APPEAL NO. 12-11613

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ATHEISTS OF FLORIDA, INC. AND ELLENBETH WACHS,

Plaintiffs-Appellants,

v.

CITY OF LAKELAND, FLORIDA AND MAYOR GOW FIELDS,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida
Civil Case No. 8:10-cv-1538-T-17MAP (Honorable Elizabeth A. Kovachevich)

BRIEF OF*AMICUS CURIAE* ALLIANCE DEFENSE FUND IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, *Amicus Curiae* Alliance Defense Fund, hereby certifies that the following individuals and entities are known to have an interest in the outcome of this case:

Alliance Defense Fund

Americans United for Separation of Church and State

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STATEMENT OF AMICI CURIAE INTEREST[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties, sanctity of life, and family values. ADF and its allied organizations represent hundreds of thousands of Americans who object to the erosion of religious liberty in our society. ADF also frequently defends municipalities against attempts to eliminate prayer at public gatherings, including Forsyth County, NC and the Town of Greece, NY. ADF believes that eliminating public invocations is inconsistent with our constitutional history and traditions and unnecessarily and destructively marginalizes the role of faith in the public square. Therefore, ADF supports Defendant-Appellee's position that this Court should uphold the decision of the district court to deny appellants' claims for relief. All parties have consented to the filing of this brief.

STATEMENT OF ISSUES

1. Whether the legislative prayer practice before public meetings of the Lakeland City Commission meetings violates the Establishment Clause of the First Amendment to the United States Constitution.

[1] Pursuant to Fed. R. App. P. 29(c)(5), *Amicus Curiae* Alliance Defense Fund certify that no party or counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* contributed any money intended to fund this brief's preparation or submission. All parties have consented to the filing of this brief.

2. Whether the legislative prayer practice before public meetings of the Lakeland City Commission violates Article I, Section 3 of the Florida Constitution.

SUMMARY OF THE ARGUMENT

The Alliance Defense Fund submits this brief to draw attention to how Atheists of Florida ("Atheists") and some court's have improperly relied upon dictum in *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3036 (1989), to eviscerate the clear holding of the Supreme Court in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330 (1983). As counsel for the Town of Greece, New York and Forsyth County, North Carolina, amicus is peculiarly situated to address this misapplication of Supreme Court precedent and explain how the recent rulings in *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011), and *Galloway v. Town of Greece, N.Y.*, ---F.3d ---, 2012 WD 1732787, C.A.2 (N.Y.), May 17, 2012 (petition for Rehearing En banc filed May 30, 2012) are irreconcilable with the holding and rationale of this court in *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263 (11th Cir. 2008).

The City of Lakeland prayer policy and practice are indistinguishable from the policy and practice this Court upheld in *Pelphrey.* In *Pelphrey* this Court upheld a neutral practice of inviting outside clergy to voluntarily deliver an invocation according to the dictates of their own consciences before legislative

bodies. *Pelphrey* appropriately followed the United States Supreme Court's ruling in *Marsh*, where the Court held that deliberative bodies could start their public meetings with a prayer without offending the Constitution. Because the City's policy and practice are easily valid under *Marsh* and *Pelphrey*, Atheists ask the Court to apply a standard rejected in *Marsh* but suggested by dictum in *Allegheny*. The *Allegheny* dictum is not persuasive though because it mischaracterized the prayers in *Marsh*. Accordingly, this Court should reject the invitation to follow it.

Atheists seek to compel the City to dictate how and to whom an invocation speaker must pray. But Atheists' requested remedy is unavailable. After *Marsh*, the Supreme Court issued numerous decisions making clear that it is inappropriate for the government to engage in a theological analysis of the meaning of words in a religious context or to determine what expressions pass an ecumenical litmus test.

Appellants ask this Court to disregard its prior clear ruling and bind itself to the Fourth Circuit's strained interpretation of *Pelphrey* in *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011). After Appellants brief filed their brief, the United States Court of Appeals for the Second Circuit issued an opinion in *Galloway*. Although both *Joyner* and *Galloway* purport to align with this Court's *Pelphrey* decision, the conclusion and rationale of each case are irreconcilable with *Pelphrey* and dramatically depart from the Supreme Court's directive in *Marsh*.

The district court below properly relied upon the reasoning of *Pelphrey* as the most consistent application of Supreme Court precedent.

The City of Lakeland has adopted and implemented a neutral policy that permits citizens to voluntarily participate in a legislative prayer opportunity. The practice is consistent with historical practices that predate the founding of this country and is consistent with the U.S. Supreme Court's established precedent. The City's policy and practice allow a prayer giver to offer a prayer consistent with the dictates of his or her own conscience. It is not for the government to tell a prayer giver how and to whom to pray. The District Court should be affirmed.

ARGUMENT

I. THE MERE PRESENCE OF UNIQUE RELIGIOUS REFERENCES IN LEGISLATIVE PRAYERS IS NOT UNCONSTITUTIONAL.

As Atheists concede, it is undisputed that the Supreme Court in *Marsh* and this Court in *Pelphrey* found that religious prayers delivered before a deliberative body do not constitute an establishment of religion. Appellants' Br. at 35. Therefore, the crux of this case centers not on the constitutionality of legislative prayers, but on whether the government is required to dictate the content of those prayers. Is the government compelled to tell a person delivering a public invocation how and to whom to pray? Supreme Court and Eleventh Circuit precedent resoundingly answer – no!

A. Mandating "nonsectarian" legislative prayers ignores the facts and analysis of *Marsh* and *Pelphrey*.

The only Supreme Court case to directly consider whether a legislative prayer violates the Establishment Clause acknowledged the long history and tradition of such prayer. The policy approved in *Marsh* included the following features:

- Prayers given by a paid government employee carrying out his governmental function;
- Government selection of the prayer giver;
- Prayers by the same Christian minister for sixteen years given exclusively in the Judeo-Christian tradition; and
- Prayers that incorporated frequent and explicit Christian references.[2]

463 U.S. at 793, 103 S.Ct. at 3336-37.

Given the features of the prayer policy upheld in *Marsh*, the City of Lakeland

[2] The *Marsh* majority opinion notes that for at least fifteen years (1965–80) the prayers of Reverend Palmer, the Presbyterian chaplain appointed by the Nebraska Legislature, were often explicitly Christian. *Marsh*, 463 U.S. at 793 n.14. While the majority made little of the Christian references because the content of the prayers was not relevant to the holding, the dissenters noted the references as a significant aspect of their objection. For example, Reverend Palmer's prayers included "Christological references." *Id.* at 800, n.9 (Brennan, J., dissenting). "The Court declines to 'embark on a sensitive evaluation or to parse the content of a particular prayer.' Perhaps it does so because it would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain." *Id.* at 823 (Stevens, J., dissenting) (internal citations omitted). Yet the prayers of the founding era, just as prayers given before Congress today, are replete with references to Jesus and the Christian faith. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 232 (2008).

policy easily passes constitutional muster. Indeed, like the policy evaluated in *Pelphrey*, the Lakeland policy is even more neutral, diverse and inclusive than the Nebraska Legislature's policy approved in *Marsh*, and thus less susceptible to allegations of religious favoritism. The Lakeland policy included the following features:

- The City allowed leaders from every identifiable religious group in the county an equal opportunity to deliver an invocation;
- Invocations were offered from a variety of denominations and diverse religious backgrounds and creeds;
- Invocation speakers were self-selected, non-paid, private citizen volunteers who responded to an invitation extended to all; and
- The City exercised no editorial control over the content of the prayers, leaving the invocations purely reflective of each speaker's own conscience and faith tradition.

The findings of fact established by the trial court reveal that the Lakeland policy is substantively indistinguishable from the policy this Court reviewed in *Pelphrey*. *Atheists of Florida, Inc. v. City of Lakeland, Fla.*, 2012 WL 589588, at *13-14, (M.D. Fla. Feb. 22, 2012). In *Pelphrey* this Court recognized that a practice of inviting a variety of local clergy to give a public invocation was "even more inclusive than the practice upheld in *Marsh*." 547 F.3d. at 1274. Therefore, a failure to approve the City's policy is irreconcilable with both *Marsh* and *Pelphrey*.

1. Atheists demand that the Court parse the content of prayers without evidence that the prayer opportunity has been exploited.

Atheists' demand that the Court engage in censoring or editing a private citizen's prayer is troubling. In *Marsh*, the Supreme Court stated that judicial parsing of prayer content should be avoided unless there is evidence the prayer opportunity has been exploited. 463 U.S. at 794–95, 103 S.Ct. at 3337-3338; *see also Pelphrey*, 547 F.3d at 1274 (acknowledging *Marsh* forbids judicial scrutiny of the content of prayers absent evidence that the legislative prayers have been exploited to advance or disparage a religion). And, as noted above, the *Marsh* Court did not consider the mere presence of unique religious references in a prayer to be objectionable – indeed, the dissent in *Marsh* objected that the prayers before the Nebraska Legislature were explicitly Christian. *Marsh*, 463 U.S. at 823, 103 S.Ct. at 3352 (Stevens, J., dissenting). But recognizing that the prayers were "often explicitly Christian" the majority still concluded the facts there provided "no indication that the prayer opportunity ha[d] been exploited." *Id.* at 793 n.14, 794, 103 S.Ct. at 3337 n.14, 3338.

When the *Marsh* Court considered whether a "prayer opportunity" had been exploited, it looked to the process by which the chaplain was chosen to participate in the invocation practice, not the content of the chaplain's prayers. The Court considered such things as "long tenure," the absence of "proof that the chaplain's

reappointment stemmed from an impermissible motive," and the chaplain's remuneration in light of historical practices. *Id.* at 793-94, 103 S.Ct at 3337.

The majority in *Marsh* noted that the prayers there were exclusively in the "Judeo-Christian tradition," but did not consider that fact important enough to even address, other than in a footnote confirming that the chaplain characterized some of his prayers as "Judeo-Christian" and acknowledged the prayers were often explicitly Christian. *Id*. at 793 n.14, 103 S.Ct. at 3337 n.14. The *Marsh* majority's decision not to consider the content of the chaplain's prayer in light of the dissent's objection is telling and further confirms that "exploitation of the prayer opportunity" analysis does not focus on unique faith references found in the content of prayers.

In *Pelphrey* this Court followed *Marsh* in using contextual factors "to determine whether the prayers had been exploited to affiliate the [city] with a particular faith: the identity of the invocational speakers, the selection procedures employed, and the nature of the prayers." *Pelphrey*, 547 F.3d at 1277. This Court carefully reviewed the *Marsh* decision and concluded that "[t]o read *Marsh* as allowing only nonsectarian prayers is at odds with the clear directive by the Court that the content of a legislative prayer 'is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited . . . .'" *Id.* at 1271 (quoting *Marsh*, 463 U.S. at 794-95, 103 S.Ct. at 3337-38).

Appellants ask this Court to eliminate a prayer opportunity solely because speakers have given explicitly Christian prayers. But the dispositive question is whether the prayer opportunity was exploited to affiliate the City with a particular faith tradition. *Id.* at 1277. The lesson from *Marsh* is that a prayer opportunity should not be deemed "exploited" merely because prayers name the deity being addressed, regularly include expressions unique to a specific faith tradition, or are consistently presented by a member of one faith tradition. By focusing on whether a legislative prayer policy is neutral rather than the content of particular prayers, courts can safeguard constitutional guarantees without becoming embroiled in ecclesiastical evaluations and the comparative theology necessary to decipher the content of a prayer.

2. Atheists ask this Court to adopt an Establishment Clause standard *Marsh* rejected.

Atheists contend that this Court should apply the Establishment Clause analysis set out in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971). In doing so, they insist – contrary to *Marsh* – that all legislative prayers inherently violate the Establishment clause. Appellants' Br. 32-34. The Supreme Court refused to apply the *Lemon* test to legislative prayers, despite the dissenters' objections. *See Marsh* 463 U.S. at 796-97, 103 S.Ct. at 3338-39.

Alternatively, Atheists contend that *County of Allegheny v. ACLU*, 492 U.S. 573 , 109 S.Ct. 3036 (1989), leads to the conclusion that *Marsh* precludes prayers with references unique to a religious tradition. Appellants' Br. 35. This assertion is poorly grounded, however, for *Allegheny* addressed only Christmas displays not public invocations. Accordingly, the characterization of *Marsh* in *Allegheny* was dictum because the constitutionality of public invocations "was not essential to [the Court's] disposition of any of the issues contested . . . ." *Central Green Co. v. United States*, 531 U.S. 425, 431, 121 S. Ct. 1005, 1009 (2001). The Supreme Court has clearly affirmed that courts "are not bound to follow [Supreme Court] dicta in a prior case in which the point now at issue was not fully debated." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 737, 127 S. Ct. 2738, 2762 (2007) (quoting *Central Va. Community College v. Katz*, 546 U.S. 356, 363, 126 S. Ct. 990 (2006)). The Court has further observed that "dicta 'may be followed if sufficiently persuasive' but are not binding." *Central Green Co.*, 531 U.S. at 431, 121 S.Ct. at 1009 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 627, 55 S. Ct. 869 (1935)).

The *Allegheny* dictum about *Marsh* is not "sufficiently persuasive" to justify changing the clear holding of *Marsh*. In *Allegheny* the Court was debating whether the display of a crèche on public property should be evaluated under the *Lemon* test or the historical analysis used in *Marsh*. The majority opted to use the *Lemon*

test. In response to arguments raised by Justice Kennedy's dissenting opinion, the majority trivialized the dissents' view as standing for the proposition "that all accepted practices 200 years old and their equivalents are constitutional today" and proceeded to challenge the dissent's argument by an inaccurate description of the facts of *Marsh*. *Allegheny*, 492 U.S. at 603, 109 S.Ct. at 3106. The majority contended that the legislative prayers in *Marsh* did not violate the Establishment Clause because the chaplain "removed all references to Christ." *Id*. at 602-03, 109 S.Ct. at 3106 (quoting *Marsh*, 463 U.S. at 793 n.14, 103 S.Ct. at 3337 n.14). The record does reflect that the chaplain "removed all references to Christ after a 1980 complaint from a Jewish legislator." *Marsh*, 463 U.S. at 793 n.14, 103 S.Ct. at 3337 n.14. Other legislators also objected to "Christological references in certain of his prayers . . . ." *Id*. at 800 n.9, 103 S.Ct at 3340 n.9 (Justice Brennan, dissenting). And as Justice Stevens pointed out, some of the prayers at issue were clearly Christian. *See Marsh*, 463 U.S. at 823 n.2, 103 S.Ct. at 3352 n.2 (quoting a March 20, 1978 prayer quoting Scripture and repeatedly referring to "Father in heaven," "son," "Christ," and "Lord"). But it is clear that the prayers challenged in *Marsh* occurred from 1965 to 1979 before the complaint was filed, not those after 1980. *Chambers v. Marsh*, 504 F. Supp. 585, 586 (1980); see also *Van Orden v. Perry*, 545 U.S. 677, 688 n.8, 125 S.Ct. 2854, 2862 n.8 (2005) (noting "[i]n *Marsh*, the prayers were often explicitly Christian" and references to Christ were not

limited until a year after the suit was filed) (Rehnquist, C.J., plurality) Thus, the *Allegheny* description of the prayers in *Marsh* as nonsectarian is unpersuasive, as this Court held in *Pelphrey*: "The taxpayers argue that *Allegheny* requires us to read *Marsh* narrowly to permit only nonsectarian prayer, but they are wrong." 547 F.3d at 1271; s*ee also Galloway*, 2012 WL 1732787, at *15 (recognizing "the chaplain's characterization of the prayer in *Marsh* as 'nonsectarian' was plainly contestable with respect to prayers delivered prior to the 1980 complaint. And it is not even clear that the removal of reference to Christ rendered all post-1980 prayers nondenominational" (citations omitted)).

After evaluating a neutral and inclusive prayer policy substantively identical to the City of Lakeland policy, this Court in *Pelphrey* concluded "[t]he taxpayers would have us parse legislative prayers for sectarian references even when the practice of legislative prayers has been far more inclusive than the practice upheld in *Marsh*. We decline this role of 'ecclesiastical arbiter,' for it 'would achieve a particularly perverse result.'" 547 F.3d at 1274 (citations omitted). The Court should rule likewise here.

B. The relief sought by Atheists is unavailable.

Atheists' brief clearly seeks a judicial ruling striking down all legislative prayers. Appellant's Br. 39 n.6. But the binding decisions of *Marsh* and *Pelphrey* put such a ruling beyond the authority of this Court. Alternatively, Atheists seek to

compel the City to censor prayers to ensure that legislative invocations are purged of words they deem to be "sectarian." Not only would the elimination of "sectarian" references from prayers mandate censorship of the content of prayers, but the act of labeling a person's sincere religious expression as "sectarian" is misguided and connotes bigotry.[3]

The Supreme Court reaffirmed *Marsh* and added clarity about government involvement in public invocations in *Lee v. Weisman,* 505 U.S. 577, 596-97, 112 S. Ct. 2649, 2660-61 (1992). In *Lee* the Supreme Court considered whether it was

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[3] When evaluating the right of religious institutions to access a neutral educational program, the Supreme Court highlighted the history of legal challenges attacking religious action as being too "sectarian":

> [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Although the dissent professes concern for "the implied exclusion of the less favored," the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's . . . at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when it coined the term "pervasively sectarian"—a term which, at that time, could be applied almost exclusively to Catholic parochial schools.

Mitchell v. Helms, 530 U.S. 793, 828-29, 120 S.Ct. 2093, 2551-52 (2000) (internal citations omitted); see also *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1258 n.5 (10 Cir. 2008) (noting "the term 'sectarian' imparts a negative connotation. *See Funk & Wagnalls New International Dictionary of the English Language* 1137 (comp. ed.1987) (defining "sectarian" as meaning '[p]ertaining to a sect; bigoted')" and recognizing that "the Supreme Court has not used the term in recent opinions except in quotations").

constitutional for a public high school to orchestrate a public invocation as part of graduation ceremonies. The Court distinguished the context of a high school graduation ceremony from that of legislative prayer and found it impermissible to incorporate a government prayer in the context of a public school graduation ceremony. While addressing the government's involvement in the composition of prayers, the Supreme Court admonished the school for regulating the content of prayers by mandating they be "nonsectarian." *Id*. at 588-90, 1112 S.Ct. at 2656-57. This Court has found that the admonition of *Lee* regarding government regulation of the content of public prayers informs the application of *Marsh*. *Pelphrey*, 547 F.3d at 1271 (noting *Lee* provides insight about the boundaries of legislative prayer); *see also Galloway*, 2012 WL 1732787, at *7.

1. Imposing a "nonsectarian" requirement risks establishing a government imposed civil religion in violation of the Establishment Clause.

A requirement that prayers be "nonsectarian" would involve the government in mandating how and to whom a person may pray. It would likewise entangle the government in dictating the content of prayers to ensure they are adequately nonsectarian. In essence, this would constitute the establishment of a civil religion.

The Supreme Court has stated that "[t]he suggestion that the government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be

accepted." *Lee*, 505 U.S. at 591, 112 S.Ct. at 2657. In *Lee*, the Supreme Court struck down a public prayer policy in part because the government had advised a speaker that prayers should be "nonsectarian." See *Pelphrey*, 547 F.3d at 1270 (*Lee* restricted the role of the government in determining the content of prayer); *Galloway*, 2012 WL 1732787, at *7 (noting that *Lee* prevents the government from imposing a "nonsectarian" requirement on legislative prayer). The Supreme Court noted that a "nonsectarian" instruction is a means by which the government impermissibly directs and controls the content of prayers. *Lee, 505 U.S.* at 588, 112 S.Ct. at 2656.

Although Atheists object to all legislative prayers, at a minimum they ask this Court to impose a "nonsectarian" requirement. Atheists justify this demand by asserting that prayers referencing a particular deity are not sufficiently inclusive. But mandating "nonsectarian" prayer to foster a sense of inclusiveness is precisely what the *Lee* court found problematic. Justice Kennedy noted:

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake the task for itself.

Id. at 589, 112 S.Ct. at 2655. Atheists' quest for a civil religion is ill advised in view of *Lee* and this Court's recognition of the principle in *Pelphrey*.

2. There is no workable standard for policing the theological content of legislative prayers to ensure they are sufficiently "nonsectarian."

Any requirement that the government limit or eliminate references unique to a faith tradition in prayers presumes the government's ability to discern what those forbidden unique characteristics are. But what metric can a secular court use to judge when an expressed faith becomes too distinctive?

This Court has highlighted the intractable difficulty of enforcing a "nonsectarian" requirement:

> We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the taxpayers have been opaque in explaining that standard. Even the individual taxpayers cannot agree on which expressions are "sectarian." . . . The taxpayers' counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. . . . The difficulty experienced by taxpayers' counsel is a glimpse of what county commissions, city councils, legislatures, and courts would encounter if we adopted the taxpayers' indeterminate standard.

Pelphrey, 547 F.3d at 1272. This is consistent with Justice Souter's description of the dangers of trying to impose a "nonsectarian" requirement that he termed "nonpreferentialism in his concurrence in *Lee*:"

> [N]onpreferentialism requires some distinction between "sectarian" religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. Simply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.

Lee, 505 U.S. at 616-17, 112 S.Ct. at 2671 (Souter, J., concurring, joined by Stevens, J. and O'Connor, J.).

All invocations delivered at City of Lakeland public meetings were the product of the invocation speaker and directed to the deity represented by the prayer giver's respective faith tradition. The content of every prayer - indeed the act of prayer itself - communicates religious affirmations not universally shared. And because a prayer at times communicates beliefs that may contradict other beliefs, all prayers are unique to the distinctive faith of the prayer giver. *See Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) ("Of course, all prayers 'advance' a particular faith or belief in one way or another. The act of praying to a supreme power assumes the existence of that supreme power").

The caution expressed in *Marsh* with respect to the "sensitive evaluation" associated with parsing the words of a prayer, *Marsh*, 463 U.S. at 794–95, 103 S.Ct. at 3337-38, addresses a concern the Supreme Court has applied in other contexts as well. *See Widmar v. Vincent*, 454 U.S. 263, 269–70 n.6, 272 n.11, 102 S.Ct. 269, 274 n.6, 275 n.11 (1981) (holding that inquiries into religious significance of words or events are to be avoided); *Mitchell v. Helms*, 530 U.S. 793, 828, 120 S.Ct. 2530, 2551 (2000) (plurality) (stating that for authorities to troll through a religious institution's beliefs in order to identify whether it is "pervasively sectarian" is offensive and contrary to precedent); *NLRB v. Catholic*

Bishop of Chi., 440 U.S. 490, 502, 99 S.Ct.1313, 1320 (1979) (finding that "the very process of inquiry leading to findings and conclusions" involving religious beliefs may impinge upon First Amendment rights).

Even if a workable standard could somehow be concocted to impose upon prayer givers prohibitions on the use of specific appellations and theological phrasing, implementing such a standard would itself be preferential and "sectarian." This is so because of the inevitably disparate impact in favoring faiths suited to the form of the designated expression.[4] Or if the terms of such a standard were to require a limit on the number of times certain theological words and names could be used, then the restrictions on distinctive prayers would only arise after the arbitrary "quota" of allowable distinctive references was met, thus meaning different speakers would face different ground rules.

Atheists' crusade to excise distinctiveness from invocations is one that cannot escape self-contradiction. This reinforces the wisdom of refusing to require "nonsectarian" prayers in *Pelphrey* and the Supreme Court's admonition against parsing the content of prayer and imposing a "nonsectarian" requirement.[5]

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[4] *See* Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralist Polity*, 40 CREIGHTON L. REV. 517, 526–27 (2007) ("Faced with the choice of praying in conformity with a government-imposed standard of orthodoxy or not praying at all, many clergy (to their credit) will choose not to pray at all").

[5] *See* Delahunty, *supra* at 518, 520 n.7 (arguing that "the purported distinction between 'sectarian' and 'non-sectarian prayer is illusory, [and] that the attempt to

II. CIRCUIT COURT OPINIONS ADDRESSING LEGISLATIVE PRAYER AFTER *PELPHREY* ARE INCONSISTENT WITH *MARSH* AND IN CONFLICT WITH *PELPHREY*.

Remarkably, Atheists implore this Court to disregard *Marsh* as well as its own clear holding in *Pelphrey* and instead follow the recent contrary Fourth Circuit panel majority in the split decision of *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011). Appellants' Br. 41 ("Thus, *Pelphrey* should be interpreted consistent with *Joyner*"). But the *Joyner* majority not only misconstrued the plain facts of *Pelphrey*, it adopted a "frequency test" for evaluating the content of legislative prayers that is irreconcilable with the rationale of both this Court and *Marsh*. *See Joyner*, 653 F.3d. at 349. In considering the Atheists' request, it should be noted that *Joyner* is an aberration. It is the only appellate decision in the country requiring the government to police the theology of legislative invocations that has not been vacated or overturned. As such, it is clearly out of step with all

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enforce such a distinction will operate in a discriminatory fashion"); Klukowski, *supra* note 2, at 252–54 (arguing that there are no judicially manageable standards for defining "sectarianism" generally); R. Luther III & D. Caddell, *Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands a "Practice Focused" Analysis*, 48 SANTA CLARA L. REV. 569, 571–72 (2008) (arguing that courts should "favor the historical and constitutional policy of permitting individuals to choose their own words" when delivering an invocation, because censoring content inevitably "undermines diversity and the free speech rights of these individuals, and in turn, renders these traditionally solemn occasions meaningless").

other courts that have considered the impact of distinctive references to a unique faith tradition in legislative prayer.

On May 17, 2012 the Second Circuit issued a decision evaluating a legislative prayer practice where a town council allowed all members of the community to volunteer to open public meetings with an invocation. *Galloway*, 2012 WL 1732787. Citing *Lee*, the Second Circuit rejected the conclusion of the Fourth Circuit in *Joyner* that the government has either the ability or the obligation to regulate the content of prayers to prevent references to a particular faith tradition from becoming too "frequent." *Id.* at *14. But it then departs from *Marsh* and *Pelphrey* by striking down the prayer practice based on the content of the prayers, despite finding no evidence that the prayer opportunity had been exploited. *See Id.* at *18-19.

A. Counting distinctive religious references to support a finding of "endorsement" is irreconcilable with *Marsh*.

In *Marsh* the Supreme Court rejected the test from *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971), for evaluating legislative prayer cases. *See Marsh* 463 U.S. at 796-97, 103 S.Ct at 3338-39. But despite the Supreme Court's clear rejection of the *Lemon* test in these cases, the Circuit Courts that have struck down legislative prayer practices have done so by effectively applying the second prong

of the *Lemon* test – the "effects" or "endorsement" test – to invalidate the practice.[6] *See Joyner*, 653 F.3d at 352, 354-55 (reasoning that frequent references to the same faith tradition in the same venue has the effect of endorsing that faith tradition in violation of the Establishment Clause); *see also Galloway*, 2012 WL 1732787, at *17 (explicitly applying the endorsement test to "the totality of the circumstances" to invalidate a legislative prayer practice).

Applying a prong of the *Lemon* test to a series of legislative prayers cannot be squared with *Marsh*. *Marsh*, 463 U.S at 793 n.14, 103 S.Ct. at 3337 n.14 (the court refused to apply the *Lemon* test to fifteen years worth of prayers that were explicitly and exclusively Christian). Thus, this Court should reject Atheists' poorly grounded request that it apply the *Lemon* test.

B. The *Joyner* decision is in direct conflict with *Pelphrey*.

The dissent in *Joyner* recognized that the *Joyner* majority opinion "is in direct conflict" with this Court's opinion in *Pelphrey*. *Joyner*, 653 F.3d. at 355-56 (Niemeyer, J., dissenting). In both cases the entire spectrum of local religious leaders were invited to participate in the prayer opportunity. In both cases the invited speakers delivered an invocation consistent with their respective faith traditions. In both cases prayers most often included explicitly Christian refer-

[6] The Fourth Circuit's "frequency" test simply rebrands the "endorsement" test. The "endorsement" test was first articulated in *Lynch v. Donnelly*, 465 U.S. 668, 691, 104 S.Ct. 1355, 1368-69 (1984), as an analytical tool in the application of the "effects" test set forth as the second prong of the *Lemon* test.

ences. But unlike the majority in *Joyner*, this Court found no constitutional violation. *Pelphrey*, 547 F.3d at 1278.

In *Pelphrey* the record reflected that "between 1998 and 2005, 96.6 percent of the clergy [that delivered an invocation], to the extent their faith was discern[i]ble, were Christian." 547 F.3d at 1267. Additionally, 68 to 70 percent of the prayers contained Christian references. *Id*. Yet the prayers were deemed constitutional because the sporadic participation of non-Christians and the application of a neutral practice demonstrated the prayer opportunity was not exploited . *Id*. at 1278, 1281-82.

The Fourth Circuit majority attempted to distinguish *Pelphrey* by opining that the "sectarian terms" in the prayers offered in *Pelphrey* were of no moment because Jewish, Unitarian, or Muslim clerics occasionally offered invocations. *Joyner*, 653 F.3d. at 352-53 (quoting *Pelphrey*, 547 F.3d at 1266). The majority distinguished the *Joyner* facts by ignoring the evidentiary record of a variety of prayers offered by non-Christians in the decades-old practice. Instead, they focused solely on the identity of prayer givers and the content of prayers in the one year following the written codification of the Board's long-standing practice. The majority noted that during the one-year period, "[n]one of the prayers mentioned any other deity" than Jesus, and no "non-Christian religious leader c[a]me forth to give a prayer." *Id*. at 353.

But the *Joyner* majority's attempt to distinguish the facts of *Pelphrey* demonstrates how it misconstrued this Court's reasoning. As this Court pointed out, "the diversity of speakers, in contrast with the chaplain of one denomination allowed in *Marsh* supports the finding that the county did not exploit the prayers to advance any one religion." *Pelphrey*, 547 F.3d at 1277. Note that the diversity of speakers in *Pelphrey* was relevant to evaluating the motives of the council, and the neutral practice demonstrated that the prayer opportunity was not "exploited." The *Joyner* majority rejected the idea that a neutral practice or policy mattered. *Joyner*, 653 F.3d. at 353-54. Applying the reasoning of *Joyner* would have led this Court to strike down the practice in *Pelphrey* because members of Christian faith traditions delivered nearly 97 percent of the invocations and included explicit Christian references at least 70 percent of the time. *Pelphrey*, 547 F.3d at 1267.

The facts established by the district court below demonstrate that, since the adoption of the Lakeland policy, multiple members of the Jewish faith, as well as a Muslim Imam, have delivered invocations before city council meetings. *Atheists of Florida, Inc. v. City of Lakeland, Fla.*, 2012 WL 589588, at *13-14, (M.D. Fla. Feb. 22, 2012). This demonstrates that the City of Lakeland did not exploit the prayer opportunity to promote any particular faith tradition any more than Cobb County in *Pelphrey*.

Moreover, a difference in the interpretation of the word "advance" in the

Marsh decision has resulted in a further conflict between the Fourth Circuit and this Court. *Marsh* confirmed that the content of legislative prayer "is not of concern to judges" absent an "indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794–95, 103 S.Ct. at 3338. The Fourth Circuit's unusual reading of the word "advance" has caused a circuit split. Under *Joyner*, legislative prayers "advance" religion if the majority of the invocation speakers are of the same religion and refer to tenets of their faith too often.

The Tenth Circuit in *Snyder v. Murray City Corp*., 159 F.3d 1227 (10th Cir. 1998), held that "the kind of legislative prayer that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine." *Id*. at 1234. The court explained:

> Of course, all prayers "advance" a particular faith or belief in one way or another. The act of praying to a supreme power assumes the existence of that supreme power. Nevertheless, the context of the decision in *Marsh* . . . underscores the conclusion that the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause. Rather, what is prohibited by the clause is a more aggressive form of advancement, *i.e.*, proselytization. By using the term "proselytize," the Court indicated that the real danger in the area is [an] effort by the government to convert citizens to particular sectarian views.

Id. at n.10 (internal citations omitted).

This Court explicitly adopted the logic and rationale of *Snyder* in *Pelphrey*.

See Pelphrey, 547 F.3d at 1274. In contrast, the Fourth Circuit has expressly rejected the Tenth Circuit's rationale in *Snyder*, instead holding that even prayers that do not proselytize, disparage, or aggressively advocate may nevertheless "advance" a religious faith in violation of *Marsh*. *Wynne v. Town of Great Falls*, 376 F.3d 292, 301 n.6 (4th Cir. 2004) (rejecting the *Snyder* court's statement and holding that "[n]ot all prayers advance a particular faith. Rather, nonsectarian prayers, by definition, do not advance a particular sect or faith"). The *Joyner* majority's reliance upon *Wynne* throughout its opinion shows a similar rejection of *Snyder*, as followed in *Pelphrey*. *See Joyner*, 653 F.3d. at 349-54.

C. The *Galloway* decision is in direct conflict with *Pelphrey*.

The *Galloway* court acknowledged this Court's *Pelphrey* decision but, despite *Galloway* having substantively similar facts as *Pelphrey*, the court struck down the neutral policy before it. *Galloway*, 2012 WL 1732787, at *15; *cf. Joyner*, 653 F.3d. at 352-53. The Second Circuit's analysis cannot be squared with *Pelphrey*. While this Court wisely refused to parse out the content of individual prayers, the *Galloway* court did exactly that. It counted the number of references to "Jesus" and other similar theological terms and went so far as to analyze the plural form of pronouns used. *See Galloway*, 2012 WL 1732787, at *18-20. The *Galloway* court parsed the content of the prayers while admitting that the nature of the prayers themselves did not violate *Marsh*. *Id.* at *18.

Pelphrey relied upon "evidence of exploitation" as used in the *Marsh* standard to look for evidence of an impermissible governmental motive because the Supreme Court's use of the term "exploitation" implies intentional manipulation. *Pelphrey*, 547 F.3d at 1278. *Galloway* did the opposite. The Second Circuit looked to *Allegheny's* dicta about *Marsh* and determined that scienter was irrelevant. After acknowledging that none of the prayers ran afoul of the *Marsh* standard and that there was no religious animus, the *Galloway* court nonetheless struck down the invocations because of the content of various prayers. 2012 WL 1732787, at *16 n.3, *19. Recognizing the inevitable outcome of their standard, the Second Circuit concluded with a warning that deliberative bodies should consider not engaging in prayer before their legislative sessions because of constitutional barriers. *Galloway*, 2012 WL 1732787, at *23. In so doing, the Second Circuit adopted a standard that starkly contrasts with this Court's ruling in *Pelphrey*.

III. PRIVATE CHOICES DETERMINING PRAYER CONTENT DEFLECT CONCERNS OF DENOMINATIONAL PREFERENCE.

Denominational preference in legislative prayer was of no concern in *Marsh*, yet Atheists contend that distinctively Christian references are *per se* evidence of an Establishment Clause violation. It is constitutionally permissible, under *Marsh*, for the government to hire a chaplain from one denomination to devise and present prayers on a continual basis. It follows, therefore, that it is constitutional for the

City here to accommodate volunteer clerics self-selected from among local religious congregation to offer invocations. Here, the City's policy strictly limited its own participation in the invocations. Consequently the nature and content of the prayer was not determined by the City or by any policy the City adopted or implemented.

Atheists assert that simply because many of the clergy who volunteered to present an invocation referenced Jesus, the City was advancing or preferring one particular faith. This contention is without merit. It is both at odds with *Marsh* and with the principle employed in Supreme Court case law dissociating government imprimatur from the choices of private persons responding to neutral government invitations.

The Supreme Court has repeatedly held that private decisions to take advantage of opportunities presented in facially neutral government programs do not bear the imprimatur of the government. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8, 113 S.Ct. 2462, 2466 (1993) (a government-funded sign-language interpreter conveying theological messages in a religious school was not attributable to government because the program neutrally provided access to a broad class of citizens without reference to their religious faith); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487, 106 S.Ct. 748, 751 (1986) (a neutral scholarship program directed state aid to a religious institution due to the

independent, private choice of the student; thus no attribution of religious messages to the government).

That same principle applies here. Because the City's neutral policy provided equal access to clerics of all faith congregations in the community, the aggregate faith composition of the resulting prayer givers is not attributable to the government any more than is the faith of any individual prayer giver. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652, 122 S.Ct. 2460, 2467 (2002) (upholding a neutral education voucher program even though 96% of the students enrolled in religiously affiliated schools, for the "focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools"); *Mueller v. Allen*, 463 U.S. 388, 401, 103 S.Ct. 3062, 3070 (1983) (upholding constitutionality of state program authorizing tax deductions for educational expenses even though 96% of the program beneficiaries were parents of children in religious schools, stating that "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law"). Due to the neutral character of the City's invocation opportunity, government favoritism of one faith tradition over another cannot logically or legally be inferred. The City of Lakeland adopted a policy that respects the independent choices of private citizens that choose to voluntarily participate in the

prayer opportunity. The opinion of the district court should be affirmed.

CONCLUSION

The Supreme Court has already held that legislative prayers are constitutional. It has also warned that the government should not be involved in regulating the content of prayers, since that exercise itself may violate the Constitution. The City of Lakeland's approach closely follows the policy and procedures approved by this Court in *Pelphrey* and should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,999 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: June 25, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2012, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that service will be accomplished by the appellate CM/ECF system and regular mail upon the following:

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