

No. 17-815

IN THE
**United States Court Of Appeals
For The Ames Circuit**

COUNCIL OF THE TOWN OF WENDELL,

DEFENDANT-APPELLANT,

v.

FELIX MONK,

PLAINTIFF-APPELLEE.

**ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES**

JOINT APPENDIX

TABLE OF CONTENTS

Procedural Order 1

Memorandum Opinion Regarding Defendants’ Motion to Dismiss.....2

Complaint.....9

Joint Stipulation of Facts16

 Exhibit 1: Town of Wendell Ordinance 17-3718

**UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT**

Council of the Town of Wendell,

Defendant-Appellant

v.

Felix Monk,

Plaintiff-Appellee

Procedural Order

No. 17-815

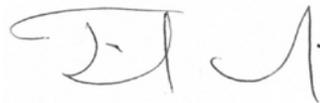
Defendant-Appellant's Petition for Interlocutory Appeal is granted.

The Court has decided to hear oral argument in this case. The parties are directed to address two issues in their briefing and arguments to the Court:

1. Whether the plaintiff's claim for nominal damages saves this case from mootness.
2. Whether the complaint states a valid claim for violations of the Establishment Clause.

The parties are reminded to adhere to this Court's Local Rule 28.1, which provides that "Any non-jurisdictional issue either conceded or not raised in the district court may not be raised for the first time on appeal."

For the Court,



Tejinder Singh
Deputy Assistant Clerk of the Court

January 24, 2018

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES**

Felix Monk

Plaintiff

v.

Council of the Town of Wendell

Defendant

Docket No. CV17-105

**MEMORANDUM OPINION
REGARDING DEFENDANT’S MOTION TO DISMISS**

Felix Monk filed a complaint alleging that the Council of the Town of Wendell’s legislator-led prayer invocations violate the Establishment Clause of the First Amendment. The Council has moved under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for dismissal of the complaint on two grounds—mootness and failure to state a claim. For the reasons that follow, the Council’s motion is granted in part and denied in part. However, because the resolution of this motion involves controlling questions of law as to which there is substantial ground for difference of opinion, and because an immediate appeal may materially advance the ultimate termination of the litigation, I hereby certify this order for an immediate appeal under 28 U.S.C. § 1292(b).

I.

The following facts are taken from the complaint or are otherwise undisputed. The Council of the Town of Wendell consists of seven elected members, who hold public meetings every other week to handle city business and hear from constituents.

Beginning in 2013, it was the practice of the Council that at the commencement of each meeting one elected member of the Council would offer an invocation to those in attendance.

Overwhelmingly, those invocations constituted Christian prayers. Invocations would typically begin with a request to all those present to stand and bow their heads, and then the Council member would speak for approximately one to two minutes, leading the room in prayer. Council members typically prayed for guidance and wisdom in the discharge of their duties, and for the well-being of specific town residents or the community in general.

The only people in the room who ever led the invocations were elected members of the Council itself, and the only faith ever invoked was Christianity. Many of the Christian references were explicit, including references to Jesus Christ, the Holy Spirit, and sometimes specific passages of the Bible. Occasionally, invocations would be more interactive. On at least one occasion, for example, Council member Mary King led “all those who know the words” in a recitation of the Lord’s Prayer.

After the invocation, the Chair of the Council would call the meeting to order, and the Council would move through its agenda, which typically would include debate on resolutions and hearing from constituents, civil servants (*e.g.*, the police chief), or community advocates about issues that might require the Council’s attention.

Public meetings were frequently attended by at least a dozen town residents. The room where the Council regularly meets has capacity for 100 people, but it was only occasionally full. On days when the Council was considering more controversial measures, however, it was not unusual for more than 100 people to want to attend a meeting, and seats would be given on a first-come, first-serve basis. Regardless of the number of people in attendance, the Council would always begin meetings with an invocation by one of its members, and the invocation nearly always included an explicitly Christian prayer.

Plaintiff Felix Monk, a professor of religious studies, moved to Wendell in 2014 to teach at the City College. Monk's scholarship focuses on the rights of religious minorities, and he engages in activism on behalf of those communities as well. After a string of hate crime incidents against Muslim shopkeepers in 2016, Monk attended multiple Council meetings where the Council was formulating the town's response. Monk testified at one of these meetings, suggesting the creation of a police training and outreach program to make minorities feel safe and protected in the community. The Council subsequently adopted a version of Monk's proposal, and asked him to liaise with the police department to implement it.

Monk represents to the Court that he is "spiritual," but he does not identify with any religion. In fact, he identifies principally as "anti-religious," believing that organized religion has, on balance, had a negative influence on the world. After attending the Council meetings regarding the policing initiative, Monk complained to certain members of the Council that beginning each meeting with an explicitly religious and sectarian invocation was improper and possibly unconstitutional under the Establishment Clause.

The Council, however, did not modify its practice. According to the Complaint, Council member King told Monk that in her view, the prayer practice was not harmful, that it had been in place for years, and that she did not think it was proper for Monk to judge the practice since he was a newcomer to town and a non-believer. She also noted that the Council was protective of religious minorities, citing the efforts taken after the hate crime incidents. The other members of the Council who Monk talked to likewise opined that their prayer practice was beneficial and not improper.

On February 7, 2017, Monk brought this lawsuit under 42 U.S.C. § 1983, alleging Establishment Clause violations. He seeks nominal damages, declaratory relief that the Council's

legislative prayer practice is unconstitutional, and injunctive relief prohibiting further violations of the Establishment Clause.

Approximately three months after Monk filed his complaint, at its meeting on May 4, 2017, the Council held a hearing at which the propriety of its invocation practice was one of the items on the agenda. Numerous witnesses spoke for and against the practice, and various Council members made their opinions known as well. Strong opinions were voiced both for and against the practice. Monk did not testify at the meeting.

The following meeting, two weeks later, did not open with a prayer. Instead, the chair of the Council, Ralph Williams, gave an invocation extolling the virtues of public participation and public service. The invocation did ask “those who pray” to offer their prayers for good governance, and requested from “those who don’t” pray their “support” and “good will.”

During the meeting, the Council enacted a resolution stating that although the prior practice of opening meetings with Christian prayers was not harmful, the Council had determined that in the future, legislative sessions should begin with “a non-sectarian statement of purpose and good will.”

After the enactment of this resolution, the Council’s attorneys moved to dismiss this case on two separate grounds. First, they argue that the change to the Council’s legislative prayer practice renders the entire case moot, so that this Court lacks subject matter jurisdiction over it. Second, they argue that if the case is not moot, then the complaint fails to state a claim because under binding Supreme Court precedent, including *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Council’s prior legislative prayer practice did not violate the Establishment Clause.

In response to the motion, Monk concedes that his claims for injunctive and declaratory relief are moot. He does not assert that the new practice violates the Establishment Clause, he

acknowledges that the Council has changed its practice in good faith, and he admits that the Council is serious about taking a more inclusive approach to the invocation going forward. However, Monk does not concede that his claim for nominal damages is moot. He continues to pursue this claim because, he argues, it is important to establish that the prior practice violated the Establishment Clause of the Constitution, harming him and other Town residents who were subjected to it.

II.

The Council has moved to dismiss under Rule 12(b)(1) and Rule 12(b)(6). Its 12(b)(1) motion to dismiss on mootness grounds raises a factual challenge to this Court's subject matter jurisdiction because it requires the Court to go beyond the four corners of the complaint to evaluate the jurisdictional import of post-complaint events. The factual issues are straightforward in this case because the parties have jointly stipulated to the relevant post-complaint facts.

The 12(b)(6) motion tests the sufficiency of the allegations in the complaint only. The Court takes the well-pleaded allegations as true, and will dismiss only if the complaint fails to state a claim as a matter of law. The Court addresses the motions in turn.

A.

First, the Court concludes that the claim for nominal damages is not moot because it is a claim for backward-looking relief for previous Constitutional violations. The Court acknowledges that federal courts of appeals are divided on this question, and that the Eleventh Circuit, sitting en banc, recently held that a claim for nominal damages, standing alone, does not save an otherwise moot case from dismissal. *See Flanigan's Enterprises, Inc. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017). Some other prominent judges have agreed with that reasoning. *See Freedom from Religion Found. Inc v. New Kensington Arnold Sch. Dist.*, 832

F.3d 469, 482 (3d Cir. 2016) (Smith, J., concurring dubitante); *Husain v. Springer*, 494 F.3d 108, 136 (2d Cir. 2007) (Jacobs, J., concurring in part and dissenting in part); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1262 (10th Cir. 2004) (McConnell, J., concurring).

But the weight of authority is to the contrary. *See, e.g., Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345 (5th Cir. 2017), *as revised* (July 3, 2017); *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 872 (9th Cir. 2017); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006); *Utah Animal Rights Coal.*, 371 F.3d at 1258; *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001). This Court sides with the majority of circuits that have held that a claim for nominal damages is sufficient to save a case from mootness.

The Council's 12(b)(1) motion is therefore granted with respect to the claims for injunctive and declaratory relief, but denied as to the claim for nominal damages.

B.

Because the case is not moot, the next question is whether the Town's legislative prayer practice is constitutional under the Establishment Clause. This is a very close question, as evidenced by the fact that two courts of appeals, sitting en banc, have reached divergent conclusions about very similar prayer practices. *Compare Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (finding legislator-led sectarian prayer to be unconstitutional) *with Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (reaching the opposite result). After careful consideration, this Court concludes that Monk's allegations survive a motion to dismiss. Put succinctly, the fact that the prayers were led exclusively by elected officials, were exclusively Christian, requested public participation, and included statements that could be construed as proselytizing or demanding public participation crosses a line that the Establishment Clause does not permit a legislative prayer to cross. Examining the Council's practice "as a whole," *Town of*

Greece, 134 S. Ct. at 1824, and taking the facts in the complaint as true, the Court cannot conclude that the complaint fails to state a claim on which relief could be granted.

III.

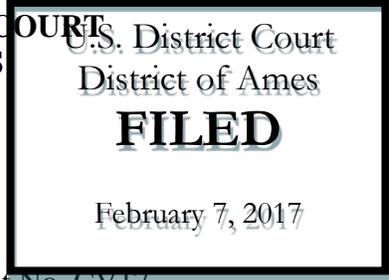
For the foregoing reasons, the Council's motion is granted in part and denied in part. The Council has requested that I certify this order for interlocutory review under 28 U.S.C. § 1292(b). In light of the complexity of the legal issues presented, I am happy to do so.

Dated: December 1, 2017

E. Gideon Ellison

United States District Court
For the Ames District

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES



Felix Monk

Plaintiff

v.

Council of the Town of Wendell

Defendant

Docket No. CV17-

COMPLAINT

Plaintiff Felix Monk, by his attorneys, alleges as follows:

INTRODUCTION

1. The Establishment Clause prohibits government endorsements of religion, the intertwining of government with a specific religion, and especially coercion in favor of any given religion. For years, the defendant, the Council of the Town of Wendell, has opened every or nearly every public legislative meeting with Christian prayers, led by elected officials, that amount to an unlawful establishment of religion. This establishment of religion has violated the constitutional rights of Plaintiff and others who have been subjected to this ongoing practice, and it must stop. This complaint, brought under 42 U.S.C. § 1983 and the First and Fourteenth Amendments, seeks declaratory and injunctive relief under as well as nominal damages and attorney's fees.

JURISDICTION

2. The Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

3. The Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act. 28 U.S.C. §§ 2201, 2202.

PARTIES

4. Plaintiff is a U.S. citizen and a resident of the Town of Wendell who attended multiple meetings of the Council where he was subjected to sectarian prayers. Plaintiff intends to continue attending Council meetings to follow local issues of interest.

5. Defendant is the legislative body that governs the Town of Wendell, an incorporated municipality in the state of Ames. Defendant has the capacity to sue and be sued as a separate entity within the Town government. The Council comprises seven members, each elected to a two-year term, with no term limits.

FACTS

6. In August 2014, Plaintiff Monk moved to Wendell to take a position teaching religious studies at Wendell City College. Monk has taught religious studies for almost a decade at various colleges, and also participates in other efforts to secure and protect the rights of religious minorities in the United States.

7. The Council holds biweekly public meetings every other Thursday, where it addresses Town business. The meetings begin with an invocation delivered by one of the Council members, followed by a business meeting where constituents and other government officials can discuss issues that merit the Council's attention. The Council also discusses and votes on resolutions, legislating for the Town.

8. Monk attended his first Council meeting on February 5, 2015. At that meeting, Council member Charles Gansford began the legislative session with an invocation that was not only Christian, but bordered on proselytizing:

Dear Lord, please give us the wisdom and courage to do your will and to do what is right and just for the people of this town. Please grant us the compassion of your son Jesus Christ so that we can lift up those around us and preserve peace in our time. Please bless this town and its council, that we can hold you, the one true God in whose name we pray, close to us as we go about our business tonight and every other night. Please especially bless those in our town who are homeless, or sick, or mentally ill, that they may get the help they need, and that we may do what we can to provide that help for them. Amen.

9. Prayers like this one are commonplace at the start of legislative sessions. The consistent practice of the Council was to have an invocation comprising prayers led by legislators (and only by legislators), referencing Christian ideals (and only Christian ideals), and calling for participation by those present—sometimes by bowing their heads, sometimes by saying “Amen,” and other times by actually praying along. For example, on at least one occasion, councilwoman Mary King admonished “all those who know the words” to recite the Lord’s Prayer. On multiple occasions, prayers included statements implying that Christianity is superior to other religions (*e.g.*, references to “the one true God”). The following are three representative examples of prayers offered during invocations:

- a. Lord father, we thank you for giving us life and prosperity this day. We confess our sins and ask you for forgiveness, and thank you for your many blessings. I ask that you be with us as we conduct the Town’s business this evening, in the name of Jesus Christ. Amen. (April 2, 2015 Meeting)
- b. Let us pray. Holy Spirit, open our hearts to your love and your grace, and enable us to spread the good word of peace and prosperity to all those who need it in these desperate times. Help us please to bring the people together, united around a message of hope and of love. Forgive us our sins and lead us to a better path today. Amen. (November 19, 2015 Meeting)
- c. Let us pray. Dear God in Heaven, blessed are the meek. Help us stand for the defenseless and protect the weak, as your son Jesus protected those around him. Give us the strength to see the true needs of the people, and to do what must be done to uplift them and make this Town strong again. As we approach the Christmas season, where we celebrate the birth of your son Jesus Christ, stay in our hearts and call us toward both duty and joy, so that we may be worthy of your grace. Amen. (December 3, 2016 Meeting)

10. Since 2013, to Plaintiff's knowledge, every Council meeting has begun with a sectarian Christian prayer, and each member of the Council has delivered such a prayer.

11. Members of the public who attended Council meetings had no choice but to sit through these sectarian prayers. Although members of the public technically were permitted to arrive late, the Council chamber only has capacity for approximately 100 people, and so there was a real risk that there would be no seats available for late arrivals on days when the Council was deciding important matters.

12. In March and April 2016, the Council held a series of meetings to formulate the Town's response to a string of violent hate crimes against Muslim shopkeepers. These meetings, like every other meeting, opened with legislative prayers. Plaintiff Monk testified at one of these meetings about a police training initiative to improve relations between the Town police and the Town's Muslim residents, so that residents would feel safe and protected, and police would be able to respond to their needs. At each of the meetings Monk attended, the meeting opened with a Christian prayer. To its credit, the Council did adopt a version of Plaintiff's proposal, implementing a pilot police training program and asking Plaintiff to assist with its implementation by liaising with the police department.

13. After those meetings, Monk conveyed his concern about legislative prayer to three members of the Council: Mary King, Charles Gansford, and Ralph Williams, all of whom had supported his police training initiative. He explained to each of them that he believed Christian legislative prayers were sending an unintended exclusionary signal to religious minorities, and fostering an attitude of Christian superiority that might inadvertently contribute to violence against religious minorities in the Town. He further explained that in any event, such explicit endorsements of Christianity by legislators in a legislative setting raised Establishment Clause

concerns. He also communicated that although he is a spiritual person, he is anti-religious, and believes that organized religion has caused more harm than good in the world. Monk suggested that the Council could instead consider a non-religious invocation.

14. The Council members refused to change their practice. Councilwoman King downplayed Monk's concerns, argued that the practice had been in place for years (since 2013), and protested that the Council was attentive to the needs of religious minorities, pointing at the police training initiative and other measures the Council recently had taken in response to the hate crime attacks. She also suggested that as a newcomer to the Town and as a non-believer, Monk was not well-positioned to understand the importance of legislative prayer, or to pass judgment on the practice. Councilmen Gansford and Williams likewise indicated that they did not perceive legislative prayer as improper.

15. Consequently, for the last several months, Monk and other residents of the Town who attend Council meetings have continued to hear, at every meeting, a Christian prayer. These prayers have sent the message that belief systems other than Christianity are less worthy, acceptable, and mainstream than Christianity itself. They have created a distraction from governance and caused unnecessary tension in and around Council meetings.

CAUSE OF ACTION: VIOLATION OF THE FIRST AMENDMENT
(42 U.S.C. § 1983)

16. The allegations in paragraphs 1 through 13 are incorporated as if stated fully herein.

17. Defendant violated Plaintiff's rights under the Establishment Clause of the First Amendment to the U.S. Constitution and the Fourteenth Amendment to the U.S. Constitution.

18. Defendant's past and continued delivery of invocations at its Council meetings, as alleged above, constitute an official policy, practice, custom, and/or usage for purposes of 42 U.S.C. § 1983.

19. The custom, practice, and policy established by Defendant is the cause-in-fact of the constitutional violation.

20. Specifically, Defendant's invocation practice unconstitutionally affiliates Defendant with one faith, Christianity.

21. Defendant's invocation practice has the primary purpose and effect of promoting and advancing one faith, Christianity.

22. Defendant's invocation practice also improperly endorses one faith. A reasonable, objective observer aware of the conduct alleged above would conclude that the Defendant has endorsed, and continues to endorse, Christianity.

23. Defendant's invocation practice further coercively exposes Plaintiff and others to unwanted sectarian exercises and messages as a condition of attending meetings of their local governmental body.

24. Unless restrained by this Court, Defendant will continue to subject Plaintiff and others to this unconstitutional custom, policy, and practice, causing irreparable harm by denying Plaintiff's fundamental constitutional right to be free from governmental promotion of sectarian legislative prayer practice and governmental coercion of sectarian practices at meetings of legislative bodies.

PRAYER FOR RELIEF

WHEREFORE, Monk requests that this Court:

- a. Declare that the defendants' conduct violated the First Amendment.
- b. Award injunctive relief prohibiting defendants from further violations.
- c. Award nominal damages of \$1 to vindicate Monk's First Amendment rights.
- d. Award Monk attorney's fees under 42 U.S.C. § 1988.

- e. Award any other relief that the Court deems just and proper.

Respectfully submitted,

Arlo Moncrieffe

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Attorney for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES**

Felix Monk

Plaintiff

v.

Council of the Town of Wendell

Defendant

Docket No. CV17-105

JOINT STIPULATION OF FACTS

Plaintiff and Defendant (the Parties) jointly stipulate that the following facts are true and undisputed.

1. The Complaint in this case, challenging the constitutionality of Defendant's practice of opening legislative sessions with a prayer, was timely filed on February 7, 2017.
2. On May 4, 2017, the Council of the Town of Wendell deliberated over the benefits and drawbacks of opening legislative sessions with prayers. Members of the public were invited to provide comments, and more than a dozen members of the public spoke either in support of or against the practice. Members of the Council likewise offered their opinions. The discussion was civil and productive.
3. On May 15, 2017, the Council did not open its regular meeting with a prayer. Instead, Council chair Ralph Williams gave the following invocation:

Hi all. We are gathered here to do the work of the town, and to lift up our fellow men and women. It's so great to have you all here, participating in our public process. We will all work to do our very best for you, to live up to the trust you have placed in us as public officials. For those who pray, we ask that you pray for us, that we might govern fairly and wisely. For those who don't, we hope for your support and your good will, too.

4. At that same meeting, the Council enacted, by a vote of 6-1, a resolution, enclosed as Exhibit 1. In effect, the resolution announces the Council's intent to replace Christian prayer at legislative sessions with more general, non-sectarian expressions of good will.

5. The resolution did not admit, and in fact denied, that the previous practice had been unconstitutional or otherwise improper. The Council continues to believe that its prior practice did not violate the Constitution.

6. Nevertheless, for the purpose of promoting religious inclusion and facilitating peace and harmony in the Town of Wendell, the Council enacted the resolution and has no plans to modify it.

7. Since the resolution was enacted in May, no member of the Council has initiated any meeting with a Christian prayer. Instead, all meetings have begun with non-sectarian statements of purpose and good will. All Council members have delivered invocations that comply with the resolution.

8. Neither this lawsuit nor any other pending litigation allege that any of the invocations since the resolution was enacted violate the Constitution.

Respectfully submitted,

Arlo Moncrieffe

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Attorney for Plaintiff

Anastasia Wilson

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Wilson & Simpson, P.C.
23 Broad St.
Town of Wendell, Ames

Attorney for Defendant

September 1, 2017

EXHIBIT 1

Town of Wendell Ordinance 17-37

WHEREAS, it has been a practice in the Town of Wendell since 2013 to open meetings of the Town Council with an invocation including a positive message of good will;

WHEREAS, the Council members have often chosen to profess their faith during these invocations;

WHEREAS, some residents of the Town have voiced a concern that sectarian prayers during legislative sessions are not as inclusive as alternative approaches; and

WHEREAS, the Council does not believe that sectarian prayers are in any way unlawful or improper, but nevertheless strives to promote religious inclusion and to accommodate diverse perspectives;

BE IT THEREFORE ORDAINED that from this day forward, Council meetings shall open with an invocation consisting of a non-sectarian statement of purpose and good will.

For the avoidance of doubt, mentions of religion or of faith included in such generally non-sectarian statements shall not be prohibited, and there shall be no penalty or sanction for such mentions.

ADOPTED May 15, 2017 by a majority vote of the Council of the Town of Wendell.

IN FAVOR: Ralph Williams, Reina Ames, Charles Gansford, Martin Holmes, Lucia Puccini, and Laura Tsasz.

AGAINST: Mary King