



June 21, 2007

**AN OPEN LETTER TO INTERESTED PARTIES
REGARDING THE LEGALITY OF PUBLIC INVOCATIONS**

To whom it may concern:

This letter is made available by the Alliance Defense Fund (“ADF”) to express our support and encouragement of continued participation in the important American tradition of opening public proceedings with a prayer. In recent months, elected officials in a number of cities and counties have received correspondence from groups such as the American Civil Liberties Union (“ACLU”) demanding that public invocations be censored or altogether prohibited. We write to assure elected officials and all concerned citizens that such drastic measures are unnecessary and inadvisable, and to suggest model invocation policies that can serve as a constitutional solution to the present controversy.

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 two alternative model policies that can be considered and adopted by local governmental bodies in your area and elsewhere. This letter explains the basic framework for those model policies.

I. LEGAL ANALYSIS

There is simply no question that a public body may open its meetings 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 be direct and sectarian without running afoul of the First Amendment’s Establishment Clause.

A. The Legality of Public Invocations is Well Established.

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. 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 (emphasis added). By simply following these traditions, government officials run no risk of violating the Constitution.¹

B. Sectarian Prayers are Historical and Constitutionally Permissible.

Contrary to the recent contentions of the ACLU, the Constitution does *not* require the removal of all sectarian references from public prayers. 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 not *what* is being spoken—but *who* is speaking and *why*.

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, in accordance with Supreme Court precedent, a policy which mandates only “nonsectarian” prayer would 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—rather 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. The specific issue was not before the Court at all, because the Nebraska chaplain removed references to Jesus from his prayer *before Marsh* was decided. The Court only referred to that development in an offhand footnote (*Id.*, 463 U.S. at 793, n.4), and in no way relied on that fact for its decision. Instead, the Court relied upon and referenced centuries of traditional invocations that *did* mention Jesus as well as other sectarian deities and beliefs. 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. Rather, *Marsh* and its progeny hold that courts should be concerned with the broader context and circumstances surrounding the prayers. *See, Id.*, at 792-96.

2. Lower Court Cases.

Some 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

¹ 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.

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.

Id., at 794-795 (emphasis added).

For example, the U.S. Court of Appeals for the Tenth Circuit, which includes Colorado, 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 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 (4th Cir. 2004), 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.*, 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*, 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, *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*, 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 (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").

More recently, federal district courts have upheld non-proselytizing, sectarian school board prayers (*Dobrich v. Walls*, 380 F.Supp. 2d 366 (D. Del 2005), and 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)). 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. 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.

In summary, legislative prayers—even sectarian ones—are clearly constitutional and “deeply embedded in the history and tradition of this country.” *Id.*, at 786. And 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.

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

Attached are two alternative policies that ADF has prepared as proposed solutions to the recent challenges brought by the ACLU and others. *We have drafted these policies to provide a constitutional mechanism to preserve the longstanding tradition of allowing public meetings to be opened with a prayer.* A growing number of cities and counties nationwide are adopting these same models. The first policy allows for invocations provided by leaders of established religious congregations in the community, on a rotating and first-come/first-serve basis. The second policy allows for elected officials themselves, in their individual capacities, to rotate the invocation duty. The model policies further ensure that the invocations will be offered according to the dictates of the conscience of each prayer-giver, as the First Amendment requires.

We strongly believe that both of these policies will pass constitutional muster. For that reason, ADF is offering to defend *pro bono* any local governmental body that adopts one of these models and is challenged.

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.”² It is both lawful and wise for public officials to respect and cherish

² 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.

our religious heritage, and to invoke God's protection and guidance over their public work and our nation.

It is our hope that the information provided in this letter will be helpful in explaining the reasons why local governmental bodies can and should continue the tradition of opening invocations by codifying their practices with a safe, 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 not-for-profit organizations, our services are provided *pro bono*.

Very sincerely yours,

A handwritten signature in cursive script that reads "Benjamin W. Bull". The signature is written in black ink on a light-colored background.

Benjamin Bull
Chief Counsel
Alliance Defense Fund

Attachments (proposed policies)

**POLICY REGARDING OPENING INVOCATIONS - Clergy
BEFORE MEETINGS OF THE [NAME] CITY COUNCIL**

WHEREAS, the [name] City Council (“the Council”) is an elected legislative and deliberative public body, serving the citizens of [city, state]; and

WHEREAS, the Council has long maintained a tradition of solemnizing its proceedings by allowing for an opening prayer before each meeting, for the benefit and blessing of the Council; and

WHEREAS, the Council wishes to maintain a tradition of solemnizing its proceedings by allowing for an opening prayer before each meeting, for the benefit and blessing of the Council; and

WHEREAS, the Council now desires to adopt this formal, written policy to clarify and codify its invocation practices; and

WHEREAS, our country’s Founders recognized that we possess certain rights that cannot be awarded, surrendered, nor corrupted by human power, and the Founders explicitly attributed the origin of these, our inalienable rights, to a Creator. These rights ultimately ensure the self-government manifest in our Legislature, upon which we desire to invoke divine guidance and blessing; and

WHEREAS, such prayer before deliberative public bodies has been consistently upheld as constitutional by American courts, including the United States Supreme Court; and

WHEREAS, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court rejected 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, and specifically 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; and

WHEREAS, the Council desires to avail itself of the Supreme Court’s recognition that it is constitutionally permissible for a public body to “invoke divine guidance” on its work. *Id.*, at 792. Such invocation “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.*; and

WHEREAS, the Supreme Court affirmed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), “Our 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.” *Id.*, at 675; and

WHEREAS, the Supreme Court further stated, that “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.*, at 693 (O’Connor, J., concurring); and

WHEREAS, the Supreme Court also famously observed in [*Zorach v. Clauson*, 343 U.S. 306, \(1952\)](#), “We are a religious people whose institutions presuppose a Supreme Being.” *Id.*, at 313-14; and

WHEREAS, the Supreme Court acknowledged in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), that the American people have long followed a “custom of opening sessions of all deliberative bodies and most conventions with prayer...,” *Id.*, at 471; and

WHEREAS, the Supreme Court has determined, “The content of [such] 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, or to disparage any other, faith or belief.” *Marsh*, 463 U.S. at 794-795; and

WHEREAS, the Supreme Court also proclaimed that it should not be the job of the courts or deliberative public bodies “to embark on a sensitive evaluation or to parse the content of a particular prayer” offered before a deliberative public body. *Id.*; and

WHEREAS, 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); and

WHEREAS, in *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233 (10th Cir. 1998), *cert. denied*, the United States Court of Appeals for the Tenth Circuit held that “[w]e are obliged, therefore, to read *Marsh* as establishing the constitutional principle that the genre of government religious activity that has come down to us over 200 years of history and which we now call ‘legislative prayer’ does not violate the Establishment Clause;” and

WHEREAS, in *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 940 (Utah 1993), the Supreme Court of Utah, in upholding a city council’s practice of legislative prayer, recognized the unique religious origins of our state: “This is a state, after all, that was settled by people with primarily religious motivations. Our early

history is of the struggle between those with deeply held views on matters of conscience, whether grounded in orthodox religion or otherwise. The state that was created by the parties to this struggle plainly was not intended to be hostile to the foundation upon which most of its creators grounded their value system- religion.” *Id.* at 940; and

WHEREAS, the Supreme Court of Utah held that the practice of legislative prayer did not violate Art. I § 4 of the Utah Constitution, which prohibits using public money or property for “religious worship, exercise, or instruction” or “for the support of any ecclesiastical establishment.” *Id.* at 939. The Supreme Court of Utah also held that the practice of legislative prayer does not violate the clause in Art. I § 4 of the Utah Constitution prohibiting the union of church and state. *Id.* at 939-40.; and

WHEREAS, the Supreme Court of Utah mandated that “Government is not to prefer religion to nonreligion, but neither should it be hostile to religion. Religious exercise is to be unfettered, and freedom of conscience is to be supreme.” *Id.* at 940; and

WHEREAS, the Tenth Circuit held that the Establishment Clause and *Marsh* do not require that a public body “ensure a kind of equal access to [its] program of invitational prayers.” *Id.* Instead, “[w]hat matters under *Marsh* is whether the prayer to be offered fits within the genre of legislative invitational prayer that ‘has become part of the fabric of our society’ and constitutes a ‘tolerable acknowledgement of beliefs widely held among the people.’” *Id.* (quoting *Marsh*, 463 U.S. at 792.); and

WHEREAS, the Tenth Circuit noted that the “long-accepted genre” of legislative prayer is “often” one that “reflect[s] a Judeo-Christian ethic.” *Id.* at 1234; and

WHEREAS, the Tenth Circuit recognized that prayer by its very nature “assumes the existence of a supreme power,” and therefore, “all prayers ‘advance’ a particular faith or belief in one way or another.” *Id.* at 1234 n.10. Accordingly, “[t]he mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause.” *Id.*; and

WHEREAS, the Tenth Circuit delineated the type of prayer that is “intolerable.” *Id.* at 1233. Specifically, “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; and

WHEREAS, the Tenth Circuit further held that public bodies may choose the speaker to deliver an invocation: “[T]he decision in *Marsh* also must be read as establishing the constitutional principle that a legislative body does not violate the Establishment Clause when it chooses a particular person to give its invitational prayers.” *Id.* at 1233. Concomitantly, “there can be no Establishment Clause violation merely in the fact that a legislative body chooses not to appoint a certain person to give its prayers.” *Id.*; and

WHEREAS, the Tenth Circuit held that selection of a certain person to deliver the invocation will violate the Establishment Clause when “the selection ‘stem[s] from an impermissible motive’” to “proselytize...or to disparage another faith, or to establish a particular religion as the sanctioned or official religion of the legislative body.” *Id.* at 1234 (quoting *Marsh*, 463 U.S. at 793.); and

WHEREAS, the Tenth Circuit made a number of key findings in *Snyder*, and the Council hereby acknowledges and relies upon the most important of those findings, including the following:

1) The court noted that the city council had various members of the local religious communities offer invocations. *Id.* at 1228; and

2) Most of the prayers offered were at the request of the city council, usually in response to a form letter the council circulated to local religious communities. *Id.*; and

3) The city council could lawfully bar a speaker because he would “proselytize” his own views and “disparage” others by offering a mock, unconventional “prayer,” that would seek “to convert [the speaker’s] audience to his belief in the sacrilegious nature of governmental prayer.” *Id.* at 1235; and

4) The council therefore did not violate the Establishment Clause when it excluded the prayer at issue, as the prayer “[fell] well outside the genre of legislative prayers that the Supreme Court approved in *Marsh*”; the prayer explicitly attacked the genre itself; the record was devoid of any attempt by the council to promote or disparage any religion by excluding the prayer; and the prayer disparaged “those who believe that legislative prayer is appropriate.” *Id.* at 1235; and

WHEREAS, the Council intends, and has intended in past practice, to adopt a policy that does not proselytize or advance any faith, or show any purposeful preference of one religious view to the exclusion of others; and

WHEREAS, the Council recognizes its constitutional duty to interpret, construe, and amend its policies and ordinances to comply with constitutional requirements as they are announced; and

WHEREAS, the Council accepts as binding the applicability of general principles of law and all the rights and obligations afforded under the United States and [state] Constitutions and statutes.

NOW, THEREFORE, BE IT RESOLVED by the City Council of [city, state], that the Council hereby adopts the following written policy regarding opening invocations before meetings of the Council, to wit:

1. In order to solemnize proceedings of the [name] City Council, it is the policy of the Council to allow for an invocation or prayer to be offered before its meetings for the benefit of the Council.

2. The prayer shall not be listed or recognized as an agenda item for the meeting or as part of the public business.

3. No member or employee of the Council or any other person in attendance at the meeting shall be required to participate in any prayer that is offered.

4. The prayer shall be voluntarily delivered by an eligible member of the clergy in the [name of city]. To ensure that such person (the “invocation speaker”) is selected from among a wide pool of the [city’s] clergy, on a rotating basis, the invocation speaker shall be selected according to the following procedure:

a. The Clerk to the [name] City Council (the “Clerk”) shall compile and maintain a database (the “Congregations List”) of the religious congregations with an established presence in the local community of the [name of city].

b. The Congregations List shall be compiled by referencing the listing for “churches,” “congregations,” or other religious assemblies in the annual Yellow Pages phone book(s) published for [name of city], research from the Internet, and consultation with local chambers of commerce. All religious congregations with an established presence in the local community of [name of city] are eligible to be included in the Congregations List, and any such congregation can confirm its inclusion by specific written request to the Clerk.

c. The Congregations List shall also include the name and contact information of any chaplain who may serve one or more of the fire departments or law enforcement agencies of [name of city].

d. The Congregations List shall be updated, by reasonable efforts of the Clerk, in November of each calendar year.

e. Within thirty (30) days of the effective date of this policy, and on or about December 1 of each calendar year thereafter, the Clerk shall mail an invitation addressed to the “religious leader” of each congregation listed on the Congregations List, as well as to the individual chaplains included on the Congregations List.

f. The invitation shall be dated at the top of the page, signed by the Clerk at the bottom of the page, and read as follows:

Dear religious leader,

The [name] City Council makes it a policy to invite members of the clergy in [city] to voluntarily offer a prayer before the beginning of its meetings, for the benefit and blessing of the Council. As the leader of one of the religious congregations with an established presence in the local community, or in your capacity as a chaplain for one of the local fire departments or law enforcement agencies, you are eligible to offer this important service at an upcoming meeting of the Council.

If you are willing to assist the Council in this regard, please send a written reply at your earliest convenience to the Clerk to the Council at the address included on this letterhead. Clergy are scheduled on a first-come, first-serve basis. The dates of the Council's scheduled meetings for the upcoming year are listed on the following, attached page. If you have a preference among the dates, please state that request in your written reply.

This opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. To maintain a spirit of respect and ecumenism, the Council requests only that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocation speaker, nor to disparage any faith or belief different than that of the invocation speaker.

On behalf of the [name] City Council, I thank you in advance for considering this invitation.

*Sincerely,
Clerk to the Council*

- g. As the invitation letter indicates, the respondents to the invitation shall be scheduled on a first-come, first-serve basis to deliver the prayers.
5. No invocation speaker shall receive compensation for his or her service.
6. The Clerk shall make every reasonable effort to ensure that a variety of eligible invocation speakers are scheduled for the Council meetings. In any event, no invocation speaker shall be scheduled to offer a prayer at consecutive meetings of the Council, or at more than three (3) Council meetings in any calendar year.
7. Neither the Council nor the Clerk shall engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered by an invocation speaker.

8. Shortly before the opening gavel that officially begins the meeting and the agenda/business of the public, the Chairperson of the Council shall introduce the invocation speaker and the person selected to recite the Pledge of Allegiance following the invocation, and invite only those who wish to do so to stand for those observances of and for the Council.

9. This policy is not intended, and shall not be implemented or construed in any way, to affiliate the Council with, nor express the Council's preference for or against, any faith or religious denomination. Rather, this policy is intended to acknowledge and express the Council's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of [name of city].

10. To clarify the Council's intentions, as stated herein above, the following disclaimer shall be included in at least 10 point font at the bottom of any printed Council meeting agenda: "Any invocation that may be offered before the official start of the Council meeting shall be the voluntary offering of a private citizen, to and for the benefit of the Council. The views or beliefs expressed by the invocation speaker have not been previously reviewed or approved by the Council, and the Council does not endorse the religious beliefs or views of this, or any other speaker."

NOW, THEREFORE, BE IT FURTHER RESOLVED that this policy shall become effective immediately upon adoption by the Council.

THUS INTRODUCED at the regular meeting of the City Council of [city, state], on _____, 2007.

For: _____
Against: _____

THUS ADOPTED at the regular meeting of the City Council of [city, state], on _____, 2007.

CLERK

CHAIR of COUNCIL

**POLICY REGARDING OPENING INVOCATIONS – Elected Officials
BEFORE MEETINGS OF THE [NAME] CITY COUNCIL**

WHEREAS, the [name] City Council (“the Council”) is an elected legislative and deliberative public body, serving the citizens of [city, state]; and

WHEREAS, the Council has long maintained a tradition of solemnizing its proceedings by allowing for an opening prayer before each meeting, for the benefit and blessing of the Council; and

WHEREAS, the Council wishes to maintain a tradition of solemnizing its proceedings by allowing for an opening prayer before each meeting, for the benefit and blessing of the Council; and

WHEREAS, the Council now desires to adopt this formal, written policy to clarify and codify its invocation practices; and

WHEREAS, our country’s Founders recognized that we possess certain rights that cannot be awarded, surrendered, nor corrupted by human power, and the Founders explicitly attributed the origin of these, our inalienable rights, to a Creator. These rights ultimately ensure the self-government manifest in our Legislature, upon which we desire to invoke divine guidance and blessing; and

WHEREAS, such prayer before deliberative public bodies has been consistently upheld as constitutional by American courts, including the United States Supreme Court; and

WHEREAS, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court rejected 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, and specifically 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; and

WHEREAS, the Council desires to avail itself of the Supreme Court’s recognition that it is constitutionally permissible for a public body to “invoke divine guidance” on its work. *Id.*, at 792. Such invocation “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.*; and

WHEREAS, the Supreme Court affirmed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), “Our 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.” *Id.*, at 675; and

WHEREAS, the Supreme Court further stated, that “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.*, at 693 (O’Connor, J., concurring); and

WHEREAS, the Supreme Court also famously observed in [*Zorach v. Clauson*, 343 U.S. 306, \(1952\)](#), “We are a religious people whose institutions presuppose a Supreme Being.” *Id.*, at 313-14; and

WHEREAS, the Supreme Court acknowledged in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), that the American people have long followed a “custom of opening sessions of all deliberative bodies and most conventions with prayer...,” *Id.*, at 471; and

WHEREAS, the Supreme Court has determined, “The content of [such] 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, or to disparage any other, faith or belief.” *Marsh*, 463 U.S. at 794-795; and

WHEREAS, the Supreme Court also proclaimed that it should not be the job of the courts or deliberative public bodies “to embark on a sensitive evaluation or to parse the content of a particular prayer” offered before a deliberative public body. *Id.*; and

WHEREAS, 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); and

WHEREAS, in *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233 (10th Cir. 1998), *cert. denied*, the United States Court of Appeals for the Tenth Circuit held that “[w]e are obliged, therefore, to read *Marsh* as establishing the constitutional principle that the genre of government religious activity that has come down to us over 200 years of history and which we now call ‘legislative prayer’ does not violate the Establishment Clause;” and

WHEREAS, in *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 940 (Utah 1993), the Supreme Court of Utah, in upholding a city council’s practice of legislative prayer, recognized the unique religious origins of our state: “This is a state, after all, that was settled by people with primarily religious motivations. Our early

history is of the struggle between those with deeply held views on matters of conscience, whether grounded in orthodox religion or otherwise. The state that was created by the parties to this struggle plainly was not intended to be hostile to the foundation upon which most of its creators grounded their value system- religion.” *Id.* at 940; and

WHEREAS, the Supreme Court of Utah held that the practice of legislative prayer did not violate Art. I § 4 of the Utah Constitution, which prohibits using public money or property for “religious worship, exercise, or instruction” or “for the support of any ecclesiastical establishment.” *Id.* at 939. The Supreme Court of Utah also held that the practice of legislative prayer does not violate the clause in Art. I § 4 of the Utah Constitution prohibiting the union of church and state. *Id.* at 939-40.; and

WHEREAS, the Supreme Court of Utah mandated that “Government is not to prefer religion to nonreligion, but neither should it be hostile to religion. Religious exercise is to be unfettered, and freedom of conscience is to be supreme.” *Id.* at 940; and

WHEREAS, the Tenth Circuit held that the Establishment Clause and *Marsh* do not require that a public body “ensure a kind of equal access to [its] program of invitational prayers.” *Id.* Instead, “[w]hat matters under *Marsh* is whether the prayer to be offered fits within the genre of legislative invitational prayer that ‘has become part of the fabric of our society’ and constitutes a ‘tolerable acknowledgement of beliefs widely held among the people.’” *Id.* (quoting *Marsh*, 463 U.S. at 792.); and

WHEREAS, the Tenth Circuit noted that the “long-accepted genre” of legislative prayer is “often” one that “reflect[s] a Judeo-Christian ethic.” *Id.* at 1234; and

WHEREAS, the Tenth Circuit recognized that prayer by its very nature “assumes the existence of a supreme power,” and therefore, “all prayers ‘advance’ a particular faith or belief in one way or another.” *Id.* at 1234 n.10. Accordingly, “[t]he mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause.” *Id.*; and

WHEREAS, the Tenth Circuit delineated the type of prayer that is “intolerable.” *Id.* at 1233. Specifically, “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; and

WHEREAS, the Tenth Circuit further held that public bodies may choose the speaker to deliver an invocation: “[T]he decision in *Marsh* also must be read as establishing the constitutional principle that a legislative body does not violate the Establishment Clause when it chooses a particular person to give its invitational prayers.” *Id.* at 1233. Concomitantly, “there can be no Establishment Clause violation merely in the fact that a legislative body chooses not to appoint a certain person to give its prayers.” *Id.*; and

WHEREAS, the Tenth Circuit held that selection of a certain person to deliver the invocation will violate the Establishment Clause when “the selection ‘stem[s] from an impermissible motive’” to “proselytize...or to disparage another faith, or to establish a particular religion as the sanctioned or official religion of the legislative body.” *Id.* at 1234 (quoting *Marsh*, 463 U.S. at 793.); and

WHEREAS, the Council intends, and has intended in past practice, to adopt a policy that does not proselytize or advance any faith, or show any purposeful preference of one religious view to the exclusion of others; and

WHEREAS, the Council recognizes its constitutional duty to interpret, construe, and amend its policies and ordinances to comply with constitutional requirements as they are announced; and

WHEREAS, the Council accepts as binding the applicability of general principles of law and all the rights and obligations afforded under the United States and [state] Constitutions and statutes.

NOW, THEREFORE, BE IT RESOLVED by the [name] City Council of [city, state], that the Council hereby adopts the following written policy regarding opening invocations before meetings of the Council, to wit:

1. In order to solemnize proceedings of the [name] City Council, it is the policy of the Council to allow for an invocation or prayer to be offered before its meetings for the benefit of the Council.

2. The prayer shall not be listed or recognized as an agenda item for the meeting or as part of the public business.

3. No member or employee of the Council or any other person in attendance at the meeting shall be required to participate in any prayer that is offered.

4. The prayer shall be voluntarily delivered by a single Council member, scheduled on a rotating basis among all Council members who voluntarily choose to participate in the rotational list.

5. The designated Council member shall deliver the prayer or invocation in his or her capacity as a private citizen, and according to the dictates of his or her own conscience.

6. No guidelines or limitations shall be issued regarding an invocation’s content, except that the Council shall request by the language of this policy that no prayer should proselytize or advance any faith, or disparage the religious faith or non-religious views of others.

7. No Council member shall receive supplemental compensation of any kind for providing the prayer or invocation.

8. No Council member shall be scheduled to offer a prayer at consecutive meetings of the Council, or at more than _____ (____) Council meetings in any calendar year.

9. No other member(s) of the Council shall engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered by the scheduled Council member.

10. Shortly before the opening gavel that officially begins the meeting and the agenda/business of the public, the Chairperson of the Council shall introduce the invocation speaker and the person selected to recite the Pledge of Allegiance following the invocation, and invite only those who wish to do so to stand for those observances of and for the Council.

11. This policy is not intended, and shall not be implemented or construed in any way, to affiliate the Council with, nor express the Council's preference for or against, any faith or religious denomination. Rather, this policy is intended to acknowledge and express the Council's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of [name of city].

12. To clarify the Council's intentions, as stated herein above, the following disclaimer shall be included in at least 10 point font at the bottom of any printed Council meeting agenda: "Any invocation that may be offered before the official start of the Council meeting shall be the voluntary offering of a private citizen, to and for the benefit of the Council. The views or beliefs expressed by the invocation speaker have not been previously reviewed or approved by the Council, and the Council does not endorse the religious beliefs or views of this, or any other speaker."

NOW, THEREFORE, BE IT FURTHER RESOLVED that this policy shall become effective immediately upon adoption by the Council.

THUS INTRODUCED at the regular meeting of the City Council of [city, state], on _____, 2007.

For: _____

Against: _____

THUS ADOPTED at the regular meeting of the City Council of [city, state], on _____, 2007.

CLERK

CHAIR of COUNCIL