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Legal Memorandum: Secular Invocations

The constitutional requirements governing legislative prayers require local government entities to authorize non-theistic invocations whenever theistic invocations are authorized.

The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first of the two clauses, "commonly called the Establishment Clause, commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).[1] The Supreme Court has made clear that this "wall between church and state" must "be kept high and impregnable." *Everson v. Bd. of Ed. of Ewing Twp.,* 330 U.S. 1, 18 (1947). The Establishment Clause "means *at least* this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, *aid all religions*, or prefer one religion over another." *Id.* at 15 (emphasis added). *But see Marsh v. Chambers*, 463 U.S. 783 (1983).

To keep this wall high, "the Constitution mandates that the government remain secular." *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). This means, among other things, that the government must "not promote or affiliate itself with any religious doctrine or organization," *id.* at 590-91, and must "'not favor religious belief over disbelief.'" *Id.* at 593 (citation omitted). Indeed, there are a "'myriad [of] subtle ways in which Establishment Clause values can be eroded.'" *Id.* at 591 (citation omitted). In *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971), the Court synthesized these principles into what is known as the "*Lemon* test," which has "been applied regularly in the Court's later Establishment Clause cases." *Id.* at 592. Pursuant to *Lemon*, governmental action must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Id.* State action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

There is no question that legislative prayers violate the Establishment Clause pursuant to the *Lemon* test. *Snyder v. Murray City Corp*., 159 F.3d 1227, 1232 (10th Cir.1998) ("the kind of

[1] Despite the reference to "Congress," the First Amendment applies equally to the states and local governmental entities through the Fourteenth Amendment. *Everson v. Bd. of Ed. of Ewing Twp*., 330 U.S. 1, 15 (1947).

legislative prayers at issue in *Marsh* simply would not have survived the traditional Establishment Clause tests that the Court had relied on prior to *Marsh* and . . . since *Marsh*"); *Marsh*, 463 U.S. at 800-01 (Brennan, J., dissenting, with Marshall J., joining) ("if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."). As correctly pointed out by Justice Brennan, "if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause." *Id.* at 796. The majority in *Marsh* did not appear to dispute this contention. *See Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 281 (4th Cir. 2005). Even prior to *Lemon*, it was settled law that the Establishment Clause prohibits the government from prescribing any "particular form of prayer." *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

Outside of the legislative prayer context, government-sponsored prayers are unconstitutional. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000); *Lee v. Weisman,* 505 U.S. 577, 579 (1992); *Wallace v. Jaffree*, 472 U.S. 38, 48 (1985); *Sch. Dist. Abington Twsp. v. Schempp*, 374 U.S. 203, 205 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the . . . prayer."); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989) *cert. denied*, 490 U.S. 1090 (1989).

Prayer is an inherently religious activity. Whenever the government sponsors prayers, it necessarily lacks a secular purpose under the first prong of *Lemon. See Santa Fe*, 530 U.S. at 309 ("infer[ring] that the specific purpose of the policy" permitting but not requiring student-led prayers was religious thus failing the first prong of *Lemon*); *Karen B.*, 653 F.2d at 901 ("Prayer is perhaps the quintessential religious practice . . . The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests."); *Jager*, 862 F.2d at 830 (when a public school sponsors an "intrinsically religious practice" such as prayer, it "cannot meet the secular purpose prong."); *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd* 472 U.S. 38 (1985) (because "prayer is the quintessential religious practice" there can be "no secular purpose" in acting to encourage it); *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (finding religious purpose in judge's practice of opening court sessions with prayer, as it involved "an act so intrinsically religious"). Because "prayer is 'a primary religious activity in itself,'" a government's "intent to facilitate or encourage prayer" is "*per se* an unconstitutional intent to further a religious goal." *Holloman v. Harland,* 370 F.3d 1252, 1285 (11th Cir. 2004).

Likewise, legislative prayers easily fail the second prong of *Lemon. Santa Fe*, 530 U.S. at 307. There is no question that "facilitating any prayer clearly fosters and endorses religion

over nonreligion." *Holloman*, 370 F.3d at 1288. A prayer, "because it is religious, does advance religion." *Hall*, 630 F.2d at 1021 (state's sponsorship of a nondenominational prayer printed on the state map failed the second prong of *Lemon*). "*Engel* expressly held that neither the nondenominational quality of the prayer nor the voluntariness of the recitation could save the prayer from violating the Establishment Clause." *Id.* at 1020.

The above notwithstanding, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court carved out a very limited exception to the *Lemon* test (and therefore the Establishment Clause) to make room for certain types of legislative prayers. Indeed, the vast majority of federal courts have described *Marsh* as an "exception" to *Lemon*.[2] Some of these cases explicitly referred to *Marsh* as an exception to the *Establishment Clause* itself.[3] Other courts discussing *Marsh* have

[2] *See, e.g.*, *Edwards v. Aguillard,* 482 U.S. 578, 583, n.4 (1987) ("The *Lemon* test has been applied in all cases since its adoption in 1971, ***except*** in *Marsh*"); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013) (the "Supreme Court has not extended the *Marsh* ***exception***"); *Joyner v. Forsyth County*, 653 F.3d 341, 349 (4th Cir. 2011) ("'the ***exception*** created by *Marsh* is limited'") (citation omitted); *Doe v. Indian River Sch. Dist*., 653 F.3d 256, 259, 275 (3d Cir. 2011) (where the issue was "whether a school board may claim the ***exception*** established for legislative bodies in *Marsh*, or whether the traditional Establishment Clause principles . . . apply" the court concluded that "*Marsh's* legislative prayer ***exception*** does not apply"); *Card v. City of Everett,* 520 F.3d 1009, 1014 (9th Cir. 2008) ("*Marsh* . . . should be construed as carving out an ***exception*** to normal Establishment Clause jurisprudence.") (internal quotation omitted); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1276 (11th Cir. 2008) ("the Supreme Court has never expanded the *Marsh* ***exception***"); *Coles by Coles v. Cleveland Bd. of Educ*., 171 F.3d 369, 376, 379 (6th Cir. 1999) ("the unique and narrow ***exception*** articulated in *Marsh*"); *Jager v. Douglas County Sch. Dist*., 862 F.2d 824, 829, n.9 (11th Cir. 1989) ("*Marsh* created an ***exception*** to the *Lemon* test only for such historical practice."); *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985) (referring to *Marsh* as an "**exception**" to *Lemon*); *Weisman v. Lee*, 908 F.2d 1090, 1094-96 (1st Cir. 1990) (Bownes, J., concurring) (twice referring to "the **exception** to [*Lemon*] delineated in *Marsh*."); *Doe v. Tangipahoa Parish Sch. Bd*., 631 F. Supp. 2d 823, 835 (E.D. La. 2009) (*Marsh* is "a narrow ***exception***"); *Bats v. Cobb County*, 410 F. Supp. 2d 1324, 1328 (N.D. Ga. 2006) (*Marsh* is an "**exception**"); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002) (same); *Wynne v. Town of Great Falls*, 2003 U.S. Dist. LEXIS 21009, *10 (D.S.C. 2003) (*Marsh* created an "***exception*** in Establishment Clause law"); *Metzl v. Leininger*, 850 F. Supp. 740, 744 (N.D. Ill. 1994) (referring to "*Marsh* court's narrow 'historical ***exception'*** to traditional Establishment Clause jurisprudence."); *Albright v. Board of Educ. of Granite School Dist*., 765 F. Supp. 682, 688 (D. Utah 1991) (*Marsh* is an "**exception**"); *Lundberg v. West Monona Community School Dist.,* 731 F. Supp. 331, 346 (N.D. Iowa 1989) (explaining that the plaintiffs sought to "escape the *Lemon* test by invoking the *Marsh* ***exception***" and concluding that "the *Marsh* ***exception*** is not controlling."); *Jewish War Veterans v. United States*, 695 F. Supp. 3, 11, n.4 (D.D.C. 1988) ("[t]he Supreme Court has applied the *Lemon* framework in all but one establishment clause case. The ***exception*** was *Marsh*."); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 142, n. 38 (N.D.N.Y 1988) (the "*Lemon* test has been applied by the Supreme Court in all cases subsequent to its formulation with one exception. In *Marsh* . . . the Court carved out a narrow ***exception*** to the prohibitions of the establishment clause"); *cf. Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) ("the Court is carving out an ***exception*** to the Establishment Clause.") (emphasis added in each).

[3] *See, e.g.*, *Indian River Sch. Dist*., 653 F.3d at 259, 275; *Card,* 520 F.3d at 1014; *Wynne*, 2003 U.S. Dist. LEXIS 21009, *10; *Metzl*, 850 F. Supp. at 744; *Blackwelder*, 689 F. Supp. at 142, n. 38.

highlighted its *sui generis* and one-of-a-kind nature, thereby affirming at the very least that *Marsh* is inconsistent with Establishment Clause jurisprudence.[4]

Marsh is not only inconsistent with decades of Establishment Clause jurisprudence preceding it, but also with jurisprudence following it. *See, e.g.*, *Santa Fe v. Doe*, 530 U.S. 290, 313 (2000) (prayer in public school unconstitutional); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (same); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (same). *See also Wynne v. Town of Great Falls, S. Carolina*, 376 F.3d 292, 302 (4th Cir. 2004) ("in the more than twenty years since *Marsh*, the Court has never found its analysis applicable to any other circumstances; rather, the Court has twice specifically refused to extend the *Marsh* approach to other situations.") (referring to *Lee* and *Allegheny*); *Jewish War Veterans*, 695 F. Supp. at 11, n.4 ("[t]he Court returned to the *Lemon* test in cases decided after *Marsh*."). Consequently, lower courts have refused to apply *Marsh* to situations other than legislative prayer[5] (or to expand it in cases on that topic).[6]

The types of legislative prayers allowed under *Marsh* are limited. In *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983), the Court held that legislative prayers are permissible only if they do not "advance any one . . . faith or belief." In *Town of Greece v. Galloway*, 572 U.S. ___, 2014 U.S. LEXIS 3110, *27-28 (2014), the Supreme Court reinforced the critical aspect of *Marsh* that a legislative prayer practice must not be "'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Marsh*, 463 U.S., at 794-795." *Town of Greece*, 2014 U.S. LEXIS 3110 at *31.[7] In *Town of Greece*:

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[4] *See, e.g.*, *McCreary County v. ACLU,* 545 U.S. 844, 860 n.10 (2005) (describing *Marsh* as a "special instance[]"); *Rubin v. City of Lancaster*, 710 F.3d 1087, 1091, n.4 (9th Cir. 2013) (since "*Marsh*, legislative prayer has enjoyed a 'sui generis status' in Establishment Clause jurisprudence."); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 281 (4th Cir. 2005) ("*Marsh*, in short, has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines."); *Coles*, 171 F.3d at 381 ("*Marsh* is one-of-a-kind"); *Snyder v. Murray City Corp*., 159 F.3d 1227, 1232 (10th Cir. 1998) (en banc) ("the constitutionality of legislative prayers is a sui generis legal question"); *Jones v. Hamilton County*, 891 F. Supp. 2d 870, 885 (D. Tenn. 2012) (same); *Graham v. Central Community Sch. Dist.,* 608 F. Supp. 531, 535 (S.D. Iowa 1985) ("*Marsh* decision is a singular Establishment Clause decision.").

[5] *See, e.g.*, *Warner v. Orange County Dep't of Prob*., 115 F.3d 1068, 1076 (2d Cir. 1997) (refusing to apply *Marsh* to compulsory A.A. program); *Cammack v. Waihee*, 932 F.2d 765, 772 (9th Cir. 1991) (refusing to apply *Marsh* to Good Friday holiday); *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 828 (11th Cir. 1989) (*Marsh* "has no application to" school prayers); *Carter v. Broadlawns Medical Center*, 857 F.2d 448, 453 (8th Cir. 1988) (declining to extend *Marsh* to hospital chaplaincy program).

[6] *Wynne*, 376 F.3d at 302 (declining to extend *Marsh* to permit sectarian legislative prayers, noting "we and our sister circuits have steadfastly refused to extend *Marsh*").

[7] Prior to *Town of Greece,* lower federal courts, applying *Marsh* and *Allegheny* have frequently found *sectarian* legislative prayers unconstitutional .*See Joyner v. Forsyth Co.*, 653 F. 3d 341 (4th Cir. 2011); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004) (holding a town council's prayers that "invok[ed] the name 'Jesus Christ' . . . advance[d] one faith, Christianity, in preference to others, in a manner decidedly inconsistent with *Marsh*"); *Coles v. Cleveland Bd. of Ed.*, 171 F. 3d 369 (6th Cir. 1999) (holding that school board's prayers that made "repeated reference to Jesus and the Bible" were

> The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. . . . The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. . . . The town instead left the guest clergy free to compose their own devotions.

Town of Greece v. Galloway, 572 U.S. ___, 2014 U.S. LEXIS 3110, *9-10 (2014). The Court upheld the practice on the grounds that: "The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one." *Id.* at *34-35. A key fact the Court's ruling hinged on was that "any member of the public is welcome in turn to offer an invocation reflecting his or her own conviction." *Id.* at *41.

The Court noted however that "[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, . . . the prayer" is inconsistent with "the purpose of the occasion and to unite lawmakers in their common effort." *Id.* *29-30.

Likewise, *Marsh* is narrowly confined to *legislative* prayers. No court has extended *Marsh* to executive or gubernatorial prayers, let alone any prayers that are not before a legislative body. *See Atheists of Fla., Inc.*, 713 F.3d at 590 (the "Supreme Court has not extended the *Marsh* exception to legislative bodies other than state legislatures"); *Graham*, 608 F. Supp. at 535 ("the holding of [*Marsh*] is clearly limited to the legislative setting."). *Cf. Allegheny*, 492 U.S. at 604 n.53 (opining that *Marsh* would not apply to a governor's proclamation). The Supreme Court has refused to apply *Marsh* to public school prayers. *Santa Fe*, 530 U.S. at 313; *Lee*, 505 U.S. at 592; *Wallace*, 472 U.S. 38. The courts have likewise refused to extend *Marsh* to prayers by the judicial branch, *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1147- 49 (4th Cir. 1991),[8] and by military officials, *Mellen v. Bunting*, 327 F.3d 355, 368-69 (4th Cir. 2003), finding them unconstitutional under *Lemon*. *Id.* Finally, the courts have refused to extend *Marsh* to prayers before school boards, despite their "similar[ity] to a legislative body." *Indian River Sch.*, 653 F.3d at 259, 275-79; *Coles*, 171 F.3d at 381.

Finally, as is particularly applicable here, *Marsh* specifically prohibits a local governmental entity from categorically excluding certain faiths from delivering invocations.

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unconstitutional); *Bacus v. Palo Verde Unified School District Board of Education*, 52 Fed. Appx. 355 (9th Cir. 2002) (holding that school board's prayers "in the name of Jesus" were unconstitutional); *Rubin v. Burbank*, 101 Cal. App. 4th 1194 (2002) (holding that city council's "invocation offered to Jesus Christ violated the Establishment Clause").

[8] *See also ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 494-495 (6th Cir. 2004) (declining to apply *Marsh* in ruling a judge's Ten Commandments display violated Establishment Clause pursuant to *Lemon*); *Glassroth*, 335 F.3d at 1298 (same).

Pelphrey v. Cobb County, 547 F.3d 1263, 1277-78 (11th Cir. 2008). This includes secular invocations delivered by Atheists, Humanists and other non-theists. It is well settled that "religious beliefs protected by the Free Exercise and Establishment Clauses need not involve worship of a supreme being." *Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013) (*Kaufman II*). As correctly noted by Judge Posner, Establishment Clause jurisprudence treats "the nonreligious as a sect, the sect of nonbelievers." *ACLU v. St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986). It is firmly established that Establishment Clause protection "extends beyond intolerance among Christian sects – or even intolerance among 'religions' – to encompass intolerance of the disbeliever and the uncertain." *Wallace*, 472 U.S. at 52-54. *See also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216 (1963) ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government" can "pass laws or impose requirements which aid all religions as against non-believers.").

Atheism and other non-theistic traditions are therefore treated as "religions" for First Amendment purposes. *Id. See County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); *Kaufman v. Pugh*, 733 F.3d 692 (7th Cir. 2013) (*Kaufman II*); *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005) (*Kaufman I*); *Reed v. Great Lakes Cos.,* 330 F.3d 931, 934 (7th Cir. 2003); *ACLU v. City of Plattsmouth*, 358 F.3d 1020, 1041 (8th Cir. 2004); *Desper v. Ponton*, 2012 U.S. Dist. LEXIS 166546, *5-6 (E.D. Va. 2012); *Hatzfeld v. Eagen*, 2010 U.S. Dist. LEXIS 139758, *17-18 (N.D.N.Y 2010); *Loney v. Scurr*, 474 F. Supp. 1186, 1194 (S.D. Iowa 1979); *State v. Powers*, 51 N.J.L. 432, 434-35 (N.J. Sup. Ct. 1889).[9]

As such, the government is prohibited from refusing to authorize a secular invocation where it authorizes theistic invocations. Indeed, even in *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012), the town permitted anyone "to give an invocation, including adherents of

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[9] Humanism is also a religion under the First Amendment. *See, e.g.*, *Gillette v. U.S.*, 401 U.S. 437, 439, 461-62 (1971) (entertaining free exercise claim "based on a humanist approach to religion"); *U.S. v. Seeger*, 380 U.S. 163, 176 (1965); *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961) ("Buddhism, Taoism, Ethical Culture, [and] Secular Humanism" are "religions"); *Newdow v. United States Cong*., 313 F.3d 500, 504 n.2 (9th Cir. 2002) ("recognized religions exist that do not teach a belief in God, e.g., secular humanism."); *U.S. v. Ward*, 989 F.2d 1015, 1017-18 (9th Cir. 1993) (many "'believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace.'") (citations omitted); *Grove v. Mead School Dist*., 753 F.2d 1528, 1534 (9th Cir. 1985); *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684, 689 (11th Cir. 1987); *Chess v. Widmar*, 635 F.2d 1310, 1318 n.10 (8th Cir. 1980) ("Secular Humanism" is a "religion"); *In re Weitzman*, 426 F.2d 439, 457 & n.5 (8th Cir. 1970); *U.S. v. Meyers*, 906 F. Supp. 1494, 1499-1500 (D. Wyo. 1995); *Crockett v. Sorenson*, 568 F. Supp. 1422, 1425 (W.D. Va. 1983); *ACLU v. Eckels*, 589 F. Supp. 222, 227 (S.D. Tex. 1984); *In re "E"*, 59 N.J. 36, 55 n.4 (N.J. 1971); *Welker v. Welker*, 24 Wis. 2d 570, 575-76 (Wis. 1964); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673 (1st Dist. 1957).

any religion, atheists, and the nonreligious," and it had "never rejected such a request." The same was true in *Rubin v. City of Lancaster*, 710 F.3d 1087, 1090 (9th Cir. 2013). The Ninth Circuit made a point to observe that at least four invocations were "given by a self-identified 'metaphysicist,' one was given by a Sikh, and another by a Muslim." It upheld a city's legislative prayer practice on the grounds that the city had taken "every feasible precaution" to "ensure its own evenhandedness." *Id.* at 1097. For instance, the city's policy provided that "[n]either the council nor the clerk may 'engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered.'" *Id.* Moreover, the clerk had "never removed a congregation's name from the list of invitees or refused to include one." *Id.*

In upholding certain legislative prayers in *Pelphrey v. Cobb County,* 547 F.3d 1263, 1277-78 (11th Cir. 2008), the Eleventh Circuit relied on the "diverse references in the prayers," which included references to "Allah," "Mohammed," and the "Torah," which made it such that the prayers did not "advance any particular faith." More importantly, in *Pelphrey v. Cobb County*, 448 F. Supp. 2d 1357 (N.D. Ga. 2006), at the district court level, it was found that the county had engaged in a constitutionally unacceptable method of selecting clergy because representatives of "certain faiths were categorically excluded based on the content of their faith." *Id.* at 1373-74. The Eleventh Circuit upheld that finding. *Pelphrey*, 547 F.3d at 1279 (affirming the district court's finding that the government violated the Constitution because it "'categorically excluded' certain faiths"). Notably, the Eleventh Circuit rejected the county's argument that "the selection process is immaterial when the content of the prayer is constitutional," because it noted, "[t]he central concern of *Marsh* is whether the prayers have been exploited to created an affiliation between the government and a particular belief or faith." *Id*. at 1281 (citing *Marsh*, 463 U.S. at 794-95). *See also Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013) (practice of opening city commission sessions with prayer did not violate Establishment Clause because city required that invitations to participate be extended to all religious groups).

Recently interpreting this narrow *Marsh* exception, the Supreme Court emphasized in *Town of Greece v. Galloway* that a government's prayer practice must be "nondiscriminatory" and must make reasonable efforts to include invocations from all members of the community, regardless of their faith, *supra.*

In view of the above, it is clear the government must allow secular invocations to be delivered pursuant to *Marsh.* If you have any questions or concerns, please do not hesitate to contact our attorneys at the Appignani Humanist Legal Center at mmiller@americanhumanist.org or (202) 238-9088.

Thank you,

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