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Via email

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City of Aberdeen Council Members
60 North Parke Street
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Re: Establishment Clause Violation

Dear Aberdeen Mayor and City Council Members,

A concerned citizen has contacted our office to request assistance regarding serious and ongoing violations of the Establishment Clause of the First Amendment occurring under your authority. Specifically, since at least March of 2020, the Aberdeen City Council has been operating an unconstitutional legislative prayer practice in which the “prayer” is delivered by a city council member (typically Councilwoman Landbeck or Mayor McGrady). The prayers are Christian and often overtly sectarian in nature, ending in “In Jesus’ name” (i.e. the December 14, 2020 prayer delivered by Councilwoman Landbeck). This practice flagrantly violates binding precedent, *see generally Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017), and must cease immediately.

The American Humanist Association (AHA) is a national nonprofit organization with tens of thousands of members across the country, including many in Maryland. The mission of AHA’s

legal center is to protect one of the most fundamental principles in our democracy: the constitutional mandate requiring separation of church and state. We have litigated dozens of cases in federal courts from coast to coast, including in the U.S. Supreme Court, the Fourth Circuit, and the U.S. District Court of Maryland. In fact, just two years ago, AHA won a case in Maryland involving this very issue. *Hake v. Carroll Cty.*, 2014 U.S. Dist. LEXIS 40476, at *3 (D. Md. Mar. 25, 2014), No. 1:13-cv-01312-SAG, Doc. 117 (Sept. 9, 2019) (after previously concluding the council-led prayers violated Establishment Clause, court signed permanent order precluding the county officials from delivering legislative prayers and awarding AHA attorneys' fees and costs).

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It prohibits the government from promoting "a point of view in religious matters" or otherwise taking sides between "religion and religion or religion and nonreligion." *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005) (citing *Epperson v. Ark.*, 393 U.S. 97, 104 (1968)). The government must not "place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general . . . conveying the message that those who [are not adherents] are less than full members of the community." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

The Supreme Court has made clear that the "First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of [government] would be used to control, support or influence the kinds of prayer the American people can say." *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962) ("[G]overnment in this country . . . is without power to prescribe by law any particular form of prayer . . . in carrying on any program of governmentally sponsored religious activity."); *accord Town of Greece v. Galloway*, 572 U.S. 565, 581 (2014) ("It is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise."); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302-03, 308 (2000); *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Thus, your ongoing practice of government-authored and government-delivered official prayers is "inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself." *Engel*, 370 U.S. at 433.

Fourth Circuit precedent has long prohibited local governments from opening public meetings with sectarian Christian prayers. *See Joyner v. Forsyth Cty.*, 653 F.3d 341, 344, 347-48 (4th Cir. 2011) (holding legislative prayer practice unconstitutional because prayers invoked "Jesus" and "Savior" and "[n]one of the prayers mentioned non-Christian deities," and making clear that legislative prayer is allowed "only when it is nonsectarian in both policy and practice."); *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292, 298, 301-02 (4th Cir. 2004) (holding town's prayer practice unconstitutional where prayers were led by the council members and often mentioned "Jesus" or "Savior").¹

In 2014, the Supreme Court handed down *Town of Greece v. Galloway*, 572 U.S. 565 (2014), which clarified that sectarian legislative prayers are permissible *only* when they are

¹ *See also Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d 276, 283 (4th Cir. 2005) (upholding legislative prayer practice because the prayers were nonsectarian in policy and practice); *Turner v. City Council*, 534 F.3d 352, 353 (4th Cir. 2008), *cert. denied*, 555 U.S. 1099 (2009) ("the requirement that the prayers be nondenominational does not violate the Establishment Clause.").

delivered by *private citizens* pursuant to a neutral and non-discriminatory open forum policy that allows anyone to deliver an invocation of their choosing. The Supreme Court upheld that town's practice because a "minister or layperson of any persuasion, *including an atheist*, could give the invocation." *Id.* at 571 (emphasis added). It was critical that "[t]he town at no point excluded or denied an opportunity to a would-be prayer giver." *Id.* See *id.* at 583 ("The tradition reflected in *Marsh* permits *chaplains* to ask their own God for blessings of peace, justice, and freedom that find appreciation *among people of all faiths.*") (emphasis added). Indeed, the Court made clear:

The analysis would be different if town *board members* directed the public to participate in the prayers, . . . Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, *came not from town leaders but from the guest ministers . . .*

Id. at 588 (emphasis added). The Court reiterated: "*Our Government* is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Id.* at 581 (emphasis added) (citing *Engel v. Vitale*, 370 U. S. 421, 430 (1962)).

In relying upon *Engel, supra*, the *Greece* Court reaffirmed the principle that the First Amendment "stand[s] as a guarantee that neither the power nor the prestige" of the government "would be used to *control, support or influence* the kinds of prayer the American people can say - - that the people's religions must not be subjected to the pressures of *government* for change each time a new political administration is *elected to office.*" *Engel*, 370 U.S. at 429-30 (emphasis added). The Court acknowledged that the government "is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." *Id.* at 430. "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Id.* at 435.

Even prior to *Town of Greece*, the Fourth Circuit's cases indicated that elected officials could not deliver opening legislative prayers without running afoul of the Establishment Clause. See generally *N.C. Civ. Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147, 1149 (4th Cir. 1991) ("For a judge to engage in prayer in court entangles governmental and religious functions to a much greater degree than a chaplain praying before the legislature.").

In *Joyner*, the Fourth Circuit explained that "[t]he proximity of prayer to official government business can create an environment in which the government prefers — or appears to prefer — particular sects or creeds at the expense of others." 653 F.3d at 347. Judge Niemeyer, like the majority in *Town of Greece*, asserted that allowing "*private* individuals" to deliver prayers "on a first-come, first-serve basis, eliminate[ed] any opportunity for County officials to assert preferences." *Id.* at 363-65. In *Wynne*, by contrast, "the Town Council [members themselves] insisted upon invoking the name 'Jesus Christ,'" which Judge Niemeyer agreed was "decidedly inconsistent with *Marsh.*" *Id.* at 362 (quoting *Wynne*, 376 F.3d at 301). Where Judge Niemeyer parted with the majority is that he believed the "sectarian references [in *Joyner*] were the product

of free choice and religious leaders' composing their own invocations, *without any control or review of content by the County.*" *Id.* at 363 (emphasis added).

Relying upon Fourth Circuit precedent, the court in *Doe v. Pittsylvania County*, 842 F. Supp. 2d 906, 914 n.4 (W.D. Va. 2012), two years before *Town of Greece*, found a legislative prayer practice unconstitutional in large part because legislators delivered the prayers rather than private citizens. *See id.* (finding that "the Board impermissibly wraps the power and prestige of the [] County government around the personal religious beliefs of individual Board members").

After *Town of Greece*, the same U.S. District Court struck down a legislative prayer practice because the prayers were delivered by the local legislators. *Hudson v. Pittsylvania Cty.*, 2014 U.S. Dist. LEXIS 106401 (W.D. Va. Aug. 4, 2014). The court concluded: "the active role of the Pittsylvania County Board of Supervisors in leading the prayers, and, importantly, dictating their content, is of constitutional dimension and falls outside of the prayer practices approved in *Town of Greece.*" *Hudson*, 2014 LEXIS 106401 at *6-7.

Most saliently, in 2017, the Fourth Circuit (en banc) held that lawmaker-led legislative prayers violate the Establishment Clause. *Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017). In *Rowan County*, as here, the Board of Commissioners opened each meeting with a commissioner-led invocation. *Id.* at 272-73. The content of each invocation was exclusively up to the commissioner delivering it. *Id.* Judge Wilkinson, writing for the majority, emphasized that, while legislative prayer may enjoy a more relaxed analysis than other areas of Establishment Clause jurisprudence, "the general principles animating the Establishment Clause remain relevant even in the context of legislative prayer." *Rowan County*, 863 F.3d at 275. The court went on to distinguish *Marsh* and *Town of Greece*, stating that "[t]hose decisions did not concern *lawmaker-led* prayer." *Id.* at 276 (emphasis added).

Echoing what Judge Niemeyer said in *Joyner*, at 363, the Fourth Circuit in *Rowan County* elucidated: "In *Marsh*, the prayer-giver was paid by the state. In [*Town of Greece*], the prayer-giver was invited by the state. But in Rowan County, the prayer-giver was the state itself. The Board was thus elbow-deep in the activities banned by the Establishment Clause—selecting and prescribing sectarian prayers." *Id.* at 281. Here too, the lawmakers have "composed and delivered their own sectarian prayers," making it just as unconstitutional as the practice struck down by the entire Fourth Circuit (en banc) in *Rowan County*. *See id.* at 280, 286-87.

Rowan County paid the ACLU \$285,000 in attorneys' fees. Carroll County was on the hook for AHA's fees in a similar ballpark for its lawmaker-led prayers. *See Carroll Cty.*, No. 1:13-cv-01312-SAG, Doc. 117. *See also Am. Humanist Ass'n., et al. v. Greenville*, No. 6-13-cv-2471-BHH (D. S.C. 2020) (holding AHA entitled to \$446,466.00 in attorneys' fees for unconstitutional school prayer); *Doe v. Kidd*, 656 Fed. Appx. 643, 661 (4th Cir. Aug. 9, 2016) (awarding fees of \$669,077.20 in civil rights case).

In view of the foregoing authorities, it is plain that your practice violates the Establishment Clause. This letter serves as an official notice of the unconstitutional activity and a formal demand to terminate this and any similar illegal activity immediately. Please respond within two weeks with written assurances that the practice has ceased or our office will consider litigation.

Sincerely,
s/Monica L. Miller, Esq.
Legal Director and Senior Counsel
American Humanist Association
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