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Re: Secular Invocations

Board of Supervisors,

This letter is written on behalf of a Los Angeles County resident, Indra Zuno, who has made repeated requests to the Los Angeles Board of Supervisors to deliver a secular invocation at a Board of Supervisors meeting. The Board currently authorizes members of the community to deliver a brief invocation at the start of its meetings. Invocation speakers are invited from a broad population of religious leaders and community leaders within the County of Los Angeles Ms. Zuno received a letter dated February 26, 2014, from the office of Supervisor Zev Yaroslavsky, informing her that her latest request to deliver a secular invocation was denied. This letter respectfully requests that that the Board permit Ms. Zuno to deliver a secular invocation.

The American Humanist Association (AHA) is a national nonprofit organization with over 24,800 members, over 170 local chapters and affiliates, and over 200,000 online supporters across the country. The Appignani Humanist Legal Center, the AHA's legal arm, includes a network of cooperating attorneys from around the country, and has litigated cases involving the rights of Humanists in state and federal courts from coast to coast.

A review of the facts here raises serious concerns regarding the treatment received by Ms. Zuno in response to her request to deliver a secular invocation. Though the aforementioned denial letter was finally sent to her on February 26, 2014, she had been communicating with the county regarding the issue since last July, when she first expressed interest in delivering a secular invocation. Over the following months Ms. Zuno patiently waited and occasionally inquired regarding the status of her request, but was consistently met with unresponsiveness and delay. Despite her sincere interest, cooperation, and persistence, no attempt was made to work constructively with her, and she was finally denied in a bureaucratic and dismissive manner. Unfortunately, this series of events can only be construed as reflecting an unfair and unlawful bias against Ms. Zuno's secular views.

The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first of the two Clauses, "commonly called the Establishment Clause, commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The Establishment Clause "'means at least' that [n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Hartmann v. Cal. Dep't of Corr. & Rehab*., 707 F.3d 1114, 1125 (9th Cir. 2013) (citation omitted). *See County of Allegheny v. ACLU,* 492 U.S. 573, 610 (1989).

The California Constitution also demands separation of church and state in its Establishment Clause. Cal. Const. art. I, § 4. Additional provisions in the California Constitution go even further than the Federal Establishment Clause, adding more bricks to the wall of separation. The "No Preference" Clause found in Article I, section 4 is "more expansive" than the Federal Establishment Clause. *Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1123 (9th Cir. 2002). California courts and the Ninth Circuit "have interpreted [it] as censuring so much as even the *appearance* of religious partiality." *Murphy v. Bilbray*, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991) (emphasis added).[1]

Although the constitutionality of legislative prayers is currently pending before the Supreme Court, and its earlier decision, *Marsh v. Chambers*, upholding certain legislative prayers might be overturned in its entirety,[2] the Board's practice of refusing to authorize a resident to deliver a secular invocation is contrary to the Establishment Clause under existing precedents, independent of the Court's ultimate ruling in *Town of Greece v. Galloway*.

In *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983), the Court held that legislative prayers are permissible only if they do not "advance any one . . . faith or belief." In *Allegheny*, the Court made clear that *Marsh* does not "justify . . . legislative prayers that have the effect of affiliating the government with any one specific faith or belief" and emphasized the fact that the chaplain in Marsh "had removed all references to Christ." 492 U.S. at 603.[3]

Marsh specifically prohibits a county from categorically excluding certain faiths from delivering invocations, and this protection includes Atheists, Humanists and other non-theists. It is well settled that

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[1] *See also Hewitt v. Joyner*, 940 F.2d 1561, 1567 (9th Cir. 1991) ("not only may a governmental body not prefer one religion over another, it also may not appear to be acting preferentially"); *Ellis v. La Mesa*, 990 F.2d 1518, 1524 (9th Cir. 1993); *Vernon v. City of Los Angeles,* 27 F.3d 1385, 1395 (9th Cir. 1994); *Sands v. Morongo Unified Sch. Dist.,* 53 Cal. 3d 863, 883, 281 Cal. Rptr. 34 (Cal. 1991) (plurality); *Fox v. City of Los Angeles,* 22 Cal.3d 792, 796 (1978) (illumination of cross on city hall violated No Preference Clause).

[2] *Town of Greece v. Galloway*, 2013 U.S. LEXIS 7508 (U.S., Oct. 15, 2013)

[3] Lower federal courts, applying *Marsh* and *Allegheny* have frequently found sectarian legislative prayers unconstitutional. *See Joyner v. Forsyth Co.*, 653 F. 3d 341 (4th Cir. 2011); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004) (holding a town council's prayers that "invok[ed] the name 'Jesus Christ' . . . advance[d] one faith, Christianity, in preference to others, in a manner decidedly inconsistent with *Marsh*"); *Coles v. Cleveland Bd. of Ed*., 171 F. 3d 369 (6th Cir. 1999) (holding that school board's prayers that made "repeated reference to Jesus and the Bible" were unconstitutional); *Bacus v. Palo Verde Unified School District Board of Education*, 52 Fed. Appx. 355 (9th Cir. 2002) (holding that school board's prayers "in the name of Jesus" were unconstitutional); *Rubin v. Burbank*, 101 Cal. App. 4th 1194 (2002) (holding that city council's "invocation offered to Jesus Christ violated the Establishment Clause").

"religious beliefs protected by the Free Exercise and Establishment Clauses need not involve worship of a supreme being." *Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013) (*Kaufman II*). As correctly noted by Judge Posner, Establishment Clause jurisprudence treats "the nonreligious as a sect, the sect of nonbelievers." *ACLU v. St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986). Therefore, Atheism is treated as a religion for First Amendment purposes. *See County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); *Kaufman v. Pugh*, 733 F.3d 692 (7th Cir. 2013) (*Kaufman II*); *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005) (*Kaufman I*) (refusal to authorize Atheist study group violated Establishment Clause); *Reed v. Great Lakes Cos.,* 330 F.3d 931, 934 (7th Cir. 2003); *ACLU v. City of Plattsmouth*, 358 F.3d 1020, 1041 (8th Cir. 2004); *Desper v. Ponton*, 2012 U.S. Dist. LEXIS 166546, *5-6 (E.D. Va. 2012); *Hatzfeld v. Eagen*, 2010 U.S. Dist. LEXIS 139758, *17-18 (N.D.N.Y 2010); *Loney v. Scurr*, 474 F. Supp. 1186, 1194 (S.D. Iowa 1979); *State v. Powers*, 51 N.J.L. 432, 434-35 (N.J. Sup. Ct. 1889).[4]

As such, the Board is prohibited from refusing to authorize a secular invocation where, as here, it authorizes theistic (and even sectarian) invocations. Indeed, even in *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012), the town permitted anyone "to give an invocation, including adherents of any religion, atheists, and the nonreligious," and it had "never rejected such a request." The same was true in *Rubin v. City of Lancaster*, 710 F.3d 1087, 1090 (9th Cir. 2013). The Ninth Circuit made a point to observe that at least four invocations were "given by a self-identified 'metaphysicist,' one was given by a Sikh, and another by a Muslim." It upheld a city's legislative prayer practice on the grounds that the city had taken "every feasible precaution" to "ensure its own evenhandedness." *Id.* at 1097. For instance, the city's policy provided that "[n]either the council nor the clerk may 'engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered.'" *Id.* Moreover, the clerk had "never removed a congregation's name from the list of invitees or refused to include one." *Id.*

In upholding certain legislative prayers in *Pelphrey v. Cobb County,* 547 F.3d 1263, 1277-78 (11th Cir. 2008), the Eleventh Circuit relied on the "diverse references in the prayers," which included references to "Allah," "Mohammed," and the "Torah," which made it such that the prayers did not "advance any particular faith." More importantly, in *Pelphrey v. Cobb County*, 448 F. Supp. 2d 1357

[4] Humanism is also a religion under the First Amendment. *See, e.g.*, *Gillette v. U.S.*, 401 U.S. 437, 439, 461-62 (1971) (entertaining free exercise claim "based on a humanist approach to religion"); *U.S. v. Seeger*, 380 U.S. 163, 176 (1965); *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961) ("Buddhism, Taoism, Ethical Culture, [and] Secular Humanism" are "religions"); *Newdow v. United States Cong*., 313 F.3d 500, 504 n.2 (9th Cir. 2002) ("recognized religions exist that do not teach a belief in God, e.g., secular humanism."); *U.S. v. Ward*, 989 F.2d 1015, 1017-18 (9th Cir. 1993) (many "'believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace.'") (citations omitted); *Grove v. Mead School Dist*., 753 F.2d 1528, 1534 (9th Cir. 1985); *Kalka v. Hawk*, 215 F.3d 90 (D.C. Cir. 2000) (assuming Humanism is a religion); *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684, 689 (11th Cir. 1987) (same); *Chess v. Widmar*, 635 F.2d 1310, 1318 n.10 (8th Cir. 1980) ("Secular Humanism" is a "religion"); *In re Weitzman*, 426 F.2d 439, 457 & n.5 (8th Cir. 1970); *U.S. v. Meyers*, 906 F. Supp. 1494, 1499-1500 (D. Wyo. 1995); *Crockett v. Sorenson*, 568 F. Supp. 1422, 1425 (W.D. Va. 1983); *ACLU v. Eckels*, 589 F. Supp. 222, 227 (S.D. Tex. 1984); *In re "E"*, 59 N.J. 36, 55 n.4 (N.J. 1971); *Welker v. Welker*, 24 Wis. 2d 570, 575-76 (Wis. 1964); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673 (1st Dist. 1957).

(N.D. Ga. 2006), at the district court level, it was found that the county had engaged in a constitutionally unacceptable method of selecting clergy because representatives of "certain faiths were categorically excluded based on the content of their faith." *Id.* at 1373-74. The Eleventh Circuit upheld that finding. *Pelphrey*, 547 F.3d at 1279 (affirming the district court's finding that the government violated the Constitution because it "'categorically excluded' certain faiths"). Notably, the Eleventh Circuit rejected the county's argument that "the selection process is immaterial when the content of the prayer is constitutional," because it noted, "[t]he central concern of *Marsh* is whether the prayers have been exploited to created an affiliation between the government and a particular belief or faith." *Id*. at 1281 (citing *Marsh*, 463 U.S. at 794-95). *See also Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013) (practice of opening city commission sessions with prayer did not violate Establishment Clause because city required that invitations to participate be extended to all religious groups).

Insofar as the Board is categorically excluding non-theists from delivering invocations, it is violating the Establishment Clause pursuant to *Marsh.*

In view of the above, I respectfully ask that the Board permit Ms. Zuno or any member of her secular congregation to deliver a secular invocation at an upcoming meeting. I request that you respond to me in writing (email preferred) at mmiller@americanhumanist.org by March 26, 2014 of the steps you will take regarding the secular invocation.

Thank you for taking the time to address this very important matter,

Monica Miller, Esq.
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