Nos. 17-15769, 18-10109

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DAVID WILLIAMSON, *et al.*,

Plaintiffs / Appellees / Cross-Appellants,

v.

BREVARD COUNTY,

Defendant / Appellant / Cross-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Middle District of Florida
Case No. 6:15-cv-01098-JA-DCI, Hon. John Antoon II

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to the persons listed in the initial brief of Defendant / Appellant / Cross-Appellee Brevard County, the following persons have an interest in the outcome of this appeal:

1. American Ethical Union

2. American Humanist Association

3. Anderson, Andy

4. Barfield, Jim

5. Fisher, Robin

6. Infantini, Trudie

7. Isnardi, Kristine

8. Lewis, Mary Bolin

9. Miller, Monica L.

10. Nelson, Chuck

11. Pritchett, Rita

12. Schverak, Christine M.

13. Smith, Curt

14. Tanner, Alison

15. Tobia, John

16. Unitarian Universalist Association

Plaintiffs / Appellees / Cross-Appellants certify that, to their knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

By: /s/ Alex J. Luchenitser Date: April 27, 2018
Alex J. Luchenitser
Counsel for Plaintiffs / Appellees / Cross-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs / Appellees / Cross-Appellants agree with Brevard County that oral argument should be heard in this case. It presents important constitutional issues: (1) whether a governmental body may exclude citizens from the opportunity to solemnize its meetings because they do not believe in God; and (2) whether governmental officials may direct citizens to rise for opening prayers at legislative meetings.

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County's Appeal

Defendant / Appellant / Cross-Appellee Brevard County's appeal concerns the constitutionality of a County policy that permits only people who believe in a monotheistic God—and not atheists, Humanists, and other nontheists—to open meetings of the County Board of County Commissioners with invocations. (*See* R. 83 ¶¶ 14, 136-37, 139.) Plaintiffs / Appellees / Cross-Appellants agree with the County's jurisdictional statement with respect to the County's appeal.

Plaintiffs add that they have standing—a matter that the County does not dispute before this Court—to challenge the policy at issue in the County's appeal, in three separate ways. First, Plaintiffs have been discriminated against by the County: Plaintiffs are five nontheist individuals and three nontheist organizations (*id.* ¶¶ 82, 85, 94); Plaintiffs have all requested opportunities to give opening invocations to the Board and have all been rejected because of their religious beliefs (*id.* ¶¶ 112-18, 129, 131, 133, 137, 139); and, as a result, the individual plaintiffs suffered emotional harm (R. 55-2 at A119-21 ¶¶ 31, 33-34, A130-31 ¶¶ 26-27, A142 ¶ 21, A155-56 ¶¶ 36-37, A163-64 ¶¶ 16-17, 19),

while the organizational plaintiffs suffered economic harm (*id.* at A121 ¶ 35, A131 ¶ 28, A156 ¶ 38; R. 55-9 at A1146-48). *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989); *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984); *Hassan v. City of New York*, 804 F.3d 277, 289-90 & n.1 (3d Cir. 2015). Second, two of the individual plaintiffs have attended Board meetings (R. 83 ¶ 107), all of the individual plaintiffs have watched meetings or meeting portions on television or the internet (*id.* ¶ 108), and all intend to attend meetings in the future (*id.* ¶ 109). *See Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1279-80 (11th Cir. 2008). Third, two of the individual plaintiffs pay property taxes to the County (R. 83 ¶ 84) that are used to support the County's discriminatory invocation practice (*id.* ¶¶ 46-48). *See Marsh v. Chambers*, 463 U.S. 783, 786 n.4 (1983); *Pelphrey*, 547 F.3d at 1280-81.

Plaintiffs' Cross-Appeal

Plaintiffs' cross-appeal concerns their claims that County Commissioners violated the Establishment Clause of the First Amendment to the U.S. Constitution and Article I, Section 3 of the Florida Constitution by directing audience members at Board meetings to rise for opening prayers. (R. 28 ¶¶ 302, 327.) The district court had

jurisdiction over the federal Establishment Clause claim under 28 U.S.C. §§ 1331 and 1343, and over the Florida constitutional claim under 28 U.S.C. § 1367. Plaintiffs have standing to challenge the directives to rise because two of the individual plaintiffs were subjected to such directives at Board meetings that they attended and therefore felt pressured and coerced to participate in prayer and excluded from the meetings (R. 55-2 at A117-18 ¶ 25, A120 ¶¶ 32-33, A155 ¶ 33; R. 83 ¶ 107), and because all five individual plaintiffs intend to attend Board meetings in the future (R. 83 ¶ 109). *See Lee v. Weisman*, 505 U.S. 577, 584, 593-94 (1992).

This Court has jurisdiction over the cross-appeal under 28 U.S.C. § 1291, as the cross-appeal is from a final judgment issued on November 29, 2017 (R. 115), disposing of all of Plaintiffs' claims. The County timely filed its notice of appeal on December 28, 2017 (R. 119), and Plaintiffs timely filed their notice of cross-appeal on January 10, 2018 (R. 123).

STATEMENT OF ISSUES

On appeal: Whether the U.S. and Florida Constitutions permit Brevard County to exclude citizens, on account of their lack of belief in God, from the opportunity to solemnize County Board meetings.

On cross-appeal: Whether the U.S. and Florida Constitutions permit the County's Commissioners to direct attendees of County Board meetings to rise for opening prayers.

STATEMENT OF THE CASE

Nature of the Case

Brevard County permits private citizens to open its Board's meetings with invocations, but only if they believe in a monotheistic God. (R. 83 ¶¶ 14, 136-37, 139.) The County has adopted a policy barring nontheists—atheists, Humanists, and others who do not believe in a deity—from presenting opening invocations. (*Id.* ¶ 139.) Plaintiffs challenge the County's discriminatory policy for selecting invocation-speakers under the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment to the U.S. Constitution; the Equal Protection Clause of the Fourteenth Amendment; and the Establishment (part of Article I, Section 3), No-Aid (another part of

Article I, Section 3), and Equal Protection (Article I, Section 2) Clauses of the Florida Constitution. (R. 28 ¶¶ 296-327.)

County Commissioners also direct audience members to rise for opening prayers at Board meetings. (R. 83 ¶ 67.) Plaintiffs challenge this practice as unconstitutionally coercive under the federal and Florida Establishment Clauses. (R. 28 ¶¶ 302, 327.)

Contrary to what the County suggests (Cty. Br. 2), Plaintiffs do not challenge any other aspects of the County's invocation practice. (*See* R. 28 ¶¶ 335-41.)

Course of Proceedings

Plaintiffs filed their complaint on July 7, 2015 (R. 1), and an amended complaint on August 19, 2015 (R. 28). With the benefit of a 301-paragraph stipulation of facts (R. 83), the district court decided this case on cross-motions for summary judgment on September 30, 2017, issuing a comprehensive, 69-page opinion (R. 105).

The court ruled that the County's discriminatory policy for selecting invocation-speakers violated all the constitutional clauses under which Plaintiffs sued, except for the Florida No-Aid Clause. (*Id.* at 49-50, 61-65, 68.) The court concluded that it was unconstitutional

for "[t]he County [to] define[ ] rights and opportunities of its citizens to participate in the ceremonial pre-meeting invocation during the County Board's regular meetings based on the citizens' religious beliefs." (*Id.* at 68.) Through the County's discriminatory policy, added the court, "religion has become . . . an instrument [of division] in Brevard County." (*Id.*)

On the other hand, the court granted summary judgment to the County on Plaintiffs' claim that the Commissioners' directives to rise for prayers were unconstitutionally coercive. (*Id.* at 55, 64-65.) The principal basis for this ruling was that the plaintiffs who attended Board meetings did not comply with these directives. (*See id.* at 53-55.)

On November 29, 2017, the court entered an agreed-upon (*see* R. 112-14) Final Judgment that enjoined the County from discriminating against nontheists in the selection of opening invocation-speakers or requiring theistic content in opening invocations. (R. 115 ¶ 6.) The court also awarded damages to Plaintiffs (R. 115 ¶ 7), per a partial settlement agreement on the amount of damages that Plaintiffs would receive if the County was found liable for a constitutional violation (R. 112-2).

Statement of Facts

A. Invocations at Board meetings.

The Brevard County Board of County Commissioners—which has five commissioners, each representing one of five districts—is the legislative and governing body of Brevard County. (R. 83 ¶¶ 2, 8.) The Board regularly holds meetings in its main boardroom to carry out its responsibilities. (*Id.* ¶ 10.) These meetings are open to the public, are carried live on cable television, and are available for viewing on the Board's website. (*Id.* ¶¶ 10, 12.)

The Board meetings typically open with an invocation, usually given by volunteer clerics. (*Id.* ¶¶ 14, 43.) The Board's purpose for the invocation "is recognition of the contribution of the faith-based community to the county." (*Id.* ¶ 199.) The invocation is listed on the official agenda for each meeting and occurs immediately after the call to order. (*Id.* ¶¶ 64-65.)

Commissioners take turns selecting speakers to deliver invocations, following a rotation system. (*Id.* ¶¶ 43-45, 200.) Commissioners use County resources funded with taxpayer dollars—such as email, mail, and phones—to invite and communicate with

invocation-speakers. (*Id.* ¶¶ 46-48.) At Board meetings, Commissioners typically introduce the invocation-speakers they select, and the invocation-speakers often then—in accordance with a Commissioner's instruction—spend up to a few minutes providing the audience with information about their house of worship and its activities before commencing their invocation. (*Id.* ¶¶ 66, 77.)

Of the 195 invocations given before the Board from January 1, 2010 through March 15, 2016, all but seven were given by Christians or contained Christian content. (*Id.* ¶ 53.) Six were given by Jews, and one was generically monotheistic. (*Id.* ¶ 54.) All the invocations had theistic content, though a few also had significant nontheistic sections. (*Id.* ¶¶ 60-63, 204.) Most of the invocations were delivered by ordained clergy who led houses of worship, but at least twenty were delivered by non-clergy (such as police officers, a judge, Commissioners' aides, and staff of a member of Congress), and at least fifteen were delivered by clergy who did not head a house of worship (such as chaplains for prisons, hospitals, schools, sports teams, and political organizations). (*Id.* ¶¶ 56-59.)

Occasionally, Commissioners have difficulty finding someone to give an opening invocation. (*Id.* ¶ 50.) Sometimes, as a result, a moment of silence is held in lieu of an invocation, or the invocation is given by Commissioners or members of the audience. (*Id.* ¶¶ 51, 203.)

B. Plaintiffs' desire to deliver invocations.

Plaintiffs are five individual nontheists and three nontheist organizations. (*Id.* ¶¶ 82, 94.) All five individual plaintiffs identify as atheists, and four also identify as Secular Humanists. (*Id.* ¶ 85.) As described by the American Humanist Association, "Humanism is a progressive philosophy of life" that "encompasses a variety of nontheistic views (atheism, agnosticism, rationalism, secularism, and so forth) while adding the important element of a comprehensive worldview and set of ethical values," which "affirm[ ] our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity." (*Id.* ¶¶ 86-87.) A document entitled Humanist Manifesto III sets forth a detailed statement of basic Humanist beliefs. (R. 55-3 at A310-11; R. 83 ¶¶ 89-90.)

The individual plaintiffs' atheistic and Humanist beliefs are strongly held and very important to them, having a place in their lives

equal to the significance that theistic beliefs have in the lives of Christians, Jews, and adherents of other monotheistic faiths. (R. 83 ¶ 91.) For example, the individual plaintiffs engage in community service based on their nontheistic beliefs, read and study seminal texts about their belief systems, follow leading authors of such texts, and have special days of the year on which they observe their beliefs. (*Id.* ¶ 102.) And all the individual plaintiffs view their atheistic or Humanist beliefs as a "religion" as defined under the law and for purposes of how they should be classified with respect to religion. (*Id.* ¶ 92.)

Three of the individual plaintiffs are ordained as Humanist clergy (in two cases as Humanist Celebrants, and in one case as a Humanist Celebrant and Chaplain) by the Humanist Society, an organization that is incorporated as a religious organization and recognized as such by the Internal Revenue Service. (R. 55-2 at A265; R. 55-3 at A299 (citing I.R.C. § 170(b)(1)(A)(i)); R. 83 ¶ 93.) As Humanist clergy, these plaintiffs have the same legal status as ministers of theistic religions, including the right to solemnize weddings. (R. 55-3 at A268, A270.)

The three organizational plaintiffs strive to create communities for nontheists in the Brevard County area. (R. 55-2 at A115 ¶ 18, A127

¶ 13, A150-51 ¶¶ 17-22; R. 83 ¶ 94.) Their members are principally atheists, agnostics, Humanists, and other nontheists. (R. 83 ¶ 95.) They regularly hold meetings at which their members discuss nontheistic beliefs and get to know other nontheists, educational and outreach events that teach about nontheism, community-service events, and celebratory events. (*Id.* ¶ 97.) In these ways the organizational plaintiffs play important roles in the lives of their members, similar to the roles that traditional theistic congregations play in their members' lives. (R. 55-2 at A117 ¶ 23, A128 ¶ 18, A151 ¶ 22.)

Four of the five individual plaintiffs are leaders of one or more of the organizational plaintiffs—they conduct meetings and events, lead discussions of nontheistic beliefs at meetings, organize community-service events, spearhead public outreach, and act as their organizations' principal contacts—thus serving roles similar to that of a congregational leader of a church or synagogue. (R. 83 ¶¶ 98-100.) The fifth individual plaintiff is a member of one of the organizational plaintiffs. (*Id.* ¶ 101.)

Many of the individual plaintiffs and organizational plaintiffs' members have suffered discrimination and negative treatment as a

result of their atheistic beliefs. (R. 55-2 at A114 ¶ 15, A126-28 ¶¶ 10, 16, A151 ¶ 21, A161 ¶ 8; R. 83 ¶ 106.) Indeed, nontheists across the United States face many forms of discrimination (*see* Ryan T. Cragun, et al., *On the Receiving End: Discrimination toward the Non-Religious in the United States*, 27 J. Contemp. Religion 105, 105, 111, 114 (2012), https://bit.ly/2IthU8U), even though the population of nontheists has been growing (*see, e.g.*, Pew Research Center, *America's Changing Religious Landscape* 4, 11, 50, 146 (2015), http://pewrsr.ch/1rfd46z), and nontheists have made important contributions to society in a wide variety of professions (R. 55-9 at A1138-45). *See also* Br. of *Amici Curiae* American Humanist Association, et al. ("AHA Br.") 16-24.

To benefit the Board, serve their community, and combat anti-atheist prejudice by demonstrating how nontheists can contribute to society, Plaintiffs would like to give opening invocations at Board meetings. (R. 83 ¶ 110.) Plaintiffs would deliver solemn and respectful invocations that do not proselytize or disparage any faith (R. 55-2 at A119 ¶¶ 28-30, A129-30 ¶¶ 22-24, A141 ¶¶ 18-19, A152-53 ¶¶ 25-27, A161-62 ¶¶ 10-11), similar to moving and inspiring invocations delivered by nontheists at many governmental meetings around the

country, which have invoked authorities or principles such as the Founding Fathers, the U.S. Constitution, democracy, equality, and justice (*id.* at A221-51; R. 83 ¶ 111). For example, one of the organizational plaintiffs' members recently delivered the following nontheistic invocation to the City Commission of Longwood, Florida:

> Thank you Mayor, Commission Members, Staff, and community members for the opportunity to offer opening words for tonight's meeting.
>
> This is a room in which there are many challenging debates, moments of tension, of frustration, and ideological division. This is also a room where we come to work together and where we have much more in common than we realize or remember during our discourse. And we all share the same potential for care, for compassion, for fear, for joy, for love.
>
> On this eve of the Winter Solstice, the year's darkest day, let's take a moment to reflect on a few examples of what we have to be thankful for. We have a safe city thanks to our hardworking police, firefighters, and paramedics looking out for our health and our security. We have children who are learning and growing because of our wonderful teachers who dedicate themselves to a brighter future. And we have a city that thrives because this commission and the city staff are dedicated to working together with the community.
>
> Carl Sagan once wrote, "For small creatures such as we, the vastness is bearable only through love."
>
> There is, in the political process, much to bear. In this room tonight, let us cherish and celebrate our shared humanness, our common capacity for reason and compassion and our love for Longwood and its place in Central Florida.

> No matter why or how you celebrate the change of season may you, your family, and friends be filled with hope for a bright future, and love for your neighbor.

(R. 55-2 at A224-25.)

C. The Board's rejection of Plaintiffs' requests.

Plaintiffs sent the Board a series of requests to give invocations, but the Board rejected all the requests, first in two letters, and then through a formal resolution. (R. 83 ¶¶ 112-40.) That resolution, No. 2015-101, enacted a Board policy that permits opening invocations "by persons from the faith-based community" only. (*Id.* ¶ 139.) Resolution 2015-101 further provided that "[s]ecular invocations" may be given only during the "Public Comment" segment of a Board meeting. (*Id.*) A half-hour Public Comment period—with each speaker limited to three minutes—occurs after the "Resolutions, Awards, and Presentations" and "Consent Agenda" segments of each meeting; any remaining public comment occurs after the conclusion of the meeting's published agenda. (*Id.* ¶¶ 142-44.)

Resolution 2015-101 explained that the Board's invocation practice "recogni[zes] . . . the traditional positive role faith-based monotheistic religions have historically played in the community." (*Id.* ¶

136.) The resolution further asserted that allowing nontheistic invocations "could be viewed as the Board['s] endorsement of Secular Humanist and Atheist principles" and "hostility toward monotheistic religions." (*Id.* ¶ 137.) To support its conclusions, the Board devoted most of the eleven-page resolution to a detailed dissection of the beliefs of Secular Humanists and organizations with which Plaintiffs are affiliated, depicting those groups in a negative manner. (R. 55-7 at A708-13; R. 83 ¶ 138.) Similarly, the Board's initial response-letter reasoned that the original requesting plaintiff "organization and its members do not share th[e] beliefs or values" of "a substantial body of Brevard constituents," including belief in "the highest spiritual authority." (R. 83 ¶ 117.)

In depositions, current and former Commissioners who voted for the Board's rejection of Plaintiffs' requests (*see id.* ¶¶ 115-17, 122-24, 132, 139, 150) made clear that they would also disallow invocations by other religious groups of which they disapprove: Some Commissioners testified that they would not allow opening invocations by deists, polytheists, Wiccans, Rastafarians, or anyone who does not subscribe to a monotheistic religion. (*Id.* ¶¶ 159, 164, 169, 175.) A Commissioner

who then chaired the Board explained that some of these groups would be rejected on the ground that their beliefs are not "representative of our community." (*Id.* ¶¶ 161, 164-65.) Commissioners further testified that they would examine more closely the beliefs of certain religious groups—including Hindus, Sikhs, Wiccans, polytheists, and Native American practitioners—to decide whether to permit them to give invocations. (*Id.* ¶¶ 160, 170, 176, 184; *see also id.* ¶¶ 166, 183.)

Commissioners also explained that the purpose of the Board's invocation practice is to promote Christianity or monotheism: A former Board chair testified that the invocation practice is a "long-standing tradition of honoring the Christian community" and that allowing nontheists to take part "would be a dishonor to the Christian community." (*Id.* ¶¶ 173-74; *accord* R. 55-7 at A885:2-3, A896:12-13, A898:3-20.) Another former Board chair agreed that "allowing Christian invocations show[s] the Board's support for Christianity." (R. 83 ¶¶ 167-68.) And the Commissioner who sponsored Resolution 2015-101 stated that "[t]he invocation is for worshipping the God that created us . . . [t]he one and only true God. The God of the Bible." (*Id.* ¶¶ 151, 153-54; *accord id.* ¶¶ 155-56.) He added that the Board's invocation practice

"endorses faith-based religions." (*Id.* ¶ 152; *see also* R. 55-7 at A753:10-23, A754:9-12.)

In addition, Commissioners made other statements, on social media and elsewhere, expressing favoritism toward Christianity and monotheism or hostility toward atheism and other minority religions. (R. 83 ¶¶ 157-58, 162-63, 177-81.) For example, the Commissioner who sponsored Resolution 2015-101 placed postings on Facebook calling Islam "a religion of hatred" and stating, "It's either 'One Nation Under God,' or bite my ass and just leave!" (*Id.* ¶¶ 151, 158.) A different Commissioner tweeted, concerning the invocations issue, "let each commish select a pastor . . . Atheist[s] do not count." (*Id.* ¶ 163.) And another Commissioner mocked atheism on Facebook with the following post:

> **Atheism**
>
> The belief there was once absolutely nothing. And nothing happened to the nothing until the nothing magically exploded (for no reason), creating everything and everywhere. Then a bunch of the exploded everything magically rearranged itself (for no reason whatsoever), into self-replicating bits which then turned into dinosaurs.
>
> **And they mock your beliefs.**

(*Id.* ¶ 181.)

Commissioners also agreed with views set forth in emails from constituents that understood the Board's invocation policy as promoting Christianity or monotheism. (*Id.* ¶¶ 185-89.) For instance, four Commissioners agreed with an email stating, "I fully support the policy of asking God to bless our meetings. The Bible is the only book that identifies who the God of creation is. I personally do not know who [nontheists] are going to ask to bless the meetings[,] for all other God[s] would not be a blessing." (*Id.* ¶ 187.) Two Commissioners who chaired the Board agreed with an email lauding them for "standing firm [t]o [up]hold Christian values in our community." (*Id.* ¶ 188.) And one Commissioner agreed with an email praising him as "a faithful Christian soldier." (*Id.* ¶ 189.) The Commissioners received many such emails from supporters of their policy (R. 55-8/55-9 at A1064-1113; R. 83 ¶¶ 185, 276-77), as well as a good number of emails from opponents who understood the policy as communicating official disapproval of atheism (R. 55-9 at A1115-36; R. 83 ¶ 190).

D. The Board's directives to stand for invocations.

At Board meetings, a Commissioner typically directs the audience to rise for the invocation. (R. 55-4 at A372-526; R. 55-7 at A859:9-16,

A913:1-11; *see also* R. 83 ¶ 67; R. 105 at 53 n.29.) The audience is asked to stand out of respect for the religion of the invocation-speaker. (R. 83 ¶ 68.) Sometimes the Board chair stands up without verbally asking others to do so. (*Id.* ¶ 69.) Either way, all the Commissioners stand for the invocation, and all audience members typically do so. (*Id.* ¶¶ 70-71.) Commissioners notice when audience members do not stand. (R. 55-7 at A732:5-7, A779:9-14, A820:12-21, A860:15-18, A888:15-18, A936:25-937:2.)

Commissioners give their directives to rise for prayer in an intimate, coercive environment: The boardroom is small, with approximately 196 seats in eleven rows for the audience. (R. 83 ¶¶ 18, 22-23.) Typically, approximately twenty-five people attend Board meetings, but sometimes fewer than ten do. (R. 55-7 at A850:14-23, A881:10-15, A907:3-7; R. 83 ¶ 27.) The Commissioners sit on a raised platform, facing the audience. (R. 83 ¶¶ 19-21.) People can see and hear each other from one end of the boardroom to the other. (*Id.* ¶¶ 25-26.)

Commissioners sometimes talk to members of the public in the boardroom before meetings begin. (*Id.* ¶ 28.) The Board sometimes considers and votes on matters that affect only one person or a small

group of people, such as zoning changes, liquor licenses, and easements. (*Id.* ¶¶ 30-33.) People affected may present public comments before the Board votes. (*Id.* ¶ 34.) Children and County employees sometimes attend Board meetings to be honored or to support an honoree during the "Resolutions, Awards, and Presentations" segment of the meetings—which occurs shortly after the invocation—and those children or employees are typically in the boardroom during the invocation. (*Id.* ¶¶ 35-42.) Indeed, a County employee wrote that he feels that he is expected to pray during the invocation. (R. 55-7 at A1004.)

Two plaintiffs have attended Board meetings where they were directed to rise for invocations. (R. 55-2 at A117-18 ¶ 25, A155 ¶ 33; R. 83 ¶ 107.) They felt pressured to participate in prayer and excluded from the meetings by these directives. (R. 55-2 at A120 ¶ 32, A155 ¶ 33.) One received disapproving looks from audience members when he remained seated while nearly everyone around him was standing. (*Id.* at A120 ¶ 32.) The other three individual plaintiffs have watched Board meetings or portions on television or the internet, and all five intend to attend Board meetings in the future. (R. 83 ¶¶ 108-09.)

Standard of Review

As this case was decided on cross-motions for summary judgment, the standard of review for all issues presented is *de novo*. *See, e.g.*, *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005).

SUMMARY OF ARGUMENT

The district court correctly held that Brevard County's discriminatory policy for selecting invocation-speakers violates the U.S. and Florida Constitutions in numerous ways.

First, the policy violates the Establishment Clause of the First Amendment. The Supreme Court and this Court have both held that the Establishment Clause prohibits governmental bodies from discriminating based on religion in deciding who may give opening invocations. The County's policy does exactly that. The Supreme Court and this Court have ruled that atheism and Humanism are religions protected from governmental discrimination. Even if they were not to be treated as such, the Establishment Clause prohibits government from favoring the religious over nonbelievers, and the County's policy plainly violates that principle.

The Commissioners' purpose of promoting monotheism and their hostility toward atheism compound the discrimination inherent in the County's policy. What is more, the policy excessively entangles the Board in religion, because it arises from and results in impermissible religious judgments and inquiries.

The County's defenses to the Establishment Clause claim lack merit. An invocation need not be theistic, as the Supreme Court has recognized. Plaintiffs have sworn not to give proselytizing or disparaging invocations. "Separate but equal" arrangements akin to the County's relegation of nontheists to the Public Comment segment of meetings have long been condemned, and Public Comment is far from equal to the opening invocation in any event. And historical analysis cannot support the County's discrimination.

In addition, the County's discriminatory policy violates six other constitutional clauses. The First Amendment's Free Exercise Clause prohibits governmental bodies from conditioning participation in governmental activities on adoption or profession of any religious belief, and the Amendment's Free Speech Clause more generally prohibits government from conditioning such participation on a person's beliefs or

affiliations. Yet the County is conditioning participation in the governmental function of solemnizing public meetings on profession of belief in God, excluding Plaintiffs on account of their nontheistic beliefs and affiliations. The Fourteenth Amendment's Equal Protection Clause prohibits government from treating citizens differently based on their religious beliefs except when necessary to further a compelling interest, and the County has no such interest. Florida's Establishment and Equal Protection Clauses contain prohibitions similar to those of their federal counterparts, and Florida's No-Aid Clause prohibits use of tax funds to preferentially advance particular religions; the County is violating the Florida clauses as well.

Finally, the Commissioners' practice of directing Board-meeting attendees to rise for prayers violates the U.S. and Florida Constitutions' Establishment Clauses by coercing audience members to participate in religious exercises. The district court erred in rejecting these claims based on the attending plaintiffs' failure to comply with these directives. The Supreme Court has made clear that the Establishment Clause prohibits government from calling on citizens to take part in prayer, not just physically compelling them to do so.

ARGUMENT

I. The County's invocation-speaker-selection policy is unconstitutional.

A. The policy violates the Establishment Clause.

The County's policy for selecting invocation-speakers violates the Establishment Clause in two principal ways. First, the policy discriminates based on religion. Second, the policy entangles the Board in religious judgments and inquiries.

1. The County is discriminating based on religion.

a. Religious discrimination in invocation-speaker selection is prohibited.

The district court correctly ruled that the County's invocation-speaker-selection policy violates the Establishment Clause by discriminating against nontheists. (R. 105 at 49.) The Supreme Court has repeatedly emphasized that the Establishment Clause prohibits governmental bodies from discriminating based on religion: "[T]he 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.' " *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). "The clearest command of the Establishment

Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). "[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause." *McCreary*, 545 U.S. at 875-76.

The Supreme Court has reiterated this antidiscrimination principle in its legislative-prayer decisions. In *Town of Greece v. Galloway*, which upheld a town board's policy of opening meetings with invocations that contained references to particular faiths, the Court emphasized that the town's "leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation." 134 S. Ct. 1811, 1816 (2014); *accord id.* at 1824. The Court made clear that government must "maintain[ ] a policy of nondiscrimination" in deciding who may present invocations, and that the selection of invocation-speakers must "not reflect an aversion or bias on the part of [governmental] leaders against minority faiths." *Id.* at 1824; *see also id.* at 1826 (plurality opinion[1]) ("A practice that classified citizens based on their religious views would violate the

[1] The plurality section of the *Greece* opinion represents controlling precedent. *See infra* at 75-76 n.7.

Constitution . . . ."); *id.* at 1831 (Alito, J., concurring) ("I would view this case very differently if" minority faiths had been omitted "intentional[ly]" rather than "careless[ly]"). Similarly, in *Marsh v. Chambers*, 463 U.S. 783, 793-94 (1983), the Court warned that a legislature's choice of a legislative chaplain must not "stem[ ] from an impermissible motive" to "giv[e] preference to his religious views."

Following this principle, in *Pelphrey v. Cobb County*, 547 F.3d 1263, 1281-82 (11th Cir. 2008), this Court held that a county commission violated the Establishment Clause by removing Jews, Muslims, Jehovah's Witnesses, and Mormons from a list that it used to select invocation-speakers. This Court explained that the Clause "prohibits purposeful discrimination"—"the selection of invocational speakers based on an 'impermissible motive' to prefer certain beliefs over others." *Id.* at 1278, 1281 (quoting *Marsh*, 463 U.S. at 793). "[T]he categorical exclusion of certain faiths based on their beliefs is unconstitutional," emphasized the Court. *Id.* at 1282; *accord Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 591 (11th Cir. 2013).

b. Plaintiffs' belief systems are religions protected by the Establishment Clause's anti-discrimination principle.

The County policy barring atheists and Secular Humanists from giving opening invocations facially violates the Establishment Clause's prohibition against religious discrimination in the selection of invocation-speakers. As the district court recognized (R. 105 at 34-35), and as the County conceded at oral argument (R. 93 at 77:19-23), atheism and Secular Humanism are religions protected by the Establishment Clause.

In *Torcaso v. Watkins*, 367 U.S. 488, 495 & n.11 (1961), the Supreme Court held that government must not "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs," and the Court specifically identified Secular Humanism as "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God." Likewise, rejecting a proposed definition of religion that "presupposes a belief in God," this Court held in *Glassroth v. Moore*, 335 F.3d 1282, 1294-95 (11th Cir. 2003), that "for First Amendment purposes religion includes non-Christian faiths and those that do not

profess belief in the Judeo-Christian God; indeed, it includes the lack of any faith." *Accord Theriault v. Silber*, 547 F.2d 1279, 1281 (5th Cir. 1977[2]) (holding that definition of "religion" that excludes atheism or agnosticism is "too narrow" for Free Exercise and Establishment Clause purposes). Other courts have agreed that atheism (*Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003)), Humanism (*Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014); *Fellowship of Humanity v. Alameda Cty.*, 315 P.2d 394, 396-98, 406 (Cal. Dist. Ct. App. 1957); *Strayhorn v. Ethical Soc'y of Austin*, 110 S.W.3d 458, 468-72 (Tex. App. 2003)), and other nontheistic belief systems (*United States v. Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983); *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981); *Wash. Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957)) are religions for purposes of the Constitution, civil-rights laws, and tax laws. *See also* AHA Br. 3-12.

[2] Fifth Circuit decisions issued before October 1981 are precedent in this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Federal agencies also recognize Humanism and atheism as religions. For example, the Department of Defense recognizes atheism and Humanism as "faith groups" for servicemembers. Memorandum from Lernes J. Hebert, Acting Deputy Assistant Sec'y of Def. for Military Pers. Policy, to various Dep't of Def. officials 1, 6-7 (Mar. 27, 2017), http://bit.ly/2qk8vYu. The Department of Veterans Affairs recognizes atheist and Humanist symbols as "emblems of belief" available for placement on government-furnished headstones for deceased veterans. *Available Emblems of Belief for Placement on Government Headstones and Markers*, National Cemetery Administration, http://1.usa.gov/1ElvZM8 (last visited Apr. 25, 2018). The Bureau of Prisons recognizes Humanism as a religious preference for inmates. Steven DuBois, *Federal Prisons Agree to Recognize Humanism as Religion*, AP (July 28, 2015), http://bit.ly/2EANnnJ; *see also* AHA Br. 14-15. And the I.R.S. recognizes the Humanist Society—which ordained three of the plaintiffs as Humanist clergy (R. 83 ¶ 93)—as a religious organization (*see* R. 55-3 at A299 (citing I.R.C. § 170(b)(1)(A)(i))).

Indeed, Plaintiffs' belief systems and practices have numerous similarities to those of traditional theistic religions (*see supra* at 9-11; R. 55-2 at A108-17, A123-28, A134-40, A144-52, A160-61; R. 83 ¶¶ 86-102; *see also* AHA Br. 13-14); the main difference is that Plaintiffs look to reason, science, and ethics instead of theistic principles as authorities (R. 83 ¶¶ 85-87, 90). The district court thus correctly ruled that by "intentionally discriminating against potential invocation-givers based on their beliefs, the County runs afoul of the Establishment Clause." (R. 105 at 49.) *See also Fields v. Speaker of the Pa. House of Representatives*, 251 F. Supp. 3d 772, 789 (M.D. Pa. 2017) (denying motion to dismiss case substantially similar to this one).

c. Even if Plaintiffs' belief systems were not religions, government may not favor religion over nonreligion.

But even if atheism and Humanism were not considered to be religions, the County's discriminatory policy would still be unconstitutional. "The First Amendment mandates governmental neutrality . . . between religion and nonreligion" (*Epperson*, 393 U.S. at 104); "the government may not favor . . . religion over irreligion" (*McCreary*, 545 U.S. at 875). For instance, in *Texas Monthly, Inc. v.*

Bullock, 489 U.S. 1, 14-15 (1989), the Supreme Court struck down a sales-tax exemption for religious periodicals because it was denied to nonreligious publications. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 & n.9 (1985), the Court invalidated a law that gave religious adherents an unqualified right not to work on their Sabbaths, in part because the law did not give nonreligious employees any comparable right. In other words, governmental bodies cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers." *Torcaso*, 367 U.S. at 495.

Contrary to what the County contends (Cty. Br. 31), this principle applies with full force to the selection of invocation-speakers. In *Greece*, the Supreme Court rejected the proposition that legislative-prayer practices are immune from general Establishment Clause rules and are to be measured solely against historical tradition. The Court cautioned that its legislative-prayer precedents "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." 134 S. Ct. at 1819; *see also infra* at 51, 57-58. The Court then cited cases concerning other Establishment Clause issues to support its ruling that governmental bodies must not

discriminate based on religion when selecting invocation-speakers (*see supra* at 25-26), as well as two rulings we discuss in sections I(A)(2) and II below: that government must not become entangled in religious judgments when implementing an invocation practice, and that government must not coerce people to participate in invocations. *See Greece*, 134 S. Ct. at 1822, 1825-26 (plurality opinion at 1825-26) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso*, 367 U.S. 488).

Indeed, in *Greece* the Court emphasized that the "purpose and effect" of a legislative-invocation practice must not be "to exclude or coerce nonbelievers." *Id.* at 1827 (plurality opinion). Thus, whether or not their beliefs are considered "religions," the County violates the Establishment Clause's neutrality rules by prohibiting opening invocations from people who do not believe in God.

d. The Board's purpose to promote monotheism and its hostility toward atheism compound the discrimination inherent in the County's policy.

Because the County's policy expressly draws religious lines to determine eligibility to deliver opening invocations, the facts here are

diametrically different from those in *Greece*, where the Court concluded that a facially neutral policy for selecting invocation-speakers did not violate the Establishment Clause just because—reflecting the composition of the community—the vast majority of invocation-speakers happened to be Christian. *See id.* at 1824; *cf.* Cty. Br. 32. The "categorical exclusion" (*Pelphrey*, 547 F.3d at 1282) of nontheists here renders the County's policy facially unconstitutional and is enough to end the analysis. That said, legislative-invocation practices also must not "betray an impermissible governmental purpose" of "proselytiz[ing]" or "denigrat[ing]" any belief system. *See Greece*, 134 S. Ct. at 1824; *accord Marsh*, 463 U.S. at 793. The County's facial discrimination is compounded here by what the district court described as "overwhelming evidence of . . . 'impermissible purpose.' " (R. 105 at 26; *accord id.* at 34.)

For instance, Board Resolution 2015-101, which enacted the County's discriminatory policy, praised "faith-based monotheistic religions" (R. 83 ¶ 136) and depicted Humanism negatively (R. 55-7 at A708-13). The Commissioners who chaired the Board when it rejected Plaintiffs' applications to solemnize its meetings testified that the Board's invocation practice "honor[s] the Christian community" and

"show[s] the Board's support for Christianity," and that allowing nontheists to take part "would be a dishonor to the Christian community." (R. 83 ¶¶ 167-68, 173-74.) Similarly, the Commissioner who sponsored Resolution 2015-101 said that the invocation practice "endorses faith-based religions," adding, "[t]he invocation is for worshiping the God that created us . . . [t]he one and only true God. The God of the Bible." (R. 83 ¶¶ 151-54.)

The Commissioners further made posts on social media exhibiting hostility toward atheism, such as, "It's either 'One Nation Under God,' or bite my ass and just leave!"; "let each commish select a pastor . . . Atheist[s] do not count"; and a longer post ridiculing atheism for denying that there was an intelligent force behind the creation of the universe. (*Id.* ¶¶ 158, 163, 181.) Additional evidence of the Commissioners' "impermissible motive" (*Marsh*, 463 U.S. at 793) of favoring Christianity or monotheism and disfavoring atheism and other minority religions is discussed above at 14-18, in the parties' stipulation

of facts (*see* R. 83 ¶¶ 136-37, 155-91, 199), and in the district court's opinion (*see* R. 105 at 28-34).[3]

e. The County is also compounding the unconstitutional discrimination by using tax dollars to support it.

The County's discriminatory policy violates two plaintiffs' rights not only by denying them opportunities to present opening invocations, but also because the County is using those plaintiffs' tax dollars to support a discriminatory practice. (R. 83 ¶¶ 46-48, 84.) The Supreme Court has held that tax dollars must not be spent in a religiously discriminatory manner (*see, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 231-32 (1997)), and this Court accordingly held that the discriminatory invocation practice in *Pelphrey* violated the rights of taxpayers who were forced to fund it (*see* 547 F.3d at 1279-82).

[3] The Supreme Court and this Court have repeatedly relied on statements of individual legislators, made in a variety of contexts, as evidence of impermissible purpose in Establishment Clause cases. *See Edwards v. Aguillard*, 482 U.S. 578, 591-92 & n.13 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56-57 (1985); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1531-34 (11th Cir. 1993).

2. The County has entangled itself in theological judgments.

The County's invocation-speaker-selection policy violates one other Establishment Clause principle: Governmental bodies must not become excessively entangled with religion, including through inquiries into or judgments about religious matters. *See, e.g.*, *Hernandez v. Comm'r*, 490 U.S. 680, 696-97 (1989); *Lemon v. Kurtzman*, 403 U.S. 602, 613, 621-22 (1971). Contrary to what the County contends (Cty. Br. 36), this principle applies in the legislative-prayer context, as *Greece* made clear in rejecting a claim that legislative prayers must be nonsectarian. *See* 134 S. Ct. at 1822. The Court explained that a nonsectarianism requirement would cause public officials to become "supervisors and censors of religious speech" and thus would improperly "involve government in religious matters." *Id.* Similarly, the Court held that towns cannot—"[s]o long as [they] maintain[ ] a policy of nondiscrimination"—be forced to reach beyond their borders "to promote 'a "diversity" of religious views' " at invocations, for this would require towns " 'to make wholly inappropriate judgments about the number of religions [they] should sponsor and the relative frequency

with which [they] should sponsor each.' " *Id.* at 1824 (quoting *Lee*, 505 U.S. at 617 (Souter, J., concurring)).

The County's invocation policy is a product of just such impermissible judgments. Resolution 2015-101 premised its conclusions on a five-page dissection of the beliefs of Secular Humanists and organizations with which Plaintiffs are affiliated (R. 55-7 at A708-13; R. 83 ¶ 138), and followed a letter that rejected Plaintiffs' requests to deliver invocations on the grounds that Plaintiffs did "not share . . . beliefs or values" of "a substantial body of Brevard constituents" (R. 83 ¶ 117). Similarly, Commissioners testified that they would prohibit various minority religions from presenting invocations (*id.* ¶¶ 159, 164, 169, 175)—because those groups' beliefs are not "representative of our community" (*id.* ¶ 165)—and that they would closely examine the beliefs of other groups to determine whether to give permission (*id.* ¶¶ 160, 170, 176, 184). Such a quest for "religious orthodoxy" "acceptable to the majority" is wholly antithetical to the Establishment Clause. *See Greece*, 134 S. Ct. at 1822.

As the district court held, the County "is clearly entangling itself in religion by vetting the beliefs of those groups with whom it is

unfamiliar before deciding whether to grant permission to give invocations." (R. 105 at 50.) And by requiring that opening invocations be "faith-based" (R. 55-7 at A705), not "Secular Humanist or atheistic" (*id.* at A715 ¶ 39), the County is unconstitutionally "prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief." *See Greece*, 134 S. Ct. at 1822. Indeed, any effort to distinguish "faith-based" invocations from "atheistic" ones could be as "difficult[ ]," "futil[e]," and unconstitutional as the inquiries into whether prayers are sectarian that *Greece* held to be improper. *See id.* For example, some invocations, such as two recently given to the U.S. House of Representatives, do not expressly reference a divine entity but could be construed—or not, depending on the listener—as implicitly addressing one. *See* 161 Cong. Rec. H5878 (daily ed. Sept. 10, 2015); 161 Cong. Rec. H2825 (daily ed. May 12, 2015).

What is more, the County's conduct has resulted in "the very divisions along religious lines that the Establishment Clause seeks to prevent." *See Greece*, 134 S. Ct. at 1819; *accord McCreary*, 545 U.S. at 876. The Board received many emails in response to its exclusion of nontheists; monotheists who supported the policy understood it as

promoting their beliefs, while nontheists who opposed it understood it as disapproving of theirs. (R. 55-8/55-9 at A1064-1136; R. 83 ¶¶ 185-90, 276-77.) To both groups, the policy marks nontheists as " 'outsiders, not full members of the political community.' " *See McCreary*, 545 U.S. at 860 (quoting *Santa Fe*, 530 U.S. at 309).

3. The County's defenses to the Establishment Clause claim are meritless.

The County puts forward four principal defenses to Plaintiffs' Establishment Clause claim, contending that: (a) legislative invocations must be theistic; (b) Plaintiffs would give improper invocations; (c) Plaintiffs may give "invocations" during Public Comment; and (d) historical practice justifies excluding Plaintiffs. None of these arguments has merit.

a. Legislative invocations need not be theistic.

The County contends that it can exclude nontheists because invocations and prayers must by definition be theistic. (Cty. Br. 29-31.) That is not so. Dictionary definitions and case law confirm that an "invocation" or "prayer"—words that *Greece* used interchangeably (*see* 134 S. Ct. at 1816-27)—need not be theistic.

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 or process of petitioning for help or support." *Invocation*, Merriam-Webster, http://bit.ly/1Rua0bP (last updated Apr. 17, 2018). 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 (last visited Apr. 25, 2018).

"Prayer" isn't necessarily theistic either. It may be "an earnest request or wish." *See Prayer*, Merriam-Webster, http://bit.ly/1TLTnyb (last visited Apr. 25, 2018); *accord Prayer*, Oxford Dictionaries, http://bit.ly/1sdhYkU (last visited Apr. 25, 2018) ("an earnest hope or wish."). Or it may be "a request for specific relief." *See Prayer for Relief*, Black's Law Dictionary.

Consistent with these definitions, although the Court in *Greece* sometimes described legislative prayers in theistic terms, it recognized that they may be nontheistic. Under the Town of Greece's policy, emphasized the Court, "an atheist[ ] could give the invocation." 134 S. Ct. at 1816; *accord id.* at 1826 (plurality opinion) ("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"); *see also Bormuth v. Cty. of Jackson*, 870 F.3d 494, 514 (6th Cir. 2017) (en banc) (upholding legislative-prayer "policy permit[ting] prayers of any—or no—faith") (emphasis omitted), *petition for cert. docketed*, No. 17-7220 (Dec. 29, 2017); *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532, 1534 (M.D. Fla.) (concluding that city resolution designating "day of non-denominational prayer" encompassed nonreligious "earnest[ ] request[s]"), *aff'd mem.*, 880 F.2d 420 (11th Cir. 1989).

Thus, in describing the "constraints . . . on [the] content" of legislative invocations, the *Greece* Court did not include any requirement that they be theistic. 134 S. Ct. 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*, 463 U.S. at 794-95).

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.* And while "religious themes provide particular means to [such] universal ends," appropriate invocations may instead "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). Plaintiffs want to give invocations that call on the kinds of nontheistic authorities and values approved of in *Greece*—such as the Constitution, democracy, equality, cooperation, fairness, and justice (R. 55-2 at A119 ¶ 30, A130 ¶ 24, A141 ¶ 19, A153 ¶ 27, A162 ¶ 11)—similarly to invocations delivered by nontheists before many governmental bodies around the country (*id.* at A221-51; R. 83 ¶ 111; *see also* AHA Br. 26-28).

The County points out (Cty. Br. 29) that in *Santa Fe*, 530 U.S. at 306-07, 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*, 505 U.S. 577—the Court noted that a "*religious* invocation" is the kind that is unconstitutionally coercive in the public-school context. 134 S. Ct. at 1827 (plurality opinion) (emphasis added).

The County relies (Cty. Br. 31-32) on a statement in *Coleman v. Hamilton County*, 104 F. Supp. 3d 877, 890 (E.D. Tenn. 2015), that "[p]rayer, by its very definition, is religious in nature." That assertion is incorrect for the reasons given above. It is also dictum. *Coleman* upheld a policy that required invocation-speakers to be clergy affiliated with an "established assembly or congregation" against a challenge by an individual who was not. *Id.* at 880-81, 888. But that policy prohibited excluding any assembly or congregation "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); and it permitted not only "prayer[s]" but also

"short solemnizing message[s]" (*Jones v. Hamilton Cty. Gov't*, 530 F. App'x 478, 488 (6th Cir. 2013) (earlier opinion in same case)). Unlike in *Coleman*, here the County *prohibits* opening invocations from people with nontheistic perspectives (R. 183 ¶ 139), the County *does not* require that the invocations be given by clergy or leaders of houses of worship (*id.* ¶¶ 56-59), four of the plaintiffs *are* leaders of nontheistic congregations or assemblies (*id.* ¶¶ 94-100), and three of them *are* ordained Humanist clergy (*id.* ¶ 93).

These facts also make this case very different from another decision on which the County significantly relies (Cty. Br. 29-30), *Barker v. Conroy*, 282 F. Supp. 3d 346, 351 (D.D.C. 2017), *appeal docketed*, No. 17-5278 (D.C. Cir. Dec. 20, 2017), in which a policy of the U.S. House of Representatives required guest chaplains to be clergy ordained in the religion they want to represent, but the proposed nontheist guest chaplain was ordained in a theistic religion that he no longer practiced. Even though that was the only reason that the House provided for denying the nontheist's application, and despite concluding that the nontheist lacked standing, the *Barker* court proceeded to a cursory merits analysis that suggested—in part based on the erroneous

assumption that prayers must be theistic—that the House could generally exclude nontheist invocation-speakers. *See id.* at 351, 359-60, 363-65.

In addition, the *Barker* decision, which is now on appeal, treated the case as "a challenge to the ability of Congress to open with a [theistic] prayer." *Id.* at 364. Here, Plaintiffs have all 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. (R. 60-1 at A1152 ¶¶ 1-2, A1155 ¶¶ 1-2, A1158 ¶¶ 1-2, A1161 ¶¶ 1-2, A1164-65 ¶¶ 1, 3; *accord id.* at A1175:11-1176:8.) None of the statements that the County cites in arguing that Plaintiffs have a different motive was made by any of the plaintiffs themselves, with the exception of some statements by plaintiff David Williamson. (*See* Cty. Br. 14-15, 33.) And although Mr. Williamson had in the past advocated against inclusion of invocations at legislative meetings, his goals evolved after *Greece* confirmed the legality of such invocations, and he and his organization, plaintiff Central Florida Freethought Community, now advocate for equal opportunity for nontheists to be invocation-speakers. (R. 60-1 at A1164-65 ¶¶ 2-3, A1171-72, A1184:7-12.)

b. Plaintiffs' invocations would not be proselytizing or disparaging.

The County asserts (Cty. Br. 35-36) that it can prohibit Plaintiffs from delivering opening invocations because *Greece* requires governmental bodies to ensure that invocations do not proselytize or disparage any faith (134 S. Ct. at 1823). As with its unfounded contention that Plaintiffs want to end invocations, the County argues that Plaintiffs would give 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 that are critical of theistic religions, and because some invocations given by other nontheists (likewise not parties) have allegedly been proselytizing or disparaging. (*See* Cty. Br. 13-17, 20, 52, 54.) For example, the County relies on allegedly improper invocations that appear on a Central Florida Freethought Community webpage that collects secular invocations (Cty. Br. 15-16), even though inclusion of an invocation on that page does not mean that the Freethought Community approved or was involved with the invocation (R. 60-1 at A1166 ¶ 7).

Such guilt-by-association speculation cannot justify the County's discriminatory policy or (*cf.* Cty. Br. 37) inquiries into the religious beliefs of proposed invocation-speakers. To begin with, Plaintiffs have all twice declared under penalty of perjury that their invocations will not be proselytizing or disparaging and will comply with the other requirements of *Greece*, 134 S. Ct. at 1823. (R. 55-2 at A119 ¶ 28, A129 ¶ 22, A141 ¶ 18, A152-53 ¶ 25, A161-62 ¶ 10; R. 60-1 at A1152-53 ¶¶ 3-6, A1155-56 ¶¶ 3-6, A1158-59 ¶¶ 3-5, A1161-62 ¶¶ 3-5, A1165-67 ¶¶ 4-9; *accord id.* at A1177:25-1178:2, A1181:8-11, A1183:23-25.) Furthermore, it is not uncommon for theistic clergy to make statements that proselytize their faith or disparage another in their sermons or writings—as many of the County's theistic invocation-speakers have (*see* R. 83 ¶¶ 283-301)—but that does not mean that they would make such statements during a legislative invocation. Excluding Plaintiffs based on statements of their associates—while (appropriately) ignoring proselytizing or disparaging statements made by theistic invocation-speakers themselves to their congregations—only underscores the discriminatory nature of the County's practice.

In any event, the County can protect its interest in ensuring that invocation-speakers do not proselytize or disparage simply by instructing speakers in advance not to do so. And if a speaker disregards that instruction the County can, as the district court noted (R. 105 at 48), refrain from inviting the speaker to return.

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

The County contends (Cty. Br. 32-33) that prohibiting nontheists from giving opening invocations is constitutional because the County allows nontheists to give "invocations" during Public Comment sections of Board meetings. But arguments that "separate but equal" treatment does not constitute discrimination have long been "thoroughly discredited." *E.g.*, *Watson v. City of Memphis*, 373 U.S. 526, 538 (1963).

Moreover, allowing theists to give invocations at the beginning of meetings while relegating nontheists to Public Comment is far from equal. The "place" of legislative invocations is "at the opening of legislative sessions." *Greece*, 134 S. Ct. at 1823. The opening invocation is a ceremonial part of Board meetings that takes place directly after the call to order (R. 83 ¶ 64) so that it may solemnize what is to come. A

Commissioner 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. (*Id.* ¶¶ 77, 200.) All Commissioners stand for the invocation out of respect for the speaker's beliefs, and all audience members typically stand as well. (*Id.* ¶¶ 68, 70-71.) Invocation-speakers may take as long as five minutes for their presentations. (*Id.* ¶ 136 § 6.) After the invocation, a Commissioner typically thanks the invocation-speaker. (*Id.* ¶ 79.)

In contrast, Public Comment commences after completion of the invocation, Pledge of Allegiance, "Resolutions, Awards, and Presentations," and "Consent Agenda" segments of Board meetings. (*Id.* ¶¶ 35, 142, 198.) By that time, some members of the audience have left. (*Id.* ¶ 145.) Each Public Comment speaker is limited to three minutes, and the speakers are heard based on the order in which they turn in sign-up cards. (R. 55-5 at A591 § 8.1; R. 83 ¶ 144.) If Public Comment cannot be completed within a half-hour, a second Public Comment segment is held at the end of the meeting, after most of the audience typically has left. (R. 83 ¶¶ 143, 146.)

Furthermore, Public Comment is often far from solemn: Speakers discuss topics such as the County's feral-cat policy, the naming of streets, and governmental conspiracy theories; "[a]s a practical matter, there are no restrictions on what is said." (*Id.* ¶ 147.) Commissioners would not rise for a nontheistic invocation during Public Comment or ask the audience to do so. (R. 55-7 at A778:15-25, A860:5-12, A914:14-19.)

And the Board would allow Christian prayers during Public Comment, should speakers wish to offer them. (R. 83 ¶ 148.) 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 segment 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).

d. History cannot justify the County's discriminatory policy.

The County occasionally appeals to history and tradition (Cty. Br. 10, 23, 26, 34-35) but does not present any significant or proper analysis

of the pertinent history. In fact, history provides no defense for the County's discrimination.

To begin with, as noted above, the Supreme Court has cautioned that its legislative-prayer precedents "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Greece*, 134 S. Ct. at 1819. "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh*, 463 U.S. at 790. Rather, the Court's decisions to uphold opening invocations at legislative sessions 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 has reasoned that because the First Congress enacted a congressional chaplaincy the same week that it approved the First Amendment, the Amendment's framers must have believed that the Establishment Clause permits legislative invocations. *Id.* at 1818-19; *Marsh*, 463 U.S. at 787-92.

But there is no long, 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 or belief in doing

so. Except for several years in the middle of the Nineteenth Century, Congress has always had permanent chaplains. *See History of the Chaplaincy*, Office of the Chaplain: U.S. House of Representatives, http://bit.ly/2wlwNqH (last visited Apr. 25, 2018); *Senate Chaplain*, United States Senate, http://bit.ly/2em2A0L (last visited Apr. 25, 2018). And there is no evidence that either chamber of Congress ever invited guest chaplains to deliver invocations before 1855. *See* 2 Robert C. Byrd, *The Senate, 1789–1989* 302 (1982), http://bit.ly/2oU3mbg. Further, after extensive research, Plaintiffs have found no evidence that any nontheist ever asked to give an opening invocation to any governmental body in the decades that followed adoption of our Constitution. That is not surprising: Few people during that era openly disclosed that they did not believe in God, for doing so resulted in social ostracism and, at times, criminal punishment. *See, e.g.*, Leigh Eric Schmidt, *Village Atheists: How America's Unbelievers Made their Way in a Godly Nation* 3-4 (2016); Amanda Porterfield, *Conceived in Doubt: Religion and Politics in the New American Nation* 14-42 (2012). As Congress did not use guest chaplains during the Founding Era, and nontheists did not make requests to present legislative invocations

then, history cannot support exclusion of nontheistic guest chaplains today.[4]

If history has anything to tell us on this issue, it supports permitting legislative invocations that reflect diverse and minority beliefs. "Our tradition assumes that adult citizens . . . can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Greece*, 134 S. Ct. at 1823. To promote religious

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[4] As one of the five Justices of the *Greece* majority concluded in a separate opinion, it is only early Congressional history that should matter, not the history of state legislatures' practices. *See* 134 S. Ct. at 1832 (Alito, J., concurring). That is because the Establishment Clause did not apply to the states from the time when the First Amendment was ratified until it was incorporated against them in the 1940s through the Fourteenth Amendment. *See, e.g.*, *Wallace*, 472 U.S. at 49. And so Founding Era practices at the state level cannot speak to how the Framers understood the Establishment Clause. Indeed, when the Bill of Rights was adopted and in the decades that followed, many states had established churches, religious tests for office, and other constitutional provisions that discriminated based on religion—practices that plainly violate the Establishment Clause. *See, e.g.*, Stanley F. Chyet, *The Political Rights of the Jews in the United States: 1776–1840*, American Jewish Archives, Apr. 1958, at 24-67, http://bit.ly/2Fp6eCZ. In any event, like Congressional history, Founding Era state-legislative history cannot support exclusion of nontheistic guest chaplains today because the state legislatures did not use guest chaplains in the first place. In the decades after enactment of the Bill of Rights, state legislatures used permanent chaplains, relied on a limited number of rotating local clergy, or did not have opening prayers at all. *See* James S. Kabala, *"Theocrats" vs. "Infidels": Marginalized Worldviews and Legislative Prayers in 1830s New York,"* Journal of Church and State, Winter 2009, at 91-92, 100-101.

diversity in the invocations that it heard, when Congress first enacted its chaplaincy it required that the House and Senate chaplains be of different denominations and that they rotate between the two chambers. *See* 110 Cong. Rec. 3176 (1964). At that time, in practice, this rule served to ensure diversity among Protestant denominations, because almost everyone in the country was Protestant. *See, e.g.*, Fr. Robert J. Fox, *The Catholic Church in the United States of America*, Catholic Education Resource Center (2000), https://bit.ly/2HXOdhi; *Vital Statistics: Jewish Population in the United States, Nationally (1654–Present)*, Jewish Virtual Library, http://bit.ly/2wLKNej (last visited Apr. 25, 2018).

But we are a much more pluralistic nation today. Thus, Congress properly "acknowledges our growing diversity . . . by welcoming ministers of many creeds," including Buddhist, Hindu, Muslim, and Native American invocation-speakers. *See Greece*, 134 S. Ct. at 1820-21; Byrd, *supra*, at 304. And nontheists are by far the largest non-Christian belief-group in America today, representing at least nine percent of the population (Jews, the next largest, represent less than two percent). *See* Pew Research Center, *Religious Landscape*, *supra*, at 4; Pew Research

Center, *U.S. Public Becoming Less Religious* 47-48 (2015), http://pewrsr.ch/1SETWFd. Accordingly, as noted above, nontheists have in recent years delivered numerous nontheistic invocations before state legislatures and local governmental bodies across the country. (R. 55-2 at A221-51; R. 83 ¶ 111.) The inclusion Plaintiffs seek—which would allow nontheistic invocations to coexist with, not replace, theistic invocations (*cf.* Cty. Br. 35)—would effectuate the aspiration toward diversity reflected in the "different denominations" rule that Congress enacted when it first established its chaplaincy.

A review of the annual messages to Congress of our first six Presidents—the equivalent of today's State of the Union addresses—also supports inclusion of nontheistic invocations. Most of those annual messages had some theistic reference—usually of thanks or entreaty—but some did not. *See State of the Union Addresses and Messages*, The American Presidency Project, http://bit.ly/M9VL27 (last visited Apr. 25, 2018). And in 1823, President James Monroe, after recounting various successes of our country, ended his annual message with a secular missive of thanks after it appeared that he was leading up to a theistic one:

> To what, then, do we owe these blessings? It is known to all that we derive them from the excellence of our institutions. Ought we not, then, to adopt every measure which may be necessary to perpetuate them?

James Monroe, *Seventh Annual Message* (1823), http://bit.ly/2G8n3Dp.

The County may contend that its exclusion of nontheistic invocations is supported by a lack of evidence—beyond the above-quoted Monroe address—of such invocations being given to governmental bodies in the Founding Era. But that argument would prove too much. Historians believe that no non-Christian ever gave an opening prayer to Congress before 1860 or to any state legislature before 1850. *See* Bertram W. Korn, *Eventful Years and Experiences: Studies in Nineteenth Century American Jewish History* 98-99, 114-15 (1954), http://bit.ly/2G8eqsE. Furthermore, there is at least circumstantial evidence of religion-based discrimination against Catholics in Congress's selection of legislative chaplains throughout much of American history, including as recently as the year 2000. *See* Christopher C. Lund, *The Congressional Chaplaincies*, 17 Wm. & Mary Bill of Rts. J. 1171, 1187-93 (2009). Indeed, until 2000, except for one Catholic who served for only a year (from 1832–33), all of Congress's permanent chaplains were Protestants. *See id.* at 1187-96. The

appointment of the Catholic in 1832 sparked anti-Catholic sentiment across the country that continued long after; and when a Catholic was finally appointed again in 2000, it was only in the face of expressions of anti-Catholic prejudice. *See id.* at 1187-93.

Thus, if a lack of nontheistic invocations in early American history could support exclusion of nontheists from opportunities to present legislative invocations today, history would equally support exclusion of all non-Christians and even of non-Protestants. Of course, that would be contrary to the law: *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. And whatever role history may play in constitutional interpretation, the Supreme Court has repeatedly rejected efforts to use history to justify discriminatory policies. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015); *United States v. Virginia*, 518 U.S. 515, 531 (1996); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966); *see also McDaniel v. Paty*, 435 U.S. 618, 623-24, 629 (1978) (striking down state constitutional provision prohibiting ministers from

holding legislative offices even though many states maintained such provisions when U.S. Constitution was adopted).

B. The County's invocation-speaker-selection policy violates the Free Exercise, Free Speech, and Equal Protection Clauses.

The rights of nontheists to equal treatment are protected not only by the Establishment Clause but also by several other provisions of the U.S. Constitution. The district court correctly held that the County's invocation-speaker-selection policy violates the Free Exercise, Free Speech, and Equal Protection Clauses. (R. 105 at 61-63.)

1. The County's policy violates the Free Exercise and Free Speech Clauses.

The First Amendment's Free Exercise and Free Speech Clauses prohibit governmental bodies from conditioning participation in governmental activities on a person's religious or other beliefs or affiliations. The Free Exercise Clause in particular bars governmental bodies from making adoption or profession of any religious belief a precondition for taking part in governmental affairs. In *Torcaso*, 367 U.S. at 489-90, 495-96, the Supreme Court held that a state could not require people seeking commissions as notaries to declare a belief in God. The Court concluded that such a "religious test for public office"

not only violates the Establishment Clause (*see id.* at 492-95) but also "unconstitutionally invades the appellant's freedom of belief and religion" (*id.* at 496). Subsequently, in ruling in *McDaniel* that a law banning ministers from holding public office violated the Free Exercise Clause, the Court confirmed that the law struck down in *Torcaso* violated that Clause too. *See* 435 U.S. at 626-27 (four-Justice plurality opinion); *id.* at 634-35 (Brennan, J., concurring); *id.* at 642-43 (Stewart, J., concurring).

Similarly, the Free Speech Clause prohibits government from denying citizens opportunities to take part in governmental activities based on their beliefs or affiliations. Governmental bodies cannot, for example, hire, fire, promote, or transfer civil-service employees based on their political beliefs or affiliations. *E.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990); *Branti v. Finkel*, 445 U.S. 507, 516-17 (1980); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). A federal HIV-prevention program violated the Free Speech Clause by barring participation by organizations that would not adopt a policy formally opposing sex work. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 133 S. Ct. 2321, 2332 (2013). The State of Missouri violated the free-speech

rights of the Ku Klux Klan by prohibiting it, "based on the Klan's beliefs and advocacy," from taking part in an Adopt-A-Highway program. *Cuffley v. Mickes*, 208 F.3d 702, 707 (8th Cir. 2000). And a state law school's legal-services program could not constitutionally exclude a prospective client because of his publicly stated views concerning religious displays on public property. *Wishnatsky v. Rovner*, 433 F.3d 608, 611-12 (8th Cir. 2006).

The County's policy barring nontheists from delivering opening invocations violates these First Amendment principles. As in *Torcaso*, 367 U.S. at 496, the County is violating the Free Exercise Clause by conditioning participation in a governmental function—here, solemnizing public meetings—on profession of belief in God. Likewise, the County is violating the Free Speech Clause by excluding Plaintiffs based on their nontheistic beliefs and affiliations. Indeed, the County's Resolution 2015-101 justifies the challenged policy with a long and disparaging analysis of organizations with which Plaintiffs are affiliated. (R. 55-7 at A708-13.)

What is more, the Supreme Court relied partly on free-exercise and free-speech principles (in addition to the Establishment Clause) in

Greece to support its rejection of the proposition that legislative invocations must be nonsectarian. The Court noted that the Town of Greece "neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers." *Id.* at 1816. Looking to free-exercise principles, the Court then explained that, beyond prohibiting proselytizing and disparaging invocations (*see id.* at 1823-24), the government cannot "require ministers to set aside their nuanced and deeply personal beliefs" but instead "must permit a prayer giver to address his or her own God or gods as conscience dictates." *Id.* at 1822. Following free-speech principles, the Court added that requiring invocations to be nonsectarian would improperly force governmental bodies to "act as supervisors and censors of religious speech" or to "define permissible categories of religious speech." *Id.* Contrary to these teachings, the County refuses to permit Plaintiffs to open Board meetings in a manner consistent with their "deeply personal beliefs" and has defined monotheistic speech as the only "permissible categor[y] of religious speech."

The County contends that Plaintiffs' free-exercise claim should fail on the ground that Plaintiffs did not allege that they applied to deliver invocations for religious reasons or as part of religious observance. (Cty. Br. 48-49.) But the County failed to raise this argument below (*see* R. 54 at 19-21; R. 59 at 1-13; R. 62 at 2-6), so it is waived. *E.g.*, *S.E.C. v. Monterosso*, 756 F.3d 1326, 1338 (11th Cir. 2014). In any event, in its cases striking down discrimination based on religious status under the Free Exercise Clause, the Supreme Court has never required a showing that the privilege denied to the plaintiff was sought for religious reasons or as part of religious observance. *See Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2021-25 (2017); *McDaniel*, 435 U.S. at 626-29; *Torcaso*, 367 U.S. at 495-96. And here, Plaintiffs *did* all declare that their Humanist or other nontheistic religious beliefs called upon them to take actions that benefit the community, and that accordingly they wanted to give invocations in part to benefit the Board and county residents by providing positive and inspiring messages. (R. 55-2 at A108-09 ¶¶ 3-4, A111 ¶ 9, A115-19 ¶¶ 18-21, 27, A123-24 ¶¶ 3-4, A128-29 ¶¶ 18, 21, A135 ¶¶ 3-4, A138 ¶ 11, A141 ¶ 17, A144-45 ¶¶ 3-4, A148 ¶ 13, A152 ¶ 24, A160-61 ¶¶ 3, 9; R. 83 ¶¶ 86-87, 102, 110.)

The County also opposes Plaintiffs' free-exercise claim by arguing that Plaintiffs cannot demonstrate that they would have been invited to deliver invocations if they had not been rejected on religious grounds. (Cty. Br. 50-51.) This argument was not made below either (*see* R. 54 at 19-21; R. 59 at 1-13; R. 62 at 2-6) and is therefore waived as well. In any event, the only reason that the County provided for excluding Plaintiffs was their religious beliefs. (R. 83 ¶¶ 117, 124, 133, 136, 139.) Indeed, Commissioner Trudie Infantini actually invited plaintiff Ronald Gordon to give an opening invocation, but she abandoned the invitation after he informed her that he is an atheist. (R. 55-2 at A162-63 ¶¶ 12-14; R. 55-6 at A683-85.) As Plaintiffs established that their exclusion was motivated by a discriminatory animus, it was the County's burden to demonstrate that they would have been excluded anyway. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977). The County presented no such evidence.

The County attempts to defend against Plaintiffs' free-speech claim by arguing that the invocation segment of Board meetings is a limited public forum restricted to theistic prayers (Cty. Br. 39-48), but that argument is meritless. The invocations are not a limited public

forum, for three reasons. First, the Commissioners select invocation-speakers by invitation (R. 83 ¶¶ 43-45), but "[a] limited public forum is created only where the government 'makes its property generally available to a certain class of speakers,' as opposed to reserving eligibility to select individuals who must first obtain permission to gain access." *Hotel Emps. & Rest. Emps. Union v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002) (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998)). Second, the speech permitted here—"traditional faith-based invocation[s]" (R. 83 ¶ 133)—is "very circumscribed" (*see Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 820 (5th Cir. 1999), *aff'd*, 530 U.S. 290). Third, if invocations were treated as a limited public forum, *Greece*'s conclusion that government may (and must) prevent proselytizing and disparaging invocations (134 S. Ct. at 1823) would be in tension with cases concluding that excluding proselytizing or disparaging speech from such a forum is impermissible viewpoint discrimination (*see Matal v. Tam*, 137 S. Ct. 1744, 1763-64 (2017) (four-Justice plurality opinion); *id.* at 1765-67 (Kennedy, J., concurring opinion for four other Justices); *Morgan v. Swanson*, 659 F.3d 359, 412 n.28 (5th Cir. 2011) (portion of opinion of Elrod, J., joined

by majority of en banc court); *Amandola v. Town of Babylon*, 251 F.3d 339, 344 (2d Cir. 2001); *Doe*, 168 F.3d at 821 & n.12). The cases on which the County relies (Cty. Br. 40) for the general proposition that meetings of local governmental bodies are limited public forums do not hold that all segments of such meetings are public forums but instead address only the public-comment segments of meetings and what audience members may display in the meeting room. *See, e.g.*, *Cleveland v. City of Cocoa Beach*, 221 F. App'x 875, 878 (11th Cir. 2007); *Rowe v. City of Cocoa*, 358 F.3d 800, 802-03 (11th Cir. 2004).

And even if the opening invocation were a limited public forum, that would not help the County's case: Excluding speech from a limited public forum based on its "atheistic perspective" is unconstitutional viewpoint discrimination. *See Rosenberger v. Rector & Visitors*, 515 U.S. 819, 831 (1995). The County cannot circumvent this prohibition by defining the forum as one reserved for "faith-based religious prayer" (Cty. Br. 41), because government is forbidden to draw the "boundaries" of a limited public forum in a manner that discriminates " 'on the basis of [ ] viewpoint.' " *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 685 (2010) (quoting *Rosenberger*, 515 U.S. at 829). The County's argument

that Public Comment serves as an "alternative channel[ ] of communication" through which Plaintiffs can deliver "invocations" (Cty. Br. 47-48) fares no better, because providing alternative channels of communication cannot justify excluding a speaker from a forum based on viewpoint. *See Martinez*, 561 U.S. at 690; *Galena v. Leone*, 638 F.3d 186, 199 (3d Cir. 2011); *Cleveland*, 221 F. App'x at 878.

2. The County's policy violates the Equal Protection Clause.

The County's discrimination against nontheists additionally violates the Equal Protection Clause of the Fourteenth Amendment, which prohibits government from treating citizens differently based on their religious beliefs. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Religion is a "suspect classification" that triggers strict scrutiny under the Clause. *E.g.*, *Burlington N. R.R. v. Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Strict scrutiny also applies when government disfavors "a 'discrete and insular' minority" (*Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938))) that has been "subjected to . . . a history of purposeful unequal treatment, or relegated

to . . . a position of political powerlessness" (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). To satisfy strict scrutiny, governmental conduct must further a compelling governmental interest and be narrowly tailored to that interest. *See, e.g.*, *Miller*, 515 U.S. at 920.

The County's refusal to allow nontheists to present invocations triggers strict scrutiny by discriminating based on religion. Strict scrutiny is also proper because—as Plaintiffs have themselves experienced (R. 55-2 at A114 ¶ 15, A126-28 ¶¶ 10, 16, A151 ¶ 21, A161 ¶ 8; R. 83 ¶ 106)—nontheists have long faced invidious discrimination and have long been relegated to political powerlessness. *See* Cragun, *supra*, at 105, 111, 114; Margaret Downey, *Discrimination Against Atheists: The Facts*, 24 Free Inquiry No. 4 (2004), http://bit.ly/1VUEs6k; Penny Edgell, et al., *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*, 71 Am. Soc. Rev. 211, 218 (2006), http://bit.ly/1XUH3v6; Jeffrey M. Jones, *Atheists, Muslims See Most Bias as Presidential Candidates*, Gallup (June 21, 2012), http://bit.ly/PYVMrT; Lawton K. Swan & Martin Heesacker, *Anti-Atheist Bias in the United States: Testing Two Critical Assumptions*, 1

Secularism & Nonreligion 32, 40 (2012), http://bit.ly/1TbarcB; AHA Br. 23-24.

The County asserts that Plaintiffs are not similarly situated to theistic invocation-speakers because they would not deliver theistic invocations. (Cty. Br. 52.) But Plaintiffs' unsuitability to give theistic invocations is inextricably tied to their identity as nontheists, and the Supreme Court has "declined to distinguish between status and conduct" to justify discrimination in such situations. *See Martinez*, 561 U.S. at 689. The County also contends that Plaintiffs are not similarly situated to its past invocation-speakers—or, alternatively, that the County can satisfy strict scrutiny—because Plaintiffs allegedly would deliver proselytizing or disparaging invocations and allegedly want to end legislative prayer altogether. (Cty. Br. 52-54.) These factually and legally meritless contentions are disposed of above at 45-48.

The only other interest that the County has put forward in an attempt to satisfy strict scrutiny is a purported desire not to convey County endorsement of Humanism or hostility toward monotheism. (Cty. Br. 54; R. 83 ¶ 137.) But 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 Club v. Milford Cent. Sch.*, 533 U.S. 98, 113-14 (2001); *Widmar v. Vincent*, 454 U.S. 263, 273-75 (1981).[5] As the County's exclusionary policy cannot satisfy strict scrutiny, it violates the Equal Protection Clause.

3. The government-speech doctrine does not render the Free Exercise, Free Speech, and Equal Protection Clauses inapplicable.

Bereft of legitimate defenses specific to Plaintiffs' Free Speech, Free Exercise, and Equal Protection Clause claims, the County is left to argue that these Clauses should not apply in legislative-prayer cases at all. (Cty. Br. 38-39.) But the cases that the County cites for this proposition—all of which predate *Greece* or rely on pre-*Greece* cases—are based on the assumption that legislative invocations invariably are entirely government speech. *See Turner v. City Council*, 534 F.3d 352, 356 (4th Cir. 2008); *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404

[5] The County's statistics reporting that only about one-third of County residents are affiliated with religious congregations—statistics that do not measure residents' religious beliefs (R. 83 ¶¶ 192, 196, 240)—are irrelevant because 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).

F.3d 276, 288 (4th Cir. 2005); *Fields*, 251 F. Supp. 3d at 792; *Coleman*, 104 F. Supp. 3d at 891; *Atheists of Fla., Inc. v. City of Lakeland*, 779 F. Supp. 2d 1330, 1342 (M.D. Fla. 2011). That assumption does not survive *Greece*.

Although invocations delivered by governmental officials or government-employed chaplains remain classic government speech, *Greece* treats invocations given by invited private citizens as having some aspects of private speech. As explained above, *Greece* recognizes that private invocation-speakers have free-speech and free-exercise interests. *See* 134 S. Ct. at 1816, 1822. And *Greece* tightly circumscribes the government's authority to control the content of invocations given by private citizens: Beyond ensuring that invocations are not proselytizing or disparaging, governmental officials must permit private invocation-speakers to solemnize legislative meetings "as conscience dictates." *See id.* at 1822-23.

At least in the circumstances here, the invocations should accordingly be classified as "hybrid speech"—speech that "has aspects of both private speech and government speech." *See W. Va. Ass'n of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 298 (4th Cir.

2009). On the one hand, the invocations are sponsored by the County (*see* R. 83 ¶¶ 64-66); the invocations are presented for a governmental purpose (*see Greece*, 134 S. Ct. at 1823, 1825); and legislative invocations have historically been delivered by governmental chaplains (*see id.* at 1818). On the other hand, the invocations here are delivered by private citizens (*see* R. 83 ¶¶ 56-57); the citizens compose the invocations themselves (*see id.* ¶ 52; R. 55-7 at A969-70 ¶¶ (g)-(h)); and the County does not review draft invocations in advance (R. 83 ¶ 52). Analysis of the factors that the Supreme Court and this Court consider in assessing whether speech is governmental or private—whether the government composes the speech, whether the government revises or censors it, whether the speech has traditionally been given by the government, and whether people are likely to identify the speech with the government (*see Matal*, 137 S. Ct. at 1758-60; *Mech v. Sch. Bd.*, 806 F.3d 1070, 1074-75 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016))—thus shows that "the speech at issue does not fit neatly into either category" (*Musgrave*, 553 F.3d at 298).

But even if the speech here were purely government speech, that would not exempt the County's discriminatory policy from scrutiny

under the Free Exercise, Free Speech, and Equal Protection Clauses. The cases on which Plaintiffs rely under these Clauses prohibit governmental bodies from discriminating based on religious belief or affiliation even when picking individuals to deliver government speech—for instance, when deciding who may hold public office or employment. *See, e.g.*, *Rutan*, 497 U.S. at 75; *Torcaso*, 367 U.S. at 496. Indeed, if a city planned to select a private citizen at random to read a city-drafted proclamation at city hall, excluding a religious minority from the selection process would surely violate the three Clauses even though the proclamation would be pure government speech.

Finally, the County's argument that only the Establishment Clause applies here is contrary to the elementary principle that governmental actions—including those touching on religion—can violate more than one constitutional provision. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-89 (2012) (Establishment and Free Exercise Clauses); *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (First Amendment and Equal Protection Clause); *Torcaso*, 367 U.S. at 492-96 (Establishment and Free Exercise Clauses); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (Free

Speech, Free Exercise, and Equal Protection Clauses). The district court was therefore correct in rejecting the argument "that legislative prayer claims are necessarily subject to analysis under only the Establishment Clause." (R. 105 at 59.)

C. The County's invocation-speaker-selection policy violates the Florida Constitution.

The district court was also correct in ruling (R. 105 at 63-65) that the County's refusal to permit nontheists to deliver invocations violates the Establishment Clause (part of Article I, Section 3) and Equal Protection Clause (Article I, Section 2) of the Florida Constitution. The County's policy violates these clauses for the same reasons that it violates their federal counterparts, as Florida courts interpret these clauses similarly to their federal counterparts. *See Lakeland*, 713 F.3d at 595-96; *Todd v. Florida*, 643 So. 2d 625, 628 & n.3 (Fla. 1st Dist. Ct. App. 1994); *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987).

The district court's judgment can alternatively be affirmed on one ground that the court rejected (R. 105 at 68): that the County's policy violates the Florida Constitution's No-Aid Clause (part of Article I,

Section 3).[6] The No-Aid Clause imposes even stricter limitations on use of public funds for religious purposes than does the federal Establishment Clause. *See Council for Secular Humanism v. McNeil*, 44 So. 3d 112, 119 (Fla. 1st Dist. Ct. App. 2010). Though it permits use of tax dollars to support a nondiscriminatory invocation practice, the No-Aid Clause prohibits tax funding of a governmental program that " 'encourages the preference of one religion over another.' " *Lakeland*, 713 F.3d at 596 (quoting *McNeil*, 44 So. 3d at 120); *accord Southside Estates Baptist Church v. Bd. of Trustees*, 115 So. 2d 697, 700-01 (Fla. 1959). Here, the County is using tax dollars (R. 83 ¶¶ 46-48) to fund an invocation practice that prefers monotheism over atheism, Humanism, and other religions.

II. The Board's practice of directing meeting attendees to rise for prayer violates the Establishment Clause.

In addition to incorrectly rejecting the No-Aid Clause claim, the district court erred by ruling against (R. 105 at 55) Plaintiffs' challenge to the Board's practice of directing people who attend its meetings to

[6] Plaintiffs may rely on the No-Aid Clause despite not cross-appealing on this issue because prevailing on it would not entitle them to relief greater than that ordered by the district court. *See, e.g.*, *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015).

rise for opening prayers. "It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.' " *Greece*, 134 S. Ct. at 1825 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part)). The Supreme Court has thus held that governmental bodies must not coerce people to take part in prayer. *See, e.g.*, *Santa Fe*, 530 U.S. at 310-12; *Lee*, 505 U.S. at 599.

In *Greece*, the Court concluded that the invocation practice before it was not coercive. *See* 134 S. Ct. at 1824-27. "Although [town] board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public." *Id.* at 1826. And while "audience members were asked to rise for the prayer" on a few occasions, "[t]hese requests . . . came not from town leaders but from the guest ministers . . . accustomed to directing their congregations in this way." *Id.* "[T]he analysis would be different," emphasized the Court, "if town board members directed the public to participate in the prayers." *Id.*[7]

[7] The coercion section of Justice Kennedy's opinion in *Greece* (134 S. Ct. at 1824-28), though a plurality opinion, is controlling precedent because it provides the narrowest grounds for the judgment on that issue (*see*

The Fourth Circuit, sitting en banc, has accordingly ruled that county commissioners violated the Establishment Clause by asking citizens to rise for opening prayers. *Lund v. Rowan Cty.*, 863 F.3d 268, 286-87 (4th Cir. 2017), *petition for cert. docketed*, No. 17-565 (Oct. 16, 2017); *accord Hudson v. Pittsylvania Cty.*, 107 F. Supp. 3d 524, 535 (W.D. Va. 2015). As the court explained, "when these words are uttered by elected representatives acting in their official capacity, they become a request on behalf of the state." *Lund*, 863 F.3d at 287; *see also Fields*, 251 F. Supp. 3d at 790 ("coercion is a real likelihood when the government itself . . . directs public participation in prayers"). The court emphasized that "commissioners were seeking audience involvement, not merely addressing fellow legislators." *Lund*, 863 F.3d at 287.

Here, too, the County is violating the Establishment Clause by seeking audience involvement in its opening prayers. Commissioners regularly direct audience members to rise for invocations. (R. 55-4 at

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Marks v. United States, 430 U.S. 188, 193 (1977))—a " 'middle ground' " that provides a " 'legal standard which, when applied, will necessarily produce *results* with which a majority of the Court from that case would agree' " (*see United States v. Hughes*, 849 F.3d 1008, 1015 (11th Cir.) (quoting *United States v. Davis*, 825 F.3d 1014, 1035 (9th Cir. 2016) (Bea, J., dissenting); *United States v. Graham*, 704 F.3d 1275, 1277 (10th Cir. 2013)), *cert. granted*, 138 S. Ct. 542 (2017)).

A372-526; R. 55-7 at A859:9-16, A913:1-11.) And the audience is asked to stand out of respect for the religion of the invocation-speaker. (R. 83 ¶ 68.)

What is more, the Commissioners issue their directives to rise in a context that exacerbates their coercive force. The Board meetings occur in a small boardroom with only eleven rows of seats, and they are sometimes attended by less than ten people. (*Id.* ¶¶ 18, 22-27.) Commissioners sometimes talk to members of the public in the boardroom before meetings begin. (*Id.* ¶ 28.) When attendees do not rise for the prayer that follows, Commissioners notice. (R. 55-7 at A732:5-7, A779:9-14, A820:12-21, A860:15-18, A888:15-18, A936:25-937:2.) So do other audience members, who have cast disapproving looks on those who do not stand. (R. 55-2 at A120 ¶ 32.) The Commissioners go on to vote on issues—such as zoning changes—that may greatly affect attendees, who may need to address the Board about those items. (R. 83 ¶¶ 30-34.)

Further, one of the reasons that the *Greece* Court gave for its conclusion that there was no coercion was that "any member of the public [was] welcome in turn to offer an invocation reflecting his or her

own convictions" (134 S. Ct. at 1826), but that is far from the case here. In addition, children and County employees are sometimes present for the invocations because they or their associates are to be honored shortly thereafter (R. 83 ¶¶ 36-42), and one County employee reported feeling that he is expected to pray during the invocation (R. 55-7 at A1004). *Cf. Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 275-80 (3d Cir. 2011) (presence of children at school-board meetings supported conclusion that board's prayer practice was unconstitutionally coercive); *Venters v. City of Delphi*, 123 F.3d 956, 970 (7th Cir. 1997) (Establishment Clause prohibits public employers from religiously coercing their employees).

The district court erred by concluding that the Board's directives to rise were not coercive because the plaintiffs who attended Board meetings did not comply with them. (*See* R. 105 at 54-55.) This Court has held that, in assessing the constitutionality of a government-sponsored prayer practice, "[t]he Establishment Clause focuses on the constitutionality of the state action, not on the choices made by the complaining individual." *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 832 (11th Cir. 1989). And the fact that the County does not physically

force meeting attendees to rise does not render constitutional the County's directives to do so. For the Establishment Clause forbids "subtle and indirect" "pressure" and "overt compulsion" alike. *Lee*, 505 U.S. at 593. The Supreme Court and this Court have thus repeatedly rejected arguments that government may legitimize directives to take part in prayer by affording objectors an option to leave the room or stay silently seated during the prayer. *See Lee*, 505 U.S. at 596; *Sch. Dist. v. Schempp*, 374 U.S. 203, 224-25 (1963); *Engel*, 370 U.S. at 430; *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1287-88 (11th Cir. 2004). Such options "serve[ ] only to marginalize"; failing to comply causes one to "stand out" as a religious dissenter. *See Lund*, 863 F.3d at 288. Indeed, the plaintiffs who attended Board meetings suffered that exact harm as a result of their noncompliance with the Board's directives to rise. (*See* R. 55-2 at A120 ¶ 32, A155 ¶ 33.)

Nor does historical practice legitimize the Commissioners' directives to rise. Historical research indicates that no oral directive to rise to members or guests preceded Congressional opening prayers in the Founding Era, though it appears that Congress's members were expected to rise for the prayers. *See* Joseph H. Jones, *The Life of Ashbel*

Green, V.D.M. 261 (1849), http://bit.ly/2elRIA8. Today, too, no request to stand for invocations is made in either chamber of Congress. *See, e.g.*, *Legislative Day of April 16, 2018*, Office of the Clerk, U.S. House of Representatives, at 2:14:14-2:14:30 (Apr. 16, 2018), https://bit.ly/2J3kcfe; *Senate Floor Proceedings*, U.S. Senate, at 01:29-01:53 (Apr 16, 2018), https://bit.ly/2JSW14D. And the historical purpose of legislative prayer "is largely to accommodate the spiritual needs of lawmakers," not to "promote religious observance among the public." *See Greece*, 134 S. Ct. at 1825-26. The Commissioners stray far from this purpose and violate the Establishment Clause here by directing members of the public to rise for opening prayers.[8]

CONCLUSION

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet the Brevard County

[8] The directives to rise violate the Florida Constitution's Establishment Clause as well, for it is interpreted similarly to its federal counterpart. *See, e.g.*, *Todd*, 643 So. 2d at 628 & n.3.

Board prescribes belief in a monotheistic god as orthodox, and denies to nonbelievers equal opportunity to perform the cardinal public function of solemnizing its meetings. At the same time, the Board calls on its constituents to confess their faith in its favored belief system by rising for prayers reflecting it.

This Court should affirm the district court's grant of summary judgment to Plaintiffs on the issue of discrimination in the selection of invocation-speakers. This Court should reverse the district court's grant of summary judgment to the County on the issue of the Board's directives to rise for prayer and instruct the district court to enter summary judgment in Plaintiffs' favor on this question.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i) because, excluding the parts of the brief exempted by Rule 32(f) and Eleventh Circuit Rule 32-4, it contains 15,164 words.

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CERTIFICATE OF SERVICE

I certify that on April 27, 2018, I filed this brief through the Court's CM/ECF system, which caused the brief to be electronically served on the opposing party, through the following counsel:

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On the same date, I caused seven paper copies of this brief to be dispatched to a third-party commercial carrier for delivery to the Clerk of Court within three days.

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