<u>Williamson et al v. Brevard County</u>
United States District Court for the Middle District of Florida
Case No. 6:15-cv-1098-Orl-28DCI
Final Order: November 29, 2017

Facts

Brevard County Board of County Commission ("BoCC") meetings are typically opened with a religious invocation that is generally, but not always, given by a cleric from the faith-based community. From January 1, 2010, through March 15, 2016, 195 invocations were given at Board meetings, and all but seven were given by Christians or contained Christian content.

Plaintiff Williamson, the Founder and Chair of Plaintiff Central Florida Freethought Community ("CFFC") sent a letter to the Chair of the BoCC requesting the opportunity to offer invocations at BoCC meetings. Williamson and other plaintiffs identify as atheists or Secular Humanists. After two months went by with no response from the Chair, Williamson wrote a second letter. The BoCC approved a letter which provided the CFFC did not share the beliefs or values that are a long part of the County's heritage and which are shared among a substantial body of County constituents. Further, the letter from the BoCC stated the BoCC would continue to only permit opening invocations by people with beliefs that represented a large segment of its constituents. The BoCC's letter went on to explain that, although Plaintiffs would not be permitted to deliver the invocation, they would be permitted to speak for 3 minutes during the public comment period of the BoCC meetings, just like any other member of the public.

Later, another plaintiff emailed a commissioner asking that a member of CFFC be allowed to deliver an invocation and stating he was a Brevard County atheist. A commissioner responded by saying, by its nature, an invocation should be given only by a person who seeks guidance from a higher power, and and without a 'higher power' lacks the capacity to fill that spot. Later, another

Plaintiff from Americans United for Separation of Church and State wrote a letter to the BoCC to ask the BoCC to reconsider its limitation on invocation speakers.

In response to these requests to deliver the invocation by various Atheist groups, the BoCC adopted a Resolution in which the BoCC determined supplanting traditional ceremonial pre-meeting prayer with an invocation by atheists, agnostics, or other persons represented or associated with the Plaintiff groups could be viewed as the County being hostile against monotheistic religions. In reaching this conclusion, the BoCC relied on the longstanding tradition of allowing monotheistic religions the opportunity to deliver the pre-meeting invocation. The Resolution reserved time for the atheist or agnostic groups to speak during public comment period of the BoCC meetings.

After the BoCC passed the Resolution, the plaintiffs filed suit and alleged violations of the Establishment Clause of the First Amendment to the U.S. Constitution; the Free Exercise Clause of the First Amendment; the Free Speech Clause of the First Amendment; the Equal Protection Clause of the Fourteenth Amendment; Article I, Section 2 of the Florida Constitution; and Article I, Section 3 of the Florida Constitution. The plaintiffs' complaint sought an injunction, a declaratory judgment, and damages. At the Summary Judgment stage of the litigation, the district court entered a Final Judgment in favor of the plaintiffs and imposed a permanent injunction against the County's invocation policies based on the reasoning set forth below.

Plaintiffs' Claims

Establishment Clause of the US Constitution

The Plaintiffs alleged the County's invocation practice violated the Establishment Clause by purposefully discriminating based on religious beliefs; by entangling public officials in religious

judgments; and by coercing audience members to take part in religious exercises. In response to these claims, the County contended its invocation practice conformed to Establishment Clause principles set out by the United States Supreme Court.

The District Court relied primarily on two SCOTUS cases to determine the validity of Plaintiffs' Establishment Cause claims: *Marsh v. Chambers* and *Town of Greece v. Galloway*.

In *Marsh*, the Supreme Court analyzed the prayer practice of the Nebraska Legislature which opened each of its sessions with a prayer given by a chaplain who was paid with public funds and chosen every two years by the Executive Board of the Legislative Council. 463 U.S. 783 (1983). The Supreme Court found that neither the prayers themselves nor the use of public funds to pay the chaplain violated the Establishment Clause because "the opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country" and that throughout this country's history "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id*. at 786. As a result of this long-standing tradition of prayer before legislative bodies, the Marsh Court found that the drafters of the First Amendment saw no real threat to the Establishment Clause from the practice of prayer. *Id.* at 791.

In *Town of Greece*, the Supreme Court analyzed the method by which city councilmembers selected local clergy members to deliver a prayer before council meetings. 134 S. Ct. 1811 (2014). Specifically, the prayer givers were chosen by a town employee calling congregations listed in a local directory until an available minister was found for the monthly town meeting. *Id*. at 1816. As time went on, the town compiled a list of willing 'board chaplains' who accepted invitations and agreed to return in the future. *Id*. No "would be prayer giver" was ever excluded by the town and the town did not review the prayers in advance or provide guidance on tone or content. *Id*. The

Supreme Court upheld the town's practices and found that "the town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one," and "so long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." *Id*. at 1824.

In sum, *Marsh* and *Town of Greece* stand for the proposition that, while legislative prayer is, as a general matter, constitutional, intentional discrimination and improper motive can take a prayer practice beyond what the Establishment Clause permits.

With regard to intentional discrimination, the court found that Brevard County limits the prayer opportunity to those it "deems capable" of doing so – based on the beliefs of the would-be prayer giver. Further evidence of intentional discrimination is seen after Plaintiffs requested to give the invocation at a BoCC meeting, when the County responded with an express statement and policy of exclusion. The court also looked to depositions of Commissioners which showed that certain Commissioners would either deny invocation givers based on certain religious or belief systems or that they would have to "look into" whether they should allow those potential speakers to give an invocation. The court also noted that the County cannot and did not deny that it had imposed a categorical ban on Plaintiffs and other non-atheists as givers of opening invocations at BoCC meetings.

The County defended its exclusionary policy of the Plaintiffs by maintaining that an invocation must be "religious" and "invoke a higher power" and that because the Plaintiffs are not religious and do not believe in a higher power, they are not qualified to give an opening invocation at BoCC meetings. The District Court rejected this justification on the grounds that the County had created an overly narrow view of the purpose of an invocation. Further, the District Court

found that the government requiring an invocation contain a religious component effectively results in that entity composing or censoring prayers in a way it deems acceptable to be delivered to the public.

The County also defended its policy by claiming it is not discriminating against a minority because atheists and secularists are a "clear majority" in Brevard County and it is actually "religious [people]" who are in the statistical minority. The District Court found this contention not relevant to an Establishment Clause analysis.

The County also defended its policy by claiming it did not deny Plaintiffs the opportunity to give an invocation because it gave nontheists the opportunity to speak during the Public Comment period of BoCC meetings. The County characterized this as an alternative and comparable opportunity to the one religious adherents are given during the pre-meeting invocation. The District Court rejected this argument.

The Plaintiffs also argued the County's invocation policy violated the Establishment Clause because it entangles the County with religion. The District Court found that the County clearly entangled itself in religion by vetting the beliefs of Plaintiffs' groups before deciding whether to grant permission to give invocations.

The Plaintiffs also argued the County's invocation practice violated the Establishment Clause by coercing participation in religious exercises. In support of this claim, the Plaintiffs pointed to the fact Commissioners often direct audience members to rise for invocations and, because the BoCC meeting room is small with constant interaction between the Commissioners and the public, this practice effectively coerces the public to submit to religion. The District Court

found no unconstitutional coercion because the evidence did not support a finding of "actual legal coercion".

Free Exercise Clause of the US Constitution

The Plaintiffs claimed the County violated the Free Exercise Clause by making adoption or profession of a religious belief a precondition for taking part in governmental affairs. The District Court found that, by opening up its invocation practice to volunteer citizens but requiring those citizens believe in a higher power before they are permitted to solemnize a BoCC meeting, the County violated the freedom of religious belief and conscience guaranteed by the Free Exercise Clause.

Free Speech Clause of the US Constitution

The Plaintiffs claimed the County violated the Free Speech Clause by prohibiting the Plaintiffs from giving invocations based on their nontheistic beliefs and affiliations. The District Court agreed with the Plaintiffs.

Equal Protection Clause of the US Constitution

The Plaintiffs claimed the County's invocation practice violated the Equal Protection Clause of the Fourteenth Amendment by treating them differently based on their religious beliefs. The District Court analyzed this claim under strict scrutiny, which requires the County's practice to withstand an equal protection challenge only if it is narrowly tailored to achieve a compelling interest. The District Court agreed with the Plaintiffs by finding undisputed evidence that the County categorizes its citizens along religious lines. Specifically, the District Court noted that, in selecting invocation speakers, the County had divided religious citizens from secular citizens and "monotheistic, faith based" citizens from all other citizens. Here, the County justified its policy of

excluding the Plaintiffs from invocation practice by citing a desire to recognize “faith based monotheistic religions” to avoid displacing those faith based religions and to avoid an appearance of approving atheism or Secular Humanism. The District Court did not find this justification compelling enough to pass a strict scrutiny analysis.

Article I, Section 2 of the Florida Constitution

This clause is construed like the Equal Protection Clause of the US Constitution so Plaintiffs prevailed on this count.

Article I, Section 3 of the Florida Constitution

This section provides that “there shall be no law respecting the establishment of religion” and that “no revenue of the state or any political subdivision thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”

The Florida Establishment Clause is interpreted in the same manner as the Establishment Clause found in the US Constitution.

The “no-aid” clause of section 3 imposes further restrictions on the state’s involvement with religious institutions than is imposed by the Establishment Clause. Here, Plaintiffs contended the County violated the no-aid clause by using tax dollars to fund an invocation practice that prefers monotheism over atheism and other religions. Plaintiffs relied on this contention by pointing to the fact that Commissioners use County resources to invite and communicate with invocators. The District Court found that the use of public funds for incidental expenses related to the use of buildings does not rise to a violation of the “no-aid” clause of section 3.

Conclusion

Brevard County defines the rights and opportunities of its citizens to participate in the ceremonial pre-meeting invocation during the County's BoCC meetings based on the citizens' religious beliefs. Therefore, the County's invocation policies violate the First and Fourteenth Amendments to the US Constitution and Article I, Sections 2 and 3 of the Florida Constitution.

Remedy

The District Court issued a permanent injunction prohibiting the County from continuing the unconstitutional invocation practices. Specifically, the County may not require theistic content in opening invocations; or impose a categorical ban on Plaintiffs and other non-atheists as givers of opening invocations at its BoCC meetings.

The District Court ordered the County to pay $60,000 in compensatory damages that were agreed to between the parties during Mediation proceedings.

The Court directed the parties to file a motion for attorneys' fees and costs by 60 days after the date of judgment.