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February 2, 2012

VIA ELECTRONIC AND U.S. MAIL

North Carolina Attorney General Roy Cooper
Legal Services Division
9001 Mail Service Center
Raleigh, NC 27699-9001

Re: Constitutional Concerns about Sectarian Legislative Prayer Opening Sessions of
the North Carolina General Assembly

Dear Attorney General Cooper,

Several legislators and members of the community have contacted us to express concern about the North Carolina General Assembly's ("NCGA") frequent practice of convening session with sectarian prayer. According to the complaints, this practice occurs in both the House and Senate chambers, and a significant majority of these legislative prayers are explicitly sectarian and favor only one religion, Christianity. We write to make inquiries and to provide guidance in order to ensure that the practices of the NCGA are in compliance with the Establishment Clause of the First Amendment to the United States Constitution.

Pursuant to the First Amendment, governments are prohibited from encouraging or promoting religion. The government is rather to remain neutral on matters of religion. The Supreme Court has held that "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Court has also emphasized that government entities should not "demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)." *County of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989). The Establishment Clause applies to state and local government entities. *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 15 (1947).

Even though the Supreme Court has upheld the constitutionality of prayer before legislative bodies, *Marsh v. Chambers*, 463 U.S. 783 (1983), such prayer, as stated by the majority in *Marsh*, must not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-795.¹ This admonition in *Marsh* forbids sectarian legislative prayer. See *Joyner v. Forsyth County, North Carolina*, 653 F.3d 341, 348 (4th Cir. 2011), *cert. denied*, *Forsyth County, N.C. v. Joyner*, --- S.Ct. ----, 2012 WL 117559 (2012) (noting that the

¹ As is the case in this instance, *Marsh* pertained to the constitutionality of legislative prayer in the state legislature in Nebraska. *Marsh*, 463 U.S. at 784. Subsequent cases discussed in this letter make it clear that *Marsh* and its progeny apply to both state and local legislative bodies.

law “approv[es] legislative prayer only when it is nonsectarian in both policy and practice”); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 (4th Cir. 2004); *cert. denied, Town of Great Falls v. Wynne*, 125 S. Ct. 2990 (2005) (“The invocations at issue here, which specifically call upon Jesus Christ, are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather, they embody the precise kind of ‘advance[ment]’ of one particular religion that *Marsh* cautioned against.” (alteration in original)); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 426 (2005) (concluding that sectarian legislative prayer “runs counter to the credo of American pluralism and discourages the diverse views on which our democracy depends”); *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 356 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 909 (2009) (noting that “[t]he restriction that prayers be nonsectarian in nature is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith”).

As explained most recently in the *Joyner* case by the Fourth Circuit Court of Appeals, which has jurisdiction over the NCGA, as well as local governments in North Carolina, “faith is as deeply important as it is deeply personal, and the government should not appear to suggest that some faiths have it wrong and others got it right.” *Joyner*, 653 F.3d at 349. The court further explained:

As our nation becomes more diverse, so also will our faiths. To plant sectarian prayers at the heart of local government is a prescription for religious discord. In churches, homes, and private settings beyond number, citizens practice diverse faiths that lift and nurture both personal and civic life. But in their public pursuits, Americans respect the manifold beliefs of fellow citizens by abjuring sectarianism and embracing more inclusive themes.

Joyner, 653 F.3d at 355.

As such, “in order to survive constitutional scrutiny, invocations must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide.” *Id.* at 342. Writing for the court in *Joyner*, Judge Wilkinson explained that, “[s]ectarian prayers must not serve as the gateway to citizen participation in the affairs of local government. To have them do so runs afoul of the promise of public neutrality among faiths that resides at the heart of the First Amendment’s religion clauses.” *Id.* at 342-43. In order to “embrace a non-sectarian ideal,” state and local government entities must be “proactive in discouraging sectarian prayer in public settings.” *Id.* at 347, 354-55 (noting that “[t]ake-all-comers policies that do not discourage sectarian prayer will inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein”).

In light of the above constitutional concerns, we recommend that you adopt a policy to ensure that the NCGA halts the practice of opening sessions with sectarian invocations. Under *Marsh* and its progeny, the NCGA is still permitted to open its sessions with a prayer, so long as the prayer is nonsectarian. See *Simpson* and *Turner* (upholding nonsectarian prayer policies).

Thank you in advance for your attention to this matter. We request that you inform the ACLU-NCLF of your proposed course of action by **Friday, February 17, 2012**. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Katherine Lewis Parker
Legal Director

cc: Speaker Thom Tillis, North Carolina House of Representatives
President Pro Tempore Phil Berger, North Carolina Senate