AMERICAN ATHEISTS
LEGAL CENTER
718 7th Street NW, Washington DC 20001

AHLC Appignani Humanist Legal Center
1821 Jefferson Place NW, Washington, DC 20036 | T 800.837.3792

cfi CENTER FOR INQUIRY

May 9, 2019

Via Regular Mail & Hand Delivery

Mayor John Rees
Winter Garden City Hall
300 W Plant Street
Winter Garden, FL 34787

Commissioner Lisa Bennett
Winter Garden City Hall
300 W Plant Street
Winter Garden, FL 34787

Commissioner Bob Buchanan
Winter Garden City Hall
300 W Plant Street
Winter Garden, FL 34787

Commissioner Mark A. Maciel
Winter Garden City Hall
300 W Plant Street
Winter Garden, FL 34787

Commissioner Colin Sharman
Winter Garden City Hall
300 W Plant Street
Winter Garden, FL 34787

Re: Resolution 19-03 and the Opening Invocation Procedure and Policies at Winter Garden City Commission meetings

Dear Mayor Rees and Commissioners:

For more than four years, Joseph Richardson and the Central Florida Freethought Community (CFFC), an affiliate of American Atheists, the American Humanist Association, and the Center For Inquiry, have been working tirelessly to convince the Winter Garden City Commission to make the invocation policy at commission meetings more inclusive, to better reflect the Winter Garden community. At every turn, you have met that effort with animosity and outright hostility. In 2014, Mayor Rees directed the police chief to forcibly remove Joseph from a commission meeting after Joseph sat silently during the delivery of the Pledge of Allegiance following a commissioner-led prayer.[1] Only when subsequently faced with the threat of litigation over this clear-cut violation of Mr. Richardson's right to free speech did you deign to change the City Commission's policy by giving members of the community the opportunity to deliver the opening invocation and by finally acknowledging what was already true: that standing for the recitation of the Pledge of Allegiance is optional.[2]

[1] https://www.wftv.com/news/local/winter-garden-leaders-change-policy-prayer-pledge-/107225886
[2] City Resolution No. 15-04

Even after ostensibly "adopting a policy of non-exclusion and selection of volunteer invocation speakers,"[3] you have used the policy as an opportunity to continue excluding Joseph and CFFC from participating in the invocation. According to the available data, in 90 meetings held over the four years since the current policy was adopted, you have never invited Joseph or another member of the CFFC to deliver an invocation, despite Joseph's inclusion in the database that serves as the pool of speakers from which you select individuals to deliver the invocation at each meeting.[4] While the CFFC was entirely ignored by you in the selection process, a number of Protestant leaders have been repeatedly given the opportunity to participate.[5]

Now, with only three days' notice and just as CFFC prepares to present a petition to this body asking you to implement a new policy that would be nondiscriminatory in more than just name, you have instead elected to consider a new policy that would reinstate the prior, exclusionary invocation practice. Doing so would violate the Establishment Clause and Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Furthermore, retaining the current policy, as it is presently structured, violates the Free Speech Clause of the First Amendment. The only constitutional option available to you in these circumstances is to amend the invocation policy to remove the unbridled discretion of the commissioners in selecting speakers or, alternatively, to eliminate invocations from city commission meetings altogether.

American Atheists, Inc., is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation," created by the First Amendment, between government and religion. The organization strives to create an environment where atheism and atheists are accepted as members of the nation's communities and where casual bigotry against the atheist community is seen as abhorrent and unacceptable. American Atheists promotes the understanding of atheists through education, outreach, and community-building, and works to end the stigma associated with being an atheist in America.

The Center For Inquiry ("CFI") is a nonprofit organization devoted to promoting reason, science, critical thinking, and humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI advocates for public policy that is rooted in science, evidence, and objective truth. CFI works to defend the rights of non-believers around the world and to protect the freedom of inquiry that is vital to a free society.

The American Humanist Association (AHA) is a national nonprofit organization based in Washington, D.C., with over 650,000 supporters and members across the country, including many in Florida. The mission of AHA's legal center is to protect the most fundamental principles of our democracy: First Amendment liberties, including free speech and church-state separation. We have successfully litigated First Amendment cases in state and federal courts from coast to coast, including in Florida.

The City Commission will violate the constitutional rights of Winter Garden's residents if you approve Resolution 19-03.

Over the last four years, this body has repeatedly shown disdain for Mr. Richardson, CFFC, and nonreligious residents. In August of 2014, when Joseph remained seated during the recitation

[3] Id.
[4] https://www.invocationsonline.com/localities/winter-garden-fl
[5] Id.

of the Pledge of Allegiance in protest of the invocation policy the Commission then had in place you enlisted the help of the Winter Garden Police Department to have him forcibly removed from the commission meeting, a flagrant violation of his right to free speech.

Then, after the threat of a lawsuit over that violation forced you to change the invocation and Pledge of Allegiance policies, you begrudgingly granted Edward Lynch the opportunity to deliver the first non-religious invocation on October 22, 2015. Mr. Lynch delivered that invocation as an individual, independent of any congregation or organization. A few months later, this body approved Resolution 16-02, which effectively limited the scope of potential speakers to those representing organizations with 501(c)(3) status.

After Mr. Lynch delivered his invocation, it was nearly three and a half years before another nonreligious individual was afforded the opportunity. During that period, numerous individuals representing Protestant organizations were given multiple opportunities to deliver invocations. Joseph Richardson, despite representing CFFC, a 501(c)(3) organization, and despite being listed in the speaker database, was never extended an invitation.

The second (and potentially last) non-religious individual to be granted the opportunity to deliver the invocation was Joan Cleary, of the First Unitarian Church of Orlando, who delivered an invocation on February 28, 2019. Less than three months after Ms. Cleary delivered her secular invocation, this body now seeks to eliminate the opportunity altogether. Instead, you seek to reinstate a policy whereby you, the commissioners, are the only individuals whose religious beliefs will be acknowledged during City Commission meetings.

Approval of Resolution 19-03 would violate the Establishment Clause of the First Amendment

Adopting a commissioner-led prayer policy contravenes the Establishment Clause pursuant to *Town of Greece v. Galloway* and Circuit precedent. When government officials themselves deliver prayers at government meetings, "the prayer-giver [is] the state itself."[6] When Winter Garden city commissioners delivered the invocation prior to the implementation of Resolution 15-04, the commissioners were "elbow-deep in the activities banned by the Establishment Clause—selecting and prescribing sectarian prayers."[7] In contrast, the prayers in *Town of Greece*, the Supreme Court's most recent decision addressing legislative prayer, were delivered by private citizens pursuant to a non-discriminatory open forum policy that allowed anyone (including an atheist) to deliver an invocation of their choosing. The Court indicated that it would not have upheld the practice if the prayers were delivered instead by town officials. The Court stressed: "*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."[8] The Court explained:

> The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer

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[6] *Lund v. Rowan Cty., N.C.*, 863 F.3d 268, 281 (4th Cir. 2017) (en banc), *cert. denied Rowan Cty. v. Lund*, ___ U.S. ___, 138 S.Ct. 2564 (2018).
[7] *Id.*
[8] *Town of Greece v. Galloway*, 572 U.S. 565, 581 (2013) (emphasis added) (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

> opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, <u>came not from town leaders but from the guest ministers</u>.[9]

The Court continued, "[i]n no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished."[10] The Court reasoned, "[t]o hold that invocations must be nonsectarian would force the legislatures . . . to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact."[11] If legislatures merely editing or approving prayers raises constitutional concerns, it is a fortiori more unconstitutional for legislators to actually deliver the prayers. In upholding Greece's practice, the Court stressed: "Greece [i.e. the council members] neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content . . . The town instead left the guest clergy free to compose their own devotions."[12]

In relying upon *Engel* in *Galloway*, the Court reaffirmed the idea the First Amendment was added to the Constitution to "stand as a guarantee that neither the power nor the prestige" of the 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." [13] The Court acknowledged that the government "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."[14]

As the Court ruled in *Engel* and as is equally applicable today: "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[15]

Several lower courts have properly interpreted *Town of Greece* to mean that local government officials cannot deliver legislative prayers.[16] Notably, the Fourth Circuit Court of Appeals, in *Lund v. Rowan County*, rejected Rowan County's commissioner-led prayer practice.[17] The decision to institute a commissioner-led invocation policy created a "rigid, restrictive practice" that "created a closed-universe of prayer-givers dependent solely on election outcomes. The

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[9] *Id.* at 588.
[10] *Id.* at 589.
[11] *Id.* at 581.
[12] *Id.* at 571.
[13] *Engel*, 370 U.S. at 429-30.
[14] *Id.*
[15] *Id.* at 435.
[16] *See Lund*, 863 F.3d at 272; *Hudson v. Pittsylvania County*, 2014 U.S. Dist. LEXIS 106401, at *6-7 (W.D. Va. Aug. 4, 2014) ("the active role of the Pittsylvania County Board of Supervisors in leading the prayers, and, importantly, dictating their content, is of constitutional dimension and falls outside of the prayer practices approved in *Town of Greece*.").
[17] *Lund*, 863 F.3d at 272.

commissioners effectively insulated themselves from requests to diversify prayer content."[18] The court highlighted the political division that such a policy could cause, noting that "[a]t one meeting, an individual who expressed opposition to the Board's prayer practice was booed and jeered by the audience."[19]

The Fourth Circuit's analysis of the invocation practice in *Lund* is particularly salient when examining Winter Garden's history of commissioner-led invocations. The two practices of the two municipalities bear striking parallels, right down to an attendee being singled out for their objection to the policy.

Approval of Resolution 19-03 would violate the Free Exercise Clause of the First Amendment

Not only does Winter Garden's history of commissioner-led invocations implicate serious Establishment Clause concerns, but the actions by this body described above are "elements of a clear and impermissible hostility toward the sincere . . . beliefs that motivated" Joseph and CFFC in pursuing the opportunity to deliver a secular invocation, amounting to a violation of their right to free exercise of their sincerely held beliefs.[20] Just last year, the Supreme Court reiterated that government actions motivated by animosity or bias toward a person based on religious views is highly suspect. "[T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens . . . . The Free Exercise Clause bars even subtle departures from neutrality on matters of religion."[21]

By ejecting Mr. Richardson from a commission meeting in August of 2014 and thereafter taking successive steps to curtail the ability of non-religious individuals to deliver secular invocations at commission meetings, this body is displaying the precise sort of religious animosity that the Supreme Court found to be "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[22]

Approval of Resolution 1903 would violate the Equal Protection Clause of the Fourteenth Amendment.

This body, as a state actor in control of a non-public forum for speech, retains the authority to alter the terms of access to such forums, or close the forum entirely.[23] This authority, though, is far from absolute.[24] It is a necessary prerequisite to any otherwise-valid government action that any discriminatory effect the action might have on a suspect class of persons played no "causal role" in the decision to take the action.[25] The Equal Protection Clause of the Fourteenth Amendment prohibits the government from imposing even viewpoint-neutral restrictions if it is

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[18] *Id.*
[19] *Id.*
[20] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, ___ U.S. ___, 138 S. Ct. 1719, 1729 (2018).
[21] *Id*. at 1731.
[22] *Id.* at 1732.
[23] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Lehman v. Shaker Heights*, 418 U.S. 298, 303 (1974).
[24] *Lehman*, 418 U.S. at 303.
[25] *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1222 (11th Cir. 2005) (en banc), *cert denied Johnson v. Bush*, 546 U.S. 1015 (2005).

doing so in order to disadvantage an individual or group on the basis of race, nationality, or religion.[26]

From the actions and events described above, it appears that this body is considering implementing a severely restricted invocation policy with the intent to discriminate along religious lines by preventing non-religious residents from offering secular invocations city commission meetings in the future. Even a policy that, on its face, is religiously neutral violates the Equal Protection Clause if it was implemented as a result of "purposeful discrimination" even if it is facially neutral.[27] Government policies that draw classifications "upon inherently suspect distinctions such as race, religion, or alienage"[28] must meet the strict scrutiny standard,[29] under which a law must be narrowly tailored to further a compelling government interest, and be the least restrictive means of achieving that interest.[30]

If you approve and implement Resolution 19-03, that decision will not survive strict scrutiny when it is inevitably challenged in court. Government actions "directed at particular religious . . . minorities" trigger the most exacting judicial review because such classifications implicate "prejudice against discrete and insular minorities . . . , which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect [them]."[31]

The current policy violates the constitutional rights of Winter Garden residents and must be amended.

This body has placed Winter Garden in an unenviable position. To avoid continued constitutional violations, you must not only reject Resolution 19-03 but also implement changes to the current invocation policy or eliminate it altogether. Luckily, these changes need not be sweeping or difficult to implement. The city commission should eliminate the requirement imposed by Resolution 16-02 that speakers represent 501(c)(3) organizations and select individuals to deliver invocations by cycling through the speaker database. By doing so, the city will be giving every person who wishes to deliver an invocation an equal opportunity to participate.

The current policy violates the Establishment Clause of the First Amendment

One of the constants in Establishment Clause jurisprudence is that the government must not play favorites. "The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion."[32] In the Supreme Court's most recent case concerning prayer at government meetings, *Town of Greece v. Galloway*, the Court took pains to point out that "[t]he town at no point excluded or denied an opportunity to a would-be prayer

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[26] *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Miller v. Johnson*, 515 U.S. 900, 911 (1995); *Burlington N. R.R. v. Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).
[27] *E & T Realty v. Strickland*, 830 F.2d 1107, 1112 n.5 (11th Cir. 1987); *see also Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).
[28] *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).
[29] *Leib v. Hillsborough County Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009); *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 213 (3d Cir. 2013).
[30] *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *Burson v. Freeman*, 504 U.S. 191, 199 (1992).
[31] *Carolene Products Co.*, 304 U.S. at 152 n.4; *see also Dukes*, 427 U.S. at 303.
[32] *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *see also Pelphrey v. Cobb County*, 547 F.3d 1263, 1278-1282 (11th Cir. 2008).

giver"[33] and that the prayer practice was constitutionally permissible "[s]o long as the town maintains a policy of nondiscrimination."[34] These decisions "make clear that while legislative prayer—even sectarian legislative prayer—is, as a general matter, constitutional, intentional discrimination and improper motive can take a prayer practice beyond what the Establishment Clause permits."[35]

In contrast to the prayer practice at issue in *Town of Greece*, this body has not remained studiously neutral between religion and religion, nor between religion and nonreligion. This body has in place a practice that excludes or denies those seeking an opportunity to deliver an invocation in multiple ways. The selection of the individual to deliver the invocation is governed by the subjective desires of you, the commissioners, which has resulted in numerous Protestant speakers being invited back to deliver the invocation again and again, while non-religious speakers and those of other faiths have been excluded. Similarly, each of the two instances in which non-religious individuals did deliver invocations, this body quickly took steps to restrict the invocation policy in such a way as to exclude those individuals from being invited back.

This body has "excluded or denied" other speakers by requiring, under Resolution 16-02, each speaker to be associated with a 501(c)(3) organization. This restriction serves no purpose other than to exclude smaller congregations and groups that may not have the members, personnel, or resources needed to properly operate a non-profit corporation.

The current invocation policy violates the Free Speech Clause of the First Amendment.

The Free Speech Clause of the First Amendment prohibits any governmental body from imposing restrictions that discriminate between speakers on the basis of viewpoint. *Perry Educ. Ass'n*, 460 U.S. at 46. This includes non-public forums, such as invite-only opportunities to deliver invocations at government meetings.[36] Viewpoint discrimination is an "egregious form" of censorship.[37] The Supreme Court has made this quite clear. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[38]

To that end, the Eleventh Circuit Court of Appeals applies the unbridled-discretion doctrine as one means of determining whether restrictions placed on a forum--even a non-public forum, is constitutionally sound.[39] The doctrine states that "[a] grant of unrestrained discretion to an official responsible for monitoring and regulating First Amendment activities is facially unconstitutional."[40]

The current policy governing invocations delivered at city commission meetings grants to commissioners "broad censorial power"[41] over who may deliver invocations. While anyone (who represents a 501(c)(3) organization with ties to the community) may be included in the speaker database, commissioners have "boundless discretion" to select from the potential speakers on that

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[33] 572 U.S. 565, 571 (2013).
[34] *Id.* at 585.
[35] *Williamson v. Brevard Cty.*, 276 F. Supp. 3d 1260, 1277 (M.D. Fla. 2017).
[36] *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1306 (11th Cir. 2003).
[37] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).
[38] *Id.*
[39] *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1226 (11th Cir. 2017).
[40] *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1310 (11th Cir. 2003).
[41] *Id.* at 1311.

list based on any criteria whatsoever, including limiting it only to those whose views comport with the commissioners' own beliefs. Commissioners' ability under the policy "to exercise this prerogative runs afoul of the Constitution's concern over unbridled official discretion in the First Amendment arena."[42]

Conclusion

The Winter Garden City Commission has a choice to make. If you maintain the current invocation policy, the city faces the prospect of expensive litigation that you will likely lose. If you approve Resolution 19-03, the city will also face litigation that it will likely lose. However, if you implement two straightforward changes to the current policy, the city commission can retain the invocation practice while avoiding constitutional pitfalls. Alternatively, you could avoid the issue altogether by foregoing the practice of including invocations at commission meetings.

Sincerely,

Geoffrey T. Blackwell, Esq.
Litigation Counsel
American Atheist Legal Center
718 7th St. NW
Washington, D.C. 20001
legal@atheists.org

Nicholas J. Little, Esq.
Vice President and General Counsel, Legal Director.
Center for Inquiry, Inc.
1012, 14th St N.W. Ste 205
Washington, D.C. 20005
nlittle@centerforinquiry.org

Monica L. Miller
Senior Counsel
American Humanist Association
1821 Jefferson Place NW
Washington, DC, 20036
mmiller@americanhumanist.org

[42] *Id.*; *see also Barrett*, 872 F.3d at 1226.