Case Nos. 17-15769-FF, 18-10109

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-Orl-28DCI

APPELLANT/CROSS-APPELLEE BREVARD COUNTY'S REPLY AND RESPONSE 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. Schverak, Christine M.
27. Seidel, Andrew L.
28. Space Coast Freethought Association
29. Tilley, Daniel B.
30. Williamson, David
31. 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.

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4. ISSUE FOR REVIEW

The issue on cross-appeal is:

1. Whether requests at some but not all of Brevard County's Board of County Commissioners meetings for attendees to rise for the invocation and Pledge of Allegiance amount to unconstitutional coercion of religious exercise in violation of 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.

5. 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 practices and policies 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 constitutional 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). Prior to the invocation and Pledge of Allegiance, the BOCC Chairperson sometimes asks—but sometimes does not ask—the audience to stand for the invocation and Pledge of Allegiance. (R. 83 ¶¶ 67-69). All audience members typically stand for the invocation, but sometimes some audience members do not stand. (R. 83 ¶¶ 71-72). No evidence in the record indicates that Commissioners' decisions on items before the BOCC have been influenced by whether a person participated in or stood for the invocation. (R. 83 ¶ 73). Attendees are not required to remain in the boardroom throughout a meeting. (R. 83 ¶ 81).

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

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

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

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 October 11, 2016, the parties filed their Amended Stipulation of Facts Regarding Cross-Motions for Summary Judgment (R. 83). 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.[3] With respect to Appellees' Establishment Clause claim, 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.

On Appellees' coercion theory of Establishment Clause liability, the district court held that regardless of which standard of coercion from *Town of Greece* applies, Appellees were not subjected to unconstitutional coercion. (R. 105 at 53-54). The district court stated that the fact that children were occasionally present for BOCC meetings and that requests for attendees to stand for the Pledge of Allegiance and invocation were often made by Commissioners did not support finding unconstitutional coercion in violation of the Establishment Clause. (*See* R. 105 at 54). The district court also noted that two of the Appellees (who are both adults) "did not feel so pressured that they actually stood if asked to do so." (R. 105 at 54).

[3] This section discussed the disposition below as related to the cross-appeal.

As a final note regarding coercion, the district court stated that even if any of the Appellees were offended by a request to stand for the invocation and Pledge of Allegiance, offense does not equate to unconstitutional coercion. (R. 105 at 55).

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 Appellees' Florida "No-Aid" Clause claim, the district court granted summary judgment in favor of Brevard County. (R. 105 at 68). The district court held that the Florida Supreme Court would not find a violation of the Florida "No-Aid" Clause from unquantified, incidental expense of Brevard County's use of existing resources to contact potential invocation speakers. (R. 105 at 66-68).

On November 29, 2017, the district court entered the Final Judgment (R. 115). On December 28, 2017, Brevard County initiated this appeal by filing a notice of appeal with the clerk of the district court. (R. 119). On January 10, 2018, Appellees filed their Notice of Cross-Appeal. (R. 123).

6. 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 constitutional 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).

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 in a lobby just outside the entrance to the main boardroom. (R. 83 ¶ 13). The main boardroom is approximately 60 feet wide and 70 feet deep. (R. 83 ¶ 18).[4] The main boardroom has approximately 196 seats for the audience, and the total capacity of the main boardroom is 270. (R. 83 ¶ 22).

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 just before the Pledge of Allegiance and prior to the "Resolutions, Awards, and Presentations" portion of the meeting agenda. (R. 83 ¶ 198).

Typically, at the beginning of each meeting, the County Commissioner who has selected the invocation speaker introduces the speaker. (R. 83 ¶ 66). Then, prior to the invocation, some of the BOCC's chairpersons have asked the audience to stand for the invocation and Pledge of Allegiance out of respect for the religion of the person giving the invocation and for the Pledge of Allegiance. (*See* R. 83 ¶¶ 67-68). Some of the BOCC's chairpersons have simply stood for the invocation and Pledge of Allegiance, with the other Commissioners and the audience typically following. (R. 83 at 69). On occasion, some audience members do not stand. (R. 83 ¶ 72).

[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.

There is no evidence in the record that the Commissioners' decision on items before the Board have been influenced by whether a person participated in or stood for the invocation, or that Commissioners have otherwise treated citizens differently as a result of standing or not standing for the invocation. (R. 83 ¶ 73).

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). 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). Some audience members leave board meetings in the middle of the meeting. (*See* R. 83 ¶ 145).

On a rotating basis, each commissioner selects an 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). At board meetings, with extremely rare exceptions, agenda items (other than the invocation) are secular in nature. (R. 83 ¶ 29).

CFFC is an organization 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 including "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's decision in *Town of Greece v. Galloway*. (R. 83 ¶ 222). A May 5, 2014 FFRF news release responding to *Town of Greece* 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). That 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* decision is overturned." (R. 83 ¶ 225). A "goal" expressed in that 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). That news release also 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).

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). 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 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

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

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 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]

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).

[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).

7. 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. Through those practices and policies, Brevard County in no way coerces participation in religious exercises. Incidental use of Brevard County's existing resources to contact potential invocation speakers does not violate the "No-Aid" Clause of Article I, Section 3 of 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 part of an invocation.

8. 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 in this appeal.

B. Brevard County Did Not Violate the Establishment Clause Through Coercion of Participation in Religious Exercises

The district court properly concluded that Brevard County does not violate the Establishment Clause by supposedly coercing participation in religious exercises.[7] In *Town of Greece v. Galloway*, the Supreme Court rejected the plaintiffs' coercion argument, although by a divided Court with no majority rationale. *See Town of Greece v. Galloway*, 134 S.Ct. 1811, 1825-27, 1837-38 (2014). Regarding coercion, the plurality (Justices Kennedy and Alito and Chief Justice Roberts) was "not persuaded that the town of Greece, through the act of offering a brief, solemn, and

[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, argument herein concerning the Establishment Clause also applies with respect to Appellees' claim under Article 1, Section 3 of the Florida Constitution.

respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance," but it emphasized that "[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 (plurality opinion). Although the plurality found no coercion on the facts presented, the plurality noted, "[t]he analysis would be different if town board members directed the public to participate in the prayers, signaled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826. Although the plaintiffs in *Town of Greece* filed declarations stating that the prayers offended them and made them "feel excluded and disrespected," the plurality held: "Offense . . . does not equate to coercion." *Id.*

Justice Thomas authored a concurring opinion, which Justice Scalia joined, through which Justices Thomas and Scalia agreed with the plurality that the town's invocation practice was not coercive. *Id.* at 1838 (Thomas, J., concurring in part and in the judgment). In the concurring opinion, Justice Thomas explained that coercion meant "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* at 1837 (emphasis in original) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992)). "In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue." *Id.* at 1837. "Dissenting ministers were barred from preaching, and political participation was

limited to members of the established church." *Id.* Justice Thomas also noted that many state constitutional provisions that prohibited religious compulsion made clear that the relevant sort of compulsion was legal in nature and "included no concern for the finer sensibilities of the 'reasonable observer.'" *Id.* at 1838. "Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt by respondents in this case." *Id.* at 1838. "[A]n Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." *Id.* (internal quotation marks omitted). Justices Thomas and Scalia agreed with the plurality's conclusion that "[o]ffense . . . does not equate to coercion" and noted that they "would simply add . . . that '[p]eer pressure, unpleasant as it may be, is not coercion' either." *Id.* (alterations in original) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004)).

"When a fragmented Court decides a case and no single rationale explaining the results enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Ga.*, 428 U.S. 153, 169 n.15 (1976)) (alteration in original). Justice Thomas' concurring opinion from *Town of Greece* clearly represents the position taken by those Members of the Court who concurred in judgments on the narrowest

grounds. *See Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 515 n.10 (6th Cir. 2017). Justices Thomas and Scalia specifically concurred in Justice Kennedy's tradition analysis, but not in his social-coercion analysis. *See Town of Greece*, 134 S.Ct. at 1837-38. Justice Kennedy's social coercion analysis would certainly find coercion with respect to the sort of legal coercion that Justice Thomas agreed would violate the Establishment Clause. Therefore, Justice Thomas' concurring opinion clearly represents the narrowest ground to support the Court's judgment on the coercion theory of Establishment Clause liability.[8] *See Elmbrook Sch. Dist. v. Doe*, 134 S.Ct. 2283, 2285 (2014) (Scalia, J., dissenting from denial of certiorari); *Marks*, 430 U.S. at 993-94 (explaining that a three-Justice plurality opinion, and not a concurring opinion on broader grounds, constituted the holding of the Court and provided the governing standards). Beyond that, prior Supreme Court decisions support applying the coercion standard articulated in Justice Thomas' concurring opinion over that of

[8] Brevard County acknowledges but respectfully disagrees with existing, non-binding authority suggesting that Justice Kennedy's coercion analysis represents the narrowest ground to support the Court's judgment. *See, e.g., Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 602 n.9 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result) (concluding, without explanation, that Justice Kennedy's plurality opinion is narrower than Justice Thomas' concurring opinion). Appellees offer no explanation for their contention that Justice Kennedy's plurality represents the narrowest ground to support the Court's judgment. (*See* Appellees' Br. at 92 n.7).

Justice Kennedy's plurality opinion. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988); *Zorach v. Clauson*, 343 U.S. 306, 311 (1952).

The Fifth Circuit applies a three-part test in evaluating whether a government has coerced anyone to support or participate in religion or its exercise. *See Croft v. Perry*, 624 F.3d 157, 169 (5th Cir. 2010). Under that test, courts may find that unconstitutional coercion occurs when the government **directs** a formal religious exercise in such a way as to **oblige the participation of objectors**. *Id.* (quoting *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999)). In *Croft*, the Fifth Circuit applied that test to conclude that public school students were not coerced to engage in a religious exercise when teachers required the students to recite the Texas Pledge of Allegiance, which contained the phrase "one state under God." *Id.* at 169-70; *see also Bauchman v. W. High Sch.*, 900 F. Supp. 254, 259-60, 270 (D. Utah 1995) (no unconstitutional coercion where high school student in for-credit choir class was excused from practicing and performing any religious songs that she found offensive); *compare Inouye v. Kamna,* 504 F.3d 705, 714 (9th Cir. 2007) ("The Hobson's choice [parole officer] Nanamori offered Inouye—to be imprisoned or to renounce his own religious beliefs—offends the core of Establishment Clause jurisprudence."); *Kerr v. Farrey*, 95 F.3d 472, 480-81 (7th Cir. 1996) (requirement that inmate observe Narcotics Anonymous meetings, which

contained explicit theistic content, or face a higher security classification was unconstitutionally coercive).

In this case, the district court did not resolve the question of whether Justice Kennedy's plurality opinion or Justice Thomas' concurring opinion is controlling. (*See* R. 105 at 53 n.30). The district court concluded that, on the reasoning of either Justice Kennedy's plurality opinion or Justice Thomas' concurring opinion, Brevard County did not unconstitutionally coerce religious exercise. (*See* R. 105 at 53 n.30). Certainly, Brevard County did not coerce participation in religious exercise by force of law and threat of penalty. The record is clear: there is no evidence Commissioners have treated citizens differently as a result of a citizen's standing or not standing for the invocation, and there is no evidence that Commissioners' decisions on items before the Board have been influenced by whether a person participated in or stood for the invocation. (R. 83 ¶ 73). Attendees at BOCC meetings sometimes simply receive a request—but not a direction—to stand for the invocation and Pledge of Allegiance. While attendees might be requested to stand during the invocation, they are not directed or even requested to actually participate in the invocation itself. That is, BOCC meeting attendees are not required to recite or repeat the invocation or otherwise involve themselves in the invocation.[9] Attendees are not even required to

[9] Appellees attempt to make much of the dicta from *Town of Greece* stating, "the analysis would be different . . . if the town board members directed the public to

be in the boardroom during the invocation. (*See* R. 83 ¶ 81). As the district court noted, Williams and Becher did not feel so pressured that they actually stood for the invocation if asked to do so. (R. 105 at 54-55 (citing R. 53-1 at 44-45, 52-1 at 12-13)). Certainly, under either Justice Kennedy's plurality opinion or Justice Thomas' concurring opinion, the fact that any of the Appellees might have been offended does not amount to unconstitutional coercion. *See Town of Greece*, 134 S.Ct. at 1826-27, 1837-38 ("The majority properly concludes that 'offense . . . does not equate to coercion.'").[10]

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participate in the prayers." (Appellees' Br. at 92 (citing *Town of Greece*, 134 S.Ct. at 1826)). Even if that portion of *Town of Greece* was not dicta, it would not change the outcome in this case. The record in this case is clear that attendees were not required to actually recite any prayer or "participate" in the invocation whatsoever. Individuals who were present in the boardroom at the outset of the invocation (despite a lack of requirement to be present then to attend any other portion of a BOCC meeting) sometimes (but not always) heard a request to stand. (*See* R. 83 ¶¶ 67-69, 81).

[10] Appellees appear to selectively ignore this holding of *Town of Greece* and instead direct the Court to public-school-setting coercion cases that are inapplicable here. (*See* Appellees' Br. at 96). While Appellees may disagree with this and other holdings of *Town of Greece*, this Court should apply the *Town of Greece* Court's holding on the coercion issue unless and until the Supreme Court of the United States reverses that holding. Also regarding *Town of Greece*, Appellees incorrect contend that, unlike in *Town of Greece*, any member of the public is not welcome to offer an invocation reflecting his or her own convictions in Brevard County. (*See* Appellees' Br. at 94-95). Appellees disregard that attendees of Brevard County's BOCC meetings may express their own convictions during the public comment portion of the meeting. (*See* R. 83 ¶¶ 147-48). Regardless, it is clear that *Town of Greece*'s coercion holding does not turn on whether meeting attendees are afforded an option to express their own convictions at public meetings of local governments.

The district court also agreed that the occasional presence of children during the invocation does not change the analysis or the result. (*See* R. 105 at 54). While children may generally be more impressionable than adults, it is the fact that activity involving religion took place in a public-school environment or in connection with school activities that sets cases finding unconstitutional coercion in a public school setting apart from this case. *See, e.g.*, *Lee*, 505 U.S. at 580-82, 588-89, 598 (prayer exercises in public schools carry a particular risk of coercion); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000). However, even in such a setting, children observing a message that may have some religious content does not necessarily amount to unconstitutional coercion. *See Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1333 (11th Cir. 2001); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1038 (9th Cir. 2010) (elementary school students being "coerced" into listening to other students recite the Pledge of Allegiance, which contains the phrase "under God," was not unconstitutional coercion in violation of the Establishment Clause). Given that no BOCC meeting attendee is required to attend any particular portion of the meeting, the cases addressing supposed coercion of religious exercise in school settings are inapplicable in this case.[11]

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[11] The occasional presence of children at BOCC meetings is also beside the point, since none of the Individual Appellees is a child. Similarly, none of the Appellees is (or was at any time relevant to this case) a Brevard County employee. Therefore, whether Brevard County's practices are unconstitutionally coercive with respect to

C. Brevard County Did Not Violate the No-Aid Clause

The district court entered summary judgment in favor of Brevard County on Appellees claim under the "No-Aid" Clause of the Florida Constitution. (*See* R. 105 at 68). Brevard County maintains that the Court should not consider the No-Aid Clause claim because Appellees did not cross appeal on their No-Aid Clause claim. (*See* R. 123 at 1). As a result, this Court lacks jurisdiction to consider Appellees' No-Aid Clause claim. *See White v. State Farm Fire & Cas. Co.*, 664 F.3d 860, 864 (11th Cir. 2011); *Moton v. Cowart*, 631 F.3d 1337, 1340 n.2 (11th Cir. 2011); *see also Black v. Reynolds*, 674 F. App'x 851, 854 (11th Cir. 2016).

Appellees contend on appeal that they make seek review on their No-Aid Clause claim despite not cross-appealing on the issue because "prevailing on it would not entitle [Appellees] to relief greater than that ordered by the district court." (Appellees' Br. at 91 n.6 (citing *Jennings v. Stephens*, 135 S.Ct. 793, 798 (2015)).[12] Appellees are mistaken in their contention that reversing the district court's order on the No-Aid Clause issue would not entitle Appellees to relief greater than that ordered by the district court. The difference between this case and the circumstances presented in *Jennings* was that *Jennings* involved a new theory supporting an

children, Brevard County employees, or both, is beyond the scope of the case actually presented to the Court.

[12] Citations to pages in briefs previously filed in this appeal refer to CM/ECF's pagination.

ineffective assistance of counsel claim for a convicted criminal defendant. *See* 135 S.Ct. at 798-99. However, in this case, Appellees' No-Aid Clause claim was a distinct claim for affirmative relief that was (perhaps improperly) combined into a single count with another state-law claim for affirmative relief. (*See* R. 28 at 71); *Weiland v. Palm Beach Cnty. Sheriff's Office*, 792 F.3d 1313, 1321-23 (11th Cir. 2015) (describing a complaint containing multiple claims for relief combined into a single count as one type of impermissible "shotgun pleading"). Reversal on Appellees' No-Aid Clause claim would, even if this Court affirms the district court's judgment on Appellees' Florida Establishment Clause claim, result in greater relief to Appellees in the form of a declaratory judgment on the No-Aid Clause claim and possible additional (or differing) injunctive relief. (*See* R. 28 ¶¶ 336, 338). Therefore, the Court should not consider Appellees' No-Aid Clause claim. *See Jennings*, 135 S.Ct. at 798. However, even if the Court considers the propriety of the district court's summary judgment in favor of Brevard County on the No-Aid Clause claim, this Court should affirm the district court's summary judgment in favor of Brevard County on the No-Aid Clause claim.

The district court properly granted summary judgment in favor of Brevard County on Appellees' claim under the "No-Aid" Clause of the Florida Constitution. As an initial matter, substantive state law applies to state-law claims heard on the basis of supplemental jurisdiction. *See Jones v. United Space Alliance, LLC*, 494

F.3d 1306, 1309 (11th Cir. 2007); *see also West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) ("State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."). The "No-Aid" Clause of Article I, Section 3 of the Florida Constitution states: "No revenue of the state or any political subdivision thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

This Court previously considered Florida's No-Aid Clause in *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013). In that case, a city's administrative employees contacted potential invocation speakers from a list of religious leaders. *Id.* at 584-86. The plaintiffs argued that the time and expense of printing and mailing invitations to the speakers constituted an impermissible expenditure in aid of religion. *Id.* at 586. The city estimated that the annual cost of updating the list and mailing out invitations was $1,200.00 to $1,500.00. *Id.* at 596. This Court concluded that the plaintiffs did not demonstrate that the city's expenditures on arranging invocational speakers resulted in a direct or indirect pecuniary benefit to any group. *See id.* Nor did the plaintiffs demonstrate that any

religious organization received financial assistance from the city to promote and advance the organization's theological views. *See id.* Therefore, this Court affirmed the district court's summary judgment in favor of the defendant on the No-Aid Clause claim. *See id.* at 579, 596; *see also Atheists of Fla., Inc. v. City of Lakeland, Fla.*, 838 F. Supp. 2d 1293 (M.D. Fla. 2012), *affirmed in part, vacated and remanded in part*, 713 F.3d 577 (11th Cir. 2013) ("What is more, the incidental expenditure of funds to invite invocation speakers to solemnize meetings of governmental bodies is, in the Court's view, simply not the type of practice contemplated by the Florida Constitution's Establishment Clause. That is especially so in light of the longstanding tradition of solemnizing the meetings of both houses of the Florida legislature, a practice indicative of the innocuous, secular nature with which this State views legislative prayer.").

Southside Estates Baptist Church v. Bd. of Trustees, Sch. Tax Dist. No. 1 in and for Duval Cnty., 115 So. 2d 697 (Fla. 1959), dictates that Florida law does not provide for liability under the No-Aid Clause in the circumstances presented by this case. In *Southside*, the school district's board of trustees allowed several churches to use school buildings on Sundays. *Id.* at 698. The plaintiffs argued that permitting such use constituted an indirect contribution of financial assistance to a church in violation of a Florida constitutional provision, which existed in a prior version of the Florida Constitution, substantially similar to the No-Aid Clause. *Id.* at 698-99; *see*

also Bush, 886 So. 2d at 348-51 (noting that the present No-Aid Clause is substantially similar to the predecessor constitutional provision that was at issue in *Southside*). The defendants argued that the predecessor to the current No-Aid Clause was not violated because there was no direct expenditure of public funds and because any indirect expense to the public because of depreciation resulting from use by churches is of "such minimal consequence that the law should refuse to notice it." 115 So. 2d at 699. The Florida Supreme Court generally agreed with the defendants. *See id.* at 699-700. The Florida Supreme Court stated: "Nothing of substantial consequence is shown and we see no reason to burden this opinion with a discussion of trivia." *Id.*

Council for Secular Humanism, Inc. v. McNeil, 44 So. 3d 112, 122-23 (Fla. 1st DCA 2010), also demonstrates that Florida law does not support Appellees' No-Aid Clause claim. 44 So. 3d at 122-23. *McNeil* involved a No-Aid Clause challenge to the Florida Department of Corrections' payment of public funds to contractors, some of which taught Christian doctrines, for provision of social services to inmates. *Id.* at 119, 121-22. Noting that the No-Aid provision is not as restrictive as it might initially seem, the Florida First District Court of Appeal stated, "the no-aid provision does not constitute a per se bar to state or local government contracting with religious entities for the provision of goods and services." *See id.* at 121. The court then held that the simple fact that public funds were used to pay an individual chaplain, as

opposed to a church, sect, religious denomination, or sectarian institution, does not establish a cause of action under the No-Aid Clause. *See id.* at 123.

Appellees did not direct the district court to any evidence in the record to indicate that Brevard County paid anything to any church, nor did Appellees direct the district court to any evidence to quantify the cost to Brevard County of using existing resources to contact potential invocation speakers. (*See* R. 105 at 66).[13] Regardless of the exact amount, the incidental cost (if any) of Brevard County's use of those existing systems to contact potential invocation speakers is so minimal that, under Florida law, it does not constitute a No-Aid Clause violation. *See, e.g., Southside*, 115 So. 2d at 699-700.[14] As in *McNeil*, no Brevard County funds are directly or indirectly used to benefit any church, sect, religious denomination, or sectarian institution.[15] *See* 44 So. 3d at 123.

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[13] As a result, Appellees failed to carry their burden on summary judgment with respect to an element for which they bore the burden of proof. Therefore, aside from legal arguments, the district court properly denied summary judgment in favor of Appellees and granted summary judgment in favor of Brevard County on the No-Aid Clause claim.

[14] Through their principal brief, Appellees continue to miss this point. (*See* Appellees' Br. At 90-91). Regardless of whether a governmental program encourages the preference of one religion over another, there is no violation of the No-Aid Clause if such supposed encouragement is through minimal, indirect expense. *See Southside*, 115 So. 2d at 699-700. At best, Appellees address only a portion of what is required to find a violation of the No-Aid Clause.

[15] As Brevard County explained in its initial brief, the BOCC is the principal audience for the invocation. (Brevard County Br. at 28 (quoting *Town of Greece*, 134 S.Ct. at 1825)). Thus, even if any county funds are expended directly or

D. Brevard County Did Not Violate the Establishment Clause

Legislative prayer cases occupy their own area of First Amendment jurisprudence. *See Town of Greece*, 134 S.Ct. at 1818. 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*, 134 S.Ct. at 1818; *Marsh*, 463 U.S. at 792.[16,17] 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).

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indirectly in contacting potential invocation speakers, such expenditure is for the benefit of Brevard County and not any church, sect, religious denomination, or sectarian institution.

[16] "[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*, 886 So. 2d at 344; *see also Todd*, 643 So. 2d at 628, 628 n.3 (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.

[17] Appellees discussion of *Town of Greece* tends to lose sight of the core issues and holding of that case. (*See, e.g.,* Appellees' Br. at 74). Therefore, because *Town of Greece* is of particular importance to this case, Brevard County reiterates the essential aspects of *Town of Greece*.

463 U.S. at 792 (alteration in original).

More recently, in *Town of Greece*, 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.

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). 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.

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).[18] "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.

In Appellees' principal brief, they discuss some purposes of legislative prayer but self-servingly omit those that do not support their positions in this case.[19] In

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[18] 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.

[19] It is only through omission of some of the purposes of legislative prayer that Appellees can arrive at their misguided contention that Brevard County has

doing so, Appellees attempt to transform *Town of Greece* from what it actually is into something else that might fit their own purposes, despite their demonstrated hostility to the *Town of Greece* decision. (*See* R. 83 ¶¶ 222-25).[20] As explained above and in Brevard County's principal brief, the *Marsh* Court discussed legislative prayer as "invok[ing] Divine guidance on a public body" as "a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. *Town of Greece* expanded upon that principle, explaining that legislative prayer is a "recognition" "that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power . . . ." 134 S.Ct. at 1827-28; *see also id.* at 1823, 1827 (describing the purpose of a legislative invocation as to acknowledging "the central place that religion, and religious institutions, hold in the lives of those present," and noting 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."). Also curiously missing

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attempted to use history and tradition to support what Appellees contend is an unconstitutional practice.

[20] The Individual Appellees now attempt to distance themselves from the fact that they are all members of FFRF as well as the fact that FFRF "was initially founded for the very purpose of protesting government prayer at city and county meetings" and that FFRF characterized as "hostile" the *Town of Greece* decision. (R. 83 ¶¶ 220, 222). Although Appellees have backpedaled heavily on that point in connection with litigation, Appellees' supposed change of goals could not have been known to Brevard County when the circumstances giving rise to this case occurred.

from Appellees principal brief is any recognition of *Town of Greece*'s statement: "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 . . . ." *Id.* at 1827.

Brevard County adhered to and supported all of the purposes of legislative invocations by implementing its challenged practices and policies. Brevard County's policies and practices for invocations at regular BOCC meetings were appropriate and lawful to ensure recognition and acknowledgement of theistic beliefs; to acknowledge religious leaders and the institutions they represent; and to show respect for the divine.[21] Appellees, by their own admission, would not offer a "prayer" as the Supreme Court used the term in *Marsh* and *Town of Greece*.[22]

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[21] Upon recognizing such purposes, it becomes exceedingly clear that distinguishing faith-based invocations from atheistic ones is not "difficult" or "futile," and thus not unconstitutional, as Appellees have contended. (*See* Appellees' Br. at 55).

[22] 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.") (emphasis added). Similarly, in *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 306, the Supreme Court explained that the term "invocation" "primarily describes an appeal for divine assistance." So, while *Town of Greece* does mention a "policy of nondiscrimination" and a lack of "aversion or bias on the part of [government] leaders against minority faiths[,]" 134 S.Ct. at 1824, those statements must be read against the background the Court set out regarding the theistic nature of prayer and the permissible, theistically-connected purposes of legislative prayer. Such statements cannot be pulled out of context to support an argument that *Town of Greece* mandates

Appellees would not acknowledge any higher power or even local religious leaders and the institutions that those religious leaders represent.[23] 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*.[24] Prevention of such disruption through the challenged invocation practices and policies does not violate the Establishment Clause.

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permitting nontheistic opening remarks in place of a traditional, theistic invocation. (*See* Appellees' Br. at 74).

[23] Appellees now attempt to assure the Court that they would not offer remarks that would proselytize or disparage (*see* Appellees' Br. at 64), but they stop short of providing any assurance that they would acknowledge (in the manner *Town of Greece* envisions) local religious leaders and the institutions that those religious leaders represent, acknowledge the central place that religion and religious institutions hold in the lives of those present, or both.

[24] It is clear that Appellees' true intention is 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.")); *see also Barker v. Conroy*, 282 F. Supp. 3d 346, 2017 WL 4563165, at *13 (D.D.C. 2017) (noting that what the plaintiff was actually challenging in suing over denial of his request to serve as a guest chaplain in the United States House of Representatives was "the ability of Congress to open with a prayer.").

E. Brevard County Did Not Violate the Free Speech Clause

It bears repeating that legislative prayer cases occupy their own area of First Amendment jurisprudence. *See Town of Greece*, 134 S.Ct. at 1818. In Brevard County's principal brief, it explained that meetings of local government bodies and commissioners are limited public forums. (*See* Brevard County's Br. at 52-54).[25] Brevard County argued that the district court erred in not conducting a forum analysis with respect to Appellees' Free Speech Clause claim. (Brevard County's Br. at 52). Appellees argued that the invocations are not limited public forums. (Appellees' Br. at 80-81). However, like the district court, Appellees did not conduct a forum analysis. Precedent applicable in this Court dictates that the invocation is part of a limited public forum. *See Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1225 (11th Cir. 2017); *Crowder v. Housing Auth. of City of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993) *see also 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); *Cleveland v. City of Cocoa Beach*, 221 F. App'x 875, 878 (11th Cir. 2007).

Furthermore, despite Appellees' argument that the invocations are not limited public forums, Appellees do not offer any explanation or suggestion as to what—if

[25] Brevard County maintains its contention that legislative prayer cases are cognizable under only the Establishment Clause. (*See* Brevard County Br. at 51-52).

not a limited public forum—the invocation actually is.[26] While Brevard County maintains its prior argument (*see* Brevard County's Br. at 52-54) that the invocation is part of a limited public forum, Brevard County notes that even if Appellees are correct that the invocation is not a limited public forum, accepting that as a premise for Appellees' Free Speech Clause claim would result in summary judgment in favor of Brevard County.

When a regulation restricts the use of government property as a forum for expression, an initial step in analyzing whether the regulation is unconstitutional is determining the nature of the government property involved. *United States v. Frandsen*, 212 F.3d 1231, 1237 (11th Cir. 2000). In *Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011), this Court explained, "the Supreme Court has broadly discerned three distinct (although not airtight) categories of government property for First Amendment purposes: traditional public fora, designated public fora, and limited public fora." Certainly, BOCC meetings are not a traditional public forum—"public areas such as streets and parks that, since 'time out of mind, have been used

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[26] Appellees' contention, offered later in their principal brief, that the invocation is not entirely government speech only adds to the confusion. (*See* Appellees' Br. at 86-88). Appellees also later suggest that the invocation might be "hybrid speech" but do not discuss how that classification would affect the analysis on their Free Speech Clause claim. (*See* Appellees' Br. at 87-88). Regardless, the contention that legislative prayer is "hybrid speech" has previously been rejected. *See Fields v. Speaker of the Pennsylvania House of Representatives*, 251 F. Supp. 3d 772, 792 (M.D. Penn. 2017).

for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* at 1231 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). Similarly, BOCC meetings are obviously not designated public forums—"government property that has not traditionally been regarded as a public forum" but that has been "intentionally opened up for that purpose." *Id.* (quoting *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010)). To create a designated public forum, the government must intentionally open up a location or communication channel for use by the public at large. *Id.* (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 802 (1985)). By contrast, 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; *Bloedorn*, 631 F.3d at 1231.

If a BOCC meeting is not a traditional public forum, a designated public forum, or a limited public forum, then the only alternative is that it is part of a nonpublic forum. *See Barrett*, 872 F.3d at 1226. However, that conclusion is of no real help, because the distinction between permissible content-based discrimination and impermissible viewpoint-based discrimination applies with respect to nonpublic fora as well as limited public fora. *See id.*

As Brevard County explained in its principal brief, Brevard County engaged in content-based discrimination, not viewpoint-based discrimination. (*See* Brevard County Br. at 54-61). 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 and so has not engaged in viewpoint discrimination. Brevard County distinguished between invocations with theistic 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 solely secular content, which were placed under public comment preceding the secular business meeting. However, secular invocations were *not excluded* from the limited public forum.[27] Appellees are permitted to give secular invocations during BOCC meetings, which is the limited public forum at issue. Because Brevard County does not exclude Appellees' speech from its limited public forum, Brevard County has not engaged in viewpoint discrimination.

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[27] Nor are they "relegated" to the public comment portion of the meeting as Appellees argue. (*See* Appellees' Br. at 65-66). Appellees were afforded a *greater* opportunity to deliver non-theistic or secular supplications to the BOCC than *Town of Greece* requires.

F. Brevard County Did Not Violate the Free Exercise Clause

Brevard County, through its practices and policies 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 Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."); *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*, 687 F.3d at 1256-57.[28] On

[28] Based upon *GeorgiaCarry.Org*, 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.

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 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 and *Torcaso* both concerned free exercise of religion in the context of holding public office. *See McDaniel*, 435 U.S. at 620 (state-law prohibition on ministers and priests from serving as delegates on the state's limited constitutional convention); *Torcaso*, 367 U.S. at 489-90 (appointment to office of Notary Public). 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. 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.[29] 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*, 687 F.3d at 1257-58.[30]

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[29] Appellees continue to misconstrue the issue as one of viewpoint and status. (*See, e.g.,* Appellees' Br. at 79). As explained in Brevard County's principal brief and above with respect to the Establishment Clause, Appellees would not give an invocation that would fulfill the lawful purposes of legislative prayer, including recognition and acknowledgement of theistic beliefs as well as religious leaders and the institutions they represent.

[30] 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.

Appellees contend that Brevard County raised certain arguments concerning Appellees' Free Exercise Clause claim for the first time on appeal. (*See* Appellees' Br. at 79). Unless Appellees are willing to concede that atheism and Humanism are not "religions" for First Amendment purposes, Brevard County *did* argue that Appellees were not prevented from engaging in conduct that they sought to undertake for supposedly religious reasons or as part of religious observance. (*See* R. 54 at 23-24; R. 62 at 3). Furthermore, the Court may entertain an argument raised for the first time on appeal. *See Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004); *see also Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) ("[P]arties are not limited to the precise arguments they made below."); *Universal Title Ins. Co. v. United States*, 942 F.2d 1311 (8th Cir. 1991). Beyond whether this specific argument is newly raised on appeal, Brevard County identified that Appellees failed to carry their burden on summary judgment by failing to prove an essential element of their claim.

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.[31] The Equal Protection Clause keeps

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[31] 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 also applies

governmental decisionmakers from treating differently persons who are in all relevant aspects alike. *Rowe v. City of Cocoa*, 358 F.3d 800, 803 (11th Cir. 2004) (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 necessary result of Appellees' religion.[32] Because the difference in treatment of

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with respect to Appellees' claim under Article 1, Section 2 of the Florida Constitution.

[32] *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

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).[33] 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 practices and policies were narrowly tailored to achieve a compelling state interest. An interest in complying with constitutional

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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).

[33] The case Appellees cite, *Martinez*, 561 U.S. at 689, in support of the supposed proposition that the Supreme Court of the United States has "declined to distinguish between status and conduct" to justify discrimination (Appellees' Br. at 85) is clearly taken out of context and inapplicable here. The issue in *Martinez* was a supposed distinction between status (sexual orientation) and a conjunction of conduct and the belief that the conduct is not wrong. 561 U.S. at 689. In the same paragraph, the Court explained that the supposedly conduct-based law concerned conduct that is closely correlated to the status (sexual orientation) such that the law targeted more than just conduct. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in judgment)). Appellees provide no legal support for the same connection between what might be nontheistic conduct at issue in this case and status as nontheists.

obligations, particularly those under the Establishment Clause, may be characterized 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 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.

Additionally, Appellees could have offered their intended opening remarks prior to the regular, non-consent business agenda, which, in the Supreme Court's words, is the portion of the meeting for the "fractious business of governing . . . ." *Town of Greece*, 134 S.Ct. at 1823. 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.

9. 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. Through those practices and policies, Brevard County in no way coerces participation in religious exercises. Appellees could have addressed the BOCC at its regular meetings, prior to the BOCC's regular, non-consent business 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*.

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; affirm the district court's Order (R. 105) to the extent the district court granted Brevard County's motion for summary judgment and denied 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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10. 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 12,823 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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11. CERTIFICATE OF SERVICE

I hereby certify that on June 12, 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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