

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

LANCE HUNT, IRIS FONTANA,)
AND ELISE BOYER,)
)
Plaintiffs,)
)
vs.)
)
KENAI PENINSULA BOROUGH,)
)
Defendant.)
_____)

Case No. 3AN-16-10652 CI

DECISION AND ORDER

I. INTRODUCTION

This is a case of first impression in the State of Alaska. The question before the court is whether Kenai Peninsula Borough’s (“KPB”) invocation policy violates the Establishment Clause of the Alaska Constitution. KPB has opened its meetings with invocations for decades. In 2016, KPB adopted Resolution 2016-056 (“Resolution”), which limited the selection of invocation speakers to either leaders of religious associations that meet certain requirements or chaplains serving organizations in the Borough. Plaintiffs, Lance Hunt, Iris Fontana, and Elise Boyer, contend that the Resolution adopted in 2016 prohibits them from delivering the invocation, excludes disfavored religious views, and violates the Establishment Clause, Free Speech Clause, and Equal Protection Clause of the

Alaska Constitution. KPB asserts that government speech in the form of legislative prayer is subject only to the proscriptions of the establishment clause, and because the Resolution is in line with the prayer practice engaged in by the drafters of the Alaska Constitution, it does not violate the establishment clause.

KPB filed a motion for partial summary judgment regarding plaintiffs' free speech, free association, and equal protection claims. Plaintiffs responded by opposing and filing their own motion for summary judgment on all claims, including the establishment clause claim. KPB replied regarding its initial motion and opposed plaintiffs' motion, and filed its own cross-motion for partial summary judgment on the establishment clause claim. Thus, before the court are two full cross-motions for summary judgment on all claims.

The parties agree that the material facts are undisputed but disagree on how the law applies to those facts. The court heard oral argument on the pending motions on April 11, 2018. It must be concluded, consistent with the United States Supreme Court's guidance in *Marsh* and *Greece*, that the Resolution constitutes an impermissible establishment of religion in violation of Alaska's Establishment Clause. Because the establishment clause claim is dispositive of this issue, the court does not reach a decision on the free speech, free association, or equal protection claims. The court grants plaintiffs' motion for summary judgment and denies both of KPB's motions for partial summary judgment.

II. FACTS

The facts relevant to this decision are fairly straightforward. On January 6, 1981, the KPB Assembly adopted an invocation policy in which the Assembly President designated someone to offer a brief invocation at the start of each meeting. Since 1999, the selection process consisted of the Assembly President designating a local pastor within the Borough to solicit and create a list of volunteers from local clergy who were willing to deliver the invocations at Assembly meetings. This practice continued from 1999 to 2016. In 2016, the KPB Assembly addressed controversial ordinances that drew larger crowds to the Assembly meetings. At that time, the Assembly began to hear some vocal complaints about its invocation practice. To address those complaints, the Assembly President modified the procedure for selecting invocation givers to a first come, first served practice so that the opportunity to give an invocation was open to a broader scope of people. This first come, first served practice resulted in two controversial invocations being given, one ending with the phrase “Hail Satan.” Following the two controversial invocations, the Assembly heard more vocal complaints. As a result, the Assembly adopted the invocation policy at issue today.

KPB Resolution 2016-056 was adopted in October 2016. The Resolution provides “a formal, written policy to clarify [the Assembly’s] invocation

practices.”¹ The Resolution amends Section IX of the Kenai Peninsula Borough Manual to provide the first written policy regarding opening invocations. The Assembly Manual now details the invocation speaker selection process and provides that:

The invocation shall be voluntarily delivered by an appointed representative from the Associations List developed as described below. To ensure that such person (the “invocation speaker”) is selected from among a wide pool of representatives the invocation speaker shall be selected according to the following procedure:

The Clerk shall post a notice on the borough internet home page that all religious associations with an established presence in the Kenai Peninsula Borough that regularly meet for the primary purpose of sharing a religious perspective, or chaplains who may serve one of [sic] more of the fire departments, law enforcement agencies, hospitals, or other similar organizations in the borough, are eligible to provide invocations to the assembly, and that the authorized leader of any such association or chaplain can submit a written request to provide an invocation to the borough clerk. An additional printed notice containing this information shall be made available to the public during assembly meetings and at the clerk’s office.²

The Resolution expressly states that no person in attendance at the meeting shall be required to participate in the invocation, and the Assembly will not take note of a person’s attention or inattention during the invocation.

¹ Kenai Peninsula Borough Resolution 2016-056.

² Kenai Peninsula Borough Assembly Manual at 14.

After the adoption of the Resolution, plaintiffs Hunt, Fontana, and Boyer each submitted a written request to provide an invocation to the borough clerk. All three plaintiffs are residents of the borough, but are not members of qualifying religious associations³ or serve as borough chaplains. The borough denied each of the plaintiffs' requests to give the invocation, based on their failure to meet the criteria of the Resolution.⁴

In response to KPB's denial of their requests, plaintiffs filed suit against KPB. Plaintiffs allege that the invocation selection policy implemented through the Resolution violates the prohibition against the establishment of religion, denies them of their freedom of speech and freedom of association, and denies them of

³ The court uses the term qualifying religious associations to reference those associations meeting the requirements outlined in the Resolution. According to the Resolution, qualifying religious associations are associations that have an established presence in the Kenai Peninsula Borough, regularly meet for the primary purpose of sharing a religious perspective, and qualify for I.R.C. §501(c)(3) tax-exempt status.

⁴ Lance Hunt is an atheist. His request was denied because he does not belong to a qualifying religious association. Iris Fontana is a member of The Satanic Temple. Her request was denied because she does not belong to a qualifying religious association. While The Satanic Temple is an association, it is not a qualifying religious association because it does not meet regularly in the Borough and has not sought tax-exempt status, because it believes that no church should be tax exempt. Elise Boyer is Jewish. Her request was denied because she does not belong to a qualifying religious association. Due to the diffuse population of the borough it is not possible for her to affiliate with a qualifying religious association.

their entitlement to equal rights, opportunities, and protection.⁵ KPB filed a motion for partial summary judgment on three of the four claims asserted by plaintiffs. Plaintiffs replied by filing their own motion for summary judgment on all four claims. And KPB countered by filing a motion for partial summary judgment on the fourth claim.

III. SUMMARY JUDGMENT STANDARD

Under Civil Rule 56, a court may grant summary judgment if there is no genuine issue of fact and a party is entitled to judgment as a matter of law.⁶ In reviewing a summary judgment motion, the court draws all reasonable inferences in favor of the non-moving party.⁷ The party seeking summary judgment “has the initial burden of showing by admissible evidence that there is an absence of genuine factual dispute and that it is entitled to judgment as a matter of law.”⁸ The parties in this case agree that the material facts are not in dispute and the case should be resolved on summary judgment; they just disagree over the outcome.

⁵ Amended Complaint.

⁶ Alaska Civil Rule 56.

⁷ *Moore v. Allstate Ins. Co.*, 995 P.2d 231, 233 (Alaska 2000).

⁸ *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

IV. DISCUSSION

The Alaska Supreme Court has not yet had the opportunity to address the issue of legislative prayer. However, the United States Supreme Court has addressed legislative prayer, and the constitutionality of legislative prayer, on multiple occasions. While the Court has not addressed the specific issue of invocation speaker selection, this court is guided by those existing decisions and the decisions of various other courts in framing the analysis and disposing of this issue under the establishment clause.

A. Establishment Clause Claim.

Plaintiffs' fourth claim for relief, but the only claim addressed by this court, falls under the Alaska Constitution's Establishment Clause. Article I Section 4 of the Alaska Constitution provides that "[n]o law shall be made respecting an establishment of religion." The establishment clause does not only prohibit the establishment of a state religion, it prohibits laws that act as a step towards the establishment of a state religion. The United States Supreme Court has identified three main evils the clause was intended to protect against: "sponsorship, financial support, and active involvement of the sovereign in religious activity."⁹ Due to the opaque language of the establishment clause, and the lack of caselaw

⁹ *Lemon v. Kurtzman*, 403 US 602, 612 (1971) (quoting *Walz v. Tax Commission*, 397 US 664, 668 (1970)).

interpreting it, this court's analysis is confined to the narrow issue before it: Whether the specific requirements set forth in the Resolution constitute an impermissible establishment of religion.

1. Establishment Clause and Legislative Prayer.

a. Alaska's Establishment Clause.

Although the Alaska Supreme Court has not addressed the constitutionality of legislative prayer under Alaska's Establishment Clause, it has discussed how the establishment clause should be interpreted. In *Bonjour v. Bonjour*,¹⁰ the Court discussed Alaska's Establishment Clause by referencing the Establishment Clause of the United States Constitution. The court explained that, "[a]lthough we have construed certain provisions of the Alaska Constitution to provide greater protection for individual rights than is afforded by the United States Constitution, we need not construe Alaska's religion clauses more broadly than their federal counterparts in this case."¹¹ The Court made clear that the two establishment clauses are to be interpreted and applied consistently.

Bonjour was decided in 1979, before the United States Supreme Court issued either of its legislative prayer decisions. At that time, establishment clause

¹⁰ 592 P.2d 1233 (Alaska 1979).

¹¹ *Bonjour v. Bonjour*, 592 P.2d 1233, 1236 n.3 (Alaska 1979).

challenges were decided under the *Lemon*¹² test. In 1983, the United States Supreme Court rejected applying the *Lemon* test in cases involving legislative prayer practices.¹³ And in 2014, the Court affirmed its rejection of the *Lemon* test to analyze legislative prayer.¹⁴ Although the Alaska Supreme Court has not ruled on the establishment clause since *Bonjour*, this court finds no reason to apply the *Lemon* test so as to “construe Alaska’s religion clauses more broadly than their federal counterparts.”¹⁵ Therefore, this court is guided by the establishment clause analysis set forth in *Marsh*¹⁶ and *Greece*.¹⁷

b. United States Supreme Court’s Interpretation of the Establishment Clause as it Pertains to Legislative Prayer.

The United States Supreme Court has addressed legislative prayer under the Establishment Clause on two occasions: *Marsh v. Chambers* and *Town of Greece, New York v. Galloway*. In *Marsh*, the Court was tasked with deciding whether the

¹² 403 US 602 (1971).

¹³ *Marsh v. Chambers*, 463 US 783, 790 (1983).

¹⁴ *Town of Greece, New York v. Galloway*, 164 S.Ct 1811, 1819 (2014).

¹⁵ *Bonjour*, 592 P.2d at 1236 n.3.

¹⁶ 463 US 783 (1983).

¹⁷ 164 S.Ct 1811 (2014).

Nebraska Legislature’s practice of opening each legislative day with a prayer given by a chaplain paid by the State violated the Establishment Clause of the First Amendment.¹⁸ The Nebraska Legislature had employed the same Presbyterian minister to serve as chaplain for 16 years, providing prayers in the Judeo-Christian belief.¹⁹ The Court framed the issue as one of tradition by detailing the history of legislative prayer opening sessions of legislative and other deliberative public bodies from colonial times through the founding of the Republic and to present day. The Court explained that “[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns.”²⁰ The Court concluded that “legislative prayer presents no more potential for establishment than the provisions of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations.”²¹ The Court held that legislative prayer has become part of the fabric of our society and is not an establishment of religion or a step toward establishment but rather is simply a tolerable acknowledgment of beliefs widely

¹⁸ *Marsh*, 463 US at 784.

¹⁹ *Marsh* at 793.

²⁰ *Id.* at 790.

²¹ *Id.* at 791.

held.²² The Court went on to find that no feature of the Nebraska practice violated the establishment clause.²³

In a dissenting opinion, Justice Brennan described the decision in *Marsh* as “carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.”²⁴ In *Greece*, this exception to the establishment clause was affirmed.²⁵ In *Greece*, the court was again faced with the question of whether a town opening its monthly board meetings with prayer constituted an impermissible establishment of religion; and specifically, whether that prayer must be nonsectarian.²⁶ The town in that case followed an informal method of selecting prayer givers. A town employee would call local congregations to invite their participation in the monthly invocation.

²² *Id.* at 792.

²³ The Nebraska practice was challenged on three points: the clergyman of only one denomination had been selected for 16 years, the chaplain was paid at public expense, and the prayers were in the Judeo-Christian tradition. Weighing against the historical background the Court found that none of these factors served to invalidate Nebraska’s practice.

²⁴ *Marsh v. Chambers*, 463 US 783, 796 (1983) (Brennan, J., dissenting).

²⁵ *Town of Greece, New York v. Galloway*, 134 S.Ct. 1811, 1818 (2014) (explaining that *Marsh* carved out an exception to the Court’s establishment clause jurisprudence by sustaining legislative prayer without subjecting the practice to the formal analysis traditionally applied to establishment clause challenges).

²⁶ *Greece*, 134 S.Ct. at 1815.

The town also accepted volunteers, whether minister or layperson, who wished to participate in the monthly invocation.²⁷ Due to the religious composition of the town, overwhelmingly Christian, all of the invocations given from 1999 to 2007 were by Christian ministers.²⁸ After two residents voiced concern that Christian themes pervaded the prayers and excluded citizens of other beliefs, the town invited a Jewish layman, chairman of the local Baha'i temple, and a Wiccan priestess to give the invocation.²⁹ In reviewing the invocation practice of the town and the sectarian language of the prayers, the Court again detailed the historical practices and understandings that make legislative prayer compatible with the establishment clause. The Court determined that allowing invocation speakers to express themselves in a religious idiom "acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds."³⁰ The Court found that the religious diversity of the town was reflected in the diversity of invocation speakers. The fact that nearly all of the speakers were Christian did not reflect an aversion or bias on the part of the town leaders against

²⁷ *Greece* at 1816.

²⁸ *Id.*

²⁹ *Id.* at 1817.

³⁰ *Id.* at 1820-21.

minority faiths; it simply reflected the predominantly Christian population of the town.³¹ The Court held that sectarian invocations are constitutional so long as a policy of nondiscrimination is maintained.

The Court noted in both *Marsh* and *Greece* that the setting of the invocations, at town board meetings before an audience of adults not readily susceptible to religious indoctrination, was important.³² “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.”³³ The Court did not describe any qualification that may be put on invocation speakers, because neither of the invocation policies before it obligated would-be speakers to meet any set criteria.

The Court stated that “it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.”³⁴ Nonetheless, the Court’s decisions provide guidance as to where the boundary lies. A single clergyman may give every invocation for a public body so

³¹ *Id.* at 1824.

³² *Marsh* at 792.

³³ *Greece* at 1823.

³⁴ *Id.* at 1819.

long as the selection and reappointment of that clergyman does not stem from impermissible motive and no preference is shown toward a particular religion.³⁵ The invocation opportunity may not be exploited to proselytize or advance any one, or to disparage any other, faith or belief.³⁶ A town is not required to search beyond its borders for non-Christian prayer givers to achieve religious balancing.³⁷ And the public may not be directed to participate in the invocation.³⁸ This court's inquiry must be aimed at determining whether the Resolution implemented by KPB fits within these boundaries.

2. The Resolution Violates Alaska's Establishment Clause.

The Resolution was adopted in October 2016, and provides the written policy on opening invocations. The Resolution details the invocation speaker selection process and provides requirements that would-be invocation speakers must meet before they may request to give an invocation. The Resolution provides that:

The invocation shall be voluntarily delivered by an appointed representative from the Associations List developed as described below. To ensure that such person (the "invocation speaker") is

³⁵ *Marsh* at 793-94.

³⁶ *Marsh* at 795-96; *Greece* at 1817.

³⁷ *Greece* at 1824.

³⁸ *Id.* at 1825.

selected from among a wide pool of representatives the invocation speaker shall be selected according to the following procedure:

The Clerk shall post a notice on the borough internet home page that all religious associations with an established presence in the Kenai Peninsula Borough that regularly meet for the primary purpose of sharing a religious perspective, or chaplains who may serve one of [sic] more of the fire departments, law enforcement agencies, hospitals, or other similar organizations in the borough, are eligible to provide invocations to the assembly, and that the authorized leader of any such association or chaplain can submit a written request to provide an invocation to the borough clerk. An additional printed notice containing this information shall be made available to the public during assembly meetings and at the clerk's office.³⁹

The Resolution also provides that no person in attendance at the meeting shall be required to participate in the invocation, and the Assembly will not take note of a person's attention or inattention during the invocation.

The invocation policy set forth in the Resolution states that two groups are eligible to request to provide an invocation at KPB Assembly meetings. The first group is any chaplain who serves a fire department, law enforcement agency, hospital, or similar organization in the borough. And the second group is any association that has an established presence in the borough, that regularly meets for the purpose of sharing a religious perspective, and that qualifies for I.R.C.

³⁹ Kenai Peninsula Borough Assembly Manual at 14.

§501(c)(3) tax-exempt status.⁴⁰ The Resolution is meant to provide an invocation policy that is “all-inclusive of every diverse religious association serving the residents of the Kenai Peninsula Borough.”⁴¹ Individuals that do not fall into either eligible category are denied the opportunity to give the opening invocation.

The Resolution is inclusive of tax-exempt religious association serving residents of the borough. It is not inclusive of every religious view or belief practiced by the residents of the Kenai Peninsula Borough. Plaintiffs Hunt, Fontana, and Boyer are all examples of borough residents whose religious views are excluded and disfavored by the Resolution.

As part of its analysis, this court must be mindful of the history and tradition of legislative prayer in this country. The United States Supreme Court has noted that “in the 1850’s, the judiciary committees in both the House and Senate reevaluated the practice of official chaplaincies . . . [and] concluded that the office posed no threat of an establishment” because “*no faith was excluded by law, nor any favored.*”⁴² History and tradition support an inclusive invocation policy. Not one that is inclusive of “diverse religious association,” but rather one

⁴⁰ KPB Resolution 2016-056 at 3-4.

⁴¹ KPB Resolution 2016-056 at 3.

⁴² *Greece* at 1819 (emphasis added).

that is inclusive of every faith. The Resolution at issue here excludes minority faiths from participating in the invocation practice.

In its motions for summary judgment, KPB explains that the Resolution came about in response to a controversial invocation given by a member of a disfavored religion.⁴³ The purpose of the Resolution was to exclude or prevent similar invocations from being given. KPB has not alleged or indicated that either of the controversial invocations exploited the opportunity “to proselytize or advance any one, or to disparage any other, faith or belief,” as prohibited by the United States Supreme Court. Rather, KPB alleges that the invocations were controversial and the views they represented were disfavored. The reaction of KPB, passing the Resolution that excludes minority faiths, violates Alaska’s Establishment Clause.

The goal behind legislative invocations and other ceremonial prayers is the idea that people of many faiths may be united in a community of tolerance and devotion.⁴⁴ “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

⁴³ Mot. For Partial Summ. J. at 4 (“Following two controversial invocations, one reciting a prayer to Satan and ending with the phrase “Hail Satan!”, the Assembly adopted Resolution 2016-56”).

⁴⁴ *Greece* at 1823.

being.”⁴⁵ KPBB has made clear that the Resolution stemmed from intolerance for the controversial views expressed during two particular invocations. But our country’s “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.”⁴⁶ If KPBB is opening the invocation opportunity to all borough residents, they cannot then put in place requirements that in effect exclude minority faiths or beliefs. Consistent with the establishment clause, an individual may only be prevented from giving an invocation where they have exploited the invocation opportunity to proselytize, advance, or disparage any faith or belief.

B. Claims for Equal Protection, Free Speech, and Free Association.

Plaintiffs are requesting for this court to find that the Resolution violates the Alaska Constitution’s Equal Protection Clause, Free Speech Clause, and right to associate. In support of their freedom of speech claim, plaintiffs argue that the Resolution creates a limited public forum that the government may not unreasonably restrict access to.⁴⁷ In support of their freedom of association claim, plaintiffs argue that the Resolution impermissibly forces individuals to associate

⁴⁵ *Id.*

⁴⁶ *Id.*, see also *Marsh* at 792.

⁴⁷ Amended Complaint at 9.

with groups or other individuals in order to be eligible to give an invocation.⁴⁸ And in support of their equal protection claim, plaintiffs argue that the Resolution denies equal rights, opportunities, and protections to similarly situated people in the Kenai Peninsula Borough.⁴⁹ KPB contends that each of these three claims is deficient as a matter of law.⁵⁰ Because this court finds that the Resolution violates Alaska's Establishment Clause, it does not reach the equal protection, free speech, or free association claims.

V. CONCLUSION

For the reasons set forth above, the court grants plaintiffs' motion for summary judgment. The court denies KPB's motion for partial summary judgment and cross-motion for partial summary judgment.

⁴⁸ Amended Complaint at 10.

⁴⁹ Amended Complaint at 10.

⁵⁰ See Mot. for Partial Summ. J. at 2-3.

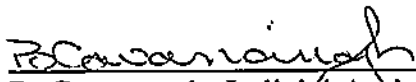
Dated this 9th day of October, 2018, at Anchorage, Alaska.



ANDREW PETERSON
Superior Court Judge

I certify that on 10-9-18 a copy
of the above was delivered to:

S. Orlansky
J. Decker
K. Clarkson
M. Clarkson
B. Harvey



B. Cavanaugh, Judicial Assistant