



# **Court Report**

## **November 2022**

### **Eleventh Circuit**

- **First Amendment - Prayer**

***Gundy v. City of Jacksonville, Fla.*, 50 F.4th 60 (11<sup>th</sup> Cir. Sept. 30, 2022)**

**Editor's Note: While this case involved a city council, it may be instructive to local boards of education who still permit prayer before school board meetings.**

This case involved a pastor who was invited to pray before the city council meeting. The council adopted a policy allowing invocations by selected speakers "for the blessing and benefit of the Council". Each council member could invite a speaker from a church in the area. The prayers could not proselytize, advance or disparage a particular faith. A council member who was running for mayor invited a pastor who was also a campaign supporter to give the invocation the week before the election. During the course of his invocation, he criticized various local public officials. The council president reminded him that he was to make a "spiritual prayer" but the pastor continued with his political remarks. The council president turned off the pastor's microphone. The next day, the council president took to Twitter to criticize his fellow council member and the pastor for politicizing the invocation.

The pastor sued the city and the council president in his individual capacity for violating his First Amendment rights of religious expression and free speech--specifically, turning off his microphone, his statement on Twitter and

his decision to change the council’s prayer procedures in the days after the incident. The City Defendants argued that the pastor’s speech was “government speech” made for the council’s benefit and was not protected by the First Amendment. The trial court ultimately granted summary judgment in favor of the City Defendants. The pastor appealed to the Eleventh Circuit.

On appeal, the Court first examined whether the invocation was private speech or government speech. While private speech is protected by the First Amendment, government speech is not. The government—here, the council—had the right to speak for itself, choose people to speak on its behalf or stop such speech if it disapproved. To determine whether speech is government speech, the Court looked to three factors: history, endorsement and control.

As to history, the Court examined whether the speech has traditionally been used to communicate messages on behalf of the government. Here, the invocation was for the “benefit and blessing of the Council” and the speakers were specifically invited by the council members. As to endorsement, the Court asked whether the type of speech is often associated with the government in the public’s mind. Here, the Court found that it was because the speech happened at the council meeting and the council members chose the speakers. Finally, as to control, while the council did not assume editorial control over the pastor’s remarks, it did exert control by choosing the speaker. The Court held that each of these factors demonstrated that the invocation was government speech not protected by the First Amendment. Accordingly, the Court ruled in favor of the City Defendants.

## **Attorney General’s Opinions**

- **Competitive Bids - Interagency Agreements**

### **A.G. Op. 2022-043 (Aug. 9, 2022)**

A county board wanted to enter into an agreement with the county commission to pave school parking lots and assist with other projects. Under the proposal, the commission would purchase required equipment and materials through a bid process but provide those purchases as well as necessary labor to the board at cost. The board asked whether such an arrangement would be subject to competitive bidding.

State law gives county boards broad authority to maintain its property and to enter into cooperative agreements with the county commissions. *Ala. Code*

§16-8-12.1. Likewise, county commissions have broad authority to use resources to benefit county schools. *Ala. Code* §11-3-11(a)(21). In a past opinion, the Attorney General determined that a county commission could allow a city to use county labor and equipment to resurface city streets without competitive bidding. Such an exemption would encourage government cooperation, but also, government officials were not likely to be motivated by greed in such matters.

- **Political Activities**

**A.G. Op. 2022-040 (Aug. 4, 2022)**

*Ala. Code* §17-17-5 and *Ala. Code* §36-12-61 restrict the use of public property for political activities. A county commission asked whether state law would prohibit use of its property by political candidates for forums or meetings. The Attorney General decided that state law did not prohibit candidates, including county commissioners, from using county facilities as long as the facilities were open to all candidates equally. While common areas could be used for such purposes, private spaces such as individual offices not open, to the general public could not.

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