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Staunton City Council
116 West Beverly Street
Staunton, VA 24401

Re: *Invocations*

Dear Council Members:

As a national organization that has been at the forefront of protecting religious liberty for over three decades, The Rutherford Institute[1] has advised local legislative bodies, their members and their constituents in an attempt to dispel misconceptions about the legality of the practice of legislative prayer. We have recently been asked to weigh in before the Staunton City Council over the possibility of your re-examining the policy of opening meetings with an invocation.

The following is a legal analysis of the controlling precedents that govern this issue as they relate to the Council's current invocation practice.

It is our opinion that the Staunton City Council's current time-honored and salutary practice of legislative prayer is defensible under the decisional framework that has been adopted by the United States Supreme Court and the Fourth Circuit Court of Appeals.

The United States Supreme Court considered the constitutionality of legislative prayers in a 1983 case, *Marsh v. Chambers*, when a member of the Nebraska Legislature challenged the state's practice of paying a chaplain to open each of its sessions with prayer.[2] The legislator alleged that this practice violated the so-called "separation of church and state" concept embodied in the First Amendment's Establishment Clause.

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[1] The Rutherford Institute is a non-profit civil liberties organization, and our mission includes educating the public about the Bill of Rights and providing free legal representation to individuals whose civil rights are threatened or infringed.

[2] *Marsh v. Chambers*, 463 U.S. 783 (1983).

In an opinion penned by Chief Justice Burger, the Supreme Court began its analysis by noting the historical pedigree of legislative prayers, calling the practice "deeply embedded in the history and tradition of this country."[3] The Court observed that the practice of legislative prayer had "coexisted with the principles of disestablishment and religious freedom" from colonial times.[4] Without even applying the "Lemon Test" framework that typically governs judicial analysis of Establishment Clause cases, the Court concluded:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.[5]

In so holding, the Court noted that the invocation practice had not been exploited to proselytize or advance any one faith, nor to disparage any other.[6]

Since the Supreme Court's landmark decision in *Marsh v. Chambers*, the United States Court of Appeals for the Fourth Circuit has considered the constitutionality of municipalities' invocation practices in a handful of cases. Each time, it has relied heavily on its examination of the content of the prayers being offered, apparently interpreting the Supreme Court's characterization of the legislative prayers at issue in *Marsh* as the key to the holding.

Indeed, in *Wynne v. Town of Great Falls, South Carolina*, the Fourth Circuit concluded that the Town Council had transgressed the line between permissible invocations and impermissible proselytization of a single faith, because the prayers at issue "frequently" contained references to Jesus Christ.[7] The court thus deemed the invocations to create a division of the Town's residents along denominational lines and struck the practice as unconstitutional. However, the Fourth Circuit carefully limited its opinion to the facts before it, noting:

> 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

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[3] *Id.*, at 786.
[4] *Id.*
[5] *Id.*, at 792.
[6] *Id.*, at 794-95.
[7] 376 F.3d 292, 298-99 (4th Cir. 2004).

> opportunity to do so may provide a source of strength to believers, and a time of quiet reflection for all.[8]

The very next year, the Fourth Circuit considered another legislative invocation policy, this time of the Chesterfield County Board of Supervisors.[9] The Board's policy was to invite religious leaders from congregations within the County to offer "non-sectarian" invocations at its meetings. The Fourth Circuit concluded that this practice did not cross the constitutional "line" that had been demarcated in *Marsh v. Chambers*, and thus upheld the invocation practice.[10]

Three years later, in *Turner v. City Council of City of Fredericksburg*, the Fourth Circuit rejected an individual Council member's First Amendment-based challenge to a City Council invocation policy requiring invocations offered by Council members to be nondenominational.[11] The court reasoned that while "the Establishment Clause does not absolutely dictate the form of legislative prayer," the Council was acting squarely within the confines of controlling legislative prayer precedents by limiting invocations to non-sectarian prayers.[12]

Finally, in *Joyner v. Forsyth County, North Carolina*, the most recent of the Fourth Circuit's legislative prayer cases, the court struck down the invocation practice of the Forsyth County Board of Commissioners.[13] In theory, the invocation opportunity was open to religious leaders from any area congregation. However, in practice the invocation was routinely a Christian prayer that typically included a reference to Jesus Christ. The Fourth Circuit affirmed the district court's ruling that the practice was unconstitutional, finding that "in order to survive constitutional scrutiny, invocations must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide. Sectarian prayers must not serve as the gateway to citizen participation in the affairs of local government."[14]

A review of these cases leaves no room for doubt: legislative prayers that are non-sectarian in nature and are not exploited as an opportunity to proselytize any particular faith nor disparage any other are unassailable under the First Amendment. Based on the information we have received about the Council's practice, these are precisely the type of invocations that have been offered. It is our understanding that the Council's invocations have historically mentioned no Deity more specific than "God." Therefore, there is no conceivable legal reason for the Council to modify its current practice in any way.

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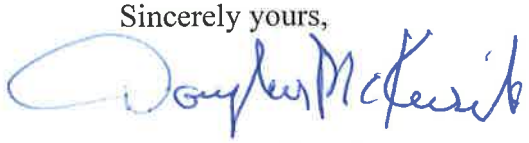
[8] *Id.*, at 302.
[9] *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005).
[10] *Id.*
[11] 534 F.3d 352 (4th Cir. 2008).
[12] *Id.*, at 356.
[13] 653 F.3d 341 (4th Cir. 2011).
[14] *Id.*, at 342-43.

As such, The Rutherford Institute hopes that the Council will choose to continue its invocations rather than preemptively capitulating to baseless fears of phantom lawsuits.

I hope that this information has been helpful to you. If I can provide further assistance, please do not hesitate to contact us.

Sincerely yours,



Douglas McKusick
Senior Staff Attorney

Cc: Doug Guynn, City Attorney