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Via first class mail  
Umatilla County  
Board of Commissioners

RE: Constitutionality of Issuing Proclamations relating to the National Day of Prayer.

Dear Umatilla County,

We were recently asked if it would be constitutional for Umatilla County to issue a proclamation recognizing the National Day of Prayer. The short and obvious answer is yes.

In recent years, particular activist groups have suggested that observing the National Day of Prayer is somehow unlawful. Such opinions have no foundation in the law. In fact, no city or county in the country has even been successfully sued for simply observing or recognizing that it is the National Day of Prayer. Cities and Counties have even formally participated without risking liability. In the last few years there are two new United States Supreme Court cases that make it even more clear that a city or county or official can recognize religion and even allow prayer at public events.

You can be confident that your participation in and acknowledgement of the National Day of Prayer are constitutionally protected activities. You are free to proclaim the event, or your County's support for this event, and you are under no obligation to satisfy the demands of any disgruntled individual or civil libertarian group that may oppose such action. You could even open your own meetings with prayer. *Town of Greece v. Galloway*, 572 U.S. 565, 570, 134 S. Ct. 1811, 1815 (2014).

National Day of Prayer is a real, historic event, and proclamation which takes place every year.

*The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals. 36 U.S.C.S. § 119.*

Thus, it is existing federal law that creates the annual event, a proclamation that an annual event is taking place, pursuant to federal law is happening is akin to a news announcement. It is not by itself an opinion or any expression at all. Umatilla County can, by proclamation or otherwise recognize or participate in this federal event without any risk of violating the constitution.

To the contrary, ironically as explained below, the County could create liability for itself by denying a public proclamation request if that denial is based on the fact that the content relates to religion. That would be viewpoint discrimination.

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## Legal Analysis

Since the time of this nation's founding, public prayer has been an essential part of our heritage. The tradition of designating an official day of prayer actually began with the Continental Congress in 1775.<sup>1</sup> On October 3, 1789, President George Washington issued a *National Day of Thanksgiving Proclamation*, "to be devoted by the people of these United States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be," so that "we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him . . . to promote the knowledge and practice of true religion and virtue . . ."<sup>2</sup> Since that time, American Presidents have continued this important tradition.<sup>3</sup> In 1952, President Harry Truman signed into law a joint resolution by Congress to "set aside an appropriate day as a National Day of Prayer."<sup>4</sup> In 1988, the law was amended by Congress and signed by President Ronald Reagan to specify the annual event should be observed on "the first Thursday in May in each year."<sup>5</sup> The resulting statute, 36 U.S.C.A. § 119, currently provides as follows:

*"[t]he President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 119.*

Most presidents since 1952, including President Barack Obama and former President George W. Bush, have complied with this statute, issuing proclamations through their press secretaries. *Freedom from Religion Found., Inc. v. Obama*, 691 F. Supp. 2d 890, 895 (W.D. Wis. 2010).

That federal law was challenged in court and the 7<sup>th</sup> Circuit United States Federal Court and upheld as the court ruled:

36 USC Section 119 imposes duties on the President alone. It does not require any private person to do anything—or for that matter to take any action in response to whatever the President proclaims. If anyone suffers injury, therefore, that person is the President, who is not complaining. No one has standing to object to a statute that imposes duties on strangers. See, e.g., *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556

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<sup>1</sup> June 12, 1775, Resolution Calling for a Day of Public Fasting and Prayer. *The Journals of the Continental Congress 1774-1789* (Washington, D.C.: Government Printing Office, 1905), Vol. II, p. 87.

<sup>2</sup> James D. Richardson, *A Compilation of Messages and Papers of the Presidents, 1789-1897* (Published by Authority of Congress 1899), Vol. 1, p. 64.

<sup>3</sup> "Presidents Adams and Madison also issued thanksgiving proclamations, as have almost all our presidents." *Lynch v. Donnelly*, 465 U.S. 668, 675, n.2 (1984).

<sup>4</sup> *Public Law 82-324; 66 Stat. 64—April 17, 1952.*

<sup>5</sup> January 25, 1988, in the Second Session of the One Hundredth Congress. *Public Law 100-307—May 5, 1988.*

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(1984). *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011).

Like in that case, no Umatilla County resident could or would have standing to object to that federal statute, nor the County's recognition of that statute through a Proclamation, as they too would not be harmed. If a person can't be legally harmed by the Proclamation itself, they also can't be legally be harmed by being told that it exists. Just as the President's proclamations and "appeals to the Almighty" can be issued consistent with the Establishment Clause, so can the proclamations and appeals of state and local officials. Historically, all governors from all 50 states, along with the president of the United States, have issued proclamations in honor of the National Day of Prayer. **There is no basis in law to suggest that a County Commissioner or Board could not do the same.**

As the leader of your county, a county commissioner would be well within your rights individually or as a board to echo these sentiments. Local observances of this historic annual event are both lawful and appropriate. You can proclaim and participate in the National Day of Prayer, just as millions of Americans and thousands of other local leaders do annually on the first Thursday in May.

Recently someone tried to challenge a board of County Commissioners' participation in a National Day of Prayer event in New Mexico and lost on this same theory. *Pettit v. Schaljo*, No. CIV 23-0367 JB/GJF, 2023 U.S. Dist. LEXIS 94425, at \*6 (D.N.M. May 31, 2023).

An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech. *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U. S. 226, 250, 110 S. Ct. 2356 (1990) (plurality opinion). Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." *Van Orden v. Perry*, 545 U. S. 677, 699, 125 S. Ct. 2854 (2005) (Breyer, J., concurring in judgment). *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534-35, 142 S. Ct. 2407, 2427-28 (2022)

If it is not unconstitutional for the President of the United States to make the actual proclamation; and also it is not unconstitutional to have the statute requiring the proclamation in the first place; then it is not unconstitutional to recognize that it is happening or proclaim that the event is happening.

The Federal Court went on to explain why there is no standing or right to challenge this kind of proclamation.

It is difficult to see how any reader of the 2010 proclamation would feel excluded or unwelcome. Here again is the proclamation's only sentence that explicitly requests

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citizens to pray: "I call upon the citizens of our Nation to pray, *or otherwise give thanks, in accordance with their own faiths and consciences*, for our many freedoms and blessings, and I invite all people of faith to join me in asking for God's continued guidance, grace, and protection as we meet the challenges before us." But let us suppose that plaintiffs nonetheless feel slighted. Still, hurt feelings differ from legal injury. The "value interests of concerned bystanders" (*United States v. SCRAP*, 412 U.S. 669, 687, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)) do not support standing to sue. *Id.*

In fact, by censoring free speech based on the fact it is religious could actually CREATE liability for the County rather than avoiding liability. The County, through its Board of Commissioners, clearly has the power to issue proclamations in general, however when the city does so, it's policies and decision making on what it allows comes into question under legal scrutiny. Government policies and restrictions on speech must not discriminate against speech based on viewpoint, *ibid.* and must be reasonable in light of the forum's purpose, *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S. Ct. 3439. Pp. 5-6, 473 U.S. 788; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102, 121 S. Ct. 2093, 2097 (2001). Viewpoint "neutrality" does not mean that the government must ensure the internal neutrality of each event in its fora by mandating that no viewpoint or all viewpoints be expressed. Rather, it means that the government must be *indifferent* to the viewpoints of all speakers in its fora. *See* 515 U.S. at 835-36 ("granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them" threatens "vital First Amendment speech principles"). *Deboer v. Vill. of Oak Park*, 53 F. Supp. 2d 982, 990 (N.D. Ill. 1999). A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." *Fulton*, 593 U. S., at \_\_\_, 141 S. Ct. 1868 (slip op., at 6). *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022)

"[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights". *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022) citing *Rosenberger*, 515 U. S., at 845-846; *Good News Club*, 533 U. S., at 112-119; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394-395, 113 S. Ct. 2141 (1993); *Widmar*, 454 U. S., at 270-275, 102 S. Ct. 269.

Thus, if the County Board of Commissioners has allowed publicly requested Proclamations in the past, but denies this request because it relates to religion, the Board could absolutely be challenged based on first amendment violations and viewpoint discrimination.

The 9<sup>th</sup> Circuit has ruled that a city can even spend money and provide a location for National Day of Prayer events. In the Case of *Gentala vs. the City of Tucson*, the City was found to have violated the rights of those seeking to hold a National Day of Prayer event by denying their request. The court ruled it violates the Free Speech Clause of the First Amendment when it

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excluded and refused to fund this specific event, when it had funded others even though it was in direct support of religious organizations (National Day of Prayer). The Court also concluded that Establishment Clause considerations did not justify the City's exclusion of its funding for this community event. *Gentala v. City of Tucson*, 325 F. Supp. 2d 1012, 1014 (D. Ariz. 2003).

The United States Constitution protects not only the right to harbor religious beliefs inwardly and secretly. It does [\*\*\*\*26] perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through “the performance of (or abstention from) physical acts.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524, 142 S. Ct. 2407, 2421 (2022) citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 877, 110 S. Ct. 1595 (1990).

Governments or their agents can even participate in things like direct prayer vigils, so long as the quantity and depth of the government activity doesn't accumulate to becoming a government led event. The test that has been adopted to determine when a government's activities amount to sponsorship in violation of the Establishment Clause depends upon the degree to which a government entity or official initiated, organized, facilitated, promoted, provided space for, paid for, supervised, participated in, regulated, censored, led, endorsed, encouraged, or otherwise controlled the activity. *Rojas v. City of Ocala*, 739 F. Supp. 3d 1068 (M.D. Fla. 2024). Here, a simple proclamation by Umatilla County would fall far far below that threshold.

Accordingly, it is erroneous, and an unjustifiable and unsupportable legal position to say that a city or a county cannot participate or recognize National Day of Prayer with a proclamation. Unless your county chooses to make zero proclamations annually, it also cannot refuse to make a proclamation because it relates to a religious event.

Here, a proclamation about the National Day of Prayer would simply announce what is enshrined in law, which is an annual national date and event, that is performed by our President and was enacted by the United States Congress, and to simply announce what it is, and explain that it is happening would not be anywhere close to a violation of the law. The County could probably even go much further allow its own facilities to be used, and staff to participate in the actual event without have any constitutional problems if such government assets are used in Umatilla County for other types of similar events.

Best wishes,

*Tyler Smith*

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