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

Civil Action No. 5:14-cv-00651-TJC-PRL

THE AMERICAN HUMANIST ASSOCIATION, INC.,
ART ROJAS,
FRANCES JEAN PORGAL,
LUCINDA HALE,
and DANIEL HALE,

Plaintiffs,

v.

CITY OF OCALA, FLORIDA,
KENT GUINN, individually and in his official capacity as mayor of the City of Ocala,
and GREG GRAHAM, individually and in his official capacity as chief of police of the
Ocala Police Department,

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT GUINN'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

PLAINTIFFS' INDEX OF EXHIBITS

Previously Submitted Exhibits

Plaintiff Art Rojas's Interrogatory Responses ("Rojas Int.")

Plaintiff Frances (Jean) Porgal's Interrogatory Responses ("Porgal Int.")

Plaintiff Lucinda (Luci) Hale's Interrogatory Responses ("L. Hale Int.")

Plaintiff Daniel (Dan) Hale's Interrogatory Responses ("D. Hale Int.")

Defendant City of Ocala's Interrogatory Responses ("Ocala Int.")

Defendant Greg Graham's Interrogatory Responses ("Graham Int.")

Defendant Kent Guinn's Interrogatory Responses ("Guinn Int.")

Defendant City of Ocala's Supplemental Interrogatory Responses ("Supp. Int.")

Defendant Greg Graham's Supplemental Interrogatory Responses ("Supp. Int.")

Deposition of Greg Graham, excerpted, with highlights ("Graham Dep.")

Deposition of Kent Guinn, excerpted, with highlights ("Guinn Dep.")

Deposition of Art Rojas, excerpted, with highlights ("Rojas Dep.")

Deposition of Frances (Jean) Porgal, excerpted, with highlights ("Porgal Dep.")

Deposition of Lucinda (Luci) Hale, excerpted, with highlights ("L. Hale Dep.")

Deposition of Daniel (Dan) Hale, excerpted, with highlights ("D. Hale Dep.")

Declaration of Katherine Paige and attached Exhibits ("Paige Decl.")

Exhibit No.	**Description**	**Dep. Exhibit No.**
Exhibit 1	OPD Prayer Vigil Letter	*Graham Dep. Ex. 3* *Guinn Dep. Ex. 2*
Exhibit 2	OPD Prayer Vigil Letter Facebook post, Sept. 18, 2014, with comments	*Graham Dep. Ex. 51*
Exhibit 3	OPD Prayer Vigil Photos	

3-A	OPD Chaplain Quintana speaking from stage	*Graham Dep. Ex. 58* *Guinn Dep. Ex. 14*
3-B	Uniformed OPD Chaplains speaking from stage	*Graham Dep. Ex. 64* *Graham Dep. Ex. 65* *Guinn Dep. Ex. 20* *Guinn Dep. Ex. 21*
3-C	OPD Chaplain Quintana participating in prayer circle on stage and speaking with Vigil attendee	*Graham Dep. Ex. 60* *Guinn Dep. Ex. 16*
3-D	OPD Chaplain Quintana raising hands and Messianic Rabbi playing shofar	*Graham Dep. Ex. 63* *Guinn Dep. Ex. 19*
3-E	Mayor Guinn speaking with Prayer Vigil attendee	
3-F	Uniformed OPD officer at Prayer Vigil	
3-G	Chief Graham and Prayer Vigil attendee	
3-H	Chief Graham and Plaintiff Rojas	
3-I	Chief Graham and Plaintiff Porgal	*Graham Dep. Ex. 61* *Guinn Dep. Ex. 17*
3-J	Chief Graham and Ocala Atheists poster	
3-K	Prayer Vigil speaker	
3-L	Prayer Vigil crowd	*Graham Dep. Ex. 59* *Graham Dep. Ex. 62* *Guinn Dep. Ex. 15* *Guinn Dep. Ex. 18*
Exhibit 4	Payer Vigil Program	*Graham Dep. Ex. 57*
Exhibit 5	Email from Chief Graham to Captain Edwards & Chaplain Quintana, Sept. 18, 2014, Subject: Prayer Vigil	*Graham Dep. Ex. 19*
Exhibit 6	OPD emails with Prayer Vigil flyer	
6-A	Email from trbito@ocalapd.org to Captain Edwards, Sept. 19, 2014, Subject: what do you think?, with attached Prayer Vigil flyer	

6-B	Email from trbito@ocalapd.org to Captain Edwards, Sept. 19, 2014, Subject: once this is approved I"ll send it to Angie [sic], with attached Prayer Vigil flyer with OPD emblem	
Exhibit 7	Email from Officer Williams to Narvella Haynes, cc: Captain Edwards, Sept. 19, 2014, with attached Prayer Vigil letter and flyer	
Exhibit 8	Email from trbito@ocalapd.org to Delphine Herbert, Sept. 19, 2014, Subject: A message from Chief of Police	
Exhibit 9	Email from Mayor Guinn to Chief Graham, Sept. 21, 2014, Subject: Prayer Vigil • Reply email from Chief Graham, Sept. 21	*Graham Dep. Ex. 8* *Guinn Dep. Ex. 4*
Exhibit 10	Email from Chaplain Quintana to OPD Chaplains, cc: Chief Graham, Sept. 22, 2014, Subject: Urgent Prayer Service – Wednesday September 24, 2014 – 6:30PM at Downtown Square, with attached "Chief Graham Letter"	*Graham Dep. Ex. 6* *Guinn Dep. Ex. 6*
Exhibit 11	Email from Captain Edwards to Chaplain Quintana, Sept. 22, 2014, Subject: Re: Urgent Prayer Service –Wednesday September 24, 2014-6:30PM at Downtown Square • Reply email from Chaplain Quintana, Sept. 22	*Graham Dep. Ex. 28*
Exhibit 12	Email from Captain Edwards to Chief Graham, Narvella Haynes & Chaplain Quintana, Sept. 23, 2014, Subject: PRAYER VIGIL • Reply email from Chaplain Quintana, Sept. 23 • Reply email from Narvella Haynes, Sept. 23 • Reply email Captain Edwards, Sept. 23	*Graham Dep. Ex. 14* *Graham Dep Ex. 27*
Exhibit 13	Email from Captain Edwards to Major Ford, Sept. 23, 2014, Subject: Staff Meeting	
Exhibit 14	Email from Captain Edwards to OPD officials, Sept. 24, 2014, Subject: Fwd: Re:	*Graham Dep. Ex. 15*
Exhibit 15	Email from Captain Edwards to Captain Edwards, Sept. 24, 2014, with Prayer Vigil speech	

Exhibit 16	Post-vigil email from Captain Edwards thanking Prayer Vigil organizers, with replies from Narvella Haynes and Chaplain Quintana, Sept. 25, 2014	
16-A	Email from Captain Edwards to Narvella Haynes & Chaplain Quintana, cc: Chief Graham, Officer Williams, Sept. 25, Subject: PRAYER VIGIL	*Graham Dep. Ex. 13*
16-B	Email reply from Narvella Haynes, Sept. 25	*Graham Dep. Ex. 9*
16-C	Email reply email from Chaplain Quintana, Sept. 25	*Graham Dep. Ex. 10*
Exhibit 17	Email from Chief Graham to Amy Trempler, Sept. 25, 2014, Subject: Fwd: Re: PRAYER VIGIL	
Exhibit 18	Email from Captain Edwards to Major Ford, Sept. 29, 2014, Subject: Command Staff	*Graham Dep. Ex. 18*
Exhibit 19	Email from Captain Edwards to Officer Williams, Narvella Haynes & Chaplain Quintana, Sept. 29, 2014, Subject: Meeting – Post Prayer Vigil	
Exhibit 20	Email from Chaplain Quintana to Captain Edwards, Officer Williams, Narvella Haynes, cc: Chief Graham, Chaplain Quintana, torygee@dignitymemorial.com, Oct. 10, 2014, Subject: Summary & Follow-Up to Community Meeting with OPD on 10/2/20147 10/9/2014	
Exhibit 21	Email from Captain Edwards to Major Ford, Oct. 14, 2014, Subject: Re:	*Graham Dep. Ex. 17*
Exhibit 22	Email from Captain Corey Taylor to Chief Graham, Oct. 20, 2014, Subject: Re: Today's incident	
Exhibit 23	Email from Delphine Herbert, Jan. 23, 2015, Subject: EVERYONE INVITED Saturday, Jan 31, 10 a.m. - 12 noon – Addressing Race Relations in Ocala/ Marion County	*Graham Dep. Ex. 20*
Exhibit 24	Emails between Plaintiff Porgal and Chief Graham	
24-A	Email from Plaintiff Porgal to Chief Graham, Sept. 20, 2014, Subject: Prayer Vigil on Downtown Square • Reply email from Chief Graham, Sept. 20	*Porgal Dep. Ex. 16*

24-B	Email from Plaintiff Porgal to Chief Graham, Sept. 22, 2014, Subject: Email • Reply from Chief Graham, Sept. 22	*Graham Dep. Ex. 11*
24-C	Email reply from Chief Graham, Sept. 24, 2014 Subject: Re: Email	*Porgal Dep. Ex. 17* *D. Hale Dep. Ex. 11*
Exhibit 25	Email from Plaintiff Luci Hale to Chief Graham, Sept. 22, 2014, Subject: Community Prayer Vigil • Reply email from Chief Graham, Sep. 22	*Graham Dep. Ex. 54* *L. Hale Dep. Ex. 3*
Exhibit 26	Email from Plaintiff Dan Hale to Chief Graham, Sept. 22, 2014, Subject: Fw: Fwd: Community Prayer Vigil • Reply from Chief Graham, Sept. 22 • Reply from Dan Hale, Sept. 22	*Graham Dep. Ex. 52* *D. Hale Dep. Ex. 10*
Exhibit 27	Email from Plaintiff Porgal to Mayor Guinn, Sept. 20 • Reply email from Mayor Guinn to Porgal, Sept. 20, Subject: Prayer Vigil at Downtown Square • Reply email from Plaintiff Porgal, Sept. 20	*Graham Dep. Ex. 55*
Exhibit 28	Correspondence between Plaintiff Luci Hale and Mayor Guinn	
28-A	Email from Plaintiff Luci Hale to Mayor Guinn, Sept. 22, 2014, Subject: Community Prayer Vigil • Reply email from Mayor Guinn, Sept. 22 • Reply email from Luci Hale, Sept. 22	*Graham Dep. Ex. 12* *Guinn Dep. Ex. 8*
28-B	Facebook messages between Plaintiff Luci Hale and Mayor Guinn, Sept. 22 & 23, 2014	*L. Hale Dep. Ex. 4*
Exhibit 29	Email from Plaintiff Dan Hale to Mayor Guinn, Sept. 22, 2014, Subject: Fw: Fwd: Community Prayer Vigil • Reply from Mayor Guinn, Sept. 22 • Reply from Dan Hale, Sept. 22	*Graham Dep. Ex. 52* *D. Hale Dep. Ex. 11* *D. Hale Dep. Ex. 12*
Exhibit 30	Correspondence between David Niose (American Humanist Association) and Chief Graham	*Graham Dep. Ex. 53*

30-A	Email from David Niose (American Humanist Association) to Chief Graham, Sept. 21, 2014 Subject: Constitutional violation	*Graham Dep. Ex. 53*
30-B	Reply from Chief Graham to David Niose, Sept. 21, 2014	
30-C	Reply from David Niose to Chief Graham, Sept. 21, 2014	
Exhibit 31	Facebook message complaints sent to OPD, Sept. 19 – 22, 2014	
31-A	Facebook message, Kenneth Lawrence Schroeder, Sept. 19	*Graham Dep. Ex. 50*
31-B	Facebook message, Georg Kellermann, Sept. 19	*Graham Dep. Ex. 49*
31-C	Facebook message, Kristopher Keeney Sept. 20	*Graham Dep. Ex. 48*
31-D	Facebook message, Chris Cockerham, Sept. 20	*Graham Dep. Ex. 47*
31-E	Facebook message, Adam St Martin, Sept. 20	*Graham Dep. Ex. 46*
31-F	Facebook message, Darrin Browne, Sept. 21	*Graham Dep. Ex. 42*
31-G	Facebook message, Graham Brooks, Sept. 21	*Graham Dep. Ex. 45*
Exhibit 32	Facebook message, John M. Porgal, Sept. 24, 2014 • Reply email from Greg Graham, Sept. 24	
Exhibit 33	Emails from Paul Tjaden, with reply emails from Mayor Guinn and Chief Graham	
33-A	Email from Paul Tjaden to Mayor Guinn, Sept. 19, 2014, Subject: letter from Police Chief on official letterhead requesting prayer vigil • Reply email from Mayor Guinn, cc: Chief Graham, Sept. 19	*Graham Dep. Ex. 40* *Guinn Dep. Ex. 3*
33-B	Email from Paul Tjaden to Chief Graham, Sept. 22, 2014, Subject: More on your prayer vigil • Reply email from Chief Graham, Sept. 23 • Reply email from Paul Tjaden, Sept. 23 • Reply email from Chief Graham, Sept. 23	*Graham Dep. Ex. 40* *D Hale. Dep Ex. 12* *Porgal Dep. Ex. 12*

33-C	Email from Paul Tjaden to Mayor Guinn, Sep. 28, 2014, Subject: A similar religious entanglement as yours in Eureka, CA is settled. • Reply email from Mayor Guinn, Sept. 28	
33-D	Email from Paul Tjaden to Chief Graham, Dec. 29	
Exhibit 34	Email from Cat Sullivan to Jeannine Robbins & cmaier@ocalapd.org, Sept. 24, 2014, Subject: OPD LETTERHEAD PROMOTES A Prayer Vigil ON FACEBOOK…Seriously? Can you help set this right for ALL "We, The People"? • Reply email from Chief Graham, Sept. 24	*Graham Dep. Ex. 43* *Graham Dep. Ex. 16*
Exhibit 35	Email from Bud Laurent to Mayor Guinn, Sept. 22, 2014, Subject: Your Police Department • Reply email from Mayor Guinn, cc: Chief Graham, Sep. 22	*Graham Dep. Ex. 5* *Guinn Dep. Ex. 7*
Exhibit 36	Email from Pat MacMurray to Chief Graham, Sept. 21, 2014 • Reply email from Chief Graham, Sep. 21	*Graham Dep. Ex. 41*
Exhibit 37	Email from Plaintiffs Porgal and Luci Hale, Ocala Atheists, to Chief Graham, Sept. 30, 2014 • Reply email from Chief Graham, Oct. 1	*Porgal Dep. Ex. 18*
Exhibit 38	Email from Patrice Yawn to Chief Graham, relaying phone message from Karen Jungwerth, Sept.19, 2014	
Exhibit 39	Email from Scott Thomas to Chief Graham, Sept. 21, 2014, Subject: Stand tall on prayer! • Reply email from Chief Graham, Sept. 22	*Graham Dep. Ex. 23*
Exhibit 40	Email from Jill Eason to Chief Graham, Sept. 25, 2014, Subject: Proud of your stance • Reply email from Chief Graham, Sept. 25	*Graham Dep. Ex. 24*
Exhibit 41	Email from Bernie DeCastro to Mayor Guinn, Nov. 17, 2015, Subject: Help Mayor Guinn resist Atheist tonight • Reply email from Mayor Guinn, Nov. 17	*Graham Dep. Ex. 29* *Guinn Dep. Ex. 9*

57-F	OCALA STAR-BANNER, *OPD task force continues to work*, Oct. 7, 2014	
57-G	OCALA STAR-BANNER, *'Stop the Violence' rally takes to the streets*, Oct. 18, 2014	
57-H	OCALA STAR-BANNER, *Groups sue Ocala, police*, Nov. 25, 2014	
Exhibit 58	OPD Chaplain Policy Documents	
58-A	Chaplain Program	*Graham Dep. Ex. 4* *Guinn Dep. Ex. 5*
58-B	OPD Organizational Chart	
58-C	OPD Equipment	
58-D	OPD Chaplains Program Section Manual, Sept. 2015	*Graham Dep. Ex. 21*
58-E	OPD Chaplains Program Section Manual, Sept. 2010	*Graham Dep. Ex. 22*
58-F – 58-I	OPD Directive 1.03, 1.04, 2.06, 2.08	
Exhibit 59	Linkedin Profile of Narvella Haynes, *available at*: https://www.linkedin.com/in/narvella-haynes-68724271	
Exhibit 60	City of Ocala Special Permit for April 2015 Prayer Vigil	
Exhibit 61	Sacred Fire Ministries webpage	*Guinn Dep. Ex. 13*
Exhibit 62	OCALA STAR-BANNER, *Pentecostal Full Gospel Worship Center, local leaders look to future*, July 20, 2015	*Graham Dep. Ex. 56* *Guinn Dep. Ex. 12*
Exhibit 63	Ocala City Council meeting minutes, Nov. 17, 2015	

Supplemental Exhibit

Exhibit 64	FOX NEWS INSIDER, *'It's Happening to Me in My Community': Atheists Sue Mayor Over Prayer Vigil*, Nov. 29, 2014	

Like the City, the Mayor makes the same arguments found in his motion to dismiss while offering no new facts to suggest he is entitled to relief now.[1] The Mayor does not dispute that the City, through OPD, initiated, planned, organized and led a public Prayer Vigil with the Mayor's approval, endorsement, and active participation. (P.MSJ 1-8) (Mayor MSJ 1-4). Although the Mayor concedes these material facts, he makes several misstatements of fact, *infra.*

I. The material facts are undisputed but the Mayor makes false factual assertions.

1. City Initiated. First, the Mayor does not dispute that OPD staff initiated the Prayer Vigil during an official OPD meeting. (P.MSJ 3) (Mayor MSJ 1).

2. City Planned/Organized. Second, the Mayor does not dispute that OPD staff organized and planned for the Prayer Vigil. (P.MSJ 3-18) (Mayor MSJ 1-2).

3. City Promoted. Third, the Mayor does not dispute that OPD promoted the Prayer Vigil. (Mayor MSJ 1-2). The Mayor even asserts: "Announcement of the prayer vigil appeared on the Police Department stationery and on its Facebook web site." (Mayor MSJ 2). Nor does the Mayor dispute that he was directly involved in promoting it. (*Id.* 2-3) (P MSJ 6-7).

4. Mayor Approved. Fourth, it is undisputed the Mayor authorized the Prayer Vigil, and did so almost immediately after it was initiated. (Ex. 9). On September 19, just two days after OPD staff decided to have the event, Mayor Guinn stated in an email he thought the Prayer Vigil was a "great idea" and would "be sure to praise" Chief Graham for it. (Ex. 33-A). The Mayor testified that he might have been aware of the Vigil even before September 19.[2] On September 21, the Mayor emailed Graham: "As I told you, I think this is a great idea and have been responding to the atheist groups that are writing me about it. I put it on my calendar to be there."[3] The next day, the Mayor refused to cancel the Vigil, saying:

> There is nothing in the constitution to prohibit *us* from *having* this vigil. Not only are *we not canceling* it *we are* trying to promote it and have as many people as possible to join *us. We* open every council meeting with a prayer. And we end the prayer in Jesus name

[1] Plaintiffs refer to and incorporate by reference their motion for summary judgment ("P.MSJ") and their opposition to the City's Motion for Summary Judgment ("P. Opp. City"), filed simultaneously herewith.
[2] (Guinn Dep. 38:8-18, 44:8-45:22, 46:12-14, 46:25-47:6).
[3] (Ex. 9) (Graham Dep. 42:10-43:6). He added: "Your [sic] doing an awesome job running the department I just need to be made aware of what's going on." (Ex. 9).

> *we* pray. *Our city* seal says "God be with us" and *we* pray that he is and us with him.[4]

That same day, the Mayor also responded to a different person, refusing to cancel the event:

> I'm proud to stand by *my Chief* and *support* him. Times like this do test *leadership* and that's why *we're leading the community* in this prayer vigil. Yes *we* have heard from folks like you who don't understand the constitution. *We* are doing absolutely nothing wrong.[5]

Thus, the Mayor's assertion that he "knew nothing about the prayer vigil" until "mere days before" is misleading to say the least. (Mayor MSJ 12). The Vigil was initiated by OPD staff on September 17, just a week before it took place on September 24, (P.MSJ 3, 10), and the Mayor knew about it on the 18th or 19th.[6] He testified that he "certainly understood that there was some controversy about it, about the chief's promoting it and the appearance or at least alleged police department's sponsorship of it." (Guinn Dep. 46:25-47:6). He also understood OPD was involved in organizing and promoting it: "Q. Was it your understanding that the OPD had some involvement-- A. *Sure*. Q. -- in the *planning and organizing* of it? A. *It was on their letterhead*."[7] The Mayor's claim that he "knew nothing of the scheduled prayer vigil until after it had been planned, organized, and scheduled," is also false. (Mayor MSJ 2).[8] He knew about the Vigil a day or two after it was initiated, well before it had been fully organized. (Exs. 9-13).

Finally, the Mayor's claim that "he had no idea of what was planned to occur at the prayer vigil" is inconceivable. (Mayor MSJ 2). Clearly, he knew *prayer* was planned to occur. (Exs. 9, 27-29, 33). He even anticipated that it would be a predominantly Christian event. (Guinn Dep. 91:11-23).

5. Authority over OPD and its Prayer Vigil. Fifth, the Mayor had ultimate authority over the Vigil, including canceling it or at least withdrawing OPD's involvement in it, but adamantly refused to do so.[9] The Mayor is the "sole, municipal authority overseeing the City's police department." (Mayor MSJ 2). He has oversight over Graham and OPD Chaplains.[10]

---

[4] (Ex. 28-A) (emphasis added). *See also* (Guinn Dep. 99:1-20) (Graham Dep. 49:7-50:3).
[5] (Ex. 35) (emphasis added). *See also* (Graham Dep. 36:3-19) (Guinn Dep. 96:13-22).
[6] (Exs. 9, 33-A) (Guinn Dep. 38:8-18, 44:8-45:22, 46:12-14, 46:25-47:6).
[7] (Guinn Dep. 40:2-6) (emphasis added). *See also* (*id.* 40:12-16).
[8] The Mayor repeats the same baseless and misleading claim throughout his Motion. (*Id.* at 2-3, 11-12, 16).
[9] (Guinn Dep. 54:12-55:15, 98:24-99:10) (Exs. 9, 28-A, 33, 35).
[10] (P.MSJ 6-7, 12) (Graham Dep. 161:16-21, 178:23-179:7, 180:3-7) (Guinn Dep. 54:12-55:15) (Ex. 58-B).

The Mayor's sworn testimony acknowledges his ultimate authority over OPD's actions surrounding the Prayer Vigil. (Guinn Dep. 54:12-55:15, 98:24-99:10). The Mayor was asked: "as far as the vigil itself, did you have authority to instruct the police chief or the police department to not have department chaplains leading prayers at the vigil?" He responded: "Sure. I had authority to do that." (*Id.* 55:5-10). Next, he was asked: "And you also had authority to order the police chief or the police department to instruct that chaplains not wear uniform if they attend the vigil?" He responded: "Yes." (*Id*. 55:11-15). The Mayor also admitted he had authority to order Chief Graham to remove the OPD promotional letter, asserting, "Yeah. It's within my authority, overseeing the police department." (*Id.* 54:17-18). Finally, he was asked, "And you didn't feel that it was necessary to those things?" to which he answered: "That's correct." (*Id.* 55:16-18).

Beyond all this, the Mayor clearly understood that he had authority over the Prayer Vigil because he repeatedly exercised such authority in *expressly* refusing to cancel it. (Exs. 28-A, 35). Thus, the Mayor's claim that he had "neither knowledge nor control" over the Prayer Vigil (Mayor MSJ 11) is belied by this uncontroverted evidence alone. The Mayor offered no evidence to the contrary. Instead, citing only his own affidavit, the Mayor merely asserts "[a]s mayor of the City of Ocala, he had no legal 'authority to organize, order, or forbid such a gathering' as the prayer vigil." (*Id.* at 2-3). While Plaintiffs agree the Mayor had no *legal authority* to organize a Prayer Vigil, he undeniably had authority to cancel it or at least prohibit OPD involvement.

The Mayor elusively asserts, nonetheless, that the "liability against Defendant Guinn, as Mayor, for not cancelling the prayer vigil is not only negated by the nature and scope of the municipal charter's allocation of authority, but also by Defendant Guinn's positive, sworn statements concerning his authority under the charter." (Mayor MSJ 11 n.43). Puzzlingly, the Mayor does not even produce said charter. But assuming such a charter exists, it would not negate the fact that Mayor Guinn had authority over OPD's Prayer Vigil that he "enthusiastically" authorized on numerous occasions. (P.MSJ 6-7, 12) (Exs. 9, 28-A, 33, 35). Even more puzzlingly is exactly how the Mayor possibly thinks this charter helps him. The Mayor testified: "Under the City of Ocala city charter, I am the sole, municipal official in authority over the Ocala Police

Department." (Mayor Aff. ¶3). This is the *only* explanation of the charter in his affidavit. And it in no way supports the Mayor's position that he *lacked* authority over the OPD's Prayer Vigil. Instead, it confirms it!

Furthermore, the Mayor has it exactly backwards when he posits that his self-serving affidavit is more probative than the overwhelming uncontroverted evidence regarding his authority, *supra*, (Mayor MSJ 11) *see also* (P.MSJ 6-7, 12). "Conclusory, self serving, or uncorroborated allegations in an affidavit or deposition will not create an issue of fact for trial sufficient to defeat a well supported summary judgment." *Bancale v. Cox Lumber Co*., 1998 U.S. Dist. LEXIS 22773, at *2-3 (M.D. Fla. May 14, 1998) (citation omitted). Indeed, the Eleventh Circuit has "consistently held that conclusory allegations without specific supporting facts have no probative value." *Leigh v. Warner Bros., Inc*., 212 F.3d 1210, 1217 (11th Cir. 2000).

6. OPD Led/Participated with Mayor's Authorization. Sixth, it is undisputed that uniformed OPD staff, including officers and chaplains, led and participated in the Prayer Vigil with his and Chief Graham's express authorization. (P.MSJ 3-18) (Mayor MSJ 2-4). To briefly summarize, OPD Chaplains were present in uniform at the Vigil as directed by Chief Graham. Representatives of OPD, wearing OPD uniforms with official OPD patches and badges, served as speakers and led prayers from a stage. Indeed, half of the speakers were OPD personnel. The other half were Christian ministers invited by OPD. An OPD Chaplain was introduced as a "Chaplain with the City of Ocala Police Department." Captain Edwards, also a speaker, referred to his dual roles as "police officer" and "a child of God." (Ex. 15). These uniformed personnel preached Christianity to the crowd in a revivalist style. (P.MSJ 11 n.50). Uniformed officers also joined hands in a prayer circle. (P.MSJ. 11) (Ex. 3-C) (Guinn Dep. 119:2-16).

All of the above was done with full authority of the Mayor. (P.MSJ 6-7, 12). Mayor Guinn witnessed uniformed OPD staff on the stage leading Christian prayers. (Guinn Dep. 103:18-104:1). He admitted that it would have been within his authority to stop OPD Chaplains from leading prayers at the Vigil. (*Id.* 55:2-15). Not only did the Mayor not stop them, but he

"personally prayed during the vigil."[11]

7. Ratification. Finally, the Mayor indisputably ratified OPD's actions surrounding the Prayer Vigil after it occurred. Sanctioning the Prayer Vigil, he declared: "God is good!!! All the time. The fight is on." (Ex. 41). He even appeared on Fox News to defend the Prayer Vigil. (Guinn Dep. 66:22-67:1) (Ex. 64). "Guinn spoke to Anna Kooiman on 'Fox and Friends Weekend' . . . and explained that *he* and Ocala's chief of police reached out to the city's large faith-based community *and organized* a vigil[.]" (Ex. 64) (emphasis added). Significantly, Mayor Guinn testified that he would not prevent OPD from hosting another Prayer Vigil or from posting another letter urging "fervent prayer."[12]

II. The Mayor is liable under § 1983.

A supervisor is liable under § 1983 if *either*: (1) "'the supervisor personally participates in the alleged constitutional violation,'" *or* (2) "'there is a causal connection between actions of the supervising official and the alleged constitutional deprivation.'" *Bryant v. Jones*, 575 F.3d 1281, 1299 (11th Cir. 2009) (citation omitted). This Court need not even look for a "causal connection" because the Mayor clearly "personally participated" in the Prayer Vigil by authorizing it, endorsing it, refusing to cancel it, defending it, participating in it, and accepting responsibility for it afterwards, *supra.* Indeed, it is undisputed that the Mayor:

- Is the "sole, municipal authority overseeing the City's police department;"
- Was aware of OPD's letter on OPD letterhead shortly after it was publicly posted;
- Had the authority to direct OPD to remove the letter from Facebook but refused to do so;
- Knew about OPD's planned Prayer Vigil with ample time to cancel it;
- Understood that the planned Prayer Vigil would be a predominantly Christian event;
- Affirmatively and repeatedly refused to cancel the Prayer Vigil;
- Publicly endorsed the Prayer Vigil;
- Had authority to stop OPD staff from wearing OPD uniforms and delivering prayers;
- Refused to stop uniformed OPD staff from leading and participating in the prayers;
- Participated in the Prayer Vigil including the prayers led by OPD staff;

[11] (Mayor MSJ 3) (Guinn Dep. 109:22-25). *See also* (L. Hale Dep. 75:10-13, 77:20-23, 78:5-8) (D. Hale Dep. 69:11-14, 72:6-18) (Rojas Dep. 51:7-8).

[12] (Guinn Dep. 134:15-135:12). He also believes it is acceptable for a police chief to encourage citizens to believe in Jesus on department letterhead. (Guinn Dep. 16:19-17:16, 18:3-5, 89:11-13, 91:1-5).

- Staunchly defended the Prayer Vigil afterwards.

See supra, at 1-5; (P.MSJ 15-17). In the face of the foregoing, the Mayor inexplicably argues: "*no* credible evidence exists of *any kind* causally connecting Defendant Guinn to anything which Plaintiffs believe amounted to a deprivation of putative constitutional right." (Mayor MSJ 10) (emphasis added). The fact that the Mayor knew about OPD's Prayer Vigil, had ample time to cancel it, and expressly refused to do so, is enough. But he did so much more. He *endorsed* the Vigil, *approved* Chief Graham's actions,[13] and even *participated in the prayers* at the Vigil itself.

The Mayor provided no evidence to refute this. Rather, Mayor Guinn's brief avers that: "*Other than his own personal responses and attendance*, Plaintiffs have produced no facts that qualify as evidence of involvement or participation by Defendant Guinn." (Mayor MSJ 12). This is nothing short of an admission of liability. First, the Mayor's "own personal responses" – encouraging citizens to attend the Prayer Vigil and refusing to cancel it[14] – would be enough to establish § 1983 liability. Second, the Mayor's "attendance" at the Prayer Vigil would also be enough, since he witnessed the unlawful activities, had the authority to stop them, and did not. *See Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986) (supervisory liability would attach where officer was "present during the encounter" and "in a position to intervene" but did not).

Even if he did not attend the Vigil at all, it would be sufficient that the Mayor was aware of OPD's letter endorsing "fervent prayer" and the Prayer Vigil on OPD's public Facebook page, had the authority to order it be removed, and refused to do so. *Id.* It would even be enough that he refused to seek advice of counsel after receiving legal complaints about the planned Vigil. (Guinn Dep. 46:25-47:14, 84:19-25).[15] "Having actual notice of the alleged unconstitutional practices combined with a refusal to investigate or respond comprises such a causal connection." *Purser v. Donaldson*, 2006 U.S. Dist. LEXIS 61721, at *12-13 (S.D. Ga. Aug. 30, 2006).

That the Mayor claims he had "no idea of what was to occur" beforehand is both false and irrelevant. (Mayor MSJ 12). Again, at the very least he knew that OPD was involved in

[13] He even told Chief Graham, twice, "I think this is a great idea." (Ex. 9) (Graham Dep. 42:10-43:6).
[14] (Exs. 28-A, 33, 35) (Guinn Dep. 99:1-20) (P.MSJ 6-7).
[15] *See Barr v. Gee*, 437 F. App'x 865, 875 (11th Cir. 2011).

planning and promoting a "Prayer Vigil." (*Id.* at 2-4) (Exs. 9, 27-29, 33, 35). Regardless, the Mayor was present at the event, witnessed these activities, and as the "sole" authority overseeing OPD, was indisputably in a position to "intervene." (Mayor MSJ 2). *See Dukes v. Miami-Dade Cty*., 232 F. App'x 907, 913 (11th Cir. 2007) (recognizing § 1983 liability based on failing to intervene). Not only did he *not intervene*, he actively *participated* in the OPD prayers. If a supervisory official "fails or refuses to intervene when a constitutional violation . . . takes place in his presence, the officer is directly liable under Section 1983." *Byrd*, 783 F.2d at 1007 (citations omitted). It "makes no difference whether the plaintiffs' constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior." *Schnell v. Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969). Liability would attach even if the Mayor just "stood idly by." *Ensley v. Soper*, 142 F.3d 1402, 1407 (11th Cir. 1998).[16]

III. The Mayor is not entitled to qualified immunity.

A. The Mayor failed to prove his actions were within his discretionary authority.

To "even be potentially eligible for . . . qualified immunity, the official must have been engaged in a 'discretionary function.'" *Holloman v. Harland*, 370 F.3d 1252, 1263-64 (11th Cir. 2004) (citations omitted). The official shoulders the burden of proof. *Id.* The Mayor failed to satisfy his burden. Employment by the "government is not a carte blanche invitation to push the envelope and tackle matters far beyond one's job description or achieve one's official goals through unauthorized means." *Id.* at 1266-67. And it goes without saying that government "employees have no right to make the promotion of religion a part of their job description." *Grossman v. S. Shore Pub. Sch. Dist*., 507 F.3d 1097, 1099 (7th Cir. 2007). In *Holloman*, the Eleventh Circuit held that a teacher was not performing a discretionary function when leading class in a moment of silent prayer, and was therefore not entitled to qualified immunity. 370 F.3d at 1265. The court reasoned: "Pursuing a job-related goal through means that fall outside the

[16] *E.g.*, *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976) (breach of "duties of a mayor and a chief of police to control a policeman's known propensity for improper use of force").

range of discretion that comes with an employee's job is not protected by qualified immunity." *Id*. at 1267. Here too, the Mayor's actions in authorizing OPD's Prayer Vigil, actively endorsing prayer, and participating in the OPD's prayers at the Vigil itself, cannot be said to be within his discretionary duties.[17]

In fact, citing his own affidavit, the Mayor asserts "he had no legal 'authority to organize, order, or forbid such a gathering' as the prayer vigil." (Mayor MSJ 2-3). That being the case, he cannot claim to have been acting within his authority when he authorized OPD's Prayer Vigil, publicly defended OPD's Prayer Vigil, expressly refused to cancel it, and actively participated in it. Thus, the Mayor did not shoulder his burden of proof. To be sure though, the Mayor indisputably had authority to cancel OPD's Prayer Vigil (or withdraw OPD's involvement), a fact that he admitted under oath, *supra*, and a fact that derives from his position as the "sole, municipal authority overseeing the City's police department." (Mayor MSJ 2).

But if the Court is satisfied that the Mayor shouldered his burden, notwithstanding the above, it must then conduct a two-step inquiry: "(1) do the facts alleged, construed in the light most favorable to the plaintiffs, establish that a constitutional violation occurred; and (2) was the violated constitutional right clearly established." *Smith v. LePage*, 2016 U.S. App. LEXIS 15644, at *8 (11th Cir. Aug. 25, 2016) (citations omitted). Under either step, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment," here, the Mayor. *Id.* Having already shown that a clear constitutional violation occurred (P.MSJ 19-31) (P. Opp. City 12-21), the only issue for present purposes is the second step. But before turning to that analysis, Plaintiffs briefly respond the Mayor's Establishment Clause arguments.

B. A constitutional violation occurred.

Under the controlling *Lemon* test, "government action violates the Establishment Clause if it has any of the following characteristics: (1) a non-secular purpose; (2) the principal or primary effect of advancing or inhibiting religion; or (3) fostering an excessive government

[17] *See also Lenz v. Winburn*, 51 F.3d 1540, 1547 (11th Cir. 1995) (government official was not entitled to qualified immunity because "she acted outside the scope of her authority").

entanglement with religion." *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 527 (7th Cir. 2009) (citation omitted). The City's actions surrounding the Prayer Vigil failed *each* prong of the *Lemon* test (P.MSJ 19-32) and the Mayor plainly failed to show otherwise, *infra.*

1. The *Lemon* test, rather than the rare legislative prayer exception carved out in *Marsh* and *Greece*, governs the constitutionality of the Prayer Vigil.

The Mayor's entire Establishment Clause analysis is doomed because it hinges on *an exception* to the *Lemon* test. (Mayor MSJ 14-21). In particular, the Mayor erroneously assumes that the OPD's Prayer Vigil qualifies for the extremely narrow ***exception*** to the *Lemon* test – carved out in *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) – exclusively for "*legislative* prayer."[18] This case does not involve *legislative* prayer. Even the City concedes that *Lemon* is controlling. (City MSJ 13). More to the point, this Court already decisively held that "legislative prayer . . . is not at issue here." (Doc. 14. at 18) (emphasis in original) (Doc. 22).

Other courts have also correctly held that *Marsh/Greece* does not apply to police department prayers. *See Marrero-Méndez v. Calixto-Rodríguez*, 830 F.3d 38, 48 (1st Cir. 2016) (*Marsh/Greece* exception did not apply to police department prayers); *Clarke*, 588 F.3d at 527-28 (*Lemon* applies to police department's inclusion of religious speakers in department meetings). Likewise, the court in *Newman v. City of E. Point*, properly held that *Marsh* did not apply to a "Mayor's Community Prayer Breakfast." 181 F. Supp. 2d 1374, 1378-80 (N.D. Ga. 2002). Nor does *Marsh/Greece* apply to *any* other governmental context.[19] The "Supreme Court has not yet

[18] *See McCreary Cty. v. ACLU*, 545 U.S. 844, 860 n.10 (2005) (describing *Marsh* as a "special instance"); *Jager v. Douglas Cty. Sch. Dist*., 862 F.2d 824, 829 n.9 (11th Cir. 1989) ("*Marsh* created an **exception to the *Lemon* test** only for such historical practice") (emphasis added). *See also Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) ("the Court is carving out an **exception** to the Establishment Clause."); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013) (the "Supreme Court has not extended the *Marsh* **exception**"); *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1276 (11th Cir. 2008) ("the Supreme Court has never expanded the *Marsh* **exception**"); *Rubin v. City of Lancaster*, 710 F.3d 1087, 1091 n.4 (9th Cir. 2013) ("legislative prayer has enjoyed a **'sui generis status'** in Establishment Clause jurisprudence"); *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999) ("*Marsh* is **one-of-a-kind**"). (Emphasis added in each).

[19] **Public Schools:** *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000); *Lee v. Weisman*, 505 U.S. 577, 592, 596-97 (1992); *Jager*, 862 F.2d at 828 (*Marsh* "has no application to" school prayers); **Judicial Branch:** *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147- 49 (4th Cir. 1991); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 494-95 (6th Cir. 2004); **Executive Branch:** *Mellen v. Bunting*, 327 F.3d 355, 368-69 (4th Cir. 2003); **City Events:** *Hewett v. City of King*, 29 F. Supp. 3d 584, 630-31 (M.D.N.C. 2014).

extended the rule of *Marsh* and *Galloway* to nonlegislative prayer practices." *Hewett*, 29 F. Supp. 3d at 629. *Accord Cty. of Allegheny v. ACLU*, 492 U.S. 573, 604 n.53 (1989) (*Marsh* would not apply to a governor's proclamation).

Outside the rare legislative prayer exception, government-endorsed prayers plainly violate the Establishment Clause, including at:

- police department meetings and functions,[20]
- a mayor's community breakfast (*Newman*, 181 F. Supp. 2d at 1381),
- a military institute (*Mellen*, 327 F.3d at 367-69),
- a village-sponsored festival,[21]
- a courtroom (*Constangy*, 947 F.2d at 1150), and
- a city-sponsored memorial ceremony (*Hewett*, 29 F. Supp. 3d at 596, 636).

The "First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of [government] would be used to control, support or influence the kinds of prayer the American people can say." *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962).

2. The Prayer Vigil lacked a secular purpose under the first *Lemon* prong.

The "defendant [must] show by a preponderance of the evidence that action challenged" has a secular purpose. *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993).[22] Because "prayer is 'a primary religious activity in itself,'" a government's "intent to facilitate or encourage prayer in a public school is *per se* an unconstitutional intent to further a religious goal." *Holloman*, 370 F.3d at 1285.[23] Like the City, the Mayor failed to overcome the presumed religious purpose permeating the City's actions in urging "fervent prayer" through its City-sponsored *Prayer* Vigil. On the contrary, the Mayor expressly stated that he saw the purpose of the prayer vigil as an attempt to utilize the power of prayer. (Guinn Dep. 76:18-77:7). He did not even point to an ostensible purpose such as "community policing" in his deposition. (*Id*.).

[20] *Marrero-Méndez*, 830 F.3d at 45, 48; *Clarke*, 588 F.3d at 524-26.
[21] *Doe v. Village of Crestwood*, 917 F.2d 1476 (7th Cir. 1990).
[22] *See also Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) (a secular purpose "is in the nature of a defense, and the burden of producing evidence in support of a defense is . . . on the defendant").
[23] *Accord Santa Fe*, 530 U.S. at 309-10; *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985); *Jager*, 862 F.2d at 830.

The Mayor's purpose "analysis" is plainly deficient, consisting of three sentences and a single, non-binding case, *Am. Atheists, Inc. v. Port Auth*., 760 F.3d 227, 238 (2d Cir. 2014), distinguished *infra.* (Mayor MSJ 14-15). And he advances the sole conclusory justification that the "avowed purpose of the prayer vigil was to assist law enforcement." (*Id.*). Such "an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." *Stone v. Graham*, 449 U.S. 39, 41-42 (1980).[24] Again, attempting "to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose." *Holloman*, 370 F.3d at 1286. *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963); *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003) ("Use of the Ten Commandments for a secular purpose, however, does not change their inherently religious nature").[25]

This inherently religious purpose is buttressed by "public comments" of City officials including especially the Mayor. *McCreary*, 545 U.S. at 862-64. Defending the Prayer Vigil before it occurred, the Mayor proclaimed: "We open every council meeting with a prayer. And we end the prayer in *Jesus* name we pray. Our city seal says 'God be with us' and *we pray* that he is and *us with him*." (Ex. 28-A). Defending the Vigil afterwards, he announced: "God is good!!! All the time. The fight is on." (Ex. 41). The Mayor further testified that he believes the "Christian community" needs to oppose atheists who object to OPD's Prayer Vigil. (Guinn Dep. 101:4-102:1). The Mayor's remarks are consistent with those made by the other City officials involved. (P.MSJ 14-17). For instance, OPD Chaplain Quintana pronounced: "Nothing should stop, hinder or prevent from fervent prayer. Keep it to 15-20 minutes of PRAYER only" (Ex. 12). Captain Edwards, in an email with other OPD staff, stated he was only keeping "in mind the *fair weather Christians* and the children that may attend." (*Id.*). Afterwards, he thanked OPD staff and Haynes for helping with the "PRAYER VIGIL," referencing two Bible quotes. (Ex. 16). Quintana responded thanking the Captain for "organizing this event," adding his "favorite verses,"

[24] *See id.* at 42 ("the Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.").
[25] *Accord Rabun*, 698 F.2d at 1111 (even if "purpose for constructing the cross was to promote tourism, this alleged secular purpose would not have provided a sufficient basis for avoiding conflict with the Establishment Clause.").

including "**John 17:23"** and **"Psalm 133:1."** (Ex. 16-C).

Together with the "patently religious" nature of prayer, this "openly available data support[s] a commonsense conclusion that a religious objective permeated the government's action." *McCreary*, 545 U.S. at 862-63. "To assert a secular purpose against this backdrop is ludicrous." *Kitzmiller v. Dover Area Sch. Dist*., 400 F. Supp. 2d 707, 763 (M.D. Pa. 2005).

Rather than distinguish the foregoing cases directly on point, the Mayor cites a single, non-binding case, *Port Authority*, which did not even involve prayer. (Mayor MSJ 14-15). *Port Authority* is plainly distinguishable. The Second Circuit held that "a particular artifact recovered from World Trade Center debris, a column and cross-beam" in a public museum was not unconstitutional. 760 F.3d. at 232. The "column and cross-beam" along with "more than 10,000 artifacts" were given to the "September 11 Memorial and Museum Foundation." *Id.* at 234-36. The court concluded a reasonable observer would view the effect of it, "amid hundreds of other (mostly secular) artifacts, to be ensuring historical completeness," akin to "religious paintings in governmentally supported museums." *Id.* at 236, 243-44. Under the purpose test, the court found that "the actual purpose of displaying the cross in the September 11 Museum is a genuine secular interest in recounting the history of extraordinary events." *Id.* at 240.

The Prayer Vigil was not an *artifact*, but a purposefully planned event by City officials. There is nothing remotely analogous between the facts here and those in *Port Authority*. In *Port Authority*, the government's secular purpose was "further evident from their documented account of interactions with religious groups emphasizing that, once placed in the Museum, the artifact's singular import will be historical, and no longer venerational." *Id.* at 239-40. The government even expressly avowed: "As a public institution, we will not explicitly offer religious services in association with the artifact." *Id*. Conversely, the City here "explicitly offer[ed] religious services," *id.* and its documents and interactions reflect a singular purpose to urge "fervent *prayer*." (Exs. 1-2, 8, 12, 28-A). The *Prayer* Vigil was indeed intended for "PRAYER only." (Ex. 12). Prayer "is undeniably religious and has, by its nature, both a religious purpose and effect." *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980). This lack of secular purpose "is

dispositive." *Wallace*, 472 U.S. at 56.

3. The Prayer Vigil unconstitutionally endorsed religion.

Yet, regardless of the purpose, the Prayer Vigil emphatically fails *Lemon's* effect prong. "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief." *Allegheny*, 492 U.S. at 593-94, 610.

> [A]n important concern of the effects test is whether the *symbolic union* of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.[26]

Whenever a prayer is merely *included* in an otherwise secular government-sponsored event, even if nondenominational and only two-minutes in duration (*Lee*), the "conclusion is inescapable that the religious invocation conveys a message that the [government] endorses" it. *Jager*, 862 F.2d at 831-32. "A religious service under governmental auspices necessarily conveys the message of approval or endorsement . . . This is so *even when* the endorsement takes place in company with *secular events*." *Doe v. Crestwood*, 917 F.2d 1476, 1478 (7th Cir. 1990) (emphasis added). *See Lee*, 505 U.S. at 592 (two-minute prayer).

The same result is obtained when the government merely promotes a *privately*-organized, *privately*-funded, *privately*-sponsored event or display. *E.g.*, *Allegheny* (private display with disclaimer); *Rabun* (privately-funded display); *Crestwood*, 917 F.2d at 1476-79 (privately-sponsored event); *Gilfillan v. Philadelphia*, 637 F.2d 924, 931 (3d Cir. 1980) (city endorsed privately-sponsored event just by funding part of platform); *Hewett*, 29 F. Supp. 3d at 633-65 (mayor endorsed privately-sponsored event because of language in city's promotional materials).

In the present case, unlike in, *Lee*, *Santa Fe*, and *Jager*, a short prayer was not merely *included* in an otherwise secular event; the entire "Prayer Vigil" itself was devoted to "PRAYER only." (Ex. 12). And unlike in *Allegheny*, *Rabun*, *Crestwood*, *Gilfillan*, and *Hewett*, there is no evidence of any private sponsor of the Prayer Vigil. Necessarily then, the City's *exclusively* religious event, that it sponsored *exclusively*, must be unconstitutional too.

[26] *School Dist. v. Ball*, 473 U.S. 373, 390 (1985) (internal citation omitted, emphasis added).

This unconstitutional endorsement was heightened by the fact that the City's police department promoted "fervent prayer," uniformed police personnel led citizens in Christian prayer, police officers participated, and the Mayor and Chief visibly participated too:

> A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian.
>
> "When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

Friedman v. Bd. of Cty. Comm'rs, 781 F.2d 777, 781-82 (10th Cir. 1985).[27] Plaintiffs and non-Christian citizens in fact felt affronted, threatened, and marginalized by the OPD's Prayer Vigil.[28] One citizen posted on OPD's Facebook page: "why are the police asking us to pray? will they arrest us if we don't pray?" (Ex. 2, p.3). Plaintiffs testified that the Prayer Vigil was coercive, in that it pressured community members to participate in religious exercise, necessarily portraying those who do not believe and do not participate as outsiders. (P.MSJ 13 n.65). Moreover, all ten of the speakers were Christian.[29] Observant Jews were effectively excluded, as the Prayer Vigil took place on the first evening of Rosh Hashanah.[30]

Like its purpose section, the Mayor's *Lemon* effect "analysis," is bereft of authority and persuasion. (Mayor MSJ 15). Indeed, he relied almost entirely on *Port Authority*, distinguished above, and *Greece* (*id.* at 14-15), which is an exception to *Lemon*, *supra*, that is inapplicable here. In a conclusory fashion, the Mayor simply avowed that the "primary effect was to move the citizens who attended to be more concerned, more vigilant, more willing to participate and assist in the law enforcement activities to solve and stop the crime spree." (*Id.* at 15). He cited *no evidence* for this sweeping assertion.

---

[27] *Id.* (citing *Schempp*, 374 U.S. at 221; *Engel*, 370 U.S. at 430-31).
[28] (Exs. 2, 24-36, 38) (Graham Dep. 33:22-25).
[29] (Graham Dep. 99:13-16, 100:14-101:8, 144:13-145:14, 157:5-10) (Guinn Dep. 28:2-3, 91:11-23, 112:6-8) (Rojas Dep. 41:9-42:7) (Porgal Dep. 88:3-14).
[30] On September 22, for instance, a citizen wrote to OPD on its Facebook: "Are you aware that the Jewish New Year, Rosh Hashanah, starts on Wed 9/24? Essentially by endorsing this prayer vigil, you are saying Jews need not appear." (Ex. 2, p.16). Likewise, a reporter with the Ocala Star Banner wrote: "Tonight, which is Rosh Hashana, is the police chief's prayer vigil. I've been asked if there is only a Christian God." (Ex. 53).

But even if the Prayer Vigil had these claimed effects (which are really just recitations of avowed *purpose*), they would not negate, or even have any bearing upon, the undeniable religious effect of prayer. The "effect prong asks whether, *irrespective of government's actual purpose*, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace*, 472 U.S. at 56 n.42 (emphasis added). There is no question that "facilitating any prayer clearly fosters and endorses religion over nonreligion." *Holloman*, 370 F.3d at 1288. In *Hall*, for instance, the court held unconstitutional a decidedly "innocuous" "motorist prayer" on a state map even though it had the purpose of promoting motorist safety. 630 F.2d at 1019-21 n.1. That the "prayer may foster the state's legitimate concern for safety of motorists," was irrelevant, as a "prayer, because it is religious, does advance religion." *Id.* at 1020, 1022. Similarly, in *DeSpain v. De Kalb Cty. Cmty. Sch. Dist.*, the court held that a nondenominational "thank you" poem constituted a prayer and that its recitation in a public school violated the Establishment Clause. 384 F.2d 836 (7th Cir. 1967). The state argued that the verse promoted good manners and gratitude and the court acknowledged that it may well have had those secular effects. *Id.* Nonetheless, the court noted that *Engel* and *Schempp* would be meaningless if the use of a prayer may be justified on the grounds that it promotes secular virtues. *Id*. at 839.

Likewise, in *Gilfillan*, the city claimed that by funding a platform for the Pope's visit, a privately-organized event, it "helped put Philadelphia in a good light." 637 F.2d at 930-31. It further averred that "the 'unique' nature of the Pope's visit" made "the effect not primarily religious." *Id.* But the Third Circuit found "no merit" to these arguments, observing: "the City's assistance had effectively enabled the Pope to reach large numbers of persons and to perform a religious service. A religious effect of such magnitude may itself be unique." *Id.*

And in *Doe v. Elmbrook Sch. Dist.*, the Seventh Circuit held that a school district's use of an "auditorium" within a nondenominational church for graduation ceremonies failed the effect test even though it had a secular purpose. 687 F.3d 840, 844 n.1, 853-54 (7th Cir. 2012). Namely, the school's facilities were crowded and overheated and the school could not find a comparable venue for the same price. *Id.* at 845 n.2, 848, 855. Thus, although using the church's auditorium

had the secular effects of providing greater comfort to attendees and saving the school money, the religious effect of the "religious iconography" in the church was still plain." *Id.* at 851-53.

This Court's decision in *Mendelson v. St. Cloud*, involving a privately-donated cross on a city's water tower, is also instructive. 719 F. Supp. 1065, 1067-71 (M.D. Fla. 1989). The city contended "that the cross has secular and historical value as a guidepost for fishermen and pilots and as a landmark." *Id*. Yet the secular effect of the cross as a guidepost did not in any way negate the religious effect of the cross. This Court properly held that those "who observe the cross atop the water tower can only presume that the City of St. Cloud has abandoned any pretense of religious neutrality and has wholeheartedly endorsed the Christian religion." *Id.*

OPD's use of "fervent prayer" to solve the crime problem sent a stigmatic message "to nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members'" of the community. *Trunk v. City of San Diego*, 629 F.3d 1099, 1125 (9th Cir. 2011) (citations omitted). By analogy, in *Trunk*, the Ninth Circuit held that a war memorial cross had a secular purpose but not effect. That the cross had the undeniable effect of commemorating veterans did not change the cross's religious meaning. On the contrary, the court properly recognized that such a use of a

> Christian symbol to honor all veterans sends a strong message of endorsement and exclusion. It suggests that the government is so connected to a particular religion that it treats that religion's symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating.

Id. at 1124-25. The Tenth Circuit reached the same conclusion in *Am. Atheists v. Duncan*, that memorial status does not nullify a cross's "religious sectarian content because a memorial cross is not a generic symbol of death; it is a Christian symbol of death." 616 F.3d 1145, 1161 (10th Cir. 2010). The Seventh Circuit in *Harris v. City of Zion* also ruled that a city's seal, which depicted a cross in one quadrant, along with other "snapshots of the community" had the effect of endorsing religion. 927 F.2d 1401, 1412-13 (7th Cir. 1991). The court reasoned: "The images on the seal are not just neutral snapshots of the community . . . To any observer, the Rolling Meadows seal expresses the City's approval of those four pictures of City life—its flora, its

schools, its industry and commercial life, and its Christianity." *Id.*

Of course, there is no evidence to support the Mayor's argument that the Prayer Vigil had crime-solving effects. (Mayor MSJ 15). The entire one-hour Prayer Vigil consisted of sermons, prayers, and religious songs. (Graham Dep. 139:19-140:14). Police representatives spent no time discussing the crimes that had recently occurred or urging those who lived in the area of the crimes to come forward to help address the problem.[31] The Mayor could point to no peer-reviewed studies supporting the efficacy of prayer in solving crime. (Guinn Dep. 136:11-14). Both he and Chief Graham admitted they do not know of any other police department that solved violent crime by calling for fervent prayer. (*Id.* 74:19-22) (Graham Dep. 131:16-24). The City's "needless use of means that are inherently religious makes a message of endorsement likely if not unavoidable." *Jewish War Veterans v. United States*, 695 F. Supp. 3, 14 (D.D.C. 1988).

The Mayor cites *Port Authority* for the argument that reasonable observers "'would know that, in troubling times, many persons find comfort in prayer and religious rituals.'" (Mayor MSJ 15). But *Port Authority* does not support his claim that the *government* can facilitate these "prayer and religious rituals." Rather, as already noted, central to the Second Circuit's decision in upholding the museum artifact was the fact that the government publicly avowed not to "offer religious services in association with the artifact." 760 F.3d at 240. The court wrote:

> The observer would further know that, in troubling times, many persons find comfort in prayer and religious rituals . . . and that this was certainly the case in the aftermath of the September 11 attacks. . . . With this recognition, a reasonable observer would view the primary effect of displaying The Cross at Ground Zero, amid hundreds of other (mostly secular) artifacts, to be ensuring historical completeness, not promoting religion.

Id. at 243-44. Nothing in this passage sanctions a *city* endorsing "fervent prayer," much less conducting an entire Prayer Vigil. And even if *Port Authority* did stand for this untenable position, Eleventh Circuit precedent makes clear that government action "facilitating any prayer clearly fosters and endorses religion over nonreligion." *Holloman*, 370 F.3d at 1288.

The Mayor's reading of *Port Authority* conflicts with Supreme Court precedent too. As

[31] (Porgal Int. 8) (Porgal Dep. 48:10-17, 75:21-23) (L. Hale Dep. 35:4-9) (D. Hale Dep. 74:4-20).

the Court recognized in *Allegheny*: "To be sure, in a pluralistic society there may be some would-be theocrats, who wish that their religion were an established creed, and some of them perhaps may be even audacious enough to claim that the lack of established religion discriminates against their preferences." 492 U.S. at 611. "But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself." *Id.* Although "some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration," the "Constitution does not permit the gratification of that desire." *Id.* at 612.

Finally, in relying on *Greece* in his *Lemon* effect analysis, the Mayor not only fails to grasp the fact that *Greece* is an inapplicable exception to *Lemon*, *supra*, but also the factual differences between legislative prayer, which is intended to accommodate the private religious needs of legislators, and the City's Prayer Vigil. "Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct." *Id.* at 603 n.52.

4. The Prayer Vigil unconstitutionally entangled the City with religion.

Plaintiffs already demonstrated that the Prayer Vigil failed *Lemon*'s third prong and will not be repetitive here. The Mayor's third prong "analysis" is the most deficient of all, as it depends entirely on the legislative exception to *Lemon.* (Mayor MSJ 16-18). As *Marsh* and *Greece* are exempt from *Lemon*, the Mayor failed to show how the City's actions in initiating, planning, promoting, and leading a Prayer Vigil did not result in excessive entanglement.

C. The violated constitutional right was clearly established.

Turning to the second step, for a right to be clearly established, "there need not be a case on all fours, with materially identical facts"; rather, there can be "notable factual distinctions" between the precedent and the case before the court. *Holloman*, 370 F.3d at 1277 (quotations omitted). Officials need only have "reasonable warning" that their conduct violated constitutional rights. *Id*. (quotation omitted). This Court already correctly concluded that the Establishment Clause was violated at "the most fundamental level" and the case law was more than sufficient to give the Mayor a "reasonable warning." (Doc. 14 at 24) (Doc. 22).

The Mayor accused *this Court* of creating an unwarranted *per se* rule on prayer, but it is actually the Mayor who proposed an unwarranted *per se* rule. (Mayor MSJ 18 n.64). Whereas this Court merely correctly recognized that the case law is well settled that government-sponsored prayer violates the Establishment Clause (save for the rare legislative exception) (Doc. 14 at 18) (Doc. 22), the Mayor argued that officials can *never* be held personally liable for Establishment Clause violations "given the amorphous, protean contours of judicial Establishment Clause analyses." (Mayor MSJ 21). But his position is foreclosed by ample precedent denying qualified immunity Establishment Clause cases, including in novel situations:

- *Holloman*, 370 F.3d at 1263 (teacher was "not even potentially entitled to summary judgment on qualified immunity grounds against [] Establishment Clause claims")
- *Lakeland*, 779 F. Supp. 2d at 1343 (mayor would not be entitled to qualified immunity for Establishment Clause violation)
- *Rich v. City of Jacksonville*, 2010 U.S. Dist. LEXIS 143973, at *42 (D. Fla. 2010) (lack of similar cases not dispositive where conduct would clearly violate Establishment Clause)
- *Marrero-Méndez*, 830 F.3d at 48 (police officials not entitled to qualified immunity for endorsing prayer)
- *Inouye v. Kemna*, 504 F.3d 705, 717 (9th Cir. 2007) (denying qualified immunity to prison officials in Establishment Clause case)
- *Wood v. Bd. of Educ*., 2016 U.S. Dist. LEXIS 136512, at *25 (D. Md. Sep. 30, 2016) (school officials not entitled to qualified immunity on Establishment Clause claim)
- *Sundquist v. Nebraska*, 2015 U.S. Dist. LEXIS 104601, at *21-22 (D. Neb. Aug. 10, 2015) (denying qualified immunity to prison officials in Establishment Clause case)
- *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1286-87 (D. Or. 2014) (denying qualified immunity to federal prison officials for refusing to authorize a Humanist study group, despite novelty of issue and no case directly on point)
- *Ryan v. Mesa Unified Sch. Dist*., 64 F. Supp. 3d 1356, 1363 (D. Ariz. 2014) (denying qualified immunity and despite school official's argument that "'[t]he law on student prayer is not established with sufficient clarity'")
- *Pugh v. Goord*, 571 F. Supp. 2d 477, 511 (S.D.N.Y. 2008) (prison officials)
- *Byar v. Lee*, 336 F. Supp. 2d 896, 904 (W.D. Ark. 2004) (sheriff)
- *Hansen v. Ann Arbor Pub. Schs*, 293 F. Supp. 2d 780 (E.D. Mich. 2003) (school officials)

- *Carlino v. Gloucester City High Sch*., 57 F. Supp. 2d 1 (D.N.J. 1999), *aff'd*, 44 F. App'x 599 (3d Cir. 2002) (school officials)

In fact, some of these courts explicitly rejected the Mayor's very argument.[32]

More importantly, the Mayor failed to explain how the Supreme Court and Eleventh Circuit cases involving prayer, together with the robust consensus of persuasive authority barring government-endorsed religious events, did not provide a "reasonable warning." As this Court correctly found, no "factually particularized, pre-existing case law was necessary for it to be obvious to local government officials that organizing and promoting a Prayer Vigil would violate the Establishment Clause." (Doc. 14 at 24) (Doc. 22). Significantly though, there *is* ample factually particularized case law including *Newman*, *Crestwood*, *Gilfillan*, and *Hewett*.

The Mayor did not mention these or the Eleventh Circuit prayer cases, let alone distinguish them. Noticeably absent from his brief is *any* Eleventh Circuit or Supreme Court decision, or even a non-binding decision, that remotely supports the constitutionality of the Prayer Vigil. Rather, he relies on only inapplicable non-binding cases, including those involving *private* speech: (1) *Harrison v. Culliver*, 2008 U.S. Dist. LEXIS 124589 (S.D. Ala. 2008); (2) *CF v. Capistrano Unified Sch. Dist*. 654 F.3d 975 (9th Cir. 2011); and (3) *Morgan v. Swanson*, 755 F.3d 757 (5th Cir. 2014). (Mayor MSJ 19-21), *see infra*.

Where, "as here, a religious practice is conducted by a state official at a state function, state sponsorship is so conspicuously present that only '*the plainly incompetent or those who knowingly violate the law*,' would deny it." *Marrero-Méndez*, 830 F.3d at 45-46 (citation omitted, emphasis added). In *Marrero-Méndez*, the court held:

> [Police officials] participated in . . . the prayer with a group of police officers during an official intervention meeting. Appellants have not cited, nor have we identified, any case that would deem such a prayer as a voluntary and spontaneous exercise by private individuals. Even in cases where the persons initiating or engaging in prayer are not state officials, the Supreme Court has inferred state sponsorship of the prayer where indirect state involvement suggests an imprimatur on the religious practice.[33]

That the Mayor even cites *Harrison* reveals his utter loss for precedent. In fact, *Harrison*

[32] *E.g.*, *Ryan*, 64 F. Supp. 3d at 1363 (the "argument that government officials are entitled to blanket qualified immunity in cases involving student prayer is untenable.").
[33] 830 F.3d at 45-46 (citing *Lee* and *Santa Fe*).

does not even support the assertion for which the Mayor cites it.[34] In *Harrison*, a prisoner witnessed a privately-organized worship service in the exercise yard where he was also present, and a prayer offered by a citizen as part of a GED ceremony that he was not required to attend. 2008 U.S. Dist. LEXIS 124589, at *1-8. Crucial to the court's conclusion finding no violation was the fact that the activities took place in a prison where "deference" is accorded to the "decisions of prison administrators." *Id*. at *19. The court stressed that "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Id*. at *15 (citations omitted). The court held that the inmate's limited "exposure [to religion] on those occasions had a valid, rational connection to the legitimate government interest of managing and securing the prison while accommodating the religious rights of another group of prison inmates." *Id.* at *19. It emphasized: "'Accommodating religious practices that does not amount to an endorsement is not a violation of the Establishment Clause.'" *Id.* at *24.[35] Here, the City was obviously not accommodating private prisoners' free exercise rights when *it* initiated, planned, promoted, and led a Prayer Vigil to hundreds of citizens assembled at its behest.

The Mayor's reliance on *Capistrano* further reveals his desperation for precedent. *Capistrano* did not involve government promoting religion. Instead, it involved a uniquely postured challenge to "hostility" toward religion, a murky area of the law with no precedent. 654 F.3d at 978. In finding that the teacher was entitled to qualified immunity, the Ninth Circuit stressed that, unlike here: "there has never been any reported case holding that a teacher violated the Establishment Clause by making statements in the classroom that were allegedly hostile to religion." *Id.* at 986. The court reiterated again, "we are aware of no prior case holding that a teacher violated the Establishment Clause by appearing critical of religion during class lectures,

[34] The Mayor argues that the "court granted summary judgment for the defendants individually *based on qualified immunity*." (Mayor MSJ 20) (emphasis added). But the court wrote: "Having found herein that Plaintiff's allegations do not establish a constitutional violation, '**there is no necessity for further inquiries concerning qualified immunity**.'" 2008 U.S. Dist. LEXIS 124589, at *10 n.4 (emphasis added).

[35] *See also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.").

nor any case with sufficiently similar facts." *Id.* at 987. Also complicating matters was the deference accorded to protecting academic freedom – a factor not present in this case:

> The Supreme Court has long recognized the importance of protecting the "robust exchange of ideas" in education . . . [T]eachers must also be given leeway to challenge students to foster critical thinking skills and develop their analytical abilities. This balance is hard to achieve, and we must be careful not to curb intellectual freedom by imposing dogmatic restrictions that chill teachers from adopting the pedagogical methods they believe are most effective. [*Id*. at 988 (citations omitted)].

Finally, the Mayor's reliance on *Morgan* for his argument that Establishment Clause law on government-sponsored prayer was not well settled cannot seriously be maintained. (Mayor MSJ 21). *Morgan* involved a *Free Speech* claim and did not involve prayer. In fact, the government (a principal) was not accused of promoting religion at all, but instead, was sued for disallowing a student to distribute religious material at an in-class winter party, in violation of the Free Speech Clause. 755 F.3d 757, 758-59 (5th Cir. 2014). Unlike this Court, which has the benefit of ample controlling authority holding that government-endorsed prayer is unconstitutional, and a robust consensus of persuasive authority holding that merely promoting a *privately-organized* prayer event violates the Establishment Clause, the Fifth Circuit in *Morgan* had no controlling authority and the non-binding authority was sharply splintered. The court observed: "Neither the Supreme Court nor this Court has explained whether *Tinker* or *Hazelwood* governs students' dissemination of written religious materials in public elementary schools, whether at official parties, after school on the 'lawn and sidewalk,' or at unspecified times and in unspecified places during the school day." 659 F.3d 359, 376 (5th Cir. 2011). It continued: "Not only is there no categorical ban on viewpoint discrimination in public schools, our sister circuits have divided over the question." *Id.* at 379.[36] The court reasoned:

> Factually analogous precedent failed to prohibit Principal Swanson's conduct (restricting the distribution of religious materials at a classroom party), as did the general bodies of law discussed above. Her case is unique among our qualified-immunity cases because, in addition to no law prohibiting her conduct, one of our sister circuits had explicitly

[36] The court noted that the Sixth Circuit had "upheld a school's restriction on a student seeking to distribute a candy-cane message, nearly identical to the one in this case." *Id.* at 380 (citation omitted). A Third Circuit decision was "practically on all fours," but had "upheld an elementary school's restriction on religious gifts." *Id.* Nor could the court "ignore the Fourth Circuit's decision in *Peck* . . ." *Id.* at 384.

> sanctioned almost identical conduct. Swanson had been advised of this precedent—the Third Circuit's decision in *Walz*—before acting . . .

Id. at 382. By clear contrast, the Mayor cannot point to any case, binding or otherwise, that upheld a government's promotion of a prayer event, let alone a City-sponsored "Prayer Vigil" where uniformed personnel led the citizenry in prayer. The cases are instead all to the contrary, including a case within the Eleventh Circuit that specifically held that a city's promotion of a "mayor's prayer breakfast" violated the Establishment Clause. *Newman*, 181 F. Supp. 2d at 1381. *Newman*, like *Crestwood*, *Gilfillan*, and *Hewett*, is in accord with binding precedent.

"Ambiguity in the law cannot be manufactured by borrowing from factually and legally distinguishable cases" such as those the Mayor relied upon. *Marrero-Méndez*, 830 F.3d at 48.

Finally, the fact that the Mayor received *actual notice* that his actions were unconstitutional cannot be understated. Qualified immunity cannot apply if the official "had constructive or *actual* notice that such conduct violated a federal right." *In re Potter*, 354 B.R. 301, 318 (Bankr. N.D. Ala. 2006) (emphasis added). For instance, in *Inouye*, the Ninth Circuit held that a prison official was not entitled to qualified immunity for violating the Establishment Clause. 504 F.3d at 717. Relevant to this determination was the fact that the official "had *actual* notice that his actions were unconstitutional, in the form of [the inmate's] letter." *Id.*[37] In light of the above, an official in the Mayor's position, having available near-unanimous judicial invalidation of prayer in similar contexts, should not have reasonably made such a mistake.

D. The Mayor's reckless disregard for the Constitution warrants punitive damages.

The Mayor's "reckless and callous indifference to the federally protected rights of others" even makes him liable for punitive damages. *Smith v. Wade*, 461 U.S. 30, 56 (1983). (P.MSJ 33). As someone with no legal degree and admittedly no training in constitutional law, (Guinn Dep. 14:21-15:1), a reasonable person in the Mayor's shoes, upon receiving numerous complaints alleging Establishment Clause violations, would seek legal advice to determine the merit of such

[37] *See also Hansen*, 293 F. Supp. 2d at 814 ("Defendants can hardly claim that a reasonable education official in their position would not have understood that their actions were unlawful when they themselves were expressly informed" by "a licensed attorney").

complaints. But the Mayor did no such thing. Instead, he chose a posture of defiance, adamantly endorsing and defending OPD's Prayer Vigil. Responding to a complaint on September 22, for instance, he proclaimed: "Yes we have heard from *folks like you who don't understand the constitution*. *We are* doing *absolutely nothing wrong*."[38] That day, he responded to Plaintiff Hale:

> There is *nothing in the constitution to prohibit us* from having this vigil. Not only are we not canceling it *we are trying to promote it* and have as many people as possible to join us. *We open every council meeting with a prayer*. And we end the prayer in Jesus name we pray. Our city seal says "God be with us" and we pray that he is and us with him. [39]

At the time the Mayor made these assertions, he had never received any training on Establishment Clause issues, or any constitutional issues for that matter. (Guinn Dep. 14:21-15:1, 47:18-48:15, 81:1-82:25, 84:1-85:3). Even by the time of his deposition, the Mayor was still unaware that legislative prayer is an *exception* to Establishment Clause jurisprudence, (*id.* 81:6-10), a fact he should have known from this Court's decision denying his own motion to dismiss. (Doc. 14 at 18). When asked if he understood that legislative prayer was an exception to *Lemon*, he candidly admitted: "Remember, I don't have *any constitutional knowledge*." (Guinn Dep. 81:24-82:1, 82:8-9) (emphasis added). Yet the Mayor publicly defended the City's Prayer Vigil on legislative prayer grounds. (Ex. 28-A). Even now, the Mayor does not comprehend the *sui generis* nature of the exception, relying on it extensively in his motion. (Mayor MSJ 14-21).

The Mayor testified that while he "certainly understood" that there was controversy about the planned Prayer Vigil, including "the chief's promoting it and the appearance or at least alleged police department's sponsorship of it," he did not think it was "necessary or desirable, even, to confer with either [legal] counsel or [his] advisors here at city hall about the legality of the chief's letter and the prayer vigil." (Guinn Dep. 46:25-47:12). In fact, he did not "seek any advice" on the matter at all. (*Id*. 47:13-14).

What is more concerning is the fact the Mayor testified he would do nothing different in hindsight. He was asked: "In hindsight, do you feel that it would have been wise to consult with

[38] (Ex. 35) (emphasis added). *See also* (Guinn Dep. 96:13-22).
[39] (Ex. 28-A) (emphasis added). *See also* (Guinn Dep. 99:1-100:2).

counsel at the time of the prayer vigil over these legal controversies rather than just reach your own conclusion?" to which he responded, "No." (Guinn Dep. 84:19-25).[40] In fact, the Mayor even testified that it would be acceptable for the OPD to host another prayer vigil and to post another letter urging for "fervent prayer" on official OPD letterhead. (Guinn Dep. 135:4-12). He made this statement in spite of this Court's ruling that a government-sponsored Prayer Vigil violates *well-settled* First Amendment rights. (Doc. 14 at 19-20). *See also* (Guinn Dep. 101:4-22).

The Mayor's actions in refusing to consult with counsel upon receiving legal complaints, then fervently defending the Prayer Vigil with uneducated declarations regarding Establishment Clause law, at the very least, reflect "reckless and callous indifference" to the constitutional rights of others. (P.MSJ 33). Such "behavior on the part of an infringing defendant allows the court to fashion the appropriate deterrent remedy." *Polo Fashions, Inc. v. Rabanne*, 661 F. Supp. 89, 96 (S.D. Fla. 1986). In light of the Mayor's unequivocal testimony he would do nothing differently, nominal damages alone will likely "fail to serve as a convincing deterrent." *Playboy Enterprises, Inc. v. Baccarat Clothing Co., Inc*., 692 F.2d 1272, 1274 (9th Cir. 1982).

CONCLUSION. This Court reached the correct conclusion when it held that the Mayor was not entitled to qualified immunity based on the facts set forth in the complaint. (Doc. 14) (Doc. 22). The summary judgment evidence fully substantiates those facts and buttresses them with additional evidence of the Mayor's flagrant disregard for First Amendment rights. Consequently, Plaintiffs respectfully request that this Court deny the Mayor's motion for summary judgment in its entirety and grant Plaintiffs' motion.

Respectfully submitted,

October 31, 2016

s/ Monica L. Miller
MONICA L. MILLER, Esq.
American Humanist Association
1777 T Street N.W., Washington, DC, 20009

[40] He was even asked again, "As you sit here today, do you wish that you had consulted counsel back then around the time of the prayer vigil?" His answer was clear: "No. It costs too much to ask those questions." (Guinn Dep. 85:16-19).

phone (202) 238-9088
mmiller@americanhumanist.org
CA Bar: 288343 / DC Bar: 101625

DAVID A. NIOSE
American Humanist Association
1777 T Street N.W., Washington, DC, 20009
phone (202) 238-9088
dniose@americanhumanist.org
MA Bar: 556486 / DC Bar: 1024530

HEATHER MORCROFT
331 S. Wymore Road
Winter Park, FL 32789
phone (407) 325-0585
hmorcroft13@gmail.com
FL Bar: 0709859

ATTORNEYS FOR PLAINTIFFS