

3/12/19

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

REGINALD L. GUNDY,

Plaintiff,

v.

CITY OF JACKSONVILLE,  
FLORIDA, a Municipality of the  
State of Florida,

and

AARON L. BOWMAN, individually,

Defendants.

CASE NO.: 3:19cv7955-39MCA

COMPLAINT

COMES NOW the Plaintiff, Reginald L. Gundy ("Plaintiff"), by and through his undersigned counsel, and by way of this Complaint seeks relief against Defendants, the City of Jacksonville, Florida, and Aaron L. Bowman, individually (at times herein referred to collectively herein as "Defendants"), as follows:

INTRODUCTION

1. On March 12, 2019, Pastor Reginald L. Gundy was the invited speaker to conduct an invocation, i.e., prayer, before the City of Jacksonville City Council at a regular public meeting. The past practice of the City Council was to have the invited speaker for the invocation proceed unimpeded and without restraint. During this meeting, however,

☛ Aaron L. Bowman, President of the City Council, was not satisfied with the prayer of Pastor Gundy and after first admonishing Pastor Gundy to stop his prayer due to the content of the invocation, Council President Bowman then shut off the microphone that Pastor Gundy was using to deliver the requested invocation.<sup>1</sup> That act improperly silenced Pastor Gundy in this public event. A day later, in response to a journalist, Council President Bowman published a statement on Twitter, presumably regarding Pastor Gundy, in which he blamed another council member for finding <sup>1</sup>“a pastor that would agree to such a sacrilegious attack politicizing something as sacred as our invocation. It obviously was a last ditch effort to try and revive a failed term and campaign. **Fortunately I control the microphone.**”<sup>2</sup> Presumably, the council member Council President Bowman was referring to was the former Council President, Anna Brosche, who had invited Pastor Gundy to give the invocation and was running for Mayor of the City of Jacksonville against Council President Bowman’s chosen candidate, the incumbent Mayor. The election in that race was set for March 19, 2019. It appears clear that Council President Bowman linked the mayoral race to Pastor Gundy’s invocation.

Just a few weeks after the March 12 Council Meeting, by Memorandum dated May 1, 2019, Council President Bowman issued an official policy guidance for the City Council limiting and interfering with the speech of those that might conduct the official invocation

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<sup>1</sup> Mark Woods, *A Moment of Silence, Please*, The Florida Times-Union, May 17, 2019, <https://www.jacksonville.com/news/20190517/mark-woods-moment-of-silence-please>.

<sup>2</sup> See Exhibit A hereto, Tweet of the official Twitter account of @AaronAbowman, 3:20 p.m.-3/13/2019 (emphasis added). This Tweet has since been deleted from the account.

before the City Council, including limiting the invocation to certain speech, and otherwise controlling the terms of the invited speaker's invocation.

Having invited prayer into the public sphere by the City Council invocation, the City Council's policy, custom, and practice of limiting and deterring free exercise of religion by Council President Bowman's interference in Pastor Gundy's March 12, 2019 prayer and the implementation of an Invocation Policy violate the Free Exercise Clause of the U.S. Constitution and Florida Constitution by, *inter alia*, preventing the invocator from giving prayer to address his or her own God or gods as conscious dictates, unfettered by the City Council President or others.

The restrictions on Plaintiff's free speech when he was invited to give the invocation and as implemented by an Invocation Policy of the City Council are constitutional violations. The restrictions are subjective and could mean nearly anything to any particular speaker or listener. For example, a listener to a City Council invocation could claim offense or that the message included a reference to political views or that the message was meant to advance a particular faith. The official policy restricting speech and free exercise during the invocation promoted by the City Council and Council President Bowman imposes a clear restraint and interference on constitutionally-protected free exercise of religion and free speech. Additionally, the silencing of Pastor Gundy's microphone by Council President Bowman because of an official's "boundless discretion" is impermissible interference with his constitutional rights. Accordingly, the retaliatory and discriminatory policy and practices of Defendants relating to the City Council invocation violate the Free Exercise and Free Speech Clauses of the U.S. Constitution, as

well as Sections 3 and 4 of Article I of the Florida Constitution. The Plaintiff seeks injunctive and declaratory relief as well as damages for the violations of his constitutionally protect rights.

### **PARTIES, JURISDICTION AND VENUE**

2. Plaintiff Reginald L. Gundy is an adult male who is, and at all times relevant herein has been, a citizen of, and resides in, the City of Jacksonville, Duval County, Florida.

3. Defendant City of Jacksonville, Florida (“COJ”) is being sued on the basis of actions by its City Council (at times herein referred to as “City Council”), is a municipal governing body located in Duval County, Florida and is a body politic that may be sued under the laws of the State of Florida.

4. Defendant Aaron L. Bowman, is an individual who is, and at all times relevant herein has been, a citizen of and resides in the City of Jacksonville, Duval County, Florida. Defendant Bowman is, and at all times relevant herein has been, the President of the City Council.

5. This Court has jurisdiction over this case pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343, 28 U.S.C. §1367, and 42 U.S.C. §§ 1983 and 1988.

6. A substantial part of the acts complained of herein occurred primarily in the City of Jacksonville, Duval County, Florida. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c).

### **FACTUAL BACKGROUND**

7. Plaintiff Gundy is an ordained pastor, leader of Mt. Sinai Missionary Baptist

Church in Jacksonville, Florida, since April 1999, a life-long resident of the City of Jacksonville, Florida, a veteran of the United States Armed Forces, having served in the U.S. Army, and former Duval County school teacher.

8. The Charter of the City of Jacksonville (referred to herein as the “Charter”) provides that the City Council is the public body entrusted with making laws for the City of Jacksonville, including that: “All legislative powers of the consolidate government (except such as are retained by the second, third, fourth, and fifth urban services districts) are vested in the council, and the council may legislate with respect to any and all matters which are within the powers of the consolidated government.” Section 5.07, *Charter of the City of Jacksonville*.

9. At all times relevant herein, the City Council maintains through its Rules a provision that it may designate a Chaplain, which the City Council President may appoint and who “shall arrange to open each meeting of the Council with a prayer/invocation. The President or Chaplain may invite or designate others to provide appropriate ceremonies.” Rule 1.106, Rules of City Council.

10. The City Council maintained a 2018/2019 Council Year Invocation Schedule (“Invocation Schedule”), that lists Council Member Matt Schellenberg as Chaplain. The Invocation Schedule is published on the COJ website and was established prior to March 2019.<sup>3</sup>

11. Pastor Gundy was listed on the Invocation Schedule as the person to provide

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<sup>3</sup> See [http://apps2.coj.net/City\\_Council\\_Public\\_Notices\\_Repository/18-19%20Invocation%20List.pdf](http://apps2.coj.net/City_Council_Public_Notices_Repository/18-19%20Invocation%20List.pdf).

the invocation for the regular City Council meeting set for March 12, 2019.

12. Pastor Gundy was invited to provide the invocation to the City Council with no time limit or other restraints.

13. At all times relevant herein, Defendant Bowman was the President of the City Council presiding over the March 12, 2019, City Council meeting.

14. The Rules of the City Council provide, in pertinent part, that the authority of the President of the City Council, shall include:

In addition to his/her duties and powers as the permanent presiding officer of the Council, the President is the chief executive and administrative officer of the Council and is responsible for the proper execution of these Rules, the orders of the Council and the ordinances of the City appertaining to the Council. The President, or his/her designee, shall advise and provide policy guidance to the Council Secretary, Director of Staff Services and Council Auditor with regard to the administration and management of their offices, employees and staff. The President shall have general control of the Council chamber and committee room and of the offices and other rooms assigned to the use of the Council whether in City Hall or elsewhere. The President shall designate the Secretary to the Council President, who shall serve at the discretion of the President.

*See Rule 1.202, Rules of City Council.*

15. On or about September 20, 2014, the General Counsel for COJ, Jason Gabriel, Esquire, provided a Memorandum to then City Council President Clay Yarborough, regarding "City Council Invocations" that set forth law regarding prayer at City Council Meetings (the "Memorandum"). The Memorandum was published on the COJ website. A true and exact copy of the Memorandum is attached hereto as Exhibit B.

16. At all times relevant herein, Defendant Bowman was aware of the law and

limitations on the invocation relevant to prayer and speech at City Council meetings, including the information set forth in the Memorandum. Accordingly, Defendant Bowman's actions as set forth herein violated the clearly established rights of Plaintiff Gundy to free exercise of religion and free speech that Defendant Bowman knew or should have known.

17. On or about March 19, 2019, the COJ municipal elections were to take place.

18. The COJ municipal elections to be held in March 2019, included a race for the Mayor of the City of Jacksonville, that had, *inter alia*, the incumbent Mayor and a then City Council member competing for the office.

19. Prior to March 12, 2019, Defendant Bowman had publicly announced that he was a supporter of the re-election of, and had indeed endorsed, the incumbent Mayor.

20. The public agenda for the regular meeting of the City Council for March 12, 2019, lists the invocation as being conducted by Pastor R.L. Gundy.

21. Pastor Gundy attended the March 12, 2019, regular meeting of the City Council at the City Council Chambers in City Hall of the COJ.

22. Beginning at in or around 5:00 p.m. on March 12, 2019, Pastor Gundy began the invocation at the City Council with a prayer, speaking into a microphone at a podium in front of the entire City Council.

23. The prayer of Pastor Gundy at the City Council on March 12, 2019,

commenced and invoked “Jesus” and “Eternal God our father, the father of Adam, Eve . . .” and other references to a Higher Power, without interruption.<sup>4</sup>

24. Pastor Gundy continued the invocation and stated: “Father, in the name of Jesus, we have a political climate right now that is dividing our community further and further apart because of pride and selfish ambitions,” and he continued in prayer stating that “People are being intimidated, threatened and bullied by an executive branch of our city government while cronyism and nepotism is being exercised in backrooms. . .” At that point, Pastor Gundy was interrupted by Defendant Bowman who stated, according to a press report based upon the City Council video closed captioning: “Mr. Gundy, I’m going to ask you to stop the prayer.”<sup>5</sup>

25. Despite Defendant Bowman’s interruption to stop the prayer, Pastor Gundy continued the prayer, stating, *inter alia*, “However, in the name of Jesus . . .” and by referencing food deserts, sexual abuse and people shot down in the streets.<sup>6</sup> Then, the microphone Pastor Gundy was speaking into was cut off at the direction of Defendant Bowman.

26. The invocation by Pastor Gundy on March 12, 2019, had lasted approximately 4 minutes before it was cut off by Defendant Bowman.

27. The City Council meeting of March 12, 2019, then continued with the Pledge of Allegiance, and the business on the public agenda.

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<sup>4</sup> See Mark Woods, *A Moment of Silence, Please*, The Florida Times-Union, May 17, 2019, <https://www.jacksonville.com/news/20190517/mark-woods-moment-of-silence-please>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*



28. At approximately 3:20 p.m. on March 13, 2019, Defendant Bowman published the following statement on his official Twitter public communication account (the "Bowman Twitter Statement"):

I never envisioned a CM stooping so low to find a pastor that would agree to such a sacrilegious attack politicking something as sacred as our invocation. It obviously was a last ditch effort to try and revive a failed term and campaign. Fortunately I control the microphone.

A true and exact copy of the Bowman Twitter Statement is attached hereto as Exhibit A. The Bowman Twitter Statement's reference to a "CM" was regarding City Councilmember Anna Brosche, who was a candidate for Mayor of the City of Jacksonville on March 13, 2019, against the incumbent Mayor in the March 19, 2019 election.

29. On or about May 1, 2019, Defendant Bowman pursuant to his duties as Council President, distributed the City Council President's Executive Policy on Council Invocations (the "Invocation Policy") to govern the conduct of invocations at City Council meetings. A true and exact copy of the Invocation Policy is attached hereto as Exhibit C.

30. The Invocation Policy is intended to improperly limit and interfere with the free exercise of religion and free speech of citizens selected to provide an invocation before the City Council. For example, the Invocation Policy states that an invocation should not, *inter alia*, leverage personal political views or partisan politics, nor shall it be a mechanism to discuss sectarian controversies or for any intimations concerning federal, state or local policy decision-making. See Exhibit C, p.2. These prohibitions on the invocation content are subject to interpretation by a listener and can be used to improperly limit or interfere with an invocation in violation of the U.S. Constitution and Florida Constitution.

31. The Invocation Policy is the official policy of the City Council by virtue of Defendant Bowman's authority as City Council President who possesses final policy making authority over the subject matter of the Invocation Policy.

32. In addition to the Invocation Policy, Defendant Bowman introduced Legislation in May 2019, Ordinance 2019-329, in the City Council to amend various rules of the City Council to restrict and interfere with invocations and speech before the City Council. The said legislation has since been withdrawn.

33. At all times relevant herein, the acts of Defendant Bowman as set forth herein were intended to interfere with and restrain the free exercise of religion and speech by Pastor Gundy and others in a subjective and unconstitutional manner.

34. The actions of Defendant Bowman on March 12, 2019, as set forth herein, in directing Pastor Gundy to "stop" his prayer before the City Council and directing that the microphone be shut off, interfered with Pastor Gundy's rights under the U.S. Constitution and Florida Constitution to be free from interference in the free exercise of his religious beliefs and free speech.

35. As reflected by, *inter alia*, the content of the Bowman Twitter Statement prior to the March 19, 2019 election, the acts of Defendant Bowman restricting the rights of Pastor Gundy and others as set forth herein were taken for retaliatory, political and other impermissible reasons, and not for the legitimate operation and/or functioning of the City Council.

36. All conditions precedent to bringing this action, if any, have been satisfied, waived or excused.

**COUNT ONE**  
**Violation of First Amendment Free Exercise of Religion**  
**Pursuant to 42 U.S.C. §1983**  
**(Both Defendants)**

37. Paragraphs 1 to 36 above are incorporated as if fully set forth herein.

38. The Free Exercise Clause of the First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." This provision applies fully to state and municipal governments, including Defendants, through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

39. The Free Exercise Clause prohibits governmental bodies from conditioning participation in political or governmental affairs on adoption or profession of any religious belief.

40. In addition, although governmental bodies must regulate invocations at governmental meetings to ensure that they do not advance or proselytize any one, or disparage any other, faith or belief, governmental bodies may not — as a result of constitutional restrictions that are at least in part rooted in the Free Exercise Clause — censor invocations given by private citizens to entirely prohibit the invocations from reflecting or referencing the beliefs of those who give them.

41. Having invited prayer into the public sphere by the City Council invocation, the City Council's policy, custom, and practice of limiting and deterring free exercise of religion by the implementation of the Invocation Policy and Defendant Bowman's interference in Pastor Gundy's March 12, 2019 prayer violate the Free Exercise Clause by interfering with the religious belief and opinions of Pastor Gundy, by, *inter alia*, (a)

preventing Pastor Gundy from giving prayer to address his own God or gods as conscious dictates, unfettered by the City Council President or others; and (b) stopping or otherwise interfering with Plaintiff's prayers.

42. Defendants were acting under color of the authority of the State of Florida when Defendants interfered with the right of free exercise of religion by Plaintiff on March 12, 2019, and thereafter.

43. Defendant Bowman's actions violated the clearly established rights of Plaintiff of which reasonable persons in Defendant Bowman's position should have known.

44. Defendant Bowman's acts against Plaintiff in violation of Plaintiff's First Amendment rights, were retaliatory, including the creation and use of the Invocation Policy, that represented the official custom, policy, or practice of Defendant City of Jacksonville.

45. Defendant Bowman's individual actions and omissions were willful, wanton, intentional, conscious and malicious and in deliberate disregard of Plaintiffs' First Amendment rights.

46. As a direct and proximate result of Defendants' actions, Plaintiff has suffered and will continue to suffer damage.

**COUNT TWO**  
**Violation of First Amendment Free Speech**  
**Pursuant to 42 U.S.C. §1983**  
**(Both Defendants)**

47. Paragraphs 1 to 36 above are incorporated as if fully set forth herein.

48. The Free Speech Clause of the First Amendment to the U.S. Constitution

provides that "Congress shall make no law ... abridging the freedom of speech." This provision applies fully to state and municipal governments, including Defendants, through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

49. The opportunity to perform invocations at governmental meetings is subject to certain regulation by government.

50. Thus, governmental bodies may regulate such invocations to ensure that they do not advance or proselytize any one, or disparage any other faith or belief:

51. On the other hand, as a result of constitutional restrictions that are at least in part rooted in the Free Speech Clause, governmental bodies may not censor invocations given by private citizens at governmental meetings to entirely prohibit the invocations from reflecting or referencing the beliefs or viewpoints of those who give them.

52. The Free Speech Clause also prohibits governmental bodies from conditioning participation in governmental activities on a person's beliefs or affiliations.

53. The Defendant City of Jacksonville's policy, custom, and practice of limiting and deterring free speech by the implementation of the Invocation Policy and Defendant Bowman's interference in Pastor Gundy's March 12, 2019 prayer violate the Free Speech Clause by interference with the religious belief and opinions of Pastor Gundy, by, *inter alia*, (a) preventing the Plaintiff, as invocator, from giving prayer to address his own God or gods as conscious dictates, unfettered by the City Council President or others; (b) stopping or otherwise interfering with Plaintiff's prayers; and (c) denying Plaintiff and others, on account of their beliefs and affiliations, the opportunity to solemnize governmental meetings.

54. At the March 12, 2019, City Council meeting, Plaintiff Gundy exercised his right to freedom of speech as afforded by the First Amendment of the U.S. Constitution by speaking out in the context of his prayer on matters of public concern as set forth herein, including concerning the state of the welfare of citizens of the City of Jacksonville and the political system.

55. Plaintiff's speech at the March 12, 2019, City Council meeting was a substantial or motivating factor and was a determinative consideration in the action by Defendants in suspending and terminating Plaintiff's speech at the City Council on March 12, 2019, and in implementing the Invocation Policy.

56. Defendants were acting under color of the authority of the State of Florida when Defendants interfered with the right of free speech by Plaintiff on March 12, 2019 and thereafter.

57. Defendant Bowman's actions violated the clearly established rights of Plaintiff of which reasonable persons in Defendant Bowman's position should have known.

58. Defendant Bowman's acts against Plaintiff in violation of Plaintiff's First Amendment rights, were retaliatory, including the creation and use of the Invocation Policy, that represented the official custom, policy, or practice of Defendant City of Jacksonville.

59. Defendant Bowman's individual actions and omissions were willful, wanton, intentional, conscious and malicious and in deliberate disregard of Plaintiffs' First Amendment rights.

60. As a direct and proximate result of Defendants' actions, Plaintiff has

suffered and will continue to suffer damage.

**COUNT THREE**

**Violation of Free Exercise**

**Pursuant to Article I, Section 3 of the Florida Constitution  
(Defendant City of Jacksonville)**

61. Paragraphs 1 to 46 above are incorporated as if fully set forth herein.

62. Article 1, Section 3 of the Florida Constitution provides, in relevant part, that "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof" and that "[n]o revenue of the state or any political subdivision or agency 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."

63. The Invocation Policy is the official policy of the City Council by virtue of Defendant Bowman's authority as City Council President who possesses final policy making authority over the subject matter of the Invocation Policy.

64. Having invited prayer into the public sphere by the City Council invocation, the Defendant City of Jacksonville's policy, custom, and practice of limiting and deterring free exercise by the implementation of the Invocation Policy and Defendant Bowman's interference in Pastor Gundy's March 12, 2019 prayer violate Article 1, Section 3 of the Florida Constitution by, *inter alia*, (a) preventing the Plaintiff, as invocator, from giving prayer to address his own God or gods as conscious dictates, unfettered by the City Council President or others; and (b) stopping or otherwise interfering with Plaintiff's prayers.

65. As a direct and proximate result of Defendant City of Jacksonville's actions,

Plaintiff has suffered and will continue to suffer damage.

**COUNT FOUR**  
**Violation of Free Speech**  
**Pursuant to Article I, Section 4 of the Florida Constitution**  
**(Defendant City of Jacksonville)**

66. Paragraphs 1 to 36, 47-60 above are incorporated as if fully set forth herein.

67. Article 1, Section 4 of the Florida Constitution provides, in relevant part, that "Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

68. Plaintiff Gundy exercised his right to freedom of speech as afforded by Article 1, Section 4 of the Florida Constitution by speaking out on matters of public concern as set forth herein, including concerning the state of the welfare of citizens of the City of Jacksonville and the political system.

69. Plaintiff's speech at the March 12, 2019, City Council meeting was a substantial or motivating factor and was a determinative consideration in the action by Defendant City of Jacksonville in suspending and terminating Plaintiff's speech at the City Council on March 12, 2019, and implementing the Invocation Policy.

70. The Defendant City of Jacksonville's policy, custom, and practice of limiting and deterring free speech by the implementation of the Invocation Policy and Defendant Bowman's interference in Pastor Gundy's March 12, 2019 prayer violate Article 1, Section 4 of the Florida Constitution by, *inter alia*, (a) preventing Plaintiff, the invocator, from giving prayer to address his own God or gods as conscious dictates,



unfettered by the City Council President or others; (b) stopping or otherwise interfering with Plaintiff's prayers; and (c) denying Plaintiff and others, on account of their beliefs and affiliations, the opportunity to solemnize governmental meetings.

71. In addition, the City of Jacksonville's policy, custom, and practice of interfering with speech at invocations at City Council meetings violates Article I, Section 4 of the Florida Constitution because it deters residents, including Plaintiff Gundy from protected speech.

72. As a direct and proximate result of Defendant City of Jacksonville's actions, Plaintiff has suffered and will continue to suffer damage.

**WHEREFORE**, Plaintiff Reginald L. Gundy respectfully requests that this Honorable Court grant the following relief:

- (1) Enter judgment on behalf of Plaintiff against Defendant City of Jacksonville on all Counts herein, and against Defendant Aaron L. Bowman on Counts One and Two;
- (2) Plaintiff seeks temporary and permanent injunctive relief prohibiting Defendants from violating, and continuing to violate, the U.S. Constitution and the Florida Constitution as set forth herein;
- (3) As an actual controversy exists between the parties regarding whether Defendants violated the U.S. Constitution and Florida Constitution, Plaintiff seeks declaratory relief that Defendants violated, and continue to violate, the U.S. Constitution and the Florida Constitution as set forth herein;

- (4) Award Plaintiff compensatory damages against Defendants in amounts to be determined at trial;
- (5) Award Plaintiff reasonable attorneys' fees, court costs, expenses, pre-judgment interest, and post-judgment interest;
- (6) Award punitive damages against Defendant Bowman in his individual capacity; and
- (7) Such other or further equitable and monetary relief as the Court deems appropriate.

Dated: July 1, 2019

Respectfully submitted,

HENRICHSEN LAW GROUP  
301 W. Bay Street, Suite 900  
Jacksonville, Florida 32202  
(904) 381-8183  
Fax: (904) 212-2800

/s/ Neil L. Henrichsen  
Neil L. Henrichsen  
Fla. Bar No.: 0111503  
nhenrichsen@hslawyers.com  
service@hslawyers.com

Attorneys for Plaintiff



OFFICE OF GENERAL COUNSEL  
CITY OF JACKSONVILLE  
117 WEST DUVAL STREET  
SUITE 480  
JACKSONVILLE, FL 32202  
PHONE: (904) 630-1724



**MEMORANDUM**

**TO:** The Honorable Council President Clay Yarborough  
**FROM:** Jason R. Gabriel, General Counsel *JRG*  
**RE:** City Council Invocations  
**DATE:** September 20, 2014

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**I. Background.**

The City Council has been contacted by certain organizations and individuals with questions about, or support for, legislative invocations. Accordingly, the Office of General Counsel has reviewed the subject issues and has prepared this memorandum providing legal advice on this matter. The term invocation is used interchangeably with the term prayer in this memo.

**II. Questions Asked.**

- (1) May the City Council open its meetings with a prayer?
- (2) If so, how do United States Supreme Court decisions impact City Council Rules with respect to legislative invocations, the process for selecting an invocation, or the process for selecting a Council Chaplain?

**III. Short Answers.**

- (1) The City Council may open its meetings with a prayer for the legislative body, so long as there is "no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."
- (2) The Supreme Court's decisions indicate that Council Rules may be implemented as follows: (1) a designated Chaplain may give the invocation on

behalf of the legislative body, or (2) the legislative body may open the process to rotating ministers and theologians, on behalf of the body. Either approach may be employed, so long as it is on behalf of and for the benefit of the legislative body (i.e., an internal act) and the chosen method does not disparage, proselytize, or advance one religion. The City Council Rule<sup>1</sup> permits the Council President to select a colleague to serve as Chaplain, and the Establishment Clause does not limit the Council President's choice of Chaplain.

#### IV. Discussion.

The First Amendment to the U.S. Constitution includes an Establishment Clause, as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

A legal analysis of legislative invocations falls into a narrow area of First Amendment, Establishment Clause case law governed by *Marsh v. Chambers*,<sup>2</sup> rather than the typical Establishment Clause cases governed by *Lemon v. Kurtzman*.<sup>3</sup>

#### *Marsh v. Chambers*

One of the lead decisions by the United States Supreme Court regarding legislative invocations is *Marsh v. Chambers*, 463 U.S. 783 (1983)<sup>4</sup>. Here, the Supreme Court looked to the country's long history and tradition of opening legislative (and other deliberative body) meetings with prayer, as it noted the coexistence of such practice with the principles of disestablishment and religious freedom. The Supreme Court noted that the very Congress which adopted the Bill of Rights also approved the use of paid chaplains:

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<sup>1</sup> City Council Rule 1.106 (Chaplain) states the following: "The President may appoint one Council Member to be Chaplain of the Council, who shall arrange to open each meeting of the Council with a prayer/invocation. The President or Chaplain may invite or designate others to provide appropriate ceremonies." This rule grants the Council President discretion to choose any of the current Council Members to serve as Chaplain.

<sup>2</sup> 463 U.S. 783 (1983).

<sup>3</sup> Aside from legislative invocation cases, the Lemon test governs Establishment Clause cases. There must be: (1) a legitimate secular purpose, (2) primary effect is not to endorse religion, and (3) no excessive entanglement. See *Lemon v. Kurtzman*, 403 U.S. 602 (1975).

<sup>4</sup> *Town of Greece, NY v. Galloway*, 134 S.Ct. 1811 (2014) is the other lead decision by the U.S. Supreme Court with respect to legislative invocations.

It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. 463 U.S. at 790.

In *Marsh*, a state legislator challenged the constitutionality of a practice of the Nebraska legislature of opening each of its sessions with a prayer by a chaplain paid with public funds. The Supreme Court held that such practice did not violate the Establishment Clause, even though a clergy member of only one denomination (Presbyterian) had been selected for 16 years, in Nebraska, and even though the prayers were in the “Judeo-Christian” tradition.

The Supreme Court in one portion of its opinion stated that the opening of legislative sessions with prayer is “part of the fabric of society” as follows:

In light of the unambiguous and unbroken history of more than two hundred years, there can be no doubt that the practice of opening legislative sessions with prayer has become 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 toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. 463 U.S. at 792.

In short, the Court held that so long as “no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief,” 463 U.S. 794-95, the legislative invocation did not violate the Establishment Clause of the United States Constitution. The Court closed its decision with a conclusory remark as to the importance of history and tradition in this context creating a presumptive validity of the invocation, stating: “The unbroken practice for two centuries in the National Congress, for more than a century in Nebraska and in many other states, gives abundant assurance that there is no real threat ‘while this Court sits.’” 463 U.S. at 795.

### *Town of Greece*

On May 5, 2014, the United States Supreme Court decided the *Town of Greece* case. *Town of Greece, NY v. Galloway*, 134 S.Ct. 1811 (2014). Since 1999, the monthly town board meetings in Greece, New York have opened with a roll call, a recitation of the Pledge of Allegiance, and a prayer given by clergy selected from the congregations listed in a local directory. While the prayer program is open to all creeds, nearly all of the local congregations are Christian and thus nearly all of the participating prayer givers have been too. Citizens who attended meetings to speak on local issues filed suit alleging that the town violated the First Amendment’s Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayer. They sought to limit the town to “inclusive and ecumenical” prayers that referred only to a “generic God.” The District Court upheld the prayer practice on summary judgment: finding no

impermissible preference for Christianity; concluding that the Christian identity of most of the prayer givers reflected the predominantly Christian character of the town's congregations, not an official policy or practice of discriminating against minority faiths; finding that the First Amendment did not require the town to invite clergy from congregations beyond its borders to achieve religious diversity; and rejecting the theory that legislative prayer must be nonsectarian. The Second Circuit reversed, holding that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. The Supreme Court disagreed with the Second Circuit and reversed the judgment.

In *Town of Greece*, the Supreme Court found that (in referencing the *Marsh* case) the respondent (citizen's) insistence on nonsectarian prayer was not consistent with the long tradition followed by Congress and state legislatures:

The Court found the prayers in *Marsh* were consistent with the First Amendment not because they espoused only a generic theism but because the Nation's history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 134 S.Ct. at 1820.

The Court here distinguished dictum from the *County of Allegheny*<sup>5</sup> case which suggested that *Marsh* permitted only prayer with no overtly Christian references. The Court noted that such stance would be irreconcilable with the facts, holding and reasoning of *Marsh*, which instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S., at 794-795 (*Marsh*), and 134 S.Ct. at 1814 (*Town of Greece*).

The Court reasoned that:

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. 134 S.Ct. at 1814 and 1822.

The Court warned against government prescribing prayers to be recited in public institutions in order to promote a preferred system of belief or behavior. In such respect a government may not mandate a civic religion "that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." 134 S.Ct. 1822. "The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public

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<sup>5</sup> *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." 134 S.Ct. at 1823.

In rejecting the suggestion that legislative prayer must be non-sectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from the prayer's place at the opening of the legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. The Court concluded that 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 function. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation. 134 S.Ct. at 1814.

It must be noted once more that the analysis would be different if a town board (City Council) directed the public to participate in prayers, or solicited audience members to engage in any aspect of prayer. Any action of prayer/invocation by the Council though it may be intended to be inclusive, must never be coercive. 134 S.Ct. at 1826.

As the Court concluded in the *Town of Greece* case:

[C]eremonial 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 acknowledgement of their belief in a higher power, always with due respect for those who adhere to other beliefs. 134 S.Ct. at 1827-1828.

This ceremonial prayer however need not be prayer devoid of religious content. Throughout its opinion, the Court in *Town of Greece* reiterated the validity of a sectarian invocation, completely rejecting the argument that the Town of Greece council should create rules for prayers. In reaffirming its holding in *Marsh*, the Court reiterated the notion that chaplains have the right to pray to the dictates of their own beliefs, this being true even if, as was true in *Marsh*, the same chaplain had delivered the invocation for more than 15 years:

The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. 134 S.Ct. at 1823.



As for legislatively chosen chaplains, they may choose their own invocations, "so long as the practice over time is not 'exploited to proselytize or advance any one, or to disparage any other, faith or belief.' *Marsh*, 463 U.S., at 794-95." 134 S.Ct. at 1823.

### *Other Legislative Invocation / Establishment Clause Cases*

This is not to say, however, that all practices of prayer at the opening of all sorts of public legislative meetings are constitutional. In fact, the opposite has been held to be true here in the Eleventh Circuit, the federal judicial appellate court which controls in Florida (and Alabama and Georgia) at the intermediate federal appellate level. In *Pelphrey v. Cobb County, Georgia*, 547 F. 3d 1263 (11<sup>th</sup> Circuit 2008), a taxpayer filed suit against a county as to the offering of religious invocations at the beginning of sessions of the county commission, and at the beginning of county planning commission meetings. The United States District Court below had found at trial that a process that the county planning commission had used to select clergy persons to give opening prayers at commission meetings violated the Establishment Clause. The Eleventh Circuit reversed and found to the contrary, but within certain important limitations.

The Eleventh Circuit held that the Cobb County Commission was a public body entrusted with making laws for the county. It also held that the Cobb County Planning Commission, as an entity that assisted the County Commission with its work, likewise was a legislative body. Similarly, the Jacksonville City Council unquestionably is the principal legislative body for the Consolidated Government here in Duval County. The Eleventh Circuit held that use of opening prayers in the two legislative bodies in Georgia did not violate the Establishment Clause as long as the prayers "did not advance or disparage a belief or affiliate government with a specific faith." 547 F.3d at 1269-78. See also, *Atheists of Florida v. City of Lakeland*, 713 F.3d 577 (11<sup>th</sup> Cir. 2013).

The Court in *Town of Greece* confirmed the reasoning of the 11<sup>th</sup> Circuit. In discussing the Town of Greece policy of inviting ministers, the Court stated that "[t]he town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one." 134 U.S. at 1824. It then added two somewhat conflicting statements:

[1] So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. [2] 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," *Lee v. Weisman*, 505 U.S., at 617, 112 S.Ct. 2649 (Souter, J., concurring), a form of government entanglement with religion that is far more troublesome than the current approach. 134 U.S. at 1824.

The Court suggests that nondiscrimination is important, but that the search for diversity contains its own constitutional risks. This should be taken as a warning that if a legislative body chooses to invite speakers, then it should be careful not to engage in discrimination. These comments do not, however, modify the Court's clear confirmation that a legislative body may choose its own chaplain, and the chaplain may choose her or his own invocation.

## V. Conclusion.

The constitutionality of legislative invocations is considered on a case by case basis with judicial outcomes that are contingent upon the detailed facts of each case. There are no bright-line rules and everything is subject to interpretation based on express or implied purposes, history and tradition, context and the process that the City employs.

Until the Supreme Court says otherwise, there are essentially two constitutionally protected ways to handle a brief invocation at the commencement of meetings: (1) a designated Chaplain may give the invocation on behalf of the legislative body, or (2) the legislative body may open the process to rotating ministers and theologians, on behalf of the body. Either approach may be undertaken, so long as it is on behalf of and for the benefit of the legislative body (i.e., an internal act) and the chosen method does not disparage, proselytize, or advance one religion.

Finally, Council Rule 1.106 (Chaplain), grants the Council President discretion to choose any of the current Council Members to serve as Chaplain. The Establishment Clause does not create rules for selecting the Council Chaplain. As noted with respect to choosing an invocation, the Establishment Clause prohibits discrimination against religion and also prohibits governmental efforts to define appropriate religion. The Council Rule does not by its terms discriminate against or define appropriate religion. The Rule simply permits the Council President to select a colleague. The Establishment Clause does not limit the Council President's choice of Chaplain.

Absent a pattern of prayers that over time denigrate, proselytize, or betray impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation under the Establishment Clause.

I trust that this opinion provides the guidance you seek. I am available to discuss this with you at your convenience.



**AARON L. BOWMAN**  
President  
Council Member  
District 3  
E-Mail: abowman@coj.net

**OFFICE OF THE CITY COUNCIL**

117 West Duval Street  
City Hall, Suite 425  
Jacksonville, Florida 32202  
Office (904) 630-1386  
Fax (904) 630-2906  
TDD (904) 630-1580

**MEMORANDUM**

**To:** Honorable Council Members  
**From:** Aaron L. Bowman, Council President  
**CC:** Cheryl L. Brown, Director/Council Secretary  
**Date:** May 1, 2019  
**Re:** Council Invocations; Council Rules 1.201; 1.202, 1.106 and 4.202

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Following advice from counsel, I am providing guidance and seeking your procedural assistance in the implementation of the above rules.

The City Council for the consolidated City of Jacksonville has long maintained a tradition of solemnizing its proceedings by allowing for an opening invocation before each meeting, for the benefit and blessing of the Council. As the Supreme Court of the United States has stated, the practice of offering legislative invocations "is deeply embedded in the history and tradition of this country" and serves "the legitimate secular purpose of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." Marsh v. Chambers, 463 U.S. 783, 786 (1983); Lynch v. Donnelly, 465 U.S. 668, 693 (1984); accord, Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811, 1823 (2014)(noting the invocation's "place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage").

However, legislative invocations must not be exploited to proselytize or advance any one faith or belief, or to disparage any other faith or belief, and must not create the impression that the legislative body is affiliated, or intends to affiliate, with any particular

faith or belief.<sup>1</sup> In addition, an invocation should not include personal political views or partisan politics, should be free from sectarian controversies, and from any intimations pertaining to federal, state, or local policy. Keeping in mind these safeguards, and considering the legal authorities addressing this issue, the following steps should ensure that the Council's tradition of offering invocations at the beginning of its meetings complies with constitutional requirements:

- Each Council Member will be given the opportunity to select or to have the Council Secretary/Director select the person to give the invocation, subject to the constraints herein.
- The Chaplain of the Council (the "Chaplain") shall compile a list ("the Congregations List") of the religious congregations with an established presence in Jacksonville. A copy of the Congregations List shall be provided to the Council Secretary/ Director by the Chaplain.
- The Congregations List shall be compiled from information reasonably available in the phone book (the Yellow Pages) and on the Internet, information provided by local chambers of commerce, and written requests for inclusion submitted by established congregations to the Council Secretary/Director. The Congregations List shall also include the name of any chaplain who may serve one or more of the fire departments or law enforcement agencies of Jacksonville.
- The Council Secretary/Director shall keep the Congregations List as well as a record of the name of the person performing the invocation at each Council meeting and their religion denomination.
- The Congregations List shall be updated in November of each calendar year by the Chaplain.
- Any invitation extended by a Council Member shall specify that the opportunity to offer a legislative invocation must not be exploited to convert others to any particular faith, to advance any particular faith, or to disparage any other faith or belief.
- The length of the prayer should not exceed two (2) minutes.
- In addition, the Council Member making the invitation shall also specify that the invocation shall not be a basis for leveraging personal political views or partisan politics; nor shall it be a mechanism to discuss sectarian controversies or for any intimations concerning federal, state or local policy decision-making.
- The Chaplain shall ensure that no individual is scheduled to offer invocations at two

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<sup>1</sup> Recently, an invocation policy which excluded those who do not believe in monotheistic religion was found to violate the Fourteenth and First Amendments in Williamson v. Brevard County, 276 F. Supp. 3d 1260 (M.D. Fl. 2017).

consecutive meetings, or at more than three meetings in any calendar year.

- The Chaplain shall make every reasonable effort to avoid scheduling speakers from the same congregation at consecutive meetings.
- The Chaplain shall make every reasonable effort to ensure that a variety of faiths and beliefs are scheduled to offer legislative invocations.
- To the extent possible, within the above constraints, religious leaders who accept the invitation shall be accommodated on a first-come, first-serve basis.
- No member or employee of the Council, or any other person in attendance at the meeting, shall be required to participate in the legislative invocation.

In adopting this policy, it is recognized that legislative invocations are not a forum for the free exercise of personal, religious, or political beliefs, but rather a vehicle through which the Council itself, through selected speakers, seeks blessings and guidance in accomplishing its governmental work. Individuals remain free to pray on their own behalf, as their conscience requires.

Please do not hesitate to contact me if you have any questions or require additional information.

cc: Jason R. Gabriel, General Counsel  
Council Members