APPEAL NO. 11-56318

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELLY RUBIN AND MAUREEN L. FELLER,

Plaintiffs-Appellants,

v.

CITY OF LANCASTER, A MUNICIPAL CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Central District of California
Civil Case No. 2:10-cv-04046 (Honorable Dale S. Fischer)

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 *amicus curiae* Alliance Defense Fund states that they have no parent corporation and issue no stock.

Dated: November 17, 2011

/s/Brett Harvey
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STATEMENT OF *AMICI CURIAE* INTEREST

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. ADF believes that eliminating public invocations is inconsistent with our constitutional history and traditions and 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.

SUMMARY OF THE ARGUMENT

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court evaluated and affirmed the validity of deliberative bodies starting public meetings with a prayer. The instant case is easier than *Marsh* because it includes several additional factors that offer even greater separation between the imprimatur of the state and the content of the offered invocations.

For well over 200 years, legislative bodies at all levels of government in our country have solemnized their proceedings with prayer, and the Supreme Court

affirmed the constitutionality of this "deeply embedded" tradition in *Marsh.* The *Marsh* court affirmed the constitutionality of legislative prayers that for 16 years contained frequent, explicit Christian references delivered by the same paid government employee as part of his governmental duties. In this case, the Lancaster City Council developed a neutral policy that invited local leaders of every faith in the county to volunteer on a "first-come, first-served" basis to deliver an invocation consistent with each guest speaker's respective faith tradition. Therefore, the invocation practice of the City of Lancaster incorporates greater protections from the alleged establishment of religion than the practices reviewed in *Marsh*.

The Appellants seek an unconstitutional remedy. 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. Because Appellants were offended by having to hear the name of Jesus in a public prayer, they now ask this court to dictate how and to whom an invocation speaker must pray. But the request is unconstitutional.

While the legislative prayer practice upheld in *Marsh* involves a government employee performing government functions, the City of Lancaster has developed a policy and practice that removes the imprimatur of the City from the content of the

delivered invocations. The Supreme Court has issued a series of rulings demonstrating that the independent private choices of individuals responding to a neutral government invitation do not carry the imprimatur of the state. *See, e.g. Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). In the present case the City of Lancaster developed a neutral policy that provided an opportunity for private citizens to voluntarily deliver an invocation. The speakers were self-selected by voluntarily responding to an open invitation. The content of each invocation was controlled by the choices and the conscience of the invocation speaker. Consistent with Supreme Court precedent, the expressions of the invocation speakers - including references to Jesus Christ - do not violate the Establishment Clause.

The Appellants rely heavily on *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011) *petition for cert. filed* (Oct. 27, 2011) (No. 11-546), a recent Fourth Circuit decision. Appellants' reliance is misplaced. Not only do the facts of this case make the analysis of the *Joyner* majority inapplicable, but the analysis of the *Joyner* majority is also inconsistent with every other federal court that has considered the question of sectarian references in legislative prayers in the past four years. The district court properly relied upon the reasoning of the Eleventh Circuit in *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263 (11th Cir. 2008), as the most consistent application of Supreme Court precedent.

The City of Lancaster has adopted and implemented a neutral policy that permits citizens to voluntarily take advantage of a legislative prayer opportunity. The practice is consistent with historical practices that predate the founding of this country, and is consistent with established judicial precedent. The City's policy and practice allows 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 SECTARIAN REFERENCES IN LEGISLATIVE PRAYERS IS CONSISTENT WITH THE UNITED STATES SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

As Appellants concede, it is undisputed that prayers delivered before deliberative bodies do not constitute an establishment of religion. Appellants'. Br. at 60. Therefore, the crux of this case centers not on the constitutionality of legislative prayers, but rather 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 precedent resoundingly states – no! The Appellants' demand that Lancaster must censor the content of prayers offered by private volunteer prayer-givers disregards the commands of the U.S. Supreme Court in both *Marsh* and *Lee v. Weisman*, 505 U.S. 577 (1992).

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

1. The prayers here are less attributable to the state than the prayers in *Marsh*.

As the only Supreme Court case to directly consider whether a legislative prayer violates the Establishment Clause, *Marsh* acknowledged the long history and tradition of such prayer. The challenged invocation policy of the Nebraska Legislature approved in *Marsh* was not unlike the policies of countless other legislative bodies across our country. The policy approved by the *Marsh* Court 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 individual Christian minister for sixteen years given exclusively in the Judeo-Christian tradition; and
- Prayers that incorporated frequent and explicit sectarian references.[1]

[1] 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 sectarian references because the content of the prayers was not relevant to the holding, the dissenters noted the sectarian 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

463 U.S. at 784–85.

Given the features of the prayer policy upheld in *Marsh*, the policy of the City of Lancaster was properly upheld by the court below. Indeed the Lancaster policy was even more neutral, diverse and inclusive than the Nebraska Legislature's policy approved in *Marsh*, and thus less susceptible to the allegations of sectarian favoritism. Consider the comparative features of the policy here:

- 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 zero editorial control over the content of the prayers, leaving the invocations purely reflective of each speaker's own conscience and faith tradition.

The Lancaster invocation policy informed the audience of the purpose of the invocations, permitted the invocations to be presented by private citizens rather than a paid government employee, and opened the opportunity to members of all faith traditions. A failure to approve the City's policy is irreconcilable with the

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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).

Marsh precedent and risks creating a new, unworkable standard for review of legislative prayer in the Ninth Circuit.

2. Contrary to Supreme Court Precedent, the relief demanded by the Appellants requires the City to parse the content of prayers without evidence that the prayer opportunity has been exploited.

The Appellants' demand that the City engage in censoring or editing a private citizen's prayer is alarming. In *Marsh*, the Court stated that judicial parsing of prayer content should be avoided if there is no evidence the prayer opportunity has been exploited. 463 U.S. at 794–95. And, as noted above, the *Marsh* Court did not consider the mere presence of sectarian references in a prayer to be objectionable. The dissent in *Marsh* objected that the prayers before the Nebraska Legislature were explicitly sectarian, *see id.* at 823 (Stevens, J., dissenting), but the majority noted the prayers were "often explicitly Christian" and yet concluded the facts there provided "no indication that the prayer opportunity ha[d] been exploited." *Id.* at 793 n.14, 794.

The Appellants asks this court to strike down any prayer that simply references the name of a deity. But the lesson from *Marsh* is that a prayer opportunity should not be deemed "exploited" merely because prayers may name a deity or include expressions of a particular faith. By focusing on the context of a legislative prayer policy rather than the content of particular prayers, courts can safeguard constitutional guarantees without becoming embroiled in ecclesiastical

evaluations and comparative theology.

But the Appellants' demand requires even further divergence from the Supreme Court's instruction in *Marsh* because the Appellants seek to alter the *Marsh* method for reviewing legislative prayer practices by reviewing the content of the prayers themselves, rather than the "prayer opportunity." When the *Marsh* Court considered whether a "prayer opportunity" had been exploited, it looked to the process pursuant to which the chaplain was allowed to pray, 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. *Marsh*, 463 U.S at 793-94. After making that inquiry the Court stated: "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 . . . ." *Id.* at 794.

The majority in *Marsh* noted that the prayers were exclusively in the "Judeo-Christian tradition," but did not consider that important enough to even address, other than to drop a footnote that simply confirmed that the chaplain, in fact, characterized his prayers as "Judeo-Christian" and acknowledged the prayers were often explicitly Christian *Id.* at 793 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 sectarian references found in the content of prayer.

3. The Appellants ask this court to evaluate legislative prayer by adopting an Establishment Clause standard wholly inconsistent with *Marsh*.

The relief sought by Appellants is irreconcilable with *Marsh* because it incorporates the *Lemon* test that was posed by the *Marsh* dissent and rejected by the majority. It also distorts *Marsh*'s historical analysis.

The Appellants contend that the facts of *Marsh* are augmented by a mischaracterization of the facts set forth in the dicta of the plurality opinion in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).[2] Appellants' Br. 42, 53. The Appellants support their contention by pointing to the majority opinion in the split panel decision of *Joyner v. Forsyth County*, 653 F.3d 341, 348 (4th Cir. 2011), *petition for cert. filed* (Oct. 27, 2011) (No. 11-546). The dictum in *Allegheny*

[2] In *Allegheny* the Court was debating whether the display of a crèche on public property should be evaluated under the traditional Establishment Clause analysis set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), 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, Justice Blackmun, writing the plurality opinion, 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 support for the trivialized view by mischaracterizing the facts of *Marsh*. *Allegheny*, 492 U.S. at 603. Blackmun contended that the legislative prayers involved in *Marsh* did not violate his understanding of the Establishment Clause because the chaplain 'removed all references to Christ.'" (citations omitted) *Id.* at 602-03. However, this is contrary to the facts of *Marsh*. (*Supra* § I.A.1.a. n.1)

recognizes that "nonsectarian" prayers do not have the "effect of affiliating the government with any one specific faith or belief." *Allegheny*, 492 U.S. at 603. But the *Joyner* majority uses this recognition to subvert the *Marsh* standard as being dependent upon passing the "endorsement" test.[3] *Marsh* rejected the use of the *Lemon* test for the evaluation of legislative prayer practices. *See Marsh*, 463 U.S at 797.

The reliance of the majority in *Joyner* and the Appellants upon *Allegheny* so as to dictate "nonsectarian" prayers is erroneous.[4] (*Supra* § I.A.1.c.ii). In *Pelphrey*, the Eleventh Circuit recognized that "[b]oth *Allegheny* and *Lee* provide insight about the boundaries of legislative prayer" and provided a thoughtful

[3] Relying on *Allegheny's* mischaracterization of the facts of *Marsh*, the Fourth Circuit majority found that frequent "sectarian" references in legislative prayer impermissibly risk affiliating the government with a specific faith or belief. Consequently, the majority adopted a "frequency" test, concluding that "infrequent" "sectarian" references may not make out a constitutional case, but repeated "sectarian" references are problematic. The court reasoned that "frequent" sectarian references to a particular faith constitute government advancement and effective endorsement of one religious faith. *Joyner*, 653 F.3d at 352, 355. In other words, 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(1984), as an analytical tool in the application of the "effects" test set forth as the second prong of the *Lemon* test.

[4] The reliance of the *Joyner* majority upon *Allegheny* in order to modify the standard of *Marsh* is not only under review by the U.S. Supreme Court, *petition for cert. filed* Oct. 27, 2011 (No. 11-546), but it contradicts the express holding of a unanimous Fourth Circuit panel opinion in *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 281 n.3 (4th Cir. 2005) (noting "[n]othing in *Allegheny* suggests that it supplants *Marsh* in the area of legislative prayer").

analysis about the application of both cases to legislative prayer. 547 F.3d at 1270-72. After fully exploring the application of *Allegheny*, the Eleventh Circuit noted: "[t]he taxpayers argue that *Allegheny* requires us to read *Marsh* narrowly to permit only nonsectarian prayer, but they are wrong." *Id*. at 1271; s*ee also Galloway*, 732 F. Supp. 2d 195, 225, 242 (neither *Marsh* nor *Allegheny* require nonsectarian prayers for Establishment Clause compliance).

Upon evaluating the implementation of a neutral and inclusive prayer policy substantively identical to the one adopted by the City of Lancaster, the *Pelphrey* court 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.'" (citations omitted) *Id*. at 1274.

The Appellants would have this court rely on dicta in the fractured *Allegheny* opinion to conclude that *Marsh* stands for the proposition that only nonsectarian legislative prayers can pass constitutional muster. But that is clearly erroneous because the prayers of the Nebraska chaplain, as well as other legislative prayers considered by the *Marsh* Court contained frequent sectarian references and yet were deemed constitutional. *Supra* § I.A.1. n.1*; see also Van Orden v. Perry*, 545 U.S. 677, 688 n.8 (2005) (noting "[i]n *Marsh*, the prayers were often explicitly

Christian" and references to Christ were not limited until the year after suit was filed) (Rehnquist, C.J., plurality); *Doe v. Tangipahoa Sch. Bd.*, 473 F.3d 188, 212–13 (5th Cir. 2006) (Clement, J., dissenting) ("If content is determinative, the *Marsh* Court's analysis would be internally conflicted. The content of congressional prayer, referred to by the *Marsh* Court as exemplifying permissible legislative prayer, traditionally has included sectarian references. . . . By relying on congressional prayer as a demonstrative example, the *Marsh* Court endorsed the understanding that the sectarian nature of the prayer's content does not render it necessarily constitutionally unsound"), *plurality opinion vacated en banc on jurisdictional grounds*, 494 F.3d 494 (5th Cir. 2007).

B. The relief sought by Appellants is unconstitutional.

To the extent *Allegheny* is considered to have created ambiguity about the holding of *Marsh*, the Supreme Court added clarity about government involvement in public invocation three years later in *Lee*. The Supreme Court considered whether it was constitutional for a public high school to orchestrate a public invocation as part of graduation ceremonies. Distinguishing the context from a high school graduation ceremony from that of legislative prayer, the Court found it impermissible to incorporate a government prayer in the context of a public school graduation ceremony. But, as the Eleventh Circuit noted, *Lee* informs the application of *Marsh*. *Pelphrey*, 547 F.3d at 1271. In particular, the Supreme Court

admonished the government for advising an invited speaker to deliver a "nonsectarian" prayer. *Lee*, 505 U.S. at 588-92.

1. Imposing a "nonsectarian" requirement requires the government to mandate how and to whom a person must pray and establishes a government imposed civil religion in violation of the Establishment Clause.

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 religion with more specific creeds strikes us as a contradiction that cannot be accepted." *Lee*, 505 U.S. at 591. In *Lee*, the Supreme Court struck down a public prayer policy in part because the government had advised an invited speaker that prayers should be "nonsectarian." The Court noted that the "nonsectarian" instruction constituted a means by which the government directed and controlled the content of prayers. *Id*. at 588. Recognizing the impermissibility of government dictated prayer the Court noted: "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers …' and that is what the school officials attempted to do." *Id*. (citing *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

Although the Appellants object to all legislative prayers, at a minimum they ask this court to impose a "nonsectarian" requirement. Appellants 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.

Lee at 589.

The Appellants ask this court to dictate the content of legislative invocations. In support the Appellants offer a strained interpretation of *Marsh* and its progeny and ignore the obvious admonitions of the Supreme Court in *Lee*.

2. There is no workable standard that allows the government to police the theological content of prayer to ensure that legislative prayers are sufficiently "nonsectarian."

The Supreme Court has noted the judiciary's inability to even identify what constitutes a "sectarian reference." In a concurring opinion filed in *Lee,* that was joined by Justice Stevens and Justice O'Connor, Justice Souter addressed the dangers of trying to impose a "nonsectarian" requirement that he termed "nonpreferentialism:"

> [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 (Souter, J., concurring)

All invocations delivered at City of Lancaster public meetings were presented in language chosen by the invocation speaker and directed to the deity represented by his or her respective faith tradition. The content of every prayer—indeed the act of prayer itself—communicates religious affirmations not universally shared. And because a prayer communicates beliefs that may contradict others, all prayer is inescapably "sectarian" in some general sense. *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"). An invocation that is not directed at a particular deity is no prayer at all.

Any decision from this court that assigns to the government the obligation to limit or eliminate sectarian references in prayers facilely assumes the government's capacity to discern what that forbidden characteristic is. What metric can a secular court use to adjudge how much sectarianism is too much?

The caution expressed in *Marsh* on the "sensitive evaluation" associated with parsing the words of a prayer, 463 U.S. at 794–95, 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 (1981) (holding that inquiries into religious

significance of words or events are to be avoided); *Mitchell v. Helms*, 530 U.S. 793, 828 (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 (1979) (finding that "the very process of inquiry leading to findings and conclusions" involving religious beliefs may impinge upon First Amendment rights).

Indeed, the only two courts to have analyzed the practical implications of enforcing a "nonsectarian" requirement for legislative prayer have highlighted the intractable difficulty of such a task. What constitutes a "sectarian" reference and how could such be policed? The Eleventh Circuit explained:

> 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. The Western District of New York was similarly perplexed:

> [T]he court finds that Plaintiff's proposed non-sectarian policy, which would require Town officials to differentiate between sectarian prayers and nonsectarian prayers, is vague and unworkable, as *Pelphrey* demonstrates. The instant case illustrates the illusory nature of so-

> called nonsectarian prayer, since, as shown above, many of the prayers that Plaintiffs say are sectarian are indistinguishable from prayers they say are not.

Galloway, 732 F. Supp. 2d at 243.

Even if a standard could be concocted that could somehow stipulate straightforward prohibitions on specific appellations and theological phrasing, implementing such a standard would itself be preferential and "sectarian" due to its inevitably disparate impact in favoring faiths suited to the form of the expression called for.[5] Or if its terms were to require a quantitative analysis of theological words and names, then the restriction on sectarian prayer would only arise after the arbitrary "quota" of allowable sectarian references was met, meaning different speakers would face different ground rules.

The crusade to excise "sectarianism" from invocations is one that cannot escape self-contradiction. This surely is at least one reason why the Court in *Marsh* did not impose such a requirement.[6]

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[5] *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").

[6] *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 enforce such a distinction will operate in a discriminatory fashion"); Klukowski, *supra* note 1, 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*

II. THE PRIVATE CHOICES DETERMINING THE PRAYER CONTENT FURTHER DEFLECT CONCERNS OF GOVERNMENTAL DENOMINATIONAL PREFERENCE.

Denominational preference in legislative prayer was not of concern in *Marsh*, yet the Appellants rely upon references to Jesus Christ to be *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. All the more is it constitutional for the City here to accommodate volunteer clerics self-selected from among every local religious congregation to devise and present prayers on a rotating basis. Here, by design and in its implementation, 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.

The Appellants assert that because many of the clergy who volunteered to present an invocation referenced Jesus, the City was advancing or preferring one particular faith. This is incorrect on at least two levels. First, it is at odds with *Marsh.* Second, it is at odds with the principle employed in Supreme Court case law dissociating government imprimatur from the choices of private persons

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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.")

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 (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 (1986) (a neutral scholarship program directed state aid to a religious institution because of the independent, private choice of the student, thus no attribution of sectarian messages to the government).

That principle applies here. Because the City's neutral policy provided equal access to clerics of all faith congregations, the aggregate faith composition of the resulting prayer givers is not attributable to the government any more than is the faith of any individual respondent. *See Zelman*, 536 U.S. at 652 (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 (1983) (upholding constitutionality of state program authorizing tax deductions for edu-

cational 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"). Because of the neutral character of the City's invocation opportunity, government favoritism of one religion cannot logically be inferred.

Supreme Court precedent makes clear that legislative prayers are consistent with principles of disestablishment, even if they include "sectarian" references. But the lower court's decision can be upheld without even engaging in Establishment Clause analysis. In this case, the Establishment Clause may only be implicated by virtue of the fact that the City of Lancaster permits legislative prayers. But the legitimacy of legislative prayers generally is not in dispute. Consequently, this case turns solely on the City's obligation to control the content of legislative prayer.

The City of Lancaster incorporates the indicia of a limited public forum for private citizens to deliver invocations. The speakers are self-selected by opting into a neutral, volunteer program, and the City has no editorial control over the content of the invocation. (*See* Lancaster Invocation Policy). Lancaster's incorporation of many of the characteristics of a limited public forum in to its legislative prayer policy provides further evidence to the reasonable observer that

the content of the invocation does not imply City endorsement. The City of Lancaster adopted a policy that respects the independent choices of private citizens that chose to voluntarily participate in the prayer opportunity. The opinion of the district court should be affirmed.

III. APPELLANTS' RELIANCE UPON THE MAJORITY OPINION IN *JOYNER V. FORSYTH COUNTY* IS MISPLACED.

The Appellants relied heavily upon the analysis and conclusions of the Fourth Circuit panel majority in the split decision of *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011). But the majority opinion in *Joyner* is the only appellate decision that remains binding authority requiring the government to police the theology of legislative invocations, and it is out of step with other courts that have considered the impact of sectarian references in a legislative prayer.

A. The *Joyner* decision is in direct conflict with the Eleventh and Eighth Circuits.

The facts in this case, like those in *Joyner*, are substantively indistinguishable from those in cases reviewed by other courts, including *Pelphrey,* 547 F.3d 1263; *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979); *Galloway v. Town of Greece, N.Y.*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010), *argued*, No. 10-3635 (2d Cir. Sept. 12, 2011); and *Doe v. Tangipahoa Sch. Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009). In each of those cases a local governmental body invited local religious leaders to provide invocations consistent with the dictates of the invocation

speaker's own conscience. Offended plaintiffs challenged the respective prayer policies on the ground that some of the invocations included "sectarian" references. But in every case, the courts affirmed that the government is not required to mandate only "nonsectarian" prayers. Similarly, the district court in *Doe v. Indian River School District*, 685 F.Supp.2d 524 (D.Del. 2010) (*rev'd on other grounds*, --- F.3d ----, 2011 WL 3373810 (3rd Cir.2011)), found that sectarian references, including references to a named deity, do not invalidate a legislative prayer.

1. The *Joyner* majority opinion conflicts with the Eleventh Circuit.

The dissent in *Joyner* noted that the majority opinion "is in direct conflict" with the Eleventh Circuit opinion in *Pelphrey*. 653 F.3d. at 355-56. In both cases, 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 references. But unlike the majority in *Joyner*, the Eleventh Circuit found no constitutional violation. *Pelphrey,* 547 F.3d at 1278.

In *Pelphrey* it was established that "between 1998 and 2005, 96.6 percent of the clergy [that delivered an invocation], to the extent their faith was discernable, were Christian." 547 F.3d at 1267. Additionally, in the decade prior to the court's decision "70 percent of the prayers before the county commission contained

Christian references." *Id*. And yet the prayers were deemed constitutional.

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, in a period exceeding ten years, 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 focusing solely on the one year following the written codification of the Board's decades-old invocations practice and noting, "[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." 653 F.3d. at 353. The majority opinion in *Joyner* recognized that diverse references in public invocations provide evidence that a prayer policy does not advance a single faith. *Id.* Here the parties have stipulated to the fact that members of various faiths have accepted the City's invitation to give an invocation. Am. Findings of Fact and Conclusions of Law at 15, Dkt.44.

The facts established by the district court below demonstrate that, since the adoption of the Lancaster policy, approximately one third of the invocation opportunities have resulted in invocations provided by a self identified metaphysicist, a member of the California Sikh Council, a person from an Islamic congregation, or no invocation at all. *Id.* at 6. As the Eleventh Circuit points 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.

The diversity represented by the invocation speakers before the Lancaster City Council make plain that the City did not exploit the prayer opportunity to promote Christianity. The District Court below noted that "Plaintiffs have presented no evidence or argument to suggest that the April 27 'prayer opportunity [was] exploited to proselytize or advance any one, or to disparage any other, faith or belief,' and have not contended that it had this purpose or effect." Am. Findings of Fact and Conclusions of Law at 11, Dkt.44. The District Court in this case went on to find "[t]here is no evidentiary support for Plaintiff's apparent contention that the Invocation Policy of Procedures, which on their face encourage participation by members of all faiths and discourage proselytizing and disparagement – are a sham." *Id*., at 15. Appellants' reliance upon *Joyner* is misplaced because here the facts more closely parallel *Pelphrey* than *Joyner*.

The *Pelphrey* decision has been widely accepted as a correct application of *Marsh*. *See Tangipahoa Sch. Bd.*, 631 F. Supp. 2d at 837 ("The Eleventh Circuit, in a scholarly and insightful opinion, explicitly rejected an argument that *Marsh* permits only nonsectarian prayer; rather, that court cautioned, courts should not evaluate the content of prayer absent evidence of exploitation"); *Galloway*, 732 F. Supp. 2d at 243 ("[T]he Court finds the Plaintiff's proposed non-sectarian policy,

which would require Town officials to differentiate between sectarian prayers and nonsectarian prayers, is vague and unworkable, as *Pelphrey* demonstrates"); Am. Findings of Fact and Conclusions of Law at 12 n.4, Dkt.44 ("As the Eleventh Circuit noted, whether certain references 'are "sectarian" is best left to theologians, not courts of law'" (quoting *Pelphrey*)). The *Joyner* majority opinion is inconsistent with this consensus.

2. The *Joyner* majority opinion conflicts with the Eighth Circuit.

Like the Eleventh Circuit, the Eighth Circuit has also held that legislative prayers may contain sectarian references. In *Bogen*, a precursor to the Supreme Court's opinion in *Marsh*, the Eighth Circuit affirmed a policy very similar to the policy of Forsyth County. In *Bogen*, a county board invited local clergy to provide the invocations prior to its public meetings. Each of the volunteers happened to be Christian clergy, and the county board did not review or edit the content of the resulting prayers. The Eighth Circuit found no problem with the sectarian content of the invocations and upheld the prayer policy as constitutional. 598 F.2d at 1113.

The conflict between these circuits and the Fourth Circuit majority is significant. While the Eighth and Eleventh Circuits have left to private volunteers the business of composing their own invocations, the Fourth Circuit now "require[s] legislative bodies to undertake the impossible task of monitoring and prescribing appropriate legislative prayers for religious leaders to offer as

invocations." *Joyner*, 653 F.3d at 365 (Niemeyer, J., dissenting). A Petition for Certiorari seeking review of the *Joyner* decision is currently pending before the U.S. Supreme Court, filed on Oct. 27, 2011 (No. 11-546).

B. The *Joyner* majority's interpretation of the *Marsh* standard is in conflict with the Tenth and the Eleventh Circuits.

A difference in the interpretation of one key word—"advance"—in the *Marsh* decision has resulted in a further conflict between the Fourth Circuit and its sister circuits.

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." 463 U.S. at 794–95. It is the Fourth Circuit's interpretation of the word "advance" that has caused a circuit division.

1. The Tenth Circuit's interpretation of *Marsh* is the most widely accepted.

The Tenth Circuit has 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." *Snyder*, 159 F.3d 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).

The Eleventh Circuit has adopted the logic and rationale of *Snyder* (*see Pelphrey*, 547 F.3d at 1274), and all of the federal district courts, other than *Joyner*, that have considered the validity of sectarian references in legislative prayers in the last three years have also adopted the analysis of the Tenth and Eleventh Circuits as the most accurate reading of *Marsh*. *See* s*upra* § III.A.

2. The *Joyner* majority's interpretation of *Marsh* is inconsistent with the Tenth and Eleventh Circuit and is not accepted by a binding panel opinion in any other circuit.

The Fourth Circuit expressly rejected the Tenth Circuit's rationale in *Snyder* and held instead that sectarian 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") (internal emphasis and quotation marks omitted). A divided panel of the Fifth Circuit followed the *Wynne* interpretation in *Doe v.*

Tangipahoa Parish Sch. Dist., 473 F.3d 188, 202 (5th Cir. 2006) (holding that legislative prayers that contain explicit references to a deity run afoul of *Marsh*), *vacated en banc on jurisdictional grounds*, 494 F.3d 494 (5th Cir. 2007); as did a divided panel of the Seventh Circuit in *Hinrichs v. Bosma*, 440 F.3d 393, 400 (7th Cir. 2006) (holding that *Marsh* prohibits "sectarian" references in legislative invocations), *vacated en banc on jurisdictional grounds sub nom. Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007). Since both these opinions were vacated, there is no binding panel decision in any other federal circuit that adopts the rationale of the Fourth Circuit.

In the present case, the record shows a diverse pool of invocation speakers and reveals that no prayers sought to disparage others or convert the audience to a particular faith. When similar facts were presented to the Eighth and Eleventh Circuits, the policy was upheld. Likewise, this court should uphold the practice and policy of the City of Lancaster.

CONCLUSION

The Supreme Court has already held that legislative prayers can be given. It has also determined that the government should not be involved in composing prayers. The City of Lancaster's approach is the best example of how to deliberative bodies can comply with Supreme Court precedent while opening the session in prayer.

First of all, the City allows local clergy and prayer givers to deliver the invocation. This provides the best opportunity for invocations to be given by a wide spectrum of people. Since the implementation of the City's policy, the invocations have included offerings from Metaphysicists, Muslims, Sikhs, and Christians. Secondly, the City does not tell people how or to whom to pray, but rather leaves this decision to the independent private choice of the invocation speaker. This avoids a "nonsectarian" mandate on legislative prayer resulting in inconsistent and unworkable standards that impermissibly require the government to regulate the language of prayer. The District Court should be affirmed.

Respectfully submitted this the 17th day of November, 2011.

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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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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2011, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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