

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 · MADISON, WI 53701 · (608) 256-8900 · WWW.FFRF.ORG

March 20, 2012

**SENT VIA FAX & U.S. MAIL
(785) 368-7074**

The Honorable Mike O'Neal
Speaker
Kansas House of Representatives
300 SW 10th Ave
Room 370-W
Topeka KS 66612

Re: Stop Unconstitutional Prayers before House Sessions

Dear Mr. Speaker:

We are writing on behalf of concerned Kansas residents and taxpayers and members of the Freedom From Religion Foundation ("FFRF") who object to the House of Representatives' practice of opening sessions with religious devotions. FFRF is a national nonprofit organization representing over 17,500 members across the country including members in Kansas. Our purpose is to protect the constitutional principle of separation between state and church.

On behalf of our Kansas membership, we urge you to discontinue the practice of scheduling prayers to open House sessions. Removing official prayers from government meetings is the only way to ensure that the House is in compliance with the Constitution.

It is our information and understanding that the Kansas House of Representatives ("House") opens its sessions with prayer. We understand that last Thursday, March 15th, Father James Gordon of St. John Vianney Catholic Church in Maple Hill, delivered a controversial sectarian and anti-abortion prayer. He delivered this prayer "in Jesus' name" and referenced political concerns despite House policy and practice prohibiting those types of prayers and references. The following is a transcription of Father Gordon's prayer:

“Heavenly Father, Creator of Heaven and Earth, and Creator of all Life, we thank You for all the blessings that You have bestowed upon us and upon this great Nation of ours and upon this great State of Kansas. We also thank you for those Representatives that You have given us that truly acknowledge Your absolute rights over all men and women.

We call upon you now, in this urgent time of need for our country, to guide us to the true freedom for which our nation was founded for: That is the freedom to do good, with all the rights of life, liberty and pursuit of happiness. We know that we cannot be truly happy unless we do the good You created us for by exercising our freedom well and responsibly.

We ask you for the grace to bring us back to the principles that have made this state and this nation great. We ask you to strengthen our understanding of traditional marriage: one man and one woman, we ask you to bring us back to virtuous morals in society, morals that kept us from killing a child in the womb through abortion. We ask you to defend us now in the fight for true religious freedom and freedom of conscience, that seems to be threatened now in the public sphere. We know that a truly formed conscience is what keeps order in the person and in society. We reiterate the words of St. Thomas More, who was once a Statesman and the Chancellor of England, who said. “when men forsake their own conscience for the sake of public duties, they lead their nation down a short road to chaos.”

He acknowledged his responsibility before all the men and women that he came to serve and his responsibility before God, who He knew would be his judge in all his decisions.

Therefore, we ask You for the grace and for all those who serve You in public office to defend life, liberty, and the pursuit of happiness, and to uphold the natural law and the rights of God.

We ask you to keep us one nation under God, and not one Nation without God.

We thank you for these men and women here whom we know you have blessed by giving them this awesome responsibility. We ask You for the necessary graces for them and bring many blessings upon them. We ask all this through Jesus Christ, Our Lord, Who lives and reigns with You forever and ever. Amen.”

This anti-abortion homily was not issued in a vacuum. It was intended to influence legislators. This prayer was given in the context of a sweeping state anti-abortion bill, considered on of the broadest attacks on abortion rights under consideration by a state legislature. The day after this anti-abortion tirade, the full state House adopted an amendment to the state budget to prohibit state money from being used on abortions and banning state workers from performing abortions during the workday.

We understand that you publicly agreed that the prayer went beyond acceptable guidelines for prayer at House sessions. House Minority Leader Paul Davis reportedly also found the prayer to be inappropriate.

While it is admirable that you recognized the problem with Father Vianney's prayer, his prayer and other sectarian prayers offered before House sessions demonstrate why any prayer — sectarian or not — before legislative sessions is inappropriate and should be discontinued immediately.

This controversy should be a learning experience for the House. The Kansas State Legislature ought not to lend its power and prestige to religion, amounting to a governmental endorsement that excludes some citizens.

Government prayer is unnecessary, inappropriate, and divisive. Calling upon Representatives and citizens watching in the gallery or online to rise and pray (even silently) is coercive, embarrassing and beyond the scope of secular city government. Representatives are free to pray privately or to worship on their own time in their own way. They do not need to worship on taxpayers' time. Even nonsectarian prayer excludes the 11% of your state population that is nonreligious, which is more than 233,000 adults in Kansas (Religious Identification Survey 2008). The violation is compounded when a majority of prayers are sectarian, i.e. to Jesus, or a majority of the officiants are of one religion, i.e. Christian or Christian clergy (which inevitably happens). Such prayer creates acrimony, makes minorities feel like political outsiders in their own community, and shows unconstitutional governmental preference not just for religion over nonreligion, but Christianity over other faiths. It also offends the 14% of the Kansas population that is Non-Christian. *Id.*

Sectarian Prayers

The prayers being offered before the House's sessions do not fall into the narrow exception of the 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 was a constitutional exception. The Court found government prayer, 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 794-795. The Court expressly noted that the content of the prayers was permissible because the chaplain had "removed all references to Christ." *Id.* at 793 n.14.

Even if the House has had an established history of opening its meetings with prayer, the House's practice still violates the Establishment Clause because of its sectarian nature. 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 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., Turner v. Fredericksburg*, 534 F.3d 292 (4th Cir. 2004), cert. denied, 2009 WL 56225 (U.S.)(No. 08-518)(finding constitutional a city council policy prohibiting sectarian prayers); *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); *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.’ ”).

Just recently, in 2011, the Fourth Circuit Court of Appeals ruled that prayers to Jesus during Forsyth County Commissioners meetings were unconstitutional. *Joyner v. Forsyth County, N.C.*, 653 F.3d 341, 349 (4th Cir. 2011), cert. denied No. 10-1232 (U.S. January 13, 2012). The Court said, “Faith is as deeply important as it is deeply personal, and the government should not appear to suggest that some faiths have it wrong and others got it right.” *Id.* at 349. The Court explained:

To be sure, citizens in a robust democracy should expect to hear all manner of things that they do not like. But the First Amendment teaches that religious faith stands on a different footing from other forms of speech and observance. Because religious belief is so intimate and so central to our being, government advancement and effective endorsement of one faith carries a particular sting for citizens who hold devoutly to another. This is precisely the opposite of what legislative invocations should bring about. In other words, whatever the Board’s intentions, its policy, as implemented, has led to exactly the kind of ‘divisiveness the Establishment Clause seeks rightly to avoid.’ *Id.* at 354-355 (quoting *Simpson v. Chesterfield County Bd. of Supr’s*, 404 F.3d 276, 284 (4th Cir. 2005).

The Fourth Circuit’s reasoning in another prayer at government meetings case, *Wynne*, is particularly helpful in understanding the boundaries for prayer at government meetings drawn in *Marsh*. In *Wynne*, the court held that any sectarian invocations of deities in legislative prayer serve to affiliate the government with a particular sect or creed and/or advance a particular faith or belief. *See Wynne*, 376 F.3d at 302. 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 that Marsh cautioned against.” Id. (emphasis added).

The prayers currently invoked at House meetings impermissibly advance Christianity and lead a reasonable observer to believe that the House is endorsing not only religion over non-religion, but also Christianity over other faiths. 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.

U.S. Founded on Separation of State/Church

America was founded in part by refugees seeking freedom from government dictation of religion. These refugees wanted freedom from a government telling them which church to support, what religious rituals to engage in, or what to believe or disbelieve. The U.S. founders who adopted our entirely secular Constitution knew there can be no religious liberty without the freedom to dissent. Whether to pray, whether to believe in a god who answers prayer, is an intensely precious and personal decision protected under our First Amendment as a paramount matter of conscience. It is also important to note that the founders did not pray at the Constitutional Convention, which shows intent.

Our nation is founded on a godless Constitution, whose only references to religion in government are exclusionary, such as that there shall be no religious test for public office (U.S. Const. art. VI). The United States was first among nations to adopt a secular constitution, investing sovereignty in “We the People,” not a divinity. Our founders were aware that “[t]orrents of blood have been spilt in the old world” when religion and government were united. (James Madison, Memorial and Remonstrance, 1785). Madison added, “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.”

Religion had been an intensely divisive issue in the original Thirteen Colonies, where religious intolerance was endemic, and citizens might lose civil rights, be banished, jailed or in some instances executed, for holding a religious conviction contrary to that of the government. Today the religious right often touts the pre-Constitutional actions of the

Continental Congress that adopted the weak Articles of Confederation, and that failed to include safeguards separating government from religion. The religious right often conflates the short-lived 8-year Articles with the enduring Constitution that replaced it. Yet even at the inaugural session of that Continental Congress in 1774, when a delegate proposed to open a session with prayer, both John Jay and John Rutledge (two future Chief Justices of the Supreme Court) objected, saying Congress was “so divided in religious Sentiments . . . that We could not join in the same Act of Worship.” It is significant that after the catastrophic experiences with the Articles, our founders ensured there was no prayer at the Constitutional Convention, which convened in 1787 to write the U.S. Constitution. See Leo Pfeffer, *Church State and Freedom*, 121-122 (Beacon Press, 1967).

Significantly, President Thomas Jefferson, recognizing of the intrinsic problems when religion and government mix, actively opposed government sponsorship of prayer:

I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises ... I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines; nor of the religious societies that the general government should be invested with the power of effecting any uniformity of time or matter among them. Fasting & prayer are religious exercises. The enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it.

(Jefferson’s letter to Rev. Samuel Miller, 1808).

Likewise, James Madison, the primary architect of the U.S. Constitution and Bill of Rights, and our second president, ultimately opposed government prayers and congressional chaplaincies. See Andy G. Olree, *James Madison and Legislative Chaplains*, 102 *Northwestern L. Rev.* 145 (2008). In his *Detached Memoranda*, Madison criticized the chaplaincies and the idea that “religious truth is to be tested by numbers or that the major sects have a right to govern the minor.”

Solution is to Discontinue Prayer

Citizens electing to attend or participate in government meetings such as the House’s public sessions and Representatives working in the state legislature should not be subjected to Christian-based, or even non-denominational prayer. By hosting prayers and devotionals, which inevitably show preference for Christianity, the House is illegally and inappropriately imposing its religious beliefs on its own members and Kansas citizens in attendance.

Moreover, these types of government prayers and religious rituals not only conflict with the Constitution, but also with biblical teachings. Christians who know their bible are

familiar with the biblical injunction of Jesus in the Sermon on the Mount, condemning as hypocrisy public prayer. "Enter into thy closet and when thou hast shut the door, pray to thy Father which is in secret." (Matthew 6:5-13).

Prayers are being used for political reasons in the House. This should be offensive to believers as it is to nonbelievers, and to our U.S. Constitution.

To avoid the constitutional concerns these prayers create for the House and the divisiveness these prayers cause within the community the solution is simple: discontinue official, government prayers before legislative meetings. We request a prompt response in writing about what steps you are taking to respect the Establishment Clause and remedy these constitutional violations.

Sincerely,

Annie Laurie Gaylor

Annie Laurie Gaylor and Dan Barker
Co-Presidents

Dan Barker