No. 12-11613

In the

United States Court of Appeals

for the Eleventh Circuit

ATHEISTS OF FLORIDA, INC., ELLENBETH WACHS,
Plaintiffs – Appellants,

versus

CITY OF LAKELAND, FLORIDA, GOW FIELDS, in his individual capacity,
Defendants – Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

AMICI CURIAE FLORIDA STATE SENATORS ALAN HAYS AND STEVE WISE; FLORIDA STATE REPRESENTATIVES DENNIS BAXLEY (DISTRICT 24), CHRIS DORWORTH (DISTRICT 34), ERIC EISNAUGLE (DISTRICT 40), STEVE PRECOURT (DISTRICT 41), AND KELLI STARGEL (DISTRICT 64) BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE

The undersigned counsel certifies that in addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement provided by Defendants/Appellees in their respondent's brief, the following persons and entities have an interest in the outcome of this case. The undersigned counsel also certifies that none of the amici curiae associated with this brief is a publicly held corporation, is owned by a publicly-held corporation, or issues stock:

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INTEREST OF AMICI

The Florida state legislators named herein, as *amici curiae*, respectfully submit that the District Court decision should be affirmed.

Amici are Florida legislators who benefit from the time-honored tradition of legislative prayer and wish to preserve it: State Senators Alan Hays and Steve Wise; State Representatives Dennis Baxley (District 24), Chris Dorworth (District 34), Eric Eisnaugle (District 40), Steve Precourt (District 41), and Kelli Stargel (District 64). These legislators are concerned about recent Fourth and Second Circuit decisions that clash with this Circuit's precedent and leave legislative bodies with no clear way to safeguard their invocation practices.

The parties have consented to the filing of this brief.

FED. R. APP. P. 29(C)(5) STATEMENT

No party's counsel has authored this brief in whole or in part, and no party or party's counsel has contributed money that was intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUE(S)

Whether the District Court correctly applied the law of the United States Supreme Court and this Circuit in granting summary judgment in favor of Defendants-Appellees on Plaintiffs-Appellants' claim that the legislative prayer practice before Lakeland City Commissions meetings violates the Establishment Clause of the First Amendment to the United States Constitution.

Amici contend that the District Court correctly granted summary judgment in favor of Defendants-Appellees.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Establishment Clause protects religious liberty and conscience by ensuring that American citizens are not compelled to endorse, practice, or support a religious mission. But "[i]t would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 44-45 (2004) (O'Connor, J., concurring). The Constitution restricts government ties to religion while guarding private religious expression. These complementary concepts intersect in legislative prayer, a time-honored tradition affirmed by the Supreme Court in light of American history. *Marsh v. Chambers*, 463 U.S. 783 (1983). Plaintiffs depart from that precedent in their flawed

conclusion that legislative prayer is unconstitutional per se—or at the very least must be purged of all sectarian references.

Recent Fourth and Second Circuit decisions have thrust governmental bodies into legal quicksand where they risk crippling liability in spite of the most carefully crafted invocation policies. The Fourth Circuit plunges government into a theological abyss by asserting that "in order to survive constitutional scrutiny, invocations must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide." *Joyner v. Forsyth County*, 653 F.3d 341, 342 (4th Cir. 2011). The Second Circuit admitted the defendant town's prayers were consistent with *Marsh*: "The prayers in the record were not offensive in the way identified as problematic in *Marsh*." *Galloway v. Town of Greece*, No. 10-3635-cv, 2012 U.S. App. LEXIS 9985, at *30 (2d Cir. May 17, 2012). The Court repeatedly acknowledged that *Marsh* does not mandate a nonsectarian policy (*id*. at *20, 22, 23, 36)—but nevertheless created a "totality of the circumstances" test to conclude that the town's policy and practice affiliated it too closely with Christianity (*id.* at 27). The Second Circuit circumvents *Marsh* and leaves local governments with virtually no choice but to abandon the historical, cherished American tradition of opening legislative sessions with an invocation.

One escape from this legal quagmire is to require evidence of "exploitation"—the standard announced in *Marsh* and followed by *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008). Any standard that restricts or bans "sectarian" references is unworkable and places the government in a Catch-22. All the government can do is adopt a religiously neutral selection process for inviting speakers to pray and respect the conscience of those speakers by avoiding control over their content where no "exploitation" is evident. *Marsh* and *Pelphrey* provide a workable test, in sharp contrast to the hopelessly muddied decisions in *Joyner* and *Galloway*. The District Court correctly rejected Plaintiff's claims, tracking precedent in this Circuit and the Supreme Court.

ARGUMENT

I. A MANDATORY NON-SECTARIAN POLICY CREATES IMPOSSIBLE LEGAL HURDLES.

Legislative prayer is a unique genre sanctioned by the Supreme Court—a hybrid combining elements of public and private expression. No circuit court has thoroughly grappled with the public-private distinction where private citizens are invited to pray in the context of government business. Courts tend to presuppose that invocations are government speech. But some courts have adopted a four-factor test to distinguish public and private expression—and that test reveals the prayers may be private speech.

Plaintiffs object to "the entire *institution* of legislative prayer." *Atheists of Florida, Inc. v. City of Lakeland*, No. 8:10-cv-1538-T-17-MAP, 2012 U.S. Dist. LEXIS 21763, *36 (M.D. Fla. February 22, 2012) ("*Atheists*"). The District Court rejected not only this radical position—but also the suggestion that all sectarian prayer must be excluded. *Id*. Indeed, a non-sectarian policy creates a classic Catch-22, either thrusting courts into forbidden theological territory or squelching the liberties of citizens who volunteer to pray for their governments.

"There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995), citing *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis added). Legislative prayer cases have not fleshed out this critical distinction. The government speech doctrine has only developed since *Marsh*. But either way, a mandatory non-sectarian policy violates both Establishment Clause and Free Speech principles: The government becomes enmeshed in religion if the prayers are government speech, but viewpoint discrimination is a real risk if they are private speech. Existing precedent does not require either alternative.

Where private citizens pray on government property, the "speech" line is not easily drawn. Since *Marsh*, some courts have used a four-factor test in other contexts to distinguish government from private speech:

- Purpose,
- Editorial control,
- Identity of the literal speaker, and
- Ultimate responsibility for the content.

Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1094-95 (8th Cir. 2000) (public radio station program was government speech); *Wells v. City & County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001) **(**city's holiday display was government speech, allowing exclusion of atheist plaintiffs' "Winter Solstice"). The Fourth Circuit applied the test twice to hold that personalized license plates are private speech. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004). The test finds support in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005) (beef promotion program was government speech). The Supreme Court considered (1) whether the purpose was to disseminate a government message, (2) editorial control, and (3) who the speech is "attributed to." *Id.* at 560-565. Although the Court did not identify "ultimate responsibility" as a factor, the government logically is responsible to implement the policy required by the *Beef Promotion and Research Act of 1985*. *Id.* at 553.

Following *Johanns,* Circuit Courts have split over the continued viability of the four-factor test. The Ninth Circuit found it consistent with *Johanns*, holding that Arizona's license plate program was a forum for private expression. *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 960 (9th Cir. 2007). The Sixth Circuit rejected the test but upheld a comparable license plate scheme it classified as government speech. *Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006). The Seventh and Eighth Circuits have adopted a "reasonable person" standard to distinguish public and private speech. *Choose Life of Ill., Inc. v. White,* 547 F.3d 853, 863 (7th Cir. 2008); *Roach v. Stouffer,* 560 F.3d 860 (8th Cir. 2009). *Roach* reduced the inquiry to "one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party." *Id.* at 867. This Circuit has not addressed the four-factor test, but one Florida District Court reduced the analysis to two questions: "(1) how easily the government is identified as the speaker, and (2) how much control the government has over the message communicated." *Sons of Confederate Veterans, Florida Division, Inc. v. Atwater,* Case No. 6:09-cv-134-Orl-28KRS, 2011 U.S. Dist. LEXIS 34104, *20 (M.D. Fla. March 30, 2011) ("*Atwater*"). Using these factors, the Court held that Florida's specialty license plates were private speech. *Id*. at *25.

In legislative prayer cases, courts gloss over the public-private speech distinction. Two cases expressly hold that legislative prayers are government speech. *Simpson v. Chesterfield County Bd. of Commissioners*, 404 F.3d 276, 288 (4th Cir. 2005); *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 355 (4th Cir. 2008). *Turner* applied *Knights* and concluded the policy did not violate the rights of the Baptist minister Council member (Turner) who challenged Fredericksburg's non-sectarian policy. *Id.* at 355. The invocation was on the agenda (*id.* at 354); the Council exercised editorial control and the "literal speaker" was a Council member acting in his official capacity (*id*. at 355). The prayers were government speech—but permissible under *Marsh*. Other cases presuppose government speech by using an Establishment Clause analysis. *Wynne v. Town of Great Falls*, 376 F.3d 292, 296-302 (4th Cir. 2004); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1231-34 (10th Cir. 1998); *Joyner*, 653 F.3d at 349.

This Circuit implicitly acknowledged the tension between public and private expression, upholding one prayer policy against an Establishment Clause challenge while finding a prior policy unconstitutional because it excluded certain faiths. *Pelphrey*, 547 F.3d at 1268-79. The exclusion of particular faiths is tantamount to the viewpoint discrimination that is prohibited where *private* speech is at issue.

Lakeland's invocation is offered by a volunteer responding to a broad invitation, using selection procedures that encourage diversity. *Atheists*, at *8, 54.

Resolution No. 4848 removes the invocation from the official agenda and requires a disclaimer that distances the City from the individual speakers. *Id*. at *10. The content of the prayers cannot reasonably be attributed to the City. Plaintiffs fail to show that *the City*—in its religiously neutral policy or practice—has improperly affiliated itself with a particular religion. Lakeland's rotation of speakers "greatly undercuts the perception that the [City] has purposefully aligned itself with one religious viewpoint." *Id*. at *24-25, quoting *Pelphrey v. Cobb Cnty.*, 410 F. Supp. 2d 1323, 1345 (N.D. Ga. 2006) (citing *Newdow v. Bush*, 355 F. Supp. 2d 265, 289 (D.D.C. 2005)). Moreover, the City respects the Free Speech rights of the speakers by refusing to micro-manage the content of their prayers.

The District Court observed that "the institution of legislative prayer itself is indubitably constitutional." *Atheists*, at *36; citing *Van Orden v. Perry*, 545 U.S. 677, 699 (2005). But Plaintiffs ask this Court to bypass Supreme Court precedent and either reject legislative invocations altogether or embrace the questionable conclusion that *only* non-sectarian prayer is constitutional. In *Marsh*, the Presbyterian chaplain who had served for 16 consecutive years voluntarily withdrew Christian references from his prayers in deference to a Jewish legislator. *Marsh* mentions that in a footnote—not as a mandate. *Marsh*, 463 U.S. at 793, n. 14. Most courts refuse to hold that the Establishment Clause requires a non-sectarian policy. *Turner*, 534 F.3d at 356; *Snyder*, 159 F.3d at 1233-34; *Pelphrey*,

547 F.3d at 1278; *Doe v. Tangipahoa Parish School Board, et al.,* 631 F.Supp.2d 823, 836 (E.D. La. 2009); *Galloway,* at *20, 22, 23, 36. The *Pelphrey* plaintiffs argued unsuccessfully that the Establishment Clause *only* permits non-sectarian prayer. This Circuit—tracking *Marsh*—held that the court should not judge the content of the prayers so long as the opportunity has not been improperly exploited to proselytize. *Pelphrey,* 547 F.3d at 1266. The Commissioners did not "compose or censor the prayers." *Id*. at 1267. "The taxpayers argue that *Allegheny* requires us to read *Marsh* narrowly to permit only nonsectarian prayer, but they are wrong." *Id*. at 1271. Even *Joyner* declared only that "legislative prayer must strive to be nondenominational so long as that is reasonably possible." *Joyner,* 653 F.3d at 349.

The Tenth Circuit observed the "inversion of the usual posture" in some Establishment Clause challenges to legislative prayer. These cases often involve the member of a particular faith alleging the state has "established" a religion by allowing a government-sanctioned speaker to deliver an invocation while denying him the opportunity to pray. *Snyder,* 159 F.3d at 1231. The *Snyder* plaintiff complained when the city council denied him the opportunity to offer a "prayer" that mocked the genre itself (legislative prayer). The Court framed the issue as an Establishment Clause challenge, although it reads more like a Free Speech claim alleging viewpoint discrimination. *Id.* at 1228.

It is challenging to untangle the knots—but either way, it would spawn new problems to dictate that legislative prayer *must* be non-sectarian.

A. Government-Controlled Prayer Is Both Unconstitutional And Unworkable.

If invocations are government speech, a non-sectarian policy requires the government to monitor individual prayers and control their content—a practice the Establishment Clause precludes. Invocation speakers are comparable to the teachers in *Lemon*—they are not static like a book or monument, but persons who pray according to conscience. *Lemon v. Kurzman*, 403 U.S. 602, 619 (1974). Ongoing government surveillance of their prayers enmeshes the government in a theological exercise it is not competent to perform—indeed, the Supreme Court signaled that a high school's nonsectarian graduation prayer policy might itself be constitutionally flawed. *Atheists*, at *20, citing *Lee v. Weisman*, 505 U.S. 577, 588 (1992) ("it is no part of the business of government to compose official prayers for any group of the American people"—quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

A nonsectarian policy is also extraordinarily vague and impractical. How many sectarian references are "too many"? What time frame should be considered? Must speakers write their prayers and submit them in advance for approval? (That scenario raises the issue of prior restraint.) How does government control a speaker who violates the policy? The Second Circuit admitted that

Marsh does not mandate nonsectarian prayers but engaged in the "parsing" *Marsh* forbids, analyzing the content of the town's invocations without citing evidence of prohibited exploitation. *Galloway*, at *8-9.

Any test that hinges on the frequency of sectarian references—as in *Joyner* and *Galloway*—compels the government to parse content. This Circuit wisely noted that the line between "sectarian" and "nonsectarian" is "best left to theologians, not courts of law." *Pelphrey*, 547 F.3d at 1267. *Pelphrey* read *Turner* as declining to hold that *Marsh* mandates a non-sectarian prayer policy:

> We need not decide whether the Establishment Clause compelled the Council to adopt their legislative prayer policy, because the Establishment Clause does not absolutely dictate the form of legislative prayer.

Id. at 1273, quoting *Turner*, 534 F.3d at 356; *see also Snyder*, 159 F.3d at 1233-34. *Snyder* also cautions that a government entity might fall "dangerously close to the 'quagmire' of 'excessive entanglement'" if a volunteer speaker were rejected on the basis of religious persuasion. *Id.* at 1231.

Plaintiffs urge that the City directs and controls the content of invocations through its selection process, and that citizens who attend Commission meetings are compelled to approve those prayers. *Atheists*, at *2. They contend that "*Marsh* and *Pelphrey* were wrongly decided." *Id*. at *36. Alternatively, their complaint suggests that "the City's allowance of prayers of a *sectarian* nature [is] constitutionally intolerable." *Id*. at *36. But that approach places governments in

an intrusive role and empowers them to censor private prayers. *Marsh* does not require that result, but instead warns that courts must *not* consider the content *unless* there is already evidence of improper proselytizing:

> 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, 463 U.S. at 794-795, quoted by *Atheists*, at *17. Even *Wynne* permitted "parsing" only because the record was already "replete with powerful indication[s] that the Town Council did indeed 'exploit' the prayer opportunity 'to proselytize or advance' one faith." *Wynne*, 376 F.3d at 299, n. 4. *Wynne* is unusual because the Town Council—the government itself—refused to allow non-Christian prayers.

Even *Joyner* does not fully support Plaintiff's radical position. The Fourth Circuit restricted sectarian references, but did not decree an absolute ban. *Joyner*, 653 F.3d at 351 ("courts should not be in the business of policing prayers for the occasional sectarian reference"). Forsyth County adopted a neutral policy welcoming a diversity of religious speakers. At Board meetings between May 29, 2007 and December 15, 2008, "almost four-fifths" of the prayers contained sectarian references. *Id*. at 344. This occurred solely as a result of *private* choices—not *government* exploitation or influence. Under Plaintiffs' rationale, even the most carefully crafted policy would fail if the random selection process resulted in too

many volunteers from the same religious tradition. That could easily happen if followers of a particular faith are concentrated in a region—and in the Second Circuit, the government is now obliged to look beyond its borders, creating an even more unworkable standard. *Galloway*, at *27 ("The randomness of the process...was limited by the town's practice of inviting clergy almost exclusively from places of worship located within the town's borders."). Drawing the precise line immerses the government in religion by requiring it to evaluate the content or count the number of prayers from a particular faith. But the *Marsh-Pelphrey* standard only excludes "aggressive advocates." "[T]he mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause." *Snyder,* 159 F.3d at 1234, n. 10.

B. If The Prayers Are *Private* Speech, Government Oversight Of The Content Is Impermissible Viewpoint Discrimination.

As the concurring judge in *Snyder* warned, it is

> ...misguided...to read this single passage from *Marsh* as standing for the far-reaching proposition that a governmental body can, in all circumstances, allow certain legislative prayers while censoring and barring others because they "proselytize" or "disparage" another faith or religious belief.

Id. at 1237 (Lucero, J., concurring). *Snyder's* caution underscores the private speech component in legislative prayers offered by community volunteers. If the prayers are private speech, the government cannot censor the expression merely because it represents the viewpoint of a unique faith tradition.

The license plate cases highlight the dangers of viewpoint discrimination when government and private speech elements overlap:

> Although the Supreme Court has not yet recognized that speech can be governmental and private at the same time, its decisions on government speech and viewpoint discrimination provide instruction on whether the State's viewpoint discrimination in the license plate forum can stand.

Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d at 795-796. The first two factors favored government speech but the other two leaned toward private speech. *Id.* at 794, citing *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 244-45 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) (suggesting it is an "oversimplification [to assume] that all speech must be either that of a private individual or that of the government and that a speech event cannot be *both* private and governmental at the same time"). Suppression of a particular viewpoint—preventing the veterans' organization from including the Confederate flag in its design—is impermissible. In *Atwater*, the Court concluded that Florida's specialty license plate program had allowed the legislature to engage in "dangerous viewpoint discrimination." *Atwater*, at *8.

In a decision extending *Marsh* to school board meetings, the court identified points in the policy that correspond more closely with private speech:

- The prayer was not part of the official agenda;
- No person was required to attend or participate; and

- Prayers were offered by a diversity of volunteer clergy who responded to a broad invitation and were scheduled on a first-come, first-serve basis.

Tangipahoa, 631 F.Supp.2d at 827. In *Tangipahoa*, an express disclaimer distanced the government from the content of the prayers—supporting the conclusion that *private* speech was involved:

> Any invocation that may be offered before the official start of the Board meeting shall be the *voluntary offering of a private citizen*, to and for the benefit of the Board. The views or beliefs expressed by the invocation speaker have not been previously reviewed or approved by the Board, and the Board does not endorse the religious beliefs or views of this or any other speaker.

Id. at 829 (emphasis added). Similarly, Lakeland removed the invocation from its official meeting agenda, and Resolution No. 4848 includes a disclaimer that "the Commission is not allowed by law to endorse the religious beliefs or views of this, or any other speaker." *Atheists*, at *10.

The speaker's identity varies even within legislative prayer cases. Government agents were responsible for the invocations in *Marsh*, *Wynne*, and *Turner*. *Marsh*, 463 U.S. at 784 (chaplain employed by state); *Wynne*, 376 F.3d at 294 (council member); *Turner*, 534 F.3d at 353 (same). Private speakers said the prayers in *Simpson*, *Pelphrey*, *Snyder*, and *Joyner*. *Simpson*, 404 F.3d at 279; *Pelphrey*, 547 F.3d at 1266; *Snyder*, 159 F.3d at 1228; *Joyner*, 653 F.3d at 343. It is difficult to conceive of this as *government* speech. But in spite of the speakers' personal responsibility in *Joyner*—as the District Court conceded (*Joyner v.*

Forsyth County, 2009 U.S. Dist. LEXIS 105360, *15)—the Fourth Circuit dismissed the "identity of the speaker" as irrelevant (*Joyner*, 653 F.3d at 350) and invalidated the prayers because of their "proximity...to official government business." *Id*. at 347. But where private speakers are invited to pray without government oversight—as they are in Lakeland—the risk of impermissible viewpoint discrimination is high and cannot be so easily dismissed. In this Circuit, the "identity of the invocational speaker" is a crucial factor. *Pelphrey*, 547 F.3d at 1277. Lakeland has consistently "attempted to vary the religious denominations invited to give the invocation" (*Atheists*, at *4) both before (*id*. at *7-8) and after (*id*. at *9) the City codified its policy by passing Resolution No. 4848. Lakeland's diversity weighs heavily in favor of constitutionality.

II. LAKELAND'S POLICY FITS SQUARELY WITHIN THE CONTOURS OF *MARSH*.

Marsh established legislative prayer as a unique genre "with its own set of boundaries and guidelines." *Simpson*, 404 F.3d at 281, citing *Snyder*, 159 F.3d at 1232. Legislative prayer and disestablishment have coexisted since colonial times. *Marsh*, 463 U.S. at 786. Although history alone does not establish the constitutionality of a practice or create a vested right in violation of the Constitution, contemporaneous actions of the draftsmen shed light on their intent. *Id.* at 790. "[A]n unbroken practice...is not something to be lightly cast aside." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). Legislative prayer is "part of the

fabric of our society." *Marsh,* 463 U.S. at 792. *Marsh* involved a chaplain hired and paid by the state, but Congress has also historically practiced a system of inviting local clergy to officiate. *Simpson,* 404 F.3d at 286, citing *Marsh,* 463 U.S. at 789 n. 10. Lakeland's practice has existed for decades. *Atheists*, at *3 (citing minutes from June 19, 1951). As *Turner* observed, "both varieties of legislative prayer...recognize the rich religious heritage of our country." *Turner,* 534 F.3d at 356.

Even the *Marsh* dissent recognized that "government cannot, without adopting a decidedly *anti*-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture." *Marsh*, 463 U.S. at 810-811 (Stevens, J., dissenting). *Lemon* also attests to the importance of history in evaluating Establishment Clause claims, noting the Supreme Court's rejection of a claim that tax exemptions for houses of worship might lead to establishment. That contention could not stand up against "more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present." *Lemon v. Kurzman,* 403 U.S. at 624, citing *Walz v. Tax Comm'n,* 397 U.S. 664. The Supreme Court has rejected a "rigid, absolutist view of the Establishment Clause" that "would undermine the ultimate constitutional objective as illuminated by history." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984), citing *Walz v. Tax Comm'n*, 397 U.S. at 671. *Allegheny*

qualified the role of history with its caution against affiliating the government with a particular religion, but noted that "legislative prayer does not urge citizens to engage in religious practice." *Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573, 603 n. 52 (1989).

Extensions of *Marsh* uphold comparable activities rooted in historical tradition: *Murray v. Buchanan,* 720 F.2d 689, 689 (D.C. Cir. 1983) (en banc) (paid legislative chaplain at the United States Congress); *Newdow v. Eagen,* 309 F. Supp. 2d 29 (D.D.C. 2004) (same); *Katcoff v. Marsh,* 755 F.2d 223 (2d Cir. 1985) (prayer by military chaplains on Army bases); *Doe v. Tangipahoa Parish Sch. Bd., et al.,* 631 F.Supp.2d 823 (E.D. La. 2009) (school board meetings); *Newdow v. Bush,* 355 F.Supp.2d 265 (Presidential Inauguration).

The Lakeland policy, like the policy examined in *Simpson*, "is in many ways more inclusive than that approved by the *Marsh* Court." *Simpson,* 404 F.3d at 285. The *Marsh* chaplain was paid with public funds, while the speakers in *Simpson* and Lakeland are unpaid volunteers. *Id*. Both governments welcome a broad spectrum of religious leaders, in contrast to the Presbyterian minister employed for 16 years in *Marsh*. *Id.* Both policies schedule speakers in a neutral manner that precludes government oversight. *Id*. These factors bring the policy well within *Marsh*—and even enable it to pass more traditional Establishment Clause tests. Plaintiffs' approach would generate a whole new set of legal obstacles. Indeed, as this

Circuit observed, "invalidating a practice of prayer more inclusive than that upheld in *Marsh* 'would achieve a particularly perverse result.'" *Pelphrey*, 547 F.3d at 1273, quoting *Simpson*, 404 F.3d at 287.

III. LEGISLATIVE PRAYER IS A UNIQUE GENRE THAT BLENDS ELEMENTS OF BOTH GOVERNMENT AND PRIVATE SPEECH. LAKELAND'S POLICY COMPLIES WITH BASIC FIRST AMENDMENT PRINCIPLES FOR BOTH.

Lakeland's policy and practice comply with the First Amendment—both the Establishment Clause *and* private expression. As Plaintiffs admit, the Commission has never denied a request to give the invocation, nor has it has attempted to control the content of the prayers. *Atheists*, at *56-57.

"The interaction between the 'government speech doctrine' and Establishment Clause principles has not...begun to be worked out." *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1141 (2009) (Souter, J., concurring). Legislative prayer is a unique form of expression that combines elements of both public and private speech, and classification may hinge on a particular policy's wording. In Lakeland, invocations occur in the context of government business—but private speakers are volunteers selected on a rotating basis that encourages diversity and excludes government oversight of the content. *Atheists*, *8 (describing current procedure for compiling a diverse list of potential speakers). The government drafted the Resolution that codified its policy and extends the invitation, but private speakers are ultimately responsible for what they say. This

tracks the broader principle that the *government* does not advance religion when any indirect benefit results solely from *private* choices. *Arizona School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1448 (2011) ("contributions result from the decisions of private taxpayers regarding their own funds").

Marsh was decided years before the government speech doctrine emerged—but the Supreme Court described legislative prayer as a reasonable acknowledgment well within the Constitution:

> To invoke Divine guidance on a public body entrusted with making the laws 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.

Marsh, 463 U.S. at 792; cited in *Simpson*, 404 F.3d at 282 and *Atheists*, at *17. *Marsh* is a "striking example of the accommodation of religious belief intended by the Framers," because America's first congressmen had no constitutional problem with employing chaplains to offer daily prayers in the Congress. *Lynch v. Donnelly*, 465 U.S. at 674. Justice Kennedy observed that the government is permitted "some latitude in recognizing and accommodating the central role religion plays in our society.... Any approach less sensitive to our heritage would border on latent hostility toward religion." *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring).

Plaintiffs' approach is insensitive to America's heritage and hostile toward religion. This is contrary to the well-established principle *Marsh* illustrates:

> [T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, *e. g., Zorach v. Clauson,* 343 U.S. 306, 314, 315 (1952); *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 211 (1948). Anything less would require the 'callous indifference' we have said was never intended by the *Establishment Clause*. *Zorach*, *supra*, 343 U.S. at 314.

Lynch v. Donnelly, 465 U.S. at 673. Even the *Marsh* dissent acknowledged that "in one important respect, the Constitution is *not* neutral on the subject of religion—the Free Exercise Clause protects claims rooted in religious conscience." *Marsh*, 463 U.S. at 812 (Stevens, J., dissenting).

A. Even If *Lemon* Applied, Lakeland's Policy Is Constitutional.

Establishment Clause scrutiny is applied with far less rigor to legislative prayer. *Simpson*, 404 F.3d at 287. *Marsh* abandoned *Lemon* because legislative prayer is "deeply embedded in the history and tradition of this country." *Atheists*, at *15, quoting *Marsh*, 463 U.S. at 786. The Eighth Circuit decision overruled in *Marsh* had applied *Lemon*—holding that the "purpose and primary effect" was to advance religion, because of the chaplain's long tenure, and forbidden "entanglement" resulted from the use of state funds. *Marsh*, 463 U.S. at 786.

Lemon itself acknowledged the "blurred, indistinct, and variable barrier" between church and state: "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."

Lemon v. Kurzman, 403 U.S. at 614. A year later, the Court reaffirmed the need to "reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that...total separation of the two is not possible." *Lynch v. Donnelly*, 465 U.S. at 672.

Marsh carved out an exception to the usual Establishment Clause tests, eschewing *Lemon*. But Lakeland's policy, which addresses the *Lemon* concerns of the *Marsh* dissent, could survive both *Lemon* and the more recent "endorsement" test proposed by Justice O'Connor.

1. The Policy Serves A Recognized Secular Purpose: It Solemnizes The Commission's Proceedings.

Legislative prayer serves legitimate secular purposes, such as "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Simpson*, 404 F.3d at 283, citing *Lynch v. Donnelly*, 465 U.S. at 693 (O'Connor, J., concurring). Tracking *Marsh*, legislative intent is a crucial inquiry in this Circuit—specifically, whether the government "categorically excluded specific faiths based on their beliefs." *Pelphrey*, 547 F.3d at 1282. In fact, "the bar for proving such impermissible motive is quite high" in light of *Marsh*—"the virtually uninterrupted sixteen year tenure of a single Presbyterian minister." *Pelphrey*, 410 F. Supp. 2d at 1337. In *Marsh*, the Court found no impermissible motive in spite of the chaplain's lengthy tenure and payment from public funds. *Marsh*, 463 U.S. at 793-

794. Even the disproportionate representation of one faith does not, per se, prove that an impermissible motive exists. *Pelphrey*, 410 F. Supp. 2d at 1346; *Pelphrey*, 547 F.3d at 1277.

When Lakeland passed Resolution No. 4848, the City explained that the purpose of the invocations was "to maintain a tradition of solemnizing its proceedings." *Atheists*, at *8. The Commission expressed its intent "to adopt a policy that does not proselytize or advance any faith, or show any preference of one religious view to the exclusion of others." *Id*. at *9. The policy serves an acknowledged secular purpose, passing the first *Lemon* prong.

2. The Policy Does Not Impermissibly Advance Religion.

The *Marsh* dissent objected to forcing legislators to participate in a religious exercise and requiring citizens to pay for it. *Marsh*, 463 U.S. at 808 (Stevens, J., dissenting). But any benefit Lakeland's policy confers on a particular faith is at best "indirect, remote, and incidental." *Lynch v. Donnelly*, 465 U.S. at 683, citing *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973), *Widmar v. Vincent*, 454 U.S. 263, 273 (1981). Unlike *Marsh*, speakers in Lakeland are unpaid volunteers and no one—legislator or citizen—is required to participate in the invocation. Moreover, it is "a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment...forbids endorsement

of religion in general." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring).

It is true that even *Marsh* precludes the use of legislative prayer to affiliate the government with a particular faith. *Wynne,* 376 F.3d at 297, citing *Allegheny*, 492 U.S. at 603. This Circuit identified three factors to assess whether that has happened: (1) the identity of the speaker; (2) the selection procedures employed; and (3) the nature of the prayers. *Pelphrey,* 547 F.3d at 1277. In Lakeland, "invocations are offered by various leaders of the local community, as opposed to members of the governmental body itself." *Atheists*, at *24. The selection procedure is intentionally designed to encourage diversity. *Id*. at *8, 54. The City has never denied a request to give the invocation. *Id*. at *56-57. The prayers—which must be offered by the representative of *some* particular faith—are simple blessings in line with over two centuries of unbroken American practice.

A few cases interpret *Allegheny's* comments about *Marsh*—warning about affiliating the government with a particular faith—as holding that *Marsh* mandates a non-sectarian policy. *See Allegheny,* 492 U.S. at 603. Two of these cases were vacated, remanded, and later dismissed for lack of standing: *Doe v. Tangipahoa Parish Sch. Bd., et al.*, 494 F.3d 494 (5th Cir. 2007) and *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006). In another case, the Town Council refused to *allow* invocations that were not explicitly Christian. *Wynne*, 376 F.3d at 295. In

Lakeland, Christian references are solely the result of a random procedural process, coupled with the private choices of volunteers who respond to an open invitation designed to foster diversity. Those choices do not affiliate the *government* with Christianity, nor do the sectarian references per se constitute the aggressive advocacy precluded by *Marsh* and *Allegheny*.

3. Lakeland Invites A Variety Of Religious Leaders To Pray Without Government Oversight, Avoiding Forbidden Entanglement.

The *Marsh* dissent asserted there was entanglement in the process of selecting a "suitable" chaplain and limiting that person to "suitable" prayers. *Marsh*, 463 U.S. at 798-799 (Stevens, J., dissenting). Lakeland's policy avoids this objection by inviting a wide spectrum of potential speakers without inquiry into their religious beliefs, and scheduling them on a rotating basis. This process avoids the entanglement that would almost certainly result if the City adopted a mandatory non-sectarian policy.

B. A Reasonable Observer Would Not Perceive Lakeland's Policy Or Practice As Government Endorsement Of A Particular Faith.

Based on *Marsh*, Justice O'Connor's "endorsement" test is not the proper analysis. But even if this Court adopted a similar test, as the *Joyner* and *Galloway* courts did, Lakeland's policy would survive.

The endorsement test rests partially on the same historical foundation as *Marsh*: "[T]he history and ubiquity of a practice...provides part of the context in

which a reasonable observer evaluates whether a challenged government practice conveys a message of endorsement of religion." *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring). Legislative prayer and other similar practices "are not understood as conveying government approval of particular religious beliefs." *Lynch v. Donnelly*, 465 U.S. at 693 (O'Connor, J., concurring).

Plaintiffs allege they are "effectively forced to stand and bow their heads and either acknowledge and express approval of the prayers, or be singled out." *Atheists*, at *2 (Dt. 10, ¶ 148). But "the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Elk Grove Unified School District v. Newdow*, 542 U.S. at 44 (O'Connor, J., concurring). People who reject religion are entitled to reasonable accommodation but not complete protection from exposure to religious expression. A "heckler's veto" does not establish improper endorsement. "[S]ome references to religion in public life and government are the inevitable consequence of our Nation's origins." *Id.* at 35 (O'Connor, J., concurring); *see also Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. at 780 (O'Connor, J., concurring).

The church-state "wall of separation" is much lower in a legislative meeting than in a public school context. *Tangipahoa*, 631 F.Supp.2d at 833. Legislative

prayers address an adult audience, with far less potential for the misunderstanding or coercion than might occur in a public school. *Marsh,* 463 U.S. at 792; *Simpson,* 404 F.3d at 282.

> Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*. . . . The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend.

Lee v. Weisman, 505 U.S. at 596-597. A reasonable observer, familiar with the time-honored practice of legislative prayer, America's rich religious history, and Lakeland's policy would not reasonably perceive the invocations as an improper endorsement of a particular faith.

C. Lakeland Respects The Parameters Of The Public Forum Created By The Policy.

The Establishment Clause applies only to government speech—not private religious expression in a public forum. *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. at 767, 770. Although Lakeland's Resolution should pass muster if the prayers are deemed government speech, it is more likely the City has created a forum for private speech. If so, it properly avoids "purposeful discrimination" against any particular faith (*Pelphrey*, 547 F.3d at 1281)—discrimination that would be tantamount to prohibited viewpoint discrimination against private speakers.

The Supreme Court articulated a three-step framework to analyze restrictions of private speech on government property. The court must classify the speech, identify the forum (public or nonpublic), and evaluate the reasons for exclusion. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

Lakeland's broad invitation to religious leaders is comparable to both *Pelphrey* and *Simpson*. Commissioners in *Pelphrey* randomly selected "volunteer leaders of different religions, on a rotating basis, to offer invocations with a variety of religious expressions." *Pelphrey*, 547 F.3d at 1266. In *Simpson*, similarly, Chesterfield County sent letters "designed to foster widespread participation" and scheduled respondents on a first-come, first-serve basis. *Simpson*, 404 F.3d at 279. In Lakeland, city officials comb the Yellow Pages, the internet, and other sources in order to identify places of worship and extend a broad invitation. *Atheists*, at *8. These procedures strongly suggest a forum for diverse private expression.

The government may designate a place or channel of communication as a public forum, either for the public at large, or for use by certain speakers or discussion of certain topics. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983); *Cornelius*, 473 U.S. at 802. Speakers cannot be excluded absent a compelling state interest—and never to suppress the speaker's particular viewpoint. *Perry*, 460 U.S. at 46; *Cornelius*, 473 U.S. at 799. Government may

also open a more limited "nonpublic forum." Here, access is restricted on the basis of subject matter (invocation) and speaker identity (local religious leaders), but must be viewpoint neutral and reasonable in light of the forum's purpose. *Cornelius*, 473 U.S. at 806. Some cases have used the term "limited public forum," but again, viewpoint discrimination is an "egregious form of content discrimination" that is impermissible. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-830 (1995); *Lamb's Chapel*, 508 U.S. at 390. The government "must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829.

Lakeland's policy is consistent with principles governing private expression in a government-created forum. Its restrictions on the speaker (local religious leaders) and topic (invocation) are both reasonable in light of the Commission's purpose for the forum: "to maintain a tradition of solemnizing its proceedings." *Atheists*, at *8 (quoting Resolution No. 4848). Inviting a religiously diverse group of volunteers to pray, using a list compiled from various public sources, the policy avoids the impermissible viewpoint discrimination that could result from a mandatory non-sectarian policy. The City merely confines the forum "to the limited and legitimate purposes for which it was created." *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 49. Additional scrutiny of the content would impermissibly "raise the specter of government censorship to ensure that all

[invocations] meet some baseline standard of secular orthodoxy." *Rosenberger,* 515 U.S. at 844.

CONCLUSION

The District Court decision falls well within binding precedent in the Supreme Court and this Circuit, avoiding the unworkable, precarious standards espoused in *Joyner* and *Galloway*. A non-sectarian mandate would strangle religious expression in the public square, contrary to decades of established American tradition. This Court should affirm the District Court decision.

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CERTIFICATES PURSUANT TO FED. R. APP. P. 32

I certify that the foregoing amici curiae brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). In reliance on the word count feature of the word-processing system used to prepare the brief, Microsoft Word 2007, the brief contains 6,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), which is no more than one-half the maximum length of 14,000 words authorized by Fed. R. App. P. 29(d), 32(a)(7)(B)(i).

The foregoing amici curiae brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on June 22, 2012. I certify that service will be accomplished by the appellate CM/ECF system to all participants in the case that are registered CM/ECF users.

One true and correct copy of the foregoing amici curiae brief was caused to be sent to the following counsel of record by U.S. Mail:

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