

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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ATHEISTS OF FLORIDA, INC.,  
AND ELLENBETH WACHS,  
*Plaintiffs-Appellants,*  
v.  
CITY OF LAKELAND, FL,  
AND MAYOR GOW FIELDS,  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Middle District of Florida,  
No. 8:10-CV-1538-T-17-MAP  
Hon. Elizabeth A. Kovachevich

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**Brief *Amicus Curiae* of  
The Becket Fund for Religious Liberty  
In Support of Defendants-Appellees  
and in Support of Affirmance**

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**12-11613 - Atheists Of Florida, Inc. and Ellenbeth Wachs v. City Of Lakeland and Mayor Gow Fields**

**CERTIFICATE OF INTERESTED PERSONS**

I hereby certify the following is a complete list of the district court judges, attorneys, persons, associations of persons, firms, partnerships, corporations (including subsidiaries, conglomerates, affiliates, parent corporations, and any publicly held corporation owning 10% or more of the party's stock), and other identifiable legal entities related to a party that have an interest in this case.

1. Alliance Defense Fund, Amicus Curiae;
2. Americans United for Separation of Church and State, Amicus Curiae;
3. Atheists of Florida, Inc., Plaintiff-Appellant;
4. Baxley, Dennis, Florida State Representative, Amicus Curiae;
5. The Becket Fund for Religious Liberty, Amicus Curiae;
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8. City of Lakeland, Defendant-Appellee;
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18. Hays, Alan, Florida State Senator, Amicus Curiae;
19. Husby, Eric O., Attorney for Plaintiffs-Appellants;
20. Khan, Ayesha N., Attorney for Amicus Curiae;
21. Kovachevich, Elizabeth A., United States District Judge,  
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22. Lipper, Gregory M., Attorney for Amicus Curiae;
23. Mayor Gow Fields, Defendant-Appellee;
24. Miller, Mark A., Attorney for Defendants-Appellees;
25. Precourt, Steve, Florida State Representative, Amicus Curiae;
26. Scales, Edwin A., Attorney for Defendants-Appellees;

27. Stargel, Kelli, Florida State Representative, Amicus Curiae;
28. Stemberger, John, Attorney for Amicus Curiae;
29. Verm, Diana M., Attorney for Amicus Curiae;
30. Wachs, Ellenbeth, Plaintiff-Appellant;
31. Wise, Steve, Florida State Senator, Amicus Curiae.

Dated: June 25, 2012

A handwritten signature in blue ink, appearing to read "Diana M. Verm", is written over a horizontal line.

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## INTEREST OF THE AMICUS

The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute that protects the free expression of all faiths. The Becket Fund exists to vindicate a simple but frequently neglected principle: that because the religious impulse is natural to human beings, public and private religious expression is natural to human culture. A significant example of such public religious expression is the legislative prayer at issue in this case.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the *amicus curiae* contributed money that was intended to fund preparing or submitting this brief.

All parties have consented to the filing of this brief.

## **STATEMENT OF THE ISSUES**

1. 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.

2. Whether the District Court correctly applied the law of this Circuit and Florida law in granting summary judgment in favor of Defendants-Appellees on Plaintiffs-Appellants' claim that the legislative prayer practice before Lakeland City Commission meetings violates Article I, Section 3 of the Florida Constitution.

## SUMMARY OF THE ARGUMENT

The tradition of legislative prayer has deep roots in this nation's history. In *Marsh v. Chambers*, the Supreme Court upheld that tradition under the Establishment Clause because it was promoted by the same founders who drafted and ratified the First Amendment. But in this case, appellants would truncate *Marsh* to exclude prayers that reflect the faith of the person praying. They advocate a rule prohibiting so-called “sectarian” prayers—which, for purposes of this case, means prayers that mention “Jesus Christ” and contain other “explicitly Christian references.” Appellant’s Br. 23. Appellants’ proposed rule has no basis in *Marsh*, and indeed this Circuit, in *Pelphrey v. Cobb County*, has already rejected the idea that *Marsh* authorizes courts to assess whether prayers are “sectarian.” This *amicus* brief reinforces that correct reading of *Marsh* by providing exhaustive, original, historical research into the precise content of legislative prayers throughout American history.

A more nuanced inquiry like the one undertaken in this brief is indispensable to applying *Marsh* correctly and to resisting the misguided revisionism advocated by appellants. But no court has yet focused on the historical material available to shed light on the tradition of legislative prayer. This *amicus* brief seeks to fill that gap. The materials addressed herein demonstrate that limiting *Marsh* to “non-sectarian”

prayers would invalidate centuries of federal and state legislative prayers, and, indeed, would invite courts to engage in amateur theological inquiry that could *itself* violate the Establishment Clause. At bottom, accepting appellants' invitation to root out "sectarian" prayers would implicitly overrule *Marsh* itself.

Throughout American history, those persons invited to offer prayers at legislative meetings have been free to pray, if they chose, in the distinctive formulas of their own faiths. In order that they may continue to do so, this Court should affirm that the prayers at issue in this case are constitutional under *Marsh*.

## ARGUMENT

### **I. *Marsh* permits prayers that adopt the language and formulas of specific faith traditions—including those of Christianity.**

The reasoning behind the holding of *Marsh v. Chambers* is straightforward. Because the founders supported the practice of legislative prayer at the time that they adopted the Establishment Clause, legislative prayer does not violate the Establishment Clause. *Marsh* declined to rely on the *Lemon* test, and instead upheld legislative prayer based on its strong historical pedigree. *Marsh v. Chambers*, 463 U.S. 783, 789 (1983). Appellants ask the Court to revise that historical pedigree. They say that, by allowing prayers that invoke the name of Christ, the City of Lakeland has removed itself from the confines of *Marsh*. They are mistaken. If *Marsh* is not to be eviscerated, the explicit invocation of a

particular deity, doctrine, or faith tradition cannot, in and of itself, render a prayer unconstitutional. The extensive original historical research undertaken by *amicus* in this brief reveals that a ruling that *Marsh* excludes so-called “sectarian” prayer would call into question two centuries of American tradition and would itself undermine the reasoning of *Marsh*.

**A. *Marsh’s* reasoning is based on the history of legislative prayer.**

In *Marsh*, a Presbyterian clergyman was employed by the Nebraska legislature to offer prayers for sixteen years. The Supreme Court noted that the prayers were “in the Judeo-Christian tradition.” *Marsh*, 463 U.S. at 793 n.14. Instead of applying the test adopted in *Lemon v. Kurtzman*, 403 U.S. 602 (1972), *Marsh* examined the history of legislative prayer and determined that the framers could not have considered it an establishment of religion. The same week the first Congress passed the Bill of Rights, it hired a chaplain to pray at its meetings. The Court could not accept the conclusion that “Members of the First Congress . . . intended the Establishment Clause of the [First] Amendment to forbid what they had just declared acceptable.” *Marsh*, 463 U.S. at 790. The Court explicitly declined “to embark on a sensitive evaluation or to parse the *content* of a particular prayer,” absent “indication that the prayer opportunity has been exploited to

proselytize or advance any one, or to disparage any other, faith or belief.” *Marsh*, 463 U.S. at 794-95 (emphasis added).

Since *Marsh*, some courts have considered whether legislative prayers become unconstitutional when they are too “sectarian.” In *Pelphrey v. Cobb County*, this Circuit considered a challenge to prayers offered at county commission meetings, in which 68-70% of the prayers “contained Christian references.” 547 F.3d 1263, 1267 (11th Cir. 2008). *Pelphrey* affirmed that *Marsh* forbade parsing the content of the prayers at issue. *Pelphrey*, 547 F.3d at 1272. The court admitted it “would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions,” *id.*, and instead concluded that “[w]hether invocations of ‘Lord of Lords’ or ‘the God of Abraham, Isaac, and Mohammed’ are ‘sectarian’ is best left to theologians, not courts of law.” *Id.* at 1267. *Pelphrey* rejected dicta from the Supreme Court’s subsequent decision in *Allegheny* that the *Marsh* prayers were only constitutional because they had “removed all references to Christ.” *Id.* at 1271 (citing *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989)). *Pelphrey* instead followed the “clear directive” of *Marsh* that a court assessing an Establishment Clause challenge to legislative prayers may only inquire whether “the prayer opportunity has been exploited to proselytize or advance any one . . . faith or belief.” *Pelphrey*, 547 F.3d at 1271 (citing *Marsh*, 463 U.S. at 794-95).

**B. The history of legislative prayer is replete with explicitly Christian prayers.**

A close examination of the public prayers which constitute America's historical tradition—a tradition which *Marsh* treated as determinative of the constitutionality of legislative prayer—reveals an overriding theme: those prayers have regularly included express references to Jesus Christ and invocations of both Christian and Jewish scriptural passages. To be clear: this does not mean that *only* Christian- or Jewish-themed prayers are constitutional. But it certainly means that express Christian language in a prayer cannot, alone, *disqualify* the prayer from constitutional protection.

Founding-era prayers, it is true, were rarely recorded. Instead, reporters often noted that a prayer was offered, but did not record it. Those prayers that are available, however, show exactly what one would expect: the language and formulas used reflect the faith of the person praying. That is, the prayers regularly invoked Christ's name, and they also used other religious language drawn directly from Christian and Jewish scripture. *See infra* Part B.1. Moreover, when congressional prayers began to be regularly recorded in 1910, all the available prayers from the years of 1910 to 1914 demonstrate the same pattern. *See infra* Part B.2.

# **1. Examples of the earliest legislative prayers contain language appellants would condemn as “sectarian.”**

There are numerous examples of public prayers at the time of our nation’s founding that appellants would deem “sectarian” and hence unconstitutional. Perhaps the touchstone occurred in 1774, when the Continental Congress convened to determine the fate of the thirteen colonies. One of the delegates called for a prayer to invoke divine blessing on their efforts. James P. Moore, Jr., *One Nation Under God: The History of Prayer in America* 56 (2005). Two delegates objected “because [they] were so divided in religious sentiments . . . that [they] could not join in the same act of worship.” *Id.* (quoting letter from John Adams to Abigail Adams, 2 *Diary and Autobiography of John Adams, 1771-1781* 156 (L.H. Butterfield, ed. 1963)). But Samuel Adams quelled the objections by asserting that “he was no bigot, and could hear a Prayer from any gentleman of Piety and Virtue, who was at the same time a friend to his Country.” *Id.* See also *Marsh*, 463 U.S. at 791-92. Accordingly, the delegates agreed on an Episcopal minister, and the next morning he opened the meetings with a prayer “in the name and through the merits of Jesus Christ.” Office of the Chaplain, <http://chaplain.house.gov/archive/continental.html> (last visited June 25, 2012).

This robust and open debate—literally on the threshold of the nation’s birth—strongly affirms the constitutional pedigree of legislative prayer, because, as *Marsh*



explained, the debate “infuses [the historical argument] with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly.” *Marsh*, 463 U.S. at 791. And the result of the debate was a signal example of a prayer that expressly invoked the name of Jesus Christ.

Between the Continental Congress and the death of George Washington in 1799, none of the prayers of the chaplain hired by Congress survived, but our nation’s leaders issued a number of public prayers that reflected the national tone. For instance, just before his retirement from the Continental Army in 1783, George Washington wrote a letter to all of the governors of the victorious United States, of which the last paragraph consisted of a now famous prayer, invoking both the Jewish prophet Micah and the example of Christ:

I now make it my earnest prayer, that God would have you, and the State over which you preside, in his holy protection, . . . that he would most graciously be pleased to dispose us all, to do Justice, to love mercy, and to demean ourselves that Charity, humility, and pacific temper of mind, which are the Characteristics of the Divine Author of our blessed Religion, and without an humble imitation of whose example in these things, we can never hope to be a happy Nation. Moore, *supra* at 74-75 (emphasis added).

Furthermore, with his 1789 inauguration, George Washington set the precedent for inaugural religious solemnities. Following his swearing in, Washington conducted a “grand procession” (which included the members of the Senate and the House) to St. Paul’s Episcopal Church for a prayer service. *Id.* at 75-76. At the

service, Washington, the entire Congress, and the rest of the assembly sang the *Te Deum*, a traditional Christian hymn of praise that includes, among many other Christian references, the phrase “O Christ, Thou art the King of glory!” *Id.*<sup>1</sup>

John Adams continued Washington’s prayerful habits. In a Thanksgiving proclamation issued March 23, 1798, President Adams asked for “His infinite

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<sup>1</sup> The entire text of the *Te Deum* reads thus:

“O God, we praise Thee, and acknowledge Thee to be the supreme Lord.  
Everlasting Father, all the earth worships Thee.  
All the Angels, the heavens and all angelic powers,  
All the Cherubim and Seraphim, continuously cry to Thee:  
Holy, Holy, Holy, Lord God of Hosts!  
Heaven and earth are full of the Majesty of Thy glory.  
The glorious choir of the Apostles,  
The wonderful company of Prophets,  
The white-robed army of Martyrs, praise Thee.  
Holy Church throughout the world acknowledges Thee:  
The Father of infinite Majesty;  
Thy adorable, true and only Son;  
Also the Holy Spirit, the Comforter.  
O Christ, Thou art the King of glory!  
Thou art the everlasting Son of the Father.  
When Thou tookest it upon Thyself to deliver man,  
Thou didst not disdain the Virgin's womb.  
Having overcome the sting of death, Thou opened the Kingdom of Heaven to all  
believers.  
Thou sittest at the right hand of God in the glory of the Father.  
We believe that Thou wilt come to be our Judge.  
We, therefore, beg Thee to help Thy servants whom Thou hast redeemed with Thy  
Precious Blood.  
Let them be numbered with Thy Saints in everlasting glory.”

Daniel Guernsey, *Adoration: Eucharistic Texts and Prayers Throughout Church History* 228-229 (1999). The *Te Deum* dates to the fourth century A.D. and has been part of the traditional Christian daily office of prayers for centuries. F. Brittain, *Medieval Latin and Romance Lyric to A.D. 1300* 63 (Cambridge 2009) (1937).

grace, through the Redeemer of the World, freely to remit all our offenses, and to incline us by His Holy Spirit to that sincere repentance and reformation.” H.R. Misc. Doc. No. 210, 269 (1896).

The next recorded legislative prayer occurred to commemorate the death of George Washington in 1799. Major General Henry Lee III offered a prayer before both Houses. Christopher L. Webber, *An American Prayer Book* 58 (Christopher L. Webber ed., 2008). Lee referred to Washington as “our beloved brother in Christ,” and asked that those present

may rest with the spirits of just men made perfect; and finally may obtain unto the resurrection of life, through Jesus Christ our Lord; at whose second coming in glorious majesty to judge the world, the earth and sea shall give up their dead; and the corruptible bodies of those who sleep in him shall be changed; and made like unto his own glorious body; according to the mighty working whereby he is able to subdue all things unto himself. *Id.* at 58-59.

He closed “through Jesus Christ our Lord.” *Id.* at 60.

These surviving prayers are a powerful indication of what was understood to be permissible in governmental prayer at the time of our nation’s founding. Specifically, they suggest that the invocation of Jesus Christ and of other explicitly Christian themes was commonplace and uncontroversial. There is certainly no evidence to suggest that such features were an anomaly. But the key point is this: *Marsh* laid down a principle of constitutional interpretation that relied on historical

practices to validate the practice of legislative prayer. Under that analysis, the presence of expressly Christian language in a prayer cannot possibly, of its own force, disqualify the prayer from the protection of *Marsh*. The logic of *Marsh*, in light of the historical record, simply forbids it.

Prayers before legislatures were not officially recorded by congressional record-keepers until the 1860s, and they were not regularly recorded until the twentieth century. Prayers from before 1860 were only occasionally preserved for posterity in newspapers. The earliest example *amicus* found was in 1844. A Missouri paper printed the prayer of Septimus Tustin requesting that “we may listen to the solemn admonitions . . . ‘be ye also ready, for at such an hour as ye think not, the Son of Man shall come,’” quoting Matthew 24:44 in reference to the second coming of Christ. *Prayer in Congress*, The Radical, March 30, 1844 at 1. In 1854, at the start of the debate on the Kansas-Nebraska act, the New York Times printed a prayer referring to God as the “high and mighty Ruler of the Universe” and asking for unity in that difficult debate. *Thirty-Third Congress, First Session*, N.Y. Times, May 23, 1854. The prayer closed in the name of Jesus Christ. *Id.*

Among the earliest recorded prayers in the Congressional Globe are two from July 4, 1861. The Senate Chaplain prayed that God’s “Church and Kingdom may flourish” for “Jesus Christ’s sake.” Cong. Globe, 37th Cong, 1st Sess. 1 (1861).

The House Chaplain concluded his prayer with a recitation of the Lord’s Prayer. *Id.* at 2.

Each and every one of the prayers noted in this section—from the invocation at the Continental Congress in 1774, to George Washington’s prayer in 1783, to the Congressional chaplain’s recitation of the Lord’s prayer in 1861—would be considered “sectarian,” and therefore unconstitutional, under the rule proposed by appellants. And *amici* have been unable to discover any prayers from that era that would be considered by appellants to be “nonsectarian”—i.e., without reference to Christ or scripture. Appellants approach simply cannot be reconciled with *Marsh*. Appellants cannot hope to reconcile that result with *Marsh*.

**2. In a five-year period of regularly recorded Congressional prayers, most mentioned Christ or referenced Christian scripture.**

Congress began recording chaplains’ prayers more often after the turn of the century. The House of Representatives published a book that included each of the prayers in 1911, 1912, and 1913. Rev. Henry N. Couden, *Prayers Offered at the Opening of the Daily Sessions of the House of Representatives During the Sixty-second Congress of the United States*, H.R. Doc. No. 1458 (1913). *Amicus* further reviewed each of the prayers recorded in the Congressional Record between 1910

and 1914, for a total of 1,054 prayers over five years.<sup>2</sup> As the earliest set of prayers that was regularly recorded over a five-year period, these prayers from 1910-1914 are a useful data set for a statistical analysis of the historical tradition of legislative prayer in America. This analysis reveals the extent to which that tradition includes prayers that appellants would consider “sectarian” and thus unconstitutional.

Of 1,054 prayers, two were offered by rabbis; so 1,052 of the prayers were offered by Christian clergy. *Amicus* analyzed this data with reference to the number of prayers that (1) mention the name of Jesus Christ or reference Christ, and (2) reference either the Christian New Testament or the Jewish Scriptures (or “Old Testament”).

Out of 1,052 prayers:

- 59% use the words Jesus or Christ explicitly.<sup>3</sup>
- 75% reference Jesus Christ.<sup>4</sup>
- 90% reference Jesus Christ or the New Testament.<sup>5</sup>
- In total, 94% reference Christ, the Bible, or both.<sup>6</sup>

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<sup>2</sup> The text of each of these prayers is not reproducible within the word limits of this brief, but *amicus* has available at the Court’s request a chart detailing the statistical analysis of the prayers. Should the Court request it, *amicus* will produce an appendix that includes this research within a week’s notice.

<sup>3</sup> 620 prayers.

<sup>4</sup> 792 prayers reference Jesus Christ. This number includes prayers that clearly reference Jesus Christ as “Master” “Great Exemplar” and other similar terms, or ended prayers “In His name.”

<sup>5</sup> 946 prayers either reference Jesus Christ or the New Testament. 321 prayers total reference the New Testament, 154 prayers reference the New Testament that do not also reference Jesus Christ.

Representative examples include:

- Almighty God, our heavenly Father, Thou art our Shepherd. Though Thou causest us to walk through the valley of the shadow of death, we will fear no evil. Thou art, O God, still with us. The rod of Thy faithfulness and the staff of Thy providence, they comfort us. Make us, we humbly pray Thee, to rest in the green pastures of Thy tender mercies and lead us beside the still waters of Thy heavenly grace. Grant that goodness and mercy may follow us all the days of our life and that we may dwell in the house of Thy presence forever. . . . In the name of Him who abolished death and brought life and immortality to light, hear our prayer. Amen. 48 Cong. Rec. S7739 (Reverend Ulysses G. B. Pierce, June 6, 1912) (referencing Psalm 23).
- We look to Thee for Thy guidance and commit our ways unto Thee and pray that Thou wilt order our steps. If Thy presence go not with us, send us not up hence; but if Thou wilt guide Thy servants, we will find our place in the order of a divine government whose lord is God. To this end we submit ourselves to Thee in Jesus' name. Amen. 50 Cong. Rec. S39 (Reverend Forrest J. Prettyman, Apr. 7, 1913).
- We remember the patriotism of the old Jewish nation and how Jerusalem was so dear to them, and how Palestine became the Holy Land because they lived holy lives upon that soil; and we know very well that it was no more holy land than America can be if we will live holy lives upon our native soil; if we will recognize that this is a chosen land; if we will recognize that Almighty God is our Jehovah and that He leadeth the Nation. . . . [K]eep us by Thy almighty power in Thine almighty hands, which are safe hands for us to rest in; kind hands, the hands of the Christ, in whose name we ask it all. Amen. H.R. Doc. No. 1458 at 64-65 (Reverend Royal A. Simonds, Mar. 9, 1912).
- O Lord, our God and our Father, . . . [h]elp, we beseech Thee, to throw our influence on the side of right, truth, and justice, and

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<sup>6</sup> At least 404 prayers reference either the New Testament or Jewish scripture.

- eschew all evil, that Thy kingdom may come and Thy will be done in the earth as it is in heaven, through Jesus Christ, our Lord. Amen. 45 Cong. Rec. H1289 (Reverend Henry N. Couden, Jan. 31, 1910) (citing the Lord's Prayer, Matthew 6).
- [U]nto Thee Thou King Eternal, invisible, Thou only wise God, be the glory forever and ever. Amen. 51 Cong. Rec. S11515 (Reverend A.J. Dickinson, July 2, 1914) (quoting 1Timothy 1:17).
  - Eternal and everliving God, our heavenly Father, from whom no secrets are hid, we freely confess our weakness, our sins, and most fervently pray for Thy forgiveness. Thou knowest the spirit is willing but the flesh is weak. Bear with us, O we beseech Thee, and create within us clean hearts and renew a right spirit within, that we may go forward from this moment taking up life anew to larger attainments under Thy leadership, supported by Thy strength. In the spirit of the Lord Jesus Christ. Amen. H.R. Doc. No. 1458 at 10-11 (Reverend Couden, Apr. 11, 1911) (referencing Matthew 26:41 and Psalm 51:10).
  - Guide us ever to Thy glory at home and abroad with the righteousness which alone exalts a nation. We humbly ask, in the name of Jesus Christ our Lord. Amen. 51 Cong. Rec. S2560 (Reverend J.J. Muir, Jan. 30, 1914) (referencing Proverbs 14:34).
  - O Thou who art the life and light of men, the giver of every good gift, the inspiration of all our longings, hopes, and aspirations, the God of our salvation, pour down upon us, we beseech Thee, Thy spiritual gifts and grant us every blessing which makes for righteousness, that we may be true to our better self and grow day by day into the likeness of our Maker, until we all come unto the measure and stature and fullness of Christ; for Thine is the kingdom, and the power, and the glory forever. Amen. H.R. Doc. No. 1458 at 30-31 (Reverend Couden, July 29, 1911) (quoting Ephesians 4:13 and Matthew 6:13).
  - Eternal God, source of all wisdom, strength, and purity, help us with increasing faith and confidence to draw copiously upon Thee for light to guide, strength to sustain, and purity to shield us from the polluting hand of sin, that we may love mercy, do justly, and walk humbly with Thee, our Father, as faithful servants, and bring



forth the fruits of the spirit abundantly, to the honor and glory of Thy holy name. Amen. *Id.* at 15 (Reverend Couden, May 2, 1911) (quoting Micah 6:8 and Galatians 5).

- Almighty Father, we invoke Thy blessing upon us to-day as we pray for Thy guiding hand and spirit upon our Representatives that they shall represent and guide our Nation. . . . We ask all these blessings in the name of our Saviour and Redeemer. Amen. 51 Cong. Rec. H14422 (Reverend Charles H. Hume, Aug. 29, 1914).
- Father Almighty, boundless the resources, endless the mercies, plenteous the gifts poured out upon us. Help us as rational beings gifted with the power of choice to lay hold upon these things, make them ours, that we may wisely use them to the uplift of our souls and the furtherance of Thy kingdom, that peace and good will may reign supreme. In the spirit of the Lord Christ. Amen. H.R. Doc. No. 1458 at 114-115 (Reverend Couden, Dec. 7, 1912) (all emphases added).

Prayers were often timely, addressing current events:

- On the first session in 1910, Rev. Couden prayed: “Once more, Almighty God, our Heavenly Father, in the dispensation of Thy providence are we brought face to face with a new year. The past is gone, with its joys and sorrows, hopes and disappointments, victories and defeats, leaving us the richer, if we are wise, by its experiences. Help us, . . . that we may increase to our good and add somewhat to the public weal, seeking ever to find the best that is in ourselves and the best that is in our fellow-men; that we may lend a helping hand to others and glorify Thy holy name, in Christ Jesus our Lord. Amen.” 45 Cong. Rec. H289 (Jan. 4, 1910).
- On the day after the Titanic sank, Senate Chaplain Prettyman prayed: “Though Thou slay us, yet will we trust in Thee. Comfort our hearts, O God, and graciously grant that neither height nor depth may separate us from the love of God which is in Christ Jesus our Lord. For Thy name's sake hear our cry and answer our prayer. Amen.” 48 Cong. Rec. S4836 (Apr. 16, 1912) (referencing Job 13:15 and Romans 8:39).

- After World War I began, House Chaplain Couden concluded his prayer “in the name of the Prince of Peace. Amen.” 51 Cong. Rec. H12879 (July 28, 1914).
- On the last meeting before Easter, Rev. Couden prayed, quoting Romans 8: Our Father in heaven, our hearts go out to Thee In love and gratitude for that marvelous event which the Christian world is preparing to celebrate on the morrow in a holy service of praise and thanksgiving, for in that great event Thou hast taught us that good is stronger than evil, life is stronger than death, and that Thy love Supreme will at last bring every wandering soul to Thee In purity. For I am persuaded that neither death, nor life, nor angels, nor principalities, nor powers, nor things present, nor things to come, nor height, nor depth, nor any other creature, shall be able to separate us from the love of God, which is in Christ Jesus our Lord. Amen. 45 Cong. Rec. H3794 (Mar. 26, 1910).
- On the death of King Edward VII of England: Our Father in heaven, our hearts go out in sympathy to the people of England in the loss of their King. . . . Comfort, we beseech Thee, those who mourn their sovereign, especially the family, the bereaved Queen and children, in the blessed hope of the Gospel of Jesus Christ. 45 Cong. Rec. H4855 (Reverend Henry N. Couden, May 7, 1910) (all emphases added).

This representative data set of legislative prayers shows that any rule of constitutional law forbidding so-called “sectarian” prayers—here, meaning prayers with explicit Christian references—is at war with the historical record and with the interpretive approach required by the Supreme Court in *Marsh*. In other words, appellants’ suggestion that courts should prune the “sectarian” branches of legislative prayers would require courts to bring down the whole tree. Appellants admit that this is their ultimate goal, Appellant’s Br. at 31 n.6, but they cannot

reconcile their position with the binding authority of *Marsh* and the plain indications of the historical record. Even on the assumption that references to Jewish scripture are “non-sectarian,” a constitutional rule forbidding references to Christ or Christian scripture would invalidate 88% of the prayers offered in Congress from 1910 to 1914.

The wording of each prayer clearly depends on the choices and style of the individual chaplain. There is no evidence that chaplains were *required* to mention Christ. In fact, they chose not to do so a quarter of the time. By the same token, however, there is no indication that they were required to measure their words, ideas, or concepts by any theological yardstick—and certainly not according to whether the prayers were “sectarian” or “non-sectarian.”

Some chaplains closed in the name of Jesus Christ, and others did not. Reverend Pierce, the Senate Chaplain from 1909-1913, rarely directly mentioned Christ’s name, but he frequently incorporated scripture and Christian hymns into his prayers. *See, e.g.*, 47 Cong. Rec. S4377 (Aug. 22, 1911) (quoting Numbers 6:25, “we pray Thee to bless and keep us, to make Thy face to shine upon us, and shield us with Thy grace, to lift up the light of Thy countenance upon us and give us peace.”). Of his forty-two prayers, thirty-five, or 83%, reference scripture. Pierce’s successor, Rev. F. J. Prettyman, nearly always closed: “For Christ's sake.

Amen.” *See, e.g.*, 51 Cong. Rec. S1752 (Jan. 16, 1914). Their colleague in the House, Rev. Henry Couden, had no fixed pattern. *See, e.g.*, H.R. Doc. No. 1458 at 14 (one prayer ends by reciting the Lord’s prayer, one implicitly ends in Christ’s name, and another closes praising “Almighty God”). The openings of these prayers are also varied, ranging from “Almighty Father,” 51 Cong. Rec. H13166 (1914), to “Infinite and Eternal Spirit,” 51 Cong. Rec. H15105 (1914), from “O Thou great Jehovah,” 51 Cong. Rec. H15269 (1914), to a guest chaplain’s “In the name of the Father, and the Son, and the Holy Ghost.” 51 Cong. Rec. H15831 (1914). Another Senate Chaplain, Edward E. Hale, whose prayers were recorded for 16 weeks in 1904, ended each and every prayer with a Bible reference and a recitation of the Lord’s Prayer from the Christian New Testament. Edward E. Hale, *Prayers offered in the Senate of the United States in the winter session of 1904* (1904). Every one of his ninety-three recorded prayers would be unconstitutional under appellants’ rule.

Other data sets of legislative prayers from the nineteenth century support the conclusion that each clergy’s style of prayer, while unique, is based on the formulas and language of their specific faiths. The 1910-1914 prayers constitute the most extensive data set available, but a few small collections of state legislative prayers from the nineteenth century have been published. Two sets of prayers from

the Massachusetts legislature—100 prayers from 1868 and fifty prayers in 1892—point in the same direction as the larger data set.<sup>7</sup> From the 1868 set, the Unitarian minister William R. Alger referenced either Jesus Christ or the Bible in at least 42% of the prayers, while in 1892, 70% of the prayers by a Congregational minister, Daniel Wingate Waldron, referenced either Christ or scripture. Unitarian Alger preferred, apparently, to express his prayers without explicit references to Christ, praying, for example: “Author of nature and Supreme Ruler of men, possessing every perfection in Thyself Thou needest nothing from us.” William R. Alger, *Prayers Offered in the Massachusetts House of Representatives During the Session of 1868* 11 (1868). The Congregationalist chaplain, however, employed a different style, quoting from Galatians 6:2: “Inspire us with a large sympathy, that we may be numbered with those who bear one another’s burdens, and so fulfill the law of Christ.” Daniel Wingate Waldron, *The Chaplain's Prayers* Feb. 18, 1892 (1892).

The tradition reflected in these prayers is no relic of the past—to the contrary, it continues today. Congressional prayers still regularly invoke the name of Christ. See, e.g., Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 (1996) (“Indeed, within the last six years alone,

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<sup>7</sup> These data sets are also available at the Court’s request.

over two hundred and fifty opening prayers . . . have included supplications to Jesus Christ.”). To be sure, as our representatives have become more diverse, prayers have come to include more references to other religious traditions. *Compare* 158 Cong. Rec. H1365 (daily ed. Mar. 16, 2012) (Prayer of the Reverend Blake Johnson: “Lord, keep this Nation under Your care and guide us in the way of justice and truth, through Jesus Christ our Lord, who lives and reigns with You and the Holy Spirit, one God, world without end.”) *with* 153 Cong. Rec. S111 (July 12, 2007) (Prayer of Mr. Rajan Zed: “We meditate on the transcendental Glory of the Deity Supreme, who is inside the heart of the Earth, inside the life of the sky, and inside the soul of the Heaven. May He stimulate and illuminate our minds.”). But the basic point remains: express references to particular religious concepts, persons, or scriptures have never been understood to run afoul of the Establishment Clause.

## **II. Parsing the content of prayers is unconstitutional.**

In addition to undermining *Marsh*, the approach suggested by appellants would require a federal court to dictate what a chaplain or pastor may or may not say in front of the legislature. This raises constitutional problems of its own.

**A. Appellants cannot provide a workable definition of “sectarian”**

Appellants’ basic claim that “sectarian” language in legislative prayer renders the prayer unconstitutional is unworkable for two basic reasons.

First and fundamentally, all prayers refer in some respect to a supreme being or beings and so could be considered “sectarian” under appellants’ proposed test. References to a divinity or some other higher power are what distinguish a prayer from any public statement. Merriam-Webster defines “prayer” as “an address (as a petition) to God or a god in word or thought.” Merriam-Webster's Collegiate Dictionary 975 (11th ed. 2003). From this vantage point, then, *any* prayer—simply by virtue of the fact that it is a *prayer*—could be considered “sectarian” and therefore violative of the Establishment Clause. That cannot be the law for the simple reason that it would overrule *Marsh*.

Second, there are so many ways to refer to the divine that a discussion of which names are “sectarian” and which are “non-sectarian” is futile and would, in any event, entangle courts in endless and pointless theological debates. Prayers addressed to “Allah,” “God,” “Lord,” “Thou Great Father Soul,” “Papa Jesus,” or “Father in Heaven,” are each distinctive in theological nuance. As *Pelphrey* noted, there are immense practical difficulties in drawing the line between “sectarian and nonsectarian expressions” in such prayers. 547 F.3d at 1272. “Even the individual

[plaintiffs] cannot agree on which expressions are ‘sectarian.’” *Id.* (noting disagreement between plaintiffs’ counsel and individual plaintiff’s testimony over the use of “Heavenly Father” and “Lord”). Appellants in this case do no better than the plaintiffs in *Pelphrey*. They offer no rule or list that would guide courts in a constitutional manner, because there is no such line.

**B. Government control over the content of prayers is unconstitutional.**

The Supreme Court has consistently recognized the constitutional problems with dictating the content of prayers. *See, e.g., Marsh*, 463 U.S. at 792 (“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.”). Appellants ask this Court to disregard these problems, to parse the language of the prayers in the record, and to determine that they were made with the intent to “proselytize.” Appellant’s Br. 38. Lakeland’s prayers are more ecumenical than the prayers of Congress’ historical tradition. Striking down these prayers on the basis of their Christian references, therefore, would be a serious departure from tradition. Simply mentioning the name of Christ in prayers is not unconstitutional. As *Marsh* stated, the founding fathers “did not consider opening prayers as a proselytizing activity or as symbolically placing the government’s official seal of approval on one religious



view” but “as conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions.” *Marsh* 463 U.S. at 792 (internal quotations omitted).

Instead, a rule like the one proposed by appellants would unconstitutionally discriminate between religions, entangle courts in questions of religious doctrine, and coerce people of faith to pray in a certain way. In other words, appellants are inviting the Court to adopt an analysis that, in and of itself, risks violating the Establishment Clause. This would set a far more troubling precedent than anything contained in the prayers themselves.

The Supreme Court has long recognized that discriminating between religions violates “[t]he clearest command of the Establishment Clause.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). Prohibiting certain ways of referring to God would prohibit the prayers of some faiths while allowing others. The Methodist priest would be prohibited from asking Jesus’ blessing, while the Unitarian minister would be able to invoke a generic “higher power.” Federal courts have recognized that discrimination inevitably occurs when government benefits are meted out according to the “sectarian” nature of a religious practice. In *Colorado Christian University v. Weaver*, the Tenth Circuit struck down a government program that denied funds to universities that were “pervasively sectarian” because the government’s policy constituted discrimination “expressly based on the degree of

religiosity of the institution” 534 F.3d 1245, 1259 (2008). Nor is it an effective argument that each religion has a range of prayers at its disposal, some more expressly “sectarian” than others. The court in *Weaver* rejected the argument that “[a]ny religious denomination . . . could establish a pervasively sectarian institution,” holding that discrimination “between ‘types of institution’” was just as unconstitutional as discriminating between denominations themselves. *Id.* at 1259. The same principle applies to types of prayer.

Parsing which prayers are sectarian causes even more problems than discrimination between prayers: it risks entangling courts in “controversies over religious doctrine and practice,” a position that clearly violates the First Amendment. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976). For a court to sift through a list of prayers and examine the extent to which they invoke the name of a deity and whether they are intended to proselytize necessarily requires a court to ask theological questions about the prayers. “It is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs.” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Is “Prince of Peace” a reference to Jesus? Is “Heavenly Father” a permissible reference or is it too restrictive of faiths that would not refer

to God in that way? These are questions the Court can (and indeed must) avoid asking; it can accomplish that by giving wide latitude to the content of prayers.

Even more visible than the danger of entanglement is the danger of government coercion of religion. If it is impermissible for the government to consider questions of religion and to discriminate between prayers, it is blatantly unconstitutional for the government to dictate what prayers ministers may pray. In *Lee v. Weisman*, the Supreme Court held that for a government official to provide guidelines on prayer and request that they be nonsectarian “directed and controlled the content of the prayers” in violation of the Establishment Clause. 505 U.S. 577, 588 (1992).

Requiring that ministers omit or include certain terms in their prayers is essentially “the Government’s placing its official stamp of approval upon one particular kind of prayer,” which is “one of the greatest dangers” averted by the First Amendment. *Engel v. Vitale*, 370 U.S. 421, 429 (1962). In fact, the government “is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.” *Id.* at 430. Supreme Court precedent is clear: the Establishment Clause permits legislative prayer but it does not permit the government to censor that prayer.

**C. The term “sectarian” has a bigoted history.**

Even employing the *word* “sectarian” creates constitutional problems. In the nineteenth century, the term sectarian came to prominence along with a movement of xenophobic sentiment. *See Mitchell*, 530 U.S. at 828. At a time when the Catholic population was growing, and Nativist groups such as the anti-Catholic, anti-immigrant, Know-Nothing party were growing in size and political power, the term “sectarian” was an epithet applied to those who did not share the “common” Protestant religion. These Nativist groups fought their battles particularly in the common schools, attempting to edge out “sectarian” competition by enacting measures that required the reading of the King James Bible in public schools, and barring any public funds toward “sectarian” schools.

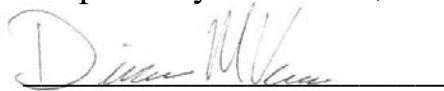
The “Blaine Amendment” to the Federal Constitution, named after the notoriously Anti-Catholic presidential candidate James G. Blaine, who proposed the measure in 1874, would have prevented any government funds from being used by “sectarian” (mainly Catholic) schools. The measure failed in Congress by a narrow margin, but by the early decades of the twentieth century, most states had either adopted, or had forced upon them by their Enabling Acts, similar provisions nick-named in Blaine’s honor.

The Supreme Court has repeatedly recognized and condemned the nefarious intentions behind these Blaine Amendments, and the pejorative meaning of the term “sectarian.” In *Locke v. Davey*, the Court noted the “link” between the Blaine Amendments and anti-Catholicism. 540 U.S. 712 (2004). Prior to that, in *Mitchell*, 530 U.S. 793, the Court’s plurality opinion pointed out the “shameful pedigree” of the history of hostility towards “sectarian” schools, noting that “it was an open secret that ‘sectarian’ was code for ‘Catholic.’” *Id.* at 828. Applying the term “sectarian” in the context of legislative prayer does not erase its pejorative meaning, bigoted history, or discriminatory intent, and courts should avoid employing it to determine the permissibility of religious practices.

### CONCLUSION

For the reasons mentioned herein, the ruling of the district court below should be affirmed.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Diana M. Verm", is written over a horizontal line.

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### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of June, 2012, the attached brief *amicus curiae*, together with this certificate of service has been filed electronically using the Court's ECF system and sent via ECF electronic notification system to counsel of record, and by commercial carrier to Pam Bondi at the mailing address of record, by commercial carrier to Eric O. Husby, 2001 W. Cleveland Street, Tampa, FL 33606, by commercial carrier to Mark N. Miller, One Lake Morton Drive Lakeland, Florida 33801, and by commercial carrier to Edwin A. Scales, III, P.A., 201 Front St., Ste. 333, Key West, FL 33040-8347.

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