



FREEDOM FROM RELIGION FOUNDATION

P.O. Box 750 • Madison WI 53701 • (608) 256-8900 • www.ffrf.org

May 21, 2009

The Honorable Larry D. Hansen
Mayor
Lodi City Council
PO Box 3006
Lodi CA 95240

COPY

Re: City Council Invocations

Dear Mayor Hansen:

I am writing on behalf of concerned Lodi residents and taxpayers and other California members of the Freedom From Religion Foundation (FFRF) to urge you to discontinue the practice of scheduling Lodi City Council meetings with prayers that unconstitutionally reference Christianity and invoke Jesus Christ. FFRF is a nationwide nonprofit organization, which works to protect the constitutional principle of separation of church and state. FFRF represents nearly 14,000 members across the country, including 2,183 members in California.

It is our information and understanding that the Lodi City Council (hereinafter "City" or "Council") includes a prayer or invocation as part of its monthly meetings. Our complainant informs us that it is the City's practice to invite local members of the clergy to deliver these prayers. The City Council Protocol Manual, adopted by the Council in March 2006 describes this practice. It specifically states, "Invocations are to be non-sectarian and non-denominational." See City Council Protocol Manual 6.3i p. 16.

Upon reviewing the prayers from 2007 through May 6, 2009, it is clear that these prayers are rarely, if ever, non-denominational. Please find enclosed a chart, which lists all meetings from 2007, 2008 and 2009, during which an invocation was given. Please note that in thirty-nine of the invocations given since 2007 the prayers invoked Jesus Christ. It is our further understanding that members of the public regularly attend Council meetings and have necessary business before the Council.

First and foremost, the prayers being offered before the Council's meetings do not fall into the narrow exception of constitutionally permissible government-sponsored prayer laid out by the Supreme Court. In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court ruled that the Nebraska legislature's history and tradition of opening with a prayer by a paid chaplain was constitutional. The exception found by the Court in this case was confined to a situation involving a

non-sectarian, non-denominational prayer, led by an officiant who had not been selected based upon any impermissible religious motive, and which was addressed to the body of legislators present and no one else. See *Marsh*, 463 U.S. 783. Additionally, the Court held that legislators must have the option not to participate. The prayer opportunity must not be “exploited to proselytize or advance any one, or to disparage any other, faith, or belief.” 463 U.S. at 794-95. The Court also noted that the content of the prayers was permissible because the chaplain has “removed all references to Christ.” *Id.* at 793 n.14.

Given that it appears this prayerful practice only began in 2006, there is absolutely no ‘unique history’ of legislative prayer in this case. However, even if the Council had an established history of opening its meetings with prayer, the practice still violates the Establishment Clause because of its continual references to Christ. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989), the Supreme Court found that, even if history and custom had saved non-sectarian legislative prayer, “history cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.” Additionally, the Court reiterated, “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.” *Id.* The Court continued, “The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had ‘removed all references to Christ.’ ” *Id.*

Lower federal courts, including the Ninth Circuit, which encompasses California, have continued to emphasize that some government-sponsored prayers are constitutionally permissible only because they are non-sectarian, non-denominational and do not invoke a particular faith or deity. See, e.g., *Bacus v. Palo Verde Unified School District*, 52 Fed.Appx. 355 (9th Cir. 2002)(unpublished)(“These prayers advanced one faith, Christianity, providing it with a special endorsed and privileged status in the school board. Some religions accept Jesus Christ as the Messiah, some do not, and some people do not believe in any religious faith. Solemnizing school board meetings ‘in the Name of Jesus’ displays ‘the government’s allegiance to a particular sect or creed.’ ”); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998)(“...the kind of legislative prayer that will run afoul of the Constitution is one that proselytizes particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine.”); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004)(holding that the Establishment Clause was violated when the town council opened sessions with prayer containing references to Jesus Christ); *Coles ex rel. Coles v. Cleveland Bd. Of Educ.*, 171 F.3d 369 (6th Cir. 1999)(striking down school board’s practice of opening meetings with prayer because the prayers contained repeated references to Jesus Christ and the Bible).

In *Wynne*, the court held that any sectarian invocations of deities in legislative prayer are demonstrative of affiliating the government with a particular sect or creed and/or advancing a particular faith or belief. See *Wynne v. Town of Great Falls*,

376 F.3d 292. Additionally, both the presence and participation of town citizens were crucial to the court's determination that the Town Council had attempted to advance the Christian faith. *See id.* at 301. Ultimately, the court concluded,

"Marsh does not permit legislators to ... engage, as part of public business and for the citizenry as a whole, in prayers that contain explicit references to a deity in whose divinity only those of one faith believe. The invocations at issue here, 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. (emphasis added).

Recently, the Supreme Court let stand another decision from the Fourth Circuit, which upheld a government policy requiring prayer before city council meetings to be non-denominational. In *Turner v. Fredericksburg*, 534 F.3d 352, 353 (4th Cir. 2008)(cert. denied, 2009 WL 56225 (U.S.)(No. 08-518), the Fourth Circuit held that prayers held at the city council meetings constituted government speech. Therefore, it was proper for the city council to prohibit sectarian prayers. *Id.* at 353. Justice O'Connor, writing for the court, stated, "[t]he restriction that prayers be nonsectarian in nature is designed to make the prayers accessible to the people who come from a variety of backgrounds, not to exclude or disparage a particular faith." *Id.* at 356.

The City Council of Lodi cannot, under current law and the Council's own policy, permit any prayers that contain references to an explicit deity. The prayers currently given during Council meetings impermissibly advance Christianity and lead a reasonable observer to believe that the Council is endorsing not only religion over nonreligion but also Christianity over other faiths. Even though the Council may be permitted to engage in invocations prior to its meetings, this opportunity does not provide "license to advance its own religious views in preference to all others..." *Wynne*, 376 F.3d 292. Furthermore, this practice inappropriately alienates non-Christians and non-believers. Their efforts to participate in public meetings are adversely affected by these types of prayers, which turn non-believers and non-Christians into political outsiders of their own community and government. The constitutional rights of citizens to participate in government meetings such as the Council's monthly meetings should not be predicated upon being subjected to Christian-based prayers.

We understand that you expressed your concerns about this practice in March 2006 during Council Debate on the display of "In God We Trust" in the Council Chamber. During that discussion you pointed out that the Council was in violation of court decisions concerning invocations at government meetings. We are pleased that you agree that the practice of allowing prayers that reference Jesus Christ violates the Establishment Clause of the First Amendment to the United States Constitution and is impermissible under City Council Protocol Section 6.3i. We urge you to discontinue this practice immediately and bring the Council back into compliance

with constitutional dictates. We respectfully request a written reply addressing the steps you are taking to remedy this constitutional violation.

Sincerely,

A handwritten signature in black ink, appearing to read 'RSK', written in a cursive style.

Rebecca S. Kratz
Staff Attorney

Enclosure