ALLIANCE DEFENSE FUND
Defending Our First Liberty

July 27, 2011

Supervisor Josie Gonzales, Chair
San Bernardino County Government Center
385 North Arrowhead Avenue, Fifth Floor
San Bernardino, CA 92415-0110

Re: Confirming the legality of Public Invocations

Dear Chair Gonzales:

This letter is made available by the Alliance Defense Fund ("ADF") to express support and encouragement for the important American tradition of having a public invocation before the opening of public proceedings. The news has reported that the San Bernardino County Board of Supervisors has received a letter making the extraordinary demand that public invocations be censored or altogether prohibited. We write to assure elected officials and concerned citizens that the Constitution clearly protects public invocations, even those that include a prayer.

The letter received by San Bernardino County Board of Supervisors is part of a targeted and coordinated attack on public invocations. In recent months, elected officials in cities and counties across the country received correspondence from activists groups such as the American Civil Liberties Union ("ACLU"), Americans United for the Separation of Church and State ("AU"), and The Freedom from Religion Foundation ("FFRF") demanding to control how and to whom prayers said before public meetings are offered. The tactics used by these groups often include disinformation about the status of the law and intimidation through threats of legal action. Despite the assertions made by these groups, courts continue uphold the practice of invocations at public meetings. On July 11, 2011 a federal court upheld the right of Lancaster, CA to pray before their city council meetings, even if the prayers are specific to the faith traditions of the prayer giver.[1] This case and a host of other relevant court decisions are discussed more fully below.

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1 *Rubin v. City of Lancaster*, 2011 WL 2693568 (C.D. Cal., July 11, 2011)

By way of introduction, ADF is a not-for-profit legal alliance defending the right to hear and speak the Truth through strategy, training, funding and direct litigation. Our organization exists to educate the public and the government about important constitutional rights, particularly the freedom of religious expression. ADF has been called upon to assist and successfully defend many public officials nationwide. In order to help defend public invocations, we have drafted and made available model policies that can be adopted by local governmental bodies in your area and elsewhere. This model policy provided the basis of the policy just upheld for the City of Lancaster. This letter explains the basic framework for the model policy, and concludes with an offer of free legal assistance.

I. LEGAL ANALYSIS

In his Farewell Address on September 19, 1796, President Washington famously admonished: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . The mere Politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity." It is both lawful and wise for public officials to respect and cherish our religious heritage and to invoke God's protection and guidance over their public work and our nation.

There is simply no question that a public deliberative body may open its meetings with an invocation, even one that includes a prayer. Public prayer has been an essential part of our heritage since before this nation's founding, and our Constitution has always protected the activity. Contrary to some recent claims, such prayer can also include sectarian references without running afoul of the First Amendment's Establishment Clause.

A. The Legality of Public Invocations is Beyond Dispute.

The United States Supreme Court has acknowledged that official proclamations of thanksgiving and prayer, and invocations before the start of government meetings, are an essential part of our culture and in no way a violation of the Constitution. This has been a consistent principle in First Amendment jurisprudence.

The central case on this subject is *Marsh v. Chambers,* 463 U.S. 783 (1983), where the Court approved the Nebraska Legislature's practice of opening each day of its sessions with a prayer by a chaplain paid with taxpayer dollars. *Marsh* has been repeatedly mischaracterized by some advocacy groups in recent months, but its holding is clear. In *Marsh*, Chief Justice Burger concluded:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since,

> the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.

Id., at 786. In fact, the Court noted that agreement was reached on the final language of the Bill of Rights on September 25, 1789, just three days *after* Congress authorized opening prayers by paid chaplains. *Id.,* at 788. Clearly then, "To invoke divine guidance on a public body . . . is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.,* at 792. Those beliefs help define who we are as a nation.

In *Lynch v. Donnelly,* 465 U.S. 668, 675 (1984), the Court affirmed that "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." Justice O'Connor opined that such official references encompass "legislative prayers of the type approved in *Marsh* [citation omitted], government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court.'" *Id.,* at 693 (concurring opinion). She explained, "Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.*

In *Marsh*, the court reiterated historical precedent. Thirty years before *Marsh* was decided, Justice Douglas famously observed, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson,* 343 U.S. 306, 313-14 (1952). Ninety-one years before *Marsh,* the Court acknowledged in *Holy Trinity Church v. United States,* 143 U.S. 457 (1892), that America had a "custom of opening sessions of *ALL* deliberative bodies and most conventions with prayer. . ." *Id.,* at 471 (emphasis added). By simply following these traditions, government officials run no risk of violating the Constitution.[2]

B. Sectarian Prayers are Historical and Constitutionally Permissible.

Recently, some activist groups have implied that all references to a particular deity, such as Jesus Christ, in public invocations are unlawful. To the contrary, the Constitution does *not* require such censorship. Courts focus on the *context* of legislative prayers rather than the specific *content* of any particular invocation. The government

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[2] As explained below, the lower courts have extended *Marsh* beyond the context of a state legislature, and applied it in deciding whether to permit prayer at meetings of local governmental bodies as well.

cannot establish a preferred religious viewpoint, i.e., "nonsectarian," and *dictate* the form of a prayer. For this reason, a policy which mandates only "nonsectarian" prayer would itself likely be unconstitutional. Instead, public bodies are much safer when they provide an open forum for individuals to offer prayer according to the dictates of their own consciences. This may work best on a rotational basis. Under such a policy, the viewpoint expressed—whether sectarian or nonsectarian—is then left to the individual prayer-giver rather than the government.

1. Supreme Court Cases.

In *Marsh*, the Supreme Court gave no indication that the mere mention of a specific deity or belief would violate the Establishment Clause. Instead, the Court reviewed and relied upon the examples of chaplains who gave overtly sectarian prayers as evidence of permissible public invocations. *See Marsh*, 463 U.S. at 794–95. The *Marsh* Court did not explicitly address the constitutionality of legislative prayers offered in Jesus' name (or in the name of any other specific deity) because that issue was not before the Court. However, the Court did reference the prayers delivered in Congress and at the Constitutional Convention as examples of what would and should be historically and traditionally permitted. *See Id.* at 791-92. Included in those example invocations were prayers mentioning the name of Jesus brought by invited guests.

For example, the *Marsh* Court reviewed and discussed the opening of the first session of Congress with prayer and concluded that "the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society." *Id.* The prayer at the first session of the Continental Congress, in Carpenter's Hall, Philadelphia on September 7, 1774, was delivered by the Rev. Jacob Duché. He included these words (emphasis added):

> Be Thou present; O God of Wisdom, and direct the councils of this Honorable Assembly: enable them to settle all things on the best and [surest] of foundations: that the scene of blood may be speedily closed: that Order, Harmony and Peace may be effectually restored, and Truth, and Justice, Religion, and Piety prevail and flourish among the people. Preserve the health of their bodies and the vigor of their minds, shower down on them, and the millions they here represent, such temporal Blessings as Thou seest expedient for them in this world, and crown them with everlasting Glory in the world to come. *All this we ask in the name and through the merits of Jesus Christ, Thy Son and Our Savior, Amen.*[3]

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[3] September 7, 1774, *First Prayer in Congress: Beautiful Reminiscence* (Washington, D.C. Library of Congress); William J. Federer, *America's God and Country: Encyclopedia of Quotations* (Coppell, TX Fame Publishing, Inc., 1994), p.137; Gary DeMar, *God and Government: A Biblical and Historical Study*

The content of Rev. Duché's prayer is virtually indistinguishable from the content of the typical opening prayer at any public meeting in America today. If the above prayer was reviewed with approval and referenced by the Supreme Court in *Marsh*,[4] then it, and prayer like it, is certainly appropriate today as well. Neither *Marsh* nor any other Supreme Court case commands removal of all sectarian references from public prayer, particularly where different persons of varying creeds take turns offering the prayer.

2. Lower Court Cases.

Numerous appellate and district courts that have had occasion to apply *Marsh* have found no trouble with sectarian prayers—so long as they are not exploited and used for proselytizing. The lower courts have rightfully focused on the key guideline provided by *Marsh:*

> ***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 to proselytize or advance any one*, or to *disparage any other*, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Marsh, 463 U.S. at 794-795 (emphasis added).

For example, the U.S. Court of Appeals for the Tenth Circuit has stated that "the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause." *Snyder v. Murray,* 159 F.3d 1227, 1234, n.10 (10th Cir. 1998). In that case, the court held that a city council could lawfully bar a speaker because he would "proselytize" his own views and "disparage" others by offering a mock, unconventional "prayer." Applying *Marsh,* the court observed: "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 (emphasis added). Specifically addressing what it means to "advance" a particular faith under *Marsh,* the court found that, "All prayers 'advance' a particular faith or belief in one way or another. . . By using the term 'proselytize,' the [*Marsh*] Court indicated that the real danger in this area is effort by the

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(Atlanta, GA American Vision Press, 1982), Vol. I, p. 108; John S.C. Abbott, *George Washington* (New York, NY Dodd, Mead & Co., 1875, 1917), p.187; Reynolds, *The Maine Scholars Manual* (Portland, ME Dresser, McLellan & Co., 1880).

[4] Notably, many of the prayers offered by the Nebraska Legislature's chaplain and reviewed by the *Marsh* Court were overtly sectarian. *See, e.g., Marsh* 463 U.S. at 823 n.2 (Stevens, J., dissenting) ("Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified.").

government to *convert* citizens to particular sectarian views." *Id.*, 1234, n.10 (emphasis added).

The United States Court of Appeals for the Eleventh Circuit recently upheld non-proselytizing county commission meeting prayers, even though more than 70% of them concluded in Jesus' name. *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263 (11th Cir. 2008). In that case, the federal district court below provided helpful standards for reviewing a legislative prayer and looked to whether the public officials had an "impermissible motive" to proselytize only one faith, or to show "purposeful preference of one religious view to the exclusion of others[.]" *Pelphrey v. Cobb County, Ga.*, 410 F.Supp.2d 1324, 1338 (N.D. Ga. 2006). Below this type of threshold, the courts have consistently disclaimed any interest in the content of legislative invocations, announcing a strong disinclination "to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh,* 463 U.S. at 795. "To 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 to proselytize or advance any one . . . faith or belief.'" *Pelphrey*, 547 F.3d at 1271 (quoting *Marsh*, 463 U.S. at 794-95). "Whether invocations of 'Lord of Lords' or 'the God of Abraham, Isaac and Mohammed' are 'sectarian' is best left to theologians, not courts of law." *Id.* at 1267.

In the Fourth Circuit, the court approved a legislative prayer practice in which various clergy in a county's religious community were invited to present invocations during meetings of the county board. In that case, *Simpson v. Chesterfield County Bd. of Supervisors,* 404 F.3d 276 (4th Cir. 2004), the court found it important that the County "made plain that it was not affiliated with any one specific faith by opening its doors to a wide pool of clergy." *Id.* at 286. The court did not, however, seem to reason that such a provision was an absolute prerequisite to the invocation practice's constitutionality, nor did it invoke the language of its earlier broad pronouncement in *Wynne v. Town of Great Falls,* 376 F.3d 292 (4th Cir. 2002), *cert. denied,* 125 S.Ct. 2990 (2005), that any reference to a particular deity is constitutionally impermissible.

The reason the *Wynne* case was easily distinguishable from *Simpson,* and from most other situations, is because the town council in *Wynne* exclusively invoked Jesus' name, publicly chided the plaintiff for failing to stand and participate in the prayers, and further excluded the plaintiff from participating in the public meeting without participating in the invocation. *Wynne* presented a genuinely exploitative situation where a town council "insisted upon invoking the name 'Jesus Christ' to the *exclusion of other deities* associated with any other particular religious faith." *Wynne*, 376 F.3d at 295, 301. Obviously, such action may be deemed by a reviewing court as "exploiting" the invocation to "proselytize or advance Christianity." The Fourth Circuit's injunction

against proselytizing town council prayers in *Wynne* thus does not fairly implicate all non-proselytizing prayers in every situation. In fact the court later clarified in *Simpson:*

> The facts of *Wynne* . . . contrast sharply with those in the present case. The insistent sectarianism of the Great Falls prayers violated even the spacious boundaries set forth in *Marsh.* [By contrast] Chesterfield's policy, adopted in the immediate aftermath of *Marsh,* echoes rather than exceeds *Marsh*'s teachings. The County never insisted on the invocation of Jesus Christ by name, as the Town Council in Great Falls did.

Simpson, 404 F.3d at 283 (citations omitted).

The Fourth Circuit further specified that, "A party challenging a legislative invocation practice cannot, therefore, rely on the mere fact that the selecting authority chose a representative of a particular faith, because some adherent or representative of some faith will invariably give the invocation." *Id.* at 285.

Included in the unreasonable demands of some activist groups is the misleading implication that lower courts have concluded that sectarian references in public invocations are unlawful. Nothing is further from the truth. Rather than rely upon the statements of groups who are committed to the eradication of public invocations, look to the actual ruling of the courts. To date, no federal appellate court has mandated only nonsectarian prayers. *See Pelphrey*, 547 F.3d at 1272. To do so would impermissibly censor the content of prayer.

Similarly, federal district courts reviewing this issue in the last several years have uniformly refused to prohibit legislative prayers, simply because they include a reference to a particular deity. For example, in *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F.Supp.2d 823 (E.D. La. 2009), the court held that a model prayer policy drafted by ADF is constitutional on its face. The court clarified: "Fidelity to *Marsh* commands not a content-based approach, or an inquiry into whether prayers are sectarian or nonsectarian at the outset, but, rather, focuses on exploitation of the prayer opportunity and efforts, direct or not, to proselytize; to promote or sell a religion." *Id.* at 839. "In approving *Pelphrey* and *Marsh*, this Court refuses to 'reduce *Marsh* to a sectarian/non-sectarian litmus test.'" *Id.* at 840 (citations and quotations omitted).

In both *Dobrich v. Walls*, 380 F.Supp.2d 366 (D. Del. 2005) and *Doe v. Indian River Sch. Dist.*, 685 F.Supp.2d 524 (D.Del. 2010), a Delaware school board's policy, which allowed for uncensored invocations, was upheld. The *Indian River* court examined the previously cited decisions of *Turner*, *Pelphrey* and *Tangipahoa*, and determined it

"agrees with those courts that have concluded that *Marsh* did not intend to authorize only nonsectarian legislative prayer." *Id.* at 541-42.[5]

Significantly, on July 11, 2011, the United States District Court of the Central District of California found an invocation policy structured like the model policy proposed by ADF to be constitutionally valid. *Rubin v. City of Lancaster*, 2011 WL 2693568 (C.D. Cal., July 11, 2011). In *City of Lancaster* the federal court relied upon the Supreme Court's decision in *Marsh* to reiterate that public invocations before public meetings do not violate the Establishment Clause. *Id.* at *4-6. The court then reviewed every federal case to address public invocation since *Marsh* and noted "Having reviewed these cases and others, the Court concludes that *Marsh* does not prohibit sectarian prayer and specifically does not prohibit references to Jesus or any other deity." *Id.* at *6[6]

While the Ninth Circuit, which includes California, has yet to issue any ruling specifically on point regarding legislative prayer, in *Bacus v. Palo Verde School Board,* unpublished-2002 WL 31724273 (9th Cir. 2002), the court held: "We need not decide whether the prayers 'in the name of Jesus' would be a permissible solemnization of a legislature-like body, provided that invocations were, as is traditional in Congress, rotated among leaders of different faiths, sects, and denominations." *Id.* at 1. With regard to prayer content, the Ninth Circuit's reference to Congressional invocations is important because prayers offered before Congress often contain explicit sectarian references. *See* Newdow v. Bush, 355 F.Supp.2d 265, 285 n. 23 (D.D.C.2005) (acknowledging that "the legislative prayers at the U.S. Congress are overtly sectarian"); *see also* Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 COLUM. L.REV. 2083, 2104 at n.118 (1996) (noting that, from 1989 to 1996, for example, "over two hundred and fifty opening prayers delivered by congressional chaplains [ ] included supplications to Jesus Christ"). State and local governments can look to the practices of the U.S. Congress for examples of what is constitutionally permitted. By way of example, on July 15, 2010, the Rev. Dr. John Cross offered the following prayer in the United States House of Representatives:

> Heavenly Father, thank You for being so kind, gracious, holy, and just. Thank You for demonstrating Your endless love through Jesus. Thank You for giving us the honor of living in our great country. Thank You for those who have gone before us.

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[5] The court further noted that if the plaintiffs' theory were correct, similar prayers given in the United States House of Representatives would also violate the Establishment Clause. Id. at 542 n.137.

[6] The federal court in *Rubin v. City of Lancaster* dismissed the analysis of a 2002 California State Court decision of *Rubin v. City of Burbank* which invalidated an invocation policy, noting that federal law "does not provide relief for "violations" of a state court's interpretation of the United States Constitution. *Rubin v. City of Lancaster*2011 WL 2693568, at *6 n.6 (C.D. Cal., July 11, 2011).

> We pray for those who are serving now to protect our freedom. Please give them safety. We pray for peace. We pray for our President, Congress, and all who lead our country. Please give them wisdom and direction as they make decisions.
>
> May we look to You as our Source, not our economy. In these days of global terror, may we remember You as our security. Use us to be instruments who bring hope to the underserved and safety for the unprotected. May we be a Nation who humbles ourselves before You. We bless You and please bless America.
>
> In Jesus' name, Amen.

156 Cong. Rec. H5619-02 (2010). His prayer was far from extraordinary. In the 111th Congress alone (i.e. the 2010 Congress), at least 32 prayers have been offered in the name of Jesus Christ.[7] Moreover, sectarian references in inaugural prayers have also

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[7] "In Jesus' name, Amen." 156 Cong. Rec. H5619-02 (2010); "These things we pray in the name of our Lord Jesus Christ. Amen." 156 Cong. Rec. H5205-02 (2010); "Cause us always to look to You, to bow before You, and to humbly follow You is my prayer in Jesus' name. Amen." 156 Cong. Rec. H4908-03 (2010); "Finally, Lord, bless President Obama, his family, and all of the leaders of this great Nation, in the matchless name of Your Son, Jesus, the Christ. Amen." 156 Cong. Rec. H4333-02 (2010); "In the precious name of Christ we pray. Amen." 156 Cong. Rec. H3661-03 (2010); "All this we ask in the name of Jesus. Amen." 156 Cong. Rec. H3313-03 (2010); "This I pray in the name of Your Son, Jesus. Amen." 156 Cong. Rec. H3205-03 (2010); "It is in the blessed name of our Lord, Jesus Christ, that we lay these requests at Your feet. Amen." 156 Cong. Rec. H2581-03 (2010); "We thank You for the sacred gift and trust given to us in the Senate, looking to You in all things, through Christ, in whose Name we pray. Amen." 156 Cong. Rec. S2331-01 (2010); "In Jesus' name, amen." 156 Cong. Rec. H2507-02 (2010); "We put our trust in You alone, in Jesus' name we pray. Amen." 156 Cong. Rec. H2321-02 (2010); "We pray respecting all faiths, but pray this prayer in the Name of the Lord Jesus Christ. Amen." 156 Cong. Rec. S757-01 (2010); "These and many other blessings we ask in the name of our Savior, Jesus Christ, Amen." 155 Cong. Rec. H11796-03 (2009); "I offer this prayer in the name of the One I call Jesus the Christ. Amen." 155 Cong. Rec. H11519-03 (2009); "In Jesus' name, amen." 155 Cong. Rec. H11385-03 (2009); "In Jesus' name, amen." 155 Cong. Rec. H11301-02 (2009); "We ask all of this in the name of our Lord and Savior, Jesus Christ. Amen." 155 Cong. Rec. H10523-02 (2009); "In Jesus' name we pray. Amen." 155 Cong. Rec. H10411-03 (2009); "Father, I ask this prayer in the powerful Name of Jesus. Amen." 155 Cong. Rec. S9761-01 (2009); "We pray these things over this place, this House today, in Jesus' name. Amen." 155 Cong. Rec. H9553-03 (2009); "We pray this prayer, respecting all faiths, but we pray this prayer in the name of our Lord and Savior Jesus Christ. Until You come, we pray. Amen." 155 Cong. Rec. H9345-03 (2009); "And in Jesus' name we pray. Amen." 155 Cong. Rec. H8963-03 (2009); "With gratitude to You, most high God, I pray in the name of my Savior, the Lord Jesus Christ, amen." 155 Cong. Rec. H8587-03 (2009); "I ask this in Jesus' name. Amen." 155 Cong. Rec. H8103-03 (2009); "In the name of Jesus, I pray. Amen." 155 Cong. Rec. H7839-03 (2009); "In Jesus' name we pray. Amen." 155 Cong. Rec. H7743-01 (2009); "In the Name of Jesus Christ, I pray. Amen." 155 Cong. Rec. H7253-04 (2009); "We humbly ask all of this in the name of Jesus Christ. Amen." 155 Cong. Rec. H6907-01 (2009); "We pray these things in the Name of the One who binds up the brokenhearted and proclaims liberty to the captives. In Jesus' Name, amen." 155 Cong. Rec. S5767-01 (2009); "In the name of Christ, amen." 155 Cong. Rec. H5311-03 (2009); "May the words that are written behind me 'In God We Trust' be true this day, in the name of my God and

been historically common.[8] At President Obama's inauguration, Dr. Rick Warren's invocation quoted scripture, referred to Jesus in four languages, and closed with the Lord's Prayer.[9] His prayer mirrored those of Rev. Kirbyjon Caldwell, Rev. Franklin Graham, and Rev. Billy Graham—all of whom prayed in Jesus' name at each of President George W. Bush's and President Clinton's inaugurations[10]—and the prayers offered at every inauguration since at least 1937. Epstein, *supra*, at 2107-08. Clearly, if sectarian references in legislative prayers are constitutionally impermissible, then Congress and many (if not most) of our presidents are serial offenders.

In summary, Supreme Court precedent and the precedent of many lower courts, along with the practices of Congress and many of this nation's presidents, indicate that legislative prayers—even sectarian ones—are clearly constitutional and "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. Sectarian references in legislative prayers are not unconstitutional. Only exploitative government action that deliberately and exclusively seeks to aggressively promote one religion to the exclusion of others is a problem. Absent such exploitation, it is not the government's job "to embark on a sensitive evaluation or to parse the content of a particular prayer." Id. at 795.

C. The Government Must Avoid "Comparative Theology."

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my Savior, the Lord Jesus Christ, I pray. Amen." 155 Cong. Rec. H4399-01 (2009); "We ask all this in the Name of our Lord and Savior, Jesus Christ. Amen." 155 Cong. Rec. S1615-01 (2009).

[8] Inaugural prayers are akin to legislative prayers. See, e.g., Newdow v. Roberts, 603 F.3d 1002, 1019 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("[Inaugural] prayers closely resemble the legislative prayers upheld by the Supreme Court in Marsh."). Indeed, presidential inaugurations are effectively joint sessions of Congress; the leadership and many members of Congress typically attend the ceremonies, the proceedings of which are published in the Congressional Record.

[9] The prayer concluded: "I humbly ask this in the name of the one who changed my life, Yeshua, Esau, Jesus, Jesus, who taught us to pray: Our Father, who art in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done, on Earth as it is in heaven. Give us this day our daily bread, and forgive us our trespasses as we forgive those who trespass against us. And lead us not into temptation but deliver us from evil. For thine is the kingdom and the power and the glory forever. Amen." 155 Cong. Rec. S667-02, 667 (2009).

[10] "Respecting persons of all faiths, I humbly submit this prayer in the name of Jesus Christ. Amen." 151 Cong. Rec. S101-05, 105 (2005); "May this be the beginning of a new dawn for America as we humble ourselves before You and acknowledge You alone as our Lord, our Saviour, and our Redeemer. We pray this in the name of the Father and of the Son, the Lord Jesus Christ, and of the Holy Spirit. Amen." 147 Cong. Rec. S421-05, 422 (2001); "This we pray in the name of the Father, the Son, and the Holy Spirit. Amen." 143 Cong. Rec. S119-03, 120 (1997); "I pray this in the name of the One who was called Wonderful Counselor, the mighty God, the everlasting Father, and the Prince of Peace. Amen." 139 Cong. Rec. S55-01, 55 (1993).

It is indeed an important principle that government officials cannot "assume the role of regulators and censors of legislative prayer." *Pelphrey*, 410 F.Supp.2d at 1339. As that court summarized:

> It would seem anomalous for the outcome of the Marsh inquiry to turn on the obviousness or subtlety of the sectarian references in question; such a rule would create the perverse incentive for speakers to endeavor to couch sectarian concepts in opaque terms, and place courts in the unenviable position of determining just how "obvious" a sectarian reference has to be before it must be excised from legislative invocations, even when not otherwise offensive to *Marsh*'s prohibition against proselytization, advancement, or disparagement.

Id. at 1338 n.14.

After a recent controversy in the Ohio House of Representatives, ADF was asked to submit a legal opinion regarding whether a suggested policy of reviewing invocations prior to their delivery, and mandating only "nonsectarian" content, would be constitutional. ADF opined that such a mandate would constitute an unconstitutional prior restraint on free speech. Further the opinion noted that the Supreme Court counseled against the efforts of government officials to affirmatively screen, censor, prescribe, and/or proscribe the specific content of public prayers offered by private speakers because such government efforts would violate the First Amendment rights of those speakers. Thankfully, the Speaker of the House, Rep. Jon Husted, wisely corrected the situation and issued a memo on September 10, 2007, stating: "As such, while the Ohio House of Representatives is under my leadership we will not censor the content of prayers given prior to a House session."

Speaker Husted made the right legal decision. In *Lee v. Weisman*, 505 U.S. 577 (1992), Justice Souter remarked: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than "comparative theology." *Id.* at 616–17 (Souter, J., concurring). The legislative branch of government, like the judicial, is prohibited from divining the "religious" from the "non-religious" and must avoid sifting through individual prayers to subjectively determine whether or not an invocation would be "sectarian." Because such editorial endeavors would offend constitutional guarantees under both the Free Exercise Clause and the Establishment Clause, they are clearly prohibited by Supreme Court precedent.

Examples of this precedent include: *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (stating that for authorities to troll through a religious institution's beliefs in order to

identify if they are "pervasively sectarian" is offensive and contrary to precedent); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 843-44 (1995) (rejecting the argument that a university should distinguish between evangelism on the one hand and the expression of religious views on secular subjects on the other); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (recognizing a problem should government attempt to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties); *Rusk v. Espinosa*, 456 U.S. 951 (1982) (mem.) (striking down a charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 272 n.11 (1981) (finding that inquiries into the religious significance of words or events are to be avoided); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid the entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs).

II. MODEL POLICIES AND OFFER OF *PRO BONO* DEFENSE

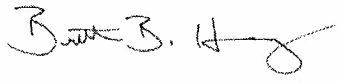
ADF has prepared a model policy as a proposed solution to the recent challenges brought by the FFRF, the ACLU, and others. *This policy was drafted to provide a constitutionally sound mechanism to preserve the longstanding tradition of allowing public meetings to be opened with an invocation.* A growing number of state and local governments nationwide are adopting this model. The policy allows for invocations provided by leaders of established religious congregations in the community, on a rotating and first-come/first-serve basis. The model policy further ensures that the invocations will be offered according to the dictates of the conscience of each invocation speaker, as the First Amendment requires. Additionally, ADF has worked with deliberative bodies to customize a policy that is consistent with their unique needs, including the development of a policy that allows the elected officials to offer an invocation on a rotating basis.

We strongly believe that ADF has crafted an invocation policy that will pass constitutional muster. For that reason, ADF is not only offering to provide deliberative bodies with an invocation policy, free of charge, but ADF will also provide a free legal defense to any local governmental body whose ADF crafted invocation policy is legally challenged.

It is our hope that the information provided in this letter will be helpful in explaining the reasons why governmental bodies can and should continue the tradition of opening invocations, and we encourage each deliberative body to codify its invocation practices with a safe and constitutionally sound written policy.

Please do not hesitate to contact us if ADF can provide any further information or assistance, or if we may help respond to any challenge or threat of litigation with regard to public invocations. As a not-for-profit organization, our services are provided *pro bono*.

Very sincerely yours,



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