

# ACLU of Virginia

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## Memo

TO: House Committee on Militia, Police and Public Safety  
FROM: Hope R. Amezquita, Legislative Counsel; Kent Willis, Executive Director  
DATE: January 28, 2010

**RE: Opposition to HB 9 (Carrico), State Police Volunteer Chaplaincy  
Program Permitting Government-Sanctioned Sectarian Prayers**

HB 9 allows the Superintendent of State Police to establish a volunteer chaplaincy program authorizing employees to, among other activities, provide “invocations and benedictions at Department sanctioned events and ceremonies.” This bill also prevents the Superintendent from regulating the religious content of prayers offered by volunteer chaplains during their official duties.

The ACLU asks you to vote against HB 9 because it authorizes state officials to offer unconstitutional sectarian prayers at government events, and it creates a chaplaincy program not clearly supported by the law.

***HB 9 Permits Unconstitutional Sectarian Prayers at Government-Sanctioned Events***

By preventing the Superintendent of State Police from regulating the content of prayers offered by chaplains, HB 9 allows government officials to offer sectarian prayers at government-sanctioned events. To the extent that any official government prayer is constitutional, it must always be nonsectarian.

***Legal notes:*** See *Marsh v. Chambers*, 464 U.S. 783, 794-5 (1983) (“The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief”); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (“Indeed, in *Marsh* itself, the Court recognized 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. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had ‘removed all references to Christ’”); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir., 2004) (“Here, the Town Council insisted upon invoking the name ‘Jesus Christ,’ to the exclusion of deities associated with any other particular religious faith, at Town Council meetings in public prayers in which the Town's citizens participated. Thus, the Town Council clearly “advance[d]” one faith, Christianity, in preference to others, in a manner decidedly inconsistent with *Marsh*.”)

## ***HB 9 Establishes an Official Government Chaplaincy Program in Circumstances Not Supported by Law***

Although government chaplaincy programs inherently violate the Establishment Clause, courts have permitted such programs in special circumstances -- such as the military and prisons -- where the individuals being served have no access to religious services unless the government provides them. This exception, however, may not apply to persons attending State Police "events and ceremonies," as these individuals have access to private sector religious programs.

***Legal notes:*** See *Montano v. Hedgepeth*, 120 F.3d 844 (8th Cir. 1997) ("Indeed, states might commit a technical violation of the Establishment Clause by even hiring prison chaplains. Nonetheless, this is condoned as a permissible accommodation for persons whose free exercise rights would otherwise suffer"); *Katcoff v. Marsh*, 755 F.2d 223 (2nd Cir., 1985) (Upholding Army chaplaincy program because the Free Exercise Clause "obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them," but remanding for consideration of chaplaincy program of large urban areas where religious leaders are readily available: "If the ability of such personnel to worship in their own communities is not inhibited by their military service . . . , the justification for a governmental program of religious support for them is questionable and . . . requires a showing that they are relevant to and reasonably necessary for the conduct of our national defense by the Army.")

## ***Disclaimer Requirements Do Not Render HB 9 Constitutional***

HB 9 requires that written programs distributed at Department-sanctioned events include disclaimers that prayers offered at such events are not endorsed by the Department. This requirement does not make HB 9 constitutional. The mere declaration that a prayer is not endorsed by the government does not change the fact that it is being offered by a government official as a formal part of the program at a government-sanctioned event. Furthermore, HB 9 does not require a disclaimer when there is no written program, thus allowing sectarian prayers without a disclaimer at some, if not most, Department-sanctioned events.

## ***Optional Attendance Does Overcome Constitutional Deficiencies***

The provision of HB 9 allowing Department employees to be absent from Department-sanctioned events where a prayer is offered punishes individuals who choose not to attend because of their religious beliefs.

## ***ACLU of Virginia is Prepared to Mount Legal Challenge if HB 9 Passes and Leads to Unconstitutional Prayers***

HB 9 attempts to codify a practice that directly conflicts with established constitutional law requiring prayers at government-sanctioned events, when allowed, to be nonsectarian. In fact, a North Carolina U.S. District Court reaffirmed this principle on January 28, 2010 stating that the legislative body has two options---either do not open meetings with prayer or open meetings with non-sectarian prayers (*see Joyner v. Forsyth County, North Carolina Case No. 1:07 cv 00243, 01/28/10*). The ACLU of Virginia is prepared to file a lawsuit challenging any impermissible sectarian prayer offered as a result of this bill should it become law.