation, regarding the City Glencoe's Christian flag. Also below is an open records request made pursuant to Alabama law.

As you no doubt recall, FFRF explained to the City of Glencoe that it is unconstitutional for the government to endorse one religion over another by flying a Christian flag over City Hall. As we explained then, the City of King, North Carolina refused to remove a Christian flag that displayed the Latin cross and lost in court. *See Hewett v. City of King*, Case No. 1:12CV1179 (M.D.N.C. Nov. 2012). The city settled the lawsuit for \$500,000 and incurred more than \$50,000 in legal expenses.

We were pleased to learn that the Glencoe removed the flag at that time. It is critical that our elected officials honor their duties under the First Amendment and Mayor Gilchrist did so, even in the face of public outcry. However, we understand that Mayor Gilchrist has been working to install a new 50-foot flagpole that will make it appear—intentionally—as if the flag is still being flown by the city. His crusade was covered by the Washington Post. Stephanie McCrummen, "Taking up the Christian banner," THE WASHINGTON POST, (Dec. 22, 2017) at <http://wapo.st/2BvbmaM>.

This raises two concerns. First, this may create an additional constitutional problem if the mayor is using city resources to install this pole and raise the Christian flag. Second, when it comes to state-church law, appearances matter. The government cannot appear to endorse one religion over another. Our open records request, submitted with this letter, will help determine whether or not the mayor has overstepped.

1. Mayor Gilchrist appears to be using city resources to further a religious goal: flying a Christian flag.

The *Post* article describes the new push to raise the Christian flag on church property and makes it clear that this is the mayor's plan, that he dug the hole, that he directed the placement of the new flagpole, and that he stored the flag to be hoisted in his office in City Hall. It also appears as

though Mayor Gilchrist selected the spot for the new flagpole, which he chose because it will appear as though the flag is flying over city hall even if it may technically be over church property. Gilchrist also mused over which elected officials he will invite to his flag raising ceremony.

This story certainly gives the impression that the mayor is working to circumvent the Establishment Clause of the First Amendment to the United States Constitution, which the Supreme Court has said time and again “mandates government neutrality between religion and religion, and between religion and nonreligion.” *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); *Epperson v. Ark.*, 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947).

From all appearances, any reasonable Glencoe resident would interpret the Mayor’s actions in this case as government official using his public office to endorse of religion. In 2002, a federal court enjoined a city and mayor from organizing, advertising, promoting or endorsing a prayer breakfast. *Newman v. City of East Point*, 181 F. Supp. 2d 1374 (N.D. Ga. 2002). In that case, the court restricted the use of city funds, employees, resources and supplies in facilitating the Mayor’s Prayer Breakfast. *Id.* As a result of the city’s activities (making and sending invitations, issuing press releases, advertising the event, etc.), the court stated, “an objective observer would most certainly conclude that the City of East Point has endorsed religion, specifically Christianity, by its actions.” *Id.* at 1381.

The records we seek below should illuminate whether this constitutional stricture has been violated. If the mayor has used his public office, city resources, or city funds to help put up this flagpole, he has violated the Constitution.

2. The government cannot appear to endorse a religious message.

The Supreme Court has ruled, “The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief.” *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989). The goal is to ensure that the government does not “appear[] to take a position on questions of religious belief.” *Id.* at 594. *See also, Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 787 (1995) (Souter, J., concurring) (“Effects matter to the Establishment Clause, and one, principal way that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer.”); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (invalidating practice that would have appeared to any reasonable observer to be “delivered with the approval of the school administration”); *Bishop v. Aronov*, 926 F.2d at 1073 (11th Cir. 1991) (“Because of the potential establishment conflict, even the appearance of proselytizing by a professor should be a real concern to the [government].”) (emphases added).

The *Post* story describes the spot the mayor chose to fly the flag and the reasons he did so. It was selected so as to make it appear that the city is endorsing flag:

The spot turned out to be right between the First Baptist Church and City Hall, a patch of grass so ambiguously situated that a passerby might wonder whether it belonged to

church or to state. It was visually in line with a veterans memorial in front of City Hall and the American and Alabama flags just beyond. It was in front of a row of seven trees that seemed to mark the end of church property and the beginning of the city complex. While the patch of grass had once been a public right of way, however, it had been quietly turned over to the church years before. Legally, there was no question that the parcel was on private, church grounds.

The mayor ... headed out of the front doors of City Hall, walked across the invisible line separating state from church, and stopped on the patch of grass where he felt free to express himself as a private, Christian citizen.

In short, the city is deliberately fostering the appearance of endorsement.

The appearance of city endorsement is exacerbated because the flag was illegally flown a few feet away for years. When examining the purpose of two Kentucky county courthouse displays of the Ten Commandments under the *Lemon* test, the Supreme Court rejected the government's argument that only its latest action had any relevance to determining the purpose of a religious display. The Court declined:

They [the County defendants] argue that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show . . . The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which [the] policy arose.

McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 866 (2005)(citations and internal quotations omitted).

Given its past endorsement and a site deliberately selected to make it appear as though the flag is city-flown, the city must now take steps to affirmatively dissociate itself from this flag and pole. The City of Marshfield tried to transfer the land under a fifteen-foot marble statue of Jesus Christ displayed with his arms open in prayer and the phrase, "Christ guide us on our way," to save that statue after FFRF filed a lawsuit. *See FFRF v. City of Marshfield, Wis.*, 203 F.3d 487 (7th Cir. 2000). The Court only upheld the land transfer on the understanding that the city would take affirmative steps to dissociate itself from endorsing that religious message:

The inability to distinguish between City park and [private] property affects both the [private] property's status as a public forum and the perceived endorsement of religion. Therefore, should the City (on City property) construct some defining structure, such as a permanent gated fence or wall, to separate City property from Fund property accompanied by a clearly visible disclaimer, on City property.

Id. at 497.

Indeed, without the fences and disclaimers, the transfer “does not relieve the continued perception of government endorsement.” *Id.* In short, Glencoe will have to ensure that the flagpole’s “positioning and orientation” do not “combine with the other physical features to convey the impression that the [flag] is on city park property.” *Id. at 495.* Unfortunately, the city has done precisely the opposite. Moreover, this is not a case involving a 15-foot statue that can be seen only by those in a public park, but a 50-foot flagpole that can be seen from far away and which the mayor allegedly chose for that heightened visibility.

If the flagpole remains up, which may not be possible if Glencoe and Mayor Gilchrist have been careless about using city resources to erect it, the city will have to affirmatively disclaim the message. This might include, but not be limited to, a tall, conspicuous fence to show the demarcation between city and church property; permanent signage disclaiming the flag; and some sort of public statement or advertisement to counter the impression left if one of the nation’s second two largest newspapers that this is in fact a government endorsement of religion.

There is also the matter of how the church received public land in the first place. The Establishment Clause prohibits the government from supporting churches financially, including by gifting them land. *See, e.g., Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 778–79 (1973) (striking down government-subsidized maintenance and repair of nonpublic schools); *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (holding that government aid to nonpublic education impermissibly entangled the government with religion, even when limited to secular subjects); *Wirtz v. City of S. Bend*, 813 F.Supp.2d 1051, 1068 (N.D. Ind., 2011) (“A well-informed and reasonable nonadherent would see the below-market transfer as a direct endorsement of a particular religion.”).

The response to our records request should answer some of these questions. Thank you for your time and attention to this matter.

Sincerely,



Andrew L. Seidel
Director of Strategic Response
Constitutional Attorney