IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

HASHMEL C. TURNER, JR.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil No. 3:06-cv-00023-JRS
CITY COUNCIL OF THE CITY OF FREDERICKSBURG,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC. AND
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Amici, by counsel, respectfully submit this Memorandum in support of the defendants' Motion for Summary Judgment.

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Virginia ("ACLU of Virginia"), is the Virginia affiliate of the American Civil Liberties Union, and has approximately 9,000 members in the Commonwealth of Virginia. Its mission is to protect the individual rights of Virginians under the federal and state constitutions and civil rights statutes. Since its founding, the ACLU of Virginia has been a forceful opponent of religious discrimination and state-sponsored sectarianism.

Americans United for Separation of Church and State is a national, nonsectarian public interest organization based in Washington, D.C., that is committed to preserving the constitutional principles of religious freedom and separation of church and state.

Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by the U.S. Supreme Court and by the U.S. Courts of Appeal. Americans United has more than 75,000 members nationwide, including many within the jurisdiction of this Court.

STATEMENT OF FACTS

It is the longstanding practice of the City Council for the City of Fredericksburg to open its official meetings with a brief prayer. The opportunity to offer this opening prayer is afforded to Council members on a rotating basis. In past years, Council members respected Fredericksburg's religious diversity by delivering nonsectarian prayer. However, since joining the Council in July of 2002, plaintiff Hashmel Turner has insisted upon praying in the name of Jesus Christ.

In July 2003, *Amicus* American Civil Liberties Union of Virginia contacted the City Council and asked that Councilman Turner refrain using the official prayer opportunity to deliver explicitly Christian prayers. In response, Turner voluntarily removed his name from the prayer rotation. However, in October 2003, Turner was placed back on the rotation and began once again to deliver opening prayers in the name of Jesus Christ. On July 26, 2004, the ACLU of Virginia contacted the City Council once more, drawing the Council's attention to the recently decided case of *Wynne v. Town Council of Great Falls*, 376 F.3d 292 (4th Cir. 2004). The ACLU requested that, in light of this decision, Councilman Turner refrain from invoking Jesus Christ as part of the official prayers with which the Council opened its meetings. This letter prompted a council meeting at which Turner was convinced by his peers "to refrain from offering

prayer at the council meetings until the issue could be studied further by the City Attorney." Complaint ¶ 25.

The City Attorney drafted a memorandum on "whether Council members may offer a prayer to Jesus Christ during the official prayer with which they begin Council meetings." She concluded that Council members may "offer a non-denominational prayer, seeking God's blessing on the governing body and His assistance in conducting the work on the City," but explained that "there is no clear legal authority to permit a denominational prayer—one invoking Jesus Christ, for example—as part of the official meeting."

On November 8, 2005, the Council voted 5-1 (with Turner abstaining) to adopt a nondenominational prayer policy. Following this decision, Councilman Turner brought suit in the District Court for the Eastern District of Virginia to enjoin the Mayor and the City Council from enforcing the prayer policy. He alleges that the policy contravenes the Establishment Clause, "violates [his] fundamental right to free speech, infringes [his] religious beliefs and unduly burdens his exercise of those beliefs, and denies [him] the equal protection of the law."

SUMMARY OF ARGUMENT

Councilman Turner may not deliver a sectarian prayer at the opening of official City Council meetings without violating the Establishment Clause of the First Amendment. While the Establishment Clause generally permits a legislative body to invoke divine guidance before engaging in its public business, it prohibits the "exploitation" of a legislative prayer opportunity "to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983).

Sectarian legislative prayers that invoke Jesus Christ fall squarely within this prohibition because they necessarily "advance" the Christian faith. *Wynne v. Town Council of Great Falls*, 376 F.3d 292, 301-02 (4th Cir. 2004).

The Supreme Court has held that there is "a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. v. Mergens*, 296 U.S. 226, 250 (1990) (emphasis in original)). Legislative prayer constitutes "government speech" that is subject only to the proscriptions of the Establishment Clause. *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005). Because it regulates only government speech, not private speech, the prayer policy adopted by the City Council does not and cannot violate Councilman Turner's rights to free speech, free exercise of religion, or equal protection under the First and Fourteenth Amendments.

ARGUMENT

I. COUNCILMAN TURNER MAY NOT DELIVER SECTARIAN PRAYER AT THE OPENING OF OFFICIAL CITY COUNCIL MEETINGS WITHOUT VIOLATING THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

"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 principal of denominational neutrality reflects "one of the major concerns that prompted adoption of the Religion Clauses." *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2742 (2005). That is, "[t]he Framers and the citizens of their time intended not only to protect the integrity of individual conscience in

religious matters, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate." *Id.* (citation omitted). Moreover, when government endorses one religion over another, it diminishes the free exercise of religion:

> Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship.

Id. at 2747 (O'Connor, J., concurring). This fundamental Establishment Clause principle—that government may not express a preference for one religion over another—is not diminished in the context of legislative prayer.

In *Marsh v. Chambers* the Supreme Court held that the Establishment Clause permits a legislative body to invoke divine guidance before engaging in its public business. 463 U.S. at 792. Eschewing its usual Establishment Clause tests, the Court in *Marsh* instead focused on the "unique history" of legislative prayer in the United States, noting that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786. It found that "the practice of opening legislative sessions with prayer has become part of the fabric of our society" and therefore concluded that "[to] invoke Divine guidance on a public body entrusted with making the laws is not, *in these circumstances*, an 'establishment' of religion; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792 (emphasis added).

But while the Court upheld the prayers at issue in *Marsh*, it cautioned that the Establishment Clause does not permit a legislative body to "exploit" the prayer

opportunity to "advance any one, or…disparage any other, faith or belief." *Id.* at 794-95. The Court has since elaborated on this prohibition, stating 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). Prayers that affiliate the government with a specific religious faith violate the "'clearest command of the Establishment Clause…that one religious denomination cannot be officially preferred over another.'" *Id.* at 605 (quoting *Larson*, 456 U.S. at 244).

Sectarian legislative prayers necessarily have the effect of affiliating the government with Christianity and thereby advancing the Christian faith. According to the Supreme Court's own interpretation of *Marsh*, sectarian prayers are squarely prohibited by the Establishment Clause. The *Allegheny* Court explained that, while the Establishment Clause prohibits legislative prayers that affiliate the government with a specific faith or belief, "[t]he legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" *Allegheny*, 492 U.S. at 603 (quoting *Marsh*, 463 U.S. at 793 n.14). In other words, what saved the prayers in *Marsh* was not their long history alone, but that history combined with the fact that the prayers were "nonsectarian" and therefore avoided conveying "a message of endorsement of particular religious beliefs." *Id.* at 630-31 (O'Connor, J., concurring).

Accordingly, the Fourth Circuit has straightforwardly held that sectarian legislative prayers are unconstitutional. *Wynne v. Town Council of Great Falls*, 376 F.3d 292 (4th Cir. 2004). At issue in *Wynne* was a town council's practice of opening its

monthly meetings with an explicitly Christian prayer. *Wynne*, 376 F.3d at 294. The court held that such a practice violated the Establishment Clause, stressing that, because of their sectarian character, the challenged prayers stood "in sharp contrast to the prayer held not to constitute an 'establishment of religion' in *Marsh*." *Id.* at 298.

> 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 301-302. Whereas 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.

The holding in *Wynne*—that the Establishment Clause prohibits sectarian legislative prayers—was recently reaffirmed by the Fourth Circuit in *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005). In upholding the prayer policy at issue in *Simpson*, the court noted with approval that the policy specifically required that invocations "be non-sectarian with elements of the American civil religion and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief." *Id.* at 278. The court reasoned that such restraints "ensure that the prayers do not 'proselytize or advance any one, or [] disparage any other faith or belief,' and therefore are constitutionally sound." *Id.* at 284 (quoting *Marsh*, 463 U.S. at 794-95).

Just last year, the District Court for the Southern District of Indiana held that the Indiana General Assembly violated the Establishment Clause by opening its sessions with sectarian Christian prayer. *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (2005). In denying

a motion to stay the district court's judgment, the Seventh Circuit explained that "the Supreme Court itself has read *Marsh* as precluding sectarian prayer." *Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006). In addition to *Wynne* and *Simpson*, the Seventh Circuit cited several other federal and state court decisions supporting the principle that sectarian legislative prayer is unconstitutional. *Id.* at 400-01 (citing *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 Fed. App'x 355 (9th Cir. 2002) (unpublished order); *Snyder v. Murray City Corp.*, 129 F.3d 1227 (10th Cir. 1998); *Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867 (Cal. Dist. Ct. App. 2002); *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993)); *accord Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 371, 385 (6th Cir. 1999) (holding unconstitutional school board's practice of opening meetings with "clearly sectarian" prayers that had "repeated references to Jesus and the Bible").

The City Council for the City of Fredericksburg has chosen to open its meetings with prayer. Councilman Turner, when he delivers this official prayer, is speaking on behalf of the government. If permitted to pray in the name of Jesus Christ, Councilman Turner would affiliate the government with Christianity, thereby "advancing" or "endorsing" the Christian faith. This is exactly what the Establishment Clause, as interpreted in *Marsh*, *Allegheny*, *Wynne*, *Simpson*, and *Hinrichs*, forbids. As *Wynne*, *Hinrichs*, *Bacus*, *Rubin*, and *Coles* make clear, legislative prayers in the name of Jesus Christ are sectarian and therefore unconstitutional.

This is not to say that Councilman Turner may never refer to Jesus Christ in the context of his position as a member of the City Council. For example, there would be no Establishment Clause violation if, during the course of deliberations over a proposed

ordinance, Turner were to say, "Based on the teachings of Jesus Christ, I am compelled to vote against this measure." And the Establishment Clause would not prohibit Turner from leading a group of his fellow Council members in a voluntary, private, and unofficial Christian prayer before an official Council meeting. But the Establishment Clause certainly does not allow Turner to deliver an explicitly Christian prayer as part of an official government-sanctioned prayer opportunity.

Marsh v. Chambers treated nonsectarian prayers as "simply a tolerable acknowledgment of beliefs *widely held* among the people of this country." 463 U.S. at 793 (emphasis added). According to the Fourth Circuit, such prayers "embod[y] the principle that religious expression can promote common bonds through solemnizing rituals, without producing the divisiveness the Establishment Clause seeks rightly to avoid." *Simpson*, 404 F.3d at 276. Rather than promoting common bonds, explicitly Christian legislative prayers like the ones at issue here tend to divide the community along religious lines. *Wynne*, 376 F.3d at 298-99. In doing so, such prayers "run[] counter to the credo of American pluralism and discourage[] the diverse views on which our democracy depends." *Simpson*, 404 F.3d at 283.

II. THE CITY COUNCIL'S PROHIBITION AGAINST SECTARIAN PRAYERS DOES NOT VIOLATE COUNCILMAN TURNER'S RIGHTS UNDER THE FIRST OR FOURTEENTH AMENDMENTS.

Councilman Turner claims that, by adopting a nonsectarian, nondenominational prayer policy, "the Defendants have violated [his] constitutional rights under the Establishment Clause of the First Amendment of the United States Constitution (as applied under the Fourteenth Amendment)." Complaint ¶ 65. This argument is directly in conflict with the holdings of *Wynne* and *Simpson*, in which, as explained above, the

Fourth Circuit expressly stated that the Establishment Clause *requires* official legislative prayer to be nonsectarian.

Moreover, Councilman Turner's argument—that a nonsectarian prayer policy violates the Establishment Clause—was explicitly rejected by the U.S. Court of Appeals for the Tenth Circuit in *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998). The court in *Snyder* held that the Establishment Clause is not violated "when a legislative body or its agent chooses to reject a government-sanctioned speaker because the tendered prayer falls outside the long-accepted genre of legislative prayer." *Id.* at 1234. The court reasoned:

> The genre approved in *Marsh* is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose. That genre, although often taking the form of invocations that reflect the Judeo-Christian ethic, typically involves nonsectarian requests for wisdom and solemnity, as well as calls for divine blessing on a work of the legislative body. When a legislative body prevents its agents from reciting a prayer that falls outside this genre, the legislators are merely enforcing the principle in *Marsh* that a legislative prayer is constitutional if it is "simply a tolerable acknowledgment of beliefs widely held among the people of this country."

Id. (quoting *Marsh*, 463 U.S. at 792). Because the plaintiff's proposed prayer fell "outside the genre of invocational legislative prayer authorized by *Marsh*," the court held that "there was nothing improper about excluding it from the time properly set aside for legislative prayer." *Id.* at 1236.

Like the plaintiff's proposed prayer in *Snyder*, Turner's sectarian prayers "fall[] outside the long-accepted genre of legislative prayer authorized by *Marsh*." *Id.* For the reasons explained above, Turner's sectarian legislative prayers necessarily advance a specific religious faith—Christianity. Thus, in prohibiting such prayers, the City Council is "merely enforcing the principle in *Marsh*" that legislative prayers cannot proselytize or

advance a specific faith or belief. "A deliberative body has a right to take steps to avoid the kind of government prayer that would fun afoul of *Marsh* and the Establishment Clause." *Id.* at 1235. This is exactly what the City Council of Fredericksburg has done.

Turner also argues that the City Council's prayer policy violates his rights to free speech, free exercise of religion, and equal protection. But there is "a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. v. Mergens*, 296 U.S. 244, 250 (1990) (emphasis in original)). The legislative prayer at which the City Council's prayer policy is directed constitutes "government speech" that is subject only to the proscriptions of the Establishment Clause. *Simpson*, 404 F.3d at 288.

Like Councilman Turner, the plaintiff in *Simpson* alleged that, by denying her request to deliver the opening prayer at a meeting of the Board of Supervisors, the County of Chesterfield had violated not only the Establishment Clause, but also "the Free Exercise and Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 287-88. But because the court concluded that legislative prayer is "government speech," not private speech, the court went no further than determining whether the County had violated the Establishment Clause. *Id.* at 288. Since the court determined that the County had not violated the Establishment Clause in excluding the plaintiff from its list of persons permitted to deliver prayers, the court held that "the standards for challenges to government speech…require that

Simpson's other claims must be rejected." *Id.* The *Simpson* decision compels the same conclusion here.

Indeed, the speech regulated by the City Council's prayer policy is even more clearly "government speech" than the speech at issue in *Simpson*. Whereas the plaintiff in *Simpson* was an ordinary citizen, Councilman Turner is a government official. Moreover, as in *Simpson*, there is no indication that the City Council, by providing an opportunity for prayer, "intended for the exchange of views or other public discourse [or]…for the exercise of one's own religion." *Id.* In any event, even if Turner does have some free speech, free exercise, or equal protection rights in this case, the City Council's need to comply with the Establishment Clause by prohibiting sectarian prayers is a compelling governmental interest that would justify the burden (if any) placed on any First or Fourteenth Amendment rights Turner might have in this context. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) (Scalia, J., writing for a four-Justice plurality); *id*. at 783 (O'Connor, J., concurring).

Councilman Turner also argues that the City Council's actions have violated his rights under certain provisions of the Virginia Constitution (Art. I, Sections 1, 2, 11, 12, and 16) and Title 57, Sections 1 & 2 of the Code of Virginia. It is not necessary for the Court to analyze these provisions, however, since allowing Councilman Turner to present his sectarian prayers would violate the federal Establishment Clause. Under the Supremacy Clause of the U.S. Constitution (Art. VI), the federal Establishment Clause overrides any state constitutional or statutory provisions that may be in conflict with it.

CONCLUSION

For the forgoing reasons, *amici curiae* respectfully urge the Court to grant the defendants' request for summary judgment.

Respectfully submitted,

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Rebecca K. Glenberg (VSB No. 44099)
American Civil Liberties Union of
Virginia Foundation, Inc.
6 North 6th Street, Suite 400
Richmond, Virginia 23219
(804) 644-8080
(804) 649-2733 (FAX)

Ayesha N. Khan
Richard B. Katskee
Alex J. Luchenitser
Americans United for Separation
of Church & State
518 C Street, N.E.
Washington, DC 20002
Tel: (202) 466-3234
Fax: (202) 466-2587

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2006, I mailed a copy of the foregoing document by United States mail, postage pre-paid, to the following:

Richard Johan Conrod, Jr.
Kaufman & Canoles PC
150 W Main St
PO Box 3037
Norfolk, VA 23510

James Jeffrey Knicely
Knicely & Associates
487 McLaws Circle
PO Box GK
Williamsburg, VA 23187

Maya Miriam Eckstein
Thomas Kennerly Johnstone, IV
Terence James Rasmussen
Robert Martin Rolfe
Hunton & Williams LLP
951 E Byrd St
Riverfront Plaza
Richmond, VA 23219

Elliot M. Mincberg
Judith Ellen Schaeffer
People For The AmericanWay
2000 M Street N W
Ste 400
Washington, DC 20036

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