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MEMORANDUM

TO: Concerned Parties

FROM: John W. Whitehead, President

DATE: October 6, 2005

SUBJECT: Prayer at City Council Meetings: Analysis and Guidelines

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The issue of prayer and/or invocations at City Council meetings has come into question since the Fourth Circuit Court of Appeals issued its decision in *Wynne v. Town of Great Falls, South Carolina* in July 2004. The purpose of this memorandum is to explain the limited import of that decision, to emphasize that constitutionally permissible methods remain for offering prayer before City Council meetings and to suggest guidance in the conduct of such meetings.

In *Wynne*, the Fourth Circuit Court of Appeals held that City Council members in Great Falls, South Carolina violated the Establishment Clause by engaging "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." *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004). The Rutherford Institute believes the *Wynne* decision is limited in its holdings. Indeed, there are constitutionally permissible alternatives remaining that permit prayer at City Council meetings. This is confirmed by a more recent Fourth Circuit decision, *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005), which rejected a challenge to a county board's practice of opening board public meetings with a prayer.

Legislative Prayers

The *Wynne* decision does not prohibit all prayers by Council members at City Council meetings. The United States Supreme Court has held that such officially sponsored invocations before sessions of legislative bodies are constitutionally permissible. *Marsh v. Chambers,* 463 U.S. 783, 794 (1983). Recognizing this, the court's decision in *Wynne* plainly states:

> Public officials' brief invocations of the Almighty before engaging in public business have always, as the *Marsh* Court so carefully explained, been part of our Nation's history. The Town Council of Great Falls remains free to engage in such invocations prior to Council meetings. The opportunity to do so may provide a source of strength to believers, and a time of quiet reflection for all.

Wynne, at 24-25.

Recognition of the validity of legislative prayer was reaffirmed recently by the Fourth Circuit's decision in *Simpson.* The court there wrote that legislative invocational prayer has become part of the "fabric of society" and is "'among those government acknowledgments of religion [that] serve, . . ., the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.'" *Simpson*, 404 F.3d at 282-83 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)). The *Simpson* decision upheld a county board's practice of allowing religious leaders of various faiths to offer a prayer at the beginning of board public meetings, distinguishing *Wynne* on the basis that the town council in that case insisted that the prayer invoke a particular religion. *Simpson*, 404 F.3d 283-84.

Thus, consistent with the Fourth Circuit Court's decision in *Simpson* and *Wynne*, Council members or invited clergy may continue to offer prayers before Council sessions. The Supreme Court's decision in *Marsh* stands for the proposition that officially sanctioned prayers before legislative sessions are constitutionally valid and do not offend the Establishment Clause.

Including "Sectarian" Prayers of Many Faiths

Critical to the *Wynne* decision was the fact that the only "sectarian" references in the prayers were those to the Christian faith. *Wynne*, 376 F.3d at 301, n.7. The court noted that the City Council had "made no effort to balance its exclusively Christian references with any reference to a deity … associated with any specific faith other than Christianity." *Id.* at 300, n.5 In *Marsh,* the Supreme Court had held, "The content of the prayer is not of concern to judges where … there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. The court in *Wynne* held that the Council's *exclusively* Christian-specific prayers were unconstitutional because the exclusion of all other faiths in the prayers advanced the Christian faith and disparaged others.

Thus, the *Wynne* decision does not mean that a rotation of "sectarian" prayers, including references specific to a variety of faiths, would be unconstitutional. Permitting or offering prayers specific to a variety of religious faiths would not "proselytize or advance any one, or … disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. Indeed, a rotating system of this kind was approved in *Simpson*, 404 F.3d 284, which lauded the board's effort to invite and include clergy from many faiths and held that this exceeded the requirements of *Marsh* and lent a richness to the board's practice. The Fourth Circuit approved of prayers that were sectarian in

nature, including invocations of "the God of Abraham, Isaac and Jacob," and "the God of Abraham, of Moses, Jesus, and Mohammad." The board's "openness to this ecumenism is consonant with our character both as a nation of faith and as a country of free religious exercise and broad religious tolerance." *Id.* It also pointed out that the Supreme Court in *Marsh* had found constitutionally acceptable prayers that fit within the "Judeo-Christian tradition." *Id.* at 283 (citing *Marsh*, 463 U.S. at 793).

Per the Supreme Court's decision in *Marsh* and the Fourth Circuit's decision in *Simpson*, should Council members wish to offer "sectarian" prayers specific to a variety of faiths – or invite clergy from a variety of faiths to offer such prayers – such a practice would be consistent with the Establishment Clause. *Id. See also, Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (upholding as constitutional the City Council's practice of inviting members of the clergy to offer invocations before meetings and its exclusion of one individual who wished to offer a sacrilegious prayer). Indeed, such a practice would celebrate the diversity of religious beliefs and faiths of the nation and community.

Prayer by Clergy and Other Private Citizens is Private Speech

It must be pointed out that prayers delivered by City Council members (i.e., government officials) and those delivered by private speakers, other than government officials, are governed by different constitutional analyses. In fact, because prayers delivered by clergy or other private citizens constitute private speech, rather than government speech, there is no reason to restrict the content of such prayers. And, in our opinion, the First Amendment Establishment Clause to the United States Constitution forbids such restriction. As with all Establishment Clause questions, the critical inquiry with respect to prayers delivered at Council meetings is whether the religious speech is private speech or government speech. "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clause protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion); *accord Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 841 (1995).

It is the identity of the speakers as private individuals, rather than government representatives, that distinguishes the invocations from those considered in both *Wynne* and *Marsh*. Invocations delivered voluntarily by private individuals at Council meetings do not constitute "government speech" merely by virtue of the fact that they are allowed by the Council members and occur on government property. Because they do not constitute government speech, prayers delivered by private citizens necessarily fall into the category of private speech and, thus, are not within the ambit of the First Amendment's Establishment Clause. Rather, they are *protected* by the Free Speech and Free Exercise Clauses.

In both *Marsh* and *Wynne*, the primary concern was about government favoritism toward a particular religious sect. In *Wynne*, this concern was implicated because the exclusively Christian invocations were offered by representatives of the Town; they thus had the effect of affiliating the Town with Christianity. On the other hand, where Town officials simply allow

private individuals to deliver invocations without restricting their content, there is no official affiliation of the Town with whatever invocation happens to be delivered. These invocations constitute private speech that is protected by the very core of the First Amendment. Moreover, a Council's policy of allowing different individuals to pray on a rotating basis is even less likely to result in proselytization of any one particular faith, or disparagement of any other, than the policy upheld in *Marsh* because any given belief system may be represented by the different individuals who are given the opportunity to pray at various times.

The Establishment Clause Forbids Town Officials to Dictate the Contents of Prayers by Private Individuals

It is also clear that governmental entities may not dictate the content of prayers by private individuals. This is a violation of the Establishment Clause. As the Supreme Court noted in *Lee v. Weisman*, 505 U.S. 577, 589 (1992):

> 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. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.

Therefore, any undertaking by government officials to proscribe certain expressions from the prayer of private individuals and prescribe other expressions constitutes government interference in the activities of private citizens and, thus, is violative of the Free Exercise, Free Speech and Establishment Clauses.

Prayers for the Benefit of the Council Members Only

Finally, the *Wynne* decision recognizes that the prayers at issue in that case were not "only for the benefit of the Council members." *Wynne*, 376 F.3d at 301, n.7. Rejecting the City Council's argument to that effect, the court noted that the City Council listed the prayers first on its agenda of public business, that citizens participated in the prayers by standing and bowing their heads and by declaring "amen" and "hallelujah" and that a Town Council resolution stated that the prayers were for divine guidance for the Town and its citizens. *Id.* Given these facts, the court held that the prayers were not "only for the benefit of the Council members," but that the Council had "directed Christian prayers at – and thereby advanced Christianity to – the citizens in attendance at its meetings and the citizenry at large." *Id.* It was this use of the prayers to advance the Christian faith that the court held violated the Establishment Clause.

By contrast, the prayers approved in *Simpson*, 404 F.3d at 284, were addressed to and were a blessing for the benefit of the board. The invocation was not made for the benefit of the

individual leading it nor for those who might be present, and the citizenry at large was not invited to participate.

Thus, the *Wynne* decision does not foreclose even "sectarian" prayers by Council members at meetings so long as those prayers are only for the benefit of the Council members themselves and not for the purpose of advancing the Christian faith or disparaging other faiths. Should Council members wish to offer such prayers, they should not appear on the agenda for public business and should occur prior to opening the meeting for public business.

For further information about this issue, feel free to contact The Rutherford Institute.