



March 24, 2016

**VIA E-MAIL**

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**Re: Christian Prayer Offered at Press Conferences**

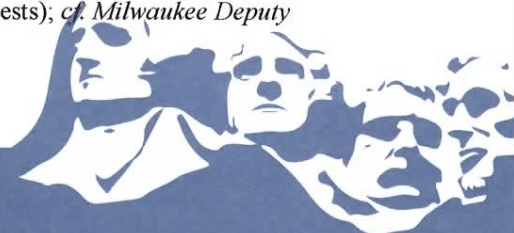
Dear Attorney General Jackley,

We write to you because we respectfully disagree with your March 17, 2016, letter regarding your use of prayer at the press conference on March 16, 2016. Your letter reflects an unfortunate misunderstanding of the law pertaining to official prayer by government officers and a disregard for the religious–liberty principles that are fundamental to our Constitution.

The federal courts have repeatedly recognized that official prayer or government promotion of prayer is unconstitutional.<sup>1</sup> This Establishment Clause

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<sup>1</sup> See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314-16 (2000) (public-school policy authorizing school-sponsored prayers at football games had “the purpose and perception of [unconstitutional] school endorsement of student prayer”); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (striking down state statute promoting “voluntary prayer” as “not consistent with the established principle that the government must pursue a course of complete neutrality toward religion”); *Engel*, 370 U.S. at 430 (prohibiting daily recitation of official public-school prayer”); *Mellen v. Bunting*, 327 F.3d 355, 373 (4th Cir. 2003) (ruling that military academy prayers send the “unequivocal message” that government officials “endorse[] the religious expressions embodied in the prayer[s]”); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278-79 (5th Cir. 1996) (overturning school-prayer statute); *N.C. Civil Liberties Union Found. v. Constasy*, 947 F.2d 1145, 1151 (4th Cir. 1991) (“When a judge sits on the bench, says ‘Let us pause for a moment of prayer,’ and proceeds to recite a prayer in court, clearly the court is conveying a message of endorsement of religion.”); *Hall v. Bradshaw*, 630 F.2d 1018, 1023 (4th Cir. 1980) (holding state department of transportation’s inclusion of “Motorist’s Prayer” on official map violated Establishment Clause); *Am. Humanist Ass’n, Inc. v. City of Ocala*, No. 5:14-cv-651-Oc-32PRL, 2015 WL 5123274, at \*12 (M.D. Fla. Aug. 31, 2015) (“the state cannot advance prayer activities without the implication that the state is violating the Establishment Clause”); *Newman v. City of East Point*, 181 F. Supp. 2d 1374, 1380-81 (N.D. Ga. 2002) (holding that city’s funding and promotion of prayer breakfast ran afoul of the Lemon and endorsement tests); cf. *Milwaukee Deputy*



prohibition on official prayer “applies not only to statutes, but also to acts and decisions of individual government actors, as their conduct bespeaks government conduct.” *Am. Humanist Ass’n*, 2015 WL 5123274, at \*10 (internal quotation marks omitted).

The Supreme Court’s decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), did not vitiate the Constitution’s general ban on official prayer. *Town of Greece* upheld the constitutionality of invocations delivered during meetings of legislative bodies, and the Court did so only because of the prayers’ unique history dating back to the adoption of the First Amendment. *See id.* at 1819 (“The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time.”); *see also Marsh v. Chambers*, 463 U.S. 783, 787-88 (1983) (“The First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer.”). Because “the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment,” the Court reasoned that “the Framers considered legislative prayer a benign acknowledgment of religion’s role in society.” *Town of Greece*, 134 S. Ct. at 1819.

The Attorney General’s office, unlike the governmental bodies at issue in *Town of Greece* and its predecessor, *Marsh*, is not a town council, state legislature, or other type of legislative body; there is no comparable history of official prayer by the Attorney General’s office generally—let alone at press conferences. Thus, these cases do not provide legal cover for the May 16 prayer.

That the prayer was explicitly Christian in nature merely compounds the constitutional violation and runs afoul of another core Establishment Clause principle: “[O]ne religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The crimes discussed during the May 16 press conference were unquestionably tragic. Many people in attendance and those watching at home

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*Sheriffs’ Assoc. v. Clarke*, 588 F.3d 523, 528-29 (7th Cir. 2009) (finding that county sheriff had endorsed religion by inviting religious group to give proselytizing presentations to employees); *Doe v. Village of Crestwood*, 917 F.2d 1476, 1478 (7th Cir. 1990) (holding that village could not sponsor a mass as part of a municipal festival because “[a] religious service under governmental auspices necessarily conveys the message of approval or endorsement”).

may have prayed over the events. Indeed, our Constitution's commitment to religious liberty ensures that they had every right to do so.<sup>2</sup> But religious freedom thrives best when the government stays out of religion, and that means that the government cannot and should not tell us how or when to pray or encourage religious worship. As the Supreme Court has recognized, the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *ACLU of Ky. v. McCreary County*, 545 U.S. 844, 860 (2005). Turning an official press conference into a vehicle for government sponsored-prayer ignores that constitutional obligation.

We hope you will reconsider your position and join us in protecting the rights of all South Dakotans by discontinuing this practice.

Sincerely,



Courtney Bowie\*

Legal Director

\*Admitted only in Alabama, Mississippi, and Massachusetts (inactive)

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<sup>2</sup> The ACLU vigorously defends the rights of all individuals to pray and practice their faith. A list of our work in this area, is available here: <https://www.aclu.org/aclu-defense-religious-practice-and-expression?redirect=defendingreligion>.