



June 20, 2008

*Via Email and US Mail*

Hon. Michael Huebsch  
Assembly Speaker  
Wisconsin State Assembly  
Room 11 West  
State Capitol  
P. O. Box 8952  
Madison, WI 53708

RE: Policies concerning legislative prayer

Dear Rep. Huebsch,

This letter is being submitted to you by the Alliance Defense Fund (“ADF”) to express our support and encouragement of the Wisconsin State Assembly’s participation in the important American tradition of opening its sessions with a prayer. Recently, legislators in other states and elected officials in a number of American cities and counties have received threatening correspondence from groups such as the Americans United for the Separation of Church and State. These groups have made extraordinary demands for public invocations to be censored or altogether prohibited. We know the Assembly is now facing a similar threat, and we write to assure you that yielding to such drastic measures is unnecessary and inadvisable.

As you know, ADF is a not-for-profit legal alliance of more than 1,100 attorneys nationwide 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. Through our offices across the country, ADF has been called upon to assist and successfully defend many public officials and legislative bodies on a variety of related issues. Of course, ADF has represented the Wisconsin State Assembly in its intervention effort in the ongoing domestic partner benefits litigation.

In recent months, we have received requests for assistance from state legislatures and numerous county and city governments nationwide, regarding the matter of public invocations. Our responses have explained why recent demands to censor or prohibit some public invocations are unwarranted. This letter summarizes the reasons why. Attached to this letter is a model invocations policy that you may want to consider as a solution for the Assembly.

## I. LEGAL ANALYSIS

As you know, 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. Moreover, such prayer can 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 invalidated 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 and is often misunderstood, 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 Historical and Constitutionally Permissible.**

Recently, 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.*<sup>1</sup>

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).

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<sup>1</sup> 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).

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 (10<sup>th</sup> 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 government *to convert* citizens to particular sectarian views.” “ *Id.*, 1234, n.10 (emphasis added).

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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (9<sup>th</sup> 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 (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").

In *Dobrich v. Walls*, 380 F.Supp.2d 366 (D. Del., Aug. 2, 2005), a federal district court recently reviewed and specifically approved as constitutional the prayer policy of a public school board where the policy allowed for opening prayers, even though representatives were predominately of one faith tradition and there was occasional sectarian content in the prayers. As that court explained, "As the *Marsh* decision makes clear, the practice of opening legislative sessions with a prayer is acceptable under the Constitution." *Id.*, at 377.

Like the Fourth Circuit, the *Dobrich* court found it persuasive that in *Marsh*, "[t]he Court went on to find no violation of the Establishment Clause based on the fact that the clergyman offering the prayers was from one denomination, used Judeo-Christian prayers, and was paid at the public expense." *Id.*, at 376.

Another federal district court recently upheld non-proselytizing but sectarian county commission meeting prayers in Jesus' name. *Pelphrey v. Cobb County, Ga.*, 448 F.Supp.2d 1357 (N.D. Ga., Sept. 8, 2006). The *Pelphrey* court 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.

The Seventh Circuit, which as you know includes Wisconsin, recently overturned a federal district court and held that state taxpayers lacked standing to challenge the opening invocations policy of the Indiana House of Representatives. *See Hinrichs v. Bosma*, 506 F.3d 584, (7<sup>th</sup> Cir., 10/30/07). In that case, the lower court had previously determined in an unusual

ruling that sectarian prayers offered before the Indiana House violated the Establishment Clause. Because the Seventh Circuit reversed the trial court in that case, the lower court's opinion is non-binding even in the Southern District of Indiana. It certainly has no effect in the state of Wisconsin.

In summary, the Supreme Court and many lower courts have indicated 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 a legislative prayer are not a problem—exploitative government action that deliberately and exclusively seeks to aggressively promote one religion to the exclusion of others is. 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 794-795

### C. The Government Must Avoid “Comparative Theology.”

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 at the Ohio House of Representatives, we were asked to submit ADF's legal opinion on whether a suggested policy of reviewing invocations prior to their delivery, and mandating only “nonsectarian” content, would be constitutional. We wrote to explain that such prior restraints on free speech would be constitutionally impermissible, and that the Supreme Court has 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, as such government efforts would violate the First Amendment rights of those speakers. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 588-589 (1992). Thankfully, the Speaker of the House, Rep. Jon Husted, wisely corrected the situation and committed in a September 10, 2007, memo: “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.”

The Ohio House made the right legal decision. In *Lee*, 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) (plurality) (stating that for authorities to troll through a religious institution’s beliefs in order to identify if it is “pervasively sectarian” is offensive and contrary to precedent); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 843-44 (1995) (rejecting argument that 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); *Id.* at 344-45 (Brennan, J., concurring) (same); *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); *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); *Rusk v. Espinosa*, 456 U.S. 951 (1982) (mem.) (striking down charitable solicitation ordinance that required officials to distinguish between “spiritual” and secular purposes underlying solicitation by religious organizations).

## II. MODEL POLICY AND OFFER OF *PRO BONO* DEFENSE

Attached to this letter is a model invocations policy (“Policy”) that we respectfully present to you as a proposed solution to the current controversy. The Policy is similar to the ones we have drafted at the request of a growing number of other public bodies nationwide, to provide a constitutional mechanism to preserve the longstanding tradition of allowing public meetings to be opened with a prayer. The Policy avoids government censorship and entanglement in religion, and ensures that invocations will be offered according to the dictates of the conscience of each prayer-giver, as the First Amendment requires.

We strongly believe that this Policy will pass constitutional muster. For that reason, if the Wisconsin State Assembly adopts it as proposed, ADF hereby offers to defend the Assembly free of charge in the event the Policy faces any legal challenge.

In his Farewell Address, President Washington 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.”<sup>2</sup> 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.

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<sup>2</sup> September 19, 1796, Farewell Address. James D. Richardson, *A Compilation of Messages and Papers of the Presidents, 1789-1897* (Published by Authority of Congress 1899), Vol. 1, p. 220.

We trust that this letter will be helpful to you in advising the Assembly on this issue, and we hope that Wisconsin will join other states and cities in maintaining the important tradition of opening invocations by codifying its practice with a safe, written policy. If we can answer any questions or concerns that you may have as you review these documents, or if we can assist you in any other way, please do not hesitate to contact me.

We thank you in advance for your attention to this matter and your dedicated public service.

Very sincerely yours,

ALLIANCE DEFENSE FUND

A handwritten signature in black ink, appearing to read "Mike Johnson", with a long horizontal flourish extending to the right.

J. Michael Johnson  
Senior Legal Counsel

Brian Raum  
Senior Legal Counsel

JMJ/pg  
Attachment (model policy)