RECORD NO. 06-1944

In The
United States Court of Appeals
For The Fourth Circuit

HASHMEL C. TURNER, JR.,

Plaintiff - Appellant,

v.

THE CITY COUNCIL OF THE CITY OF FREDERICKSBURG, VIRGINIA; THOMAS J. TOMZAK, in his official capacity as Mayor of the City of Fredericksburg, Virginia,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The district court's jurisdiction over this matter involving the constitutionality of a legislative prayer policy arose under 42 U.S.C. § 1983, 28 U.S.C. § 1343, 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201-02. This Court's jurisdiction arises under Federal Rule of Appellate Procedure 3(a)(1) and 28 U.S.C. § 2107. The Notice of Appeal was timely filed on August 23, 2006 in that the Final Order from which the appeal was taken was entered by the District Court on August 14, 2006. (See Final Order granting Summary Judgment in favor of Defendants/Appellees at App., p. 591; Notice of Appeal at App., p. 592; District Court Docket Report confirming dates of Final Order and Notice of Appeal at App., pp. 6-7).

STATEMENT OF THE ISSUES

This appeal addresses the constitutionality of a prayer policy adopted by the City Council for the City of Fredericksburg, Virginia ("City Council").[1] For nearly fifty years, the City Council had opened its meetings with a prayer given by a City Council member – the councilors took turns

[1] Both appellees/defendants will be jointly referred to herein as the City Council.

offering the prayer as part of a prayer rotation. In November 2005, however, after being threatened with litigation the City Council adopted a new policy aimed at prohibiting Appellant Hashmel C. Turner, Jr. ("Turner" or "Councilor Turner"), a duly elected member of City Council, from closing his individual prayers with the name of Jesus Christ. The new policy requires that all prayers offered by City Council members be "nondenominational." Because Turner closes his prayers by invoking the name of Jesus Christ, the City Council deemed his prayers to be outside the scope of the policy and thus have refused to permit Turner to take his place in the prayer rotation with other City Council members.

The issues to be raised on appeal are as follows:

(1) Did the district court err by granting defendants' motion for summary judgment and denying plaintiff's motion for summary judgment?

(2) Did the district court err by holding that the prayer offered by an elected City Council member as part of a prayer rotation (whereby each member of City Council is given the opportunity to pray on a rotating basis) was government speech instead of private speech or, in the alternative, hybrid speech?

(3) Did the district court err by failing to find that the City Council's enactment of a policy prescribing and/or

proscribing the content of Councilor Turner's prayer offered as part of the prayer rotation constitutes impermissible viewpoint discrimination?

(4) Did the district court err by failing to find that the City Council policy prescribing and/or proscribing the content of Councilor Turner's prayer offered as part of the prayer rotation violates the Establishment Clause?

(5) Did the district court err by holding that even isolated references to Jesus Christ in legislative prayers over a four year period violate the Establishment Clause?

(6) Did the district court err by finding that the City Council policy prescribing and/or proscribing the content of Councilor Turner's prayer offered as part of the prayer rotation was necessary to avoid violating the Establishment Clause?

(7) Did the district court err by parsing the content of Councilor Turner's specific prayers without first addressing whether the mention of Jesus Christ in less than 10 legislative prayers out of 100 such prayers over a four year period exploited the prayer opportunity to proselytize or advance any one faith or belief?

(8) Did the district court err by failing to find that the City Council policy permitting only "nondenominational" prayers is unconstitutionally vague and overbroad as a matter

of law and as applied to Councilor Turner, thus vesting impermissible unbridled discretion in City Council?

STATEMENT OF CASE

This action was filed on January 11, 2006, under 42 U.S.C. § 1983 for violations of Turner's constitutional rights under the First, Fifth and Fourteenth Amendments to the Constitution, as well as certain provisions of the Virginia Constitution. The suit also sought declaratory relief with respect to Turner's rights under the same constitutional provisions.

Turner is a member of Fredericksburg City Council. He has served since 2002 and in May 2006 was elected for another four year term. Since the 1950s, the City Council has called upon council members, on a rotating basis, to open its meetings with prayer. Upon his election in 2002, Turner requested that he be placed on the rotating schedule to pray. After several prayers were offered by Turner in this rotating schedule, the American Civil Liberties Union threatened to sue the City Council for violating the Establishment Clause because Turner invoked the name of Jesus Christ in his prayers. No other City Council member was then invoking the name of Christ in any prayer. After receiving the threat of litigation, the City Council adopted a policy permitting only "nondenominational" prayers. Thereafter, when Turner stated

that he would continue to close his prayers in the name of Jesus Christ, the Mayor refused to acknowledge Turner when his turn in the prayer rotation arose.

Turner then filed this suit requesting declaratory and injunctive relief. Specifically, the suit asked the district court to declare the rights of the parties with respect to the application of the First, Fifth and Fourteenth Amendments to the Constitution. It also asked the district court to enjoin the defendants/appellees from interfering with Appellant's constitutional rights by ordering a permanent injunction preventing defendants from enforcing the "nondenominational" policy against Turner and ordering the Mayor to place Turner in the prayer rotation and recognize Turner in the normal course of city council meetings to offer prayer as his turn in the rotation arose. The suit also asked for costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

The parties cross-moved for summary judgment. The district court granted the City Council's motion for summary judgment and denied Turner's motion for summary judgment. This appeal followed.

STATEMENT OF FACTS

Since at least 1957, the City Council has opened its council meetings with prayer. (App., p. 37). These prayers are presented by a member of City Council on a rotating basis

– in other words, members take turns presenting the prayers, with a different Council member praying at each meeting. Id.

Since his initial election to City Council in 2002, Councilor Turner (who is a full-time employee of Fort A.P. Hill, an ordained minister and a part-time pastor of the First Baptist Church of Love, a nondenominational church in the Fredericksburg area) has taken his place in this prayer rotation. (App., p. 457). During this time, of the approximately 100 prayers presented by various City Council members, Councilor Turner has offered less than 10 prayers. (App., pp. 466-71 (summary of identity of members offering prayers at City Council meetings)). In nearly all of those prayers, Councilor Turner closed by praying in the name of Jesus Christ because he sincerely believes that he is required to do so by his faith. (App., pp. 457-58). No other City Council member has ever mentioned the name of Jesus Christ in any of the approximately 90 additional prayers presented during that period. (App., pp. 472-568 (transcript of City Council prayers offered during period in question)).

Councilor Turner's prayers and the prayers offered by other City Council members are offered by the councilors in their individual capacities and not on behalf of the entire City Council. (App., p. 457 (affidavit of Councilor Turner); App., pp. 28-29 (statement of Councilor Girvan given during

Nov. 8, 2005 City Council meeting)). Councilor Turner specifically offers his prayers both for himself individually so that he may have divine wisdom and guidance in carrying out his responsibilities and likewise for the deliberations of the City Council. (App., p. 457). In fact, on at least one occasion Councilor Turner prefaced his prayer saying, "[a]s we go into prayer this afternoon, my prayer is personal, does not reflect the Council's belief." (App., p. 523 (transcript of prayer from Nov. 25, 2003 City Council meeting)).

Furthermore, Councilor Turner's deeply held religious beliefs require him to pray in the name of Jesus Christ. (App., pp. 457-58). Councilor Turner believes that this tenet of his faith is supported by numerous passages of the Bible, many of which he cited for reference in his declaration filed with the district court in support of his cross-motion for summary judgment. Id. In fact, Councilor Turner believes that if he does not pray in the name of Jesus Christ, his prayers will not be heard and thus will not be answered. Id. In light of this belief, Councilor Turner has consistently invoked the name of Jesus Christ when praying before City Council. Id.

As noted, no other City Council member has mentioned the name of Jesus Christ in a prayer since 2002, which includes approximately 100 prayers, 9 of which were offered by

Councilor Turner. (App., pp. 472-568). However, other Councilors from 2002 to present have used varying names for the deity they invoke: On sixteen (16) different occasions, Councilor Girvan prayed to "Almighty God." On fifty-nine (59) different occasions, Councilors (other than Councilor Turner) referred to either "Father" or "Heavenly Father." Id. These "denominational" practices have not stopped since November 8, 2005, the date when City Council adopted the new Prayer Policy that resulted in Councilor Turner being excluded from the prayer rotation.

On November 8, 2005, in response to threatened litigation by the ACLU the City Council adopted a policy of offering only "nondenominational" prayers. (App., pp. 22-30 (relevant excerpts of transcript of Nov. 8, 2005 meeting)). This policy was discussed and adopted by the City Council members upon the advice and recommendation of the City Attorney, who prepared a memorandum setting forth her findings and conclusions. (App., pp. 31-33).

The City Attorney's memorandum, in pertinent part, set forth the following conclusion and recommendation:

> Council may continue to offer a non-denominational prayer, seeking God's blessing on the governing body and His assistance in conducting the work on the City, as part of its official meeting. At this time, there is no clear legal

> authority to permit a denominational prayer—one invoking Jesus Christ, for example—as part of the official meeting.

Id.

In the discussion at the November 8, 2005 meeting, the City Council voted upon a motion to "accept the City Attorney's recommendation that Council continue to offer nondenominational prayers seeking God's blessing on the governing body and his assistance in governing works of the city as a part of its official meeting." (App., p. 26). The motion was adopted by a vote of 5-1, with Councilor Turner abstaining. (App., p. 29).

Councilor Turner's next turn in the rotation to pray arrived on November 22, 2005. (App., p. 458). Before the meeting, the Mayor of Fredericksburg asked Councilor Turner if he would continue to invoke the name of Jesus Christ in his prayers. Id. Councilor Turner stated that he would. Id. Thus, at the November 22, 2005 City Council meeting the Mayor refused to recognize Councilor Turner and instead recognized Councilor Girvan for the opening prayer. (App., p. 459; App., p. 39 (Affidavit of Dr. Thomas J. Tomzak, Mayor)). Mayor Tomzak is charged with the duty of presiding over City Council meetings. (See Fredericksburg City Charter, Article III § 2-81(b)).

After the filing of this action, Mayor Tomzak was quoted in The Free Lance-Star newspaper as follows: (i) "Tomzak said he does not believe Turner's rights are being violated and the suit filed today is 'a lawsuit that I probably agree with'"; (ii) he believes Councilor Turner is a "man of faith and a man of principle"; and (iii) he refused to recognize Councilor Turner for prayer at the November 22, 2005 Meeting because "I did not want to unleash a 1,000 pound gorilla – the ACLU – on the City Council." (App., pp. 572-73 ("Councilman Sues Fellow Council Members," The Free Lance Star, Jan. 11, 2006)).

Mayor Tomzak also told the Richmond Times-Dispatch that, "I thought we had violated [Turner's] First Amendment rights. He was only praying for the good health of his community." (App., pp. 574-75 ("Fredericksburg Council Sued by Councilman," The Richmond Times-Dispatch, Jan. 12, 2006)).

SUMMARY OF ARGUMENT

The essential question in this case is whether the government may provide an opportunity to pray to a select group of individuals but (i) dictate the content of the prayers the individuals in the group may recite, and (ii) preclude any member of the group who refuses to comply with the script from offering a prayer. The answer, provided by the Supreme Court, is "no" – the government simply cannot prescribe or proscribe the content of any "official" prayer

without violating the Establishment Clause, and it cannot discriminate against any person based on his or her religious viewpoint without violating that person's rights to free speech and free religious expression.

In the City Council's view (and the view adopted by the district court), (i) Councilor Turner's prayers constitute government speech subject only to the Establishment Clause, and (ii) even a single mention of the name Jesus Christ in *any* legislative prayer violates the Establishment Clause, thus requiring that Councilor Turner's prayers be censored.

This view, however, cannot be squared with the long-standing First Amendment protections against viewpoint discrimination and the Supreme Court's historic ban on government efforts to prescribe or proscribe the content of prayer.

First, it goes without saying that the government cannot itself pray, thus prayer cannot be government speech. Moreover, the Supreme Court's "government speech" doctrine has traditionally been applied only where the government actually controlled the precise content of the speech at issue, such as where the government advertised or provided counseling on military affairs. Because the individual council members control the content of their prayers, the prayers do not constitute government speech.

Second, the Supreme Court has never held that the Establishment Clause requires any references to Christ or other deity to be extracted from a legislative prayer. And in Wynne v. Town of Great Falls, this Court explained that its concerns with the use of the name of Christ were its "repeated" and orchestrated invocations – the Court even noted that it was only focusing on the language of specific prayers after the district court expressly found that the prayer opportunity had been "exploited" by the entire council to advance one particular religion.

Third, the City Council's "nondenominational" policy is facially deficient because it is vague and overly broad, thus vesting unbridled discretion in the City Council. This Court has itself ruled in Simpson v. Chesterfield County Board of Supervisors that mere denominational preferences do not violate the Establishment Clause. Furthermore, other City Council members have offered prayers both before and after the adoption of the November 8, 2005 Prayer Policy that contain significant denominational references and leanings – yet only Councilor Turner's particular references to Jesus Christ have been targeted under the policy.

To some extent, the error of the City Council in adopting the new Prayer Policy is understandable. It was done under threat of litigation by a national legal organization. And

cases arising under the Religion Clauses are fact intensive and not easily reduced to a simple formula or single precedent. In the words of Justice Breyer, "[i]f the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases …. [N]o exact formula can dictate a resolution to such fact-intensive cases." Van Orden v. Perry, 125 S. Ct. 2854, 2869 (2005) (Breyer, J., concurring in judgment).

This case, falling as it does in the fault line between the restrictions of the establishment clause and the protections of the free speech clause,[2] is a classic borderline case. Yet whether viewed as an establishment clause case or a free speech case, the conclusion is the same – the government simply may not dictate the content of prayer nor discriminate against an individual based on his religious viewpoint.

Thus, for these reasons and those set forth below the Court should reverse the decision of the district court and enter judgment in favor of Councilor Turner.

[2] For ease of reference, this brief refers to the free speech clause, with the understanding that, as recognized by this Court on several occasions, the free speech arguments incorporate arguments relating to the free exercise and equal protection clauses. Simpson, 404 F.3d at 288 (recognizing "unitary analysis" principle).

ARGUMENT AND AUTHORITIES

I. Standard of Review.

The Court reviews legal conclusions such as those reached by the district court granting summary judgment in this case "de novo." Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276, 280 (4th Cir. 2005); United States v. Stevenson, 396 F.3d 538, 541-542 (4th Cir. 2005) (citations omitted).

II. Legislative Prayer is Deeply Embedded in the History and Tradition of this Country and Is Constitutional.

The Supreme Court of the United States has affirmed the constitutionality of legislative prayer, finding in the process that it is deeply embedded in the history and tradition of this Country.

In Marsh v. Chambers, 463 U.S. 783 (1983), the plaintiff challenged the practice of the Nebraska Legislature, which employed a Presbyterian chaplain who offered prayer to open each session of the legislature, arguing that this practice violated the Establishment Clause. The Supreme Court rejected the challenge, finding that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." Id. at 786. In fact, the Court found that the

First Congress "adopted the policy of selecting a chaplain to open each session with prayer." Id. at 787-88. The Court noted that only three days after Congress authorized the appointment of paid chaplains it reached agreement on the language for the Bill of Rights. Id. Given these facts, the Court observed that, "[c]learly the men who wrote the First Amendment Religion Clauses did not view … opening prayers as a violation of that Amendment …." Id. The Court concurred in this view, determining that legislative prayer did not violate the Constitution.

Moreover, in the course of its opinion the Court declined the plaintiff's request to delve into the content of the specific prayers offered. Instead, the Court observed that, "[t]he content of the prayer is not of concern to judges" unless the prayer opportunity "has been exploited to proselytize or advance any one … faith or belief." Id. at 794-95. In the absence of any such evidence, the Court held that, "it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." Id. at 795.

The ruling in Marsh thus establishes that the City Council's prayer rotation procedure and Councilor Turner's participation in that procedure are presumed constitutional. Furthermore, in the absence of the exploitation by the City

Council of the prayer opportunity to proselytize or advance any one faith, neither the Mayor, the City Council, nor this Court should "parse" the content of any particular prayer.

III. The District Court Erred in Concluding that Councilor Turner's Prayers are Government Speech.

Contrary to the conclusion of the district court, Councilor Turner's prayers do not fit the government speech criteria. Therefore, this Court should conclude that his prayers are private speech or, at the very least, hybrid speech.

1. Councilor Turner's Prayers Are Private Speech.

A. Turner's Prayers Pass the Private Speech Test.

Councilor Turner's prayers are private speech because they pass the speech test adopted by this Court. In Planned Parenthood of South Carolina Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004), this Court applied a four factor test to determine whether the speech at issue was government or private. This test considers, "(1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the

private entity bears the ultimate responsibility for the content of the speech." Id. at 792-93.[3]

Applying the same analysis to the facts of this case leads to the conclusion that Councilor Turner's speech is not purely government speech and thus is protected from viewpoint discrimination. First, the central purpose of the program in which the speech occurs (i.e., opening the Council session in prayer) is twofold: (i) it is for the benefit of the individual Council members, who seek wisdom in their own

[3] The Supreme Court has identified other indica that shed light on whether speech is private or government-endorsed speech. In Board of Ed. of Westside Community Schools (Dist. 66) v. Merghens, 496 U.S. 226, 250 (1990), Justice O'Connor (writing for the Court in an Establishment Clause challenge to the Equal Access Act) declared that "there 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 Clauses protect." Id. Not only did Justice O'Connor look to the audience, which she recognized was mature enough and likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis, she also considered the *context* in which the speech was uttered. "The proposition that schools do not endorse everything they fail to censor is not complicated. '[P]articularly in this age of massive media information . . . the few years difference in age between high school and college students [does not] justif[y] departing from Widmar.' Bender v. Williamsport Area School Dist., 475 U.S. 534, 556 (1986) (Powell, J., dissenting)." Id. The Court also looked to the broad range of participation as an indication that it would be perceived as private in nature. Id. at 252. These Merghens factors were critically important in this Court's decision to uphold a private program making Bibles available in public schools as private, and not governmental, speech. See Peck v. Upshur County Bd. of Ed., 155 F.3d 274, 283ff. (4th Cir. 1998).

activities on the Council, and (ii) it solemnizes the occasion and asks for wisdom for the City Council members generally. (See, e.g., City Council members' prayers asking that their actions benefit the community (App., pp. 494, 499, 502, 508)). Thus, the first factor is itself split, with elements of both private and government speech.

Second, Council members historically exercised full editorial control over the content of their prayers, with the sole exception being the new Prayer Policy's mandate that the prayers be "nondenominational" (a requirement that is itself an unconstitutional "prescription" and "proscription" of the prayers' content). Moreover, the individual Council members in practice fashion the content of their prayers as individuals. (App., p. 28 (Statement of Councilor Girvan)).

Third, the identity of the literal speakers is the Council members. Because it is the City Council members themselves, and not invited members of the local clergy, their individual identities are emphasized. For example, Councilor Turner himself has made clear that, "[a]s we go into prayer this afternoon, my prayer is personal, does not reflect the Council's belief." (App., p. 523). If the speakers were simply members of the local clergy, the audience would more likely assume that they were invited by the full Council and that their statements would be endorsed by the full Council.

Yet each Councilor is just one member of seven, and immediately after the prayer is offered the Council begins to debate the various issues of the day, thus emphasizing the individuality of each of the members. The fact that the members of Council participate on a rotating basis affirms this reality.

Fourth, the City Council members individually bear the ultimate responsibility for their speech (i.e., prayer). As noted above, Councilor Turner and Councilor Girvan have both on separate occasions made clear they were speaking in their individual capacities only. (App., pp. 28, 523).

The district court erred in its analysis of this test because, in circular fashion, it founded its analysis on the presupposition that Councilor Turner's prayers violate the Establishment Clause. For example, it concluded that the prayers were government speech because it concluded that the government was obligated to exercise editorial control over the speech to avoid an Establishment Clause violation. (App., p. 585). The district court also concluded that a prayer may not be offered "without the Mayor's permission." (App., p. 585). Yet both of these conclusions presuppose that (i) the City Council and the Mayor can constitutionally discriminate against Councilor Turner's religious viewpoint and (ii) Councilor Turner's prayers violate the Establishment Clause.

Once this presupposition is removed, the district court's analysis breaks down.

B. This Court's Decisions Do Not Compel a Different Result.

In concluding that Councilor Turner's prayers constitute government speech, the district court also relied on this Court's decision in Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276 (4th Cir. 2005). Yet Simpson is distinguishable on its facts. There, the plaintiff, a Wiccan, was not a part of the "particular class of speakers" invited to participate in the prayer forum. Instead, the Wiccan plaintiff was not invited to participate in the offering of prayers and sued to gain access to the forum. By contrast, in this case Councilor Turner is a member of the particular class of speakers who are eligible to participate in the prayer forum. In fact, for years Councilor Turner participated until the City Council passed its new Prayer Policy in November 2005.

Since Councilor Turner is a member of the class of speakers with access to the forum, the mere fact that the City Council meeting is a nonpublic forum does not alter the analysis – as this Court has recently recognized in its decision in Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools, the government may not

discriminate against a particular viewpoint even in a nonpublic forum. 457 F.3d 376, 384 (4th Cir. 2006) (Motz, J.) ("[E]ven in a nonpublic forum, government regulation must be not only reasonable *but also viewpoint neutral*.") (emphasis added).

The Supreme Court, of course, embraces the same rule. See Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666 (1997). In Forbes, the Court found that a political debate sponsored by a public television station was a nonpublic forum, since the government "reserve[d] eligibility for access to the forum to a particular class of speakers …." Id. at 679. But it then observed that a nonpublic forum "does not mean that the government can restrict speech in whatever way it likes." Id. at 682. Rather, "[t]o be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." Id. Thus, Forbes illustrates both the precise analytical equivalent to the nonpublic forum for prayer created by the city council and a crucial distinction between this case and the Court's decision in Simpson – specifically, the City Council has reserved eligibility for access to the prayer rotation to a particular class of speakers, the city councilors, who are themselves protected from impermissible

viewpoint discrimination. See also R. Johan Conrod, Note, Linking Public Websites to the Public Forum, 87 Va. L. Rev. 1007, 1015 n. 49 (2001) (citing cases for the proposition that viewpoint discrimination in nonpublic forum is impermissible).

C. The Supreme Court Has Never Deemed Legislative Prayer to Constitute Government Speech.

Perhaps most importantly, however, the Supreme Court has never deemed legislative prayer to constitute government speech. Rather, in the relatively short lifespan of the government speech doctrine,[4] it has been applied where the government controlled the actual content of the speech – a feature not present here where the individual city council

[4] In 2005, Justice Souter characterized the doctrine as follows: "The government-speech doctrine is relatively new, and correspondingly imprecise." Johanns, 544 U.S. at 574 (Souter, J., dissenting). For further evidence of the imprecise nature of the government speech calculus, see Planned Parenthood of South Carolina v. Rose, 361 F.3d 786 (4th Cir. 2004) (Michael, J., opinion of the court); Rose, 361 F.3d at 800 (Luttig, J., concurring in the judgment); Rose, 361 F.3d at 801 (Gregory, J., concurring in the judgment); Planned Parenthood of South Carolina v. Rose, 373 F.3d 580 (4th Cir. 2004) (Wilkinson, J., concurring in denial of rehearing en banc); Rose, 373 F.3d at 582 (Shedd, J., dissenting from denial of rehearing en banc (joined by Williams, J.)); Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, J., concurring in denial of rehearing en banc); Sons of Confederate Veterans, 305 F.3d at 242 (Williams, J., concurring in denial of rehearing en banc); Sons of Confederate Veterans, 305 F.3d at 244 (Luttig, J., concurring in denial of rehearing en banc); Sons of Confederate Veterans, 305 F.3d at 247 (Niemeyer, J., dissenting from denial of rehearing en banc); Sons of Confederate Veterans, 305 F.3d at 251 (Gregory, J., dissenting from the denial of rehearing en banc).

members are personally responsible for the content of their prayers and where the government itself may not, as a nonbelieving entity, even offer a prayer. See Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 560-61 (2005) (finding beef advertising campaign constituted government speech where "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government" and "the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign").

Likewise, where the government speaks through its military recruiters or funds family planning counseling by medical doctors the Supreme Court has concluded that such communications also constitute government speech. Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 126 S. Ct. 1297 (2006) (military recruiters); Rust v. Sullivan, 500 U.S. 173 (1991) (family planning counseling). In each of these instances, the government is indisputably the speaker and dictates the precise content of each communication.

In the context of the religion clauses, the Supreme Court has addressed circumstances where the government "speaks" through the display of symbols, such as crèches or the Ten Commandments. In each of these contexts, the Supreme Court has at one time upheld such displays and at another struck

them down as unconstitutional (thus illustrating Justice Breyer's observation of the "fact-intensive" nature of such cases). See Van Orden, 125 S. Ct. 2854 (upholding Ten Commandments display); McCreary County v. American Civil Liberties Union of Ky., 125 S. Ct. 2722 (2005) (finding Ten Commandments display unconstitutional); County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (finding display of crèche in courthouse unconstitutional); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding display of crèche on public grounds). In none of these cases, however, was there a specific individual who could be identified as the "speaker" or "author" of the religious symbol. Rather, in each instance the religious "speech" was identified with and propagated by the government as a whole.

Outside the school context, the Supreme Court has never found prayer or other "official" acts of worship by an identifiable individual to be "government speech."[5] And in the school context, whenever the Court has detected any indication that the prayers constituted "government speech" because their content was effectively prescribed and/or proscribed by the

[5] The Court in Marsh v. Chambers, 463 U.S. 783 (1983), never considered whether the legislative prayers in that case were private or government speech, although it conducted its analysis under the rubric of the Establishment Clause.

state, it has ruled that such prayers are unconstitutional. See, e.g., Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000) (striking down prayers at school football games); Lee v. Weisman, 505 U.S. 577 (1992) (striking down officially sponsored graduation prayers). In sum, there is no Supreme Court precedent supporting the conclusion that a legislative prayer offered by an identifiable individual constitutes "government speech."[6]

The reason, of course, is that the Supreme Court has embraced a long-standing prohibition barring the government from dictating the content of "official" prayer. As Justice Kennedy concluded in Lee v. Weisman, "[i]t is a cornerstone principle of our Establishment Clause jurisprudence that *it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government* .… 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." 505 U.S. at 588-90

[6] Common sense also supports this result. An entity such as the government may advertise, it may recruit, and it may fund programs, but it may not worship or pray because an entity cannot have religious belief. Only individuals can believe, and only individuals can pray. To divorce the prayer from the individual is to render the exercise no longer prayer but simply the recitation of words that include references to religion but that do not themselves constitute prayer in any meaningful sense of the word.

(emphasis added). And contrary to the district court's conclusion, Justice Kennedy did not limit this observation to any particular context but rather found it to be a "cornerstone principle of our Establishment Clause jurisprudence."[7]

In light of this mandate, it is clear that the government may not itself "pray" or prescribe prayer. It may invite private clergy, as in Simpson, to give the invocation. It may employ and pay a Presbyterian minister, as in Marsh. Or, as in this case, it may instead leave the choice of prayer to participating individual councilors in a prayer rotation – councilors who offer the prayer in their own words, as elected representatives and not as employees of or speakers for the city, but as individuals who reasonable observers would know are offering prayer in their individual capacities.

2. In the Alternative, Councilor Turner's Prayers are At Minimum Hybrid Speech and Thus Protected.

This Court first recognized in Planned Parenthood of South Carolina Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004), that some speech may be neither wholly government speech nor wholly

[7] One could in fact synthesize the disparate strands of constitutional theory in this case by deeming Councilor Turner's prayers to be hybrid speech, protected from viewpoint discrimination by the city council but subject to review under the Establishment Clause if evidence existed that the prayer opportunity had been exploited to proselytize or advance one religion.

private speech but rather a form of "hybrid" speech incorporating elements of both government and private speech.[8] The Rose court held that such hybrid speech was entitled to the same protections from viewpoint discrimination that private speech enjoys. Thus, should this Court determine that Councilor Turner's prayers are not purely private speech, it should hold, in the alternative, that his prayers are at least "hybrid" speech and thereby protected from impermissible viewpoint discrimination.

Rose involved a challenge to a state program to put the slogan "Choose Life" on certain license plates. The proceeds of the program were to benefit crisis pregnancy centers, but not groups advocating abortion. This Court applied the four factor speech test, addressing: "(1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the

[8] This Court merely affirmed summarily Magistrate Judge Dohnal's "government speech" finding on appeal in Simpson and did not address in its opinion whether the speech in the facts and circumstances of that case might qualify as "hybrid" speech under Rose. 404 F.3d 276 (4th Cir. 2005).

government or the private entity bears the ultimate responsibility for the content of the speech." Id. at 792-93.

It concluded that, in applying this test to its circumstances, the first two factors suggested government speech, but the last two factors suggested the speech at issue was private. Id. at 794. Given this mixed conclusion, it determined (recognizing that it was operating without the benefit of Supreme Court authority) that the speech at issue was "hybrid" government/private speech, thus requiring it to consider whether the government had engaged in impermissible viewpoint discrimination. Id.

This Court should, at the least, reach the same conclusion with respect to Councilor Turner's prayers. Just as in Rose, at least two of the four speech factors clearly weigh in favor of a finding of private speech: (i) the degree of editorial control over the content of the speech, and (ii) the literal identity of the speaker. Of the other two factors, both have elements of private speech. Unlike the outside clergy in Simpson, here the Council members have professed that they are praying for the benefit of themselves, at least in part, and expressing their own viewpoints. And as individual Council members who must run for re-election and be held accountable for their actions, they share in the ultimate responsibility for the speech.

In sum, two of the four factors are mixed and the other two factors lean decisively in favor of a finding that Councilor Turner's prayers are private speech. At the least, then, Turner's prayers should be considered hybrid speech and protected from viewpoint discrimination by the City Council.

IV. Because the Prayers Are Private Speech, The District Court Erred by Failing to Find that the City Council's Policy Constitutes Impermissible Viewpoint Discrimination.

Since Councilor Turner's prayers constitute private (or hybrid) speech, the district court erred by failing to hold that the City Council's new Prayer Policy impermissibly discriminated against Councilor Turner's religious viewpoint.

The Supreme Court has consistently held that the government may not censor speech solely because of the speaker's religious viewpoint. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (Kennedy, J.) (holding that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction" and recognizing that this doctrine prohibits regulation of religious viewpoints); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 393-94 (1993) ("It discriminates on the basis of viewpoint to permit school property to be used for the presentation of all

views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."); Widmar v. Vincent, 454 U.S. 263, 276 (1981) ("[W]e are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech.").

For example, in Rosenberger, the University of Virginia funded student magazines through a Student Activities Fund ("SAF"). A student group named Wide Awake Productions ("Wide Awake") sought funding for its magazine, which was described as a magazine "of philosophical and religious expression" intended to "provide a unifying focus for Christians of multicultural backgrounds." 515 U.S. at 825-26. The SAF refused to fund Wide Awake, however, contending that to use state monies to fund a distinctly Christian magazine violated the Establishment Clause.

This Court, on appeal, concluded that there was a presumptive violation of the free speech clause, but further found the University's viewpoint discrimination justified by the compelling interest of the state in "maintaining strict separation of church and state" and "the necessity of avoiding a violation of the Establishment Clause." Id. at 828, 838 (quoting this Court as stating that funding Wide Awake would "send an unmistakably clear signal that the University of

Virginia supports Christian values and wishes to promote the wide promulgation of such values.")

The Supreme Court reversed. First, it ruled that SAF's failure to fund Wide Awake was impermissible viewpoint discrimination since SAF refused to do so based solely on the religious viewpoint of the magazine. Id. at 828-37. According to the Court, the University opened a limited public forum by creating SAF with the purpose to fund magazines fitting certain criteria. Id. at 829-30. Since Wide Awake met those criteria, the University was prohibited from discriminating against it based on the religious viewpoint the magazine espoused. Id.; See also Widmar, 454 U.S. 263 (holding that the University of Missouri at Kansas City's attempts to restrict use of its classrooms by student groups for worship violated the students' free speech rights).

The Court then addressed this Court's Establishment Clause concerns. In doing so, it observed that the position adopted by this Court would "require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question – speech otherwise protected by the Constitution – contain too great a religious content." Id. at 844. The Court then noted that this "eventuality raises the specter of governmental

censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy." Id. Given these censorship concerns, it rejected this Court's conclusion and found in favor of Wide Awake. Id.

The Supreme Court's holding in Rosenberger (and its prior decisions in Widmar and Lamb's Chapel) confirms that the City Council's Prayer Policy is unconstitutional. Here, the City Council has opened a forum for legislative prayer and has by historic tradition and practice established a procedure whereby City Council members, as the class of permissible speakers in the forum, are designated to offer prayer. Councilor Turner, as a member of the Council, is within the class of permissible speakers in the forum, and his prayers fit the content that is permitted within the forum (i.e., he is not proffering, for example, readings from his favorite novels). See Rosenberger, 515 U.S. at 829-30 (recognizing the distinction between "on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations"). Under these circumstances, the City Council may not discriminate against Councilor Turner's religious *viewpoint*

unless the Council's action survives "strict scrutiny" – in other words, unless (i) the censorship is justified by a compelling state interest, and (ii) it is narrowly tailored (the two primary components in the "strict scrutiny" analysis). Widmar, 454 U.S. at 269-70.

The Prayer Policy's surgical removal of the name Jesus Christ from Councilor Turner's prayers is not supported by any compelling state interest. The district court concluded that the prohibitions on the religious viewpoint of Councilor Turner's prayers were necessary to avoid an Establishment Clause violation. However, the Supreme Court has specifically warned against the dangers of government dictating or censoring the content of official prayers (not to mention the Marsh Court's caution that judges avoid "parsing" specific prayers), even where such prescriptions and prohibitions are intended to avoid conflict with the Establishment Clause.

In addition to rejecting such justifications in Rosenberger, in Lee v. Weisman, 505 U.S. 577 (1992), the Supreme Court excoriated a similar practice. There, the Court considered a challenge to a high school graduation prayer policy in which the school provided the rabbi (who was to offer the prayer) with a booklet titled "Guidelines for Civic

Occasions" and "advised him that his prayers should be nonsectarian." Id. at 588.[9]

In a majority opinion authored by Justice Kennedy, the Court observed as follows:

> It is a cornerstone principle of our Establishment Clause jurisprudence that *it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government* … and that is what the school officials attempted to do.
>
> Petitioners argue … that the directions for the prayers were a good faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. … We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. … If common ground can be defined with permits once conflicting faiths to express the shared conviction that there is an ethic and a morality

[9] Because Lee involved high school prayer and not legislative prayer, the district court concluded that Justice Kennedy's concerns with government prescriptions of official prayers did not apply to this case. (App., p. 589). Justice Kennedy's observations, however, were not limited to the context of that case but applied broadly across the First Amendment landscape. In fact, in the language quoted above Justice Kennedy referred to this rule as a "cornerstone principle of our Establishment Clause jurisprudence" – hardly the kind of limiting language one would expect to see if Justice Kennedy did in fact intend to cabin his concerns within the boundaries of the school prayer arena.

> which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. *But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.*
>
> 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.
>
> …. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which that all creeds must be tolerated and none favored. *The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.*

Id. at 588-90 (emphasis added and internal citations omitted). Given Justice Kennedy's stinging rebuke to a strikingly similar practice, the district court's concerns over an ostensible Establishment Clause violation are not a sufficiently compelling justification.[10]

Because there is no compelling state interest, the Court need not reach the question of whether the Prayer Policy was

[10] Both the transcript from the November 8, 2005 meeting at which the Prayer Policy was adopted and Mayor Tomzak's statements to The Free Lance-Star make clear that the primary motivation of the Council members was to avoid litigation brought by the ACLU. Such a concern is not a compelling interest sufficient to survive strict scrutiny.

narrowly tailored to achieve the ends of the Council. Suffice it to say, however, that a policy reaching much more broadly than any Supreme Court precedent requires is not narrowly tailored and, in fact, is so broad ranging and ambiguous that it is unconstitutional on its face. And, of course, to the extent the Council attempted to develop a more precise tailoring of the Prayer Policy, it would risk running afoul of the Supreme Court's prohibition on prescription or proscription of prayer.

In sum, the Prayer Policy violates Councilor Turner's free speech and free exercise rights because it impermissibly discriminates against his religious viewpoint.

V. The District Court Erred by Failing to Find that the City Council's Prayer Policy Violates the Establishment Clause Because it Prescribes and/or Proscribes the Content of Council Members' Prayer.

As noted above, the Supreme Court has expressly held that government officials may not prescribe or proscribe the content of official prayers, even when motivated by an effort to ensure that such prayers are "nonsectarian." Lee v. Weisman, 505 U.S. 577 (1992). In light of this authority, the City Council's adoption and application of its Prayer Policy violates the Establishment Clause prohibition on government prescription of official prayers, and the district court erred by failing to make this finding.

Because Lee has been extensively discussed in a preceding section, it will be dealt with minimally here. Essentially, the Supreme Court in Lee considered a challenge to a high school graduation prayer policy.[11] In its opinion, the Court considered the school district's approach to prescribing the content of the prayer offered. The Court found that the school district invited a rabbi to give the prayer. It provided the rabbi with a booklet titled "Guidelines for Civic Occasions" and "advised him that his prayers should be nonsectarian." Id. at 588.

In a majority opinion authored by Justice Kennedy, the Court decisively rejected this practice:

> It is a cornerstone principle of our Establishment Clause jurisprudence that *it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government* … and that is what the school officials attempted to do.

Id. at 588 (emphasis added and internal citations omitted).

[11] Significantly, the Court in Lee recognized the parallels between the graduation prayer context and the legislative prayer context, but concluded that the different levels of possible coercion faced by a high school student distinguished its circumstances from Marsh. 505 U.S. at 596-97. The concerns raised by the Court in Lee regarding the prescription of official prayer, however, were not impacted by the character of the audience (i.e., students) and were characterized by the Court as being fundamental principles underlying the Religion Clauses. Thus, they apply with equal force to the context of the instant case.

As a matter of prescription or proscription, the City Council's "nondenominational" policy is indistinguishable from the Lee school district's requirement that the rabbi's prayer be "nonsectarian." In both cases, the government seeks to impose content upon an official prayer. Put another way, the Prayer Policy impermissibly seeks to "establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds."

Thus, the Court should find that the Prayer Policy, rather than avoiding an Establishment Clause violation, actually creates one.

VI. The District Court Erred by Holding that Each Legislative Prayer Must Be "Nonsectarian," and thus Even Councilor Turner's Isolated References to Jesus Christ Violated the Establishment Clause.

The district court also erred because it concluded that each individual legislative prayer must be "nonsectarian," and thus even Councilor Turner's isolated references to Jesus Christ violated the Establishment Clause. Yet neither the Supreme Court's decision in Marsh v. Chambers, 463 U.S. 783 (1983), nor subsequent cases decided by the Fourth Circuit require the name "Jesus Christ" to be extirpated from legislative prayer.

First, the district court misconstrued the Supreme Court's holdings in Marsh and Allegheny. The Court in Marsh

did not hold that legislative prayers must be nonsectarian – in fact, it held that judges should not even look to the content of a particular prayer unless there is first an indication that the "prayer opportunity" was being used to "proselytize" or "advance" a particular faith. The only reference to the term "nonsectarian" appears in a footnote, wherein the Court states that the chaplain described his prayers as "nonsectarian." 463 U.S. at 793, n.14. But this footnote was not part of the Court's holding. And given the Court's refusal even to review the content of the prayers at issue, it would have been impossible for the Court to make such a ruling.

Moreover, the Marsh chaplain's removal of all references to Christ is distinguishable from this case (even assuming, *arguendo*, that it has any constitutional significance). In Marsh, the Nebraska legislature hired a chaplain to deliver the prayer at the opening of each legislative session. Thus, if the chaplain had included references to Christ such references would have appeared in *every single prayer*, and would have been presented by a paid employee of the state who was acting at the behest of the legislature as a body.

Here, by contrast, the City Council has a rotating prayer policy, whereby a different member of the Council presents the prayer at each meeting. Thus, while Councilor Turner includes

a reference to Jesus Christ in his prayers, *no other Council member has done so in the past four years.* This fact alone distinguishes Marsh and establishes that no proselytization has occurred under the City Council's historic prayer rotations practice.

The district court also erroneously construed the Supreme Court's decision in Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989), as requiring non-sectarian prayer. Allegheny, however, (a case not involving prayer at all) stated that legislative prayers cross the Establishment Clause line when the prayers "have the effect of affiliating the government with any one specific faith or belief." Id. at 604. Thus, the dicta of the Allegheny court was consistent with the holding in Marsh – in both cases, exploiting the prayer opportunity to proselytize or advance one religion would run afoul of the Establishment Clause.

Likewise, this Court's decision in Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004), is also distinguishable. The Court in Wynne took great pains to establish that the case before it did not involve the "parsing" of a specific prayer – which it acknowledged would be prohibited under Marsh – but rather it relied "on the district court's factual finding that the challenged prayers *'frequently' invoked* 'Jesus,' 'Jesus Christ,' 'Christ,' or 'Savior.'" Id. at 298 n.4 (emphasis

added). Based on this finding, this Court concluded that the prayers as a whole "promoted one religion over all others, dividing the Town's citizens along denominational lines." Id. at 298-99. See also Simpson, 404 F.3d at 283 ("Wynne was concerned that *repeated invocations* of the tenets of a single faith undermined our commitment to participation by persons of all faiths in public life.") (emphasis added).

In fact, the district court in Wynne found that, "the Town Council insisted upon invoking the name Jesus Christ to the exclusion of deities associated with any other particular religious faith," and that the Mayor had stated, "[t]his is the way we've always done things and we're not going to change." Id. at 295, 301. Thus, the holding of Wynne, when properly characterized, was that frequent references to Jesus Christ to the exclusion of all other deities promoted one religion above all others, thus exceeding even the broad vistas of Marsh.

The rotational opening prayer of the City Council is entirely different from the facts found by the district court in Wynne where the council focused solely on the name of Christ. Prayers invoking the name of Christ in this case were not "frequent" – less than 10 out of nearly one hundred prayers even mentioned Christ. In addition, there is no indication that Councilor Turner's prayers constituted a

"Christian prayer ritual" or a "denominational prayer." Id. at 296. This is emphasized by the fact that on at least one occasion Councilor Turner specifically disclaimed that he was speaking for the City Council while praying. (App., p. 523). Instead, he made clear that, "[a]s we go into prayer this afternoon, my prayer is personal, does not reflect the council's beliefs." Id.[12]

Thus, the holding in Wynne does not address the discrete question of whether the mere invocation of Jesus Christ in a few prayers over a four year period constitutes "proselytizing or advancement" of a particular religion. And the district court did not explain how the rotational prayer policy itself had the effect of exploiting the rotational opening prayer as an opportunity to proselytize or advance religion. Given the undisputed facts regarding the isolated references to a single deity, it is clear that no such proselytization occurred and therefore that no Establishment Clause violation existed.

The fundamental error of the district court was to flip this analysis on its proverbial head by first *requiring* that specific prayers be parsed to find references to Christ and by then working backward to conclude that such references

[12] Councilor Girvan also confirmed during the November 8, 2005 meeting that her prayers were offered individually.

proselytize or advance one religion.[13] Yet if the Court must parse every prayer to determine whether it crosses the Establishment Clause line without any initial finding that the prayer opportunity was exploited to proselytize, then the language in Marsh expressly prohibiting such intrusive activity by the courts has no meaning. See also Pelphrey v. Cobb County, Ga., __ F. Supp. 2d __, Civ. Act. No. 1:05cv2075-RWS, 2006 WL 2590594, *7 (N.D. Ga. Sept. 8, 2006) ("[T]o read into the Establishment Clause an absolute proscription of sectarian references during legislative invocations would do violence to Marsh."); Newdow v. Bush, 355 F. Supp. 2d 265, 285 n.23 (D.D.C. 2005) (rejecting Establishment Clause

[13] The City Council argued below that because an attendee at any given meeting hears 100% of the prayers at the meeting, the only prayers the attendee may hear are those offered by Councilor Turner, which include the name of Jesus. This allegedly would cause this theoretical minimally engaged citizen to feel like a "second class citizen in her own community." Suffice it to say that the Supreme Court has rejected this approach. In determining who the relevant observer of the religious activity might be for Establishment Clause purposes, the Supreme Court has consistently held that this theoretical person should be someone versed in the actual practices of the government entity and not an uninformed individual. See, e.g., Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring in judgment) ("But, as I have explained, the relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question."); Capitol Square Review and Advisory Board v. Pinnette, 515 U.S. 753, 765 (1995) ("It is significant that we referred [in previous religion clause cases] only to what would be thought by 'the community'-not by outsiders or individual members of the community uninformed about the school's practice.").

challenge to inauguration prayers because they did not proselytize or exploit the prayer opportunity, even though some included sectarian references, and observing that, "it is notable that the legislative prayers at the U.S. Congress are overtly sectarian" because between 1990 and 1996 "over *two hundred and fifty* opening prayers delivered by congressional chaplains have included supplications to Jesus Christ") (emphasis added) (internal citation omitted).

VII. The District Court Erred By Failing to Find that the Prayer Policy Is Unconstitutionally Vague and Overly Broad Such that It Gives the City Council Unbridled Discretion to Censor Speech.

Finally, the district court erred by failing to conclude that the Prayer Policy is unconstitutionally vague and overly broad such that it impermissibly gives the City Council unbridled discretion to censor speech.

In Child Evangelism Fellowship, this Court outlined the dangers of policies that do not have sufficient safeguards against viewpoint discrimination:

> Such unbridled discretion threatens two specific harms in the *First Amendment* context. First, its existence, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. Second, the absence of express standards renders it difficult to differentiate between a legitimate denial of access and an illegitimate abuse of censorial power.

457 F.3d at 386 (internal citations and quotation marks omitted) (emphasis in original). This Court further concluded that these concerns exist *even in nonpublic forums*. Id. at 387 ("[E]ven in cases involving nonpublic or limited public forums, a policy … that … does not provide sufficient criteria to prevent viewpoint discrimination, generally will not survive constitutional scrutiny.") In light of these concerns, this Court ruled that the school board's policy on access to a flyer distribution program was unconstitutional because it vested unbridled discretion in the government officials and did not contain sufficient safeguards to prevent viewpoint neutrality. Id. at 389.

The Supreme Court has also found policies that are vague and overbroad to violate the Constitution because they give government officials virtually unrestrained power to censor speech. In Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569 (1987), the Supreme Court declared that an airport policy banning "nonairport related" speech was void on its face for vagueness and overbreadth. The Court noted that the "link between airport related speech and non-airport related speech is, at best, murky." Id. at 576. Thus, because the term gave the Airport a "virtually unrestrained power" to charge persons with violation of the murky policy the Court

concluded that the "opportunity for abuse … is self-evident." Id.

The concerns expressed by this Court in Child Evangelism Fellowship and the Supreme Court in Jews for Jesus also exist here. The City Attorney memorandum setting forth the recommendation ultimately adopted by the Council stated as follows:

> Council may continue to offer a non-denominational prayer, seeking God's blessing on the governing body and His assistance in conducting the work on the City, as part of its official meeting. At this time, there is no clear legal authority to permit a denominational prayer—one invoking Jesus Christ, for example—as part of the official meeting.

In addition, during the November 8, 2005 meeting the motion voted upon and approved was to continue offering "nondenominational" prayers. Thus, the touchstone for the Prayer Policy is the term "nondenominational."

The Prayer Policy's reliance on the undefined term "nondenominational" – which has no settled meaning in Establishment Clause jurisprudence – fails to satisfy constitutional standards. The City Council may classify virtually any religious speech as "denominational" given the vagueness of the term. To cite just a few examples of the vagueness of the policy, the Transcript of Prayers set forth in the Appendix shows multiple references to "Almighty God"

and “most merciful Father,” that have occurred since the passage of the Prayer Policy in November 2005. (App., pp. 551-58). It is not clear why these references would not be considered denominational and in violation of the Prayer Policy since they each have characteristics unique to the traditions of specific religious faiths – for example, the term “Father” implies a son, which in the Christian faith is Jesus Christ. The only conclusion one can draw from these references is that the City Council is free to classify any speech with which they disagree as violating their policy – which renders the Prayer Policy unconstitutional on its face.

The prayers the City Council permits under its new policy are not limited simply to references to a merciful Father either. The deities referenced are seen to intervene in human affairs (as opposed to a Deistic or other Gods who do not, or no God at all). They are seen in the prayers with the ability to impart specific gifts to mankind. For example, prayers have been made before Christmas “in the spirit of the season” (App., p. 551) and included entreaties for the “gift of forgiveness” and the “gift of redemption.” Id. They have included “special prayer” for healing and comfort for specific people. (App., p. 553). Some plead for a “spirit of wisdom, charity and justice,” while others pray for intervention on behalf of people in uniform, or help in making decisions.

(App., p. 551-52). These prayers, made in the name of a merciful Father or Almighty God, are no less denominational than Councilor Turner's prayers, if his may be deemed denominational at all (which they are not). Moreover, any discernment of the content is, as the Marsh Court made clear, inappropriate for any kind of civil magistrate and fosters the kind of entanglement prohibited by the Establishment Clause.

Furthermore, fixed meaning for the term used in the new Prayer Policy is elusive. The word "nondenominational" is generally undefined, other than as the reverse of "denominational." The latter term means "sponsored by, or under the control of, a religious denomination; sectarian." Webster's New World Dictionary (2d College Ed. 1980).[14] Under this definition, prayer not "sponsored by or under the control of a religious denomination" would potentially be permissible under the Prayer Policy. And to the extent the Prayer Policy intended to use the term "nonsectarian," the Supreme Court in Lee has precluded that choice.

Perhaps most significantly, however, in Simpson this Court explicitly acknowledged that the existence of denominational markers would not violate the Establishment Clause. It observed that, "[i]n noting the Presbyterian

[14] The term finds little meaning outside Christianity – for example, one does not hear Muslim subgroups defined as "denominations."

identity of the chaplain in Marsh, the Court recognized the reality that *any* choice of minister would reflect, if not denominational preference, then at the least denominational awareness. A chaplain by definition is a member of one denomination or faith. Yet this did not cause the Court in Marsh to void the practice of the Nebraska legislature." 404 F.3d at 285 (emphasis in original).[15] Thus, Simpson confirms that mere denominational preferences do not violate the Establishment Clause.

In light of this authority, the Prayer Policy achieves even greater heights of vagueness. Council members are limited, apparently, not only from using language in their prayers that violates the Establishment Clause but also language that does not conflict with it. And there is no direction given for where the line is with any given prayer – presumably somewhere in a vast sea of gray between the terms "merciful Father" and "Jesus Christ."

In sum, the term "nondenominational" is vague and overly broad because not only is it capable of conflicting interpretations (and in fact given the current prayers in City Council apparently has little settled meaning), but the term

[15] Moreover, the Supreme Court has used the term "denominational preferences" in the context of competing, organized religions, not in terms of sectarian terms peculiar to one religion. Larsen v. Valente, 456 U.S. 228 (1982).

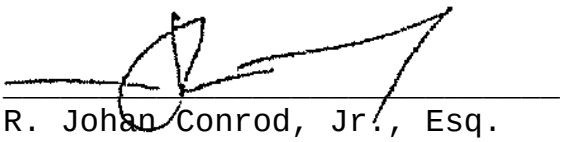
"denominational" describes conduct that does not violate the Establishment Clause. Given this vagueness and overbreadth, the City Council has virtually unbridled discretion to censor prayers with which it does not agree. And such unbridled discretion, as this Court has recognized, violates the First Amendment. Thus, the district court erred in failing to find the Prayer Policy unconstitutionally vague and overbroad.

CONCLUSION

For the reasons stated above, this Court should reverse the District Court's judgment in favor of the City Council and the Mayor, enter judgment in favor of Turner and declare the new Prayer Policy unconstitutional in that it impermissibly discriminates against Councilor Turner's religious viewpoint, itself violates the Establishment Clause and is otherwise unconstitutionally vague and overbroad, thus vesting impermissible unbridled discretion in the City Council. This Court should then enjoin the City Council from enforcing the Prayer Policy against Councilor Turner and order the Mayor to recognize Councilor Turner as his turn in the prayer rotation arises. Finally, the Court should remand this action to the district court for a determination of the costs and fees due Councilor Turner as the prevailing party.

Respectfully submitted,

KAUFMAN & CANOLES, P.C.



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