Appignani Humanist Legal Center

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March 10, 2017

Via Email

Escambia County Commissioners
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Re: Unconstitutional Denial of Invocation

Dear Escambia County Commissioners,

This office was recently contacted by Andre Ryland, a certified Humanist Celebrant, regarding a situation that he correctly perceives as a serious constitutional violation. Specifically, Mr. Ryland reports that your Commission, by revoking an invitation for him to appear before your board to deliver a ceremonial invocation, has blatantly violated the Establishment Clause of the First Amendment and discriminated against him on the basis of religion.

The documented facts indicate that the reason for the withdrawal of the invitation was religious favoritism and content-based discrimination against Mr. Ryland and the solemnizing message that he intended to deliver. As a Humanist and therefore a member of a minority viewpoint in the community, Mr. Ryland understandably saw the invocation appearance as an important event, and therefore he took affirmative steps to publicize his appearance. However, soon after issuing a press release informing local media of the scheduled appearance, Mr. Ryland was informed that the invitation was withdrawn. This was done despite the fact that there was nothing in the press release to justify the revocation. This unexpected and unprecedented action was not only a disappointment for Mr. Ryland and other Humanists in the area, but it undoubtedly reinforced existing prejudices against Humanists and set back the effort to gain acceptance.

The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including many in Florida. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring a separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including Florida, and we have litigated constitutional cases in state and federal courts from coast to coast,

including in Florida.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU,* 492 U.S. 573, 610 (1989). As relevant here, the government must not "discriminate among persons on the basis of their religious beliefs and practices." *Id.* at 590-91. At the most fundamental level, the Establishment Clause prohibits the government from promoting "a point of view in religious matters" or otherwise taking sides between "religion and religion or religion and nonreligion." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (citations omitted).

Establishment Clause cases "have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1992). And it is firmly established that Establishment Clause protection "extends beyond intolerance among Christian sects – or even intolerance among 'religions' – to encompass intolerance of the disbeliever and the uncertain." *Wallace*, 472 U.S. at 52-54. "The First Amendment protects not only Christians and Jews, but atheists, animists, pagans, wicca and everyone alike, no matter whether they are inside or outside the religious mainstream." *ACLU v. City of Plattsmouth*, 358 F.3d 1020, 1041 (8th Cir. 2004).[1] Thus, "beliefs protected by the Free Exercise and Establishment Clauses need not involve worship of a supreme being." *Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013). The "'disparate treatment of theistic and non-theistic religions is as offensive to the Establishment Clause as disparate treatment of theistic religions.'" *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014) (citation omitted).

Ordinarily, the Establishment Clause prohibits the government from sponsoring or promoting prayer. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962). But *Marsh v. Chambers*, 463 U.S. 783 (1983) carved out a narrow exception for legislative prayer based on the long and unique history of the practice dating back to the First Congress.[2] In *Marsh*, the Court cautioned, however, that legislative prayer practices are permissible only if they do not "advance any one . . . faith or belief."

Where, as here, a legislative body refuses to allow members of a certain faith to deliver invocations, it violates the Establishment Clause. *See generally Pelphrey v. Cobb County*, 547 F.3d 1263, 1277-78 (11th Cir. 2008). In *Town of Greece v. Galloway*, the Supreme Court reiterated that a legislative prayer practice is unconstitutional if it is "'exploited to proselytize or

[1] *See also Allegheny*, 492 U.S. at 615 (The Establishment Clause "guarantee[s] religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216 (1963) ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government" can "pass laws or impose requirements which aid all religions as against non-believers.").

[2] *See Edwards*, 482 U.S. at 583 n.4; *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*"); *Rubin v. City of Lancaster*, 710 F.3d 1087, 1091 n.4 (9th Cir. 2013) ("legislative prayer has enjoyed a 'sui generis status'").

advance any one, or to disparage any other, faith or belief.'" 134 S. Ct. 1811, 1823 (2014) (citing *Marsh*, 463 U.S. at 794-95). The Court held that such a practice must be "nondiscriminatory" and the legislative body must make reasonable efforts to include invocations from all members of the community, including atheists. *Id.* at 1823-25. The Court indicated that a practice would fail if it reflected an "an aversion or bias on the part of town leaders against minority faiths." *Id.* at 1824. It ruled that a practice that targets "citizens based on their religious views would violate the Constitution." *Id.* at 1826.

Galloway thus requires the government must maintain a policy of inclusivity. *Id.* at 1824. In *Galloway*, unlike here, the town permitted anyone "to give an invocation, including adherents of any religion, atheists, and the nonreligious," and it had "never rejected such a request." 681 F.3d 20, 23 (2d Cir. 2012). The Supreme Court thus upheld Greece's practice because:

> The town at no point excluded or denied an opportunity to a would-be prayer giver. . . . [A] minister or layperson of *any persuasion*, including an atheist, could give the invocation.

134 S. Ct. at 1816 (emphasis added). The town "welcome[d] a prayer by any minister or layman who wished to give one." *Id.* at 1824. The Court stressed that "any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions." *Id.* at 1826. Greece even went out of its way to invite "a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess . . . was granted" an opportunity as well. *Id.* at 1817.[3]

Similarly, in *Rubin v. City of Lancaster*, the court upheld a city's legislative prayer practice on the grounds that the city had taken "every feasible precaution" to "ensure its own evenhandedness." 710 F.3d 1087, 1097 (9th Cir. 2013). The Ninth Circuit made a point to observe that invocations were "given by a self-identified 'metaphysicist,' one was given by a Sikh, and another by a Muslim." *Id.* at 1090. Moreover, the clerk had "never removed a congregation's name from the list of invitees or refused to include one." *Id.* at 1097.

In *Pelphrey*, the Eleventh Circuit held that the county's legislative prayer practice was unconstitutional because representatives of "certain faiths were categorically excluded."[4] Notably, the Eleventh Circuit rejected the county's argument that "the selection process is immaterial when the content of the prayer is constitutional," because "[t]he central concern of *Marsh* is whether the prayers have been exploited to created an affiliation between the government and a particular belief or faith." 547 F.3d at 1281 (citing *Marsh*, 463 U.S. at 794-95). *See also Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013) (practice of opening city commission sessions with prayer did not violate Establishment Clause because city

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[3] *See also Lakeland*, 713 F.3d at 592 ("Lakeland's current process . . . is even more expansive and inclusive than that found constitutional in *Pelphrey*"); *Jones*, 530 Fed. Appx. at 488 ("[t]he County's procedures for selecting potential invocation speakers are not discriminatory and allow any bonafide religious organization to participate."); *Rubin*, 710 F.3d at 1090 ("selection process does not discriminate against any faith").

[4] *Pelphrey v. Cobb County*, 448 F. Supp. 2d 1357 (N.D. Ga. 2006), *aff'd* 547 F.3d at 1279 (affirming the district court's finding that the government violated the Constitution because it "'categorically excluded' certain faiths").

required that invitations to participate be extended to all ideologies); *Jones v. Hamilton County*, 891 F. Supp. 2d 870, 886 (E.D. Tenn. 2012) ("Even when operating under a facially neutral policy, a legislature may not select invocational speakers based on impermissible motives or sectarian preferences.").

We can only speculate that the invitation was withdrawn because the aforementioned press release made reference to content within the planned invocation that would have been consistent with teachings of the so-called Satanic Temple. If so, by refusing to allow a Humanist to deliver an invocation, expressly because of its alleged content, Escambia County has violated the Establishment Clause. In fact, the County's overt preference for Christian prayers and its categorical discrimination against non-Christian messages violates the "clearest command of the Establishment Clause": that "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Where, as here, the governmental grants a preference among religions, the Court must "treat the law as suspect" and "apply strict scrutiny." *Id.* at 244-46. Such action is presumed unconstitutional unless "justified by a compelling governmental interest," and "is closely fitted to further that interest." *Id.* at 247.[5] This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).[6]

There is no "compelling government interest" for refusing to allow an invocation solely because of its content reflects a sect or religion to which the commissioners personally do not approve. A "mere message of disapproval" suffices "for an Establishment Clause violation." *Catholic League v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1057 (9th Cir. 2009). In *Howard*, for instance, the court rejected a justification proffered by a prison defending its refusal to provide a Satanist space for rituals, reasoning that the decision "appears to have been based on the content of plaintiff's beliefs -- an unacceptable criteria according to the Supreme Court." 864 F. Supp. at 1029-30. *See also Sherman-Bey*, 2011 U.S. Dist. LEXIS 73801, at *30 ("Defendants rejected his application for [Moorish Science Temple] services based on religious disagreement, not logistical reasons.").

Not only has the County violated the Establishment Clause, but it has also violated Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause prohibits governmental discrimination on the basis of religious viewpoints. *See generally Cooper v. Pate*,

[5] *See Rouser*, 630 F. Supp. 2d at 1195-96 ("evidence that Native American inmates are allowed access to a sweat lodge and fire pit, while Wiccan inmates are not" is denominational preference subject to strict scrutiny); *Warrior v. Gonzalez*, 2013 U.S. Dist. LEXIS 165387, *23-24 (E.D. Cal. 2013) (prison's "strip search policy prefers other religions over Islam. . . . [S]trict scrutiny should be applied."); *Evans v. Cal. Dep't of Corr. & Rehab*., 2012 U.S. Dist. LEXIS 5373, *5-6 (C.D. Cal. 2012) (prison violated Establishment Clause under *Larson* by providing kosher meals to Jews but not Muslims); *Caruso v. Zenon*, 2005 U.S. Dist. LEXIS 45904, *47 (D. Colo. 2005) (same); *Glenn v. N.H. State Prison Family Connections Ctr*., 2012 U.S. Dist. LEXIS 78689, *12-13 (D.N.H. 2012) ("by offering Christian religious services conducted by state-employed chaplains and Christian Bibles at no cost, and not providing a paid Imam or Qur'ans to inmates, the prison is demonstrating a preference for Christianity over Islam" failing "strict scrutiny"); *Rouser*, 630 F. Supp. 2d at 1194-96. *Cf. Sklar v. Comm'r*, 282 F.3d 610, 618-19 (9th Cir. 2002) (applying *Larson* to tax laws).

[6] The Establishment Clause is violated "even without a substantial burden on religious practice if the government favors one religion over another." *Kaufman II*, 733 F.3d at 696.

378 U.S. 546 (1964) (plaintiff stated claim when "alleging that solely because of his religious beliefs he was denied . . . privileges enjoyed by other prisoners"); *Reed v. Faulkner*, 842 F.2d 960, 964 (7th Cir. 1988) ("defendants are treating the Rastafarians differently from American Indians (and doing so deliberately) for no reason at all; and if so this is a denial of equal protection of the laws in an elementary sense."). This includes discrimination against nontheistic religious viewpoints. *See, e.g., Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 2014 U.S. App. LEXIS 13354, *8-13 (7th Cir. 2014) (statute violated Equal Protection because it arbitrarily discriminated against Humanists); *Kaufman v. Pugh*, 733 F.3d 692 (7th Cir. 2013) (refusal to authorize Atheist study group violated Establishment Clause); *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005) (*Kaufman I*) (same); *Am. Humanist Ass'n & Jason Michael Holden v. United States*, 2014 U.S. Dist. LEXIS 154670 (D. Or. Oct. 30, 2014) (refusal to authorize secular humanist study group in prison violates Establishment Clause and Equal Protection Clause). The "denial of [a] privilege to adherents of one faith while granting it to others is discrimination on the basis of religion." *Native American Council of Tribes v. Solem*, 691 F.2d 382, 384-85 (8th Cir. 1982) (emphasis added).[7]

When the government discriminates on the basis of religion — a "suspect" classification — strict scrutiny applies.[8] Once again, there is no compelling interest for the County's refusal to allow Ryland's invocation because of its purported Satanic content.[9] No detailed analysis is even necessary here, as the County's decision was expressly based on religious disapproval. "Intentional discrimination means that a defendant acted at least in part because of a plaintiff's protected status." *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994).

It is our hope that, without our having to take this further, you will do the right thing and reverse the decision to block Mr. Ryland from offering an invocation. We look forward to hearing from you.

Very truly yours,
Monica Miller, Esq.

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[7] *See Cooper*, 382 F.2d at 522. *See also Brown v. Johnson*, 743 F.2d 408, 413 (6th Cir. 1984) ("by allowing prisoners of other faiths and their respective churches to hold group worship services, while denying plaintiffs the same privilege" undoubtedly "is a distinction among religious faiths."); *Fulwood*, 206 F. Supp. at 374 ("By allowing some religious groups to hold religious services" while "denying that right to petitioner and other Muslims, respondents have discriminated" on the basis of religion).

[8] *See Ass'n of Christian Schs. Int'l v. Stearns*, 362 Fed. Appx. 640, 646 (9th Cir. 2010) (religion is a suspect class); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001) (same); *Rupe v. Cate*, 688 F. Supp. 2d 1035, 1041-49 (E.D. Cal. 2010); *Remmers v. Brewer*, 361 F. Supp. 537, 542 (S.D. Iowa 1973). *See also Irvin v. Yates*, 2014 U.S. Dist. LEXIS 2120, *9 (E.D. Cal. 2014); *Davis v. Powell*, 901 F. Supp. 2d 1196, 1219-20 (S.D. Cal. 2012); *Hysell v. Schwarzenegger*, 2011 U.S. Dist. LEXIS 72243, *17-18 (E.D. Cal. 2011).

[9] *See generally Wright*, 2012 U.S. Dist. LEXIS 84804, *47 ("the refusal to allow group worship [for non-theistic religion 'Nation of Gods and Earths'] is not reasonably related to legitimate penological objectives."). *See also Shabazz v. Norris*, 1991 U.S. App. LEXIS 12285, *7-8 (6th Cir. 1991); *Rupe*, 688 F. Supp. 2d at 1049-50 (where "Pagans were denied opportunities to practice their religion that were available to mainstream religions," there was "no [legitimate] justification"); *Remmers*, 361 F. Supp. at 542 (no "compelling state concern" is furthered "by denying to Church of the New Song members the same rights of assembly and worship enjoyed by Protestant and Catholic inmates.").