

No. 11-56318

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

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**SHELLEY RUBIN and MAUREEN I. FELLER,**

*Plaintiffs-Appellants,*

**v.**

**CITY OF LANCASTER,**

*Defendant-Appellee.*

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**On Appeal from the United States District Court  
for the Central District of California**

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**BRIEF AMICUS CURIAE OF  
WALLBUILDERS, INC.,**  
in support of Defendant-Appellee  
Urging Affirmance

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## **FRAP RULE 26.1 DISCLOSURE STATEMENT**

*Amicus Curiae*, WallBuilders, Inc., has not issued shares to the public, and it has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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## **INTEREST OF *AMICUS CURIAE***

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority on American history and on the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. WallBuilders and its constituents desire to see religion treated as the Framers of the First Amendment intended and seeks to clarify what the religion clauses of the First Amendment really mean.

This Brief is filed pursuant to consent of all parties.

## **STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)**

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. 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 the Brief; and no person other than counsel of record for *Amicus Curiae* WallBuilders, Inc., The National Legal Foundation, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

## **SUMMARY OF THE ARGUMENT**

Your *Amicus* argues that history teaches that the Constitution easily countenances public invocations before meetings of local governmental bodies. Such history is unequivocal and ubiquitous, counseling that public invocations made by government officials are firmly rooted in our national heritage, beginning in colonial America and extending to our national, state, and local governments. Further, this ubiquity is also emblematic of who we are as a nation, and consistent with the religious protections afforded by the First Amendment.

## **ARGUMENT**

### **I. PUBLIC INVOCATIONS PERVADE OUR NATION'S HISTORY AND ARE INOFFENSIVE TO THE CONSTITUTION.**

As the City of Lancaster has argued, the court below correctly analyzed the

invocation<sup>1</sup> at issue under *Marsh v. Chambers*, 463 U.S. 783 (1983). (Appellee’s Br. at 14.) The City is also correct that the key to *Marsh’s* analysis is history. (Appellee’s Br. at 14-17.) What is often overlooked, however, is the fact that the *Marsh* Court *deliberately* ignored the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and chose instead to be guided by history. One realizes this when the briefing at the United States Supreme Court is examined. *Marsh* and *Chambers* both argued that they should win the case under *Lemon*. Brief for Petitioners at 24-25, 39-47, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23), available at 1982 U.S. S. Ct. Briefs LEXIS 911 (hereinafter, *Marsh* Pet’rs Br.); and Brief for Respondent at 17-38, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23), available at 1983 U.S. S. Ct. Briefs LEXIS 1437 (hereinafter, *Marsh* Resp’t Br.). However, the United States filed an *amicus curiae* brief in which it argued *Lemon* only in the alternative. Brief *Amicus Curiae* for the United States at 31, 35-51, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23), available at 1982 U.S. S. Ct. Briefs LEXIS 910 (hereinafter, *Marsh* U.S. *Amicus* Br.). Its primary argument was that the Court should *not* use *Lemon* but should be guided by history,

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<sup>1</sup> The City argues that the only issue live on appeal is a single prayer given on April 27, 2010, in particular because the prayer contained a reference to Jesus or Jesus Christ. (Appellee Br. at 11, n.3.) As will be demonstrated below, regardless of whether a single prayer or the entire invocation practice is at issue, the overwhelming weight of the history and tradition of public invocations includes protections to the City for its policy as well as the challenged prayer.

especially noting that in the light of the weight of the historical arguments, “analysis of the legislative chaplaincy practice under the *Lemon* test seems pointless” and “ill-suited.” *Id.* at 34, 35.

In direct response, not only Chambers, but also his *amici*, argued that history was not a trustworthy guide. *Marsh* Resp’t Br. at 11-12, 39-48; Brief *Amicus Curiae* for Anti-Defamation League at 25-28, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23), available at 1983 U.S. S. Ct. Briefs LEXIS 1438; and Brief *Amicus Curiae* for Society of Separationists at 25-28, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23), available at 1983 U.S. S. Ct. Briefs LEXIS 1440. But the Court rejected that argument and did accept the argument of the United States that the case should be decided based upon historical principle and not under *Lemon*, often highlighting and citing much of the same historical support presented in the United States’ *amicus* brief. *See, e.g., Marsh*, 463 U.S. at 787-88; and *Marsh* U.S. *Amicus* Br. at 17-18. Thus, it is important to review some of that history and the way various courts have been guided by it.

Legislative prayer is, of course, part of a broader practice. “Invocations in legislative bodies, and in courts, state and federal, in the inaugurations of local, state and federal officers, and religious references in proclamations by mayors, governors and presidents are not new in this country.” *Lincoln v. Page*, 109 N.H.

30, 32 (1968). Summarizing the ubiquity of invocations of God in public life, Justice Scalia succinctly noted that “[f]rom our Nation’s origin, prayer has been a prominent part of governmental ceremonies and proclamations.” *Lee v. Weisman*, 505 U.S. 577, 633 (1992) (Scalia, J., dissenting). In fact, the “history and tradition of our Nation are replete with public ceremonies *featuring* prayers of thanksgiving and petition.” *Id.* (Scalia, J., dissenting) (emphasis added). These “invocations [have been] accepted as a matter of course at a wide range of public occasions, including legislative sessions, presidential inaugurations, and the opening of terms of court.” *Colo v. Treasurer & Receiver General*, 378 Mass. 550, 556 (1979).

In fact, in its *amicus* brief in *Marsh*, the National Conference of State Legislatures (NCSL) documented that invocations and prayers were at that time ubiquitous in our nation’s state legislative bodies.<sup>2</sup> Including Nebraska’s unicameral legislature’s chaplain at issue in *Marsh*, 26 state legislative bodies had “regular” paid chaplains. Brief *Amicus Curiae* for NCSL at 2-3, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23), available at 1982 U.S. S. Ct. Briefs LEXIS 912 (hereinafter, *Marsh NCSL Amicus Br.*) Additionally, both of the Texas state legislative bodies had “regular chaplains” that served a full session, but

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<sup>2</sup> This includes Massachusetts’ Senate, which only occasionally opened its sessions with prayer at the time *Marsh* was decided. *Marsh NCSL Amicus Br.* at 1. Interestingly enough, only a few years previously, Massachusetts’ Senate did still have paid chaplains, as will be discussed below. *Colo*, 378 Mass. at 551.

which were unpaid, bringing the total number of legislative bodies with regular chaplains to 28. *Id.* at 2-4. The remaining bodies “employ[ed] guest ministers or their own members and staff serving for . . . a day, week, or month,” with 31 of those legislatures paying the guest chaplain from the “legislative budgets.” *Id.* at 5-6. The regular chaplains were appointed in some states for a single legislative session, in others for two years, and in the South Carolina Senate for four years. *Id.* at 4. Every state using paid chaplains allowed reappointment. *Id.*

Invocations as part of legislative or deliberative bodies at the national, state, and local level is simply one significant thread completely “interwoven into the fabric of American life.” *Marsa v. Wernik*, 163 N.J. Super. 589, 594 (1978). The ubiquitous nature of these practices at the time of *Marsh* is unsurprising since “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.” *Marsh*, 463 U.S. at 786. Although, the “long history of a certain practice, . . . and its acceptance as an uncontroversial part of our national and State tradition” are not dispositive as to whether that practice is constitutional, such considerations “do suggest that [a court] should reflect carefully before striking it down.” *Colo*, 378 Mass. at 557. As Justice Holmes famously stated, “a page of history is worth a volume of logic.” *New York Trust Co. v. Eisner*, 256

U.S. 345, 349 (1921).

And, as just noted, the history of legislative invocations begins in the colonial era dating, for example, to 1712 in Virginia and 1754 in Maryland. *See Marsh U.S. Amicus Br.* at 15 (citing *Journal of the House of Burgesses of Virginia* 34, 36 (Nov. 20 & 21, 1712); and *Votes and Proceedings of the Lower House of Assembly of the Province of Maryland* 4 (Dec. 12, 1754). Additionally, the “first item of business at the Virginia Colony Convention of Delegates was a resolution ‘[t]hat the Reverend Thomas Price be appointed chaplain to this Convention, and that he be desired to read prayers every morning at 10 o’clock.’” *Marsh U.S. Amicus Br.* at 15 (citing and quoting *Proceedings of the Virginia Convention of Delegates, 1775-1776*, at 59 (Dec. 5, 1775)). “At the conclusion of the session, the Convention provided for allowances [*i.e.* payment] ‘to the several officers of this Convention,’ including the chaplain.” *Id.* (citing and quoting *Proceedings of the Virginia Convention of Delegates, 1775-1776*, at 102 (Jan. 20, 1776)).

Further, the colonial chaplaincy tradition continued right into the infancy of our national, state, and local government. For instance, at the national level and as the Supreme Court noted in *Marsh*, the first sessions of the “Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain.” 463 U.S. at 787. Also of significance, “at least

six ratifying conventions (Massachusetts, Connecticut, New Jersey, New York, Rhode Island, and Virginia) elected chaplains as officers or had visiting ministers deliver opening prayers.” *Marsh U.S. Amicus Br.* at 18, n.6 (citing *Debates, Resolutions and Other Proceedings of the Convention of the Commonwealth of Massachusetts* 24 (Jan. 9, 1788); 2 J. Elliot, *supra*, at 2; *Litchfield Monitor (Conn.)* 5 (Jan. 14, 1788); *Pennsylvania Packet* (Dec. 15, 1787); *New Jersey Minutes of the Convention* 7 (Dec. 13, 1787); *Journal of the Convention of New York* 7 (June 17, 1788); W. Staples, *Rhode Island in the Continental Congress, 1765-1790*, at 668, 670, 674 (1971); *Debates and Other Proceedings of the Convention of Virginia* 13 (June 2, 1788); 3 J. Elliot, *supra*, at 1).

Further, after ratification of the Constitution, “the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer.” *Id.* at 787-88. Significantly, in 1789, both the House and the Senate not only elected chaplains, they also passed a statute providing for the chaplains pay at a rate similar to that which the legislators themselves received. *Id.* at 788, n.7.

Further, the congressional chaplains were appointed without concern for significant denominational diversity. Rather, the First Congress simply chose to ensure that the House and Senate chaplains were of different denominations and

that they would interchange the chaplains weekly between the two houses (a practice that lasted approximately 50 years). *Marsh U.S. Amicus Br.* at 18 (citing 1 Senate J. 12; and 1 House J. 16). The first eight Senate chaplains were Episcopalian, the first three House chaplains were Presbyterian, and the vast majority of the chaplains were Protestant Christians. *Id.* at 28-29 (citing *Chaplains of the United States Senate, April 25, 1789 to Date* (December 8, 1982); and *History of the United States House of Representatives*, H.R. Doc. No. 250, 89th Cong., 1st Sess. 212 (1965)).

The chaplaincy for the United States Congress was specifically reviewed by committees of the Thirty-first, Thirty-second, and Thirty-third Congresses, concerning the “constitutionality and desirability of maintaining federal chaplaincies in the House and Senate as well as in the military.” *Id.* at 21-22 (citing A. Stokes & L. Pfeffer, *Church and State in the United States* 479-80 (Harper & Rowe rev. 1st ed. 1964)). Each of the three Congresses’ committees deliberated and issued reports “tracing the history of the federal chaplaincies in this country and conclud[ed] that [the chaplaincies] were sound both as a matter of constitutional jurisprudence and public policy.” *Id.* at 22 (citing H.R. Rep. No. 171, 31st Cong., 1st Sess. (1850); S. Rep. No. 376, 32d Cong., 2d Sess. (1853); and H.R. Rep. No. 124, 33d Cong., 1st Sess. (1854)). Not surprisingly, therefore,

the congressional “practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.” *Marsh*, 463 U.S. at 788.

*See also*, Congressional Research Service, *House & Senate Chaplains: An Overview*, 1 (May 26, 2011).

That the chaplaincies are constitutionally sound is especially noteworthy when one considers the duties of the chaplain. For instance, the House chaplain is engaged in varied ministries, including opening sessions of Congress, praying at special events, and offering counsel to members of Congress. Chaplain’s Office Brochure, [http://chaplain.house.gov/chaplaincy/chaplain\\_brochure.pdf](http://chaplain.house.gov/chaplaincy/chaplain_brochure.pdf) (last visited Nov. 21, 2011). The Senate chaplain has similar duties. [http://www.senate.gov/artandhistory/history/common/briefing/Senate\\_Chaplain.htm#2](http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm#2) (last visited Nov. 21, 2011) (chaplain’s “duties include counseling and spiritual care for the Senators, their families and their staffs). Furthermore, their prayers have often been of a sectarian nature and often included references to Jesus and His deity. As one scholar has noted, “from America’s earliest days to the present times, the prayers delivered by these chaplains have been true sacral prayers, and many of them, true Christian prayers.” Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2104 (Dec. 1996). By way of illustration, Epstein quoted the following three prayers:

“God of our Lord Jesus Christ, we thank Thee for blessing and prospering our land . . . . We look forward to the coming of our Lord and His kingdom . . . . In the name of our Lord who died that we might live. Amen.”

“O merciful Saviour, inspire us all to outthink, outdo, and outlove Thine enemies who are ours, and keep us aware of Thy everlasting presence. Free us, Divine Master, we pray Thee, of earthly fears and anxieties, and help us while facing our responsibilities to be true and faithful servants of Christ, giving loving service to our fellow men in His holy name. Amen.”

“O God, who makest us glad with the yearly remembrance of the birth of Thine only Son, Jesus Christ, at whose coming the angels sang of peace on earth to men of good will: Help us as again we draw near to His manger-cradle, to see in His infant face the light of Thine infinite love, and to find in Him the man that we may yet become . . . . We ask it in the name of the Babe of Bethlehem, for whom we long, and in that longing, are sure to find, even Thy Son, our Savior, Jesus Christ. Amen.”

*Id.* at 2104, n.17 (quoting various volumes of the Congressional Record from 1972, 1961, and 1941, respectively).

And the post-*Marsh* congressional prayers have also invoked Jesus’ name.

In particular, between 1990 and 1996, “over two hundred and fifty opening prayers delivered by congressional chaplains have included supplications to Jesus Christ.”

*Id.* at 2104. The prayers contain many references like “[w]e praise You for the way we see Your power displayed in the weakness of Jesus, Your goodness in His life, Your justice in the cross,” “[w]e make this prayer in the name of Jesus Christ because He taught us to pray, and He has given us such unworthy vessels as we are

the right to approach Thy throne with confidence,” and “Help us heed Jesus’ invitation to come to Him when we ‘labor and are heavy laden.’ Help us to count on His understanding, His love, His forgiveness, His renewal.” *Id.* at 2104, n.118.

In addition to the regularity of the prayers they prayed, the chaplains themselves often have become something of a fixture at Congress as well. In the House of Representatives, chaplains have served terms as long as 11, 12, 17, 21, 25, and 29 years. (Lengths of terms calculated from records available at <http://chaplain.house.gov/chaplaincy/history.html> (last visited Nov. 21, 2011).) The House chaplains during the twentieth century have served on average 21 years. Chaplain’s Office Brochure, [http://chaplain.house.gov/chaplaincy/chaplain\\_brochure.pdf](http://chaplain.house.gov/chaplaincy/chaplain_brochure.pdf) (last visited Nov. 21, 2011). Similarly, in the Senate, chaplains have served terms as long as 10, 10, 12, 14, 14, and 20 years. (Lengths of terms calculated from records available at [http://www.senate.gov/artandhistory/history/common/briefing/Senate\\_Chaplain.htm#2](http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm#2) (last visited Nov. 21, 2011).)

The history of invocations within state legislatures rivals that of the national practice, not the least of which includes the length of the chaplains’ service. Massachusetts, for example, has employed chaplains since 1780, and despite some modification of the practice in the mid-1800s, had continued to pay their chaplains, as authorized by statute, until at least the early 1980s. *Colo*, 378 Mass. at 556,

n.11, 557-58; *Marsh* NCSL *Amicus* Br. at 1, 2-3. Further, at the time *Colo* was decided, the Massachusetts’ House chaplain had served for 24 years, and the Senate chaplain had served for 20 years. *Colo*, 378 Mass. at 557.

Significantly, the *paid* chaplaincy in Massachusetts even survived a debate at the state constitutional convention in 1917-18, concerning the appropriation of public funds for religious purposes. *Colo*, 378 Mass. at 556. Although various amendments were proposed to prohibit public funding of parochial schools, the “appointment and payment of legislative chaplains continued without apparent dissension.” *Id.* In fact, one delegate to the convention noted that the “sentiment which led to the convention’s approval of an ‘anti-aid amendment’ was not that ‘the State is opposed to religion, . . . [We] bear testimony to that every morning in this Convention, sir, when we have the divine aid and assistance invoked to guide us in our deliberations.’” *Id.* (citing and quoting 1 Debates in the Massachusetts Constitutional Convention, 1917-1918, at 190 (1918)).

Nebraska’s chaplaincy practice is also well-documented, it being the subject of the dispute in *Marsh*. At the time *Marsh* was decided, Nebraska had employed (and paid) the same Presbyterian chaplain for sixteen consecutive years. 463 U.S. at 785. Moreover, the chaplaincy itself actually predated Nebraska statehood, having been instituted in 1855 while Nebraska was still a territory. *Marsh* U.S.

*Amicus* Br. at 11. Later, in 1867, the same year Nebraska became a state, the legislature “provided that the chaplain would be a compensated officer with the duty of opening each legislative session with a prayer.” *Id.* That same practice continued without change for more than 115 years. *Id.* In addition, to the longstanding chaplaincy in Nebraska, the chaplain at the time Marsh was decided had been serving 16 years and had for most of those years prayed explicitly Christian prayers. *Marsh*, 463 U.S. at 793, n.14.

Similarly, Indiana had opened its legislative sessions, usually with guest clergy sponsored by individual legislators, for 188 years before its practice was challenged. *Hinrichs v. Bosma*, 440 F.3d 393, 395 (7th Cir. 2006).

Although historical descriptions for prayers at local governmental meetings are not as prevalent in the cases, and some localities have only recently implemented the practice,<sup>3</sup> courts have noted the longstanding practice as a customary part of American life. In fact, in one dispute arising out of a challenge to a city’s prayer policy that dated to 1953, thirty-four cities joined to file an *amicus* brief, seeking to be a voice for some larger “dozens” of cities *in California*

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<sup>3</sup> See, e.g., *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 197 (W.D.N.Y. 2010) (noting that it was only in 1999 that the town began to “offer oral prayer at the start of Board meetings”). Yet the *Galloway* court had no problem applying *Marsh* to such a relatively recent innovation *within that town*. *Id.* at 216-17, 219-39.

opening their meetings with prayer. Brief *Amicus Curiae* for Thirty-four California Cities at 1, *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194 (Cal. App. 2002) (No. B148288), available at 2001 WL 34131868 (hereinafter, *Rubin Thirty-four Cities Amicus Br.*). Thus, if California itself had more than thirty-four towns including invocations at their meetings in 2002, it is no stretch of reason to think that hundreds or perhaps even thousands of cities, towns, and counties throughout the rest of the nation had similar practices.

To further illustrate the practices of the local governments regarding invocations, statements from several courts will suffice. For example, Salt Lake City's invocation practice is a venerable one. There the city government's practice of opening meetings with prayer dates back to its inception as a city in 1851. *Society of Separationists v. Whitehead*, 870 P.2d 916, 918, n.1 (Utah 1993). Other practices, like the one in the Indian River School District, were begun at the inception of the political body. The Indian River School District, upon its creation in 1969, opened its school board meetings with prayer from then through 2011. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 261 (3d Cir. 2011).

Other courts, like the court below, *Rubin v. City of Lancaster*, 2011 U.S. Dist. LEXIS 74879, at \*2 (C.D. Cal. July 11, 2011), simply characterized a town or county's prayer practice in general terms. In upholding a New Jersey town's pre-

meeting invocation, the New Jersey Supreme Court explained that “*in the past* meetings were customarily opened with an invocation by local clergy *until June 1976*, when council members individually began giving the invocations. *Marsa*, 86 N.J. at 238 (emphasis added). The District Court in Minnesota noted the “[l]ong-time custom and practice” in the United States of opening town meetings with prayer. *Bogen v. Doty*, 456 F. Supp. 983, 984 (D. Minn. 1978). Other municipalities and towns simply have “longstanding practice[s]” or “long tradition[s] of opening their meetings with prayer.” *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008); *Bats v. Cobb County*, 410 F. Supp. 2d 1324, 1325 (N.D. Ga. 2006). And as the *Marsa* court noted, any “rationale striking down the practice [of opening a town meeting with an invocation] as an excessive governmental entanglement with religion would extend to interdict prayers before federal and state legislative bodies,” *Marsa*, 163 N.J. Super. 594, a step *Marsh* plainly forbids.

Thus, invocations given before national, state, or local legislative meetings are permissible as consistent with the best and most venerable traditions of our nation. Such invocations<sup>4</sup> have extended well beyond the legislative prayer context.

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<sup>4</sup> Here, your *Amicus* uses the term “invocation” in two senses. First, invocation refers to a formal prayer offered “invoking” or requesting God’s help or blessing over a particular occasion, not unlike those offered at public meetings in the City

The Supreme Court has explained such patent religious sentiment thusly:

It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are “earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing . . . .]”

*School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212-213 (1963)

(internal citations omitted). In fact, as Justice O’Connor noted,

“for centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance.” *Elk Grove Unified Sch.*

*Dist. v. Newdow*, 542 U.S. 1, 36 (2004) (O’Connor, J., concurring). It is little

wonder the Supreme Court itself acknowledged, “[w]e are a religious people

whose *institutions* presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S.

306, 313 (1952) (emphasis added).

The City of Lancaster should rightly be permitted to be just one more of those “institutions” by calling upon God to open its meetings. The content of the prayer, the convictions of the one offering the prayer, and the frequency with which the person prays at the meeting are all of small import in contrast to the vast and unbroken practice of public invocations. Whether the chaplain has nearly always been protestant (as is the case with the United States Congress), or whether

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of Lancaster. Second, invocation also refers to more generalized calls by public officials for God’s help or blessing, albeit not necessarily as a formalized prayer.

the chaplain has retained his or her position for a decade or decades (as is the case in the United States Congress and was the case in *Marsh*), or whether the prayer reflects the convictions of the one praying, including praying in Jesus' name (as was true in *Marsh*, is often true in the United States Congress, and is true in the instant case), the Establishment Clause has easily accommodated this religious expression for over 200 years. It can (and should) accommodate such expression for 200 more.

### CONCLUSION

For the foregoing reasons, and for additional reasons stated in the Appellee's Brief, the judgment of the District Court should be affirmed.

Respectfully submitted,  
this 21st day of November, 2011

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## CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amici Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 4,247 words as calculated by Microsoft Word 2007.

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## CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2011, I have electronically filed the foregoing Brief *Amicus Curiae* of WallBuilders, Inc., in the case of *Rubin, et al. v. City of Lancaster*, No. 11-56318, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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