

# ACLU of Virginia

530 East Main Street, Suite 310 Richmond, Virginia 23219 (804) 644-8022

August 5, 2009

## Via E-mail and Regular Mail

City Council of Chesapeake, Virginia  
City Clerk's Office  
City Hall Building  
306 Cedar Road, 6th Floor  
Chesapeake, VA 23322  
council@cityofchesapeake.net

Re: Prayer at City Council Meetings

Dear City Council Members:

I understand that you have received conflicting advice from advocacy organizations regarding the permissible content of opening prayers at City Council meetings. In our view, the law is clear: The Constitution requires that City Council prayers be nonsectarian; i.e., they must not belong to any particular religion. I write to correct two erroneous contentions set forth in the August 4, 2009 letter to you from the Alliance Defense Fund (ADF) and the Family Foundation: First, that sectarian legislative prayers are constitutionally permissible, and second, that a policy prohibiting sectarian legislative prayers would be unconstitutional.

### **1. City Council Prayers Must be Nonsectarian**

Obviously, when people pray as individuals, they may do so in any fashion they choose; government may not censor individual prayers. But opening prayers at City Council meetings are *not* expressions of individual religious belief; they are official governmental speech. *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 355 (4<sup>th</sup> Cir. 2008); *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 279 (4<sup>th</sup> Cir. 2005). And when the government speaks, it cannot play favorites among religions: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

This basic principle – that government may not prefer one religious faith over another – holds true in the case of legislative prayer. In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court upheld the practice of opening legislative meetings with prayer, but cautioned that the government must not "exploit" the prayer opportunity to "advance any one, or . . . disparage any other, faith or belief." 463 U.S. at 794-95. In a later case, the Court further explained that "'not even 'the unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.'" *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989). "The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" *Id.* at 603.

If this were not clear enough, the Fourth Circuit has expressly held that a town council's practice of opening meetings with explicitly Christian prayers violated the First Amendment. *Wynne v. Town Council of Great Falls*, 376 F.3d 292 (4<sup>th</sup> Cir. 2004). The ADF letter suggests that this holding applies only in

situations, like that in Great Falls, where citizens are publicly exhorted to participate in a sectarian prayer. But such a narrow reading is foreclosed by the plain language of the opinion:

The invocations at issue, which specifically call upon Jesus Christ, are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather, they embody the precise kind of “advancement” of one particular religion that *Marsh* cautioned against.

*Id.* at 301-02. The court explained that “[w]hereas the prayers approved of in *Marsh* had been “nonsectarian” and “civil,” the prayers at issue in *Wynne* “contained references to ‘Jesus Christ,’ and thus promoted one religion over all others, dividing the Town’s citizens along denominational lines.” *Id.* at 298-99.

To comply with the Constitution, opening prayers at City Council meetings must not prefer one religion over another. Recent prayers referring to “the compassion of Christ” and “the Father, the Son and the blessed Holy Spirit” do not comply with this requirement. City Council must take steps to ensure that official government speech is nonsectarian.

## **2. A Policy Requiring Prayers to be Nonsectarian is Constitutional.**

The ADF letter states that “a policy which mandates only ‘nonsectarian’ prayer would itself likely be unconstitutional.” This is demonstrably false, for it was just such a policy that was upheld in *Turner v. City Council of City of Fredericksburg*.

In *Turner*, city council members offered opening prayers on a rotating basis. When the council adopted a policy requiring that all such prayers be nondenominational, Councilman Hashmel Turner sued, arguing that the policy violated his free speech rights. The Fourth Circuit rejected this argument. Because the prayers were official, governmental speech, rather than the individual, private speech of Councilman Turner, the council was within its rights to impose such a requirement.

The same is true if members of the community, rather than council members, deliver the prayers. In *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 288 (4<sup>th</sup> Cir. 2005), the court held that legislative prayers offered on a rotating basis by local clergy constituted government speech. The court noted with approval that the policy specifically required that invocations “be non-sectarian.” *Id.* at 278.

The Constitution requires that legislative prayers be nonsectarian. A policy that includes this requirement is not unconstitutional.

In one respect, the ACLU of Virginia agrees with the ADF letter: It is far from desirable for government officials to delve into the sensitive sphere of religious doctrine through the delicate parsing of prayers. However, this is the inevitable result when government thrusts itself into the religion business. The most straightforward solution to this conundrum is simply not to have official, government prayers. Let private citizens pray as they wish. Let the government stay out of it.

Sincerely,

Rebecca K. Glenberg  
Legal Director

cc: Ronald S. Hallman, City Attorney (rhallman@cityofchesapeake.net)