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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF HUMBOLDT

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**SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT**

CAROLE BEATON,

Plaintiff,

vs.

CITY OF EUREKA, FRANK JAGER,  
Mayor, Does 1 through 10,

Defendants.

CASE NO. DR130058

SECOND ORDER REGARDING  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT/ADJUDICATION AND  
PLAINTIFF'S MOTION FOR SUMMARY  
ADJUDICATION OF ISSUES

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Through an order filed November 18, 2013, the Court denied portions of the motion for summary judgment/adjudication of defendants City of Eureka and Frank Jager (collectively, "Defendants") addressing whether Defendants' participation in the "prayer breakfasts" at the Wharfinger Building violated three clauses of the California Constitution.

S:\DR130058

1 The same order asked the parties to communicate whether they would support or oppose  
2 a stay regarding the issue of invocations at meetings of the Eureka City Council. A stay seemed  
3 potentially appropriate since the U.S. Supreme Court is expected to issue a decision on similar  
4 issues in late June or early July in a case called *Town of Greece v. Galloway*. Plaintiff Carole  
5 Beaton opposed the proposed stay and, upon a review of her arguments, a stay does not seem  
6 appropriate.

7 Accordingly, this order addresses: (1) Beaton's motion for summary adjudication as to  
8 whether any form of legislative prayer at Eureka City Council meetings, including the  
9 nonsectarian invocations called for by Eureka's Policy and Procedure 1.25, violates three clauses  
10 of the California Constitution (*see* Notice filed May 15, 2013 at 1:24-27; *see also* Memo. in  
11 Support filed May 15, 2013); and (2) Defendants' motion for summary adjudication as to  
12 whether invocations generally, and Policy and Procedure 1.25 specifically, are compliant with  
13 those clauses (*see* Notice filed May 3, 2013 at 2:1-3, 2:9-10; *see also* Memo. in Support filed  
14 May 3, 2013 at 6:22-27).

## 15 I. FACTS

16 Invocations are held at meetings of the Eureka City Council pursuant to section 30.09 of  
17 the Eureka Municipal Code, which provides:

### 18 § 30.09 ORDER OF BUSINESS

19 The business of all regular meetings of the Council shall be transacted in  
20 the following order unless the Council, by a vote of at least a majority of the  
21 members present, shall suspend the rules and change the order:

- 22 (A) Closed session (if required);
- 23 (B) Roll call;
- 24 (C) Pledge of allegiance to the flag;
- 25 (D) Invocation;
- (E) Mayor's announcements;
- (F) Council reports;
- (G) City Board/Commission reports;

- (H) Public comment period;
- (I) Public hearings;
- (J) Consent calendar;
- (K) Ordinances/resolutions;
  - (1) Introduction
  - (2) Adoption
- (L) Reports;
- (M) City Manager's report; and,
- (N) Adjournment.

(See Beaton's Separate Statement filed July 22, 2013, Fact 1 (response to Defendants' UMF).)<sup>1</sup>

Before 2009, there was no formal policy regarding the delivery of invocations at City Council meetings. (*Id.*, Fact 2.) Since 2009, anyone who volunteers may deliver an invocation. (*Id.*, Fact 3.) On May 1, 2012, Eureka adopted Policy and Procedure No. 1.25 ("P&P 1.25"), entitled "Invocations at City Council Meetings." (Defendants' RJN filed May 3, 2013 ¶¶ 2-3, Exs. B-C.)

Prior to the adoption of P&P 1.25, at least six invocations took place: two in 2010, two in 2011, and two in the first part of 2012.<sup>2</sup> (Beaton's RJN filed May 15, 2013 ¶ 2, Ex. 2.) Mayor Jager believes that each of those six invocations was delivered by a Christian of one denomination or another. (Jager Depo. at 36:11-19.)

The procedures adopted in P&P 1.25 are set forth below verbatim:

1. Anyone who wishes to give an invocation at a City Council meeting should contact the City Clerk.
2. The City Clerk will provide the individual with a Volunteer Application (Exhibit A).
3. Once the Volunteer Application has been signed the individual will be permitted to give the invocation at a City Council meeting.

<sup>1</sup> The version of Eureka Municipal Code section 30.09 lodged by Defendants places invocations second in order while the version quoted herein places invocations fourth. (See Defendants' RJN filed May 3, 2013 ¶ 5, Ex. E.) This difference appears to stem from the fact that the version quoted herein includes an amendment of April 16, 2013.

<sup>2</sup> It is possible that as many as fourteen invocations took place prior to May 1, 2012. (See Beaton's Separate Statement filed May 15, 2013, Fact 11.) However, the deposition testimony supporting that fact is not entirely clear, particularly given the absence of many of the names mentioned in the deposition from meeting minutes lodged by Beaton. (Compare Jager Depo. filed July 22, 2013 at 33:7-36:14 with Beaton's RJN filed May 15, 2013 ¶ 2, Ex. 2.)

1 4. The City Clerk will schedule the date and time of the invocation.

2 (Defendants' RJN filed May 3, 2013 ¶ 4, Ex. D.)

3 The referenced volunteer application must be signed, and requires the applicant to affirm  
4 that he/she understands the following: "The invocation must be non-sectarian. The courts have  
5 ruled that the invocation may not reference a specific religion, prophet, or deity. The invocation  
6 may include only non-sectarian terms such as God or Creator." (*Id.* ¶ 4, Ex. D at p. 2.)

7 P&P 1.25 was adopted in response to a letter from the ACLU Redwood Chapter  
8 requesting that sectarian prayers be discontinued at future City Council meetings. (*See* Beaton's  
9 Separate Statement filed July 22, 2013, Fact 7 (response to Defendants' UMF).)

10 Since the adoption of P&P 1.25, there has been only one invocation at a City Council  
11 meeting. (*Id.*, Fact 9.) The invocation was delivered by a member of the Hindu faith. (*Id.*, Fact  
12 10.) That individual had signed the volunteer application. (*Id.*, Fact 11.) Eureka did not review  
13 or censor his invocation before it was delivered. (*Id.*, Fact 12.) It has never been Eureka's  
14 practice to review or censor an invocation. (*Id.*, Fact 13.)

15 On May 15, 2012, a young man sang "God Bless America" during the time set for the  
16 invocation. (*Id.*, Fact 14.)

17 The record does not reflect anything of a religious nature taking place at City Council  
18 meetings since the adoption of P&P 1.25 on May 1, 2012 other than the one invocation delivered  
19 by a member of the Hindu faith and the one instance of a young man singing "God Bless  
20 America."

## 21 II. ANALYSIS

22 Beaton contends that allowing any invocations at City Council meetings, whether  
23 sectarian or nonsectarian, violates three clauses of the California Constitution: the  
24 "Establishment" and "No Preference" clauses of article I, section 4, and the "No Aid" clause of  
25 article XVI, section 5. Defendants contends that invocations in general and as conducted under

1 P&P 1.25 do not offend these clauses because the speakers are volunteers and, since the adoption  
2 of P&P 1.25, the volunteers must acknowledge the requirement that the invocation be  
3 nonsectarian.

4 As mentioned in the Court's prior order, the *Lemon* test applies to the Establishment  
5 Clauses of both the California and U.S. Constitutions. See David A. Carrillo and Shane G.  
6 Smith, *California Constitutional Law: The Religion Clauses*, 45 Univ. of San Francisco L. Rev.  
7 689, 702-703 (2011) (explaining that the *Lemon* test remains the law under the U.S.  
8 Establishment Clause despite that six Supreme Court justices have expressed dissatisfaction with  
9 it); see *East Bay Asian Local Dev. Corp. v. State of California*, 24 Cal. 4th 693, 718-19 (2000).

10 It appears uncontroversial that Eureka's invocations fail the *Lemon* test. However, it is  
11 also uncontroversial that, at least for purposes of the federal Establishment Clause, the *Lemon*  
12 test does not apply to legislative invocations because of the U.S. Supreme Court's decision,  
13 *Marsh v. Chambers*, 463 U.S. 783 (1983).

14 The *Marsh* decision deliberately carved out an exception to existing Establishment  
15 Clause jurisprudence. See *id.* at 796 (Brennan, J. dissenting). The Court concluded in *Marsh*  
16 that the Nebraska Legislature's practice of beginning each of its sessions with a prayer offered  
17 by a chaplain, who was being paid out of public funds, did not violate the Establishment Clause.  
18 *Id.* at 784-85, 792. The basis for the Court's conclusion was threefold.

19 The first reason is historical:

20 The opening of sessions of legislative and other deliberative public bodies  
21 with prayer is deeply embedded in the history and tradition of this country.  
22 From colonial times through the founding of the Republic and ever since, the  
23 practice of legislative prayer has coexisted with the principles of  
24 disestablishment and religious freedom. In the very courtrooms in which the  
25 United States District Judge and later three Circuit Judges heard and decided  
this case, the proceedings opened with an announcement that concluded, 'God  
save the United States and this Honorable Court.' The same invocation  
occurs at all sessions of this Court.

*Id.* at 786.

1 But history alone is not enough. The second reason the U.S. Supreme Court broke from  
2 precedent was the Court's conclusion that those who drafted the First Amendment did not intend  
3 the Establishment Clause to bar legislative invocations:

4 Standing alone, historical patterns cannot justify contemporary violations of  
5 constitutional guarantees, but there is far more here than simply historical  
6 patterns. In this context, historical evidence sheds light not only on what the  
7 draftsmen intended the Establishment Clause to mean, but also on how they  
8 thought that Clause applied to the practice authorized by the First Congress --  
9 their actions reveal their intent.

10 ¶, ¶

11 ...It can hardly be thought that in the same week Members of the First  
12 Congress voted to appoint and to pay a chaplain for each House and also  
13 voted to approve the draft of the First Amendment for submission to the  
14 states, they intended the Establishment Clause of the Amendment to forbid  
15 what they had just declared acceptable. In applying the First Amendment to  
16 the states through the Fourteenth Amendment, [citation], it would be  
17 incongruous to interpret that Clause as imposing more stringent First  
18 Amendment limits on the states than the draftsmen imposed on the Federal  
19 Government.

20 *Id.* at 790.

21 Third and finally, the break from precedent in *Marsh* was supported by the Court's  
22 judgment that allowing legislative invocations does not threaten the broader principle of  
23 separation of church and state:

24 This unique history leads us to accept the interpretation of the First  
25 Amendment draftsmen who saw no real threat to the Establishment Clause  
arising from a practice of prayer similar to that now challenged. We conclude  
that legislative prayer presents no more potential for establishment than the  
provision of school transportation, *Everson v. Board of Education*, 330 U.S. 1  
(1947), beneficial grants for higher education, *Tilton v. Richardson*, 403 U.S.  
672 (1971), or tax exemptions for religious organizations, *Walz, supra*.

26 *Id.* at 791; *see also id.* at 792 ("In light of the unambiguous and unbroken history of more than  
27 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has  
28 become part of the fabric of our society. To invoke Divine guidance on a public body entrusted  
29 with making the laws is not, in these circumstances, an 'establishment' of religion or a step

1 toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the  
2 people of this country.”).

3 The above discussion of *Marsh* does not apply directly to this case because *Marsh*  
4 considered the U.S. Constitution, not the California Constitution. The three clauses of the  
5 California Constitution at issue are the Establishment, No Preference, and No Aid clauses. The  
6 problem for the Court is that unfortunately, with one exception noted below, there appears to be  
7 no precedent determining whether legislative invocations offend these three clauses. The Court  
8 readily admits that the question whether legislative invocations violate these clauses may be  
9 more appropriately resolved by a Court of superior jurisdiction.

10 As explained below, the Court’s best judgment is that it should follow *Marsh* in  
11 determining whether Eureka’s invocations violate the Establishment, No Preference, or No Aid  
12 clauses.

### 13 *California Establishment Clause*

14 Applying *Marsh* to California’s Establishment Clause seems appropriate because  
15 California’s Establishment Clause must be interpreted consistently with U.S. Supreme Court  
16 authorities interpreting the First Amendment’s Establishment Clause. *See East Bay Asian Local*  
17 *Dev. Corp.*, 24 Cal. 4th at 718-19 (“We do not believe, however, that the protection against the  
18 establishment of religion embedded in the California Constitution creates broader protections  
19 than those of the First Amendment. We are satisfied that the California concept of a ‘law  
20 respecting an establishment of religion’ (art. I, § 4) coincides with the intent and purpose of the  
21 First Amendment establishment clause. ...There is nothing in the history of the clause to suggest  
22 that the drafters or the electorate intended that the clause be any more protective of the doctrine  
23 of separation of church and state than the First Amendment establishment clause.”). Also, the  
24 one authority addressing legislative invocations under the California Constitution (at least the  
25 only one this Court is aware of) concluded that *Marsh* should be followed for purposes of

1 California's Establishment Clause. See *Rubin v. City of Lancaster*, 710 F.3d 1087, 1101 (9th  
2 Cir. 2013).

### 3 *California No Preference Clause*

4 Applying *Marsh* to California's No Preference clause also appears appropriate. It  
5 appears appropriate because those who drafted the No Preference clause, like the drafters of the  
6 First Amendment, did not intend to prohibit legislative prayer, at least based on historical  
7 evidence comparable to that relied upon in *Marsh*:

8 Since 1849 the state Constitution has begun with a religious invocation: "We,  
9 the People of the State of California, *grateful to Almighty God for our*  
10 *freedom*, in order to secure and perpetuate its blessings, do establish this  
11 Constitution." (Cal. Const., preamble, italics added; cf. Cal. Const. of 1849,  
12 preamble.) This language, as well as the history of how it came to be  
13 included, eloquently refute the argument that the framers of the state  
14 Constitution intended to prohibit ceremonial prayer.

15 Ceremonial prayer pervaded the Constitutional Convention of 1849. "The  
16 first regular session was 'opened with prayer to Almighty God for His  
17 blessing on the body, in their work, and on the country.' On the following day  
18 provision was made whereby the Convention should be opened each day with  
19 prayer. The clergy of Monterey, consisting of Rev. Padre Antonio Ramirez  
20 and Rev. [Samuel Hopkins] Willey, were requested to act as chaplains; and it  
21 was unanimously agreed 'That the officiating clergy of this House be admitted  
22 to the privileged seats of the House.'" (Hunt, *The Genesis of California's First*  
23 *Constitution* (1895) at pp. 40-41, fns. omitted; see also Conmy, *The*  
24 *Constitutional Beginnings of California* (1959) at p. 18; Report of the Debates  
25 in the Convention of California on the Formation of the State Constitution in  
September and October, 1849 (1850) at pp. 19, 54 (hereafter *Debates of*  
1849.) The two clergymen alternated, "thus illustrating that there was  
religious harmony." (Conmy, *supra*, at p. 18.)

26 [¶, ¶, ¶, ¶]

27 It was against the background of daily prayer, and the well-debated decision  
28 to thank God in the preamble, that the delegates adopted a provision ensuring  
29 the free exercise and enjoyment of religion "without discrimination or  
30 preference." (Cal. Const. of 1849, art. I, § 4; see present Cal. Const., art. I, §  
31 4.)

32 *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 931, 933 (1991) (Panelli, J. dissenting).





1 Court will also grant Defendants’ motion for summary adjudication *of the limited issues their*  
2 *motion presents*: whether invocations at City Council meetings as a general matter, or P&P 1.25  
3 specifically, violate the California Constitution. To be clear, the Court’s granting Defendants’  
4 motion in this regard does not mean that Defendants have prevailed entirely on the issue of  
5 invocations.

6 Under *Marsh*, invocations are generally permissible. However, in *Rubin v. City of*  
7 *Burbank*, 101 Cal. App. 4th 1194 (2002), *Marsh* was interpreted as forbidding any legislative  
8 invocation in which the prayer opportunity has been exploited to proselytize or advance any one,  
9 or to disparage any other, faith or belief. *See id.* at 1201-1202. Further, the Court in *Rubin v.*  
10 *City of Burbank* found a single sectarian reference, in the form of a single reference to Jesus  
11 Christ, sufficient to allow a trial court to conclude that the one invocation at issue had failed that  
12 standard (*i.e.*, the single reference to Jesus Christ was sufficient to affirm the trial court’s finding  
13 that “the prayer opportunity had been exploited to advance one faith, Christianity, over  
14 another”).<sup>3</sup> *See* 101 Cal. App. 4th at 1203-1205.

15 The operative complaint, Beaton’s First Amended Complaint filed January 28, 2013,  
16 claims that legislative invocations are generally unlawful in California, but also states a claim for  
17 violation of the California Constitution on the ground that the particular invocations delivered at  
18 Eureka City Council meetings were inappropriately sectarian. (*See* ¶¶ 9-10.) While Defendants  
19 are entitled to the Court’s adjudication that invocations in general and P&P 1.25 in particular are  
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21 <sup>3</sup> Courts disagree about whether and to what extent *Marsh* allows sectarian references in invocations. The  
22 Ninth Circuit concluded in *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013) that *Marsh* does not  
23 categorically forbid sectarian references, *id.* at 1094, using reasoning that is at odds with the reasoning in  
24 *Rubin v. City of Burbank*. Even if this Court agreed with the reasoning of *Rubin v. City of Lancaster*, it  
25 would still be required to follow *Rubin v. City of Burbank*. *Auto Equity Sales, Inc. v. Superior Court*, 57  
Cal. 2d 450, 455 (1962) (“Decisions of every division of the District Courts of Appeal are binding upon  
all the justice and municipal courts and upon all the superior courts of this state.... Courts exercising  
inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function  
to attempt to overrule decisions of a higher court.”).

1 lawful, Beaton still has a claim that the specific invocations were exploited in order to  
2 proselytize, advance, or disparage one or another religious beliefs or faiths.

3 **ORDER**

4 1. Beaton's motion for summary adjudication is denied.

5 2. Defendants' motion for summary adjudication is granted as to the issues presented by  
6 their motion. More specifically, the Court summarily adjudicates in Defendants' favor that  
7 invocations at Eureka City Council meetings in general, and P&P 1.25 in particular, do not  
8 violate the California Constitution. The Court's granting summary adjudication of those issues  
9 does not preclude Beaton from pursuing her claim, consistent with *Rubin v. City of Burbank*, that  
10 specific invocations violated the California Constitution.

11 3. Defendants shall serve notice of entry of this order.

12  
13 Dated: December 24, 2013

**W. BRUCE WATSON**

W. Bruce Watson, Judge of the Superior Court

STATE OF CALIFORNIA,            )  
COUNTY OF HUMBOLDT        ) SS. AFFIDAVIT OF SERVICE BY MAIL

I, Susan C. Edwards, say:

That I am a citizen of the United States, over 18 years of age, a resident of the County of Humboldt, State of California, and not a party to the within action; that my business address is 825 5<sup>th</sup> Street, Humboldt County Courthouse, Eureka, California, 95501; that I served a true copy of the attached SECOND ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT/ADJUDICATION AND PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES by placing said copies in the attorney's mail delivery box in the Court Operations Office at Eureka, California on the date indicated below, or by placing said copies in envelope(s) and then placing the envelope(s) for collection and mailing on the date indicated below following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Eureka, California in a sealed envelope with postage prepaid. These copies were addressed to:

Peter Martin, Court Operations Box #57

Cyndy Day-Wilson, 531 K Street, Eureka, CA 95501

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on the 24 day of December, 2013, at the City of Eureka, County of Humboldt, State of California.

KERRI L. KEENAN, Clerk of the Court

By Susan C. Edwards  
Deputy Clerk