UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

REGINALD L. GUNDY,

Plaintiff,

v. Case No. 3:19-cv-795-BJD-MCR

CITY OF JACKSONVILLE FLORIDA, a Municipality of the State of Florida,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on the City of Jacksonville, Florida's (the "City" and/or "Defendant") Motion for Summary Judgment (Doc. 37; the "Motion") and the parties briefing related thereto (Docs. 41, 52). The Motion is fully briefed and ripe for review.

I. Findings of Fact

Many of the facts in this case are undisputed. Plaintiff is a senior pastor at Mt. Sinai Missionary Baptist Church in Jacksonville, Florida. (Doc. 38-3 at 2).[1] He was invited by Anna Brosche, a member of the City Council

[1] The depositions of Plaintiff and Aaron Bowman have been submitted in condensed form, rendering citation to specific pages problematic. (See Docs. 38-3, 38-4). When the Court cites to a page number for anything that is on the docket in this case, the Court is referring to the page numbering generated by CM/ECF that is printed as a header at the top of each document.

and mayoral candidate, to give an invocation[2] at the March 12, 2019 City Council meeting. Id. at 5. Plaintiff prepared his remarks in advance and brought notes with him on March 12, 2019. (Doc. 38-3 at 68-69). A complete transcript of Plaintiff's prayer from March 12, 2019 is included in the record. (Doc. 38-2). However, suffice it to say Plaintiff's prayer vacillated between appeals to a higher power for divine blessing[3] and open criticism of the City Council and the incumbent administration.[4]

During Plaintiff's prayer, Aaron Bowman, who was Council President at the time, interrupted Plaintiff and stated "Mr. Gundy, I'm going to ask you – I'm going to ask you to – make it a spiritual prayer. Id. at 4-5. Plaintiff continued on with his prayer for a short time before Mr. Bowman cut off

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[2] The City has a practice of opening each legislative session with an invocation or prayer. The invocation period has been governed by a memorandum prepared by John D. "Jack" Webb on July 22, 2010 (Doc. 38-4 at 150-51; the "Webb Policy"). The Webb Policy states, in pertinent part:

> The City Counsel for the consolidated City of Jacksonville has long maintained a tradition of solemnizing its proceedings by allowing for an opening invocation before each meeting, for the benefit and blessing of the Council. . . . However, legislative invocations must not be exploited to proselytize or advance any one faith or belief, or to disparage any other faith or belief, and must not create the impression that the legislative body is affiliated, or intends to affiliate, with any particular faith or belief.

Id.

[3] Plaintiff began his prayer by addressing the "Eternal God our father," (Doc. 38-2 at 3), and at various points asked for blessing for the community, the incumbent mayor, and the Council. Id. at 5.

[4] Plaintiff condemned the Council's refusal to "seek forgiveness for slavery and over 50 years of neglect since consolidation" (Doc. 38-2 at 4) and accused the incumbent mayor and his administration of intimidation, bullying, cronyism, and nepotism. Id.

Plaintiff's microphone. Id. at 6. Mr. Bowman, as Council President, had the ability to cut off access to the microphone pursuant to the body's procedural rules – specifically, the Rules of the Council of the City of Jacksonville (the "Council Rules"), which gives the Council President general authority over City Council meetings. Council Rule 1.202. Plaintiff and Ms. Brosche believed Mr. Bowman's decision to silence Plaintiff was motivated by Mr. Bowman's support of Ms. Brosche's opponent in the in-progress mayoral race: the incumbent mayor, Lenny Curry. (Doc. 16 at ¶ 38); (Doc. 41-1).

Following the City Council meeting, Mr. Bowman took two actions pertinent to Plaintiff's claims. The day after Plaintiff's invocation, Mr. Bowman posted a message on social media that was critical of the manner in which Plaintiff's invocation was conducted and expressed thinly veiled contempt for Ms. Brosche. (Doc. 38-3). He then prepared a memorandum outlining guidance for the City Council on future invocations (the "Bowman Memo"). (Doc. 38-4 at 154-56). He sought to formally adopt his guidance as City policy by proposing new legislation incorporating it. Id. at 159-61. The measure was ultimately withdrawn by Mr. Bowman and no City action was taken with respect to the invocation policy. Id. at 166.

Plaintiff filed this lawsuit on July 2, 2019, which included claims under 42 U.S.C. section 1983 (hereafter, "Section 1983") and the Florida Constitution for alleged violations of Plaintiff's free speech and free exercise

rights. (Doc. 1). The City moved to dismiss the action (Doc. 18), which was partially granted (Doc 36). The only claims which remain at issue are Plaintiff's free speech claims under Section 1983 and the Florida Constitution in Counts II and IV of the Amended Complaint, respectively. Id.

II. Legal Standard

Under the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The record to be considered on a motion for summary judgment may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). An issue is genuine when the evidence is such that a reasonable jury could return a verdict in favor of the non-movant. See Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (quoting Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 919 (11th Cir. 1993)). "[A] mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion for summary judgment." Kesinger ex rel. Estate of Kesinger v. Herrington, 381 F.3d 1243, 1247 (11th Cir. 2004) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

The party seeking summary judgment bears the initial burden of demonstrating to the Court, by reference to the record, that there are no genuine issues of material fact to be determined at trial. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). "When a moving party has discharged its burden, the non-moving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 593-94 (11th Cir. 1995) (internal citations and quotations omitted). Substantive law determines the materiality of facts, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. In determining whether summary judgment is appropriate, a court "must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995) (citing Dibrell Bros. Int'l, S.A. v. Banca Nazionale Del Lavoro, 38 F.3d 1571, 1578 (11th Cir. 1994)).

III. Discussion

The Court begins by noting that two issues preliminarily addressed in the Court's order on the City's Motion to Dismiss (Doc. 36) remain unchanged. The Court previously determined there were elements of

Plaintiff's invocation that were private speech, as opposed to government speech. Id. at 5-10. The City has maintained its position that Plaintiff's invocation was government speech and therefore not protected by the First Amendment. (Doc. 37 at 6-7). However, the only additional fact provided in support of the City's position is the Webb Policy adopted by the City in 2010 with respect to invocations. (Doc. 38-4 at 150-51). The Webb Policy, which was still in effect at the time Plaintiff gave his invocation, emphasized that the invocation is meant for the City Council's benefit and placed some restraints on the content of invocations. Id. Specifically, the Webb Policy stated invocations "must not be exploited to . . . disparage any other faith or belief ." Id. at 151. While this factor may tilt the "control" factor discussed in the Court's prior Order (Doc. 36), this fact alone is insufficient to alter the Court's prior analysis. As such, the factors set forth in Cambridge Christian School, Inc. v. Florida High School Athletic Assn., Inc., continue to support a finding that the contents of Plaintiff's prayer was his own private speech. 945 F.3d 1215, 1240 (11th Cir. 2019).

The Court also found the forum at issue in this case was a nonpublic forum. Id. at 10-12. The Court previously found that the allegations in the Amended Complaint (Doc. 16) indicated the invocation period during City Council meetings were limited to people expressly invited to speak by the City Council and reserved for a specific type of address, as outlined in the

Webb Policy. (Doc. 36 at 11-12). This type of forum is clearly distinct and set apart from a more public forum, like the public comments portion of each City Council meeting. See, e.g. Cleveland v. City of Cocoa Beach, Fla., 221 F. App'x 875, 878 (11th Cir. 2007) (noting the distinction between the government's ability to restrict speech to specific topics in a city council meeting versus the limited authority to restrict speech in public forums). The parties did not submit any evidence or argument against the Court's earlier determination and the Court finds no reason to deviate from its earlier finding now that the record is more developed.

With those determinations in mind, the Court turns to the City's first argument related to the scope of municipal liability under Section 1983. (Doc. 37 at 10). A city or municipality may be liable in a Section 1983 action "only where the municipality itself causes the constitutional violation at issue." Cook ex. rel. Estate of Tessier v. Sheriff of Monroe Cnty., 402 F.3d 1092, 1115 (11th Cir. 2005) (citations and emphasis omitted). Thus, a plaintiff must establish that an official policy or custom of the municipality was the "moving force" behind the alleged constitutional deprivation. See Monell, 436 U.S. at 693–94. Under Monell, "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." Id. at 691. To impose liability on a municipality, "a plaintiff must show: (1) that his constitutional rights

were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004) (internal citation omitted).

"A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality." Sewell v. Town of Lake Hamilton, 117 F.3d 488, 489 (11th Cir. 1997) (internal citation omitted). The policy requirement is "intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." Grech v. Clayton Cnty., 335 F.3d 1326, 1329 n.5 (11th Cir. 2003) (en banc) (emphasis and internal quotations omitted). Indeed, municipal liability attaches under Section 1983 only where "'a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers." City of Canton v. Harris, 489 U.S. 378, 389 (1989) (quoting Pembaur v. Cincinnati, 475 U.S. 469, 483-84 (1986)).

Plaintiff contends the Council President's general control over the legislative session is the violative policy or custom in this case that implicates

municipal liability.[5] (Doc. 41 at 16-17). Council Rule 1.202 is undoubtedly a "policy" for purposes of the Court's Monell analysis. The Council Rules as a whole "are adopted by ordinance . . . [and] are declared to be general and permanent ordinances of the City and they shall continue in force according to their tenor notwithstanding that they are not codified in the Ordinance Code." Jacksonville Ordinance Code § 10.101. Incorporation of the Council Rules into the Ordinance Code was the type of "deliberate choice" made by a majority of the City Council that constitutes municipal action.

While the Court notes that Council Rule 1.202 is not facially restrictive of any particular content or viewpoint, it does empower the Council President to limit speech at City Council meetings. If the Council President were to apply Council Rule 1.202 in a manner that results in an unreasonable restriction on Plaintiff's First Amendment rights, that application can be fairly construed as a policy which satisfies the requirement for municipal action under Monell. See Lozman v. City of Riviera Beach, 39 F. Supp. 3d 1392, 1407 (S.D. Fla. 2014) (analyzing similar "Rules of Decorum" related to expelling an individual from council meetings and finding them to be sufficient "policy" for purposes of Monell).

[5] Plaintiff also makes reference to the subsequent Bowman Memo, though as the Court previously noted it cannot be a "policy" for purposes of Monell since it was not in effect when Plaintiff gave his invocation.

The next question for the Court's consideration, then, is whether the City's restriction on Plaintiff's speech was reasonable – i.e., whether Plaintiff's First Amendment rights were violated. In a nonpublic forum like the one at issue in this case, the City can regulate speech to preserve the forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Minn. Voters Alliance v. Mansky, 138 S. Ct. 1876, 1885 (2018) (quoting Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46 (1983)).

The City's flexibility in limiting speech is thus at its highest when the speech is made in a nonpublic forum. See id. For example, the government can impose content-based restrictions, including those related to political advocacy, in a nonpublic forum that it could not otherwise impose in a more public forum. See id. Indeed, the Supreme Court has compared the rights of the government to limit speech in nonpublic forums to those held by private property owners. Id. (quoting Adderley v. Fla., 385 U.S. 39, 47 (1966)) (directing courts to apply "a distinct standard of review to assess speech restrictions in nonpublic forums because the government, 'no less than a private owner of property,' retains the 'power to preserve the property under its control for the use to which it is lawfully dedicated.'").

That said, the City's ability to regulate speech in a nonpublic forum is not absolute. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687 (1992)) ("nonpublic forum status 'does not mean that the government can restrict speech in whatever way it likes.'"). Restrictions on speech are considered reasonable when they are consistent with the City's legitimate interest in preserving the forum for its intended purpose. See Cambridge Christian, 942 F.3d at 1244; see also Perry Educ. Assn., 460 U.S. at 50-51. Additionally, restrictions on speech must be viewpoint neutral. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828-29 (2010) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."). Restrictions also cannot be applied in an arbitrary or haphazard manner. Cambridge Christian, 945 F.3d at 1240 (citing Mansky, 138 S. Ct. at 1888).

In this case, the Court finds the restrictions on speech inherent in the City's policy of giving general discretion over City Council meetings to the Council President are not unreasonable on their face. As applied to invocations, the authority conferred under Council Rule 1.202 would allow a Council President to enforce content-based restrictions on speech to ensure an invocation is preserved for its intended purpose. See Perry Educ. Assn.,

460 U.S. at 50-51. Moreover, nothing in Council Rule 1.202 or the Webb Policy expressly authorizes the Council President to engage in viewpoint discrimination or unreasonable restrictions on free speech.

Since the policy itself is facially reasonable, Plaintiff's claims hang on whether the policy was: (1) used in a way that discriminated based on a speaker's viewpoint, or (2) enforced arbitrarily. See Cambridge Christian, 942 F.3d at 1240. Plaintiff asserts both violations exist in this case. Plaintiff believes he was interrupted during his invocation and had his microphone shut off solely because his prayer was critical of Mr. Bowman's preferred mayoral candidate, making it viewpoint discrimination. (Doc. 41 at 19). Plaintiff also cites to another allegedly similar prayer given by Dr. Nicholas G. Louh that was not censored by Mr. Bowman as evidence that the City's policy was being arbitrarily and haphazardly enforced. Id. at 6. The Court disagrees.

First, the Court finds Mr. Bowman's actions were not viewpoint discrimination. Mr. Bowman's comment when interrupting Plaintiff and the subsequent removal of Plaintiff's amplification were for the stated purpose of preserving the invocation for its intended purpose. That purpose, according to the City, was to maintain "a tradition of solemnizing its proceedings . . . for the benefit and blessing of the Council." (Doc. 38-4 at 150). The City accomplished this by permitting an invocation that was "solemn and

respective [sic] in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing" (Id. at 147 (citing Town of Greece, NY v. Galloway, 572 U.S. 565, 582-83 (2014)). The City even expressly prohibited the invocation from being "exploited to . . . disparage any other faith or belief" (Doc. 38-4 at 151). Taken together, it is clear the City set aside time for an invocation for uplifting, uncontentious, and unifying purposes. See Am. Legion v. Am. Humanist Assoc., 139 S. Ct. 2067, 2088 (2019) (noting the original purpose of legislative prayer was designed to "solemnize" proceedings, "unifying those in attendance as they pursued a common goal of good governance.").

During his invocation, Plaintiff's remarks were at times objectively disparaging of the City Council and the incumbent administration. (See Doc. 38-2 at 4). While the remarks might have been entirely appropriate if delivered in a more public forum or even Plaintiff's pulpit, they were subject to the reasonable and viewpoint-neutral limitations set by the City for the invocation period – a nonpublic forum. See Cleveland, 221 F. App'x at 878-79 (affirming a council rule that prohibited attendees at a city council meeting from wearing clothing with political messages because it was an appropriate content-based restriction that was viewpoint neutral). Therefore, by restricting Plaintiff's prayer when it became contentious and divisive, Mr. Bowman acted consistently with the City's viewpoint-neutral policy on

invocations and preserved the forum for its intended purpose of unification. See Am. Legion, 139 S. Ct. at 2088 (stating "legislative prayer needed to be inclusive, rather than divisive," to accomplish its unifying purpose).

Equally important is Mr. Bowman's testimony that he would have censored any invocation that was critical of any political figure, regardless of party affiliation. Id. at 27-28. This evinces Mr. Bowman's apolitical purpose in enforcing Council Rule 1.202 in the manner that he did and further affirms the viewpoint-neutral nature of Council Rule 1.202. The facts underlying these determinations are undisputed[6] and do not establish that any viewpoint discrimination occurred. Rather, they prohibited Plaintiff's invocation from straying away from its enumerated purpose.

Second, Plaintiff has not succeeded in establishing a pattern or practice where the Council President – whoever it might be – used his or her general powers under Council Rule 1.202 to engage in viewpoint discrimination through arbitrary or haphazard enforcement. Plaintiff points to Mr. Bowman's comment regarding his discretionary authority under Council Rule

[6] Plaintiff's efforts to dispute these facts are unavailing. Plaintiff's subjective understanding for why his microphone was cut off has no bearing on whether discrimination actually occurred. Similarly, Ms. Brosche's comment that Mr. Bowman's actions "appeared to me to be based upon Mr. Bowman's disagreement with the viewpoint expressed by [Plaintiff]" (Doc. 41-1 at 3) are not determinative of whether viewpoint discrimination occurred. The only evidence of Mr. Bowman's subjective intent is contained in his deposition testimony and the response he prepared to a constituent regarding the incident (Doc. 38-4 at 162-63), both of which evidence his actions were designed to preserve the invocation as a practice and ensure it was confined to its stated legislative purpose.

1.202 as evidence that Mr. Bowman arbitrarily and haphazardly exercised his authority. In his deposition, Mr. Bowman compared determining when to censor content at a City Council meeting to his appreciation for art: "I don't know it until I see it . . . ." Doc. 38-4 at 14. While Mr. Bowman's subjective understanding of his discretion may lend itself to arbitrary enforcement, the inquiry is not whether Mr. Bowman's interpretation of his authority could have resulted in a violation. Instead, the Court must look at whether any Council President's use of the discretion – however he or she interpreted it – was in fact arbitrary or haphazard.

In that regard, Plaintiff has not presented any evidence that Mr. Bowman or any other Council President actually enforced the Council Rules arbitrarily. There were a number of things that could have indicated the City engaged in arbitrary or haphazard enforcement of Council Rule 1.202 in this case. For example, if Council Presidents routinely interrupted invocations when a speaker expressed a particular viewpoint, that would potentially be indicative of arbitrary enforcement. Likewise, evidence of Council Presidents routinely failing to interrupt when a person invited to offer an invocation was disparaging toward Ms. Brosche or those affiliated with her politically would have bolstered Plaintiff's argument.

However, nothing in the record evinces a pattern or practice by Mr. Bowman or any Council President of using Council Rule 1.202 to censor

content in an invocation in an inconsistent manner. In fact, Plaintiff's own evidence suggests Council Rule 1.202 had never been enforced to interrupt an invocation prior to Plaintiff's prayer. (Doc. 41-1 at 3). This significantly limits the type of evidence available to Plaintiff to establish arbitrary or haphazard enforcement.

To prevail, then, Plaintiff needed evidence that Council Presidents, pursuant to Council Rule 1.202 and the applicable invocation policy, allowed disparaging or divisive remarks to be made of the City Council or the executive branch during an invocation without interruption. The sole example cited by Plaintiff, Dr. Louh's invocation on August 29, 2021 (Doc. 38-5), is hardly comparable. For one, it was given three days following the fatal mass shooting at the Jacksonville Landing,[7] providing much-needed context for the remarks that acknowledged violence in the City.

More saliently, however, is the lack of divisive or accusatory remarks during Dr. Louh's invocation. While it is somber and reflective in reference to violence in the City of Jacksonville, it refrains from placing blame on the legislature or executive branch for that violence. That restraint is a significant differentiation from Plaintiff's invocation, which condemned the

[7] The Court takes judicial notice of the date of the incident and the fact that it occurred under Federal Rule of Evidence 201. See https://www.jacksonville.com/news/20180826/3-dead-including-suspect-in-mass-shooting-at-jacksonville-landing/1 (last accessed March 17, 2021).

City Council for being unrepentant and accused the executive branch of various immoral and unethical actions. (Doc. 38-2 at 4).

The distinction between the invocations also undermines Plaintiff's argument. Contrary to Plaintiff's position, the two invocations were not substantially similar and therefore do not evidence that Mr. Bowman was enforcing the Council Rules arbitrarily and haphazardly by only censoring Plaintiff's invocation. Since no other evidence on this matter was presented,[8] the Court finds summary judgment is appropriate.

To conclude, the Court wants to make two things clear with respect to its ruling. One, the City prevailed in this action because the record does not reflect the City had a history of arbitrary enforcement of Council Rule 1.202. On a different record or if actions of the Council President result in arbitrary enforcement, a different outcome could result. Two, the Court reiterates that it is not meant to be the arbiter of what is allowable "prayer" and what is not. As cautioned by the Supreme Court, if courts are tasked with acting "as supervisors and censors of religious speech," the level of government involvement in religious matters will become far greater than it is now and

[8] Plaintiff's lack of any evidence that Mr. Bowman or another Council President enforced the Council Rules in such a manner that allowed others to make divisive or disparaging remarks about political figures is notable. Jacksonville has had mayors from both sides of the political aisle and has allowed legislative prayer during different administrations. The lack of any evidence on this issue has proven fatal to Plaintiff's claim of arbitrary or haphazard enforcement of Council Rule 1.202.

risks creating an impermissible civic religion. Town of Greece, 572 U.S. at 581.

Accordingly, after due consideration, it is

ORDERED:

1. Defendant's Motion for Summary Judgment (Doc. 37) is **GRANTED.**

2. The Clerk of Court is **DIRECTED** to enter judgment in favor of Defendant consistent with this Order, terminate all pending motions, and close this file.

DONE and **ORDERED** in Jacksonville, Florida this 22ND day of March, 2021.

BRIAN J. DAVIS
United States District Judge

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Copies furnished to:

Counsel of Record