No. 18-12679

In the United States Court of Appeals
for the Eleventh Circuit

ART ROJAS, LUCINDA HALE, DANIEL HALE,
Plaintiffs – Appellees,
v.
CITY OF OCALA, FLORIDA, GREG GRAHAM, individually and in his official capacity as chief of police of the Ocala Police Department,
Defendants – Appellants,

KENT GUINN, individually and in his official capacity as mayor of the City of Ocala,
Defendant.

On Appeal from the United States District Court
for the Middle District of Florida

APPELLANT CITY OF OCALA'S REPLY BRIEF

Jay Alan Sekulow
Jordan A. Sekulow
Andy Ekonomou
Christina A. Stierhoff
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Abigail A. Southerland
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Francis J. Manion
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Counsel for Defendants-Appellants

No. 18-12679, *Rojas v. City of Ocala*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26, counsel for Appellant City of Ocala certifies that the following have or may have an interest in the outcome of this case/appeal:

- American Center for Law & Justice (law firm for Appellant)
- American Humanist Association (law firm for Appellee)
- Chubb Limited (formerly ACE), parent company of Chubb North America
- Chubb North America
- City of Ocala (Appellant)
- Compagnone, Christina (formerly Christina Stierhoff, Counsel for Appellant)
- Corrigan, Timothy J., presiding district court judge
- Andy Ekonomou (Counsel for Appellant)
- Gilligan, Patrick G., Esq. (Counsel for Appellant)
- Gilligan, Gooding, Batsel, Anderson & Phelan, P.A. (law firm for Appellant)
- Hale, Daniel (Appellee)
- Hale, Lucinda (Appellee)
- Manion, Francis J. (Counsel for Appellant)

No. 18-12679, *Rojas v. City of Ocala*

- Miller, Monica L., Esq. (Counsel for Appellee)
- Morcroft, Heather, Esq. (Local Counsel for Plaintiffs-Appellee)
- Rojas, Art (Appellee)
- Sekulow, Jay (Counsel for Appellant)
- Sekulow, Jordan (Counsel for Appellant)
- Southerland, Abigail (Counsel for Appellant)

Dated: November 5, 2021

Respectfully Submitted,

/s/ Abigail Southerland

Abigail Southerland
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Counsel for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Sources

ABBREVIATIONS

"R."	refers to the Page ID in Appellant's Appendix
"Br."	refers to Defendants-Appellant's opening brief filed with this Court
"App. Br."	refers to Plaintiffs-Appellees' brief filed with this Court
"OPD"	refers to the Ocala Police Department

INTRODUCTION

In the eyes of Plaintiffs-Appellees, the First Amendment should be interpreted in a manner that specially limits religious expression rather than protects it. To be sure, if the Vigil that took place had been a public gathering involving any non-religious speech, Plaintiffs-Appellees would not have raised a legal challenge. Indeed, if Chief Graham had been tasked with finding a shooter at an Ocala Atheist event and, in doing so, consulted with the group's leaders and vocally supported their efforts to organize a protected First Amendment gathering, Plaintiffs-Appellees would not have filed suit, nor would they have demonized Chief Graham for his efforts as they have done here.

Rejecting our long-time history and precedent which not only permits but recognizes the important and permissible role of chaplains and public references to God and prayer by public officials, Appellees urge this Court to toss aside a host of case precedent, defy the Supreme Court's recent ruling in *American Legion v. American Humanist Association* and in essence scrub "away any reference to the divine." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2085 (2019). Indeed, Plaintiffs-Appellees advocate for a country in which chaplains are no longer permitted to lead members of the public in prayer and government officials can no longer have any association with religion at all. In fact, according to Plaintiffs-Appellees government officials must shut down protected First Amendment

gatherings out of fear of division or where there is opposition. *See* App. Br. at 21 (complaining that Chief Graham and the Mayor "allowed hundreds to show up to a prayer event," and failed to use their authority and position to cancel the Vigil, prevent chaplains from praying and/or order the police to cease cooperation with faith community leaders). This hardly seems consistent with the humanist values of "mutual care and concern," that Plaintiffs-Appellees profess much less "the Establishment Clause's tolerance" for the very practices that they recommend we abolish. *See Am. Legion*, 139 S. Ct. 2067.

I. PLAINTIFFS-APPELLEES LACK STANDING.

Plaintiffs-Appellees make no serious response to the city's argument that Plaintiffs-Appellees lack standing. As explained in Appellant City's opening brief, one cannot manufacture standing by deliberately exposing oneself to speech one finds offensive. *See Valley Forge Christian Coll. v. Am. United for Separation of Church and State*, 454 U.S. 464, 485 (1982) (noting that offense is "the psychological consequence presumably produced by observation of conduct with which one disagrees." Plaintiffs-Appellees do not point to evidence in the record to dispute that the injury alleged here is one of offense). [1] Nor do Plaintiffs-Appellees

[1] In seeming recognition of the insufficiency here, counsel for Appellees appears to allege a new offense or injury on their behalf – this time one that offends humanist "aspirations" or values, *see* App. Br. at 17 (citing a 2021 statement describing humanist values) but such an assertion is nowhere in the record below). To be sure,

attempt to distinguish the avalanche of case law foreclosing standing here. The Supreme Court's recent decision in *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), lends no support to Plaintiffs-Appellees in this case. Appellant City does not challenge standing based on issues of mootness or nominal damages as in *Uzeugbunam*. Further, *Carney v. Adams*, 141 S. Ct. 493 (2020), affirms dismissal in this case for lack of standing. There, the Supreme Court ruled that the plaintiff had failed to show any concrete injury upon which standing could be based and ordered that the judgment be vacated and remanded with instructions to dismiss the case where, as here, the plaintiff essentially sought to engineer his own standing. 141 S.Ct. at 503. Plaintiffs-Appellees' lack of Article III standing therefore suffices to require reversal of the judgment below and remand for dismissal of this suit.

II. THERE IS NO ESTABLISHMENT CLAUSE VIOLATION HERE.

Plaintiffs-Appellees' claim likewise fails on the merits.

Last year, in addition to further narrowing the range of cases subject to the *Lemon* test, this Court identified two important considerations to guide the Court's review of certain Establishment Clause cases arising in the future. *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1322-23 (11th Cir. 2020). First, the proper legal analysis for reviewing "cases involving 'religious references or imagery in public

---

despite numerous opportunities by Plaintiffs-Appellees to articulate any number of injuries, they never did cite and have not cited to any such undisputed facts.

monuments, symbols, displays and ceremonies'" is one that "focuses on the particular issue at hand and looks to history for guidance" – not the *Lemon* test. *Id*. (explaining that the Supreme Court "jettisoned *Lemon v. Kurtzman*, 403 U.S. 602 (1971) for such cases). "Second, there is 'a strong presumption of constitutionality' for 'established, religiously expressive monuments, symbols, *and practices*.'" *Id*. (citing *Am. Legion*, 139 S. Ct. at 2085) (emphasis added). *See also id*. at 1325 (once again affirming these two principles).

In seeming recognition of the difficulties these principles pose to Plaintiff-Appellees' legal challenges and arguments, Plaintiffs-Appellees undertake a long excursion, at a high level of generality, through various aphorisms, historical references, and case excerpts, ranging even to assertions of tyranny, war and coercion. More troubling, Appellees embellish facts to fit a narrative of improper purpose, coercion, and discrimination. From the outset, and with the urging and support of the very organization serving as legal counsel in this case, Plaintiffs-Appellees were intent on suing the City. *See* App. Br. at 3; R. 3, 1978. Their characterization of the event has become even more fantastical with each stage of litigation. And now, Plaintiffs-Appellees weave a tale of how the City "delegate[ed] state authority to clergy to acquire crime evidence[2]; exploit[ed] clergy to pressure

[2] Plaintiffs-Appellees fail to point to any "delegation of authority." Volunteers, several non-chaplains, took part in planning and leading the Vigil for the community.

worshipers" and suggests that "[p]astors and police shared authority on stage" and that the City "authored prayers and selected religious speakers." *Id*. at 62.[3] In reality, what occurred was a community-led prayer vigil to bring the community together following a crime spree. Volunteers and citizens attended and participated as they wished – whether it was to participate in prayer or peacefully protest. As the photographs and other evidence in the record demonstrate, a diverse group of citizens – all united by a desire to support the loss of their fellow citizens – gathered and mingled with one another and/or prayed with one another. R. 1419-24. Both those supporting the Vigil and those opposing the Vigil talked with Chief Graham who was there. *Id*.; *id*. 1403-09; R. 681-82. The gathering was peaceful and Plaintiffs-Appellees – like everyone in attendance at the Vigil – attended because they wanted to, not because they were coerced to attend.

The undisputed facts, together with applicable law, are discussed below.

A. Establishment Clause History and Precedent Fail To Support Plaintiffs-Appellees' Legal Challenge.

Plaintiffs-Appellees present a host of "bedrock principles" and "evils" of the Establishment Clause. Notably absent from this tour of the Establishment Clause are cases that apply here. While Plaintiffs-Appellees do not challenge the OPD's

[3] Had there been improper evidence-gathering methods, that would, be a matter for criminal procedural objections for the accused shooter, not a matter of Establishment Clause adjudication.

chaplain program, they do take issue with select volunteer chaplains' participation in the Vigil. Accordingly, a history of chaplain and their roles in leading lawmakers, citizens, armies and communities during difficult times is relevant.

Courts have always granted significant deference to chaplaincy programs and legislative prayer in light of their well-established place in American history and tradition. Both practices pre-date enactment of the First Amendment and have "long been understood to be compatible with the Establishment Clause." *Town of Greece v. Galloway*, 572 U.S. 565, 575 (2014). *See also Am. Legion*, 139 S. Ct. 2087 (citing *Town of Greece*, 572 U.S. at 576, and noting that "the decision of the First Congress to 'provid[e] for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society.'"). *See also id*. (citing *Marsh v. Chambers*, 463 U.S. 792, 787-88 (1983), and noting further that "Congress for more than 200 years had opened its sessions with a prayer and that many state legislatures had followed suit."). Indeed, "the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment." *Marsh*, 463 U.S. at 788. Any challenged conduct taking place "before and contemporaneous with the adoption of the Establishment Clause" must be granted "weighty evidence" that such conduct was

not intended to be prohibited under the Clause. *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985).

Appellant City provided a brief history of some of these long-time practices in its opening brief. Chaplaincies are no exception. As already noted, legislative chaplains have been customary since the late 1700s. Their responsibilities include "prayer at the commencement of each sitting of the House, hosting clergy, and ministry . . . with spiritual care and counsel, prayer services, discussion events and other activities." *Chaplains of the House*, History, Art & Archive of the United States House of Representatives, https://history.house.gov/People/Office/Chaplains/ (last visited Oct. 29, 2021).[4]

Additionally, in *Katcoff v. Marsh*, the court upheld the Army's chaplaincy program. 755 F.2d at 238. The court noted that while such a program might violate the *Lemon* test (if viewed with that lens alone and without a review of history), providing armed forces with a military chaplaincy "began during Revolutionary days" and "has continued ever since then, with the size of the chaplaincy growing larger in proportion to the increase in the size of our Army." *Id.* at 225. In addition to chaplains, the military employs civilians to assist them including assistants, organists, voluntary religious teachers, contract clergy and the like. *Id*. at 229. *See*

[4] As the list of chaplains for Congress over the years indicates, the majority of the chaplains have represented the Christian faith.

also Montano v. Hedgepeth, 120 F.3d 844, 850 n. 10 (8th Cir. 1997) (adjudicating dispute arising in prison chaplain context); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448, 453 (8th Cir. 1988) (upholding the practice of providing hospital patrons chaplains).

In sum, the Establishment Clause, together with certain practices – including the ones here of volunteer chaplains participating in a community prayer vigil and government officials expressing support for and calling for prayer – cannot be viewed as if they exist in a sterile vacuum. The historical background is important "to the extent it sheds light on the purpose of the Framers of the Constitution." *Katcoff*, 755 F.2d at 233. *See also id*. ("in interpreting the Bill of Rights such 'an unbroken practice is not something to be lightly cast aside.' *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970)").

B. School Prayer Cases Relied Upon By Plaintiffs-Appellees Are Both Factually and Legally Inapposite Here.

There is little dispute that school prayer cases are distinct from many other Establishment Clause cases because of the potential for coercion. *Town of Greece*, 572 U.S. at 590-91; *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 660 (1943) (determining that school-aged children have "impressionable minds," and are more "susceptible to religious indoctrination or peer pressure" than adults). *See also Lee v. Weisman*, 505 U.S. 577, 592 (1992) (citing *Engel v. Vitale*, 370 U.S. 421 (1962), and specifically noting that "prayer exercises in public schools carry a

particular risk of indirect coercion" that is "pronounced")*; Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 296-97; 309-10 (2000) (specifically noting the "imposition of coercion upon" students). Plaintiffs-Appellees therefore err in urging that school prayer cases are controlling here. App. Br. at 45 (relying upon *Engel*, *Lee*, *Santa Fe Indep. Sch. Dist.*, *and Wallace v. Jaffree*, 472 U.S. 38 (1985).

In addition to the obvious legal distinctions, there are significant factual distinctions in these cases further undermining their persuasive authority and applicability here. For example, in *Engel*, a state government agency recommended, and a governing school board directed, that a prayer be said aloud by each class in the presence of the teacher at the beginning of each school day. 370 U.S. at 422. The prayer was written by governing authorities. *Id*. Again, in *Santa Fe*, school officials enacted a policy to provide for a time of prayer "on government property at government-sponsored school-related events." 530 U.S. at 302. The Court held the school policy unconstitutional because of the extensive control maintained by schools over the message to be delivered. *Id*. at 303 (noting only one student was given access to the stage for the entire season and the statement or invocation was subject to specific regulations and confined to certain content for which the school was required to approve before it was delivered).

Similarly, in *Lee*, school officials invited members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies.

505 U.S. at 580. The Court held the practice unconstitutional noting that students' "attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory." *Id*. at 586.

Finally, in *Wallace*,[5] the Court applied the Lemon test to find that a state legislature's bill declaring a period of silence "for meditation or voluntary prayer" was unconstitutional because the evidence showed that the stated purpose was to return prayer to schools, and no secular purpose was present. 472 U.S. at 55-58.

In stark contrast here, no governing body enacted a law or any other official policy in support of regular prayer. The Vigil was a one-time event. It did not take place during formal government proceedings, or on government property at a government-sponsored school event. No government officials maintained any control over the message or prayer to be provided, and attendance was not mandatory or obligatory.

C. The Facts Presented In This Case Do Not Support Plaintiffs-Appellees' Narrative of Coercion, Lack of Neutrality and OPD police prayer.

1. There is no evidence of coercion here.

[5] As yet another example of how important the facts presented in each case are to a proper Establishment Clause determination, *see* the Supreme Court's later decision in *Brown v. Gilmore*, 533 U.S. 1301, 1304 (2001), upholding another state's bill allowing for a moment of silence in school. There, the Supreme Court specifically noted the difference of just a few facts in *Wallace* compared to *Brown* warranting a different decision. *Id*.

As explained above, coercion was present and a compelling consideration in all the school cases cited by Plaintiffs-Appellees.

While Plaintiffs make bold claims that the City "lured hundreds" to a worship service, *see* App. Br. at 55, "pressure[ed] worshipers"[6] and "influenc[ed] hundreds of worshipers," App. Br. at 28, no such evidence was presented here. There is no testimony that citizens attending the Vigil felt pressured or obligated to attend. The evidence presented demonstrates that those in attendance felt free to protest, rather than participate. App. Br. at 11 (noting that the Ocala Atheists staged a peaceful protest); Br. at 12 (Plaintiffs-Appellees' attendance served as a form of protest). Plaintiffs-Appellees testified that they attended because they wanted to. Br. at 12. *See also* R. 1411-12 (photographs of posters made and put up by "Ocala Atheists" at the Vigil expressing discontent with Chief Graham).

Further, as Appellant City explained in great detail in its opening brief, the Supreme Court has, on more than one occasion, rejected the notion that there is any element of coercion for adults and constituents in cases involve legislative prayer – even when that prayer takes place at a formal government gathering where official business will be conducted. Br. at 26-27 (citing *Town of Greece*, 572 U.S. at 590-91).

[6] Exactly what these worshipers were "pressured" or "influenced" to do is never articulated by Plaintiffs-Appellees

2. *There is no evidence of a lack of neutrality here.*

Throughout their brief, Plaintiffs-Appellees argue that those who organized the Vigil failed to maintain neutrality with regards to religion, and thus a per se violation of the Establishment Clause occurred. First, the consideration of neutrality is irrelevant when private citizens and volunteers organize and lead a religious event or gathering. *See* R. 460-461; 464-65 (corroborating testimony by both Narvella Haynes and Quintana that the Vigil was their idea; that they took responsibility for organizing the details of the Vigil and that no government funds were provided and/or used for the Vigil). The Establishment Clause does not apply to private speech. *Capital Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (noting that "private speech cannot be subject to veto by those who see favoritism where there is none," and that religious speech cannot violate the Establishment Clause where it is purely private and occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Id*. at 766). The Supreme Court has also rejected the notion that the "constitutionality of legislative prayer turns on the neutrality of its content." *Town of Greece*, 572 U.S. at 580.

Plaintiffs-Appellees' claims of lack of neutrality and discrimination are, once again, unsupported. Plaintiffs never assert that they requested and were denied a

request to help lead the Vigil,[7] nor do they present any evidence that anyone else was denied the same opportunity to participate in or lead the Vigil. Chief Graham's undisputed testimony is that he believed that all citizens, regardless of their religious beliefs, were welcome to participate and speak at the Vigil. Br. at 8. In fact, when contacted by a citizen, Chief Graham encouraged him to contact the organizers for the event and participate. Br. at 8.

Accordingly, *Williamson v. Brevard County* is not applicable here. There, the Commissioners enacted a resolution and then maintained "plenary authority" or control over holding invocations and selecting the speakers. 928 F.3d 1296, 1312 (11th Cir. 2019). No evidence has been presented by Plaintiffs-Appellees in this case that Chief Graham or any other government official or employee had similar control over the Vigil or its content.[8] Further, while evidence of exclusion of other religions was undisputed in *Williamson* and based on the Commissioners' own admissions, *id*. at 1313, there is no such undisputed evidence presented here.

Finally, the make-up of the audience or speakers at the Vigil is not, itself, evidence of a lack of neutrality. This is especially true where, as here, the Vigil was designed to respond to the crime spree that took place in a specific faith-based community in Ocala, and to bring that community together. To be sure, if the content

[7] In *Williamson v. Brevard County*, Plaintiff requested and was denied the opportunity to deliver an invocation. 928 F.3d 1296 (11th Cir. 2019).
[8] See Section C.3 below for further discussion.

of the speech at the gathering had been anything other than religious, no cry for neutrality would be made and no legal challenge brought.

Indeed, what Plaintiffs-Appellees propose Appellant City should have done to maintain neutrality would have been constitutionally suspect. Involvement by Chief Graham or other government officials to exert control over the Vigil and its speakers or to interfere with the Vigil by mandating that the Vigil be all inclusive and/or represent all religious and non-religious "faiths" would, itself, result in improper entanglement. *See Williamson*, 928 F.3d at 1313 (taking issue with the fact that the Commissioners took religious beliefs into account when selecting a speaker and "scrutinized belief systems").[9]

3. *The conduct actually attributable to private citizens, volunteer chaplains and City officials/employees fails to support an Establishment Clause violation.*

As this Court knows well, there is a significant difference between an employee and volunteer, as well as individuals acting in their personal capacity versus their official capacity. These distinctions are particularly important here and regularly disregarded by Plaintiffs-Appellees. For example, Plaintiffs-Appellees continuously and erroneously assert that "employees" "in plain clothes," as well as

[9] Plaintiffs-Appellees do not challenge the chaplaincy program; they only take issue with the fact that the chaplains who volunteered and participated in the Vigil appeared to be Christian. Notably, Chief Graham testified that he invited several non-Christians to serve as chaplains over the course of his career, that he would certainly accept them and that he had Muslim chaplains in the past. R. 955-56.

"OPD staff" led the Vigil and that other uniformed police "interrogated" witnesses during the event. App. Br. at 10 (alleging "an employee who was not in uniform" [i.e. Edwards] was on stage during the Vigil). *See also id*. at 6, 50 (alleging uniformed and maybe even plain clothed officers "interrogated witnesses").

The conduct of all relevant parties and inconsistent statements as to each made by Plaintiffs-Appellees is addressed below.

a. Private citizens and volunteer chaplains

Private citizens planned and led the Vigil. R. 455-64 (affidavits of three individuals – all corroborating this fact). Plaintiffs-Appellees fail to acknowledge that the volunteer chaplains are – first and foremost – private citizens and faith leaders in the City of Ocala. R. 462-63. They serve as chaplains on a volunteer basis. *Id*. Thus, unlike legislative, military chaplains and the like, they receive no salary; they hold other full-time jobs or professions, and do not serve as employees for any government entity. *Id.* There are no taxpayer dollars utilized to compensate them for any time spent serving as chaplains. *Id.* And as already stated, Plaintiffs-Appellees cannot feign confusion regarding the difference between chaplains and OPD police and staff. They fully understood these differences. Br. at 38.

Likewise, the undisputed testimony in this case is that Captain Edwards attended the Vigil *in his capacity as a private citizen*, wearing plain clothes rather

than his uniform. R. at 466.[10] He did not attend as an "employee" for the OPD.[11] No OPD "employee" in plain clothes was on stage. Plaintiffs-Appellees also exaggerate Edwards's involvement leading up to the Vigil. It is untrue that Captain Edwards "elicited Chaplain Quintana to help him coordinate speakers" for the event. The various pages of evidence cited fail to support any involvement by Captain Edwards in this respect. *See* App. Br. 6-7.

In sum, there was no "police-led worship activity." No "employees" led the Vigil.[12]

b. Chief Graham

As the City outlines in its opening brief, from the time the Vigil was announced to the community to the conclusion of the event, Chief Graham's communications

[10] Plaintiffs-Appellees also cite to a prepared statement Edwards sent to himself – purportedly comments he considered presenting at the Vigil – that mentioned his profession as a police officer, as well as a father and active member and deacon his church. Once again, this evidence does not support any suggestion that Edwards attended as a police officer. Further, no evidence was presented that Edwards actually gave the prepared statement at the Vigil, much less spoke at the Vigil.

[11] Unfortunately, Appellees' mischaracterizations of the facts involving Captain Edwards do not end there. Appellees also assert that Captain Edwards "email[ed]" OPD staff" to thank them for putting together the Vigil. App. Br. at 11. The evidence cited, however, shows that Edwards emailed Narvella Haynes (private citizen) and Quintana (community pastor and OPD volunteer chaplain) and thanked them and all who "helped and allowed the Prayer Vigil to take place." *Id*. (citing Dkt. 54-32).

[12] There is little evidence regarding the actual content of the speech by leaders at the Vigil other than prayers. Notably, Plaintiffs-Appellees rely primarily upon photographs to support their assertion of what was said at the Vigil. App. Br. at 10 (citing to a host of photographs and R. 1981).

with the public and his conduct consistently communicated that the Vigil was not a City or OPD event, but, instead, a community-led event. It is also undisputed, and Plaintiffs-Appellees have admitted, that it was standard for the OPD to invite citizens to attend public events and rallies in Ocala that were, in some way, associated with the interest of law enforcement. Br. at 38. In regards to the Vigil, on several occasions, Chief Graham made clear that he was not leading the event or speaking at the event and that he would not and could not cancel the event. R. 1485-87. Further, when asked by a citizen who the speakers would be and/or whether different faiths would be represented, he directed the citizen to those organizing the event. Br. 38. While Plaintiffs-Appellees point to communications Chief Graham received regarding the date and time of the Vigil, these communications were not unusual because Chief Graham made sure the OPD remained apprised of all gatherings taking place and regularly provided a police presence at each gathering, irrespective of the content and purpose.[13] *Id*. Notably, while Chief Graham was kept in the loop on the details regarding the Vigil, he did not weigh in regarding the details, except as it related to the date of the event.[14]

[13] Accordingly, Plaintiff-Appellees claim of improper use of taxpayer funding for a police presence at the Vigil does not serve as support for an Establishment Clause violation.

[14] Once again, Plaintiffs-Appellants are less than forthcoming about the evidence they cite and rely upon. *See* App. B. at 7 (citing R.1451 insinuating Edwards emailed Graham, when Edwards actually emailed Chaplain Quintana, Narvella Haynes and Graham; and Graham never responded).

Plaintiffs-Appellees' attempts to discredit the late Chief Graham (who is no longer alive to defend himself) – while not relevant and have no bearing on this case – cannot go unaddressed where, as here, they are fully aware that the accusations they launch against him were found to be without sufficient evidence.[15] It should be further noted that the lower court's perceived inconsistency in Graham's testimony and his affidavit regarding chaplain duties was mistaken. App. Br. at 5 (citing R. 1974). There is no inconsistency. Chief Graham clearly testified that an OPD chaplain's duties would include "*participation* in a prayer vigil," but not proselytizing to the public. *Id*. at R. 1973-74 (emphasis added). The portion from Chief Graham's affidavit cited by the lower court does not contradict this testimony. In his affidavit, Chief Graham once again affirms that proselytizing is not part of a chaplain's official department function and clarifies that "lead[ing" – *as opposed to participating in* – a religious event would also fall outside departmental function. *Id.*

[15] For the first time on appeal, counsel for Plaintiffs-Appellees repeat allegations lodged against Chief Graham years ago in an attempt to tarnish his reputation. *See* App. Br. at 55 n. 11 (citing a case filed against Graham and dismissed on almost all grounds at the motion to dismiss stage). Because the case was dismissed Chief Graham had no opportunity to respond to the allegations. Further, an independent investigation found the claims made against him lacking of sufficient evidence. He was recommended for full reinstatement and the decision was affirmed unanimously by the City Council. Richard Whitley, *Ocala Police Chief's Investigation Recommends Full Reinstatement*, WUFT News (January 13, 2017), available at https://www.wuft.org/news/2017/01/13/ocala-police-chiefs-investigation-recommends-full-reinstatement/.

The lower court did not point to any other instance in which it perceived Chief's Graham testimony to be inconsistent. *Id*.

c. Mayor Guinn

The evidence presented demonstrates that Mayor Guinn supported the idea of the Vigil and attended the event. Mayor Guinn also testified without dispute that he had no involvement in or knowledge of plans or details of the event and did not believe it to be an OPD event. Br. at 9-10. Nothing in the record, however, supports Plaintiffs-Appellees' claim that the Mayor encouraged "the 'Christian community' to oppose atheists who oppose the prayer vigil." App. Br. 10 (citing Dkt. 54-11 at 100). Nowhere in the email cited by Plaintiffs-Appellees does Mayor Guinn encourage people to oppose the atheists. In response to a private citizen's request that the City not cave to the threat of a lawsuit, Mayor Guinn stated he agreed with the citizens' urging to fight the lawsuit and assured her he would not cave. *Id*.

Establishment Clause precedent is clear that the Constitution cannot be interpreted to purge all religious reference from the public square. *Am. Legion*, 139 S. Ct. at 2080-81; *Lynch v. Donnelly*, 465 U.S 668, 676, 677, 686, 693 (1984) (citing examples); *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989) (citing examples).

CONCLUSION

This Court should vacate the judgement below and remand with instructions to dismiss the case for lack of jurisdiction. Alternatively, if the Court finds that Plaintiffs-Appellees have adequately established standing, the decision of the district court should be reversed and the case remanded for entry of summary judgment in favor of Appellants.

November 5, 2021

Respectfully Submitted,

/s/ Abigail Southerland
Abigail Southerland
AMERICAN CENTER FOR LAW
& JUSTICE
[redacted]

Jay Alan Sekulow
Jordan A. Sekulow
Christina A. Stierhoff
AMERICAN CENTER FOR LAW
& JUSTICE
[redacted]

Francis Manion
AMERICAN CENTER FOR LAW
& JUSTICE
[redacted]

Counsel for Defendants/Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 32(g) because it contains 5,421 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

/s/ Abigail Southerland
Abigail Southerland
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Counsel for Defendants/Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on November 5, 2021, using CM/ECF, which then served such filing upon the following registered counsel of record for Plaintiffs-Appellees:

Heather Morcroft, Esq.
[redacted]

Monica L. Miller
[redacted]

s/ Abigail A Southerland
Abigail Southerland*
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Counsel for Defendants/Appellants