ADL
Anti-Defamation League®

BY FAX & REGULAR U.S MAIL

June 1, 2016

The Honorable Nikki R. Haley
Office of the Governor
1205 Pendleton Street
Columbia, South Carolina 29201

Re: S. 233, As Amended

Dear Governor Haley,

On behalf of the Anti-Defamation League (ADL), we write in reference to S. 233, as amended, "A bill … relating to invocations to open meetings of deliberative bodies" ("S. 233A"). Although the legislation attempts to codify the U.S. Supreme Court's most recent legislative prayer decision, it has significant constitutional defects. We therefore urge you to veto this bill.

ADL is a leading national human relations and civil rights organization. For over a century we have been an ardent advocate for faith, fairness and freedom for all Americans.

Deliberative Bodies Do Not Include School Boards

S. 233A's definition of "Deliberative public body" includes a school district board. School boards, however, are not encompassed by the legislative prayer exception to the Establishment Clause established in *Marsh v. Chambers*, 463 U.S. 783 (1983).

Although the U.S. Supreme Court's recent *Greece v. Galloway* decision extended *Marsh's* legislative prayer exception to a local town board and it generally allows sectarian opening prayers before such entities, it made no reference to school boards. *See* 134 S. Ct. 1811 (U.S. 2014). Therefore, lower court decisions interpreting the meaning of a deliberative body under *Marsh* remain good law.

In *Cole v. Cleveland Board of Education*, the U.S. Court of Appeals for the Sixth Circuit specifically found that the *Marsh* exception is inapplicable to a school board and further ruled that the board's practice of opening meetings with non-sectarian or sectarian prayers was unconstitutional. *See* 171 F.3d 369 (6th Cir. 1999).

According to court, "the school board is an integral part of the public school system ...," and therefore "... its practice of opening its meetings with a prayer does not fit within the rubric of *Marsh.*" This ruling was based on

> *... the fact that school board meetings are an integral component of the Cleveland public school system serves to remove it from the logic in Marsh and to place it squarely within the history and precedent concerning the school prayer line of cases. That the Cleveland School Board is part of the public school system is underscored by the realities of its meetings. These meetings are conducted on school property by school officials, and are attended by students who actively and regularly participate in the discussions of school-related matters. This reality supports our conclusion that the logic behind the school prayer line of cases is more applicable to the school board's meetings than is the logic behind the legislative prayer exception in Marsh.*

The court also noted that

> *... the question of whether the Cleveland School Board is "a deliberative public body" as that phrase was used in Marsh is very much in dispute. The Supreme Court did not define the term, and has never discussed its scope. In fact, as far as Marsh is concerned, there are no subsequent Supreme Court cases. Marsh is one-of-a-kind, and whether its extension to the Cleveland School Board would conflict with Lee and the other school prayer cases is the very issue that makes this case a difficult one.*

Although the *Greece* decision extended the *Marsh* decision to a town board, it did not define and in fact did not make reference to the meaning of "deliberative body." Rather, the Court spoke in terms of legislative bodies stating,

> *Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent. "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." (Citations omitted).*

Public schools did not exist in the United States two centuries ago. Indeed, the first public school in America was established in 1821. As a result, the *Greece* decision does not contemplate a public school board. This decision therefore has no application to a school district board because it did not address school boards or further define the meaning of "deliberative body" referenced in *Marsh*.

Consequently, invocations before school district boards are subject to the *Lemon*, endorsement or coercion tests typically applied to religion in the public school issues. Applying these standards, an invocation – whether sectarian or non-sectarian – at a school district board meeting would be unconstitutional. *See generally Santa Fe Indep. School District v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).

Policies Authorizing Members of a Deliberative Public Body or a Chaplain Elected by Such a Body to Offer Invocations Violate the *Greece* Decision

S. 233A authorizes sectarian or non-sectarian invocations by a "public official, elected or appointed to the deliberative body ..." or "a chaplain elected by the public officials of the deliberative public body ... ." A sectarian invocation offered by such an official or chaplain would violate the *Greece* decision.

Although the *Greece* decision permits sectarian invocations at meetings of local legislative bodies, opening prayer practices are not without limitation. The Court required that a legislative body must implement a policy of non-discrimination with respect to prayer givers.

Lower courts interpreting the non-discrimination requirement have ruled that policies limiting invocations to members of a local legislative body are discriminatory in violation of *Greece*. *See Hudson v. Pittsylvania County,* 107 F.3d 524 (W.D. Va. 2015); *Lund v. Rowan County*, 103 F.3d 712 (M.D. N.C. 2015).

In *Hudson*, the district court stated:

> *[U]nlike in Town of Greece, where invited clergy and laypersons offered the invocations, the Board members themselves led the prayers in Pittsylvania County. Thus, unlike in Town of Greece, where the government had no role in determining the content of the opening invocations at its board meetings, the government of Pittsylvania County itself, embodied in its elected Board members, dictated the content of the prayers opening official Board meetings. Established as it was by the Pittsylvania County government, that content was consistently grounded in the tenets of one faith -- Christianity. As such, the prayer practice in Pittsylvania County had the effect of officially endorsing, advancing and preferring one religious denomination* ... .

Similarly, in *Lund* the district court stated:

> *Under the Board's practice, the government is delivering prayers that were exclusively prepared and controlled by the government, constituting a much greater and more intimate government involvement in the prayer practice than that at issue in Town of Greece or Marsh. The Commissioners here cannot separate themselves from the government in this instance. Additionally, because*

of the prayer practice's exclusive nature, that is, being delivered solely by the Commissioners, the prayer practice cannot be said to be nondiscriminatory. The need for the prayer policy to be nondiscriminatory was one of the characteristics key to the constitutionality of the Town of Greece's practice.

S. 233A's authorization of an invocation offered by chaplain elected by a deliberative public body raises the same constitutional issues as in *Hudson* and *Lund*. Under such a circumstance the deliberative body by choosing the chaplain would have an intimate role and involvement in the determining the content of invocations and thereby also run afoul of the non-discrimination requirement.

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ADL believes that religious diversity has flourished in America because of the separation of church and state mandated by both the Establishment and Free Exercises Clauses of the First Amendment. As such, government should neither promote nor be hostile to religion.

Although this belief may be distasteful to some, this position is not one of hostility towards religion. Rather, it reflects a profound respect for religious freedom and recognition of the extraordinary diversity of religions represented across America.

In light of the constitutional issues outlined above, we urge you to veto S. 233A.

Sincerely,

Mark Moskowitz
Southeast Regional Director