

**RECORD NO. 18-12679**

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**In The  
United States Court Of Appeals  
For The Eleventh Circuit**

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**ART ROJAS, LUCINDA HALE, DANIEL HALE,**

*Plaintiffs-Appellees,*

**v.**

**CITY OF OCALA, FLORIDA,  
GREG GRAHAM,**

**individually and in his official capacity as  
chief of police of the Ocala Police Department,**

*Defendants-Appellants.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA**

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**BRIEF OF APPELLEES**

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**Monica L. Miller  
AMERICAN HUMANIST ASSOCIATION  
1821 Jefferson Place, NW  
Washington, DC 20036  
(202) 238-9088  
mmiller@americanhumanist.org**

*Counsel for Appellees*

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## **CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26, counsel for Appellees certifies that the following have or may have an interest in the outcome of this case/appeal:

- American Center for Law & Justice (law firm for Appellant)
- American Humanist Association (law firm for Appellee)
- Chubb Limited (formerly ACE), parent company of Chubb North America
- Chubb North America
- City of Ocala (Appellant)
- Compagnone, Christina (Counsel for Appellant)
- Corrigan, Timothy J., presiding district court judge
- Franjola, George, Esq. (Counsel for Appellant)
- Gilligan, Patrick G., Esq. (Counsel for Appellant)
- Gilligan Gooding, Batsel, Anderson & Phelan, P.A. (law firm for Appellant)
- Hale, Daniel (Appellee)
- Hale, Lucinda (Appellee)
- Manion, Frank (Counsel for Appellant)
- Miller, Monica L., Esq. (Counsel for Appellee)
- Morcroft, Heather, Esq. (Local Counsel for Plaintiffs Court)
- Rojas, Art (Appellee)

- Sekulow, Jay (Counsel for Appellant)
- Sekulow, Jordan (Counsel for Appellant)
- Southerland, Abigail (Counsel for Appellant)

Dated: October 15, 2021

Respectfully Submitted,

*s/ Monica L. Miller*

Monica L. Miller

American Humanist Association

1821 Jefferson Pl. NW

Washington, DC 20036

(202) 238-9088

mmiller@americanhumanist.org

*Counsel for Plaintiffs-Appellees*

## **STATEMENT REGARDING ORAL ARGUMENT**

The issues presented in this case are vital to our democracy but do not necessitate oral argument. The law is settled in Appellees' favor. Oral argument would unnecessarily deplete the Court's resources. Nonetheless, counsel welcomes the opportunity for oral argument should it please the Court.

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## **ABBREVIATIONS**

“R.\_\_\_\_” refers to the Page ID in Appellants' Appendix

“Br.\_\_\_\_” refers to Appellants’ opening brief filed with this Court

“Dkt.\_\_\_\_” refers to parts of the record not contained in appellants’ Appendix that will be provided to the Court in a supplemental appendix.

“OPD” refers to the Ocala Police Department.

Appellants, the City of Ocala (“Ocala”), Kenneth Graham (“Chief Graham”), Reuben Guinn (“Mayor Guinn”), are collectively referred to as “Ocala” “the City” or “Defendants” unless otherwise stated.

## **JURISDICTIONAL STATEMENT**

The District Court correctly found that Plaintiffs meet the requirements of Article III. R.1987-93.

## **STATEMENT OF THE ISSUES**

Under the direct supervision of a police chief and mayor, uniformed law enforcement personnel and police-selected ministers delivered Christian prayers and sermons to hundreds of worshipers in the heart of town for over an hour. Government officials urged the public to attend this “important” event for “fervent prayer” initiated by the chief and planned and led by his staff. Does the Establishment Clause allow a city

to: (1) organize and promote a Christian worship service for the public; (2) exercise authority over Christian prayers delivered to hundreds of citizens assembled at its behest; (3) create a church service to turn worshipers into witnesses; and (4) categorically exclude non-Christians from a police event?

## INTRODUCTION

“Why are the police asking us to pray? will they arrest us if we don’t pray?” – *Ocala citizen*

Uniformed police personnel preached Christianity in a revivalist style to hundreds of worshipers assembled at the government’s behest for an hour in the heart of town. The police chief, mayor, and uniformed officers engaged the crowds while plain clothes officers may or may not have interrogated witnesses. The mayor declared ideological war against atheists, debated citizens over prayer, and allowed hundreds to show up to a prayer event—amidst shootings—hosted by the police department. And Ocala says all of this was done for the purpose of targeting a specific church-going witness, as if that makes it more constitutional.

## STATEMENT OF THE CASE

### I. Overview and District Court Ruling

Plaintiffs are residents of Marion County and members of the American Humanist Association (AHA). R.3. They had an interest in being a part of the community and were concerned about crime. R.1989. They attended the Prayer Vigil but were unable to participate in any of the activity. R.1989.

Frances Jean Porgal testified that “police representatives spent no time discussing the crimes that had recently occurred,” or “requesting assistance” from the community or urging people to come forward with information; instead, speakers prayed, preached, and sang. R.719.

Art Rojas testified that it was “a Christian revival” and “not a comfortable place for non-believers.” R.711. He felt “pressure to participate and show approval,” lest he be seen as “publicly opposing the police.” R.711.

Lucinda Hale described police “employees in uniform on the stage singing, praying, raising their hands like a good old-fashioned down-home revival.” R.1309-10.

The District Court found that Ocala's "Prayer Vigil" was "inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself." Dkt.14 at 24 (quoting *Engel*). See also Dkt.14 at 23-24 (Defendants' "conduct 'lies so obviously at the very core of what the Establishment Clause prohibits" a violation should be "obvious" to government officials)

"Even the City and Chief Graham agreed at oral argument that a government entity or actor may not organize and hold a prayer vigil without violating the Establishment Clause. But they say that is not what happened here. Rather, they contend the Prayer Vigil was a community-sponsored activity, not a government-sponsored event." R.2001-02. And yet: "without the Chief's invitation, the involvement of police officials in planning the event, and the Ocala Police Department Chaplains' participation, there would not have been a Prayer Vigil at all." R.2001.

"While the City paints this as a fleeting incident," the court noted, "the events here took place over the course of eight days." R.2020-21. During that time "both Chief Graham and Mayor Guinn took many actions in their official roles in very public ways to initiate, organize,

facilitate, promote, encourage, endorse, and otherwise sponsor the Prayer Vigil (all in the face of vocal opposition which pointed out the violation).” R.2021.

The District Court found the discrepancies in Ocala’s “facts” overbearing to the point of invoking the sham affidavit doctrine on Graham’s testimony. R.2010, R.1974.

## **II. Factual Background**

### **A. Ocala Police Initiate and Organize Worship Service**

#### **1. Police Chief Holds Meeting**

Chief Graham held a meeting at the Ocala Police Department on September 17, 2014, with other OPD personnel and officers (Captain Edwards, Officer Williams, Captain Sirolli, Major Yonce, OPD Chaplain Brockington and OPD Chaplain Edwin Quintana), and a single community member, Narvella Haynes. R.1967. Haynes was then associated with the New Zion Missionary Baptist Church. Dkt.54-75.

OPD Chaplain Quintana proposed a “Prayer Vigil.” R.820. Graham “thought it was a great idea” and said: “Let's do it.” R.820.



Mayor Guinn informed Graham: “As I told you I think this is a great idea and have been responding to the atheist groups that are writing me about it. I put it on my calendar to be there.” Dkt.54-25.

## **2. OPD Chaplains are “Staff”**

Pursuant to OPD’s Directive: “Ocala Police Department Chaplains are official members of the Ocala Police Department” and are “considered members of the staff.” R.469. OPD supplies and pays for the Chaplains' uniforms. Dkt.54-5 at 7. “They are issued Police Identifications,” a “badge,” police cell phones, and “are authorized to drive Department vehicles.” R.469. They are also covered by worker's compensation. R.469. Graham testified that “participating in a prayer vigil” would be part of the official function of an OPD Chaplain. R.875.

## **3. OPD Invites Speakers, Orders Staff to Deliver Prayers in Uniform, Plans for “Christians” Only**

Captain Edwards emailed an OPD Major saying he would be “mentioning” the Vigil at an upcoming staff meeting and emailed another OPD Captain to say he was “working on getting this prayer vigil set up.” R.1455.

Captain Edwards elicited Chaplain Quintana to help him coordinate speakers by reaching out to Christian churches, including

Mayor Guinn's Church. R.1967-68, R.1971, R.429, R.522-23, R.771, Dkt.54-27.

Chaplain Quintana emailed all OPD Chaplains (copying Graham) instructing: "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).'" Dkt.54-26. The subject read: "Urgent Prayer Service." R.661.

All of the OPD Chaplains were of the Christian faith. R.893. R.1973.

Chief Graham emailed Captain Edwards and Quintana (but not Haynes) saying: "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." Dkt.54-21.

Captain Edwards asked Graham whether they should secure an indoor location with the forecast of rain. R.1451. Edwards suggested the Mt. Moriah Missionary Baptist Church. R.1451.

Chaplain Quintana replied: “My two cents is to pray with or without rain on the Square. Nothing should stop, hinder or prevent from fervent *prayer*. Keep it to 15-20 minutes of PRAYER only.” R.1450.

Edwards responded: “I guess I was keeping in mind the fair weather Christians and the children that may attend.” R.1450.

**B. Chief and Mayor Promote Prayer and Ignite Division**

Chief Graham directed an OPD Sergeant to post a letter on OPD’s Facebook page to promote the Prayer Vigil. Printed on OPD letterhead, Graham’s letter provided (in part):

Blessings to all our citizens, specifically Pastors, Community Leaders, Parents and our precious youth.

We are facing a crisis in the City of Ocala and Marion County that *requires fervent prayer* and your presence to show unity.  
...

I am urging you all to please support a *very important* “Community *Prayer Vigil*” that will be held this coming Wednesday, September 24, 2014 at 6:30 pm to be held at our Downtown Square located in the heart of the City.

Please support peace and this appeal for unity on this *very important* “Community Prayer Vigil” coming this next Wednesday. *We need you.*

R.12-13 (emphasis added). OPD staff created a separate flyer depicting praying hands and the OPD logo. Dkt.54-22 at 7.

The Prayer Vigil became “a matter of public debate in Ocala, with the citizenry vocalizing opinions both for and against it on social media, in communications to Chief Graham and Mayor Guinn, and in local news outlets.” R.1978. Mayor Guinn responded to a citizen who opposed the prayer vigil:

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

Dkt.54-51. Responding to Mrs. Hale, Mayor Guinn 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. . . . in Jesus name we pray.

R.15. He told another: “I think this is great. I’ll be sure to praise him [Graham] for it.” R.1528.

In response to a supporter who wrote, “Stand tall on prayer,” Chief Graham replied:

I have been getting quite a few responses from people, mostly from out of our area, who oppose this. I have no intention on calling this gathering off nor changing my personal belief on the power of prayer.

Dkt.54-55. Graham refused to remove the Facebook letter despite AHA's legal warning (Dkt.54-46 at 2-3), and told Mrs. Porgal "I have no intention of canceling the event." R.494.

The Mayor testified that the "Christian community" must oppose atheists who oppose the prayer vigil. Dkt.54-11 at 100. One citizen rejoiced: "It is so refreshing to see political leaders taking a stand for Christianity!" R.905, Dkt.54-63. Another declared:

it is way past time for us to shake the shackles of complacency and apathy and get engaged in the fight. Please join me tonight in support of our elected officials *in fighting the enemies of our God*.

R.902. (emphasis added). The Mayor replied: "God is good!!! All the time. The fight is on." Dkt.54-41.

### **C. OPD holds hour-long service for Christian worshipers**

"Approximately ten people were on the stage during the Prayer Vigil, including four uniformed Ocala Police Chaplains" one "employee who was not in uniform," and five Christian ministers invited by OPD. R.1980, R.764.

The service lasted about an hour. R.936. About 500-600 attended. R.1981, Dkt.54-11 at 108:19-20. OPD staff preached from the stage. R.1981, R.1391, Dkt.54-19, Dkt.54-31.

Mr. Hale testified that he observed uniformed OPD personnel praying and holding hands with the other citizens and bowing heads. I mean, it was kind of like a tent revival . . . [T]he hallelujahs, the hands in the air, the oh, yes, Lord, so on and so forth, you know.

R.1261, R.1279.

Graham testified that the prayers were only Christian and the audience was predominately Christian. R.893-84. He spent his time “engaging people in the crowd” alongside other uniformed officers. R.937.

The Ocala Atheists (not a party here) staged a peaceful protest. Dkt.54-18, Dkt.54-73.

#### **D. Congratulatory Emails Circulate Within OPD**

Chaplain Quintana emailed Captain Edwards: “God bless you Captain *for organizing this event* and I am honored *you invited me.*” Dkt.54-32 at 4 (emphasis added).

An OPD employee lauded Graham for “bringing the community together through prayer.” Dkt.54-56. Graham replied: “stuff like this is easy when you believe.” *Id.* An OPD Captain boasted: “my commander-in-chief . . . fully understands the power of prayer.” Dkt.54-38.

Captain Edwards thanked OPD staff for “allow[ing] the PRAYER VIGIL to take place,” remarking that “[t]here was opposition but Isaiah

54:17 says “No weapon that is formed against thee shall prosper; and every tongue that shall rise against thee in judgment thou shalt condemn.” Dkt.54-32. Edwards closed with, “Romans 8:28.” *Id.*

### **SUMMARY OF THE ARGUMENT**

The district court’s ruling affirms the permissible boundary between respect for religion in society and exploitation of religion for government aims.

This case is not about shielding atheists from offense. It is about shielding prayer from atheism. And government from tyranny. And society from strife.

This is not a legislative prayer case. Nor is this an old monument retained for historic purposes.

This case involves a full-blown worship service for hundreds of Christians led by uniformed police staff, initiated and controlled by the police chief, and heralded by the mayor. Anyone opposing the prayer vigil would have been opposing the police.

No test is needed to reach the common-sense conclusion that Ocala’s actions violated the Establishment Clause.

No case supports a public worship service controlled by the government, much less controlled by a police department.

At bottom, Ocala's service with police-approved ministers invited to preach Christianity deprived the Church of full autonomy over its dogma, running afoul of the Supreme Court's recent ministerial exception cases.

Allowing police to "wayward minister" waters down prayer, leaves citizens with the impression Christianity needs government support, thus weakening its bonds, and taints prayer with a corrosive secularism.

Neutrality is the touchstone of any Establishment Clause analysis. It would take Olympic level stretching to find that the government acted neutrally with regard to religion in this case.

Government cannot facilitate or sponsor prayer. The police chief deployed his staff and Christian ministers to deliver prayers from a stage he controlled. Ocala used law enforcement time to organize a worship event, promote "fervent prayer," and urge hundreds to attend an "important" event by the "Ocala Police Department."





(R.1396)

## ARGUMENT

### I. *Monell* Liability and Standing

Having shown that the City was directly responsible for initiating, organizing, promoting, and leading the Prayer Vigil, § 1983 liability is irrefutable. *See generally Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267, 1282 (11th Cir. 2008) (county liable for Establishment Clause violation from clerk's action in crossing through phonebook). Ocala even concedes a *Monell*

policy: “*Graham’s decision . . . was one of many methods* employed by the City.” Br.33 (emphasis added).

Perplexingly, Ocala still insists: “the planning of the Vigil [was] by private citizens.” Br.2. Guinn and Graham admitted that they were “not aware” of “any entity that was more involved in initiating, planning, or conducting the Vigil than the OPD.” R.545, R.819. Haynes was the *only* private citizen involved. R.960. We still have no evidence—no name even—of any NAACP leader involvement.

The idea came from OPD headquarters, and not *anywhere else*. Graham admitted that the four OPD Chaplains were serving in their official capacities under 1(B) of the OPD Manual. Dkt.54-10 at 77-78 Dkt.54-74. Graham also admitted that Captain Edwards was involved in planning as a “district commander.” R.817, Dkt.54-29, Dkt.54-34. Edwards even drafted a speech that referred to his role as both a “police officer” and “a child of God.” Dkt.54-31.

Mayor Guinn testified that he possessed the authority to: (1) instruct OPD to not have “chaplains leading prayers at the vigil;” (2) order the “department to instruct that chaplains not wear uniforms if they attend the prayer vigil” and; (3) order Graham to remove the Facebook letter. Dkt.54-11 at 54-55.

Ocala's standing arguments are foreclosed by precedent. *E.g.*, *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1324, 1334-35 (11th Cir. 2020) (plaintiff “used the cross for his own purposes”); *Pelphrey*, 547 F.3d at 1279-80 (plaintiffs had standing to challenge prayers they voluntarily viewed on the internet). *Carney v. Adams*, 141 S. Ct. 493, 501 (2020) (Br.23) did not involve “any actual past injury.” *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796, 802 (2021) makes clear that victims of one-off otherwise moot First Amendment violations, have standing to seek nominal damages.

James Madison said we must “take alarm at the first experiment on our liberties.” James Madison, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶3 (“REMONSTRANCE”), *reprinted in* *Everson v. Bd. of Educ.*, 330 U.S. 1, 65-66 (1947). Seeking only \$1, Plaintiffs desired nothing more than to vindicate the rights of all society. Ocala contends that Mr. Hale could not have “felt singled out” because he “spoke personally with Chief Graham during the event about volunteering with the police department.” Br.22. Respectfully, this simply underscores our humanist values:

Humanists long for and strive toward a world of mutual care and concern, free of cruelty and its consequences, where

differences are resolved cooperatively without resorting to violence.<sup>1</sup>

**II. When Establishment Clause history, bedrock precepts, and direct precedent present an obvious violation, no test is needed.**

**A. This Court does not need a special framework for Ocala’s obvious constitutional violation.**

The District Court correctly held that Ocala’s actions were “inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.” *Engel*, 370 U.S. at 433. The Establishment Clause sought to end governmental “control, support or influence [over] the kinds of prayer the American people can say.” *Id.* at 429-30. *See Lee v. Weisman*, 505 U.S. 577, 589 (1992) (The “First Amendment does not allow the government” to “undertake” authoring, stifling, or controlling prayers).

The Supreme Court has articulated several frameworks for evaluating Establishment Clause claims.<sup>2</sup> No case holds that courts must apply one of those frameworks to find a violation.

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<sup>1</sup> “Humanism and Its Aspirations,” AHA (Oct. 12, 2021), <https://americanhumanist.org/what-is-humanism/manifesto3/>.

<sup>2</sup> These include the *Lemon* test, strict scrutiny, and the coercion test.

What the Supreme Court’s “cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects.” *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973).

The Court must not be concerned with the “mechanism used to advance a concept, but the evil against which the clause protects.” *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff’d*, 472 U.S. 38 (1985) (citation omitted). As the Court in *Larson v. Valente*, 456 U.S. 228, 252 (1982) explained: “Although application of the *Lemon* tests is not necessary to the disposition of the case before us, those tests do reflect the *same concerns* that warranted the application of strict scrutiny [here].” (emphasis added).

If government action presents an obvious violation under direct precedent, history, or bedrock Establishment Clause requirements, courts may jettison the disjunctive *Lemon* test for a more direct route (just as courts may jettison *Lemon*’s effect and entanglement prongs in an obvious purpose case, or purpose in an effect case). *E.g.*, *Lee*, 505 U.S. at 592; *Ray v. Comm’r, Ala. Dep’t of Corr.*, 915 F.3d 689, 695-98 (11th Cir. 2019)

(bypassing *Lemon* for strict scrutiny because clergy policy favored Christian over Muslim inmates); *Williamson v. Brevard County*, 928 F.3d 1296, 1316 (11th Cir. 2019) (“This plainly violates the principle of denominational neutrality found at the heart of the Establishment Clause.”); *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263 (11th Cir. 2008) (finding violation regardless of *Lemon*).<sup>3</sup>

## **B. The Core Establishment Clause Evils**

As set forth more fully in section IV, Ocala’s actions run afoul of the Establishment Clause’s “history and the evils it was designed forever to suppress.” *McGowan v. Maryland*, 366 U.S. 420, 441-42 (1961). The following “evils” have been expressed since the founding era through current Supreme Court jurisprudence, set forth in a rough hierarchy as established by the Court.

**1. Tyranny.** The Establishment Clause’s “*first* and most immediate purpose rested on the belief that a union of government and religion

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<sup>3</sup> Indeed, the “principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988). *See also United States v. Benitez*, 165 F. App’x 764, 767 (11th Cir. 2006) (“We may affirm a district court’s decision on grounds the district court did not address.”).

tends to *destroy government* and to degrade religion.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (emphasis added).

**2. Religious Degradation.** The other “first purpose” was to protect religion from degradation. *Id.*

**3. Division, War, Strife.** The third major “purpose of the Establishment Clause” was to prevent the “anguish, hardship and bitter strife” that resulted when “religious groups struggled with one another to obtain the Government’s stamp of approval.” *Id.* at 429, 432. The Framers were most concerned about prayer-driven strife: “The controversies over the Book [of Common Prayer in England] and what should be its content repeatedly threatened to disrupt the peace of that country.” *Id.* at 425-27.

**4. Control of Prayer.** Ending government control over prayer was a foremost reason for the Establishment Clause’s existence. The Establishment Clause was “*added to the Constitution* to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to *control, support or influence* the kinds of prayer the American people can say.” *Engel*, 370 U.S. at 429-30 (emphasis added). “*It is a matter of history* that . . . governmentally composed prayers

for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.” *Id.* at 425 (emphasis added).

**5. Taxes For Worship.** Our founders believed that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947) (quoting Jefferson, *A Bill for Establishing Religious Freedom*). They asserted “that no man shall be compelled to frequent *or support any religious worship*, place, or ministry whatsoever.” *Id.* (quoting 12 Hening’s Stat. 85).

**6. Church Entanglements.** The Establishment Clause was intended to prevent “sponsorship, financial support, and active involvement of the sovereign in religious activity,” *Walz v. Tax Comm’n of New York City*, 397 U.S. 664, 668 (1970), including the delegation of state functions to religious authorities, *Larkin v. Grendel’s Den*, 459 U.S. 116, 123 (1982).

**7. Discrimination.** The Founders demanded equal treatment of “the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination,” 1 Writings of Thomas Jefferson 62 (P. Ford ed. 1892). The Establishment Clause thus requires both “non-



interference and non-preferential treatment by the state.” *Ray*, 915 F.3d at 696-98.

**8. Coercion.** Although not a central function of the Establishment Clause, coercion is a shortcut to finding an Establishment violation. That is because “[g]overnment pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.” *Lee*, 505 U.S. at 604 (Souter, J. concurring).

### C. Bedrock Establishment Clause Requirements

Relying on the history of the Establishment Clause, *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947) set forth several clear prohibitions that remain bedrock Establishment Clause requirements today, irrespective of any test:

Neither a state nor the Federal Government *can set up a church*.

Neither can pass laws which aid one religion, aid all religions, or *prefer one religion over another*.

Neither can force nor *influence* a person to *go to* or to remain away *from church* against his will or force him to profess a belief or disbelief in any religion.

*No person can be punished* for entertaining or professing religious beliefs or disbeliefs, *for church attendance or non-attendance*.

*No tax* in any amount, large or *small*, can be levied to support any *religious activities* or institutions, whatever they may be called, or whatever form they may adopt to teach or *practice religion*.

Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

(emphasis added).

#### **D. Neutrality Touchstone**

“The touchstone” for Establishment Clause claims “is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’” *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Everson*, 330 U.S. at 15-16; *Wallace*, 472 U.S., at 53)).

“Government in our democracy, state and national, must be neutral in matters of religious *theory, doctrine, and practice*.” *Epperson*, 393 U.S. at 103-04 (emphasis added). The government “may not aid, foster, or promote one religion or religious theory against another.” *Id.*

“The neutrality principle embodied in the Establishment Clause is a critical bulwark of religious freedom,” *Ray*, 915 F.3d at 696-98 (citing *Engel*, quoting *Larson*), and a “*central* purpose of the Establishment

Clause.” *Gillette v. United States*, 401 U.S. 437, 449 (1971) (citing *Epperson* and *Everson*) (emphasis added).

Neutrality is required in purpose and impact. Regardless of the *Lemon* test, when government “activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact.” *Gillette*, 401 U.S. at 450.

Eight Justices in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963) agreed, long before *Lemon*, that the Establishment Clause “test may be stated as follows:”

what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment *exceeds the scope of legislative power as circumscribed by the Constitution*.

(emphasis added). This neutrality purpose and effect analysis was used without controversy in numerous still-binding cases leading up to *Lemon*. *E.g.*, *Torcaso v. Watkins*, 367 U.S. 488, 489-90 (1961) (“the purpose or effect” unconstitutionally favored god-believers); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 598 (1961) (neither “purpose nor its effect is religious”); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (“the purpose or effect”); *McGowan v. Maryland*, 366 U.S. 420, 445 (1961)

(“purpose and effect”); *Epperson*, 393 U.S. 97 (1968) (improper religious purpose dispositive) (non-exhaustive list).

The Court continues to evaluate purpose and effect independent of the *Lemon* test. *E.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533-34 (1993) (evaluating “the object or purpose of a law” for “the minimum requirement of neutrality”); *Van Orden v. Perry*, 545 U.S. 677, 686 691 n.11 (2005) (plurality) (jettisoning *Lemon*’s reasonable observer while finding “no evidence of such” a “primarily religious purpose in this case”); *id.* at 681, 688-91 (evaluating effect and finding an “undeniable historical meaning,”); *id.* at 701-03 (Breyer, J., concurring) (evaluating motives and meaning of monument separately). *See also infra* at VI-E.

The *Lemon* “test” took the existing neutrality requirements and added entanglement while confirming this is a disjunctive “test” designed for judicial efficiency. *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971) (“We need not decide whether these legislative precautions restrict the principal or primary effect,” or secular purpose, because there was “excessive entanglement”). If a case presents an obvious purpose violation, courts can skip effect, or vice versa, thus saving judicial resources. *See United States v. Leon*, 468 U.S. 897, 923 n.23 (1984) (“[S]ending state and

federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.”) (citation omitted).

*Lemon*’s disjunctive efficacy was apparent from the start. *Nyquist*, 413 U.S. at 794 (because the “challenged sections have the impermissible effect of advancing religion, *we need not consider* whether such aid would result in entanglement”) (quoting *Lemon*; emphasis added); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (“no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose”).

**E. The only exception to these Establishment Clause requirements is legislative prayer.**

In just one “special” instance, the Court found “good reason to hold governmental action legitimate even where its manifest purpose was presumably religious,” legislative prayer. *McCreary*, 545 U.S. at 859 n.10 (citing *Marsh v. Chambers*, 463 U.S. 783, 804 n.16 (1983)). *See Lee*, 505 U.S. at 603 n.4 (noting that since 1971, the Court had decided “31 Establishment Clause cases” and *Marsh* was the only case that did not rest on the “principles described in *Lemon*”).

As this Court recently made clear, legislative prayers “occupy a unique position in the framework of Establishment Clause jurisprudence.” *Williamson*, 928 F.3d at 1298-99.

Even though the government is *generally prohibited* from entangling itself in religious judgments *or promoting religious belief*, our courts have repeatedly upheld prayer at the opening of government meetings because of this long national tradition. . . . Every step of the way, though, the courts have made clear that there are limits.

*Id.* Ocala’s police worship service does not qualify, *infra* at VI.

### **III. Ocala committed a bedrock Establishment Clause violation by influencing hundreds of worshipers to attend an hour-long Christian prayer service.**

It is axiomatic that “[n]either a state nor the Federal Government . . . can force *nor influence* a person to go to . . . church.” *Everson*, 330 U.S. at 15 (emphasis added). The Establishment Clause was designed “to prohibit legislation for the support of any religious tenets, *or the modes of worship* of any sect.” *Davis v. Beason*, 133 U.S. 333, 342 (1890) (emphasis added).

As Justice Scalia recognized, simply “giving sectarian religious speech *preferential access to* a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995)

(emphasis added). The Establishment Clause forbids “secular sanction to any religious *ceremony*.” *Engel*, 370 U.S. at 442 n.7 (Douglas, J., concurring, emphasis added).

The “Prayer Vigil consisted of chaplains offering Christian prayers and singing from the stage with responsive audience participation.” R.1998. This was by all credible accounts a “Christian revival.” R.1983, R.894-96. OPD was inches close to using an actual Baptist church. R.1449. They were committed to “PRAYER only” and only for “fair weather Christians” and “children.” R.1450.

“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 [a] Festival.” *Doe v. Crestwood*, 917 F.2d 1476, 1478-79 (7th Cir. 1990) (emphasis added). *See also Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930-31 (3d Cir. 1980). Whereas the mass in *Gilfillan* “would have occurred regardless of the [city’s] expenditures,” *id.* at 939 (Aldisert, J., dissenting), Ocala’s Prayer Vigil would not have occurred but for the OPD and Mayor. R.2001.

This is a potent violation of the Establishment Clause under *Everson*. No further analysis is required.

**IV. Ocala’s Christian worship service was wholly inconsistent with the purposes of the Establishment Clause and the Establishment Clause itself.**

**A. Tyranny Evil: The Establishment Clause is principally a restraint on government power, the usurpation of which threatens our foundation.**

**1. Ocala had an affirmative duty to remain neutral.**

“When there ain’t a crack in the foundation  
 Baby, I know any storm we’re facing  
 Will blow right over while we stay put  
 The house don’t fall when the bones are good”

*-Maren Morris, “Bones”*

The Establishment Clause is first in the Bill of Rights for a reason: it ensures we do not entropy into tyranny. Its primary purpose had less to do with religious freedom and more to do with preserving our free government. “The Establishment Clause was designed as a specific bulwark against [] potential abuses of governmental power.” *Flast v. Cohen*, 392 U.S. 83, 104 (1968). The “Clause is more than a negative prohibition.” *Pinette*, 515 U.S. at 777 (O’Connor, J., concurring).

Our architects knew “that a union of government and religion tends to destroy government.” *Engel*, 370 U.S. at 431-32. They



deemed religious establishment antithetical to the *freedom of* all. The Free Exercise Clause embraces a freedom of conscience. . . . but the Establishment Clause is a *specific prohibition* on forms of *state intervention* in religious affairs with no precise counterpart in the speech provisions.

*Lee*, 505 U.S. at 591 (emphasis added).

Madison minced no words: officials who breach this duty are Tyrants:

*The preservation of a free government* requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, *and are Tyrants*.

REMONSTRANCE ¶2 (emphasis added).

## 2. Ocala’s Christian worship service threatened the preservation of a free government.

The Supreme Court has held that “if citizens are subjected to state-sponsored religious exercises, *the State disavows its own duty* to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.” *Lee*, 505 U.S. at 592 (emphasis added). *Accord Engel*, 370 U.S. at 431.

Ocala disavowed its duty when it initiated, planned, and executed an hour-long “Prayer Vigil,” for Christians only, spurring inevitable division along religious lines. The Mayor used the Prayer Vigil for his own political spotlight. Dkt.61-1 (Fox News Insider article, “It's Happening to Me in My Community”). Chief Graham testified that he devised this whole event to pressure a specific church-going witness, calling it a “bizarre” story. R.818.

Today’s case threatens a core reason for the Establishment Clause’s existence. The Establishment Clause’s purpose of preventing tyranny is no less vital than the nondiscrimination principle vindicated in *Ray* and in *Williamson*. (Neither of which hinged on *Lemon*).

How long does it take for a democracy to crumble? On August 16, 2021, we watched fellow human beings cling to departing U.S. aircraft in Kabul, Afghanistan, after the Taliban takeover.<sup>4</sup> It is pro-American to say that prayer belongs with the people and not with Caesar.

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<sup>4</sup> Ellen Knickmeyer, *Cost of the Afghanistan war, in lives and dollars*, AP News (Aug. 17, 2021), <https://perma.cc/6N2W-EFXV>.

**B. Religious Degradation: Ocala’s Prayer Vigil degrades religion in all the ways our Founders feared.**

Ocala transgressed the Establishment Clause’s second “immediate purpose” by “degrad[ing] religion.” *Engel*, 370 U.S. at 431. The founders were concerned with several forms of religious degradation, *infra*.

**1. Weak religion needs government support**

First, our Founders knew that “many people had lost their respect *for any religion* that had relied upon the support of government to spread its faith.” *Id.* Madison argued that government support weakened the beliefs of adherents strengthened their opponents and generated “pride and indolence in the Clergy.” REMONSTRANCE ¶7. Jefferson contended that it “tends only to corrupt the principles of that very Religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it.”<sup>5</sup>

Benjamin Franklin may have put it best:

When a Religion is good, I conceive it will support itself; and when it does not support itself, and God does not care to support [it], so that its Professors are oblig’d to call for the

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<sup>5</sup> Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), *reprinted in FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY* 94-95 (John J. Patrick ed., 1995).

help of the Civil Power, 'tis a Sign, I apprehend, of its being a bad one.<sup>6</sup>

*Wallace* struck down government prayer, “not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that *religious beliefs worthy of respect* are the product of free and voluntary choice by the faithful.” 472 U.S. at 52-54 (emphasis added). That holding applies directly to Ocala’s actions.

## 2. Corrosive Secularism

Second, arming OPD staff with badges and microphones to administer Christian prayers to the masses may \*seem\* like a boost to Christianity but our founders knew better. They understood that government-sponsorship taints religion “with a corrosive secularism.” *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985).

## 3. Wayward Minister

Third, keeping religion out of the government’s hands best enables religion to “flourish according to the zeal of its adherents and the appeal of its dogma.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). History proved that “politically appointed ministers in colonial Virginia were, in

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<sup>6</sup> Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), <http://bit.ly/2jMsrvO>.

the view of the faithful, often ‘less than zealous in their spiritual responsibilities.’” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 n.9 (2020) (citation omitted).

In *Morrissey-Berru*, the Court held, in absolute terms: “the Religion Clauses protect the right of churches and other religious institutions to decide matters ‘of faith and doctrine’ without government intrusion.” 140 S. Ct. at 2060 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012)).

More specifically, the Court held: “*any attempt* by government to dictate or *even to influence* such matters would constitute one of the *central attributes* of an establishment of religion. The First Amendment *outlaws* such intrusion.” *Id.* (emphasis added). This rule is necessary, otherwise a “wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith.” *Id.*

Christian sermons and prayers were delivered by police staff under the direct supervision of a police chief to hundreds of worshipers for an hour. How is this not wayward ministering?

Ocala attempted and did in fact involve itself in controlling and monitoring matters of religious doctrine and practice. Ocala claims this was an OPD “method” to trap specific “witnesses and their families” because they “attended church.” Br.4. What zeal could we expect from ministers preaching with the aim of putting a man “in jail”? R.818.

These precedents cannot be fairly read to, on the one hand, recognize a church’s absolute right to interpret religious texts with their zeal and, at the same time, allow police staff to preach Christianity to crowds of worshipers and protestors.

#### **4. Pyrrhic Victories**

Madison forewarned: “experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a *contrary* operation.” REMONSTRANCE ¶7. A truncated inventory follows.

##### **i. The Creche**

“The creche has been relegated to the role of a neutral harbinger of the holiday season . . . devoid of any inherent meaning.” *Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., Stevens, J., dissenting). Justice Kennedy asserted: “devout adherents” may “be as

offended by the holiday display as are nonbelievers, if not more so.”  
*County of Allegheny v. ACLU*, 492 U.S. 573, 678 (1989) (concurring and dissenting in part).

“To place these religious symbols in a common hallway or sidewalk, where they may be ignored or *even insulted*, must be distasteful to many who cherish their meaning.” *Id.* (emphasis added).

*Lynch* inspired the Satanic “Snaketivity.” Laurel Wamsley, *Satanic Sculpture Installed At Illinois Statehouse, Just In Time For The Holidays*, NPR (Dec. 4, 2018), <https://n.pr/2Rz1ukj>.





"Snaketivity," *Bernard Schoenburg* via AP (2018)

## ii. The Latin Cross

The Supreme Court allowed Maryland to redefine the Latin cross's "exclusively sectarian meaning" by casting it as a "secular" and "benign" symbol that represented Satanists and Atheists alike. *American Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2070, 2074-75 (2019). The Trump administration claimed the cross was not religious to begin with. Brief for the United States as Amicus Curiae at 32.



The government assertions propelled millions of Christians to file a brief *against* the government: “Petitioners’ welter of alleged secular meanings for the cross, and their efforts to minimize its religious meaning, are offensive to many Christians.” Brief for the Baptist Joint Committee for Religious Liberty, et al. as Amici Curiae at 2. The brief was signed by:

- **The Evangelical Lutheran Church in America:** the largest Lutheran denomination in North America; 3.7 million members and 9,000 congregations
- **Clerk of the General Assembly of the Presbyterian Church (U.S.A.):** 1.6 million members in over 9,500 congregations
- **The General Synod of the United Church of Christ:** 944,000 members and 5,000 churches in the U.S.
- **The Baptist Joint Committee:** 14 supporting organizations, including state and national Baptist conventions and conferences

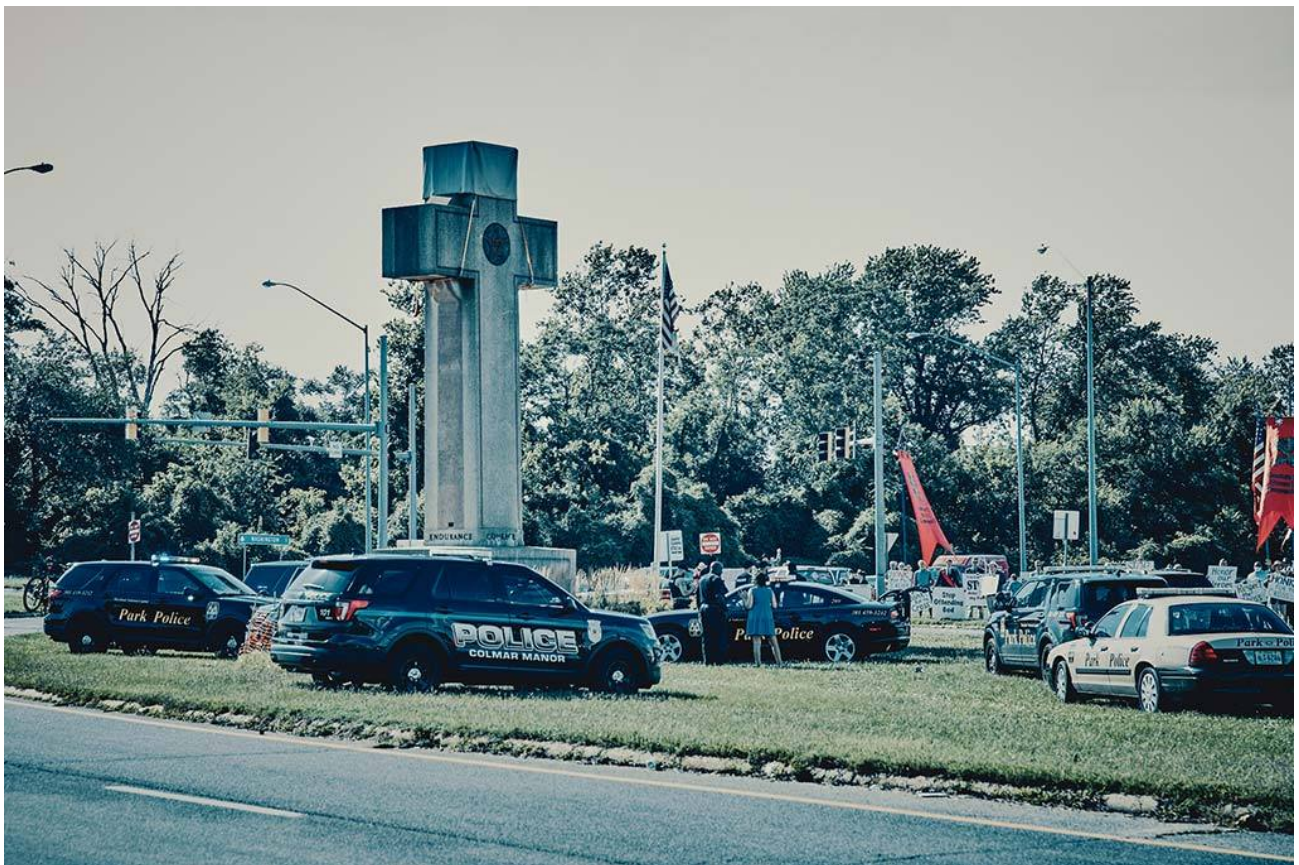
*Id.* at A-1-A-4.

The *American Legion* ruling thrilled the Satanists: “Deciding that the Bladensburg Cross does not just represent Christians . . . is consistent with Satanism.” The Satanic Temple, *Bladensburg Satanic Peace Cross Ceremony*, (visited October 11, 2021), <https://perma.cc/HM9J-SXEM> (the images below are courtesy of the TST website at this URL).

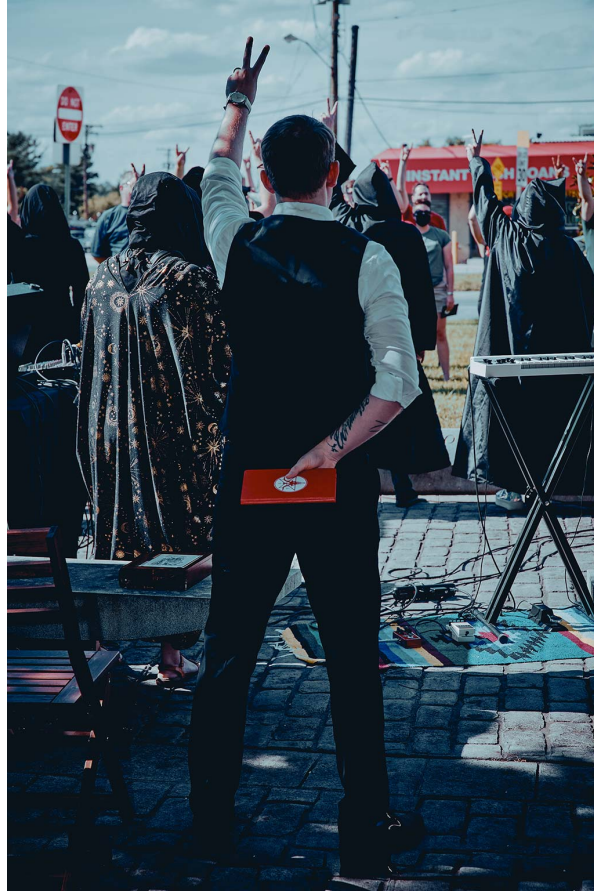
Throngs of citizens crowded the Bladensburg intersection this summer to join, or protest, robed Satanists chanting around their newly dedicated “Bladensburg Satanic Peace Cross.” *The Satanic Temple Celebrates First Satanic Monument on Public Property*, APNews.com (July 19, 2021), <https://perma.cc/6C5B-ELKU>.













*Satanic Dedication*, TST (2021), <https://perma.cc/HM9J-SXEM>.

Florida Satanists were already outbidding Christians for use of the Pensacola Cross on Easter. *Pensacola*, 949 F.3d at 1333 (City allowed Satanic worship at Easter cross).

### iii. Legislative Prayer

The Court in *Town of Greece v. Galloway*, 572 U.S. 565, 571 (2014), upheld a town’s legislative prayer practice because a “minister or layperson of any persuasion, *including an atheist*, could give the invocation.” (emphasis added). This was not mere dicta:

SCALIA: what is the equivalent of prayer for somebody who is not religious?



LAYCOCK: We take *Marsh* to imply that atheists cannot get full relief in this context[.]

ALITO: I think the point about atheists is a good point[.]

SCALIA: What about devil worshippers?

Transcript of Oral Argument at 18-19, 32-33, <https://perma.cc/KJQ7-ZFL2> (Excerpted).

Because of *Greece*, atheist invocations are now commonplace. *E.g.*, The Florida House, *3rd Day of Regular Session, Fla. Senate* (Jan. 11, 2018), <http://bit.ly/2HaIxjo>. And Scalia’s fear that devil-worshippers would haunt legislative halls is now reality. *Satanic Temple, Inc. v. City of Bos.*, 2021 U.S. Dist. LEXIS 136031, at \*12-13 (D. Mass. July 21, 2021).

#### iv. **America is becoming less religious.**

According to Pew research, in 2019, over 25% of Americans were atheist, agnostic, or “nothing in particular.”<sup>7</sup> By 2017, there were “20

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<sup>7</sup> Gregory A. Smith, *et al.*, *In U.S., Decline of Christianity Continues at Rapid Pace: An Update on America’s Changing Religious Landscape*, PEW RESEARCH CENTER (Oct. 17, 2019), [pewforum.org/wp-content/uploads/sites/7/2019/10/Trends-in-Religious-Identity-and-Attendance-FOR-WEB-1.pdf](https://pewforum.org/wp-content/uploads/sites/7/2019/10/Trends-in-Religious-Identity-and-Attendance-FOR-WEB-1.pdf).

states in which no religious group comprise[d] a greater share of residents than the religiously unaffiliated.”<sup>8</sup>

**C. Prayer Evil: Ocala’s control and influence over prayer violates the Establishment Clause at its core.**

Ocala’s police-led Christian worship service strikes at the core reason we have the Establishment Clause to begin with. Government-controlled prayer is “inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.” *Engel*, 370 U.S. at 433. Again, the “First Amendment *was added to the Constitution* to stand as a guarantee that neither the power nor the prestige of [the government] would be used to control, support or influence the kinds of prayer the American people can say.” *Id.* at 429-30.

The Clause was designed “to put an end to governmental control of religion and of prayer.” *Id.* at 435. Jefferson was adamant: “Every religious society has a right to determine for itself the times for [fasting & prayer] exercises, & the objects proper for them, according to their own

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<sup>8</sup> Robert P. Jones and Daniel Cox, *America’s Changing Religious Identity*, PUBLIC RELIGION RESEARCH INSTITUTE (Sept. 6, 2017), [prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf](http://prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf).

particular tenets; and the right can never be safer than in their hands, *where the Constitution has deposited it.*” 11 Writings of Thomas Jefferson 429 (A. Lipscomb ed. 1904) (emphasis added).

# **1. The prayer cases are controlling.**

The Supreme Court has repeatedly held that government-sponsored prayer violates the Establishment Clause. *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 296, 313 (2000) (“the prayer was to be determined by the students, without scrutiny or preapproval by school officials”); *Lee*, 505 U.S. at 587-88 (it is a “cornerstone principle” that the government may not “direct[] and control[] . . . prayers.”); *Wallace*, 472 U.S. at 60; *Engel*, 370 U.S. at 430. These cases are binding and govern this case.

## **i. *Engel***

The Court in *Engel* held that government-controlled prayer is “wholly inconsistent with the Establishment Clause.” 370 U.S. at 435. The Establishment Clause guarantees “that neither the power nor the prestige” of the government “would be used to *control, support or influence* the kinds of prayer the American people can say.” *Id.* at 429-30 (emphasis added).

The Clause “must *at least* mean that in this country it is no part of the business of government *to compose official prayers* for any group of



the American people to recite as a part of a *religious program carried on by government.*” *Id.* at 425 (emphasis added). That is exactly what happened here.

*Engel* did not turn on purpose, effect, discrimination, *Lemon*, or coercion. It turned on the Clause’s “first and most immediate purpose,” which is “that a union of government and religion tends to *destroy government and to degrade religion.*” *Id.* at 431 (emphasis added). *Engel* concerned “governmental encroachment upon religious freedom.” *Id.* at 430. *See also id.* (“government in this country, be it *state or federal*, is *without power* to prescribe . . . any particular form of prayer”).

And the Court relied on the history of the Establishment Clause itself. *E.g., id.* at 425 (“It is a matter of history” that government-controlled prayer “caused many of our early colonists to leave England”). The state court held that a “few seconds of prayer in the schools, acknowledging dependence on Almighty God,” was “an integral part of our national heritage and tradition.” *Engel v. Vitale*, 10 N.Y.2d 174, 179 (1961).

In the Supreme Court’s view (*contra* Br.28), it was “an unfortunate fact of history that when some of the very groups which had most

strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law.” 370 U.S. at 427.

The Court made clear that *coercion* was not a basis for its ruling (*contra* Br.25): “The Establishment Clause, unlike the Free Exercise Clause, . . . is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.” *Id.* at 430.

## ii. *Wallace*

In *Wallace*, the Court held that a statute authorizing a period of silence for “meditation or voluntary prayer” violated the Establishment Clause because the “addition of ‘or voluntary prayer’ indicates that the State intended to characterize prayer as a favored practice.” 472 U.S. at 60. A government purpose to favor prayer violates “the *established principle* that the government must pursue a course of complete neutrality toward religion.” *Id.* (emphasis added). Ocala favored “PRAYER only.” R.1450. *Wallace*’s holding is conclusive here.

## iii. *Lee*

Based on “the *fundamental limitations* imposed by the Establishment Clause,” *Lee* held that “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.” 505 U.S. at 587. *Lee* confirms that courts may bypass *Lemon* if a central Establishment Clause principle is violated. *See id.* at 587 (“The State's involvement . . . violates these *central principles*.”) (emphasis added).

The Court determined that a *few minutes* of nonsectarian prayer by a private citizen at a voluntary, *overall secular* event constituted such an obvious violation. *Id.* at 587.

*Lee* rested not just on the coercion evil, but also the religious degradation evil: “while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, *these same Clauses exist to protect religion from government interference*.” *Id.* at 589 (emphasis added). To that end, the Court noted that casting the prayers as “de minimis” is “an affront to the rabbi who offered them.” *Id.* at 594. Government-controlled prayers also put “at grave risk that freedom of belief and conscience which are *the sole assurance that religious faith is real, not imposed*.” *Id.* at 592 (emphasis added).

**iv. *Santa Fe***

In *Santa Fe*, the Court held that a policy allowing a student-initiated, student-led “brief invocation and/or message” at football games violated the Establishment Clause as a matter of purpose, effect, entanglement, divisiveness, and coercion. 530 U.S. at 296-97, 309-10. Whereas Ocala’s entire event was government-initiated prayer and worship, *Santa Fe* would at most involve a few minutes of student-initiated prayer at a varsity sporting event. *Id.* at 305, 310.

**2. The prayer cases do not depend on coercion.**

Ocala makes no attempt to distinguish *Santa Fe*, *Wallace*, *Engel*, or *Lee*. The closest it gets is its bald assertion: “While prayer in schools may still pose significant challenges and warrant closer scrutiny, cases such as the present one do not,” Br.27, because, school prayer cases “almost always contain an element of coercion.” Br.25.

*Wallace* and *Engel* made clear that the Establishment Clause is violated regardless of whether prayer “coerce[s] nonobserving individuals.” *Wallace*, 472 U.S. at 60 n.51 (quoting *Engel*, 370 U.S. at 430). *Engel* repeatedly referred to the “state” and “federal” governments (not “school official”) (*contra* Br.31) and concludes: “It is neither

sacrilegious nor antireligious to say that *each separate government* in this country should stay out of the business of writing or *sanctioning* official prayers.” *Id.* at 435 (emphasis added).

Ocala’s actions were unequivocally more coercive than the school prayer cases. The involvement of police both leading and patrolling an *hour-long* prayer event, with uniformed (and maybe plain clothed) officers interrogating or “engaging” witnesses *about a shooting* (Br.10), makes this environment *so much more intimidating* than a student message at a football game. Any prayer in *Wallace* would be *silent*.

Furthermore, Ocala planned this event around “the children” (R.1450) who were expressly summoned in Graham’s letter. R.13. The OPD staff prayers even specifically targeted the children. Dkt.54-16 at 3 (“Father we thank you for tonight, for the gathering of your children”); Dkt.54-16 at 4 (“help the children that are lost”). Children congregated in the front of the stage.



### 3. Legislative prayer is the exception not the rule.

Ocala has it exactly backwards when it argues that government prayer is presumptively constitutional unless in the public-school context. Br.25-26. As this Court made clear in *Williamson*: “the government is *generally prohibited* from entangling itself in religious judgments or *promoting religious belief*.” 928 F.3d at 1298 (emphasis added). *See also Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013) (the “Supreme Court has not extended the *Marsh* exception” to non-legislative prayer practices).

Ocala's argument is further refuted a consistent body of Circuit decisions finding government prayer unconstitutional in non-legislative adult contexts, including (but not limited to):

- **Police departments:** *Milwaukee Deputy Sheriff's Ass'n v. Clarke*, 588 F.3d 523 (7th Cir. 2009); *Marrero-Méndez v. Pesquera*, 2014 U.S. Dist. LEXIS 116118 (D. Puerto Rico 2014), *affd*, 830 F.3d 38 (1st Cir. 2016)
- **State map:** *Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980)
- **Prisons:** *Jackson v. Nixon*, 747 F.3d 537 (8th Cir. 2014) (religious components in addiction program unconstitutionally coercive)
- **State military institute:** *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003)
- **Courtroom:** *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145 (4th Cir. 1991)
- **City-sponsored festival:** *Doe v. Village of Crestwood*, 917 F.2d 1476 (7th Cir. 1990)<sup>9</sup>
- **Faculty meetings:** *Warnock v. Archer*, 380 F.3d 1076 (8th Cir. 2004)
- **City-sponsored private-led mass:** *Gilfillan*, 637 F.2d 924

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<sup>9</sup> See also *Hewett v. City of King*, 29 F. Supp. 3d 584 (M.D.N.C. 2014); *Newman v. City of East Point*, 181 F. Supp. 2d 1374 (N.D. Ga. 2002).



**D. War and strife: weaponizing prayer thwarts law enforcement aims while violating the Establishment Clause’s purpose to end religious division.**

**1. Government-induced division over prayer violates the Establishment Clause.**

What better way to end violence than to mix police with sectarian prayer? After all, “nothing does a better job of roiling society” than “when the government weighs in on one side of religious debate.” *McCreary*, 545 U.S. at 876. Such a struggle can “strain a political system to the breaking point.” *Walz*, 397 U.S. at 694 (opinion of Harlan, J.).

The Framers “intended not only to protect the integrity of individual conscience in religious matters, *Wallace*, 472 U.S., at 52-54, and n.38, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate.” *McCreary*, 545 U.S. at 876.

“One of the purposes served by the Establishment Clause is to remove debate over [prayer] from governmental supervision or control.” *Santa Fe*, 530 U.S. at 310-11. “The controversies over the Book [of Common Prayer] and what should be its content repeatedly threatened to disrupt the peace of [England].” *Engel*, 370 U.S. at 426-27.



Everyone in *Lee* seemed to agree that “sectarianism” is “the flashpoint for religious animosity.” 505 U.S. at 588-89. Even Scalia contended that the “Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife.” *Id.* at 646 (Scalia, J., dissenting).

The “potential for divisiveness is of particular relevance here” because “it centers around an overt religious exercise,” *id.* at 587-88, of a sectarian character and in a coercive police-controlled environment. *Lee* found that the “the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony *is apparent.*” *Id.* (emphasis added). If the potential for divisiveness loomed large over the selection of a Rabbi for a middle school graduation, it most certainly is cause for concern here.

Chief Graham ignited a battle over prayer on OPD’s Facebook and Mayor Guinn encouraged the “Christian community” to “fight” the “atheists.” R.901-02. This same mayor proclaimed “Confederate Memorial Day” in 2019 and was accused of having Klan ties by a fellow

councilwoman.<sup>10</sup> Meanwhile, the EEOC found reasonable cause to believe that Chief Graham sexually harassed female officers.<sup>11</sup>

Ocala lured hundreds of Christians in a public space, charged up to “fight” atheists and “stand tall on prayer,” for a cop-led worship service amidst shootings, racial tensions, sexual harassment, and an atheist protest. The police easily could have had another shooting on their hands. *E.g.*, David Gonzales, *Pensacola Man's Facebook Post Targets AHA Lawyer In Cross Case, Ignites Firestorm*, ABC3, WEARTV.com (June 22, 2017), <https://perma.cc/5XSW-SPMY> (“Some attack Miller with

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<sup>10</sup> Carlos Medina, *Mayor proclaims Confederate Memorial Day*, Ocala StarBanner (Apr. 2, 2019), <https://www.ocala.com/news/20190402/mayor-proclaims-confederate-memorial-day>.

<sup>11</sup> Chief Graham “made loud vulgar references to anal sex and the breasts of the female officers,” “wrestled with another female officer” to “see nude photographs of her on her cell phone, and while she resisted, pushed her head down simulating her performing an oral sex act on him.” *Walsh v. City of Ocala*, 2019 U.S. Dist. LEXIS 122484, at \*15 (M.D. Fla. 2019).

*See also* Katie Pohlman, *Feds: ‘Reasonable cause’ to believe Ocala police chief engaged in sexual discrimination*, Ocala StarBanner (Jun. 27, 2018), <https://www.ocala.com/news/20180627/feds-reasonable-cause-to-believe-ocala-police-chief-engaged-in-sexual-discrimination>; Carlos E. Medina, *Ocala seeks to settle police department discrimination complaints for \$500,000*, Ocala StarBanner (Sep. 23, 2019), <https://www.ocala.com/news/20190923/ocala-seeks-to-settle-police-department-discrimination-complaints-for-500000>.

derogatory names and gun emojis. One comment even asks for violence wishing her death.”); Hemant Mehta, *Christians Are Harassing the Atheist Lawyer Who Won the Pensacola Cross Case*, Patheos (June 21, 2017), <https://perma.cc/6KD6-LLYR> (discussing threats against the undersigned, including “Needs to go bye bye,” and “run her out of town”).



(R.1411) <sup>12</sup>

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<sup>12</sup> To be sure, atheists are a nonviolent bunch. See Phil Zuckerman, *Staunch atheists show higher morals than the proudly pious, from the pandemic to climate change*, SALON, August 21, 2021, <https://www.salon.com/2021/08/21/staunch-atheists-show-higher-morals-than-the-proudly-pious-from-the-pandemic-to-climate-change/>.

**2. As America diversifies and gun sales skyrocket, the potential for violent religious strife intensifies.**

The stakes could not be higher. Firearms are killing America's youth at a rapid pace.<sup>13</sup> Gun sales have skyrocketed during the pandemic, nearly half to first-time gun owners, putting guns in millions of new hands.<sup>14</sup> These numbers are frightening alongside a pandemic-compounded mental health crisis and emergency room shortages.<sup>15</sup>

John Jay and John Rutledge opposed legislative prayer on the grounds that the delegates were "so divided in religious sentiments" that they "could not join in the same act of worship." *Marsh*, 463 U.S. at 791 (quotations omitted). Their views lost to Samuel Adams, who countered that "he was no bigot" and would gladly "hear a prayer from a

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<sup>13</sup> Marina Pitofsky & Jordan Lancaster, *2017 Marked First Year Firearms Killed More People than Car Accidents: Study*, THE HILL (September 18, 2019), <https://thehill.com/blogs/blog-briefing-room/news/462085-2017-marked-first-year-firearms-killed-more-people-than-car>.

<sup>14</sup> Jaclyn Diaz, *1st-Time Gun Buyers Help Push Record U.S. Gun Sales Amid String of Mass Shootings*, NPR (Apr. 26, 2021) <https://www.npr.org/2021/04/26/989699122/1st-time-gun-buyers-help-push-record-u-s-gun-sales-amid-string-of-mass-shootings>.

<sup>15</sup> Alison Abbott, *COVID's Mental-Health Toll: How Scientists are Tracking a Surge in Depression*, NATURE (February 3, 2021), <https://www.nature.com/articles/d41586-021-00175-z>.

gentleman of piety and virtue,” no matter his denomination. *Id.* at 792 (quotations omitted).

When a non-Christian delivered an invocation in Pensacola, Florida in 2016, we caught a glimpse of the strife our forefathers warned us about:



*“Satanic prayer disrupted at council meeting,”* WEAR (July 14, 2016), <https://perma.cc/7RDA-L579>.





(WEAR, 2016)



(WEAR, 2016)



(WEAR, 2016)

In 2019, Brevard County Commissioners would “bar a deist from delivering an invocation,” which this Court found incompatible with the Establishment Clause since it would “exclude Thomas Jefferson, Benjamin Franklin, John Adams, and many others among our Nation's Founders.” *Williamson*, 928 F.3d at 1314.

By pitting Christians against “atheists” amidst shooters, Ocala could have had Jefferson killed. The Gazette of the United States posed the “grand question” of whether Americans should vote for

“GOD—AND A RELIGIOUS PRESIDENT [John Adams]; or impiously declare for JEFFERSON—AND NO GOD!!!”<sup>16</sup>

### **E. Taxes for Religious Worship**

“No tax in any amount, large or *small*, can be levied to support any *religious activities* or institutions, whatever they may be called, or whatever form they may adopt to teach or *practice religion*.” *Everson*, 330 U.S. at 16 (emphasis added). Not even “three pence” for it is “the principle of assessment” that is wrong, not the amount. REMONSTRANCE ¶3.

City taxpayer funds were used to organize, promote, and patrol, a church service. R.762-63, R.958, R.966, Dkt.54-33.

Ocala admitted that Chief Graham “coordinate[d] the presence of uniformed officers (including himself) at the Vigil to maintain safety and engage citizens.” R.450. Graham admitted that he used OPD resources and staff time to promote the event. R.826, R.294. No doubt “three pence” contributed to “religious activities” for hundreds to “practice religion.”

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<sup>16</sup> Edward J. Larson, *A Magnificent Catastrophe: The Tumultuous Election of 1800, America’s First Presidential Campaign* 173 (2007). See also *Letter to Peter Carr, 10 August 1787*, National Archives, <https://founders.archives.gov/documents/Jefferson/01-12-02-0021> (telling his nephew to “question even the existence of God”).



This violates the Establishment Clause. *Everson*, 330 U.S. at 65-66; *Gilfillan*, 637 F.2d at 930-31.

#### **F. Church Entanglements**

Ocala's actions also undermined "the core rationale underlying the Establishment Clause" of "preventing 'a fusion of governmental and religious functions.'" *Larkin*, 459 U.S. at 126-27 (quoting *Schempp*, 374 U.S. at 222). These actions included:

- Delegating state authority to clergy to acquire crime evidence
- Exploiting clergy to pressure worshipers
- Pastors and police sharing authority on stage
- Authoring prayers and selecting religious speakers (*e.g.* Dkt.54-31)
- Supervising ministers who delivered sermons to the public

*See Gilfillan* 637 F.2d at 931 ("relationship between the City and the Archdiocese [in connection with the event] constituted entanglement").

#### **G. Discrimination: Ocala knowingly excluded Jewish speakers and worshipers.**

News reports described the "prayer vigil" as an event "attended by leaders from the Christian community and hundreds of people." Dkt.54-73 at 17. A reporter contacted an Ocala official: "Tonight, which is Rosh

Hashana, is the police chief's prayer vigil. I've been asked if there is only a Christian God." Dkt.54-69 at 3.

Ocala was home to *at least* fourteen Jewish synagogues and temples, an Islamic center, and a Buddhist temple. Dkt.54-16 at 5-9. Ocala made no attempt to include any non-Christians at the vigil. R.1971, R.1980, R.1989. Dkt.54-11 at 90.<sup>17</sup> Graham testified that he's never even "seen a non-Christian pray." R.951.

Defendants were repeatedly notified that their event prevented observant Jews from attending. One citizen exclaimed: "you are saying Jews need not appear." Dkt.54-18 at 17. *See also* Dkt.54-69 at 3.

If any test applies here, *Larson* and *Ray* require strict scrutiny. *See also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 855-56 (1995) (Thomas, J., concurring) (recognizing the clear constitutional "defect" of extending government funding "only to Christian sects"); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting) ("the Establishment Clause prohibits the favoring of one religion over others").

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<sup>17</sup> A Messianic Christian affiliated with a Christian church wore a Jewish cap. R.582, R.1394.

Consequently, the “legislative prayer jurisprudence” (Br.15) is of zero help to Ocala. In *Williamson*, an actual legislative prayer case, this Court held that the Establishment Clause was violated where board members had “plenary authority” to “invite whomever they want to deliver invocations, with no consistent standards or expectation of inclusiveness.” 928 F.3d at 1299. *See also Pelphrey*, 547 F.3d at 1281-82. OPD had “plenary authority” over the speakers. At least one mister was the Mayor’s own pastor. R.523.

Ocala has transgressed not one but essentially every purpose for the Establishment Clause’s existence. This is more than reason to affirm.

**V. Ocala violated the Establishment Clause’s central neutrality requirement.**

**A. Ocala acted with an unconstitutional religious purpose.**

It is “settled jurisprudence that ‘the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such.’” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989) (citations omitted).

Defendants acted with the purpose to promote prayer, to host a Christian worship service, to “take a stand” against “atheists,” and to use

prayer as a witness-gathering “method” at a police-controlled event.  
Br.29, R.602.

**1. Secular Purpose is a dispositive Establishment Clause requirement.**

“It is not a trivial matter” to require “a secular purpose” for that “requirement is precisely tailored to the Establishment Clause's purpose.” *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (citation omitted). The “‘purpose’ requirement aims at preventing [government] from abandoning neutrality.” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987).

The Court evaluates purpose regardless of the *Lemon* test. *E.g.*, *American Legion*, 139 U.S. at 2089-90; *Van Orden*, 545 U.S. at 691-92; *Lukumi*, 508 U.S. at 532; *Gillette*, 401 U.S. at 450.

The lack of a legitimate secular purpose is dispositive. *E.g.*, *Wallace*, 472 U.S. at 56 (dispositive); *McCreary*, 545 U.S. at 869 (2005) (dispositive under *Lemon*); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (dispositive); *Edwards*, 482 U.S. 578 (dispositive); *Epperson*, 393 U.S. 97 (dispositive before *Lemon*); *Schempp*, 374 U.S. at 222 (same); *see also Santa Fe*, 530 U.S. at 309 (unconstitutional religious purpose one of

several dispositive grounds); *Torcaso*, 367 U.S. at 489-90 (unconstitutional religious purpose pre-*Lemon*).

**2. Ocala intended to facilitate prayer and that intent violates the Establishment Clause.**

Because “prayer is ‘a primary religious activity in itself,’” this Court has repeatedly held that a government “intent to facilitate or encourage prayer . . . is *per se* an unconstitutional intent to further a religious goal.” *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004). Recognizing “that prayer is the quintessential religious practice implies that no secular purpose can be satisfied.” *Jaffree*, 705 F.2d at 1534-35; *accord Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 829-30 (11th Cir. 1989).

Supreme Court precedent is equally clear that a government’s purpose to facilitate or endorse prayer violates the Establishment Clause. *Santa Fe*, 530 U.S. at 309-10 (“infer[ring] that the specific purpose of the policy” was religious); *Wallace*, 472 U.S. at 60.

In *Wallace*, the Court held that regardless of coercion or effect, “the *State* intended to characterize prayer as a favored practice” and that intent violated “*the established principle* that the government must pursue a course of complete neutrality toward religion.” *Id.* (emphasis added).

Likewise, in *Santa Fe*, the Court found an unconstitutional religious purpose regardless of the policy's "possible applications" and even if no "student were ever to offer a religious message. 530 U.S. at 314, 316.

The state "cannot escape the proscriptions of the Establishment Clause merely by identifying a beneficial secular purpose." *Hall*, 630 F.2d at 1021 (even if "motorist's prayer" "foster[s] the state's legitimate concern for safety of motorists," the "state has chosen a clearly religious means to promote its secular end"). *E.g.*, *Santa Fe*, 530 U.S. at 309 & 322 (Rehnquist, J. dissenting) (government-controlled prayer failed purpose test despite "plausible secular purposes"); *Edwards*, 482 U.S. at 586, 589 ("the Act's stated purpose is to protect academic freedom"); *Schempp*, 374 U.S. at 222-23 ("promotion of moral values" and "teaching of literature"); *Holloman*, 370 F.3d at 1285-86 ("While promoting compassion may be a valid secular purpose, teaching students that praying is necessary or helpful to promoting compassion is not.").

**3. Ocala intended to promote prayer, host a worship service, and maybe to use prayer as a witness trap.**

The District Court found that the “Prayer Vigil had a religious purpose” not simply because prayer is religious (which is enough under precedent) but *also* because all of the evidence confirms overpowering religious motivation: (1) “the Ocala Police Department asked Ocala’s citizens to join in ‘fervent prayer,’ and (2) “the Prayer Vigil consisted of chaplains offering Christian prayers.” R.1998.

Additionally: (3) OPD planned this for “fair weather Christians.” R.1450; (4) OPD Chaplain remarked: “Nothing should stop, hinder or prevent from fervent prayer. Keep it to 15-20 minutes of PRAYER only” *Id.*; (5) Graham proclaimed his “belief on the power of prayer.” Dkt.54-55; (6) the Mayor proclaimed: “God is good!!! All the time. The fight is on.” Dkt.54-41; (7) Captain Edwards’ planned remarks said he was there “to call upon God thru Prayer.” Dkt.54-15.

To assert a secular purpose against this backdrop would be dishonest. Yet it is this exact backdrop that Ocala writes: “*Any contention that the event was motivated ‘wholly [or even in part] by religious considerations,’ Lynch, 465 U.S. at 680, simply isn’t supported by the*

evidence presented in this case.” Br.33. What evidence *would* support a motivation by religious considerations if not the evidence in this case?

Failing to distinguish binding Supreme Court rulings holding that prayer is a religious purpose, Ocala relies instead on *Van Orden* and *Lynch* for its purpose argument, contending:

Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Van Orden* [at 691]. . . . Where a religious purpose is mixed with a secular purpose, such conduct does not violate the Establishment Clause. *Lynch* [at 680]

Br.32.

To suggest that an hour of Christian prayer and sermons is mostly secular with a “taint” (*Lynch*, 465 U.S. at 686) of “religious content” is profane. *Lynch* is not a recipe that allows governments to take a religious purpose, mix it with a secular purpose, and voila: secular pie. Binding precedent is clear that when the government acts with the purpose of facilitating or sponsoring prayer, that purpose is religious and unconstitutional. No concoction of “unity” “witnesses” “culprits” “jail” “shooting spree” negates this religious purpose.



Defendants intended to promote prayer. That is a religious purpose and “is dispositive” of its unconstitutionality. *Wallace*, 472 U.S. at 56. That Ocala had additional goals is questionable but irrelevant. The government cannot act with the purpose of gathering citizens to pray for an hour and then say there was no religious purpose. That leaves nothing sacred.

**B. Ocala’s stated purpose is so illegitimate it compounds and magnifies the constitutional defects with its actions.**

Ocala robotically clings to its narrative, no matter how inconsistent and replete of misrepresentations:

Defendants’ secular purpose was undisputedly clear here in addressing the crime spree and their cooperation with local community leaders (*who then planned and led the Vigil*) to *convince witnesses to come forward to testify* against the shooters does not constitute a violation of the Establishment Clause.

Br.33, 41 (emphasis added).

OPD scheduled its Vigil on a Jewish holiday for “fair weather Christians” and disregarded everybody else, *whether or not they witnessed the crime*. The entire service consisted of Christian sermons, prayers, and religious songs. R.896. This was for “PRAYER only.” R.1450.

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The most chilling component of Ocala's appeal is that it insouciantly contends that the

police knew the identity of the shooters and some potential witnesses, but could not persuade witnesses to come forward to testify. Dkt. 54-10, at 21:1-18. **The police also knew that the witnesses and their families attended church.**

Br.4 (emphasis added). The police "knew who the witnesses were, obviously," Graham said, and they "knew those families attended church."

R.818. Graham testified that he orchestrated a church event to "put these people in jail." R.818.

"No person can be punished . . . for church attendance or non-attendance." *Everson*, 330 U.S. at 15-16.

If the police could not lawfully interrogate the witnesses at their private church, what gave them the authority to create a church service to accomplish this end?

The Police Chief used his power and prestige and law enforcement personnel to bait hundreds of citizens to a church service under the pretenses of the "power of prayer." Dkt.54-55, R.887.

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Using prayer to lure worshipers into a witness interrogation is an *extreme* abuse of power. Madison contended that government officials who would use religious authority to pursue secular ends “exceed the commission from which they derive their authority and are Tyrants.” REMONSTRANCE ¶2.



(R.1419)

**C. Ocala’s Prayer Vigil was not neutral in effect.**

Government action “facilitating any prayer clearly fosters and endorses religion over nonreligion” in violation of the Establishment Clause. *Holloman*, 370 F.3d at 1288. Ocala facilitated prayer and favored Christian prayer over Jewish prayer.

Ocala's effect defense is befuddling: "Supreme Court precedent provides, once again, all the instruction we need here. In *Lynch*, the Court upheld the government's display of a crèche." Br.34. They go on to cite *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532 (M.D. Fla. 1989) which involved an anti-drug day resolution, not a prayer event. As the District Court summarized:

The content of the facebook letter (inviting the community to come join in fervent prayer), . . . the nature of the speakers' remarks (Christian prayers and songs), the participation from the crowd (responding in religious colloquy with speakers, holding hands in circles, bowing heads), all bespeak the religious effect of the activity.

R.1999.

**VI. A police-led prayer service for the masses is neither legislative prayer nor a presumptively constitutional old monument.**

**A. The involvement of police makes this case extremely ill fitted for *Greece*, which narrowly allows a pre-meeting invocation to accommodate the spiritual needs of lawmakers.**

Ocala argues: "Supreme Court precedent is clear that the present case should be analyzed pursuant to legislative prayer jurisprudence," which it claims, allows "encouraging citizens to gather for prayer." Br.15.

Legislative prayer is an “internal act” to “accommodate spiritual needs of lawmakers,” and does not promote religion to the public. *Greece*, 572 U.S. at 587-88 (quoting *Marsh*). Central to *Greece*’s holding was that the audience “for these invocations is not, indeed, the public but lawmakers themselves.” *Id.* The Court stressed that its decision would “be different if town board members directed the public to participate in the prayers.” *Id.* Moreover, legislative prayer does not “advance any one faith” in the prayers or the speaker selection. *Id.* at 581.

One citizen opined: “why are the police asking us to pray? will they arrest us if we don’t pray?” Dkt.54-18. Whereas the legislative branch is partisan, police must be neutral for safety. And unlike in the legislative context, anyone challenging the government would have been challenging the police. R.711, R.722, R.732.

As the Tenth Circuit explained regarding a cross on police cars:

A person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were Christian police, . . . A follower of any non-Christian religion might well question the officers’ ability to provide even-handed treatment.

*Friedman v. Bd. of Cnty. Comm’rs*, 781 F.2d 777, 781-82 (10th Cir. 1985).

**B. No history supports a police-led prayer service.**

No history could sanction a police-controlled Christian worship service. *E.g.*, *Engel*, 370 U.S. at 425-30; *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) (there was ample “historical precedent for [discriminatory oath] laws” that violated the Establishment Clause). Although a Christian chaplain would have been consistent with *Marsh’s* chaplain, this Court in *Ray* ignored *Greece* and even bypassed *Lemon* to apply *strict scrutiny*. 915 F.3d at 696-98.

Of course, Ocala has no historical precedent to stand on. Ocala cites Bush and Obama but not Madison, or Jefferson. Br.29. To be sure, the Colonial Congress issued a proclamation recommending “a day of publick humiliation, fasting, and prayer” (Br.28) for the “*English Colonies*” to “bless our rightful sovereign, *King George the Third*.”<sup>18</sup> Alexander Hamilton set the record straight:

The President of the United States would be an officer elected by the people for FOUR years; the king of Great Britain is a perpetual and HEREDITARY prince . . . *The one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church.*<sup>19</sup>

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<sup>18</sup> Bouton, Nathaniel, *Provincial and State Papers*. G. E. Jenks, “Proclamation for a day of Fasting and Prayer” 545 (June 12, 1775).

<sup>19</sup> *The Federalist No. 69* (1788), <https://guides.loc.gov/federalist-papers/text-61-70> (emphasis added).

Thomas Jefferson and Andrew Jackson refused to declare national days of thanksgiving on Establishment Clause grounds. *Marsh*, 463 U.S. at 807 (Brennan, J., dissenting).

A National Day of Prayer proclamation (Br.29), moreover, is emphatically different from police hosting a *worship service*. See *Doe v. Wilson Cty. Sch. Sys.*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008).

**C. *American Legion* does not make a police-led prayer vigil presumptively constitutional.**

Ocala argues that police-led worship activities are presumptively constitutional because “*American Legion* served as the final proverbial nail in the coffin for application of the *Lemon* test to the present case.” Br.27.

Nothing in *American Legion* opens the door for police-led Christian worship services. *American Legion* recognized that a religious monument displayed for historical purposes may take “on an added secular meaning.” 139 S. Ct. at 2089. Whereas a monument may have multiple secular meanings, “prayer is by definition religious.” *Id.* at 2087.

*American Legion* held that “retaining established, religiously expressive monuments, symbols, and practices is quite different from



erecting or adopting new ones.” *Id.* at 2085. *See Pensacola*, 949 F.3d at 1330-31. *American Legion*’s “presumption” of secular purpose and effect extends only to (1) “*established*” (2) monuments/symbols (or ceremonial mottos). *Id.*

Ocala admits this was a “one-time” “event not at all analogous to a monument display.” Br.15. Unlike *Pensacola*, none of *American Legion*’s four considerations are satisfied here: (1) we have ample evidence of the government’s purpose; (2) the meaning of prayer did not change; (3) time did not imbue the worship service with secular historic significance; (4) a “contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that [a] longstanding, pre-existing monument has not.” *Pensacola*, 949 F.3d at 1333.

This Court and other Circuits declined to apply *American Legion*’s presumption to religious action by police and prison officials. *See E.g., Ray*, 915 F.3d at 696-98; *Aguilera v. City of Colo. Springs*, 836 F. App’x 665, 670-71 (10th Cir. 2020) (upholding officer’s “praise the Lord” under *Lemon*; expression was “outside of *American Legion*’s” ambit); *Knudtson v. Cty. of Trempealeau*, 982 F.3d 519, 525-29 (7th Cir. 2020) (*American Legion* inapplicable to government employer’s statements).

**D. OPD’s Prayer Vigil was not ceremonial deism.**

Ocala does not say how *American Legion* applies to its worship service but the only conceivable path is through the ceremonial dicta because a prayer service is not a monument, symbol, motto, or display. *American Legion*, 139 S. Ct. at 2081 n.16. See *Perrier-Bilbo v. United States*, 954 F.3d 413, 428 (1st Cir. 2020) (upholding ceremonial deism under *American Legion*).

While the Supreme Court has not upheld ceremonial deism, dictum supports ceremonial deism, subject to four prerequisites: “[1] History and Ubiquity;” “[2] Absence of worship or prayer;” “[3] Absence of reference to particular religion” and “[4] Minimal religious content.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36-42 (2004) (O’Connor, J., concurring).

Because the Establishment Clause “tried to put an end to governmental control of religion and of prayer,” *Engel*, 370 U.S. at 435, “only in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism.” *Newdow*, 542 U.S. at 40 (O’Connor, J., concurring). The Court has only upheld “one such prayer against Establishment Clause challenge”: legislative prayer. *Id.* (citing *Marsh*).

Justice Scalia seconded Justice Kennedy's view that a "religious ceremony or activity" poses a greater threat to Establishment Clause values than a "creche" or "Ten Commandments." *McCreary*, 545 U.S. at 909 (Scalia, J., dissenting) (quoting *Allegheny*, 492 U.S. at 664 (Kennedy J., concurring and dissenting in part)).

Additionally, "no religious acknowledgment could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another." *Newdow*, 542 U.S. at 42 (O'Connor, J., concurring). As Justice Scalia explained, "our constitutional tradition, from the Declaration of Independence" down "to the present day," has "ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian . . . for example, the divinity of Christ." *Lee*, 505 U.S. at 641 (Scalia, J., dissenting). See Dkt.54-44 at 2 (Mayor promoting "Jesus Christ").

In sum, Ocala's Prayer Vigil falls far outside of *Greece* and even farther outside *American Legion*.

**E. Although unnecessary to find a violation here, the *Lemon* test and the underlying requirements remain binding on this Court.**

The Supreme Court instructed the Courts of Appeals to leave to it “the prerogative of overruling its own decisions” especially regarding “*Lemon*.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Justice Thomas made clear: “this Court has not overruled *Lemon v. Kurtzman*.” *Georgia v. Pub.Resource.Org, Inc.*, 140 S. Ct. 1498, 1520 n.10 (2020) (Thomas, J., dissenting) (citing *American Legion*). Justice Gorsuch criticized the plurality’s presumption: “where exactly in the Constitution does this presumption come from?” *American Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring in the judgment only).

*American Legion* held that longstanding, dual-meaning monuments presumptively carry a secular purpose (because time alters purposes and hands) and secular effect (historical preservation). 139 S. Ct. at 2085. This simply codifies the practical result of *Van Orden, supra*.

*American Legion* continued to evaluate purpose separate from effect, shelving only the reasonable observer. *id.* at 2078 (“traffic-safety concerns”); *id.* at 2087 (the cross’s “religious associations are no longer in the forefront”). *id.* at 2091 (Breyer, J., concurring) (“undeniably secular motive”).

This Court followed suit in *Pensacola*, 949 F.3d at 1332. The Court found “the purposes . . . have multiplied over time” yet found no “meaningful evidence *regarding the City's own motivations*.” *Id.* at 1332-33. Regarding effect, the Court found the “cross's message has evolved into a neutral one.” *Id.* The Court concluded: “It's hard to imagine how the City could more convincingly demonstrate its commitment to neutrality than by allowing use of the cross for . . . satanic rituals.” *Id.*

### CONCLUSION

The District Court’s ruling is faithful to our national heritage and the protection of both church and state. The Court should affirm.

October 15, 2021

Respectfully submitted,

s/ *Monica L. Miller*

Monica L. Miller

American Humanist Association

1821 Jefferson Pl. NW

Washington, DC 20036

(202) 238-9088

mmiller@americanhumanist.org

*Counsel for Plaintiffs-Appellees*

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Dated: October 15, 2021

s/ Monica L. Miller  
Monica L. Miller

*Counsel for Plaintiffs-Appellees*

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The undersigned certifies that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on October 15, 2021, using CM/ECF, which then served such filing upon the following registered counsel of record for Appellants:

Abigail A. Southerland  
American Center for Law &  
Justice  
625 Bakers Bridge Ave., St. 105-  
121  
Franklin, TN 37067  
Tel. (615) 599-5572  
asoutherland@aclj.org

Francis Manion  
American Center for Law &  
Justice 6375 New Hope Rd.  
New Hope, KY 40052  
Tel. (502) 549-7020  
fmanion@aol.com

Christina A. Compagnone  
American Center for Law &  
Justice  
201 Maryland Ave. NE  
Washington, DC 20002  
Tel. (202) 641-9168  
cstierhoff@aclj.org

Jay Alan Sekulow  
American Center for Law &  
Justice  
Direct: (757) 226-2749  
Firm: (202) 546-8890  
201 Maryland Ave NE  
Washington, DC 20002-5703

Jordan A. Sekulow  
American Center for Law &  
Justice  
Direct: 202-546-8890  
Firm: (202) 546-8890  
201 Maryland Ave NE  
Washington, DC 20002-5703

George Franjola  
Gilligan Gooding Franjola &  
Batsel  
Direct: 352-867-7707  
Firm: 352-867-7707  
1531 SE 36TH AVE  
Ocala, FL 34471



Olivia F. Summers  
American Center for Law &  
Justice  
1000 Regent University Dr. STE  
422  
Virginia Beach, VA 23464

Carly F. Gammill  
Direct: 615-599-5572  
American Center for Law &  
Justice  
STE 116-19  
625 Bakers Bridge Ave  
Ste 105-121  
Franklin, TN 37064

Patrick Gerald Gilligan  
Gilligan Gooding Franjola &  
Batsel  
Direct: 352-867-7707  
Firm: 352-867-7707  
1531 SE 36th Ave  
Ocala, FL 34471

Dated: October 15, 2021

s/ Monica L. Miller  
Monica L. Miller

*Counsel for Plaintiffs-Appellees*