

March 24, 2024

RE: Invocation Policy

To Whom It May Concern:

We have heard that there have been questions relating to the Invocation Policy in the Ottawa County Board Rules. The following memo is to provide the public with a legal analysis of the Invocation Policy and its legal underpinnings.

The primary case on this issue is the 2014 United States Supreme Court case entitled *Town of Greece v. Galloway*, 572 U.S. 565 (2014). This case arose from a dispute about the invocation policy of a local municipality in the State of New York. The Supreme Court analyzed the issue in detail and concluded that a local legislative body that opens its sessions with a legislative prayer or invocation does not violate the First Amendment of the United States Constitution. The Court noted several important aspects of the invocation policy that ensured its constitutionality:

- “The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation.” *Id.* at 571.
- “Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers. The town instead left the guest clergy free to compose their own devotions.” *Id.* at 571.
- “By welcoming many viewpoints, the District Court concluded, the town would be unlikely to give the impression that it was affiliating itself with any one religion.” *Id.* at 574.
- “[The invocation policy] acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds.” *Id.* at 574.
- “That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not ‘exploited to proselytize or advance anyone, or to disparage any other, faith or belief.’” *Id.* at 583.
- “From the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being.” *Id.* at 584.

The overriding principle set forth by the Supreme Court in the *Town of Greece* case can be summarized as follows:

The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates. *Id.* at 582.

The County Invocation Policy is based on this principle. Because the County opens its meetings with an invocation by any member of the public, it must allow invocations of any religion. “The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.” *Marsh v. Chambers*, 463 U.S. 783, 787 (1983). Ottawa County has never denied or refused individuals the opportunity to give an invocation because of either their religious beliefs or the content of their speech or invocation. This practice continues and was codified by the Board with the Invocation Policy.

Evelyn Beatrice Hall famously wrote in her biography of Voltaire that “I disapprove of what you say, but I will defend to the death your right to say it.” Allowing anyone to give an invocation is not approving or disapproving of what was said or prayed, but instead is giving the opportunity to anyone to give the invocation, regardless of their religious beliefs or message. Even in *Town of Greece*, the Court noted that “[a] Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation.” *Town of Greece*, 572 U.S. at 572. Even though people of the Wiccan faith were a small minority in that locality, that person was still provided an equal opportunity to give an invocation. The Supreme Court also held:

The determination of what is a “religious” belief or practice is more often than not a difficult and delicate task.... However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. *Thomas v. Review Bd. Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981).

The Michigan Supreme Court, relying on the *Thomas* case, held that “the Court must accept an organization's good-faith characterization that its activity is grounded in religious belief because ‘[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.’” *Michigan Dept. of Social Services v. Emmanuel Baptist Preschool*, 434 Mich. 380; 455 N.W.2d 1 (1990) (citing *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680 (1989)). In addition, we are in the Federal Sixth Circuit and even the Court of Appeals in our circuit has “assume[d] that Satanism or the Church of Satan is a ‘religion’ . . .” *Kunselman v. Western Reserve Local School Dist.*, 70 F.3d 931 (6th Cir. 1995).

This policy also ensures that everyone who desires to give the invocation will have equal opportunity to do so regardless of the composition of the Board. For example, no matter whether the Board is majority Christian, Muslim, Hindu, Wiccan, Atheist, or Satanist, the policy provides an opportunity for any person to give an invocation. Under the First Amendment, it is not the role of government to police speech or favor/disfavor certain religious views. “A practice that classified citizens based on their religious views would violate the Constitution[.]” *Town of Greece*, 572 U.S. at 589. Again, once the Board “invites public prayer into the public sphere,” it must allow anyone to participate. *Id.* at 582.

The Court also acknowledged that a speech or invocation may be considered unfavorable or offensive. However, that is not a reason to deny someone the opportunity to speak or pray. It does not violate the Constitution to “merely [expose] constituents to prayer they would rather not hear and in which they need not participate.” *Id.* 590. The Court further held:

From the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith. *Id.* at 584.

Finally, the Court held:

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 in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. *Id.* at 589.

The Supreme Court has long held that the government cannot be the arbiter of religious beliefs, determine which ones are true or false, or make differentiations between people because of their varying beliefs. The Supreme Court held:

“The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.” The First Amendment has a dual aspect. It not only “forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship” but also “safeguards the free exercise of the chosen form of religion.”

Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.

Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.

The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. *United States v. Ballard*, 322 U.S. 78, 85-87 (1944) (internal citations omitted).

No matter what religious beliefs a person may have or not have, it is not the role of government to make determinations based upon a person's religious beliefs or lack thereof. "Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Engel v. Vitale*, 370 U.S. 421, 430 (1962). "The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views." *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 386 (1990). It is not the role of government "to say that their religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

We have heard questions regarding a few other invocation cases from around the Country, such as *Satanic Temple Inc v. City of Boston*, 21-CV-10102-AK (2023) and *Satanic Temple v. City of Scottsdale*, CV-18-00621 (2020). Those cases support the Board's Invocation Policy. In both of those cases, no person was denied the opportunity to give an invocation because of their religious beliefs. The Federal District Court in *Boston* held that it was proper for a municipality to have a written policy because it "would help avoid constitutional issues in the future." Moreover, the Federal Court of Appeals in the *Scottsdale* case held that "when legislative bodies engage in legislative prayer, they cannot pick and choose from religions. . ." *Scottsdale*, 20-15338, at 5 (2021). The reasons the Plaintiffs in those cases did not prevail were for other grounds, not because of their religious beliefs.

This means that the First Amendment applies to every person, even if that person is in a small minority who holds those beliefs. Similarly, it also means that religious beliefs are protected, even if those beliefs may be considered repugnant to the majority of the public or those officials currently seated in government office.

Current Procedure:

The process set forth in the current Policy does not require individual Commissioners or the Board to initiate contact with a specific person in the public and directly invite that person to give an invocation. The current Policy does not require that Commissioners or anyone on their behalf specifically invite someone because of a particular religious faith. Instead, the Policy allows any member of the public to request, through their own Commissioner, to give an invocation and to be placed on the list of people who are interested in giving invocations in the future. The "Coordinator" will then reach out to people on the list and arrange for them to give an invocation for a future Board meeting on a specific date.

No Commissioner, even the one who forwards the name of the invocation giver, is responsible for the person giving an invocation just as Commissioners are not responsible for a person making a public comment. Just as anyone is allowed to speak during the public comment segment, anyone is allowed to request to give an invocation. Allowing such free expression in multiple ways is a colloquial "feature, not a bug," of our free society.

Implementation of the current Policy does not mean the Board is putting its stamp of approval on the religion or message of any particular person giving an invocation. Rather, the Board is demonstrating its commitment to upholding all citizens' First Amendment rights of free speech and free exercise of religion.

Without going into exhaustive detail, the Invocation Policy's terms are consistent with established case law, such as not pre-reviewing the invocation, not paying invocation givers, not favoring or disfavoring any religion, and not requiring that any member of the public or the Board participate in any way with the invocation.