

FREEDOM FROM RELIGION *foundation*

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February 15, 2013

SENT VIA MAIL & EMAIL
(joel.landeen@rcgov.org)

Mr. Joel Landeen
Office of the City Attorney
300 Sixth Street
Rapid City, SD 57701

Re: Unconstitutional Prayer Policy

Dear Mr. Landeen:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) to renew FFRF's objection to the unconstitutional prayers that open City Council meetings. We urge the Rapid City Common Council to abide by court precedent on this issue.

We understand that members of the City Council have expressed a desire to continue with sectarian prayers and have asked you to draft a policy for the purpose of providing a purported defense to litigation. This is misguided and any such policy would not absolve the City Counsel from complying with the Constitution and court precedent.

As in initial matter, we are troubled by what took place at the City Council meeting on February 4. It is shameful that some City Council members used heated rhetoric in asserting they want to "fight" and that FFRF is a "bully" in simply asking for the council to follow the Constitution. Council members explicitly stated the Council will continue with sectarian prayers and that the proposed policy is only for the purpose of a supposed litigation defense.

Unconstitutional Sectarian Prayers

As you are likely aware, courts have ruled that regular sectarian prayers offered to start government meetings are unconstitutional. The Council may not continue with its current practices with only a nominal change in policy. Courts review what takes place in practice, not just the policy. As the Fourth Circuit Court of Appeals said in *Joyner v. Forsyth County*:

[C]itizens attending Board meetings hear the prayers, not the policy. What this means is that we cannot turn a blind eye to the practical effects of the invocations at issue here. The dissent suggests that the "frequency of Christian prayer" was merely the "product of demographics," and the County "could not control whether the population was religious." What the dissent offers as a defense of the policy,

however, is one of the problems with it. 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).

It is no defense that the Council may have an occasional non-Christian invocation officiant. The Second Circuit Court of Appeals ruled just last year that a town’s invocation practice was unconstitutional even when the town had a few invocations delivered by those of minority faiths. *Galloway v. Town of Greece*, 681 F.3d 20 (2nd Cir. 2012)(Holding that invocation practice affiliated the town with Christianity and was unconstitutional).

In short, the Council has given you an impossible task, to create a legally defensible *policy* for the purposes of a litigation position, rather to correct the constitutional defects in the Council’s current *practice*.

Limits on Government Prayer Uphold, Rather Than Abridge Individual Rights

Council members at the most recent meeting incorrectly implied that limits on the prayers of legislative bodies somehow would violate individual rights. These claims have no basis in law or logic.

Under the First Amendment’s Free Exercise Clause, citizens have a right to the free exercise of religion. Under the First Amendment’s Establishment Clause, the government has no such right to practice a religion. The Establishment Clause exists precisely to limit government actions relating to religion, to maintain governmental neutrality on the subject of religion. No government official has the “right” to use his or her governmental office, power or position to conduct a religious exercise at a government meeting. Private citizens, including governmental officials in their personal capacities, are free to practice their religion. That liberty is strengthened, rather than weakened, by keeping government out of the business of religion.

When legislative bodies schedule and host officiants to pray as part of government meetings, courts consider the government to be the “speaker.” (For further discussion please see: Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 Minn. L. Rev. 972 (2010)). In *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008), the Court held that meeting prayers were government speech and found that there was no violation of Free Speech and Free Exercise rights of an individual who was barred from imposing sectarian prayers at government meetings. FFRF is unaware of any case addressing the issue of government prayers that has found the prayers to constitute private rather than government speech.

Government bodies, in disseminating messages, must avoid advancing one religion. “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, 883 (2005)(O’Connor, J., concurring).

Religious Divisiveness

Mayor Sam Kooiker and some City Council members have turned the issue of City Council prayer into a discussion of the merits of religion. This highlights the religious, rather than secular purpose for their invocations and their intent to continue with Christian prayers.

Council Member Bill Clayton admonished a young non-religious man who spoke at the Feb. 4th meeting who disagreed with the Council’s prayer practices. In doing so, Clayton condescendingly told two stories on the issue of Christianity and the bible. In the first, he said that a friend who was an atheist became a Christian. He said, “the harder he tried to disprove the Bible using science, the more he found that the Bible proved science.” Clayton continued:

Now, Christianity is not a religion of exclusion. Anybody who’s been around any Bible preaching is familiar with John 3:16. “God gave his only beloved son that whosoever shall believe in him shall not perish, but have everlasting life.” It is God’s will that nobody perish. Nobody is excluded. And all of us have heard, “love the sinner, hate the sin.”

Council Member Clayton’s second story included his view that our laws are biblical:

The Bible is replete with instructions. Our laws of our land come from the Bible. It’s frightening to think how lawless this land might be were we not to have guidance given in that book...You have to have the rules. And the rules, like it or not, come from the book we call the Bible.

Council Member Clayton’s comments highlight the religious intent and endorsement of Christianity inherent in the Council’s prayer practice.

Mayor Kooiker’s criticisms of FFRF and disregard for the views of non-believers is also illustrative. We understand that Mayor Kooiker emailed all city employees his opinion on the matter after the council meeting. This caused offense to a number of City staffers. We received emails from a handful of City employees. The Mayor’s message marginalizes those who disagree and affirms that continuing with Christian prayers has the full support from the Mayor and the City.

FFRF would like to reiterate that non-Christian and non-citizens are a part of your community. We received complaints about the prayers from some of these individuals. FFRF also has a number of members who reside in Rapid City. Since our complaint, several

other residents have reached out to FFRF to express their agreement with changing the prayer ritual.

Thankfully, under the U.S. Constitution, a majority of citizens can't use the government to institute their religion. This is a matter of constitutional law, not "majority rule." It is immaterial how many residents would like the Council to continue sectarian prayers. The courts have continually reaffirmed that the rights of minorities and freedom of conscience are protected by the Constitution. As the Supreme Court has said, "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304-305 (2000) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)). As the Court said in *Barnette*,

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. 319 U.S. at 638.

The best resolution is for the Council to drop prayers from its public meetings convened for civic business. These prayers have been divisive in the community. It would be wise to resolve the issue once and for all, as other municipalities have done, rather than to maintain a prayer practice that is a liability and excludes segments of the population.

Sincerely,



Patrick C. Elliott
Staff Attorney