

**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 PORCAL,  
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 THE CITY OF OCALA AND  
GREG GRAHAM'S MOTION FOR SUMMARY JUDGMENT**

---

**TABLE OF CONTENTS**

PLAINTIFFS’ INDEX OF EXHIBITS ..... iii

I. The material facts are undisputed but the City’s “Statement of Undisputed Facts” contains numerous and significant inaccuracies. .... 1

    1. OPD Initiated..... 1

    2. OPD Planned. .... 2

    3. No Private Sponsor..... 4

    4. Authority to Cancel. .... 4

    5. City-Endorsed..... 7

    6. City-Led..... 7

    7. Exclusionary Christian Event..... 8

II. Plaintiffs have standing because they had direct, unwelcome contact with the City’s promotion of the Prayer Vigil and the Prayer Vigil itself..... 8

    A. Plaintiffs were not required to alienate themselves from the Prayer Vigil..... 10

    B. *Valley Forge* and *FFRF* are plainly distinguishable. .... 11

III. The City’s Prayer Vigil – including the City’s actions in initiating, organizing, and promoting it, as well as the participation of uniformed OPD personnel in leading and participating in prayer at the event – violated the Establishment Clause. .... 12

    1. Misleading Bifurcated Analysis..... 12

    2. Inapplicable Cases..... 13

    3. False Factual Statements. .... 15

    A. The City failed to demonstrate a legitimate secular purpose. .... 16

    B. The City’s Prayer Vigil – and the Mayor and Chief’s active promotion of it – had the primary effect of advancing and endorsing religion..... 18

C. The Prayer Vigil unconstitutionally entangled the City with religion.....	21
IV. Municipal liability attaches to the City’s actions.....	21
V. Chief Graham is not entitled to qualified immunity.....	22
CONCLUSION.....	25

**PLAINTIFFS’ INDEX OF 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.”)

<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>	<b><u>Dep. Exhibit No.</u></b>
<b>Exhibit 1</b>	OPD Prayer Vigil Letter	<i>Graham Dep. Ex. 3</i> <i>Guinn Dep. Ex. 2</i>
<b>Exhibit 2</b>	OPD Prayer Vigil Letter Facebook post, Sept. 18, 2014, with comments	<i>Graham Dep. Ex. 51</i>
<b>Exhibit 3</b>	OPD Prayer Vigil Photos	

<b>3-A</b>	OPD Chaplain Quintana speaking from stage	<i>Graham Dep. Ex. 58</i> <i>Guinn Dep. Ex. 14</i>
<b>3-B</b>	Uniformed OPD Chaplains speaking from stage	<i>Graham Dep. Ex. 64</i> <i>Graham Dep. Ex. 65</i> <i>Guinn Dep. Ex. 20</i> <i>Guinn Dep. Ex. 21</i>
<b>3-C</b>	OPD Chaplain Quintana participating in prayer circle on stage and speaking with Prayer Vigil attendee	<i>Graham Dep. Ex. 60</i> <i>Guinn Dep. Ex. 16</i>
<b>3-D</b>	OPD Chaplain Quintana raising hands and Messianic Rabbi playing shofar	<i>Graham Dep. Ex. 63</i> <i>Guinn Dep. Ex. 19</i>
<b>3-E</b>	Mayor Guinn speaking with Prayer Vigil attendee	
<b>3-F</b>	Uniformed OPD officer at Prayer Vigil	
<b>3-G</b>	Chief Graham and Prayer Vigil attendee	
<b>3-H</b>	Chief Graham and Plaintiff Rojas	
<b>3-I</b>	Chief Graham and Plaintiff Porgal	<i>Graham Dep. Ex. 61</i> <i>Guinn Dep. Ex. 17</i>
<b>3-J</b>	Chief Graham and Ocala Atheists poster	
<b>3-K</b>	Prayer Vigil speaker	
<b>3-L</b>	Prayer Vigil crowd	<i>Graham Dep. Ex. 59</i> <i>Graham Dep. Ex. 62</i> <i>Guinn Dep. Ex. 15</i> <i>Guinn Dep. Ex. 18</i>
<b>Exhibit 4</b>	Payer Vigil Program	<i>Graham Dep. Ex. 57</i>
<b>Exhibit 5</b>	Email from Chief Graham to Captain Edwards & Chaplain Quintana, Sept. 18, 2014, Subject: Prayer Vigil	<i>Graham Dep. Ex. 19</i>
<b>Exhibit 6</b>	OPD emails with Prayer Vigil flyer	
<b>6-A</b>	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 *Graham Dep. Ex. 14*  
• Reply email from Narvella Haynes, Sept. 23 *Graham Dep. Ex. 27*  
• Reply email Captain Edwards, Sept. 23
- 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 10/2/2014 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 *Porgal Dep. Ex. 16*
- Reply email from Chief Graham, Sept. 20

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



- 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 *Graham Dep. Ex. 40*  
*Guinn Dep. Ex. 3*
- Reply email from Mayor Guinn, cc: Chief Graham, Sept. 19
- 33-B** Email from Paul Tjaden to Chief Graham, Sept. 22, 2014, Subject: More on your prayer vigil *Graham Dep. Ex. 40*  
*D Hale. Dep Ex. 12*
- Reply email from Chief Graham, Sept. 23 *Porgal Dep. Ex. 12*
  - Reply email from Paul Tjaden, Sept. 23
  - Reply email from Chief Graham, Sept. 23

- 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 & *Graham Dep. Ex. 43*  
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. 16*
- Exhibit 35** Email from Bud Laurent to Mayor Guinn, Sept. 22, *Graham Dep. Ex. 5*  
2014, Subject: Your Police Department
- Reply email from Mayor Guinn, *Guinn Dep. Ex. 7*  
cc: Chief Graham, Sep. 22
- Exhibit 36** Email from Pat MacMurray to Chief Graham, *Graham Dep. Ex. 41*  
Sept. 21, 2014
- Reply email from Chief Graham, Sep. 21
- Exhibit 37** Email from Plaintiffs Porgal and Luci Hale, Ocala *Porgal Dep. Ex. 18*  
Atheists, to Chief Graham, Sept. 30, 2014
- Reply email from Chief Graham, Oct. 1
- 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. *Graham Dep. Ex. 23*  
21, 2014, Subject: Stand tall on prayer!
- Reply email from Chief Graham, Sept. 22
- Exhibit 40** Email from Jill Eason to Chief Graham, Sept. 25, *Graham Dep. Ex. 24*  
2014, Subject: Proud of your stance
- Reply email from Chief Graham, Sept. 25
- Exhibit 41** Email from Bernie DeCastro to Mayor Guinn, Nov. *Graham Dep. Ex. 29*  
17, 2015, Subject: Help Mayor Guinn resist Atheist *Guinn Dep. Ex. 9*  
tonight
- Reply email from Mayor Guinn, Nov. 17

- Exhibit 42** Email from Fred Ewell to Chief Graham, Nov. 29, Subject: A brief message for Chief Greg Graham, Ocala Police Department, Fred Ewell to Graham, Graham response
- Reply email from Chief Graham, Dec. 1
- Exhibit 43** Email from Shana Mitchell to OPD, Sept. 25, 2014 *Graham Dep. Ex. 32*
- Reply email from Chief graham, Sept. 25
- Exhibit 44** Email from Diane Reichard to Chief Graham, Ocala CFO, Oct. 9, 2014
- Email reply from Chief Graham, Oct. 9
- Exhibit 45** Email from CharMaine Burnett to Chief Graham, *Graham Dep. Ex. 37*  
Sept. 30, 2014
- Exhibit 46** Email from Jennifer and Keith Lorensen to Chief *Graham Dep. Ex. 33*  
Graham and Mayor Guinn, Sept. 29, 2014, *Guinn Dep. Ex. 11*  
Subject: Thank you for standing up to the Freedom From Religion Foundation
- Exhibit 47** Email from Leah Oxendine to Mayor Guinn, *Graham Dep. Ex. 30*  
Nov. 19, 2015, Subject: Prayer vigils – thank you! *Guinn Dep. Ex. 10*
- Exhibit 48** Email from Dotty Rispoli to Chief Graham, *Graham Dep. Ex. 39*  
Oct. 2, 2014, Subject: Prayer Walk on Saturday
- Exhibit 49** Email from Reverend Samuel Smith to Mayor *Graham Dep. Ex. 38*  
Guinn, cc: Chief Graham, rob@hopeinocala.com, mark@hopeinocala.com & Luci Hale, June 12, 2015, Subject: Congratulations and Thanks for the Prayer Vigil
- Exhibit 50** Email from Meltin Bell to Chief Graham & Mayor *Graham Dep. Ex. 31*  
Guinn, Jan. 3, 2015, Subject: Blessings and favor to you for supporting last year’s prayer rally
- Exhibit 51** Email from Paul Clark to Chief Graham, Sept. 25, 2014, Subject: COMMUNITY PRAYER VIGIL
- Reply email from Chief Graham, Sept. 25
- Exhibit 52** Additional emails, phone calls, and Facebook messages sent to OPD in support of the Prayer Vigil
- 52-A** Facebook message, Mary Stone, Sept. 23, 2014 *Graham Dep. Ex. 35*
- 52-B** Phone message, Tommy Exum, Sept. 24, 2014 *Graham Dep. Ex. 36*

- 52-C** Phone message, Ted Jasper, Sept. 24, 2014
- 52-D** Email from Laurie Whitaker to Chief Graham  
Sept. 24, 2014
- 52-E** Email from Robert Douglas to Chief Graham,  
Oct. 21, 2015
- 52-F** Facebook messages, Zachary Counts, Nov. 26, 2014
- 52-G** Email from Bob Graham to Chief Graham, Dec. 5,  
2014
- 52-H** Facebook message, Carrie Tolson, Dec. 22, 2014
- 52-I** Facebook message, Kathy Wilk, July 27, 2015
- Exhibit 53** Email from Susan Carr, Ocala Star-Banner, to  
Kathy Crile, OPD Parks & Rec Director, Sept. 24,  
2014, Subject: Oct. 4 – God belongs in our city
- Reply email from Kathy Crile, Sept. 24
  - Email forwarded, Sept. 24
  - Reply email from Jeannine Robbins, Sept. 24
- Exhibit 54** Reviews on the OPD Facebook page, approximately  
Sept.– Nov. 2014
- Exhibit 55** Ocala Star-Banner Letters to the Editor
- Exhibit 56** News reporters requesting comment from OPD and  
Chief Graham about the Prayer Vigil
- Exhibit 57** News articles about the Prayer Vigil
- 57-A** OCALA STAR-BANNER, *Ocala will gather to pray,  
bring justice*, Sept. 22, 2014
- 57-B** OCALA STAR-BANNER, *Area atheists object to OPD  
organizing a community prayer vigil*, Sept. 23,  
2014
- 57-C** OCALA STAR-BANNER, *Hundreds join in stop-the-  
violence vigil*, Sept. 24, 2014
- 57-D** WUFT NEWS, *Ocala Community Members Unite at  
Prayer Vigil*, Sept. 25, 2014
- 57-E** OCALA STAR-BANNER, *Stemming violence takes  
more than prayer*, Oct. 5, 2014

- 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, *Graham Dep. Ex. 21*  
Sept. 2015
- 58-E** OPD Chaplains Program Section Manual, *Graham Dep. Ex. 22*  
Sept. 2010
- 58-F** OPD Directive 1.03
- 58-G** OPD Directive 1.04
- 58-H** OPD Directive 2.06
- 58-I** OPD Directive 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*, *Graham Dep. Ex. 56*  
July 20, 2015 *Guinn Dep. Ex. 12*
- Exhibit 63** Ocala City Council meeting minutes, Nov. 17, 2015

The City and Chief Graham (collectively “City” unless noted) attempted at an early stage of litigation to convince this Court that: (1) Plaintiffs lacked standing; (2) municipal liability could not attach to the City’s actions; and (3) the Mayor and Chief are entitled to qualified immunity. (Doc. 8, “D.MTD”). This Court rejected each of these arguments. (Doc. 14) (Doc. 22). The City’s efforts to resurrect these identical arguments are no more persuasive now.<sup>1</sup>

**I. The material facts are undisputed but the City’s “Statement of Undisputed Facts” contains numerous and significant inaccuracies.**

The City recites many “facts” that are starkly false, *infra*. These factual disputes, however, are *immaterial* to this case.<sup>2</sup> It is undisputed that the City, through its police department (“OPD”) initiated, organized, promoted, participated in, and led prayers at its Prayer Vigil. (P.MSJ 1-18). The City presents no evidence to the contrary. Rather, in a Janus-like fashion, it first denied that the Prayer Vigil was OPD-sponsored (City MSJ 1), but then switched gears to vehemently argue that it was “one tactic used by OPD” and part of “OPD’s approach of Community Policing.” (*Id.* at 4, 27). Obviously the City cannot have it both ways. And the evidence supports only one conclusion: the Prayer Vigil was clearly an OPD event. Indeed, Chief Graham and Mayor Guinn conceded that they were “not aware” of “any entity that was more involved in initiating, planning,<sup>3</sup> or conducting the Vigil than the OPD.”<sup>3</sup>

**1. OPD Initiated.** OPD indisputably initiated the Prayer Vigil. (P.MSJ 3-9) (City MSJ 2-3). The City admits OPD Chaplain Quintana initiated the idea in an OPD meeting organized by the Chief and held at OPD headquarters. (*Id.* at 2). The City further admits that the Chief formally approved the idea for the Prayer Vigil during said meeting. (*Id.* at 3). Not only did he approve it, but he testified: “I thought -- actually thought it was a great idea. So I said, ‘Yeah, *let’s – let’s – let’s* do it.’ And that’s when, you know, I said, ‘*Let’s* do it.’” (Graham Dep. 23:19-

---

<sup>1</sup> Plaintiffs incorporate by reference their motion for summary judgment (“P.MSJ”) and all evidence filed therewith. The City and Graham’s motion is cited as (“City MSJ”) followed by the page number.

<sup>2</sup> Whether a fact is material depends on the substantive law, and “[f]actual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

<sup>3</sup> (Graham Dep. 28:6-21) (Guinn Dep. 70:2-10). *See also* (Ex. 34) (acknowledging involvement by the “Ocala Police Department, and I as the Chief of Police”).

21) (emphasis added). The idea came from OPD headquarters, and not *anywhere else*.<sup>4</sup>

**2. OPD Planned.** It is further uncontroverted that OPD planned and organized the Prayer Vigil after it was initiated. (P.MSJ 3-18). There is no evidence that any other entity planned or organized it. The evidence is undisputed that OPD personnel:

- Scheduled the time, date, and location for the Prayer Vigil (Exs. 1, 2, 5, 12)
- Sought an alternative venue for the Prayer Vigil in the event of rain (Ex. 12)
- Created a letter promoting the Vigil on OPD letterhead and posted it publicly (Exs. 1, 2)
- Created a flyer with OPD's emblem promoting the Prayer Vigil during staff time (Ex. 6)
- Discussed the Prayer Vigil during several OPD staff meetings (Exs. 13, 18)
- Determined who would speak at the Prayer Vigil (Exs. 4, 11) (City MSJ 5-6)
- Directed OPD Chaplains to participate in the Prayer Vigil in OPD uniform (Ex. 10)

The City nonetheless asserts: “No OPD employee (other than Richard Edwards who participated while off-duty and wearing plain clothes) determined or directed any aspect of the Vigil” (City MSJ 6). This is false and misleading, and not just because Chief Graham himself was involved in Vigil planning and promotion, *infra*. Four uniformed OPD Chaplains led prayers at the event, and Chief Graham conceded *OPD* Chaplains “took a significant part in planning the vigil.”<sup>5</sup> OPD Chaplains are “*official members* of the Ocala Police Department and are members of the *staff* of the Chief of Police.”<sup>6</sup> The City admits OPD Chaplain Quintana initiated the idea *and* “took responsibility for further planning and organizing.” (City MSJ 3). The City also admits that Chaplain “Quintana was responsible” for inviting clergy “to speak at the Vigil.”<sup>7</sup>

Captain Edwards was also heavily involved in *planning* the Vigil, and not as an “off-duty” citizen.<sup>8</sup> Chief Graham admitted Edwards was involved as “district commander.” (Graham Dep. 20:10-13). Edwards participated in the OPD meeting when the Prayer Vigil was initiated, discussed the Vigil at OPD meetings,<sup>9</sup> facilitated speaker coordination,<sup>10</sup> found an alternative

<sup>4</sup> Thus, there is simply no merit to the City’s suggestion that Graham was merely “reaching out to the faith-based community for assistance and expressing support *for their idea of a vigil*.” (City MSJ 4) (emphasis added).

<sup>5</sup> (Graham Dep. 23:22-24:9). *See also* (*id.* 22:7-21, 28:2-21) (Exs. 3-A-3-D) (Ocala Int. 25) (Graham Ints. 1-4).

<sup>6</sup> (Ex. 58-A) (emphasis added) (Graham Dep. 24:23-25:4) (Guinn Dep. 68:22-69:5). *See also* (Ex. 17).

<sup>7</sup> (City MSJ 6). *See also* (Exs. 4, 11) (Graham Dep. 100:14-101:2) (Ocala Int. 25).

<sup>8</sup> (City MSJ 6). *See also* (Exs. 5-7, 11-19) (Graham Dep. 20:10-13, 55:11-56:24, 57:13-17).

<sup>9</sup> (Exs. 13, 18). On September 23, Edwards emailed Major Ford stating that he would be “mentioning the Prayer Vigil, tomorrow night” at a regularly scheduled OPD staff meeting. (Ex. 13). In a September 29 email to Ford,

venue in the event of rain (Ex. 12), helped set up the event,<sup>11</sup> and communicated regularly via OPD email in planning for the event.<sup>12</sup> He also spoke at the Prayer Vigil, referring to his dual status as an *OPD* “police officer” and “a child of God.” (Ex. 15). Thus, the City’s later contention that Captain Edwards merely provided OPD Chaplains “meeting space” is meritless. (City MSJ 3). Chaplain Quintana’s email to Edwards is revealing: “God bless you Captain *for organizing this event* and I am honored you invited me.” (Ex. 16-C).

Other sworn officers were also involved, including Officer Williams, Officer Woods, Major Yonce, Captain Sirolli, Sergeant Scroble, and Law Enforcement Analyst Brito.<sup>13</sup>

Chief Graham himself approved the idea for the Prayer Vigil in the OPD staff meeting *he* organized.<sup>14</sup> He further *directed OPD Chaplains to be present at the Prayer Vigil in uniform.*<sup>15</sup> He was also instrumental in promoting the Prayer Vigil. (Exs. 1-2, 9). Yet the City inexplicably argues that beyond his involvement in initiating the Vigil, Graham had “no involvement in or knowledge of the planning of the Vigil.” (City MSJ 3). This is wrong. In fact, the *next* day, Graham emailed Captain Edwards and Chaplain Quintana: “*We* are going to have the vigil on Thursday night instead of Wednesday due to getting feedback from a lot of ministers that Wednesday is not the best night to do it.” (Ex. 5) (emphasis added). That day, Graham also signed and posted the OPD letter. (Ex. 2). On September 22, Graham was copied on Quintana’s email to OPD Chaplains, which stated: “*Chief Graham asked me* to contact all our chaplains and ask you all to be pres[ent] (Please see attached attachment with all detail information) *He also asked* to please be Dressed up in the Official Chaplains Uniform (White Shirt).”<sup>16</sup>

---

Edwards included “Prayer Vigil last Wednesday – well attended” in a list of items to mention at that week’s Command Staff meeting. (Ex. 18) (Graham Dep. 63:3-64:4).

<sup>10</sup> On September 22, Captain Edwards emailed Chaplain Quintana: “Please send me the name of the Pastors that are praying and their Church name and title.” (Ex. 11).

<sup>11</sup> In an email between six OPD officers, Edwards wrote: “I am working on getting this prayer vigil set up.” (Ex. 14).

<sup>12</sup> (Exs. 5-7, 11-19) (Graham Dep. 56:10-24, 57:13-17).

<sup>13</sup> (Exs. 3-C, 3-F, 6-8, 10, 14, 16, 20) (Graham Ints. 1-2) (Graham Dep. 19:20-20:20, 53:9-55:2, 161:2-8, 169:2-10) (Guinn Dep. 119:2-16).

<sup>14</sup> (City MSJ 2-3) (Graham Dep. 20:4-7, 23:11-21) (Graham Int. 1).

<sup>15</sup> (Ex. 10) (Graham Dep. 37:3-38:25, 39:10-13, 40:1-41:19, 162:3-17).

<sup>16</sup> (Ex. 10) (emphasis added). The City even later concedes that Graham had knowledge of the planning “such information as the date, time and location of the Vigil.” (City MSJ 6).



**3. No Private Sponsor.** There is no evidence to support the City’s claim that “local community members” rather than OPD, “organized and hosted” the Prayer Vigil, and that it was “led by private citizen Narvella Haynes.” (City MSJ 1, 12). Again, OPD staff came up with the idea of the Prayer Vigil, and both Mayor Guinn and Chief Graham conceded that they were “not aware” of “any entity that was more involved in initiating, planning, or conducting the Vigil than the OPD.” (Graham Dep. 28:6-21) (Guinn Dep. 70:2-10). Haynes was the *only* citizen invited to help the OPD, and even that was only per Chief Graham’s authorization.<sup>17</sup>

Noticeably absent from the City’s motion are any emails or documents showing that “community *members*” unaffiliated with OPD (City MSJ 1-8) had any role in the event. Referring to the initial *OPD* meeting that Chief Graham organized at *OPD* headquarters, the City wrote: “The meeting was attended by *several individual citizens* who are active in the local faith-based community and several OPD officers.” (*Id.* at 2) (emphasis added). But only a single *non-OPD* “individual citizen” (Haynes) was present. Everyone else was OPD staff.<sup>18</sup> Even Chief Graham admitted that the OPD Chaplains and Officers were present in their official capacities.<sup>19</sup> Regarding Haynes, Chief Graham testified that *he invited her* because she had helped the OPD in the past. (Graham Dep. 20:22-25). Even Graham’s own interrogatory responses concede that the Chaplains were involved in their official capacities as OPD staff.<sup>20</sup> And Haynes had no significant role in the Prayer Vigil (she was not a speaker), and certainly no role that would negate the OPD’s status as initiators, planners, and organizers of the event.

**4. Authority to Cancel.** While the City concedes the Prayer Vigil was initiated by OPD and promoted by the Chief, *supra*, it relies extensively on the fact that Chief Graham denied the ability to cancel the event. (City MSJ 4-5, 18). This denial, however, came only after Graham

<sup>17</sup> (Graham Int. 1) (Graham Dep. 19:20-20:25) (City MSJ 2).

<sup>18</sup> (City MSJ 2) (Graham Int. 1) (Graham Dep. 19:20-20:25) (Ocala Int. 25).

<sup>19</sup> He testified: “Edwards . . . was the district commander . . . so that’s why he was there. Officer Mary Williams was the district service officer . . . Captain Sirolli was the captain in charge of our criminal investigative division who was handling the investigation of all the shootings. Major Yonce was the major in charge of Captain Sirolli. Hugh Brockington is one of *our chaplains*. Edwin Quintata [sic] is one of *our chaplains*.” (Graham Dep. 20:10-22).

<sup>20</sup> (Graham Int. 1). After listing the names of *all* those present, the response stated: “. . . All of these people can be contacted *through counsel for the City, with the exception of Narvella Haynes*.” *Id.* (emphasis added).

and Mayor Guinn had both expressly *refused to cancel* the event several times, and after receiving a litigation threat. (Exs. 24, 28-A, 29, 30, 33) (Supp. Int. 22).

The Mayor's sworn testimony acknowledges the City's authority over the event. (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 uniforms if they attend the prayer vigil?" He responded: "Yes." (*Id.* 55:11-15). The Mayor was also asked if it was within his authority to order Chief Graham to remove the OPD letter, to which replied: "Yeah. It's within my authority, overseeing the police department." (*Id.* 54:15-18). The Mayor's testimony is consistent with his and the Chief's emails refusing to cancel the Vigil. On September 22, the Mayor proclaimed:

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.

(Ex. 28-A) (emphasis added). That day, he wrote to another person: "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. . ." (Ex. 35). On September 22 and 23, Graham stated "I have no intention of canceling the event," and "I have no intention on calling this gathering off[.]"<sup>21</sup> Only *after* one of the eventual Plaintiffs urged Graham to "cancel this vigil before the legal wrangling begins," did Graham write, "I have no say in whether it gets canceled or not." (Ex. 24-C).

Even Chief Graham understood that he had the authority to *reschedule* the *date* of the Prayer Vigil, and therefore the authority to cancel it. (Ex. 5). Graham also accepted responsibility for the Prayer Vigil after the event in responding to an OPD employee who applauded Graham for "bringing the community together through prayer." (Ex. 40). Captain Edwards likewise

---

<sup>21</sup> (Exs. 24-B, 39). *See also* (Exs. 24-26, 32-34, 36).

understood that he had the authority to change the *location* of the Vigil on OPD's behalf.<sup>22</sup> Chaplain Quintana even thanked Edwards "for organizing this event."<sup>23</sup>

In light of the mountains of evidence showing heavy, and even exclusive, OPD involvement at all stages of the Prayer Vigil, Graham's self-serving declaration that it was his "understanding that the Vigil was being planned and organized not by OPD but by members of the community" is incomprehensible. (City MSJ 6). His own testimony, where he concedes OPD involvement at levels beyond any other entity, belies this position. (Graham Dep. 28:6-21).

"[U]nsupported self-serving statements . . . are insufficient [for] summary judgment," *Torjagbo v. United States*, 2007 U.S. Dist. LEXIS 48223, at \*18-19 (M.D. Fla. July 3, 2007), especially when, as here, they are made in response to a *litigation* threat. See *McCreary Cty. v. ACLU*, 545 U.S. 844, 871-72 (2005). In Establishment Clause cases, courts must skeptically view, and often disregard, "self-serving" avowals. *Stone v. Graham*, 449 U.S. 39, 41 (1980). In *Am. Atheists, Inc. v. City of Starke*, this Court correctly did just that, declaring:

While the City may attempt to deny the fact that it is indeed a Cross on top of the water tower, as noted above, the attitudes and comments of the citizens of and an official in the City contradict any such notion. The Court will not entertain the idea that the Cross is actually a lowercase "t" standing for the . . . football team the "Tornadoes."<sup>24</sup>

In a final attempt to prove that some unidentified third party organized the Prayer Vigil, the City argued that one of the four Plaintiffs, Rojas, "conceded, that Chief Graham had no control over whether to cancel the Vigil." (City MSJ 5). Even if one Plaintiff's subjective belief could somehow be relevant to whether the Chief had actual authority to cancel the event, the City seriously misstates his testimony. Rojas actually testified that he believed the Chief "had control to stop his involvement or his staff involvement in it."<sup>25</sup>

Regardless, it is undisputed the Mayor had ultimate authority to cancel the event, or at

---

<sup>22</sup> On September 23, Edwards emailed Chief Graham, Officer Williams, Chaplain Quintana, and Haynes, proposing that the Vigil be held at a Baptist church in the event of rain. (Ex. 12). He wrote: "Your thoughts before we would send this alternative plan out." Quintana replied: "My two cents is to pray with or without rain on the Square. . . ." Edwards responded: "I have no problem with doing so on the square. *We* are a few making a *decision* for many and yes It would show good faith by doing so in the rain. . . . *I'll do* what the majority want. Capt. Edwards." (*Id.*).

<sup>23</sup> (Ex. 16-C) (Graham Dep. 45:11-18, 46:3-7).

<sup>24</sup> 2007 U.S. Dist. LEXIS 19512, at \*14 (M.D. Fla. Mar. 19, 2007).

<sup>25</sup> (Rojas Dep. 21:7-24, 31:12-20, 32:12-14, 55:5-8).

least to withdraw OPD's involvement in the Prayer Vigil, but adamantly refused to.<sup>26</sup>

**5. City-Endorsed.** It is undisputed that OPD *endorsed, promoted, and defended* the Prayer Vigil. (P.MSJ 1-18) (City MSJ 1-8). The government's mere *appearance* of endorsing a privately-sponsored religious event or display is unconstitutional. (P.MSJ 19-32), *infra* at 18-21. Chief Graham conceded that the Vigil appeared to many in the community to be OPD-sponsored. (Graham Dep. 67:17-68:11). Mayor Guinn also conceded that the Prayer Vigil appeared to be a Christian event. (Guinn Dep. 91:11-92:10).

**6. City-Led.** And even if the Vigil had been initiated, planned, and promoted by private entities rather than OPD, OPD staff undeniably *led and participated* in the Prayer Vigil with the Mayor and Chief's resounding approval. (P.MSJ 3-14). Not only did the Mayor and Chief approve, but they both actively participated in the Prayer Vigil and the OPD-led prayers.<sup>27</sup>

The City asserts: "Other than a few officers present for purposes of security and engaging citizens about the crime spree, Chief Graham did not ask or instruct anyone, including any OPD chaplain, to attend or participate in the Vigil." (City MSJ 6). This statement is plainly false because the evidence shows that not only did Chief Graham instruct OPD Chaplains to *attend* the Prayer Vigil, but he specifically instructed them to *participate in uniform*.<sup>28</sup> Moreover, five of the ten speakers were OPD personnel, four being in OPD uniform.<sup>29</sup> Graham admitted that the Chaplains were acting in their official capacities pursuant to section 1(B) of the OPD Manual.<sup>30</sup> Mayor Guinn admitted he had ultimate authority over the OPD Chaplains at the Vigil. (Guinn Dep. 55:2-15). While the City asserts that OPD Chaplains are unpaid (City MSJ 7, 18), this is immaterial because OPD Chaplains are "*official members of the Ocala Police Department*" and considered "staff."<sup>31</sup> They are even "covered by Florida Worker's compensation." (Ex. 58).

<sup>26</sup> (Exs. 9, 28-A) (Guinn Dep. 54:12-55:18).

<sup>27</sup> (P.MSJ 12) (Exs. 3-E, 3-G-3-H, 3-J) (Graham Dep. 139:16-140:11) (Guinn Dep. 77:12-25, 109:12-25) (Rojas Ints. 8, 10-11, 13) (D. Hale Ints. 10-11, 13) (Porgal Ints. 8, 10-11, 13) (L. Hale Ints. 10-11, 13) (Rojas Dep. 25:21-22, 51:7-8) (L. Hale Dep. 34:21-35:3, 36:17-37:16, 37:24-38:3, 78:5-8) (D. Hale Dep. 69:11-12, 72:6-18).

<sup>28</sup> (Ex. 10) (Graham Dep. 37:3-38:25, 39:10-13, 40:1-41:19, 162:3-17).

<sup>29</sup> (Graham Dep. 22:7-20, 28:2-5) (Exs. 3-A-3-B) (Ocala Int. 25) (Graham Ints. 3-4) (Paige Decl. Exs. A-B).

<sup>30</sup> (Graham Dep. 77:20-78:14) (Exs. 3-A-3-D, 58-D-58-E).

<sup>31</sup> (Ex. 58) (emphasis added) (Graham Dep. 24:6-9, 24:23-25:4, 182:2-5) (Guinn Dep. 21:20-25, 68:22-69:5).

Uniformed OPD *police officers* also *participated* in the Prayer Vigil.<sup>32</sup> They were not simply “present for purposes of security.” (City MSJ 6). Uniformed *officers* joined hands in what appeared to be a prayer circle.<sup>33</sup> Plaintiff Luci Hale described police “employees in uniform on the stage singing, praying, raising their hands like a good old-fashioned down-home revival.”<sup>34</sup> Photos of the event confirm this. (Exs. 3-C-3-D) (Guinn Dep. 119:2-16).

**7. Exclusionary Christian Event.** It is undisputed that the Prayer Vigil was predominantly Christian. (P.MSJ 12-13). All ten speakers were Christian.<sup>35</sup> The Mayor admitted he expected the event would be mostly Christian. (Guinn Dep. 91:11-23). And Captain Edwards expressed concern only for “fair weather Christians.” (Ex. 12). The City was also on notice that the event would exclude observant Jews and atheists. (Exs. 2, 24-27, 33, 53) (P.MSJ 13).

Once again, relying only on self-serving statements, the City asserts: “Chief Graham believed that there would be members of various faiths present at the Vigil . . . and, in fact, encouraged a member of the atheist community to contact the organizers of the event if he wished to speak at the event.” (City MSJ 3, 21). This erroneously implies that Graham benevolently decided to invite an atheist without prompt. But Graham was *responding* to an atheist, Paul Tjaden, who objected to the Prayer Vigil and expressed zero interest in partaking in a *prayer event* he correctly understood to be unconstitutional. (Ex. 33-B). There is no evidence that any atheist or non-Christian was invited to speak at the Prayer Vigil *prior to the controversy*. Nor does Graham’s email support the City’s claim that there were private “citizens organizing the event.” (City MSJ 21). The “minister that is organizing the event” referenced in Graham’s email (Ex. 33-B) was an OPD Chaplain for whom he had full oversight. (Exs. 10-11, 58-B).

**II. Plaintiffs have standing because they had direct, unwelcome contact with the City’s promotion of the Prayer Vigil and the Prayer Vigil itself.**

For Establishment Clause standing, it is sufficient to show: (1) direct, unwelcome contact

<sup>32</sup> (City MSJ 6-7) (Exs. 3, 10) (Guinn. Dep. 119:2-16). *See also* (P.MSJ 10 n.43).

<sup>33</sup> (Ex. 3-C) (D. Hale Dep. 45:23-46:5) (Graham Dep. 149:5-12, 149:23-150:14) (Guinn Dep. 119:2-16).

<sup>34</sup> (L. Hale Dep. 29:25-30:2). *See also* (Graham Dep. 155:2-9) (D. Hale Dep. 45:16-18, 68:23-69:5).

<sup>35</sup> (Exs. 4, 11) (Graham Dep. 96:15-16, 100:14-101:18) (Guinn Dep. 103:18-104:1) (Paige Decl. Exs. A-B).

(2) with state-sponsored religion.<sup>36</sup> Indeed, “alleging *only* ‘personal and unwelcome contact’ with government-sponsored religious [activity] is sufficient to establish standing.” *Awad v. Ziriax*, 670 F.3d 1111, 1121-22 (10th Cir. 2012) (citations omitted). Plaintiffs indisputably had “direct, unwelcome contact” with the City’s promotion of a Prayer Vigil and the Prayer Vigil itself. (P.MSJ 2 n.6) (Doc. 14) (Doc. 22). Indeed, Plaintiffs’ exposure to OPD’s letter – endorsing “fervent prayer,” “blessings,” and encouraging local citizens to attend a “Prayer Vigil” – was enough *without more*. An “identifiable trifle” is sufficient for standing. *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973) (citation omitted). There is “no minimum quantitative limit required to show injury.” *Saladin*, 812 F.2d at 691 (citing *SCRAP*).

Plaintiffs suffer a cognizable injury when they are merely subjected to “unwelcome religious statements.” *Id.* at 692. In *Saladin*, plaintiffs challenged a city seal with the word “Christianity.” *Id.* at 689. Although some lived outside the city, the Eleventh Circuit found standing simply because they received city stationery and were “affronted by the presence of the allegedly offensive word.” *Id.* at 693. If those non-residents had standing based upon stationery from *another city* mentioning “Christianity,” the Plaintiffs here must have standing for encountering the City’s letter and emails urging “fervent prayer” and *their* attendance at a Prayer Vigil in *their own community*. The “psychological feeling of being excluded or denigrated on a religious basis in one’s own community is enough.” *FFRF v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 2016 U.S. Dist. LEXIS 19995, at \*22 (C.D. Cal. Feb. 18, 2016) (citations omitted). As Plaintiff Hale testified: “this letter was on a public Facebook page that was designed for the police department that holds sway every time I come into the City of Ocala to run my errands and what it is saying to me is that there’s a special place for religious people in this city. It does not include me.” (L. Hale Dep. 27:22-28:3).<sup>37</sup> Accordingly, Plaintiffs’ unwelcome contact with the OPD letter, *and* the Prayer Vigil itself, is *beyond* sufficient.

<sup>36</sup> *E.g.*, *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987); *ACLU v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107 (11th Cir. 1983); *Suhre v. Haywood Cty.*, 131 F.3d 1083 (4th Cir. 1997).

<sup>37</sup> *See also* (Porgal Dep. 20:3-6, 53:10-22) (Rojas Dep. 15:6-17, 31:25-32:2, 70:3) (D. Hale Dep. 16:8-13, 22:17-20).

**A. Plaintiffs were not required to alienate themselves from the Prayer Vigil.**

This Court already correctly found Plaintiffs had standing (Doc. 14 at 6-15) (Doc. 22). Even the Mayor concedes standing. (Mayor MSJ). Yet the City insists Plaintiffs lack standing, not based on any new facts or superseding law but on its own novel theory of standing. Namely, the City argues that religious minorities, knowing a constitutional violation is occurring in which the majority Christian religion is being endorsed by the government, have a duty to stay away. (City MSJ 11-13). It states that Plaintiffs lack standing because of “their voluntary attendance at the Vigil.” (*Id.* at 12). This argument lacks persuasion for four reasons.

First, the City overlooks the fact that Plaintiffs’ unwelcome contact with the OPD letter promoting the Prayer Vigil is sufficient to confer standing to challenge the Prayer Vigil, *independent* of attendance, *supra*. For instance, the resident in *Doe v. Crestwood*, had standing to challenge a village’s endorsement of a short mass as part of a three-day Italian festival based on an article in a “newspaper published by the Village” promoting the event. 917 F.2d 1476, 1479 (7th Cir. 1990). Likewise, residents in *Newman v. City of E. Point* had standing to challenge a prayer event based on a flyer publicizing it. 181 F. Supp. 2d 1374, 1377-78 (N.D. Ga. 2002).

Second, the City’s argument is foreclosed by precedent. The Eleventh Circuit in *Pelphrey v. Cobb Cty.*, held that a plaintiff had standing to challenge a county’s legislative prayer practice. 547 F.3d 1263, 1279-80 (11th Cir. 2008). Crucially, his standing was not defeated by the fact that he *chose* to subject himself to the prayers on the internet, even though he could have muted them or fast forwarded them. *Id.*<sup>38</sup> The plaintiff in *Hewett v. City of King* likewise had standing to challenge a city’s involvement in a private event that included prayer. 29 F. Supp. 3d 584, 603-04 (M.D.N.C. 2014). That he elected to attend the event, and protest it, did not “diminish[] Plaintiff’s asserted injury.” *Id.*<sup>39</sup>

Third, the City’s argument rests on the false premise that Plaintiffs would feel less

---

<sup>38</sup> *Accord Pelphrey v. Cobb Cty.*, 495 F. Supp. 2d 1311, 1316-17 (N.D. Ga. 2007); *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at \*23-25 (reaching same conclusion as *Pelphrey*).

<sup>39</sup> *See also Linnemeir v. Purdue Univ.*, 155 F. Supp. 2d 1044, 1055 n.9 (N.D. Ind. 2001) (that plaintiffs’ “alterations of behavior were ‘self-inflicted’ injuries and that the Plaintiffs voluntarily chose to change their behavior,” had “no bearing on . . . whether the Plaintiffs’ have demonstrated an injury sufficient to confer standing.”).

stigmatized if they ostracized themselves from the City’s “Community Prayer Vigil.” But this makes no sense. Plaintiffs would be just as injured had they avoided the event. Simply being aware of the fact that the City was sponsoring a Prayer Vigil harmed Plaintiffs.<sup>40</sup>

Feelings of marginalization and exclusion are cognizable forms of injury, particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion ‘that they are *outsiders*, not full members of the political community.’<sup>41</sup>

Fourth, if the City’s rule were adopted, prospective Establishment Clause plaintiffs would be forced to ignore unconstitutional conduct occurring in their own community. Plaintiffs attended the Vigil to investigate the City’s conduct. (Rojas Dep. 40:8-13). Without being able to personally observe the government’s planned unlawful activities and gather evidence of the same, very few prospective plaintiffs would have standing to challenge unconstitutional activity.

**B. *Valley Forge* and *FFRF* are plainly distinguishable.**

The City continues to invoke the same distinguishable cases that this Court already found inapplicable here: *FFRF* (7th Cir. 2011) and *Valley Forge*.<sup>42</sup> *Valley Forge* and *FFRF* are no more persuasive now. As this Court recognized, Plaintiffs’ standing is unlike that in *FFRF* and *Valley Forge*, as each “personally witnessed the prayer vigil, along with the prayers recited at it.” (Doc. 14 at 11) (Doc. 22). *See also Rabun*, 698 F.2d at 1107. By contrast, in *Valley Forge* and *FFRF* “the plaintiffs had no direct contact with the challenged conduct but, instead, merely heard of the conduct from others.” *Mullin v. Sussex Cty.*, 861 F. Supp. 2d 411, 420 n.4 (D. Del. 2012) (citations omitted). The City nevertheless even refers to *FFRF* as “particularly instructive,” asserting that the “letter signed by Chief Graham was a request – nothing more – to citizens.” (City MSJ 10). Obviously this case involves far more than a simple “request.” Unlike in *FFRF*, OPD initiated, planned, organized, and led an entire Prayer Vigil with uniformed police personnel leading prayer and uniformed officers participating, *supra*. (P.MSJ 1-18). The City even

<sup>40</sup> *E.g., Ariz. Civ. Liberties Union v. Dunham*, 88 F. Supp. 2d 1066, 1077 (D. Ariz. 1999) (“a move may not have reduced the contact Levine had with the Proclamation because she learned of it through newspaper articles”).

<sup>41</sup> *Moss v. Spartanburg Cty. Sch. Dist.*, 683 F.3d 599, 607 (4th Cir. 2012) (quoting *McCreary*, 545 U.S. at 860).

<sup>42</sup> (D.MTD 5-9, 21) (City MSJ 8-12) (Doc. 14) (Doc. 22).



concedes that *FFRF* has no bearing on the Prayer Vigil *itself*.<sup>43</sup>

The City goes on to state that Plaintiffs cannot “claim injury because they felt excluded or unwelcome.” (City MSJ 10). But feelings of marginalization and exclusion *are* cognizable forms of Establishment Clause injury. *Moss, supra. Valley Forge* recognizes that “psychological consequence” *does* constitute harm where, as here, it “is produced by government condemnation of one’s own religion or endorsement of another’s *in one’s own community*.” *Catholic League v. San Francisco*, 624 F.3d 1043, 1049-52 (9th Cir. 2009) (emphasis added). For example, in *Lee* and *Santa Fe* “nothing bad happened . . . except a psychological feeling of being excluded.” *Id.*

### **III. The City’s Prayer Vigil – including the City’s actions in initiating, organizing, and promoting it, as well as the participation of uniformed OPD personnel in leading and participating in prayer at the event – violated the Establishment Clause.**

The City must show that its actions surrounding the Prayer Vigil satisfy *each* prong of the disjunctive *Lemon* test. (P.MSJ 20-32). Plaintiffs, by contrast, need only show that the City’s actions failed *one* prong, yet demonstrated that the City’s actions failed all three. (*Id.*). Indeed, the City’s entire *Lemon* analysis is erroneous and suffers from several fatal flaws, discussed *infra*.

**1. Misleading Bifurcated Analysis.** The City incorrectly focused its *Lemon* analysis solely on the OPD letter promoting the Prayer Vigil and the Prayer Vigil itself, and evaluated each separately. (City MSJ 14-21). Significantly, each incident could in fact amount to an independent violation.<sup>44</sup> But by focusing solely on these two incidents, and each in a vacuum, the City failed to account for the compounding effect of the City’s actions in promoting the Prayer Vigil and *then* leading it. It also failed to account all the many other ways in which the City impermissibly endorsed the Prayer Vigil including: (1) initiating it; (2) promoting it beyond the OPD letter, such as the OPD *flyer* and emails; and (3) publicly defending it before and afterwards. All evidence of City involvement must be considered *holistically* through the lens of a “reasonable observer.”<sup>45</sup> For instance, in holding that a city unconstitutionally endorsed a

<sup>43</sup> Although the City cited *FFRF* in its “Prayer Vigil” section, it did not explain how it applied. (City MSJ 12).

<sup>44</sup> Compare *Santa Fe*, 530 U.S. at 316 (government-endorsed prayer unconstitutional in absence of communications promoting it beforehand) with *Newman*, 181 F. Supp. 2d at 1377-78 (government communications unconstitutional independent of event itself).

<sup>45</sup> E.g., *Green v. Haskell Cty. Bd. of Comm’rs*, 568 F.3d 784, 799-800 (10th Cir. 2009).

“Mayor’s Prayer Breakfast,” *Newman* did not separately evaluate each piece of evidence under *Lemon*, but rather, looked at the totality of the city’s actions, and then concluded: “By doing *all of these things*, the City of East Point has played more than a *de minimis* part in the promotion of the Mayor’s Prayer Breakfast.” 181 F. Supp. 2d at 1381 (emphasis added).

**2. Inapplicable Cases.** The City’s entire analysis hinges upon three distinguishable cases: *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532 (M.D. Fla. 1989), *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1333 (11th Cir. 2001).

Because *Allen* held that the plaintiff lacked standing, any discussion of the merits is purely *dicta*. Such *dicta*, however, supports Plaintiffs. First, *Allen* did not involve an actual prayer event. Nor did it involve uniformed government staff leading citizens in prayer. *Allen* merely involved a *facial* challenge to a *resolution*. 719 F. Supp. at 1536. In the resolution, the city requested that *all* segments of the community express dedication to the fight against drugs by engaging in “a day of non-denominational voluntary prayer, *meditation, personal commitment* or other *appropriate solemn dedication*.” *Id.* at 1533 (emphasis added). Finding standing lacking, the Court held that, unlike here: “There are no allegations of *specific prayers*, prayer at any *specific locations*, *City involvement in prayer* or in prohibiting prayer, or any other actions by the City which might expose anyone to prayer or religion.” *Id.* at 1536 (emphasis added).

The Court announced that even if the plaintiff had standing, there would be no Establishment Clause violation because there was “no evidence that City officials will play an active role, *or any role*, in the anti-drug day.” *Id.* at 1534 (emphasis added). The Court added:

The record is silent as to *any specific events* planned. There is no evidence of any plans to *have group prayer* in any school or other public forum, *by any public official*, or otherwise. . . . Although the entire community is urged to participate in the anti-drug day, the resolution, on its face, . . . urges “prayer,” but also urges *with equal force* “meditation, personal commitment or other appropriate solemn dedication.”

*Id.* (emphasis added). Its holding would be different if the city sponsored a *day of prayer*:

[T]he City’s resolution establishes an event different from a mere “official day of prayer.” A reasonable interpretation of the resolution might be that the City is urging the Jacksonville community to “earnestly request”, in each individual’s own way, an end to the sale and use of drugs, without urging that anyone conduct religious prayer. [*Id.*]

Even the City concedes *Allen* is distinguishable, citing it only for the OPD *letter*. (City MSJ 19).

Second, the *Allen* resolution merely called for the formation of a committee to coordinate participation by private citizens, including, “(a) all churches, synagogues and other religious organizations; (b) all public and private schools, colleges and universities; (c) all private businesses and local government offices and their respective employees;” and (d) media. *Id.* at 1533. By contrast, the City reached out only to the “faith-based community,” and specifically the *Christian* community, not even “synagogues.” (City MSJ 4) (Graham Dep. 50:6-12) (Ex. 34).<sup>46</sup>

*Adler* is equally distinguishable. Like *Allen*, *Adler* was limited to a facial challenge only, which alone renders it inapplicable here. And in upholding the policy, the court relied on “‘the total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say.’” 250 F.3d at 1342. First, unlike in *Adler*, OPD decided there would be a Prayer Vigil. (P.MSJ 3-9) (City MSJ 2-3). Second, OPD decided who would speak at its Vigil. (Exs. 4, 11). Third, OPD decided what the speakers could say, namely, “PRAYER only.” (Ex. 12). Whereas *Adler*’s policy was silent on “prayer,” the City sponsored a “Prayer” Vigil. The court in *Adler* upheld the policy on its face *because* of “the complete absence . . . of code words such as ‘invocation’ unequivocally connoting religion.” 250 F.3d at 1342. The City did not even use “code” words. Instead, the City urged citizens to join the City in “fervent prayer.” (Exs. 1, 8). As in *Santa Fe*, this, “by its terms, invites and encourages religious messages.” 530 U.S. at 306. Fourth, *uniformed OPD staff* delivered the prayers. (P.MSJ 10).

Finally, “*Lynch* is clearly distinguishable on its facts. *Lynch* did not involve any religious exercise like prayer at a public government function.” *Graham v. Cent. Cmty. Sch. Dist.*, 608 F. Supp. 531, 536 (S.D. Iowa 1985). Instead, *Lynch* involved a passive holiday display, on private

---

<sup>46</sup> Moreover, *Allen* was effectively abrogated by *Santa Fe*, which made clear that in Establishment Clause cases, it is not enough for a policy to be facially neutral. 530 U.S. at 307-08 n.21. *Santa Fe* held that a policy allowing students to deliver a “brief invocation and/or message” at school events violated the Establishment Clause on its face and as applied. *Id.* at 306-13. This was so “even if no . . . student were ever to offer a religious message.” *Id.* *Allen* applied the standard that is used in statutory construction cases: “When one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way.” 719 F. Supp. at 1534 (citation omitted). However, this “standard in a facial challenge” was “unequivocally” found inapposite in the “Establishment Clause area” in *Santa Fe. Selman v. Cobb Cty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1299 (N.D. Ga. 2005).

property, that was dominated by secular elements. 465 U.S. at 687. The fact that the City even cites *Lynch* indicates that it is at a loss to find any authority supporting its position.<sup>47</sup> The Court's subsequent decision in *Cty. of Allegheny v. ACLU*, holding a religiously-dominated holiday display unconstitutional, is far more analogous. 492 U.S. 573, 578-81, 598-602 (1989). Unlike *Lynch*, the City did not merely include prayer as one small component of an otherwise secular event, but held an entire Prayer Vigil with a "patently Christian message." *Id.* at 601.<sup>48</sup>

**3. False Factual Statements.** The City's *Lemon* analysis rests on three serious misstatements of fact. First, in arguing that *Adler*, *Allen*, and *Lynch* are indistinguishable, the City wrote: "there is simply *no evidence* that the Vigil was sponsored by Defendants Graham or the City, or that it took place pursuant to any city policy."<sup>49</sup> But there is no evidence of any sponsor *other than the City*. Additionally, Chief Graham admitted that the OPD Chaplains were acting pursuant to "City policy," specifically, 1(B) of the OPD Manual.<sup>50</sup> More importantly, the City *itself* admits that "the Vigil was one of many methods used by the OPD," conceding it was an OPD event. (City MSJ 17). The City also admits that it "advertised" and "encouraged" the Prayer Vigil, and was therefore at least a "sponsor." (*Id.*). *See Crestwood*, 917 F.2d at 1479.

Second, the City stated: "No on-duty City employee spoke or otherwise participated in leading the Vigil." (*Id.* at 6). But it is undisputed that *half* of the speakers were OPD staff, four in *OPD uniform*.<sup>51</sup> Captain Edwards was a speaker as a "police officer" and "district commander." (Ex. 15) (Graham Dep. 20:10-13). Uniformed officers also *participated*. (Ex. 3).

Third, the City wrote: "there is no evidence indicating that Defendants Graham or the City *played any role in hosting or organizing* the event, and they had *absolutely no knowledge* concerning, let alone *control over*, the selection of speakers or the content of their speech." (City MSJ 18, 21) (emphasis added). It added: "Nor is there evidence that *any City official* participated

---

<sup>47</sup> *E.g.*, *Holloman v. Harland*, 370 F.3d 1252, 1259 (11th Cir. 2004) (ignoring *Lynch*); *Newman*, 181 F. Supp. 2d at 1376 (same); *Crestwood*, 917 F.2d at 1479 (distinguishing *Lynch*).

<sup>48</sup> *See* (Guinn Dep. 91:11-92:10, 99:1-20) (Graham Dep. 50:6-12) (Ex. 12) (P.MSJ 12-13).

<sup>49</sup> (City MSJ 21) (emphasis added) (regarding *Adler*). *See also* (City MSJ 8, 14-16, 28).

<sup>50</sup> (Graham Dep. 77:20-78:14) (Exs. 3-A-3-D, 58-D-58-E).

<sup>51</sup> (Graham Dep. 22:7-20, 28:2-5) (Exs. 3-A-3-B, 15) (City MSJ 6).

in the planning or organization.” (*Id.* at 19). These statements are laden with falsities. For one, there is no evidence that the Prayer Vigil was organized, hosted, or planned by *any* entity *other than the City, supra*. Whereas the City’s imprimatur is all over the event, it can only identify a *single* non-OPD individual (Haynes) who was even involved, and that was because Chief Graham authorized it, *supra*. Additionally, the City undeniably had *knowledge* of, and control over, the speakers. The City admits that OPD Chaplain “Quintana was responsible” for inviting clergy “to speak.” (City MSJ 6). Captain Edwards helped coordinate speakers (Ex. 11) and was a speaker himself, as a “police officer.” (Ex. 15). Indeed, half the speakers were OPD staff. The Chief and Mayor had direct control over these speakers. (Graham Dep. 168:15-21) (Guinn Dep. 55:2-15).

Because neither the law nor facts upon which the City relies are availing, no further undertaking is required. Plaintiffs nonetheless offer a brief *Lemon* analysis below.

**A. The City failed to demonstrate a legitimate secular purpose.**

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). “Recognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied.” *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff’d*, 472 U.S. 38 (1985).<sup>52</sup> The City failed to overcome this presumption of religious purpose. Rather, it merely stated: “Graham’s purpose of ending a crime spree and apprehending those responsible . . . was purely secular.” (City MSJ 16-17). But attempting “to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose.” *Holloman*, 370 F.3d at 1285-86. In *Holloman*, the Eleventh Circuit thus held: “While promoting compassion may be a valid secular purpose, teaching students that praying is necessary or helpful to promoting compassion is not.” *Id.* The court in *Hall v. Bradshaw* similarly held that a “motorist’s prayer” on a state map failed the purpose test, even though its purpose was to promote “motorist safety,” because “the state has chosen a clearly

---

<sup>52</sup> *Accord Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 830 (11th Cir. 1989).

religious means to promote its secular end.” 630 F.2d 1018, 1021 (4th Cir. 1980).<sup>53</sup>

The City makes no attempt to distinguish these cases or others like them. Nor does it cite any case to support its position that a city’s endorsement of “fervent prayer,” a city-sponsored prayer vigil, and uniformed police personnel leading citizens in prayer, satisfies the purpose test so long as it is done in the name of solving crime. Instead, it relies on *Allen*, *Lynch*, and *Adler*, which are obviously distinguishable. Indeed, in *Allen*, this Court held that the purpose prong was satisfied because “there is no evidence of a specific prayer, a specific public forum or other location where ‘prayer’ will take place, or even that ‘prayer’ as opposed to some ‘other appropriate solemn dedication’ to fight drug use will be advocated.” 719 F. Supp. at 1537 (emphasis added). The Court distinguished *Jager* explaining: “In *Jager*, the practice called for prayer only.” *Id.* at 1537-38. Here, unlike *Allen*, the City had a specific “location where prayer” would take place. And like *Jager*, the City’s “Prayer Vigil” called for “prayer only.” As OPD Chaplain Quintana remarked: “Nothing should stop, hinder or prevent from fervent prayer. Keep it to 15-20 minutes of PRAYER only” (Ex. 12).

Beyond its presumed religious purpose, statements by City officials unapologetically reflect a religious purpose, like Quintana’s “PRAYER only” comment.<sup>54</sup> Defending the Prayer Vigil, 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). Chief Graham wrote: “I have no intention on calling this gathering off nor changing my personal belief on the *power of prayer.*” (Ex. 39). An OPD employee applauded Graham for “bringing the community together through prayer,” to which Graham replied: “stuff like this is easy when *you believe.*” (Ex. 40). Defending the Vigil, the Mayor proclaimed: “God is good!!! All the time. The fight is on.” (Ex. 41). Captain Edwards was only keeping “in mind the *fair weather Christians* and the children that may attend.” (Ex. 12). Afterwards, he thanked other OPD staff for helping with the “PRAYER VIGIL,” referencing two Bible quotes,

<sup>53</sup> *Accord Sch. Dist. Abington Twp. v. Schempp*, 374 U.S. 203, 222-23 (1963); *Rabun*, 698 F.2d at 1111.

<sup>54</sup> Courts can “infer [an improper] purpose from . . . public comments” of officials. *McCreary*, 545 U.S. at 862-63.

including: “**Romans 8:28** ‘And we know that **all things work together for good** to them that love God, to them who are the called according to his purpose.’” (Ex. 16). Quintana responded thanking the Captain for “organizing this event,” adding his “favorite verses,” including “**John 17:23**” and “**Psalm 133:1.**” (Ex. 16-C). “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).

Finally, the City misapprehends the purpose test altogether, averring that excessive entanglement is necessary. It asserts: “the Facebook letter at issue here had a clearly stated secular purpose and falls significantly short of the type of ‘comprehensive, discriminating, and continuing state surveillance’ *necessary* to violate the *Lemon* test.” (City MSJ 16) (emphasis added). But if government activity lacks a secular purpose, it is unconstitutional regardless of effect or *entanglement*.<sup>55</sup> The language it quotes regarding “surveillance” pertains exclusively to the *entanglement* prong and is not a requirement for purpose or effect. (*Id.* at 14, 16).<sup>56</sup>

**B. The City’s Prayer Vigil – and the Mayor and Chief’s active promotion of it – had the primary effect of advancing and endorsing religion.**

Even if the City could somehow prove a secular purpose for its inherently religious activity, the Prayer Vigil clearly had the unconstitutional effect of advancing and endorsing religion. The effect prong is violated when the government simply appears to “affiliate[] itself with religious beliefs or institutions.” *Allegheny*, 492 U.S. at 609-10. Here, the City did not simply appear to “affiliate” itself with religion by endorsing a private institution’s religious event but hosted its *own* “Prayer Vigil” with *its own* uniformed police personnel leading prayers.

Notably, a city need not be an exclusive sponsor, or even a primary one, for its support of a religious event (or display) to violate the Establishment Clause. *E.g.*, *Allegheny* (private display with disclaimer); *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

<sup>55</sup> *E.g. Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Stone*, 449 U.S. at 41 (“[T]he posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional.”).

<sup>56</sup> *See Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973) (“Because we have found that the challenged sections have the impermissible effect of advancing religion, *we need not consider* whether such aid would result in entanglement of the State with religion in the sense of ‘[a] comprehensive, discriminating, and continuing state surveillance.’”) (quoting *Lemon*) (emphasis added).

funding part of platform); *Hewett*, 29 F. Supp. 3d at 633-65 (mayor and city officials' endorsed privately-sponsored event because of language in promotional materials). Of course, despite all this, the evidence shows that the City was the Prayer Vigil's *exclusive* sponsor here. Thus, the City's actions were necessarily unconstitutional.

The City readily admits that OPD "advertised" and "encouraged citizens to attend" the Prayer Vigil (City MSJ 17), and that OPD "was promoting" the Vigil by posting the letter on Facebook. (Graham Dep. 50:2-10). Such promotion alone violated the Establishment Clause. Whether "the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. 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.

That "Graham did not compose the Facebook post," (City MSJ 16), is irrelevant. The "Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations." *Id.* at 600. Of course, the Facebook post *was* the *City's own communication*; it was on OPD letterhead, authored and edited by OPD staff, signed by the Chief, and posted on OPD's official Facebook page.<sup>57</sup> The City also ignores the separate flyer subsequently created by OPD officials and approved by Captain Edwards. (Ex. 6).

Furthermore, the City's actions in initiating, organizing, sponsoring, and leading a Prayer Vigil violated the Establishment Clause independent of the OPD Facebook letter promoting it. (Exs. 1-2). Government action "facilitating any prayer clearly fosters and endorses religion over nonreligion." *Holloman*, 370 F.3d at 1288. In *Holloman*, the Eleventh Circuit held that a teacher unconstitutionally endorsed religion by simply offering her students an opportunity to pray, even though she "did not promote any particular prayer, or even compel prayer in general." *Id.* at 1287. It was sufficient she "encouraged recitation of . . . prayer." *Id.* (citation omitted).

The City's entire effect analysis relies on *Allen*, *Adler*, and *Lynch*, and the erroneous

---

<sup>57</sup> See *Newman*, 181 F. Supp. 2d at 1379-80 (city endorsed prayer event based on flyers and letter on city letterhead).



factual statements refuted *supra*. Again, even the City concedes *Allen* is distinguishable, citing it only to justify the OPD letter and not the Vigil itself. (City MSJ 8, 15-16). And the *Allen* resolution did not promote prayer any more it did secular activity. 719 F. Supp. at 1538.<sup>58</sup>

The City's only other argument is that "no government funds were used." (City MSJ 5, 16). But a "religious service under governmental auspices necessarily conveys the message of approval or endorsement. Prevailing doctrine condemns such endorsement, even when no private party is *taxed* or coerced in any way." *Crestwood*, 917 F.2d at 1478 (citations omitted). No government funds were used on the unconstitutional student prayers in *Santa Fe* or the Rabbi's prayers in *Lee*.<sup>59</sup> *Accord Allegheny*, 492 U.S. at 600 (privately-funded display). In *Rabun*, the Eleventh Circuit held a privately-funded cross unconstitutional, reasoning: "As the Supreme Court has noted the source, whether public or private, of the funds used to construct or maintain these symbols is not decisive; rather the focus . . . is on the state's support of a particular activity." 698 F.2d at 1110 n.22 (citing *Stone* and *Engel*).

*Crestwood* is particularly salient. A village unconstitutionally endorsed a privately-organized mass that was one small part of a three-day Italian festival, even though "the only government involvement . . . was an advertisement, included within an advertisement for the rest of the festival, in the Village newspaper, and the recruitment of an Italian-speaking priest by a Village employee." 917 F.2d at 1487-88 (Coffey, J., dissenting). "All other aspects of the mass were planned by the Crestwood Women's Club . . . *without the expenditure of any public funds*." *Id.* (emphasis added). But, relying on *Allegheny*, the Seventh Circuit found it sufficient that the "information in the Village's paper would lead an objective observer to conclude that the Village itself is the sponsor, or at least a sponsor." *Id.* at 1479. Significantly, unlike in *Rabun*, *Allegheny*, and *Crestwood*, there is no evidence of any *private sponsorship* here. Further, the evidence

---

<sup>58</sup> Even still, as noted above at FN 46, the resolution in *Allen* would not survive under *Santa Fe*. As the Seventh Circuit properly held in *Crestwood*: "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*, such as the foods, crafts, and entertainment offered at the Festival." 917 F.2d at 1478 (emphasis added).

<sup>59</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).

reveals that municipal funds *were* expended on the Prayer Vigil.<sup>60</sup>

**C. The Prayer Vigil unconstitutionally entangled the City with religion.**

The City’s “organization and arrangement of the religious speakers,” communications “using words such as ‘us,’” and “disclosing religious messages, through its City officials,” excessively entangled “the City with the religious messages conveyed.” *Hewett*, 29 F. Supp. 3d at 635. (P.MSJ 28, 30-31).<sup>61</sup> Like the other prongs, the City relies on *Allen* and *Lynch*. But the *Allen* resolution satisfied this prong because it did “no more than (a) urge and request a day for the [secular] alternative enumerated activities and (b) authorize[d] the designation of a committee to encourage and coordinate activities.” 719 F. Supp. at 1538. Here, the City urged for “PRAYER only” and had its own staff organizing, leading, and participating in prayer activities.

**IV. Municipal liability attaches to the City’s actions.**

Having shown that the City was directly responsible for *initiating, organizing, promoting, and leading* the Prayer Vigil, liability under § 1983 is irrefutable. This Court previously found that municipal liability would attach to the City’s actions. (Doc. 14 at 21) (Doc. 22). The City offers no evidence controverting the facts upon which the Court relied, yet inexplicably insists there is no basis for municipal liability. (City MSJ 22-25). When “a government official makes a decision, ‘this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute [had decreed it].’” *Rich v. City of Jacksonville*, 2010 U.S. Dist. LEXIS 143973, at \*42 (D. Fla. 2010) (citing *Lee*, 505 U.S. at 587). Municipal liability can attach in many ways, including: (1) “a single decision” of a policymaking official; (2) an omission that “manifest[s] deliberate indifference to the rights of citizens;” (3) “ratification;” or (4) failure to supervise.<sup>62</sup>

---

<sup>60</sup> This includes: (1) personnel time creating the OPD letter and posting it on social media; (2) creating and printing a flyer with OPD resources; (3) staffing and overseeing the Prayer Vigil; and (4) clothing for a Chaplain in direct response to the Prayer Vigil. (Graham Ints. 1-2) (Graham Dep. 161:2-9, 168:22-169:17) (Ex. 17). See *Pelphrey*, 547 F.3d at 1267, 1281 (municipal funds “in the form of materials and personnel time, to select, invite, and thank the invitational speakers”); *Newman*, 181 F. Supp. 2d at 1377-78 (taxpayer funds “were used to print the flyers”).

<sup>61</sup> See also *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 385 (6th Cir. 1999) (finding excessive entanglement where “the school board decided to include prayer” and “chose which member from the local religious community would give those prayers”); *Gilfillan*, 637 F.2d at 931; *N.C. Civil Liberties Union Legal Found. v. Constasy*, 947 F.2d 1145, 1151-52 (4th Cir. 1991) (when “a judge prays in court, there is necessarily an excessive entanglement”).

<sup>62</sup> *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003). See *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123-27 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

The City conceded that “Defendants’ support for a community-wide prayer vigil . . . is undoubtedly related to their official duties,” and that the “actions attributable to Mayor Guinn and Chief Graham fall squarely within their scope of employment.” (D.MTD 23). *See also* (City MSJ 26). The Mayor and Chief also repeatedly acknowledged their authority over the Prayer Vigil.<sup>63</sup> The Mayor proclaimed: “Not only are *we* not canceling it *we* are *trying to promote it*.”<sup>64</sup> As the “sole, municipal authority overseeing the City’s police department” (Mayor MSJ 2), the Mayor’s authorization makes municipal liability incontestable.<sup>65</sup> Under *Allegheny, Crestwood, Newman, Gilfillan, and Hewett*, the City’s *promotion* of the Prayer Vigil would even be sufficient. But the City did far more. It *initiated* and *approved* the Prayer Vigil. OPD staff proceeded to organize the Vigil. OPD Chaplains were directed to lead the Prayer Vigil in uniform, and they did so. Other uniformed officers participated. And all of this was done with the Chief and Mayor’s authorization, *supra* at 1-8.<sup>66</sup>

#### **V. Chief Graham is not entitled to qualified immunity.**

To “even be potentially eligible for . . . qualified immunity, the official must have been engaged in a ‘discretionary function.’” *Holloman*, 370 F.3d at 1263-64 (citations omitted). Chief Graham 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).

But even assuming, *arguendo*, Graham was engaged in a discretionary function, he is not entitled to qualified immunity because he violated clearly established Establishment Clause rights, *supra*. (P.MSJ 32-33). *See Holloman*, 370 F.3d at 1263 (teacher was “not even potentially

<sup>63</sup> (Exs. 5, 12, 24-B, 28-A, 34) (Guinn Dep. 54:12-55:15, 98:24-99:10) (Graham Dep. 161:13-21).

<sup>64</sup> (Ex. 28-A). *See also* (Exs. 33-A, 35, 58-B) (Guinn Dep. 54:12-55:22, 96:13-22).

<sup>65</sup> *See Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir. 1994) (“A municipality’s failure to correct the constitutionally offensive actions of its police department may rise to the level of a ‘custom or policy’ if the municipality tacitly authorizes these actions or displays deliberate indifference[.]”).

<sup>66</sup> In *Milwaukee Deputy Sheriff’s Ass’n v. Clarke*, municipal liability was found based on a single sheriff’s actions in inviting a religious group to speak at internal department gatherings. 588 F.3d 523, 524-26 (7th Cir. 2009).

entitled to summary judgment on qualified immunity grounds against [student's] Establishment Clause claims"). Indeed, this Court properly found that at the time of the Prayer Vigil, the Mayor and Chief violated the Establishment Clause at "the most fundamental level." (Doc. 14 at 24).

The City argues that there is "no bright line staked out." (City MSJ 28). Yet it fails to explain how binding cases finding government-sponsored prayer activities unconstitutional, including *Santa Fe*, *Lee*, *Engel*, *Jager*, *Jaffree*, and *Holloman*, among others, were not "sufficiently specific as to give the defendants 'fair warning.'" *Id.* at 1278. In fact, apart from these controlling prayer cases, numerous factually analogous cases including *Allegheny*, *Rabun*, *Crestwood*, *Gilfillan*, *Newman*, and *Hewett*, very explicitly held that merely *co*-sponsoring a *private* religious event (or display) violates the Establishment Clause.

The Eleventh Circuit has held that while "officials must have fair warning that their acts are unconstitutional, there need not be a case 'on all fours,' with materially identical facts, before we will allow suits against them." *Id.* at 1277. "A principle of constitutional law can be 'clearly established' even if there are 'notable factual distinctions.'" *Id.* "Officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). In *Rich*, for example, this Court had not found "any case which squarely correspond[ed] with the facts of the instant action." 2010 U.S. Dist. LEXIS 143973, at \*53. But this Court refused to grant qualified immunity, noting: "no factually particularized, pre-existing case law was necessary for it to be obvious to every objectively reasonable prosecutor that the alleged conduct would violate the Establishment Clause." *Id.* at \*54. Moreover, Chief Graham had the benefit of *actual notice* that his actions were contravening the Establishment Clause. (Exs. 2, 24-26, 30-34). But he willfully eschewed these warnings, not even bothering to consult with his attorneys. (Graham Dep. 136:23-137:3).

The only authorities the City cites to justify Graham's actions are *Allen* and *Lynch*, and a case involving "purely private" speech, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995). Like *Allen* and *Lynch*, *Pinette* does not support the City's position that canceling its own Prayer Vigil would violate the Free Speech Clause. (City MSJ 29). *Pinette* did

not involve uniformed police personnel leading the citizenry in prayer, nor did it involve a government official urging citizens to join the City in “fervent prayer” on City letterhead. Rather, the state maintained a traditional public forum for *private speech*. It authorized a Christmas tree and a rabbi’s application to erect a menorah but denied a Ku Klux Klan officer’s application to place a temporary cross on the square. *Id.* at 758. The Court held that the denial of the Klan’s application was not justified on Establishment Clause grounds because the display “was private expression.” *Id.* at 760, 765. Graham’s letter on OPD letterhead was clearly *government speech*. “Ambiguity in the law cannot be manufactured by borrowing from factually and legally distinguishable cases” as these. *Marrero-Méndez v. Calixto-Rodriguez*, 830 F.3d 38, 48 (1st Cir. 2016) (police officials not entitled to qualified immunity for endorsing prayer).

The City’s assertion that Chief Graham was merely expressing “support for a public event organized by private citizens . . . (the only alleged conduct attributable to him)” is baseless. (City MSJ 26). There is no evidence that the Vigil was “organized by private citizens.” And the OPD letter is far from the “only alleged conduct attributable to [Graham].” *Supra* at 1-8. (P.MSJ 3-18). In fact, the City immediately thereafter contradicted itself, stating: “Beyond calling an initial meeting . . . Chief Graham played no further role in planning and organizing the Vigil.” (City MSJ 27). Graham did not just call the meeting though. He enthusiastically approved the Prayer Vigil proposed by an OPD staff member. He then promoted it with the OPD letter. Additionally, Graham had authority over the Prayer Vigil, including the OPD Chaplains and officers, and authorized their actions in organizing, planning, and leading the prayers. He even directed the OPD Chaplains to participate in uniform. (Ex. 11). In *Marrero-Méndez*, the First Circuit rejected a nearly identical argument, reasoning, as applicable here:

[Commander] Calixto initiated -- and [officers] Rivera and Cruz 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. [Citing *Lee* and *Santa Fe*].

830 F.3d at 45-46. 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.” *Id.* (citation omitted, emphasis added).

With no case law to rely upon, the City resorts to the novel argument that an official is entitled to qualified immunity if his unconstitutional actions are “limited.” (City MSJ 27). But it is “no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment.” *Schempp*, 374 U.S. at 225. In *Lee*, the Court held that the “intrusion of the religious exercise cannot be refuted by arguing that . . . [it is] *de minimis*.” 505 U.S. at 594.<sup>67</sup> For an Establishment Clause violation, the government’s actions “need not be material or tangible.” *Friedman v. Bd. Cty. Comm’rs*, 781 F.2d 777, 781 (10th Cir. 1985). Courts have rejected the notion that an “official is immune from liability because he has only violated the Constitution once.” *Banks v. N. Las Vegas Police Dep’t*, 1990 U.S. App. LEXIS 20437, at \*8 (9th Cir. 1990). Where an “actor deliberately follows a course of action that violates a claimant’s constitutional rights, the single act and resulting injury are sufficient to establish liability.” *Id.*

In fact, Chief Graham’s actions surrounding the Prayer Vigil were so flagrant that they justify punitive damages. (P.MSJ 33-35). Far from being an innocent bystander to the unconstitutional Prayer Vigil, Chief Graham enthusiastically approved it, promoted it, refused to cancel it, sought no legal counsel after objections were voiced, and instructed OPD Chaplains to participate in uniform. He then actively participated in the Prayer Vigil itself while in OPD uniform and took credit for the Prayer Vigil in communications with OPD staff, only to then disingenuously deny involvement when faced with this constitutional reckoning.

**CONCLUSION.** The City’s total failure to submit evidence supporting the constitutionality of its actions confirms that there is no genuine dispute of material fact, and compels a grant of summary judgment in favor of Plaintiffs.

Respectfully submitted,

---

<sup>67</sup> See also *Hall*, 630 F.2d at 1022 & n.1 (“motorist” prayer was “utterly innocuous”); *DeSpain v. DeKalb Cty. Sch. Dist.*, 384 F.2d 836, 839-40 (7th Cir. 1967) (poem was “*de minimis*” and “innocuous”).

October 31, 2016

s/ Monica L. Miller  
MONICA L. MILLER, Esq.  
American Humanist Association  
1777 T Street N.W., Washington, DC, 20009  
*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  
hmercroft13@gmail.com  
FL Bar: 0709859

**ATTORNEYS FOR PLAINTIFFS**