



July 15, 2010

Via Facsimile and U.S. Mail

Mayor Gow Fields
Lakeland City Commission
Lakeland City Hall
228 South Massachusetts Avenue
Lakeland, FL 33801

RE: Law regarding public invocations and suit filed by Atheist of Florida

Dear Mayor Fields,

This letter is being submitted to you by the Alliance Defense Fund (“ADF”) to express our support and encouragement of the Lakeland City Commission’s participation in the important American tradition of opening its sessions with a prayer. Recently, elected officials in a number of American cities and counties have received threatening correspondence or been subject to lawsuits filed by groups similar in mission to Atheist of Florida. These groups have made extraordinary demands for public invocations to be censored or altogether prohibited. We have been informed that the City of Lakeland has been subjected to a lawsuit demanding the city change its policies regarding public invocation at the start of meetings by the City Commissioners, and we write to assure you that the Constitution clearly still protects the cherished practice of opening invocations.

By way of introduction, ADF is a not-for-profit legal alliance of more than 1,600 attorneys and like-minded organizations defending the right of people to freely live out their faith. Our organization exists to educate the public and the government about important constitutional rights, particularly the freedom of religious expression. We frequently defend these important freedoms in the courts, and through our offices across the country, ADF has been called upon to assist and successfully defend many public officials and legislative bodies on this and a variety of related issues.

I. LEGAL ANALYSIS

There is simply no question that a legislative body may open its sessions with an invocation. Public prayer has been an essential part of our heritage since the time of 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 denied a challenge to 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 the opinion, 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, three days *after* those same members of 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 specified that such official references encompass "government practices embracing religion, including Thanksgiving and Christmas holidays, congressional and military chaplains and the congressional prayer room, the motto, the Pledge of Allegiance, and presidential proclamations for a National Day of Prayer." *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.*

Thirty years before *Marsh* was decided, Justice Douglas famously observed, "We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public

events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.” *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). The Court held that the Establishment Clause does not prohibit “[p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a national holiday; ‘so help me God’ in our courtroom oaths—these and all other references to the Almighty that run through our laws, [and] our public rituals . . . [including] the supplication with which the Court opens each session: ‘God save the United States and this Honorable Court.’” *Id.*, at 312-13. 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. By simply following these traditions, government officials run no risk of violating the Constitution.

B. Sectarian Prayers are Likewise Historical and Constitutionally Permissible.

Recently, some activist groups have implied that all sectarian references in public invocations are unlawful. To the contrary, the Constitution does *not* require such censorship. Although the Supreme Court has not directly addressed the question, close reading of the case law indicates that *Marsh* and its progeny permit sectarian invocations. What matters most to the courts is the *context* of legislative prayers—rather than the specific *content* of any particular invocation.

In short, the rule of thumb is that the government cannot compel someone to pray in accordance with one preferred religious viewpoint. 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 sectarian deity or belief would violate the Establishment Clause. Instead, the Court reviewed and relied upon overtly sectarian prayers as examples of permissible public invocations. *See Marsh*, 463 U.S. at 794–95; *McCreary County v. ACLU of Ky.*, 125 S.Ct. 2722, 2733, n. 10 (2005). The *Marsh* Court did not issue an opinion on whether it would be unconstitutional for prayers to be offered in Jesus’ name (or in the name of any other specific deity) since that issue was not before the Court. *Marsh*, 463 U.S. at 793, n. 4. However, the Court did reference the prayers delivered at the Continental Congress and the Constitutional Convention as examples of what would and should be historically and traditionally permitted. *Id.* at 791-92. Included in those example prayers were invocations brought in the name of Jesus, by invited guests.

For example, the *Marsh* Court reviewed and discussed the opening of the first session of the Continental 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 that first session of the Congress, September, 7, 1774, in Carpenter’s Hall, Philadelphia, was delivered by 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.*¹

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*, then it, and prayers like it, should certainly be 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. These 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.

Id., 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*,

¹ 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* (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).

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

The U.S. Court of Appeals for the Eleventh Circuit, which includes Florida, recently upheld non-proselytizing but sectarian county commission meeting prayers in Jesus' name. *Gary Pelphrey, a.k.a. Bats, et al v. Cobb County, Georgia, et al*, 547 F.3d 1263 (11th Cir., Oct. 28, 2008). In that case, the federal district court below actually arrived at some helpful standards for reviewing a legislative prayer, and looked to whether the public officials had an "impermissible motive or intent" 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., Jan. 13, 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 794-795. "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." *Pelphrey*, 547 F.3d at 1267.

Challenges to sectarian invocations are a new phenomenon,² and the courts have thus far declined these extraordinary requests to impose a blanket censor upon prayer content. As the *Pelphrey* Court summarized:

The [plaintiff] taxpayers erroneously contend that several other circuits have read *Marsh* to permit only nonsectarian prayer. A review of the precedents of our sister circuits establishes that they have *not* reached a consensus on the permissibility of sectarian references in legislative prayers. Two of the circuits read *Marsh* as we do. The remaining four circuits have not reached a decision about sectarian references in legislative prayers.

Pelphrey, 547 F.3d at 1272 (emphasis added).³

² "There had been virtually no litigation or legal authority concerning the constitutionality of sectarian legislative prayer until the last six years." 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 (2008).

³ "[Like the Fourth Circuit,] [t]he Tenth Circuit also has stated that *Marsh* does not categorically prohibit prayers that invoke 'particular concept[s] of God.' *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233-34, 1234 n. 10 (10th Cir.1998) (en banc). . . . Contrary to the taxpayers' argument, the Fifth Circuit, the Seventh Circuit, and the Ninth Circuit have not decided the constitutionality of sectarian references in legislative prayers." *Pelphrey* at 1273-74.

In the Fourth Circuit, the court recently 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), *cert. denied*, 126 S.Ct. 426 (2005), the court found it important that the County "made plain that that it was not affiliated with any one specific faith by opening its doors to a wide pool of clergy." *Id.*, 404 F.3d 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 and also *publicly chided* the plaintiff for failing to stand and participate in the prayers. *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 that circuit. 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, *see Wynne*, at 294-96 & n. 2, 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. *Wynne*, at 301.

Simpson, 404 F.3d at 283.

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.

The Ninth Circuit apparently agrees. 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.

Clearly, 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

