No. ____

In the Supreme Court of the United States

CITY OF OCALA, FLORIDA,

Petitioner,

v.

ART ROJAS AND LUCINDA HALE,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner City of Ocala, in response to a local shooting, encouraged the citizenry to attend an upcoming prayer rally. Respondents learned of the event and, concerned that the rally might constitute an Establishment Clause violation, made a point to attend in person. Respondents allege that the event did indeed contain religious elements that offended them and made them feel excluded. Respondents then sued in federal court, asserting a violation of the Establishment Clause. Both the district court and the Eleventh Circuit held that at least one of the respondents had "offended observer" standing to bring suit. The question presented is:

Is psychic or emotional offense allegedly caused by observation of religious messages an injury sufficient to confer standing under Article III of the Constitution, including where the offended party deliberately seeks out the exposure in question?

PARTIES

The caption contains the names of all of the current parties.

There were originally four plaintiffs, two of whom (Jean Porgal and Daniel Hale) have since died. The remaining two plaintiffs, Art Rojas and Lucinda Hale, remain parties and respondents here.

There were originally four defendants; only one (petitioner City of Ocala) remains. The district court granted summary judgment in favor of defendant Mayor Reuben "Kent" Guinn, and plaintiffs have not challenged that ruling. The district court also ruled in favor of defendant Chief of Police Greg Graham in his official capacity, and plaintiffs did not pursue that claim further. Chief Graham was also sued in his individual capacity, but he died during the pendency of this case. Plaintiffs also sued the Ocala Police Department, but the district court ruled that the Department was not a separate entity from the city, and plaintiffs have not challenged that ruling. Accordingly, defendant City of Ocala is the sole remaining defendant on appeal and is the sole petitioner here.

RELATED PROCEEDINGS

Counsel is not aware of any related proceedings under Supreme Court Rule 14.1(b)(iii).

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The opinion of the Eleventh Circuit is reported as *Rojas v. City of Ocala*, 40 F.4th 1347 (11th Cir. 2022). Pet. App. A. The opinion of the district court on cross-motions for summary judgment is reported as *Rojas v. City of Ocala*, 315 F. Supp. 3d 1256 (M.D. Fla. 2018). Pet. App. B. A prior district court ruling on defendants' motion to dismiss (which includes the adopted report and recommendation of the magistrate judge) is reported as *American Humanist Association v. City of Ocala*, 127 F. Supp. 3d 1265 (M.D. Fla. 2015). Pet. App. C1 and C2. The order of the Eleventh Circuit regarding suggestions of death of parties is unreported but available as *Rojas v. City of Ocala*, 2021 U.S. App. LEXIS 36730 (11th Cir. Dec. 13, 2021). Pet. App. D.

JURISDICTION

The Eleventh Circuit issued its decision on July 22, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

Article III of the United States Constitution provides in pertinent part as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

U.S. Const. Art. III, § 2.

INTRODUCTION

In the Establishment Clause case of *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), this Court held that the "psychological consequence presumably produced by observation of conduct with which one disagrees" is insufficient to confer standing under Article III. *Id.* at 485. Despite this clear and unequivocal holding, federal circuit courts, including the court below, have repeatedly found "offended observer" standing to suffice in Establishment Clause cases. This Court has never embraced the offended observer theory of standing. Indeed, to rest legal standing solely on personal offense, disagreement, or grievance, even if phrased in constitutional terms, would be to set aside the mandate under Article III that the jurisdiction of federal courts be limited to genuine cases or controversies. *Infra* § I.

Some, including members of this Court, have theorized that offended observer standing arose in the lower courts in response to the *Lemon*[1] and endorsement tests under the Establishment Clause, and thus, since this Court has disavowed those tests, federal courts should likewise discard offended observer standing. But that has not happened. The demise of the *Lemon*/endorsement standard has not put a stop to the lower courts' acceptance of offended observer standing, as this case from the Eleventh Circuit, and other very recent cases from the Third and Seventh Circuits, starkly illustrate. *Infra* § II. The

[1] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

lower courts therefore remain in dire need of a reminder of what this Court held in *Valley Forge*.

The present case features an especially egregious invocation of offended observer standing, since plaintiffs-respondents *deliberately sought out* the very exposure which they then cited as providing them a right to have federal courts adjudicate the merits of their Establishment Clause claims. Moreover, respondents' testimony makes clear that the essence of their supposed injury is *ideological disagreement*. Respondents' theory of standing is, in essence, "I came, I saw, I was offended, just as I expected to be!" *Infra* § III. This Court should grant review to determine whether to repudiate respondents' offended observer claim to standing.

STATEMENT OF THE CASE

1. Jurisdiction in District Court

Petitioner challenges plaintiffs-respondents' standing in this case; the existence of subject matter jurisdiction is therefore disputed. The complaint invoked 42 U.S.C. § 1983 and asserted subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3). The federal district court and the court of appeals held that at least one of the individual plaintiffs, Lucinda Hale, had standing.

2. Facts Material to the Question Presented

The question presented is the sufficiency of "offended observer" standing under Article III to bring an Establishment Clause claim in federal court. Of the five original plaintiffs, one (American Humanist

Association) was dismissed with prejudice, and two (Jean Porgal and Daniel Hale) have died. This petition therefore addresses only the standing claims of the remaining two plaintiffs, Lucinda Hale and Art Rojas. The facts giving rise to their claims are as follows.

Ocala is a Florida city located roughly halfway between Orlando and Gainesville. In response to a shooting spree in which several children were injured, the Ocala Chief of Police reached out to the local community for assistance in bringing the perpetrators to justice. In particular, Chief Graham met with local NAACP leaders who suggested outreach to the local faith-based community for help in persuading witnesses to come forward. Chief Graham accordingly set up a meeting to pursue the NAACP's suggestion. At that meeting, a local minister proposed a prayer vigil or similar event. Subsequently, that minister and a local community activist planned a vigil and requested Chief Graham to co-sign, and post on the Ocala Police Department (OPD) Facebook page, a letter encouraging attendance at the prayer vigil. Chief Graham agreed and did so, placing the letter on OPD letterhead. Pet. App. 13a-15a. The minister and activist then handled the planning and organization of the vigil, which took place in late September of 2014. (The extent of city involvement in the vigil, which related to the merits, was and is disputed but is not relevant to the standing question.)

Plaintiff-respondent Art Rojas is a resident of Ocala and an atheist. Cplt. ¶6. He alleged that he is "injured and aggrieved . . . because his local government and its agents and employees are endorsing and promoting monotheistic religion" and because, moreover, he "personally witnessed Defendants' acts . . . and was offended and otherwise

harmed by them." *Id*. Plaintiff-respondent Lucinda Hale, a resident of Fort McCoy (not Ocala), is likewise an atheist. Cplt. ¶8. Her allegation of injury was similar: she was

> injured and aggrieved by the acts described herein because governmental actions directed at their community, Marion County, violated the Establishment Clause, and because [she] personally witnessed [said acts] and w[as] offended and otherwise harmed by them.

Id. Both Hale and Rojas added that they felt it "coercive" to "send[] a message that important authority figures favor those who share a certain religious belief," which in turn would create pressure "to participate and hesitan[ce] to speak out to the contrary." Dkt. 54-3, at #15 (Hale). *See also* Dkt. 54-1, at #15 (Rojas) (similar). Rojas acknowledged, however, that "[n]o one coerced [him] to attend the event." Dkt. 54-12, at 40:6-7. And Hale did not list any compulsion as her reason for attending. Dkt. 54-15, at 46:4-9, 59:18-20.

Indeed, plaintiffs-respondents Art Rojas and Lucinda Hale only became aware of the Facebook posting and the upcoming prayer vigil through third party sources. Rojas saw a forwarded copy of OPD Facebook page online. Dkt. 54-12, at 9:3-15. And Hale visited the OPD's Facebook page after hearing about the letter from another source. Dkt. 54-15, at 11:15-23, 12:5-8. She voluntarily attended the vigil because she wanted "to observe what happened, see how religious it would be, and see the extent of city and police department involvement. I also felt that my presence would be a form of protest." Dkt. 54-3, at #14. *Accord*

Dkt. 54-15, at 46:4-9. Hale identified her harm as "direct contact with the city's Establishment Clause violations" as well as concern that the city's acts would cultivate an environment of "hostile feelings" toward atheists in general and her in particular. Dkt. 54-3, at #14.

The pertinent allegations by Rojas are sparser still. He attended the vigil "to observe what was going on," Dkt. 54-1, at #12, and "to see if there were going to be violations of the Establishment Clause," Dkt. 54-12, at 31:8-13. As to any harm he suffered, Rojas stated that "[m]y understanding is that direct contact with an Establishment Clause violation is itself harm, and I had direct contact" with the alleged violations. Dkt. 54-1, at #14. Rojas added that the vigil was "not a comfortable place for non-believers like myself." *Id.*

Rojas objected, *not to the event itself,* but to the involvement of city officials. Dkt. 54-12, at 31:4-6, 11-13, 18-20, 32:3-14, 46:21-25. Lucinda Hale likewise had "no problem" with a prayer vigil so long as there was no "involvement of any government employees," Dkt. 54-15, at 18:10-16. *Id.* at 31:6-15 ("prayer vigil" in the park "would have been fine. It's when you get government involved that I have a problem"). *Id.* at 76:16-77:7.

3. Proceedings in the District Court

The American Humanist Association (AHA), along with individuals Art Rojas, Frances Porgal, and Lucinda and Daniel Hale, filed suit in federal district court asserting a violation of the Establishment Clause and naming as defendants the City of Ocala, the Ocala Police Department, Mayor Kent Guinn, and Chief of

Police Greg Graham, the latter two being sued in both their individual and official capacities.

Defendants all filed a motion to dismiss, which was referred to a magistrate judge. The magistrate issued a report recommending that the entire case be dismissed as to AHA, as to all claims for prospective relief, as to all claims against the Ocala Police Department, and as to all official capacity claims against the mayor and chief of police. The magistrate's report recommended leaving in place only the individual plaintiffs' nominal damages claims against the city and, in their individual capacities, the mayor and chief of police. Pet. App. 108a. On the standing issue, the magistrate judge noted this Court's holdings that it is

> not enough for the plaintiffs to simply claim that the Constitution had been violated or that they were committed to the separation of church and state; rather, they must identify an injury (even a non-economic one) caused by the conduct, and that it must be more than the psychological consequence that is associated with one's knowledge that a constitutional wrong is occurring or has occurred. *Valley Forge*, 454 U.S. at 485-86.

Pet. App. 87a. Nevertheless, the magistrate pointed to Eleventh Circuit precedent upholding standing in the offended observer context. Pet. App. 87a-91a.

Defendants filed objections to the report, seeking an even broader dismissal. Meanwhile, plaintiffs did not file any objections to the report, though they did respond to defendants' objections. The district court proceeded to adopt the magistrate's report and recommendation in full, Pet. App. 74a, which meant

the suit was pared down to the individual plaintiffs' nominal damages claims against the City of Ocala, Mayor Guinn, and Chief Graham.

Following discovery, the remaining parties cross-moved for summary judgment. The district court granted summary judgment to Mayor Guinn, but otherwise granted summary judgment in favor of plaintiffs, holding that the remaining individual plaintiffs (Frances Porgal had died) had standing and that the city and chief of police had violated the Establishment Clause. On the standing question, the district court held that plaintiffs had standing because they saw the OPD Facebook posting and attended the Community Prayer Vigil. Pet. App. 34a-35a.

The City of Ocala and Chief Graham timely appealed. Plaintiffs did not cross-appeal.

4. Proceedings in the Eleventh Circuit

On appeal, the Eleventh Circuit affirmed the holding that plaintiff Lucinda Hale had standing to sue. (The court did not address whether Art Rojas had standing, and Daniel Hale had died in the meantime.) The court noted that Lucinda Hale "attended the prayer vigil" and did so "because she wanted to observe it and . . . has an interest in being part of the community and is concerned about crime." Pet. App. 5a. The court ruled that

> Hale's "contact is sufficient to establish the personal and individualized injury necessary for standing." *Pelphrey [v. Cobb County]*, 547 F.3d [1263,] 1280 [(11th Cir. 2008)]. She voluntarily attended the prayer vigil and knew she would encounter religious practices she found offensive,

> but under Supreme Court precedent that [voluntariness] does not mean she lacks standing to bring an Establishment Clause claim.

Pet. App. 6a (citing *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022)[2]). The court of appeals did not reach the merits of the Establishment Clause claim, instead vacating the lower court's decision and remanding for reconsideration in light of this Court's ruling in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).

This petition followed.

REASONS FOR GRANTING THE WRIT

This Court has never endorsed "offended observer" standing, in Establishment Clause cases or elsewhere. To the contrary, it ought to be clear from this Court's holdings that "offended observer" standing, without more, does not suffice to bring an Establishment Clause claim in federal court. *Infra* § I. Nevertheless, lower courts have widely embraced offended observer standing – albeit *only* in the context of Establishment Clause claims. Moreover, as this case from the Eleventh Circuit illustrates – and as recent cases from

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[2]The injury in *Ted Cruz for Senate* was financial and thus obviously sufficient, as such, under Article III. The question there was whether an otherwise cognizable injury is *traceable* to defendants when a plaintiff voluntarily takes the steps that will trigger that injury. 142 S. Ct. at 1647-48. Here, by contrast, the alleged injury – offense at observing something the viewer considers unconstitutional – is not itself cognizable. That respondents voluntarily sought out the offending exposure in question underscores the fictional – and manipulable – nature of the supposed injury.

the Third and Seventh Circuits confirm – the death of the *Lemon*/endorsement test has not convinced the lower courts to scrap offended observer standing. *Infra* § II. The instant case presents an especially weak example of offended observer standing, both because respondents Hale and Rojas deliberately sought out the very exposure of which they complain, and because their testimony makes clear that the essence of their dispute is not visual or auditory offense but rather ideological disagreement. *Infra* § III. This Court should grant review to repudiate once and for all the idea that Establishment Clause plaintiffs can write their own ticket to federal court simply by observing an alleged constitutional violation.

I. "OFFENDED OBSERVER" STANDING DOES NOT SATISFY ARTICLE III.

"Offended observer" standing is inconsistent with this Court's interpretation of Article III.

Respondents' standing in this case rests upon claims of personal objection, discomfort, and hurt feelings. In other words, this is a case of "offended observer" standing. Never has this Court approved anything like such a wide-open concept of access to federal adjudication. Indeed, to the extent this Court has addressed the issue at all, it has firmly repudiated such limitless theories of Article III standing.

A. Article III Requires an Injury in Fact.

It is now well settled that to bring a claim in federal court, a plaintiff must satisfy the "irreducible constitutional minimum" of standing, namely, by demonstrating the following three elements:

> (1) an "injury in fact" that is "concrete" and "actual or imminent";
> (2) a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant"; and,
> 3) "redressability – a substantial likelihood that the requested relief will remedy the alleged injury in fact."

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (internal quotation marks, editing marks, and citations omitted); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998).

Plaintiffs-respondents here do not claim that they are local taxpayers invoking municipal taxpayer standing. *Compare Crampton v. Zabriskie*, 101 U.S. 601, 609 (1880); *Doremus v. Board of Educ.*, 342 U.S. 429, 433-34 (1952) (citing *Crampton* in an Establishment Clause case); *see also ASARCO v. Kadish*, 490 U.S. 605, 613 (1989) (referencing *Crampton*). Instead, they assert only that each respondent was offended and disturbed, not by the challenged prayer vigil itself, but by the (alleged) fact that city officials were involved in the production of the event, thereby rendering the event (allegedly) unconstitutional. But "longstanding legal doctrine prevent[s] this Court from providing advisory opinions at the request of one who, without other concrete injury, believes that the government is not following the law." *Carney v. Adams*, 141 S. Ct. 493, 501 (2020). Worse, the alleged injury, as in *Carney*, is contrived: respondents deliberately attended precisely to "observe" an expected legal violation.

B. Personal Objection or Feeling Offense, without More, Is Not an Injury in Fact.

A claim of personal offense or dismay, without more, fails the first requirement of standing, namely, a showing of injury in fact. As this Court has stated in no uncertain terms, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107. Plaintiffs in such cases

> fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 485-86 (1982) (emphasis omitted).

Recognition of "offended observer" standing not only runs directly contrary to this Court's holding set forth above, it also is profoundly inconsistent with Article III.

For example, allowing "personal offense" to suffice would render irrelevant the entire body of taxpayer standing precedents. In that area of case law, the usual rule, set forth in *Frothingham v. Mellon*, 262 U.S. 447 (1923), is that federal and state taxpayers cannot sue to challenge the use of tax money. This Court recognized a narrow exception to that rule in

Flast v. Cohen, 392 U.S. 83 (1968), which allows taxpayers to sue only to challenge specific, legislatively authorized expenditures of funds in alleged violation of the Establishment Clause. *See Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007); *ACSTO v. Winn*, 563 U.S. 125 (2011). However, this Court has carefully and repeatedly insisted upon maintaining firm limits to that exception. For one thing, suits alleging violations of *other* clauses are not permitted. *E.g.*, *United States v. Richardson*, 418 U.S. 166 (1974) (no taxpayer standing to sue under Statement and Account Clause); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (no taxpayer standing to sue under Incompatibility Clause); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) (no taxpayer standing to sue under Commerce Clause). Suits under the Establishment Clause, meanwhile, are carefully bounded. Thus, challenging the exercise of authority outside of the taxing and spending authority is not allowed. *See Valley Forge* 454 U.S. at 480 (no taxpayer standing to bring Establishment Clause challenge to exercise of federal power under Property Clause, as opposed to Taxing and Spending Clause). Suits challenging the discretionary executive *use* of funds, as opposed to specifically authorized legislative spending, are not allowed. *Hein*, 551 U.S. at 605-12. Suits challenging tax *credits* instead of *expenditures* are not allowed. *ACSTO*, 563 U.S. at 142-43.

In short, this Court has repeatedly confined the *Flast* exception to its facts. Yet "offended observer" standing casts those limits to the wind. As here, plaintiffs would not need to claim taxpayer status or identify a specific legislative authorization of an expenditure. Indeed, they would not need to allege

government spending at all. The taxpayers in *Valley Forge* could have had standing after all, just by visiting the location in question and alleging, as in this case, offense, discomfort, and feeling unwelcome, *supra* pp. 4-6, all as a result of what they regarded as the government's "religious favoritism"[3] and "promotion of religion," Dkt. 54-3, at #14 (Hale). Ditto for the taxpayers in *Hein* and *ACSTO*. In short, the carefully bounded limits to the *Flast* exception would be pointless irrelevancies.

Notably, *this Court* has *never* adopted offended observer standing as sufficient under Article III. To be sure, this Court has adjudicated *on the merits* cases that rested upon that theory of standing in the lower courts. But this Court has repeatedly ruled that the *exercise* of jurisdiction is not precedent for the *existence* of jurisdiction. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *ACSTO*, 563 U.S. at 144 (citing *Hagans v. Lavine*, 415 U.S. 528, 535, n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us"). "[W]e have repeatedly held that the existence of unaddressed

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[3]A claim of favoritism in the actual *treatment* of persons or events could of course be brought as a discrimination claim under the Equal Protection Clause. "Offended observer" standing would not be necessary for such litigation. But respondents here made no such claim. To the contrary, equal treatment seemingly would not remove respondents' objections. Dkt. 54-12, at 27:5-12 (Rojas) (would have same objection were atheists hosting and leading an event responding to the crime spree).

jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (citations omitted).

> "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions – *even on jurisdictional issues* – are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted).

Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 478-79 (2006) (emphasis added).

C. There Is No Special Establishment Clause Exception to the Rule against "Hurt Feelings" Standing.

This Court has likewise made clear that there should not be special privileges for Establishment Clause plaintiffs: "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992). As *Valley Forge* held, litigants' "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487 (footnote omitted). What's true for the country should be true for a county.

Respondents may protest that absent standing here, no one could sue even for egregiously

unconstitutional government acts. But this Court has already expressly rejected that argument. "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger*, 418 U.S. at 227. *Accord Valley Forge*, 454 U.S. at 489 (quoting same language in denying standing to bring Establishment Clause claim). "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418 U.S. at 179.

Wisdom counsels adherence to those precedents. *First*, the plea that "someone has to be able to sue" proves too much. The hypothetical downside of a lack of offended observer standing is by no means unique to Establishment Clause claims, as *Schlesinger*, *Richardson*, and *DaimlerChrysler* (not to mention *Frothingham*) demonstrate. Flagrant violation of still other clauses, *e.g.*, the Nobility Clause, U.S. Const. Art. I, § 9, cl. 8 – say, by the President or Congress conferring knighthood on prominent donors or former government officials – would not give standing to offended observers either.

Second, worst-case scenarios have a way of generating *political* consequences. As this Court observed in *Richardson*, "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. *Id.* Were worst-case hypotheticals sufficient to justify disregarding limits on standing, then *Valley Forge*, *Hein*, and *ACSTO* should have come out the other way, as little

imagination is needed to conjure up unconstitutional government land transfers, workshops on religion, or expressly religiously preferential tax credits.

Offended observer standing is flawed for numerous other reasons as well. For example, it confers a unique privilege on separationist plaintiffs. Although there are doubtless myriad ways in which government speech or displays might offend various citizens, only those who bring an Establishment Clause claim are allowed to make a federal case out of their offense. As Justice Gorsuch observed, bestowing offended observer standing only on separationists leads to bizarre results:

> An African-American offended by a Confederate flag atop a state capitol would lack standing to sue under the Equal Protection Clause, but an atheist who is offended by the cross on the same flag could sue under the Establishment Clause. Who really thinks that could be the law?

American Legion v. Amer. Humanist Ass'n, 139 S. Ct. 2067, 2099 (2019) (Gorsuch, J., concurring in judgment). Indeed, the *Valley Forge* Court repudiated the notion that offense at alleged Establishment Clause violations is somehow distinguishable from the offense suffered by the plaintiffs in cases like *Schlesinger* and *Richardson*. The Court knew of "no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing." 454 U.S. at 484-85. The Court noted further that "the proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those

provisions has no boundaries." *Id.* at 485 (quoting *Schlesinger*, 418 U.S. at 227).

Offended observer standing also encroaches upon the separation of powers. This Court repeatedly has said that lax standing requirements lead to judicial invasion into the province of the political branches of government. *E.g., Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("the doctrine of standing . . . prevents courts of law from undertaking tasks assigned to the political branches"). Offended observer standing sweeps sizable categories of otherwise politically accountable government action into judicially reviewable litigation. *See also Richardson*, 418 U.S. at 191 (Powell, J., concurring) ("The power recognized in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803), is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing").

D. This Is Not a Case of Coerced Exposure to Objectionable Matter.

A different rule may well apply under Article III where the offended observer is *coerced*, in the legal sense, to view or hear the objectionable matter. A program of mandatory "indoctrination" – brainwashing – of youths in public schools or state colleges, of government employees, of prisoners or others in government custody, or of citizens generally *as a precondition* of access to services or benefits, could give rise to an injury in fact, not because of the objection to the exposure but because of the *coercion* involved. *Compare Lee v. Weisman,* 505 U.S. 577, 597 (1992) (contrasting effectively mandatory school event with government session "where adults are free to enter and

leave with little comment and for any number of reasons"). Such cases raise concerns that go well beyond the all-too-common disagreement, however visceral or sincere, that a citizen feels upon viewing government action that is personally objectionable. "People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Id*. *See also Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014) (plurality) ("Offense . . . does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views").

Here, however, the city required no exposure to speech at all. Attendance at the vigil was purely voluntary, and there is no indication attendance was a precondition for access to public benefits like use of a park or highway, receipt of municipal services, or admission to local public schools or their programs. And while respondent Hale speculated that attendance might boost one's favor in the eyes of the city (while voicing disagreement might have the opposite effect), neither she nor respondent Rojas provided any concrete evidence of actual disparate treatment. (And again, actual disparate treatment would be a different kind of injury than mere offense.) Such speculative inferences, moreover, could equally arise from almost any other government action that one finds objectionable. That does not mean one acquires standing to sue in federal court against such action. *See also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (the "threatened injury must be certainly impending to constitute injury in fact").

II. THE CIRCUITS BADLY NEED GUIDANCE ON WHETHER OFFENDED OBSERVER CLAIMS SUFFICE FOR ARTICLE III STANDING.

Despite the seemingly clear teachings of this Court set forth above, many lower courts have nevertheless recognized offended observer standing as a special rule for Establishment Clause cases, *see American Legion*, 139 S. Ct. at 2101 (Gorsuch, J., joined by Thomas, J., concurring in judgment); *City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., dissenting from denial of certiorari). This Court's intervention is therefore necessary to halt this departure from constitutional limits on federal subject matter jurisdiction.

Moreover, the problem is not going away by itself.

To be sure, Justice Gorsuch theorized that the lower courts adopted offended observer standing in response to this Court's creation of the *Lemon* and endorsement tests, *American Legion*, 139 S. Ct. at 2101 (concurrence in judgment),[4] and that "[w]ith *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing," *id.* at 2102. Yet *in this very case*, the Eleventh Circuit, while remanding *the merits* for reconsideration in light of *Lemon*'s demise, adhered to its embrace of offended

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[4] *See also* Joseph Davis & Nicholas Reaves, "Fruit of the Poisonous Tree: How the Supreme Court Created Offended-Observer Standing, and Why It's Time for It to Go," 96 *Notre Dame L. Rev.* 25, 29-32 (2020) ("Fruit of the Poisonous Tree") (making the same argument).

observer standing.[5] And the Eleventh Circuit is not the only one. The Seventh Circuit, in a post-*American Legion* case, expressly adhered to "offended observer" standing. *Woodring v. Jackson Cty.*, 986 F.3d 979, 986 (7th Cir. 2021). The Third Circuit has done the same. *Freedom From Religion Found. v. County of Lehigh*, 933 F.3d 275, 279-80 (3d Cir. 2019). Plainly, the circuits are not of a mind to correct this jurisdictional error on their own initiative.

The failure of lower courts to take a clear hint in this area is not new, after all. Notwithstanding *Valley Forge*'s clarity on the illegitimacy of standing predicated upon mere disagreement with something one observes, numerous lower federal courts, over the years, embraced offended observer standing. *E.g.*, *Suhre v. Haywood Cnty.*, 131 F.3d 1083 (4th Cir. 1997); *Vasquez v. L.A. Cnty.*, 487 F.3d 1246 (9th Cir. 2007); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987).

This pattern of disregard or distortion of *Valley Forge* has not been without its critics. Individual judges have lamented the fact that offended observer standing is obviously irreconcilable with *Valley Forge*, *Schlesinger*, and the like. *See, e.g., ACLU of Ohio Found. v. Ashbrook*, 375 F.3d 484, 495-500 (6th Cir. 2004) (Batchelder, J., dissenting) (Sixth Circuit's decisions applying offended observer standing are "inconsistent with the holdings in *Valley Forge* and

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[5]The Eleventh Circuit had already, in a different post-*American Legion* case, reaffirmed its adherence to offended observer standing. *Kondrat'Yev v. City of Pensacola*, 949 F.3d 1319, 1323-25 (11th Cir. 2020).

Steel Co., and in that regard were wrongly decided"); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 684-85 (6th Cir. 1994) (Guy, J., concurring) ("discussion of 'psychological damage' establishes – not religion – but "a class of 'eggshell' plaintiffs of a delicacy never before known to the law"); *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 795 (9th Cir. 2008) (Kleinfeld, J., dissenting) ("*Valley Forge* holds that 'psychological' injury caused by 'observation' of 'conduct with which one disagrees' is not a concrete injury to a legally protected interest sufficient to confer standing. . . . Thus being there and seeing the offending conduct does not confer standing"); *Kondrat'Yev v. City of Pensacola*, 949 F.3d 1319, 1336 (11th Cir. 2020) (Newsom, J., concurring) (offended observer standing "utterly irreconcilable with . . . *Valley Forge*"). A collection of dissents and concurrences, however, does not resolve the ongoing problem of the circuits maintaining a flawed standing rule. Rarely, moreover, has any circuit been able to muster a majority to rebuff such a claim even in a particular case.[6]

The lower courts' embrace of offended observer standing represents a fundamental jurisprudential

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[6]*But see Freedom From Religion Found. v. Obama*, 641 F.3d 803, 807, 808 (7th Cir. 2011) (no standing to bring Establishment Clause challenge to President's proclamation of a National Day of Prayer: under Supreme Court's precedents, "hurt feelings differ from legal injury," and "unless all limits on standing are to be abandoned, a feeling of alienation cannot suffice as injury in fact"). However, as noted in the text above, the Seventh Circuit in the very recent *Woodring* case continues to adhere to offended observer standing, 986 F.3d at 986 (as it did in *FFRF v. Obama*, 641 F.3d at 807).

contradiction: *Valley Forge et al.* disallow standing based upon the offense that flows from disagreement, even vigorous disagreement, yet the circuits hold that being an offended observer can nevertheless be enough. Reconciling these incompatible premises spawns endless arbitrary line-drawing, if not complete abandonment of any limits on standing. As Judge Newsom has observed,

> Can it really be that, as *Valley Forge* clearly holds, "psychological" harm is not sufficient to establish Article III injury in an Establishment Clause case, and yet somehow . . . "metaphysical" and "spiritual" harm are? And can it really be that I – as a judge trained in the law rather than, say, neurology, philosophy, or theology – am charged with distinguishing between "psychological" injury, on the one hand, and "metaphysical" and "spiritual" injury, on the other? Come on.

Kondrat'Yev, 949 F.3d at 1336 (Newsom, J., concurring). The Second Circuit likewise observed that "lower courts are left to find a threshold for injury and determine somewhat arbitrarily whether that threshold has been reached." *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 490 (2d Cir. 2009) (footnote omitted). The *Cooper* court cited to an Eighth Circuit case which observed that "[n]o governing precedent describes the injury in fact required to establish standing in a religious display case." *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1028 (8th Cir. 2004), *vacated on reh'g en banc*, 419 F.3d 772 (2005).

In short, the lower courts remain tied to an unconstitutional standard that places those courts in a hopeless position: they must decide, under their own homemade test, and thus without any guidance from this Court, what qualifies as sufficient "offense," and under what circumstances, to invoke federal jurisdiction.

III. RESPONDENTS' CLAIM OF "OFFENDED OBSERVER" STANDING IS ESPECIALLY WEAK.

As noted above, the claim of "offended observer" standing in this case is particularly weak. Respondents Rojas and Hale, having learned about the impending vigil, made a point to attend in person so they could "observe" the anticipated violation. In short, the supposed "injury" was completely self-inflicted. Moreover, the "offense" at issue consisted, not of something offensive as such, but rather, something offensive to respondents only because of alleged municipal involvement. *Supra* p. 6 (Hale and Rojas objected, not to the event, but to the city's involvement). There is something "peculiar" about such an alleged injury.[7] The peculiarity is that the

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[7] *See* "Fruit of the Poisonous Tree," *supra* note 4, at 29 (footnote omitted; emphasis added):

> In addition, there is something peculiar about the government-related nature of the injury . . . . That is, the feelings of offense were limited and specific to seeing the seal on city-owned property. The same symbol displayed on private property, or even on property owned by a foreign government, would not cause the injury. Nor would reading the word "Christianity" in a dictionary. So, *it is not just the*

essence of the asserted offense is not really what respondents *observed*, but what they *judged* – namely that, by their lights, a constitutional violation had happened. Such an unvarnished legal disagreement is precisely what this Court has repeatedly held is insufficient for standing.

Why did Lucinda Hale "absolutely want to be included" in this lawsuit? As she put it in her own words, "I want to try to make a difference in this country with regard to church and state separation." Dkt. 54-12, at 51:19-21. Zeal for constitutional propriety (even if ill-founded in this case) is certainly admirable. It is not, however, a substitute for Article III injury. As this Court said in *Valley Forge*:

> It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

454 U.S. at 486. *Accord Carney*, 141 S. Ct. at 498-99 (citations and internal quotation marks omitted):

> an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an injury in fact . . . no matter how sincere or deeply committed a plaintiff is to vindicating that general interest

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content of the display, but the display's legal relationship to a governmental body that causes the offense, and thus the claimed injury.

* * *

Flaccid standing rules, while a boon for "kibitzers . . . and 'cause mongers,'" *Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 373 (7th Cir. 1997), are bad recipes for federal judicial limits. "Offended observer" standing is one such poor idea whose time for repudiation has come. Such standing "enlist[s] the federal court to superintend . . . the speeches, statements, and myriad daily activities," *Hein*, 551 U.S. at 611-12, of executive officials – *exactly* as happened in this case. *See* Pet. App. at 10a-30a. Disagreement with how a municipality conducts itself, whether couched as an objection, an offense, or a feeling, "is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Valley Forge,* 454 U.S. at 485-86. *Id.* at 483 ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning").

This Court should grant certiorari and, upon review, reverse the judgment of the Eleventh Circuit and remand for dismissal for want of standing.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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Sept. 22, 2022

APPENDIX

APPENDIX A

No. 18-12679
Rojas v. City of Ocala
United States Court of Appeals for the Eleventh Circuit
July 22, 2022

40 F.4th 1347 *

Before NEWSOM, TJOFLAT, and ED CARNES, Circuit Judges.

[*1349] ED CARNES, Circuit Judge:

In response to a shooting spree that caused injuries to several children, the City of Ocala's Police Chief, along with some of his employees and volunteer police chaplains, worked with a community activist to organize and sponsor a prayer vigil in the town square.

The police department posted a letter on its Facebook page, urging citizens to attend the vigil and fervently pray. The letter, which was jointly signed by the Chief and the community activist, was on the department's letterhead. The top of the page had an image of a police badge with "OCALA POLICE DEPARTMENT" underneath that image, and the department's address and phone number were at the bottom of the page.

After seeing the department's Facebook posting, several Marion County residents who are humanists or atheists attended the vigil where police chaplains

appeared onstage praying and singing while wearing their department-issued uniforms. Those residents later filed a lawsuit against the chief of police, the mayor, and the City, alleging a First Amendment Establishment Clause violation. They sought nominal damages, costs, and attorney's fees.

The district court granted summary judgment to the plaintiffs, and the City appealed. The issues are whether the plaintiffs have standing and, if so, whether the City violated the Establishment Clause. We conclude the answers are "yes," and "maybe."[1]

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[1] Before addressing those two issues, we need to specify which original parties to this lawsuit are no longer parties to this appeal, and explain why. Jean Porgal was originally one of the plaintiffs, but she died while the case was proceeding in the district court. Plaintiff Daniel Hale died while this appeal was pending. The two plaintiffs who remain parties in this appeal are Art Rojas and Lucinda Hale, who is Daniel Hale's widow.

Mayor Reuben "Kent" Guinn was a defendant, but the district court granted summary judgment in his favor, and the plaintiffs have not challenged that. Chief of Police Greg Graham, who was a defendant, died while the appeal was pending. The parties filed a "Joint Notice Regarding Suggestion of Death of Select Parties and Impact on this Appeal," which asserted that none of the parties' deaths had any impact on the appeal, including the death of Chief Graham. The joint notice also stated that the proper party defendant was Chief Graham's successor as chief of police, citing for that proposition Federal Rule of Appellate Procedure 43(c)(2): "When a public officer who is a party to an appeal or other proceeding in an *official capacity* dies, . . . [his] successor is automatically substituted as a party." (emphasis added).

A motions panel issued an order indicating that for purposes of this appeal, there are two remaining defendants: the City of Ocala and its police chief, who is unnamed but is sued in his official

[*1350] I. Standing

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). It "ensure[s] that federal courts do not exceed their authority as it has been traditionally understood." *Id.* And it "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Id.*

Because it is jurisdictional and implicates the authority of a federal court to decide a case, we must consider standing first. *See Gardner v. Mutz*, 962 F.3d 1329, 1338-39 (11th Cir. 2020). The familiar requirements for Article III standing are: "(1) an injury in fact — an invasion of a legally protected interest that is both (a) concrete and particularized and (b)

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capacity. There's a problem with that ruling. The district court dismissed with prejudice the official capacity claims against Chief Graham, agreeing with a magistrate judge's recommendation that those claims were, in effect, claims against the City. (The remaining claims against Chief Graham were in his individual capacity. The plaintiffs did not object to the magistrate judge's report, did not appeal the dismissal of the official capacity claims against Chief Graham, and did not substitute any party for Graham even after the district court gave them a deadline for doing so. As a result, there are no official capacity claims against the current Ocala chief of police, and he is not a party to this appeal. To the extent an earlier motions panel order held otherwise, we vacate that order. *See* 11th Cir. R. 27-1(g) ("A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the appeal is assigned on the merits, and the merits panel may alter, amend, or vacate it."). The bottom line is that the City is the only remaining defendant involved in this appeal.

actual or imminent, not conjectural or hypothetical; (2) a causal connection between the plaintiff's injury and the challenged action of the defendant; and (3) a likelihood, not merely speculation, that a favorable judgment will redress the injury." *Id.* at 1338 (cleaned up); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) (en banc). In the present case, the standing requirement at issue is injury.

"For Establishment Clause claims based on non-economic harm, the plaintiffs must identify a 'personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.'" *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003) (quoting *Valley Forge Christian Coll. v. Ams. United for Sep. of Church & State, Inc.*, 454 U.S. 464, 485 (1982)). "In this type of case, plaintiffs have standing if they are directly affected by the laws and practices against which their complaints are directed." *Id.* (alteration adopted and quotation marks omitted).

Lucinda Hale has alleged that she was directly affected by the prayer vigil and suffered an injury sufficient to confer standing to bring an Establishment Clause claim against the City of Ocala. *See Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1279-80 (11th Cir. 2008) (holding that a plaintiff had standing based on "direct contact" with an allegedly offensive invocational prayer practice at Planning Commission meetings after he voluntarily attended three meetings in person and "watched numerous meetings" on the internet).

These are the facts at this stage of the proceedings. Hale lives in Marion County (where Ocala is located) and had visited the Ocala downtown square "a number of times" before the prayer vigil took place, including going to the farmer's market there. She heard about the prayer vigil when someone informed her and her late husband about the Ocala Police Department's Facebook posting, and they then looked at that posting. She testified that "[c]rime creates an environment that's negative for all citizens," but she felt that the invitation to a community prayer vigil did not include her or others who do not pray.

Hale attended the prayer vigil and later testified that it was similar to a Christian revival. She is concerned about alleviating crime but felt unable to participate in the vigil because the speakers invited the audience only to pray and sing. Hale had attended the vigil because she wanted to observe it and also because she has an interest in being part of the community and is concerned about crime.

The district court determined that Hale had alleged "more than a mere interest in **[*1351]** the matter," and because she was injured, she has standing to bring this lawsuit. *See ACLU of Ga. v. Rabun Cnty. Chamber of Com., Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983) ("Injury in fact serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.") (quoting *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973)) (cleaned up). We agree.

Hale's "contact is sufficient to establish the personal and individualized injury necessary for standing." *Pelphrey*, 547 F.3d at 1280. She voluntarily attended the prayer vigil and knew she would encounter religious practices she found offensive, but under Supreme Court precedent that does not mean she lacks standing to bring an Establishment Clause claim. *See Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1647 (2022) ("[W]e have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred."). Because Hale has standing, we need not decide whether Rojas also does. *See Pelphrey*, 547 F.3d at 1280 ("Because one plaintiff has standing, we need not consider whether the other plaintiffs had sufficient contact with the offensive practice to establish standing.").

II.The Merits

When the district court granted summary judgment, it believed that the analytical framework articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was the controlling law. Even though many Justices soured on *Lemon* over the years, the Court seemingly could not rid itself of that much-maligned decision. Justice Scalia colorfully described *Lemon* as "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment,

joined by Thomas, J.). Because the district court and the parties believed that *Lemon* was still shuffling about at the time, the court applied it in concluding that there was an Establishment Clause violation in this case. *See* Doc. 88-1 at 31 (noting that the parties all agreed that *Lemon* applied); *id.* at 31-38, 60 (applying *Lemon*, concluding that the prayer vigil "failed each of [its] three prongs," and then addressing whether the prayer vigil was a government-sponsored event).

After this appeal was filed, however, the Supreme Court drove a stake through the heart of the ghoul and told us that the *Lemon* test is gone, buried for good, never again to sit up in its grave. Finally and unambiguously, the Court has "abandoned *Lemon* and its endorsement test offshoot." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022). In the course of doing so, the Court asserted that it had already done it — "long ago," *id.* — which was news to a third of the Court's Justices, *see id.* at 2434 (Sotomayor, J., dissenting, joined by Breyer and Kagan, JJ.) ("Today's decision . . . overrules *Lemon* . . . .").

Regardless of exactly when the ghastly decision was dispatched for good, the Supreme Court has definitively decided that *Lemon* is dead — long live historical practices and understandings. *See id.* at 2428 (majority opinion) ("In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings.") (quotation marks omitted).

[*1352] We remand this case to the district court to give it an opportunity to apply in the first instance the historical practices and understandings standard endorsed in *Kennedy*. *See Nat'l R.R. Passenger Corp. v. Florida*, 929 F.2d 1532, 1538 (11th Cir. 1991) (remanding for the district court to consider the effect of recent changes in the law).

VACATED AND REMANDED.

APPENDIX B
Rojas v. City of Ocala
United States District Court for the Middle District of Florida, Ocala Division
May 24, 2018, Decided; May 24, 2018, Filed
Case No. 5:14-cv-651-Oc-32PRL

315 F. Supp. 3d 1256 *

TIMOTHY J. CORRIGAN, United States District Judge.

[*1263] ORDER

If individuals or religious groups organize a prayer vigil and gather in the Downtown Square in the City of Ocala to pray for an end to violent crime, the First Amendment to the United States Constitution will protect the "free exercise" of their religion. But what if the government organizes and sponsors the prayer vigil? That is a problem because under the Establishment Clause of the First Amendment, the government cannot conduct such religious activity. Yet that is what happened here. While the Ocala Police Chief and his subordinates were no doubt well-intentioned and sincere in sponsoring the Prayer Vigil, their actions violated the First Amendment.

I. Introduction

When the City of Ocala experienced a violent crime-spree in the late summer and early fall of 2014, its police department sought to curtail the violence using all available means. As part of those efforts,

Chief of Police Kenneth Gregory "Greg" Graham met with members of Ocala's faith-based community to seek their assistance. What resulted was an invitation from Chief Graham to the community, promoted **[*1264]** on the Ocala Police Department facebook page and elsewhere, encouraging everyone's attendance at a "Community Prayer Vigil" on September 24, 2014 in the Downtown Square. The plaintiffs, who are atheists, contacted Chief Graham and Ocala's mayor, Reuben "Kent" Guinn, in advance of the Vigil, advising them of their concern that the City's promotion and sponsorship of a Prayer Vigil would violate the United States Constitution's Establishment Clause. The plaintiffs were rebuffed, the Vigil took place, and this lawsuit followed.

Efforts to settle the case failed and the parties filed cross-motions for summary judgment (Docs. 52, 53, 54) and responses thereto (Docs. 61, 62, 64, 68). The Court held argument on the motions on May 26, 2017, the record of which is incorporated by reference. The parties made further efforts to settle, but those too failed and the Court now issues this decision.

II. Undisputed Facts

In September 2014, the Ocala Police Department pursued various means to try to apprehend those responsible for the recent shooting spree that left several children injured. Graham Dec. I[1] (Doc. 52-1) at ¶¶ 5-6. The police knew who the

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[1] "As used herein, "Dec." is a citation to a declaration (Graham prepared two declarations, denoted here as "Dec. I" and "Dec. II"),

shooters were, but could not persuade witnesses to come forward to testify. Graham Depo. (Doc. 54-10) at Tr. 21. Their efforts included meeting with local leaders of the NAACP, who suggested to Chief Graham that the police reach out to the local faith-based community for help in convincing witnesses to cooperate. Graham Dec. I (Doc. 52-1) at ¶ 7. Heeding that suggestion, Chief Graham held a meeting at the Ocala Police Department on September 17, 2014, with Captain Richard Edwards, the District Commander of the area where most of the trouble was occurring; Officer Mary Williams, who assisted Captain Edwards with community events in the area; Captain Carmen Sirolli, the Captain in charge of the division investigating the shootings; Major Dennis Yonce, the Major to whom Sirolli reported; Hugh Brockington, an Ocala Police Department Chaplain; Edwin Quintana, another Police Chaplain; and Narvella Haynes, a community activist who lived in the area where the crimes occurred and who had previously assisted the police with community outreach. Graham Depo. (Doc. 54-10) at Tr. 19-21.

The purpose of the meeting was to develop ideas about how "to get the ministers in that area to lean on, talk to, encourage witnesses to come forward" so the police could hold the perpetrators accountable. Graham Depo. (Doc. 54-10) at Tr. 21. Chaplain Edwin

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"Depo." is a citation to a deposition, "Tr." is a citation to a page in a deposition transcript (using the Page ID from the CM/ECF header; some of the transcripts are missing pages so the court reporter's page number and the CM/ECF header page are not always aligned); "Aff." is a citation to an affidavit; "Inter. Resp." is a citation to an Interrogatory Response.

Quintana suggested that a prayer vigil or similar event on Ocala's public Downtown Square might bring the faith-based community together to get the word out and encourage people to cooperate. Graham Dec. I (Doc. 52-1) at ¶ 10; Graham Depo. (Doc. 54-10) at Tr. 23. Chief Graham "thought it was a great idea" and said "Let's do it." Graham Depo. (Doc. 54-10) at Tr. 23. Graham says he then left the meeting and Quintana and Haynes began planning the Vigil, creating a letter for Chief Graham's and Haynes' signatures that invited the community to participate in the Vigil.[2] Graham Dec. I (Doc. 52-1) at ¶ 10; Haynes Dec. (Doc. 52-2) **[*1265]** at ¶¶ 7, 9; Quintana Dec. (Doc. 52-3) at ¶¶ 5 & 6. Chief Graham read the letter and directed

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[2] On September 18 (the day after the meeting), Chief Graham sent an email to Edwards and Quintana (but not Haynes) saying that due to feedback from ministers that Wednesday was not the best night for the Vigil, "[w]e are going to have the vigil on Thursday night instead of Wednesday." Doc. 54-21 (marked Ex. 5) (9/18/2014 email from Graham to Edwards and Quintana). But by September 19, the Police Department was preparing for the Vigil to occur on Wednesday, September 24. See Doc. 54-24 (marked Ex. 8) (9/19/2014 email from Ocala Police Department employee announcing the Prayer Vigil for September 24). Although Graham and Quintana signed declarations stating that the Prayer Vigil occurred on September 25 (see Graham Dec. I (Doc. 52-1) at ¶ 22; Quintana Dec. (Doc. 52-3) at ¶ 9), it appears they were simply mistaken. Contemporaneous news stories, emails, and social media postings in the record appear to confirm the Prayer Vigil took place on Wednesday, September 24, 2014, as originally scheduled. See, e.g., Doc. 54-19 (marked Ex. 3) at Page ID 1389 (9/24/2014 social media posting with photos of the Vigil); Doc. 54-72 (marked Ex. 56) at Page ID 1613, 1617 (9/24/2014 emails from reporters to the Ocala Police Department referencing "tonight's" prayer vigil); Doc. 54-73 at Page ID 1624 (9/24/2014 9:08 p.m. story on Ocala.com about that evening's Prayer Vigil).

an Ocala Police Department Sergeant to post it on the Ocala Police Department's facebook page, and Haynes and the Chaplains encouraged members of the community to attend the Vigil. Graham Dec. I (Doc. 52-1) at ¶ 11; Graham Depo. (Doc. 54-10) at Tr. 31, 58; Graham Inter. Resp. (Doc. 54-6) at # 1; Haynes Dec. (Doc. 52-2) at ¶ 8, Quintana Dec. (Doc. 52-3) at ¶ 7. Chief Graham agreed that by posting the letter on the Ocala Police Department facebook page, he was "promoting" the Prayer Vigil. Graham Depo. (Doc. 54-10) at Tr. 50.

Printed on Ocala Police Department letterhead (with the image of the Ocala Police Department badge and words OCALA POLICE DEPARTMENT displayed at the top, and the Department address and phone number at the bottom), the text of the letter read:

> Blessings to all our citizens, specifically Pastors, Community Leaders, Parents and our precious youth.
>
> We are facing a crisis in the City of Ocala and Marion County that requires fervent prayer and your presence to show unity and help in this senseless crime spree that is affecting our communities.
>
> Within the last 30 days we have had numerous shootings that have resulted in two children and an infant being hit by bullets.
>
> Stray bullets do not have respect for addresses, social status, economic status, educational

> background, political status and the list goes on. Buy my point is none of us are exempt from stray bullets.
>
> I am urging you all to please support a very important "Community Prayer Vigil" that will be held this coming Wednesday, September 24, 2014 at 6:30 pm to be held at our Downtown Square located in the heart of the City.
>
> Please support peace and this appeal for unity on this very important "Community Prayer Vigil" coming this next Wednesday. We need you.

The letter was signed with "Blessings and Highest Regards" by Greg Graham, as Chief of Police, and Narvella Haynes. See Doc. 1, Ex. A. Here is an image of the letter:

[*1266]

OCALA POLICE DEPARTMENT

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

We are facing a crisis in the City of Ocala and Marion County that requires fervent prayer and your presence to show unity and help in this senseless crime spree that is affecting our communities.

Within the last 30 days we have had numerous shootings that have resulted in two children and an infant being hit by bullets.

Stray bullets do not have respect for addresses, social status, economic status, educational background, political status and the list goes on. But my point is none of us are exempt from stray bullets.

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

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

Blessings and Highest Regards,

Chief of Police

Marvella Haynes

402 S. PINE AVENUE • OCALA, FL 34471-1174 • (352) 369-7000

Ocala Police Department staff created a separate flyer about the Vigil which depicts a photo of the gazebo covered stage in the Downtown Square with an image of praying hands in one corner and the Ocala Police Department logo in the opposite corner, and the words "Community Prayer Vigil Wednesday, September 24, 2014 6:30 p.m. Ocala/Marion County is in crisis! Help Stop The Violence! Join us downtown on the square." Doc. 54-22 (marked Ex. 6) at 7. The Police Chief's letter and an earlier version of the flyer (created before the Ocala Police Department logo was added) were sent to Narvella Haynes by Officer Williams on September 19. Doc. 54-23 (marked Ex. 7).[3] Chief Graham stated he **[*1267]** was unaware of the existence of the flyer. Graham Dec. II (Doc. 68-1) at ¶ 4.

Quintana invited several local clergymen to participate in the Vigil and sent an email to the Ocala Police Chaplains (copying Graham) telling them that Chief Graham asked Quintana to ask all the Chaplains to be present at the Vigil and to come wearing their Police Chaplain uniforms. Quintana Dec. (Doc. 52-3) at ¶¶ 7, 8; Doc. 54-26 (marked Ex. 10) (9/22/2014 email to chaplains from Quintana, copying Graham).[4] The Ocala Police Chaplain uniform differs

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[3] Plaintiffs claim the flyer was distributed to the public by an Ocala police officer but the exhibit they cite in support (Exhibit 6-C) is not in the record. See Doc. 54 at 5.

[4] At his deposition, Chief Graham, who appeared on his own behalf and as the City's 30(b)(6) representative, testified that he did not recall directing Quintana to have the Chaplains attend and to do so in uniform and thought it more likely that he simply

from the uniform of a sworn officer— the Chaplains wear white shirts instead of blue, the sleeves bear patches that say "CHAPLAIN" above the Ocala Police Department patch, and the Chaplains do not carry weapons. Quintana Dec. (Doc. 52-3) at ¶ 9; Doc. 54-19 (marked Ex. 3) at Page ID 1386, 1389, 1394, 1396, 1401, 1402 (photos of uniformed Ocala Police Officers and uniformed Ocala Police Chaplains).

The Ocala Police Department supplies and pays for the Chaplains' uniforms. City Inter. Resp. (Doc. 54-5) at # 7. Chief Graham testified that when the Chaplains are in their police uniforms, the public would perceive them as being connected with the Ocala Police Department. Graham Depo. (Doc. 54-10) at Tr. 165-66. The Chaplains have office space in the Ocala Police Department's building. Id. at Tr. 169. According to the Ocala Police Department Directive, "Ocala Police Department Chaplains are official members of the Ocala Police Department[,]" who are "appointed by the Chief of Police," and are "considered members of the staff of the Chief of Police in a support capacity and report directly to the Chief of Police." Doc. 52-6 (marked Ex. 2) at 2. "They are issued Police Identifications in the form of an identification card with holder and badge[,]" id., are issued cell phones,

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agreed to Quintana's recommendation about that. Graham Depo. (Doc. 54-10) at Tr. 13, 37-38. The City's Interrogatory Responses say that the Ocala Police Department did not ask the Ocala Police Chaplains to have any involvement in the Vigil but they did so of their own initiative. City Inter. Resp. (Doc. 54-5) at # 8.

and are authorized to drive Department vehicles.[5] Ocala Police Department Police Chaplain Section Manual, 2010, and as reviewed 2015 (Doc. 54-74 (marked Ex. 58)) at 23-24, 36-37. Chief Graham has the authority to terminate the Ocala Police Chaplains. Graham Depo. (Doc. 54-10) at Tr. 168. Although the Ocala Police Chaplains are volunteers, they are covered by worker's compensation when performing official Department duties. Doc. 52-6 (marked Ex. 2) at 2. All of the Ocala Police Department Chaplains are of the Christian faith. Graham Depo. (Doc. 54-10) at Tr. 157. Chief Graham agreed that although it would be inappropriate for Ocala Police Chaplains to try to "convert" people in the course of their work for the Ocala Police Department, "participating in a prayer vigil" would be part of the official function of an Ocala Police Chaplain. Id. at Tr. 78-79.[6]

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[5] In his declaration, Chaplain Quintana states that Chaplains do not wear "police badges," Doc. 52-3 at ¶ 9, but the department directive and section manual both state that Chaplains are issued badges. See Doc. 52-6 at 2, Doc. 54-74 at 23, 36. In some of the photos from the Prayer Vigil, some of the Police Chaplains appear to be wearing badges. See Doc. 54-19 (marked Ex. 3) at Page ID 1386, 1389, 1390, 1394, 1396. According to the City's Interrogatory Responses, the Chaplains' badges identify the wearer as a Chaplain (as opposed to an officer), but that is not evident from the photos. See City's Inter. Resp. (Doc. 54-5) at # 7.

[6] In a later declaration, Chief Graham seems to be rejecting a portion of this deposition testimony, saying:

> As I previously testified, I do not consider uniformed [Ocala Police Department] chaplains proselytizing to the general public to be part of their official departmental function. Nor is it part of chaplains' departmental function to lead general community religious events or activities, such as the Community Prayer Vigil at issue in

[*1268] Soon after the Vigil was advertised, several citizens, including some of the plaintiffs, contacted Chief Graham and Mayor Guinn, expressing concern that a prayer vigil organized by a police department would violate the U.S. Constitution. See, e.g., Doc. 52-9 at 3-4 (9/20/2014 6:03 p.m. email); Doc. 54-51 (marked Ex. 35) at 2 (9/22/2014 5:14 p.m. email). Initially, Chief Graham's responses tended to take ownership of the Vigil, saying, for example, "I have no intention of canceling the event," Doc. 54-40 (marked Ex. 24) at 4 (9/22/2014 4:05 p.m. email), and "[t]his 'vigil' is not the only strategy that we [the Police Department] are employing to fight crime in Ocala" and explaining that the purpose of the Vigil was for the Police Department to engage the faith-based community to help make the community safer. Doc. 52-9 at 3 (9/21/2014 2:43 p.m. email). As the Chief responded to one supporter who wrote to him with the subject line "Stand tall on prayer!":

> Thanks for the encouraging words. I have been getting quite a few responses from people, mostly from out of our area, who oppose this. I have no intention on calling this gathering off nor changing my personal belief on the power of prayer. Take care and I hope to see you on

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this case, while in uniform.

Doc. Graham Dec. II (68-1) at ¶ 6. To the extent this second statement contradicts, without explanation, Graham's clear answers to unambiguous questions at his deposition, the Court rejects it under the sham affidavit doctrine. See Van T. Junkins & Associates, Inc. v. U.S. Industries, Inc., 736 F.2d 656, 657 (11th Cir. 1984); Lane v. Celotex Corp., 782 F.2d 1526, 1529-30 (11th Cir. 1986).

Wednesday.

Doc. 54-55 (marked Ex. 39) (9/22/2014 3:55 p.m. email).

Soon thereafter, however, Chief Graham began to distance himself and his Department from the Vigil, responding that the Vigil was a community event he could not stop and over which he had no control. For example, on September 23, 2014, he wrote to one citizen with whom he had been corresponding about the meaning of the Establishment Clause, "I think you are misunderstanding my role in this event. I am not leading the event, I am not speaking at the event, I will be in attendance at the event." Doc. 54-49 at 5 (marked Ex. 33-B) (9/23/2014 4:07 p.m. email). He further wrote that he knew the minister who was organizing it and could put the citizen in touch in case he wanted to attend "and say a few words." Id. To another citizen, he wrote:

> I am not sure if I have been clear in any of my prior emails to you that this event tonight is a "Community Prayer Vigil" not an Ocala Police Department or City of Ocala Prayer Vigil and as such I have no say in whether it gets canceled or not. I have indicated to several others that I have no intent on canceling the event and should have expanded my thoughts. If I were to try and cancel this event I would be violating the Constitution by preventing people from gathering and exercising their right to free speech.

Doc. 54-40 at 6 (marked Ex. 24-C) (9/24/2014 2:48 p.m. email from Graham). See also Doc. 54-50 (marked Ex. 34) (9/24/2014 1:27 p.m. email from Graham) ("I am not attacking your rights as an American to freedom of religion, I am upholding others[‘] rights to express themselves . . . this is not a City of Ocala or Ocala Police Department Prayer Vigil, it is **[*1269]** a Community Prayer Vigil and as such I have no say in canceling the event").

Although there is no evidence that Kent Guinn, Ocala's Mayor, had anything to do with the planning of the Prayer Vigil, once he learned about it,[7] he readily embraced it as a government-sponsored event, responding to a citizen's complaint about what the citizen perceived to be the Police Chief's endorsement of religion: "I think this is great. I'll be sure to praise him [Chief Graham] for it." (Doc. 54-49 (marked Ex. 33) at 3 (9/19/2014 10:55 p.m. email from Guinn to citizen, copying Graham)). Mayor Guinn wrote to Chief Graham about the Prayer Vigil two days later, stating: "As I told you I think this is a great idea and have been responding to the atheist groups that are writing me about it. I put it on my calendar to be there," but telling Graham that next time he does "things like that" to let the Mayor know so he doesn't find out from his "church and random emails." Doc. 54-25 (marked Ex. 9) at 2 (9/21/2014 12:33 p.m. email from Guinn to Graham). The next day, Mayor Guinn wrote to a protesting citizen who had urged the Mayor to show

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[7] Mayor Guinn could not recall how he first heard about the Prayer Vigil, but he thought he saw something about it at his church. Guinn Depo. (Doc. 54-11) at Tr. 71-72.

leadership in addressing the Chief's violation of the First Amendment, saying,

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

Doc. 54-51 (marked Ex. 35) (9/22/2014 6:43 p.m. email from Guinn to citizen, copying Graham). In responding to another citizen's concern about the upcoming Prayer Vigil, Mayor Guinn responded:

> Thanks for your interest in our community. There is nothing in the constitution to prohibit us from having this vigil. Not only are we not canceling it we are trying to promote it and have as many people as possible to [sic] join us. We open every council meeting with a prayer. And we end the prayer in Jesus name we pray. Our city seal says "God be with us" and we pray that he is and us with him.

Doc. 54-44 at 2 (marked Ex. 28-A) (9/22/2014 10:24 a.m. email from Guinn to citizen, copying Graham and a pastor and employee of Guinn's church (see Guinn Inter. Resp. (Doc. 54-7) at # 19)).[8]

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[8] Even after the Vigil, the Mayor continued to applaud the effort, appearing in media outlets to discuss this lawsuit and the recent Vigil. See Doc. 61-1 (marked Ex. 64) (Fox News Insider article, "It's Happening to Me in My Community": Atheists Sue Mayor

The upcoming Prayer Vigil became a matter of public debate in Ocala, with the **[*1270]** citizenry vocalizing opinions both for and against it on social media, in communications to Chief Graham and Mayor Guinn, and in local news outlets. For example, one person wrote on the Ocala Police Department's facebook page: "why are the police asking us to pray? will they arrest us if we don't pray?" Doc. 54-18 (marked Ex. 2) at CM/ECF Page 4. Plaintiffs contacted counsel for The American Humanist Association (now representing plaintiffs here) who urged Chief Graham to remove the Prayer Vigil letter from the Ocala Police Department facebook page on the grounds that it was

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Over Prayer Vigil, Nov. 29, 2014).

And at his June 2016 deposition the Mayor maintained his position, as reflected in the following questions:

> Q: Can the police chief state, on [Ocala Police Department] letterhead, that people should believe in God?
>
> A: Yes.

Guinn Depo. (Doc. 54-11) at Tr. 88.

> Q: [A]s far as you're concerned, if the police chief wants to put out something on letterhead saying that you should believe in God or that you should believe in Jesus, that's fine?
>
> A: He can do that.

Id. at Tr. 90.

> Q: So as far as you're concerned, they [the Ocala Police Department] could have another vigil such as that one next week if they wanted to?
>
> A: Sure.
>
> Q: And the chief could post another letter saying that there is something that requires fervent prayer in the city?
>
> A: Yes.

Id. at Tr. 134.

an unconstitutional government endorsement of religion. Doc. 54-46 at 2 (marked Ex. 30-A) (9/21/2014 10:47 a.m. email from David Niose to Graham). Chief Graham responded that his efforts were upholding the rights of others to assemble and that taxpayer funds were used only to the minimal extent that Graham wrote the letter and printed it on Department letterhead. Doc. 54-46 at 3 (marked Ex. 30-B) (9/21/2014 10:57 a.m. email from Graham to Niose).

Chief Graham testified he would have removed the facebook posting if the Mayor had directed him to do so. Graham Depo. (Doc. 54-10) at Tr. 161. Likewise, Mayor Guinn testified that he had the authority to order Graham to remove the facebook posting. Guinn Depo. (Doc. 54-1) at Tr. 54-55. Guinn also said he had the authority to instruct that Ocala Police Department Chaplains not lead prayers at the Prayer Vigil or attend in Ocala Police Department Chaplain uniforms, but he did not consider doing any of that because he believed those actions were permitted under the Establishment Clause. Id. Under the charter for the City of Ocala, the Mayor is the sole municipal official in authority over the Ocala Police Department and he recommends a chief of police nominee to the City Council, who appoints the Chief. Guinn Aff. (Doc. 53-1) at ¶ 3.

The day before the Prayer Vigil, the weather forecast apparently called for possible rain. Captain Edwards sent an email to Chief Graham, Ocala Police Chaplain Quintana and Ms. Haynes, copying an Ocala Police Department officer, asking whether they should secure an indoor location as an alternative. Doc. 54-28

(marked Ex. 12) at 2. Quintana's suggestion was that the Vigil should take place on the Square with or without rain, "[n]othing should stop, hinder or prevent from [sic] fervent prayer," proposing they "[k]eep it to 15-20 minutes of PRAYER only." Id. at 3 (capitalization in original). Captain Edwards sent an email to an Ocala Police Department Major on September 23, saying he would be "mentioning" the Prayer Vigil at an upcoming staff meeting, Doc. 54-29 (marked Ex. 13), and the following day he emailed an Ocala Police Department Captain to say he might not make it to a meeting because he was "working on getting this prayer vigil set up." Doc. 54-30 (marked Ex. 14).

The Prayer Vigil took place on September 24, 2014 in the Downtown Square in Ocala, a public space where meetings, rallies, assemblies and other public and privately-sponsored events occur. Graham Dec. I (Doc. 52-1) at ¶ 22; see supra note 2. Chief Graham and Mayor Guinn both attended the Prayer Vigil, but neither of them addressed the crowd. Graham Inter. Resp. (Doc. 54-6) at # 1; Guinn Inter. Resp. (Doc. 54-7) at # 15. Approximately ten people were on the stage during the Prayer Vigil, including four uniformed Ocala Police Chaplains, one off-duty Ocala Police Department employee who was not in uniform, and five faith and/or community leaders. Graham Inter. Resp. (Doc. 54-6) at # 3. Not all of those persons spoke from the stage, but a number who did speak were Ocala Police Department Chaplains. Doc. 54-16; Doc. 54-19 (marked Ex. 3) at Page ID 1386, 1389, 1390. Chief **[*1271]** Graham said he did not know in advance what any of the speakers planned to say, but

his recollection is that those who did speak either prayed or sang. Graham Dec. I (Doc. 52-1) at ¶ 16; Graham Dec. II (Doc. 68-1) at ¶ 5; Graham Depo. (Doc. 54-10) at Tr. 139-40. He did not hear any non-Christians speak at the Prayer Vigil and the crowd appeared to be predominately Christian. Graham Depo. (Doc. 54-10) at Tr. 96-99, 144-45. Mayor Guinn knew most of the Ocala Police Department Chaplains by name, but said he had no recollection as to who spoke. Guinn Depo. (Doc. 54-11) at Tr. 27-28.

Mayor Guinn estimated that 500-600 people attended the Prayer Vigil. Id. at Tr. 108. Chief Graham, who said the Vigil lasted for about an hour, also said "[t]here were a lot of people there," "definitely more than 100." Graham Depo. (Doc. 54-10) at Tr. 139, 149.[9] Chief Graham spent his time "engaging people in the crowd, talking to them" and "attempt[ing] to enlist their help with the crime spree." Id. at Tr. 140; Graham Dec. I (Doc. 52-1) at ¶ 21. In addition to Chief Graham, other uniformed police officers attended the Prayer Vigil to engage with the crowd and provide security, consistent with the Department's regular practice of having officers present at public downtown gatherings. Graham Dec. I (Doc. 52-1) at ¶ 26. The record includes photographs taken at the Prayer Vigil, as well as transcripts from video and audio recordings taken by one of the plaintiffs. See Doc. 54-19 (marked Ex. 3); Doc. 54-16. Plaintiffs note that in at least one

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[9] Plaintiffs suggest that if this was not a city-sponsored event, the organizer would have been required to seek a permit (which was not issued here), but the record is murky as to the permit requirements. See Graham Depo. (Doc. 54-10) at Tr. 70-74.

photograph, a uniformed officer appears to be participating in prayer while sitting on the edge of the stage. See Doc. 54-19 at Page ID 1392. While the recorded statements in evidence were not the only speeches given at the Prayer Vigil, there is no dispute that these speeches were religious.[10]

Plaintiffs Lucinda and Daniel Hale, who live in Marion County, had visited the Downtown Square on a number of previous occasions, such as to visit the farmer's market. L. Hale Depo. (Doc. 54-15) at Tr. 31. The Hales heard about the upcoming Prayer Vigil when someone told them about the Ocala Police Department facebook posting, which they then viewed.

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[10] For example, one of the transcripts includes these remarks delivered by a uniformed Ocala Police Department Chaplain: "Father we thank you for tonight, for the gathering of your children . . . Lord you called us together by your spirit, your spirit of love, and tonight Lord that love can conquer anything— it can conquer evil, it can conquer enemies . . . Your angels are on assignment [from] the kingdom of god. And your kingdom has come. And your kingdom is ruling even now. Behind the scenes amen there are children amen don't feel safe in their communities any more. Where bullying amen is on every corner amen. Where people amen are being threatened amen hallelujah from all kinds of things and all kinds of dangers. Lord we are not afraid, we are not afraid . . ." Doc. 54-16 at Ex. A.

Another uniformed Ocala Police Department Chaplain included these statements in his remarks (which were interspersed with responses of "Amen" from the crowd): "God healed America. . . . But in order for god to heal America, there must be an intrinsic change from the inside, with each and every one of us, where we go out and watch other people, and help the children that are lost. . . . God bless America, god heal America." Doc. 54-16 at Ex. B.

D. Hale Depo. (Doc. 54-14) at Tr. 7; L. Hale Depo. (Doc. 54-15 at Tr. 9). The facebook posting discussed the crisis of crime affecting citizens of Ocala and Marion County, and Ms. Hale agreed that crime creates a negative environment for all citizens, but she felt that the message inviting everyone **[*1272]** to a Prayer Vigil did not include her or others who do not pray. L. Hale Depo. (Doc. 54-15) at Tr. 17-19. Mr. Hale engaged in email correspondence with the Mayor in advance of the Vigil, expressing regret for the recent crime spree and applauding the Chief for his attempts to curb crime, but explaining that the Vigil invitation violated the Establishment Clause and suggesting that the City promote a different rally encouraging people to come forward with ideas about how to stop crime. D. Hale Dep. (Doc. 54-14) at Tr. 17-18; 53.

The Hales attended the Prayer Vigil and described it as similar to a Christian tent revival. D. Hale Depo. (Doc. 54-14) at Tr. 29, 47-48; L. Hale Depo. (Doc. 54-15) at Tr. 22-23. Ms. Hale stated she is concerned about alleviating crime, which was the purported purpose of the Prayer Vigil, but she felt unable to participate in any part of what actually transpired. L. Hale Inter. Resp. (Doc. 54-3) at # 8. Mr. Hale did not observe any speaker encourage people to come forward with ideas about how to stop crime. D. Hale Depo. (Doc. 54-14) at Tr. 53. Mr. Hale recalled that at least one speaker was introduced from the stage as an Ocala Police Department Chaplain. Id. at Tr. 43-44. He said he observed uniformed police officers participating in the Prayer Vigil by being part of a circle of people praying, bowing heads, and holding hands. Id. at 29-30. Mr. Hale spoke with Chief

Graham at the Vigil, and they discussed the possibility of Hale doing some volunteer work with the Ocala Police Department in the future. Id. at Tr. 35, 54. Mr. Hale feels that it is everyone's responsibility to better the community. Id. at Tr. 54.

Plaintiff Art Rojas, who lives and works in Ocala, attended the Prayer Vigil, which he described as being "essentially a Christian revival" that was "not a comfortable place for non-believers" and caused anyone present to feel "some pressure to participate and show approval," lest they be seen as "publicly opposing the police." Rojas Inter. Resp. (Doc. 54-1) at # 14, 15. Rojas said he attended the Vigil to see if there was going to be a violation of the Establishment Clause. Rojas Depo. (Doc. 54-12) at Tr. 31. Rojas wishes for his community to be more inclusive, and hopes that future events involving his government will include all of Ocala's citizens, not only Christians. Rojas Depo. (Doc. 54-12) at Tr. 37. Rojas thought that the Police Department should represent everyone, but by involving itself in the Prayer Vigil it did not represent him. Id. at Tr. 25-26.

Frances Jean Porgal attended the Vigil and, like Mr. Hale, recalled that at least one speaker was introduced from the stage as an Ocala Police Department Chaplain.[11] Porgal Depo. (Doc. 54-

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[11] Ms. Porgal, who was a resident of Marion County, was a plaintiff in this case until she passed away in January 2017. See Doc. 69. She was subsequently terminated as a party. See Doc. 72. Though no longer a plaintiff, Ms. Porgal's uncontested sworn observations recounted here are relevant evidence about material facts in this case which the Court may consider as part of the

13) at Tr. 32. Porgal observed that "police representatives spent no time discussing the crimes that had recently occurred," or "requesting assistance" from the community, or urging people to come forward with information; instead, speakers prayed, preached, and sang. Porgal Inter. Resp. (Doc. 54-2) at # 8.

The day after the Prayer Vigil, congratulatory emails circulated within the Ocala Police Department, thanking the Chief, Captains, Officers, Chaplains, and Ms. Haynes for their efforts regarding the Prayer Vigil. See Doc. 54-32 (marked Ex. 16). Captain Edwards sent an email to Ms. Haynes, Chaplain Quintana, copying Chief **[*1273]** Graham and Officer Williams, thanking everyone for helping and "allow[ing] the PRAYER VIGIL to take place[,]" remarking that "[t]here was opposition but Isaiah 54:17 says 'No weapon that is formed against thee shall prosper; and every tongue that shall rise against thee in judgment thou shalt condemn.'" Id. at 2 (capitalization in original; additional emphasis omitted). Edwards suggested a meeting to discuss the next steps including another possible vigil, and closed with, "'Romans 8:28 'And we know that all things work together for good to them that love God, to them who are the called according to his purpose.'" Id. at 2 (emphasis omitted). Chaplain Quintana replied to Captain Edwards, saying "God bless you Captain for organizing" the Prayer Vigil, and saying he (Chaplain Quintana) was honored that Captain Edwards invited him. Id. at 4.

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summary judgment record.

Sometime thereafter, Chief Graham told Ms. Porgal about an anti-bullying rally scheduled for the Downtown Square where the Prayer Vigil had occurred. Ms. Porgal and the Hales attended and participated by carrying signs discouraging bullying in schools. D. Hale Depo. (Doc. 54-14) at Tr. 55; L. Hale Depo. (Doc. 54-15) at Tr. 31-32. Chief Graham testified that going forward, he would not permit the Chaplains to participate in public events while wearing their Ocala Police Department uniforms if the event involved leading prayers, not because it was necessarily inappropriate, but to keep from getting sued. Graham Depo. (Doc. 54-10) at Tr. 164-68. Subsequent public prayer events have been held in Ocala, at least one of which was organized and sponsored by a church. Id. at 74; Doc. 54-76 at 5.

Two months after the Prayer Vigil, plaintiffs filed suit under 42 U.S.C. §§ 1983 and 1988(b) and are now seeking nominal damages, attorneys' fees, and costs against the City of Ocala, and Mayor Guinn and Chief Graham in their individual capacities, for their alleged violations of the Establishment Clause of the First Amendment.[12] See Docs. 1 and 22. The parties' cross-motions for summary judgment are now before the Court.

III. Standard of Review

"A district court must grant summary judgment 'if the movant shows that there is no genuine dispute

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[12] Some additional parties and claims (including a claim for injunctive relief) were previously dismissed. See Doc. 22.

as to any material fact and the movant is entitled to judgment as a matter of law.'" Atheists of Fla., Inc. v. City of Lakeland, 713 F.3d 577, 589 (11th Cir. 2013) (quoting Fed. R. Civ. P. 56(a)). In making this assessment, the court "view[s] all facts and reasonable inferences drawn therefrom in the light most favorable to the non-moving party." Id. (quotation, citation, and alteration omitted). Conclusory statements are insufficient to create a disputed issue as to a material fact. Carter v. City of Melbourne, 731 F.3d 1161, 1167 (11th Cir. 2013) (citation omitted). "Issues of fact are 'genuine' only if a reasonable jury, considering the evidence presented, could find for the nonmoving party." Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). "The principles governing summary judgment do not change when the parties file cross-motions for summary judgment."[13] T-Mobile S. LLC v. City of Jacksonville, 564 F. Supp. 2d 1337, 1340 (M.D. Fla. 2008).

[*1274] IV. Discussion

A. Standing

Chief Graham and the City argue that plaintiffs

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[13] To the extent the City and Chief Graham argued in their papers and at the hearing that plaintiffs have admitted defendants' statement of undisputed facts by failing to specifically refute each and every statement, the Court disagrees. Plaintiffs point to disputed facts throughout their briefs (but argue the facts in dispute are immaterial) and also note where they believe defendants have misstated the evidence.

lack standing to bring this case.[14] At issue here is Article III standing, which requires that plaintiffs show (1) they "have suffered an 'injury-in-fact;'" (2) there is a "causal connection between the injury and the [defendants'] conduct;" and (3) the injury will "likely" "be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quotations and citations omitted). In an Establishment Clause case, a "non-economic injury which results from a party's being subjected to unwelcome religious statements" may be sufficient to demonstrate an "injury in fact" resulting from the defendant's conduct "so long as the parties are 'directly affected by the laws and practices against whom their complaints are directed.'" Saladin v. City of Milledgeville, 812 F.2d 687, 692 (11th Cir. 1987) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224 n.9 (1963)). Yet, a party must show more than a mere psychological suffering "produced by observation of conduct with which one disagrees." Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 485 (1982). A "spiritual stake in First Amendment values" is not enough to show injury to support standing. ACLU v. Rabun Cty. Chamber of Commerce, Inc., 698 F.2d 1098, 1103 (11th Cir. 1983). However, where a party is forced to choose between being "subjected to unwelcome religious exercises" and being "forced to assume special burdens to avoid them," that party has suffered an injury in fact sufficient to support standing. Valley Forge, 454 U.S. at 486, n.22; see Saladin, 812 F.2d at 693 (holding plaintiffs who

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[14] Mayor Guinn does not challenge plaintiffs' standing.

were City residents bore "more than an abstract interest" in having City remove word "Christianity" from its city seal, demonstrating an injury in fact).

In Rabun County, a group of Georgia residents, motivated by their spiritual beliefs or commitment to the separation of church and state, challenged the placement of a large illuminated cross in Georgia's Black Rock Mountain State Park. 698 F.2d at 1101, 1107-08. The Eleventh Circuit found that, notwithstanding the plaintiffs' motivations in bringing suit, two of the plaintiffs demonstrated an injury in fact sufficient to create standing because they were residents of Georgia (albeit living more than 100 miles from Black Rock State Park), made use of the state parks, and their use of Black Rock was affected by "the physical and metaphysical impact of the cross." Id. at 1107-08. Thus, they faced a "special burden" of having to use other parks, or using Black Rock, but being subjected to unwelcome religious symbolism if they did so. Id. at 1108. The Eleventh Circuit also stressed that the severity of the plaintiffs' injuries was irrelevant; so long as they demonstrated some direct stake in the outcome, as opposed to a mere interest in the matter, they had shown an injury in fact. Id. (quoting United States v. SCRAP, 412 U.S. 669, 689, n.14 (1973)); see also Pelphrey v. Cobb Cty., 547 F.3d 1263, 1279-80 (11th Cir. 2008) (finding plaintiff had standing to challenge invocation at planning commission meetings where he attended three meetings and watched other meetings on the internet).

The Court found plaintiffs had standing when it ruled on defendants' motion to dismiss. See Doc. 22,

adopting Report and Recommendation, Doc. 14. The factual development **[*1275]** of the case since then further supports that determination. The undisputed facts reveal that the Hales are residents of Marion County who have attended events in the Downtown Square in Ocala. They saw the Ocala Police Department facebook page and attended the Prayer Vigil because they wanted to observe, but also because they have interest in being a part of the community and are concerned about crime. They attended the Prayer Vigil but were unable to participate in any of the activity because the speakers only invited the audience to pray and sing. The Hales have more than a mere interest in the matter. They have demonstrated an injury in fact. Similarly, Art Rojas lives and works in the City of Ocala. He saw the Ocala Police Department facebook page and attended the Prayer Vigil. He wants his community to be inclusive of all its residents, not just Christians. Like the Hales, Rojas has more than a mere interest in the matter and has demonstrated injury in fact.

Having demonstrated injury in fact, the causal connection and redressability prongs of standing are easily satisfied here. Plaintiffs' injuries are causally connected to the Prayer Vigil which they contend was sponsored by the City of Ocala and its Chief of Police. If proven, an award of nominal damages for conduct that violated the Establishment Clause would redress their injuries. See, e.g., Amnesty Int'l, USA v. Battle, 559 F.3d 1170, 1177-78 (11th Cir. 2009) (explaining that § 1983 allows for the recovery of nominal damages when constitutional rights are violated but do not result in injury giving rise to compensatory damages);

Covenant Media of S.C., LLC v. City of North Charleston, 493 F.3d 421, 428 (4th Cir. 2007) (holding that unconstitutional application of the law created a claim redressable by nominal damages); Rabun County, 698 F.2d at 1104, n.10 (explaining that the causal connection requirement was not at issue and, if the plaintiffs suffered an injury from the presence of the cross, it would be redressed by its removal); Saladin, 812 F.2d at 690, n.5 (noting other standing prongs were not at issue). Chief Graham and the City have not argued otherwise here.

Further, none of the prudential considerations which might counsel toward "judicial constraint" are present— plaintiffs's complaint falls within the zone of interests protected by the Establishment Clause, the issue raised here is not abstract such that it is more appropriately addressed by the legislative branch, and plaintiffs are asserting their own interests. See Saladin, 812 F.2d at 690, 690 n.5 (discussing prudential concerns and finding them clearly satisfied).

The Seventh Circuit's decision in Freedom From Religion Foundation, Inc. v. Obama, 641 F.3d 803 (7th Cir. 2011), upon which the City and Chief Graham rely in challenging plaintiffs' standing, does not compel a different result. Among other legal deficiencies, the plaintiffs in that case were unable to show how a presidential proclamation calling all the nation's citizens to pray or give thanks in accordance with their own faiths and consciences caused them to suffer any special burden, or any burden at all. Id. at 805-08. The circumstances here were different— the citizens of the

City of Ocala and Marion County were called to join a Prayer Vigil whose stated purpose was "to show unity and help in this senseless crime spree that is affecting our communities." Doc. 1 at Ex. A. Plaintiffs are citizens of that community and have expressed their interest in being united as a community and in alleviating crime; they thus bore the requisite special burden.[15]

[*1276] The City and Chief also argue that plaintiffs would have suffered no injury had they simply ignored the facebook page and opted not to attend the Prayer Vigil. But being forced to choose between avoiding the religious message and being involved members of their community was exactly the Hobson's choice creating plaintiffs' injury. See Rabun County, 698 F.2d at 1106-08, 1107 n.17 (explaining that plaintiffs' options to use state parks were restricted by placement of the cross, thereby creating

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[15] Moreover, the Seventh Circuit's Freedom From Religion decision reads Supreme Court precedent somewhat differently than the Eleventh Circuit, which is, of course, binding on this Court. See Freedom From Religion, 641 F.3d at 810-11 (Williams, J., concurring) (questioning whether the majority opinion's interpretation of Supreme Court precedent strays too far from rule adopted by every other circuit to have considered the matter, including the Eleventh).

The Court likewise rejects the City and Chief Graham's position stated in oral argument that Newdow v. Bush, 391 F. Supp. 2d 95 (D.D.C. 2005), (which is not binding on this Court in any event) stands for the proposition that only repeated exposure to unwanted religious activity can give rise to standing. Id. (finding Newdow lacked standing to challenge prayer at presidential inauguration and his claims were moot).

individualized injury as a consequence of the challenged action); see also SCRAP, 412 U.S. at 689, n.14 ("The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.") (quoting Kenneth Culp Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613 (1968))); Am. Humanist Ass'n, Inc. v. Douglas Cty. Sch. Dist. RE-1, 859 F.3d 1243, 1252 (10th Cir. 2017) (finding parent had standing to assert Establishment Clause claim against school board where school sent one flyer and one email asking parents to consider donating to school club's mission trip). Plaintiffs have standing.

B. Establishment Clause

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. In so stating, "the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). Incorporated through the Due Process Clause of the Fourteenth Amendment, the First Amendment "applies to state and municipal governments, state-created entities, and state and municipal employees." Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1268 (11th Cir. 2004) (citations omitted).

"[T]he Establishment Clause was intended to

afford protection" against "the three main evils" of "sponsorship, financial support, and active involvement of the sovereign in religious activity." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quotation and citation omitted). Still, "[i]n every Establishment Clause case, [the court] must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the [Supreme] Court has so often noted, total separation of the two is not possible." Lynch v. Donnelly, 465 U.S. 668, 672 (1984); see also Van Orden v. Perry, 545 U.S. 677, 690 (2005) (plurality opinion) (explaining in a case where a Ten Commandments monument had been in place for forty years on government property with other monuments and historic markers that "[s]imply having religious **[*1277]** content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause") (citations omitted).

"The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application." Id. at 678. Thus, "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." Glassroth v. Moore, 335 F.3d 1282, 1288 (11th Cir. 2003); see also Selman v. Cobb Cty. Sch. Dist., 449 F.3d 1320, 1323 (11th Cir. 2006) ("Knowledge of the particular facts and specific circumstances is essential to a determination of whether the governmental acts in question are religiously neutral.").

In Lemon, the Supreme Court enunciated the three part test which is the controlling standard for Establishment Clause jurisprudence: "First, the [government activity] must have a secular . . . purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;" and third, "the [government activity] must not foster an excessive government entanglement with religion." 403 U.S. at 612-13 (quotation and citations omitted). "[I]f even one of these three principles is violated, the challenged governmental action will be found to violate the Establishment Clause." Rabun County, 698 F.2d at 1109. The factors used to assess the effect of government action are similar to those used to assess whether entanglement is excessive. Agostini v. Felton, 521 U.S. 203, 232-33 (1997). Nonetheless, "while the Court has folded its traditional 'excessive entanglement' inquiry into its 'primary effect' analysis, the substance of its Establishment Clause jurisprudence remains fundamentally unaltered." Holloman, 370 F.3d at 1285; see also McCreary County v. ACLU, 545 U.S. 844 (2005) (reaffirming validity of Lemon test and not citing Agostini). Although they have cited cases for certain propositions that used other tests, the parties all agree the Lemon test applies to this Establishment Clause case.

Lemon's purpose prong is viewed objectively, taking into account "the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." McCreary, 545 U.S. at 862 (quotations and citations omitted). This consideration should include "the implementation of government action," knowledge

about "the specific sequence of events" leading to the action, and "the history and context of the community and forum in which" the action occurs. Id. at 866 (reviewing cases). Where a predominantly religious purpose is found, it is often because "the government action itself bespoke the purpose," leaving the court to draw the "commonsense conclusion" from the "openly available data" that the purpose was religious. Id. at 862-63 (citations omitted). Thus, although a government official's "stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." Id. at 864.

In applying the Lemon test's purpose prong to a case involving prayer in public school, the Eleventh Circuit explained that:

> [P]rayer is the quintessential religious practice [which] implies that no secular purpose can be satisfied. The primary effect of prayer is the advancement of ones[']religious beliefs. It acknowledges the existence of a Supreme Being. The involvement of [the defendant school district] **[*1278]** in such activity involves the state in advancing the affairs of religion. The Supreme Court and this circuit have indicated that such prayer activities cannot be advanced without the implication that the state is violating the establishment clause.

Jaffree v. Wallace, 705 F.2d 1526, 1534-35 (11th Cir. 1983) (citations omitted); see also Karen B. v. Treen, 653 F.2d 897, 901 (5th Cir. Unit A Aug. 1981)

(rejecting officials' statements of secular purpose because "prayer is a primary religious activity in itself" and its observance in a public school classroom has an "obvious[ ] religious purpose").

In a more recent school prayer case, the Eleventh Circuit reaffirmed the point of Jaffree and Treen, stating that "[b]ecause prayer is 'a primary religious activity in itself,' a teacher or administrator's intent to facilitate or encourage prayer in a public school is per se an unconstitutional intent to further a religious goal." Holloman, 370 F.3d at 1285 (quoting Treen, 653 F.2d at 901). In Holloman, the Eleventh Circuit explained that notwithstanding the teacher's goal of teaching compassion, the consequences of instituting that goal through prayer ran afoul of the purpose prong in the Establishment Clause analysis. Id. at 1285-86. "'The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular goals.'" Id. at 1286 (quoting Treen, 653 F.2d at 901).

But this is not a school prayer case[16] and, under

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[16] Nor is it a legislative prayer case. See Order (Doc. 22) (adopting Report and Recommendation (Doc. 14) (noting that this is not a case about legislative prayer, which is an exception to the Establishment Clause analysis, citing Marsh v. Chambers, 463 U.S. 783 (1983) and Pelphrey v. Cobb County, 547 F.3d 1263, 1269 (11th Cir. 2008))). See also County of Allegheny v. ACLU, 492 U.S. 573, 603 n.52 (1989) ("Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct."), abrogated on other

the Establishment Clause, "detail is key." McCreary, 545 U.S. at 867. Thus, the Court must "look to the record of evidence showing the progression leading up to" the Prayer Vigil along with the event itself to determine its purpose.[17] McCreary, 545 U.S. at 868. Given that the facebook page posting by the Ocala Police Department asked Ocala's citizens to join in "fervent prayer"— an undisputedly religious action, and that the Prayer Vigil consisted of chaplains offering Christian prayers and singing from the stage[18] with responsive audience participation, a reasonable observer would find that the Prayer Vigil had a religious purpose. That the Chief's original purpose in convening the group was to combat crime, that the facebook letter discussed the recent crime spree, and that uniformed police officers, including the Chief, may have engaged various members of **[*1279]** the crowd for that secular purpose, does not derogate from the overall religious nature of the event. The "openly available data support[s] a commonsense conclusion that a religious objective permeated" the Prayer Vigil.

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grounds by Town of Greece v. Galloway, 572 U.S. 565 (2014).

[17] Throughout this analysis, the Court views the conduct as a continuum of action, from the meeting at which the Prayer Vigil was first suggested to the Prayer Vigil itself. To the extent the City and Chief Graham have parsed the evidence such that the facebook post and the Prayer Vigil are analyzed separately and each in a vacuum, the Court does not find support for that approach in the allegations of the complaint, or in the law.

[18] The only song Chief Graham recalled hearing at the Prayer Vigil was "God Bless America." Graham Depo. (Doc. 54-10) at Tr. 140. Ms. Porgal recalled that the words were changed to "God Heal America.z' Porgal Depo. (Doc. 54-13) at Tr. 35.

McCreary, 545 U.S. at 863, 869 (finding "reasonable observer could only think" posting of a particularly religious version of Ten Commandments, allegedly displayed to educate about founding of legal documents, had religious purpose where other foundational documents were only included as a result of litigation and where pastor spoke at the dedication ceremony delivering religious message).

The Court next considers whether the "principal or primary effect" of the Prayer Vigil was "one that neither advance[d] nor inhibit[ed] religion." Lemon, 403 U.S. at 613. "The effect prong asks whether the practice under review in fact would convey a message of endorsement or disapproval [of religion] to an informed, reasonable observer." Glassroth, 335 F.3d at 1297 (quotation, citation, and alteration omitted). The effect is analyzed without regard to the government's actual purpose. Wallace v. Jaffree, 472 U.S. 38, 56 n.42 (1985) (quoting Lynch, 465 U.S. at 690 (O'Connor, J., concurring)).

Though held in a public space (Ocala's Downtown Square), the event here—a prayer vigil—can hardly be thought to be anything other than an endorsement of religion. The content of the facebook letter (inviting the community to come join in fervent prayer), the name of the event ("Community Prayer Vigil"), the nature of the speakers' remarks (Christian prayers and songs), the participation from the crowd (responding in religious colloquy with speakers, holding hands in circles, bowing heads), all bespeak the religious effect of the activity, which was to promote prayer. See Holloman, 370 F.3d at 1286

(finding teacher's conduct failed Lemon's "effect" prong because the effect of her call for students to pray promoted the "quintessential religious practice" of praying, "endors[ed] religious activity, [and] encourag[ed] or facilitat[ed] its practice") (quotation and citation omitted); Gilfillan v. City of Philadelphia, 637 F.2d 924, 930-31 (3d Cir. 1980) (finding city's expenditures to create platform from which Pope would celebrate a Mass and deliver a sermon to over 1,000,000 people had religious effect, notwithstanding that Pope would be celebrating Mass and delivering a sermon even if city had not provided the platform); Hewett v. City of King, 29 F. Supp. 3d 584, 635 (M.D.N.C. 2014) (finding mayor's delivery in his official capacity of religious messages at privately sponsored annual public commemorative events which featured Christian prayer practices had effect of City endorsement of Christianity); see also Milwaukee Deputy Sheriffs' Ass'n v. Clarke, 588 F.3d 523, 528-29 (7th Cir. 2009) (finding sheriff's invitation to religious group to speak at mandatory employee meetings gave appearance of state endorsement of religion in violation of Establishment Clause); cf. Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J., 760 F.3d 227, 243-44 (2d Cir. 2014) (finding reasonable observer would know Ground Zero Cross held such historical significance to the story of the 9/11 recovery that its inclusion with hundreds of other artifacts at government museum had effect of ensuring historical completeness and not of promoting religion).

The last prong of the Lemon test asks whether the government activity "foster[ed] an excessive government entanglement with religion." 403 U.S. at

613 (quotation and citations omitted). "For the First Amendment rests upon the premise that both religion and **[*1280]** government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." McCollum v. Bd. of Ed., 333 U.S. 203, 212 (1948). "Entanglement is a question of kind and degree," Lynch, 465 U.S. at 684. Compare Gilfillan, 637 F.2d at 931-32 (finding city failed entanglement test based on city's joint planning with Archdiocese for Pope's visit and divisiveness engendered in the community as evidenced by lawsuits), and Hewett, 29 F. Supp. 3d at 635 (finding excessive entanglement based on mayor's delivery of religious messages while in his official capacity), with Lynch, 465 U.S. at 684 (finding no excessive entanglement where there was no evidence of contact with church authorities concerning content or design of creche exhibit, and city bore no maintenance costs). Even without more, an invitation by a city police department encouraging the community's attendance at a Prayer Vigil entangles the government with religion. Given the additional involvement of the Ocala Police Department Chaplains in organizing and participating in the event while wearing their Ocala Police Department uniforms, the entanglement was excessive. Indeed, it is apparent that without the Chief's invitation, the involvement of police officials in planning the event, and the Ocala Police Department Chaplains' participation, there would not have been a Prayer Vigil at all.

Having failed each of Lemon's three prongs, the Prayer Vigil would appear to violate the Establishment Clause. Even the City and Chief

Graham agreed at oral argument that a government entity or actor may not organize and hold a prayer vigil without violating the Establishment Clause.[19] But they say that is not what happened here. Rather, they contend the Prayer Vigil was a community-sponsored activity, not a government-sponsored event. And for their part, plaintiffs don't disagree that it would be perfectly appropriate for the community or any non-government segment thereof to organize and hold a prayer vigil in the public Downtown Square.[20] What this case turns on, then, is: Whose Prayer Vigil was this?

While a more typical Establishment Clause case might focus on whether a statute or government activity has run afoul of the Lemon test, some, like here, hinge on whether the activity at issue belongs to the government at all. In Adler v. Duval County School Board, 250 F.3d 1330 (11th Cir. 2001), the Eleventh Circuit, sitting en banc to review its prior decision on remand from the Supreme Court, considered whether the school board violated the Establishment Clause

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[19] For his part, the Mayor does not admit that the government couldn't host a prayer vigil if it chose to do so, but he has confused the law that applies to legislative prayer with that applicable in most other Establishment Clause challenges, including this one. See Doc. 53 (Mayor's brief). The Mayor maintained this erroneous position at oral argument.

[20] Indeed, as Chief Graham suggested in his emails to some of the plaintiffs, the City would abridge the First Amendment rights of its citizens if it denied them use of the public Downtown Square for prayer. See Fowler v. Rhode Island, 345 U.S. 67 (1953) (striking city ordinance which prohibited making any public religious or political address in city parks).

when its policy permitted high school seniors to decide whether (or not) to have a student speaker of their choosing at graduation who could then deliver whatever message the student wanted without review or monitoring from any school officials. 250 F.3d at 1332. In reinstating its earlier opinion, the Eleventh Circuit again determined that even though the graduation itself was a school-sponsored event, and the school board policy authorized a student message, the policy **[*1281]** did not violate the Establishment Clause because school officials could not dictate that there would even be a student message and, if there was, school officials had no control over who would deliver it or the content of the message. Id. at 1341-42. Thus, the speech was not "state-sponsored" and therefore could not violate the Establishment Clause. Id. 1342; see also Holloman, 370 F.3d at 1287 ("While purely private prayer by students is constitutionally protected, prayer that is led, encouraged, or facilitated by school personnel is constitutionally prohibited").

In another case raising the question of state sponsorship, Doe v. Village of Crestwood, 917 F.2d 1476 (7th Cir. 1990), a city employee, who was also a member of a club involved with an annual village-sponsored Italian festival in a public park, invited a Roman Catholic priest to deliver a mass during the festival. 917 F.2d at 1477-78. Reviewing the district court's injunction to stop the mass, the Seventh Circuit noted, "everything turns on who is putting on this mass." Id. at 1479. Looking at the slim record available on the emergency motion for stay, the court considered that a city employee selected and recruited the priest, and advertisements and other publicity for the event

referred to "us" and "our" (meaning the village) and did not mention that anyone other than the village was sponsoring the mass. Id. From this, the Seventh Circuit determined that the record supported the district court's finding that the mass was sponsored by the government in violation of the Establishment Clause. Id.

Similarly, in Newman v. City of East Point, 181 F. Supp. 2d 1374 (N.D. Ga. 2002), the plaintiffs sought to enjoin the city and its mayor from holding the mayor's annual prayer breakfast. Id. at 1380. The city argued it was not promoting or endorsing the event, it was privately paid for and was not going to be held on city property. Id. at 1376. But plaintiffs demonstrated that in the past, city resources had been used to organize, promote, and pay for the mayor's prayer breakfast. Id. at 1380. This evidence included a letter from the mayor on city letterhead advising clergy about the breakfast and inviting them to participate in the planning and soliciting donations for the event; memoranda from the mayor to a city employee requesting reimbursements related to the prayer breakfast; and the inclusion of the event in a city-produced community flyer about other city-led events. Id. The court determined plaintiffs' showing was sufficient to secure an injunction prohibiting the city and the mayor in her official capacity from organizing, advertising, promoting, or endorsing the breakfast or using city resources to do so.[21] Id. at 1381-82; see also

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[21] The court denied plaintiffs' request to enjoin the mayor's prayer breakfast from taking place at all, and the request to enjoin the mayor or city officials from attending, finding they had a right as

Marrero-Méndez v. Calixto-Rodríguez, 830 F.3d 38, 45-46 (1st Cir. 2016) (holding that police commander's initiation of prayer with two commanding officers during official meeting of police officers could not be anything but state-sponsored prayer and "only the plainly incompetent or those who knowingly violate the law" could deny that "a religious practice . . . conducted by a state official at a state function [is] state sponsorship") (quotations and citations omitted); cf. Hewett, 29 F. Supp. 3d at 620-23 (determining that (usually Christian) flags attached to city flag pole flown in public park pursuant to a lottery program were private speech, notwithstanding that they had some elements of being public speech, because purpose was to allow individual **[*1282]** citizens to honor veterans in manner of their choosing).

From these cases and others, it is apparent that for purposes of the Establishment Clause, whether an activity "belongs to" or is "sponsored by" the government turns on the degree to which a government entity or official initiated,[22] organized,[23]

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citizens to attend and the defendants had provided assurance the event would not use city facilities, funding, or resources, and would not have the appearance of being endorsed by the city. Newman, 181 F. Supp. 2d at 1382.

[22] Village of Crestwood, 917 F.2d at 1479; McCreary, 545 U.S. at 869; Marrero-Mendez, 830 F.3d at 45.

[23] Newman, 181 F. Supp. 2d at 1380.

facilitated,[24] promoted,[25] provided space for,[26] paid for,[27] supervised,[28] participated in,[29] regulated,[30] censored,[31] led,[32] endorsed,[33] encouraged,[34] or otherwise controlled[35] the activity.[36] Applied here, these factors

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[24] Holloman, 370 F.3d at 1287, 1288.

[25] Newman, 181 F. Supp. 2d at 1380; Village of Crestwood, 917 F.2d at 1479.

[26] Newman, 181 F. Supp. 2d at 1376; Village of Crestwood, 917 F.2d at 1479.

[27] Newman, 181 F. Supp. 2d at 1380.

[28] Holloman, 370 F.3d at 1287; Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 310, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000).

[29] Holloman, 370 F.3d at 1287; Marrero-Mendez, 830 F.3d at 45.

[30] Adler, 250 F.3d at 1337.

[31] Adler, 250 F.3d at 1333.

[32] Holloman, 370 F.3d at 1287.

[33] Newman, 181 F. Supp. 2d at 1380; Holloman, 370 F.3d at 1288.

[34] Holloman, 370 F.3d at 1287, 1288; Santa Fe Ind. Sch. Dist., 530 U.S. at 308.

[35] Adler, 250 F.3d at 1341.

[36] This list of factors is not intended to be exclusive. See, e.g., Hewett, 29 F. Supp. 3d at 620-23 (looking at government versus private speech factors established in Sons of Confederate Veterans, Inc. v. Comm'n of Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002) (purpose of program, degree of editorial control, identity of speaker, and who bears ultimate

strongly indicate government sponsorship. Nonetheless, defendants disclaim any official role in the Prayer Vigil. Because each had different involvement, the potential liability of each defendant must be addressed separately.

1. Chief Graham

Chief Graham contends that he had little involvement and no control over the Prayer Vigil.[37] He

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responsibility), as factors to consider in determining whether flags were government or private speech).

[37] Chief Graham contends that plaintiff Rojas "understood and has conceded" that Chief Graham had no control over whether to cancel the Vigil, but that seems to be a misreading of Rojas' deposition testimony. See Brief (Doc. 52) at 7; Rojas Depo. (Doc. 54-12) at Tr. 25-26, 28-29 (testifying that if the Chief could not cancel the Vigil, he could at least stop the police chaplains from being involved). Moreover, the Establishment Clause focuses on the constitutionality of the government's action from the perspective of a reasonable observer (who is not necessarily the plaintiff). Additionally, there is no such concern with the Hales, the two other plaintiffs here. See, e.g., D. Hale Depo. (Doc. 54-14) at Tr. 19-22; Doc. 54-42 (marked Ex. 26) (Chief Graham's email correspondence with D. Hale); L. Hale Depo. (Doc. 54-15) at Tr. 25, 28-31, 49-50; Doc. 54-41 (marked Ex. 25) (Chief Graham's email correspondence with L. Hale). The City and Chief Graham tried to suggest that Ms. Hale knew Chief Graham could not cancel the Vigil because he told Ms. Porgal that (see Brief, Doc. 52 at 4) and Ms. Hale testified that Ms. Porgal "probably at least gave me the gist" of Chief Graham's communications with Ms. Porgal (Doc. 54-15 at Tr. 13). But this is hardly enough to import Ms. Porgal's knowledge of any of Chief Graham's particular statements to Ms. Hale. Moreover, when responding to the direct question of whether she believed they (the Chief and Mayor) had the power to cancel the Vigil, Ms. Hale testified: "I believe that

claims that although **[*1283]** he called the meeting of selected police department employees, chaplains, and a community organizer to discuss how to involve the community in solving the crime spree, he left the meeting once the idea of a Prayer Vigil was raised; others planned the Prayer Vigil without his further input; while he signed the facebook letter, he did not draft it; he viewed the Prayer Vigil as a community effort between Ms. Haynes and volunteer chaplains to bring out the citizenry; he was copied on emails about the event only because it is routine to do so for any public event and not because he was involved; he explained to various citizens by email that it was not a City event; he did not direct any officers or chaplains to attend; City funds weren't used to organize or host the Prayer Vigil; he did not know who the speakers would be; he encouraged a member of the atheist community to contact a participating minister if he wished to speak at the event; the speakers did not include any uniformed police officers; and Chief Graham did not speak to the crowd from the stage but instead attended to talk to citizens about crime and was present along with a few other officers for security purposes.

But plaintiffs point to strong evidence supporting their position that Chief Graham had significant involvement in the Prayer Vigil, from its

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they did. I believe they still do, should it occur again. And I believe that if it had been otherwise, they would have put that in writing. They would have taken [the] letter down immediately and have said, sorry, folks, that was a mistake; this is being held by these [other] people. Contact them for information." Id. at Tr. 49.

conception through its conclusion. For starters, the Chief initiated the meeting at the police department at which the plan for the Prayer Vigil was hatched and he pronounced it "a great idea." Graham Depo. (Doc. 54-10) at Tr. 23. The facebook posting which invites the community to come to the Prayer Vigil is written on Ocala Police Department letterhead and is signed by Chief Graham in his capacity as Chief of Police. The letter states in part, "We are facing a crisis in the City of Ocala and Marion County that requires fervent prayer and your presence . . . I [Chief Graham] am urging you all to please support a very important 'Community Prayer Vigil.'" Doc. 1, Ex. A. Chief Graham agrees that he read the letter and directed that it be posted on the Department's facebook page. He further agreed that in doing so, he was promoting the Prayer Vigil. The record also shows that Chief Graham sent an email suggesting the date for the Prayer Vigil be moved to accommodate local ministers; he sent multiple emails to citizens in reference to the Prayer Vigil that suggested his involvement, using words such as "we" and "I," and he did not direct these inquirers to contact someone else to complain; nor did he disabuse the Mayor or other supporters in his emails as to whose Prayer Vigil it was. Chief Graham said he did not know what the speakers would say, yet he received an email from Quintana recommending the Vigil consist of "PRAYER only." When the speakers are chaplains and the platform is a prayer vigil, a reasonable observer would understand the content of the program would be prayer.

Chief Graham also permitted Captain Edwards and others to work on the Vigil while on City time.

Additionally, although the Ocala Police Department Chaplains are volunteers, they are similar to employees in that they are covered by worker's compensation, have office space at the Police Department, are issued police badges, receive paid uniforms (which they wore to the Prayer Vigil), and are considered members of the Ocala Police Department who are subject to the authority of Chief Graham, who appoints them. When Chief Graham was copied on an email to the Chaplains advising them that the Chief **[*1284]** wanted them to attend the Vigil and to wear their uniforms, Chief Graham did not follow up to correct what he now claims was not really his directive. Of the ten people on the stage at the Prayer Vigil, four were uniformed Ocala Police Department Chaplains, and another was an off-duty Ocala Police Department employee who was not in uniform (but who may have announced to the crowd that he was indeed a police officer).[38] And Chief Graham agreed that participating in a prayer vigil would be part of an official function of an Ocala Police Department Chaplain.

In reaching its decision, the Court relies only upon undisputed material facts—i.e., those disclosed by the contemporaneous documents, such as the emails which show Chief Graham's knowledge and involvement, his deposition testimony, and that of the

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[38] See Doc. 54-31 (marked Ex. 15), which apparently is a draft of Captain Edwards' remarks (sent to himself), in which he greets the crowd, explaining he is there in many capacities, including as a police officer and a child of God, and, like the audience, is calling on God through prayer, hoping to end senseless shooting and violence in the city.

plaintiffs, to the extent it is undisputed. Defendants' briefs are filled with bold statements such as, "[O]nce the idea of a community vigil was raised . . . Chief Graham left the meeting and had no further involvement with the Vigil, except to coordinate the presence of uniformed officers (including himself) at the Vigil to maintain safety and engage citizens, as is usual for public events held downtown[,]" Doc. 52 at 27, and "[t]he only other action attributable to Graham in relation to the Vigil is his expression of support for the event through the Facebook post." Id. But such rhetoric, belied by the undisputed facts, is no impediment to granting summary judgment. Likewise, many of the statements made in Chief Graham's declarations (both of which post-date his deposition) seem very lawyerly and designed to "walk back" his deposition testimony; but to the extent these statements contradict Chief Graham's deposition testimony without explanation or are conclusory, the Court need not consider them. See supra note 6. Also, while defendants do point to some discrepancies in the evidence, they are about immaterial matters. In the end, the Court, fairly applying the undisputed facts as described supra, pp. 2-21, and drawing all reasonable inferences in Chief Graham's favor, must ask this question: Has Chief Graham shown a genuine issue of material fact that would preclude a finding that his actions violated the Establishment Clause? The answer is "no."

In making this assessment, the Court notes that the facts here are distinguishable from cases upon which Chief Graham relies. For example, in Allen v. Consolidated City of Jacksonville, 719 F. Supp. 1532

(M.D. Fla. 1989), the city passed a resolution and established a committee which, if it so decided, could call for a day of "non-denominational voluntary prayer, meditation, personal commitment or other appropriate solemn dedication" to focus attention on the city's illegal drug problem. Id. at 1533. The committee (chaired by a Jacksonville lawyer) was authorized by the City's resolution to encourage individuals to participate by involving religious organizations, public and private schools, private businesses, local government offices and the media. Id. The committee set a date for the "anti-drug day" and plaintiff filed a motion for a temporary restraining order and preliminary injunction to enjoin any activities on the grounds that the city's involvement violated the Establishment Clause. Id. In denying plaintiff's motion, the court found plaintiff had no standing, but alternatively ruled that the city's only acts were to pass the "broad" and "general" resolution and appoint the committee, **[*1285]** which did not expose anyone to prayer, did not involve prayers at any particular venue, did not include group prayer at any public forum or by any public official, and did not involve use of city funds to host or promote any activities. Id. at 1534. The facebook letter here is simply not parallel to the city's broad and general resolution in Allen; and the Prayer Vigil, through its planning and execution, stands in contrast to Allen, where the record was "silent as to any specific events planned". Id.

Adler is likewise distinguishable in that the Court found there was a "total absence of state involvement in deciding whether there [would] be a graduation message," let alone whether it would be a

prayer. 250 F.3d at 1342. This, by contrast, was a Prayer Vigil planned by the Ocala Police Department and announced to the community on the City of Ocala Police Department's facebook page. And in Lynch, a case about a holiday display that included a creche erected by the City on private property, the Supreme Court looked to the city's forty year history of public holiday displays in determining that no Establishment Clause violation occurred, likening it to the display of religious paintings in government supported museums. 465 U.S. at 671, 683. This case is not about a long-standing passive holiday display and Lynch's result is not determinative here. Looking at the "particular facts and specific circumstances" of this case, Selman, 449 F.3d at 1323, and construing "all reasonable doubts about the facts" in Chief Graham's favor, Eternal Word Television Network, 818 F.3d at 1138, the Court is left with but one conclusion: Chief Graham's actions violated the Establishment Clause.

Chief Graham argues that even if he is deemed to have violated plaintiffs' rights under the Establishment Clause, the case against him should not go forward because he is entitled to qualified immunity. "Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." Dalrymple v. Reno, 334 F.3d 991, 994 (11th Cir. 2003) (internal quotations and citations omitted). Where it applies, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal

questions." Lane v. Franks, 573 U.S. 228 (2014) (quotation and citation omitted).

"To even be potentially eligible for summary judgment due to qualified immunity, the official must have been engaged in a 'discretionary function' when he performed the acts of which the plaintiff complains." Holloman, 370 F.3d at 1263-64 (quotation and citation omitted).[39] This term "include[s] all actions of a governmental official that (1) were undertaken pursuant to the performance of his duties, and (2) were within the scope of his authority." Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir. 1994) (quotation and citation omitted). The government official bears the burden of showing that an act was within the official's discretionary authority. Holloman, 370 F.3d at 1264. Both prongs **[*1286]** of the test are analyzed from a position of generality, putting aside the fact that the action "may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." Id. at 1266. For these purposes, the Court will assume that Chief Graham acted within his discretionary authority here.

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[39] Some authorities refer to the exercise of "discretionary authority" as opposed to "discretionary function," but there does not appear to be any material difference and the Court will use them interchangeably. See, e.g., Crocker v. Beatty, 886 F.3d 1132, 1137 (11th Cir. 2018) (discretionary function); Moore v. Pederson, 806 F.3d 1036, 1042 (11th Cir. 2015) (discretionary authority); Maddox v. Stephens, 727 F.3d 1109, 1120 (11th Cir. 2013) (discretionary authority).

Thus, the burden shifts to the plaintiffs to demonstrate why qualified immunity should not apply. Id. at 1264. This requires plaintiffs to show "that a reasonable jury could interpret the evidence in the record as showing that [Chief Graham] violated a constitutional right that was clearly established at the time of the acts in question." Id. at 1267. As explained above in the Establishment Clause analysis, a reasonable jury could determine from the evidence in the record that Chief Graham violated the Establishment Clause, thereby satisfying the first prong of the analysis.

The next question is whether that right was "clearly established" at the time, such that the state of the law gave Chief Graham "fair warning" that his involvement in the Prayer Vigil was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 739-41 (2002). It is well established that "prayer is the quintessential religious practice." Jaffree, 705 F.2d at 1534. "[B]y definition" all public prayers serve religious purposes. Jager v. Douglas Cty. Sch. Dist., 862 F.2d 824, 830 (11th Cir. 1989) (citing Jaffree, 705 F.2d at 1534); see also Engel v. Vitale, 370 U.S. 421, 425 (1962) ("[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."). Additionally, the Supreme Court has explained that the government "may not promote or affiliate itself with any religious doctrine or organization." County of Allegheny, 492 U.S. at 590. The Supreme Court has further held that

government "sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" Santa Fe Ind. Sch. Dist., 530 U.S. at 309-10 (quoting Lynch, 465 U.S. at 688 (O'Connor, J., concurring)). As the Eleventh Circuit explained ten years before this Prayer Vigil, "[e]ncouraging or facilitating any prayer clearly fosters and endorses religion over nonreligion, and so runs afoul of the First Amendment." Holloman, 370 F.3d at 1288. By these authorities, all of which well-predate the actions here, a reasonable fact-finder could find that it was clearly established that a government-sponsored prayer vigil would violate the Establishment Clause. Chief Graham is not protected by qualified immunity and his motion for summary judgment is therefore due to be denied and the plaintiffs' motion for summary judgment as to Chief Graham is due to be granted.

2. Mayor Kent Guinn

The evidence reveals that Mayor Guinn had nothing to do with planning the Vigil, promoting it to the community, or participating in it in any official way. He attended the Prayer Vigil as a citizen. Yet, when the Mayor learned about the upcoming Prayer Vigil, he wholeheartedly endorsed it, and continued to do so up to and following the event. This was in the face of many vocal complaints that the Vigil would **[*1287]** and did violate the Establishment Clause. To

those citizens and others, he declared that he would not stop the Vigil. Moreover, both the Mayor and Chief Graham testified that the Mayor had the authority to tell Chief Graham to take down the facebook page, but Mayor Guinn refused. Nor did he tell the Chief not to permit the police chaplains to participate, which the Mayor also said he had the authority to do. Additionally, the Mayor responded to citizens in a manner that reflected that the Vigil was a government-sponsored event, repeatedly referencing that "we" are holding this Vigil and telling one person that "[t]here is nothing in the constitution to prohibit us from having this Vigil." Doc. 54-44 (marked Ex. 28) (9/22/2014 10:24 a.m. email from Guinn to citizen, copying Graham) (emphasis added). To another who complained about the Chief's apparent violation of the Establishment Clause, the Mayor responded that not only would he not stop it, he intended to praise the Chief for his efforts. Doc. 54-49 (marked Ex. 33) at 3 (9/19/2014 10:55 p.m. email from Guinn to citizen, copying Graham).

Yet there is not enough evidence to show that the Mayor himself had sufficient connection to the Prayer Vigil to hold him liable for it. He was certainly an ardent cheerleader, but a reasonable observer, taking into account the creation, planning, and execution of the Vigil would find the Mayor was not a part of it. The Mayor did, however, have authority to direct the Chief to take down the facebook page and to order that the Chaplains not participate in the Prayer Vigil, but he refused to take these measures. It is true, as plaintiffs contend, that the failure to intervene to stop a constitutional violation can itself create liability.

But the circumstances in which that doctrine arises are generally excessive force cases. See Jones v. Cannon, 174 F.3d 1271, 1286 (11th Cir. 1999) (noting that § 1983 liability may arise for failure to intervene when another officer uses excessive force, but not finding authority to extend the doctrine to prevent a false affidavit); de Veloz v. Miami-Dade Cty., 255 F. Supp. 3d 1222, 1233-34 (S.D. Fla. 2017) (finding no Eleventh Circuit or Supreme Court authority for failure to intervene theory of liability outside of excessive force context), appeal docketed, No. 17-13059 (11th Cir. Jul. 5, 2017). Based on the facts of this case, the Court would be hard-pressed to hold the Mayor liable for an Establishment Clause violation based solely on his failure to intervene to prevent it.

Even assuming the Mayor committed an Establishment Clause violation by failing to intervene to stop the Prayer Vigil, his duty to do so was not clearly established.[40] The Mayor is protected by qualified immunity based on the lack of authority that would warn the Mayor that he could be liable for failing to intervene to prevent the Chief's violation of the Establishment Clause. The Mayor is due to be granted summary judgment and the plaintiffs' motion seeking summary judgment as to the Mayor is due to

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[40] By so publicly failing to intervene, the Mayor did, in a sense, ratify the Chief's actions. The Court has considered whether this alone might subject him to liability but again finds a lack of authority that would warn the Mayor of this possibility. However, as noted below, the Mayor's ratification can certainly be considered in assessing the City's liability.

be denied.[41]

3. The City of Ocala

The City contends it is due to be granted summary judgment because **[*1288]** there is no basis to find municipal liability. Although local governments cannot be found liable on a theory of respondeat superior, in Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694-95 (1978), the Supreme Court determined they may be held to answer when a constitutional tort results "from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law." Denno v. Sch. Bd. of Volusia Cty., 218 F.3d 1267, 1276 (11th Cir. 2000) (citing Monell, 436 U.S. at 694). "[A] municipality may be held liable under 42 U.S.C. § 1983 for a single illegal act committed by one of its officers . . . [provided that] the challenged act may fairly be said to represent official policy, such as when that municipal officer possesses final policymaking authority over the relevant subject matter." Scala v. City of Winter Park, 116 F.3d 1396, 1397 (11th Cir. 1997); see also Cooper v. Dillon, 403 F.3d 1208, 1222 (11th Cir. 2005) (rejecting argument that city could not be liable based on single incident of statute's enforcement).

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[41] This ruling is based on an evidentiary record of undisputed facts (drawing all reasonable inferences in plaintiffs' favor), which explains why it differs from the Court's ruling on the same question presented by the Mayor's motion to dismiss, which considered only the allegations of plaintiffs' complaint. See Docs. 1, 14, 22.

"Whether an official has final policymaking authority" that may subject the government to liability "is a question of state law," Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994) (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality opinion)), which is to be decided by the court as a matter of law. Jett v. Dallas Ind. Sch. Dist., 491 U.S. 701, 737 (1989). Both Chief Graham and Mayor Guinn have authority under state law that could subject the City of Ocala to liability, assuming they were acting within their respective realms of authority at the time; no party has argued otherwise. See Fla. Const., Art. VIII § 2(b) (establishing municipalities and their powers, which include conducting a municipal government); Charter, City of Ocala, Fla., Pt. I, Subpt. A, Art. II, § 2.08 (police officers are responsible to the chief of police who is responsible to the mayor), Pt. I, Subpt. A, Art. III, § 3.03(b) (mayor shall have charge and control of the police department); Code of Ordinances, City of Ocala, Fla., Ch. 2, Art. IV, Div. 10, § 2-371 (police chief shall be elected by city council upon mayor's recommendation and has supervision over police officers and support personnel who shall act under his instructions); Guinn Dec. (Doc. 53-1) at ¶¶ 2, 3; City of Ocala and Graham's Answer (Doc. 38) at ¶ 12 (admitting that Chief Graham is in charge of day-to-day operations of the Ocala Police Department including carrying out policy, managing and supervising staff, and ensuring department activities comply with applicable law); see also Cooper, 403 F.3d at 1222 (explaining that in addition to powers granted by Florida's constitution and local laws, "there are other indicia in state law that police chiefs in Florida

have final policymaking authority in their respective municipalities for law enforcement matters") (citing various state statutes); Davis v. City of Apopka, 734 F. App'x 616, 2018 WL 1750557, *2-3 (11th Cir. 2018) (holding a Florida city's police chief was final policymaker under state and local law) (citing Florida Constitution, city ordinances, and Cooper, 403 F.3d at 1222).

While the City paints this as a fleeting incident that could not possibly be deemed official policy so as to subject it to liability, in fact, the events here took place over the course of eight days, beginning with Chief Graham's calling the meeting and culminating with the Prayer Vigil. During that time and as further described above, both Chief Graham and Mayor Guinn took many actions in their official roles in very public ways to initiate, organize, facilitate, promote, encourage, endorse, and otherwise **[*1289]** sponsor the Prayer Vigil (all in the face of vocal opposition which pointed out the violation), easily subjecting the City of Ocala to liability for violating the Establishment Clause.[42] The City of Ocala's motion for summary judgment is due to be denied and the plaintiffs' motion for summary judgment as to the City of Ocala is due to be granted.

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[42] Even though the Mayor is protected by qualified immunity and he therefore cannot be held liable in his individual capacity, his conduct as Mayor (as well as Chief Graham's) is relevant in determining the City's liability.

D. Plaintiffs' claim for punitive damages.

Although not pled in their complaint, plaintiffs argue in their summary judgment motion that they are entitled to seek punitive damages. See Doc. 54 at 33-35. Chief Graham objects.[43] See Doc. 68 at 24-25.

The cases upon which plaintiffs rely for permitting a punitive damages claim to go forward without a specific request are distinguishable. In Scutieri v. Paige, 808 F.2d 785 (11th Cir. 1987), the Eleventh Circuit determined the jury should have been given a requested instruction on punitive damages despite plaintiffs' failure to include punitive damages in their complaint's request for judgment because the complaint (a civil wiretapping case with egregious facts) alleged defendants acted "intentionally and maliciously, wantonly, willfully, in bad faith, with gross and reckless disregard" for plaintiffs' rights, and further alleged that defendants' conduct "was so flagrant and wanton as to justify an award of punitive damages." 808 F.2d at 791 n.2. The plaintiffs' prayer for relief included a request for statutory damages and the statute at issue provided for punitive damages. Id. at 791. Additionally, the defendants had listed

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[43] Punitive damages are not available against a municipality under 42 U.S.C. § 1983 (and plaintiffs do not contend otherwise). See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). The Mayor did not address the punitive damages issue in his opposition brief. However, as the Court is granting his motion for summary judgment, his lack of opposition is of no moment. Thus, this issue pertains only to Chief Graham.

plaintiffs' entitlement to punitive damages as an issue to be decided in the case and they did not object when plaintiffs included it in their pretrial stipulation. Id. at 791-92. Also, the plaintiffs had unsuccessfully sought leave to amend their complaint before trial to add a punitive damages claim to their ad damnum clause. Id. at 791. In Guillen v. Kuykendall, 470 F.2d 745 (5th Cir. 1972), the plaintiff's complaint (which alleged the defendant shot the plaintiff) alleged "malice and unwarranted excessive actions," which was sufficient to permit the jury to consider exemplary damages under Texas law. 470 F.2d at 748.

Here, in contrast with both of those cases, the only allegation in plaintiffs' complaint that could even possibly support a punitive damages request is the single sentence, "Each of the individual Defendants, in their individual capacities, intentionally or recklessly violated Plaintiffs' well-settled constitutional rights under the Establishment Clause." Complaint (Doc. 1) at ¶ 47. The paragraphs of allegations detailing defendants' actual conduct do not make hint of any particular egregiousness. And plaintiffs' request for relief was specific, asking for declaratory judgment and a permanent injunction (both described in very detailed terms), nominal damages, attorneys' fees, expenses and costs, and "such other relief as this Court deems just and proper." Id. at ¶¶ 50-51. The single conclusory statement referencing an intentional and reckless violation is not enough to put Chief Graham on notice and the Court **[*1290]** finds it is insufficient to support raising a punitive damages claim at this

late stage.[44] See Cioffe v. Morris, 676 F.2d 539, 541-42 (11th Cir. 1982) (explaining that an unpled issue may be tried only with consent of the opposing party).

V. Conclusion

The Court is granting the Mayor's motion for summary judgment and denying plaintiffs' cross-motion. The Court is denying Chief Graham and the City's motion for summary judgment and granting plaintiffs' cross-motion as to the Chief and the City. In so doing, the Court considered whether it should instead deny plaintiffs' motion for summary judgment as to the Chief and the City and conduct a non-jury trial (no remaining party requested a jury trial). However, the Court determined that holding a non-jury trial was not required: based on the undisputed facts, plaintiffs have demonstrated as a matter of law that the Chief and the City of Ocala violated the Establishment Clause.

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[44] Plaintiffs did not move for leave to amend their complaint, and the deadline to seek such leave passed five months before plaintiffs first mentioned punitive damages in their summary judgment motion. Any request for leave to amend to add a punitive damages claim at this point would have to be supported by a showing of good cause under Federal Rule of Civil Procedure 16(b)(4). Plaintiffs have not even suggested what that might be and, as the facts which plaintiffs now argue would support such a claim have largely been known since before they filed suit, it is unlikely they could show good cause for the untimely request. See Factory Direct Tires Inc. v. Cooper Tire & Rubber Co., No. 3:11-cv-255-RV/EMT, 2013 WL 12099993 (N.D. Fla. Sept. 23, 2013) (distinguishing Scutieri and denying request for leave to amend complaint to add punitive damages).

In sum, under the Establishment Clause of the First Amendment to the United States Constitution, the government cannot initiate, organize, sponsor, or conduct a community prayer vigil. That is what happened here. Yet, the same event in private hands would be protected by the First Amendment. See Bd. of Ed. of Westside Comm. Schs. v. Mergens, 496 U.S. 226, 250 1990) (opinion of O'Connor, J.) ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original). In this way, the rights of all citizens— religious and non-religious— are preserved.

Accordingly, it is hereby

ORDERED:

1. Defendant Mayor Kent Guinn's Motion for Summary Judgment (Doc. 53) is **GRANTED**.

2. The City of Ocala and Chief Greg Graham's Motion for Summary Judgment (Doc. 52) is **DENIED**.

3. Plaintiffs' Motion for Summary Judgment (Doc. 54) is **DENIED** as to their claim against Mayor Kent Guinn and is **GRANTED** as to their claims against the City of Ocala and Chief Greg Graham.

4. The Court will award each plaintiff one dollar ($1.00) in nominal damages from each of the

two liable defendants (for a total nominal damages award of six dollars ($6.00)), which sums will be included in the Court's final judgment.

5. As the prevailing parties, the Court will also be entering an award of attorneys' fees and costs in plaintiffs' favor under 42 U.S.C. § 1988.[45] No later than **June 25, [*1291] 2018**, plaintiffs shall file a motion for attorneys' fees and costs. Assuming they oppose the motion, no later than **July 20, 2018**, the City of Ocala and Chief Graham shall file their response. The Court hereby refers the attorneys' fees and costs motion to the Magistrate Judge for a Report and Recommendation.

6. The Clerk is directed to withhold entry of judgment as to any party until the Court has resolved plaintiffs' request for attorneys' fees and costs.

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[45] Although he has also prevailed in this litigation, defendant Mayor Kent Guinn is not entitled to recover his attorneys' fees and costs because a prevailing defendant may only recover fees in a civil rights case under 42 U.S.C. § 1983 if the case was "groundless, . . . frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n, 434 U.S. 412, 421 (1978); see also Fox v. Vice, 563 U.S. 826, 833 (2011) (explaining that defendants are protected against "burdensome litigation having no legal or factual basis"). That is not the case here.

DONE AND ORDERED at Jacksonville, Florida this 24th day of May, 2018.

/s/ Timothy J. Corrigan

TIMOTHY J. CORRIGAN

United States District Judge

APPENDIX C1

Am. Humanist Ass'n v. City of Ocala
United States District Court for the Middle District of Florida, Ocala Division
August 31, 2015, Decided; August 31, 2015, Filed
Case No. 5:14-cv-651-Oc-32PRL

127 F. Supp. 3d 1265 *

TIMOTHY J. CORRIGAN, United States District Judge.

[*1269] ORDER

Finding the right balance when legitimate First Amendment interests of American citizens conflict is often difficult. This is especially true when religion is involved. All of the participants in this case – the Mayor, the Police Chief, the citizens of Ocala, atheists and believers – have First Amendment rights that are due respect and protection. The question here is whether the City of Ocala, the Mayor and Police Chief organized and promoted a religious event in violation of the First Amendment. The Magistrate Judge has done a fine job of analyzing this legal question, concluding that the case deserves to go forward. I agree. However, this is just the beginning and we are a long way from determining which side of this important debate will ultimately prevail.

On July 3, 2015, the assigned United States Magistrate Judge issued a Report and Recommendation (Doc. 14) recommending that

Defendants' motion to dismiss (Doc. 8) be denied as to the individual Plaintiffs' claims for nominal damages against the City of Ocala and Mayor Guinn and Chief Graham in their individual capacities, but granted in all other respects. Only Defendants objected (Doc. 17); Plaintiffs responded to those objections (Doc. 19). Upon de novo review, it is hereby

ORDERED:

1. The Report and Recommendation of the Magistrate Judge (Doc. 14) is **ADOPTED** as the opinion of the Court. Defendants' objections are overruled as they would require the Court to engage in fact-finding which is beyond the purview of a motion to dismiss.

2. Defendants' Motion to Dismiss (Doc. 8) is **GRANTED** insofar as American Humanist Association's claims, any claim for prospective relief, and all claims against the Ocala Police Department and Mayor Kent Guinn and Chief Greg Graham in their official capacities are **DISMISSED [*1270] with prejudice**.[1] The Motion is otherwise **DENIED**.[2]

3. No later than **September 30, 2015** the remaining defendants should answer the

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[1] As Plaintiffs did not object to the Magistrate Judge's Report and Recommendation, the Court dismisses these parties and claims with prejudice.

[2] Though the Court is denying the motion to dismiss, the Court will no doubt be revisiting these issues at a later stage of the case.

complaint.

4. The parties have until **September 30, 2015** to file an Amended Case Management Report.

5. The Court encourages the parties to try to settle the matter. Consistent with the parties' recent filing (Doc. 21), if the parties wish the Court to appoint a mediator or stay the case pending settlement discussions, the Court will do so upon request.

DONE AND ORDERED in Jacksonville, Florida the 31st day of August, 2015.

/s/ Timothy J. Corrigan

TIMOTHY J. CORRIGAN

United States District Judge

APPENDIX C2
Am. Humanist Ass'n v. City of Ocala
United States District Court for the Middle District of Florida, Ocala Division
July 2, 2015, Decided; July 3, 2015, Filed
Case No: 5:14-CV-651-Oc-TJC-PRL

127 F. Supp. 3d 1265 *

PHILIP R. LAMMENS, United States District Judge.

[*1270] Report and Recommendation[1]

"Let us pray." Undoubtedly, these words are spoken thousands of times a day within the City of Ocala — in homes, places of worship, and to open meetings of various organizations and entities, including, as the Mayor says, City Council meetings. Undoubtedly, these words were spoken on numerous occasions at the Community Prayer Vigil held in downtown Ocala on September 24, 2014.

This case, quite plainly, involves prayer. Indeed, its central focus is the prayer vigil. It is about whether assuming, as we must, the Plaintiffs' well-plead facts to be true, the City of Ocala, along with its Mayor and Police Chief, violated the Establishment Clause to the U.S. Constitution by organizing and promoting the

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[1] Specific written objections may be filed in accordance with 28 U.S.C. § 636, and Rule 6.02, Local Rules, M.D. Fla., within fourteen (14) days after service of this report and recommendation. Failure to file timely objections shall bar the party from a *de novo* determination by a district judge and from attacking factual findings on appeal.

prayer vigil, even if it was for a seemingly neutral purpose — i.e., to lower crime. This is not, to be clear, a case about whether the Mayor or Police Chief (or his officers) can pray in public for our community; it is far more specific than that. The question is whether the City, and these public officials who represent each and every member of this diverse community, could organize and promote the vigil (as the Plaintiffs allege) where the focus of the event was prayer, which, as the law has repeatedly recognized, is fundamentally religious. I submit that doing so, in the manner alleged here by the Plaintiffs, is sufficient for the individual Plaintiffs to state a claim under the First Amendment.

Specifically, Plaintiffs, The American Humanist Association, Inc. ("AHA"), which describes itself as dedicated to advancing and preserving the separation of church and state and the constitutional rights of humanists, atheists, and other freethinkers; Art Rojas, an atheist, member of AHA, and resident, homeowner, and taxpayer in the City; Frances Jean Porgal, an atheist, member of AHA, and resident of Marion County; and Lucinda Hale and her husband Daniel Hale, atheists, members of Ocala Atheists, and residents of Marion County, allege that the Defendants — the City of Ocala and its Mayor, Kent Guinn (in his individual and official capacities); and the Ocala Police Department and its Chief, Greg Graham (in his individual and official capacities)—violated the Establishment Clause of the First Amendment to the United States Constitution[2] **[*1271]** insofar as they

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[2] The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free

held and promoted a Community Prayer Vigil in September 2014 on the Downtown Square in the heart of Ocala. Further, they contend that there is a risk of future events as the Defendants have "ongoing governmental policies, practices and customs of promoting, advancing, endorsing, sponsoring, and affiliating with theistic religion and the monotheistic religion in particular." (Complaint at ¶13).

As such, pursuant to 42 U.S.C. § 1983, Plaintiffs seek nominal damages for the alleged constitutional violation, and prospective declaratory and injunctive relief to prevent these Defendants from organizing and promoting future prayer events. The Defendants dispute Plaintiffs' contentions and move to dismiss the Complaint for lack of standing and failure to state a claim. That is, they contend that the Plaintiffs have failed to allege an injury, a threat of future harm as to the prospective relief, or even the commission of any constitutional wrong.

Upon due consideration I recommend that the motion be denied as to the individual Plaintiffs' claims for nominal damages against the City, as well as the Mayor and Chief in their individual capacities, but granted in all other respects. That is, the Plaintiffs' claims against the OPD and the Mayor and Chief in their official capacities are due to be dismissed, as such claims are merely claims against the City; Plaintiffs claims for prospective relief are due to be dismissed, as Plaintiffs fail to show or allege any imminent threat of a future event that might cause

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exercise thereof . . . ."

them injury; and the organization is due to be dismissed in its entirety for lack of standing.

I. BACKGROUND

It is undisputed that a Community Prayer Vigil was held on September 24, 2014 at 6:30 p.m. on the Downtown Square. There is much dispute, however, about who organized the event — the Plaintiffs say the City, Mayor, and Chief did; while the Defendants contend that civic and church leaders did. Critically, despite this dispute, at this stage of the proceedings (i.e., a motion to dismiss), these facts do not get fleshed out. Rather, the well-plead facts alleged by the Plaintiffs are taken as true. The motion, then, is decided on these facts.

The story begins just prior to the event. The Complaint alleges that on about September 20, 2014, the OPD posted a letter on its Facebook page that was written on its letterhead and signed by Chief Graham and Narvella Haynes (an individual associated with the New Zion Missionary Baptist Church) that encouraged attendance at the prayer vigil and reveals the OPD's and Chief Graham's involvement in planning, endorsing, and promoting it. The letter reads as follows:

> Blessings to all our citizens, specifically Pastors, Community Leaders, Parents and our precious youth.
>
> We are facing a crisis in the City of Ocala and Marion County that *requires fervent prayer and*

> *your presence* to show unity and help in this senseless crime spree that is affecting our communities.
>
> Within the last 30 days we have had numerous shooting that have resulted in two children and an infant being hit by bullets.
>
> **[*1272]** Stray bullets do not have respect for addresses, social status, economic status, educational background, political status and the list goes on. But my point is none of us are exempt from stray bullets.
>
> *I am urging you all to please support a very important "Community Prayer Vigil*" that will be held this coming Wednesday, September 24, 2014 at 6:30 pm to be held at our Downtown Square located in the heart of the City.
>
> Please support peace and this appeal for unity on this very important "Community Prayer Vigil" coming this next Wednesday. *We need you*.

(Complaint, Exhibit A) (emphasis added).

Then, on about September 21, 2014, AHA sent an email to Chief Graham advising him (as they see it) that his letter urging "fervent prayer" and promoting the Community Prayer Vigil was unconstitutional and demanded that the letter be removed from the police department's Facebook page. Chief Graham responded that he would not remove the letter. According to

Plaintiffs, Chief Graham and the OPD received other complaints about the letter and their involvement in the prayer vigil.

Mayor Guinn also received complaints about the City's alleged involvement in the Community Prayer Vigil. In response to an email complaint from Plaintiff Lucinda Hale, Mayor Guinn expressly promoted the event and declared that the Constitution does not prohibit "us" — which, in context, seems to refer to him as Mayor, the City, and OPD — from "having" the prayer vigil. Specifically, Mayor Guinn's response reads as follows:

> There is nothing in the constitution to prohibit us from having this vigil. Not only are we not canceling it we are trying to promote it and have as many people as possible to join us. We open every council meeting with a prayer. And we end the prayer in Jesus name we pray. Our city seal says "God be with us" and we pray that he is and us with him.

(Complaint, Exhibit B)(emphasis added).

Along with these exchanges, which, as Plaintiffs argue, show that the Mayor and Chief organized and promoted the prayer vigil, and that the City was directly involved in its planning and promotion, the individual Plaintiffs personally attended it. According to Plaintiffs, several representatives of the OPD, dressed in OPD uniforms with OPD patches and badges, served as speakers, some of whom "preached Judeo-Christian religion," while other uniformed

personnel put hands in the air and bowed their heads to participate. All of which simply lends support to the Plaintiffs' theory that it was a City, Mayor, and Police Chief run and promoted event.

II. DISCUSSION

The legal discussion of this case will first begin with weeding out the duplicative defendants, and then turn to the Plaintiffs standing and why, on this Complaint, the individual Plaintiffs can only seek nominal damages. Once the proper parties and relief sought is established, I will address why the individual Plaintiffs have sufficiently alleged a constitutional violation against the City, Mayor, and Chief.

A. Official Capacity Claims and the OPD

As an initial matter, the Plaintiffs claims against the Mayor and Chief Graham in their official capacities, as well as **[*1273]** the claim against the OPD, are due to be dismissed.

Defendants correctly argue — and Plaintiffs do not dispute — that the claims against the Mayor and Chief in their official capacities are duplicative of Plaintiffs' claims against the City itself. *See Kentucky v. Graham*, 473 U.S. 159 (1985) (a suit against a government official in their official capacity is treated as a suit against a municipality); *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir.1991); *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) (explaining that "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he

represents"). Thus, because the City has been sued directly, it is proper to dismiss the claims against Mayor Guinn and Chief Graham in their official capacities as redundant and potentially confusing.

Similarly, the claim against OPD is due to be dismissed, and Plaintiffs fail to argue otherwise. The law of the state in which the district court is located governs whether an entity can be sued in federal court. *Dean v. Barber*, 951 F.2d 1210, 1214 (11th Cir.1992) (citing Fed.R.Civ.P. 17(b)). Florida's Constitution empowers municipalities to "perform municipal functions and render municipal services." Fla. Const. art. VIII, § 2, cl. b. With these powers, the City of Ocala, a municipality, renders policing services through OPD, which is not a distinct legal entity recognized by Florida's Constitution. *See id.* Furthermore, "[w]here a police department is an integral part of the city government as the vehicle through which the city government fulfills its policing functions, it is not an entity subject to suit." *Eddy v. City of Miami*, 715 F.Supp. 1553, 1556 (S.D.Fla. 1989). Here, OPD is clearly integral to the City's policing functions, since no other police departments exist to police the City. Therefore, OPD is not a legally distinct entity from the City, and should be dismissed. The City itself is the proper defendant.

B. Standing and Plaintiffs' Claims for Relief

Before reaching the question about whether a constitutional violation is even adequately pled, the Court must first address standing. That is, whether these Plaintiffs (the individuals and the association)

can even bring this suit and for what relief. *See Elend v. Basham*, 471 F.3d 1199, 1206 (11th Cir. 2006) ("The standing inquiry 'requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.'") (citations omitted). I do submit that the individual Plaintiffs can for nominal damages (and associated attorney fees and costs), but nothing more. We will begin here, then.

A motion to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(1) for lack of standing is one that attacks the district court's subject matter jurisdiction. "The plaintiff has the burden to clearly and specifically set forth facts sufficient to satisfy Art. III standing requirements." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 976 (11 th Cir. 2005) (quotations and citations omitted). "If the plaintiff fails to meet its burden, this court lacks the power to create jurisdiction by embellishing a deficient allegation of injury." *Id.*

Article III, § 2 of the United States Constitution limits federal jurisdiction to actual cases or controversies. In **[*1274]** order to satisfy the case or controversy requirement, Plaintiffs must show that they have "standing" to sue. Specifically, Plaintiffs must show: (1) that they have suffered an injury-in-fact; (2) that there is a causal connection between the injury and the conduct complained of; and (3) that there is a likelihood that the injury will be redressed by a favorable decision. *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001). If this can be shown, then at a minimum, the individual Plaintiffs can seek nominal

damages for the alleged constitutional deprivation. *See Amnesty Intern. USA v. Battle*, 559 F.3d 1170, 1177 (11th Cir. 2009) (Section 1983 "allows for recovery of nominal damages where the plaintiff's constitutional rights were violated but the violation did not result in any injury giving rise to compensatory damages.").

Additionally, as to prospective relief, "'[b]ecause injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges . . . a real and immediate — as opposed to a merely conjectural or hypothetical — threat of future injury.'" *Id.* (quoting *Wooden v. Board of Regents of Univ. System of Georgia*, 247 F.3d 1262, 1284 (11th Cir. 2001). Indeed, "a prayer for injunctive and declaratory relief requires an assessment, at this stage in the proceeding, of whether the plaintiff has sufficiently shown a real *and* immediate threat of future harm." *Elend v. Basham*, 471 F.3d 1199, 1207 (11th Cir. 2006) (emphasis added). Without such a showing, none of the Plaintiffs can seek a claim for prospective relief.

For the organization to establish representational standing where, as here, it "brings this action to assert the First Amendment rights of its members" (see Complaint, ¶ 5), it must at least meet these requirements as well, since it can only have standing if its members would otherwise have standing. *Amnesty Intern. USA*, 559 F.3d at 1178. In addition, where this first prong (injury in fact) is met, it must also show that the interests that the organization seeks to protect are germane to the organization's purpose and that neither the claim

asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id., see also Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Here, the standing issue initially focuses on whether the individual Plaintiffs have adequately alleged that they personally suffered an injury in fact as a result of the remaining Defendants' purportedly unconstitutional actions. An injury in fact "serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *United States v. SCRAP*, 412 U.S. 669, 689 n. 14 (1973). Courts have acknowledged that "the concept of injury for standing purposes is particularly elusive in Establishment Clause cases." *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987). A direct injury, however, even a non-economic one, has been sufficient to satisfy this prong of the analysis. *Id.; see also Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263, 1279-80 (11th Cir. 2008).

1. Nominal Damages

(a) Individual Plaintiffs

To have standing to raise a claim for nominal damages, the individual Plaintiffs must have suffered an injury. In *Valley Forge Christian College v. Americans United for Separation of Church &* **[*1275]** *State*, 454 U.S. 464, 472 (1982), the Supreme Court examined the injury requirement in the context of the Establishment Clause. There, the Court denied

standing to plaintiffs who attempted to challenge the transfer of surplus federal property to a Christian school in Pennsylvania. The plaintiffs learned about the conveyance through a press release, but none of them lived in or near Pennsylvania. The Court held that the plaintiffs lacked standing because they failed to identify any personal or direct injury suffered as a result of the allegedly unconstitutional transfer. The Court explained that it was not enough for the plaintiffs to simply claim that the Constitution had been violated or that they were committed to the separation of church and state; rather, they must identify an injury (even a non-economic one) caused by the conduct, and that it must be more than the psychological consequence that is associated with one's knowledge that a constitutional wrong is occurring or has occurred. *See Valley Forge*, 454 U.S. at 485-86.

The Court explained that the plaintiffs, who did not live near or even in the same state as the property at issue, failed to allege that the conveyance affected them *directly* in any way. *Id.* at 486-87. The Court made it clear, however, that standing can be predicated on a non-economic injury, so long as it is a direct and personal one. *Id.* at 486-87 & n. 22; *see also School District of Abington Township v. Schempp*, 374 U.S. 203, 224 & n. 9 (a non-economic injury which results from a party being subjected to unwelcome religious statements can support a standing claim, so long as the parties are "directly affected by the laws and practices against whom their complaints are directed"). The Plaintiffs here essentially rely on the direct, personal injury theory to satisfy this requirement — their communications with the Chief

and the Mayor and, more specifically, their presence on the Square when the event occurred. There are cases that support this argument.

Following *Valley Forge*, the Eleventh Circuit found standing based on non-economic injury in both *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) and *Saladin v. Milledgeville*, 812 F.2d 687 (11th Cir. 1987). In *Rabun County*, the Eleventh Circuit held that the plaintiffs, who were citizens of Georgia, had standing to challenge a large illuminated cross located in a Georgia state park. The Court found that at least two of the plaintiffs were injured by the cross's presence in the park because it inhibited their ability to use and enjoy the park, where they were forced to located to other camping areas or be subjected to "unwanted religious symbolism", and where one of them had "little choice but to view the cross and suffer from the spiritual harm" associated with that because it was clearly visible from his summer cabin and the road he needed to take to get there. *See Rabun County*, 698 F.2d at 1107-08. In reaching its conclusion, the Eleventh Circuit distinguished *Valley Forge* based on the total lack of connection between plaintiffs and the subject matter of that action — i.e., the surplus property to which those plaintiffs had no connection — and the personalized non-economic injury the plaintiffs in *Rabun County* were able to demonstrate.

Likewise, in *Saladin*, the Eleventh Circuit held that the plaintiffs, who lived in and around the city of Milledgeville, had **[*1276]** standing to challenge the City's use of the word "Christianity" on the city seal

because they came into direct contact with it. *Saladin*, 812 F.2d at 692. The court noted that at least three of the plaintiffs regularly received correspondence on city stationery bearing the seal from the City's Water Works, and at least two of the plaintiffs were active in civic organizations which received proclamations from the Mayor's office embossed with the seal and were present at the presentation of the proclamations. *Id.* The Eleventh Circuit noted the plaintiffs alleged injury in that they were offended by the presence of the word "Christianity" on the seal as it represented the City's endorsement of Christianity, and thus, made Plaintiffs feel like "second class citizens" and that "Christianity is the 'litmus test' of being a 'true' citizen of Milledgeville." *Id.* at 693.

More recently, in *Pelphrey*, the court reaffirmed that under a traditional standing analysis for an Establishment Clause claim based on a non-economic injury, a plaintiff must identify a "*personal* injury suffered by them as a consequence of the alleged constitutional error." 547 F.3d at 1279 (emphasis added) (citations omitted). And further, the court stated that "[a]n actual injury occurs if the plaintiff is subjected to unwelcome religious statements and is directly affected by the laws and practices against which his or her complaints are directed." *Id.* (citations and quotations omitted). Under this standard, the plaintiff in *Pelphrey* established an injury in fact where he had direct contact with the complained of practice of the Commission's exclusion of certain religions from offering invocations at its meetings, as well as of the nature of the invocations offered, insofar as he viewed the invocations when he attended the

meetings in person and also viewed them on the internet. *Id.* at 1279-80.

Here, like *Rabun, Saladin*, and *Pelphrey*, the individual Plaintiffs assert that they came into direct contact with the allegedly unconstitutional conduct — each of the Plaintiffs (two of whom are members of AHA) personally witnessed the prayer vigil, along with the prayers recited at it, including those recited by the officers. (Complaint at ¶¶6-8, 38). In addition, in response to Plaintiff Lucinda Hale's concerns about the prayer vigil, Mayor Guinn sent her an email in which he advised that "we are not canceling it we are trying to promote it", and Chief Graham sent Plaintiff Porgal emails in which he advised that the prayer vigil was just one law enforcement strategy, that he had "no intention of canceling the event," and that he was "attempting to bring our community together to fight crime." Moreover, like in *Saladin*, Plaintiffs allege that Defendants' actions offended them and had the effect of endorsing Christianity and portraying "those who do not believe and do not participate in such religious exercises as outsiders and second-class citizens." (Complaint at ¶42).

Accordingly, based on *Valley Forge, Rabun County, Saladin*, and *Pelphrey*,[3] I **[*1277]** submit that

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[3] I am unpersuaded by Defendants' argument that this case is actually more akin to *Freedom From Religion Foundation, Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011). In that case, the plaintiffs challenged the enabling legislation for the National Day of Prayer and President Obama's proclamations issued pursuant to the legislation. While the Seventh Circuit held that general proclamations cannot confer standing, the instant case is readily

the individual Plaintiffs have alleged an injury based on their direct and personal contact with the Community Prayer Vigil (as well as their communications surrounding it) sufficient to satisfy this element of the standing analysis, and sufficient here to confer standing for purposes of nominal damages.[4] *See also Newman v City of East Point*, 181 F.Supp.2d 1374, 1377-78 (N.D. Ga. 2002) (finding plaintiffs had standing to challenge constitutionality of Mayor's Community Prayer Breakfast where flyers publicizing the Breakfast were distributed by defendants at the City's Christmas party and taxpayer funds were used to print the flyers).[5]

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distinguishable as it involved an announcement for a prayer event, the alleged organization and promotion of the event, direct communication with two of the Plaintiffs about it, and Plaintiffs presence at the event itself.

[4] As there is no dispute as to the second (causal connection) or third (redressability) prongs of the analysis, no further discussion of those requirements is necessary. However, based on a review of the complaint they certainly appear to be met.

[5] While Plaintiff Rojas has standing for nominal damages based on his direct contact with the event and prayer, I do note that his additional taxpayer standing argument appears deficient. Aside from alleging that he is a "taxpayer of the City of Ocala", as the Defendants point out the Complaint is deficient insofar as he fails to actually allege that City tax monies were spent on the event. While it can arguably be assumed that tax money was spent (as Plaintiff asks the Court to do), the Court need only accept well-plead allegations and need not embellish a deficient allegation of injury. *Bochese*, 405 F.3d at 976. In any event, this analysis is of no help to the other Plaintiffs or their claims.

(b) Organization

Even though AHA can show that two of its members have established standing for nominal damages, contrary to its simple position that it has standing where its members have standing (see Doc. 9, p. 6), its analysis on organizational standing, along with the allegations in the Complaint, are woefully deficient. Plaintiffs, who unquestionably bear the burden of establishing standing, must not only show that a member would otherwise have standing to sue in his or her own right, but also that the interests that the organization seeks to protect are germane to the organization's purpose *and* that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343; *Amnesty Intern. USA*, 559 F.3d at 1178.

Here, the Plaintiffs complaint does not expressly set forth the claims they seek into separate counts, accompanying specific prayers for relief. Instead, it incorporates all allegations under a "cause of action" heading and then states how the actions of the Defendants have violated the laws. Next, it again incorporates all preceding allegations, and under a heading for "relief sought" it says that "Plaintiffs" request declaratory judgment, a permanent injunction, and nominal damages. I assume, based on this generalized pleading, that the organization is asking not only for the prospective relief, but for nominal damages as well. Typically, though, organizational standing arises in the context of a claim for prospective relief, not nominal damages. *See Warth v. Seldin*, 422

U.S. 490, 515 (1975) ("[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations **[*1278]** to represent their members, the relief sought has been of this kind.").

This is not to say that courts have not found organizational standing for nominal damages claims; there are a few cases where they have when the issue seems to involve a pure question of law. *See, e.g., Florida Paraplegic Ass'n v. Martinez*, 734 F. Supp. 997, 1001 (1990). More persuasive, and indeed controlling, however, is our Circuit's opinion where they denied organizational standing where, like here, it was unclear "whether this suit meets the third prong: whether it requires the participation of individual members in the lawsuit." *Amnesty Intern. USA*, 559 F.3d at 1178. Indeed, like here, in that case the court noted that "Amnesty has not discussed this prong; it has provided no explanation or reasons why the members are not needed." *Id.* Since Amnesty bore the burden of proof, as AHA does here, the court held it had not established organizational standing. *Id.*[6] I

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[6] *Cf. Minor I Doe et al. v. School Bd. for Santa Rosa County*, 264 F.R.D. 670, 687-88 (N.D. Fla. 2010) (finding no organizational standing where the nature of the First Amendment claim asserted

agree with that analysis, and submit that AHA has failed to establish its organization standing here, as to nominal damages.

2. Prospective Relief

Where, as here, Plaintiffs seek prospective relief, the Court must assess whether they have sufficiently shown a real and immediate threat of future harm. *Elend v. Basham*, 471 F.3d 1199, 1207 (11th Cir. 2006). In order for an injury to suffice for prospective relief, it must be imminent. *See 31 Foster Children*, 329 F.3d at 1266-67 (noting that standing for declaratory or injunctive relief requires that future injury "proceed with a high degree of immediacy"); *Bowen v. First Family Fin. Servs.*, 233 F.3d 1331, 1340 (11th Cir.2000) (observing that a "perhaps or maybe chance" of an injury occurring is not enough for standing). Because the Court's inquiry is focused on wholly prospective conduct, it follows that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *Id.* (quoting City of *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). In fact, where the Eleventh Circuit has "found a sufficient imminence of future harm based on a past injury, the plaintiff has alleged with particularity that a future injury would likely occur in substantially the same manner as the previous injury." *Elend*, 471 F.3d at 1208.

(a chill on speech) required an assessment of individualized and particularized factual circumstances that were not common to all of its members).

Here, Plaintiffs' allegations fall short. Fairly read, the Complaint focuses on a past event — the September 24, 2014 Community Prayer Vigil — and actions purportedly taken by Defendants to promote and organize the event. Significantly, the Complaint is devoid of any allegation that another prayer vigil is scheduled or even that one is likely to be organized.

Further, Plaintiffs bald and speculative contention that Defendants will likely organize another event because they have a "policy, practice, and custom of endorsing and promoting religion in the context of government activity", is insufficient. (Doc. 9 at 6-7). Equally insufficient is their argument that a real and imminent threat exists because the Defendants' "support of the Community Prayer Vigil was part of an overall law enforcement-related practice" **[*1279]** (Doc. 8 at 19), as it too does not establish or show that there is a real and *immediate* threat of a future constitutional wrong that will injure them. The mere possibility that another prayer vigil could be scheduled at some point in the future by the Defendants "without any description of concrete plans, or indeed even any specification of when the some day will be — do[es] not support a finding of the 'actual and imminent' injury required by law". *Elend*, 471 F.3d at 1209 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

Accordingly, because the Plaintiffs (the individual and, therefore, AHA as well) fail to allege any facts to show a real and immediate threat of future harm, their claims for prospective declaratory

and injunctive relief should be denied.[7]

C. Motion To Dismiss For Failure To State A Claim

Now that I have set forth who can bring a claim (the individual Plaintiffs) and what type of relief they can seek (nominal damages), I must next address whether claims have been plausibly stated against the City and the individual Defendants (Mayor Guinn and Chief Graham). I submit that they have. Central to each claim though is whether the Complaint sets forth sufficient facts to establish a constitutional violation — such a determination is necessary in considering municipal liability, and it is the first step in the qualified immunity analysis for the individual defendants. So this analysis begins here.

Central to any claim under § 1983 is whether the Complaint alleges a constitutional violation. *See BMI Salvage Corp. v. Manion*, 366 Fed. Appx. 140, 143 (11th Cir. 2010). Defendants argue that Plaintiffs have failed to allege that the Defendants violated the Establishment Clause. The Clause, in turn, states that, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The

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[7] The Plaintiffs' footnote in their response (Doc. 9, p.8 n. 5) stating that Plaintiffs should have discovery on this issue does not change my recommendation. If Plaintiffs sought discovery they should have moved for it — a suggestion in a footnote that it may be necessary does not save this claim. Further, after the response to the motion to dismiss was filed (January 19, 2015), Plaintiffs apparently did not oppose a *stay* of discovery (see Doc. 11, March 18, 2015), which was granted (Doc. 12).

First Amendment, as incorporated through the Due Process Clause of the Fourteenth Amendment, applies to state and municipal governments, state-created entities, and state and municipal employees. *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1268 (11th Cir.2004); *S.D. v. St. Johns County School District*, 632 F. Supp. 2d 1085, 1090 (M.D. Fla. 2009). The Establishment Clause applies not only to statutes, but also to acts and decisions of individual government actors, "as their conduct bespeaks government conduct." *Id.*

To establish a basis for relief, Plaintiffs' complaint must contain, "a short and plain statement of the claim" showing that they are entitled to relief. Fed. R. Civ. P. 8(a)(2). While particularity is not required under Fed. R. Civ. P. 8, to survive a motion to dismiss, the "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 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court must view the allegations of the complaint in the light most **[*1280]** favorable to the Plaintiffs, consider the allegations of the complaint as true, and accept all reasonable inferences therefrom. *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). In considering the sufficiency of the complaint, the court limits its "consideration to the well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed." *Id.* Applying this standard, Plaintiffs' claims survive as to the City as well and the Mayor and the Chief in their individual capacities.

(1) Constitutional Violation

The Establishment Clause sets forth a principle of government neutrality and prohibits the government from promoting "a point of view in religious matters" or otherwise taking sides between "religion and religion or religion and nonreligion." *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citations omitted). Indeed, as the Supreme Court recognized in *Lee v. Weisman*, 505 U.S. 577, 589 (1992): "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." The Court further explained that: "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Id.*

Through a series of cases, the Supreme Court has established a framework for analyzing claims under the Establishment Clause. The primary test was articulated in *Lemon v. Kurtzman* and has come to be known as the "Lemon test." 403 U.S. 602 (1971).[8] Under the Lemon test, the Establishment Clause is violated if the government's primary purpose is not secular-based, if the principal effect is to aid or inhibit

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[8] The area of legislative prayer (i.e., opening or closing sessions of legislative bodies with prayer), which is not at issue here, is excepted from the traditional Establishment Clause analysis. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Pelphrey*, 547 F.3d at 1269.

religion, or if there is any excessive government entanglement with religion. *Id.* at 612-613.[9]

As previously stated with respect to standing, Plaintiffs allege that the City, through its Mayor and Police Chief, as well as the Mayor and Chief in their individual capacities, organized and promoted the Prayer Vigil. Specifically, and at the risk of being redundant, Plaintiffs allege that the OPD posted on its Facebook page a letter on its own letterhead, signed by its Chief of Police stating that the community was facing a crisis "that requires fervent prayer" and urging community members to attend the Prayer Vigil; that Mayor Guinn sent an email communication in which he refused to cancel the Prayer Vigil **[*1281]** and stated "we are trying to promote it;" that the Prayer Vigil was held on the Downtown Square; and that uniformed OPD officials participated in the Prayer Vigil with some officers leading the religious activities. Additionally, the language used in the Facebook and email communications, such as Mayor Guinn saying that there is nothing to prohibit "us" from having the Community Prayer Vigil, and advising

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[9] I note also that while there is no dispute that the Lemon Test is the applicable standard here, some courts have also used an "endorsement test" in evaluating claims under the Establishment Clause — i.e., "if the government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse religious practices and beliefs of some citizens without sending a clear message to the nonadherents that they are outsiders." *S.D. v. St. Johns County School Dist*, 632 F.Supp.2d 1085 (M.D. Fla. 2009). Under either test, the Plaintiffs' allegations are sufficient.

that "we" are not canceling it, rather "we" are promoting it, as well as Chief Graham urging attendance ("I am urging all of you to attend"), certainly suggests an ownership (for lack of a better term) of the event, as Plaintiffs allege.

These facts, taken as true, do tend to show a plausible claim that Defendants violated the Establishment Clause by organizing and promoting (or endorsing) the Prayer Vigil. At the most fundamental level, the Eleventh Circuit has recognized that "prayer is the quintessential religious practice," which implies that no secular purpose can be satisfied. *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983). Indeed, "[t]he primary effect of prayer is the advancement of ones religious beliefs." *Id.* Consequently, the Eleventh Circuit has recognized that the state cannot advance prayer activities without the implication that the state is violating the Establishment Clause. *Id.*

While Defendants argue that the Prayer Vigil had a secular purpose because it was intended "to support peace" and was "part of an overall law enforcement-related practice" (see Doc. 8 at 19), "[t]he unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interest." *Jager v. Douglas County School Dist.*, 862 F.2d 824, 830 (11th Cir. 1989). The First Amendment prevents the government, in its effort to *protect* religious freedom, for carrying on government sponsored religious activity:

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration

> is elected to office. Under that Amendment's **[*1282]** prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

Engel v. Vitale, 370 U.S. 421, 429-30 (1962).

Accordingly, I submit that the individual Plaintiffs have sufficiently alleged a violation of the Establishment Clause sufficient to survive a motion to dismiss, based on the remaining Defendants' alleged organization and promotion of the Prayer Vigil. *See e.g., Doe v. Village of Crestwood, Ill*, 917 F.2d 1476 (7th Cir. 1990) (affirming district judge's finding that the Village of Crestwood improperly sponsored a Roman Catholic mass held during a municipal Italian Festival because information published in the Village paper would "lead an objective observer to conclude that the Village itself is the sponsor, or at least a sponsor" of the mass); *Newman v. City of East Point*, 181 F.Supp.2d 1374 (N.D. Ga. 2002) (finding that the City "played more than a *de minimis* part in the promotion" of the prayer breakfast and that "an objective observer would most certainly conclude that the City of East Point has endorsed religion" based on the City using City funds to produce, duplicate and distribute a flyer advertising the Mayor's Prayer Breakfast; distributing the flyer at a City event; and listing other official City

events on the flyer with it).[10]

(2) Claim Against the City

In addition to setting forth an apparent constitutional violation, in order to sue the City itself the individual Plaintiffs must also show that the deprivation of their rights was caused by a policy, practice, or custom of the City. That is, Plaintiffs must show a basis for municipal liability, which I suggest they can do.

In *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 698 (1978), the Supreme Court held that local governments may not be held liable for constitutional deprivations on the theory of *respondeat superior*; rather, they may be held liable only if such

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[10] Of course, the Mayor, the Chief and the individual police officers would have a First Amendment right as individuals to participate in a community prayer vigil, or other public prayer for that matter, so long as the event was not otherwise in violation of the Establishment Clause. For example, while the court in *Newman v. City of East Point*, enjoined the City and the Mayor from *organizing, advertising, promoting or endorsing a community prayer breakfast*, the court refused to enjoin the Mayor from participating in the breakfast as it noted that "the Mayor and City Officials, as citizens of the United States, have a First Amendment right *as individuals* to participate in the Mayor's Prayer Breakfast as long as it is otherwise not in violation of the Establishment Clause", which the court explained meant that the event was not endorsed by the City of East Point in any way, "takes place at a non-City facility, does not use City funds, does not use City employees to publicize or organize it and is not presented as being endorsed by the City, then the Mayor and any City Officials can participate in the event." *Newman*, 181 F.Supp.2d at 1382.

constitutional torts result from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law. *Denno ex rel. Denno v. School Bd.*, 218 F.3d 1267, 1276 (11th Cir. 2000). Notably, a municipality may be held liable for a single illegal act (or acts) committed by one of its officers when the **[*1283]** challenged act may fairly be said to represent official policy, such as when that municipal officer possesses final policymaking authority over the relevant subject matter. *Scala v. City of Winter Park*, 116 F.3d 1396, 1397 (11th Cir. 1997).

Here, Plaintiffs attempt to hold the City liable for the Community Prayer Vigil based on the actions of Mayor Guinn and Chief Graham. Plaintiffs have alleged facts from which it could be inferred that Mayor Guinn and Chief Graham were final policymakers with respect to organizing the Prayer Vigil. Plaintiffs allege that Mayor Guinn and Chief Graham are responsible for setting and carrying out city policy. (Complaint at ¶¶10 & 12). In the letter posted on the OPD page, Chief Graham urged the citizens to support and attend the Prayer Vigil. Likewise, in an email Mayor Guinn stated "[n]ot only are we not canceling [the Prayer Vigil] we are trying to promote it and have as many people as possible to join us." (emphasis added). Defendants' arguments to the contrary are belied by their motion to dismiss in which they acknowledge that "Defendants' support of the Community Prayer Vigil was part of an overall law enforcement-related practice" (Doc. 8 at 19) (emphasis added); and the attached email in which Chief Graham

stated that "I have no intention of canceling the event" and that "I am attempting to bring our community together to fight crime." (Doc. 8-3 at 1) (emphasis added).

At this stage in the litigation then, and based upon these allegations, Plaintiffs have adequately alleged that Mayor Guinn and Chief Graham had final policymaking power with respect to the Community Prayer Vigil in order to state a plausible claim under § 1983 against the City. Whether these officials in fact had final policymaking authority involves questions that cannot be resolved on this motion and, as such, the City is not entitled to dismissal from this action on that ground. Further, even if the Mayor and Chief cannot be said to have final policymaking authority, there are still sufficient allegations to support the Plaintiffs' theory that the City had a practice of endorsing religion: the communications made by the Mayor of the City and its Chief of Police are evidence of the City's apparent involvement in planning and promoting the prayer vigil, and the content of those messages include a proclaimed ability to do it (that is, that the law did prevent them) and an assertion that it was part of a law enforcement strategy or *practice*. Even though the facts of this case may shake out otherwise — perhaps this was a spontaneous event planned by church leaders in response to crime, as opposed to a City event based on a practice of endorsing religion — we are only at the motion to dismiss stage, and what is alleged is enough.

(3) Claims against Mayor Guinn and Chief Graham

Mayor Guinn and Chief Graham both assert that they are protected from suit in their individual capacities by qualified immunity. Qualified immunity offers complete protection for individual government officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Assuming for purposes of this motion that Mayor Guinn and Chief Graham were engaged in a discretionary function, "the burden shifts to the plaintiff to **[*1284]** show that the defendant is *not* entitled to qualified immunity." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir.2004). To satisfy this burden, the plaintiff must show that: "(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Id.* As discussed *supra*, the allegations of the Complaint are sufficient to state a claim for a violation of the Establishment Clause. Thus, the critical question is whether the state of the law gave those officials "fair warning" that their alleged organization and promotion of a Community Prayer Vigil was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002). We make this inquiry by looking at three sources of law that would provide adequate notice of statutory or constitutional rights: "specific statutory or constitutional provisions; principles of law

enunciated in relevant decisions; and factually similar cases already decided by state and federal courts in the relevant jurisdiction." *Harper v. Lawrence County, Ala.*, 584 F.3d 1030, 1037 (11th Cir. 2009).

Here, I submit that the alleged conduct "'lies so obviously at the very core of what the [Establishment Clause] prohibits that the unlawfulness of the conduct was readily apparent to [them], notwithstanding the lack of fact-specific law.'" *Vinyard*, 311 F.3d at 1355 (*quoting Lee*, 284 F.3d at 1199). At the most fundamental level, as previously stated, the Establishment Clause sets forth a principle of government neutrality and prohibits the government from promoting "a point of view in religious matters" or otherwise taking sides between "religion and religion or religion and nonreligion." *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citations omitted). As "the quintessential religious practice", the state cannot advance prayer activities without the implication that the state is violating the Establishment Clause. *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983). No factually particularized, pre-existing case law was necessary for it to be obvious to local government officials that organizing and promoting a Prayer Vigil would violate the Establishment Clause. *See Rich v. City of Jacksonville*, 2010 WL 4403095, at *15-16 (M.D. Fla. March 31, 2010) (finding that lack of factually similar cases was not dispositive where the alleged conduct would clearly violate the Establishment Clause).

Accordingly, the motion to dismiss on the basis of qualified immunity as it pertains to the claims

against Mayor Guinn and Chief Graham should be denied at this time. I note here, as I did above, that the Court is not commenting on the ultimate merits of Plaintiffs' claims — the actual involvement of the Mayor and Chief still needs to be developed. That they are not entitled to dismissal here on the basis of qualified immunity is based on the totality of the well-plead facts that they organized and promoted a Christian prayer vigil, as state actors. *See Atheists of Florida, Inc. v. City of Lakeland*, 779 F. Supp. 2d 1330, 1343 (M.D. Fla. 2011).

D. RECOMMENDATION

For the foregoing reasons, I recommend that Defendants' motion to dismiss (Doc. 8) should be **DENIED** as to the individual Plaintiffs' claims for nominal damages against the City of Ocala and the Mayor and Chief of Police in their individual capacities, but **GRANTED** in all other respects.

[*1285] Recommended in Ocala, Florida on July 2, 2015.

/s/ Philip R. Lammens

PHILIP R. LAMMENS

United States District Judge

APPENDIX D
Rojas v. City of Ocala
United States Court of Appeals for the Eleventh Circuit
December 13, 2021
No. 18-12679-AA

2021 U.S. App. LEXIS 36730 *

Before the Court is the "Suggestion of Death" concerning Plaintiff-Appellee Daniel Hale, filed in this Court on October 22, 2021. Additionally, the Court notes the "Suggestion of Death" concerning Defendant-Appellant Greg Graham, filed in the district court on January 25, 2021.

On November 23, 2021, the Court issued an order directing the parties to file notices indicating their positions as to the impact on this appeal of (a) the death of Plaintiff-Appellee Daniel Hale and (b) the death of Defendant-Appellant Greg Graham.

On December 2, 2021, the parties filed a "Notice Regarding Death of Select Parties and Impact on this Appeal," in which they state that "neither the death of Plaintiff-Appellee Daniel Hale nor Defendant-Appellant Greg Graham impact the appeal and this Court's review of the issues presented . . . ."

In light of the parties' notice, the appeal may proceed, and the Court DIRECTS the Clerk's Office to change the case caption as follows: (1) remove "DANIEL HALE" as a Plaintiff-Appellee; and (2) replace Defendant-Appellant "GREG GRAHAM, individually

and in his official capacity of chief of police of the Ocala Police Department" with "CHIEF OF POLICE OF THE OCALA POLICE DEPARTMENT."

/s/ Robin S. Rosenbaum

UNITED STATES CIRCUIT JUDGE