ALLIANCE DEFENSE FUND
Defending Our First Liberty

December 11, 2006

Via Facsimile and U.S. Mail

Hon. H. Frank Ables, Jr.
Chairman, Oconee County Council
368 Smith Dairy Road
Westminster, SC 29693

RE: Legality of public invocations

Dear Chairman Ables,

The Alliance Defense Fund ("ADF") has been in contact with the Palmetto Family Council, the Rev. Wayne Morton, president of the Oconee County Ministerial Association, and other citizens concerned about the current controversy created by the American Civil Liberties Union ("ACLU") regarding the prayer policy of the Oconee County Council. We write to express our support and encouragement of your continued participation in the important American tradition of opening public proceedings with an invocation. Recently, elected officials in a number of American cities and counties have received correspondence from groups such as the ACLU that have made extraordinary demands for public invocations to be censored or altogether prohibited. We write to assure you that such drastic measures are unnecessary and inadvisable.

By way of introduction, ADF is a not-for-profit legal alliance defending the right to hear and speak the Truth through strategy, training, funding and litigation. Our organization exists to educate the public and the government about important constitutional rights, particularly the freedom of religious expression. When necessary, we litigate these issues, and have frequently been called upon to help defend public officials in this arena. We respectfully offer the following insight concerning this issue, and hope that it may useful in clarifying the current state of the law

I. LEGAL ANALYSIS

There is simply no question that a public body may open its meetings with an invocation. Public prayer has been an essential part of our heritage since the time of this nation's founding, and our Constitution has always protected the activity. *Moreover, such prayer can be direct and sectarian without running afoul of the First Amendment's Establishment Clause*

A. The Legality of Public Invocations is well Established.

The United States Supreme Court has acknowledged that official proclamations of thanksgiving and prayer, and invocations before the start of government meetings, are an essential part of our culture and in no way a violation of the Constitution. This has been a consistent principle in First Amendment jurisprudence.

The central case on this subject is *Marsh v. Chambers,* 463 U.S. 783 (1983), where the Court invalidated a challenge to the Nebraska Legislature's practice of opening each day of its sessions with a prayer by a chaplain paid with taxpayer dollars. In the opinion, Chief Justice Burger concluded:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.

Id., at 786. In fact, the Court noted that agreement was reached on the final language of the Bill of Rights on September 25, 1789, three days *after* those same members of Congress authorized opening prayers by paid chaplains. *Id.,* at 788. Clearly then, "To invoke divine guidance on a public body . . . is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.,* at 792. Those beliefs help define who we are as a nation.

In *Lynch v. Donnelly,* 465 U.S. 668, 675 (1984), the Court affirmed that "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." Justice O'Connor specified that such official references encompass "government practices embracing religion, including Thanksgiving and Christmas holidays, congressional and military chaplains and the congressional prayer room, the motto, the Pledge of Allegiance, and presidential proclamations for a National Day of Prayer." *Id.,* at 693 (concurring opinion). She explained, "Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.*

Thirty years before *Marsh* was decided, Justice Douglas famously observed, "We are a religious people whose institutions presuppose a Supreme Being. . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious

nature of our people and accommodates the public service to their spiritual needs." *Zorach v. Clauson,* 343 U.S. 306, 313-14 (1952). The Court held that the Establishment Clause does not prohibit "[p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a national holiday; 'so help me God' in our courtroom oaths-these and all other references to the Almighty that run through our laws, [and] our public rituals . . . [including] the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'" *Id.*, at 312-13. Ninety-one years before *Marsh,* the Court acknowledged in *Holy Trinity Church v. United States,* 143 U.S. 457 (1892), that America had a "custom of opening sessions of *ALL* deliberative bodies and most conventions with prayer. . ." *Id.*, at 471 (emphasis added). By simply following these traditions, government officials run no risk of violating the Constitution.[1]

B. Sectarian Prayers are Historical and Constitutionally Permissible.

Contrary to the recent contentions of the ACLU, the Constitution does *not* require the removal of all sectarian references from public prayers. Although the Supreme Court has not directly addressed the question, close reading of the case law indicates that *Marsh* and its progeny permit sectarian invocations. What matters most to the courts is not *what* is being spoken—but *who* is speaking and *why*.

In short, the rule of thumb is that the government cannot compel someone to pray in accordance with one preferred religious viewpoint. *For this reason, a policy which mandates only "nonsectarian" prayer would itself likely be unconstitutional.* Instead, public bodies are much safer when they provide an open forum for individuals to offer prayer according to the dictates of their own consciences. This may work best on a rotational basis. Under such a policy, the viewpoint expressed—whether sectarian or nonsectarian—is then left to the individual prayer-giver, rather than the government.

1. Supreme Court cases.

In *Marsh,* the Supreme Court gave no indication that the mere mention of a sectarian deity or belief would violate the Establishment Clause.[2] The specific issue was not before the Court at all, because the Nebraska chaplain removed references to Jesus from his prayer *before* *Marsh* was decided. The Court only referred to that development in an offhand footnote (*Id.*, 463 U.S. at 793, n.4), and in no way relied on that fact for its decision. Instead, the Court relied

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[1] As explained below, the lower courts have extended *Marsh* beyond the context of a state legislature, and applied it in deciding whether to permit prayer at meetings of local governmental bodies as well.

[2] In fact, the *Marsh* Court noted the sectarian nature of its own opening invocation: "In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court." *Marsh,* 463 U.S. at 786.

upon and referenced centuries of traditional invocations that *did* mention Jesus as well as other sectarian deities and beliefs. Neither *Marsh* nor any other Supreme Court case commands removal of all sectarian references from public prayer—particularly where different persons of varying creeds take turns offering the prayer. Rather, *Marsh* and its progeny hold that courts should be concerned with the broader context and circumstances surrounding the prayers. *See, Id.*, at 792-96.

2. Lower court cases.

The numerous appellate and district courts that have had occasion to apply *Marsh* have found no trouble with sectarian prayers—so long as they are not exploited and used for proselytizing. The lower courts have rightfully focused on the key guideline provided by *Marsh*.

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has <u>been exploited</u> to <u>proselytize or advance</u> any one, <u>or to disparage</u> any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

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

For example, the U.S. Court of Appeals for the Tenth Circuit, has stated that "the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause." *Snyder v. Murray,* 159 F.3d 1227, 1234, n.10 (10th Cir. 1998). In that case, the court held that a city council could lawfully bar a speaker because he would "proselytize" his own views and "disparage" others by offering a mock, unconventional "prayer." Applying *Marsh,* the court observed: "The kind of legislative prayer that will run afoul of the Constitution is one that *proselytizes* a particular religious tenet or belief, or that *aggressively advocates* a specific religious creed, or that *derogates another* religious faith or doctrine." *Id.*, at 1234 (emphasis added). Specifically addressing what it means to "advance" a particular faith under *Marsh,* the court found that, "All prayers 'advance' a particular faith or belief in one way or another. . . By using the term 'proselytize,' the [*Marsh*] Court indicated that the real danger in this area is effort by the government *to convert* citizens to particular sectarian views." " *Id.*, 1234, n.10 (emphasis added).

In the Fourth Circuit, which encompasses South Carolina, the court recently approved a legislative prayer practice in which various clergy in a county's religious community were invited to present invocations during meetings of the county board. In that case, *Simpson v. Chesterfield County Bd. of Supervisors,* 404 F.3d 276 (4th Cir. 2004), *cert. denied,* the court found it important that the County "made plain that that it was not affiliated with any one specific faith by opening its doors to a wide pool of clergy." *Id.*, at 286. The court did not, however, seem to reason that such a provision was an absolute prerequisite to the invocation practice's constitutionality, nor did it invoke the language of its earlier broad pronouncement in

Wynne v Town of Great Falls, 376 F.3d 292 (4th Cir. 2002), *cert. denied,* 125 S.Ct. 2990 (2005), that any reference to a particular deity is constitutionally impermissible.

The reason the *Wynne* case was easily distinguishable in *Simpson,* and from most other situations, is because the town council in *Wynne* exclusively invoked Jesus' name and also *publicly chided* the plaintiff for failing to stand and participate in the prayers. *Wynne* presented a genuinely exploitative situation where a town council "insisted upon invoking the name 'Jesus Christ' to the *exclusion of other deities* associated with any other particular religious faith." *Wynne*, at 295, 301. Obviously, such action may be deemed by a reviewing court as "exploiting" the invocation to "proselytize or advance Christianity." The Fourth Circuit's injunction against proselytizing town council prayers in *Wynne* thus does not fairly implicate all non-proselytizing prayers in every situation. In fact the court later clarified in *Simpson*:

> The facts of *Wynne* [ ] contrast sharply with those in the present case. The insistent sectarianism of the Great Falls prayers, *see Wynne,* at 294-96 & n. 2, violated even the spacious boundaries set forth in *Marsh*. [By contrast] Chesterfield's policy, adopted in the immediate aftermath of *Marsh,* echoes rather than exceeds *Marsh*'s teachings. The County never insisted on the invocation of Jesus Christ by name, as the Town Council in Great Falls did. *Wynne,* at 301.

Simpson, 404 F.3d at 283.

The Fourth Circuit further specified that, "A party challenging a legislative invocation practice cannot, therefore, rely on the mere fact that the selecting authority chose a representative of a particular faith, because some adherent or representative of some faith will invariably give the invocation." *Id.*, at 285.

The Ninth Circuit agrees. In *Bacus v. Palo Verde School Board,* unpublished-2002 WL 31724273 (9th Cir. 2002), the court held: "We need not decide whether the prayers 'in the name of Jesus' would be a permissible solemnization of a legislature-like body, provided that invocations were, as is traditional in Congress, rotated among leaders of different faiths, sects, and denominations." *Id.* at 1.

More recently, federal district courts have upheld non-proselytizing, sectarian school board prayers (*Dobrich v. Walls,* 380 F.Supp. 2d 366 (D. Del., Aug. 2, 2005), and non-proselytizing but sectarian county commission meeting prayers in Jesus' name (*Bats v. Cobb County,* 2006 WL 89853 (N.D. Ga., Jan. 13, 2006). Like the Fourth Circuit, the *Dobrich* court found it persuasive that in *Marsh*, "[t]he Court went on to find no violation of the Establishment Clause based on the fact that the clergyman offering the prayers was from one denomination, used Judeo-Christian prayers, and was paid at the public expense." *Id.*, at 376. The *Bats* court actually arrived at some helpful standards for reviewing a legislative prayer, and looked to whether the public officials had an "impermissible motive or intent" to proselytize only one faith, or to show "purposeful preference of one religious view to the exclusion of others." *Id.*, at

12. Below this type of threshold, the courts have consistently disclaimed any interest in the content of legislative invocations, announcing a strong disinclination "to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh* at 794-795.

II. CONCLUSION

Legislative prayers—even sectarian ones—are clearly constitutional and "deeply embedded in the history and tradition of this country." *Marsh,* at 786. And government officials cannot "assume the role of regulators and censors of legislative prayer." *Bats,* at 13. As that court summarized:

> It would seem anomalous for the outcome of the *Marsh* inquiry to turn on the obviousness or subtlety of the sectarian references in question; such a rule would create the perverse incentive for speakers to endeavor to couch sectarian concepts in opaque terms, and place courts in the unenviable position of determining just how 'obvious' a sectarian reference has to be before it must be excised from legislative invocations, even when not otherwise offensive to *Marsh*'s prohibition against proselytization, advancement, or disparagement.

Bats, at 13, n 14.

In his Farewell Address, President Washington admonished, "Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. ....The mere Politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity."[3] It is both lawful and wise for public officials to respect and cherish our religious heritage, and to invoke God's protection and guidance over their public work and our nation.

We hope that this letter will encourage you to ignore the present demands that you may have received from the ACLU or other like-minded groups. If ADF can provide you with any further information or assistance, or if you receive any threat of litigation to which we may be able to help you respond, please do not hesitate to contact us. As a not-for-profit public interest law firm, our services are provided *pro bono*

We thank you for your attention to this matter and your dedicated public service.

[3] September 19, 1796, Farewell Address. James D. Richardson, *A Compilation of Messages and Papers of the Presidents, 1789-1897* (Published by Authority of Congress 1899), Vol. 1, p. 220.

Very sincerely yours,

ALLIANCE DEFENSE FUND

J. Michael Johnson
Senior Legal Counsel

cc: Oconee County Council members:
Hon. Steven R. Moore
Hon. Thomas S. Crumpton, Jr.
Hon. William Rinehart
Hon. Marion E. Lyles
Ms. Opal O. Green, Clerk to Council
Mr. Tom Hendricks, Administrator

Dr. Oran P. Smith, President, Palmetto Family Council
Rev. Wayne Morton, President, Oconee County Ministerial Association
Hon. Dan Alexander, Mayor, Seneca, S.C.
State Senator Thomas C. Alexander
State Rep. Don C. Bowen
State Rep. William E. Sandifer III
State Rep. William R. Whitmire
Congressman J. Gresham Barrett
U.S. Senator Lindsey Graham