No._____

In the Supreme Court of the United States

REGINALD L. GUNDY,

Petitioner,

v.

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

Respondents.

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50 F.4th 60
United States Court of Appeals, Eleventh Circuit.

Reginald L. GUNDY, Plaintiff-Appellant,
v.
CITY OF JACKSONVILLE FLORIDA, a Municipality of the State of Florida, Aaron L. Bowman, individually, Defendants-Appellees.

No. 21-11298
|
Date Filed: 09/30/2022

Synopsis

Background: Pastor brought § 1983 action against city and city council president, alleging that his rights of free speech and free exercise of religion were violated when city council president turned off pastor's microphone during prayer invocation at city council meeting, subsequently posted a critical social media message about pastor, and proposed new guidance on future invocations. The United States District Court for the Middle District of Florida, No. 3:19-cv-00795-BJD-MCR, Brian Davis, J., 528 F.Supp.3d 1257, granted summary judgment in favor of defendants. Pastor appealed.

[Holding:] As a matter of first impression, the Court of Appeals, Lagoa, Circuit Judge, held that pastor's invocation was government speech, which was not protected by Free Speech or Free Exercise Clauses.

Affirmed.

West Headnotes (26)

[1] **Federal Courts** Pleading

The Court of Appeals reviews de novo a district court's grant of a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

[2] **Federal Civil Procedure** Construction of pleadings
Federal Civil Procedure Matters deemed admitted; acceptance as true of allegations in complaint

A court deciding a motion to dismiss for failure to state a claim accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff. Fed. R. Civ. P. 12(b)(6).

[3] **Federal Civil Procedure** Insufficiency in general
Federal Civil Procedure Matters deemed admitted; acceptance as true of allegations in complaint

To survive a motion to dismiss for failure to state a claim, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6).

[4] **Federal Civil Procedure** Insufficiency in general

A claim has "facial plausibility," as required to survive a motion to dismiss for failure to state a claim, when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Fed. R. Civ. P. 12(b)(6).

[5] **Federal Courts** Summary judgment

The Court of Appeals reviews de novo a district court's order granting summary judgment.

1 Case that cites this headnote

[6] **Federal Civil Procedure**🔑Presumptions

When considering a motion for summary judgment, courts must construe the facts and draw all inferences in the light most favorable to the nonmoving party and when conflicts arise between the facts evidenced by the parties, they must credit the nonmoving party's version.

[7] **Federal Courts**🔑Theory and Grounds of Decision of Lower Court
Federal Courts🔑Grounds for sustaining decision not relied upon or considered

The Court of Appeals may affirm the district court's grant of summary judgment on any ground supported by the record, regardless of whether that ground was relied upon or even considered by the district court.

[8] **Constitutional Law**🔑First Amendment

The Free Speech, Free Exercise, and Establishment Clauses of the First Amendment are incorporated, via Fourteenth Amendment, to apply to States and their subdivisions. U.S. Const. Amends. 1, 14.

[9] **Constitutional Law**🔑Freedom of Speech, Expression, and Press
Constitutional Law🔑Compelled or forced speech, support, or participation

The First Amendment works as a shield to protect private persons from encroachment by the government on their right to speak freely, not as a sword to compel the government to speak for them. U.S. Const. Amend. 1.

[10] **Constitutional Law**🔑Government-sponsored speech

When the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. U.S. Const. Amend. 1.

[11] **Constitutional Law**🔑Government-sponsored speech

Government statements and government actions and programs that take the form of speech do not normally trigger the First Amendment free speech guarantee designed to protect the marketplace of ideas. U.S. Const. Amend. 1.

[12] **Constitutional Law**🔑Government-sponsored speech

When the government exercises the right to speak for itself, it can freely select views that it wants to express, including choosing not to speak and speaking through the removal of speech that the government disapproves. U.S. Const. Amend. 1.

[13] **Constitutional Law**🔑Establishment of Religion

Government speech must comport with Establishment Clause. U.S. Const. Amend. 1.

[14] **Constitutional Law** Particular Issues and Applications

When members of a governmental body participate in a prayer for themselves and do not impose it on or prescribe it for the people, the religious liberties secured to the people by the First Amendment's Free Exercise Clause are not directly implicated. U.S. Const. Amend. 1.

[15] **Constitutional Law** Local governmental entities
Constitutional Law Government Meetings and Proceedings
Municipal Corporations Rules of procedure and conduct of business

Pastor's prayer invocation at city council meeting was "government speech," rather than "private speech," and thus invocation's contents, which included political criticism of council and incumbent mayor, were not protected by Free Speech or Free Exercise Clauses, in § 1983 claim challenging city council president's conduct of turning off pastor's microphone during invocation; legislative invocations were part of history and tradition of United States, council memorandum stated that invocations were part of council's tradition and were for benefit and blessing of council's proceedings, and placed restraints on invocations, such as prohibiting speakers from disparaging other faiths or beliefs, and invocation speaker was chosen and invited by active council member. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

[16] **Constitutional Law** Particular Issues and Applications

Once the government invites prayer into the public sphere, to comply with the Establishment Clause, the 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. U.S. Const. Amend. 1.

[17] **Constitutional Law** Government Meetings and Proceedings

In determining whether legislative invocations and prayers violate the Establishment Clause, a court considers: (1) the identity of the invocation speaker; (2) the process by which the invocation speaker is selected by the governmental entity; and (3) the nature of the prayer delivered by the speaker to determine whether the prayer had been exploited to affiliate the government entity with a particular faith. U.S. Const. Amend. 1.

[18] **Constitutional Law** Government Meetings and Proceedings

The Establishment Clause forbids judicial scrutiny of the content of legislative invocations and prayers, absent evidence that the prayers are used to advance or disparage a particular religion; this is because the federal judiciary has no business in composing official prayers for any group of the American people to recite as a part of a religious program carried on by government. U.S. Const. Amend. 1.

[19] **Constitutional Law** Government-sponsored speech

A court must weigh the factors of history,

endorsement, and control when determining whether speech constitutes government or private speech, under the First Amendment. U.S. Const. Amend. 1.

[20] **Constitutional Law** Government-sponsored speech

In determining whether speech is government speech or private speech under the First Amendment, courts must ask whether the type of speech under scrutiny has traditionally communicated messages on behalf of the government. U.S. Const. Amend. 1.

[21] **Constitutional Law** Government-sponsored speech

In determining whether speech is government speech or private speech under the First Amendment, courts must ask whether the kind of speech at issue is often closely identified in the public mind with the government. U.S. Const. Amend. 1.

[22] **Constitutional Law** Government-sponsored speech

In determining whether speech is government speech or private speech under the First Amendment, courts must ask whether the relevant government unit maintains direct control over the messages conveyed through the speech in question. U.S. Const. Amend. 1.

[23] **Constitutional Law** Government-sponsored speech

The government is not required to control every word or aspect of speech in order for the control factor to lean toward a finding that the speech in question is government speech, rather than private speech, for First Amendment purposes. U.S. Const. Amend. 1.

[24] **Constitutional Law** Government-sponsored speech

The factors of history, endorsement, and control that a court considers in evaluating whether particular speech is private or government for First Amendment purposes are neither individually nor jointly necessary for speech to constitute government speech, but evidence supporting government speech as to all factors will almost always result in a finding that the speech is that of the government. U.S. Const. Amend. 1.

[25] **Constitutional Law** Religious speech or activities

Because government speech must comport with the Establishment Clause anyway, any Establishment Clause-based limits cannot change conclusion that a legislative invocation or prayer is government speech, for purpose of the Free Speech Clause. U.S. Const. Amend. 1.

[26] **Constitutional Law** Government-sponsored speech
Constitutional Law Government Property and Events

Fact that a private party takes part in propagation of a message does not extinguish the

governmental nature of the message or transform the government's role into that of a mere forum-provider, for purpose of determining whether the message amounts to government or private speech under the First Amendment. U.S. Const. Amend. 1.

***63** Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 3:19-cv-00795-BJD-MCR

Attorneys and Law Firms

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Before Lagoa, Brasher, and Tjoflat, Circuit Judges.

Opinion

Lagoa, Circuit Judge:

***64** This appeal arises from a legislative invocation given by an invited, guest speaker before the opening of a Jacksonville City Council meeting.[1] It centers on the unique role of legislative invocations in our country's history and tradition, the First Amendment, and the distinction between government speech and private speech. As a matter of first impression for our Circuit, we hold that the legislative invocation at issue constitutes government speech. For this reason, after careful review and with the benefit of oral argument, we hold that the district court erred in its motion to dismiss and summary judgment orders by classifying the legislative invocation as private speech in a nonpublic forum. That said, we nonetheless affirm the district court's ultimate disposition of the case because we hold that Reginald L. Gundy's invocation constitutes government speech, not subject to attack on free speech or free exercise grounds. A discussion of the four-minute sequence of events and relevant procedural background that led to this appeal now follows.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Invocation and Initiation of Legal Proceedings

According to a 2010 City Council memorandum (the "Webb Policy"), the City Council "has long maintained a tradition of solemnizing its proceedings by allowing for an opening invocation before each meeting, for the benefit and blessing of the Council." Under this policy, "legislative invocations are not a forum for the free exercise of personal religious beliefs, but rather a vehicle through which the Council itself, through selected speakers, seeks blessings and guidance in accomplishing its governmental work." The Webb Policy also states that "legislative invocations must not be exploited to proselytize or advance any one faith or belief, or to disparage any other faith or belief, and must not create the impression that the legislative body is affiliated, or intends to affiliate, with any particular faith or belief." Additionally, "[i]ndividuals remain free to pray on their own behalf, as their conscience requires."

As part of this history and tradition, City Council Rule 1.106 calls for the appointment of a council member as "Chaplain of the Council" to help facilitate "a prayer/invocation" before each meeting; in accordance with Rule 1.106, "[e]ach council member" is given an opportunity to invite a speaker from "religious congregations with an established presence in Jacksonville" to give an invocation. And in line with this directive, Anna Brosche, a City Council member and a then-mayoral candidate, invited Reginald L. Gundy to give the invocation at the March 12, 2019, City Council meeting. The City Council meeting preceded election day for the municipal elections by about a week.

Mr. Gundy, a senior pastor at the Mount Sinai Missionary Baptist Church in Jacksonville, accepted Ms. Brosche's offer. At the time, Mr. Gundy was a supporter of Ms. Brosche's mayoral campaign, having donated to the campaign and having hosted a campaign meeting at his church. After accepting Ms. Brosche's offer, Mr. Gundy typed out a two-page prayer before the City Council meeting. Then, on March 12, Mr. Gundy arrived at the City Council meeting. Without being given a time limit for his invocation or advised as to topics deemed appropriate for invocations, Mr. ***65** Gundy stepped up to the microphone at the lectern and began his invocation.

Mr. Gundy started with a direct appeal to a higher power. When Mr. Gundy transitioned to levying criticisms against

the City's executive and legislative branches, Aaron Bowman, president of the City Council at the time, interrupted Mr. Gundy, stating: "Mr. Gundy, I'm going to ask you ... [to] make it a spiritual prayer. Thank you." Mr. Gundy continued with the invocation, and, when Mr. Bowman felt that Mr. Gundy did not change the tenor of the invocation, Mr. Bowman cut off the feed to Mr. Gundy's microphone. Mr. Gundy then finished the invocation without the benefit of the microphone. With neither incident nor confrontation, Mr. Gundy left the lectern after the City Council recited the Pledge of Allegiance.

A day after the invocation, Mr. Bowman, who supported Ms. Brosche's opponent in the mayoral race, Lenny Curry, took to Twitter and made a thinly veiled reference to Ms. Brosche, stating:

> 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.

Per his deposition testimony about his decision to cut off the microphone, Mr. Bowman believed that Mr. Gundy's invocation "was not a blessing of the [C]ouncil" and that "it crossed the political lines" by "attacking the administration, knowing that [Mr. Gundy] had sponsored [Ms. Brosche] at his church for an event." Mr. Bowman said that he "felt [Mr. Gundy] was attacking us as a legislative body. ... And then it became clear that, yes, [Mr. Gundy] was attacking the current mayor. ... [Mr. Gundy] called out the executive branch." To Mr. Bowman, "it was very clear that [Mr. Gundy] was acting on [Ms. Brosche's] behalf to try to discredit the current-sitting mayor and her opponent." Mr. Bowman also stated that the invocation was "not appreciated by many of the council members and they wanted [him] to take action."

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. This is because Mr. Bowman, as the president of the City Council, has 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 4.202(f) and 4.505. Mr. Bowman stated that a political attack against "anybody," including a hypothetical attack against Ms. Brosche, would be "out of line" and that "[a]ny discussion of politics" in the City Council chamber would require Mr. Bowman to take action.

On July 2, 2019, Mr. Gundy brought suit against both the City and Mr. Bowman in his personal capacity. Mr. Gundy then filed an amended complaint on September 30, 2019, marking the operative complaint of the lawsuit. In his amended complaint, Mr. Gundy alleged four counts against the City and Mr. Bowman. The counts stemmed from Mr. Bowman's decision to cut the feed to Mr. Gundy's microphone and Mr. Bowman's subsequent actions, including issuing the Twitter statement and a May 1, 2019, memorandum that outlined new procedures ***66** for prayer invocations (the "Bowman Memorandum").

In his first two counts, actionable under 42 U.S.C. § 1983, Mr. Gundy alleged that both the City and Mr. Bowman violated his First Amendment rights under the Free Exercise Clause (Count I) and the Free Speech Clause (Count II) of the United States Constitution. Under both counts, Mr. Gundy alleged that Mr. Bowman's actions violated his "clearly established" constitutional rights and were retaliatory, though he did not bring a discrete count for First Amendment retaliation. For the same reasons, Mr. Gundy brought another two counts against the City, alleging violations of the free exercise and the free speech clauses of the Florida Constitution (respectively, Counts III and IV).

Per his deposition testimony, Mr. Gundy said that he was "offended by [Mr. Bowman's tweet]" calling his "prayer ... sacrilegious" and that he felt like his "constitutional rights ha[d] been violated." In his amended complaint, Mr. Gundy also noted that Mr. Bowman did not interrupt a 2018 invocation in which "the presenter extensively discussed violence in the City of Jacksonville." For these reasons, Mr. Gundy alleged that Mr. Bowman's actions "were taken for retaliatory, political and other impermissible reasons" and that the City Council, through the City Council Rules, policy, and the Bowman Memorandum, maintained a "policy, custom, and practice" of limiting the free exercise of religion and speech.

B. Motion to Dismiss and Subsequent District Court Order

On October 14, 2019, the City and Mr. Bowman (collectively, "Defendants") moved to dismiss Mr. Gundy's amended complaint with prejudice. The Defendants later amended their motion to dismiss on April

17, 2020. As relevant to this appeal, the Defendants argued that Mr. Gundy's rights had not been violated because the "limited and focused purpose" of Mr. Gundy's "invited speech was to offer up a religious benediction to the nineteen-member City Council." For this reason, the Defendants argued that Mr. Gundy's invocation constituted government speech subject to the confines of the Establishment Clause—not the confines of the Free Speech Clause or the Free Exercise Clause. And, while Mr. Gundy did not plead a discrete Establishment Clause count, the Defendants argued that Mr. Gundy's amended complaint failed to "plausibly allege that the limits Defendants placed on his" invocation "violated the Establishment Clause, much less the Free Exercise and Free Speech Clauses of the First Amendment." This is because they argued that limiting invocations to "religious prayer"—versus political speech or secular prayer—is a valid restraint under the Establishment Clause.

Seemingly in the alternative and advancing a private speech theory, the Defendants also argued that the "Council Chambers, and in particular the invocation itself prior to a public meeting, is a limited public forum," in which Mr. Gundy "did not have a First Amendment right to engage in any and all speech." In such a setting, the Defendants argued that a restriction on speech is "permitted as long as it is reasonable given the forum's purpose and not based on any one viewpoint and alternative opportunities," such as the public comments portions of City Council meetings, "are provided to communicate one's speech." The Defendants argued that Mr. Bowman's "restriction was reasonable given the purpose of invocations" and that the restriction "was a proper time, place and manner restriction in a limited forum meant only for prayer for the Council's benefit at the start of each meeting, in ***67** order to control and keep the meeting orderly."

In concluding their motion to dismiss, the Defendants argued that Mr. Bowman was entitled to qualified immunity, given his role as City Council president. The Defendants also argued that the City was entitled to sovereign immunity as to the state law claims. Finally, they argued that Mr. Gundy could not seek money damages under the Florida Constitution.

On November 4, 2020, the district court granted the Defendants' motion to dismiss in part and denied it in part. The district court dismissed all of Mr. Gundy's claims against Mr. Bowman (i.e., Counts I and II), as well as the free exercise of religion claims against the City (i.e., Counts I and III) with prejudice. The district court also limited Mr. Gundy's request for money damages to his remaining free speech claim against the City under the United States Constitution (i.e., Count II) and disallowed money damages for his remaining free speech claim against the City under the Florida Constitution (i.e., Count IV).

As to the claims against Mr. Bowman, the district court found Mr. Bowman entitled to qualified immunity. In conducting its qualified immunity analysis, the district court found that "Mr. Bowman was undoubtedly acting in his official capacity when the alleged conduct took place." Thus, the district court turned to whether Mr. Gundy had met his burden of identifying a "clearly established" statutory or constitutional right in which a reasonable person, in Mr. Bowman's position, would have been aware of before silencing the microphone. The district court held that Mr. Gundy failed to meet such a burden because Mr. Gundy's citations to caselaw and City Council policies pertained to the Establishment Clause and the legality of legislative prayer, in general—not whether the City Council and Mr. Bowman had the ability to impede Mr. Gundy's invocation.

As to the free exercise claims against the City (i.e., Counts I and III), the district court examined both the Bowman Memorandum, as referenced by Mr. Gundy's complaint, along with the City Council Rules, because of Mr. Gundy's "repeated references to Mr. Bowman requesting [Mr. Gundy] cease his invocation" in the amended complaint. The district court found that the "plain language" of the Bowman Memorandum "expressly refute[d]" Mr. Gundy's allegation that it precluded him from praying as his conscience required. The district court also noted that the Bowman Memorandum was issued *after* Mr. Gundy's invocation, so it was not germane to his claims. Finally, the district court noted that the "general procedural rules giving the Council President the ultimate authority to conduct and manage Council meetings" are rules "of general application," which "do not expressly prohibit any individual from holding or acting in accordance with a sincerely held belief." Since the district court held that "[l]aws of general application," including those with incidental burdens on religious practice, do not require justification via a compelling interest, the district court also held that the City Council's "interest in maintaining order during its meetings," coupled with the fact that Mr. Gundy was allowed to complete his prayer, indicated that Mr. Gundy's right to free exercise under both the United States Constitution and the Florida Constitution was not violated.

As to the remaining free speech claims against the City, the district court held that it could not "conclude that [Mr. Gundy's] invocation was unquestionably government speech as a matter of law, as Defendants" argued. The district court noted that if it deemed Mr. Gundy's

invocation government speech, then Mr. Gundy's ***68** claims would fail because the Free Speech Clause does not regulate government speech. Citing *Mech v. School Board of Palm Beach County*, 806 F.3d 1070 (11th Cir. 2015), and "[b]eing conscientious of" this Court's "warning to tread lightly when judicially declaring speech to be the government's own," the district court found that Mr. Gundy "sufficiently alleged that at least some of his speech could be categorized as private speech subject to First Amendment protection."

Since the district court found that the invocation "arguably involve[d] private speech," the district court then went into a discussion about the nature of the speaking forum. Relying on *Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n, Inc.*, 942 F.3d 1215 (11th Cir. 2019), the district court found the invocation setting to be a nonpublic forum. The district court then noted that "further development of the record" would be needed to determine whether Mr. Bowman's decision to cut off the microphone was viewpoint neutral and nondiscriminatory. Thus, the district court denied the Defendants' motion to dismiss as to the free speech claims against the City and allowed the case to proceed with discovery.

C. Motion for Summary Judgment and Subsequent District Court Order

On November 30, 2020, the City moved for summary judgment on the remaining free speech claims (i.e., Counts II and IV) under the United States Constitution and the Florida Constitution. On March 22, 2021, the district court granted the City's motion for summary judgment. The district court held that the City was not liable under § 1983 because "the record d[id] not reflect [that] the City had a history of arbitrary enforcement" of the City Council Rules when it came to restricting speech.

In reaching its ultimate holding and relying on its previous motion to dismiss order, the district court first found that, under *Cambridge Christian*, Mr. Gundy's speech constituted private speech. Next, because of the closed nature of the invocation as compared to the open, public comments portions of City Council meetings, the district court again found that the invocation setting constituted a nonpublic forum. Then, the district court turned to the question of § 1983 and the scope of municipal liability.

Citing the *Monell* doctrine,[2] the district court noted that Council Rule 1.202, which grants general authority to the City Council president to exercise control over City Council meetings, was "undoubtedly a 'policy' for purposes of ... *Monell* analysis."[3] For this reason, the district court examined whether the "City's restriction of [Mr. Gundy's] speech was reasonable—i.e., whether [Mr. Gundy's] First Amendment rights were violated." Since the government's ability to "limit[ ] speech is ... at its highest" in a nonpublic forum, the district court found Council Rule 1.202 as "facially reasonable" when used to enforce "content-based restrictions on speech to ensure an invocation is preserved for its intended purposes." The district court then held that Mr. Gundy failed to show that the policy was "used in a way that discriminated based on a speaker's viewpoint" or that the policy was "enforced arbitrarily."

The district court held that cutting the feed to Mr. Gundy's microphone did not ***69** constitute viewpoint discrimination. The district court found that "Mr. Bowman's comment when interrupting [Mr. Gundy] and the subsequent removal of [Mr. Gundy's] amplification were for the stated purposed of preserving the invocation for" the solemnization of City Council meetings and the blessing of City Council members. While the district court held that Mr. Gundy's remarks "might have been entirely appropriate if delivered in a more public forum" or at Mr. Gundy's "pulpit," they were subject to "reasonable and viewpoint-neutral limitations" once Mr. Gundy's invocation "became contentious and divisive." The district court also credited Mr. Bowman's testimony about his apolitical intentions when impeding Mr. Gundy as part of "undisputed" facts indicating the viewpoint-neutral nature of Mr. Bowman's actions.

As to whether the City, via Mr. Bowman, enforced Council Rule 1.202 arbitrarily, the district court held that the City did not. The district court noted that Mr. Gundy failed to present "any evidence" to support such a claim. The district court found Mr. Gundy's "sole example" of the City Council allowing an invocation to continue with allegedly "disparaging or divisive remarks" as "hardly comparable" to Mr. Gundy's remarks. The district court noted that the context of Dr. Nicholas Louh's August 2018 invocation, which had been identified as the invocation Mr. Gundy referenced in his amended complaint, came "three days following the fatal mass shooting at the Jacksonville Landing." Moreover, and "more saliently," the district court noted that Dr. Louh's invocation, while "somber and reflective in reference to violence in the City of Jacksonville," refrained from "placing blame on the legislature or executive branch" and lacked "divisive or accusatory" language. For these reasons, the district court found Dr. Louh's invocation as substantially dissimilar to Mr. Gundy's invocation and held that Mr. Bowman did not enforce the City Council Rules in an arbitrary or haphazard manner.

Ultimately, in granting summary judgment for the City, the district court noted two caveats. First, the district court stated that "the City prevailed in this action because the record d[id] not reflect [that] the City had a history of arbitrary enforcement of Council Rule 1.202." Thus, the district court explained that, on "a different record," a "different outcome could result" from the actions of a City Council president. Second, the district court stated that it was "not meant to be the arbiter of what" constitutes "allowable 'prayer,' " implying that it had done no such thing in coming to its disposition of the case. Finally, the district court concluded by noting the dangers that can occur if courts become overly involved in censoring religious speech.

Mr. Gundy timely appealed the district court's orders granting the motion to dismiss, in part, and granting summary judgment.

II. STANDARD OF REVIEW

[1] [2] [3] [4]"We review *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, accepting the complaint's factual allegations as true and construing them in the light most favorable to the plaintiff." *United States v. Henco Holding Corp.*, 985 F.3d 1290, 1296 (11th Cir. 2021). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting ***70** *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

[5] [6] [7]Likewise, we review de novo a district court's order granting summary judgment. *Mech*, 806 F.3d at 1074. "Summary judgment is appropriate if 'the evidence before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *McCullough v. Antolini*, 559 F.3d 1201, 1204 (11th Cir. 2009) (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)). "When considering a motion for summary judgment, ... 'courts must construe the facts and draw all inferences in the light most favorable to the nonmoving party and when conflicts arise between the facts evidenced by the parties, [they must] credit the nonmoving party's version.' " *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013) (alteration in original) (quoting *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006)). Finally, we "may affirm the judgment of the district court on any ground supported by the record, regard-less of whether that ground was relied upon or even considered by the district court." *Kernel Recs. Oy v. Mosley*, 694 F.3d 1294, 1309 (11th Cir. 2012).

III. ANALYSIS

On appeal, Mr. Gundy raises three primary arguments. First, Mr. Gundy argues that the district court erred in finding Mr. Bowman entitled to qualified immunity and dismissing the federal claims against Mr. Bowman. Second, Mr. Gundy argues that the district court erred by dismissing the claims against the City under the *Monell* doctrine because Mr. Bowman acted in an arbitrary, haphazard, or discriminatory manner when he cut Mr. Gundy's microphone feed. Finally, Mr. Gundy argues that the district court erred by failing to address his First Amendment retaliation claims. As made clear by these arguments, Mr. Gundy's appeal centers on the fact that he brought counts against Mr. Bowman and the City based on alleged violations of his free speech and free exercise rights under the United States Constitution and the Florida Constitution.[4]

[8]As a threshold and dispositive matter, and for the reasons discussed below, we hold that the district court erred in deeming the invocation private speech in a nonpublic forum instead of government speech. And since Mr. Gundy did not allege a violation of his rights under the Establishment Clause, which is the proper constitutional vehicle to attack the government speech at issue here, his appeal must fail.[5]

*71 A. Mr. Gundy's Invocation Constitutes Government Speech

[9] [10] [11] [12]"The First Amendment works as a shield to protect *private* persons from 'encroachment[s] by the government' on their right to speak freely, not as a sword to compel the government to speak for them." *Leake v. Drinkard*, 14 F.4th 1242, 1247 (11th Cir. 2021) (alteration and emphasis in original) (citation omitted) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 566, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995)). Thus, "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of

what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015); *see also Mech*, 806 F.3d at 1074 ("The Free Speech Clause of the First Amendment 'restricts government regulation of private speech; it does not regulate government speech.' " (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009))). In this regard, "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Walker*, 576 U.S. at 207, 135 S.Ct. 2239. Indeed, "[w]hen the government exercises 'the right to "speak for itself," ' it can freely 'select the views that it wants to express,' " including " 'choosing not to speak' and 'speaking through the ... removal' of speech that the government disapproves." *Mech*, 806 F.3d at 1074 (first quoting *Summum*, 555 U.S. at 467–68, 129 S.Ct. 1125; then quoting *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000)).

[13]To be sure, "[t]his does not mean that there are no restraints on government speech." *Summum*, 555 U.S. at 468, 129 S.Ct. 1125. "[G]overnment speech must comport with the Establishment Clause," for one. *Id.* And "a government entity is ultimately 'accountable to the electorate and the political process for its advocacy.' " *Id.* (quoting *Bd. of Regents of Univ. of Wis Sys. v. Southworth*, 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000)). "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Southworth*, 529 U.S. at 235, 120 S.Ct. 1346.

[14]Thus, the distinction between government speech and private speech plays the pivotal role in this appeal. If Mr. Gundy's invocation is considered government speech, his free speech claims must fail because government speech does not enjoy protection under the Free Speech Clause. *Mech*, 806 F.3d at 1072. And in that circumstance, Mr. Gundy's free exercise claims also must fail because, "when members of a governmental body participate in a prayer for themselves and do not impose it on or prescribe it for *the people,* the religious liberties secured *to the people* by the First Amendment are not *directly* implicated." *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 289 (4th Cir. 2005) (Niemeyer, J., concurring) (emphasis in original); *accord Fields v. Speaker of Pa. House of Representatives*, 936 F.3d 142, 160 (3d Cir. 2019) ("Because legislative prayer is government speech, the Free Exercise Clause does not apply, and the [plaintiffs'] free-exercise claim fails.").

As discussed above, the district court opined on the issue of whether Mr. Gundy's invocation constituted government ***72** speech or private speech without reaching a definitive conclusion when granting, in part, the Defendants' motion to dismiss. The district court discussed the three *Cambridge Christian* factors that this Court relies on to determine whether speech constitutes government speech—namely, (1) history; (2) endorsement; and (3) control, *see* 942 F.3d at 1230–36—and stated that, at the "early stage" of the litigation, the district court could not conclude that the "invocation was unquestionably government speech." Then, in its order granting summary judgment, the district court explained that the City provided the Webb Policy as the "only additional fact ... in support of the City's position" that the invocation constituted government speech. While the district court noted that certain elements of the Webb Policy "may tilt" the control factor in favor of a government speech determination, the district court stated that the *Cambridge Christian* factors "continue[d] to support a finding that the contents of" Mr. Gundy's "prayer was his own private speech."

[15]On appeal, the Defendants "contend that the invocation" constitutes "government speech." By contrast, Mr. Gundy "agrees" with the district court "that the speech at issue is private" but claims that "the material facts in dispute provide that the forum at the invocation could be considered a limited public forum where government reserves a forum for certain groups or for the discussion of certain topics." For these reasons, we must address the threshold issue of whether Mr. Gundy's invocation constitutes government speech or private speech in some type of forum. In addressing this issue, we first note the unique and well-established role of legislative prayer in this country's history and tradition. We then apply this Circuit's government speech precedent to conclude that Mr. Gundy's invocation constitutes government speech, thereby agreeing with several sister circuits that have determined that legislative prayer constitutes government speech.

1. Legislative Prayer Occupies a Unique Place in Our History and Tradition under the Establishment Clause

In *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), the Supreme Court directly addressed the constitutionality of legislative prayer in considering "whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violate[d] the Establishment Clause of the First Amendment." 463 U.S. at 784, 103 S.Ct. 3330. Reversing the Eighth Circuit, the Supreme Court held that it did not. *Id.* at 795, 103 S.Ct. 3330.

The Supreme Court reasoned that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," flowing from "colonial times through the founding of the Republic and ever since." *Id.* at 786, 103 S.Ct. 3330. And the Supreme Court noted that "three days after Congress authorized the appointment of paid chaplains" in 1789, "final agreement was reached on the language of the Bill of Rights," showing that "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788, 103 S.Ct. 3330. For these reasons, the Supreme Court concluded:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer ***73** has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

Id. at 792, 103 S.Ct. 3330.

The Supreme Court also looked at three specific aspects of the Nebraska policy—namely, the chaplain's long tenure and Presbyterian denomination, the state-funded nature of the chaplain's salary, and the "Judeo-Christian tradition" of the chaplain's prayers—to determine whether the policy violated the Establishment Clause. *Id.* at 792–93, 103 S.Ct. 3330. Most importantly for this appeal, the Supreme Court determined that the "content of the prayer is not of concern to judges where ... there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95, 103 S.Ct. 3330.

Several years after *Marsh*, the Supreme Court decided *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), *abrogated by Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). It is notable for its commentary, in dictum, about *Marsh*. Specifically, *County of Allegheny* dealt with whether the display of a crèche and a menorah on municipal property violated the Establishment Clause. 492 U.S. at 578–79, 109 S.Ct. 3086. For purposes of this appeal, in dictum, the majority attributed the holding that the legislative prayer in *Marsh* did not violate the Establishment Clause due to the fact that the "chaplain had 'removed all references to Christ.' " *Id.* at 603, 109 S.Ct. 3086 (quoting *Marsh*, 463 U.S. at 793 n.14, 103 S.Ct. 3330). Thus, the opinion set forth the implication that the holding in *Marsh* only applied to nonsectarian forms of prayer.

Twenty-five years after *County of Allegheny*, the Supreme Court returned to the topic of legislative prayer in *Town of Greece v. Galloway*. In that case, the Supreme Court needed to "decide whether the town of Greece, New York, impose[d] an impermissible establishment of religion by opening its monthly board meetings with a prayer," given by solely Christian ministers "from 1999 to 2007." 572 U.S. at 569–71, 134 S.Ct. 1811. After reviewing the town's legislative prayer policies, the Supreme Court held that the town did not violate the Establishment Clause. *Id.* at 570, 575, 134 S.Ct. 1811.

In so doing, the Supreme Court clarified that the "inquiry" into whether legislative prayer violates the Establishment Clause depends on whether the legislative prayer at issue "fits within the tradition long followed in Congress and the state legislatures." *Id.* at 577, 134 S.Ct. 1811. Dispelling the interpretation of the dictum in *County of Allegheny*, the Supreme Court stated that an "insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases," most notably *Marsh*'s harkening back to the "decidedly Christian nature" of the first prayers given before Congress. *Id.* at 578–81, 134 S.Ct. 1811. The Supreme Court reiterated that "the 'content of the prayer is not of concern to judges,' provided 'there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.' " *Id.* at 581, 134 S.Ct. 1811 (quoting *Marsh*, 463 U.S. at 794–95, 103 S.Ct. 3330). Thus, the Supreme Court "reject[ed] the suggestion that legislative prayer must be nonsectarian." *Id.* at 582, 134 S.Ct. 1811.

***74** [16]In reaching this holding, the Supreme Court reasoned that a contrary holding "would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech," which "would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact." *Id.* at 581, 134 S.Ct. 1811. And the Supreme Court noted that the "First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech." *Id.* at 582, 134 S.Ct. 1811. For this reason, 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." *Id.*

The Supreme Court clarified that the holding did "not imply that no constraints remain on [legislative prayer's] content," but rather the "relevant constraint derives from [the] place" of legislative prayer "at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage." *Id.* at 582–83, 134 S.Ct. 1811. According to the Supreme Court, "[p]rayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function." *Id.* at 583, 134 S.Ct. 1811. The Supreme Court found support for this proposition in examining "the prayers offered to Congress," which "often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." *Id.* As to overtly sectarian language, "[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort." *Id.*

Finally, in Part II-B of the opinion, which only Justices Roberts and Alito joined, Justice Kennedy described the format and intended audience for legislative prayer. *Id.* at 586–88, 134 S.Ct. 1811. Justice Kennedy noted that the "principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Id.* at 587, 134 S.Ct. 1811. Moreover, while "many members of the public find these prayers meaningful and wish to join them[,] ... their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers." *Id.* at 588, 134 S.Ct. 1811. This is because, for "members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens." *Id.* And the legislative "prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Id.*

[17]This Court has adopted the tenets expressed in the aforementioned line of Supreme Court jurisprudence and has developed a three-factor analytical framework to determine whether legislative invocations and prayers violate the Establishment Clause. *See generally Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008). This Court considers: (1) the identity of the invocation speaker; (2) the process ***75** by which the invocation speaker is selected by a governmental entity; and (3) the nature of the prayer delivered by the invocation speaker to determine whether the prayer "had been exploited to affiliate the [government entity] with a particular faith." *Id.* at 1277–78; *accord Williamson v. Brevard County*, 928 F.3d 1296, 1310–16 (11th Cir. 2019); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590–96 (11th Cir. 2013).

[18]This Court has repeatedly cautioned against the need to reach the third factor set forth in the framework, explaining that this Court "read[s] *Marsh* ... to forbid judicial scrutiny of the content of prayers absent evidence that the legislative prayers have been exploited to advance or disparage a religion." *Pelphrey*, 547 F.3d at 1274. This is because the "federal judiciary has no business in 'compos[ing] official prayers for any group of the American people to recite as a part of a religious program carried on by government.' " *Id.* at 1278 (alteration in original) (quoting *Lee v. Weisman*, 505 U.S. 577, 588, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)); *see also Williamson*, 928 F.3d at 1310 ("[J]ust like in *Pelphrey* and *Atheists of Florida*, we have no occasion to engage the third factor of the test—the content of the prayers.").

Keeping in mind the background that legislative invocations and prayers are well-established in this country's history and tradition and the mandate to exercise caution when considering whether to review the content of prayers, we turn to our government speech precedent regarding the direct issue pertinent to this appeal—whether Mr. Gundy's invocation constitutes government speech or private speech.

2. Under Our Precedent, Mr. Gundy's Invocation Constitutes Government Speech

Having established the treatment of legislative prayer in the context of the Establishment Clause, we now turn to consideration of legislative prayer and the category of speech that such prayer falls under for purposes of the First Amendment.[6] This Court's 2019 decision in *Cambridge Christian* articulates the standard in which this Court determines whether speech constitutes government speech or private speech. *See* 942 F.3d 1215; *see also Leake*, 14 F.4th 1242.

***76** In *Cambridge Christian*, this Court examined whether the decision to prohibit two Christian schools from using the loudspeaker to broadcast a prayer before the kickoff in a state football playoff game by the Florida High School

Athletic Association ("FHSAA"), a "state actor," violated the Free Speech, Free Exercise, and Establishment Clauses of the United States Constitution, as well as those parallel clauses under the Florida Constitution. 942 F.3d at 1222, 1228. The district court had dismissed the entirety of Cambridge Christian School's claims against the FHSAA for failure to state a claim. *Id.* at 1222. As to the free speech claims, the district court concluded that speaking over the loudspeaker was either government speech or, in the alternative, that the loudspeaker "was a nonpublic forum" in which Cambridge Christian School was reasonably restricted from voicing its private speech. *Id.* at 1222–23. As to the free exercise claims, the district court found that the FHSAA did not deny the schools' abilities to pray because the schools were "still allowed to pray together at the center of the football field, albeit without the aid of a loudspeaker system." *Id.* at 1223. Finally, the district court "denied declaratory relief under the Establishment Clauses" of the United States Constitution and the Florida Constitution "on the ground that the controversy was more properly framed under the" respective free speech and free exercise clauses. *Id.*

Ultimately, this Court concluded that "the district court was too quick to dismiss all of Cambridge Christian School's claims out of hand" at the motion to dismiss stage of the litigation because of the "fact-intensive" nature of the government speech inquiry and the limited record. *Id.* This is because this Court "simply d[id] not have enough information to say with any confidence that, if every-thing in the complaint [was] true, speech disseminated over the public-address system was and would have been government speech as a matter of law." *Id.* at 1236. And since this Court could not conclude that the speech was government speech as a matter of law on the limited record, "necessarily ... at least some of [the speech] was private speech," if it was not government speech. *Id.* at 1236. This Court then turned to the district court's alternative finding and concluded that Cambridge Christian School "plausibly alleged only a nonpublic forum and no more," given the restricted nature of the loudspeaker. *Id.* at 1240. This Court also concluded that Cambridge Christian School "plausibly alleged that it was arbitrarily and haphazardly denied access to the forum in violation of the First Amendment." *Id.* at 1223.

[19] [20] [21] [22] [23]Importantly for this appeal, this Court described the factors—history, endorsement, and control—that courts in this Circuit must weigh when determining whether speech constitutes government speech. *Id.* at 1232–36. As to the history factor, courts must "ask whether the type of speech under scrutiny has traditionally 'communicated messages' on behalf of the government." *Id.* at 1232 (quoting *Walker*, 576 U.S. at 211, 135 S.Ct. 2239). As to the endorsement factor, courts must ask "whether the kind of speech at issue is 'often closely identified in the public mind with the government.' " *Id.* (quoting *Summum*, 555 U.S. at 472, 129 S.Ct. 1125). Finally, as to the control factor, courts must ask "whether the relevant government unit 'maintains direct control over the messages conveyed' through the speech in question." *Id.* at 1234–35 (quoting *Walker*, 576 U.S. at 213, 135 S.Ct. 2239). In discussing the control factor, this Court provided the caveat that "[n]o case precedent says that the government must control every word or aspect of speech in ***77** order for the control factor to lean toward government speech." *Id.* at 1235–36.

[24]Unlike *Cambridge Christian*, this appeal presents this Court with a robust enough record to determine whether Mr. Gundy's invocation constitutes government speech. We discuss the three government speech factors—history, endorsement, and control—in turn and why the district court misapplied these factors. These three "factors are neither individually nor jointly necessary for speech to constitute government speech," but "a finding that *all* evidence government speech will almost always result in a finding that the speech is that of the government." *Leake*, 14 F.4th at 1248 (emphasis in original). All three factors lead us to conclude that Mr. Gundy's invocation constitutes government speech.

i. History

To begin, we must "ask whether the type of speech under scrutiny has traditionally 'communicated messages' on behalf of the government." *Cambridge Christian*, 942 F.3d at 1232 (quoting *Walker*, 576 U.S. at 211, 135 S.Ct. 2239). Here, we agree with the district court's findings that "invocations are traditionally limited to a single purpose" of solemnizing "proceedings before legislatures engage in the ... task of governance" and that the "traditional audience of an invocation ... is the legislature itself." But we disagree with the district court's unawareness "of any established tradition of invocations being used to communicate messages on behalf of a governmental body" as being both out of touch with the role of the City Council's particular invocation and the unique role that legislative invocations have played throughout this country's history and tradition.

Because this case involves a legislative invocation, our consideration of the history factor is informed by our prior discussion of the history and tradition of legislative invocations that often arises in the context of an Establishment Clause case. Under the record presented and

the Webb Policy, the City Council "has long maintained a tradition of solemnizing its proceedings by allowing for an opening invocation before each meeting, for the benefit and blessing of the Council." This is nothing new—as we have already discussed, it has long been acknowledged that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," stemming from the "colonial times through the founding of the Republic and ever since." *Marsh*, 463 U.S. at 786, 103 S.Ct. 3330. In fact, "there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id.* at 792, 103 S.Ct. 3330. And, "[a]s a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court.' " *Town of Greece*, 572 U.S. at 587, 134 S.Ct. 1811.

While the invocation is meant for the benefit and the blessing of the City Council, which by itself militates toward a finding of government expression, *see Fields*, 936 F.3d at 158, the general public is still in attendance during the invocation. Indeed, the invocation precedes the City Council's official meetings, which members of the public participate in, making the invocation inherently "governmental in nature." *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008) (O'Connor, J., retired and sitting by designation). Further, the invocation speaker is chosen by an active member of the City Council. Thus, the speaker is an ***78** invited agent of the City Council praying on behalf of the City Council and symbolically expressing "who and what" City Council members represent before the City Council members engage in public lawmaking. *Fields*, 936 F.3d at 158 (quoting *Town of Greece*, 572 U.S. at 588, 134 S.Ct. 1811); *see also Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk*, 758 F.3d 869, 874 (7th Cir. 2014) (noting that "what a chosen agent of the government says" is inherently "part of the government's own operations").

Certainly, the history of the City Council's invocation and the well-established history and tradition of legislative invocations as part of the fabric of this country—akin to the Pledge of Allegiance—militate toward a finding of government speech. *Cf. Leake*, 14 F.4th at 1248 ("The history of military parades in general, and this [p]arade in particular, weighs in favor of finding that the [p]arade was government speech."). Moreover, the format of the City Council's invocation preceding a public meeting in which City Council members will conduct business affairs also militates toward a finding of government speech. Thus, "history establishes both that the medium used here and the message conveyed through it are ones traditionally associated with governments." *Id.* at 1249. For these reasons, the history factor weighs in favor of a government speech finding.

ii. Endorsement

Turning to the endorsement factor, we must ask "whether the kind of speech at issue is 'often closely identified in the public mind with the government.' " *Cambridge Christian*, 942 F.3d at 1232 (quoting *Summum*, 555 U.S. at 472, 129 S.Ct. 1125). Like the history factor, we again agree with many of the district court's findings but disagree with its conclusion. Indeed, we agree that "there are certainly indicia that the [City] Council endorsed" Mr. Gundy's invocation in that the City Council "designated a portion of their public meeting for an invocation, maintained rules and appointed officers dedicated to ensuring an invocation took place, personally invited [Mr. Gundy] to perform the invocation, and allowed the invocation to take place on public property." But we disagree with the district court's assertion that the "endorsement factor is ... complicated by the Establishment Clause" in concluding that the "endorsement factor does not weigh in favor of either party."

[25]As a preliminary matter, we begin with the district court's conclusion that the Establishment Clause complicates the endorsement factor. The district court's apprehension about the Establishment Clause is misguided. Indeed, "[b]ecause 'government speech must comport with the Establishment Clause' anyway, any Establishment Clause–based limits" cannot "change the conclusion that legislative prayer is government speech." *Fields*, 936 F.3d at 159 (citation omitted) (quoting *Summum*, 555 U.S. at 469, 129 S.Ct. 1125); *see also Summum*, 555 U.S. at 482, 129 S.Ct. 1125 (Scalia, J., concurring) (acknowledging the separate analyses for a government speech finding and a breach of the Establishment Clause finding). And, as discussed below, beyond the fact that government speech is confined by the bounds of the Establishment Clause from the outset, this Court has its own Establishment Clause analytical framework, *see Pelphrey*, 547 F.3d at 1277–78, and Mr. Gundy has not alleged an Establishment Clause violation.

Having addressed this preliminary matter, we move to the district court's findings that we agree with. As noted by the district court, the City Council's invocation can be closely identified in the public mind ***79** with the government because the City Council organizes the invocation, it provides the venue for the invocation, it selects the speaker

for the invocation, and then it begins its business meeting. *Cf. Mech*, 806 F.3d at 1076 ("The banners are hung on school fences, and government property is 'often closely identified in the public mind with the government unit that owns the land.' " (quoting *Summum*, 555 U.S. at 472, 129 S.Ct. 1125)). These facts are much like the facts analyzed in *Turner*, *see* 534 F.3d at 354 (noting that "[t]he prayer [was] an official part of every [c]ouncil meeting," the prayer was "delivered as part of the opening" of the meeting along with Pledge of Allegiance, and the speaker was "called on by the [m]ayor"), when it determined that the purpose of the legislative prayer was "governmental in nature." Surely, a member of the public attending the City Council meeting in person or watching the meeting on the City Council's website, on which a public video of Mr. Gundy's invocation is available, would identify the invocation with the City Council, given the occasion. *Cf. Leake*, 14 F.4th at 1249 (discussing how the "[c]ity publicly advertised and promoted the 2019 [p]arade on its website" when analyzing whether the city endorsed the parade).

[26]Moreover, Mr. Gundy, and other speakers, are *chosen* by City Council members to give an invocation "for the benefit and blessing of the Council." And "what a chosen agent of the government says" is "part of [the City Council's] own operations." *Ctr. for Inquiry*, 758 F.3d at 874. Here, the invocation speaker—the chosen agent—is part of the City Council's "ceremonial prayer ... to show who and what" the City Council and its members stand for. *Town of Greece*, 572 U.S. at 588, 134 S.Ct. 1811. Thus, the invocation speaker is "given the chance to pray on behalf of the government." *Turner*, 534 F.3d at 356. And even though the invocation speaker is a private party, the fact that a "private part[y] take[s] part in the ... propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider." *Walker*, 576 U.S. at 217, 135 S.Ct. 2239. Thus, the endorsement factor weighs in favor of a government speech finding.

iii. Control

Finally, we must ask "whether the relevant government unit 'maintains direct control over the messages conveyed' through the speech in question." *Cambridge Christian*, 942 F.3d at 1234–35 (quoting *Walker*, 576 U.S. at 213, 135 S.Ct. 2239). We note that "[n]o case precedent says that the government must control every word or aspect of speech in order for the control factor to lean toward government speech," and we do not create such precedent now. *Id.* at 1235–36; *accord Leake*, 14 F.4th at 1250 ("The government-speech doctrine does not require omnipotence."). This is because the Supreme Court and this Court have cautioned against judicial scrutiny of the *content* of prayers in all but the most extreme circumstances. *See, e.g.*, *Pelphrey*, 547 F.3d at 1274. And, as discussed below, we need not address the content of Mr. Gundy's invocation to determine that the City Council does exert control over the messages conveyed by invocation speakers. We, therefore, disagree with the district court's conclusion that the control factor did not weigh in the favor of a government speech finding.

The City Council exerts control over the messages conveyed by invocation speakers because inviting speakers to give invocations inherently exhibits governmental control over the invocation messages from the outset of the selection process. In Mr. ***80** Gundy's example, Mr. Gundy was "the literal speaker," but "he [was] allowed to speak only by virtue of his" being invited by a City Council member. *See Turner*, 534 F.3d at 355. And while the City Council did not purport to have initial editorial rights over the exact content of the invocations, selecting one speaker over another exhibits control.

Indeed, selecting a sectarian speaker versus a nonsectarian speaker plausibly could lead to different messages conveyed through an invocation. *See id.* at 354–55 ("[T]he Council itself exercises substantial editorial control over the speech in question, as it has prohibited the giving of a sectarian prayer."); *see also Barker v. Conroy*, 921 F.3d 1118, 1132 (D.C. Cir. 2019) ("[The United States House of Representatives'] requirement that prayers must be religious nonetheless precludes [the plaintiff] from doing the very thing he asks us to order [the House] to allow him to do: deliver a secular prayer."). Taken to the logical extreme, it is plausible that a member of a hate group may give a vastly different invocation than, say, a priest or a rabbi. In this sense, the selection process for choosing invocation speakers gives the City Council inherent control over invocations and their messages from the outset, which is why maintaining a selection process and a "prayer opportunity as a whole" that are consistent with the confines of the Establishment Clause is so important. *See, e.g.*, *Town of Greece*, 572 U.S. at 585–86, 134 S.Ct. 1811. Thus, the control factor weighs in favor of deeming Mr. Gundy's invocation government speech.

* * * *

Ultimately, all three factors point to a finding of government speech. For this reason, we agree with other circuits that have examined the topic of legislative prayer constituting government speech—"[a]t bottom, the [City Council] is the speaker" and Mr. Gundy's invocation is

government speech. *See, e.g.*, *Fields*, 936 F.3d at 158; *see also Morris Cnty. Bd. of Chosen Freeholders v. Freedom From Religion Found.*, —— U.S. ——, 139 S. Ct. 909, 910–11, 203 L.Ed.2d 425 (2019) (Kavanaugh, J., respecting denial of cert.) (citing *Marsh* and *County of Allegheny* to distinguish case being denied certiorari from instances "where the government itself is engaging in religious speech, such as a government-sponsored prayer or a government-sponsored religious display"). We find support for this position in the fact that a private speech and forum analysis would place this Court in the precarious position of comparing the contents of one invocation to another to determine whether any restriction on the delivery of an invocation was applied in an arbitrary or haphazard manner, as the district court did when it conducted such analysis and compared the contents of Mr. Gundy's invocation to those of Dr. Louh's invocation. In sum, Mr. Gundy's invocation before the City Council is government speech, confined by the bounds of the Establishment Clause. *See Summum*, 555 U.S. at 468, 129 S.Ct. 1125.

B. Mr. Gundy's Appeal Must Fail

Mr. Gundy brought claims under the Free Speech and Free Exercise Clauses of the United States Constitution. He did not bring a claim under the Establishment Clause. And since his invocation constitutes government speech, his speech is "not susceptible to an attack on free-speech[ ] [or] free-exercise ... grounds." *Fields*, 936 F.3d at 163; *accord Simpson*, 404 F.3d at 288 ("[T]he standards for challenges to government speech ... require that [the plaintiff's free speech and free exercise claims] must be rejected."). As such, this Court need not turn to the factors articulated in *Pelphrey*—namely, ***81** weighing (1) the identity of the invocation speaker, (2) the process by which the invocation speaker is selected, and (3) the nature of the prayer—and potentially parse through Mr. Gundy's invocation to determine if the Establishment Clause has been violated.

IV. CONCLUSION

While we hold that the district court erred in deeming Mr. Gundy's invocation to be private speech in a nonpublic forum, we AFFIRM the district court's orders on the alternative ground that the invocation constitutes government speech, not subject to attack on free speech or free exercise grounds.

AFFIRMED.

All Citations

50 F.4th 60, 29 Fla. L. Weekly Fed. C 1842

Footnotes

1 This opinion refers to the City of Jacksonville, Florida, as the "City" and to the Jacksonville City Council as the "City Council."

2 *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

3 The district court found that the Bowman Memorandum could not be seen as a municipal policy under the *Monell* doctrine because the Bowman Memorandum "was not in effect when [Mr. Gundy] gave his invocation."

4 "Florida's courts have treated the Free Speech and Free Exercise Clauses of the Florida Constitution as being coextensive with those embodied in the United States Constitution, and have adopted the same principles and methods of analysis." *Cambridge Christian*, 942 F.3d at 1228 n.2; *see also Cafe Erotica v. Fla. Dep't of Transp.*, 830 So. 2d 181, 183 (Fla. Dist. Ct. App. 2002) ("The scope of the Florida Constitution's protection of freedom of speech is the same as required under the First Amendment. ... Thus, this [c]ourt applies the principles of freedom of speech as announced in the decisions of the Supreme Court of the United States."); *Toca v. State*, 834 So. 2d 204, 208 (Fla. Dist. Ct. App. 2002) (applying the same analysis when reviewing claims under the Free Exercise Clause of the United States Constitution and the Florida Constitution). For this reason, we proceed by addressing Mr. Gundy's claims under the United States Constitution, and our analysis applies in full to Mr. Gundy's claims under the Florida Constitution.

5 The Free Speech, Free Exercise, and Establishment Clauses of the First Amendment have been incorporated, via the Fourteenth Amendment, to apply to the States and their subdivisions. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Schneider v. Town of Irvington*, 308 U.S. 147, 160, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

6 We note decisions from other circuits concluding that legislative prayer constitutes government speech, not private speech, for purposes of the First Amendment. *Simpson*, 404 F.3d at 288 (concluding that invocation before county board of supervisors constituted government speech subject only to the confines of the Establishment Clause under the First Amendment); *id.* at 289 (Niemeyer, J., concurring in judgment) ("[W]hen members of a governmental body participate in a prayer for themselves and do not impose it on or prescribe it for *the people,* the religious liberties secured *to the people* by the First Amendment are not *directly* implicated, and the distinct, more tolerant analysis articulated in *Marsh* governs." (emphasis in original)); *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008) (O'Connor, J., retired and sitting by designation) (explaining that, because legislative prayer opening each city council session constituted government speech, free speech and free exercise rights of council member, who had challenged the policy requiring the opening prayer to be nondenominational, were not violated); *Fields*, 936 F.3d at 147 (stating that, for claims arising under "Free Exercise, Free Speech, and Equal Protection Clauses," "legislative prayer is government speech not open to attack via those channels"); *see also Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk*, 758 F.3d 869, 874 (7th Cir. 2014) (noting that *Marsh* and *Town of Greece* concern "what a chosen agent of the government says as part of the government's own operations," but "do *not* concern how a state regulates private conduct" (emphasis in original)).

End of Document

In the United States Court of Appeals
For the Eleventh Circuit

No. 21-11298

REGINALD L. GUNDY,

Plaintiff-Appellant,

versus

CITY OF JACKSONVILLE FLORIDA,
a Municipality of the State of Florida,
AARON L. BOWMAN,
individually,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:19-cv-00795-BJD-MCR

ISSUED AS MANDATE: 10/31/2022

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: September 30, 2022

For the Court: DAVID J. SMITH, Clerk of Court

528 F.Supp.3d 1257
United States District Court, M.D. Florida, Jacksonville Division.

Reginald L. GUNDY, Plaintiff,
v.
CITY OF JACKSONVILLE FLORIDA, a Municipality of the State of Florida, Defendant.

Case No. 3:19-cv-795-BJD-MCR
|
Signed 03/22/2021

Synopsis

Background: Pastor brought § 1983 action against municipality, alleging that his rights of free speech and free exercise of religion were violated when city council president turned off pastor's microphone during prayer invocation at city council meeting, subsequently posted a critical social media message about pastor, and proposed new guidance on future invocations. Municipality's motion to dismiss exercise of religion claim was granted and municipality filed motion for summary judgment.

Holdings: The District Court, Brian Davis, J., held that:

[1] invocation was private speech rather than government speech;

[2] council meeting was a nonpublic forum;

[3] council rule which gave president general authority over meetings constituted a "policy" for purposes of municipal liability;

[4] municipality's policy of giving president general discretion over council meetings was not a facially unreasonable restriction on speech;

[5] president's conduct was not viewpoint discrimination; and

[6] there was no evidence that president or predecessors had arbitrarily or haphazardly enforced council rules on prayer invocations to engage in viewpoint discrimination.

Motion granted.

West Headnotes (20)

[1] **Federal Civil Procedure** Weight and sufficiency

A mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion for summary judgment. Fed. R. Civ. P. 56.

[2] **Constitutional Law** Government Meetings and Proceedings
Religious Societies Authority, rights, and privileges

Pastor's prayer invocation at city council meeting was private speech rather than government speech, and thus invocation's contents, which included political criticism of council and incumbent mayor, were protected by the First Amendment right to free speech in pastor's § 1983 action against municipality, even though council memorandum stated that invocation was meant for council's benefits and placed restraints on invocations, such as prohibiting them from disparaging any other faith or belief. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

[3] **Constitutional Law** Government Meetings and Proceedings
Municipal Corporations Rules of procedure and conduct of business

City council meeting was a nonpublic forum for purposes of the First Amendment in pastor's § 1983 action against municipality alleging that his right to free speech was violated when he was interrupted and had his microphone turned off during a prayer invocation at council meeting; invocation period for council meetings was limited to people expressly invited to speak and reserved for a specific type of address. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

[4] **Civil Rights**🔑Liability of Municipalities and Other Governmental Bodies
Civil Rights🔑Governmental Ordinance, Policy, Practice, or Custom

A city or municipality may be liable in a § 1983 action only where the municipality itself causes the constitutional violation at issue; a plaintiff must establish that an official policy or custom of the municipality was the moving force behind the alleged violation. 42 U.S.C.A. § 1983.

[5] **Civil Rights**🔑Acts of officers and employees in general; vicarious liability and respondeat superior in general

Pursuant to *Monell*, a municipality cannot be held liable under § 1983 solely because it employs a tortfeasor—or, in other words, a municipality cannot be liable under § 1983 on a respondeat superior theory. 42 U.S.C.A. § 1983.

[6] **Civil Rights**🔑Governmental Ordinance, Policy, Practice, or Custom
Civil Rights🔑Lack of Control, Training, or Supervision; Knowledge and Inaction

To impose liability on a municipality under § 1983, a plaintiff must show: (1) that his constitutional rights were violated, (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right, and (3) that the policy or custom caused the violation. 42 U.S.C.A. § 1983.

[7] **Civil Rights**🔑Governmental Ordinance, Policy, Practice, or Custom

A "policy," for purposes of municipal liability under § 1983, is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality. 42 U.S.C.A. § 1983.

[8] **Civil Rights**🔑Governmental Ordinance, Policy, Practice, or Custom

The requirement for municipal liability under § 1983 that the alleged constitutional violation be a result of municipal policy is intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. 42 U.S.C.A. § 1983.

[9] **Civil Rights**🔑Governmental Ordinance, Policy, Practice, or Custom

Municipal liability attaches under § 1983 only where deliberate choice to follow course of action is made from among various alternatives by city policymakers. 42 U.S.C.A. § 1983.

[10] **Civil Rights**🔑Governmental Ordinance, Policy, Practice, or Custom

City council rule which gave council president general authority over council meetings constituted a "policy" for purposes of municipal liability under § 1983, in pastor's action alleging that his right to free speech was violated when his microphone was turned off during a prayer invocation at council meeting; all council rules were adopted by ordinance and incorporation of council rules into ordinance code was a deliberate choice made by city council majority. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

[11] **Constitutional Law**🔑Justification for exclusion or limitation

In a nonpublic forum, the government can regulate speech to preserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. U.S. Const. Amend. 1.

[12] **Constitutional Law**🔑Justification for exclusion or limitation

The government can impose content-based restrictions on speech in a nonpublic forum, including those related to political advocacy, that it could not otherwise impose in a more public forum. U.S. Const. Amend. 1.

[13] **Constitutional Law**🔑Justification for exclusion or limitation

The government's ability to regulate speech in a nonpublic forum is not absolute. U.S. Const. Amend. 1.

[14] **Constitutional Law**🔑Justification for exclusion or limitation

Restrictions on speech are considered reasonable when they are consistent with the government's legitimate interest in preserving a nonpublic forum for its intended purpose. U.S. Const. Amend. 1.

[15] **Constitutional Law**🔑Viewpoint or idea discrimination

Restrictions on speech must be viewpoint neutral. U.S. Const. Amend. 1.

[16] **Constitutional Law**🔑Freedom of Speech, Expression, and Press

Restrictions on speech cannot be applied in an arbitrary or haphazard manner. U.S. Const. Amend. 1.

[17] **Constitutional Law**🔑Government Meetings and Proceedings
Municipal Corporations🔑Rules of procedure and conduct of business

Municipality's policy of giving city council president general discretion over council meetings was not a facially unreasonable restriction on speech, as would support municipal liability under § 1983 in pastor's action alleging that his right to free speech was

violated when president turned off pastor's microphone during a prayer invocation at council meeting; council rule only allowed president to enforce content-based restrictions on speech to ensure an invocation was preserved for its intended purpose, and neither rule nor council memorandum expressly authorized president to engage in viewpoint discrimination or unreasonable restrictions on free speech. 42 U.S.C.A. § 1983; U.S. Const. Amend. 1.

[18] **Constitutional Law**🔑Justification for exclusion or limitation

When a policy regulating speech in a nonpublic forum is facially reasonable, claims for violation of the right to free speech hang on whether the policy was: (1) used in a way that discriminated based on a speaker's viewpoint, or (2) enforced arbitrarily. U.S. Const. Amend. 1.

[19] **Constitutional Law**🔑Government Meetings and Proceedings
Municipal Corporations🔑Rules of procedure and conduct of business
Religious Societies🔑Authority, rights, and privileges

City council president's interruption of pastor and turning-off of pastor's microphone during prayer invocation at council meeting when pastor started to criticize council and mayor were not viewpoint discrimination, as would support municipal liability under § 1983 in pastor's action alleging violation of his right to free speech in a nonpublic forum; president's comment to pastor that "I'm going to ask you to – make it a spiritual prayer" sought to preserve invocation's intended purpose of solemnizing proceedings by inviting lawmakers to reflect upon shared ideals and common ends, president acted consistently with municipality's viewpoint-neutral policy on invocations, and president testified that he would have censored any invocation which was critical of any political figure. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

[20] **Constitutional Law**🔑Government Meetings and Proceedings
Municipal Corporations🔑Rules of procedure and conduct of business

There was no evidence that city council president or his predecessors had arbitrarily or haphazardly enforced council rules on prayer invocations as to engage in viewpoint discrimination, and thus pastor could not prevail on § 1983 claim against municipality alleging that his right to free speech was violated when he was interrupted and had his microphone turned off during a prayer invocation at council meeting. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

Attorneys and Law Firms

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Craig D. Feiser, Jason R. Teal, Jon Robert Phillips, Gabriella Young, Mary Margaret Giannini, City of Jacksonville Office of General Counsel, Jacksonville, FL, for Defendant.

ORDER

BRIAN J. DAVIS, United States District Judge

THIS CAUSE is before the Court on the City of Jacksonville, Florida's (the "City" and/or "Defendant")

Motion for Summary Judgment (Doc. 37; the "Motion") and the parties briefing related thereto (Docs. 41, 52). The Motion is fully briefed and ripe for review.

I. Findings of Fact

Many of the facts in this case are undisputed. Plaintiff is a senior pastor at Mt. Sinai Missionary Baptist Church in Jacksonville, Florida. (Doc. 38-3 at 2).[1] He was invited by Anna Brosche, a member of the City Council and mayoral candidate, to give an invocation[2] at the March 12, 2019 City Council meeting. Id. at 5. Plaintiff prepared his remarks in advance and brought notes with him on March 12, 2019. (Doc. 38-3 at 68-69). A complete transcript of Plaintiff's prayer from March 12, 2019 is included in the record. (Doc. 38-2). However, suffice it to say Plaintiff's prayer vacillated between appeals to a higher power ***1261** for divine blessing[3] and open criticism of the City Council and the incumbent administration.[4]

During Plaintiff's prayer, Aaron Bowman, who was Council President at the time, interrupted Plaintiff and stated "Mr. Gundy, I'm going to ask you – I'm going to ask you to – make it a spiritual prayer. Id. at 4-5. Plaintiff continued on with his prayer for a short time before Mr. Bowman cut off Plaintiff's microphone. Id. at 6. Mr. Bowman, as Council President, had the ability to cut off access to the microphone pursuant to the body's procedural rules – specifically, the Rules of the Council of the City of Jacksonville (the "Council Rules"), which gives the Council President general authority over City Council meetings. Council Rule 1.202. Plaintiff and Ms. Brosche believed Mr. Bowman's decision to silence Plaintiff was motivated by Mr. Bowman's support of Ms. Brosche's opponent in the in-progress mayoral race: the incumbent mayor, Lenny Curry. (Doc. 16 at ¶ 38); (Doc. 41-1).

Following the City Council meeting, Mr. Bowman took two actions pertinent to Plaintiff's claims. The day after Plaintiff's invocation, Mr. Bowman posted a message on social media that was critical of the manner in which Plaintiff's invocation was conducted and expressed thinly veiled contempt for Ms. Brosche. (Doc. 38-3). He then prepared a memorandum outlining guidance for the City Council on future invocations (the "Bowman Memo"). (Doc. 38-4 at 154-56). He sought to formally adopt his guidance as City policy by proposing new legislation incorporating it. Id. at 159-61. The measure was ultimately withdrawn by Mr. Bowman and no City action was taken with respect to the invocation policy. Id. at 166.

Plaintiff filed this lawsuit on July 2, 2019, which included claims under 42 U.S.C. section 1983 (hereafter, "Section 1983") and the Florida Constitution for alleged violations of Plaintiff's free speech and free exercise rights. (Doc. 1). The City moved to dismiss the action (Doc. 18), which was partially granted (Doc 36). The only claims which remain at issue are Plaintiff's free speech claims under Section 1983 and the Florida Constitution in Counts II and IV of the Amended Complaint, respectively. Id.

II. Legal Standard

[1]Under the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The record to be considered on a motion for summary judgment may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). An issue is genuine when the evidence is such that a reasonable jury could return a verdict in favor of the non-movant. See Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (quoting Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 919 (11th Cir. 1993)). "[A] mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion ***1262** for summary judgment." Kesinger ex rel. Estate of Kesinger v. Herrington, 381 F.3d 1243, 1247 (11th Cir. 2004) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

The party seeking summary judgment bears the initial burden of demonstrating to the Court, by reference to the record, that there are no genuine issues of material fact to be determined at trial. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). "When a moving party has discharged its burden, the non-moving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 593-94 (11th Cir. 1995) (internal citations and quotations omitted). Substantive law determines the materiality of facts, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248, 106 S.Ct. 2505. In determining whether summary

judgment is appropriate, a court "must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995) (citing Dibrell Bros. Int'l, S.A. v. Banca Nazionale Del Lavoro, 38 F.3d 1571, 1578 (11th Cir. 1994)).

III. Discussion

[2]The Court begins by noting that two issues preliminarily addressed in the Court's order on the City's Motion to Dismiss (Doc. 36) remain unchanged. The Court previously determined there were elements of Plaintiff's invocation that were private speech, as opposed to government speech. Id. at 5-10. The City has maintained its position that Plaintiff's invocation was government speech and therefore not protected by the First Amendment. (Doc. 37 at 6-7). However, the only additional fact provided in support of the City's position is the Webb Policy adopted by the City in 2010 with respect to invocations. (Doc. 38-4 at 150-51). The Webb Policy, which was still in effect at the time Plaintiff gave his invocation, emphasized that the invocation is meant for the City Council's benefit and placed some restraints on the content of invocations. Id. Specifically, the Webb Policy stated invocations "must not be exploited to ... disparage any other faith or belief." Id. at 151. While this factor may tilt the "control" factor discussed in the Court's prior Order (Doc. 36), this fact alone is insufficient to alter the Court's prior analysis. As such, the factors set forth in Cambridge Christian School, Inc. v. Florida High School Athletic Assn., Inc., continue to support a finding that the contents of Plaintiff's prayer was his own private speech. 942 F.3d 1215, 1240 (11th Cir. 2019).

[3]The Court also found the forum at issue in this case was a nonpublic forum. Id. at 10-12. The Court previously found that the allegations in the Amended Complaint (Doc. 16) indicated the invocation period during City Council meetings were limited to people expressly invited to speak by the City Council and reserved for a specific type of address, as outlined in the Webb Policy. (Doc. 36 at 11-12). This type of forum is clearly distinct and set apart from a more public forum, like the public comments portion of each City Council meeting. See, e.g. Cleveland v. City of Cocoa Beach, Fla., 221 F. App'x 875, 878 (11th Cir. 2007) (noting the distinction between the government's ability to restrict speech to specific topics in a city council meeting versus the limited authority to restrict speech in public forums). The parties did not submit any evidence or argument against the Court's earlier determination ***1263** and the Court finds no reason to deviate from its earlier finding now that the record is more developed.

[4] [5] [6]With those determinations in mind, the Court turns to the City's first argument related to the scope of municipal liability under Section 1983. (Doc. 37 at 10). A city or municipality may be liable in a Section 1983 action "only where the municipality itself causes the constitutional violation at issue." Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., 402 F.3d 1092, 1115 (11th Cir. 2005) (citations and emphasis omitted). Thus, a plaintiff must establish that an official policy or custom of the municipality was the "moving force" behind the alleged constitutional deprivation. See Monell v. Dept. of Social Services, 436 U.S. 658, 693–94, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Under Monell, "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." Id. at 691, 98 S.Ct. 2018. To impose liability on a municipality, "a plaintiff must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004) (internal citation omitted).

[7] [8] [9]"A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality." Sewell v. Town of Lake Hamilton, 117 F.3d 488, 489 (11th Cir. 1997) (internal citation omitted). The policy requirement is "intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." Grech v. Clayton Cnty., 335 F.3d 1326, 1329 n.5 (11th Cir. 2003) (en banc) (emphasis and internal quotations omitted). Indeed, municipal liability attaches under Section 1983 only where " 'a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers." City of Canton v. Harris, 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (quoting Pembaur v. Cincinnati, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)).

[10]Plaintiff contends the Council President's general control over the legislative session is the violative policy or custom in this case that implicates municipal liability.[5] (Doc. 41 at 16-17). Council Rule 1.202 is undoubtedly a "policy" for purposes of the Court's Monell analysis. The

Council Rules as a whole "are adopted by ordinance ... [and] are declared to be general and permanent ordinances of the City and they shall continue in force according to their tenor notwithstanding that they are not codified in the Ordinance Code." Jacksonville Ordinance Code § 10.101. Incorporation of the Council Rules into the Ordinance Code was the type of "deliberate choice" made by a majority of the City Council that constitutes municipal action.

While the Court notes that Council Rule 1.202 is not facially restrictive of any particular content or viewpoint, it does empower the Council President to limit speech at City Council meetings. If the Council President were to apply Council Rule 1.202 in a manner that results in an unreasonable restriction on Plaintiff's First Amendment rights, that application can be fairly construed as a policy which satisfies ***1264** the requirement for municipal action under Monell. See Lozman v. City of Riviera Beach, 39 F. Supp. 3d 1392, 1407 (S.D. Fla. 2014) (analyzing similar "Rules of Decorum" related to expelling an individual from council meetings and finding them to be sufficient "policy" for purposes of Monell).

[11]The next question for the Court's consideration, then, is whether the City's restriction on Plaintiff's speech was reasonable – i.e., whether Plaintiff's First Amendment rights were violated. In a nonpublic forum like the one at issue in this case, the City can regulate speech to preserve the forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Minn. Voters Alliance v. Mansky, —— U.S. ——, 138 S. Ct. 1876, 1885, 201 L.Ed.2d 201 (2018) (quoting Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

[12]The City's flexibility in limiting speech is thus at its highest when the speech is made in a nonpublic forum. See id. For example, the government can impose content-based restrictions, including those related to political advocacy, in a nonpublic forum that it could not otherwise impose in a more public forum. See id. Indeed, the Supreme Court has compared the rights of the government to limit speech in nonpublic forums to those held by private property owners. Id. (quoting Adderley v. Fla., 385 U.S. 39, 47, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966)) (directing courts to apply "a distinct standard of review to assess speech restrictions in nonpublic forums because the government, 'no less than a private owner of property,' retains the 'power to preserve the property under its control for the use to which it is lawfully dedicated.' ").

[13] [14] [15] [16]That said, the City's ability to regulate speech in a nonpublic forum is not absolute. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992)) ("nonpublic forum status 'does not mean that the government can restrict speech in whatever way it likes.' "). Restrictions on speech are considered reasonable when they are consistent with the City's legitimate interest in preserving the forum for its intended purpose. See Cambridge Christian, 942 F.3d at 1244; see also Perry Educ. Assn., 460 U.S. at 50-51, 103 S.Ct. 948. Additionally, restrictions on speech must be viewpoint neutral. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828-29, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."). Restrictions also cannot be applied in an arbitrary or haphazard manner. Cambridge Christian, 942 F.3d at 1240 (citing Mansky, 138 S. Ct. at 1888).

[17]In this case, the Court finds the restrictions on speech inherent in the City's policy of giving general discretion over City Council meetings to the Council President are not unreasonable on their face. As applied to invocations, the authority conferred under Council Rule 1.202 would allow a Council President to enforce content-based restrictions on speech to ensure an invocation is preserved for its intended purpose. See Perry Educ. Assn., 460 U.S. at 50-51, 103 S.Ct. 948. Moreover, nothing in Council Rule 1.202 or the Webb Policy expressly authorizes the Council President to engage in viewpoint discrimination or unreasonable restrictions on free speech.

***1265** [18]Since the policy itself is facially reasonable, Plaintiff's claims hang on whether the policy was: (1) used in a way that discriminated based on a speaker's viewpoint, or (2) enforced arbitrarily. See Cambridge Christian, 942 F.3d at 1240. Plaintiff asserts both violations exist in this case. Plaintiff believes he was interrupted during his invocation and had his microphone shut off solely because his prayer was critical of Mr. Bowman's preferred mayoral candidate, making it viewpoint discrimination. (Doc. 41 at 19). Plaintiff also cites to another allegedly similar prayer given by Dr. Nicholas G. Louh that was not censored by Mr. Bowman as evidence that the City's policy was being arbitrarily and haphazardly enforced. Id. at 6. The Court disagrees.

[19]First, the Court finds Mr. Bowman's actions were not viewpoint discrimination. Mr. Bowman's comment when

interrupting Plaintiff and the subsequent removal of Plaintiff's amplification were for the stated purpose of preserving the invocation for its intended purpose. That purpose, according to the City, was to maintain "a tradition of solemnizing its proceedings ... for the benefit and blessing of the Council." (Doc. 38-4 at 150). The City accomplished this by permitting an invocation that was "solemn and respective [sic] in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing" (Id. at 147) (citing Town of Greece. NY v. Galloway, 572 U.S. 565, 582-83, 134 S.Ct. 1811 (2014)). The City even expressly prohibited the invocation from being "exploited to ... disparage any other faith or belief" (Doc. 38-4 at 151). Taken together, it is clear the City set aside time for an invocation for uplifting, uncontentious, and unifying purposes. See Am. Legion v. Am. Humanist Assoc., —— U.S. ——, 139 S. Ct. 2067, 2088, 204 L.Ed.2d 452 (2019) (noting the original purpose of legislative prayer was designed to "solemnize" proceedings, "unifying those in attendance as they pursued a common goal of good governance.").

During his invocation, Plaintiff's remarks were at times objectively disparaging of the City Council and the incumbent administration. (See Doc. 38-2 at 4). While the remarks might have been entirely appropriate if delivered in a more public forum or even Plaintiff's pulpit, they were subject to the reasonable and viewpoint-neutral limitations set by the City for the invocation period – a nonpublic forum. See Cleveland, 221 F. App'x at 878-79 (affirming a council rule that prohibited attendees at a city council meeting from wearing clothing with political messages because it was an appropriate content-based restriction that was viewpoint neutral). Therefore, by restricting Plaintiff's prayer when it became contentious and divisive, Mr. Bowman acted consistently with the City's viewpoint-neutral policy on invocations and preserved the forum for its intended purpose of unification. See Am. Legion, 139 S. Ct. at 2088 (stating "legislative prayer needed to be inclusive, rather than divisive," to accomplish its unifying purpose).

Equally important is Mr. Bowman's testimony that he would have censored any invocation that was critical of any political figure, regardless of party affiliation. Id. at 27-28. This evinces Mr. Bowman's apolitical purpose in enforcing Council Rule 1.202 in the manner that he did and further affirms the viewpoint-neutral nature of Council Rule 1.202. The facts underlying these determinations are undisputed[6] and ***1266** do not establish that any viewpoint discrimination occurred. Rather, they prohibited Plaintiff's invocation from straying away from its enumerated purpose.

[20]Second, Plaintiff has not succeeded in establishing a pattern or practice where the Council President – whoever it might be – used his or her general powers under Council Rule 1.202 to engage in viewpoint discrimination through arbitrary or haphazard enforcement. Plaintiff points to Mr. Bowman's comment regarding his discretionary authority under Council Rule 1.202 as evidence that Mr. Bowman arbitrarily and haphazardly exercised his authority. In his deposition, Mr. Bowman compared determining when to censor content at a City Council meeting to his appreciation for art: "I don't know it until I see it ...." Doc. 38-4 at 14. While Mr. Bowman's subjective understanding of his discretion may lend itself to arbitrary enforcement, the inquiry is not whether Mr. Bowman's interpretation of his authority could have resulted in a violation. Instead, the Court must look at whether any Council President's use of the discretion — however he or she interpreted it — was in fact arbitrary or haphazard.

In that regard, Plaintiff has not presented any evidence that Mr. Bowman or any other Council President actually enforced the Council Rules arbitrarily. There were a number of things that could have indicated the City engaged in arbitrary or haphazard enforcement of Council Rule 1.202 in this case. For example, if Council Presidents routinely interrupted invocations when a speaker expressed a particular viewpoint, that would potentially be indicative of arbitrary enforcement. Likewise, evidence of Council Presidents routinely failing to interrupt when a person invited to offer an invocation was disparaging toward Ms. Brosche or those affiliated with her politically would have bolstered Plaintiff's argument.

However, nothing in the record evinces a pattern or practice by Mr. Bowman or any Council President of using Council Rule 1.202 to censor content in an invocation in an inconsistent manner. In fact, Plaintiff's own evidence suggests Council Rule 1.202 had never been enforced to interrupt an invocation prior to Plaintiff's prayer. (Doc. 41-1 at 3). This significantly limits the type of evidence available to Plaintiff to establish arbitrary or haphazard enforcement.

To prevail, then, Plaintiff needed evidence that Council Presidents, pursuant to Council Rule 1.202 and the applicable invocation policy, allowed disparaging or divisive remarks to be made of the City Council or the executive branch during an invocation without interruption. The sole example cited by Plaintiff, Dr. Louh's invocation on August 29, 2021 (Doc. 38-5), is hardly comparable. For one, it was given three days

following the fatal mass shooting at the Jacksonville Landing,[7] providing much-needed context for the remarks that acknowledged violence in the City.

***1267** More saliently, however, is the lack of divisive or accusatory remarks during Dr. Louh's invocation. While it is somber and reflective in reference to violence in the City of Jacksonville, it refrains from placing blame on the legislature or executive branch for that violence. That restraint is a significant differentiation from Plaintiff's invocation, which condemned the City Council for being unrepentant and accused the executive branch of various immoral and unethical actions. (Doc. 38-2 at 4).

The distinction between the invocations also undermines Plaintiff's argument. Contrary to Plaintiff's position, the two invocations were not substantially similar and therefore do not evidence that Mr. Bowman was enforcing the Council Rules arbitrarily and haphazardly by only censoring Plaintiff's invocation. Since no other evidence on this matter was presented,[8] the Court finds summary judgment is appropriate.

To conclude, the Court wants to make two things clear with respect to its ruling. One, the City prevailed in this action because the record does not reflect the City had a history of arbitrary enforcement of Council Rule 1.202. On a different record or if actions of the Council President result in arbitrary enforcement, a different outcome could result. Two, the Court reiterates that it is not meant to be the arbiter of what is allowable "prayer" and what is not. As cautioned by the Supreme Court, if courts are tasked with acting "as supervisors and censors of religious speech," the level of government involvement in religious matters will become far greater than it is now and risks creating an impermissible civic religion. Town of Greece, 572 U.S. at 581, 134 S.Ct. 1811.

Accordingly, after due consideration, it is

ORDERED:

1. Defendant's Motion for Summary Judgment (Doc. 37) is GRANTED.

2. The Clerk of Court is **DIRECTED** to enter judgment in favor of Defendant consistent with this Order, terminate all pending motions, and close this file.

DONE and **ORDERED** in Jacksonville, Florida this 22nd day of March, 2021.

All Citations

528 F.Supp.3d 1257

Footnotes

1 The depositions of Plaintiff and Aaron Bowman have been submitted in condensed form, rendering citation to specific pages problematic. (See Docs. 38-3, 38-4). When the Court cites to a page number for anything that is on the docket in this case, the Court is referring to the page numbering generated by CM/ECF that is printed as a header at the top of each document.

2 The City has a practice of opening each legislative session with an invocation or prayer. The invocation period has been governed by a memorandum prepared by John D. "Jack" Webb on July 22, 2010 (Doc. 38-4 at 150-51; the "Webb Policy"). The Webb Policy states, in pertinent part:

> The City Counsel for the consolidated City of Jacksonville has long maintained a tradition of solemnizing its proceedings by allowing for an opening invocation before each meeting, for the benefit and blessing of the Council.... However, legislative invocations must not be exploited to proselytize or advance any one faith or belief, or to disparage any other faith or belief, and must not create the impression that the legislative body is affiliated, or intends to affiliate, with any particular faith or belief.

Id.

3 Plaintiff began his prayer by addressing the "Eternal God our father," (Doc. 38-2 at 3), and at various points asked for blessing for the community, the incumbent mayor, and the Council. Id. at 5.

4 Plaintiff condemned the Council's refusal to "seek forgiveness for slavery and over 50 years of neglect since consolidation" (Doc. 38-2 at 4) and accused the incumbent mayor and his administration of intimidation, bullying, cronyism, and nepotism. Id.

5 Plaintiff also makes reference to the subsequent Bowman Memo, though as the Court previously noted it cannot be a "policy" for purposes of Monell since it was not in effect when Plaintiff gave his invocation.

6 Plaintiff's efforts to dispute these facts are unavailing. Plaintiff's subjective understanding for why his microphone was cut off has no bearing on whether discrimination actually occurred. Similarly, Ms. Brosche's comment that Mr. Bowman's actions "appeared to me to be based upon Mr. Bowman's disagreement with the viewpoint expressed by [Plaintiff]" (Doc. 41-1 at 3) are not determinative of whether viewpoint discrimination occurred. The only evidence of Mr. Bowman's subjective intent is contained in his deposition testimony and the response he prepared to a constituent regarding the incident (Doc. 38-4 at 162-63), both of which evidence his actions were designed to preserve the invocation as a practice and ensure it was confined to its stated legislative purpose.

7 The Court takes judicial notice of the date of the incident and the fact that it occurred under Federal Rule of Evidence 201. See https://www.iacksonville.com/news/20180826/3-dead-including-suspect-in-mass-shooting-at-jacksonville-landing/1 (last accessed March 17, 2021).

8 Plaintiff's lack of any evidence that Mr. Bowman or another Council President enforced the Council Rules in such a manner that allowed others to make divisive or disparaging remarks about political figures is notable. Jacksonville has had mayors from both sides of the political aisle and has allowed legislative prayer during different administrations. The lack of any evidence on this issue has proven fatal to Plaintiff's claim of arbitrary or haphazard enforcement of Council Rule 1.202.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

REGINALD L. GUNDY,

Plaintiff,

v. Case No. 3:19-cv-795-J-39MCR

CITY OF JACKSONVILLE FLORIDA, a Municipality of the State of Florida and AARON L. BOWMAN, individually,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Defendants' Amended Motion to Dismiss Amended Complaint with Prejudice (Doc. 28) and Plaintiff's response thereto (Doc. 31).

I. Background

The Council of the City of Jacksonville (the "Council"), which is the legislative body of the City of Jacksonville's consolidated government (the "City), opens each Council meeting with an invocation. (Doc. 16 at ¶¶ 8, 9); see also Rule 4.301(a), Rules of the Council of the City of Jacksonville (the "Council Rules").[1] The Council's decision to do so has been the subject of prior debate, which led to the publication of a memorandum dated September 20, 2014 by Jason Gabriel, General Counsel for the City, regarding the legality of invocations at legislative meetings and the metes and bounds of such invocations. (Doc. 16 at Ex. B).

[1] The Council Rules are accessible online at https://www.coj.net/city-council/docs/councilrules/rules-of-council-updated-2020-03-20.aspx (last accessed October 14, 2020).

Plaintiff is an ordained pastor at Mt. Sinai Missionary Baptist Church, a Christian-based religious group in Jacksonville, Florida. (Doc. 16 at ¶ 7). Plaintiff was invited to provide the invocation for the March 12, 2019 Council meeting which Defendant Aaron L. Bowman, as the Council president at the time, presided over.[2] Id. at ¶¶ 11-13. Plaintiff was not provided any instruction by the Council or Mr. Bowman regarding the content or length of his invocation beforehand. Id. at ¶ 12.

Plaintiff began his invocation on March 12, 2019 consistent with the Judeo-Christian tradition by appealing to the "Eternal God our father, the father of Adam, Eve..." and invoking the name of "Jesus," all without interference from the Council or Mr. Bowman. Id. at ¶ 23. Plaintiff then made statements which Defendants contend were politically charged, including references 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.[3] (Doc. 28 at 2-4). Plaintiff continued, "we have a political climate right now that is dividing our community further and further apart because of pride and selfish ambitions. People are being intimidated, threatened and bullied by an executive branch of our city government while cronyism and nepotism is being exercised in backrooms . . . ." (Doc. 16 at ¶ 24). It was at this point that Mr. Bowman interrupted Plaintiff's invocation and stated, "Mr. Gundy, I'm going to ask you

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[2] The Council president is given authority as the "presiding officer of the Council" through the Council Rules, which also designate the president as the one with "general control of the Council chamber and committee room and of the offices and other rooms assigned to the use of the Council whether in City Hall or elsewhere." Counsel Rule 1.202.

[3] These comments, though not specifically alleged in the Amended Complaint, come from the video of the March 12, 2019 Council meeting (the "March 19 Video") that is accessible online through the City's archive at https://www.coj.net/city-council/city-council-meetings-online (last accessed October 14, 2020). Plaintiff's invocation begins at approximately the 03:15 mark and ends at the 08:15 mark.

to stop the prayer." Id. Plaintiff ignored Mr. Bowman's request and pressed forward with his invocation, which asked for blessing on the Council and the current mayor. March 19 Video at 05:38-06:29. Mr. Bowman eventually cut off Plaintiff's microphone when Plaintiff began describing the ills plaguing the Jacksonville community, including "food deserts, sexual abuse and people shot down in the streets." (Doc. 16 at ¶ 25); see also March 19 Video at 06:58-07:10. Plaintiff was allowed to finish his invocation without audio amplification; his exact words were not captured in the March 19 Video.

In response to Plaintiff's invocation, on March 13, 2019, Mr. Bowman published a statement on his official Twitter account which derided Plaintiff's invocation and called Plaintiff's motivations into question. (Doc. 16 at ¶ 28). The Twitter comment implied Anna Brosche, a Councilmember running for Mayor of the City, conspired with Plaintiff to use the invocation to make political attacks against Ms. Brosche's opponent in the upcoming municipal election. Id.

Mr. Bowman also established an Executive Policy on Council Invocations dated May 1, 2019 (the "Invocations Policy") to govern future invocations. Id. at Ex. C. The Invocations Policy mandated that invocations "should not include personal political views or partisan politics, should be free from sectarian controversies, and from any intimations pertaining to federal, state, or local policy." Id.

On July 2, 2019, Plaintiff filed suit against Defendants, alleging violations of his First Amendment rights and his rights under Article I of the Florida Constitution. (Doc. 1). The Complaint was subsequently amended (Doc. 16) and the subject motion to dismiss the Amended Complaint followed, with Defendants arguing Plaintiff has failed to state a cause of action. (Doc. 28).

II. Legal Standard

The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Indeed, an action fails to state a claim for which relief may be granted, and may be subject to dismissal, if it fails to include such a short and plain statement. See Harper v. Lawrence Cty., Ala., 592 F.3d 1227, 1232–33 (11th Cir. 2010) (citing Fed. R. Civ. P. 8(a)(2), 12(b)(6)). A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court may dismiss a complaint for "failure to state a claim upon which relief can be granted." When reviewing a motion to dismiss, the Court must take the complaint's allegations as true and construe them in the light most favorable to the plaintiff. Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1309 (11th Cir. 2008). The Court is required to accept well-pleaded facts as true at this stage, but it is not required to accept a plaintiff's legal conclusions. Chandler v. Sec'y of Fla. Dep't of Transp., 695 F.3d 1194, 1199 (11th Cir. 2012). It is insufficient for a plaintiff's complaint to put forth merely labels, conclusions, and a formulaic recitation of the elements of the cause of action. Twombly, 550 U.S. at 555.

III. Discussion

Defendants move to dismiss Plaintiff's claims for a number of reasons, including: (a) Plaintiff's constitutional rights were not violated, either during his invocation on March 12, 2019 or under the subsequent Invocations Policy; (b) all claims against Mr. Bowman individually are barred by qualified immunity; (c) the City is entitled to immunity from suit for punitive damages; and (d) Plaintiff's claims for monetary damages under the Florida Constitution should be dismissed because there is no cognizable claim for such relief. (Doc. 28). The Court will address each of Defendants' arguments in turn.

A. Whether Plaintiff's Rights Were Violated

Plaintiff's claims involve allegations that his First Amendment rights were violated when his invocation was interrupted on March 12, 2019 and when Mr. Bowman issued the subsequent Invocations Policy. (Doc. 16). Specifically, Plaintiff alleges causes of action premised on violations of his rights under the (1) Free Speech Clause and (2) Free Exercise Clause. Id. Each right requires a separate analysis to determine whether Plaintiff's claims state a cause of action as a matter of law.

1. Free Speech Clause Claims

i. Government vs. Private Speech

Determining whether Plaintiff's speech-related claims state a cause of action begins with an overarching question: whether Plaintiff's invocation at the March 12, 2019 Council meeting was government speech or private speech. Simply put, if Plaintiff's speech was government speech, his claims fail. The Free Speech Clause of the First Amendment "restricts government regulation of private speech, it does not regulate government speech." Pleasant Grove City v. Summum, 555 U.S. 460, 470

(2009). Government, such as the Council, can therefore engage in the restriction of speech and select which viewpoints it wishes to promote or exclude – a practice traditionally prohibited by the Free Speech Clause. See Mech. v. School Bd. of Palm Beach Cty., Fla., 806 F.3d 1070, 1074 (11th Cir. 2015) (collecting cases). This is because "[g]overnment speech is regulated primarily by 'the political process,' not the Constitution." Id. (citing Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)).

Defendants seem to take for granted that the invocation at issue was government speech. (Doc. 28 at 7-8). While invocations that are "authorized by a government policy and take place on government property at government-sponsored . . . events," such as the March 12, 2019 invocation at issue here, could be government speech, "not every message delivered under such circumstances is the government's own." Santa Fe Independent School Dist. V. Doe, 530 U.S. 290, 303 (2000). Decisions to characterize speech as government speech are not to be made lightly, as it removes it of all protection under the Free Speech Clause. See Mech, 806 F.3d at 1074 ("Because characterizing speech as government speech 'strips it of all First Amendment protection' under the Free Speech Clause . . . we do not do so lightly." (internal citation omitted)).

As recently acknowledged by the Eleventh Circuit, there is no precise test for separating government speech from private speech. Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n, Inc., 942 F.3d 1215, 1230 (11th Cir. 2019). However, the Eleventh Circuit has identified three factors in evaluating whether speech is the government's own: (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 1230-35 (internal citations and quotations omitted).[4]

These factors do not uniformly support a finding that Plaintiff's speech was the Council's own. Historically, the Court is not aware of any established tradition of invocations being used to communicate messages on behalf of a governmental body and Defendants do not cite to any such tradition.[5] Rather, invocations are traditionally limited to a single purpose: to solemnize proceedings before legislatures engage in the often heated and dividing task of governance. See, e.g., Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 582-83 (2014) (noting the role of opening legislative sessions with a prayer is "meant to lend gravity to the occasion and reflect values long part of the Nation's heritage."). The traditional audience of an invocation, then, is the legislature

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[4] The Eleventh Circuit applied these factors based on similar tests employed by the Supreme Court in Walker v. Texas Division, Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015) and Summum, 555 U.S. at 470-72, but the Eleventh Circuit did not intend for them to be exclusive or relevant to all cases involving potential government speech. Mech, 806 F.3d at 1075 ("We do not mean to suggest that the factors. . . are exhaustive or that they will be relevant in all cases. See Walker, 135 S. Ct. at 2249. Whether speech is government speech is inevitably a context specific inquiry.").

[5] Defendants cite to Atheists of Fla., Inc. v. City of Lakeland, Fla., 779 F. Supp. 2d 1330, 1342 (M.D. Fla. 2011), which could be read as concluding the Lakeland City Commission's invocation was government speech. However, a closer review of the case reveals that the plaintiffs in the case, who were atheists that attended the city commission's meetings, conceded and affirmatively alleged that "[t]he prayers at issue are government speech." Id. (internal quotations and citation omitted). This was part of the plaintiffs' efforts to have the invocations be declared unconstitutional under the Establishment Clause, which was their primary motivation in bringing the case. See id. (finding that "[t]he proper analytical device [for the plaintiffs' grievances] is the Establishment Clause," not the Free Speech Clause, and the "[p]laintiffs' recouching their true claim . . . as a different constitutional species therefore changes nothing.").

itself; not the public at large.[6] As such, history weighs in favor of the content of Plaintiff's invocation being his own private speech, rather than that of the Council.

The second factor examines whether invocations are closely identified in the public mind with government speech. Cambridge Christian, 942 F.3d at 1232-34. Stated differently, the Court must determine "whether 'observers reasonably believe the government has endorsed the message[.]'" Id. (quoting Mech, 806 F.3d at 1076)). The Supreme Court has previously determined messages on state license plates, Walker, 576 U.S. at 212-213, and monuments erected in city parks, Summum, 555 U.S. at 470-71, were forms of expression so closely related to government that the messages they conveyed were government speech. See also Mech, 806 F.3d at 1075 (finding the messages on banners hung on school fences "will likely be attributed to the schools" and, therefore, constitute government speech).

Here, there are certainly indicia that the Council endorsed Plaintiff's invocation, which would weigh in favor of Plaintiff's invocation being government speech. The Council designated a portion of their public meeting for an invocation, maintained rules and appointed officers dedicated to ensuring an invocation took place, personally invited Plaintiff to perform the invocation, and allowed the invocation to take place on public property. (Doc. 16 at ¶¶ 9-12, 21); see also Council Rule 1.106 (describing the role of the Council's Chaplain as the member "who shall arrange to open each meeting of the Council with a prayer/invocation."). However, as noted supra, those aspects are not

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[6] Defendants seemingly agree with this analysis, as portions of their Motion to Dismiss are dedicated to arguing that Plaintiff's intended audience was the Council, not those members of the public in attendance or listening to the proceedings electronically. See, e.g., Doc. 28 at 4, 11 (referring to Plaintiff's "intended audience" as the Council).

dispositive on their own. See Santa Fe, 530 U.S. at 303. They are also contradicted by the allegations that the Council did not screen the content of Plaintiff's invocation beforehand and had yet to censor any prior invocations. (Doc. 16 at ¶¶ 12, 30).

The endorsement factor is also complicated by the Establishment Clause. U.S. Const. amend. I, cl. 1. A fundamental protection afforded by the First Amendment is that "Congress shall make no law respecting an establishment of religion . . . ." Id. If the Council were endorsing the content of every invocation provided by invited speakers or if its actions with respect to the invocation led the public to believe it did, the Council's conduct could potentially run afoul of the Establishment Clause. Given the steps allegedly taken by the Council to avoid such conflicts, including preparing the September 20, 2014 memorandum on how to maintain an appropriate and lawful invocation (Doc. 16 at Ex. B), the Court finds that the endorsement factor does not weigh in favor of either party at this preliminary stage of the proceedings.

With respect to the control factor, the Supreme Court has cautioned legislatures against being the regulator of content in specific prayers. See Town of Greece, 572 U.S. at 582-83. In this case, there are no allegations that the Council controlled or regulated the content of Plaintiff's invocation before it was delivered. (Doc. 16 at ¶ 12). The Council, through the September 20, 2014 memorandum, was also on notice that it was prohibited from overly censoring the content of legislative invocations. Id. at Ex. B. Though the Council ultimately implemented the Invocations Policy after Plaintiff spoke on March 12, 2019, id. at ¶¶ 32-34, which may alter this analysis for future cases, it has no bearing on Plaintiff's claims as pled. Therefore, like the endorsement factor, the control factor does not conclusively weigh in favor of a finding of government speech,

especially when construed in the light most favorable to Plaintiff. See Iqbal, 556 U.S. at 678.

At this early stage in the case, the Court cannot conclude that Plaintiff's invocation was unquestionably government speech as a matter of law, as Defendants would have the Court find. (Doc. 28). Rather, when construed in the light most favorable to Plaintiff, several factors tend to suggest Plaintiff's invocation was private speech. Being conscientious of the Eleventh Circuit's warning to tread lightly when judicially declaring speech to be the government's own, Mech, 806 F.3d at 1074, the Court finds that Plaintiff has sufficiently alleged that at least some of his speech could be categorized as private speech subject to First Amendment protection.

ii. Nature of the Forum

Having determined Plaintiff's Amended Complaint arguably involves private speech, the Court now must examine the restrictions that were placed on Plaintiff's speech. That examination begins by determining the nature of the forum in which Plaintiff gave his invocation. Cambridge Christian, 945 F.3d at 1236. The Eleventh Circuit has broadly defined four types of government fora: public, designated public, limited public, and nonpublic. See Barrett v. Walker Cty. School Dist., 872 F.3d 1209, 1226 (11th Cir. 2017). Defendants request the Court determine the Council's meeting on March 12, 2019 and, specifically, the invocation was a limited public forum.[7] (Doc. 28 at 14). Plaintiff does not specifically argue which type of forum appropriately reflects the

[7] A limited public forum "exists where a government has reserved a forum for certain groups or for the discussion of certain topics." Cambridge Christian, 942 F.3d at 1237 (internal quotations and citations omitted). An example of a traditional limited public forum would be the public comments portion of a school board meeting. See id.

invocation at the March 12, 2019 Council meeting but does cite to case law indicating it could be a more restrictive nonpublic forum.[8] (Doc. 31 at 8, 9).

The Eleventh Circuit's decision in Cambridge Christian is particularly instructive to the Court's analysis in this case. 945 F.3d at 1236-40. Therein, the plaintiff, a private Christian school, had an established tradition of amplifying a communal prayer over a loudspeaker before each high school football game. Id. at 1224. The prayers were led by a student, parent, of school employee and the school did not provide any direction regarding the content of the prayers offered. Id. In 2015, the school's football team made it to the state finals and asked the Florida High School Athletic Association ("FHSAA") if it could use the loudspeaker to perform a pre-game prayer at the finals. Id. The request to use the loudspeaker was denied by the FHSAA, but the school's football team performed their prayer at midfield without amplification. Id. at 1225.

In determining whether the venue at issue was a limited public versus a nonpublic forum, the Eleventh Circuit considered factors such as the limited nature of access to the loudspeaker[9] and limited content allowed to be amplified over the loudspeaker.[10] After review, the Eleventh Circuit concluded the venue and, specifically, use of the microphone for amplification, was a nonpublic forum. Id. at 1240. The Eleventh Circuit relied in part on the principle that "[a] state actor does not create a

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[8] A nonpublic forum "is a government space that is not by tradition or designation a forum for public communication." Cambridge Christian, 942 F.3d at 1237 (internal quotations and citation omitted). Examples of a traditional nonpublic forum include polling places, airport terminals, and military bases. See id.

[9] Access was provided to two private speakers only. Id. at 1238.

[10] Only certain content, such as music for the halftime shows and scripted messages provided by the two schools competing in the championship game were allowed to be amplified. Id.

public forum – limited or otherwise – by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Id. at 1237 (internal quotations and citation omitted).

In this case, there are many parallels to Cambridge Christian. The only people who had permission to use the microphone during the invocation at the March 12, 2019 Council meeting was Plaintiff and, arguably, Mr. Bowman.[11] This demonstrates there was seriously limited access to the forum at the subject time. Moreover, the time period in which Plaintiff spoke was specially designated for an "invocation," a specific form of speech intended to solemnize legislative proceedings. There are no allegations that the Council permitted any other form of public speech during this time, further supporting a finding that the invocation period at Council meetings are a nonpublic forum. Thus, like use of amplification in Cambridge Christian, the Court finds the amplified invocation period of each Council meeting is a nonpublic forum. 942 F.3d at 1240.

iii. Nature of the Restrictions Imposed

Since Plaintiff's invocation was delivered in a nonpublic forum, the Court must now consider what restrictions the Council was permitted to impose on Plaintiff and whether the restrictions actually imposed were lawful. In a nonpublic forum, the government can regulate speech to preserve the forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's

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[11] Relying on Mr. Bowman's overarching authority as Council President to "have general control of the Council chamber and committee room and of the offices and other rooms assigned to the use of the Council whether in City Hall or elsewhere," Defendants argue he was allowed to mute Plaintiff's microphone and speak during the invocation. (Doc. 28 at 3); see also Council Rule 1.202.

view." Minn. Voters Alliance v. Mansky, 138 S. Ct. 1876, 1885 (2018). In fact, "the government has 'much more flexibility to craft rules limiting speech' in a nonpublic forum that in any other kind of forum." Cambridge Christian, 945 F.3d at 1240 (citing Mansky, 138 S. Ct. at 1885).

However, the government's ability to regulate speech in a nonpublic forum is not absolute. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687 (1992)) ("nonpublic forum status 'does not mean that the government can restrict speech in whatever way it likes.'"). Restrictions on speech must be viewpoint neutral, meaning the government must avoid restricting speech based solely on its viewpoint or motivating ideology. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828-29 (2010) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."). Restrictions also cannot be applied in an arbitrary or haphazard manner. Cambridge Christian, 942 F.3d at 1240 (citing Mansky, 138 S. Ct. at 1888).

In this case, Plaintiff alleges Mr. Bowman restricted his invocation because it included statements that were critical of the incumbent administration – an administration Mr. Bowman publicly supported. (Doc. 16 at ¶¶ 19, 38). In the light most favorable to Plaintiff, this is arguably viewpoint discrimination. At the time Plaintiff had his microphone silenced, his prayer bore at least some resemblance to another prayer offered during Mr. Bowman's tenure as Council President that was not stopped, id. at ¶ 31, allowing the Court to infer Plaintiff's speech was restricted arbitrarily and

haphazardly. These allegations lend themselves to a potential First Amendment violation based on an impermissible restriction on Plaintiff's private speech.

As noted by the Eleventh Circuit, "[t]he line between viewpoint and content discrimination is admittedly 'not a precise one,' Rosenberger, 515 U.S. at 831 . . . and that is particularly true when it comes to restrictions on religious speech." Cambridge Christian, 942 F.3d at 1242. Through further development of the record in this case, it may become apparent that Mr. Bowman's decision to restrict access of Plaintiff's microphone and the Invocations Policy were viewpoint neutral and were not applied in an arbitrary or haphazard manner. If so, Mr. Bowman had authority to control the meeting under the Council Rules and his intervention would be a lawful restriction on Plaintiff's First Amendment right to freedom of speech. However, at this stage and in the light most favorable to Plaintiff, the Court finds Plaintiff's allegations to be sufficient to avoid dismissal as a matter of law.

2. Free Exercise Clause Claims

The Court next considers Plaintiff's claims that his rights under the Free Exercise Clause were violated. To state a cause of action under the Free Exercise Clause, Plaintiff must allege that he (1) "holds a belief, not a preference, that is sincerely held and religious in nature, not merely secular; and (2) the law at issue in some way impacts [his] ability to either hold that belief or act pursuant to that belief." GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1256-57 (11th Cir. 2012) (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993)).

In this case, the Court need not consider the intricacies of the first element, as Plaintiff's claims suffer from fatal deficiencies regarding the second. The only law at

issue in Plaintiff's Amended Complaint is the Invocations Policy, though based on Plaintiff's repeated references to Mr. Bowman requesting Plaintiff cease his invocation it can be inferred that Plaintiff also takes exception with the Council Rules providing Mr. Bowman with that authority. The Invocations Policy's plain language expressly refutes Plaintiff's allegation that it precludes him from praying as his conscience requires. Invocations Policy at 3 ("Individuals remain free to pray on their own behalf, as their conscience requires."). Since Plaintiff has not alleged any instances where the Invocations Policy, which was enacted after his March 12, 2019 invocation, was used to hinder him from holding or acting pursuant to his beliefs, Plaintiff's claim fails to state a cause of action with respect to the Invocations Policy.

Regarding the general procedural rules giving the Council President the ultimate authority to conduct and manage Council meetings, they are of general application and do not expressly prohibit any individual from holding or acting in accordance with a sincerely held belief. See Council Rule 1.202 ("The President shall have general control of the Council chamber . . . ."); see also Council Rule 4.505 (authorizing the Council President to remove "[a]ny person" who disrupts a Council meeting irrespective of other factors). Plaintiff does not argue otherwise, instead focusing his Response on cases involving the Establishment Clause.[12] (Doc. 31 at 9, 10). Laws of general application,

[12] In the Establishment Clause context, Plaintiff is correct that the government is advised to avoid micromanaging the content of prayers and invocations. Town of Greece, 572 U.S. at 582-83 ("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 administrator or judge considers to be nonsectarian."). However, Town of Greece follows that admonition by noting there are instances – such as when an invocation is used for a purpose other than to solemnize the proceedings – in which government control over content may be appropriate. Id. In fact, the Supreme Court expressly states that such a case "would present a different case than the one presently

even those that have "the incidental effect of burdening a particular religious practice," are not required to be justified by a compelling governmental interest. Church of the Lukumi Babalu Aye, 508 U.S. at 531. Here, the Council's interest in maintaining order during its meetings is sufficient. See Rowe v. City of Cocoa, Fla., 358 F.3d 800, 803 (11th Cir. 2004) ("[T]here is a significant governmental interest in conducting orderly, efficient meetings of public bodies."). That interest, combined with the fact that Plaintiff was allowed to complete his prayer and act in accordance with his beliefs,[13] indicate Plaintiff's rights under the Free Exercise Clause were not violated.[14]

B. Mr. Bowman's Qualified Immunity

Defendants argue that Mr. Bowman is entitled to qualified immunity and therefore all claims against him should be dismissed. (Doc. 28 at 17-23). "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." White v. Pauly, 137 S. Ct. 548, 551 (2017) (internal quotation and citation omitted). Typically, for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." Id. (internal quotation and citation omitted). The

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before the Court." Id. at 583. As such, Plaintiff's reliance on Town of Greece is misplaced in this context.

[13] See March 19 Video.

[14] Though not identical provisions, the Court's analysis is disallowing Plaintiff's claim under the Free Exercise Clause is equally applicable to Plaintiff's similar claim under the Florida Constitution. See Toca v. State, 834 So. 2d 204, 208 (Fla. 2d DCA 2004) (applying the same analysis to claims under Free Exercise Clause in the United States Constitution and the Florida Constitution's parallel clause); see also Commentary to Art. I, § 3, 1968 Revision of the Florida Constitution (observing that cases interpreting the Free Exercise Clause in the United States Constitution are "of great value in evaluating the status of religious freedoms" under Florida's Constitution). As such, both Count I and Count III are due to be dismissed for the reasons cited herein.

relied-upon existing precedent must not be "defined at a high level of generality," but should be "particularized to the facts of the case." Id. (internal quotation and citation omitted).

In this case, Mr. Bowman was undoubtedly acting in his official capacity when the alleged conduct took place. The position of Council President comes with the authority to, among other things, "maintain order and enforce the rules of decorum" during Council meetings. Council Rule 4.202(f); see also Council Rules 1.202, 4.505 (further elaborating on the Council President's role as a presiding officer and level of control over Council meetings). These were the powers Mr. Bowman was exercising when he interrupted Plaintiff's invocation, cut off Plaintiff's microphone, and implemented the Invocations Policy. (Doc. 16 at ¶¶ 24-26, 29, 30, 32-34).

As such, Mr. Bowman's claim to qualified immunity is dependent on whether Plaintiff had a "clearly established" right, a burden that Plaintiff must carry. See Terrell v. Smith, 668 F.3d 1244, 1250 (11th Cir. 2012); Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). Defendant points to several cases which indicate a governmental body can limit the content of prayers and invocations to religious messages, which inferentially supports a finding that Plaintiff's right to free speech in this specific context was not clearly established. See, e.g., Williamson v. Brevard Cty., 928 F.3d 1296, 1316-17 (11th Cir. 2019); Barker v. Conroy, 921 F.3d 1118, 1132 (D.C. Cir. 2019). Plaintiff, meanwhile, cites to various Supreme Court opinions and the September 20, 2014 memorandum provided to the Council regarding the legality of legislative prayer to support his assertion that his right to amplified, unfettered prayer during his invocation was clearly established.

Having reviewed the parties' arguments, the Court finds Plaintiff's to be unpersuasive. As noted supra, for Plaintiff's right to be clearly established there must be case law that is "particularized to the facts of the case" that places "the statutory or constitutional question beyond debate." White, 137 S. Ct. at 551. The two primary cases relied on by Plaintiff, Town of Greece and Marsh,[15] are both Establishment Clause cases that are devoid of analysis regarding the Free Speech Clause or Free Exercise Clause. In fact, Town of Greece arguably includes analysis harmful to Plaintiff's case – namely, that content restrictions on legislative prayer are sometimes appropriate when they are being used for purposes other than to "elevate the purpose of the occasion and to unite lawmakers in their common effort." 572 U.S. at 582-83.

Similarly, the September 20, 2014 memorandum examines the metes and bounds of the Establishment Clause and limits its analysis to the appropriateness of legislative prayer, generally. (Doc. 16 at Ex. B). It is also not the sort of authority traditionally relied on in establishing a clear right. See, e.g., Hill v. Cundiff, 797 F.3d 948, 979 (11th Cir. 2015) ("A right may be clearly established for qualified immunity purposes in one of three ways: (1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." (internal quotations and citation omitted)). Therefore, the Court finds Plaintiff has not met his burden in identifying a clearly established right for

[15] Marsh v. Chambers, 463 U.S. 783, 795 (1983).

purposes of qualified immunity and his claims against Mr. Bowman individually are due to be dismissed.

C. The City's Immunity

Defendants also assert sovereign immunity with respect to claims against the City. (Doc. 28 at 23, 24). Defendants rely on Fla. Stat. § 768.28(9), which disallows claims against the state or its subdivisions for tortious acts committed in bad faith, with malicious purpose, or in wanton and willful disregard for human rights. However, Defendants' argument is misplaced. Plaintiff's claims are brought under 42 U.S.C. section 1983 and the Florida Constitution; they are not tort claims. (Doc. 16). Municipal governments like the City cannot assert state sovereign immunity to bar claims under section 1983, Abusaid v. HIllsborough Cty. Bd. of Cty. Com'rs, 405 F.3d 1298, 1314-15 (11th Cir. 2005), or the Florida Constitution, City of Fort Lauderdale v. Hinton, 276 So. 3d 319, 325 (Fla. 4th DCA 2019) (citing Dep't of Revenue v. Kuhnlein, 646 So. 2d 717, 721 (Fla. 1994)). As such, Defendants' Motion is due to be denied on this issue.

D. Availability of Monetary Relief Under the Florida Constitution

Finally, Defendants argue Plaintiff is barred from obtaining money damages if he prevails on his claims under the Florida Constitution. The Court agrees. "[I]t is well-settled that a claim seeking monetary damages cannot be maintained for alleged violations of the Florida Constitution." Pinto v. Collier Cty., No. 2:19-cv-551, 2020 WL 2219185, at *7 (M.D. Fla. May 7, 2020) (citing, e.g., Garcia v. Reyes, 697 So. 2d 549, 551 (Fla. 4th DCA 1997)); see also Youngblood v. Florida, No. 3:01-cv-1449, 2005 WL 8159645, at *6 (M.D. Fla. Mar. 17, 2005) (Corrigan, J.) (citing Garcia, 697 So. 2d at 551). As such, Plaintiff's recovery for his remaining claim under the Florida Constitution

is limited to equitable or injunctive relief. Since Plaintiff is entitled to money damages if he prevails on his section 1983 claims, Plaintiff's prayer for monetary relief will not be dismissed or stricken in its entirety. Rather, Plaintiff is prohibited from seeking money damages for violations of the Florida Constitution only but can continue to seek monetary relief for the alleged violation of his rights under the United States Constitution in Count II.

Accordingly, after due consideration, it is

ORDERED:

1. Defendants' Motion to Dismiss (Doc. 28) is **GRANTED in part and DENIED in part**.

2. Counts I and III of the Amended Complaint (Doc. 16) and Plaintiff's claims against Mr. Bowman individually are **DISMISSED with prejudice**.

3. Plaintiff's prayer for money damages is **LIMITED** to relief for the alleged violations in Count II of the Amended Complaint and **DISALLOWED** to the extent it seeks monetary relief for injuries alleged under Count IV.

4. Defendants' Motion to Dismiss is **DENIED** in all other respects.

DONE and **ORDERED** in Jacksonville, Florida this 4th day of November, 2020.

BRIAN J. DAVIS
United States District Judge

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Copies furnished to:

Counsel of Record