COMMONWEALTH of VIRGINIA

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The Honorable Danny W. Marshall, III
Post Office Box 439
Danville, Virginia 24543

The Honorable Donald W. Merricks
Post Office Box K
Chatham, Virginia 24543

Dear Delegates Marshall and Merricks:

I am responding to your request for an official advisory opinion in accordance with § 2-2-505 of the *Code of Virginia*.

Issue Presented

You inquire regarding the constitutional limits on public prayer at meetings of the Pittsylvania County Board of Supervisors. Specifically, you ask whether opening invocations at the Pittsylvania Board of Supervisors meetings that refer to Jesus Christ constitute a violation of the United States Constitution.

Response

It is my opinion that whether any particular prayer containing the words "Jesus Christ" would violate the United States Constitution turns on contextual facts not contained in your letter. Nonetheless, I provide general guidance on the subject.

Background

You indicate that your inquiry is prompted by a letter written by the American Civil Liberties Union. The letter alleges that, because the "opening invocations at the Pittsylvania Board of Supervisors meetings are consistently Christian in nature; that is, they explicitly refer to Jesus Christ[,]" such conduct by the Board constitutes a violation of the Establishment Clause of the United States Constitution.

Applicable Law and Discussion

Prayers at sessions of legislative bodies are deeply woven into the historical fabric of this country. The same session of the First Congress that passed the Bill of Rights adopted a policy of electing

chaplains to open its sessions with a prayer.[1] "A statute providing for the payment of these chaplains was enacted into law on September 22, 1789."[2] Within days of that enactment, the First Amendment passed through Congress and was sent to the States.[3] Ever since then, the practice of legislative invocations has been considered valid, as the Unites States Supreme Court recognized in *Marsh v. Chambers*.

As the ACLU notes in its letter, the Court in *Marsh* cautioned that the practice of legislative prayer that it was upholding occurred in a context where it was not being used improperly to proselytize or advance or disparage a faith or belief. But the Court also said that courts should not closely review the content of prayer.

> The content of the prayer is not of concern to judges where, as here, 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. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.[4]

To the extent that the Supreme Court commented on the content of the prayers at issue, it was to note that the plaintiff complained "that the prayers are in the Judeo-Christian tradition" – a fact that did not trouble the Court at all.[5] Moreover, the United States Court of Appeals for the Eleventh Circuit recently upheld legislative prayers led by rotating volunteers even though they contained clearly sectarian content.[6]

The Fourth Circuit, in whose jurisdiction Virginia lies, has repeatedly reaffirmed that legislative prayers are constitutional.[7] Nonetheless, when the court has found that such invocations advanced a particular religion, it has held policies governing legislative prayers unconstitutional as applied. For example, in *Wynne v. Town of Great Falls*, the Fourth Circuit found the policy in question unconstitutional because it required the invocation of the name Jesus Christ.[8] Further, in *Joyner v. Forsyth County*, a two-judge majority recently found the policy of a North Carolina county unconstitutional because it resulted in practice in an overwhelming number of sectarian prayers.[9]

Even so, the majority opinion in *Joyner* notes that "[t]he bar for" a locality in permitting legislative invocations "is hardly a high one."[10] The majority opinion approves of two approaches. First,

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[1] Marsh v. Chambers, 463 U.S. 783, 787-78 (1983).

[2] *Id.* at 788.

[3] H.R. Jour., 1st Cong., 1st Sess. 121; S. Jour., 1st Cong., 1st Sess. 88.

[4] *Marsh*, 463 U.S. at 795-95.

[5] *Id.* at 793.

[6] Pelphrey v. Cobb Cnty., 547 F.3d 1263 (11th Cir. 2008).

[7] Joyner v. Forsyth Cnty., 653 F.3d 341, 346 (4th Cir. 2011) ("we have followed the Supreme Court's guidance in repeatedly upholding the practice of legislative prayer."); Turner v. City Council, 534 F.3d 352, 356 (4th Cir. 2008) ("The Council's decision to open its legislative meetings with non-denominational prayers does not violate the Establishment Clause."); Simpson v. Chesterfield Cnty. Bd. of Sprvrs., 404 F.3d 276, 282 (4th Cir. 2005) ("legislative invocations . . . constitute a tolerable acknowledgement of beliefs widely held among the people of this country."); Wynne v. Town of Great Falls, 376 F.3d 292, 302 (4th Cir. 2004).

[8] *Wynne*, 376 F.3d at 301.

[9] *Joyner*, 653 F.3d at 353-55.

[10] *Id.* at 354.

a locality may request ministers to use nonsectarian prayers.[11] The majority assures localities that if some sectarian references nonetheless are made, that courts are not "in the business of policing prayers for the occasional sectarian reference."[12] Second, a locality may cast its net widely enough so that "leaders of all faiths . . . come forth."[13] In that circumstance, the use of "ordinarily . . . brief sectarian terms, such as references to 'Jesus,' 'Allah,' 'God of Abraham, Isaac and Jacob,' 'Mohammed,' and 'Heavenly Father'" will not be unconstitutional because "the prayers, taken as a whole [do] not advance any particular faith."[14] Ultimately, the majority found that precedent "require[es] legislative prayers to embrace a non-sectarian ideal."[15]

As the dissent points out, however, the majority may be misapplying the precedent of *Marsh* and *Simpson*,[16] thereby rendering an inconsistent analysis. As a result, the majority opinion, while acknowledging that references to specific sectarian terms is generally permissible, requires legislative bodies to continuously review the content of offered prayers to ensure they are not overwhelmingly identifiable as Christian.[17] According to the dissent, the majority overemphasizes the voluntary individual invocations that result from the county's policy over the policy itself, which is the only government action before the Court and which the majority concedes is neutral.[18] Further, as the dissent notes, because the majority offers no standard or formula for determining at what point the practice of voluntary sectarian prayer renders the neutral policy unconstitutional,[19] courts will be required to be "in the practice of policing prayers" in opposition to *Marsh*. The dissent suggests, that in effect, to follow the majority, the only means to ensure no constitutional violation would be to eliminate legislative prayer all together, a result in direct contradiction to the traditions of this nation and one, as much precedent has demonstrated, not required by the Establishment Clause.[20]

Nonetheless, despite the sharp criticism of the majority by the dissent, unless that opinion is subsequently, authoritatively limited,[21] along the lines stated in the dissent, it would be imprudent for a Virginia locality or officers to act other than in accordance with it. In giving this opinion, I do not suggest that the Establishment Clause requires nonsectarian prayer at legislative meetings in the manner and to the extent required by the *Joyner* majority opinion; however, that opinion is currently binding in the Fourth Circuit.

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[11] *Id.* at 352. *See, e.g., Simpson*, 404 F.3d at 276.

[12] *Joyner*, 653 F.3d at 351.

[13] *Id.* at 352.

[14] *Id.* at 353 (internal quotation marks and citations omitted).

[15] *Id.* at 347.

[16] *See id.* at 362 (Niemeyer, J., dissenting).

[17] *Id.* at 364-66.

[18] *Id.* at 358-59.

[19] *See id.* at 361-62, 365.

[20] *Id.* at 364, 366-67.

[21] I note that Forsyth County's petition for writ of certiorari is currently pending in the Supreme Court of the United States. *See* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-546.htm.

Conclusion

Accordingly, while the determination of whether any particular prayer containing the words "Jesus Christ" would violate the United States Constitution turns on contextual facts not contained in your letter, it is my opinion that governmental bodies and officers should take heed of recent cases decided in the Fourth Circuit.

With kindest regards, I am

Very truly yours,

Kenneth T. Cuccinelli, II
Attorney General