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BY ELECTRONIC MAIL ONLY
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Al Hadeed
County Attorney
1769 E. Moody Blvd.
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Re: ***1st Amendment Legislative Prayer***

Dear Mr. Hadeed,

You have asked me to confirm the current state of Federal law regarding the First Amendment's Establishment Clause and its applicability to legislative prayer. You have described that Flagler County's practice has typically been an introduction seeking remembrance of the armed service members and first responders followed by a moment of silence. More specifically you have asked for my analysis on the state of the law as applied to the following quoted language:

> "We'll go ahead with a moment of silence. We ask God to bless all the citizens of Flagler County and especially the men and women in the military around the world standing watch to maintain our freedom. Here at home, our brave first responders, police, fire, and medical personnel who keep us safe, away from danger, and secure in our homes…"

The above language was offered followed by a moment of silence. A review of the taped meeting in question reveals no one was asked to stand or bow their heads.[1]

[1] Flagler County, County Commission Regular Meeting 2/3/2020, https://www.youtube.com/watch?v=j6vHrc3iPvg (last visited 2/17/2020).

The Supreme Court first fully addressed the issue of legislative prayer in Marsh v. Chambers.[2] Although there had been some references to various types of government-funded chaplaincy programs in Supreme Court cases, prior to Marsh, no Supreme Court decision had ever directly concerned chaplains or legislative prayer.[3] In holding that a Nebraska legislative chaplaincy program did not violate the Establishment Clause the Marsh Court found that an "unambiguous and unbroken history of more than 200 years" leaves "no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[4]

The U.S. Supreme Court first addressed the content or language of the prayers offered in Town of Greece v. Galloway.[5] There the Court reviewed whether prayer reflecting the language and beliefs of a specific religion "fit within the tradition long followed" in allowing legislative prayer.[6] The Town of Greece plaintiffs argued that all prayers must be nonsectarian or not identifiable with any one religion. The Supreme Court disagreed. Citing the Marsh decision, the Court, reiterated that the **"content of prayer is not of concern to judges."**[7] The Court did clarify that although legislative prayers are not required to be nonsectarian there were limits to the content by stating:

> Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. **If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,** many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.[8]

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[2] 463 U.S. 783 (1983).
[3] Engel v. Vitale, 370 U.S. 421, 441 (1962) (Douglas, J., concurring); Abington School District v. Schempp, 374 U.S. 203, 296-300 (1963) (Brennan, J., concurring).
[4] Marsh at 792.
[5] 572 U.S. 565 (2014).
[6] Id. at 577.
[7] Marsh at 794-795.
[8] Town of Greece, 572 U.S. 565, 582–83.

The most recent opinion from the 11th Circuit, the controlling law for Flagler County, came in Williamson v. Brevard County[9]. The Circuit Court held that the county's **process for selecting** volunteer invocation-givers for opening prayer at start of board meetings violated the Establishment Clause. The Williamson case does not stand for the proposition that government officials are themselves prohibited from giving a verbal prayer at the start of a legislative meeting.

Rather, the Williamson Court, focusing on the selection process, outlined a three-factor test utilized in the 11th Circuit to review the *identity* of the speaker, the *process* for selection, and the *nature* of the prayer in determining whether exploitation has occurred in a **selection process**. Williamson, at 1298[10].

As the Williamson Court succinctly put it:

> The state of our law, then, is clear at least about this much: local governments have significant freedom to conduct legislative prayers at the start of their sessions, even prayers that are explicitly sectarian and predominantly Christian. They may even employ a single cleric from only one denomination to deliver their invocations. But there is an exception to this: local governments violate the Constitution **if they organize and conduct their prayers in a way that discriminates against other religious beliefs.**[11]

The Williamson Court decision began by recognizing long standing Supreme Court jurisprudence in Marsh "that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[12] The government is generally prohibited from "entangling itself" in or "promoting religious beliefs" but the opening of government meetings in prayer has been repeatedly upheld.[13] These opening prayers are not without limit and the Court further

[9] 928 F.3d 1296 (11th Cir. 2019).
[10] Williamson at 1298.
[11] Id. at 1310.
[12] Marsh at 792.
[13] Williamson at 1298.

referenced the Marsh decision to reiterate that such prayers may not be **"exploited to proselytize or advance any one, or to disparage any other, faith or belief."**[14]

Therefore, under the U.S. Supreme Court and 11th Circuit precedent sectarian and non-sectarian prayer is acceptable. The content of any given prayer is "not of concern to judges" so long as there is no indication, particularly over time and practice, of that prayer being "exploited to proselytize or advance" any one faith over another.

The Williamson decision is distinguishable on the facts as presented in Flagler County. In Williamson the county was found to be utilizing a discriminatory process of allowing individual Commissioners to choose and favor some monotheistic religions while excluding other religions based solely on the belief system for legislative prayer. Here the County has not implemented or engaged in a **discriminatory process** for selection of speakers. Instead the County utilizes the current Chair of the County Commission to lead a moment of silence more akin to a **legislator-led** prayer.

The Town of Greece instructs that legislative prayer is to be considered from the perspective of the "reasonable observer," who is presumed to be "acquainted with [the] tradition" of legislative prayer.[15] In reviewing for Constitutional violations, the Court analyzes the prayer opportunity as a whole based upon the historical practices over time.[16] "Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a **challenge based solely on the content of a particular prayer will not likely establish a constitutional violation**."[17]

The issue of **legislator-led** prayer has not been directly addressed by the U.S. Supreme Court but has been considered in a limited number of other Circuits post Town of Greece. These include Bormuth v. County of Jackson, 870 F. 3d 494 (6th Cir. 2017) (holding the County did not violate the Establishment Clause and finding a long tradition for legislator-led prayer); Lund v. Rowan County, N.C., 863 F. 3d 268 (4th Cir. 2017) (holding the County did violate the Establishment Clause and detailing prayers that "implicitly 'signaled disfavor toward' non-Christians;" "characterized Christianity as 'the one and only way to salvation;' " "proclaim[ed]

[14] Marsh at 794-95.
[15] Town of Greece at 587; See also Lund at 284.
[16] See Town of Greece, at 567.
[17] Id. at 567.

that Christianity is exceptional and suggest[ed] that other faiths are inferior;" and "urged attendees to embrace Christianity, thereby preaching conversion").

Flagler County's practice of opening its sessions with a moment of silence is not violative of the Establishment Clause. The tradition does not seek to have the audience rise in reverence, or otherwise mandate participation. An isolated request for "God to bless" does not cross the line to violate the constitutional prohibition contained in the Establishment Clause. Such words do not "proselytize or advance any one, or disparage any other, faith or belief."[18] Further, the process does not use sectarian language such as "Jesus," "Christ," "Savior," "King of Kings," or other such wholly sectarian phrases as those found in the Lund case nor is it the common practice of the Commission to do so.

Based upon the above analysis of the First Amendment Establishment Clause jurisprudence regarding legislative prayer, even under the more narrow interpretation applied in the 4th Circuit's Lund decision, the single use of "God" leading into the recognition of service members and first-responders before a moment of silence is not likely to be found to violate the Establishment Clause. This is especially true when analyzing the County "course and practice over time."[19]

Please contact me with any questions or concerns which should be addressed.

Sincerely,

MARKS GRAY, P.A.

Denise C. May

Denise C. May

/DCM

[18] Marsh at 794-95.
[19] Id. at 582-83.