

FREEDOM FROM RELIGION *foundation*

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SENT VIA MAIL & EMAIL TO bos@roanokecountyva.gov

Mr. Richard C. Flora
Chairman, Roanoke County Board of Supervisors
5204 Bernard Dr.
Fourth Floor
Roanoke, VA 24018-0798

Re: Highly Flawed Prayer Policy

Dear Chairman Flora and County Supervisors:

I'm writing on behalf of the Freedom From Religion Foundation ("FFRF") and its membership to object to the Board of Supervisors' recently adopted prayer policy, which is highly unsatisfactory. As previously noted, FFRF is a national nonprofit organization with more than 19,000 members across the country including 500 in Virginia, and we've have received numerous complaints from local residents about the Board's prayer practices. The prayer policy adopted on November 13th does not remedy the problems we brought to your attention. We caution you that the implementation of the problematic policy will ultimately determine if the Board is still in violation of the Constitution. The best policy and wisest course of action is to end the religious rituals altogether.

We understand that the Board adopted a policy largely based on the policy that was instituted in an unconstitutional manner in Forsyth County, N.C. The Board's decision to adopt a policy that is supported by Christian legal groups in favor of sectarian prayer is simply bad governance. The policy is flawed and remains a liability for the Board. Especially unfortunate is the fact that the Board, during the course of debate and amendment of its new policy, took action that is an affront to all nonreligious U.S. citizens, exacerbating rather than curing the Establishment Clause violation we brought to your attention. You voted to exclude a reference in the policy draft permitting nonreligious citizens to participate in the invocations, an act which would have barred Virginia's most famous statesman, Thomas Jefferson, from opening your meetings. This is indefensible.

Sectarian Prayer

While the policy requires sending an invitation to clergy that includes wording from the *Joyner v. Forsyth* decision, it does not include a formal prohibition against sectarian prayers. In fact, the policy appears to expressly allow for sectarian prayers. The policy says:

No guidelines or limitations shall be issued regarding an invocation's content, except that the Board shall request by the language of this policy that invocations in the form of a prayer, when considered collectively, should avoid having

“sectarian references” become too frequent and no invocation should proselytize or advance any faith, or disparage the religious faith or non-religious views of others.

This allows an individual prayer officiant to offer a sectarian invocation. The policy only addresses prayers collectively, and it says that sectarian prayers are limited when they are “too frequent.” The letter to clergy quotes excerpts from the *Joyner* decision but does affirmatively prohibit sectarian prayers. This gives a green light to pastors to continue to deliver sectarian prayers, which the Fourth Circuit Court of Appeals has found to “advance” one faith or belief. The Board cannot wash its hands of invocations that are sectarian. As the court said in *Joyner*:

Take-all-comers policies that do not discourage sectarian prayer will inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein. This effect creates real burdens on citizens — particularly those who attend meetings only sporadically — for they will have to listen to someone professing religious beliefs that they do not themselves hold as a condition of attendance and participation. “To . . . Jewish, Muslim, Bahá’i, Hindu, or Buddhist citizens[], a request to recognize the supremacy of Jesus Christ and to participate in a civic function sanctified in his name is a wrenching burden.” 653 F.3d 341, 354 (4th Cir. 2011) *cert. denied*, 132 S.Ct. 1097 (2012)(citations omitted).

Citizens in your community have a right to attend meetings without having to observe sectarian prayers, or any prayers for that matter. Contrary to the opinions of some religious right groups, the Board may explicitly limit invocations to those that are non-sectarian. In *Turner v. Fredericksburg*, the Fourth Circuit Court of Appeals ruled that a policy excluding sectarian prayers did not violate a council member’s First Amendment rights. 534 F.3d 352 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 909 (2009). Board invocations are government speech, no matter who delivers them, and as such, remain subject to the Establishment Clause. There is no legal requirement for the Board to host devotionals at all, quite the contrary.

Maltreatment on Religious Basis is an Affront

The Board must treat all citizens equally. We were shocked to learn that during the Board meeting, County Attorney Paul Mahoney requested that wording allowing for non-religious citizens to offer an invocation explicitly be removed from the policy. The Board misguidedly adopted his intolerant suggestion and removed a provision that allowed for private citizens “who hold no religious beliefs” to deliver an invocation. Mr. Mahoney indicated he based this recommendation on the advice of attorneys from the Alliance Defending Freedom who said that someone might “mock” the process.

Non-religious citizens are being singled out and excluded by this amendment. They, like any other citizens, should be afforded the opportunity to deliver a statement to open Board meetings under your policy. The Board is flagrantly indulging not only in establishment and favoritism of religion, but censorship and exclusion of minorities. This is a gross insult to and diminishment of the political standing of your county’s nonreligious members.

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. *McCreary County v. ACLU*, 545 U.S. 844 at 883 (2005) (O'Connor, J., concurring).

Misstatements in Policy

By adopting a policy drafted by a notorious Christian Right organization, the Board has also adopted various misstatements of fact and law from that policy. Given the length of the policy, this letter will focus on a few. For instance, the enacting language says:

WHEREAS, the Supreme Court also famously observed in *Zorach v. Clauson*, 343 U.S. 306 (1952), “We are a religious people whose institutions presuppose a Supreme Being.”

In context, and as Justice Douglas later explained in his dissent in *McGowan v. Maryland*, 366 U.S. 420, 563 (1961), this is a reference to his view on the Puritan influence in shaping our constitutional and common law. As Justice Douglas said in the very next sentences following the quotation (which ADF omits), “We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary.” *Zorach*, 343 U.S. at 313-314.

Given the context, Justice Douglas was not espousing a declaration that our government supports belief in God. Justice Douglas explained his statement in *McGowan*:

“[I]f a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. This necessarily means, first, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others...

The First Amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish — whether the result is to produce Catholics, Jews, or Protestants, or to turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral.” 366 U.S. at 563-564.

The policy also selectively quotes from *Marsh v. Chambers* to imply that the content of prayers “is not of concern to judges.” *See Pg. 2*. As the Fourth Circuit has recognized, references to Jesus in prayers “advances” one faith in violation of the Establishment Clause and courts will examine the content of the prayers under such circumstances.

The policy also adopts various futile measures as an attempt to distance the Board from the prayer message. These include the sham of removing the prayer from the agenda record (not the actual agenda) and holding the County’s formal invocation before the opening gavel. These measures did not save the Forsyth County prayers from violating the Constitution. They are merely a smokescreen; the prayers are still a part of the meeting and are government speech.

Look to Jefferson on U.S. and Virginia's Secular Heritage

The resolution claims “the Founders” attribute our civil rights to a “creator,” thereby conflating the Declaration of Independence, a historic document declaring colonial independence from Britain, with the U.S. Constitution, our republic’s *foundational* and living document of governance. The U.S. Constitution is an expressly *godless* document whose only references to religion are exclusionary, such as that there shall be no religious test for public office. There is no reference to deity, prayer, Jesus, or the Ten Commandments in this secular document that County Supervisors have taken an oath to uphold. The intent of “the Founders” (those who wrote and signed the Constitution) was explicitly not to mingle religion and government, evidenced by the fact that during the four-month Constitutional Convention, no prayers were recited; in fact a call to prayer was ignored. If our founders didn’t need to pray over adoption of the U.S. Constitution, why then does a county board need to pray over liquor licenses, sewers and variances?

Jefferson, who wrote the Declaration of Independence which the ADF distorts to endorse theocratic religion, was clear on his views that church and state are a dangerous mix. He refused as president to issue days of prayer or thanksgiving, famously noting that U.S. officials had “no authority to direct the religious exercises of his constituents” (Letter of Rev. Mr. Samuel Miller, Jan. 23, 1808). It is of course to Virginia’s most famous statesman that our country owes the phrase that explains the meaning of the Establishment Clause:

“I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibit the free exercise thereof, thus building a wall of separation between church and state.” (Letter to Baptists of Danbury, Conn., Jan. 1, 1802)

In Jefferson’s *Notes on Virginia* he chronicles the intolerance in Virginia’s history, brought on by its colonial establishment of Anglicanism: “Millions of innocent men, women and children since the introduction of Christianity have been burnt, tortured, fined, imprisoned. Yet have we not advanced one inch towards uniformity. What has been the effect of coercion? To make one half the world fools and the other half hypocrites. To support roguery and error all over the earth . . .”

His landmark Virginia Statute of Religious Freedom was so important to Jefferson that he gave instructions that his authorship be engraved on his tombstone. Its preamble is a sweeping indictment of state-dictated religion. The heart of the statute is that no citizen shall be compelled to frequent or support any “religious worship, place, or ministry whatsoever.” (This wording remains in Art. I, Sec. 16 of the Virginia Bill of Rights and should be sufficient to protect citizens from being exhorted to pray as the price of attending their own county’s public government meetings).

By excluding freethinking citizens from your policy, as previously noted, you would have excluded Jefferson himself. Jefferson, a rationalist Deist in the classical sense of the Enlightenment, rejected blind faith, famously advising his nephew Peter Carr, “Question with boldness even the existence of a God: because, if there be one, he must more approve of the homage of reason, than that of blindfolded fear.” “The day will come when the mystical generation of Jesus, by the Supreme Being as his father, in the womb of a virgin, will be classed with the fable of the generation of Minerva in the brain of Jupiter.” (Jefferson to John Adams, April 11, 1823. Works, 1829 edition. Vol, IV, p. 365)

Virginia's other exalted statesman, James Madison, the author of the Constitution itself, likewise eschewed religion in government. In his "Memorial and Remonstrance" to the General Assembly of the Commonwealth of Virginia, denouncing a scheme to assess taxpayers for the salaries of "teachers of the Christian religion." Madison observed:

During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution.

After he left public life, Madison's opposition to any entanglement of religion with government grew even stronger. He explicitly and strongly opposed bills to exempt houses of worship from taxation, the "indefinite accumulation of property" and "excessive wealth" by "ecclesiastical corporations," "religious proclamations by the Executive recommending thanksgivings & fasts," and Congressional and military chaplaincies. Madison warned that the idea of "theocracy, . . . is too apt to lurk in the bosoms even of Americans." (Detached Memoranda, ca. 1817)

Continued Liability

Rather than cleanly ending the dispute over prayers once and for all, the Board has opted to continue to make the invocations a divisive focus for Roanoke County. We had hoped that the Board would have ended the prayer practice altogether, as Henrico County has done. As it stands, the prayers will require constant monitoring. If prayer officiants deliver sectarian invocations, the Board will be in violation of the Establishment Clause and it will be liable for attorney fees for those who challenge the practice.

It is inevitable that disputes will continue to arise in the future about the content of invocations and who can deliver them. The Board Clerk will spend a considerable amount of time arranging invocation officiants. Note that more than a page of the policy is devoted to a painstaking description of how the County shall compile and use "the Invocations List": it "shall solicit" clergy to lead prayers by combing through the phonebook, consulting with the local chambers of commerce, going to five additional counties and three additional towns or cities, even requiring the Clerk to refer to the IRS to verify "authenticity of a religious congregation." All of this is an unnecessary waste of taxpayer time and money, amounting to a major entanglement between the County and area churches and pastors.

Non-religious members in your community recognize that their government should not involve itself in religion, thereby excluding them. The definitive American Religious Identification Survey 2008 shows that 15% of the U.S. population is nonreligious, and that figure holds true for Virginia, involving nearly a million Virginians who identify as a "None." According to the most recent Pew study just released on religious affiliation, the non-religious now make up nearly 20% of the U.S. adult population, and a third of 18 to 29 year olds.¹ The Board must recognize how inappropriate it is to force a fifth or more of its citizens to sit through religious rituals that conflict with their rights of conscience in order for them to exercise rights of citizenship. As our nation becomes ever more

¹ Nones on the Rise: One-in-Five Adults Have No Religious Affiliation," Pew Research Center, The Pew Forum on Religion & Public Life (October 9, 2012) available at <http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx>.

secular and diverse, the County's decision to continue government prayer will offend and exclude ever more citizens, creating acrimony and discomfort.

We firmly urge you to honor not just the rights of nonbelievers in your community, but the heritage of Jefferson and Madison, by scrapping government prayer altogether. Focus on the business of the county, rather than the religion business.

May we hear from you at your earliest convenience?

Very truly,



Annie Laurie Gaylor
Co-President