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MEMORANDUM

TO: Mayor Feinsod and Members of the City Council

FROM: Kelly M. Fernandez, Esq., City Attorney

DATE: February 18, 2020

RE: Invocations

On January 28, 2020, the City received a letter from the Freedom from Religion Foundation alleging that the City's invocation practice violates the U.S. Constitution. The Establishment Clause of the First Amendment prohibits the government from making any law "respecting an establishment of religion." Invocations at government meetings have been the subject of a number of federal court cases. Below are brief summaries of the most relevant cases followed by an analysis of the City's invocation practice with options for Council's consideration.

I. Case Law:

A. Before the Supreme Court

1. *Marsh v. Chambers* (1983)

- Issue: Whether Nebraska state legislature's practice of opening sessions with an invocation by a Presbyterian minister, in the Judeo-Christian tradition, paid from state funds violated the Constitution.

- Holding: No.

- Key Points:

- The opinion noted the following in regards to the history of legislative prayer: “It can hardly be thought that in the same week members of the First Congress voted to appoint and pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.”
- Absent proof that the selection of the prayer-giver from a single denomination stemmed from an impermissible motive, the Establishment Clause is not violated.
- “The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.”

2. *Galloway v. Town of Greece* (2014)

- Issue: Whether the Town’s practice of having religious leaders in the community open town meetings with prayer violated the Establishment Clause.
- Holding: No, as it fit within the tradition of legislative prayer. (5-4 decision)
- Key Points:
 - Location of the invocation on the agenda and the Town’s practice shows that the prayers do not denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.
 - “The purpose of legislative prayer is to lend gravity” to sessions where “the divisive business of governing” will take place. Legislature prayer should be “solemn and respectful in tone.”
 - Courts are to look into the prayer opportunity as a whole and not the content of a single prayer.

B. Before the Eleventh Circuit

1. *Pelphrey v. Cobb County* (2008)

- Issue: Whether the practices of the County Commission and Planning Commission that allow volunteer leaders of different religions, on a rotating basis, to offer invocations with a variety of religious expressions violates the Establishment Clause.
- Holding: The County Commission’s invocation practice was constitutional as the prayers provided by speakers were not reviewed, censored, or composed by staff and an administrative process was used to select speakers. The Planning Commission’s invocation practice was unconstitutional as certain religious groups were excluded.
- Key Points:
 - The Court reiterated that the content of a prayer is not of concern to judges, but whether prayer is used to proselytize or advance religion or disparage any faith or

belief.

2. *Atheists of Fla. v. City of Lakeland* (2013)

- Issue: Whether the City policy on invocations, which requires that invitations to participate be extended to all religious groups, violated the Establishment Clause.
- Holding: No.
- Key Points:
 - The Court found the policy adopted by the City was more expansive and inclusive than that in *Pelphrey*. Specifically, Lakeland gathered information regarding religious organizations, including the chamber of commerce, to supplement its Yellow Pages and Internet searches, and permitted religious congregations not placed on its Congregations List to apply to be included.
 - The adopted policy was constitutional, so it did not matter that all speakers, but one, who replied to the invite to provide the invocation were Christian. Nor did it matter that sectarian references were made in the invocations since the City did not review, inquire, or involve itself in the content of any invocation.

3. *Williamson vs. Brevard County* (2019)

- Issue: Whether it was permissible for county commissioners to bar nontheists from offering invocations.
- Holding: No.
- Key Points:
 - Case brought by the Freedom from Religion Foundation, Americans United for Separation of Church and State, the American Civil Liberties Union and the ACLU of Florida
 - Court emphasized that government bodies can open their meetings with prayers.
 - "In selecting invocation speakers, the commissioners may not categorically exclude from consideration speakers from a religion simply because they do not like the nature of its beliefs. [...] To be clear, the constitutional problem is not that the commission lacked a formal, written policy or that the selection of speakers was left to the discretion of individual commissioners. [...] The issue lies in how the commissioners exercised their discretion in practice. Brevard County's haphazard selection process categorically excludes certain faiths – some monotheistic and apparently all polytheistic ones –based on their belief systems. Most commissioners do not appear to have employed belief-neutral criteria in selecting which invocation-givers to invite."

C. Before Other Circuits

1. *Lund v. Rowan County* (4th Circuit 2017)

- Issue: Whether invocations composed and delivered by members of the Board violates the establishment clause.

- Holding: Yes.

- Key Points:

- The Court described the prayers as referencing only one faith, veering occasionally into proselytization, and requiring attendees to rise and often pray with the commissioners.

- “The prayer practice served to identify the government with Christianity and risked conveying to citizens of minority faiths a message of exclusion. And because the commissioners were the exclusive prayer-givers, Rowan County’s invocation practice falls well outside the more inclusive minister-oriented practice of legislative prayer described in *Town of Greece*.” However, it was also noted that not all legislator-led prayer is constitutionally suspect, “[w]e simply conclude...that the identity of the prayer-giver is relevant.”

- * U.S. Supreme Court declined to hear the case. However, in a dissent to the decision to decline jurisdiction, Justices Thomas and Gorsuch stated strong disapproval of the 11th Circuit’s opinion.

2. *Bormuth v. County of Jackson* (6th Circuit 2017)

- Issue: Whether commissioner-led prayers violate the establishment clause.

- Holding: No.

- Key Points:

- Prayers are an important part of history and tradition, and a way for public officials to “lend gravity to public business.” Furthermore, the Court stated that “history shows that legislator-led prayer is a long-standing tradition.”

- The Court declined the invitation to find an appreciable difference between legislator-led and legislator-authorized prayer given its historical pedigree. “Put simply, we find it insignificant that the prayer-givers in this case are publicly-elected officials. In our view and consistent with our [n]ation’s historical tradition, prayers by agents (like in *Marsh* and *Town of Greece*) are not constitutionally different from prayers offered by principals.”

- * The U.S. Supreme Court declined to hear the case.

II. Practices of Neighboring Jurisdictions:

Sarasota County – Various employees provide the invocation.

City of Sarasota – The City Clerk provides the invocation, which is the same at every meeting.

Longboat Key – There is no invocation or moment of silence.

City of North Port – Religious leaders from the City are invited to provide the invocation.

III. Analysis and Options:

There is no case, to my knowledge, that involves an invocation provided by a City Clerk. However, given the cases cited above, and the current composition of the U.S. Supreme Court if such a case were to be heard by it, it is more likely than not that such a practice would be found constitutional presuming the invocation does not proselytize or advance religion, disparage any faith or belief, or require meeting attendees to participate.

Based on the foregoing, I have identified the following options for Council's consideration:

1. Maintain the current invocation practice. If consensus is to do this, I recommend a policy be adopted explicitly stating that the purpose of the invocation is to solemnize the meeting, not to proselytize, and providing that participation is not required. Consideration should also be given to having a standard invocation.
2. Allow members of the community to provide the invocation. If consensus is to do this, I recommend a policy be adopted that comports with local government invocation policies that have been found constitutional. Two sample policies are attached.
3. Substitute the invocation with a moment of silence.
4. Eliminate the invocation.