UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID WILLIAMSON, CHASE HANSEL, KEITH BECHER, RONALD GORDON, JEFFERY KOEBERL, CENTRAL FLORIDA FREETHOUGHT COMMUNITY, SPACE COAST FREETHOUGHT ASSOCIATION, and HUMANIST COMMUNITY OF THE SPACE COAST,

Plaintiffs,

v.

BREVARD COUNTY,

Defendant.

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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(DISPOSITIVE MOTION; ORAL ARGUMENT REQUESTED)

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INTRODUCTION

Brevard County opens meetings of its Board of County Commissioners with invocations. Clergy and laity from the area are invited to give these invocations, but only if they believe in a monotheistic God. The County has adopted a policy barring nontheists — atheists, Humanists, and others who do not believe in a deity — from presenting opening invocations at Board meetings, and has rejected requests to do so made by the plaintiffs, eight atheist and Humanist individuals and organizations.

The County's discriminatory policy violates the Establishment Clause of the First Amendment. The Supreme Court and the Eleventh Circuit have 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 the Eleventh Circuit 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 non-believers, and the County's policy plainly does that too.

The County's policy also violates the Establishment Clause because it arises out of judgments by the Board about what religious beliefs are acceptable to its community — theological judgments that governmental bodies are forbidden to make. In a resolution adopting its policy and a letter explaining it, the Board proclaimed that its invocation practice "recogni[zes] . . . the traditional positive role faith-based monotheistic religions have historically played in the community" and asserted that the plaintiffs "do not share . . . beliefs or values" of "a substantial body of Brevard constituents." The Commissioners who chaired

the Board when the resolution and letter were approved further explained that the invocation practice "honor[s] the Christian community" and "show[s] the Board's support for Christianity." Indeed, Commissioners testified that they would prohibit not only nontheists, but also various other minority religions — including deists, polytheists, and Wiccans — from giving invocations, because those groups' beliefs are not "representative of our community."

In addition, the County's discriminatory policy violates five 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 the 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 the County is violating the Florida clauses also.

What is more, the Board directs members of the audience at its meetings to stand during invocations. This practice, too, violates the U.S. and Florida Constitutions' Establishment Clauses, by coercing meeting attendees to participate in prayers.

The plaintiffs accordingly move for summary judgment under Federal Rule of Civil Procedure 56 on all their claims, including an order specifying that they are entitled to a permanent injunction against the challenged conduct, that they are entitled to a judgment declaring it unconstitutional, and that the County is liable for damages.

FACTS

Invocations at Board meetings

1. The Board is the County's governing body. A36-37/A93 (record citations are to a consecutively paginated appendix of exhibits) ¶¶ 104-10. It has five commissioners, each representing one of five districts. A37/A93 ¶ 111. The Board regularly holds meetings in its main boardroom. A37/A93 ¶ 113. These meetings are open to the public and shown on cable television and the internet. A37/A93 ¶ 115.

2. Each Board meeting opens with an invocation, which is listed on the official agenda for each meeting and occurs immediately after the call to order. A45/A97 ¶ 177; A330-536. The Commissioners take turns selecting speakers to deliver invocations, following a rotation system. A44/A96 ¶¶ 169-71. The Commissioners use County resources funded with taxpayer dollars — such as email, mail, and phones — to invite and communicate with invocators. A932:22-934:7; A952-53 Nos. 1-3; A972-96. At Board meetings, Commissioners typically introduce the invocators they select, and the invocators often then — in accordance with a Commissioner's instruction — orally give the audience promotional information about their houses of worship before delivering their invocations. A45/A97 ¶¶ 179, 182; A831:8-12.

3. Of the 195 invocations given before the Board since 2010 (through March 15, 2016), all but seven were given by Christians or contained Christian content. A322-29. Six were given by Jews, and one was generically monotheistic. *Id*. All the invocations had theistic content (A330-536), though a few also had significant nontheistic sections (A43-44/A96 ¶¶ 165-67).

4. Most of the invocations were delivered by ordained clergy who lead houses of worship. A322-29. But at least twenty were delivered by non-clergy, such as police officers, a judge, Commissioners' aides, and Commissioners themselves. A42/A96 ¶ 160; A329. And at least sixteen were delivered by clergy who do not head a house of worship, such as chaplains for prisons, hospitals, schools, or sports teams. A42/A96 ¶ 163; A329.

5. Occasionally, the Commissioners have difficulty finding someone to give an opening invocation. A810:15-18; A886:18-23; A997-1002. As a result, sometimes a moment of silence is held in lieu of an invocation. A322-29; A886:24-887:4. And, on one occasion, a volunteer from the audience delivered the invocation when no designated invocator was present. A42/A96 ¶ 161.

The plaintiffs' desire to give invocations

6. The plaintiffs are five nontheists and three nontheist organizations. All five individual plaintiffs identify as atheists, and four also identify as Secular Humanists. A108 ¶ 2; A123 ¶ 2; A134 ¶ 2; A144 ¶ 2; A160 ¶ 2. As described by the American Humanist Association, "Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity." A307; *see also* A304-05. A

document entitled Humanist Manifesto III sets forth a detailed statement of basic Humanist beliefs. A310-11.

7. 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. A114 ¶ 14; A125-26 ¶ 9; A140 ¶ 15; A149 ¶ 15; A161 ¶ 7. 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. A114 ¶ 14; A125-26 ¶ 9; A140 ¶ 15; A149 ¶ 15; A161 ¶ 7.

8. Three of the plaintiffs are ordained as Humanist clergy — two are Humanist Celebrants, and one is a Humanist Celebrant and Chaplain (A109-10 ¶ 5; A135 ¶ 5; A145-46 ¶ 5; A253-62) — by the Humanist Society, an organization that is incorporated as a religious organization and recognized as such by the Internal Revenue Service (A264; A298-300; I.R.C. § 170(b)(1)(A)(i)). As Humanist clergy, these plaintiffs have the same legal status as ministers of theistic religions, including the right to solemnize weddings. A263-84.

9. The three organizational plaintiffs strive to create communities for nontheists in the Brevard area. A115 ¶ 18; A127 ¶ 13; A150-51 ¶¶ 17-22. Their members are principally atheists, agnostics, Humanists, and other nontheists. A114 ¶ 17; A126 ¶ 12; A150 ¶ 17. 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. A115-17 ¶¶ 19-22; A127-28 ¶¶ 14-17; A150-51 ¶¶ 19-21. 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. A117 ¶ 23; A128 ¶ 18; A151 ¶ 22.

10. 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 organization's principal contact — thus serving roles similar to that of a congregational leader of a church or synagogue. A117 ¶ 24; A128 ¶ 19; A137-38 ¶ 10; A152 ¶ 23. The fifth is a member of one of the organizational plaintiffs. A160 ¶ 4.

11. All five plaintiffs' beliefs and practices parallel those of theistic believers in many other ways. The 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. A111-14 ¶¶ 9-13; A124-25 ¶¶ 4-8; A137-40 ¶¶ 10-14; A148-49 ¶¶ 13-14; A160-61 ¶¶ 5-6.

12. Many of the plaintiffs and plaintiffs' members have suffered discrimination and negative treatment as a result of their atheistic beliefs. A114 ¶ 15; A126-28 ¶¶ 10, 16; A151 ¶ 21; A161 ¶ 8. 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), http://bit.ly/1rfaygK[1]), even though the population of nontheists has been growing (*see, e.g.*,

[1] *See also* 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: Two-thirds would vote for gay or lesbian*, 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.

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 (A1138-45).

13. To benefit the Board, serve their community, and combat anti-atheist prejudice by demonstrating how nontheists can contribute to society, the plaintiffs would like to give opening invocations at Board meetings. A118-19 ¶ 27; A129 ¶ 21; A141 ¶ 17; A152 ¶ 24; A161 ¶ 9. The plaintiffs would deliver solemn and respectful invocations that do not proselytize or disparage any faith (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, compromise, public service, equality, and justice (A221-51).

The Board's rejection of the plaintiffs' requests

14. The 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. A659-65; A678-716. The Board instead adopted a policy that permits opening invocations only "by persons from the faith-based community." A716. It told nontheists to go to the proverbial back of the bus: "Secular invocations" may be given only during the "Public Comment" section of a Board meeting. A715-16. (A half-hour "Public Comment" period — with each speaker limited to three minutes — occurs after the "Resolutions, Awards, and Presentations" portion and "Consent Agenda" portion of each meeting; any remaining public comment

occurs after the conclusion of the meeting's published agenda items. A48/A98 ¶¶ 199-200; A714 ¶¶ 33-34.)

15. The Board's resolution explains that the Board's invocation practice "recogni[zes] . . . the traditional positive role faith-based monotheistic religions have historically played in the community." A707 ¶ 5. The resolution further asserts that allowing nontheistic invocations "could be viewed as the Board[']s endorsement of Secular Humanist and Atheist principles" and "County hostility toward monotheistic religions." A714-15 ¶¶ 36-37. To support its conclusions, the Board devoted most of its eleven-page resolution to a detailed dissection of the beliefs of Secular Humanists and organizations affiliated with the plaintiffs, depicting those groups in a negative manner. A708-13. Similarly, the Board's initial response-letter reasoned that the original requesting plaintiff "organization and its members do not share . . . beliefs or values" of "a substantial body of Brevard constituents," including belief in "the highest spiritual authority." A680.

16. In depositions, current and former Commissioners who voted for the Board's rejection of the plaintiffs' requests made clear that they would also disallow invocations by other religious groups of which they disapprove. Some Commissioners' testimony included statements that they would not allow opening invocations by deists, polytheists, Wiccans, Rastafarians, or anyone who does not subscribe to a monotheistic religion. A725:16-25; A726:25-727:20; A773:15-774:7; A774:18-23; A853:4-25; A854:7-23; A882:17-883:2. The current Board chair explained that some of these groups would be rejected on the ground that their beliefs are not "representative of our community." A774:22-23; *accord* A773:12-14. In other testimony, Commissioners indicated 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. A726:6-19; A854:3-6; A854:24-855:3; A883:3-19; A908:11-23; A930:22-931:5; *see also* A771:25-773:14; A774:14-17.

17. 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." A895:14-20; *accord* 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." A867:4-6. And the Commissioner who sponsored (A734:20-21) the Board's resolution on invocations testified that "[t]he invocation is for worshipping the God that created us. . . . The one and only true God. The God of the Bible." A751:3-14; *accord* A752:3-13. He added that the Board's invocation practice "endorses faith-based religions." A741:6-8; *see also* A753:10-23; A754:9-12.

18. Commissioners further made other statements, on social media and elsewhere, expressing favoritism toward Christianity or monotheism, or hostility toward atheism and other minority religions. A47/A98 ¶¶ 192-94; A830:7-10; A832:20-22; A1011-53; A1089; V13 ("V" citations are to video- or audio-recordings on a flash-drive) at 2:30-40, 11:50-12:00. For example, the Commissioner who sponsored the Board's resolution placed postings on Facebook calling Islam "a religion of hatred" (A1016) and stating, "It's either 'One Nation Under God,' or bite my ass and just leave!" (A1018). The current Board chair

tweeted, concerning the invocation issue, "let each commish select a pastor . . . . Atheist[s] do not count." A1043. 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.**

A1053.

19. Commissioners also agreed with views set forth in emails from constituents that understood the Board's invocation policy as promoting Christianity or monotheism. A743:9-750:17; A788:21-792:12; A833:19-839:5; A871:7-875:8; A941:4-15; A1064-1103. For instance, four of the five current 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." A745:24-746:10; A790:7-18; A836:18-837:4; A872:13-20; A1070. Both the current Board chair and the Commissioner who preceded him in that role agreed with an email lauding them for "standing firm [t]o up[]hold Christian values in our community." A792:1-12; A873:24-874:8; A1087. And one Commissioner agreed with an email praising him as "a faithful Christian soldier." A838:21-839:5; A1097. The Commissioners received many such emails from supporters of their policy (A1064-1113), as well as a good number of emails from

opponents who understood the policy as communicating County disapproval of atheism (A1115-36).

The Board's directives to stand for invocations

20. At Board meetings, a Commissioner typically directs the audience to rise for the invocation. A372-526; A859:9-16; A913:1-11. A former Board chair explained that this is done to respect the religion of the invocator. A913:12-17. Sometimes the entire Board stands without verbally asking the audience to do so. *E.g.*, V2, Jan. 26, 2016 video. Either way, all the Commissioners stand for the invocation (A731:21-23), and all audience members typically do so (A860:15-18). Commissioners notice when audience members are not standing. A732:5-7; A779:9-14; A820:18-21; A860:15-18; A888:15-18; A936:25-937:2.

21. Commissioners give their directives to stand for prayer in an intimate, coercive environment. The boardroom is small, with approximately 180 seats in ten rows for the audience. A38/A93-94 ¶¶ 120-21, 124-25; A313-20; V1. Typically, approximately twenty-five people attend Board meetings, but sometimes ten or fewer do. A850:14-23; A881:10-15; A907:3-7. The Commissioners sit on a raised platform, facing the audience. A38/A94 ¶¶ 122-23. People can see and hear each other from one end of the boardroom to the other. A38/A94 ¶¶ 127-29; A154-55 ¶ 32.

22. Commissioners sometimes talk to members of the public in the boardroom before meetings begin. A771:13-19; A804:20-23; A851:2-13; A907:8-16; A929:4-11. The Board routinely considers and votes on issues that affect individuals or small groups of people, such as zoning variances, liquor licenses, and easements. A804:24-805:25. People affected by those issues may present public comments before the Board votes. A39/A94 ¶ 135. Children

and County employees sometimes attend Board meetings to be honored or to support an honoree during the "Resolutions, Awards, and Presentations" portion of the meeting — which occurs shortly after the invocation — and those children or employees are typically in the boardroom during the invocation. A39/A94 ¶ 136; A806:1-807:10. Indeed, a County employee wrote that he feels that he is expected to pray during the invocation. A1004.

Harm inflicted by the County's policy

23. The Board's refusal to permit nontheists to deliver invocations makes the plaintiffs feel disfavored on account of their nontheistic beliefs. It sends them a message that the County approves of some religious views while disapproving of theirs, marking them as second-class citizens and outsiders whose beliefs should not receive equal respect, and exacerbating the negative treatment that atheists suffer in other aspects of life. A119-21 ¶¶ 31, 34; A130-31 ¶¶ 26-27; A142 ¶ 21; A155-56 ¶¶ 36-37; A163-64 ¶¶ 16-17. In addition, two plaintiffs pay property taxes to the County, and they object to the County's use of their taxes to support its discriminatory invocation practice. A130-31 ¶ 26; A164 ¶ 18.

24. Two plaintiffs, moreover, have attended Board meetings where they were directed to rise for invocations. A117-18 ¶ 25; A155 ¶ 33. They felt pressured to participate in prayer and excluded from the meetings by that directive. A120 ¶ 32; A155 ¶ 33. One received disapproving looks from audience members when he remained seated while nearly everyone around him was standing. 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. A117-18 ¶ 25; A130 ¶ 25; A141 ¶ 20; A155 ¶ 35; A163 ¶ 15.)

25. For all these reasons, the County's conduct makes the plaintiffs feel offended, stigmatized, insulted, humiliated, and discriminated against. A120-21 ¶¶ 33-34; A130-31 ¶¶ 26-27; A142 ¶ 21; A155-56 ¶¶ 36-37; A164 ¶ 19. In addition to this emotional harm that the individual plaintiffs suffer, the organizational plaintiffs suffer economic harm because they are denied the promotional opportunity that Christian churches and other theistic organizations receive when giving invocations. A121 ¶ 35; A131 ¶ 28; A156 ¶ 38; A1146-48.

SUMMARY JUDGMENT STANDARD

"A district court must grant summary judgment 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Atheists of Fla. v. City of Lakeland*, 713 F.3d 577, 589 (11th Cir. 2013) (quoting Fed. R. Civ. P. 56(a)). Once the moving party has met this burden, the nonmoving party can avoid summary judgment only if it makes "enough of a showing that the [fact-finder] could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). And although the evidence must be viewed in a light favorable to the non-moving party, "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

ARGUMENT

The County's policy prohibiting nontheists from giving opening invocations is rank religious discrimination that violates six federal and state constitutional clauses: the

Establishment, Free Exercise, Free Speech, and Equal Protection Clauses of the U.S. Constitution, and the Establishment and Equal Protection Clauses of the Florida Constitution. What is more, the Board's directives to rise for invocations constitute religious coercion that violates the Establishment Clauses of the U.S. and Florida Constitutions.

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

In three principal ways, the County's conduct violates the Establishment Clause of the First Amendment. First, by prohibiting atheists and Humanists from giving invocations, the County is discriminating along religious lines. Second, the County's policy impermissibly entangles public officials in making religious judgments. Third, the Commissioners' directives to stand for invocations coerce audience members to take part in religious exercises.

A. The County is discriminating based on religion.

The U.S. Supreme Court has repeatedly emphasized that the Establishment Clause prohibits governmental bodies from discriminating based on religion: "[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 Cty. v. ACLU*, 545 U.S. 844, 875-76 (2005). "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 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary*, 545 U.S. at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

The Court reiterated this antidiscrimination principle when, in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), it 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." *Id.* at 1816. The Court ruled that governments must "maintain[] a policy of nondiscrimination" in deciding who may present invocations, and that the selection of invocators must "not reflect an aversion or bias on the part of [government] leaders against minority faiths." *Id.* at 1824. Similarly, in *Marsh v. Chambers*, 463 U.S. 783, 793 (1983), the Court held that a legislature's decisions on who may open its sessions with invocations must not "stem[] from an impermissible motive."

Accordingly, in *Pelphrey v. Cobb County*, 547 F.3d 1263, 1281-82 (11th Cir. 2008), the Eleventh Circuit 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 invocators. The Eleventh Circuit 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." *Id.* at 1282; *accord Lakeland*, 713 F.3d at 591.

The County policy barring atheists and Humanists from giving invocations is facially unconstitutional under these binding precedents. The Supreme Court and the Eleventh Circuit have ruled that atheism and 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 no governmental body "can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs," noting that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God [is] . . . Secular Humanism." Likewise, rejecting a proposed definition of religion that "presupposes a belief in God," the Eleventh Circuit held 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." *Glassroth v. Moore*, 335 F.3d 1282, 1294-95 (11th Cir. 2003). 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)) and Humanism (*Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014)) are religions for purposes of the Constitution and civil-rights laws.

In addition, the federal government has recognized Humanism and atheism as religions. The U.S. Army recognizes Humanism as a religious preference for soldiers (Jason Torpy, *Now You Can Have "Humanist" on Your Army Tag*, The Humanist.com, Apr. 23, 2014, http://bit.ly/1No4nkj), and the Bureau of Prisons does so for inmates (Steven DuBois, *Federal Prisons Agree to Recognize Humanism as Religion*, AP: The Big Story, July 28, 2015, http://apne.ws/1VMpEXl). The Department of Veterans Affairs recognizes atheist and Humanist symbols as "emblems of belief" available for placement on government-furnished headstones for deceased veterans who are buried in military cemeteries. *Available Emblems of Belief for Placement on Government Headstones and Markers*, National Cemetery Administration, http://1.usa.gov/1ElvZM8. The I.R.S. has recognized the Humanist Society — which ordained three of the plaintiffs as Humanist clergy (A253-62) — as a religious

organization (*see* A298-300; I.R.C. § 170(b)(1)(A)(i)). Indeed, the plaintiffs' belief-systems and practices have numerous similarities to those of traditional theistic religions (Facts, *supra*, ¶¶ 7-11); the main difference is that the plaintiffs look to reason, science, and ethics instead of theistic principles as authorities (A303-11).

But even if atheism or Humanism were not to be treated as religions, the County's discriminatory policy would still be unconstitutional. "[T]he 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 because it 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. The County has done just that by prohibiting invocations by people who do not believe in God.

Furthermore, governmental bodies must not use invocations "to proselytize or advance any one, or to disparage any other, faith or belief." *Greece*, 134 S. Ct. at 1821-22 (quoting *Marsh*, 463 U.S. at 794-95). Here, however, the challenged policy was formalized in a resolution praising "faith-based monotheistic religions" (A707 ¶ 5) and depicting Humanism negatively (A708-13). The Commissioners who chaired the Board when the

challenged County decisions were made (A681; A716) testified that the Board's invocation practice "honor[s] the Christian community" (A895:14-15) and "show[s] the Board's support for Christianity" (A867:4-6). Similarly, the Commissioner who sponsored the resolution said that the invocation practice "endorses faith-based religions," adding, "The invocation is for worshipping the God that created us. . . . The one and only true God. The God of the Bible." A741:8; A751:3-14. And the Commissioners made various other statements expressing favoritism toward Christianity or monotheism, or hostility toward atheism and other minority religions. *See* Facts ¶¶ 16-19. The County's exclusion of nontheists plainly "stem[s] from an impermissible motive" (*Marsh*, 463 U.S. at 793) and reflects "purposeful discrimination" (*Pelphrey*, 547 F.3d at 1281).

Finally, the County's discriminatory policy violates two plaintiffs' rights not only because they are being denied opportunities to present invocations, but also because the County is using their tax dollars to support a discriminatory practice. *See* Facts ¶¶ 2, 23. The U.S. 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 the Eleventh Circuit 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).

B. The County has entangled itself in theological judgments.

The Establishment Clause prohibits governmental bodies from becoming excessively entangled with religion, such as by inquiring into religious doctrine. *See, e.g.*, *Hernandez v. Comm'r*, 490 U.S. 680, 696-97 (1989); *Lemon v. Kurtzman*, 403 U.S. 602, 621-22 (1971). In *Greece*, the Court applied this principle to reject an argument that invocations at

governmental meetings must be nonsectarian, for such a rule would cause governments to become "supervisors and censors of religious speech." 134 S. Ct. at 1822. "Our Government," noted the Court, "is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *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 v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring)).

The County's invocation policy is a product of just such impermissible judgments. The resolution enacting the policy premised its conclusions on a five-page dissection of the beliefs of Secular Humanists and organizations affiliated with the plaintiffs (A708-13), and followed a letter that rejected plaintiffs' requests to deliver invocations on the grounds that the plaintiffs did "not share . . . beliefs or values" of "a substantial body of Brevard constituents" (A680). Similarly, Commissioners testified that they would prohibit various minority religions from presenting invocations — because those groups' beliefs are not "representative of our community" (A774:22-23) — and further testified that they would closely examine the beliefs of other groups to determine whether to give permission. Facts ¶ 16. Such a quest for "religious orthodoxy" "acceptable to the majority" is wholly antithetical to the Establishment Clause. *See Greece*, 134 S. Ct. at 1822.

Indeed, the County's conduct has resulted in "the very divisions along religious lines that the Establishment Clause seeks to prevent." *See id.* at 1819; *accord McCreary*, 545 U.S. at 876. The Board received many emails in response to its exclusion of nontheists from invocations. Monotheists who supported the policy understood it as promoting their beliefs, while nontheists who opposed it understood it as disapproving of atheism. A1064-1136.

C. The County coerces participation in religious exercises.

"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 *Cty. 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 may not sponsor prayers in coercive environments, such as public-school graduations and football games. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310-12 (2000); *Lee*, 505 U.S. at 599.

In *Greece*, the Court concluded that the invocation practice before it was not coercive. 134 S. Ct. at 1824-27. "Although 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," explained the Court. *Id.* at 1826. While "audience members were asked to rise for the prayer" on a few occasions, "[t]hese requests . . . came not from town leaders but from . . . 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.* Two district courts thus have recently concluded that county boards violated the Establishment Clause in asking citizens to

rise for opening invocations. *See Lund v. Rowan Cty.*, 103 F. Supp. 3d 712, 733 (M.D.N.C. 2015), *appeal docketed*, No. 15-1591 (4th Cir. June 3, 2015); *Hudson v. Pittsylvania Cty.*, 107 F. Supp. 3d 524, 535 (W.D. Va. 2015).

Here, too, Commissioners regularly direct audience members to rise for invocations. A372-526. And they do so in the coercive environment of meetings in a small boardroom that are sometimes attended by less than ten people. *See* Facts ¶ 21. Commissioners notice when attendees do not stand. Facts ¶ 20. So do audience members, who cast disapproving looks on those who do not stand. A120 ¶ 32. The Commissioners go on to vote on issues, such as zoning variances, that may greatly affect attendees, who may need to address the Board about those items. *See* Facts ¶ 22. The Board's directives to rise thus violate the Establishment Clause. The fact that children are sometimes present during invocations because they or their associates are to be honored shortly thereafter (A806:1-18) further supports that conclusion. *See Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 275-80 (3d Cir. 2011).

II. The County's conduct violates the federal 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 specifically bans 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 v. Paty* that a law barring ministers from holding public office violated the Free Exercise Clause, the Court confirmed that the law struck down in *Torcaso* violated the Clause too. *See* 435 U.S. 618, 626-27 (1978) (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. In *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), for example, the Court noted that Congress would be barred from "enact[ing] a regulation providing that no Republican [or] Jew . . . shall be appointed to federal office." In *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990), the Court held that conditioning hiring decisions for public employment on political belief and association violates applicants' First Amendment rights. And in *Agency for International Development v. Alliance for Open Society International*, 133 S. Ct. 2321, 2332 (2013), the Court ruled that participation in a federal anti-AIDS program could not be conditioned on adoption of a policy opposing sex work. *Accord, e.g., Branti v. Finkel*, 445 U.S. 507, 516-17 (1980); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609-10 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).

The County policy barring nontheists from delivering opening invocations violates these constitutional prohibitions. As in *Torcaso*, 367 U.S. at 496, the County is violating the Free Exercise Clause by conditioning participation in the governmental function of solemnizing public meetings on profession of belief in God. Likewise, the County is

violating the Free Speech Clause by excluding the plaintiffs on account of their nontheistic beliefs and affiliations. Indeed, the County's invocation resolution justifies the challenged policy with a long and disparaging analysis of organizations with which plaintiffs are affiliated. A708-13.

What is more, the Supreme Court relied partly on free-exercise and free-speech principles in *Greece* to support its rejection of the proposition that governmental invocations must be nonsectarian. The Court did note that governmental bodies must regulate invocations to ensure that they do not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion" (134 S. Ct. at 1823) — meaning that the Court did not consider opening invocations to be a public forum in which content- and viewpoint-based restriction of speech would be prohibited. Yet, looking to free-exercise principles, the Court explained that (beyond the foregoing restrictions) the government cannot "require ministers to set aside their nuanced and deeply personal beliefs" and 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 force governmental bodies to "act as supervisors and censors of religious speech" or to "define permissible categories of religious speech," neither of which is constitutionally permissible. *Id.* Contrary to these teachings, the County refuses to permit the 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."

III. The County's conduct violates the federal Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment prohibits government from treating citizens differently based on their religious beliefs. *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. *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)).

The County's refusal to allow nontheists to present invocations plainly triggers strict scrutiny by discriminating based on religion. Strict scrutiny is also proper because nontheists have long faced invidious discrimination and been relegated to political powerlessness. *See* Facts ¶ 12. The County's policy thus must further a compelling governmental interest and be narrowly tailored to that interest. *See, e.g.*, *Miller*, 515 U.S. at 920. The County cannot come close to satisfying this standard. The interests that the County has put forward in support of its policy are to communicate to its residents approval of monotheism and to avoid any suggestion of approval of atheism (*see* A707 ¶ 5; A714-15 ¶¶ 36-37) — interests that are not even legitimate, let alone compelling.

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

Article I, Section 3, of the Florida Constitution provides: "There shall be no law respecting the establishment of religion." Florida courts interpret this clause similarly to the federal Establishment Clause. *See Lakeland*, 713 F.3d at 595-96; *Todd v. Florida*, 643 So. 2d 625, 628 & n.3 (Fla. 1st DCA 1994). The County's conduct violates this clause for the same reasons that it violates the clause's federal counterpart: the County (1) is discriminating based on religion, (2) has entangled itself in theological judgments, and (3) is coercing meeting attendees to take part in religious exercises. *See* Part I, *supra*.

Article I, Section 3, of the Florida Constitution further provides: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." This "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 DCA 2010). The Eleventh Circuit held in *Lakeland* that use of tax dollars to support a nondiscriminatory invocation practice does not violate the no-aid clause, but the court cautioned that the clause forbids using taxes to support a practice that "promote[s] the religion of the provider . . . or encourages the preference of one religion over another." 713 F.3d at 596 (quoting *McNeil*, 44 So. 3d at 120). The County here is using tax dollars (Facts ¶ 2) to fund an invocation practice that prefers monotheism over atheism, Humanism, and other religions. Indeed, the County is preferentially aiding theistic institutions by inviting them to promote themselves — in person, online, and on television — in prefaces to their invocations. *See* Facts ¶¶ 1-2.

Article I, Section 2, of the Florida Constitution provides that "[n]o person shall be deprived of any right because of," among other characteristics, "religion." Florida courts interpret this clause similarly to the federal Equal Protection Clause. *See, e.g.*, *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987). The County's openly discriminatory policy violates Florida's equal-protection guarantee for the same reasons that it violates the analogous federal guarantee. *See* Part III, *supra*.

REQUESTED RELIEF

The plaintiffs respectfully ask that the Court grant summary judgment on all their claims and issue an order specifying the following concerning relief:

1. ***Declaratory judgment.*** The plaintiffs ask that the Court specify that they are entitled to a declaratory judgment, under 28 U.S.C. § 2201 and Fla. Stat. § 86.021, that Brevard County has violated, and is continuing to violate, the U.S. and Florida Constitutions by (a) prohibiting nontheists from delivering opening invocations at Board meetings while allowing theists to do so, and (b) instructing audience members to stand for opening invocations at Board meetings.

2. ***Permanent injunction.*** A plaintiff is entitled to a permanent injunction when (1) the plaintiff has succeeded on the merits; (2) the plaintiff will suffer irreparable injury without an injunction; (3) the injury to the plaintiff outweighs any potential hardship to the defendant; and (4) the injunction would not be adverse to the public interest. *See, e.g.*, *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006). The plaintiffs satisfy this standard. First, they have shown that the County's conduct violates the U.S. and Florida Constitutions. Second, "[t]he loss of First Amendment freedoms, for even minimal

periods of time, unquestionably constitutes irreparable injury." *Id.* at 1271-72 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Third, "even a temporary infringement of First Amendment rights constitutes a serious and substantial injury, and [government] has no legitimate interest in enforcing an unconstitutional [policy]." *Id.* at 1272. Finally, the public interest supports enjoining unconstitutional practices. *See id.* at 1272-73.

Accordingly, the plaintiffs ask that the Court specify that they are entitled to a permanent injunction (a) requiring Brevard County to permit the individual plaintiffs and leaders and members of the organizational plaintiffs to deliver opening invocations at Board meetings; (b) prohibiting Brevard County from discriminating against atheists, Humanists, and other nontheists in selecting speakers to deliver opening invocations at Board meetings; and (c) prohibiting Brevard County Commissioners, officials, and employees from instructing audience members to rise for opening invocations at Board meetings.

3. ***Liability for damages.*** 42 U.S.C. § 1983 renders municipalities liable for damages arising from policies, practices, or customs that violate constitutional rights. *See, e.g.*, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). Plaintiffs who suffer emotional or economic harm from constitutional violations, including of First Amendment rights, are entitled to compensatory damages. *See, e.g.*, *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1088 (11th Cir. 1986); *Sykes v. McDowell*, 786 F.2d 1098, 1105 (11th Cir. 1986). Here, the County's unconstitutional policies, practices, and customs have inflicted both emotional and economic harm upon the plaintiffs (Facts ¶¶ 23-25), entitling them to compensatory damages.

And even if the plaintiffs were not entitled to compensatory damages, they are entitled to nominal damages. The Eleventh Circuit has "held unambiguously that a plaintiff whose constitutional rights are violated is entitled to nominal damages even if he suffered no compensable injury." *Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000). The Eleventh Circuit has applied this principle in the First Amendment context. *See KC*, 465 F.3d at 1262. Indeed, in *Pelphrey*, 547 F.3d at 1282, the Eleventh Circuit specifically held that taxpayers whose Establishment Clause rights were violated by a county commission's use of tax funds to support a discriminatory invocation policy were entitled to nominal damages.

Accordingly, the plaintiffs ask that the Court specify that the County is liable under 42 U.S.C. § 1983 for damages — either compensatory or nominal — arising out of the deprivation of rights, privileges, or immunities secured by the U.S. Constitution.[2]

CONCLUSION

In Brevard County's eyes, people who do not believe in God are a disfavored minority against whom it is acceptable to discriminate. Nontheists are as capable as theists of giving inspiring and moving invocations. Yet the County refuses to permit nontheists to open its meetings, so that it can affirm to monotheists that their beliefs — and only theirs — are acceptable to it. Six constitutional clauses speak with one voice in prohibiting such discrimination. The Court should grant this summary-judgment motion.

[2] The parties have reached a partial, contingent settlement relating to damages issues. Under its terms, the parties are to provide the Court with more details about the settlement within seven days of the Court's ruling on this motion. *See* Mediation Report, Docket Entry 39, April 12, 2016, at 2.

Respectfully submitted,

By: /s/ Alex J. Luchenitser Date: May 3, 2016
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CERTIFICATE OF SERVICE

I certify that on May 3, 2016, I electronically filed this document, together with an appendix of exhibits, by using CM/ECF (except for video and audio exhibits on a flash drive), which automatically serves all counsel of record for the defendant. I filed with the Clerk of Court a flash drive with video and audio exhibits by sending it via FedEx for delivery by May 3, 2016, and I served this flash drive on opposing counsel by sending it via FedEx for delivery by the same date to Scott Knox, Office of the County Attorney, 2725 Judge Fran Jamieson Way, Viera, FL 32940.

By: /s/ Alex J. Luchenitser Date: May 3, 2016
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