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November 22, 2016

By U.S. Mail & Email
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144 North Binkley
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Re: *Discriminatory prayergiver selection*

Dear members of the Borough Assembly:

We have received a complaint regarding the Kenai Peninsula Borough Assembly's recent resolution that restricts those who may offer opening prayers at Assembly meetings to "religious associations that regularly meet for the primary purpose of sharing a religious perspective, or chaplains who may serve one or more of the fire departments, law enforcement agencies, hospitals, or other similar organizations in the borough." This resolution was passed in direct response to an invocation delivered by an atheist. Since the passage of the resolution, the same individual has requested the opportunity to deliver the invocation and has been denied. Because this resolution is plainly designed to discriminate against atheists and to prevent them from delivering invocations, it violates the Establishment Clause of the First Amendment to the U.S. Constitution. Please rescind this unconstitutional resolution.

"The clearest command of the Establishment Clause" of the U.S. Constitution's First Amendment is "that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *accord McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005) ("the government may not favor one religion over another"). Nor may governmental bodies favor "religion over irreligion." *McCreary*, 545 U.S. at 875; *accord Epperson v. Arkansas*, 393 U.S. 97,

104 (1968). Accordingly, in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014), the U.S. Supreme Court held that municipalities must "maintain[ ] a policy of nondiscrimination" in deciding who may present opening invocations at governmental meetings. Municipalities must not follow policies or practices that "reflect an aversion or bias . . . against minority faiths." *Id.* at 1824. Thus, in upholding the invocation practice of the town at issue, the Court emphasized that the town's "leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation." *Id.* at 1816.

What is more, courts have expressly held that governmental bodies are prohibited from favoring theistic religious beliefs over beliefs—such as atheism and Humanism—that reject the idea of a deity. In *Torcaso v. Watkins*, 367 U.S. 488, 495 & n.11 (1961), the Supreme Court ruled that government cannot constitutionally "aid those religions based on a belief in the existence of God as against those religions founded on a different belief," adding that "Secular Humanism" is "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God." Similarly, in *Kaufman v. McCaughtry*, 419 F.3d 678, 681-84 (7th Cir. 2005), the court held that atheism is a religion for purposes of the First Amendment's religion clauses, and that a prison cannot constitutionally allow inmates to form groups to study theistic religions while prohibiting groups that study atheism. *See also Reed v. Great Lakes Cos.*, 330 F3d 931, 934 (7th Cir. 2003) ("atheism is indeed a form of religion" protected under Title VII); *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014) (because "Secular Humanism is a religion for Establishment Clause purposes," inmate had valid claim that prison's refusal to recognize Humanism as a religious preference or authorize a Humanist study group violates Establishment Clause).

Here, the Borough's resolution was passed in direct response to an atheist's delivering the invocation. The actual effect of the resolution's passage has been to prevent any other atheists from delivering the invocation. The self-serving language within the resolution that states that it is not intended to discriminate cannot shield the Assembly from the fact that its action has directly resulted in atheists who wish to be placed on the list to provide invocations being repeatedly denied, even though the atheist in question was allowed to do so under the Assembly's prior policy.

Please rescind this resolution. We would appreciate a response to this letter within thirty days that advises us how you plan to proceed. If you have any questions, you may contact Ian Smith at (202) 466-3234 or ismith@au.org.

Sincerely,

Richard B. Katskee, Legal Director
Ian Smith, Staff Attorney

Subject: FW: Public Comments on borough meeting Agenda item 2016-072 A Resolution Amending the Assembly Policy Regarding Invocations before Borough Assembly Meetings (Bagley, Cooper)

From: Andrew Haas [mailto:yatra@ak.net]
Sent: Tuesday, November 22, 2016 12:54 PM
To: Blankenship, Johni <JBlankenship@kpb.us>
Subject: Public Comments on borough meeting Agenda item 2016-072 A Resolution Amending the Assembly Policy Regarding Invocations before Borough Assembly Meetings (Bagley, Cooper)

Good afternoon, I would like to comment on an agenda item for this evening:

2016-072 A Resolution Amending the Assembly Policy Regarding Invocations before Borough Assembly Meetings (Bagley, Cooper)

I support this resolution.

I live in Homer and have been an attorney for 30 years. A long time ago I knew Susan Orlansky, the attorney with ACLU who would sue you. She is the smartest attorney that I have ever met. Additionally, to illustrate her experience, an online search indicates that she has been an appellate attorney in 195 cases. If she sues you, it will be expensive and you will lose.

Please quit wasting time and money insisting on invocations.