

FREEDOM FROM RELIGION *foundation*

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November 3, 2023

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Brent Johnson
President
Kenai Peninsula Borough Assembly
144 N. Binkley Street
Soldotna, AK 99669

Re: Proposed Discriminatory Invocation Policy and Open Records Request

Dear President Johnson and Borough Assembly members:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) to raise concerns with proposed changes to the Assembly's invocation practice. FFRF is a national nonprofit organization with more than 40,000 members across the country, including members in Alaska. Our purposes are to protect the constitutional principle of separation between state and church, and to educate the public on matters relating to nontheism.

It is our understanding that for the past several years, the Assembly has allowed citizens to volunteer to deliver the opening invocation, a practice which allows a variety of religious views to be represented and with no preference for any one religion or denigration of other religions. Now, we understand that the Assembly will be considering a resolution at its November 7 meeting to alter its invocation policy in an attempt to prevent Satanists, the nonreligious, and members of other minority religions from equal representation and respect at Assembly meetings. We understand the new policy would only allow invocations from official borough approved chaplains, assembly members, or the mayor. This new policy would ensure the borough has control over who delivers in the invocations and which religious views are allowed to be represented.

We write to the request that the Assembly either retain its current policy, which allows anyone to deliver the invocation without discriminating against members of minority religions and the non-religious, institute a moment of silence instead or cease including time for prayer at meetings completely. What the Assembly cannot do is alter its invocation policy in a transparent scheme to exclude religious views that it does not agree with or approve of. If the Assembly wishes to avoid issues surrounding its invocation practice, the best solution would be to drop the practice altogether.

Prayer at government meetings is unnecessary, inappropriate, and divisive. Assembly members 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 Assembly ought not to lend its power and prestige to religion by opening its meetings with prayer. As a local government, citizens, including Kenai Borough's nonreligious citizens, are compelled to come before you on important civic matters, to seek licenses, permits, to participate in important decisions affecting their livelihoods, property, children, and quality of life. Prayers exclude

non-religious residents, who currently make up the fastest growing segment of the U.S. population by religious identification—35 percent of Americans are non-Christians.¹ It is coercive and intimidating for these nonreligious citizens to come to a public meeting and be required to either make a public showing of their nonbelief or show deference to a religious sentiment they do not believe in, but which their Borough Assembly members clearly do.

However, if the Board insists on continuing to host prayers at public meetings, it cannot alter its policy to discriminate against non-Christians wishing to give a prayer. The nonreligious and members of minority religions should therefore be permitted to deliver invocations as well.

The Supreme Court addressed the issue of legislative prayer in *Town of 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. Additionally, the town of Greece "at no point excluded or denied an opportunity to a would-be prayer giver." *Id.* Any changes to the Assembly's prayer practice that restrict participation to members of approved religious groups to the exclusion of atheists, agnostics, Wiccans, Satanists, or members of any other minority religious group would advance the "approved" religions over those barred from participation and religion over nonreligion.

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. The Assembly's current policy clearly complies with the law and respects the diverse views of the Borough.

Invocation policies crafted to exclude certain beliefs or the nonreligious violate the Establishment Clause. In *Pelphrey v. Cobb County*, 547 F.3d 1263, 1281-82 (11th Cir. 2008), the Eleventh Circuit held that a county commission violated the Establishment Clause by removing Jews, Muslims, Jehovah's Witnesses, and Mormons from a list that it used to select invocation-speakers. The court explained that the Establishment Clause "prohibits purposeful discrimination"—"the selection of invitational speakers based on an 'impermissible motive' to prefer certain beliefs over others." *Id.* at 1278, 1281 (quoting *Marsh v. Chambers*, 463 U.S. 783, 793 (1983)).

And in *Williamson v. Brevard County*, 928 F.3d 1296, 1299 (11th Cir. 2019), the Eleventh Circuit ruled that a county commission violated the Establishment Clause by discriminating in favor of mainstream, monotheistic religions in its invocation practice. The court emphasized that "local governments violate the Constitution if they organize and conduct their prayers in a way that discriminates against other religious beliefs." *Id.* at 1310. After the case returned to the district court, the defendant county agreed to a settlement that prohibited it from continuing its discriminatory practices and required it to pay \$490,000

¹ *The 2020 Census of American Religion*, Public Religion Research Institute (July 8, 2021), available at <https://www.ppri.org/research/2020-census-of-american-religion>.

in damages and attorney's fees to the plaintiffs. Consent Amended Final Judgment, *Williamson v. Brevard County*, No. 6:15-cv-1098 (M.D. Fla. Feb. 19, 2020), ECF No. 152.

In order to demonstrate the Board's respect for the diverse range of religious and nonreligious citizens living in Kenai Borough, we urge you to concentrate on civil matters and leave religion to the private conscience of each individual by ending the practice of hosting prayers at your meetings. If you continue hosting prayer at your meetings, you must ensure your invocation policy does not discriminate against satanists, atheists, or members of other minority religions.

Please inform us in writing of the steps you are taking to resolve this matter and please respond to the following open records request.

Open Records Request

Pursuant to the Alaska Public Records Act (Alas.Stat. § 40.25.120) I request a copy of the following records since January 1, 2022:

- 1) All communications sent to or from Mayor Peter A. Micciche or any member of the Assembly regarding the Assembly's invocation policy or prayers taking place at Assembly meetings;
- 2) All records related to the newly proposed invocation policy;

If you choose to deny this request, please respond with a written explanation of the denial, including any references to applicable statutory exemptions relied upon.

If any of these records are available through electronic media, they may be e-mailed to records@ffrf.org. If I can provide any clarification that will help expedite your attention to my request, please contact me at 608-256-8900. I appreciate your time and attention to this request.

Sincerely,



Christopher Line
Staff Attorney
Freedom From Religion Foundation

Cc: Mayor Peter A. Micciche via pmicciche@kpb.us