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

ART ROJAS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	CASE NO. 5:14-cv-00651-TJC-PRL
v.	)	
	)	
CITY OF OCALA, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS CITY OF OCALA AND GREG GRAHAM'S DISPOSITIVE MOTION FOR RELIEF UNDER FED. R. CIV. P. 60(b) AND INCORPORATED MEMORANDUM OF LAW

MOTION FOR RELIEF

Pursuant to Federal Rule of Civil Procedure 60(b), and for the reasons provided in the incorporated Memorandum of Law, Defendants City of Ocala and Greg Graham hereby move this Court for an order vacating its summary judgment order of May 24, 2018 (Dkt. 88) (hereinafter "MSJ Order"), and dismissing this case.

MEMORANDUM OF LAW

I. THIS COURT SHOULD VACATE ITS SUMMARY JUDGMENT ORDER BECAUSE THE CASE IS-AND WAS AT THE TIME-MOOT, AND NOMINAL DAMAGES CLAIMS ARE INSUFFICIENT TO SUPPORT SUBJECT-MATTER JURISDICTION.

On August 23, 2017, the Eleventh Circuit issued an opinion clarifying the legal landscape concerning cases that have become moot and in which the only remaining claim is one for nominal damages. Specifically, the court held that "a prayer for nominal damages, by itself, is insufficient to satisfy Article III's jurisdictional requirements." *Flanigan's Enters. v. City of Sandy Springs*, 868 F.3d 1248, 1253 (11th Cir. 2017) (en banc), *cert. denied*, 86 U.S.L.W. 3484

(U.S. Mar. 26, 2018) (No. 17-869) (vacating district court judgment and remanding with instructions to dismiss the case). On August 31, 2015, this Court dismissed with prejudice Plaintiffs' claims for declaratory and injunctive relief, *see* Order adopting Magistrate's Report & Recommendation (Dkt. 22), leaving only Plaintiffs' claims for nominal damages. Because Plaintiffs' constitutional challenge in this case involves only a single, past event, which has not recurred and cannot reasonably be expected to recur, in light of the *Flanigan's Enterprises* decision it is clear that Plaintiffs' nominal damages claims were insufficient to support Article III jurisdiction and save this otherwise moot case.

Importantly, the duty to assess subject matter jurisdiction is "a continuing obligation." *Belleri v. United States*, 712 F.3d 543 (11th Cir. 2013). "Under the law of this circuit, . . . parties cannot waive subject matter jurisdiction, and [the court] may consider subject matter jurisdiction claims at any time during litigation," *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999). *See also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction, *see* Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." FED. R. CIV. P. 12(h)(3). As discussed herein, this case is, and has long been, moot, and, as clarified in the Eleventh Circuit's *Flanigan's Enterprises* opinion, Plaintiffs' sole remaining claims (*i.e.*, for nominal damages) were insufficient to support jurisdiction. Consequently, this Court should vacate its recent summary judgment order and dismiss this case as moot.

A. This Case is—and Has Long Been—Moot.

It is an unremarkable proposition that "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Flanigan's Enters.*, 868 F.3d at 1255 (quoting *Lewis v. Cont' Bank Corp.*, 494 U.S. 472, 477 (1990)). It is equally well-settled that "a case generally becomes moot and must be dismissed . . . 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Powell v. McCormack*, 395 U.S. 486, 496 (1969). While a defendant's voluntary cessation of allegedly unlawful conduct presents an exception to this general mootness rule, *see, e.g.*, *United States v. W.T. Grant Company*, 345 U.S. 629, 632 (1953), the exception does not apply when, as here, "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)). In other words, when, based on "intervening events," there is "no 'reasonable expectation' that the challenged practice will resume after the lawsuit is dismissed," *Jews for Jesus, Inc. v. Hillsborough County Aviation Authority*, 162 F.3d 627, 629 (11th Cir. 1998) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)), the case is moot. *Accord Flanigan's Enters.*, 868 F.3d at 1255-56.

Importantly, "[w]hile it is true that the burden of proving mootness generally falls heavily on the party asserting it, 'governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities.'" *Id.* at 1256 (quoting *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004)). "[E]ven where the intervening governmental action does not rise to the level of a full legislative repeal," the Eleventh Circuit has "held that 'a challenge to a

government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated.'" *Id.* (quoting *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1285 (11th Cir. 2004)). As the *Troiano* court previously explained, having "collected cases from both the Supreme Court and the Eleventh Circuit," *id.* at 1256:

> When government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit. The Court has rejected an assertion of mootness in this kind of challenge *only when there is a substantial likelihood* that the offending policy will be reinstated if the suit is terminated.

382 F.3d at 1283-84 (emphasis added). "Because of the deference with which we view voluntary changes in government action," the Eleventh Circuit has explained, "a plaintiff disputing a finding of mootness must present more than '[m]ere speculation that the City may return to its previous ways.'" *Flanigan's Enters.*, 868 F.3d at 1256 (citing *Nat'l Advert. Co. v. City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2005) ("Mere speculation that the City may return to its previous ways is no substitute for concrete evidence of secret intentions.")).

The "key inquiry," according to the Eleventh Circuit, "is whether the evidence leads us to a reasonable expectation that the City will reverse course and [renew] the allegedly offensive [conduct] should this Court . . . dismiss [the case]." *Flanigan's Enters.*, 868 F.3d at 1256. To guide that inquiry, three primary factors are considered: (1) "whether the change in conduct resulted from substantial deliberation or is merely an attempt to manipulate . . . jurisdiction"; (2) "whether the government's decision to terminate the challenged conduct was 'unambiguous'"; and (3) "whether the government has consistently maintained its commitment to the new policy or legislative scheme." *Id.* (citing *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1310 (11th Cir. 2011)). "[T]hese factors," however,

> should not be viewed as exclusive nor should any single factor be viewed as dispositive. Rather, the entirety of the relevant circumstances should be considered and a mootness finding should follow when the totality of those circumstances persuades the court that there is no reasonable expectation that the government entity will [renew] the challenged [conduct].

Id. at 1257.

As an initial matter, the *Flanigan's Enterprises* opinion would seem to indicate that this court's jurisdiction ceased upon the dismissal of Plaintiffs' claims for prospective relief. *See*, Report & Recommendation ("R&R") (Dkt. 14) at 15 ("Fairly read, the Complaint focuses on a past event – the September 24, 2014 Community Prayer Vigil – and actions purportedly taken by Defendants to promote and organize the event. Significantly, the Complaint is devoid of any allegation that another prayer vigil is scheduled or even that one is likely to be organized."); Order Adopting R&R (Dkt. 22) at 2 (dismissing with prejudice "any claim for prospective relief"). At that time, because Plaintiffs' only remaining claims were for nominal damages as to a solitary past event as to which this Court found there was no indication or likelihood of recurrence, the court could provide no further relief that would "have any practical effect on the rights or obligations of the litigants," *Flanigan's Enterprises*, 868 F.3d at 1264, as "the parties' right to a single dollar in nominal damages is not the type of 'practical effect' that should, standing alone, support Article III jurisdiction." *Id.* at 1270.

Defendants have gone even further, however, unequivocally demonstrating their commitment not to engage in the type of conduct about which Plaintiffs complained. While Defendants maintain the position that the Community Prayer Vigil was not a government event, and that no government policy was involved here, these mootness principles apply to governmental conduct, whether or not it rises to the level of an actual policy. Because the totality of the circumstances, including the evidence concerning the three mootness factors, yields the

conclusion that there is no reasonable expectation that the City will engage in the complained-of conduct, this case is—and was at the time of the summary judgment order—moot.

1. The change in conduct was based on deliberation, not an attempt to manipulate jurisdiction.

It is undisputed that Chief Graham is responsible for the day-to-day operations of the Ocala Police Department (OPD), the City department involved in the complained-of conduct. *See* MSJ Order (citing City of Ocala and Graham's Answer (Dkt. 38) at ¶ 12 (admitting that Chief Graham is in charge of day-to-day operations of the OPD)). After first confirming that he would not, going forward, allow uniformed OPD officers to lead prayers in public, Chief Graham subsequently explained that a primary reason for that decision was to avoid another lawsuit, Pls. MSJ Ex., Graham Dep. (Dkt. 54-10), at 167:25-168:10, but not to end the current one. As he put it, whether or not such conduct is appropriate, he had come to the determination that he would not permit it because "it's just best not to." *Id.* at 168:14. He further explained his conclusion, based on retrospective deliberation, that if he, as Chief of Police, were to again sign a letter like the one at issue here asking the public for assistance with a community-related crisis, different language could and would be utilized. *Id.* at 58:21-59:21. Instead of requesting citizens to engage in prayer, he stated, he would request their "[s]upport, commitment, [or] assistance." *Id.* at 59:22-25. The evidence demonstrates not that these changes came about in an attempt to manipulate the court's jurisdiction but rather, based on reflection and forward-looking thought, to avoid future controversy. In short, Chief Graham, as the City official whose department was involved in the alleged constitutional violation, "has offered persuasive explanations, not dependent upon this litigation, to explain [the changes]." *Flanigan's Enters.*, 868 F.3d at 1260.

2. The change in conduct is unambiguous.

In addition to his commitment to engage the community on non-religious terms, when asked about involvement in future events of a similar nature, Chief Graham made clear that he had no plans for any similar events, *see* Pls. MSJ Ex., Graham Dep., at 164:20-23. He unequivocally stated that, other than having police present for security purposes, he would "rule out using the word, prayer, in any future gathering that [the OPD] may or may not be involved in," *id.* at 164:24-165:4; that he would not allow uniformed OPD chaplains to preach to the public, stating that "[t]hey're not supposed to preach to the – preach, try to convert, people while in uniform," *id*. at 165:5-10; and that he would no longer allow uniformed OPD officers to lead prayers at such events. *Id.* at 167:25-168:7. *See also id*. at 166:15-167:3 (affirming that he would not permit uniformed OPD chaplains to lead prayer at a "community event"); MSJ Order, at 21 (acknowledging as an undisputed fact Chief Graham's testimony that "going forward, he would not permit the Chaplains to participate in public events while wearing their Ocala Police Department uniforms if the event involved leading prayers").[1]

[1] In its Order, this Court rejected portions of the declaration of Chief Graham under the sham affidavit doctrine, *see* MSJ Order, at 9 n.6, and asserted as an undisputed fact that "'participating in a prayer vigil' would be part of the official function of an Ocala Police Chaplain." *See id.* at 9 (citing Chief Graham's Dep. Tr. (Dkt. 54-10), at 78-79. As Chief Graham's deposition testimony cited above makes clear, however, *see* Part I.A.2, such participation would not be part of the official function of an OPD Chaplain in the context of a public or community event. Indeed, Graham made this clear at the time of his deposition in distinguishing such public or community events from an event such as the funeral of a law enforcement officer. *See* Graham Dep. Tr. (Dkt. 54-10), at 166-67. Thus, Chief Graham's later declaration is entirely consistent with, rather than contradictory to, his earlier sworn testimony and cannot be discounted under the sham affidavit doctrine. *See* Order, at 9 fn 6 (quoting Graham Dec. II (Dkt. 68-1), at ¶ 6 ("I do not consider uniformed [Ocala Police Department] chaplains proselytizing to the general public to be part of their official departmental function. Nor is it part of chaplains' department function to lead general community religious events or activities, such as the Community Prayer Vigil.")).

3. The City has maintained its commitment to these changes in conduct.

As this Court noted, "[s]ubsequent prayer events have been held in Ocala, at least one of which was organized and sponsored by a church," *id.* at 21-22, but there is no evidence or indication that the City organized, sponsored, or was otherwise impermissibly involved in those events. In fact, as has long been true, there is no evidence or indication that the City has been impermissibly involved with any other religious event or that it has strayed—or intends to stray—from the restrictions about which Chief Graham testified.[2]

The totality of the circumstances demonstrates there is no reasonable expectation, let alone any substantial likelihood, that the City or Graham will repeat the complained-of conduct and thus yields the conclusion that this case is—and has long been—moot.

B. Plaintiffs' Claims for Nominal Damages Are—and Were at the Time of the Summary Judgment Order—Insufficient to Confer Jurisdiction on This Court.

In reaching its conclusion that a claim for nominal damages is insufficient to save an otherwise moot case, the Eleventh Circuit necessarily distinguished such cases from two other scenarios, neither of which is present here. As the court explained, "there are cases in which a judgment in favor of a plaintiff requesting only nominal damages would have a practical effect

[2] As noted above, the *Flanigan's Enterprises* court reiterated that a plaintiff disputing mootness must provide "more than '[m]ere speculation that the City may return to its previous ways.'" 868 F.3d at 1256 (citation omitted). Notably, the court expressly found that "[w]hether the City defended [its conduct] and/or continues to believe it was constitutional provides only weak evidence, if any, that its [change] was ambiguous and, therefore, that the City will [return to its previous ways]." *Id.* at 1262. The court's "jurisdiction does not turn on a party's beliefs; to hold otherwise would turn the federal courts into glorified debating societies." *Id.*, n.8 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Thus, for example, the mayor's expressed beliefs about the constitutionality of the complained-of conduct here have no bearing on the mootness issue absent *evidence* that he has acted (or has plans to act) so as to give effect to those beliefs in contravention of Chief Graham's stated commitments to the contrary. No such evidence exists.

on the parties' rights or obligations." *Flanigan's Enters.*, 868 F.3d at 1263. Examples include the need for "a legal determination of a disputed [property] boundary" or "to vindicate [plaintiffs'] reputations" in a libel suit by proving falsehood. *Id.* at n.12. "Likewise, there are situations in which nominal damages will be the only appropriate remedy to be awarded to a victorious plaintiff in a *live* case or controversy." *Id.* at 1263-64 (emphasis added).

By contrast, the *Flanigan's Enterprises* court confronted a situation—like the present one—in which the case became moot *before* the court decided the constitutional issue. There, the court explained, "the only injury of which Appellants complained, and thus the only one we have the power to remedy, was the existence of a constitutionally impermissible [ordinance]." *Id.* at 1264-65. The court continued:

> Appellants have never suggested that they are entitled to actual damages resulting from the operation of the Ordinance. Nor have they made any showing that the Ordinance is likely to be reenacted. A fair reading of their complaints reveals that all of their alleged injuries would be remedied by, and therefore all of the possible relief exhausted by, removal of the challenged Ordinance provision. Having already achieved that, there is simply nothing left for us to do. Far from being "likely" that a favorable decision of this Court would have any practical effect on their rights or obligations, in these circumstances it is plainly not possible.

Id. at 1265 (internal citation omitted). As previously noted, the court subsequently clarified that "the parties' right to a single dollar in nominal damages is not the type of 'practical effect' that should, standing alone, support Article III jurisdiction." *Id.* at 1270.

Here, the situation is much the same. The only injury of which Plaintiffs have complained was the City of Ocala's involvement (actual or perceived) in the Community Prayer Vigil that took place in 2014. Plaintiffs did not seek actual damages, *see* Complaint (Dkt. 1), at 8-9, and they have made no showing that the complained-of conduct is likely to recur. A fair reading of Plaintiffs' Complaint "reveals that all of their alleged injuries would be remedied by, and therefore all of the possible relief exhausted by," the cessation of the City's involvement in the

complained-of conduct. *See* R&R, at 15 ("Fairly read, the Complaint focuses on a past event – the September 24, 2014 Community Prayer Vigil – and actions purportedly taken by Defendants to promote and organize the event. Significantly, the Complaint is devoid of any allegation that another prayer vigil is scheduled or even that one is likely to be organized."). Because Plaintiffs had already achieved that, through not only the end of the Vigil itself but also the unambiguous commitments expressed by Chief Graham, there was "simply nothing left for [this court] to do." As in *Flanigan's Enterprises*, at that point, this Court could do nothing more than "affix a judicial seal of approval to an outcome that ha[d] already been realized." 868 F.3d at 1264.

In further explaining the underpinnings of its decision, the Eleventh Circuit noted that "[t]he Supreme Court has never held that nominal damages alone can save a case from mootness," *id.*, and found that the cases on which other circuits have relied in reaching a contrary conclusion fail to support such a result. *Id.* at 1265-67.[3] The Eleventh Circuit instead found the nominal damages issue analogous to the related doctrines of standing and declaratory judgments, which the Supreme Court has thoroughly addressed. With regard to standing, the Eleventh Circuit explained that just as "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury," *id.* at 1268 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998), the same is true where "the only redress [a court] can offer [Plaintiffs] is judicial validation, through nominal damages, of an outcome that has already been determined." *Id.* Analogizing nominal damages to declaratory judgments, "[g]iven the similarities between the two remedies," *id.*, the court explained:

[3] In notable contrast to the claims presented here, in two of the three Supreme Court cases the court addressed, "a live claim for *actual* damages existed at all levels of the litigation." *Id.* at 1266 (emphasis added). *See also id.* n.18. In the third, the Court decided the case without even reaching the nominal damages / mootness issue.

> Nominal damages, like declaratory relief, are a remedy that may be granted by the federal courts upon a proper exercise of our jurisdiction; they are not themselves an independent basis for that jurisdiction. Because a prayer for declaratory relief—by itself and in an otherwise moot case—is insufficient to give a federal court jurisdiction, we believe that the Supreme Court's holdings in the declaratory relief context support our position in this case.

Id. at 1268-69.

In short, the court's exercise of jurisdiction in such circumstances "would surely constitute an impermissible advisory opinion of the sort federal courts have consistently avoided." *Id.* at 1269 (citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("Early in its history, this Court held that it had no power to issue advisory opinions.")). *See also Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1265 (10th Cir. 2004) (McConnell, J., concurring) ("As the Supreme Court commented in *Farrar v. Hobby*, in which a plaintiff received only nominal damages, success in this litigation would 'accomplish[] little beyond giving [plaintiffs] "the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated."' 506 U.S. 103, 114, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992), quoting *Hewitt v. Helms*, 482 U.S. 755, 762, 96 L. Ed. 2d 654, 107 S. Ct. 2672 (1987) (last bracket in original)).

As was true in *Flanigan's Enterprises*, because the instant case was moot before this Court issued its summary judgment order, and the claim for nominal damages was insufficient to support this Court's Article III jurisdiction, that order was merely "an opinion advising what the law would be upon a hypothetical state of facts," *id.*, not any "real and substantial controversy admitting of specific relief through a decree of a conclusive character." *Id.*

II. THIS COURT OVERLOOKED UNDISPUTED EVIDENCE MAKING CLEAR THAT PLAINTIFFS LACKED STANDING.

This Court's holding that Plaintiffs sufficiently demonstrated standing overlooked undisputed evidence that requires a different result. In finding that Plaintiffs Lucinda and Daniel Hale satisfied the jurisdictional standing requirements regarding an injury-in-fact, *see* MSJ Order, at 25-26, this Court appears to have missed the undisputed fact, as testified to by each of them, that they voluntarily and purposefully exposed themselves to conduct they *expected* would offend them. *See* Graham/City MSJ Ex. 8 (Dkt. 52-12) at 2 of 16 (ROG No. 12) (Lucinda Hale stating, "I attended [the Vigil] because I wanted to observe what happened, see how religious it would be, and see the extent of city and police department involvement. I also felt that my presence would be a form of protest."); Pls. MSJ Ex. L. Hale Dep. (Dkt. 54-15) at 39 of 61 (46:4-9) (same); Graham/City MSJ Ex. 8 at 6 of 16 (ROG No. 12) (Daniel Hale stating, "I attended because I wanted to observe"); Pls. MSJ Ex. D. Hale Dep. (Dkt. 54-14), at 26 of 55 (42:23-24) (Daniel Hale admitting he expected to observe "praying" at the vigil); Graham/City MSJ Ex. 13 (Dkt. 52-16), at 3 of 8 (43:3-5) (Daniel Hale admitting that he expected the OPD to be involved at the prayer vigil); *id.* at 5 of 8 (65:3-10) (Daniel Hale expressing his personal opposition to government officials encouraging prayer). These statements unequivocally demonstrate that both Lucinda and Daniel Hale went to the vigil fully expecting to encounter conduct they deemed offensive and objectionable under the Establishment Clause. Regardless of any feelings they may have expressed about wanting to stop crime in general, at no time did either of these plaintiffs express that this was their purpose for going to the vigil.

Similarly, Plaintiff Rojas admitted that he attended the vigil for the express purpose of observing whether there would be a violation of the Establishment Clause through OPD involvement in the event. Pls. MSJ Ex. Rojas Dep. (Dkt. 54-12), at 17 of 55 (20:22-25) (Art

Rojas stating that he attended the vigil to support his assumption that OPD was leading or sponsoring the event); *id.* at 31 of 55 (40:12-13) (Rojas testifying that he "went to the event to see if there were going to be violations of the Establishment Clause"). While the summary judgment order acknowledges this purpose as stated by Mr. Rojas, *see* MSJ Order, at 20, the court failed to address this admission in the context of the standing analysis. *See id.* at 23-26.

While standing is sometimes demonstrated by personal contact with unwelcome or unwanted conduct, applicable precedent, including a recent decision from a sister court in this jurisdiction, makes clear that standing is lacking where a plaintiff intentionally instigates such contact, as that would constitute an improper attempt to manufacture standing. "The Supreme Court has explained that a plaintiff's 'claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal [his] discoveries in federal court.'" *Am. Atheists, Inc. v. Levy Cty.*, 2017 U.S. Dist. LEXIS 198386, *10 (N.D. Fla. Dec. 3, 2017) (quoting *Valley Forge*, 454 U.S. at 487). As the *Levy County* court explained, "[a]ny injury in this context would be contrived, and [t]he Supreme Court has declined to find standing in contrived circumstances." *Id.* (internal quotations and citation omitted). "For this reason," the court went on, "courts have held that a plaintiff does not have standing to bring an Establishment Clause claim against a monument that the plaintiff purposefully encountered." *Id. Accord Am. Atheists, Inc. v. Thompson*, 2015 U.S. Dist. LEXIS 28779, **5-6 (W.D. Okla. Mar. 10, 2015) (rejecting standing where plaintiff's "testimony was clear that she went out of her way to find the monument"). *See also, Ala. Freethought Ass'n v. Moore*, 893 F. Supp. 1522, 1535 n.26 (N.D. Ala. 1995) ("This court cannot understand how voluntary exposure to purportedly offensive conduct can establish standing to obtain an injunction barring such conduct. To recognize standing in such circumstances would be

to allow a plaintiff to 'manufacture' her standing. Such a clever machination (or is it masochism), if recognized as legitimate, would make a mockery of the longstanding judicial interpretation of Article III's 'case or controversy' requirement.") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992) ("Imminence . . . has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, *and the acts necessary to make the injury happen are at least partly within the plaintiff's own control*") (emphasis added)).

Importantly, at no point have these Defendants argued that Plaintiffs could have "simply ignored the facebook page and opted not to attend the Prayer Vigil," *id.* at 28, such that they should have taken pains to deviate from their normal routine in an attempt to avoid the objectionable event. Rather, Defendants have consistently argued, because Plaintiffs have unequivocally confirmed through their own testimony, that they intentionally took pains—*i.e.*, went out of their way—to *not* avoid the event, admittedly attending for the express purpose of observing what they fully expected to be offensive conduct. Such conduct on the part of a plaintiff constitutes an attempt to manufacture standing that cannot satisfy Article III's jurisdictional requirements.[4]

[4] While Plaintiffs saw the Facebook post regarding the upcoming Community Prayer Vigil, as these Defendants have previously noted, the law is clear that this, without more, is insufficient to demonstrate any injury-in-fact. *See* Graham/Guinn MSJ (Dkt. 52), at 9-11 (citing *Valley Forge*, 454 U.S. at 482; *Freedom from Religion Found. v. Obama*, 641 F.3d 803, 806-07 (7th Cir. 2011)). The "requisite special burden," MSJ Order, at 27-28, applicable in the standing context is suffered by a plaintiff in attempting to "avoid" unwelcome or unwanted conduct. Contrary to this Court's holding, *see id.* at 27-28, Defendants are unaware of any authority to suggest that such a burden—and thus standing—may properly be predicated upon "offense at a public official's support of religion," *id.* at 807, even if the plaintiff is a member of the same community as the public official.

CONCLUSION

For the foregoing reasons, this Court should vacate its summary judgment order (Dkt. 88) and dismiss this case.

Pursuant to Middle District of Florida Rule 3.01(g), Counsel for Defendants City of Ocala and Greg Graham certify that they conferred with counsel for Plaintiffs. Counsel do not agree on the resolution of this motion.

DATED: July 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notice of electronic filing to all parties at the email addresses on file with the Clerk of the Court.

/s/ Carly F. Gammill
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Counsel for Defendants City of Ocala & Greg Graham