Record No. 06-1944

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HASHMEL C. TURNER,

Plaintiff-Appellant,

v.

THE CITY COUNCIL OF THE CITY OF FREDERICKSBURG, VIRGINIA and THOMAS J. TOMZAC, in his official capacity as Mayor of the City of Fredericksburg, Virginia,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC. IN SUPPORT OF THE APPELLEES

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INTEREST OF *AMICUS 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, and an equally forceful advocate of the freedom of speech. The ACLU of Virginia also has a particular interest in the present case because it advocated for the adoption of the Fredericksburg City Council policy at issue.

All parties have consented to the filing of this Brief *Amicus Curiae.*

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, which is delivered by 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 to pray to Jesus Christ. 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 again contacted the City Council, drawing its attention to the recently decided case of *Wynne v. Town Council of Great Falls*, 376 F.3d 292 (4th Cir. 2004), which held that legislative prayers must be nonsectarian. 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.

The City Attorney drafted a memorandum on "the issue of 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 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 non-denominational 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 claims a free speech right in official government prayers, delivered – along with the Pledge of Allegiance – by City Council members to officially open City Council meetings. The Fredericksburg City Council prayers are quintessential government speech. Councilman Turner has no First Amendment right to use those prayers to express his personal sectarian religious beliefs, and to do so would violate the Establishment Clause.

ARGUMENT

I. THE USE OF SECTARIAN PRAYER TO OPEN OFFICIAL CITY COUNCIL MEETINGS VIOLATES THE ESTABLISHMENT CLAUSE.

"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. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (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, government endorsement of one religion over another 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. (O'Connor, J., concurring).

This fundamental Establishment Clause principal – 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*, 463 U.S. 783 (1983), 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 the Court's usual Establishment Clause tests, *Marsh* 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).

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. As the Court has since explained, "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). Such prayers would 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.) The 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 only their long history, but also the fact that they were "nonsectarian" and therefore avoided conveying "a message of endorsement of particular religious beliefs." *Id.* at 630-31 (O'Connor, J., concurring).

Consistent with *Marsh* and *Allegheny*, this Court and others have uniformly held that sectarian legislative prayers are unconstitutional. In *Wynne v. Town Council of Great Falls*, 376 F.3d 292 (4th Cir. 2004), this Court held that a town council's practice of opening its monthly meetings with an explicitly Christian prayer violated the Establishment Clause. The Court stressed 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.

Turner unsuccessfully attempts to distinguish *Wynne* on the ground that in that case, the Council prayers "frequently" invoked Jesus Christ, in contrast to "isolated" references to Christ at Fredericksburg meetings. Appellant's Br. at 41-42. This is not a relevant distinction. First, *Wynne* nowhere indicates that its holding is based on the frequency of sectarian prayers. Rather, it was based explicitly on *Allegheny*'s explanation that the Supreme Court "only upheld the prayer in Marsh against Establishment Clause challenge *because* the Marsh prayer did *not* violate this nonsectarian maxim-'because the particular chaplain had "removed all references to Christ."'" *Wynne*, 376 F.3d at 299 (quoting *Allegheny*, 492 U.S. at 603) (emphasis in *Wynne*).

Second, Turner's numeric distinction fails to explain where the constitutional line falls on the continuum from "isolated" to "frequent" sectarian prayers. It cannot be the case that the constitutionality of the City Council's prayer program depends on how many of seven members decide to make sectarian references when they deliver the prayer. Moreover, even if the sectarian references in Fredericksburg are relatively "few" (because only Councilman Turner insists upon praying in Christ's name), the

City Council can prevent "frequent" references to Christ only by having a policy that requires official City Council prayers to be nonsectarian.

Turner criticizes the district court for "parsing" the content of prayers without first finding that the prayers were exploited for the purposes of advancing religion. But as this Court explained in *Wynne*, "a recognition that the prayers often included an invocation to Jesus Christ does not constitute the 'parsing' referred to in Marsh." 376 F.3d at 298 n.4. Nor did it take any "parsing" for the district court to determine that Councilman Turner's prayers often referred to Jesus Christ; the entire basis of his complaint is that he wishes to do so.

In *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005), this Court reaffirmed that sectarian legislative prayers violate the Establishment Clause. In upholding the Chesterfield County prayer policy, 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." *Simpson*, 404 F.3d 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).

Other courts have reached the same conclusion. Just last year, a district court 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 noted 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. App. 2002); *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993)).

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 forbids.

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." The Establishment Clause would also not prohibit Turner from leading a group of his fellow Council members in a voluntary, private, and non-official Christian prayer prior to an official Council meeting. But the Establishment Clause certainly forbids Turner from delivering an official, government-sanctioned prayer that is explicitly sectarian.

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, and "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 ON SECTARIAN PRAYERS DOES NOT VIOLATE COUNCILMAN TURNER'S RIGHTS UNDER THE FIRST OR FOURTEENTH AMENDMENT.

Councilman Turner claims that, by adopting a non-sectarian prayer policy, the City Council has violated his First Amendment Rights. This argument is directly in conflict with *Wynne*'s holding that the Establishment Clause *requires* official legislative prayer to be nonsectarian. Even if sectarian prayers were not constitutionally prohibited, however, the City Council would be entitled to maintain a policy requiring nonsectarian prayers. Legislative prayers are government speech, and the City Council has a legitimate interest in preventing the kind of religious divisiveness that are engendered by official sectarian prayers.

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 (quoting *Bd. of Educ. v. Mergens*, 296 U.S. 244, 250 (1990) (emphasis in original)). This Court has held unequivocally that legislative prayer constitutes "government speech." *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 Board had violated her rights to freedom of speech, free exercise of religion, and equal protection. *Id.* at 287-88. The Court found, however, that "[t]he invocation is not intended for the exchange of views or other public discourse. Nor is it intended for the exercise of one's religion." *Id.* (quoting the district court opinion, *Simpson v. Chesterfield County Bd. of Supervisors*, 292 F.Supp.2d 805, 818 (E.D. Va. 2003)). Accordingly, the Court "agree[d] with the district court's determination that the speech in this case was government speech 'subject only to the proscriptions of the Establishment Clause.'" *Id.* (citation omitted).

In this case, it is even clearer that the City Council prayer is government speech. As in *Simpson*, there is no indication that the City Council intended the opening prayer to be used "for the exchange of views or other public discourse [or] . . . for the exercise of one's own religion." *Id.* But while the plaintiff in *Simpson* was an ordinary citizen, Councilman Turner is a government official. Moreover, were he *not* a government official, Turner would not even be *permitted* to deliver an opening prayer. The opening prayer is *solely* a governmental function.

Turner attempts to distinguish *Simpson* on the fallacious grounds that "[t]here, the plaintiff, a Wiccan, was not part of the 'particular class of speakers' invited to participate in the prayer forum." (Appellant's Br. at 20.) "Since Councilor Turner is a member of the class of speaker with access to the forum," the argument, goes, the City Council may not discriminate against his viewpoint. The argument fails for several reasons. First, it does not change the fact that legislative prayer is government speech, which need not represent every available viewpoint. *See Southworth v. Bd. of Regents of Univ. of Wisc.*, 529 U.S. 217, 234-35 (2000). Second, the very reason that Simpson was denied access to the "forum" of legislative prayer was her religious viewpoint – and this Court found that exclusion permissible. Third, a "forum" that is available only to seven members of City Council, for a brief moment of time, to mark the opening of a meeting, is not a "forum" at all; it is a platform for government speech.[1]

The City Council has a legitimate interest in taking steps to ensure that the opening prayer is not used to promote

[1] To understand the incongruity of Councilman Turner's claim that the prayers are private speech, one need look no further than the Pledge of Allegiance. The Pledge, along with the prayer, is used to mark the opening of the City Council meeting. Surely, Council is entitled to ensure that the person leading the Pledge adheres to its actual text, and not use the opportunity for personal reflections on the flag.

personal, potentially divisive, religious or political beliefs. In *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998), the Tenth Circuit 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. It reasoned that

> [t]he 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*, a sectarian prayer "falls outside the long-accepted genre of legislative prayer authorized by *Marsh*." *Id.* As explained above, sectarian legislative prayers necessarily advance a specific religious faith. 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.

* * *

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, *amicus curiae* respectfully urges the Court affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December 2006, I caused two copies of the foregoing document to be sent by United States mail, postage pre-paid, to the following:

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