Nos. 18-2974, 18-3167

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIAN FIELDS, PAUL TUCKER, DEANA WEAVER, SCOTT RHOADES, JOSHUA NEIDERHISER, REV. DR. NEAL JONES, RICHARD KINIRY, PENNSYLVANIA NONBELIEVERS, INC., DILLSBURG AREA FREETHINKERS, LANCASTER FREETHOUGHT SOCIETY, AND PHILADELPHIA ETHICAL SOCIETY,

Plaintiffs / Appellees / Cross-Appellants,

v.

SPEAKER, PARLIAMENTARIAN, AND DIRECTOR OF SPECIAL EVENTS OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND REPRESENTATIVES FOR PENNSYLVANIA HOUSE DISTRICTS 92, 95, 97, 165, 167, 193, AND 196,

Defendants / Appellants / Cross-Appellees,

and

REPRESENTATIVE FOR PENNSYLVANIA HOUSE DISTRICT 182,

Non-Appealing, Nonparticipating Defendant.

On Appeal from a Final Judgment of the
United States District Court for the Middle District of Pennsylvania
Case No. 16-1764, Hon. Christopher C. Conner

BRIEF OF APPELLEES / CROSS-APPELLANTS BRIAN FIELDS, ET AL.

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CORPORATE DISCLOSURE STATEMENT

Plaintiff / appellee / cross-appellant Pennsylvania Nonbelievers, Inc., is a nonprofit religious organization incorporated in Pennsylvania. Pennsylvania Nonbelievers has no parent corporation. Pennsylvania Nonbelievers is a local partner of American Atheists, Inc., and is affiliated with Atheist Alliance International and the Council for Secular Humanism, all of which are nonprofit organizations.

Plaintiff / appellee / cross-appellant Philadelphia Ethical Society is a nonprofit religious organization incorporated in Pennsylvania. Philadelphia Ethical Society is a member of the American Ethical Union, which is a nonprofit religious organization incorporated in New York. Through its membership in the American Ethical Union, Philadelphia Ethical Society is affiliated with the International Humanist and Ethical Union, also a nonprofit organization.

No publicly held corporation has an ownership interest in Pennsylvania Nonbelievers or Philadelphia Ethical Society.

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INTRODUCTION

Government must not discriminate based on religion. It must not prescribe the content of prayer. And it must not coerce people to take part in prayer.

The Pennsylvania House of Representatives has violated all three of these fundamental rules. It has discriminated against adherents of nontheistic religions in selecting guest chaplains. It has prescribed that opening invocations be to a divine authority, not a secular one. And until after this lawsuit was filed, the House required visitors in its gallery to stand for opening prayers—a policy that its security officers enforced through repeated directives to rise.

The district court was right to enjoin these practices. The judgment should be affirmed.

JURISDICTIONAL STATEMENT

House's Appeal

Plaintiffs concur with the House's jurisdictional statement concerning its appeal, except for the House's assertion that its past practice of requiring visitors to rise for prayer is moot. *See infra* § III.B.

Plaintiffs' Cross-Appeal

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 because the claims at issue in the cross-appeal arise

under the First and Fourteenth Amendments to the U.S. Constitution. (A173–77 (complaint).) This Court has subject-matter jurisdiction under 28 U.S.C. § 1291 because the cross-appeal is from an order (A44–45) merged into an August 30, 2018 final judgment (A4–5) that disposed of those claims. Plaintiffs timely filed their cross-appeal on September 28, 2018. (A3703–05.)

ISSUES PRESENTED

1. Does the Establishment Clause of the U.S. Constitution's First Amendment permit the House to discriminate on the basis of religion by excluding atheists, Humanists, Ethical Culturists, and other nontheists when choosing members of the community to open House sessions with invocations? (Raised, *e.g.*, at A172–73 (complaint), A355 (summary-judgment motion); ruled on at A6, A38–39.)

2. Do the Free Exercise, Free Speech, and Equal Protection Clauses of the First and Fourteenth Amendments permit that discrimination? (Raised at A173–77 (complaint), A224–32 (motion-to-dismiss brief); ruled on at A44–45, A78.)

3. Does the Establishment Clause permit the House to maintain a policy—enforced by repeated directives from security officers—requiring visitors to rise for opening prayers? (Raised, *e.g.*, at A173 (complaint), Doc. 91 at 22, 52 (summary-judgment brief); ruled on at A6, A41.)

STATEMENT OF RELATED CASES

This case has never previously been before the Court.

Plaintiffs are aware of two pending cases that present legal issues similar to those here: *Williamson v. Brevard County*, 276 F. Supp. 3d 1260 (M.D. Fla. 2017), *appeal docketed*, No. 17-15769 (11th Cir. Jan. 2, 2018), and *Barker v. Conroy*, 282 F. Supp. 3d 346 (D.D.C. 2017), *appeal docketed*, No. 17-5278 (D.C. Cir. Dec. 20, 2017).

STATEMENT OF THE CASE

A. Facts.[1]

1. Invocations before the House.

The House begins most of its daily sessions with an invocation by an invited guest chaplain or a member of the House. (A1847–2624.) Immediately after calling the House to order, the Speaker of the House announces the identity of the invocation-presenter and, if a guest, the name of the presenter's house of worship or organization and the name of the Representative who invited the presenter. (A3220/A3542 ¶ 2.) Next, the Speaker directs everyone in the chamber to rise for the invocation. (A577:24–578:3; A1552–53.) The invocation-presenter then delivers the

[1] Record citations that start with an "A" are to the joint appendix. Except where indicated, record citations are to the parties' summary-judgment exhibits or, if they contain a slash, to the parties' summary-judgment statements of fact and responses. Record citations that start with a "V" are to video exhibits on a flash drive.

invocation from the Speaker's position on the Speaker's rostrum. (A3220/A3542 ¶ 2.)

Guest chaplains consider delivering the opening invocation to be an honor (A1764; A1769; A1772; A1776), and they receive many benefits in connection with their service. Before delivering the invocation, they sit on a raised dais in the front of the House chamber, two chairs over from the Speaker's chair. (A3221/A3542 ¶ 4.) They are permitted to bring as many as dozens of additional guests to sit in the chamber during the invocation, and one or two of these guests may sit on the dais too. (A3221/A3543 ¶ 5.) Children of guest chaplains may serve as guest pages on the day of the invocation. (A3221/A3543 ¶ 6.) Before delivering the prayer, guest chaplains usually meet the Speaker, the Parliamentarian of the House, and their Representative (who sometimes sits with the guest chaplain on the dais before the prayer or stands near the guest chaplain during the prayer). (A3221/A3543 ¶ 7.) Some guest chaplains have been permitted to give opening invocations regularly in conjunction with celebrations for their religious, cultural, or ethnic groups, or in connection with special occasions for their churches. (A3221–22/A3543 ¶ 8.) After giving the prayer, guest chaplains receive a commemorative gavel; a photograph of themselves with the Speaker and their Representative; a thank-you letter from the Speaker and sometimes from their Representative; and

recognition on social media by the Speaker's office and sometimes by their Representative. (A3222/A3543 ¶ 9.)

Over the last decade, about half the invocations have been delivered by guest chaplains. (A3222 ¶ 10 / A3294 ¶ 2.) The vast majority of the guests represented Christian denominations, and all were affiliated with monotheistic faiths or gave monotheistic invocations. (A1527–42; A1847–2624; A3222 ¶ 10 / A3294 ¶ 2.) Only two invocations could be identified as representing religions other than Christianity, Judaism, or Islam: one invocation delivered by a Sikh guest chaplain in 2017, and one Native American invocation delivered by a Christian House member in 2015. (A2469; A2607; A3222 ¶ 11 / A3294 ¶ 2.) Though the current Speaker directed his staff to invite more non-Christians to serve as guest chaplains, this request extended only to Jews and Muslims. (A535:6–536:22.) And while most guest chaplains were ordained clergy serving as leaders of houses of worship, some of them were not—including prison, police, healthcare, and military chaplains; a missionary; a religious college's chancellor; a member of a religious healthcare sisterhood; a lay president of a Jewish temple; and a person with no identified relationship with any particular religious organization. (A1527–42; A1887; A2153; A2249; A2252; A2281; A2290–91; A2365; A2419; A2602; A2618.)

Guest chaplains ordinarily are recommended by their Representative and approved and scheduled by the Speaker's office. (A3223/A3544 ¶ 13.) The Speaker's office may schedule guest chaplains directly, however, without the involvement of any other Representative. (*Id.*) Occasionally, guest chaplains reside outside the district of the Representative recommending them—or even outside Pennsylvania. (A3223/A3544 ¶ 14.)

2. Plaintiffs' desire to deliver invocations.

Plaintiffs are seven nontheist Pennsylvania residents and four nontheist Pennsylvania organizations. (A3224/A3544 ¶ 16; A3227/A3546 ¶ 28.) All the individual plaintiffs are nontheists: four identify both as Humanists and as atheists or agnostics; one identifies as a Unitarian Universalist, Humanist, and agnostic; one identifies as an Ethical Culturist / Ethical Humanist; and one identifies as a Freethinker. (A3224/A3544 ¶ 16.)

As explained by the American Humanist Association, "Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity." (A1273.) As explained by the Unitarian Universalist Association, " 'Unitarian Universalism is a liberal religious tradition that was formed

from the consolidation of" " the Universalist and the Unitarian Christian traditions and that now welcomes both nontheists and people with theistic beliefs. (A462 ¶ 3 (quoting A1322).) As explained by the American Ethical Union, Ethical Culture, also known as Ethical Humanism, "is a humanist Movement focusing on human goodness and building ethical relationships with each other and the Earth" that is "recognized as a religious movement because for [its members] the ethical quest has the depth of a religious commitment, and because [they] recognize the value of a community of support, celebration, and action." (A1377–78.) Similarly, Freethought is a nontheistic philosophy that professes and advances ethical values premised on secular principles. (A427–28 ¶¶ 2–3.) Humanism, Unitarian Universalism, and Ethical Culture each have detailed statements of beliefs or principles covering matters such as what is right and wrong and how people should live their lives. (A1283–85; A1329; A1392–1409.)

The individual plaintiffs' nontheistic beliefs are strongly held and centrally important to them, having a place in their lives parallel to the significance of God in the lives of adherents to theistic religions. (A402 ¶ 13; A419 ¶ 9; A429 ¶ 6; A442 ¶ 14; A456 ¶ 11; A471 ¶ 20; A483 ¶ 17.) All the individual plaintiffs but one view their nontheistic beliefs as a "religion" as defined under the law and for purposes of how they should be

classified with respect to religion. (A402–03 ¶ 13; A419–20 ¶ 9; A429 ¶ 6; A442 ¶ 14; A472 ¶ 20; A483–84 ¶ 17.)

Indeed, four of the individual plaintiffs are ordained nontheistic members of the clergy: one is a Unitarian Universalist minister; one is an Ethical Culture / Ethical Humanist Clergy Leader; and two are Humanist clergy called Humanist Celebrants. (A437 ¶ 5; A453 ¶ 5; A466 ¶ 8; A481 ¶ 9; A1248–51.) The organizations that ordained these plaintiffs are all longstanding, national religious organizations: the Unitarian Universalist Association, the American Ethical Union, and the Humanist Society. (A437 ¶ 5; A453 ¶ 5; A466 ¶ 8; A481 ¶ 9; A1253; A1267; A1322; A1422; A1427; A1429.) As clergy, these plaintiffs have the same legal status as ministers of theistic religions—including the right to solemnize weddings—and they have all performed many weddings, in some cases for theistic believers. (A438–39 ¶¶ 6–7; A454–55 ¶¶ 6–7; A469 ¶ 14; A482 ¶ 13; A1248–51; A1257; A1260.)

The four organizational plaintiffs strive to create communities for nontheists in Pennsylvania. (A3227/A3546 ¶ 29.) Their members are principally atheists, Humanists, Freethinkers, and other nontheists. (A3227/A3546 ¶ 28.) Each organizational plaintiff holds itself out to the general public for membership. (A3227/A3546 ¶ 29.)

The organizational plaintiffs regularly hold meetings and events at which members discuss nontheism, educate the public about their beliefs, engage in community service, and observe celebratory occasions. (A3227/A3546 ¶ 30.) Some of the organizations' meetings and events are structured similarly to weekly religious services of theistic congregations, while others are less formal. (A3227/A3546 ¶ 31.)

Through their events and in other ways, the organizational plaintiffs play important roles in the lives of their members, parallel to the roles that traditional theistic congregations serve in the lives of their congregants. (A408 ¶ 30; A421 ¶ 16; A445 ¶ 23; A487 ¶ 26.) Indeed, all but one of the organizational plaintiffs consider themselves to be religious organizations, as reflected in articles of incorporation, bylaws, or government-issued tax-status letters of those that are formally incorporated. (A404–05 ¶ 19; A420 ¶ 11; A484–86 ¶¶ 18–19, 21; A1319; A1429; A1435.)

Four of the seven individual plaintiffs are leaders of the four organizational plaintiffs, serving (or having served, in the case of one plaintiff who previously held his group's top leadership post and continues to serve on its board) roles similar to that of a clergyperson who leads a church or synagogue, but from a nontheistic perspective. (A398 ¶ 5; A418 ¶ 6; A439 ¶ 9; A481–82 ¶¶ 11–12; A3633 ¶ 1.) In these roles, they conduct

meetings and events; lead discussions of nontheistic beliefs at meetings, in some cases giving the nontheistic equivalent of sermons; help members deal with major changes in their lives; organize community-service events; spearhead public outreach; speak authoritatively about the organizations' beliefs; and act as their organizations' principal contacts. (A3229/A3547 ¶ 35.) A fifth individual plaintiff serves as the senior minister of the largest Unitarian Universalist church in Pennsylvania, playing a role similar to that of the ministers of many Protestant churches, except that he does not advocate theistic beliefs. (A467 ¶ 9; A469 ¶ 12.) The other two individual plaintiffs are members of two of the organizational plaintiffs. (A428 ¶ 4; A455 ¶ 8.)

The individual plaintiffs' beliefs and practices parallel those of theistic believers in many other ways too. The plaintiffs engage in community service based on their nontheistic beliefs, read and study seminal texts about their belief systems, follow leading authors of such texts, and have special days of the year on which they observe their beliefs. (A3229/A3547 ¶ 36.)

To benefit the House and all Pennsylvanians, to advance equality for nontheists, and to demonstrate that nontheists can offer meaningful messages on morality, Plaintiffs would like to give invocations at House sessions. (A3229/A3547 ¶ 38.) Plaintiffs would deliver positive, uplifting,

unifying, and respectful invocations that do not proselytize or disparage any faith, similar to moving and inspiring invocations delivered by nontheists at many governmental meetings around the country, which have invoked authorities or principles such as the Founders of our nation, the U.S. Constitution, democracy, equality, and justice. (A318–24 ¶¶ 293–99; A409–11 ¶¶ 32–35; A422–23 ¶¶ 17–19; A429–31 ¶¶ 7–10; A446–47 ¶¶ 25–27; A457–58 ¶¶ 13–15; A472–73 ¶¶ 23–25; A488–89 ¶¶ 28–30; A495 ¶ 4; A1203–32.) In fact, two of the plaintiffs have already delivered nontheistic invocations at a number of civic or other events, and one other plaintiff has delivered a nontheistic invocation before the Pennsylvania Senate, praying for compassion, understanding, and tolerance. (A3230/A3547 ¶ 40.)

These universal ideals are important to nontheists, who are a disfavored and often despised minority in the United States today (*see* Ryan T. Cragun, et al.*, On the Receiving End: Discrimination toward the Non-Religious in the United States*, 27 J. Contemp. Religion 105, 105, 114 (2012), http://bit.ly/1rfaygK), even though their population has grown to represent nine percent of Americans nationally and ten percent in Pennsylvania (A961–62) and they have made important contributions to society in a wide variety of professions (A1838–44). Indeed, many of the plaintiffs and plaintiffs' members have suffered discrimination in

employment, social, and other contexts as a result of their atheistic beliefs. (A3229/A3547 ¶ 37.)

3. The House's discrimination against Plaintiffs.

The House maintains a policy that mirrors the ugly discrimination that nontheists often face. Plaintiffs all sent the House's Speaker and Parliamentarian and Plaintiffs' particular Representatives—defendants in this case—requests to deliver nontheistic invocations before the House. (A1579–82; A1592–95; A1598–1609; A1619–24.) These requests were refused on the ground that Plaintiffs were "non-adherents or nonbelievers." (A1584–85; A1589–91; *see also* A661:17–662:17; A1597; A1618; A1626.)

With the intent of supporting this discriminatory policy, the House amended House Rule 17 to require that "[t]he Chaplain offering the prayer shall be a member of a regularly established church or religious organization or shall be a member of the House of Representatives." (A550:19–22; A1597.) The House never voted on this amendment separately, however; it was adopted as part of a vote on all the House rules together. (A651:20–652:2.) And the House's definition of "regularly established church or religious organization" is broad, requiring merely that the organization hold itself out to the general public for membership. (A504:19–22.) Indeed, each individual plaintiff satisfies the requirement

that they be a member of a "regularly established church or religious organization" (A398 ¶ 5; A404–05 ¶ 19; A418 ¶ 5; A420 ¶ 11; A428 ¶ 4; A437–38 ¶¶ 5–6; A453–54 ¶¶ 5–6; A466–67 ¶¶ 8–9; A481–82 ¶¶ 9, 11; A484–85 ¶¶ 18–19, 21; A1253; A1267; A1319; A1322; A1427; A1429; A1435), though the House appears to dispute this with respect to some of them (A1618).

In any event, the Speaker has interpreted Rule 17 to also require that every guest chaplain offer what the Speaker considers to be a "prayer"—an appeal to God, a supernatural higher power, or the divine. (A3231/A3548 ¶ 44.) The Speaker's office has relied on this gloss to Rule 17 to reject requests to give nontheistic opening prayers by the plaintiff Unitarian Universalist minister and the plaintiff Ethical Culture Clergy Leader, even though the Speaker's office did not dispute that both are members of regularly established religious organizations. (A1626.) The Speaker's office denied the Unitarian Universalist minister's request because he is agnostic, even though the Speaker recalled the House previously permitting a Unitarian Universalist minister who believed in God to give the opening prayer regularly. (A661:17–662:23.)

In their depositions, both the current Speaker and his predecessor, as well as the Parliamentarian and one of the defendant Representatives, testified that—in addition to nontheists—they would certainly or probably

reject as guest chaplains adherents of other minority religions of which they disapprove, including polytheistic religions, deism, religions that believe in spirits but do not call them "God," religions that do not believe in any god, and religions that pray to what the Speaker considers a "malevolent" higher being or force instead of a "benevolent" one. (A508:19–509:23; A620:13–22; A639:5–11; A652:23–653:4; A697:22–701:5; A704:20–705:23; A708:18–25; A816:3–8.) For example, Representative Will Tallman testified that he would reject a guest chaplain who would not pray to the "appropriate" "version of [the] divine." (A816:3–8.)

The defendant deponents further testified that to determine whether adherents of various other minority religions—including Unitarians, Hindus, Zoroastrians, Rastafarians, Wiccans, and practitioners of Native American religions—would be permitted to serve as guest chaplains, the deponents would need to conduct research about the religions and look into the faiths' doctrines. (A507:23–512:18; A619:11–622:16; A624:16–25; A701:17–703:25; A758:15–761:18; A815:11–820:13.) Former Speaker Sam Smith would have wanted to know whether the religion is "established, accepted," and "recognized by general society" or is "something that's sort of conjured up." (A701:17–702:24.) Representative Tallman would want to "dig into the[ ] doctrine" of various proposed minority-faith guest chaplains, review their "doctrinal statement," and in some cases "have a

conversation" with the proposed guest to obtain this information. (A815:11–816:24; A818:21–819:8.)

Moreover, when presented with sample invocations that (unbeknownst to the deponents) recently opened Connecticut Senate sessions, the Speaker, the former Speaker, the Parliamentarian, and Representative Tallman testified that many of the invocations would not meet the House's definition of "prayer," though some of the deponents would accept as "prayers" some invocations that other deponents would not. (A517:7–525:3; A627:23–636:20; A709:2–715:21; A820:18–831:5; A1062–77; A1233–46.) The deponents testified that to determine whether a proposed invocation qualifies as a permissible "prayer," they would consider factors such as whether the invocation mentions a supreme being, whether that being is "benevolent" or "malevolent," whether the invocation is a request or merely a message of praise, how long the invocation is, and whether it expressly contains words such as "let us pray." (A517:10–524:18; A620:18–19; A623:10–13; A625:1–5; A629:9–10; A635:14–636:20; A815:1–10; A821:19–824:23; A829:24–831:5; A839:25.)

For example, the current Speaker testified that a "prayer" is an "appeal to a benevolent higher being to provide guidance." (A650:13–18.) Former Speaker Smith similarly defined a "prayer" as "a reverent sincere appeal to God for guidance," testified that one sample invocation "doesn't

look like a prayer to me" because "it doesn't contain the elements of what I would define as a prayer to a higher being and asking for intervention," and added that he did not consider other sample invocations to be "prayers" because it was not clear whom they were being addressed to. (A695:17–696:2; A711:23–712:19; A714:24–715:14; A1234–35.) The Parliamentarian stated that "prayers" "mention a supreme being"; with respect to a couple of sample invocations that did not do so, he testified, "it's certainly not the type of prayer we would be looking for" or that he would be "very concerned about the content." (A518:22–519:5; A523:12–524:18.)

Representative Tallman testified that one proposed invocation did not qualify as a "prayer" because it did not contain a "request to a divine authority," but that adding the words "let us pray" to the beginning of that invocation would render it an acceptable "prayer." (A821:19–822:19.) With respect to another sample invocation, he testified that because it "is not a request, but . . . thanking our Lord God Almighty," "I don't consider this prayer. I consider this praise." (A829:24–831:5.) With respect to a different sample invocation that could be construed as directed at a divine being but did not expressly mention one, Representative Tallman testified that it would qualify as a "prayer" but added that if an atheist leader of an atheist assembly wanted to deliver it before the House, he would "have to

have a Q-and-A period" with the individual before deciding whether to invite him or her to serve as a guest chaplain. (A826:4–829:7.)

Even though the Speaker's office has rejected proposed nontheist guest chaplains upon concluding that they would not be willing to deliver an invocation that meets the House's definition of "prayer," the Speaker's office does not do anything to confirm that theistic proposed guest chaplains plan to deliver an invocation meeting that definition. (A3235–36/A3551 ¶ 59.) Rather, with respect to proposed theistic guest chaplains, the Speaker's office researches only whether they are members of a regularly established church or religious organization and whether there is anything in their background that may render them inappropriate to present the opening prayer. (*Id.*) Once a theistic believer passes this background check, the Speaker's office schedules the believer to present an opening invocation, sending a letter asking him or her to "craft a prayer that is respectful of all religious beliefs." (A3236/A3551 ¶ 60.)

The House's leadership has sought to justify its exclusion of nontheists on the ground that House members purportedly want daily sessions to be opened with a theistic prayer. (A540:1–4.) But one Representative testified that he is a secular agnostic, and that he would therefore like to occasionally hear, and would be able to appreciate, secular invocations at House sessions. (A800:10–801:16.) Another

Representative testified that he would be "more than happy" to advance an atheist's request to give an opening invocation. (A865:22–25.) And although the House is unwilling to permit nontheistic invocations despite having at least one nontheist member, it has permitted a Sikh prayer and a Native American prayer in recent years despite having no known members who are Sikh or subscribe to a Native American religion. (A3237/A3552 ¶ 64.) In addition, the House has permitted at least six Muslim prayers over the last decade despite having only one known Muslim member. (*Id.*)

What is more, the House refuses to permit nontheists to deliver invocations even though it has plenty of unused openings for guest chaplains. Guest chaplains have priority over House members in determining who gets to deliver invocations, but the House does not receive enough requests from guest chaplains to enable guests to give the opening prayer every time, and so a little more than half the opening prayers are given by Representatives. (A3237/A3552 ¶ 65.)

4. The House's former policy of requiring visitors to rise for prayer.

In addition to discriminating against nontheists in selecting invocation-presenters, the House—until after this litigation was filed—

required visitors to stand for opening prayers, a policy that its security officers enforced through repeated directives to rise.

Visitors may observe the House's proceedings from the House chamber's upper gallery, which is located in a balcony at the back of the chamber. (A3238/A3552 ¶ 69.) The visitors' gallery has a capacity of approximately 80 to 90 people. (A3238/A3553 ¶ 70.) Attendance in the visitors' gallery at the beginning of House daily sessions varies widely and can range from none to full capacity; average attendance is half of capacity. (*Id.*)

From at least 2005 until around January 2017, it was the House's policy that visitors in the gallery were required to stand for the opening prayer. (A586:3–587:5; A1555–70; A1824.) From around 2009 or 2010 until October 2, 2017, visitors were greeted by a sign outside the gallery that said, "Session days begin with an inter-faith prayer and the pledge of allegiance. All guests who are physically able are requested to stand during this order of business." (A3238/A3553 ¶ 71.) Until January 2017, immediately before the opening prayer, the Speaker would state, "Members and all guests, please rise," and would loudly pound his gavel three times against the top of his lectern. (A580:23–581:5; A909 ¶ 230; A1550–51; V39; V41; V45; V49.)

Under the pre-2017 policy, when visitors did not stand for the prayer, House Sergeants at Arms (who are also known as Legislative Security Officers) approached them and told them to follow the Speaker's directive to stand. (A586:3–587:5; A590:14–22; A732:6–733:6; A1556; A1573; A1824.) For example, after plaintiffs Brian Fields and Scott Rhoades disobeyed the Speaker's command to rise for a prayer when they were in the gallery at one House session, a Sergeant at Arms approached them and repeatedly—and loudly—told them to stand, raising his voice each time. (A404 ¶ 17; A442 ¶ 15.) Sergeants at Arms also told Mr. Fields to stand during other visits to the House gallery after he disobeyed the Speaker's directive. (A404 ¶ 17.)

The directives to stand made Mr. Fields and Mr. Rhoades feel pressured to participate in prayer. (A412 ¶ 39; A448 ¶ 29.) Mr. Fields also perceived that, by not rising for the invocations, he stood out as a religious dissenter—for visitors in the gallery typically stand for the invocation—and incurred the opprobrium of the House. (A403–04 ¶ 16; A412 ¶ 39; A579:3–5; A876:16–20.) Mr. Fields has attended approximately six House daily sessions since the beginning of 2012, usually in connection with advocacy or lobbying activity, and he plans to continue to attend daily sessions once or twice per year. (A3243/A3556 ¶ 92; A3633 ¶ 3.) Mr. Rhoades has attended one House daily session and intends to attend other

sessions in the future in connection with lobbying activities. (A3243/A3556 ¶ 93.)

Around January 2017, after this lawsuit was filed and mostly due to the lawsuit, the House abandoned its policy of requiring visitors in the gallery to stand for the opening prayer. (A587:3–8.) In January 2017, partly because of this lawsuit, the Speaker also added the words "as able" to his instruction that visitors "please rise" for the opening prayer. (A580:23–581:5; A582:18–583:5.) And on October 16, 2017, the sign outside the gallery was replaced with a sign that removed the word "physically" between the words "who are" and "able." (A926.) If this Court rules that the House's pre-2017 policy requiring standing for the prayer was legal, the Speaker would be able to reinstate it, as well as to return to his prior version of his instruction to rise. (A583:22–584:18; A592:15–24.)

B. Proceedings.

In August 2016, Plaintiffs filed this lawsuit, challenging the House's discriminatory guest-chaplain-selection policy under the Establishment, Free Exercise, Free Speech, and Equal Protection Clauses, and the House's policy concerning rising for prayer under the Establishment Clause. (A172–79.) Ruling on a motion to dismiss, the district court permitted the Establishment Clause claims to go forward but dismissed the other three claims. (A44.)

On cross-motions for summary judgment, the district court held that the House's guest-chaplain-selection policy violates the Establishment Clause because it "intentionally discriminates among invocation presenters on the basis of religion and thereby transcends the bounds of permissible legislative prayer." (A38.) The court further held that the House's pre-2017 policy of "[r]equiring visitors to stand and having Sergeants at Arms repeatedly and loudly direct consciously seated visitors to comply with the Speaker's request to stand amounts to an unconstitutional level of coercion" prohibited by the Establishment Clause. (A41.) On the other hand, the court upheld the Speaker's current practice of asking visitors to "please rise as able" and not using Sergeants at Arms to pressure visitors who remain seated. (A40.)

The House appealed the rulings against it. (A1–2.) To preserve their Free Exercise, Free Speech, and Equal Protection claims, Plaintiffs filed a precautionary cross-appeal of the dismissal of those claims. (A3703–05.) Plaintiffs did not appeal the ruling upholding the Speaker's current "please rise as able" practice.

SUMMARY OF ARGUMENT

The district court correctly held that the House's discriminatory policy for selecting guest chaplains violates the Establishment Clause. The Supreme Court has held that the Establishment Clause prohibits

governmental bodies from discriminating based on religion in deciding who may give opening invocations. The House's policy does exactly that. The Supreme Court and this Court have ruled that Humanism, Ethical Culture, and other nontheistic belief systems such as Plaintiffs' are religions protected from governmental discrimination. And even if they were not, the Establishment Clause prohibits government from favoring the religious over nonbelievers—a rule that the House's policy also violates.

The Supreme Court has further held that governmental officials must not prescribe the content of legislative invocations, as doing so improperly entangles government in religious judgments. But the House violates that principle by requiring that opening invocations appeal to God, a supernatural higher power, or the divine.

In addition, the House's discriminatory guest-chaplain-selection policy violates three other constitutional clauses. The Free Exercise Clause prohibits governmental bodies from conditioning participation in governmental activities on adoption or profession of any religious belief, and the Free Speech Clause prohibits government from conditioning such participation on a person's beliefs or affiliations generally. Yet the House is conditioning participation in the governmental activity of solemnizing legislative sessions on profession of belief in God and excludes Plaintiffs on

account of their nontheistic beliefs and affiliations. Moreover, the Equal Protection Clause prohibits government from treating citizens differently based on their religious beliefs except when necessary to further a compelling governmental interest—which the House lacks here.

Finally, the district court correctly held that the Establishment Clause prohibits the House's pre-2017 policy of requiring visitors in the gallery to rise for opening prayers and enforcing that rule through directives by Sergeants at Arms. The pre-2017 policy plainly violated the fundamental Establishment Clause rule that government must not coerce people to take part in prayer.

STANDARD OF REVIEW

All issues presented are subject to *de novo* review, as all were decided on summary judgment or on a motion to dismiss. *See Foglia v. Renal Ventures Mgmt.*, 754 F.3d 153, 154 n.1 (3d Cir. 2014); *Viera v. Life Ins. Co. of N. Am.*, 642 F.3d 407, 413 (3d Cir. 2011).

ARGUMENT

I. The House's guest-chaplain-selection policy violates the Establishment Clause.

The House's policy for selecting invocation-presenters violates the Establishment Clause in two principal ways. First, the policy

discriminates based on religion. Second, it entangles the House in religious judgments and inquiries.

A. The House is discriminating based on religion.

1. Government is prohibited from discriminating based on religion in selecting invocation-presenters.

The district court correctly ruled that the House's guest-chaplain-selection policy violates the Establishment Clause by discriminating against nontheists. (A38.) The Supreme Court has repeatedly emphasized that the Establishment Clause prohibits governmental bodies from discriminating based on religion: "[T]he 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). "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). "[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause." *McCreary*, 545 U.S. at 875–76.

The Supreme Court has expressly recognized that this antidiscrimination principle applies in the legislative-prayer context. In

Town of Greece v. Galloway, 572 U.S. 565, 585 (2014), one of the questions before the Court was whether a town "contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead" the opening prayers at its council meetings. The Court held that the Town's actions were constitutional because they "d[id] not reflect an aversion or bias on the part of town leaders against minority faiths." *Id.*

Rather, the town's "leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation" and had never "excluded or denied an opportunity to a would-be prayer giver." *Id.* at 571. The predominantly Christian composition of the town's guest chaplains "reflected only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths." *Id.* at 573.

It is constitutional for guest chaplains to be primarily of one faith only "[s]o long as the [government] maintains a policy of nondiscrimination" in selecting the chaplains, warned the Court. *Id.* at 585–86. Though the Establishment Clause did not require the town to "search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing" (*id.* at 586), "[a] practice that classified

citizens based on their religious views would violate the Constitution" (*id.* at 589 (plurality opinion[2])).

Indeed, noted the Court, congressional committees had concluded in the 1850s that congressional chaplaincies were constitutional in part because "no faith was excluded by law, nor any favored." *Id.* at 576. And in a concurring opinion, Justice Alito, joined by Justice Scalia, emphasized that there was no evidence that the Town's selection of guest chaplains reflected "religious bias or favoritism," adding, "I would view this case very differently" if minority faiths had been omitted "intentional[ly]." *Id.* at 593, 597.

Yet the House contends that it has a right to discriminate based on religion in selecting guest chaplains, incorrectly arguing (Br. 27–29) that *Greece*'s repeated condemnations of such discrimination are dicta. Only "[g]ratuitous statements in an opinion that do not implicate the adjudicative facts of the case's specific holding" constitute dicta. *See United States v. Warren*, 338 F.3d 258, 265 (3d Cir. 2003). Instead of making such statements, the *Greece* Court specifically decided the question whether the Town of Greece's guest chaplaincy was improperly dominated by one religion, which entailed setting forth the relevant

[2] The plurality section of the *Greece* opinion represents controlling precedent. *See infra* p. 66 n.10.

constitutional standard: intentional religious discrimination in the selection of guest chaplains is prohibited. *See* 572 U.S. at 585–86.

"But even if [the language at issue] could be accurately characterized as dictum," this Court "should not idly ignore considered statements the Supreme Court makes in dicta." *In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000). The Supreme "Court's '*dicta* are highly persuasive' and are not to be viewed lightly." *Sheet Metal Workers Int'l Ass'n Local Union No. 27 v. E.P. Donnelly, Inc.*, 737 F.3d 879, 892 n.18 (3d Cir. 2013) (quoting *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 274 (3d Cir. 2007)). A court that disregards Supreme Court dicta "place[s] [its] rulings, and the analysis that underlays them, in peril." *Galli*, 490 F.3d at 274.

What is more, *Greece*'s prohibition against religious discrimination in selecting invocation-presenters is not novel. Three decades before *Greece*, in upholding a state legislature's practice of employing a single permanent chaplain in *Marsh v. Chambers*, 463 U.S. 783, 793–94 (1983), the Court warned that a legislature's choice of chaplain must not "stem[ ] from an impermissible motive" to "giv[e] preference to his religious views."

In keeping with *Greece* and *Marsh*, sister circuits have invalidated discriminatory invocation-presenter-selection policies. In *Pelphrey v. Cobb County*, 547 F.3d 1263, 1282 (11th Cir. 2008), the Eleventh Circuit held that a county commission violated the Establishment Clause by

"categorically exclud[ing] specific faiths based on their beliefs" from its "list of potential invocational speakers." In *Lund v. Rowan County*, 863 F.3d 268, 280–82 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2564 (2018), the Fourth Circuit held that members of a county board who were all Protestant Christians violated the Establishment Clause by personally giving all the opening prayers—which were all Christian—and "prevent[ing] anyone else from offering invocations."

The House further contends (Br. 32 n.14, 40–42) that even if it cannot constitutionally favor one faith when selecting guest chaplains, it can lawfully discriminate in favor of two or more religions. In other words, in the House's view, it would be perfectly fine to permit—for example—only Christian and Jewish guest chaplains, or only Hindu and Sikh guest chaplains. But both the Supreme Court and this Court have rejected the proposition that government may favor multiple religions over others. *See, e.g.*, *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *ACLU of N.J. v. Schundler*, 104 F.3d 1435, 1447 (3d Cir. 1997). And *Greece* unqualifiedly forbids discrimination in guest-chaplain selection; nothing in the opinion limits that prohibition to discrimination in favor of a single religion. *See* 572 U.S. at 585–86.

The House also attempts to rely (Br. 22, 40–42) on the Supreme Court's bar against invocations that " 'proselytize or advance any one, or

. . . disparage any other, faith or belief' " (*Greece*, 572 U.S. at 583 (quoting *Marsh*, 463 U.S. at 794–95)), as though that is all that is constitutionally forbidden. But the prohibition against religious discrimination in choosing invocation-presenters is independent of the restriction on the content of invocations (*see id.* at 583–86); the latter does not supersede the former, and it does not authorize discrimination in favor of two or more religions in any event. Similarly, the House attempts to rely on court-of-appeals cases holding that legislative-prayer practices must not affiliate government with one religion, as though they license discrimination in favor of two or more faiths. (Br. 41 (citing cases).) They do not; indeed, some of the cited cases expressly reject the proposition. *See Pelphrey*, 547 F.3d at 1278 (Establishment Clause prohibits "the selection of invocational speakers based on an 'impermissible motive' to prefer certain beliefs over others" (quoting *Marsh*, 463 U.S. at 793)); *accord Atheists of Fla. v. City of Lakeland*, 713 F.3d 577, 591 (11th Cir. 2013). Thus, the House's allowance of some religious diversity among guest chaplains, principally among Christians, Jews, and Muslims (A535:6–536:22), does not license discrimination against other faiths—just as employers cannot lawfully discriminate against Catholics just because they have hired Protestants and Jews. *Cf.* House Br. 30–31.

But following *Greece*'s antidiscrimination rule would not require the House to permit invocations that promote white supremacy, attack LGBTQ people, or parody theistic beliefs. *Cf.* House Br. 49–51. For such invocations would not comply with requirements—set forth in *Greece*—that invocations should "lend gravity to the occasion," be "solemn and respectful in tone," and not "disparage" or "denigrate." *See* 572 U.S. at 583. Nor would the Establishment Clause bar a House policy excluding guest chaplains affiliated with organizations that practice or advocate discrimination on the basis of race, sexual orientation, or other protected characteristics (*cf.* House Br. 50–52), as long as the policy is applied neutrally to all organizations regardless of the organizations' religious beliefs. *See Hernandez v. Comm'r*, 490 U.S. 680, 695–96 (1989); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305 (1985).

The House's contention (Br. 42, 52) that legislatures will replace guest-chaplaincy programs with single, permanent chaplains to avoid *Greece*'s antidiscrimination requirement is unfounded speculation. And if a legislature does so to exclude religious minorities, its conduct would reflect an "impermissible motive" under *Marsh*. *See* 463 U.S. at 793.

In arguing that it can constitutionally discriminate, the House relies substantially (Br. 40, 42) on two pre-*Greece* decisions: *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005),

and *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998). But *Simpson*'s ruling upholding a county's refusal to allow a Wiccan to deliver an invocation is not good law after *Greece*. And *Snyder* held only that a city resident had no right to present a politically charged prayer that proselytized and disparaged particular religious beliefs (159 F.3d at 1235–36)—something that Plaintiffs will not do here (*see supra* pp. 10–11; *see also* A3297–3316). Additionally, *Simpson*'s analysis was heavily based—and *Snyder* also relied—on a legal proposition that *Greece* later rejected: that government may heavily regulate invocations to prescribe an "ecumenical" "civic faith" that "seeks guidance that is not the property of any sect." *Compare Simpson*, 404 F.3d at 287, and *Snyder*, 159 F.3d at 1234, *with Greece*, 572 U.S. at 581–82; *see also infra* p. 40.

The House further cites (Br. 18–19) a passing comment in the post-*Greece* decision *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 874 (7th Cir. 2014), that "government may . . . open legislative sessions with Christian prayers while not inviting leaders of other religions." But in light of *Greece*'s requirement that guest-chaplain-selection policies reflect "a policy of nondiscrimination" (572 U.S. at 585), this statement must be understood as referring to an invocation policy that is facially neutral but just happens to result in only Christian prayers. Indeed, *Center for Inquiry* also noted that "[t]he Supreme

Court . . . has forbidden distinctions between religious and secular beliefs that hold the same place in adherents' lives." 758 F.3d at 873.

2. Plaintiffs' beliefs are religions.

The House's policy barring nontheists from delivering invocations facially violates the Establishment Clause's prohibition against religious discrimination in the selection of invocation-presenters. For federal jurisprudence establishes that nontheistic belief systems such as those held by Plaintiffs—including atheism, Humanism, Ethical Culture, and Unitarian Universalism—constitute religions protected by the Constitution. In *Torcaso*, 367 U.S. at 495 & n.11, the Supreme Court held that government must not "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs," specifically identifying both Humanism and Ethical Culture as "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God."

Thus, appellate courts have repeatedly held that atheism, Humanism, Ethical Culture, and Unitarian Universalism are religions for purposes of the Constitution, civil-rights laws, and tax laws. *See, e.g.*, *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) (atheism); *Glassroth v. Moore*, 335 F.3d 1282, 1294 (11th Cir. 2003) (atheism); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) (atheism); *United*

States v. Moon, 718 F.2d 1210, 1227 (2d Cir. 1983) (Unitarian Universalism); *Theriault v. Silber*, 547 F.2d 1279, 1281 (5th Cir. 1977) (atheism and agnosticism); *Wash. Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957) (Ethical Culture); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394, 396–98, 406 (Cal. Dist. Ct. App. 1957) (Humanism); *Strayhorn v. Ethical Soc'y of Austin*, 110 S.W.3d 458, 468–72 (Tex. App. 2003) (Ethical Culture).

In *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981), this Court likewise concluded that "religion . . . include[s] non-theistic ideologies." *Accord Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 491 (3d Cir. 2017). And, as shown by detailed declarations from each of them (A394–491), Plaintiffs satisfy a three-factor test that this Court set forth in *Africa*, 662 F.2d at 1032–33, for determining whether a belief system is a religion.

The first factor asks whether the belief system "addresses fundamental and ultimate questions" such as "life and death, right and wrong, and good and evil," while the second factor asks whether the belief system is "comprehensive in nature . . . as opposed to an isolated teaching." *Id.* Fulfilling both of these requirements, Plaintiffs' belief systems present comprehensive teachings on whether God exists, whether there is life after death, what the right way to live is, how people should

treat other people, and how best to accomplish good. (A397–98 ¶¶ 2–4; A417–18 ¶¶ 2–4; A427–28 ¶ 3; A436–37 ¶¶ 2–4; A452–53 ¶¶ 2–4; A462–65 ¶¶ 2–6; A477–80 ¶¶ 1–8; A1283–85; A1329; A1391–1409.) Indeed, Humanism and Ethical Culture have detailed, comprehensive statements of belief (A1283–85; A1391–1409); Unitarian Universalism has a statement of seven overarching principles (A1329); and a number of leading texts expound Humanist and other nontheistic beliefs in great depth (A401 ¶ 9; A419 ¶ 7; A440–41 ¶ 11; A456 ¶ 9; A470 ¶ 16; A482–83 ¶ 14).

All the individual plaintiffs but one identify at least as Humanist (A3224/A3544 ¶ 16); two of these also identify as Ethical Culturist or Unitarian Universalist (*id.*); and the one who does not call herself a Humanist identifies as a Freethinker and has similar beliefs (A427–28 ¶¶ 2–3). Moreover, Plaintiffs' belief systems hold a place in their lives parallel to the place that belief in God has in the lives of monotheists. *See supra* p. 7; *cf. Real Alternatives, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 867 F.3d 338, 349 (3d Cir. 2017) ("single-issue interest group" "is in no way like a religious denomination," unlike Humanist group that had "comprehensive belief system that happened not to be deity-centric"); *Fallon*, 877 F.3d at 492 (anti-vaccination beliefs not comprehensive and therefore not religion).

The third factor of the *Africa* test looks for "certain formal and external signs," such as "'formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions.'" 662 F.2d at 1032, 1035 (quoting *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring in the result)). Like members of traditional theistic religions, Plaintiffs are or belong to structured organizations that hold services or meetings where members listen to nontheistic equivalents of sermons or discuss their beliefs, outreach events to propagate those beliefs, service events that aid their community based on their beliefs, and celebratory events on special days of the year. (*See supra* pp. 9–10.)

Furthermore, four of the individual plaintiffs are ordained as Humanist, Ethical Culture, or Unitarian Universalist clergy, and two others—though they do not call themselves "clergy"—serve or have served in roles for the nontheist organizations they lead similar to that of clergy who lead churches or synagogues. (*See supra* pp. 8–10.) Because Plaintiffs all are or belong to organized groups that function similarly to theistic congregations and play similar roles in their members' lives (*see supra* pp. 9–10), cases and concurrences that the House cited below (A3424–26) suggesting that Humanism might not properly be treated as a religion

when its adherents are not part of an organized group are (regardless of whether correct) inapplicable. *Cf. Kalka v. Hawk*, 215 F.3d 90, 98–99 (D.C. Cir. 2000); *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1537 (9th Cir. 1985) (Canby, J., concurring); *Malnak*, 592 F.2d at 212 (Adams, J., concurring in the result); *cf. Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 520–21 (9th Cir. 1994) (scientific teachings that coincided with Humanist beliefs held not to be religion).

In addition, the federal government has recognized atheism, agnosticism, Humanism, Ethical Culture, and Unitarian Universalism as religions. The Department of Defense recognizes atheism, agnosticism, Humanism, and Unitarian Universalism as "faith groups" for servicemembers. (A3471; A3476–77.) The Department of Veterans Affairs recognizes atheist, Humanist, and Unitarian Universalist symbols as "emblems of belief" available for placement on government-furnished headstones for deceased veterans. *Available Emblems of Belief for Placement on Government Headstones and Markers*, Nat'l Cemetery Admin., http://1.usa.gov/1ElvZM8 (last visited Jan. 23, 2019). The Bureau of Prisons recognizes Humanism as a religious preference for inmates. Steven DuBois, *Federal Prisons Agree to Recognize Humanism as Religion*, AP (July 27, 2015), http://bit.ly/2EANnnJ. And the I.R.S. recognizes the

Humanist Society and the American Ethical Union—which ordained three of the plaintiffs as clergy—as religious organizations. (A437 ¶ 5; A453 ¶ 5; A481 ¶ 9; A1267, A1429 (both citing I.R.C. § 170(b)(1)(A)(i)).)

3. Even if Plaintiffs' belief systems were not religions, government must not favor religion over nonreligion.

But even if Plaintiffs' belief systems were not considered to be religions, the House's discriminatory policy would still be unconstitutional. "The First Amendment mandates governmental neutrality . . . between religion and nonreligion" (*Epperson*, 393 U.S. at 104); "the government may not favor . . . religion over irreligion" (*McCreary*, 545 U.S. at 875). For example, the Supreme Court in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14–15 (1989), invalidated a sales-tax exemption for religious periodicals because it did not extend to nonreligious publications. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 & n.9 (1985), the Court invalidated a law that gave religious adherents an unqualified right not to work on their Sabbaths, in part because the law did not give nonreligious employees any comparable right. In other words, governmental bodies cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers." *Torcaso*, 367 U.S. at 495.

To be sure, government may treat religion differently from nonreligion for the limited purpose of "alleviat[ing] exceptional

government-created burdens on private religious exercise," so long as the accommodation of religion does not "impose unjustified burdens on other[s]." *Cutter v. Wilkinson*, 544 U.S. 709, 720, 726 (2005). But discrimination against nontheists in the selection of guest chaplains does not lift any government-created burden on the religious exercise of members of the House, who are free to attend services reflecting their specific beliefs in various houses of worship in and near Harrisburg. *See Katcoff v. Marsh*, 755 F.2d 223, 238 (2d Cir. 1985). And exclusion of nontheistic guest chaplains harms not only the applicants themselves—in part by marking them as "'outsiders, not full members of the political community'" (*see McCreary*, 545 U.S. at 860 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000))—but also members of the House who wish to hear secular invocations because they are nontheists (A800:10–801:16) or wish to fully serve their nontheist constituents (A865:22–25).

The Eleventh Circuit's decision in *Atheists of Florida*, cited by the House (Br. 43–44), does not support discrimination against nontheists. The court did not rule on whether nontheists should be permitted to deliver invocations because the atheist plaintiffs there never applied to do so; they instead challenged the content of the invocations that were being delivered. *See* 713 F.3d at 586, 589–93, 595–96, *aff'g in part and vacating*

in part 838 F. Supp. 2d 1293, 1313 (M.D. Fla. 2012). In any event, *Atheists of Florida* was decided before *Greece*, in which the Court emphasized that the "purpose and effect" of a legislative-invocation practice must not be "to exclude or coerce nonbelievers." 572 U.S. at 591 (plurality opinion). The House engages in exactly that forbidden conduct by prohibiting invocations from people who do not believe in God.

B. The House's invocation policy entangles state officials in improper religious judgments.

The Establishment Clause prohibits governmental bodies from becoming excessively entangled with religion by, for example, inquiring into religious doctrine or prescribing the content of religious exercises. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 589–90 (1992); *Hernandez*, 490 U.S. at 696–97; *Engel v. Vitale*, 370 U.S. 421, 429–30 (1962). In *Greece*, the Court applied this principle to reject an argument that invocations at governmental meetings must be nonsectarian, for such a rule would cause governments to become "supervisors and censors of religious speech" and embroil them in the "difficult[ ]" and "futil[e]" endeavor of "sifting sectarian from nonsectarian speech." 572 U.S. at 581–82. "Our Government," noted the Court, "is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Id.* at 581.

Here, the test that the House uses to determine who may serve as a guest chaplain and to exclude nontheists inherently embroils House officials in inappropriate religious judgments, in two ways. First, House officials must determine what is a "regularly established church or religious organization." (*See supra* pp. 12–15.) Second, they prescribe and judge what qualifies as "prayer." (*See supra* pp. 13, 15–17.)

1. The House's policy results in improper inquiries and judgments about the religions of proposed guest chaplains.

When the Speaker's office receives the name of a proposed guest chaplain, it researches whether the individual is a member of a "regularly established church or religious organization." (A1546; A3236/A3551 ¶ 59.) And House officials and members made clear in their depositions that, in assessing potential guest chaplains, they would reject not only nontheists but also other minority religious groups of which they disapprove—including polytheists, deists, and religions that believe in sprits not called "God." (*See supra* pp. 13–14.) The House deponents further testified that to determine whether adherents of various other minority religions—including Unitarians, Hindus, Zoroastrians, Rastafarians, Wiccans, and practitioners of Native American faiths—would be permitted to serve as guest chaplains, the deponents would need to investigate the religions and their doctrines. (*See supra* pp. 14–15.) For example, former Speaker Smith

would have wanted to know whether a religion is "established, accepted," and "recognized by general society" or is "something that's sort of conjured up" (A701:17–702:24), while Representative Tallman would want to "dig into the[] doctrine" of proposed minority-faith guest chaplains and review their "doctrinal statement" (A816:1–16; A819:5–16). This quest for "religious orthodoxy" "acceptable to the majority" is wholly antithetical to the Establishment Clause. *See Greece*, 572 U.S. at 581–82.

2. The House's policy results in improper inquiries and judgments about what qualifies as prayer.

a. The House is improperly prescribing theistic prayer.

The House also impermissibly entangles itself with religion by requiring that guest chaplains deliver invocations that meet the Speaker's definition of "prayer"—an appeal to God, a supernatural higher power, or the divine. (A3231/A3548 ¶ 44.) This requirement that prayer be theistic unconstitutionally "prescrib[es] prayers to be recited in our public institutions in order to promote a preferred system of belief." *See Greece*, 572 U.S. at 581. And as House officials' and members' testimony about what they consider prayer demonstrates, inquiries into whether prayers are theistic are just as "difficult[]," "futil[e]," and unconstitutional as the attempts to "sift[] sectarian from nonsectarian speech" that *Greece* held to be improper. *See id.* at 582.

The House deponents testified that to determine whether a proposed invocation qualifies as a permissible prayer, they would consider factors such as whether the invocation mentions a supreme being, whether that supreme being is "benevolent" or "malevolent," whether the invocation is a request or merely a message of praise, how long the invocation is, and whether it expressly contains words such as "let us pray." (*See supra* pp. 15–17.) For example, the Parliamentarian explained that "prayers" must "mention a supreme being," and when presented with two sample invocations that did not, he testified, "it's certainly not the type of prayer we would be looking for," or that he would be "very concerned about the content." (A518:22–519:5; A523:12–524:18.) Former Speaker Smith testified that one sample invocation "doesn't look like a prayer to me" because "it doesn't contain the elements of what I would define as a prayer to a higher being and asking for intervention." (A712:14–17.) Representative Tallman testified that because one sample invocation was "not a request, but . . . thanking our Lord God Almighty," "I don't consider this prayer. I consider this praise." (A829:24–831:5.)

In addition, the House deponents disagreed among themselves about whether certain sample invocations would qualify as prayers. (*See supra* p. 15.) This is not surprising, as the invocations used in the depositions generally straddled the border between theistic and nontheistic (A1233–

46); many of them did not expressly mention a supreme being but could be construed—or not, depending on the listener—as implicitly doing so (*e.g.*, A1244; *compare, e.g.*, A826:4–14 *with* A715:7–14).

b. Legislative invocations need not be theistic.

Notwithstanding the difficulty and impropriety of delineating whether invocations are theistic, the House insists (Br. 11, 33) that legislative invocations must by definition be theistic. But dictionary definitions and case law both confirm that an "invocation" or "prayer"—words that *Greece* used interchangeably (*see* 572 U.S. at 570–91)—need not be theistic.

Black's Law Dictionary defines "invocation" as "the act of calling on for authority or justification." *Invocation*, Black's Law Dictionary (10th ed. 2014). Merriam-Webster defines the term as "the act or process of petitioning for help or support." *Invocation*, Merriam-Webster, http://bit.ly/1Rua0bP (last visited Feb. 1, 2019). And Oxford Dictionaries' definition is "[t]he action of invoking something or someone for assistance or as an authority." *Invocation*, Oxford Dictionaries, http://bit.ly/1WXlSf2 (last visited Feb. 1, 2019).

"Prayer" isn't necessarily theistic either. It may be "an earnest request or wish." *See Prayer*, Merriam-Webster, http://bit.ly/1TLTnyb (last visited Feb. 1, 2019); *accord Prayer*, Oxford Dictionaries,

http://bit.ly/1sdhYkU (last visited Feb. 1, 2019) ("[a]n earnest hope or wish."). Or it may be "a request for specific relief." *See Prayer for Relief*, Black's Law Dictionary, *supra*.

Consistent with these definitions, although the *Greece* Court sometimes described legislative prayers in theistic terms, it recognized that they may be nontheistic. Under the Town of Greece's policy, emphasized the Court, "an atheist[ ] could give the invocation." 572 U.S. at 571; *accord id.* at 594 (Alito, J., concurring) (Greece "would permit any interested residents, including nonbelievers, to provide an invocation"); *see also Bormuth v. County of Jackson*, 870 F.3d 494, 514 (6th Cir. 2017) (en banc) (upholding legislative-prayer "policy permit[ting] prayers of any—or no—faith") (emphasis omitted), *cert. denied*, 138 S. Ct. 2708 (2018). The Court also noted that a "*religious* invocation" is the kind that is unconstitutionally coercive in the public-school context. *Greece*, 572 U.S. at 590 (plurality opinion) (emphasis added); *cf. Santa Fe*, 530 U.S. at 306–07 (school-prayer case stating that "invocation" is a "term that primarily"—and thus not exclusively—"describes an appeal for divine assistance").

Accordingly, in describing the "constraints . . . on [the] content" of legislative invocations, the *Greece* Court did not include any requirement that they be theistic. 572 U.S. at 582–83. Rather, the Court explained that invocations should "lend gravity to the occasion," "reflect values long part

of the Nation's heritage," be "solemn and respectful in tone," "invite[] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing," and not "denigrate nonbelievers or religious minorities, threaten damnation, . . . preach conversion," or "'proselytize or advance any one, or . . . disparage any other, faith or belief.'" *Id.* at 583 (quoting *Marsh*, 463 U.S. at 794–95).

Proper invocations, added the Court, "often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." *Id.* And while "religious themes provide particular means to [such] universal ends," appropriate invocations may instead "invoke[] universal themes . . . by," for example, "celebrating the changing of the seasons or calling for a 'spirit of cooperation' among [government] leaders." *Id.* at 583–84 (quoting an invocation given in Greece). Plaintiffs want to give invocations that call on the kinds of nontheistic authorities and values approved of in *Greece*, such as the Founders of our nation, the Constitution, democracy, equality, and justice (*see supra* pp. 10–11)—similarly to invocations delivered by nontheists before governmental bodies around the country (A1203–32),

including the Arizona House (A1227–29), the Colorado House,[3] the Florida House,[4] the Iowa House,[5] the Maine House,[6] the Maine Senate,[7] the Maryland Senate,[8] the Pennsylvania Senate (A1211–12), and the Washington State House (A1212–13).

The House relies substantially (Br. 42–43) on a 32-year-old dissenting opinion by then-Judge R.B. Ginsburg, in *Kurtz v. Baker*, 829 F.2d 1133, 1145–48 (D.C. Cir. 1987), rejecting the merits (the majority ruled on jurisdictional grounds) of a Humanist's challenge to the U.S. House's refusal to permit him to serve as a guest chaplain. But that dissent rested on the outdated and incorrect assumption that prayers must be theistic (*see id.* at 1147); it was written long before *Greece* recognized the opposite and long before nontheists started to regularly deliver nontheistic invocations at governmental meetings (A1203–32).

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[3] Colo. H. J., 71st Gen. Assemb., 1st Reg. Sess. 1177 (May 1, 2017), http://bit.ly/2BTqY83.

[4] *House—3rd Day of Regular Session*, Fla. Senate (Jan. 11, 2018), http://bit.ly/2HaIxjo.

[5] *House Video (2017-04-05)*, Iowa Legislature (Apr. 5, 2017), http://bit.ly/2o53XWq.

[6] *A Secular Invocation Maine House 2 7 2017*, YouTube (May 15, 2017), http://bit.ly/2BpQGjb.

[7] Hemant Mehta, *After Long Delay, Maine Senate Finally Allows Atheist to Deliver Invocation*, Patheos: Friendly Atheist (Feb. 16, 2018), https://bit.ly/2IMKMNs.

[8] 7 J. of Proceedings of the S. of Md., 2015 Reg. Sess. 30, http://bit.ly/2o2bK7k.

c. The House is not permitted to require theistic prayer on the ground that legislative invocations are governmental or internally directed speech.

The House goes further astray in arguing (Br. 45–49) that it may constitutionally prescribe that opening prayers be theistic on the ground that legislative prayer is government speech. The prayers by guest chaplains here are a form of hybrid speech, not government speech. *See infra* pp. 63–64. And in any event, "government speech must comport with the Establishment Clause." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). Whether or not prayers are government speech, the Establishment Clause prohibits the government from prescribing that they have particular content. *See Lee*, 505 U.S. at 589–90; *Engel*, 370 U.S. at 429–30. *Greece* made clear that this principle applies to prayers by guest chaplains, who must be permitted to give invocations consistent with their personal beliefs, "as conscience dictates." *See* 572 U.S. at 582. The House's citations to cases holding that the Free Speech Clause does not apply to government speech are inapplicable in the Establishment Clause context. *See* Br. 46 (citing *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015)).

The House also relies on *Greece*'s treatment of legislative prayer as principally "internally-directed." (Br. 17–18, 46–47 (citing *Greece*, 572 U.S. at 587–88 (plurality opinion).) But *Greece* barred legislators from prescribing the content of prayer regardless. *See* 572 U.S. at 581–82. And in many ways, the prayer practice *here* is outwardly directed. About half the prayers are delivered by members of the public, who are invited by House members to be guest chaplains. (A3222 ¶ 10 / A3294 ¶ 2; A3223/A3544 ¶ 13.) Serving as a guest chaplain carries many benefits, so invitees view the occasion as an honor. (*See supra* pp. 4–5.) Guest chaplains deliver their invocations publicly, facing the visitors in the gallery, who are called on to rise. (A3220/A3542 ¶ 2; A3241/A3554 ¶ 83; *supra* p. 3.) Indeed, in a letter inviting constituents to volunteer to serve as guest chaplains, one Representative wrote that the prayer is not only "for all members of the House" but also for "guests attending the day's session." (A1664.) That Representative also testified that he invites guest chaplains as "outreach"—to "engag[e] the general public, residents in [his] district, organizations in [his] district"—for "[t]hey are a stakeholder group just like veterans, senior citizens." (A864:17–25.)

Relatedly, the House contends (Br. 47) that nontheistic invocations would not satisfy the "spiritual needs" of their members. But at least one member of the House is a secular agnostic who would occasionally like to

hear secular invocations at House sessions. (A800:10–801:16.) Moreover, the House has permitted a Sikh prayer and a Native American prayer despite having no known members of either faith, and at least six Muslim prayers despite having only one known Muslim member. (A3237/A3552 ¶ 64.) Nor could the House require that invocations be theistic on the ground that a majority of its members believe in God. Under that logic, the House could require that invocations call on Jesus because a majority of its members are Christian. "The First Amendment is not a majority rule," however, and legislative-prayer policies cannot constitutionally permit "only those words[ ] that are acceptable to the majority." *Greece*, 572 U.S. at 582.

C. History cannot justify the House's discriminatory policy.

The House contends (Br. 32–40) that its exclusion of nontheists is justified by historical tradition. But as the district court concluded—relying on an unrebutted 67-page report from an expert historian (A938–1005)—"the House's prayer practice finds no refuge in history and tradition" (A25).

To begin with, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh*, 463 U.S. at 790. Rather, the Supreme Court's decisions upholding legislative invocations were based on an " 'unambiguous and unbroken history of

more than 200 years'" going back to the passage of the Bill of Rights. *Greece*, 572 U.S. at 576 (quoting *Marsh*, 463 U.S. at 792). The Court reasoned that because the First Congress enacted a congressional chaplaincy the same week that it approved the First Amendment, the Amendment's framers must have believed that the Establishment Clause permits legislative invocations. *Greece*, 572 U.S. at 575–76; *Marsh*, 463 U.S. at 787–92.

But there is no long, unbroken history, going back to the First Congress, of what the House does: inviting members of the public to deliver invocations, while discriminating based on creed or belief in doing so. Except for several years in the middle of the nineteenth century, Congress has always had permanent chaplains. (A952.) And there is no evidence that either chamber of Congress ever invited guest chaplains to deliver invocations before 1855. (*Id.*) Further, there is no evidence that any nontheist ever asked to give an opening invocation to any governmental body in the decades that followed adoption of our Constitution. (A957.) That is not surprising: few people during that era openly disclosed that they did not believe in God, for doing so resulted in social ostracism and, at times, criminal punishment. (A947; A957–59.) As Congress did not use guest chaplains during the founding era and nontheists did not make requests to present legislative invocations then,

history cannot support exclusion of nontheistic guest chaplains today. *Cf. Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1147–48 (9th Cir. 2018) (historical practice did not justify prayer at school-board meetings because school boards did not exist during founding era).

The House's points that some states used guest chaplains when *Marsh* was decided and that Congress rejected a proposed nontheist guest chaplain a few years later (Br. 39, 42–43) are irrelevant because such modern history cannot possibly shed light on the intent of the Establishment Clause's framers. *See Greece*, 572 U.S. at 600 (Alito, J., concurring). In addition, even state-level practices during the founding era do not illustrate the intent of the First Amendment's framers, because the Establishment Clause did not apply to the states until its incorporation against them through the Fourteenth Amendment in the 1940s; indeed, during the late eighteenth and early nineteenth centuries many states maintained established churches, religious tests for office, and other practices that plainly violated the Establishment Clause. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 n.7 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); A986–93. And even if they were relevant, early state legislatures' practices cannot support exclusion of nontheistic guest chaplains today

because (like Congress) the state legislatures did not use guest chaplains in the first place: in the decades after enactment of the Bill of Rights, they used permanent chaplains, relied on a limited number of rotating local clergy, or—like the Pennsylvania House itself from at least the 1780s until 1848—did not have opening prayers at all. (A951–54; A956–57.)

If history has anything to teach on this issue, it supports permitting legislative invocations that reflect diverse and minority beliefs. "Our tradition assumes that adult citizens . . . can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Greece*, 572 U.S. at 584. To promote religious diversity in the invocations that it heard, when Congress first enacted its chaplaincy it required that the House and Senate chaplains be of different denominations and that they rotate between the two chambers. (A959–60.) At that time, in practice, this rule served to ensure diversity among Protestant denominations, because almost everyone in the country was Protestant. (A960–61.)

But we are a much more pluralistic nation today. (A961–62.) Thus, Congress properly "acknowledges our growing diversity . . . by welcoming ministers of many creeds," including Buddhist, Hindu, Jain, Muslim, and Native American invocation-presenters. *See Greece*, 572 U.S. at 579; A962. And nontheists are by far the largest non-Christian belief group in

America today, representing at least nine percent of the population. (A961–62.) Indeed, many members of American legislatures now are nontheists. *See Secular Elected Officials*, Center for Freethought Equality, https://bit.ly/2Xg5UQC (last visited Feb. 20, 2019). Accordingly, as noted above, nontheists have in recent years delivered numerous nontheistic invocations before state legislatures and local governmental bodies across the country. (*See supra* pp. 46–47.) Moreover, the U.S. House recently permitted a Presbyterian minister to open a session with a prayer that had no theistic references (*see* 161 Cong. Rec. H5878 (daily ed. Sept. 10, 2015)), and the Connecticut Senate often opens its sessions with nontheistic invocations given by Senate officers (A964; A1061–77). The inclusion that Plaintiffs seek—which would allow nontheistic invocations to coexist with, not replace, theistic invocations—would effectuate the goal of diversity reflected in the "different denominations" rule that Congress enacted when it first established its chaplaincy.

A review of the annual messages to Congress of our first six presidents—the equivalent of today's State of the Union addresses—also supports inclusion of nontheistic invocations. Most of those annual messages had some theistic reference—usually of thanks or entreaty—but some did not. (A965; A1079–84.) And in 1823, President James Monroe, after recounting various successes of our country, ended his message with

secular words of thanks after it appeared that he was leading up to theistic ones:

> To what, then, do we owe these blessings? It is known to all that we derive them from the excellence of our institutions. Ought we not, then, to adopt every measure which may be necessary to perpetuate them?

(A965.)

To be sure, Plaintiffs are unaware of evidence—beyond the above-quoted Monroe address—of nontheistic invocations being given to governmental bodies in the founding era. But though the theistic nature of legislative invocations during that period confirms that such invocations are constitutional, it cannot justify exclusion of nontheistic guest chaplains, because such use of history would equally support exclusion of all non-Christians, and even all non-Protestants. For there is no evidence that any non-Christian ever gave an opening prayer to Congress before 1860, to the Pennsylvania House before 1945, or to any other state legislature before 1850. (A969–70; A977; A982; A985.) Furthermore, there is at least circumstantial evidence of religion-based discrimination against Catholics and other non-Protestants in the selection of legislative chaplains by Congress, the Pennsylvania House, and other state legislatures throughout much of American history, including as late as the year 2000. (A969–86.)

And while the House embraces this exclusionary history, arguing that it should be permitted to discriminate against anyone it wants (Br. 36–38), *Greece* held the opposite—that the selection of invocation-presenters must reflect a "policy of nondiscrimination," not "aversion or bias on the part of [governmental] leaders against minority faiths" (572 U.S. at 585). *Greece* also foreclosed the House's related argument (Br. 34–36) that legislative-prayer practices should be measured solely against historical tradition. The Court cautioned that its legislative-prayer precedents "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." 572 U.S. at 576. The Court then cited cases concerning other Establishment Clause issues to support its rulings on the topics of discrimination, entanglement, and (*see infra* pp. 66–67) coercion. *See* 572 U.S. at 581–82, 586–87 (plurality opinion at 586–87) (citing *Santa Fe*, 530 U.S. 290; *Lee*, 505 U.S. 577; *Engel*, 370 U.S. 421; *Torcaso*, 367 U.S. 488).

Indeed, whatever role history may play in constitutional interpretation, the Supreme Court has repeatedly rejected efforts to use it to justify discrimination. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015); *United States v. Virginia*, 518 U.S. 515, 531–32 (1996); *McDaniel v. Paty*, 435 U.S. 618, 622–23, 629 (1978). Racial segregation, for example, did not become lawful by virtue of its long existence after

enactment of the Fourteenth Amendment. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966).

Finally, history preceding the Establishment Clause's creation confirms that the Clause was intended to prohibit religious discrimination, including against nonbelievers. The Supreme Court has held that the Establishment Clause had the same intent as Thomas Jefferson's 1785 Virginia Statute for Religious Freedom (*see Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947)), and that Jefferson's (and James Madison's) views on religious liberty were incorporated into the First Amendment (*see Sch. Dist. v. Schempp*, 374 U.S. 203, 214 (1963)). Jefferson explained that he omitted any reference to Jesus Christ in the Virginia Statute in order "to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination." 1 *Writings of Thomas Jefferson* 62 (P. Ford ed. 1892). Jefferson also wrote, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god." Thomas Jefferson, *Notes on the State of Virginia* 95 (1784). Similarly, the Baptist minister John Leland, who "may have been" "the most important proponent of the Establishment Clause" (Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 Nw. U. L. Rev. 727, 741 n.67 (2009)), wrote,

"Let every man speak freely without fear, maintain the principles that he believes, worship according to his own faith, either one God, three Gods, no God, or twenty Gods; and let government protect him in so doing" (*The Writings of the Late Elder John Leland* 184 (L.F. Greene ed. 1845)). Moreover, the Religious Test Clause of the U.S. Constitution—"no religious test shall ever be required as a qualification to any office or public trust under the United States" (art. VI, cl. 3)—was understood from its inception to protect nontheists, and the Supreme Court has interpreted the Establishment Clause as encompassing the Religious Test Clause's prohibitions. *See Torcaso*, 367 U.S. at 495–96 & n.10. The House's exclusion of nontheists thus is diametrically contrary to the Establishment Clause's intent.

II. The House's guest-chaplain-selection policy violates the Free Exercise, Free Speech, and Equal Protection Clauses.

In the alternative, this Court may affirm under the Free Exercise, Free Speech, or Equal Protection Clauses. In a case substantially similar to this one, a Florida district court recently ruled in favor of the plaintiffs under those three clauses in addition to the Establishment Clause. *See Williamson*, 276 F. Supp. 3d at 1292–96.

A. The House's policy violates the Free Exercise and Free Speech Clauses.

The Free Exercise and Free Speech Clauses prohibit government from conditioning participation in governmental activities on a person's religious or other beliefs or affiliations. The Free Exercise Clause in particular bars governmental bodies from making adoption or profession of any religious belief a precondition for taking part in governmental affairs. In *Torcaso*, 367 U.S. at 489–90, 495–96, the Supreme Court held that a state could not require people seeking commissions as notaries to declare a belief in God. The Court concluded that such a "religious test for public office" not only violates the Establishment Clause (*see id.* at 492–95) but also "unconstitutionally invades the [plaintiff]'s freedom of belief and religion" (*id.* at 496). Subsequently, in ruling in *McDaniel* that a law banning ministers from holding public office violated the Free Exercise Clause, the Court confirmed that the law invalidated in *Torcaso* violated that Clause too. *See* 435 U.S. at 626–27 (four-Justice plurality opinion); *id.* at 634–35 (Brennan, J., concurring in the judgment); *id.* at 642–43 (Stewart, J., concurring in the judgment).

Similarly, the Free Speech Clause prohibits government from denying citizens opportunities to take part in governmental activities based on their beliefs or affiliations. Government may not, for example,

hire, fire, promote, or transfer civil servants based on their political beliefs or affiliations. *E.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990); *Branti v. Finkel*, 445 U.S. 507, 516–17 (1980); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). A federal HIV-prevention program violated the Free Speech Clause by barring participation by organizations that would not adopt a policy formally opposing sex work. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 570 U.S. 205, 220–21 (2013). The State of Missouri violated the free-speech rights of the Ku Klux Klan by prohibiting it, "based on the Klan's beliefs and advocacy," from taking part in an Adopt-A-Highway program. *Cuffley v. Mickes*, 208 F.3d 702, 707 (8th Cir. 2000). And a state law school's legal-services program could not constitutionally exclude a prospective client because of his publicly stated views concerning religious displays on public property. *Wishnatsky v. Rovner*, 433 F.3d 608, 611–12 (8th Cir. 2006).

The House's policy of excluding nontheists from delivering invocations violates these First Amendment principles. As in *Torcaso*, 367 U.S. at 496, the House is violating the Free Exercise Clause by conditioning participation in a governmental function—here, solemnizing public meetings—on profession of belief in God. Likewise, the House is violating the Free Speech Clause by excluding Plaintiffs based on their nontheistic beliefs and affiliations.

What is more, the Supreme Court relied partly on free-exercise and free-speech principles (in addition to the Establishment Clause) in *Greece* to support its rejection of the proposition that legislative invocations must be nonsectarian. Looking to free-exercise principles, the Court explained that government cannot "require ministers to set aside their nuanced and deeply personal beliefs" but instead "must permit a prayer giver to address his or her own God or gods as conscience dictates." 572 U.S. at 582. Following free-speech principles, the Court added that requiring invocations to be nonsectarian would improperly force governmental bodies to "act as supervisors and censors of religious speech" or to "define permissible categories of religious speech." *Id* at 581–82.[9] The Court also noted that the Town of Greece "neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers." *Id.* at 571. Contrary to these teachings, the House refuses to permit Plaintiffs to open House sessions in a manner consistent with their "deeply personal beliefs"

[9] Because the Court concluded that governmental bodies must regulate legislative invocations to ensure that they do not proselytize or disparage any faith (*Greece*, 572 U.S. at 583), it would be incorrect to treat legislative prayer as a public forum in which content- and viewpoint-based restrictions of speech would be strictly prohibited, however. *Cf. Matal*, 137 S. Ct. at 1763–64 (four-Justice plurality opinion); *id.* at 1765–67 (Kennedy, J., concurring in part and concurring in the judgment).

and has defined theistic speech as the only "permissible categor[y] of religious speech." *See id.* at 582.

B. The House's policy violates the Equal Protection Clause.

The Equal Protection Clause prohibits states from treating citizens differently based on their religious beliefs. *E.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Religion is a "suspect classification" that triggers strict scrutiny under the Clause. *See, e.g.*, *Burlington N. R.R. v. Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Strict scrutiny also applies when government disfavors "a 'discrete and insular' minority" (*Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938))) that has been "subjected to . . . a history of purposeful unequal treatment, or relegated to . . . a position of political powerlessness" (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

The House's refusal to allow nontheists to present invocations triggers strict scrutiny by discriminating based on religion. Strict scrutiny is also proper because—as Plaintiffs have themselves experienced (A3229/A3547 ¶ 37)—nontheists have long faced invidious discrimination and have long been relegated to political powerlessness. *See* Cragun, *supra*, at 105, 114; Margaret Downey, *Discrimination Against Atheists:*

The Facts, 24.4 Free Inquiry (2004), http://bit.ly/1VUEs6k; Penny Edgell, et al., *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*, 71 Am. Soc. Rev. 211, 218 (2006), http://bit.ly/1XUH3v6; Jeffrey M. Jones, *Atheists, Muslims See Most Bias as Presidential Candidates*, Gallup (June 21, 2012), http://bit.ly/PYVMrT; Lawton K. Swan & Martin Heesacker, *Anti-Atheist Bias in the United States: Testing Two Critical Assumptions*, 1 Secularism & Nonreligion 32, 40 (2012), https://bit.ly/2t3uoNx.

The House's policy thus must further a compelling governmental interest and be narrowly tailored to that interest. *See, e.g.*, *Miller*, 515 U.S. at 920. The House has not offered—and cannot supply—any interest that can satisfy this demanding standard.

C. The government-speech doctrine does not render the Free Exercise, Free Speech, and Equal Protection Clauses inapplicable.

The district court concluded that the Free Exercise, Free Speech, and Equal Protection Clauses are inapplicable here on the ground that legislative prayer is government speech. (A76–78.) But invocations by guest chaplains before the House should be classified as "hybrid speech"—speech that "has aspects of both private speech and government speech" and thus "does not fit neatly into either category." *See W. Va. Ass'n of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009).

In assessing whether speech is governmental, the Supreme Court considers whether the government composes the speech, whether the government revises or censors it, whether the speech has traditionally been given by the government itself, and whether people are likely to identify the speech with the government. *See Matal*, 137 S. Ct. at 1758–60. On the one hand, the invocations by guest chaplains here are sponsored by the House (A3220/A3542 ¶ 2; A3223/A3544 ¶ 13), presented for a governmental purpose (*see Greece*, 572 U.S. at 583, 587), and serve a function historically performed by government-employed chaplains (A951–57). On the other hand, the guest chaplains are private citizens (*see* A1546); they compose the invocations themselves (*see* A1657–58); and the House does not review draft invocations in advance (A897 ¶ 252; A912 ¶ 252). In addition, *Greece* treats invocations given by guest chaplains as having some aspects of private speech, recognizing that guest chaplains have free-speech interests and tightly circumscribing the government's authority to control the content of their invocations. *See* 572 U.S. at 581–82; *supra* p. 61.

Even if the speech here were purely government speech, however, that would not exempt the House's discriminatory policy from scrutiny under the Free Exercise, Free Speech, and Equal Protection Clauses. The cases on which Plaintiffs rely under these Clauses prohibit governmental

bodies from discriminating based on religious belief or affiliation even when picking individuals—for instance, when hiring public employees—to deliver government speech. *See, e.g.*, *Rutan*, 497 U.S. at 75; *Torcaso*, 367 U.S. at 496. Indeed, if a city planned to select a private citizen at random to read a city-drafted proclamation at city hall, excluding a religious minority from the selection process would surely violate the three Clauses even though the proclamation would be pure government speech.

Finally, it is elementary that governmental actions—including those touching on religion—may violate more than one constitutional provision. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012) (Establishment and Free Exercise Clauses); *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (First Amendment and Equal Protection Clause); *Torcaso*, 367 U.S. at 492–96 (Establishment and Free Exercise Clauses); *Niemotko v. Maryland*, 340 U.S. 268, 272–73 (1951) (Free Speech, Free Exercise, and Equal Protection Clauses). The district court was therefore incorrect in concluding that "legislative prayer is subject to review under the Establishment Clause alone." (A78.)

III. The House's former policy of requiring visitors to rise for prayers violated the Establishment Clause.

A. The Establishment Clause prohibits the House from coercing visitors to rise for prayers.

The district court correctly held that the Establishment Clause prohibits the House's pre-2017 policy of requiring visitors to rise for opening prayers and enforcing that rule through directives by Sergeants at Arms. (A41.) "It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Greece*, 572 U.S. at 586 (plurality opinion[10]) (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part)). The Supreme Court has thus held that governmental bodies must not coerce people to take part in prayer. *See, e.g.*, *Santa Fe*, 530 U.S. at 310–12; *Lee*, 505 U.S. at 587, 599.

In *Greece*, the Court concluded that the particular invocation practice before it was not coercive. 572 U.S. at 586–91. "Although [town] board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by

[10] The district court correctly held (A73–74), and the House does not contest (*see* House Br. 53–54), that the coercion section of Justice Kennedy's opinion in *Greece*, though a plurality opinion, is controlling precedent because it provides the narrowest grounds for the judgment on that issue. *See, e.g.*, *Jackson v. Danberg*, 594 F.3d 210, 219–22 (3d Cir. 2010).

the public." *Id.* at 588. And while "audience members were asked to rise for the prayer" on a few occasions, "[t]hese requests . . . came not from town leaders but from the guest ministers," who were "accustomed to directing their congregations in this way." *Id.* "The analysis would be different," emphasized the Court, "if town board members directed the public to participate in the prayers" or "singled out dissidents for opprobrium." *Id.* Though "legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate," "the pattern and practice of ceremonial, legislative prayer" must not become "a means to coerce or intimidate others." *Id.* at 589–90.

The House's pre-2017 policy did exactly that. Visitors in the House gallery were *required* to stand for the opening prayer. (*See supra* p. 19.) If they did not, Sergeants at Arms approached them and repeatedly instructed them to rise. (*See supra* p. 20.) A sign outside the gallery also told visitors that they were "requested to stand" for the prayer if "physically able." (A3238/A3553 ¶ 71.) And the Speaker prefaced the prayer with an unqualified instruction that "[m]embers and all guests, please rise" and then loudly pounded his gavel. (*See supra* p. 19.)

The pre-2017 policy thus violated the standards of *Greece*, for the House "directed"—indeed, required—"the public to participate in the

prayers," and its Sergeants at Arms "singled out dissidents for opprobrium." *See* 572 U.S at 588. The policy was far more coercive than practices—on whose constitutionality two circuits have split—in which public officials merely asked audience members to rise for prayer but did not require them to do so, much less take any enforcement action against them. *Compare Lund*, 863 F.3d at 286–87, *with Bormuth*, 870 F.3d at 517. It is no defense that the pre-2017 policy also encompassed the Pledge of Allegiance (*cf.* House Br. 55 n.25), for requiring people to stand for the Pledge is unconstitutional as well (*Lipp v. Morris*, 579 F.2d 834, 836 (3d Cir. 1978)).

And contrary to what the House contends (Br. 54–55), there is abundant, uncontradicted record evidence that requiring visitors to stand and enforcing that requirement through directives by Sergeants at Arms was a longstanding House policy, which the House Speaker and Parliamentarian—both official-capacity defendants—were aware of and endorsed. The Speaker and Parliamentarian received letters in 2005, 2006, 2007, and 2012 complaining that visitors to the gallery were required to stand by House policy and that Sergeants at Arms were enforcing that requirement. (A1556; A1561; A1569; A1573.) The Parliamentarian sent response letters in 2005, 2006, and 2007 confirming that this was the policy and defending it. (A1558–59; A1564–65; A1569–

70.) The Parliamentarian also testified that the "previous [pre-2017] policy" was that visitors were required to stand and that Sergeants at Arms were authorized to and did enforce that requirement. (A585:23–A586:12.) Speaker Smith—whose position gave him final authority over whether to continue the policy (A588:6–8)—likewise testified that this was the policy and that he was aware of it (A732:6–733:6). Moreover, plaintiff Fields testified that he was subjected to directives to rise by Sergeants at Arms during multiple visits to the House gallery (A404 ¶ 17); plaintiff Rhoades experienced the same during his visit (A442 ¶ 15); and a 2013 incident report by a Sergeant at Arms further documents enforcement of the policy (A1824).

B. The House's pre-2017 policy is not moot.

The House is incorrect in arguing (Br. 55–57) that its pre-2017 policy is moot. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*

(TOC), Inc., 528 U.S. 167, 189 (2000) (alteration in original)). "Moreover, the party alleging mootness bears the 'heavy,' even 'formidable' burden of persuading the court that the challenged conduct cannot reasonably be expected to resume." *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004) (quoting *Friends of the Earth*, 528 U.S. at 189–90).

Contrary to what the House contends (Br. 56), these rules apply fully to governmental bodies. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017); *Parents Involved*, 551 U.S. at 719; *Mesquite*, 455 U.S. at 289; *Virgin Islands*, 363 F.3d at 285. And a governmental defendant's abandonment of a challenged policy in response to litigation, as well as its continued defense of a former policy's legality, each weigh against mootness. *See Parents Involved*, 551 U.S. at 719; *Virgin Islands*, 363 F.3d at 285.

Here, the Parliamentarian testified that it was "mostly because of [this] litigation" that the House abandoned—about five months after this case was filed—its policy of requiring visitors to stand for prayers and enforcing that requirement through Sergeants at Arms. (A587:3–8.) Similarly, it was partly because of this lawsuit (and around the same time) that the Speaker added the qualifying words "as able" to his pre-prayer instruction to rise. (A582:18–583:5.) Further, the House continues to defend the constitutionality of the prior policy. (House Br. 52–55, 57.)

By contrast, in the House-cited (Br. 56) *Marcavage v. National Park Service*, 666 F.3d 856, 861 (3d Cir. 2012), the old policy was not abandoned because of the pending lawsuit, and the defendant did not continue to defend its constitutionality. Even less apposite is the Eleventh Circuit's decision in *Atheists of Florida*, 713 F.3d at 595, in which the policy was changed months *before* the lawsuit was filed. In addition, the policy change in *Marcavage* was effected through a published federal regulation (666 F.3d at 858) and the one in *Atheists of Florida* through a formal resolution (713 F.3d at 595), so similar official acts would have been needed to reinstate the policies. Here, the policy change was communicated orally to the Sergeants at Arms, and there is no reference to the policy change in the only document that the House identified as relevant to it. (A589:20–590:13; A928; A1548–49.) In the absence of an injunction, the current—or a future—Speaker would be free to reinstate the old policy unilaterally. (A583:22–584:18; A592:15–24.) The House simply has not met its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *See Friends of the Earth*, 528 U.S. at 190.

CONCLUSION

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in

politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet the Pennsylvania House prescribes belief in a divine authority as orthodox and denies to nonbelievers equal opportunity to perform the cardinal public function of solemnizing House sessions. At the same time, the House mandated that its constituents confess their faith in its favored belief by rising for prayers invoking it.

This Court should affirm the district court's decision on the grounds it set forth or, with respect to the discrimination claims, on one or more of the three alternative grounds Plaintiffs have presented.

Respectfully submitted on the 22nd of February, 2019,

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CERTIFICATIONS OF COUNSEL

The undersigned counsel certifies that:

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(ii) **(word count)** this brief complies with the type-volume limit of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i) because, excluding the parts of the brief exempted by Rule 32(f), it contains 15,292 words;

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By: /s/ Alex J. Luchenitser Date: February 22, 2019
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