FREEDOM FROM RELIGION FOUNDATION

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April 26, 2010

The Honorable Jim Doyle
Office of the Governor
115 East State Capitol
PO Box 7863
Madison WI 53707

RE: Unconstitutionality of National Day of Prayer

Dear Governor:

In light of the recent federal court ruling declaring the National Day of Prayer unconstitutional, we are requesting that you refrain, as governor, from issuing a National Day of Prayer proclamation and from participating in your official capacity in National Day of Prayer events.

We represent the Freedom From Religion Foundation ("FFRF"), a national organization with more than 14,500 freethinkers across the country. The purpose of our educational charity is to defend the Establishment Clause of the First Amendment, which Thomas Jefferson famously noted, builds "a wall of separation between church and state." The Foundation brought the challenge against the National Day of Prayer statute after receiving three decades of complaints from citizens who are offended, excluded and made to feel like political outsiders when their government oversteps its power to influence decisions over whether and when to pray.

Under our secular Constitution, elected officials have neither the moral nor the constitutional authority to exhort constituents to pray, much less to set aside an entire day for prayer every year, and tell them to gather with others "to turn to God in prayer and meditation at churches, in groups, and as individuals." Public Law 100-307.

Ironically, America was founded in part by refugees seeking freedom from precisely this kind of religious tyranny by government. They wanted freedom from a government dictating to them which church to support, what religious rituals to engage in, or what to believe or disbelieve. The U.S. founders who adopted our 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.

Effect of Freedom From Religion Foundation v. Obama

On April 15, 2010, United States District Judge Barbara B. Crabb struck down the federal statute designating the first Thursday in May as the National Day of Prayer and enjoined the President and his press secretary from issuing an annual prayer proclamation. National Day of Prayer

Dan Barker, *Co-President* • Annie Laurie Gaylor, *Co-President* • Anne Nicol Gaylor, *President Emerita*

proclamations and observances unequivocally "communicate the message that the government endorses prayer and encourages its citizens to engage in it." *Freedom From Religion Foundation v. Obama*, No. 08-588, 2010 WL 1499451, at *17 (W.D. Wis. 2010).

> "[R]ecognizing the importance of prayer to many people does not mean that the government may enact a statute in support of it, any more than the government may encourage citizens to fast during the month of Ramadan, attend a synagogue, purify themselves in a sweat lodge or practice rune magic. In fact, it is because the nature of prayer is so personal and can have such a powerful effect on a community that the government may not use its authority to try to influence an individual's decision whether and when to pray." *Id.* at *2.

> "The same law that prohibits the government from declaring a National Day of Prayer also prohibits it from declaring a National Day of Blasphemy." *Id.* at *31.

The court held that the National Day of Prayer has no secular purpose or effect and, thus, fails the *Lemon* test and endorsement test. The District Court found that the "sole purpose [of the National Day of Prayer] is to encourage all citizens to engage in prayer, an inherently religious exercise that serves no secular function in this context. In this instance, the government has taken sides on a matter that must be left to the individual conscience." *Id.* at *2.

The district court found that the "very nature of having a statute involving a 'national day' in recognition of a particular act connotes endorsement and encouragement." *Id.* at *11. Given that prayer is an inherently religious exercise, the court concluded, "a reasonable observer of the statute or a proclamation designating the National Day of Prayer would conclude that the federal government is encouraging her to pray." *Id.*

Exclusion is inevitable when government issues official prayer proclamations:

> "[W]hen the government takes sides on questions of religious belief, a dangerous situation may be created, both for the favored and the disfavored groups." *Id.* at *7.

> "[R]eligious expression by the government that is inspirational and comforting to a believer may seem exclusionary or even threatening to someone who does not share those beliefs. This is not simply a matter of being 'too sensitive' or wanting to suppress the religious expression of others. . . . it is a consequence of the unique danger that religious conduct by the government poses for creating 'in' groups and 'out' groups." *Id.* at *9.

What the National Day of Prayer Ruling Does Not *Mean*

The district court ruled unconstitutional only a *government* proclaimed day of prayer. Private entities are free, as they always have been under the Free Exercise Clause of the First Amendment, to pray and to privately call for days of prayer.

> "A determination that the government may not endorse a religious message is not a determination that the message itself is harmful, unimportant or undeserving of

> dissemination. Rather, it is part of the effort to 'carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society.' " *Id.* at *31.

Elected officials may of course attend private functions on their own time as private citizens. It would be a misuse of office, however, for the Governor to promote, organize or cosponsor such activities as have commonly been spawned by the unconstitutional National Day of Prayer, such as prayer breakfasts, or to lend the Governor's name to a "Governor's Prayer Breakfast." A Governor may not use the state web site to link to such events (often exclusively Christian in nature). Local ministerial associations should be asked to use their own names on such invitations, and not imply state approval or sponsorship.

Some religious-right groups and legal associations are deliberately misrepresenting the district court's National Day of Prayer ruling as somehow barring prayer, or privately-called days of prayer. This is nonsense. The court is making the necessary distinction between private speech (which may take any position on religion) and governmental speech (which may not be religious or take a religious position) — a distinction which groups antagonistic to the Establishment Clause refuse to acknowledge. As Governor you have taken an oath of office to uphold the secular U.S. Constitution, and must scrupulously avoid using your public office to promote or advance your personal religious beliefs.

National Day of Prayer Tainted by Sectarianism, Christian Purpose

The National Day of Prayer originated with Rev. Billy Graham during his religious crusade in Washington, D.C. in 1952. He expressed an openly Christian purpose, seeking such an annual proclamation by the President because he wanted "the Lord Jesus Christ" to be recognized across the land. Congressional sponsors likewise openly expressed an agenda of promoting Christianity and belief in a god. Christian evangelical lobbies were behind the 1988 change in law designating the first Thursday in May as the annual National Day of Prayer. Subsequently the National Day of Prayer Task Force was created to "communicate with every individual the need for personal repentance and prayer, mobilizing the Christian community to intercede for America and its leadership." Chair Shirley Dobson, wife of the founder of Focus on the Family, issues annual National Day of Prayer proclamations and submits them to the President, choosing a theme with supporting scripture from the bible. The task force's stated goal is to pressure as many governors and other elected officials as possible to also issue National Day of Prayer proclamations. Coordinators, volunteers and speakers at task force events must share the view that the bible is inerrant and "there is only one Savior and only one gospel." The district court noted "the National Day of Prayer has sparked a number of controversies around the country, demonstrating the sense of exclusion that religious endorsement by the government can create." *Id.* at *27.

Even Inclusive/Interfaith National Day of Prayer Events Raise Constitutional Concerns

An elected official cannot cure the Establishment Clause violation by issuing "all inclusive" prayer proclamations, or by holding "interfaith" prayer events:

> "One might argue that the National Day of Prayer does not violate the establishment clause because it does not endorse any one religion. Unfortunately, that does not cure the problem. Although adherents of many religions 'turn to God in prayer,' not all of them do. Further, the statute seems to contemplate a specifically Christian form of prayer with its reference to 'churches' but no other places of worship and the limitation in the 1952 version of the statute that the National Day of Prayer may not be on a Sunday. Even some who believe in the form of prayer contemplated by the statute may object to encouragements to pray in such a public manner." *Id.* at *12.

Judge Crabb also noted,

> " . . . the establishment clause is not limited to discrimination among different sects. The First Amendment 'guarantee[s] religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.' Even endorsement of 'religion generally, clashes with the 'understanding, reached...after decades of religious war, that liberty and social stability demand a religious tolerance that respects the view of all citizens.' Thus, *the government's religious conduct cannot survive scrutiny under the establishment clause simply because it endorses multiple religions instead of just one."* (internal citations omitted)(emphasis added). *Id.*

The inclusion of many faiths at state-promoted or sponsored National Day of Prayer proclamations and events notably would still exclude those of no religious faith — the non-religious and the non-believers. The non-religious are the fastest-growing segment of the U.S. population by religious identification — at 15% by national average, and as high as 22% in the Northeast, 17% in the Mid-Atlantic, 19% in the Western Mountain Division states, and 20% on the West Coast (American Religious Identification Survey 2008, Trinity College). The purpose and effect of any National Day of Prayer proclamation or activity "sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' " *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-310 (2000)(quoting *Lynch v. Donnelly*).

The message of observance of the National Day of Prayer becomes "'Americans' pray; if you do not believe in the power of prayer, you are not a true American." *FFRF v. Obama,* 2010 WL 1499451, at *14. "Identifying good citizenship with a particular religious belief is precisely the type of message prohibited by the establishment clause." *Id.*

Elected Officials Must Limit Participation in NDP Events

As a matter of policy, gubernatorial sponsorship of a National Day of Prayer proclamation or endorsement is inappropriate and unnecessary. Promotion of prayer by elected officials unfortunately raises the distasteful appearance of political pandering to appeal to or appease a vocal Christian evangelical constituency. At the same time, religious right groups seek your office to promote their agenda, using the credibility and prestige of public officials like yourself.

As the state's highest elected official, you are charged with great responsibility and have been given significant trust by citizens, including those citizens who may not share your personal religious viewpoints. Leaving prayer as a private matter for private citizens is the wisest public policy. (As an aside: Gubernatorial action which may suggest that such civic duties be left to divine intervention would hardly inspire public confidence.)

As the district court pointed out:

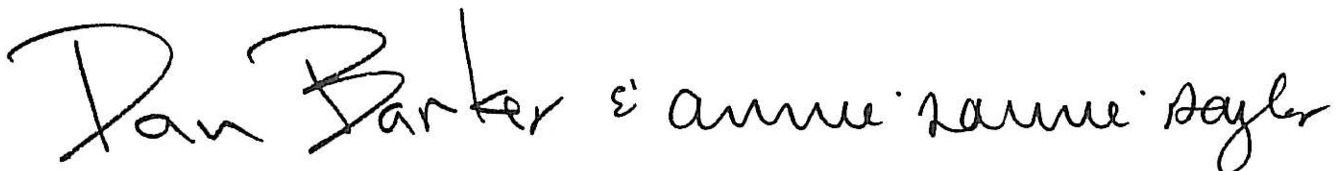
> "Even some who believe in the form of prayer contemplated by the statute may object to encouragement to pray in such a public manner. E.g., Matthew 6:5 ('You, however, when you pray, go into your private room and, after shutting your door, pray to your Father who is in secret; then your Father who looks on in secret will repay you.') ." *Id.* at *12.

You may have previously received correspondence from the Alliance Defense Fund, an organization of Christian-only attorneys which has represented the National Day of Prayer Task Force. We call your attention to the enclosed sheet refuting many of the Alliance's faulty legal assertions.

We encourage your office to read the thoughtful ruling of the district court in *FFRF v. Obama*. By ensuring that government does not take "sides on a matter that must be left to the individual conscience," the decision strikes a blow *for*, not *against*, religious liberty.

We appreciate the courtesy of your attention to this timely matter, and encourage you to stand up for the precious constitutional principle of the separation between church and state, which unites and protects all citizens, believers and non-believers alike.

Very truly yours,



Dan Barker and Annie Laurie Gaylor
Co-Presidents
FREEDOM FROM RELIGION FOUNDATION

RESPONSE TO ALLIANCE DEFENSE FUND LETTER, MARCH 31, 2010

Submitted by the Freedom From Religion Foundation, April 27, 2010

The Alliance Defense Fund's letter to Mayors was mailed ***before*** *FFRF won its challenge of the National Day of Prayer in district court on April 15, 2010. The ADF, representing the National Day of Prayer Task Force, briefed the court with the same arguments it presented to Mayors. These arguments were unpersuasive to the court. See the decision, Freedom From Religion Foundation v. Obama,* No. 08-588, 2010 WL 1499451 (W.D. Wis. 2010), *which addresses and rejects ADF claims in detail.*

I National Day of Prayer Law Based on Revisionist Myth

The Senate Report to the National Day of Prayer law (Public Law 82-324), enacted in 1952, erroneously claimed that "when the delegates to the Constitutional Convention encountered difficulties in writing and formation of a Constitution for this Nation, prayer was suggested and became an established practice at succeeding sessions." As Judge Barbara Crabb noted in her careful decision, this claim is untrue. The U.S. founders did not pray during the Constitutional Convention when they adopted our secular Constitution, which shows their intent to keep religious ritual out of government.

II Constitution Has Secular, Not Religious, Foundation

Our nation is founded on a secular and entirely godless Constitution. Its only references to religion are exclusionary, such as that there shall be no religious test for public office (U.S. Const. art. VI). The Establishment Clause of the First Amendment — "Congress shall make no law respecting an establishment of religion" — erects a "wall of separation between church and state," a descriptive metaphor by Thomas Jefferson which is a bedrock principle in decisions by the U.S. Supreme Court. The guarantees of the Bill of Rights, including the First Amendment, of course, have long been incorporated to apply to state as well as federal citizens. *See Everson v. Board of Education*, 330 U.S. 1 (1947).

III National Day of Prayer Proclamations Not an Unbroken Tradition

The district court in *FFRF v. Obama* notes: "No tradition existed in 1789 of Congress requiring an annual National Day of Prayer on a particular date. It was not until 1952 that Congress established a legislatively mandated National Day of Prayer; it was not until 1988 that Congress made the National Day of Prayer a fixed, annual event. Defendants identify no other instance in which Congress has endorsed a particular religious practice in a statute." 2010 WL1499451, at *24. The district court distinguished between the National Day of Prayer and Thanksgiving proclamations in three significant ways. ADF relies repeatedly on one National Day of Thanksgiving Proclamation by Pres. George Washington in 1789. Yet Washington also warned: "Religious controversies are always more productive of more acrimony & irreconcilable hatreds than those which spring from any other cause." (Letter to Edw. Newenham, 1792).

James Madison, primary architect of the U.S. Constitution, eventually concluded that national days of prayer were unconstitutional (Detached Memoranda, 1817). Thomas Jefferson always strenuously opposed them. In explaining why he refused to issue prayer proclamations, President Thomas Jefferson wrote to the Rev. Samuel Miller in 1808: "I consider the government of the U.S. as interdicted by the constitution from intermeddling with religious institutions, their doctrines, disciplines or exercises... But it is only proposed that I should recommend, not prescribe, a day of fasting and praying. That is, I should indirectly assume to the United States an authority over religious exercises, which the constitution has directly precluded them from . . . Every one must act according to the dictates of his own reason and mine tells me that civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents." What Jefferson could not do as President, certainly mayors may not do.

IV Justice Douglas Quote Misused

ADF quoted Justice Douglas, saying, "We are a religious people whose institutions presuppose a Supreme Being..." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). 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

that our constitutional law and our common law were founded on the belief that God gave Americans certain unalienable rights. Given the context, he was not espousing a declaration that our government is one that supports belief in God. Justice Douglas further explained,

> "[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." *Id.* at 563-564. (emphasis added)

IV Establishment Clause Law Does Not Approve Mayoral Prayer Proclamations

Establishment Clause case law supports the proposition that mayoral sponsorship of a day of prayer is constitutionally problematic. ADF told mayors, "You can be confident that your participation in and acknowledgment of the National Day of Prayer are constitutionally protected activities." That is not true. It is true that mayors, as individuals and not in their official capacity, have the rights of free exercise of religion and free speech. However, actions by government officials in their official capacity are not protected, and their actions that favor religion have been found to violate the Establishment Clause. As Judge Crabb noted in the district ruling, the Supreme Court has continually required government neutrality toward religion. *See e.g., McCreary County*, 545 U.S. at 875-76 ("[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause."); *Board of Education of Kiryas Joel Village Sch. Dis. v. Grumet*, 512 U.S. 687, 703 (1994)("government should not prefer one religion to another, or religion to irreligion."); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 590-91 (1989)("government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)(government "may not...promote one religion or religious theory against another or even against the militant opposite.)

VI *Marsh v. Chambers* Does Not Support Mayoral National Day of Prayer Activities

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court ruled that a legislative practice confined to a nonsectarian, 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, was permissible. *See Marsh*, 463 U.S. 783. The Supreme Court later noted in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 n. 52 (1989):

> It is worth noting that just because *Marsh* sustained the validity of legislative prayer, ***it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional.*** Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct. (emphasis added)

Legislative prayer is distinct from official prayer proclamations. "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

FFRF and its attorneys would be pleased to provide you with further resources. A pdf version of *FFRF v. Obama* is available online at: *http://ffrf.org/news/releases/judge-rules-in-favor-of-ffrf-in-suit-against-national-day-of-prayer/*.

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