

Eric Glatt, No. 1511098
Tara A. Rich*
Joshua A. Decker, No. 1201001
ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Lane, Ste. 207
Anchorage, AK 99503
(907) 258-0044
eglatt@acluak.org

Susan Orlansky, No. 8106042
SENIOR COUNSEL, ACLU OF ALASKA
FOUNDATION
c/o REEVES AMODIO LLC
500 L Street, Suite 300
Anchorage, AK 99501
(907) 222-7100
susano@reevesamodio.com

* Motion to admit *pro hac vice* forthcoming.

**Superior Court for the State of Alaska
Third Judicial District at Anchorage**

COPY
Original Received
DEC 14 2016
Clerk of the Trial Courts

Lance Hunt and Iris Fontana,

Plaintiffs,

v.

Kenai Peninsula Borough,

Defendant.

No. 3AN-16-_____CI

**Complaint for
Declaratory and Injunctive Relief**

INTRODUCTION

1. The separation of church and state is a core principle of Alaskan and American democracy, as are free speech and equal protection under the law. These principles are plainly and broadly expressed in both the Alaska Constitution and the United States

ACLU OF ALASKA
FOUNDATION
1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

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Complaint

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Constitution. They are among the cornerstones of our form of self-government.

2. The Kenai Peninsula Borough Assembly recently enacted Resolution 2016-056, which violates these core principles. A copy is attached as Exhibit A. The Resolution unconstitutionally prohibits some members of the public from giving invocations before Borough Assembly meetings.

3. Ever since the First Continental Congress convened in September 1774, “one of [the] purposes, and presumably one of [the] effects,” of legislative invocations, “was not to divide, but to unite.” *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1833 (2014) (Alito, J., concurring).

4. In contrast, the Assembly has unambiguously—and unconstitutionally—decreed who may and may not offer invocations before its meetings. The Resolution divides, rather than unites, the residents of the Kenai Peninsula Borough.

5. The Plaintiffs in this case, Lance Hunt and Iris Fontana, are victims of this divisive policy; the Resolution’s restrictions prohibited each from giving a public invocation. These restrictions impair the constitutional rights of Borough residents like Mr. Hunt and Ms. Fontana by controlling how residents may avail themselves of an

honored opportunity to speak in public and by denying some residents the ability to share equally in the civic life of the Borough.

6. The court should declare the Assembly's Resolution unconstitutional and enjoin the Assembly from following it.

JURISDICTION AND VENUE

7. This is a complaint for declaratory and injunctive relief brought pursuant to AS 22.10.020 and Alaska Civil Procedure Rule 57.

8. This court has jurisdiction over the parties and over the subject matter of this dispute pursuant to AS 09.05.015 and AS 22.10.020.

9. Venue in this court is proper because the acts complained of occurred within the Third Judicial District pursuant to Alaska Rule of Civil Procedure 3(c).

PARTIES

10. Plaintiff Lance Hunt is a resident of the Kenai Peninsula Borough.

11. Mr. Hunt does not identify as a religious adherent, but identifies as an atheist.

12. Before the Assembly adopted the Resolution, Mr. Hunt requested to deliver an invocation, was approved, and did so. After the

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99503
TEL: 907.258.0044
FAX: 907.258.0288

Assembly adopted the Resolution, he applied to deliver an invocation and the Assembly President denied his application on the ground that he did not satisfy the requirements of the Resolution.

13. Plaintiff Iris Fontana is a resident the Kenai Peninsula Borough.

14. Before the Assembly adopted the Resolution, Ms. Fontana requested to deliver an invocation, was approved, and did so. After the Assembly adopted the Resolution, she applied to deliver an invocation and the Assembly President denied her application on the ground that she did not satisfy the requirements of the Resolution.

15. Defendant Kenai Peninsula Borough is a second class borough under AS 29.35.210.

FACTS

16. Before the Assembly adopted the Resolution, the Kenai Peninsula Borough Clerk processed requests from members of the public to deliver invocations.

17. Before the Assembly adopted the Resolution, the Clerk accepted requests on a first-come, first-served basis. No requests are known to have been denied on any ground under this practice.

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99503
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18. Mr. Hunt delivered an invocation on July 26, 2016. His invocation solemnized the meeting and encouraged the Assembly members to overlook differences and to employ empathy for one's neighbors. His invocation reminded the Assembly that all Kenai residents strive for love, security, and happiness.

19. Ms. Fontana delivered an invocation on August 9. Ms. Fontana read an invocation prepared by an organization called The Satanic Temple. Her invocation solemnized the meeting and encouraged the Assembly members to apply reason to their deliberations and to protect personal sovereignty.

20. On October 11, the Assembly adopted the Resolution, which became immediately effective. The Resolution amended the Kenai Peninsula Borough Assembly Manual.

21. The stated intent of the Resolution is to "allow a private citizen to solemnize the proceeding of the Kenai Peninsula Borough Assembly."

22. The Resolution provides, in relevant part, that an "appointed representative" of an approved organization may deliver an invocation at the start of each Assembly meeting. The Resolution provides that a list of approved organizations will be maintained on an "Associations List" developed by the Clerk. To develop the Associations List, the

Resolution directs the Clerk to post a notice on the Borough's website stating the eligibility requirements for delivering an invocation.

23. The Associations List is open to applications from the public, provided the application is submitted by:

- (1) an authorized leader
- (2) of an association
- (3) that is religious,
- (4) that has an established presence in the Borough,
- (5) and that regularly meets
- (6) for the primary purpose of sharing a religious perspective.

24. Under the Resolution, questions about the "authenticity" of a religious association are to be resolved by considering the criteria used by the Internal Revenue Service to determine whether such an organization would "legitimately" qualify for IRS tax-exempt status.

25. The Resolution also provides that qualified chaplains who serve in the Borough are eligible to deliver invocations.

26. On October 21, Plaintiff Lance Hunt sent an email to the Clerk, requesting to be added to the list to deliver an invocation. The Clerk responded that the Borough would consider Mr. Hunt's application only if he filled out the application form available on the Borough's website.

27. Mr. Hunt completed the form as best he could. On November 13, he submitted the completed form with a cover email explaining why the Borough should allow him to deliver an invocation even though he does not belong to a religious organization, as required by the Resolution.

28. On November 15, Assembly President Cooper spoke with Mr. Hunt and informed him that the Resolution required her to deny his request.

29. On November 5, Iris Fontana completed the invocation request form on the Assembly's website. She listed the association to which she belongs as "The Satanic Temple" and indicated that the association has no established presence in the Borough. She answered that the association does not meet regularly in the Borough for the primary purpose of sharing a religious perspective. She noted that the association is not approved by the IRS as an I.R.C. § 501(c)(3) tax-exempt organization, but meets all of the criteria; she explained, "TST has not sought tax-exempt status, because we believe that no church should be tax exempt."

30. On November 7, the Clerk sent Ms. Fontana an email explaining, "Based on the current policy President Cooper has denied your request."

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31. The Resolution remains in effect and continues to control which private citizens may deliver invocations before Assembly meetings.

CLAIMS

Count I: Establishment Clause

32. Article I § 4 of the Alaska Constitution provides that “No law shall be made respecting an establishment of religion.”

33. Similarly, the First Amendment to the United States Constitution provides, “Congress shall make no law respecting an establishment of religion.”

34. The Establishment Clause in each Constitution obliges the government to remain neutral in the face of religious differences. The Establishment Clause prohibits the government from favoring some religions over other religions, from favoring some religious practices over other religious practices, and from favoring religion over non-religion.

35. The Resolution violates the Establishment Clause of both the Alaska and United States Constitutions by running afoul of the governmental obligation of neutrality and deeming only some religious associations to be worthy of providing invocations.

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Count II: Freedom of Speech

36. Article I § 5 of the Alaska Constitution provides, “Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.”

37. Similarly, the First Amendment of the United States Constitution provides, “Congress shall make no law . . . abridging the freedom of speech.”

38. The Resolution creates a limited public forum within which private citizens may speak. The government may not unreasonably restrict some people’s access to a limited public forum.

39. The Resolution violates the Free Speech Clause in Article I § 5 of the Alaska Constitution and the First Amendment of the United States Constitution by unreasonably restricting access to the limited public forum that the Kenai Peninsula Borough Assembly created in allowing members of the public to give invocations.

Count III: Freedom of Association

40. Freedom of speech includes the right to associate with others in exercising this right. It also includes the right not to be coerced into associating with others in order to exercise this right.

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99503
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41. The Resolution forces individuals to associate with groups or other individuals in order to be eligible to give an invocation before the public meetings of the Kenai Peninsula Borough Assembly.

42. The Resolution violates Article I § 5 of the Alaska Constitution and the First Amendment of the United States Constitution by allowing only people who associate with others to practice their religion in approved ways to deliver an invocation.

Count IV: Equal Protection

43. Article I § 1 of the Alaska Constitution declares that “all persons are equal and entitled to equal rights, opportunities, and protection under the law.”

44. Similarly, section 1 of the Fourteenth Amendment to the United States Constitution provides, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

45. The Resolution denies equal rights, opportunities, and protections to similarly situated people in the Kenai Peninsula Borough who apply to deliver an invocation and who could deliver an invocation that solemnizes the meeting, because some of those people cannot satisfy the Resolution’s requirements.

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PRAYER FOR RELIEF


Plaintiffs Lance Hunt and Iris Fontana respectfully pray that this court:

1. Declare that Resolution 2016-056 violates the Alaska Constitution;
2. Declare that Resolution 2016-056 violates the United States Constitution;
3. Declare that Plaintiffs are the prevailing party and are constitutional public interest litigants under AS 09.60.010(c) and Alaska Civil Rule 82;
4. Award Plaintiffs their full and reasonable costs and attorneys' fees, as the law allows for public interest litigants who enforce constitutional rights;
5. Award Plaintiffs nominal damages as a result of the constitutional violations; and
6. Award Plaintiffs all other just and equitable relief to which they are entitled.

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FOUNDATION
1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

Dated: December 14, 2016

Respectfully submitted,



Eric Glatt, No. 1511098

Tara A. Rich*

Joshua A. Decker, No. 1201001

ACLU OF ALASKA FOUNDATION

1057 W. Fireweed Lane, Ste. 207

Anchorage, AK 99503

Tel: (907) 258-0044

Susan Orlansky, No. 8106042

SENIOR COUNSEL, ACLU OF ALASKA

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c/o REEVES AMODIO LLC

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Exhibit A

Kenai Peninsula Borough Resolution 2016-056

Introduced by: Gilman, Bagley
Date: 10/11/16
Action:
Vote:

**KENAI PENINSULA BOROUGH
RESOLUTION 2016-056**

**AMENDING THE ASSEMBLY MANUAL TO INCLUDE A POLICY REGARDING
INVOCATIONS BEFORE BOROUGH ASSEMBLY MEETINGS**

WHEREAS, the Kenai Peninsula Borough Assembly ("assembly") is an elected legislative and deliberative public body, serving the residents of the borough; and

WHEREAS, the borough code of ordinances provides for an invocation to be offered at the beginning of each meeting; and

WHEREAS, the assembly desires to adopt a formal, written policy to clarify its invocation practices; and

WHEREAS, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court validated the Nebraska Legislature's practice of opening each day of its sessions with a prayer by a chaplain paid with taxpayer dollars, and specifically concluded, "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."; and

WHEREAS, in *Town of Greece v. Galloway*, 134 S.Ct. 1811 (May 5, 2014), the United States Supreme Court validated opening prayers at town council meetings finding that "legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and express a common aspiration to a just and peaceful society."; and

WHEREAS, the Supreme Court clarified in *Town of Greece* that opening invocations are "meant to lend gravity to the occasion and reflect values long part of the Nation's heritage" and should not show over time "that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."; and

WHEREAS, this resolution does not establish a policy that defines the constitutional limits for permissible public invocations but instead is intended to adopt guidelines that are consistent with the guidance provided by several courts that have considered the validity of public invocations; and

WHEREAS, numerous courts have approved an invocation practice that incorporates a neutral system to invite religious leaders from the local community and/or volunteers to provide an invocation before public meetings. *Town of Greece*. See also *Simpson v. Chesterfield Cnty. Bd. Of Supervisors*, 404 F.3d 276 (4th Cir. 2005), *cert. denied*, 546 U.S. 937 (2005); *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263 (11th Cir. 2008); *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013); and

WHEREAS, the assembly intends to adopt a policy that does not proselytize or advance any particular faith, or show a purposeful preference of one religious view over another by not permitting the faith of the person offering the invocation to be considered when extending an invitation or scheduling participation;

NOW, THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

SECTION 1. That Section IX of the Kenai Peninsula Borough Assembly Manual is hereby amended by adding a new paragraph D which adopts a written policy regarding opening invocations as follows:

IX. ASSEMBLY MEETING

...

D. Invocations.

1. It is the intent of the assembly to allow a private citizen to solemnize the proceedings of the Kenai Peninsula Borough Assembly. It is the policy of the assembly to allow for an invocation, which may include a short prayer or a solemnizing message, to be offered at the beginning of its meetings for the benefit of the assembly to accommodate the spiritual needs of the public officials.
2. No member or employee of the assembly or any other person in attendance at the meeting shall be required to participate in any prayer or solemnizing message that is offered and such decision shall have no impact on the ability of the person to actively participate in the business of the assembly.

3. No member or employee of the assembly will direct the public to stand, bow, or in any way participate in the prayers, make public note of a person's presence or absence, attention or inattention during the invocation, or indicate that decisions of the assembly will in any way be influenced by a person's acquiescence in the prayer opportunity.
4. 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:
 - a. 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 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.
 - b. The borough clerk shall compile and maintain a database (the "Associations List") of the qualifying associations and chaplains who have submitted such a written request (hereinafter referred to as a "religious association").
 - c. The policy is intended to be and shall be applied in a way that is all-inclusive of every diverse religious association serving the residents of the Kenai Peninsula Borough. The Association List is compiled and used for purposes of logistics, efficiency, and equal opportunity for all of the community's religious leaders, who may themselves choose whether to respond to the assembly's invitation and participate. Should a question arise as to the authenticity of a religious association, the assembly president shall make the decision by referring to the criteria used by the Internal Revenue Service in its determination of those organizations

that would legitimately qualify for I.R.C. §501(c)(3) tax-exempt status.

- d. The respondents to the notice shall be scheduled on a first-come, first-serve basis to deliver the invocation, provided each respondent may only ask to provide one invocation at a time, with subsequent requests only made after the date of previously scheduled invocation has passed. This is intended to help ensure that a variety of eligible representatives are scheduled for the invocations.
 - e. In the event an eligible representative of a religious association serving the local community believes that the Clerk or President has not complied with the terms of this policy, the representative has the right to have the matter reviewed by the Assembly.
 - f. If no scheduled representative is in attendance at an assembly meeting the assembly President may authorize an assembly member to provide the invocation.
5. No invocation speaker shall receive compensation for his or her service.
 6. No guidelines or limitations shall be issued regarding an invocation's content, except that the Assembly shall request by the language of this policy that no invocation should proselytize or advance any faith, or disparage the religious faith or non-religious views of others.
 7. No assembly member nor employee in the clerk's office shall engage in any prior inquiry, review of, or involvement in the content of any invocation to be offered by an invocation speaker.
 8. To clarify the assembly's intentions the following disclaimer shall be included on any printed assembly meeting agenda for a meeting during which an invocation may be provided immediately below the invocation:

“Any invocation that may be offered at the beginning of the assembly meeting shall be a voluntary offering of a private person, to and for the benefit of the assembly. No member of

the community is required to attend or participate in the invocation."

9. This policy is not intended, and shall not be implemented or construed in any way, to affiliate the assembly with, nor express the assembly's preference for, any faith or religious denomination. Rather, this policy is intended to acknowledge and express the assembly's respect for the diversity of religious denominations and faiths represented and practiced among the residents of the borough.

SECTION 2. That this resolution takes effect immediately upon its enactment.

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 11TH DAY OF OCTOBER, 2016.

Blaine Gilman, Assembly President

ATTEST:

Johni Blankenship, MMC, Borough Clerk

Yes:

No:

Absent: