IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID WILLIAMSON, et al., ,

Plaintiffs, CASE NO. 6:15-CV-1098-ORL-28 DAB

vs.

BREVARD COUNTY,

Defendant.
_____/

BREVARD COUNTY'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant Brevard County, by and through its undersigned attorney, hereby files its response to the Plaintiffs' Motion for Summary Judgment as follows:[1]

I. The County Commission policy does not violate the Establishment Clause, Free Exercise Clause, or Free Speech Clause

The Plaintiffs' Establishment Clause, Free Exercise and Free Speech claims are entirely based on four unsubstantiated misstatements of fact set forth in point 1.A. of their motion for summary judgment**:**

> "First, by *prohibiting* atheists and Humanists from giving invocations, the County is discriminating along religious lines."[2] [*Emphasis supplied*]

> "The County policy *barring* atheists and Humanists from giving invocations is facially unconstitutional under these binding precedents."[3] [*Emphasis supplied*]

[1] The same key used in Brevard's Motion for Summary Judgment will be used in this Response, except that in some circumstances references to the Plaintiffs' Motion for Summary Judgment Appendix page numbers will be used in this form: Pl. MSJ A#. Likewise, Brevard's Motion for Summary Judgment will be cited as Def. MSJ.
[2] Pl. MSJ p.14
[3] Pl. MSJ p.15

> "Finally, the County's discriminatory policy violates two plaintiffs' rights not only because they are *being denied* opportunities to present invocations, but also because the County is using their tax dollars to support a discriminatory practice."[4][*Emphasis supplied*]

Then, citing to *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 & n.9 (1985), Plaintiffs' argue:

> "[T]he Court invalidated a law that gave religious adherents an unqualified right not to work on their Sabbaths because it did not give nonreligious employees any comparable right...The County has done just that by *prohibiting* invocations by people who do not believe in God."[5] [*Emphasis supplied*]

Plaintiffs have not, in fact, been prohibited from delivering an invocation. They have the opportunity to give an invocation during the public comments and have not availed themselves of that opportunity, though having a reasonable alternative channel of communication. Plaintiffs are actually seeking the ability to deliver a secular invocation at the beginning of a Commission meeting, but their assertion that the County Commission has discriminated against them is founded on the repeated false representations that Plaintiffs have been barred, denied and prohibited from delivering invocations. The reason is clear. Many limited public forum cases involve situations in which access to a limited public forum was denied to a religious organization by a government without providing reasonable alternative channels of communication.[6]

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[4] Pl. MSJ p. 18

[5] Pl. MSJ p. 17

[6] *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093 (2001)(discrimination denying free speech where use of school denied to religious group); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995) (discrimination denying free speech where university exclusion of student religious publication from student activities fund); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141(1993)(denial of religious group after-hour access to school property for showing religious films is discrimination denying free exercise)

The County's response to Plaintiffs' claims is twofold. First, the Plaintiffs' repeated assertions that the County policy has denied the Plaintiffs the opportunity to present secular invocations are categorically and demonstrably false since the abundantly clear language in ¶39 of the invocation policy, as set forth in County Resolution 2015-101, expressly provides Plaintiffs' with the opportunity to present a secular invocation to the County Commission.[7]

Second, assuming *Caldor* applied in this case—which it does not since in *Town of Greece v. Galloway*[8] the Supreme Court explicitly rejected the *Lemon* test in pre-meeting prayer cases cases—the County has done just what the *Caldor* court suggested by giving both the faith-based community and the Plaintiffs' comparable rights to perform invocations. A faith-based invocation limited public forum is established as part of the ceremonial portion that is followed by the ceremonial Pledge of Allegiance and the ceremonial "Awards and Presentations" where secular contributions to the community by citizens and organizations are recognized.

A comparable secular invocation limited public forum is established during "Public Comment" after the "Consent Agenda" which is expressly designed to allow all non-controversial business items on that agenda to be passed in a single motion.[9] The secular invocation opportunity precedes the deliberative secular business meeting where precepts of secular humanism—including knowledge, reason, science, wisdom, empathy, compassion and ethics–are actually applied. Arguably, that scheduling is an even more favorable opportunity to present secular humanist beliefs and principles to a secular and deliberative

[7] Williamson, DW-77 ¶39
[8] *Town of Greece v. Galloway,* 134 S. Ct. 1811 (U.S. 2014)
[9] Whitten Affid. Exhibit A, p. 2, Section II which begins: "CONSENT AGENDA (The entire Consent Agenda will be passed in one motion to include everything under Section II.)"

secular governing body. It is hard to envision how the County could offer a more comparable invocation opportunity or exhibit more neutrality as between religious invocators and non-religious secular invocators, with neutrality toward religion being "a significant factor in upholding governmental programs in the face of Establishment Clause attack." [10]

The fact that Plaintiffs are allowed to give secular invocations during the secular portion of the meeting seriously hamstrings their Establishment Clause argument since, as to invocation cases, *Town of Greece v. Galloway* [11] clearly promulgates the rule that federal courts must focus on the "prayer opportunity as a whole"[12] in such cases, "especially where any member of the public is permitted to offer views reflecting his or her own convictions."[13] *Town of Greece* suggests that where this "prayer opportunity as a whole" standard is met, there is no Establishment Clause violation in government prayer cases. Indeed on the heels of the "prayer opportunity" standard in the *Town of Greece* opinion the Supreme Court noted that the Town of Greece—like Brevard County—"would welcome a prayer by any minister or layman who wished to give one,"[14] a policy that clearly met the other broad standard imposed by the Court: that the town maintain such a "policy of nondiscrimination." [15] In fact, the Court eschewed the idea that the city should ever become involved in seeking out a diversity of religious views, writing:

> "The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," [Citation

[10] *Good News Club v. Milford Cent. Sch.*,121 S. Ct. 2093, 2104 (2001); *Zorach v. Clauson*, 72 S. Ct. 679 (U.S. 1952); *Chandler v. James*, 180 F.3d 1254(11th Cir. Ala. 1999)
[11] *Town of Greece v. Galloway*, 134 S. Ct. 1811 (U.S. 2014)
[12] *Town of Greece at 1824*
[13] *Town of Greece at 1826*
[14] *Town of Greece at 1824*
[15] Ibid.

> omitted] a form of government entanglement with religion that is far more troublesome than the current approach."[16]

It follows that Brevard's policy does not violate the Establishment Clause because the Plaintiffs are afforded the opportunity to give a secular invocation, even though that opportunity occurs during Public Comment and not during the limited public forum reserved for traditional religious invocations seeking divine assistance from the "highest spiritual authority at the beginning of the meeting."[17] There is simply no support for Plaintiffs' Establishment Clause claim, in fact or law, since the Commission has the constitutional authority to establish reasonable time, place and manner restrictions on speech in a the limited public forum existing during County Commission meetings.[18]

Nonetheless, Plaintiffs contend that the County Commission is engaging in impermissible theological judgments by establishing a policy providing for religious invocations at the beginning of the ceremonial agenda and secular invocations at the beginning of the deliberative portion of the secular agenda. It is an undisputed fact—not an impermissible judgment—that Plaintiffs' self-identify as atheists and humanists whose beliefs only permit them to deliver secular invocations in which there is no appeal to a higher spiritual authority for guidance.[19] By Plaintiffs' own admission they cannot deliver a religious invocation and are not qualified to participate in the limited public forum for faith-based religious invocations at the beginning of each meeting.[20]

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[16] Id. *at 1824*
[17] *See:* Pl. MSJ A680
[18] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 103 S. Ct. 948 (1983)[In a "limited" public forum, the constitutional right of access would extend only to other entities of similar character]
[19] Def. MSJ p. 4, FN 20; Def. MSJ p.21 and related footnotes
[20] Def. MSJ p.21 and related footnotes

It follows, that since the County has afforded Plaintiffs the opportunity to present an invocation during a limited public secular invocation forum set aside for that purpose under Public Comment, there is no denial of the Establishment Clause, the Free Exercise Clause, or the Free Speech clause nor is there discrimination under the Equal Protection clause.

The Pelphrey Case

Plaintiffs rely heavily on the Eleventh Circuit Court case in *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. Ga. 2008) However, the case provides absolutely no support for the Plaintiffs' claims in this case for two reasons.

First, the *Pelphrey* "offense" and "taxpayer" standard for standing are no longer relevant because the Commission's resolution meets the *Town of Greece* standard for government invocation cases that "any member of the public is welcome *in turn* to offer an invocation reflecting his or her own convictions."[21] [*Emphasis supplied*] There is no injury of any kind in those circumstances. In fact, Justice Kennedy's opinion in *Town of Greece* effectively repudiated the *Pelphrey* "offense" standard for standing in holding "an 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."[22]

Moreover, Plaintiffs have not taken advantage of the opportunity to present an invocation under Public Comment nor is there any evidence they have been denied that opportunity. In fact, all of the documents of record indicate the Plaintiffs have been repeatedly offered that opportunity. Absent a showing that they have been denied the opportunity to provide a secular invocation, Plaintiffs have no cognizable injury under *Town*

[21] *Town of Greece at 1826*
[22] *Town of Greece at 1826*

of Greece "the prayer opportunity as a whole" standard, which is satisfied by the County policy allowing Plaintiffs to give secular invocations.

A second reason *Pelphrey* does not help the Plaintiffs is because the appellate court held that the "impermissible motive" standard does not require that all faiths be allowed the opportunity to pray. The standard instead prohibits purposeful discrimination." Notably, on the facts presented in *Pelphrey* the district court's analysis of that issue was approved by the Eleventh Circuit.[23]

The only issue, on which the *Pelphrey* court decided against the Cobb County Planning Commission, was the 2003-2004 invocator selection process which categorically excluded a number of different religions that were stricken out in the Yellow Pages used to select the invocators. The *Pelphrey* facts are distinguishable from the facts in this case.

During Public Comment at any County Commission meeting the Brevard County invocation policy set forth in Resolution 2015-101 allows anyone and everyone—whether believer or nontheist—the opportunity to present an invocation, to present any espoused beliefs of the speaker and the opportunity to describe any activities of the person's organization so long as the presentation relates to county business, "which certainly includes pre-meeting prayer."[24] As a result, the selection method for faith-based invocations in a county where 94% of persons with a religious affiliation belong to Christian congregations[25] is a moot point by virtue of the County's policy of "purposeful inclusion" allowing any secular or

[23] *Pelphrey at 1278*
[24] See: Williamson, DW-77 ¶¶32-35 and Composite Ex. N; ¶39
[25] Def. MSJ A-30 (Pl. Resp. DSRA ¶57 pp.DSRA000168-DRSA 000169)

religious invocator to present an invocation during Public Comment.[26] In that regard, the Brevard County Commission's policy is even more inclusive than the city "list" practice upheld by the Eleventh Circuit in *Atheists of Fla., Inc. v. City of Lakeland.*[27]

The district court in *Pelphrey* held that an "impermissible motive" does not require "diversity" among the faiths represented at legislative functions" as "the *sine qua non* of constitutional legitimacy." The Court relied on *Marsh v. Chambers* in which the U.S. Supreme Court rejected the argument that the sixteen year tenure of a Presbyterian minister was offensive to Establishment Clause.[28] Moreover, the *Pelphrey* District Court found that even the fact "that well over 90% of the speakers who provided the invocation" in Cobb County over a period of several years were Christian did "little to advance Plaintiffs' case."[29]

Indeed, *Town of Greece* supported the District Court's conclusion in *Pelphrey* on that very point by upholding sectarian Christian prayer in a jurisdiction where just under 97% of the residents affiliated with a religion were members of a Christian denomination and 3% of the residents who had a religious affiliation were Jewish. In the case at bar, 94% of people with a religious affiliation belong to a Christian denomination.[30]

The District Court in *Pelphrey* also held that "[t]he prayers at issue did not invariably contain sectarian Christian references, and indeed, were on a number of occasions given by non-Christian (e.g., Jewish, [Unitarian], and Muslim) clergy. Even the Christian clergy did

[26] Anderson Tr. 55:23-56:3; Fisher Tr. 15:5-23; Barfield Tr. 43:18-24; Smith Tr. 9:1-8,10:12 -12:15; Infantini Tr. 23:1-5; Bolin-Lewis Tr. 8:17-12; Nelson 22:5-24
[27] *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577(11th Cir. Fla. 2013)
[28] *Marsh v. Chambers*, 463 U.S. at 793-94
[29] *Pelphrey v. Cobb County*, 448 F. Supp. 2d 1357, 1368 (N.D. Ga. 2006)
[30] Def. MSJ A-30 (Pl. Resp. DSRA ¶57 pp.DSRA000168-DRSA 000169)

not always include in their prayers references to Christ."[31] The district court further concluded that "the references to exclusively Christian concepts…typically consisted merely of the closing, 'in Jesus' name we pray.'"[32] Similarly, Plaintiffs' transcriptions of the 197 invocations delivered to the Brevard County Commission since 2010 show that several invocations were presented by rabbis from Jewish congregations constituting less than 3% of the county's regular attendees at religious services[33] and that the "Christian" references in the overwhelming number of such invocations are nearly identical to those upheld in *Town of Greece.*

In *Pelphrey*, the District Court also held that *Marsh* "was never intended to serve as a vehicle for challenging invocator selection procedures on the basis of "disparate impact" and, that "[a]bsent evidence that the phonebook was purposefully used as a device for stifling diversity, the Court discerns nothing troubling about selection procedures that rely, in whole or in part, on the Yellow Pages."[34] Although that District Court found that the Cobb County Planning Commission staff did categorically exclude non-Christian congregations by striking through denominational entries in the Yellow Pages during 2003-2004, there is nothing in the discovery record in the case at bar to suggest that any Commissioner's staff members conducted such categorical exclusion of any religious denomination.[35]

Faced with *Pelphrey* detrimental to their positions in the extremely similar case at bar, Plaintiffs have seized upon the slim hope that the "categorical exclusion" violation found in *Pelphrey* is still viable and can be gleaned from the facts in this case. In pursuit of that

[31] *Pelphrey, 448 F. Supp. 2d at 1369*
[32] Id.
[33] Pl. MSJ A331-536
[34] *Pelphrey, 448 F. Supp. 2d at 1371*
[35] See: Pl. A:808:23-809:20

result, Plaintiffs have resorted to "cherry-picking" through the discovery record to carefully selected snippets of testimony out of context and combine those snippets into "statements" that seemingly support their view of an "impressible motive." For example, citing to page the appendix pages A726:25-727:20 in paragraph 16 of the Plaintiffs' Motion for Summary Judgment, Plaintiffs assert as fact that:

> "In depositions, current and former Commissioners who voted for the Board's rejection of the plaintiffs' requests made clear that they would also disallow invocations by other religious groups of which they disapprove. Some Commissioners' testimony included statements that they would not allow opening invocations by deists, polytheists, Wiccans, Rastafarians, or anyone who does not subscribe to a monotheistic religion."

However, Plaintiffs fail to mention and, in some cases, leave out of their appendix those pages of the transcripts in which those same Commissioners indicated that 1) opening invocations from the faith-based community could include members of any of the numerous congregations appearing on the ARDA list of congregations set forth in Exhibit B to the resolution;[36] 2) that if unselected individuals had an interest in doing so, the resolution would allow them to appear under Public Comment to give an invocation;"[37] 3) that most Commissioners had never been asked by deists, polytheists, Wiccans, Rastafarians, or anyone who does not subscribe to a monotheistic religion to provide an invocation;[38] and 4) that some Commissioners did not believe there were any religious congregations for any of

[36] Def. MSJ A-30 (Pl. Resp. DSRA ¶57 pp.DSRA000168-DRSA 000169
[37] Pl. MSJ A725:22-25; A778:1-25; A-854:7-23; A936:1-21; Anderson Tr. 55:23-56:3; Smith Tr. 9:1-8,10:12 - 12:15
[38] Smith Tr. 9:1-8,10:12 -12:15; Anderson Tr. 15:20-16:21; Bolin-Lewis Tr. 9:3-12; Fisher Tr. 10:18-25

such beliefs in their respective single member County Commission districts, from which each Commissioner draws his or her invocators.[39]

Plaintiffs also rely on *Lund v. Rowan County*,[40] and *Hudson v. Pittsylvania County.*[41] That reliance is misplaced because those Courts focused on two seminal facts in finding violations of the *Town of Greece* Establishment Clause principles. In those cases the County Commission members were the *only* eligible invocation givers and it was *solely* the County Commissioners who determined prayer content according to their personal Christian faiths, thereby advancing the Christian faith to the exclusion of any other faith. That is not the situation in Brevard County where Commissioners presented the invocation only five times in the 197 county invocations documented by the Plaintiffs, and two of those occurred when the volunteer cleric could not come to the meeting.[42]

The Plaintiffs' coercion argument also fails in this case because the facts here are not nearly as egregious as those in the *Town of Greece* where the coercion claim was rejected[43] —including the fact that during invocations at meetings attended by Becher and Williamson, Becher did not stand and Williamson was filling out a comment card.[44] In *Town of Greece* the Pledge of Allegiance preceded the prayer and the clergy invocators who followed the Pledge asked the audience to stand solely for the invocation, as opposed to this case where

[39] Smith Tr. 9:1-8,10:12 -12:15; Anderson Tr. 55:10-16, 56:18-21 ; Barfield Tr. 7:25-8:20; Bolin-Lewis Tr. 7:20-9:12
[40] *Lund v. Rowan County.*, 103 F. Supp. 3d 712 (M.D.N.C. 2015)
[41] *Hudson v. Pittsylvania County*, 107 F. Supp. 3d 524 (W.D. Va. 2015);
[42] Pl. MSJ A331-536
[43] See: Pl. MSJ p.17-19
[44] Becher Tr. 12:2-13:14; Williamson Tr. 44:9-15. NOTE: In Brevard's MSJ the county mistakenly did not include Mr. Becher as an attendee at several County Commission meetings.

the invocation was immediately followed by the Pledge of Allegiance[45]—during which American audiences traditionally stand.

Moreover, in this case the Plaintiffs' Appendix Exhibit 30 contains transcribed summaries of invocation proceedings held during 197 meetings dating from March 9, 2010 to March 15, 2016 and in 60 of those meetings the audience was not asked to stand for any reason prior to the invocation. In 114 meetings the Commission chair announced that the invocation would be followed by the Pledge of Allegiance before asking the audience to stand. In only 23 instances was the audience asked to stand without mention the Pledge of Allegiance.[46] However, it should be noted that the standard County Commission meeting agenda always indicates that the Pledge of Allegiance immediately follows the invocation.[47]

Even assuming Plaintiffs are qualified to present a secular invocation during a faith-based invocation limited public forum, *Town of Greece* rejects the claim that an Establishment Clause violation exists solely because a substantial majority of religious invocations are presented by representatives of Christian congregations representing a substantial majority of the congregations in the jurisdiction. In this case, 94% of congregations in the County are Christian denominations where a 34.9% minority of the Commission's constituents regularly attend religious services. As in *Town of Greece*, the fact that the majority of invocations were Christian only reflects that most religious adherents in the County are Christian, not that an Establishment Clause violation exists.[48]

[45] Id.
[46] Pl. MSJ A331-536
[47] (Whitten Affid. ¶9 and Ex. A)
[48] *Town of Greece at 1828, FN 1* (Justice Alito Concurring)

Finally, this case does not involve discrimination against a minority faith because atheists, as a subset of secularists—are members of a clear majority when compared to the number of people who regularly attend religious services. It is religious adherents—not secularists comprised of secular humanists, atheists, secular Christians, secular Jews, secular Muslims, secular Hindus or secular Buddhists and secular nonreligious—who are the statistical minority in Brevard County. The Commission's secular invocation policy is simply not discriminatory.

II. Brevard's Avoidance of an Establishment Clause Violation is a complete defense to Plaintiffs' Equal Protection Claim

Citing to *Good News Club v. Milford Cent. Sch,*[49] Brevard's Motion for Summary Judgment also pointed out that avoidance of an Establishment Clause violation is a defense that may justify even content-based discrimination under the Free Speech and Equal Protection claims asserted by the Plaintiffs in this case.

Though Plaintiffs recognize that a showing of a "compelling county (state) interest" and a policy narrowly tailored to achieve that interest is a defense to their Equal Protection claim,[50] they brush aside any such defense with this simple conclusory statement unsupported by any evidence, analysis or the findings in Resolution 2015-101 itself: "The interests that the County has put forward in support of its policy are to communicate to its residents approval of monotheism and to avoid any suggestion of approval of atheism (*see* A707 ¶ 5; A714-15 ¶¶ 36-37) — interests that are not even legitimate, let alone

[49] *Good News Club v. Milford Cent. Sch.,* 121 S. Ct. 2093 (2001) (public school denial of club access to the school's limited public forum on the ground that the club was religious in nature, discriminated against the club because of its religious viewpoint in violation of the Free Speech Clause; however, state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify content-based discrimination).

[50] Pl. MSJ p.24

compelling."[51] The Commission—which knows their constituencies far better than the Plaintiffs—came to radically different conclusions:

> "[T]the Board finds that yielding to FFRF and AUSCS views by supplanting traditional ceremonial pre-meeting prayer before the Board's secular business agenda at regular Board 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 AUSCS could be viewed as County hostility toward monotheistic religions whose theology and principles currently represent the minority view in Brevard County.
>
> [T]he organizations requesting the substitution of Secular Humanists or atheists to conduct a pre-meeting invocation by displacing representatives of the minority faith-based monotheistic community which has traditionally given the pre-meeting prayer, could be viewed as the Board endorsement of Secular Humanist and Atheist principles in view of:
>
> > a. the overwhelmingly secular nature of the Board's business meeting following the invocation; and
> > b. the evidence suggesting that the requesting organizations are engaged in nothing more than a carefully orchestrated plan to promote or advance principles of Secular Humanism through the displacement or elimination of ceremonial deism traditionally provided by monotheistic clerics giving pre-meeting prayers.

The U.S. Supreme Court has stated the Establishment Clause boundaries governing counties and cities in *Lynch v. Donnelly*.[52] The Constitution does not require "complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"[53] and "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement *or* disapproval of religion."[54] The high Court later added this admonition: "the First Amendment mandates governmental neutrality between religion and religion, and

[51] Pl. MSJ p.24, section III
[52] *Lynch v. Donnelly*,104 S. Ct. 1355 (U.S. 1984)
[53] *Lynch v. Donnelly, 104 S. Ct. at 1359*
[54] *Lynch v. Donnelly, 104 S. Ct. at 169* (O'Connor concurring)

between religion and nonreligion."[55] Following U.S. Supreme Court's Establishment Clause principles in *Chandler v. James* the Eleventh Circuit adopted a view that is particularly relevance to this case:

> "We believe that the First Amendment's requirement that government "tolerate" diverse political views, including those that are totally antithetical to our constitutionally guaranteed republican form of government, applies to require that government "tolerate" atheistic views without also requiring that we eschew religion. 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."[56]

The Supreme Court and several appellate courts have recognized that local governments may have a defense to Free Speech, Free Exercise and, the County would assert, Equal Protection clause claims if they can establish a compelling state interest by avoiding a violation of the Establishment Clause[57]—in this case the communication of a perceived message of hostility or endorsement toward religion should the Commission displace religious invocators with Plaintiffs in the Commission's religious invocation limited public forum rotation. On that point, the perspective of a particular the Second Circuit court should be brought to the attention of this honorable Court, albeit in a case involving government employees asserting their right to free exercise in a government forum.

In *Knight v. State Dep't of Pub. Health* the Second Circuit noted that *Good News Club* raised the possibility of the defense that "the interest of the State in avoiding an Establishment Clause violation may be [a] compelling one justifying an abridgment of free speech otherwise protected by the First Amendment" then stated: "When government

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[55] *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (U.S. 2005)
[56] *Chandler v. James*, 180 F.3d 1254 (11th Cir. Ala. 1999), FN11
[57] *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093 (2001) ; *Knight v. State Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. Conn. 2001) citing to: *Good News Club* and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993)

endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause."[58]

The County started walking this judicial tightrope of avoiding an Establishment Clause violation when its' Chair was presented with a May 9, 2014, letter from Plaintiff Williamson in which he, as a humanist celebrant, presented a request to present a secular invocation along with a claim that secular humanism is a "religion".[59] The County Commission responded with an August 19, 2004 letter offering the Plaintiffs the opportunity to provide secular invocations during the secular "Public Comment" portion of the deliberative agenda that precedes the secular business items presented for discussion.[60] The Commission response focused on five points.

First, the Commission reinforced its tradition of opening meetings in a religious invocation limited public forum featuring an appeal for guidance to the highest spiritual authority provided by members of the faith-based community because those invocators represent a substantial body—though a minority—of constituents.[61] In the resolution adopted on July 7, 2015, that "substantial body" was specifically noted as the 34.9% minority of the population in Brevard County who regularly attend religious services.[62] That the County Commission currently governs an overwhelmingly secular community is evidenced by a county religious adherent rate ranking in "the bottom 16% of all counties, or county equivalents, nationwide" and, as the 120th ranked county of the counties with the highest

[58] *Knight v. State Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. Conn. 2001)
[59] Pl. MSJ A660-661
[60] Pl. MSJ A680-681
[61] Id. A680
[62] Williamson, DW-77 ¶9

population nationwide, a religious adherence rate ranking "in the bottom 4% of the top 125 most populous counties, or county equivalents, nationwide."[63] In fact, Brevard County's religious adherent rate of 34.9% rate ranks lower than that of San Francisco County, California at 35.3%.

Second, the Commission noted that the Plaintiffs, as atheists and secular humanists, do not believe in a "highest spiritual authority." It is an admitted and undisputed fact in this case—not an impermissible judgment—that Plaintiffs' atheist beliefs only permit them to deliver secular invocations in which there is no appeal to a higher spiritual authority for guidance.[64]

Third, the August 19, 2014, letter from the Commission Chair took issue with the Plaintiffs' claim that they are excluded from providing either a secular invocation or their viewpoint at Commission meetings.[65] Plaintiff Williamson was expressly informed that during the Public Comments segment of the Commission agenda, "members of your organization are free to speak their views and beliefs, or even a closing supplication."[66] Earlier in that same letter Plaintiff was also informed that "[y]ou or your Brevard members have the opportunity to speak for three minutes on any subject involving County business during the Public Comment portion of our meeting;" that "County business clearly includes the subject of pre-meeting prayers at County Commission meetings;" and that "[d]uring Public Comment presentations, this board has politely listened to Bible readings; political points of view of all varieties; and some of our citizens' sharpest critiques and criticisms of

[63] Affidavit of Clifford Grammich, ¶¶ 16 h, j.
[64] Def. MSJ p.21 and related footnotes
[65] Pl. MSJ A680
[66] Pl. MSJ. A681

County staff and the county Commission , among other things."[67] All of these notifications were incorporated as findings set forth in the County Commission's formalized invocation policy in Resolution 2015-101, which expressly allowed secular invocations during the Public Comment part of the agenda.[68]

Fourth, placed in the tenuous position of governing a secular county in circumstances where Plaintiffs expressed desire to perform secular invocations was accompanied by a claim that secular humanism is a religion, the Commission carefully examined the pattern of "secular invocations" posted on the Plaintiff CFFC website and concluded that those secular invocations evidenced a pattern of proselytizing the values of secular humanism and disparaging traditional religion.[69] Indeed, a review of the entire repertoire of secular invocations archived on the CFFC website reveals that more than two-thirds of the invocations preach two or more of the principles of secular humanism.[70]

Fifth, noting the acknowledged CFFC's affiliation with FFRF in both the May 9, 2014, CFFC letter and January 26, 2015, joint letter signed by FFRF on behalf of Plaintiffs, the Commission reviewed the websites of both the CFFC and FFRF. This review now seems a prudent course of action in light of a recent District Court decision in *Cavanaugh v. Bartelt* upholding prison officials' denial of an inmate demand for the rights and privileges accorded to religious groups where the inmate—a declared Pastafarian—practiced "FSMism," a professed belief in the divine Flying Spaghetti Monster.[71] Finding that the inmate's professed religion was a satirical rejoinder to a certain strain of religious argument and a parody

[67] Id. at A680
[68] Williamson, DW-77, ¶39 and Section 2 at pp.10-11
[69] Id. ¶30; see also Def. MSJ pp. 24-25
[70] Williamson Dep. Tr. at Ex "DW-60"
[71] *Cavanaugh v. Bartelt*, 2016 U.S. Dist. LEXIS 48746 (D. Neb. Apr. 12, 2016)

designed to look like a religion, the Court rejected the inmate's Establishment Clause, Free Exercise and Equal Protection claims thereby upholding the prison officials' determination that the inmate was not similarly situated to inmates professing a religious faith. It is worth noting that Plaintiff Williamson once urged a Pastafarian to present a "Flying Spaghetti Monster" invocation to Brevard County Commission and offered his help if that request was denied.[72]

Viewed in the light of the *Cavanaugh* decision, it is significant that the Commission's review of what Plaintiffs refer to as "a five-page dissection" of the "beliefs" of the organizations in which they are members,"[73] resulted in Commission findings of *fact* setting forth copious examples of CFFC and FFRF sponsored comments scoffing, mocking and evidencing hostility toward religion in general, and Christianity in particular,[74] while noting the hostile goal of the CFFC and FFRF collaboration with the Satanic Temple to shut down public forums allowing religious speech.[75] That goal was confirmed in the "Nothing Fails Like Prayer Award" campaign orchestrated by FFRF and implemented by CFFC, with one or the other of which all of the Plaintiffs are affiliated.[76]

Based on those findings, coupled with the proselytizing nature evidenced in secular invocations featured on the CFFC website, the Commission unanimously passed a resolution identifying the perceived hostility its minority faith-based community was experiencing—as evidenced by emails and feedback received from numerous constituents[77]—and offered a

[72] Williamson Tr. 151:8-152:13 (Williamson Ex. DW-64)
[73] Pl. MSJ p.19; A708-13; Williamson, DW-77 pp. DRSA 3-DSRA 8
[74] Williamson, DW-77, ¶18-20;
[75] Id. at ¶25
[76] Def. MSJ pp. 5-9
[77] Pl. MSJ A1064-1112

comparable secular invocation opportunity to Plaintiffs during the secular portion of the agenda. That policy decision does not deny Plaintiffs the Equal Protection of the law.

This argument closes with a wizened and prophetic observation from Justice Goldberg:

> "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious."[78]

II. Brevard's resolution and invocator selection do not violate the Florida Constitution

Plaintiffs' argument concerning asserted violations of the Florida Constitution is unavailing under the Eleventh Circuit's holding in *Atheists of Fla., Inc. v. City of Lakeland* since there is no evidence supporting any direct or indirect expenditure or benefit to religious group attributable to the Commission's invocation practices. [79] Brevard County stands on the remainder of its argument as set forth in Points IV and V of the County's Motion for Summary Judgment, while adding that even the Plaintiffs acknowledge "the Eleventh Circuit held in *Lakeland* that use of tax dollars to support a nondiscriminatory invocation practice does not violate the no-aid clause."[80] The County's "purposefully inclusive" invocation practice *is* nondiscriminatory and, therefore, does not violate Florida's "no-aid" clause.

[78] *School Dist. of Abington Township v. Schempp,* 83 S. Ct. 1560 (1963) (Goldberg, J. concurring).
[79] Atheists of Fla., Inc. v. City of Lakeland, 713 F.3d 577(11th Cir. Fla. 2013) [Lakeland's expenditure of $1,200 to $1,500 per year to arrange for invocational speakers to solemnize the proceedings did not result in "any pecuniary benefit, either direct or indirect, nor show any religious organization received financial assistance from City]
[80] Pl. MSJ p.25

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 6, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and served on all parties using the CM/ECF system.

s/Scott L. Knox
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