NO. 11-56318
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELLEY RUBIN and MAUREEN I. FELLER,
Plaintiffs-Appellants,

v.

CITY OF LANCASTER,
Defendant-Appellee.

Appeal from United States District Court for the Central District of California Civil Case No. CV 10-4046 DSF (Honorable Dale S. Fischer)

BRIEF OF *AMICUS CURIAE* OF THE NATIONAL CENTER FOR LAW & POLICY (NCLP) IN SUPPORT OF DEFENDANT APPELLEE, SUPPORTING AFFIRMANCE.

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FRAP RULE 26.1 DISCLOSURE STATEMENTS

Amicus Curiae, The National Center for Law & Policy (NCLP) has not issued any shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can hold more than 10% of stock.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

1. The full name of every party that the attorneys represent in this case:

   Liberty Institute

2. The names of all law firms whose partners or associated have appeared for the party in this case or are expecting to appear:

   Jeffrey C. Mateer, Hiram S. Sasser III, and Justin E. Butterfield are attorneys with Liberty Institute, a public-interest law firm.

3. For all *amici curiae* that are corporations:

   i. Identify all parent corporations for all *amicus* parties:

      None.

   ii. List any publicly held company that owns 10% or more of any *amicus* party's stock:

      None.

s/ Jeffrey C. Mateer
Jeffrey C. Mateer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The National Center for Law & Policy is a non-profit, public interest law firm located in California which is dedicated to the preservation of fundamental rights embodied in the U.S. Constitution, including the freedom of speech and religious freedom. The National Center for Law & Policy provides pro bono legal advice and representation for state and local legislative bodies and their members that desire to follow the traditions of the U.S. Senate and House of Representatives in opening with an invocation. This case will have an important precedential effect on the extent to which the legislators and government officials that The National Center for Law & Policy advises may offer invocations according to the dictates of their conscience and the extent to which legislative assemblies that The National Center for Law & Policy represents may follow the historical example of the U.S. Congress in opening sessions with legislative invocations.

The National Center for Law & Policy received letters of consent to file this *amicus* brief from all parties to this case. These letters of consent are attached at the end of this brief.

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *Amicus* and its counsel made such a monetary contribution.

SUMMARY OF ARGUMENT

In *Marsh v. Chambers*, the Supreme Court affirmed the constitutionality of legislative invocations and held that courts have no authority to parse the content of an invocation unless the invocation has been exploited to proselytize or disparage religion. Indeed, the Supreme Court later noted that governmental regulation of an invocation's content violates the Establishment Clause by imposing a "civic" orthodoxy of neutrality in which judges would determine the terms and phrases that may or may not be used to refer to deities, and even those deities that may be addressed. This judicially-arbitrated civic orthodoxy would require judicial establishment of specific terms or deities as prohibited, categorically excluding certain religions that require the use of those terms and violating the mandate of the Establishment Clause that all persons be treated equally by the government, regardless of religious creed. The only way to avoid the establishment of a civic orthodoxy—and a gross violation of the Establishment Clause—is to avoid judicial evaluation of the content of any invocation, allowing each person to offer an invocation according to the dictates of his or her conscience.

Marsh permits invocations that specifically reference Jesus or the name of any other deity. The Supreme Court did not premise its holding in *Marsh* on the content of the invocations at issue. Indeed, as Chief Justice Rehnquist later noted,

the invocations at issue in *Marsh* were explicitly Christian. Furthermore, invocations at the U.S. Congress—the very invocations whose unique history the Supreme Court looked to in *Marsh*—often explicitly reference Jesus or Jesus Christ. Neither did *Marsh* define sectarian or non-sectarian. Rather, *Marsh* clearly stands for the proposition that courts cannot parse the content of a legislative invocation. Subsequent court opinions in the Third, Fifth, Tenth, and Eleventh Circuits all interpret *Marsh* to allow legislative invocations that reference Jesus. To hold otherwise ignores that all invocations "advance" faith by assuming the existence of a supreme power. *Marsh* is only concerned with situations where the invocation opportunity has been exploited to proselytize or disparage any one belief.

This honorable Court should reject the reasoning in *Joyner*, as the Fourth Circuit is the only Circuit to misconstrue *Marsh* and mandate that all legislative invocations must be "non-sectarian" and therefore exclude the mention of the name of "Jesus." This honorable court is strongly urged to affirm the District Court's opinion which properly refused to parse the legislative invocations at issue because these invocations, which have been offered by a variety of faith groups, have neither disparaged nor proselytized any particular religious belief. It would be a grave constitutional error for this honorable Court to mandate a government coerced "non-sectarian" theological orthodoxy.

ARGUMENT

I. LEGISLATIVE INVOCATIONS THAT REFERENCE JESUS ARE PERMITTED BY THE ESTABLISHMENT CLAUSE AND *MARSH V. CHAMBERS.*

A. Courts cannot parse the content of an invocation and determine whether the invocation is religiously "neutral" without considering the content of the invocation and comparing it with an established orthodoxy of neutrality.

In its landmark opinion in *Marsh v. Chambers,* the Supreme Court declared, "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983). In other words, while it is permissible for courts to consider whether an opportunity for legislative invocation is disparaging or proselytizing, they are prohibited from considering the theological nature of the invocation. In *Lee v. Weisman,* the Supreme Court went so far as to suggest that the government's requiring "nonsectarian" invocations would be tantamount to the government "compos[ing] official prayers." *Lee v. Weisman,* 505 U.S. 577, 588 (1992) (quoting *Engel v. Vitale,* 370 U.S. 421, 425 (1962)).

Preventing invocations that reference Jesus while allowing invocations that mention "God," "Allah," or "Our Father" logically necessitates that a judicially-sanctioned "civic" religion be established. Such an approach would require judges

to determine what terms and phrases may or may not be used to refer to God. Judges would become the arbiters of a new, civic orthodoxy, setting standards by which deities may be addressed in public invocations. The Supreme Court expounded upon this concern in *Lee v. Weisman*, observing, "[Our] precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that **all creeds must be tolerated and none favored**. The suggestion that government may establish an official or ***civic religion*** as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." *Lee*, 505 U.S., at 590 (emphasis added).

The establishment of a civic orthodoxy, administered by the judiciary, would be a violation of the Establishment Clause far more egregious than the perceived harm sought to be attenuated. "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 592.

The establishment of a civic orthodoxy would also necessitate that the courts establish some religions or some religious terms as more favored than others. For example, in *Hinrichs v. Bosma*, a district court in the Seventh Circuit incredibly found that "[p]rayers are sectarian … when they proclaim or otherwise communicate the beliefs that Jesus of Nazareth was the Christ, the Messiah, the

Son of God, or the Savior, or that he was resurrected, or that he will return on Judgment Day or is otherwise divine," but prayers are not sectarian if "a Muslim imam [offered] a prayer addressed to 'Allah.'" *Hinrichs v. Bosma,* No. 1:05-cv-0813-DFH-TAB, 2005 U.S. Dist. LEXIS 38330 (S.D. Ind. Dec. 28, 2005) (order denying a motion to stay).

Likewise, in *Pelphrey v. Cobb County,* the Eleventh Circuit noted that even in that one case, the handful of plaintiffs and their counsel could not agree upon what religious terms are "acceptable" and which are not. The court observed:

> We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the [plaintiffs] have been opaque in explaining that standard. Even the individual [plaintiffs] cannot agree on which expressions are "sectarian." Bats, one of the [plaintiffs], testified that a prohibition of "sectarian" references would preclude the use of "father," "Allah," and "Zoraster" but would allow "God" and "Jehovah." Selman, another [plaintiff], testified, "[Y]ou can't say Jesus, … Jehovah, … [or] Wicca. …" Selman also deemed "lord or father" impermissible.
>
> The [plaintiffs'] counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. In the district court, counsel for the [plaintiffs] deemed "Heavenly Father" and "Lord" nonsectarian, even though his clients testified to the contrary. At the hearing for oral arguments before this Court, the [plaintiffs'] counsel asserted two standards to determine when references are impermissibly "sectarian." … Counsel had difficulty applying either standard to various religious expressions. When asked, for example, whether "King of kings" was sectarian, he replied, "King of kings may be a tough one. … It is arguably a reference to one God. … I think it is safe to conclude that it might not be sectarian."

Pelphrey v. Cobb County, 547 F.3d 1263, 1272 (11th Cir. 2008). The Eleventh Circuit went on to explain that parsing the terms used in every invocation at legislative assemblies of every level would lead to judicial chaos. *Id.*

Not only would parsing the content of legislative invocations lead to the establishment of a state orthodoxy, this orthodoxy would necessarily favor some religions and offend others. As one law review article observes:

> Not all religions are monotheistic. For religions involving multiple gods and/or goddesses, a rule requiring that the prayer giver refrain from naming a deity precludes the offering of a prayer in their normal faith tradition. Second, there are Christian denominations whose doctrinal statements require that prayers invoke the name of Jesus Christ. …
>
> A rule prohibiting the naming of a particular deity, then, categorically excludes certain religions, and in so doing violates the Establishment Clause. If the Establishment Clause prohibits the government from doing anything, it prohibits categorically barring the adherents of certain faiths from participating in public events on equal terms with followers of other religions. The government cannot make violating any citizen's religious faith a condition precedent to equal treatment.

Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer,* 6 Georgetown J.L. & Pub. Pol'y 219, 254–55 (2008).

Ultimately, attempts to promote "civic religion" or "religious neutrality" must establish the judiciary as the arbiters of the civic orthodoxy. This civic orthodoxy would necessarily favor some religions over others. The only way to avoid this establishment and to remain truly neutral is to follow the guidance of

Marsh: refusing to consider the content of any invocation and permitting each person to pray according to the dictates of conscience.

B. *Marsh v. Chambers* does not mandate that invocations be free of "sectarian" references.

Marsh is clear: courts cannot parse the content of an invocation before a "legislative [or] other deliberative public bod[y]" unless the invocation opportunity had been exploited to advance or disparage a belief. *Marsh*, 463 U.S. at 786, 794. While *Marsh* does note in a footnote that the chaplain subsequently removed all references to Christ in his invocations, *id.* at 793 n.14, "the Court never held that the prayers in *Marsh* were constitutional because they were 'nonsectarian.' Nor did the Court define that term." *Pelphrey*, 547 F.3d at 1271. As the Eleventh Circuit explained, "[t]o read *Marsh* as allowing only nonsectarian prayers is at odds with the clear directive by the Court that the content of a legislative prayer 'is not of concern to judges where … there is no indication that the prayer opportunity has been exploited to proselytize or advance any one … faith or belief.'" *Id.* (quoting *Marsh*, 463 U.S. at 794–95).

To argue that *Marsh* mandates watered-down theologically neutered legislative invocations that do not reference a particular deity is to interpret the opinion in *Marsh* divorced from the actual facts of *Marsh.* In *Van Orden v. Perry*, Chief Justice Rehnquist's opinion observed, "In *Marsh*, the prayers were often

explicitly Christian…." *Van Orden v. Perry*, 545 U.S. 677, 688 n.8 (2005) (plurality opinion).

In *Newdow v. Bush*, the court pointed out that the invocations given before the U.S. Congress—the historical basis for the ruling in *Marsh*—are "sectarian." *Newdow v. Bush*, 355 F. Supp. 2d 265, 285 n.23 (D.D.C. 2005) ("the legislative prayers at the U.S. Congress are overtly sectarian") (quoting S. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 n.118 (1996) (noting that, from 1989 to 1996, "over two hundred and fifty opening prayers delivered by congressional chaplains [] included supplications to Jesus Christ")). This current Congressional practice follows a long, historical tradition established prior to our nation's founding. The first invocation before the Continental Congress, given by the Congress' chaplain, Jacob Duché, on September 7, 1774, and recorded by Charles Thomson, the secretary of the Continental Congress, concludes, "All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Saviour. Amen." Reverend Jacob Duché, *First Prayer of the Continental Congress*, Office of the Chaplain (March 21, 2011), http://chaplain.house.gov/archive/continental.html. The Continental Congress' first thanksgiving proclamation called the people to "humble and earnest supplication that it may please God through [the] merits of Jesus Christ" to forgive their sins and bless the governments of the states. 9 *Journals of the Continental Congress*,

1774–1789, 855 (1777) (Worthington Chauncey Ford ed., 1907), *available at* http://memory.loc.gov/ll/lljc/009/0100/01030855.gif. Similarly, when the House of Representatives sought to request that volunteer chaplains from the community provide the opening invocation, the House passed a resolution stating, "[W]hereas the great vital and conservative element in our system is the belief of our people in the pure doctrines and divine truths of the Gospel of Jesus Christ, it eminently becomes the representatives of a people so highly favored to acknowledge, in the most public manner, their reverence for God: Therefore—Be it resolved, That the daily sessions of this body be opened with prayer." H. Journal, 35th Cong., 1st Sess. 58 (1857).

In *Pelphrey* itself, the invocations offered before the Cobb County Commission and the Cobb County Planning Commission often "ended with references to 'our Heavenly Father' or 'in Jesus' name we pray.'" *Pelphrey*, 547 F.3d at 1267. "Prayers also contained occasional references to the Jewish and Muslim faiths, such as references to Passover, Hebrew prayers, Allah, and Mohammed." *Id.* Applying *Marsh*, the Eleventh Circuit upheld these prayers because there was no exploitation of the invocations to advance or disparage a belief since persons of different faiths were permitted to give the invocation without censorship. The facts before this Court are identical in that persons of different faiths are invited to offer invocations before the Lancaster City Counsel.

In *Pelphrey,* the Eleventh Circuit also gave an overview of other courts of appeals' interpretations of *Marsh.* The Eleventh Circuit found that the Fourth Circuit and the Tenth Circuit have also read *Marsh* to permit invocations that mention Jesus, while the remaining circuits have not reached a decision about invocations that refer to Jesus. *Id.* at 1272.

The *Pelphrey* court observed that "[t]he Tenth Circuit also has stated that *Marsh* does not categorically prohibit prayers that invoke 'particular concept[s] of God.'" *Id.* at 1273 (quoting *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233–34, 1234 n.10 (10th Cir. 1998)). In *Snyder,* the Tenth Circuit noted that "all prayers 'advance' a particular faith or belief in one way or another. The act of praying to a supreme power assumes the existence of that supreme power. … Rather what [*Marsh*] prohibited … is a more aggressive form of advancement, i.e., proselytization." *Snyder,* 159 F.3d at 1234 n.10.

Likewise, in *Simpson v. Chesterfield County Bd. of Supervisors,* the Fourth Circuit found that *Marsh* allows "a county to invite clergy from diverse faiths to offer 'a wide variety of prayers' at meetings of its governing body. The invocations upheld there included 'wide and embracive terms' such as 'Lord God, our creator,' … 'the God of Abraham, Isaac and Jacob,' 'the God of Abraham, of Moses, Jesus, and Mohammad,' [and] 'Heavenly Father' …." *Pelphrey,* 547 F.3d at 1273 (internal cites omitted) (quoting *Simpson v. Chesterfield County Bd. of Supervisors,*

404 F.3d 276, 284 (4th Cir. 2005)). In upholding the constitutionality of these invocations, the *Simpson* court noted that if it were to invalidate the broad range of invocations at issue, while *Marsh* upheld sixteen years of invocations by one chaplain from one denomination, it "would achieve a particularly perverse result … push[ing] localities intent on avoiding litigation to select only one minister from only one faith. … This would have the consequence of making America and its public events more insular and sectarian rather than less so." *Simpson,* 404 F.3d at 287.

District courts in both the Third and Fifth Circuits also follow the Eleventh Circuit's *Pelphrey* decision in holding that legislative invocations that reference Jesus are acceptable.

In the Third Circuit, *Doe v. Indian River Sch. Dist.* involved parents, individually and on behalf of their children, who sued a school district for allowing explicitly Christian invocations before meetings of the school board. *Doe v. Indian River Sch. Dist.,* 685 F. Supp. 2d 524 (D. Del. 2010). The court in *Indian River* rejected the plaintiffs' assertion that the invocations were unconstitutional under *Marsh* because of their references to "God," "Jesus," and "the Lord." That court stated:

> Although it is undisputed that several Board Members usually reference Jesus Christ in their prayers, the Court takes issue with Plainitff's characterization. … Board Member McCabe testified that some Board Members referenced "God," "Jesus," and "the Lord" in

> their prayers, but did not testify as to the frequency of these references.
>
> …
>
> In any event, even viewing the evidence in the light most favorable to Plaintiffs, the Court concludes that the fact that Board Members often reference Jesus Christ in their prayers does not render the Board's Prayer Policy unconstitutional under *Marsh.* … The Marsh Court did not premise its holding on the nonsectarian nature of the chaplain's prayers …. The Court did not draw a distinction between sectarian and nonsectarian prayer in explaining why the Nebraska Legislature's practice was constitutional, and did not seek to define the terms "sectarian" and "nonsectarian." Rather, the Court emphasized that the content of the prayer was "not of concern" in determining whether the practice was constitutional.

Id. at 540–41 (quoting *Marsh*, 463 U.S. at 794) (internal cites omitted). The *Indian River* court went on to explain that *Marsh* was concerned not with the content of invocations but with whether the invocation opportunity was exploited "to proselytize; to promote or sell a religion." *Id.* at 542 n.138 (internal cites omitted).

In a similar case in the Fifth Circuit, *Doe v. Tangipahoa Parish Sch. Bd.*, "schoolchildren and their parents" brought suit against a school board because of "a Christian prayer." *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823, 825, 831 (E.D. La. 2009). In *Tangipahoa*, "[t]he School Board … opened its meeting with an invocation since 1973; board members, teachers, students, and invited clergy have delivered the prayers, which often have referred to Jesus or other Christian themes." The court observed that the invocations in *Marsh* were "offered in the Judeo-Christian tradition, [but] the Supreme Court refused to examine their content because: 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. …" *Id.* at 839–40 (internal cites omitted). The court in *Tangipahoa* went on to explain that "[a]ttempts to apply a sectarian/non-sectarian 'bright line' test by evaluating prayer content first 'needlessly puts federal courts in the position of drawing the constitutional (and theological) line between sectarian and non-sectarian prayer' in violation of Supreme Court precedent." *Id.* at 840 n.23 (quoting *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 122 (5th Cir. 2006) (Clement, J., concurring in the judgment in part and dissenting in the judgment in part).

II. THE FOURTH CIRCUIT'S HOLDING IN *JOYNER V. FORSYTH COUNTY* WHICH MANDATES "NON-SECTARIAN" INVOCATIONS IS WRONGLY DECIDED AND SHOULD NOT BE FOLLOWED.

The Appellants rely heavily upon the analysis and conclusions of the Fourth Circuit panel majority in the split decision of *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011). But the majority opinion in *Joyner* is the only appellate decision holding that the government to should review the theology of legislative invocations and require only "non-sectarian" prayers. As has already been demonstrated above, *Joyner* is clearly out of step with other courts that have considered the impact of sectarian references in a legislative prayer[2].

[2] "The majority's decree commands that every legislative prayer reference only "God" or some "nonsectarian ideal," supposedly because other appellations might offend. Thus, in a stated sensitivity to references that might identify the religion practiced by the religious leader, the

The Fourth Circuit majority in *Joyner* attempted to distinguish *Pelphrey* by opining that the "sectarian terms" in the prayers offered in *Pelphrey* were of no moment because, in a period exceeding ten years, Jewish, Unitarian, or Muslim clerics occasionally offered invocations. *Joyner,* 653 F.3d. at 352-53 (quoting *Pelphrey*, 547 F.3d at 1266). The majority distinguished the *Joyner* facts by focusing solely on the one year following the written codification of the Board's decades-old invocations practice and noting, "[n]one of the prayers mentioned any other deity" than Jesus, and no "non-Christian religious leader c[a]me forth to give a prayer." 653 F.3d. at 353. Indeed, the majority opinion in *Joyner* recognized that diverse references in public invocations provide evidence that a prayer policy does not advance a single faith. *Id.* However, *Joyner* may be distinguished from the present case as here the parties have stipulated to the fact that members of various faiths have accepted the City's invitation to give an invocation. Am. Findings of Fact and Conclusions of Law at 15, Dkt. 44.

Indeed, the facts established by the district court below demonstrate that, since

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majority has dared to step in and regulate the language of prayer—the sacred dialogue between humankind and God. Such a decision treats prayer agnostically; reduces it to civil nicety; hardly accommodates the Supreme Court's jurisprudence in *Marsh v. Chambers*, 463 U.S. 783 (1983); and creates a circuit split, *see Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263 (11th Cir. 2008) (finding constitutional legislative prayers offered by "volunteer leaders of different religions, on a rotating basis," even though the prayers referenced Jesus; Allah; the God of Abraham, Isaac, and Jacob; Mohammed; and Heavenly Father). Most frightfully, it will require secular legislative and judicial bodies to evaluate and parse particular religious prayers under an array of criteria identified by the majority." *Joyner,* 653 F.3d at 365 (Niemeyer, J., dissenting).

the adoption of the Lancaster policy, approximately one third of the invocation opportunities have resulted in invocations provided by a self identified metaphysicist, a member of the California Sikh Council, a person from an Islamic congregation, or no invocation at all. *Id.* at 6. As the Eleventh Circuit points out, "**the diversity of speakers**, in contrast with the chaplain of one denomination allowed in *Marsh* supports the finding that the county did not exploit the prayers to advance any one religion." *Pelphrey*, 547 F.3d at 1277 (emphasis added).

The diversity represented by the speakers offering invocations before the Lancaster City Council demonstrates that the City did not exploit the prayer opportunity to promote Christianity. And the District Court below noted that "Plaintiffs' have presented no evidence or argument to suggest that the April 27 'prayer opportunity [was] exploited to ***proselytize*** or ***advance*** any one, or to ***disparage*** any other, faith or belief,' and have not contended that it had this purpose or effect." Am. Findings of Fact and Conclusions of Law at 11, Dkt.44 (emphasis added). The District Court in this case went on to find "[t]here is no evidentiary support for Plaintiff's apparent contention that the Invocation Policy of Procedures, which on their face encourage participation by members of all faiths and discourage proselytizing and disparagement – are a sham." *Id*. at 15. Appellants' reliance upon *Joyner* is misplaced because here the facts more closely parallel *Pelphrey* than *Joyner*.

Furthermore, the *Pelphrey* decision has been widely accepted as a correct application of *Marsh*. *See Tangipahoa Sch. Bd.*, 631 F. Supp. 2d at 837 ("The Eleventh Circuit, in a scholarly and insightful opinion, explicitly rejected an argument that *Marsh* permits only nonsectarian prayer; rather, that court cautioned, courts should not evaluate the content of prayer absent evidence of exploitation"); *Galloway*, 732 F. Supp. 2d at 243 ("[T]he Court finds the Plaintiff's proposed non-sectarian policy, which would require Town officials to differentiate between sectarian prayers and nonsectarian prayers, is vague and unworkable, as *Pelphrey* demonstrates"); Am. Findings of Fact and Conclusions of Law at 12 n.4, Dkt.44 ("As the Eleventh Circuit noted, whether certain references 'are "sectarian" is best left to theologians, not courts of law'" (quoting *Pelphrey*)). The *Joyner* majority opinion is clearly inconsistent with this consensus.

The conflict between these circuits and the Fourth Circuit majority is significant. While the Eighth and Eleventh Circuits have left to private volunteers the business of composing their own invocations, the Fourth Circuit now "require[s] legislative bodies to undertake the impossible task of monitoring and prescribing appropriate legislative prayers for religious leaders to offer as invocations." *Joyner*, 653 F.3d at 365 (Niemeyer, J., dissenting). A Petition for Certiorari seeking review of the *Joyner* decision is currently pending before the U.S. Supreme Court. (No. 11-546).

The Ninth Circuit has yet to decide whether, in accord with *Marsh* and its progeny, the U.S. Constitution permits private citizens to freely offer invocations according to the dictates of their conscience before legislative bodies or whether the First Amendment mandates government control and censorship of religious invocations, coercing a watered-down "non-sectarian" theological orthodoxy. If anything, the unpublished decision in *Bacus v. Palo Verde Unified School District*, 52 Fed. Appx. 355 (9th Cir. 2002), cited by Plaintiffs, appears to actually support Lancaster's rotating Invocation Policy. There, the Ninth Circuit stated that it "need not decide whether 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*. Since Lancaster's Invocation Policy neutrally encourages the participation of all faiths and the invocations offered under the policy neither disparage nor proselytize, this honorable Court must not be concerned with whether prayers in the name of "Jesus," or any other deity, are permissible.

As *Marsh* recognized, legislative invocation has a long, clear history establishing its constitutionality. *Marsh*, 463 U.S. at 792. Legislative invocation is constitutional. To parse *which* legislative invocation is permissible logically necessitates the establishment of a judicially enforced civic theological

orthodoxy—a concept foreign to the Founders and anathema to the very Establishment Clause sought to be thereby upheld.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision below.

Respectfully submitted,

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November 21, 2011

CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. RULE 32(a)

The undersigned counsel of record for *amicus curiae* affirms and declares as follows:

This brief complies with the type-volume limitation of Fed. R. App. P. Rule 32(a)(7) for a brief utilizing a proportionally-spaced font, because the length of this brief is 4,109 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using 14-point Times New Roman in Microsoft Word for Mac 2011.

Executed this 21st day of November, 2011.

s/ Dean R. Broyles
Dean R. Broyles

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. I further certify that I served two true and correct copies of the foregoing on the following by first class mail:

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As requested, I have also provided the Court with six copies of this brief by first class mail.

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