UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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,

Plaintiffs,

v.

BREVARD COUNTY,

Defendant.

Case No. 6:15-cv-1098-Orl-28DAB

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

CONTENTS

INTRODUCTION

Plaintiffs' Motion for Summary Judgment explains in detail why the County's invocation policy violates four federal and two Florida constitutional clauses. Bereft of a legitimate defense to the plaintiffs' claims, the County fills its cross-motion with red herrings.

For instance, the County points to some facets of its invocation practice that comply with *Greece*. But adhering to *Greece* in some ways does not make it permissible to violate it in others — which is exactly what the County does by discriminating in the selection of invocation-speakers and directing Board-meeting attendees to rise for invocations. The County contends that an invocation must be theistic. But *Greece* and leading dictionaries have recognized that this is not so. The County argues that nontheists may give invocations during public-comment sections of Board meetings. But such "separate but equal" defenses have long been condemned.

The County also spends much of its brief attacking organizations with which the plaintiffs are affiliated, authors whom the plaintiffs have read, and secular invocations given by others, pointing in particular to statements made by these non-parties that are critical of theistic religions. In the County's view, because people with some connection to the plaintiffs have made such statements, the plaintiffs would inevitably attack religion in their invocations. Therefore, argues the County, it has a compelling interest in prohibiting the plaintiffs from giving invocations. Such guilt-by-association reasoning is no more proper than it would be to prohibit theistic invocations on the ground that some theistic organizations, authors, or invocation-speakers have made statements proselytizing or

disparaging particular faiths. In any event, each plaintiff has declared under penalty of perjury that he will not make proselytizing or disparaging statements in his invocation.

The Court should deny the County's motion and grant the plaintiffs' motion.

I. The County's conduct violates the federal Establishment Clause.

The County devotes considerable space (at 17-19) to describing facets of its invocation practice that comport with *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). But that discussion is irrelevant, for the plaintiffs are not challenging the County's invocation policy as a whole. Rather, they challenge two specific aspects of the County's conduct: (1) the discrimination against nontheists in the selection of invocation-speakers; and (2) the Commissioners' directives that the audience rise for invocations.

As Plaintiffs' Summary Judgment Motion explains at length (at 14-21), both of those practices are proscribed by *Greece*. Unlike the County, the Town of Greece permitted "a minister or layperson of any persuasion, including an atheist, [to] give the invocation" (134 S. Ct. at 1816), and in upholding Greece's practice, the Supreme Court ruled that municipalities must "maintain a policy of nondiscrimination" in selecting invocation-speakers. *Id.* at 1824. Moreover, unlike the Commissioners here, the Greece town board did not ask "audience members . . . to rise for prayer," and the Court emphasized that "the analysis would be different if town board members directed the public to participate in the prayers." *Id.* at 1826. In sum, the County's practice is unconstitutional in two ways: It "exclude[s] [and] coerce[s] nonbelievers." *Id.* at 1827.

The County fails to acknowledge these controlling principles. Instead, it makes four main arguments concerning the Establishment Clause: (1) invocations cannot be nontheistic;

(2) it is permissible to prohibit nontheists from giving opening invocations because nontheistic invocations are allowed during public-comment periods; (3) historical practice justifies the County's exclusionary policy; and (4) the directives to rise are permissible because the County does not coerce audience members to take part in the prayers through other means. The County is wrong on all counts.

A. An invocation need not be theistic.

The County contends (at 20-21) that it can exclude nontheists because invocations and prayers, by definition, must be theistic. That is not so. Black's Law Dictionary defines "invocation" as "the act of calling on for authority or justification." *Invocation*, BLACK'S LAW DICTIONARY (10th ed. 2014). Merriam-Webster defines the term as "the act of mentioning or referring to someone or something in support of your ideas." *Invocation*, Merriam-Webster, http://bit.ly/1Rua0bP. And Oxford Dictionaries' definition is "[t]he action of invoking something or someone for assistance or as an authority." *Invocation*, Oxford Dictionaries, http://bit.ly/1WXlSf2. Similarly, Merriam-Webster and Oxford Dictionaries define "prayer" as including "an earnest request or wish" and "an earnest hope or wish." *Prayer*, Merriam-Webster, http://bit.ly/1TLTnyb; *Prayer*, Oxford Dictionaries, http://bit.ly/1sdhYkU; *see also Prayer for Relief*, BLACK'S LAW DICTIONARY (defining "prayer" as "a request for specific relief").

Consistently with these definitions, *Greece* recognized that while invocations *may* be religious, they may also be nontheistic. The Court emphasized that, under the policy of the Town of Greece, "an atheist[] could give the invocation." 134 S. Ct. at 1816; *accord id.* at 1826 ("here, any member of the public is welcome in turn to offer an invocation reflecting

his or her own convictions"); *id.* at 1829 (Alito, J., concurring) (Greece "would permit any interested residents, including nonbelievers, to provide an invocation").

Thus, in describing the "constraints . . . on [the] content" of opening invocations, the Court did not include any requirement that the invocations be theistic. *Id.* at 1823. Rather, the Court explained that invocations should "lend gravity to the occasion," "reflect values long part of the Nation's heritage," be "solemn and respectful in tone," "invite lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing," and not "denigrate nonbelievers or religious minorities, threaten damnation, . . . preach conversion," or "'proselytize or advance any one, or . . . disparage any other, faith or belief.'" *Id.* (quoting *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983)).

Proper invocations, added the Court, "often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." *Id.* While "religious themes provide particular means to [such] universal ends," appropriate invocations may "also invoke[] universal themes . . . by," for example, "celebrating the changing of the seasons or calling for a 'spirit of cooperation' among town leaders." *Id*. at 1823-24 (quoting an invocation given in Greece). The plaintiffs want to give invocations that call on the kinds of nontheistic higher authorities and values approved in *Greece*, such as the U.S. Constitution, democracy, equality, cooperation, fairness, and justice. A119 ¶ 30; A130 ¶ 24; A141 ¶ 19; A153 ¶ 27; A162 ¶ 11.[*]

[*] Record citations up to A1149 are to the appendix submitted with Plaintiffs' Summary Judgment Motion, while those starting with A1150 are to the appendix submitted with this brief. Exhibits V14 to V18 are video and audio recordings on a flash drive filed herewith.

The County points out (at 20) that in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 306-07 (2000), a school-prayer case, the Court stated that "invocation" is a "term that primarily describes an appeal for divine assistance." But "primarily" does not mean "exclusively." And so, in *Greece* — distinguishing *Santa Fe* and *Lee v. Weisman*, 505 U.S. 577 (1992) — the Court noted that it is "religious invocation[s]" that are unconstitutionally coercive in the public-school context. 134 S. Ct. at 1827.

The County also cites (at 16, 20) statements in a Tennessee district-court opinion, *Coleman v. Hamilton County*, 104 F. Supp. 3d 877, 889-90 (E.D. Tenn. 2015), that "[p]rayer, by its very definition, is religious in nature" and that "government may favor religion over nonreligion in th[e] narrow circumstance" of "legislative prayer." For the first of these statements, *Coleman* relied on a single dictionary definition of "prayer" (*id.* at 890), but as noted above, other definitions of "prayer" and "invocation" encompass nontheistic entreaties. And as also explained above, to the extent that the second statement suggests that a municipality can constitutionally prohibit nontheistic invocations, *Greece* is to the contrary.

In any event, both statements were dicta, for the question whether a governmental body can require all invocations to be theistic was not before the *Coleman* court. The policy upheld there required all invocation-speakers to be clergy affiliated with an "established assembly or congregation." *Id.* at 880, 888. Yet the policy provided that no "congregation/assembly will be excluded . . . based on the religious perspective of the organization, even religious perspectives that do not teach what would generally be considered a belief in the existence of God." *Id.* at 881 n.4. The plaintiff who complained about not being permitted to deliver an invocation was not clergy or affiliated with a

congregation or assembly (*id.* at 881), but the opinion does not disclose whether he was a nontheist.

Here, by contrast, the County allows invocations by people who are *not* clergy, as well as by clergy who do *not* head a congregation or assembly. A42/A96 ¶¶ 160, 163; A329. (Indeed, six of the last ten invocation-speakers fall into one of those two categories; for example, a recent invocation was given by the State Chaplain for the Florida Federation of Republican Women. A329; A1187; A1190.) The County does *not*, however, permit invocations by people who do not believe in the existence of God, even if they are leaders or members of nontheistic congregations or assemblies. And all five individual plaintiffs are members of such institutions, four of them are leaders thereof, and three are ordained Humanist clergy. *See* Pls.' Summ. J. Mot., Facts ("Facts") ¶¶ 8-10.

Finally, the County relies (at 21) on a statement in a handbook issued by the Humanist Society — which ordained the Humanist clergy plaintiffs (A253-62) — that permits Humanist clergy to use the term "inspiration" in lieu of "invocation." County Ex. DW-17 at 80. But the handbook merely gives Humanist clergy a choice of which term to use (*id.*), and the Humanist Society uses only the term "invocation" on its webpage about secular invocations (A1202). Indeed, the County itself uses the term "secular invocations" in its resolution prohibiting such invocations at the opening of its Board meetings. A715 § 2.

B. Relegating nontheistic invocations to public-comment periods is second-class treatment, not a defense.

The County contends (at 16) that prohibiting nontheists from giving opening invocations is lawful because nontheists are allowed to give invocations during "Public Comment" sections of Board meetings. Arguments that separating classes of people can

constitute equal treatment have long been discredited, however. *See, e.g.*, Bennett Klein & Daniel Redman, *From Separate to Equal: Litigating Marriage Equality in A Civil Union State*, 41 Conn. L. Rev. 1381, 1381 (2009).

In any event, allowing theists to give invocations at the beginning of meetings while relegating nontheists to "Public Comment" is far from equal. The opening invocation is a ceremonial part of the meeting that takes place directly after the call to order (A45/A97 ¶ 177) so that it may solemnize what is to come. One of the Commissioners selects and introduces the invocation-speaker — whose name often appears on the agenda — and invites the speaker to tell the audience about the speaker's organization. A44-45/A96-97 ¶¶ 170, 178-79, 182. All the Commissioners stand for the invocation (A731:21-23) out of respect for the speaker's beliefs (A913:12-17), and all audience members typically stand as well (A860:15-18). Invocation-speakers may take as long as five minutes for their presentations. A707 ¶ 6.

In contrast, the "Public Comment" segment of the meeting commences after completion of the invocation, Pledge of Allegiance, "Resolutions, Awards, and Presentations," and "Consent Agenda" sections of the meeting. A39/A94 ¶ 136; A48/A98 ¶ 199. By that time, some members of the audience have left. A807:16-19. Each speaker is limited to three minutes, and the speakers are heard based on the order in which they turn in sign-up cards. A591 § 8.1. If the "Public Comment" segment cannot be completed within a half-hour, a second "Public Comment" segment is held at the end of the meeting (A591 § 8.1), after most of the audience typically has left (A723:18-25).

Moreover, "Public Comment" is often far from solemn: Speakers discuss topics such

as the County's feral-cat policy (A600), the naming of streets (A615), and governmental conspiracy theories (A615-16); "[a]s a practical matter, there are no restrictions on what is said" (A680). Commissioners would not rise for a nontheistic invocation during "Public Comment" (A778:15-25; A860:5-12) or ask the audience to do so (A914:14-19). And all the Commissioners would allow Christian prayers during "Public Comment" should speakers wish to offer them (A724:1-8; A771:20-24; A808:18-22; A851:14-18; A929:15-20); thus the County permits theists to give invocations during two segments of the meetings, while nontheists are allowed only in one.

The County's policy of relegating nontheists to a later, less prominent portion of the meetings only compounds the constitutional violation by emphasizing to nontheists that the County thinks of them as second-class citizens. *See, e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984).

C. History cannot justify the County's policy.

The County attempts to appeal to history, arguing that its discriminatory policy is "in 'recognition of the traditional positive role faith-based monotheistic religions have historically played in the community.'" Cty. Mot. at 22 (quoting A707 ¶ 5). History provides no defense here, however. "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh*, 463 U.S. at 790. The Supreme Court's decisions to uphold opening invocations at governmental meetings were based on an "'unambiguous and unbroken history of more than 200 years'" going back to the passage of the Bill of Rights. *Greece*, 134 S. Ct. at 1819 (quoting *Marsh*, 463 U.S. at 792). The Court emphasized that because the First Congress enacted a congressional chaplaincy

the same week that it approved the First Amendment, the framers of the Bill of Rights must have believed that the Establishment Clause permits legislative invocations. *Greece*, 134 S. Ct. at 1818-20; *Marsh*, 463 U.S. at 788-91.

But there is no long or unbroken history, going back to the First Congress, of what the County does: inviting members of the public to give invocations, while discriminating based on creed in doing so. Instead, with the exception of a brief period in the 1850s, Congress has always had permanent chaplains. Christopher C. Lund, *The Congressional Chaplaincies*, 17 Wm. & Mary Bill of Rts. J. 1171, 1200-02 (2009). Because Congress did not invite members of the public to open its meetings with invocations at the time the Bill of Rights was approved, history does not support the proposition that the framers of the First Amendment intended that discrimination like the County's be permitted.

Moreover, attempting to analyze history more broadly to answer whether nontheists may be barred from giving invocations would prove too much. Every Congressional chaplain has been Christian. Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 Nw. U. L. Rev. 1097, 1135 (2006). Until 2000, just one of these chaplains had been Catholic; that chaplain served only a year, from 1832-33, and was removed after his appointment sparked anti-Catholic sentiment across the country that continued long after. Lund, *supra*, at 1187-93. At the state level, some states maintained established churches and prohibited Catholics from holding public office into the early nineteenth century, as the Establishment Clause did not apply to the states when it was enacted. *See, e.g.*, Charles B. Blackmar, *The Constitution and Religion*, 32 St. Louis U. L. J. 599, 600 (1988); Daniel J.

Morrissey, *The Separation of Church and State: An American-Catholic Perspective*, 47 Cath. U. L. Rev. 1, 5 (1997).

Yet no one would argue that it would be constitutional for the County to forbid Catholics or non-Christian monotheists to deliver invocations today. On the contrary, *Greece* held that the selection of invocation-speakers must reflect a "policy of nondiscrimination," not "aversion or bias on the part of [governmental] leaders against minority faiths." 134 S. Ct. at 1824. "A practice that classified citizens based on their religious views would violate the Constitution," emphasized the Court. *Id.* at 1826. *Greece* also approved Congress's recent practice of "acknowledg[ing] our [country's] growing diversity" by supplementing its permanent chaplains with invitations to guest invocation-speakers "of many creeds." *Id.* at 1820-21.

Indeed, the County's policy is not only unsupported by history but also disrespectful to the Framers of our Constitution. A majority of the current Commissioners would prohibit deists from delivering opening invocations. A726:25-727:1; A774:3-7; A854:7-23; *see also* A882:23-883:2. Yet many of the leading Founding Fathers — including Thomas Jefferson, Ben Franklin, and Thomas Paine — were deists. Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. Rev. 1, 6-7 (2008).

D. That the Board's conduct might not be coercive in some respects does not render lawful its directives to rise for invocations.

The County argues (at 19) that its invocation practice is not coercive because the Board does not treat meeting attendees differently based on whether they take part in invocations, and because attendees may leave the room during invocations. But, in concluding that the invocation practice in *Greece* was not unconstitutionally coercive, the

Court recognized that there are multiple ways in which a locality's practice might unlawfully coerce: "The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." 134 S. Ct. at 1826. The Court proscribed all these forms of coercion at municipal meetings, even though it recognized that attendees are ordinarily free to "leav[e] the meeting room during the prayer." *Id.* at 1827.

Here, unlike in *Greece*, where the town board did not ask "audience members . . . to rise for the prayers," the Board "direct[s] the public to participate in the prayers" by instructing the audience to stand. *Compare id.* at 1826 *with* A372-526. What is more, the Board does so in the coercive environment of a small boardroom, where meetings are sometimes sparsely attended, where Commissioners notice when audience members do not stand, where other attendees cast disapproving looks at those who stay seated, and where attendees subsequently address the Board about matters that personally affect them. Facts ¶¶ 20-22, 24. And though the Board's requests to rise violate the Establishment Clause independently, their coercive effect is compounded because, unlike in *Greece*, "any member of the public is [not] welcome in turn to offer an invocation reflecting his or her own convictions." *See* 134 S. Ct. at 1826.

II. The County's conduct violates the federal Free Exercise, Free Speech, and Equal Protection Clauses.

As explained in Plaintiffs' Summary Judgment Motion (at 21-22), the County's discrimination against nontheistic invocation-speakers violates the Free Exercise and Free Speech Clauses of the First Amendment because those Clauses prohibit governmental bodies

from conditioning participation in governmental activities on a person's religious or other beliefs or affiliations. The County does exactly that by conditioning participation in the governmental function of solemnizing public meetings on profession of belief in God, excluding the plaintiffs on account of their nontheistic beliefs and affiliations. Contrary to *Greece*, the County asks nontheists "to set aside their nuanced and deeply personal beliefs" if they wish to deliver opening invocations, prohibiting them from speaking as their "conscience dictates." 134 S. Ct. at 1822. The County's exclusionary policy violates the Equal Protection Clause as well, because it discriminates against the plaintiffs based on their religious beliefs, as also explained in Plaintiffs' Summary Judgment Motion (at 24).

A. The County has no defense that prevents strict scrutiny.

In response to these claims, the County (at 20-24) argues that invocations must be theistic and that nontheists may present invocations during "Public Comment"; these arguments fail for the reasons given in sections I(A) and (B) above. The County also contends (at 22-24) that it is not violating the Free Speech Clause because the invocation segment of Board meetings is a limited public forum. But if it were a limited public forum, that would not provide the County a defense. The Supreme Court has repeatedly ruled that a governmental body violates the Free Speech Clause when, in determining who may access a limited public forum, it discriminates based on whether the speaker's viewpoint is religious. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-94 (1993). Once it establishes a limited public forum, government may not exclude either a "theistic" or an "atheistic perspective." *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 831 (1995).

In any event, the invocation segment of the meetings is not a limited public forum, because the topic of the speech is tightly circumscribed and the Commissioners select the speakers by invitation (A44/A96 ¶¶ 170-71) rather than allowing a class of speakers to sign up for access. *See Santa Fe*, 530 U.S. at 302-04. Indeed, *Greece* implies that opening invocations ordinarily should not be treated as a limited public forum, because government must not permit invocations that proselytize or disparage a faith (134 S. Ct. at 1823), and limiting speech in that way would seem to be viewpoint discrimination that is forbidden in limited public forums (*e.g.*, *Good News*, 533 U.S. at 106).

B. The County cannot come close to satisfying strict scrutiny.

The only other defense the County offers (at 24) against the plaintiffs' Free Exercise, Free Speech, and Equal Protection claims is that it can satisfy strict scrutiny. To do so, the County would have to demonstrate that its discriminatory conduct furthers a compelling governmental interest through narrowly tailored means. *E.g.*, *Miller v. Johnson*, 515 U.S. 900, 920 (1995). The County puts forward (at 24-27) two interests: (1) preventing invocations that disparage theistic religions or proselytize Humanism; and (2) avoiding endorsement of Humanism. Neither of these asserted interests comes close to satisfying strict scrutiny.

1. Plaintiffs will not give proselytizing or disparaging invocations.

The County asserts (at 25) that because *Greece* requires governmental bodies to ensure that invocations do not proselytize or disparage any faith (134 S. Ct. at 1823), it has a compelling interest in preventing the plaintiffs from giving such improper invocations. The County further assumes (at 25-27) that the plaintiffs would give such improper invocations

because organizations with which they are associated (but that are not parties to the case) and authors whom they have read (also not parties) have made statements critical of theistic religions; because some invocations given by other nontheists (likewise not parties) have allegedly been proselytizing or disparaging; and because the plaintiffs allegedly want to end governmental invocations instead of giving them.

Such guilt-by-association speculation cannot justify the County's discriminatory policy. To begin with, each plaintiff has twice declared under penalty of perjury that his invocations will not be proselytizing or disparaging and will comply with the other requirements in *Greece*. A119 ¶ 28; A129 ¶ 22; A141 ¶ 18; A152-53 ¶ 25; A161-62 ¶ 10; A1152-53 ¶¶ 3-6; A1155-56 ¶¶ 3-6; A1158-59 ¶¶ 3-5; A1161-62 ¶¶ 3-5; A1165-67 ¶¶ 4-9; *accord* A1177:25-1178:2; A1181:8-11; A1183:23-25. All the plaintiffs have also declared under penalty of perjury that their goal is to obtain treatment equal to that of theists, not to end opening invocations or eliminate theistic invocations. A1152 ¶¶ 1-2; A1155 ¶¶ 1-2; A1158 ¶¶ 1-2; A1161 ¶¶ 1-2; A1164-65 ¶¶ 1, 3; *accord* A1175:11-1176:8.

In any event, none of the statements that the County cites was made by any of the plaintiffs themselves, other than plaintiff Williamson. Although Mr. Williamson has in the past advocated against inclusion of invocations at governmental meetings, his goals evolved after *Greece* confirmed the legality of such invocations, and he and plaintiff Central Florida Freethought Community ("CFFC") now advocate for equal opportunities for nontheists to be invocation-speakers. A1164-65 ¶¶ 2-3; A1184:7-13. Indeed, Mr. Williamson and CFFC have organized thirty-two nontheistic invocations in Florida, and none has resulted in a locality ending its invocation practice, while some have resulted in CFFC being invited to

return for future invocations. A1165 ¶ 3. The County complains (at 26) about a statement that Mr. Williamson made in conjunction with one invocation, but the statement was made not during the invocation but during the introduction to it, in response to statements mocking nontheists made by the governmental body involved; in any event, Mr. Williamson will not make any similar statement in conjunction with any invocation before the Board. A1167 ¶ 9. The County attempts to attribute (at 25) to CFFC allegedly improper invocations which appear on a CFFC webpage that collects secular invocations, but inclusion of an invocation on that page does not mean that CFFC approved or was involved with the invocation. A1166 ¶ 7.

What is more, if the County's guilt-by-association reasoning could justify prohibiting nontheists from giving invocations, then no theist could be permitted to give invocations either. Throughout history, leaders and texts of theistic religions have proselytized their own beliefs and made statements attacking the beliefs of other sects, yet clergy of these religions have been able to give invocations that do neither of these things. In fact, the Commissioners here have selected as invocation-speakers clergy who (or whose churches) have made proselytizing or disparaging statements such as "Jesus is the ONLY savior of the world. . . . [T]he way to heaven is ONLY through Jesus Christ. We're saved ONLY by grace, ONLY through faith in his name." (V15-1 at 6:05); "[T]he unbelievers will be judged by God and sent to Hell where they will be eternally tormented[.]" (A1258); "ISLAM IS EVIL" (A1213); "ISLAM IS NOT A RACE[;] it is an ideology hostile to all others" (A1214); "Buddha[']s . . . way out [is] like a man in a smoke-filled room trying to convince himself not to care about breathing anymore." (V15-1 at 12:28); "Buddha was no savior. He died. . . . [H]e was so

heavy I'm surprised he didn't die of cholesterol." (V17 at 20:08). *See also* A1205-69; V15-2; V16; V18.

Theistic clergy around the country have also sometimes given invocations that proselytized or disparaged a faith. *See, e.g.*, *Greece*, 134 S. Ct. at 1824; *Joyner v. Forsyth Cty.*, 653 F.3d 341, 344-45 (4th Cir. 2011). Indeed, such improper invocations have been given at Board meetings, including by clergy who were subsequently invited to return. *See, e.g.*, A322-29; A338-39; A350; A361-62; A366; A382; A434; A461; A466; A510-12; A522; A524. Some examples: "[T]here is no power but of God. . . . Whosoever therefore resisteth the power resisteth the ordinance of God. And they that resist shall receive to themselves judgment." (A350); "I pray, Father, that each one here would humbly acknowledge that without you we can do nothing." (A361); "[I]f we keep [God] as our number one priority, we'll all be with him one day." (A512); "Lord . . . judges and politicians have twisted our freedom of religion into freedom from religion. . . . Help us restore the Bible, prayer, and the truth of our nation's Christian foundations to our schools." (A522); "[L]et, Lord, this city, this community, God, this place, Brevard County be a place where we praise you and worship you and adore you and people come to know Jesus as their personal Lord and Savior." (A524).

The County correctly does not prohibit monotheists from giving invocations based on what organizations affiliated with them have said, what they have said outside the County's boardroom, or what other people of their denominations have said in invocations. (In fact, the County does not even review drafts of invocations before they are given. A969-70, ¶¶ (g), (h).) That the County seeks to exclude the plaintiffs for such reasons only underscores

the discriminatory nature of its practice.

The County also attempts to impose on the plaintiffs a standard for what constitutes "proselytizing" that is different from the one it applies to monotheistic invocation-speakers. Despite allowing the plainly proselytizing monotheistic invocations cited above, the County contends (at 27) that it is improper proselytizing for Humanists to deliver invocations that promote values such as "reason, wisdom, science, knowledge, patience, empathy, compassion, logic, understanding, and critical thinking." But what the courts consider impermissible "proselytizing" in the invocation context are "effort[s] . . . to convert citizens to particular sectarian views." *See Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998). Short of that, references to specific tenets or deities (such as Jesus Christ) of particular faiths are permitted. *See Greece*, 134 S. Ct. at 1820-23. The Humanist values that the County says should not be advanced in invocations are ones that Humanists share with many others — theists and nontheists — the types of "universal" values that *Greece* approved as appropriate to invoke. *See id.* at 1823; *see also Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 692 (11th Cir. 1987) (public school's use of textbooks that "attempt[ed] to instill . . . such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making" was not governmental endorsement of Secular Humanism or any theistic religion, even though texts "contain[ed] ideas that are consistent with [S]ecular [H]umanism" and "with theistic religion").

Finally, even if the mud with which the County attempts to smear the plaintiffs were sufficient to invoke a compelling governmental interest in preventing delivery of improper invocations, a policy prohibiting nontheists from delivering invocations is not a means

narrowly tailored to that interest. Rather, the County could condition invitations to the plaintiffs to give invocations on compliance with the limits sets forth in *Greece*, 134 S. Ct. at 1823. Or the Court could include such a condition in an injunction in the plaintiffs' favor.

2. Permitting nontheistic invocations would not endorse Humanism or send a message of hostility toward theism.

The County argues (at 24, 27) that prohibiting nontheistic invocations is necessary to advance a compelling interest in not conveying County endorsement of Humanism or hostility toward monotheism. That cannot be. As long as the County treats theists and nontheists equally in deciding who may offer invocations, no one could reasonably perceive the County's conduct as endorsing or being hostile to either theism or nontheism. *See, e.g.*, *Good News*, 533 U.S. at 113-14; *Widmar v. Vincent*, 454 U.S. 263, 273-75 (1981). If allowing Humanist invocations were an unconstitutional governmental endorsement of Humanism, then allowing Christian invocations would constitute unconstitutional endorsement of Christianity, and *Greece* would not be the law of the land.

Apparently viewing it as pertinent to its argument that allowing nontheistic invocations would convey hostility toward monotheism, the County presents evidence that 34.9 percent of Brevard County residents were affiliated with religious congregations in 2010. *See* Grammich Aff. (Ex. 3 to County's Motion) ¶¶ 10-11, 16(a). This data reports only percentages of people affiliated with a congregation, not percentages of people professing religious belief (*see id.* ¶¶ 10-11), and it is irrelevant in any event. It is no more constitutional for government to favor or disfavor a minority faith than it is to endorse or be hostile to a majority faith. *See, e.g.*, *Kaplan v. City of Burlington*, 891 F.2d 1024, 1031 (2d Cir. 1989).

III. The County's conduct violates the Florida Constitution.

Plaintiffs' Summary Judgment Motion explains (at 25-26) that the County's conduct violates Sections 2 and 3 of Article I of the Florida Constitution for the same reasons that it violates the U.S. Constitution, and also because Section 3 has a "no-aid" clause that limits the use of public funds for religious purposes even more strictly than the federal Establishment Clause does. The County contends (at 28) that it is not violating the no-aid clause because it does not make financial payments to invocation-speakers. But the no-aid clause prohibits public spending "in aid of any church, sect, . . . religious denomination or . . . sectarian institution" not just "directly" but also "indirectly." The Eleventh Circuit has thus explained that while the use of tax dollars to support a nondiscriminatory invocation practice is permitted by the no-aid clause, the clause bars use of public funds to support a practice that "'promote[s] the religion of the provider . . . or encourages the preference of one religion over another.'" *Atheists of Fla. v. City of Lakeland*, 713 F.3d 577, 596 (11th Cir. 2013) (quoting *Council for Secular Humanism v. McNeil*, 44 So. 3d 112, 120 (Fla. 1st DCA 2010)). Here, the County is using public funds to support an invocation practice that prefers monotheism over atheism, Humanism, and other religions; moreover, as part of this practice, the County preferentially aids theistic institutions by inviting them to promote themselves — in person, online, and on television — in prefaces to their invocations. *See* Facts ¶¶ 1-2.

IV. Plaintiffs have standing.

The County contends (at 2, 19-21, 27) that the plaintiffs lack standing because invocations must be theistic and its invocation practice is not coercive. But these are merits arguments (refuted in Sections I(A) and (D) above) that the County erroneously conflates

with standing. *See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989).

In any event, the plaintiffs have standing in multiple ways. First, they have requested opportunities to give opening invocations, and the County has denied them the right to do so because of their religious beliefs. A659-65; A678-716. Discriminatory treatment is in itself an injury sufficient for standing. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989); *Heckler*, 465 U.S. at 739-40; *Hassan v. City of New York*, 804 F.3d 277, 289-90 & n.1 (3d Cir. 2015). And here, as a result of the discrimination, the individual plaintiffs have suffered emotional harm, while the organizational plaintiffs have suffered economic harm from the denial of the free promotional opportunities that theistic bodies receive when giving invocations. *See* Facts ¶¶ 23, 25.

Second, the individual plaintiffs have standing because two of them (not one, as the County contends (at 19)) have attended Board meetings, all of them have watched meetings or meeting portions on television or the internet, and all intend to attend meetings in the future. *See* Facts ¶ 24; *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1279-80 (11th Cir. 2008). Third, the two who attended meetings were directed to rise for invocations and thus suffered injury from being coerced to take part in prayer. *See* Facts ¶ 24; *Lee*, 505 U.S. at 584, 593-94. Fourth, two plaintiffs have standing because they pay property taxes to the County that are used to support the County's discriminatory invocation practice. *See* A130-31 ¶ 26; A164 ¶ 18; *Marsh*, 463 U.S. at 786 n.4; *Pelphrey*, 547 F.3d at 1280-81.

CONCLUSION

For the foregoing reasons, the County's motion should be denied and the plaintiffs' motion granted.

Respectfully submitted,

By: /s/ Alex J. Luchenitser Date: June 6, 2016
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CERTIFICATE OF SERVICE

I certify that on June 6, 2016, I electronically filed this document, together with an appendix of exhibits, by using CM/ECF (except for video and audio exhibits on a flash drive), which automatically serves all counsel of record for the defendant. I filed with the Clerk of Court a flash drive with video and audio exhibits by sending it via FedEx for delivery by June 6, 2016, and I served this flash drive on opposing counsel by sending it via FedEx for delivery by the same date to Scott Knox, Office of the County Attorney, 2725 Judge Fran Jamieson Way, Viera, FL 32940.

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