
Case No. 17-15769-FF

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

David Williamson, Chase Hansel, Keith Becher, Ronald Gordon, Jeffery Koeberl, Central Florida Freethought Community, Space Coast Freethought Association, and Humanist Community of the Space Coast
Appellees/Cross-Appellants,

v.

Brevard County,
Appellant/Cross-Appellee.

Appeal from the United States District Court for the Middle District of Florida
Case No. 6:15-cv-1098-Orl28DCI

APPELLANT/CROSS-APPELLEE BREVARD COUNTY'S INITIAL BRIEF

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1. CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant/Cross-Appellee Brevard County provides the following list of persons and corporations that may have an interest in the outcome of this appeal:

1. Abudu, Nancy Gbana
2. ACLU Foundation of Florida, Inc.
3. American Civil Liberties Union Foundation
4. Americans United for Separation of Church & State
5. Antoon, John, II, Senior United States District Judge
6. Baker, David A., United States Magistrate Judge
7. Becher, Keith
8. Bell & Roper, P.A.
9. Brevard County
10. Central Florida Freethought Community
11. Freedom from Religion Foundation, Inc.
12. Girard, Bradley
13. Gordon, Ronald
14. Hansel, Chase
15. Humanist Community of the Space Coast
16. Irick, Daniel C., United States Magistrate Judge

17. Katskee, Richard B.

18. Knox, Scott L.

19. Koeberl, Jeffery

20. Luchenitser, Alex J.

21. Mach, Daniel

22. Mari, Frank M.

23. Markert, Rebecca Susan

24. Preferred Governmental Insurance Trust

25. Roper, Michael J.

26. Seidel, Andrew L.

27. Space Coast Freethought Association

28. Tilley, Daniel B.

29. Williamson, David

30. Yuan, Diana E.

Pursuant to Rule 26.1-3(b) of the Rules of the United States Court of Appeals for the Eleventh Circuit, the undersigned states that no publicly traded company or corporation has an interest in the outcome of this appeal.

2. STATEMENT REGARDING ORAL ARGUMENT

Appellant/Cross-Appellee Brevard County respectfully requests oral argument in this case pursuant to 11th Circuit Rule 28-1(c). Brevard County maintains that, given the disposition in the district court, the pending cross-appeal, and the overlapping legal issues raised in this case, oral argument would assist the Court in its resolution of this case through additional development and focusing of the issues discussed herein and in the written briefs that will be filed in the future. Because legislative prayer cases are "fact-sensitive[,]" considering "both the setting in which the prayer arises and the audience to whom it is directed[,]" *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1823 (2014), oral argument would assist in parsing the specific facts of this case as compared to other cases cited herein and those that will be cited in the written briefs that will be filed in the future.

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5. JURISDICTIONAL STATEMENT

The district court had original jurisdiction over this case pursuant to 28 U.S.C. § 1331, as Appellees/Cross-Appellants' claims contained in Counts I through IV of their First Amended Complaint (R. 28) arise under the Constitution or laws of the United States. Appellees brought claims, pursuant to 42 U.S.C. § 1983, against Brevard County under the Establishment Clause of the First Amendment to the United States Constitution (Count I), the Free Exercise Clause of the First Amendment to the United States Constitution (Count II), the Free Speech Clause of the First Amendment to the United States Constitution (Count III), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Count IV). Each of these claims arises under federal law.

The district court also exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over Counts V and VI of Appellees' First Amended Complaint (R. 28), as such claims arise under Florida law but are so related to claims over which the district court had original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Appellees' claims arising under Florida law are each based upon the same common nucleus of operative facts as Appellees' claims that arise under federal law. *See Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743 (11th Cir. 2006) ("The constitutional 'case or controversy' standard confers supplemental jurisdiction over all state claims

which arise out of a common nucleus of operative fact with a substantial federal claim.").

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The order and corresponding judgment from which Brevard County initiated this appeal was a final decision of the United States District Court for the Middle District of Florida. On September 30, 2017, the district court entered the Order (R. 105) granting in part and denying in part Brevard County's motion for summary judgment and granting in part and denying in part Appellees' motion for summary judgment. The district court entered the Final Judgment (R. 115) on November 29, 2017. Therefore, this appeal is from a final order or judgment that disposed of all parties' claims.

Brevard County timely initiated this appeal by filing its Notice of Appeal (R. 119) with the clerk of the district court on December 28, 2017. *See* Fed. R. App. P. 4(a)(1) (stating that a notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after entry of the judgment or order appealed from).

6. ISSUES FOR REVIEW

The issues now on appeal are:

1. Whether Brevard County's policies and practices for pre-meeting invocations at its Board of County Commissioners ("BOCC") meetings violated the Establishment Clause of the First Amendment to the United States Constitution and the Establishment Clause contained in Article I, Section 3 of the Florida Constitution;

2. Whether Brevard County's policies and practices for pre-meeting invocations at its BOCC meetings violated the Free Speech Clause of the First Amendment to the United States Constitution;

3. Whether Brevard County's policies and practices for pre-meeting invocations at its BOCC meetings violated the Free Exercise Clause of the First Amendment to the United States Constitution; and

4. Whether Brevard County's policies and practices for pre-meeting invocations at its BOCC meetings violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Protection Clause contained in Article I, Section 2 of the Florida Constitution.

7. STATEMENT OF THE CASE

A. Nature of the Case

Through their First Amended Complaint, Appellees sued Brevard County for monetary, declaratory, and injunctive relief, alleging that Brevard County's invocation policies and procedures with respect to regular meetings of the Brevard County Board of County Commissioners ("BOCC") violate various provisions of the United States Constitution and Florida Constitution. Generally, Appellees filed this case as a challenge to legislative prayer following the Supreme Court of the United States' decision in *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014).

Appellees Becher, Hansel, Koerberl, and Gordon are residents of Brevard County, Florida. (R. 83 ¶ 83). Appellee Williamson is a resident of nearby Seminole County, Florida. (R. 83 ¶ 84).[1] All five of the Individual Appellees identify as atheist or agnostic, and none of the Individual Appellees profess a belief in the existence of God. (R. 83 ¶¶ 85, 209). Becher, Hansel, Koeberl, and Williamson also identify as Secular Humanists. (R. 83 ¶ 85). The Organization Appellees are

[1] Becher, Hansel, Koerberl, Gordon, and Williamson are hereinafter collectively referred to as the "Individual Appellees." Humanist Society of the Space Coast ("HSSC"), Space Coast Freethought Association ("SCFA"), and Central Florida Freethought Community ("CFFC") are hereinafter collectively referred to as the "Organization Appellees."

organizations for nontheists with members who are principally atheists, agnostics, Humanists, and other nontheists. (R. 83 ¶¶ 93, 95).

Brevard County's BOCC opens regular meetings with an invocation typically presented by a cleric or representative of the faith-based community. (R. 83 ¶ 197). The invocation takes place before the Pledge of Allegiance and prior to the "Resolutions, Awards, and Presentations" portion of the meeting agenda. (R. 83 ¶ 198). On a rotating basis, each commissioner selects an invocation speaker. (R. 83 ¶ 200). On May 9, 2014 and again on July 22, 2014, Williamson wrote to Brevard County on behalf of CFFC requesting that Brevard County allow a member of CFFC to deliver a secular invocation at a BOCC meeting. (R. 83 ¶¶ 112-113). By letter dated August 19, 2014, which was approved at a BOCC meeting held the same date, Brevard County responded to Williamson by explaining the purpose of the pre-meeting invocation and inviting CFFC members to instead speak on a topic of the CFFC member's choosing during the public comment portion of the meeting. (R. 83 ¶¶ 115-117). Additional requests for Appellees (or in the case of the Organization Appellees, one or more of their members) to be permitted to give an invocation at a meeting of the Brevard County BOCC followed. (*See* R. 83 ¶¶ 118, 125-127, 128-129).

On December 16, 2014, Brevard County passed a resolution, thereby moving the first 30 minutes of the public comment portion of BOCC meetings so that such

would occur immediately after the resolutions, awards, and presentations and consent agenda portions of each regular meeting. (R. 83 ¶ 142). On July 7, 2015, Brevard County approved Resolution 2015-101 (hereinafter, the "Resolution.") (R. 83 ¶ 132).[2] The Resolution states: "Pre-meeting invocations shall continue to be delivered by persons from the faith-based community in perpetuation of the Board's tradition for over forty years." (R. 105-1 ¶ 39). The Resolution also provided: "Secular invocations and supplications from any organization whose precepts, tenets or principles espouse or promote reason, science, environmental factors, nature or ethics as guiding forces, ideologies, and philosophies that should be observed in the secular business or secular decision making process involving Brevard County employees, elected officials, or decision makers including the BOCC, fall within the current policies pertaining to Public Comment and must be placed on the Public Comment section of the secular business agenda." (R. 105-1 ¶ 39). Since Brevard County adopted the Resolution, none of the Appellees has ever appeared or requested to appear before the BOCC to deliver a secular invocation during the public comment portion of the meeting agenda. (R. 83 ¶ 246).

B. Course of Proceedings

[2] The complete Resolution is included in the record on appeal at R. 105-1 at 1-11.

On July 7, 2015, Appellees initiated this case by filing their initial complaint (R. 1). On August 19, 2015, Appellees filed their operative First Amended Complaint (R. 28). Through their First Amended Complaint, Appellees asserted the following claims against Brevard County: violation of the Establishment Clause of the First Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983 (Count I); violation of the Free Exercise Clause of the First Amendment to the United States Constitution pursuant to § 1983 (Count II); violation of the Free Speech Clause of the First Amendment to the United States Constitution pursuant to § 1983 (Count III); violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution pursuant to § 1983 (Count IV); violation of Article I, Section 2 of the Florida Constitution (Count V); and violation of Article I, Section 3 of the Florida Constitution (Count VI). (*See* R. 28 at 66-71). On September 2, 2015, Brevard County filed its Answer to Plaintiff's First Amended Complaint (R. 29).

On May 3, 2016, Brevard County filed its Motion for Summary Judgment (R. 54). On the same date, Appellees filed their Motion for Summary Judgment (R. 55). On September 26, 2016, the parties filed their Stipulation of Facts Regarding Cross-Motions for Summary Judgment (R. 78) and on October 11, 2016, the parties filed their Amended Stipulation of Facts Regarding Cross-Motions for Summary Judgment (R. 83). Thereafter, the parties each filed supplemental briefs on the cross-

motions for summary judgment. (*See* R. 84, 85, 95, 96, 97, 98). While the parties' cross-motions for summary judgment were pending, the parties reached a partial settlement agreement on the issue of damages and therefore agreed that no jury trial would be required. (R. 112-2; *see also* R. 127 at 2:25-3:22).

On September 30, 2017, the district court entered the Order (R. 105) on the parties' cross-motions for summary judgment. On November 29, 2017, the district court entered the Final Judgment (R. 115).

C. Disposition Below

On September 30, 2017, the district court entered the Order (R. 105) on the parties' cross-motions for summary judgment. With respect to Appellees' Establishment Clause claim—their "primary claim" (R. 105 at 17)—the district court held that Brevard County violated the Establishment Clause by "straying from the historical purpose of an invocation and intentionally discriminating against potential invocation-givers based upon their beliefs[] . . . ." (R. 105 at 49). The district court continued by holding that Brevard County "is clearly entangling itself in religion by vetting the beliefs of those groups with whom it is unfamiliar before deciding whether to grant permission to give invocations." (R. 105 at 50). However, the district court rejected Appellees' coercion argument, finding that none of the Appellees were subjected to unconstitutional coercion. (R. 105 at 54). Thus, the district court granted summary judgment in favor of Appellees with respect to their

Establishment Clause claim, except with respect to the coercion argument for which the district court granted summary judgment in favor of Brevard County.[3]

With respect to Appellees' Free Exercise Clause claim, the district court held that Appellant violated the Free Exercise Clause by "opening up its invocation practice to volunteer citizens but requiring that those citizens believe in 'a higher power' before they will be permitted to solemnize a Board meeting[] . . . ." (R. 105 at 61) and therefore granted summary judgment in favor of Appellees. The district court also granted summary judgment in favor of Appellees on their free speech claim. (R. 105 at 62).

Next, the district court granted summary judgment in favor of Appellees on their equal protection claim. (R. 105 at 62-63). The district court also granted summary judgment in favor of Appellees on their claim under Article 1, Section 2 of the Florida Constitution, which the district court stated is construed "like the Equal Protection Clause of the U.S. Constitution." (R. 105 at 63).

The district court construed Appellees' final claim under Article I, Section 3 of the Florida Constitution to include two components: (1) Florida's Establishment Clause and (2) the "No-Aid" Clause. (R. 105 at 63-64). With respect to Florida's

[3] Appellees' coercion claim is the subject of their cross-appeal. (*See* R. 123 at 1). Brevard County will address Appellees' coercion argument following Appellees' initial briefing of that issue.

Establishment Clause, the district court granted summary judgment in favor of Appellees (except with respect to Appellees' coercion theory) for the same reasons as with respect to Appellees' First Amendment Establishment Clause claim. (R. 105 at 64-65). With respect to Appellees' Florida "No-Aid" Clause claim, the district court granted summary judgment in favor of Brevard County. (R. 105 at 68).

On November 29, 2017, the district court entered the Final Judgment (R. 115). The Final Judgment included a declaration, "that [Brevard] County's policy and practice of selecting opening invocation speakers violates the Establishment, Free Exercise, Free Speech, and Equal Protection Clauses of the U.S. Constitution and the Establishment and Equal Protection Clauses of the Florida Constitution because it discriminates against nontheists (atheists, agnostics, Humanists, and others who do not believe in God)." (R. 115 at 2). The district court also issued a permanent injunction which, among other things, prohibits [Brevard] County "from continuing the unconstitutional invocation practices set forth in . . . Resolution 2015-101." (R. 115 at 3). Finally, through the Final Judgment, the district court awarded Appellees' monetary damages pursuant to the parties' Mediation Partial Settlement Agreement dated April 6, 2016. (R. 115 at 4).

On December 28, 2017, Brevard County initiated this appeal by filing a notice of appeal with the clerk of the district court. (R. 119).

D. Standard of Review

An appellate court reviews *de novo* a district court's order on cross-motions for summary judgment. *See Fla. Int'l Univ. Bd. of Trustees v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1252 (11th Cir. 2016). Therefore, the *de novo* standard of review applies with respect to each issue raised by Brevard County in this appeal.

8. STATEMENT OF FACTS

Appellees brought this case following the Supreme Court of the United States' decision in *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014), as a challenge to Brevard County's tradition, carried out for over 40 years, of opening the regular meetings of its Board of County Commissioners with an invocation that includes prayer or other theistic reference. Through their First Amended Complaint, Appellees sued Brevard County for monetary, declaratory, and injunctive relief, alleging that Brevard County's pre-meeting invocation practices and policies with respect to regular, public meetings of the Brevard County BOCC violate various provisions of the United States Constitution and Florida Constitution.

Brevard County is a political subdivision of the State of Florida. (R. 83 ¶ 1). The BOCC is the legislative and governing body of Brevard County. (R. 83 ¶ 2). The BOCC has the power to carry on county government. (R. 83 ¶ 3). The BOCC is comprised of five Commissioners, each of whom represents—and is elected by the voters residing in—one of five numbered single-member districts that make up Brevard County. (R. 83 ¶ 8). The BOCC may pass resolutions, which are "expression[s] of a temporary character, or a provision for the disposition of the administrative business of the Board." (R. 83 ¶¶ 6-7).

To carry out its responsibilities, the BOCC regularly conducts meetings in its main boardroom. (R. 83 ¶ 10). The BOCC's boardroom meetings are open to the

public, are carried live on cable television, and are available for public viewing on the BOCC's website. (R. 83 ¶ 12). Individuals can also watch boardroom meetings on a ceiling-mounted television set up in a lobby just outside the entrance to the main boardroom. (R. 83 ¶ 13). The main boardroom is small enough that a person standing alone can see and be seen from one end of it to another, and the commissioners can see audience members in the main boardroom during BOCC meetings. (R. 83 ¶¶ 25-26).[4]

Brevard County's BOCC opens regular meetings with an invocation typically presented by a cleric or representative of the faith-based community. (R. 83 ¶¶ 56, 197). The invocation tradition is performed in recognition of the contribution of the faith-based community to Brevard County. (*See* R. 105-1 at 2). The invocation takes place before the Pledge of Allegiance and prior to the "Resolutions, Awards, and Presentations" portion of the meeting agenda. (R. 83 ¶ 198). The invocation speaker typically faces the commissioners from a lectern at the front of the main boardroom. (R. 83 ¶¶ 74, 76). The individual giving the invocation nearly always faces the commissioners seated on the dais with his or her back to the public attendees as the invocation is presented. (*See* R. 54-2 ¶¶ 19-20). At the conclusion of the invocation, a commissioner usually asks the audience to join in the Pledge of

[4] Additional details regarding the size of the boardroom and arrangement of seating within the boardroom are in the record at R. 83 ¶¶ 22-27.

Allegiance, turns toward the flag, and leads the Pledge of Allegiance. (R. 83 ¶ 78). There is no rule or regulation requiring attendees of BOCC meetings to remain in the boardroom during the invocation, nor is there any rule or regulation prohibiting members of the public from entering or leaving the main boardroom at any time during a meeting. (R. 83 ¶ 81).

On a rotating basis, each commissioner selects and invocation speaker. (R. 83 ¶ 200). On occasion, a representative of the faith-based community cannot be arranged or fails to attend and either an audience member is called upon or a commissioner volunteers to deliver the invocation. (R. 83 ¶ 203). Occasionally, Brevard County had difficulty finding someone to give an invocation, and in such circumstances, a moment of silence is held in lieu of an invocation. (R. 83 ¶¶ 50-51). At board meetings, with extremely rare exceptions, agenda items (other than invocations) are secular in nature. (R. 83 ¶ 29).

According to the *2010 U.S. Religion Census: Religious Congregations & Membership Study* published by the Association of Statisticians of American Religious Bodies ("ASARB"), only 34.9% of Brevard County residents were affiliated with a religious congregation as of 2010. (R. 83 ¶ 192). According to the ASARB data, Brevard County ranks, with respect to percentage of residents affiliated with a religious congregation, in the bottom 4% of the top 125 most populous counties in the United States and the bottom 16% of all counties in the

United States. (R. 83 ¶ 195). The Pew Research Center's 2014 U.S. Religious Landscape Study reported that 70% of Florida adults identify themselves as Christians, 3% identify themselves as Jewish, 3% identify themselves as atheists, 4% identify themselves as agnostics, and 17% identify themselves as "nothing in particular." (R. 83 ¶ 196).

CFFC is an organization headquartered in Seminole County for atheists, freethinkers, and other non-theists. (R. 83 ¶ 205). One of CFFC's purposes is "advocating for the constitutional principle of separation of state and church and educating the public on the value of a secular government." (R. 83 ¶ 205). CFFC is an affiliate of the American Humanist Association ("AHA"). (R. 83 ¶ 206). AHA maintains a website on which it posts articles. (R. 83 ¶ 216). One of those articles is "Some Reasons Why Humanists Reject the Bible," by non-party Joseph C. Sommer. (R. 83 ¶ 216). That article states, among other things, that the Bible "was written solely by humans in an ignorant, superstitious and cruel age"; that "because the writers of the Bible lived in an unenlightened era, the book contains many errors and harmful teachings" and "numerous contradictions"; that "biblical myths support the belief, which has been held by primitive and illiterate people throughout history, that supernatural being frequently and arbitrarily intervene in this world"; that "in the light of experience and reason, the Bible's claims about supernatural occurrences do not warrant belief"; that "by treating this mistake-ridden book as the word of God,

humanity has been led down many paths of error and misery throughout history"; and that "if the Bible was actually written by fallible humans who lived in an unenlightened era," it would "perpetuate the ideas of an ignorant and superstitious past — and prevent humanity from rising to a higher level." (R. 83 ¶ 216).

CFFC is also a chapter of the Freedom from Religion Foundation ("FFRF"), and FFRF's bylaws provide that all members of FFRF chapters must also be members of FFRF. (R. 83 ¶ 207). Therefore, each of the Individual Appellees are members of FFRF. (R. 83 ¶ 220). FFRF has stated that it "was initially founded for the very purpose of protesting government prayer at city and county meetings," and FFRF characterized as "hostile" the Supreme Court of the United States' decision in *Town of Greece v. Galloway*. (R. 83 ¶ 222). A May 5, 2014 FFRF news release responding to the Supreme Court's decision in *Town of Greece v. Galloway* stated: "'If the Supreme Court won't uphold the Constitution, it's up to us—it's up to you' is the response of [FFRF] to the high court's ruling May 5 that judicially blessed sectarian prayer at official government meetings." (R. 83 ¶ 223). The May 5, 2014 FFRF news release offered certificates to citizens "who succeed in delivering secular 'invocations' at government meetings," and the "individual judged to give the 'best' secular invocation" would be invited to open FFRF's own annual convention with the invocation. (R. 83 ¶ 224). FFRF called this the "Nothing Fails Like Prayer Award" contest, to be held annually "until the [*Town of*] *Greece* [*v. Galloway*]

decision is overturned." (R. 83 ¶ 225). A "goal" expressed in FFRF's May 5, 2014 news release "is to show that government bodies don't need prayer to imagined gods, or religion or superstition, to govern—they need to be guided by reason." (R. 83 ¶ 226). FFRF's May 5, 2014 news release contained the statement: "Citizen request has stopped the practice of government prayer throughout the country and can continue to do so." (R. 83 ¶ 227).

In a September 8, 2015 email to a nineteen-year-old individual interested in delivering a Jedi invocation, Williamson wrote, in part:

> The goal here (for me, anyway) is to mock these invocations and show them for what they are a pep rally for a closed group of Christians who don't want anyone else's mythology confused with their own.

(R. 83 ¶ 229). Williamson supported FFRF's "Nothing Fails Like Prayer Award" contest by maintaining an archive of secular invocations on the CFFC website and seeking, himself, to perform secular invocations at government meetings. (R. 53-1 at 26:1-13, 57:18-59:13). A pattern of "invocations" satirizing, mocking, and disparaging theistic religion while promoting atheism or secular humanism is evident from the following examples from CFFC's secular invocation website archive:

> I would like to thank the council for inviting me to speak here today. Let us bow our heads in prayer. "We give thanks and praise to you, whom in all your teachings, guide us in our lives and give meaning to our existence and endow these fine people here today to perform their duties to serve us all. Thank you, Satan."

(R. 53-9 at 15);

> Our collective atheism — which is to say, loving empathy, scientific evidence, and critical thinking — leads us to believe that we can create a better, more equal community without religious divisions.
> [. . .]
> Mother Earth, we gather today in your redeeming and glorious presence, to invoke your eternal guidance in the universe, the original Creator of all things.
> May the efforts of this council blend the righteousness of Allah with the all-knowing wisdom of Satan. May Zeus, the great God of justice, grant us strength tonight. Jesus might forgive our shortcomings while Buddha enlightens us through His divine affection. We praise you, Krishna, for the sanguine sacrifice that freed us all. After all, if Almighty Thor is with us, who can ever be against us?
> And finally, for the bounty of logic, reason, and science, we simply thank the atheists, agnostics, Humanists, who now account for 1 in 5 Americans, and growing rapidly. In closing, let us, above all, love one another, not to obtain mythical rewards for ourselves now, hereafter, or based upon superstitious threats of eternal damnation, but rather, embrace secular-based principles of morality — and do good for goodness' sake.
> And so we pray. So what?

(R. 53-9 at 24-25); "I request from the council and our community that we don't turn towards faith or religion to guide government decisions but rather good will towards all people in our community." (R. 53-9 at 4);

> With that, let me begin the invocation:
> Let us play.
> There is work to be done but let's not forget to play. One of the greatest human accomplishments took a great deal of work but started with a most playful idea, "Let's fly to the moon and back."
> Let us play.

(R. 53-9 at 7).

Hansel, Becher, and Koeberl have expressed admiration for the writings of Prefessor Lawrence Krauss, who stated in an interview included in his book, *A Universe from Nothing*, that he is an "anti-theist" and said the following in response to the question: "If you get rid of God, then does life lose all purpose?"

> For me it certainly doesn't—quite the opposite. I would find little purpose living in a world ruled by some divine Saddam Hussein-like character, as my late friend Christopher Hitchens put it, who not only makes all the rules, but punishes those who disobey them with eternal damnation. I find living in a universe without purpose to be amazing, because it makes the accident of our existence and our consciousness even more precious—something to be valued during our brief moment in the sun.

(R. 83 ¶ 217). Hansel, Becher, Gordon, and Koeberl all have expressed admiration for the writings and statements of atheist Richard Dawkins, who stated in his book, *The God Delusion*:

> The God of the Old Testament is arguably the most unpleasant character in all fiction: jealous and proud of it; a petty, unjust, unforgiving control-freak; a vindictive, bloodthirsty ethnic cleanser; a misogynistic, homophobic, racist, infanticidal, genocidal, filicidal, pestilential, megalomaniacal, sadomasochistic, capriciously malevolent bully . . . . Thomas Jefferson—better read—was of a similar opinion describing the God of Moses as "a being of terrific character—cruel, vindictive, capricious, and unjust."

(R. 83 ¶ 218).

On May 9, 2014 and again on July 22, 2014, Williamson wrote to Brevard County on behalf of CFFC requesting to allow a member of CFFC to deliver a secular invocation at a Brevard County BOCC meeting. (R. 83 ¶¶ 112-113). By

letter dated August 19, 2014, which was approved at a BOCC meeting held the same date, Brevard County responded to Williamson by explaining the purpose of the pre-meeting invocation and inviting CFFC members to instead speak on a topic of the CFFC member's choosing during the public comment portion of the meeting. (R. 83 ¶¶ 115-117). The letter, stated, in part:

> The Invocation portion of the agenda is an opening prayer presented by members of our faith community. The prayer is delivered during the ceremonial portion of the County's meeting and typically invokes guidance for the [BOCC] from the highest spiritual authority, a higher authority which a substantial body of Brevard constituents believe to exist. The invocation is also meant to lend gravity to the occasion, to reflect values long part of the Country's heritage and to acknowledge the place religion holds in the lives of many private citizens in Brevard County.

(R. 83 ¶ 117). In August and September 2014, Gordon sent emails to District 3 Commissioner Trudie Infantini informing her that he was an atheist and offering to give an invocation at a Board meeting. (R. 83 ¶ 118). Commissioner Infantini did not accept Gordon's offer. (R. 83 ¶ 118). On August 21, 2014, Rev. Ann Fuller sent an email to all five members of Brevard County's BOCC stating that she is a Brevard County resident, "ordained clergy," and a "known humanist in the community." (R. 83 ¶ 119). Rev. Fuller requested "an opportunity to give an invocation at an upcoming board meeting." (R. 83 ¶ 119). The same day, Commissioner Infantini responded to Rev. Fuller, stating in relevant part:

> I am willing to have most anyone offer an invocation. However, by definition, an invocation is seeking guidance from a higher power. Therefore, it would seem that anyone without a "higher power" would lack the capacity to fill that spot . . . .
>
> Further, I welcome "freethinkers" being the only "freethinker" on the board. It just doesn't seem like the invocation is the correct place for it is all.

(R. 83 ¶ 120).

On January 26, 2015, Ayesha Khan, then legal director for Americans United for Separation of Church and State ("AU"), sent a letter to Brevard County's BOCC titled "Nontheists' Delivery of Opening Invocations." (R. 83 ¶ 125). The letter requested that Brevard County reconsider the "limitation" of having BOCC opened with an invocation by a religious leader who is a theist. (*See* R. 83 ¶ 125). The signature block of the January 26, 2015 letter included AU, FFRF, the American Civil Liberties Union ("ACLU"), and the American Civil Liberties Union of Florida ("ACLUFL"), and set forth the name of a representative for each one of those organizations. (R. 83 ¶ 126). The January 26, 2015 letter requested that Williamson and Hansel, as well as Rev. Fuller, be granted the opportunity to deliver an invocation at a BOCC meeting. (R. 83 ¶ 127).

On May 26, 2015, AU, FFRF, ACLU, and ACLUFL sent another letter to Brevard County's BOCC requesting that Williamson, Hansel, Becher, Gordon, and Koeberl, or other representatives of CFFC, SCFA, and HCSC, be granted the

opportunity to deliver an opening invocation at a BOCC meeting. (R. 83 ¶ 129). Brevard County's County Attorney sent a letter to Appellees' counsel on May 28, 2015, stating that he would bring the May 26, 2015 letter before the Board at its next meeting on July 7, 2015. (R. 83 ¶ 130).

On July 7, 2015, Brevard County approved Resolution 2015-101 (the "Resolution.") (R. 83 ¶ 132). The Resolution set forth factual findings and conclusions incorporated into a pre-meeting invocation policy. (*See* R. 105-1).[5] The Resolution recounted many "Godless quotes" on the "staff picks" portion of FFRF's website that were openly scoffing, mocking, demeaning, extremely hostile, and even hateful toward traditional, faith-based monotheistic religions. (R. 83 ¶ 131). The Resolution also noted that CFFC-affiliated speakers who were provided opportunities to give invocations at other local government meetings had "exploited the opportunity to proselytize and advance their own beliefs while disparaging the beliefs of faith-based religions." (R. 83 ¶ 131). The Resolution included the Board's finding, "that yielding to FFRF and [AU] views by supplanting traditional ceremonial pre-meeting prayer before the [BOCC]'s secular business agenda at regular [BOCC] meetings—a segment reserved for the acknowledgement and interaction with the county's faith-based community—with an 'invocation' by

[5] The complete Resolution is included in the record at R. 105-1 at 1-11.

atheists, agnostics or other persons represented by or associated with FFRF and [AU] could be viewed as County hostility toward monotheistic religions whose theology and principles currently represent the minority view in Brevard County." (R. 83 ¶ 131).

The Resolution states: "Pre-meeting invocations shall continue to be delivered by persons from the faith-based community in perpetuation of the Board's tradition for over forty years." (R. 105-1 ¶ 39). "Secular invocations and supplications from any organization whose precepts, tenets or principles espouse or promote reason, science, environmental factors, nature or ethics as guiding forces, ideologies, and philosophies that should be observed in the secular business or secular decision making process involving Brevard County employees, elected officials, or decision makers including the BOCC, fall within the current policies pertaining to Public Comment and must be placed on the Public Comment section of the secular business agenda." (R. 105-1 ¶ 39).[6] There are no practical restrictions on what is said during the public comment portion of regular BOCC meetings. (R. 83 ¶ 146).

[6] Prior to enactment of the Resolution—Brevard County passed a separate resolution, thereby moving the first 30 minutes of the public comment portion of BOCC meetings so that such would occur immediately after the resolutions, awards, and presentations and consent agenda portions of each regular meeting. (R. 83 ¶ 142). If the public comment portion of the meeting is not concluded within 30 minutes, the remainder of the public comment portion occurs "at the conclusion of business specified on the regular commission agenda." (R. 83 ¶ 143).

Since Brevard County adopted the Resolution, none of the Appellees has ever appeared or requested to appear before the BOCC to deliver a secular invocation during the public comment portion of a BOCC meeting. (R. 83 ¶ 246).

9. SUMMARY OF THE ARGUMENT

Legislative prayer does not violate the Establishment Clause, and legislative prayer cases occupy their own area of First Amendment jurisprudence. As stated by the Supreme Court, the purpose and effect of legislative prayer is acknowledgement of religious leaders and the institutions they represent as well as acknowledgment of the central place that religion, and religious institutions, hold in the lives of those present. The audience for legislative prayer is the legislators themselves. Legislative prayer is an internal act directed at a legislature's own members to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. Brevard County's practices and policies concerning its regular BOCC meetings further the historical purposes of this Nation's legislative prayer tradition and therefore do not violate the Establishment Clause or its equivalent in the Florida Constitution.

A governing body may impose content-based, viewpoint-neutral restrictions upon public participation in its public meetings, which are limited public fora. Restricting invocations to faith-based, theistic prayer is a content-based restriction —not viewpoint discrimination. Such restrictions are reasonable in order to achieve the purposes of an invocation and prevent invocations that disparage certain beliefs, proselytize, or preach conversion. Brevard County's content-based restriction on invocations is lawful under the Free Speech Clause because Brevard County

provides alternative channels for communication in the form of the public comment period, both immediately before and after the BOCC's non-consent regular business agenda. Thus, Appellees were not excluded from the limited public forum based upon viewpoint.

Brevard County did not violate Appellees' rights to free speech because Appellees were not regulated or restricted as to conduct that they sought to undertake for religious reasons or as part of religious observance. Similarly, Appellees had no affirmative right to give an invocation at a BOCC meeting, nor could they reasonably anticipate giving an invocation at a BOCC meeting, as each individual commissioner, on a rotating basis, invites an invocation speaker.

Brevard County did not violate Appellees' rights under the Equal Protection Clause (or its equivalent in the Florida Constitution) because Appellees are not similarly situated to supposed comparators. Appellees, by their own admission, would not have offered prayer as the Supreme Court considered the term in *Town of Greece* and would have given "invocations" that would not have supported the historical purposes of this Nation's legislative prayer tradition. Similarly, Appellees would have offered "invocations" that included content that a government may not permit as an invocation.

10. ARGUMENT

A. Standard of Review

An appellate court reviews *de novo* a district court's order on cross-motions for summary judgment. *See Fla. Int'l Univ. Bd. of Trustees v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1252 (11th Cir. 2016). Therefore, the *de novo* standard of review applies with respect to each issue raised by Brevard County in this appeal.

B. Legal Standard Applicable to Motions for Summary Judgment

A court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is mandated against a party who fails to prove an essential element of its case "with respect to which [the party] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

C. Brevard County Did Not Violate the Establishment Clause

1. Legislative Prayer Following Marsh and Town of Greece

The Supreme Court of the United States held in *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), "that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause." *Town of Greece v.*

Galloway, 134 S.Ct. 1811, 1818 (2014); *Marsh*, 463 U.S. at 792.[7] In *Marsh*, the Court stated: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." 463 U.S. at 786. "From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.* The practice of opening legislative sessions with prayer has continued with interruption since the First Congress. *Marsh*, 463 U.S. at 787-88. The *Marsh* Court stated:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become a part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step towards establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952).

[7] "[T]he first sentence of article I, section 3 [of the Florida Constitution] is synonymous with the federal Establishment Clause in generally prohibiting laws respecting the establishment of religion." *Bush v. Holmes*, 886 So. 2d 340, 344 (Fla. 1st DCA 2004); *see also Todd v. Fla.*, 643 So. 2d 625, 628, 628 n.3 (Fla. 1st DCA 1994) (the Florida Establishment Clause and the federal Establishment Clause are interpreted in the same manner by courts). Therefore, this discussion also applies with respect to Appellees' claim under Article 1, Section 3 of the Florida Constitution.

Id. at 792 (alteration in original). Not only did *Marsh* authorize legislative prayer, it also "expressly authorized legislative bodies to appoint and retain a single person to give invocations at the beginning of official meetings." *Coleman v. Hamilton Cnty.*, 104 F. Supp. 3d 877, 889 (E.D. Tenn. 2015).

More recently, in *Town of Greece v. Galloway*, the Supreme Court adhered to and amplified its prior decision in *Marsh*. *See* 134 S.Ct. at 1823, 1827. The plaintiffs in *Town of Greece* sought to limit the defendant town's invocations to non-sectarian, "inclusive and ecumenical" prayers that referred only to a "generic God" and would, in the plaintiff's view, not associate the government with any one faith or belief. *Id.* at 1817, 1821. The Court rejected the plaintiffs' invitation to do so, holding that sectarian prayer does not violate the Establishment Clause. *Id.* at 1821-22.

The Court explained that legislative invocations are meant to "lend gravity to the occasion and reflect values long part of the Nation's heritage." *Id.* at 1823. Generally regarding legislative prayer, the *Town of Greece* Court explained:

> Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs.

Id. at 1827-28. "As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend

petty differences in pursuit of a higher purpose, and express a common aspiration to a just and peaceful society." *Id.* at 1818. "The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers." *Id.* at 1827. "Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not 'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* at 1823 (quoting *Marsh*, 463 U.S. at 794-95). In legislative prayer cases, "[t]he inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* at 1825. Following *Town of Greece*, a government may decline to permit invocations that denigrate nonbelievers or religious minorities, threaten damnation, preach conversion. *See id.* at 1822, 1824. Similarly, there is a significant government interest in conducting orderly, efficient meetings of governing boards. *See Rowe v. City of Cocoa*, 358 F.3d 800, 804 (11th Cir. 2004).

Importantly, "[t]he principal audience for these invocations is not, indeed, the public but the ***lawmakers themselves***, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing."

Town of Greece, 134 S.Ct. at 1825 (emphasis added).[8] "Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function." *Id.* at 1823.

2. Brevard County Did Not Engage in Intentional Discrimination

Throughout *Marsh* and *Town of Greece*, the Supreme Court discussed prayer in a manner that presupposed that prayer involves an appeal for divine assistance or an appeal to a higher power. *See Town of Greece*, 134 S.Ct. at 1818 ("The [*Marsh*] decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause."). Similarly, in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306 (2000), the Supreme Court explained that the term "invocation" "primarily describes an appeal for divine assistance." Consistent with these statements, the United States District Court for the District of Columbia recently held in *Barker v. Conroy*, Civil Action No. 16-850 (RMC), 2017 WL 4563165, at *13 (D.D.C. Oct. 11, 2017), that the refusal of the Chaplain of the

[8] The *Town of Greece* Court continued by characterizing legislative prayer as an "internal act" directed at a legislature's own members "largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers." *Id.* at 1825-26. On this point it is noteworthy that at regular meetings of Brevard County's Board of County Commissioners, the individual giving the invocation nearly always faces the commissioners and away from the public attendees as the invocation is presented. (*See* R. 54-2 ¶¶ 19-20).

United States House of Representatives to invite an avowed atheist to deliver the morning "prayer," in the guise of a non-religious public exhortation as a "guest chaplain," did not violate the Establishment Clause. The plaintiff in *Barker* was the co-President of FFRF and an "atheist activist[.]" *Id.* at *1. The plaintiff's representative in the House sponsored the plaintiff and asked the House Chaplain, a Roman Catholic priest, to grant the plaintiff permission to deliver the morning invocation in the House. *Id.* at *1-2. The House Chaplain denied the plaintiff's request because (1) the plaintiff was ordained in a denomination in which he no longer practiced at the time of the request and (2) because the plaintiff was not a religious clergyman because he had parted with his previously-held religious beliefs. *Id.* at *2. The plaintiff challenged such refusal as a violation of the Establishment Clause. *Id.* The court held that what the plaintiff was actually challenging, was "the ability of Congress to open with a prayer." *Id.* at *13. "To decide that [the plaintiff] was discriminated against and should be permitted to address the House would be to disregard the Supreme Court precedent that permits legislative prayer." *Id.* "*Marsh* definitively found that legislative prayer does not violate the Establishment Clause." *Id.* The court also noted that *Town of Greece* does not reference atheists. *Id.* at *13. Thus, the court dismissed the plaintiff's Establishment Clause claim for failure to state a claim upon which relief can be granted. *See id.* at *16.

A second post-*Town of Greece* decision also informs the analysis in this case—that decision is *Coleman v. Hamilton Cnty.*, 104 F. Supp. 3d 877 (E.D. Tenn. 2015). In *Coleman*, the plaintiff requested that he be added to the list of individuals eligible to give an invocation at the opening of meetings of the county commission and to be scheduled to deliver an invocation. *Id.* at 880-81. The defendant limited the list from which invocation speakers were chosen from a list of religious congregations from the defendant county, and the plaintiff was not a representative of any such religious congregation. *Id.* at 880-81. Therefore, the defendant never added the plaintiff to the list or scheduled him to deliver an invocation. *Id.* at 881. The plaintiff sued, bringing an Establishment Clause challenge, and the defendant moved for summary judgment. *Id.* at 884, 887. The court first noted: "Implicit in the body of federal case law on legislative prayer—which all repeatedly emphasize that legislative prayer is somehow different than other Establishment Clause cases—is the understanding that the government may favor religion over nonreligion in this narrow circumstance." *Id.* at 889-90. The court continued: "Prayer, by its very definition, is religious in nature." *Id.* at 890. Thus, legislative bodies can require that invocation-givers have some religious credentials. *Id.*; *see also Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1281 (11th Cir. 2008) (noting that *Marsh* "does not require that all faiths be allowed the opportunity to pray. The standard instead prohibits purposeful discrimination."). The court also noted that the defendant had

an interest in establishing basic criteria for selecting religious groups to participate in the prayer invocations in order to, among other things, ensure that speakers are members of bona fide religious organizations, as opposed to other groups with missions completely unrelated to the commission's practice of solemnizing its meetings with an invocation. *Id.* at 890. Therefore, the court granted the defendant's motion for summary judgment on the plaintiff's Establishment Clause claim. *Id.* at 890.

As the Supreme Court explained in *Town of Greece*, the fact that nearly all the invocation speakers turned out to be Christian does not reflect an aversion or bias on the part of the government against minority faiths. *See* 134 S.Ct. at 1824. The same applies equally in this case—the simple fact that non-theism was not represented during the invocation portion of regular BOCC meetings does not indicate that Brevard County held an aversion or bias against non-theistic viewpoints. As discussed in greater detail below in connection with Appellees' Free Speech claim, Appellees *were* granted an opportunity to deliver non-theistic or secular supplications to the BOCC—immediately prior to the time the BOCC would begin its non-consent agenda—during the public comment portion of regular BOCC meetings. Thus, Appellees were afforded a *greater* opportunity to deliver non-theistic or secular supplications to the BOCC than *Town of Greece* requires. Appellees' insistence on delivering their supplications during the invocation period

reveals Appellees' true intention—to challenge the practice of legislative prayer wholesale and eliminate it as a practice for regular meetings of Brevard County's BOCC (and no doubt all governments within the United States). (*See* R. 83 ¶ 229 (statement of Williamson: "The goal here (for me, anyway) is to mock these invocations and show them for what they are a pep rally for a closed group of Christians who don't want anyone else's mythology confused with their own."); (R. 83 ¶ 227) (FFRF's May 5, 2014 news release, stating: "Citizen request has stopped the practice of government prayer throughout the country and can continue to do so.")).[9] Given the opportunity Appellees had to address the BOCC prior to the beginning of the non-consent agenda and Appellees' clear goal of eliminating legislative prayer, this Court should follow *Barker* and *Coleman* and hold that Brevard County's invocation practices and policies for regular BOCC meetings do not violate the Establishment Clause.

The district court concluded its discussion of Appellees' intentional discrimination theory of Establishment Clause liability by stating: "By straying from the historical purpose of an invocation and intentionally discriminating against

[9] The fact that Appellees have not sought to deliver a non-theistic "invocation" during the initial public comment period highlights that their goal is to end Brevard County's invocation tradition and not to actually participate in the limited public forum by delivering respectful, solemnizing opening remarks to the BOCC before the BOCC begins its regular, non-consent business agenda.

potential invocation-givers based upon their beliefs, the County runs afoul of the Establishment Clause." (R. 105 at 49). Brevard County respectfully maintains that the district court is incorrect in that conclusion. Brevard County adhered to and supported the traditional, historical purposes of invocations by implementing its challenged practices and policies. The *Town of Greece* Court explained:

> Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs.

Id. at 1827-28. The Court also stated: "The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers." *Id.* at 1827.

> By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. Indeed, some congregations are not simply spiritual homes for town residents but also the provider of social services for citizens regardless of their beliefs.

Id.

Brevard County's policies and practices for invocations at regular BOCC meetings were appropriate and lawful to ensure recognition and acknowledgement

of theistic beliefs as well as to acknowledge religious leaders and the institutions they represent. Without recognition and acknowledgement of theistic beliefs during the pre-meeting invocation, touch with the traditional, historical purpose of legislative invocations, as practiced in this nation, would be lost. Appellees, by their own admission, would not offer a "prayer" as the Supreme Court used the term in *Marsh* and *Town of Greece*. Furthermore, the record in this case is clear that Appellees sought to disrupt and end Brevard County's tradition of opening regular BOCC meetings with invocations that have, for over 40 years, comported with the historical purposes of invocations as explained in *Town of Greece*. Prevention of such disruption through the challenged invocation practices and policies does not amount to unlawful intentional discrimination.

With respect to Appellees, Brevard County did not run afoul of the Establishment Clause in declining to invite individuals to give non-theistic invocations that, as indicated by the record, reflect a pattern of hostility to theistic religion, disparaged adherents to theistic religions, promoted non-theism over theism, or some combination of the foregoing. *Town of Greece* is sufficiently clear that a local government may lawfully decline to permit invocations that "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion[] . . .

." *Id.* at 1823.[10] Rather, a local government must ensure that, over time, invocations are not used for one or more of those improper purposes in order to *comply with* the Establishment Clause. *See id.* at 1823. Therefore, with respect to Appellees, Brevard County's challenged conduct was permissible to maintain compliance with the Establishment Clause.

3. Brevard County Did Not Excessively Entangle Itself With Religion

Excessive government entanglement with religion is one part of the *Lemon* test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The district court noted that the Supreme Court declined to apply the *Lemon* test in the legislative prayer context in *Town of Greece* and *Marsh*. (R. 105 at 50). Brevard County maintains that this Court should follow *Town of Greece* and *Marsh* by declining to apply the *Lemon* test in this case. *See Town of Greece*, 134 S.Ct. at 1821; *see also Van Orden v. Perry*, 545 U.S. 677, 686 (2005). Based on *Marsh*, *Van Orden*, and *Town of Greece*, Brevard County also disputes that "excessive entanglement with religion" is a viable theory of liability under the Establishment Clause in legislative prayer cases.

[10] The quoted portion of *Town of Greece* above makes clear that a local government may not permit an invocation practice that over time denigrates religious minorities. Thus, contrary to the district court's statement (R. 105 at 41), whether a particular segment of Brevard County's population is a religious majority or minority *is* germane to the Establishment Clause analysis in a legislative prayer case.

Despite not applying the *Lemon* test, the district court stated: "[T]he County is clearly entangling itself in religion by vetting the beliefs of those groups with whom it is unfamiliar before deciding whether to grant permission to give invocations." (R. 105 at 50). However, the district court did not clearly delineate any standard that it applied with respect to Appellees' excessive entanglement theory of liability.

Clearly, *Town of Greece* permits—and may require—a government to inquire and possibly "vet" the beliefs of those groups with whom it is unfamiliar before deciding whether to invite a member of such group to give an invocation. *See* 134 S.Ct. at 1823-24. As explained above, a local government may—and perhaps must—decline to permit invocations that denigrate, proselytize, threaten damnation, or preach conversion. *See id.* Thus, some inquiry into the beliefs of the individual who would give the invocation, his or her affiliation, or both, is permissible and appropriate to ensure that an invocation is not used for any of those improper purposes. Additionally, Brevard County maintains that a local government does not "excessively entangle" itself with religion by establishing practices and policies that adhere to and support the traditional, historical purposes of invocations—recognition and acknowledgement of theistic beliefs as well as to acknowledgement of religious leaders and the institutions they represent. Finally, as discussed in additional detail below, Brevard County is permitted to inquire and ensure that

invocations will conform to the lawful, content-based limitations that Brevard County may place upon its limited public forum. Particularly because individual commissioners invite invocation speakers on a rotating basis, inquiring as to whether an invocation will conform to content-based limitations on the limited public forum may require inquiry into the beliefs of groups with which the individual commissioner is not immediately familiar.

D. Legislative Prayer Challenges are Cognizable Under Only the Establishment Clause

A legislative prayer challenge may only be brought under the Establishment Clause and not under the Free Speech, Free Exercise, or Equal Protection Clauses. *See Fields v. Speaker of the Pennsylvania House of Representatives*, 251 F. Supp. 3d 772, 792 (M.D. Penn. 2017) ("We join the unanimous consensus of courts before us to conclude that legislative prayer is subject to review under the Establishment Clause alone."). In *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F. 3d 276, 288 (4th Cir. 2005), the Fourth Circuit reached the same conclusion after noting that the purpose of the invocation is simply that of a brief pronouncement of simple values presumably intended to solemnize the occasion and that the invocation was not intended for the exchange of views or other public discourse. Therefore, the *Simpson* court affirmed summary judgment in favor of the defendant on the plaintiff's free exercise, free speech, and equal protection claims. *Id.* at 287-88; *see*

also Turner v. City Council of City of Fredericksburg, 534 F.3d 352, 356 (4th Cir. 2008) (O'Connor, J. (Ret.), sitting by designation) (declining to permit the plaintiff to pursue a free exercise challenge to legislative prayer, noting that the plaintiff was given the chance to pray on behalf of the government, was unwilling to do so in the manner that the government had proscribed, but remains free to pray on his own behalf, in nongovernmental endeavors, in the manner dictated by his conscience); *Coleman*, 104 F. Supp. 3d at 891 (dismissing with prejudice plaintiff's equal protection challenge to legislative prayer); *Atheists of Fla., Inc. v. City of Lakeland*, 779 F. Supp. 2d 1330, 1342 (M.D. Fla. 2011). Therefore, the district court should have declined to consider any of Appellees' claims beyond their Establishment Clause and Florida Constitution No-Aid Clause claims.

E. Brevard County Did Not Violate the Free Speech Clause

1. BOCC Meetings Are Limited Public Forums

The district court erred in failing to analyze whether the forum at issue was a limited public forum. In determining whether the government has constitutionally regulated speech, the first step is determining the nature of the forum in which the speaker is trying to speak. The "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983). A limited public forum is not by tradition or designation a forum for public communication, and the

government may impose reasonable regulations on speech in such forums. *Perry*, 460 U.S. at 45.

Meetings of local government bodies and commissions are limited public forums in which the BOCC can regulate the time, place, and manner of speech as long as content-based regulations are viewpoint neutral. *Crowder v. Housing Auth. of City of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993); *Cleveland v. City of Cocoa Beach*, 221 F. App'x 875, 878 (11th Cir. 2007); *Galena v. Leone*, 638 F.3d 186, 199 (3d Cir. 2011); *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010) (entire city council meeting held in public is a limited public forum); *Steinburg v. Chesterfield Cnty. Planning Comm'n*, 527 F.3d 377, 385 (4th Cir. 2008) (public meeting is a limited public forum in which government entity is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve civility and decorum).

This Court held in *Rowe* that a city council rule restricting non-resident comments during the public comment agenda portion of a city council meeting to other items on the council's business agenda was reasonable, content-based, and viewpoint-neutral. *See* 358 F.3d at 802. Therefore, *Rowe* stands for the proposition that, because meetings of local government governing bodies are limited public forums, those local governing bodies are allowed to place reasonable, content-based,

viewpoint neutral restrictions on persons speaking during specific agenda items at their meetings.

In *Town of Greece*, the Supreme Court necessarily presumed the town council meeting was a limited public forum because the Court required local governments to regulate the invocation portion of their agenda with content-based restrictions that would prohibit proselytization or disparagement. *See* 134 S.Ct. at 1822. Even Appellees recognize *Town of Greece*'s directive that local governing bodies observe and, necessarily, implement such restrictions. (R. 95 at 7). Brevard County's regular BOCC meetings are, likewise, limited public forums.

Consequently, the crux of the free speech issue is whether Brevard County's practices and policies restricting the invocation agenda item to faith-based religious prayer are reasonable, content-based, and viewpoint-neutral. Skipping a proper forum analysis, the district court erroneously concluded, "exclusion of non-theists—who . . . are indeed 'capable' of providing an invocation within the meaning of *Town of Greece*—is impermissible viewpoint discrimination." (R. 105 at 46). Thereby, the district court created and applied a "capability" test for viewpoint discrimination that is novel but erroneous and inconsistent with precedent.

2. *Restricting Invocations to Faith-Based Religious Prayer is a Content-Based Restriction, Not Viewpoint Discrimination*

The district court erred in concluding that "exclusion of nontheists—who, as discussed earlier, are indeed "capable" of providing an invocation within the meaning of *Town of Greece*—is impermissible viewpoint discrimination." (R. 105 at 46). However, traditional limited public forum analysis does not contemplate a "capability" test. Viewpoint discrimination exists only when regulations *exclude* speech otherwise within the forum's limitations and based on the speaker's specific motivating ideology. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995). Brevard County has *not* excluded Appellees' speech from the limited public forum, which is the BOCC meeting—and so has not engaged in viewpoint discrimination.

The Supreme Court has drawn a distinction "between content discrimination, which is permissible if it preserves the purpose of the limited forum, and viewpoint discrimination, which is not permissible if directed at speech otherwise permitted within the forum." *Id.* at 830. In this case, Brevard County distinguished between invocations with exclusively religious content—which the BOCC placed at the beginning of the ceremonial portion of its meeting that also includes awards, presentations, and resolutions recognizing community contributions—and invocations with secular content, which were placed under public comment preceding the secular business meeting. However, secular invocations were *not excluded* from the limited public forum.

The common thread in cases in which the Supreme Court finds viewpoint discrimination in a limited public forum is the *exclusion* of a viewpoint from the limited public forum, especially the *exclusion* of a religious viewpoint. In *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993), the school district was deemed to have engaged in viewpoint discrimination in violation of the Free Speech Clause when it *excluded* a private group from presenting films at the school based solely on the films' discussions of family values from a religious perspective. Similar viewpoint discrimination based on exclusion of a religious viewpoint was found in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001), and in *Rosenberger*, 515 U.S. at 837, in which a university *refused* to fund an otherwise fundable student publication solely because it discussed issues from a religious perspective.[11]

Brevard County has not excluded Appellees' speech from regular BOCC meetings because Appellees are permitted to give secular invocations during BOCC meetings, which is the limited public forum at issue. Following *Rowe,* the Brevard County BOCC may exercise control over its own agenda and restrict the times in the limited public forum during which traditional faith-based invocations and secular invocations may be delivered. Both types of invocations are allowed at any regular

[11] Also, *Lamb's Chapel*, *Good News Club*, and *Rosenberger* are not legislative prayer cases.

Commission meeting. In fact, the Rule of Decorum for Public Comment section in Resolution 14-219—which existed before any Appellee sought an opportunity to deliver a secular invocation—specifically states that: "it is the policy of the [BOCC] to respect minority views as well as differing opinions, conclusions, backgrounds and beliefs." (R. 105-1 ¶ 35). Because Brevard County does not exclude Appellees' speech from its limited public forum, Brevard County has not engaged in viewpoint discrimination.

3. The County's Rule Limiting Invocations to Faith-Based Religious Prayer is Reasonable

a. Brevard County's Restriction on Speech is Reasonable in Light of the Purpose of the Limited Public Forum

The district court erred in failing to determine if Brevard County's regulations were reasonable in light of the purpose of forum, taking into consideration alternative channels of communication, as required under traditional limited public forum analysis. *Perry*, 460 U.S. at 53-54; *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 808-10 (1985); *Rosenberger*, 515 U.S. at 819-21. In this context, reasonableness "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius,* 473 U.S. at 809. The purpose of the forum is to conduct County business in an orderly and efficient manner. In furtherance of that, Brevard County may set its own agenda for meetings and restrict conversation to relevant topics. *Rowe*, 358 F.3d at 803; *Jones v. Heyman,*

888 F.2d 1328, 1333-34 (11th Cir. 1989) (mayor confining speaker to content of agenda item at city commission meeting is a reasonable time, place, and manner regulation). Therefore, Brevard County can restrict the content of the invocation agenda item to faith-based, religious prayers, which furthers the purpose of an invocation as defined in *Town of Greece*. The Court stated that the purpose of an invocation is to "[show] that prayer in this limited context could coexist with the principles of disestablishment and religious freedom," to acknowledge "the central place that religion, and religious institutions, hold in the lives of those present," and to strive for the idea that "even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being." *Town of Greece*, 134 S.Ct. at 1820, 1823, 1827. By contrast, secular invocations are not prayers and do not serve to acknowledge the role that religion has, currently and historically, in the community.

Likewise, under *Rowe,* the BOCC can restrict non-prayer supplications with invariably secular content to the public comment portion immediately preceding the Commission's secular business meeting. Such a restriction on the timing for presentation of secular invocations encouraging the application of secular principles, such as reason, logic and science, to decision-making, is certainly reasonable in light of the secular purpose of the secular business conducted immediately after secular invocations are delivered during the limited public forum. Moreover, the separation

of religious prayer invocations from secular supplications is reasonable because persons presenting religious prayers during the limited public forum are not similarly situated with persons delivering secular invocations because the latter readily admit they do not and will not deliver religious prayers. (R. 28 ¶ 3; R. 28-1,2,4,5,7,8).

Another reasonable purpose for separating a traditional religious invocation from secular supplications is supported by the portfolio of secular invocations of record in this case, which do not "show respect for the divine in all aspects" of citizens lives and being. (R. 24-10 at 6-10; R. 24-10 at 1). In fact, Brevard County documented a demonstrated lack of respect for the divine in several secular invocations which, if allowed to displace religious prayer, could be viewed as the BOCC condoning hostility toward religion. Under the circumstances, the separation of invocations with religious content from invocations with secular content is eminently reasonable in light of the purposes of the limited public forum and the purpose of the invocation as established in *Town of Greece*. The district court should have conducted the same analysis and concluded that Brevard County's regulations on speech are constitutional.

b. The County's Regulation on Speech and Speakers During the Invocation is Reasonable Because It Leaves Open Alternative Channels of Communication to Appellees During the Limited Public Forum

The district court failed to consider the alternative channels of communication available to Appellees. A critical fact distinguishing this case from every limited public forum free speech case cited by Appellees is that Appellees have not been excluded from the BOCC meeting and were afforded alternative channels of communicating with the intended audience of an invocation—the commissioners—during the limited public forum.

Restrictions upon speech in a limited public forum may be reasonable if alternative channels of communication are available. *Perry*, 460 U.S. at 53. The more alternative channels there are for speakers to address their audience, the more judicial support there is for the reasonableness of the restrictions. *Id.*; *Greer v. Spock,* 424 U.S. 828, 839 (1976) (servicemen free to attend off-base political rallies); *Pell v. Procunier*, 417 U.S. 817, 827-28 (1974) (prison inmates may communicate with media by mail and through visitors).

In *Perry*, the Court considered "the substantial alternative channels that remain[ed] open for union-teacher communication to take place[,] . . .rang[ing] from bulletin boards to meeting facilities to the United States mail." 460 U.S. at 53. The Court concluded that the ability of the union agent to communicate with teachers was not "seriously impinged by the restricted access to the internal mail system." Similarly, in *Parkland Republican Club v. City of Parkland*, 268 F. Supp. 2d 1349, 1355 (S.D. Fla. 2003), the political organization's ability to communicate with the

public was not seriously impinged by their exclusion from a parade because they could attend the parade as audience members and hold signs or pass out leaflets.

In this case, the intended audience for invocations is the commissioners. *Town of Greece*, 134 S.Ct. at 1825. Appellees have ample opportunity to deliver secular invocations to the BOCC at regular meetings because they can deliver secular invocations during either of the two public comment sections—one before the deliberative business meeting and the other at the end of the meeting—both of which are afforded during every regular BOCC meeting. (R. 83 ¶ 143). Therefore, restrictions on pre-meeting invocations are reasonable, and thus lawful, because of the availability of alternative channels for communication.

F. Brevard County Did Not Violate the Free Exercise Clause

Brevard County, through its policies and procedures for pre-meeting invocations at regular meetings of its BOCC, did not violate Appellees' rights under the Free Exercise Clause of the First Amendment. The Free Exercise Clause pertains "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *see also GeorgiaCarry.Org, Inc. v. Ga.*, 687 F.3d 1244, 1253 (11th Cir. 2012) ("The protections afforded by the Free Exercise Clause prevent the government from discriminating against the exercise of religious beliefs or conduct motivated by

religious beliefs."). To prevail on a free exercise claim, a plaintiff must prove that he or she holds a belief—not a personal preference or secular belief—that is sincerely held and religious in nature and that the law at issue in some way impacts the plaintiff's ability to either hold that belief or act pursuant to that belief. *GeorgiaCarry.Org, Inc.*, 687 F.3d at 1256-57.[12] On summary judgment, Appellees never contended that delivering pre-meeting invocations at regular meetings of boards of local governments is conduct that they undertake for religious reasons. Thus, there can be no contention that, in not inviting any of Appellees to deliver an "invocation" during the time reserved for the pre-meeting invocation (as opposed to the initial public comment period), Appellees were regulated or restricted as to conduct that they sought to undertake for religious reasons or as part of religious observance.

Neither of the two cases ((1) *McDaniel v. Paty*, 435 U.S. 618 (1978), and (2) *Torcaso v. Watkins*, 367 U.S. 488 (1961)) Appellees cited in support of their free exercise claim involved legislative prayer. Given that legislative prayer cases occupy their own area of First Amendment jurisprudence, *see Town of Greece*, 134

[12] Based upon *GeorgiaCarry.Org, Inc.*, the Court might also hold that Appellees' supposed desire to offer a secular "invocation" during the pre-meeting invocation (and not during the initial public comment period) is a personal preference or secular belief not protected by the Free Exercise Clause. *See* 687 F.3d at 1258 (plaintiffs' desire to carry handguns in places of worship was a non-protected personal preference or secular belief).

S.Ct. at 1818, the Court should decline to apply *McDaniel* and *Torcaso*. Even if the Court considers those decisions , the Court should not reach the conclusion that Brevard County violated Appellees' rights to free exercise of religion.

McDaniel involved a state-law prohibition on ministers and priests from serving as delegates on the state's limited constitutional convention. 435 U.S. at 620. The Supreme Court, in a four-Justice plurality opinion, noted that the state was "punishing a religious profession with the privation of a civil right." *Id.* at 620, 626 (quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904)). The Court ultimately held that the restriction at issue violated the plaintiff's First Amendment right to free exercise of religion. *Id.* at 629. *Torcaso* involved a state's requirement that barred every person who refuses to declare a belief in God from holding public office of profit or trust in the state. 367 U.S. at 489-90. The plaintiff was appointed to the office of Notary Public by the state's governor but was refused a commission to serve because he would not declare his belief in God. *Id.* at 489.

Thus, *McDaniel* and *Torcaso* both concerned free exercise of religion in the context of holding public office. This case does not involve public office. Instead, it involves a function that Appellees were in no way guaranteed or entitled to have any involvement. On a rotating basis, each commissioner was left to his or her discretion as to who to select to deliver the pre-meeting invocation at regular meetings of Brevard County's BOCC. Invocations were directed to the

commissioners and were given for the commissioners' benefit. Unlike the plaintiffs in *McDaniel* and *Torcaso*, Appellees cannot establish that they would have been able to participate (in this case by being invited to give the pre-meeting invocation)—regardless of religious belief or religious practices. That is, Appellees cannot show that they would have been invited to give a pre-meeting invocation but for their religious beliefs or observance. None of the Appellees had any affirmative right to deliver a pre-meeting invocation to Brevard County's BOCC. Therefore, Appellees cannot credibly claim—and failed to prove—that Brevard County's pre-meeting invocation practices and policies (including the Resolution) "create[d] a constitutionally impermissible burden on a sincerely held religious belief." *GeorgiaCarry.Org, Inc.*, 687 F.3d at 1257-58. Appellees thereby failed to prove that they were deprived of their rights to free exercise of religion.[13]

[13] Additionally and alternatively, if this Court holds that Appellees did adequately prove that Brevard County imposed an impermissible burden on their sincerely held religious beliefs, Brevard County maintains, as explained in greater detail below regarding Appellees equal protection claim, that Brevard County's pre-meeting invocation practices and policies pass strict scrutiny.

G. Brevard County Did Not Violate the Equal Protection Clause

Brevard County did not violate Appellees' rights under the Equal Protection Clause of the Fourteenth Amendment.[14] "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *Rowe*, 358 F.3d at 803 (quoting *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992)). Appellees are not "in all relevant aspects alike" to the individuals who have delivered invocations. First, Appellees would not, by their own admission, deliver a prayer or invocation as the Supreme Court considered those terms in *Marsh* and *Town of Greece*. Also, Appellees are not "in all relevant aspects alike" because Appellees approached the invocation with the goal of ending the practice of legislative prayer; with stated intent to *not* speak within the legitimate bounds for the pre-meeting invocation; were reasonably believed by Brevard County to present an "invocation" that was disparaging, hostile, mocking, and derisive of theistic belief systems and their adherents; and were reasonably believed to present an invocation that would have affirmatively promoted non-theism over theism. None of these differences are a

[14] Article I, Section 2 of the Florida Constitution is construed like the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987); *Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204, 211 (Fla. 1st DCA 1983). Therefore, this section of Brevard County's brief also applies with respect to Appellees' claim under Article 1, Section 2 of the Florida Constitution.

necessary result of Appellees' religion.[15] Because the difference in treatment of Appellees' with respect to the pre-meeting invocation is due to their conduct and not because of membership in any protected class, the Court should not apply strict scrutiny and instead hold that Brevard County's conduct passes rational basis review. *See Zabriskie v. Court Admin.*, 172 F. App'x 906, 909-10 (11th Cir. 2006) (supposed difference in treatment that the plaintiff faced was due to his conduct and not any suspect classification, and the defendant's conduct passed rational basis review). The record is abundantly clear that Brevard County had multiple rational bases for its invocation practices and policies. (*See, e.g.,* R. 105-1).

Even if this Court applies strict scrutiny with respect to Appellees' equal protection claim, Brevard County's policies and procedures were narrowly tailored to achieve a compelling state interest. An interest in complying with constitutional obligations, particularly those under the Establishment Clause, may be characterized

[15] *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 834 (D. Neb. 2016), concerned a prisoner who claimed to: be a "Pastafarian[;]" profess a divine belief in a Flying Spaghetti Monster; and practice a religion of "FSMism." *See id.* at 823. The court in *Cavanaugh* found that FSMism was not a "religion" and was instead a parody intended to advance an argument about science, the evolution of life, and the place of religion in public education. *Id.* at 824. Regarding the plaintiff's equal protection claim, the court found that, because FSMism was not a religion, the plaintiff was not similarly situated to others who profess a religious faith and dismissed the plaintiff's equal protection claim. *Id.* at 834. Notably, Williams once urged a self-described Pastafarian to present a Flying Spaghetti Monster "invocation" to Brevard County's BOCC and offered to help if the individual's request to present such an "invocation" was denied. (*See* R. 53-8 at 3).

as compelling. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Knight v. Conn. Dept. of Public Health*, 275 F.3d 156, 165 (2d Cir. 2001); *see also Good News Club*, 533 U.S. at 141 (Souter, J., dissenting) ("This Court has accepted the independent obligation to obey the Establishment Clause as sufficiently compelling to satisfy strict scrutiny under the First Amendment."). The district court ignored *Widmar* in considering Appellees' equal protection claims. (*See* R. 105 at 63). The Supreme Court was clear in *Town of Greece* that legislative prayer may not, if it is to comply with the Establishment Clause, be exploited to proselytize or advance any one, or to disparage any other, system of belief. 134 S.Ct. at 1821-22. The record is replete with evidence that Appellees sought to engage in each of those non-permitted purposes in delivering their "invocations." Thus, Brevard County's pre-meeting invocation practices and policies were necessary in order to comply with *Town of Greece* and thereby comply with the Establishment Clause. *See Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) (internal quotation marks omitted) ("[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe."); *see also Chandler v. James*, 180 F.3d 1254, 1261 n.11 (11th Cir. 1999) ("Tolerance of disbelief does not require that we deny our religious heritage, nor elevate atheism over that heritage. The First Amendment requires only that the State tolerate both, while establishing neither.").

These policies and practices were particularly necessary given that, as of 2010, only 34.9% of Brevard County's population are religious adherents. (*See* R. 83 ¶ 192). Similarly, Brevard County ranks, with respect to percentage of residents affiliated with a religious congregation, in the bottom 4% of the top 125 most populous counties in the United States and the bottom 16% of all counties in the United States. (*See* R. 83 ¶ 195).

Additionally, Appellees could have offered their intended opening remarks prior to the regular, non-consent business agenda. Appellees simply chose not to do so. Therefore, even if strict scrutiny applies, Brevard County's practices and policies for its pre-meeting invocations pass strict scrutiny.

11. CONCLUSION

Brevard County's practices and policies for regular BOCC meetings, which are limited public fora, are reasonable, content-based, and viewpoint-neutral restrictions enacted to further the purposes of legislative prayer recognized by the Supreme Court. Appellees could have addressed the BOCC at its regular meetings, prior to the BOCC's regular, non-consent agenda but have not availed themselves of such opportunity because their true goal is not to participate in the limited public forum but to end Brevard County's legislative prayer tradition, despite *Town of Greece*.

The record and the parties' filings directed to their cross-motions for summary judgment indicate that summary judgment was appropriate in favor of Brevard County on each of the issues raised in this appeal. Accordingly, Brevard County respectfully requests that this Court reverse the district court's Order (R. 105), to the extent the district court denied Brevard County's motion for summary judgment and granted Appellees' motion for summary judgment, and remand with instructions that the district court enter judgment in favor of Brevard County on all claims.

Respectfully submitted,

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12. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations found in Fed. R. App. P. 32(a) because it contains 12,962 words. I further certify that this brief was prepared using a word processing program, Microsoft Word 2016, and was prepared in 14-point, Times New Roman font, in accordance with Fed. R. App. P. 32(a).

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13. CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2018, the undersigned filed a copy of this brief electronically with the Clerk of the Court using the Court's CM/ECF system, which will send an electronic notice of filing to all counsel of record. Additionally, the undersigned has served seven paper copies of this brief upon the Eleventh Circuit Clerk of Court via a reliable third-party commercial carrier for delivery on or before three days after the date of this certificate of service.

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