

No.

In The
Supreme Court of the United States

REGINALD L. GUNDY,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and AARON L. BOWMAN, individually,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's invited invocation before the City Council, without any instructions or limitations, was private speech as the district court held, or did the Court of Appeals err by finding that the invocation was government speech.
2. Whether Petitioner's rights under the First Amendment's Free Exercise of Religion clause were violated and he was retaliated against when his invocation before the City Council was silenced by the presiding official due to political reasons.
3. Whether Petitioner's rights under the First Amendment's Free Speech clause were violated and he was retaliated against when his invocation before the City Council was silenced by the presiding official due to political reasons
4. Whether the City Council President Aaron L. Bowman was entitled to qualified immunity for silencing the Petitioner's invocation to the City Council.

PARTIES TO THE PROCEEDING

Petitioners Pastor Reginal L. Gundy is a natural person and citizen of the State of Florida, City of Jacksonville.

Respondents are the City of Jacksonville, Florida and Aaron L. Bowman, individually, a former City Council President for the City of Jacksonville.

CORPORATE DISCLOSURE STATEMENT

Petitioner Pastor Reginal L. Gundy is a natural person, so no corporate disclosure is required for him under Rule 29.6.

STATEMENT OF RELATED CASES

This case arises from and is related to the following proceedings in the U.S. District Court for the Middle District of Florida and the U.S. Court of Appeals for the Eleventh Circuit:

- *Reginald L. Gundy v. City of Jacksonville, Florida et al.*, No. 3:19-cv-795-BJD-MCR (M.D. FL.), judgment entered March 22, 2021; and
- *Reginald L. Gundy v. City of Jacksonville, Florida et al.*, No. 21-11298 (11th Cir.), judgment entered September 30, 2022.

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OPINIONS BELOW

The Eleventh Circuit's panel decision appears at 50 F.4th 60 and is reproduced at App01-017. The Middle District of Florida's decision on summary judgment appears at 528 F.Supp.3d 125 and is reproduced at App021-031 and on a motion to dismiss is reproduced at App030-49.

JURISDICTION

The Eleventh Circuit issued its panel decision on September 30, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment's Free Exercise Clause, which provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. amend.

I.

The First Amendment's Free Speech Clause, which provides that "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I, cl. 3.

STATEMENT OF THE CASE

Reginald L. Gundy, a senior pastor at Mt. Sinai Missionary Baptist Church in Jacksonville, Florida, was invited by Anna Brosche, a City of Jacksonville Council member and mayoral candidate in 2019, to give an invocation at the March 12, 2019 City of Jacksonville regular City Council meeting. *Gundy v. City of Jacksonville Florida*, 50 F.4th 60, 64 (11th Cir. 2022)(App005). The City of Jacksonville City Council (the "City Council") meeting preceded election day for the

municipal elections by about a week. *Id.* Pastor Gundy was a supporter of Councilmember Brosche's candidacy for mayor. *Id.*

City Council President at the time, Mr. Aaron Bowman, supported Ms. Brosche's opponent in the mayoral race, Lenny Curry, and presided over the March 12 Council meeting. *Id.* at 65 (App006).

Pastor Gundy typed out a two-page prayer before the March 12 City Council meeting, and without being given a time limit for his invocation or advised as to topics deemed appropriate for invocations, Pastor Gundy stepped up to the microphone at the lectern and began his invocation. *Id.* at 64-65 (App005-6). Pastor Gundy started his invocation with a direct appeal to a higher power. *Id.* at 65 (App006). Pastor Gundy invoked "Eternal God our father, the father of Adam, Eve..." and the name of "Jesus". 11/4/2020 Order of District Court on Motion to Dismiss (App031). However, when Pastor Gundy made reference to "toxic and hazardous waste in Jacksonville that is 'killing our children' and calling out the Council for refusing to seek forgiveness or make recompense for slavery" as well as other statements in his invocation, Mr. Bowman interrupted and then silenced Pastor Gundy's invocation by shutting off the microphone at the lectern. *Id.*; *Gundy*, 50 F. 4th at 65 (App006).

The next day, Mr. Bowman went on Twitter and in reference to mayoral candidate and councilmember Ms. Brosche, stated:

I never envisioned a [council member] stooping so low to find a pastor that would agree to such a sacrilegious attack politicizing something as sacred as our invocation. It obviously was a last ditch effort to try and revive a failed term and campaign. Fortunately I control the microphone.

Id. at p. 65 (App006).

In silencing Pastor Gundy, Mr. Bowman noted that “determining when someone crosses the line in an invocation is like ‘artwork’ in that Mr. Bowman does not ‘know it until [he] see[s] it’ but, once known, he can act to prevent an invocation from straying from its purpose as a blessing and proceeding into a political discussion.” *Id.* As president of the City Council, Mr. Bowman had general authority under City Council Rule 1.202 to “control ... the Council chamber and committee room and ... the offices and other rooms assigned to the use of the Council whether in City Hall or elsewhere,” as well as general authority to maintain decorum and discipline when serving as the presiding officer of meetings under City Council Rules. *Id.*

During an August 2018 City Council innovation that Mr. Bowman presided over as Council President, another community religious leader made comments that the district court found “somber and reflective in reference to violence in the City of Jacksonville,” but because that invocation refrained “from placing blame on the legislature or executive branch for that violence” there was “a significant differentiation from [Petitioner’s] invocation...” *Gundy v. City of Jacksonville Florida*, 528 F.Supp.3d 1257, 1267 (M.D. Fla. 2021)(App028).

Pastor Gundy filed a lawsuit on July 2, 2019, for claims under 42 U.S.C. section 1983 (hereafter, “Section 1983”) and the Florida Constitution in the district court alleging violations of his free speech and free exercise rights. *Id.* at 1261(App024). A motion to dismiss by the City was partially granted in favor of the City (App00). Mr. Bowman was also found to have qualified immunity from the

claims and the case was dismissed against him. *Id.* Thereafter, Pastor Gundy’s free speech claims under Section 1983 and the Florida Constitution against the City were dismissed by the district court on summary judgment, where the court held that although his speech was private speech in a nonpublic forum, there were no material facts in dispute and judgment was entered in favor of the City. *Id.* at 1267 (App028).

The Court of Appeals affirmed the district court’s summary judgment against Pastor Gundy, however, the Court of Appeals disagreed with the district court and concluded that Pastor Gundy’s invocation was government speech, i.e., not private speech, and because of that holding his claims failed. *Gundy*, 50 F. 4th at 80 (App016).

REASONS FOR GRANTING THE PETITION

This case presents important constitutional questions concerning an unclear area of law regarding legislative invocations that the Court of Appeals found to be “a matter of first impression for our Circuit.” *Id.* at 64; see Daniel M. Vitagliano, *Government Speech Doctrine—Legislator-Led Prayer’s Saving Grace*, 93 St. Johns Law R. 809, 822 (2019)(“... argues that the general confusion over legislative prayer is due in part to courts’ failure to first classify the prayers as either government or private speech”).

Here, the district court determined that Petitioner’s invited invocation before the City Council, without any instructions or limitations, was private speech. However, the Court of Appeals concluded that the invocation was government

speech. This Court should clarify the law on when a non-legislator-led prayer is private or government speech.

Furthermore, this Court should grant review and reverse the Eleventh Circuit's decision viewing the Petitioner's speech during the invocation as government speech. This Court then has the opportunity to clarify the law regarding rights under the First Amendment's Free Exercise of Religion and Free Speech clauses when there is interference with a legislative prayer, such as here Petitioner was silenced by the presiding official of the City Council due to political reasons.

Finally, Petitioner asks this Court to grant review and in reversing the Eleventh Circuit's decision that Petitioner's invocation was government speech, find that claims against Mr. Bowman were not barred by qualified immunity as there were material facts in dispute concerning the arbitrary and capricious nature of Mr. Bowman's exercise of power as City Council President when he silenced Petitioner's invocation.

Petitioner addresses these issues in turn.

I. The Court Should Grant Certiorari to Clarify the Law on Whether a Non-Legislator-Led Prayer is Private or Government Speech

Here, the Court is presented with a case where the Court of Appeals disagreed with the district court's holding on both its decision on the motion to dismiss and the motion for summary judgment that Pastor Gundy's invocation was private speech. *Gundy*, 50 F. 4th at 80 (App016). If the invocation is private speech,

Pastor Gundy engaged in protected activity under the First Amendment during the March 12, 2019 invocation by both his free exercise of religion and free speech. While the First Amendment “restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S.Ct. 1125 (2009).

The Court of Appeals noted that “the distinction between government speech and private speech plays the pivotal role in this appeal.” *Gundy*, 50 F. 4th at 71 (App010). As the district court found, not every message, such as an invocation, authorized by government policy and taking place on government property at government-sponsored events are the government’s own. *See* 11/4/2020 Order of District Court on Motion to Dismiss (App035), citing *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 303 (2000). In its extensive evaluation of whether Pastor Gundy’s invocation was government speech, the district court utilized three factors: “(1) **History**-i.e., whether the speech ‘has traditionally communicated messages on behalf of the government’; (2) **Endorsement**-i.e., whether the speech ‘is often closely identified in the public mind with the government’; and (3) **Control**-i.e., whether the government ‘maintains direct control over the messages conveyed through the speech in question.’” *Id.* at 6-7 (App035-036)(emphasis in original), citing *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass’n, Inc.*, 942 F.3d 1215, 1230-35 (11th Cir. 2019) (internal citations and quotations omitted). It was based upon this analysis that the district court concluded that Pastor Gundy’s invocation was private speech. *Id.* at 7-10 (App036-039). In its ruling on the motion

for summary judgment, the district court similarly concluded that there were no additional facts presented by the City that persuaded the court that the invocation was anything other than private speech. *Gundy*, 528 F.Supp.3d at 1262 (App025).

The Court of Appeals, however, reached a different conclusion than the district court using the same analysis finding the invocation as government speech on the same set of facts. *Gundy*, 50 F. 4th at 77-80 (App013-016). In doing so, the Court of Appeals specifically addressed as “misguided” a statement by the district court that the Establishment Clause complicates the endorsement factor of the analysis. *Id.* at 78. Recognizing that government speech must comport with the Establishment Clause, the Court of Appeals held that any Establishment Clause–based limits cannot change the conclusion that legislative prayer is government speech. *Id.*, citing *Fields v. Speaker of Pa. House of Representatives*, 936 F.3d 142, 159 (3d Cir. 2019)(quoting *Summum*, 555 U.S. at 469 and 482 (Scalia, J., concurring)). Yet, the district court had specifically addressed the endorsement issue in its finding the invocation private speech. *See* 11/4/2020 Order of District Court on Motion to Dismiss (App037-038). Not all legislative invocations are automatically government speech that is subject only to Establishment clause protections.

Importantly, in *Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811 (2014), the Court recognized that:

The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or

her own God or gods as conscience dictates, unfettered by what an or judge considers to be nonsectarian.

Town of Greece, 134 S. Ct. 1822-23; see *Marsh v. Chambers*, 463 U.S. 783, 794-795, 103 S.Ct. 3330 (1983). While *Town of Greece* is an Establishment clause case, it is illustrative of the principle that once Pastor Gundy's invocation was commenced, it was private speech and not that of the City Council. The Court should grant certiorari here to clarify the law on legislative invocations finding that Pastor Gundy was engaged in private speech.

II. The Court Should Grant Certiorari Because Petitioner's Private Speech was Improperly Silenced Under the First Amendment

The silencing of Pastor Gundy's invocation at issue for political reasons by Mr. Bowman is a violation of the First Amendment. See *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 2229-30 (2015) (prohibitions on content and viewpoint discrimination are distinct but related limitations that the First Amendment places on government regulation of speech); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)(viewpoint discrimination is "an egregious form of content discrimination...when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the regulation.").

Here, the Court of Appeals did not reach the issue of a constitutional violation because it found that the invocation was government speech. See *Gundy*, 50 F. 4th at 80 (App016). However, the district court did evaluate the facts relating to Petitioner's First Amendment violation claims on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and ruling on the motion for summary judgment under Fed.

R. Civ. P. 56. The district court construed the facts in light most favorable to the City and drew inferences in favor of Respondents, however. It was error for the district court to hold that the City could have no liability to Pastor Gundy for his Free Exercise of Religion claim. Mr. Bowman's actions in silencing Pastor Gundy's prayer for political reasons, as the top policy maker and authority at the March 12, 2019 Council meeting, were binding on the City. *See Bd. of Cty. Commissioners v. Brown*, 520 U.S. 397, 405, 117 S.Ct. 1382 (1997)("proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federal protected right necessarily establishes the municipality acted culpably")(emphasis in original)).

Finally, the district court failed to directly address Pastor Gundy's claims of First Amendment retaliation and should be reversed because Mr. Bowman's adverse acts were motivated by retaliatory animus against Pastor Gundy's perceived support of a political rival. Accordingly, the Court should grant certiorari here to resolve the important issues in this case.

III. The Court Should Grant Certiorari to Find that the City Council President's Improper Silencing of Petitioner's Invocation was Not Barred by Qualified Immunity

To determine whether government officials are protected by qualified immunity, courts shall consider (1) whether the evidence, taken in the light most favorable to the non-moving party, shows that the administrators violated a federal right and, if so, (2) whether that right was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151 (2001).

First Amendment precedent prohibits governmental bodies from becoming excessively entangled with religion, such as by inquiring into religious doctrine. *See Hernandez v. Comm’r*, 490 U.S. 680, 696-97 (1989); *Lemon v. Kurtzman*, 403 U.S. 602, 621-22 (1971). The Supreme Court applied this principle in *Town of Greece* to reject an argument that invocations at governmental meetings must be nonsectarian, for such a rule would cause governments to become “supervisors and censors of religious speech.” *Town of Greece*, 134 S. Ct. at 1822. Government cannot cause governments to become the “supervisors and censors of religious speech. *Id.*

Thus, there was fair warning in the instant matter from *City of Greece* and other cases that interfering with an invocation once authorized by the government is not constitutional because “Once [government] invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.” *Town of Greece*, 134 S. Ct. 1822-23.

Moreover, the Free Speech Clause of the First Amendment provides that “Congress shall make no law abridging the freedom of speech.” U.S. Const. amend. I, cl. 3.¹ The Free Speech Clause prohibits government from denying citizens opportunities to take part in governmental activities based on their beliefs or affiliations. *See United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947)

¹ The Free Speech Clause and Free Exercise Clause of the U.S. Constitution are applied to the City and Mr. Bowman by virtue of the Fourteenth Amendment. *See School Dist. of Abington Twp. v. Pennsylvania*, 374 U.S. 203, 215-16, 83 S.Ct. 1560 (1963).

(Congress would be barred from “enact[ing] a regulation providing that no Republican [or] Jew . . . shall be appointed to federal office”).

There are alleged facts by Petitioner in his Amended Complaint relevant to the claims against Mr. Bowman individually, relating to his unconstitutional intent on March 12, 2019, when the invocation was silenced. In particular, the Twitter statement of Bowman on March 13, 2019, demonstrates the “viewpoint” Mr. Bowman had regarding Pastor Gundy’s invocation and that Bowman viewed it as originating from his political rival Anna Brosche. That discriminatory viewpoint is what makes the unconstitutional behavior here dangerous for invocations, or other protected speech, at future governmental meetings. A City Council President can selectively limit invocations based upon his/her perceived political alliances or religious bias that masquerades as an *ad hoc* decision by a top official that an invocation or other protected speech is too political. Thus, in dismissing Mr. Bowman on a Fed. R. Civ. P. 12(b)(6) motion by finding that there was not a clearly established right of Free Speech or Free Exercise of Religion for Pastor Gundy’s invocation at the March 12, 2019 City Council meeting, the district court erred. App017-18. This issue was not addressed by the Court of Appeals. However, in coming to its conclusion, the district court disregarded the plain language of the U.S. Constitution, case law and the law set forth in the City Council’s 2010 Webb Memorandum on invocations reviewed by Mr. Bowman upon taking the position of Council President at City Council meetings. *See* App0005.

Because of these issues, this Court should grant certiorari here, find Petitioner's protected speech to be private speech, and resolve the qualified immunity issue in this case in Petitioner's favor, or, in the alternative, remand that issue to the Court of Appeals.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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