UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2974

Brian Fields, *et al.*

v.

Speaker of the Pennsylvania House of Representatives, *et al.*

Speaker of the Pennsylvania House of Representatives, *et al.*,

Appellants.

On appeal from the United States District Court
for the Middle District of Pennsylvania,
at No. 16-1764 (The Honorable Christopher C. Conner)

OPENING BRIEF OF APPELLANTS / CROSS-APPELLEES & APPENDIX VOLUME 1 OF 7 (A1 TO A78)

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I. STATEMENT OF JURISDICTION

Appellees invoked the district court's federal question jurisdiction because their claims arise under the First Amendment of the United States Constitution and a federal statute, 42 U.S.C. §1983.[1] *See* 28 U.S.C. §1331. On September 5, 2018, appellants timely appealed the district court's August 29, 2018 ruling on cross-motions for summary judgment, which disposed of all claims and constitutes a final judgment. (Appx. A1-A43.) This Court's jurisdiction is proper under 28 U.S.C. §1291.

II. STATEMENT OF THE ISSUES PRESENTED

1. Did the district court err in finding that the Establishment Clause prohibits the Pennsylvania House of Representatives from limiting its guest chaplain practice to religious faiths that recognize a Divine authority?

2. Did the district court err in finding that the House violated the Establishment Clause because a security guard once purportedly asked two appellees to rise during the House's session-opening ceremony?[2]

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[1] Because any claim based on the Pennsylvania House of Representatives' pre-2017 "please rise" practice is moot, the district court lacked subject matter jurisdiction over that claim. *See infra* at §VII.B.

[2] These two issues were raised in appellants' motion to dismiss (and associated briefs), answers to the complaint and amended complaint, motion for summary judgment (and associated briefs), and in their brief opposing appellees' motion for

(footnote continued on next page)

III. STATEMENT OF RELATED CASES

Appellants are not aware of any related cases.

IV. CONCISE STATEMENT OF THE CASE

A. Relevant Procedural History

On August 25, 2016, appellees[3] sued the Pennsylvania House Speaker, the Parliamentarian of the House, and individual House Members from districts in which appellees reside. (Appx. A108-A180.) Appellees asserted causes of action under 42 U.S.C. §1983, alleging that the House Prayer practice violated the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment, by excluding non-believers. (Appx. A172-A177.) Appellees requested declaratory judgment and injunctive relief. (Appx. A177-A179.)

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summary judgment. (Appx. A79-107, A181-A182, A355-358, A2632-A2635.) The district court ruled in orders and opinions disposing of those motions. (Appx. A6-A78.)

[3] In this brief, "appellees" means the plaintiffs below and appellees/cross-appellants here: Brian Fields, Paul Tucker, Deana Weaver, Scott Rhoades, Joshua E. Neiderhiser, Pennsylvania Nonbelievers, Inc., Dillsburg Area Freethinkers, Lancaster Freethought Society, Rev. Dr. Neal Jones, Philadelphia Ethical Society, and Richard Kiniry.

The House[4] moved to dismiss appellees' complaint for lack of standing and failure to state claims upon which relief could be granted. (Appx. A181-A182.) The district court granted the motion in part and denied it in part, dismissing appellees' Free Speech, Free Exercise, and Equal Protection claims but allowing their Establishment Clause claims to move forward.[5] (Appx. A44-A78.)

Following discovery, the parties filed cross-motions for summary judgment on the remaining claims. (Appx. A355-A358, A2632-2635.) The district court granted partial relief to both sides. (Appx. A6-A43.) The court declared that both the House guest chaplain policy and its "pre-2017 opening invocation practices" violated the Establishment Clause but held that its current practice of asking audience members to "please rise as able" did not. The district court permanently enjoined the House guest chaplain practice as implemented at the time.

[4] In this brief, "appellants" and general references to the "House" mean these defendants below and appellants/cross-appellees here: Speaker of the Pennsylvania House of Representatives, Parliamentarian of the Pennsylvania House of Representatives, Director of Special Events of the Pennsylvania House of Representatives, and Representatives for Pennsylvania House Districts 92, 95, 97, 165, 167, 193, and 196.

[5] Appellees later filed an amended complaint, naming additional plaintiffs and defendants but leaving the substance of their claims unchanged. (Appx. A246-345.)

B. Statement of Facts

1. The historical background of legislative prayer.

Our national tradition of legislative prayer begins with a famous Pennsylvanian, Benjamin Franklin, who suggested that the Constitutional convention "begin each morning with 'prayers imploring the assistance of Heaven, and its blessings on our deliberations.'" *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.11 (10th Cir. 1998) (quoting 1 Max Farrand, *Records of the Federal Convention of 1787*, at 452 (1911)). Although the convention did not adopt Franklin's proposal, his suggestion set "[t]he traditional tone for legislative prayers." *Id.* Later, the First Congress, "as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer." *Marsh v. Chambers*, 463 U.S. 783, 787-88 (1983). "A statute providing for the payment of these chaplains was enacted into law on Sept. 22, 1789," and, "[o]n Sept. 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights." *Id.* (citations omitted).

2. The history of legislative prayer in the Pennsylvania House of Representatives.

As the House of Representatives understands it, the prayer tradition in the Pennsylvania legislature pre-dates even Franklin's convention proposal, reaching back to William Penn and the 17th century provincial assembly that anteceded the

Commonwealth General Assembly. (Appx. A2652:9-18, A2675:3-13.) Although there is no historical record of legislative prayer in the Pennsylvania House in the late 18th and early 19th century, the House recommenced the practice in the 1850s by inviting a handful of Harrisburg clergy to rotate as chaplain for the session-opening Prayer. (Appx. A2853-A2855.)

In 1865, invoking the "natural and indefeasible right to worship Almighty God," the House began appointing permanent chaplains. (Appx. A2855.) For the next 130 years, the "permanent chaplains" of the Pennsylvania House of Representatives "were always Protestant clergymen drawn from a relatively small number of Protestant denominations that did not reflect the vast diversity of religious belief in Pennsylvania among Protestants, much less non-Protestants." (Appx. A2789.) In 1995, the House implemented a "rotating" chaplain practice. Since 2004, it has invited guest chaplains from around the Commonwealth to provide its opening Prayer; when a guest chaplain is unavailable, a House Member typically fills in. (Appx. A2765-A2766, A2862.)

Rule 17 of the House's internal operating Rules, which sets out the House "Order of Business," specified that each legislative session day must begin with a

"Prayer by the Chaplain" and the "Pledge of Allegiance."[6] (Appx. A1546.) As amended in January 2015, Rule 17 required 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." (*Id.*) The amended version of Rule 17 was "unanimously adopted by the members [of the House], Republican and Democrat," and "codifies" the informal guidelines and definitions long utilized by the House. (Appx. A2654:16-A2655:1, A2678:2-18, A2679:3-10.) The House defines "Prayer" as "an opportunity for the members of the House to seek divine intervention in their work and their lives." (Appx. A349, A2653:5-11, A2673:6-9, A2689:1-10.)

Representatives typically propose guest chaplains, who pass their names along to the Speaker's Office, though others interested in participating may also submit a request directly to the Speaker's Office. (Appx. A2659:2-16.) Under current Speaker Mike Turzai, the House of Representatives has sought to increase the religious diversity of its guest chaplains. (Appx. A2674:13-17, A2686:9-2687:2.)

[6] Under Article II, Section 11 of the Pennsylvania Constitution, each chamber of the General Assembly "shall have power to determine the rules of its proceedings." PA. CONST. art. II, §11; (Appx. A2676:19-A2677:4). According to House protocol, the Speaker possesses authority over the interpretation of House rules, subject to an appeal and vote by the entire House. (Appx. A719:4-12.)

Once the Speaker's Office receives a proposal for a guest chaplain, it performs a non-intrusive background review to ensure compliance with House Rules and avoid any public relations issues. (Appx. A2685:7-12.) Those selected receive a letter explaining that "[t]here are 203 members of the House coming from a wide variety of faiths," and, as such, "efforts to deliver an inter-faith prayer are greatly appreciated." (Appx. A346.) Although broadly inclusive Prayers are encouraged, guest chaplains' Prayers are not reviewed prior to delivery. (Appx. A2657:25-A2658:19.) After leading the Prayer, guest chaplains are presented with a commemorative gavel and often pose for a photograph with their local Representative. (Appx. A2680:11-22.)

3. The appellees challenge House practices.

Appellees are seven individuals and four organizations, drawn from an array of atheist, agnostic, and/or humanist belief systems but united in one crucial respect: their beliefs do not recognize a divine authority. Appellees were not nominated by their local representatives but instead contacted the House on their own behalf and/or through counsel, requesting (and sometimes demanding) inclusion in the House Prayer practice. They universally concede that, if invited, they will provide an "uplifting" secular message in lieu of a Prayer invoking divine authority – and thus will not offer a Prayer consistent with House traditions. (Appx. A255-A256 ¶25, A313 ¶276.) Some appellees asserted to the House that

their inclusion is required by Supreme Court precedent. (Appx. A347.) In each instance, the House declined appellees' requests and, where appropriate, explained that Supreme Court precedent does not require such inclusion. (Appx. A348-A350.)

Appellees also challenge the House of Representatives' tradition of asking Members and visitors (who sit in the gallery behind and above the chamber floor) to stand during recitation of the Prayer and Pledge of Allegiance. Under its current policy, the House requests that those present "please rise as able" during its session-opening ceremony. (Appx. A2681:4-23.) The request is made as a "sign of respect" for the institution of the House, its traditions, and the individual giving the Prayer. (Appx. A2661:25-A2662:17, A2681:4-23.) It is not a request to participate in the Prayer, nor is it a request that House Members or visitors respect any particular religious doctrine. (Appx. A2662:7-10.)

Two appellees, Brian Fields and Scott Rhoades, allege targeted treatment during a visit to the legislative chamber in 2012. (Appx. A255 ¶24, A267 ¶60.) More specifically, appellees' pleading alleges that, while seated in the mezzanine, "the Speaker of the House directed [appellees] to stand," and, when they did not, the "Speaker then repeatedly asked [appellees] to stand" and, "[w]hen [appellees] did not, the Speaker publicly asked a Legislative Security Officer to further

pressure [appellees] to stand for the prayer," at which point a "Security Officer then approached [appellees] and several times asked [them] to stand." (*Id.*)

Discovery revealed this description of events to be a fabrication. (Appx. A2729:1-10) (allegation "was a false memory that [Rhoades] got after speaking to other people"); (Appx. A2691:13-A2692:7). During their depositions, Fields and Rhoades both admitted that then-Speaker Samuel H. Smith did not single them out or ask them to stand beyond his generalized request to all attendees. (*Id.*) Instead, they testified that a security guard made several requests (not demands) that they "please rise." (Appx. A2691:21-A2693:4, A2729:1-A2733:11.) Fields and Rhoades were part of a larger group of visitors who did not stand, were not asked to leave, and against whom no action was taken. (Appx. A2693:3-4, A2732:25-A2733:11.)

By appellees' own account, this was a singular event. Appellee Fields asserted that he often attends House sessions as a gallery visitor and typically refuses to stand. (Appx. A255 ¶23.) Other than the alleged instance in 2012, Fields identified no other occasion on which he was personally asked to rise. (Appx. A269217-A2693:4, A255 ¶¶23, 24.) Moreover, any request directed at appellees (to the extent a request was made) was not the product of House policy; House leaders were unaware a security guard might "ask[] people who didn't rise in the gallery to do so." (Appx. A2664:15-18.) During Speaker Turzai's tenure,

he "never ever required anybody to stand." (Appx. A2663:21-A2664:2, A2665:24-A2666:4.) It is undisputed that, when the House learned of appellees' allegation, it took steps to ensure that such requests would not happen in the future. (Appx. A3622, A587:3-A588:14.)

V. SUMMARY OF ARGUMENT

The practice of opening sessions with a religious prayer is a centuries-old tradition in our federal and state legislatures. That long history provides the animating spirit behind the Supreme Court's two legislative prayer decisions, *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 572 U.S. 565 (2014). In both, the Supreme Court looked to history to justify, and uphold, legislative prayer practices that were monolithically Christian and often sectarian. Together, *Marsh* and *Greece* establish a presumption of constitutionality for legislative prayer, so long as the "prayer opportunity" is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-795.

Although the appellee non-believers do not allege the Pennsylvania House of Representatives "exploited" its Prayer practice, the district court granted summary judgment in their favor and, in doing so, created a "new metric" in Establishment Clause jurisprudence. That new metric is rooted in two intertwined conclusions lacking any identifiable textual foundation in *Marsh* or *Greece*.

Essentially, the district court held that the House's failure to include all "belief" systems, including non-belief, in its religious Prayer practice is a form of "discrimination" and, by "discriminating" in this way, its otherwise constitutional Prayer practice violated the Establishment Clause. Fashioned from a single dependent clause in *Greece*, the district court's ruling undermines centuries of American legislative tradition and effects a "particularly perverse result": striking down a practice that is more diverse than the prayer practices upheld by the Supreme Court in *Marsh* and *Greece*. *Simpson v. Chesterfield Cty. Bd. of Sup'rs*, 404 F.3d 276, 287 (4th Cir. 2005).

Until last year, no federal court had ever suggested that the Establishment Clause requires legislative prayer practice to include atheists, non-theists, or other non-believers.[7] This absence of precedent is hardly surprising, given the emphasis the Supreme Court's legislative prayer decisions place on "Divine guidance," legislators' "belief in a higher power," and prayer's ability to address "precepts far beyond the authority of government to alter or define." *Greece*, 572 U.S. at 591. As described in *Greece*, history and religion are inextricably intertwined in a

[7] District courts decided two other non-believer challenges to legislative prayer practices in the last year, to mixed results. *See, e.g.*, *Barker v. Conroy*, 282 F. Supp. 3d 346 (D.D.C. 2017) (upholding practice); *Williamson v. Brevard Cty.*, 276 F. Supp. 3d 1260 (M.D. Fla. 2017) (finding practice unconstitutional).

practice that "accommodate[s] the spiritual needs of lawmakers and connect[s] them to a tradition dating to the time of the Framers." *Id.* at 588. A secular invocation cannot fulfill the traditional purpose of soliciting "Divine guidance" because, no matter how eloquent it might otherwise be, it does not address a Supreme Being. By imposing an open-door requirement on guest chaplain practices, the district court's ruling impermissibly infringes on both the House of Representatives' religious tradition – a form of government speech – and its Members' religious exercise.

The implications of the district court's holding reach beyond the question of whether legislatures' session-opening religious prayer must be redefined to include the non-religious. On a more general level, until the last year, no federal court had ever determined that the exclusion of a single "minority faith" might invalidate an otherwise constitutional prayer practice. The logic of the district court's opinion leaves legislatures that host guest chaplains (and, by doing so, ensure diversity) with no control over the contours of their practice. This requirement, if not reversed, will likely mean the end of guest chaplain practices.

The district court also found that a one-off incident, in which a House security guard allegedly confronted two appellees for refusing to stand during the session-opening Prayer and Pledge of Allegiance, rendered that alleged House "policy" unconstitutionally coercive. Because the House leaders ensured that such

events will not take place in the future, any claim based on this singular event was moot. But even if it was not, the ruling – which ignored the fact that House leaders did not direct, and were unaware of, the singular event on which appellees base their claim – is unsupported by the plurality opinion in *Greece*. It, too, must be reversed.

VI. STANDARD OF REVIEW

This Court exercises "plenary review of a district court's resolution of cross-motions for summary judgment" and applies "the same standard as did the district court."[8] *Norfolk S. Ry. Co. v. Pittsburgh & W. Va. R.R.*, 870 F.3d 244, 252-53 (3d Cir. 2017). This Court will "affirm a grant of summary judgment where 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed.R.Civ.P. 56(a)). Where, as here, the parties presented competing motions, the paradigm applies separately to each of the cross-motions. *See Auto-Owners Ins. Co. v. Stevens & Ricci Inc.*, 835 F.3d 388, 402 (3d Cir. 2016). These standards apply to each of the issues appellants raise on appeal.

[8] This Court exercises "plenary review over a trial court's ruling on mootness." *Weitzner v. Sanofi Pasteur*, 819 F.3d 61, 63-64 (3d Cir. 2016).

VII. ARGUMENT

A. The Establishment Clause does not prohibit the Pennsylvania House of Representatives from limiting its guest chaplain practice to religious faiths that recognize divine authority.

The district court erred when it granted appellees' motion for summary judgment. Its decision misreads the Supreme Court's legislative prayer decisions, *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 572 U.S. 565 (2014), misapplies the historical analysis they require, and impermissibly fashions a new constitutional standard that, if applied, will spell the end of diversity-enhancing legislative guest chaplain practices. This Court should reverse.

Appellees are atheists, secular humanists, and other non-believers (and their supporting organizations) who desire to offer non-religious messages during session-opening time the Pennsylvania House of Representatives sets aside for religious Prayer. The House Prayer practice serves the secular purpose of solemnizing legislative activity while providing House Members with a moment of religious expression and reflection. Although some legislative prayer practices rely upon a permanent chaplain, the House invites guest chaplains, a practice that provides valued diversity while satisfying the tradition's central purpose: solicitation of Divine guidance. No one disputes that this religious expression is constitutional. Appellees demand inclusion in the House practice but concede that

they will not address any transcendent authority. For this reason, their request for inclusion was denied. That denial does not violate the Establishment Clause.

As a matter of constitutional principle, the content of the House of Representatives' religious expression and reflection is government speech, subject to internal House procedure and its Members' preferences, not those of the public. Moreover, nothing in the history of legislative prayer or the Supreme Court's Religion Clause jurisprudence suggests that the government's religious practice must encompass non-religion. Legislatures have enjoyed control over their religious expression since legislative prayer's inception centuries ago. Absent "exploitation" through proselytization, overt affiliation, or disparagement, *Marsh* and *Greece* do not to limit that control. *Marsh*, 463 U.S. at 794-95.

1. The Supreme Court's Establishment Clause jurisprudence confirms the constitutionality of the House of Representatives' guest chaplain practice.

The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST., amend. I. "The general principle deducible from the First Amendment and all that has been said by the Court is this: that [it] will not tolerate either governmentally established religion or governmental interference with religion." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970). "Short of those expressly proscribed governmental acts," the

Supreme Court has explained, "there is room for play in the joints" of the First Amendment that "permits religious exercise to exist without sponsorship and without interference." *Id.* The House guest chaplain practice fits easily within the "room" set aside for the government's religious expression.

Appellees' Section 1983 claim arises under the Establishment Clause, which "address[es] governmental efforts to benefit religion or particular religions," rather than the Free Exercise Clause, which "pertain[s] if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (Kennedy, J.). In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court set forth a three-pronged test for Establishment Clause challenges: statutes "must have a secular legislative purpose," their "primary effect must be one that neither advances nor inhibits religion," and they "must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13.

The *Lemon* test does not always control, however. In the intervening half-century, the Supreme Court's Establishment Clause jurisprudence has ramified into "interlocking lines of cases applying the Clause in particular situations." *Doe v. Indian River School Dist.*, 653 F.3d 256, 269 (3d Cir. 2011). Even within the Gordian knot of these "interlocking lines," however, no one disputes that the

government may not "'employ[] Religion as an engine of Civil policy,'" *Van Orden v. Perry*, 545 U.S. 677, 737 (2005) (Souter, J., dissenting) (quoting 2 *Writings of James Madison* 183, 187 (G. Hunt ed. 1901)), by wielding its "coercive power" to aid or hinder either religions or their followers. *McGowan v. Maryland*, 366 U.S. 420, 453 (1961).

This coercive power is at its apex when the government conditions public benefits on individual belief by "pass[ing] laws or impos[ing] requirements which aid all religions as against non-believers" or "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). But coercion takes more subtle forms, too, as when the government expresses an "official" denominational preference. *See Larson v. Valente*, 456 U.S. 228, 244-45 (1982). By prohibiting overt favoritism, the Establishment Clause remains "inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.*

No law, public benefit, civil policy, or unconstitutional condition is at issue here. Instead, a group of non-believers challenge the internally-directed speech of the Pennsylvania House of Representatives, a legislative body that is but one half of the Commonwealth's bicameral General Assembly, which is, itself, but one third of a tripartite system of separated powers. The legislature's internal rules and speech do not carry the force of law, do not represent the views of the

Commonwealth as a whole, do not impose any requirements on the public, and do not venture beyond the walls of the legislative chamber. In this way, the House Prayer practice is only nominally "legislative," "not a matter of business, but … a matter of ceremony."[9] *Barker*, 282 F. Supp. 3d at 363 (quoting 6 Cannon, *Precedents of the House of Representatives* §663 (1936)).

Interiority is legislative prayer's distinguishing and defining feature. As described by the Supreme Court, the "audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Greece*, 572 U.S. at 587; *Id.* (legislative prayer is an "internal act," "directed" at the legislature's "own members"). The Seventh Circuit recently relied on this distinction – between the "government's own operations" and "how a state regulates private conduct" – to reject a state government's invocation of *Marsh* and *Greece* to justify its prohibition on secular wedding officiants:

> [A]lthough *Marsh* and *Greece* show that a government may, consistent with the First Amendment, open legislative sessions with Christian prayers while not inviting leaders of other religions, they do not begin to suggest that a state could limit the solemnization of

[9] The ceremonial nature of the practice is why legislative privilege does not apply. *Cf. Kurtz v. Baker*, 829 F.2d 1133, 1146 n.2 (D.C. Cir. 1987) (R. B. Ginsburg, J., dissenting); *Barker*, 282 F. Supp. 3d at 363 (same).

> weddings to Christians, while excluding Judaism, Islam, Buddhism, and – humanism.

Center for Inquiry v. Marion Circuit Court Clerk, 758 F.3d 869, 874 (7th Cir. 2014).

Legislative prayer's internal, expressive nature does not place it beyond the reach of the First Amendment, of course. But because any "benefit" is highly attenuated and any risk of coercion vanishingly small, some significant factor beyond mere religious expression is necessary to render the practice unconstitutional.

Outside the legislative prayer context, the Supreme Court has devised and discarded several Establishment Clause "tests," resulting in a jagged line of precedent that produces inconsistency even where facts seem nearly identical.[10] And yet the government continues to speak in a religious idiom: presidents swear their oath with the words "so help me God," the Supreme Court begins its day with "God save the United States and this Honorable Court," and our currency bears the

[10] Courts have found, for instance, that "a creche displayed on government property violates the Establishment Clause, except when it does not," a "menorah displayed on government property violates the Establishment Clause, except when it does not," and a "display of the Ten Commandments on government property also violates the Establishment Clause, except when it does not." *Utah Highway Patrol Ass'n v. American Atheists*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of *certiorari*).

motto, "IN GOD WE TRUST." *See Greece*, 572 U.S. at 587; *New Doe Child #1 v. United States*, 901 F.3d 1015, 1023 (8th Cir. 2018) (religious reference on currency is constitutional even though "motivated 'in part because of religious sentiment'").

The Supreme Court's light touch with regard to the government's religious speech suggests minimal risk of establishment or coercion where the expression is ceremonial. More specifically, as described below, the Supreme Court has characterized the risk posed by legislative prayer as constructively non-existent. *See Marsh*, 463 U.S. at 792. Absent that risk, judicial intrusion into the internal operations of the Commonwealth's legislature is unwarranted.

a. *Marsh v. Chambers*

The Supreme Court first addressed legislative prayer thirty-five years ago, in *Marsh v. Chambers*. There, a Nebraska state senator challenged his own legislature's practice of paying a permanent chaplain to open its sessions with Christian prayer. Beginning in 1965, and then biennially for the next 16 years, the Nebraska legislature selected a single Presbyterian clergyman to provide opening prayers. *See Marsh*, 463 U.S. at 785; *Chambers v. Marsh*, 675 F.2d 228, 234 (8th Cir. 1982).

The senator alleged that the religious content of the chaplain's prayers and the payment of his salary with public funds violated the Establishment Clause. 463

U.S. at 785-86. The district court agreed in part, finding no violation in the chaplain's prayers but holding that his salary could not be paid with public funds. *Id.* On appeal, the Eighth Circuit applied *Lemon v. Kurtzman* and, analyzing the issues together, "held that the chaplaincy violated all three elements of the [*Lemon*] test." *Id.* at 786.

The Supreme Court reversed. Casting *Lemon* aside, the Court looked to history as the measure of legislative prayer's constitutionality, holding that its "unbroken history of more than 200 years" – dating back to the same United States Congress that drafted the language of the Establishment Clause itself – gives rise to a broad presumption of constitutionality. *Id.* at 792; *id.* at 786 ("From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."). "This unique history," it held, "leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id.* at 791; *see also id.* at 788-89 ("[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment"). Although the practice addressed in *Marsh* was overtly theistic, the Court characterized the practice as "a tolerable acknowledgment of beliefs widely held among the people of this

country," not an "'establishment' of religion" nor even "a step toward establishment." *Id.*

More specifically, the Court found that neither a decades-long reliance on a clergyman of a single faith nor his payment with public funds "serve[d] to invalidate Nebraska's practice." *Id.* at 793. Rejecting "any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church," the Court stated that, in the absence of an "impermissible motive," the legislature's year-in, year-out reliance on a Presbyterian chaplain "does not in itself conflict with the Establishment Clause." *Id.* at 793-94. Through its broad presumption of constitutionality, *Marsh* limits judicial intrusion into legislative prayer practice to those exceptional circumstances in which "the prayer opportunity" is "exploited to proselytize or advance any one, or to disparage any other, faith or belief."[11] *Id.* at 794-95.

b. *County of Allegheny v. ACLU*

Six years after *Marsh*, the Supreme Court decided *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), holding that a county government's holiday "crèche" violated the Establishment Clause. In doing so, the Court did not look to *Lemon* or

[11] Justice Brennan recognized this presumption in his dissent, where he objected to treating "practice[s] authorized by the First Congress as presumptively consistent with the Bill of Rights." *Id.* at 816.

history but instead applied the nascent "endorsement test," a standard proposed by Justice O'Connor in a series of prior concurrences. This test distills *Lemon* to a single concern: whether the government's use of "religious symbolism" has "the effect of endorsing religious beliefs." 492 U.S. at 597. Courts applying the standard "do not consider [] purpose in determining whether a religious display has violated the Establishment Clause" but instead "focus on the effect of the display on the reasonable observer." *Freethought Soc'y v. Chester Cty.*, 334 F.3d 247, 261 (3d Cir. 2003) (emphasis in original).

County of Allegheny would not be relevant here if the Court did not attempt to retrofit *Marsh* to its "endorsement" framework. *Marsh*, it noted in *dicta*, "recognized that not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief." 492 U.S. at 603 (citation omitted). The legislative prayer at issue in *Marsh* "did not violate this principle because the particular chaplain had 'removed all references to Christ.'" *Id.*

This characterization of *Marsh* drew vociferous opposition from Justice Kennedy, who asserted that "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings." *Id.* at 670. Thus, "[a] test for implementing the protections of the Establishment Clause that, if

applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." *Id.*

In the wake of *Allegheny*, some courts began to apply the endorsement standard in suits challenging legislative prayer. *See, e.g.*, *Simpson v. Chesterfield County Bd. of Sup'rs*, 292 F. Supp. 2d 805, 817 (E.D. Va. 2003), *rev'd*, 404 F.3d 276 (4th Cir. 2005). This was no small change. Under *Allegheny*, the mere perception that a prayer practice "affiliat[es] the government with any one specific faith or belief" could trigger a finding of unconstitutionality, even where that affiliation is not purposeful. 492 U.S. at 603.

c. *Town of Greece v. Galloway*

In 2014, the Supreme Court revisited legislative prayer, extending the reasoning of *Marsh* to local government proceedings. In *Town of Greece v. Galloway*, two residents of Greece, a town of just under 100,000 people in western New York, challenged the town's practice of inviting local clergy to open its monthly board meetings with a Christian invocation. Although the Greece prayer practice was ostensibly open to everyone, only Christian prayers were offered in the ten years leading up to the appellees' suit. 572 U.S. at 570-72.

Like *Marsh*, *Greece* produced conflicting rulings in the courts below. The district court, applying *Marsh*, upheld the practice. *Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010). On appeal, the Second Circuit conceded

that *Marsh* was controlling but reversed, based on a holistic factual analysis rather than any "single element" of the town's practice. 572 U.S. at 574; *Galloway v. Town of Greece*, 681 F.3d 20, 33 (2d Cir. 2012). In doing so, the Second Circuit joined the chorus of courts that interpreted *Allegheny* as a gloss on *Marsh*. Although the Second Circuit found no "animus" behind the town's practice, it held that the town could not "overcome the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." 681 F.3d at 31-33. The circuit court found the practice unconstitutional "regardless of [the] town's intentions." *Id.* at 32.

At the Supreme Court, the *Greece* plaintiffs focused on three factors supporting the Second Circuit's ruling. First, the prayers were often sectarian. 572 U.S. at 571-72. Second, the prayers were directed to the public: unlike the Nebraska legislature, Greece prayer-givers stood facing attendees, their back to the board members. (Appx. A3082-A3083, A3097.) Third, in contrast to the public's passive observance in *Marsh*, citizens participated at Greece board meetings, petitioning the board in its adjudicatory and regulatory role. 572 U.S. at 586.

The Supreme Court rejected each of these arguments. In a majority opinion authored by Justice Kennedy, the Court found the "contention that legislative prayer must be generic or nonsectarian" baseless. *Id.* at 579-80. It stated that

"*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content." *Id.* at 580. Further, the Court clarified that legislative prayer is solicited by the legislature for the benefit of the legislature. *Id.* at 587-88. As a result, even when overwhelmingly Christian and sectarian, the practice is not "an effort to promote religious observance among the public." *Id.* at 588; *see also id.* at 587 ("The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing.").

Justice Kennedy's majority opinion also delivered a thorough rebuke to *Allegheny*, characterizing its discussion of legislative prayer as mere "*dictum*," "irreconcilable with the facts of *Marsh* and with its holding and reasoning." *Id.* at 580. By doing so, the Court spurned the endorsement standard and returned legislative prayer to the doctrinal framework of *Marsh*, which permits even monolithic and sectarian Christian prayer as long as there is no evidence of intentional alignment with a single religious viewpoint.[12] *Greece* does not create a new metric, it rejects one: the endorsement standard set forth in *Allegheny*.

[12] *See*, *e.g.*, *Marsh*, 463 U.S. at 823 n.1 (Stevens, J. dissenting) (noting that the *Marsh* majority opinion makes "subjective motivation of legislators the decisive criterion").

2. The district court erred by creating a new constitutional standard from *dicta*.

When the district court denied the House of Representatives' motion to dismiss in April 2017, it ignored the broader context of the Supreme Court's legislative prayer decisions and found, instead, that *Greece* "installed" what the court variously labeled a "new metric," a "nondiscrimination mandate," or an "anti-discrimination principle." (Appx. A71-A72 & n.166.) That "new metric" was sweeping: "when a legislature opens its door to guest chaplains and other prayer givers, it may not purposefully discriminate among them on the basis of religion." (Appx. A71-A72.)

There was a hiccup, however. As the House quickly pointed out, "discrimination" was not before the Court in *Greece*, leaving any discussion of it pure *obiter dictum*. And so, when the district court spoke again, in August 2018, the language of "mandates" and "metrics" was nowhere to be found. In fact, the district court conceded that any reference to "nondiscrimination" in *Greece* could only be *dicta* because "the question of intentional religious discrimination in guest chaplain selection was not squarely before the Court." (Appx. A28-A29.)

Ultimately, the district court's awareness of its prior overreach changed nothing. Asserting that *Greece* "repeatedly warned" or "admonished against intentional discrimination," the Court held that the opinion "presaged disposition" of the appellees' Establishment Clause claim, conjuring its own new metric from

Greece's non-binding language. (Appx. A27-A29.) Even this more modest take on *Greece* over-shoots the mark, however. The court's description of "repeated" admonishments is contradicted by *Greece* itself, which refers to "discrimination" and "nondiscrimination" just one time each. More importantly, in both instances, *Greece* addresses "discrimination" in a *Marsh*-like manner, to reject the Second Circuit's endorsement test. Presented with the undisputed appearance of the town's affiliation with sectarian Christianity, the *Greece* court treated the lack of overt "discrimination" as a kind of safe-harbor: the town's "advancement" of Christianity was accidental, not purposeful, and thus not a violation of the Establishment Clause.

But even if the district court was correct, and the Supreme Court intended to comment on prayer-giver exclusion, any such commentary remains *obiter dicta*. It is true, as the district court stated, that "*dicta* in Supreme Court opinions 'are highly persuasive' and are not to be viewed lightly.'" (Appx. A29) (citation omitted). But the Supreme Court's creation of a new constitutional standard is, by any measure, a big deal, and it seems fair to ask that courts refrain from fashioning case-dispositive constitutional rules from non-binding language. Such caution heeds the "fundamental and longstanding principle of judicial restraint" that presumes "courts avoid reaching constitutional questions in advance of the necessity of deciding them," *Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S.

439, 445 (1988), and recognizes that, although *dictum* "may be respected," it "ought not to control the judgment in a subsequent suit, when the point is presented for decision." *Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 978 n.38 (3d Cir. 1980) (quoting *Cohens v. Virginia*, 19 U.S. 120, 179 (1821)).[13]

Moreover, the persuasive power of *dicta* is context-dependent: this Court, like others, only "gives *dicta* as much weight as it sees fit under the circumstances of a particular case." *United States v. Dupree*, 617 F.3d 724, 741 (3d Cir. 2010) (Fisher, J., concurring). Here, context and "circumstance" do not support a forceful application of the "nondiscrimination" language in *Greece*. After all, even if the district court's interpretation of that language is correct (it is not), its newly-minted standard is found in a single dependent clause in an opinion that rebukes an attempt to mine new constitutional rules from non-binding language. *Greece*, 572 U.S. at 579-80. In the end, however the Supreme Court's brief discussion of "discrimination" might be interpreted, the district court's transformation of *dictum* into a new, decisive constitutional standard takes "persuasion" too far.

[13] Other circuits honor this same principle. *See United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (applying "the Supreme Court's admonition that, although *dictum* 'may be followed if sufficiently persuasive,' it 'ought not to control the judgment in a subsequent suit'" (citation omitted)).

3. The House Prayer practice exceeds historical standards of diversity.

The "essential inquiry" into legislative prayer practice under *Marsh* and *Greece* is undisputed: "whether the practice at issue 'fits within the tradition long followed in Congress and the state legislatures.'" (Appx. A22) (quoting *Marsh*). Tradition and history, the district court conceded, reflect a "natural prevalence of theistic legislative prayer" and "convincingly support sectarian and theistic content in legislative prayers." (Appx. A24-A25.) In other words, the House practice of religious Prayer does not, itself, contravene any historical standard.

In fact, it exceeds it. There is no allegation that the Pennsylvania House practice is overly sectarian. And, by any measure, the diversity of the House Prayer practice improves upon legislative prayer's historical record. According to appellees' expert, Professor Paul Finkelman, the United States Congress' permanent chaplains have included sixty-one Protestants (of which four-fifths come from just three denominations), one Catholic, and no one else. (Appx. A2780.) Similarly, for nearly a hundred years, from 1865 to 1994, the "permanent chaplains" of the Pennsylvania House "were always Protestant clergymen drawn from a relatively small number of Protestant denominations that did not reflect the vast diversity of religious belief in Pennsylvania among Protestants, much less non-Protestants." (Appx. A2789.)

Although the Pennsylvania House practice is limited to those belief systems capable of "invoking Divine guidance," it embraces diversity within those parameters. Since 1995, when the House abandoned permanent chaplains for rotating and guest chaplains, its Prayer practice has included Judaism, Islam, and Hinduism, as well as an extraordinarily diverse array of Christian faiths and denominations, including Evangelical Lutheran, Greek Orthodox, Methodist, Presbyterian, Advent Lutheran, Mennonite, Baptist, Roman Catholic, Episcopalian, Catholic, Lutheran, Pentecostal, Anglican, Baptist Evangelist, Seventh-Day Adventist, United Church of Christ, Church of God, African Methodist Episcopal, Evangelical Congregational, Assemblies of God, and Church of the Brethren. (Appx. A2898-A2943.) House efforts to embrace religious diversity have only increased in recent years. (Appx. A2674:13-17, A2686:9-15.)

This diversity is the product of the House's own initiative, not judicial intervention: after all, the Supreme Court has repeatedly rejected a constitutional diversity mandate. It did so implicitly in *Marsh*, when it found a Presbyterian clergyman's 16-year tenure as chaplain constitutional because it was not a purposeful attempt to "advance[] the beliefs of a particular church." 463 U.S. at 793. And it did so expressly in *Greece*, by shrugging off a constitutionally-imposed "quest to promote a 'diversity' of religious views." 572 U.S. at 586. As in *Marsh*, the Greece practice of sectarian Christian prayer was also constitutional,

so long as it was not perpetuated through the intentional exclusion of non-Christian faiths.[14] *Id.* at 585-86.

Together, *Marsh* and *Greece* demonstrate that, even where it is exclusively Christian and sectarian, legislative prayer is but a "tolerable acknowledgement of beliefs widely held," not "a first, treacherous step towards establishment of a state church." *Id.* at 575; *Marsh*, 463 U.S. at 791-92. Logically, then, for the House practice to violate the First Amendment, it must constitute some "treacherous step" beyond the practices in *Marsh* and *Greece* – a pernicious modification of the traditional practice that approaches the actual "establishment of a state church." *Marsh*, 463 U.S. at 791. Appellees have identified no such "step."

4. The district court's historical analysis is predicated on legal and factual errors.

The district court nonetheless found the House practice unconstitutional. Although it recognized that "the primary evil that [the] Framers sought to prevent

[14] Affiliation with a single religious viewpoint is also central to Justice Kagan's *Greece* dissent, which characterizes the Greece practice as "government-sponsored prayer of a single religion," that pushed "beyond the constitutional pale" by "infus[ing] a participatory government body with one (and only one) faith" and creating a "majority religious belief." *Id.* at 618, 632-33. Justice Kagan's remedy is a prayer practice indistinguishable from that of the Pennsylvania House: "invit[ing] clergy of many faiths to serve as chaplains," ensuring "the government does not identify itself with one religion or align itself with that faith's citizens." *Id.* at 632.

through the Establishment Clause may well have been the establishment of a state religion aligning with one particular sect of Protestant Christianity," it set that history aside. (Appx. A31.) Citing our "vastly diverse religious tapestry" and an "understanding" of the Establishment Clause that has "evolved" and "broadened" over time, the district court enlarged the scope of impermissible evils from "establishment of a state religion" to "establishment of a category of favored religions – like monotheistic or theistic faiths." (Appx. A31-A32.) This is difficult to reconcile with *Marsh* and *Greece*, however, which reject the argument that original intent and historical tradition (no matter how narrow) are "not relevant to a society far more heterogeneous than that of the Framers." *Marsh*, 463 U.S. at 791.

Moreover, both decisions embrace the theistic nature of a practice the Supreme Court describes as an "invocation" of "Divine guidance," and "a tolerable acknowledgment of beliefs widely held" among a citizenry "whose institutions presuppose a Supreme Being." *Marsh*, 463 U.S. at 792 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)); *Greece*, 572 U.S. 591 (prayer reflects "belief in a higher power" and "precepts far beyond the authority of government to alter or define"). The district court's "evolved" legislative prayer framework thus begets a metaphysical irony: the government may "invoke" and even "presuppose" a "Supreme Being" but it may not limit its religious expression to those belief systems that actually recognize one.

How did the district court drift so far afield? It made two errors, one legal and one historical. First, the district court misread Justice Kennedy's majority opinion in *Greece* as "caution[ing] that history and tradition cannot save an otherwise unconstitutional practice." (Appx. A22, A24-A25); (Appx. A66) ("The Court forewarned … that history and tradition cannot save an otherwise unconstitutional practice."). Second, it erroneously held that the House of Representatives' selective control over its guest chaplain practice constituted a meaningful departure from historical tradition.

a. The district court mischaracterizes the historical standard.

Although the district court cited no specific language, its assertion that history "cannot save an otherwise unconstitutional practice," (Appx. A22), is apparently rooted in *Greece*'s admonition that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Greece*, 572 U.S. at 576. As the next sentence in *Greece* reveals, however, the district court's interpretation mistakenly inverts the Supreme Court's position. History does not "save" an "otherwise unconstitutional practice," history determines what is constitutional: "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* As courts have recognized post-*Greece*, this constitutes "an unequivocal directive." *New Doe Child #1*, 901 F.3d at 1020; *see also Kondrat'yev v. City of Pensacola*,

903 F.3d 1169, 1179 (11th Cir. 2018) (Newsom, J., concurring) (noting same "unequivocal, exceptionless rule").

This account is strongly supported by Justice Kennedy's other Establishment Clause opinions, including his lengthy disquisition in *Allegheny*, which provided a "blueprint" for *Greece*. *Kondrat'yev*, 903 F.3d at 1178 ("Justice Kennedy used as the blueprint for his majority opinion in *Greece* his earlier separate opinion in *Allegheny*"). *Marsh*, Justice Kennedy explained there, "stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings." *Allegheny*, 492 U.S. at 670. Per Justice Kennedy, historical practice and understanding suggest just "two limiting principles": the government "may not coerce anyone to support or participate in any religion or its exercise," and it "may not … give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.* at 659.

These same principles provide the analytical structure for *Greece*, as well, which is divided into two parts: the first, a historical assessment of whether the Greece practice of sectarian Christian prayer constituted an "establishment" of religion, and the second, an analysis of whether the practice "coerce[d] participation by nonadherents." *Greece*, 572 U.S. at 577-78, 586; *see also New*

Doe Child #1, 901 F.3d at 1020 (describing *Greece's* "two-fold analysis" under which "historical practices often reveal what the Establishment Clause was originally understood to permit, while attention to coercion highlights what it has long been understood to prohibit."). Appellees' allegations do not fall within either category.

b. History confirms that legislatures may tailor their religious practice to their preferences.

Here, as in *Greece*, the proper "inquiry" is "to determine whether the prayer practice [at issue] fits within the tradition long followed in Congress and the state legislatures." 572 U.S. at 577. That history, faithfully applied, reveals that the House practice the district court derides as "discrimination" is no such thing. Rather, it is the mere reflection of legislators' long-standing right to tailor their ceremonial religious observation to their own prerogatives – a right shielded from judicial intrusion as long as they stop shy of outright affiliation. (Appx. A2787) (allegations of discrimination and controversy "were not limited to the selection of Congress's permanent chaplains but also accompanied Congress's selection of rotating or guest chaplains"); (Appx. A2794) (noting circumstantial evidence that states selected only Protestant legislative chaplains).

Appellees' own historical evidence confirms this. As their expert notes, the writings of James Madison describe a practice dictated by legislative preference:

> The tenets of the chaplains elected [by the majority] shut the door of worship agst the members whose creeds & consciences forbid a participation in that of the majority. To say nothing of other sects, this is the case with that of Roman Catholics & Quakers who have always had members in one or both of the Legislative branches. Could a Catholic clergyman ever hope to be appointed a Chaplain?[15]

(Appx. A2781) (citations omitted); Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1186 (May 2009) (citation omitted). Three decades later, this remained unchanged. A United States Senate Report from 1853 accedes that chaplain selections "are always made from some one of the denominations into which Christians are distributed," a narrowness "that is not in consequence of any legal right or privilege, but by the voluntary choice of those who have the power of appointment." (Appx. A2786.) Indeed, appellees' expert implicitly conceded that the House of Representatives' diversity-enhancing Prayer practice far exceeds the historical standard: "to the extent that historical practice could be viewed as indirectly supporting those policies, it would also support

[15] The answer to Madison's question is a qualified "yes." For instance, in 1832-33, a Catholic priest was appointed to serve as Congressional chaplain. (Appx. A2781-2782.) In the midst of "anti-Catholic hostility" he "was not reappointed … receiving only ten votes out of thirty-nine on the first ballot, and only one on the fifth and final ballot." (Appx. A2782.)

discrimination against any non-Protestant in the selection of prayergivers." (Appx. A2756.)

c. The district court's attempt to distinguish guest chaplain practices is unsupported by history.

It may be the case that the historical deference described above owes more to political pragmatism than lofty idealism. But those pragmatic roots do not alter the applicable constitutional standard – the House practice must be measured against a tradition that has never matched (or been required to match) the country's "religious tapestry," even when that tapestry was far less varied. (Appx. A2779) (noting that "Protestant dominance of the Congressional chaplaincies persisted even though by the middle of the Nineteenth Century, the nation had a substantial and growing non-Protestant population."); (Appx. A2789) (composition of Pennsylvania Prayer-givers was "odd[], given the circumstances of Pennsylvania's founding," because "no chaplains were Mennonite, Quaker, or Amish").

Hemmed in by history, the district court portrayed the House guest chaplain practice as a "horse of a different color from prayer practices previously found to be consistent with history and tradition." (Appx. A24.) It pointed to two distinguishing aspects. First, the district court suggested that the use of "guest chaplains" is not historically supported because "the United States Senate and House of Representatives have always appointed permanent chaplains" and "[g]uest chaplains did not exist at the federal level until 1855." (*Id.*) Second, it

looked to the lack of "historical evidence of nontheists requesting, or being denied the opportunity, to give the invocation in either chamber of Congress." (*Id.*) On both points, the district court's fine-grained parsing proves artificially narrow,[16] contravening the Supreme Court's declaration that it "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." *Greece*, 572 U.S. at 577.

Here, history shows that guest chaplains are not a new wrinkle in an age-old practice. The Supreme Court made no distinction between permanent and guest chaplains in *Greece*. The Nebraska practice addressed in *Marsh* also included guest chaplains, and the Supreme Court made special note there of the fact that guest chaplains were common in state legislatures. *Marsh*, 463 U.S. at 794 n.18. Like Justice Kagan in her *Greece* dissent, the *Marsh* court found the presence of guest chaplains to be a factor weighing against "establishment," even though guest chaplain practices were never fully inclusive. *Id.* at 793 (Nebraska legislature's chaplain "was not the only clergyman heard by the Legislature; guest chaplains have officiated at the request of various legislators and as substitutes during [the chaplain's] absences."); *see also Greece*, 572 U.S. at 632 (Kagan, J., dissenting)

[16] The district court's focus on federal history strays from *Greece*, which directs courts' comparative analysis to "the tradition long followed in Congress and the state legislatures." 572 U.S. at 577 (emphasis added).

(towns can "invite[] clergy of many faiths to serve as chaplains," ensuring "government does not identify itself with one religion").

Nor is there any conceptual basis for applying a different constitutional standard to permanent and guest chaplains. Whether it happens every session, every year, or every decade, "the act of choosing one person necessarily is an act of excluding others," and so, if the Constitution "allows a legislative body to select a speaker for its invocational prayers, then it also allows the legislative body to exclude other speakers." *Snyder*, 159 F.3d at 1233. This same logic dispenses with the district court's second distinguishing feature. Whether or not a 19th century atheist, specifically, ever requested inclusion in a legislature's prayer practice is ultimately irrelevant given legislatures' long history of turning away all but a few faiths. Centuries of denominationally-narrow prayer practice – including those involving guest chaplain practices – cannot be written off as historical accident. History confirms the constitutionality of prayer practices far more exclusive than the guest chaplain practice at issue here.

5. Federal courts are united in focusing on purposeful affiliation with a single sect.

As established in *Marsh*, there exists a single standard for any legislative prayer practice, whether the chaplains are permanent, rotational, or week-to-week: "the prayer opportunity" may not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794-95. Nearly every major

legislative prayer decision after *Marsh* reflects this, universally identifying the purposeful alignment with a single religious viewpoint as the fault-line between constitutional and unconstitutional prayer-giver selection.

Just last year, the *en banc* Fourth Circuit reaffirmed this demarcation when it struck down a county board's prayer practice, holding that, "[b]y proclaiming the spiritual and moral supremacy of Christianity, characterizing the political community as a Christian one, and urging adherents of other religions to embrace Christianity as the sole path to salvation, the Board in its prayer practice stepped over the line." *Lund v. Rowan Cty.*, 863 F.3d 268, 286 (4th Cir. 2017). In so holding, *Lund* merely echoes what circuit courts have consistently iterated and reiterated over the last thirty-five years. *See Rubin v. City of Lancaster*, 710 F.3d 1087, 1095 (9th Cir. 2013) (test of legislative prayer is whether the "'prayer practice, viewed in its entirety,' has 'advance[d] a single religious sect'"); *Atheists of Fla. v. City of Lakeland*, 713 F.3d 577, 592-93 (11th Cir. 2013) (no violation where practice did not "exploit the prayer opportunity to proselytize or advance or disparage any one faith or belief" or have the "effect of affiliating the [government] with any discrete faith or belief"); *Joyner v. Forsyth Cty.*, 653 F.3d 341, 349 (4th Cir. 2011) (practice may not "repeatedly suggest the government has put its weight behind a particular faith"); *Pelphrey v. Cobb Cty.*, 547 F.3d 1263,

1272 (11th Cir. 2008) ("a legislative body cannot … 'exploit' [a] prayer opportunity to 'affiliate' the Government with one specific faith or belief").[17]

Not surprisingly, then, in those rare instances where plaintiffs have asserted Establishment Clause challenges based on prayer-giver exclusion – including *Simpson*, *Atheists of Florida*, *Kurtz*, and *Snyder* – their claims have been rejected. In *Simpson*, where the Fourth Circuit upheld a county board's exclusion of a Wiccan from its prayer program, the court presciently described the "particularly perverse result" of a constitutional requirement that guest chaplain practices be absolutely inclusive: it would "push localities intent on avoiding litigation to select only one minister from only one faith," as approved by *Marsh*, with "the consequence of making America and its public events more insular and sectarian rather than less so."[18] *Simpson*, 404 F.3d at 287.

Moreover, in contrast to the district court's assertion that there is "no historical evidence of nontheists requesting, or being denied the opportunity, to

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[17] *See also Simpson*, 404 F.3d at 283 ("*Marsh* precluded local legislatures from improperly exploiting 'a 'prayer opportunity' to 'advance' one religion over others'"); *Snyder*, 159 F.3d at 1234 (noting that "'impermissible' in this context is a motive in selecting the prayer-giver either to 'proselytize' a particular faith or to 'disparage' another faith, or to establish a particular religion as the sanctioned or official religion of the legislative body").

[18] The district court relied on its discovery of a "new metric" as a basis for ignoring this contradictory line of pre-*Greece* precedent. (Appx. A35 n.9.)

give the invocation in either chamber of Congress," (Appx. A24), both *Kurtz* and *Atheists of Florida* involved atheist exclusion claims. Although the *Kurtz* majority held that the plaintiff did not have standing to challenge the prayer practice in the United States Congress, then-Judge Ruth Bader Ginsburg addressed the merits of his claims. In doing so, Judge Ginsburg concluded that Congressional practice "authorize[s] opening legislative sessions with prayer, nothing more and nothing else" – a practice she defined as "the invocation of 'Divine Guidance.'" *Kurtz*, 829 F.2d at 1147 (emphasis in original). Based on that definition, Judge Ginsburg found that the plaintiff's arguments exhibited "little realism and large indulgence in wishful thinking," because he did "not want to take part in the session opening traditionally maintained by Congress, for that opening does not include secular remarks." *Id.* Citing the "'unique' historical roots" of legislative prayer practice, Judge Ginsburg found that atheists possessed, "under current jurisprudence, no tenable free speech, establishment clause, or due process claim to advance." *Id.* Implicit in Judge Ginsburg's reasoning is the legislature's right to dictate the content of its own religious expression.

More recently, in *Atheists of Florida*, an atheist group challenged a city's pre-meeting prayer practice, which required that prayer-givers be selected from "local clergy" in a manner "all-inclusive of every diverse religious congregation" in the area. 713 F.3d at 584. Although the resolution ensured a diverse prayer

practice, the *Atheists of Florida* plaintiffs characterized the resolution as an "egregious" constitutional violation "because it 'expressly excluded non-religious or secular speakers, and required the invocations to be religious.'" *Id.* at 593.[19] Citing its prior decision in *Pelphrey*, the Eleventh Circuit upheld the practice and linked its constitutional analysis of the "selection process" to the question of "whether the prayers have been exploited to create[] an affiliation between the government and a particular belief or faith." *Id.* at 591-92 (quoting *Pelphrey*).

As this inviolate line of precedent reveals, "'diversity' among the faiths represented at legislative functions has never been the *sine qua non* of constitutional legitimacy." *Pelphrey v. Cobb Cty.*, 448 F. Supp. 2d 1357, 1371 (N.D. Ga. 2006), *aff'd*, 547 F.3d 1263. Instead, "pronounced evidence of a legislative purpose to sanction one religious viewpoint" serves "as a necessary predicate for declaring a legislature's selection of clergy a violation of the Establishment Clause." *Id.* at 1370-71. "[C]ontext," the *Simpson* court similarly

[19] *See also Atheists of Fla. v. City of Lakeland*, 838 F. Supp. 2d 1293, 1298 (M.D. Fla. 2012) (plaintiffs challenged "the selection and invocation process itself, which necessarily excludes atheists and agnostics and results in a majority of Christian invocation speakers"); Am. Compl. at ¶¶46, 95 (doc. 10, filed Aug. 18, 2010), *Atheists of Fla. v. City of Lakeland*, M.D. Fla. No. 10-1538. In its opinion, the district court disregarded *Atheists of Florida*, contending that the Eleventh Circuit "never actually reached" the issue of atheist exclusion. (Appx. A35 n.9.) As mentioned above, although the court did not address atheist exclusion directly, the argument was central to the plaintiffs' complaint.

confirmed, "is all important, for if *Marsh* means anything, it is that the Establishment Clause does not scrutinize legislative invocations with the same rigor that it appraises other religious activities." 404 F.3d at 287. And so, while deference is not "unlimited," courts must recognize that "too much judicial fine-tuning of legislative prayer policies risks unwarranted interference in the internal operations of a coordinate branch." *Id.* at 286-87.

6. The district court's ruling infringes on government speech.

Given the relatively deferential standard imposed by *Marsh* and *Greece*, it is hardly surprising that post-*Marsh* legislative prayer challenges have proven almost unremittingly futile. And yet legislative prayer practices around the country continue to grow more diverse, a result of democratic forces rather than judicial edict. The Pennsylvania House is an enthusiastic participant in this trend, abandoning a more narrow permanent chaplain practice for the variety provided by rotating and guest chaplains. *See supra* at §VII.A.3. The inarguable value of inclusiveness does not transform absolute diversity into a constitutional imperative, however, nor does it strip legislatures of their right to define the contours of their religious expression and reflection. The House desires a traditional religious practice, as *Marsh* and *Greece* allow.

In finding otherwise, the district court's ruling conflicts with its own April 2017 opinion, which correctly identified legislative prayer as a form of

"government speech" through which the "government can 'say what it wishes' subject only to the Establishment Clause and the will of 'the electorate and the political process.'" (Appx. A76-A77) (citation omitted). As detailed below, there is a reason courts have refrained from applying constitutional absolutes – like that of the district court below – to legislative prayer.

a. The House of Representatives' religious expression and reflection is protected.

"When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others[,]" *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017), and it does not "unconstitutionally discriminate[] on the basis of viewpoint" when it "advance[s] certain permissible goals." *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2246 (2015) (quoting *Rust v. Sullivan*, 50 U.S. 173, 194 (1991)). The House's choice to solemnize its legislative sessions with a moment of religious reflection is indisputably "permissible" under *Marsh* and *Greece*. The district court infringed on that permissible expressive activity by forcing the House to include non-religion in its practice.

But the district court's ruling does not simply interfere with the House of Representatives' institutional expressive activity, it also encroaches on a religious activity the Supreme Court has described in resolutely personal terms: legislators' prayer is "'an internal act'" directed not to the public but to "the lawmakers themselves," designed to "accommodate the[ir] spiritual needs" and allow them to

"show who and what they are." *Greece*, 572 U.S. at 587-88. The reference to "accommodation" in *Greece* is not happenstance. By describing legislative prayer as a permissible "accommodation" of individual "spiritual needs," the opinion locates room enough "in the joints" of the First Amendment to allow legislators the freedom to exercise and honor their own spirituality. *Cf. Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring) ("Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." (quoting *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring))).

The House argued below that it is entitled to structure its spiritual practice around its self-defined needs, as long as it does not "proselytize or advance any one," or "disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-795. The district court rejected those needs outright.[20] Characterizing this argument as "myopic," the district court ignored prayer's spiritual purpose and focused entirely on its secular, utilitarian role: "lend[ing] gravity to public business, remind[ing]

[20] Finding "no merit in defendants' insistence that plaintiffs could not deliver invocations that accommodate the spiritual needs of the lawmakers," the district court ignored the House defendants' stated position in favor of de-contextualized deposition testimony from just two Members. (Appx. A37.) It is hard to imagine a more "unwarranted interference in the internal operations of a coordinate branch." *Simpson*, 404 F.3d at 286-87.

lawmakers to transcend petty differences in pursuit of a higher purpose, and express[ing] a common aspiration to a just and peaceful society."[21] (Appx. A36.) Because there was "no evidence" that nontheistic prayers "fared worse than their theistic counterparts at fulfilling the foregoing purposes," the district court held, the House had no legitimate basis for limiting its practice to traditional religious prayer. (*Id.*)

The House never argued that secular belief systems are incapable of communicating wisdom or solemnity, of course. It asserted that, no matter how eloquent they may prove to be, secular invocations by definition lack the Divine aspect that the House seeks from its Prayer practice. (Appx. A3187-A3188.) In other words, an interpretation of the Establishment Clause that mandates inclusion of belief systems incapable of appealing to a transcendent power forces the House to forgo the specific purpose of its opening Prayers. (*Id.*) That legislative Prayer serves a secular purpose does not negate the equal importance of its capacity to invoke "precepts far beyond the authority of government to alter or define," rooted in a "belief in a higher power." *Greece*, 572 U.S. at 591.

[21] The full passage states that, "while religious in nature," legislative prayer "has long been understood as compatible with the Establishment Clause" because it also serves a secular purpose. *Greece*, 572 U.S. at 575 (emphasis added). The district court's characterization strips it of this context.

The district court's determination that the House "discriminates" by tailoring the contents of its Prayer practice to its self-defined religious needs is fundamentally misguided. If legislative prayer is a form of government speech, and the "invocation" of "Divine guidance" is a permissible goal of legislative prayer, then the House does not "discriminate" when it limits its practice to those belief systems that recognize a Divine authority.

b. The district court's reasoning threatens religious diversity, it does not enhance it.

On a more practical level, the unavoidable implication of the district court's analysis is that a guest chaplain practice may not exclude any "minority faith" that is "equally capable" of "lending gravity" to proceedings. This leaves no room for institutional discretion, constructively converting the legislative rostrum into a religious public forum. Because any belief system is capable of "solemnizing" legislative proceedings – a practitioner need only avoid controversial subject matter – any belief system would also be entitled to participate. The possibilities range from the rare and obscure (like pantheism, polytheism, and deism), to counter-religions (like Satanism), to parody "religions" (like Pastafarianism), to radical factions of more familiar religions, to religious cults and even practitioners

of the occult.[22] Indeed, the district court's all-access approach would require the House – if petitioned – to invite onto the chamber floor even those religions whose tenets embrace abhorrent or anti-democratic views, including racial supremacy, female subjugation, and virulent homophobia. Under the district court's logic, any exclusion based on those views would, as with non-believers, "purposefully discriminate … on the basis of religion." (Appx. A71-A72.)

The district court dismissed this argument as "plainly incorrect" but failed to offer a constitutionally-viable basis for exclusion. Instead, citing *Greece*, it rejoined that the House would not be required to "invite" all minority faiths because "legislatures do not have to attempt to 'achieve religious balancing' by seeking out and inviting diverse religious viewpoints." (Appx. A38) (quoting *Greece*). While this may be true as far as it goes, it is beside the point. The district court's opinion prohibits the House from declining an invitation to a member of any minority belief system that – like appellees – demands inclusion. This is no mere hypothetical threat. In February 2018, for instance, an Arizona branch of the Satanic Temple sued, alleging that the exclusion of Satanists from a city council

[22] Appellees, themselves, recognized this logic. (Appx. A2704:24-2705:17, A2721:16-20.)

prayer practice violated the Establishment Clause. (Appx. A3480-A3488.) The district court's opinion provides no basis for turning Satanists away.

Without citing a single supporting authority, the district court also surmised that, "of course," the House could "bar[] invocations that promote white supremacy, disparage other religious views, encourage subjugation of women, or exhibit animus toward the LGBTQ community."[23] (Appx. A38.) But the threat posed by an open-door requirement is not unpalatable content (at least not solely). As noted above, any religious figure, no matter how outrageous or offensive his or her underlying beliefs, can promise (and provide) an inoffensive prayer simply by avoiding inflammatory subject matter.[24] A requirement that the House include all

[23] The court made no effort to explain this principle, nor is it self-explanatory. That non-practitioners may find another religion's beliefs offensive does not change their religious nature: "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Lukumi Babalu Aye*, 508 U.S. at 531 (holding animal sacrifice protected by First Amendment). The district court's new framework is a recipe for unconstitutional entanglement.

[24] Appellees' suit reflects this. Although appellees affiliated with Pennsylvania Nonbelievers contend that their proposed invocations would not proselytize or disparage other faiths, in the past, the group has sponsored public "sermons" which denigrate religion, preach atheistic conversion, and incorporate "blasphemy." (Appx. A3455-A3458, A3431 n.15, A3588 n.17.) The group also co-sponsored a controversial slavery-themed anti-religion billboard. *See Atheist Group's Slave Billboard in Allison Hill Neighborhood Called Racist, Ineffective*, HARRISBURG PATRIOT-NEWS, Mar. 6, 2012 (available at www.pennlive.com). This background

(footnote continued on next page)

minority faiths is a requirement that it associate with undesired groups, providing them with what appellees themselves have described as an "opportunity to increase the visibility of their organizations, in association with the power and prestige of government." (Appx. A335 ¶338.)

As noted *supra* at §VII.A.5, the district court's logic, combined with political reality, will compel legislatures "intent on avoiding litigation to select only one minister from only one faith," with "the consequence of making America and its public events more insular and sectarian rather than less so." *Simpson*, 404 F.3d at 287. History, as reflected in *Marsh* and *Greece*, confirms that the House may limit its Prayer practice to religious beliefs that acknowledge a Divine or transcendental authority. As a result, the "perverse result" predicted in *Simpson* is easily avoided: we need only listen to history and all the Supreme Court has said about it.

B. The district court erred when it held that the House of Representatives' prior "please rise" practice violated the Establishment Clause.

The district court correctly held that the House of Representatives' current invocation practice, which asks those in attendance to "please rise as able," does

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(footnote continued from previous page)

does not prevent its representatives from presenting a solemn or uplifting invocation, of course.

not "amount to unconstitutional coercion." (Appx. A40.) It found the pre-2017 Prayer practice a "different matter," however, holding that, by "[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," the House engaged in impermissible coercion. (Appx. A41.) Quoting *Greece*, the court characterized appellees' allegations as "precisely the 'singl[ing] out [of] dissidents for opprobrium' that the plurality cautioned would offend the Establishment Clause." (*Id.*) But the events described, "view[ed]…in a light most favorable to the nonmoving party," do not rise to the level of unconstitutional coercion as defined in the plurality opinion in *Greece*. *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 235 n.5 (3d Cir. 2008). The district court's ruling also contravenes this Court's mootness jurisprudence.

In a plurality opinion, Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, dispensed with allegations that the atmosphere of the Greece town meetings rendered its prayer practice unconstitutionally coercive. Conceding the intimate and interactive atmosphere of town board meetings – where the politicians "know many of their constituents by name" – the Court nonetheless found that the Greece practice did not rise to the level of coercion. *Greece*, 572 U.S. at 586. Observers may chafe when exposed to beliefs with which they disagree, the plurality noted, but "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." *Id.* at 590. The plurality opinion in *Greece* identified two ways in which a legislative prayer practice may prove coercive: materially, where the government "allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation," and ceremonially, through a "pattern and practice" of inflammatory rhetoric or compulsory action that occurs "over time," utilized "to coerce or intimidate." 572 U.S. at 589-90. Appellees allege neither.

What they do allege is supported by threadbare evidence: the deposition testimony of individuals who retreated from, then revised, their allegations at the first sign of scrutiny. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."). But even if appellees' account was credible, the record does not establish that the single alleged event was the product of House policy. As the district court recognized, House leaders were wholly unaware that a guard had (allegedly) taken

the misguided initiative of asking that specific visitors stand.[25] (Appx. A16.) Once informed, the Leaders ensured no such events could occur in the future. (*Id.*)

Based on the record, it is clear that the one-off event described by appellees does not and cannot constitute a practice. Appellee Fields, the only appellee who regularly attends House sessions, asserted that he typically does not stand during the Prayer and Pledge of Allegiance and the 2012 occurrence is the only time he could remember that a security guard approached him. (Appx. A255 ¶23, A2708:10-A2710:15.) Viewed holistically, as required under *Greece*, the event alleged, while perhaps unfortunate and uncomfortable (if true), does not violate the Establishment Clause. "Offense," the *Greece* plurality emphasized, "does not equate to coercion." 572 U.S. at 589.

If this singular, undirected event constituted a separate "policy" – even though appellees never alleged that it did – any challenge to it became moot when the House took steps to ensure that nothing similar happens in the future. The district court summarily rejected this, stating in a footnote that abandonment "does not remove [the policy] from the purview of the court." (Appx. A41 n.10.)

[25] The record also does not establish that the alleged policy was religious in nature, as required to violate the Establishment Clause: the request to stand is not for the Prayer, specifically, but the ceremony at large, which includes the Pledge of Allegiance.

Quoting *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 189 (2000), the court asserted that mootness applies "only 'if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (Appx. A41 n.10.) It found "no such absolute clarity." (*Id.*)

In doing so, the district court ignored this Court's precedent, which establishes a different standard for governmental bodies, as well as a presumption of good faith. In *Marcavage v. National Park Service*, 666 F.3d 856 (3d Cir. 2012), for instance, this Court held that a protestor's claims for injunctive and declaratory relief were moot because the Park Service changed the disputed policy at issue, and there was "no indication" that the revised policy was adopted "to avoid an adverse judgment … and [would] be abandoned" once the case became final. *Id.* at 861-62. As this Court made clear, "[g]overnment officials are presumed to act in good faith," and "to rebut this presumption" a party must establish some "showing of bad faith" by the governmental actor. *Id.* In its absence, it is "unreasonable to expect that future constitutional violations will recur." *Id.*

In *Atheists of Florida*, discussed *supra* at §VII.A.5, the Eleventh Circuit similarly found an atheist organization's Establishment Clause claims to be moot. 713 F.3d at 594-95. After recognizing the general rule regarding abandonment, the

court held that "voluntary cessation by a government actor gives rise to a rebuttable presumption that the objectionable behavior will not recur." *Id.* An assertion of mootness in such a case "should be rejected 'only when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated.'" *Id.* (citation omitted). The court contrasted isolated or unintentional practices, which favored a finding of mootness, with a "continuing practice" that counseled against it.[26] *Id.*

The undisputed record before the district court requires a mootness finding under the standards set forth in *Marcavage* and *Atheists of Florida*. Appellees' claims were predicated on an alleged one-off event that indisputably happened without the knowledge of anyone in House leadership. Changes have been made to prevent anything of the sort from happening in the future. But even if voluntary cessation does not moot appellees' claim, the record, viewed in the light most favorable to the House, does not rise to the level of unconstitutional coercion under the *Greece* plurality opinion.

[26] Ultimately, the Eleventh Circuit concluded that it "lack[ed] jurisdiction" over the challenge to the prior practice "because the case [was] moot." 713 F.3d at 595; *see also Troiano v. Supervisor of Elections in Palm Beach Cty.*, 382 F.3d 1276, 1285 (11th Cir. 2004) ("a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated").

VIII. CONCLUSION

For these reasons, the House requests that the Court reverse the district court's decision regarding the House's guest chaplain policy and its pre-2017 opening invocation practices.

Respectfully submitted,

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196, all solely in their official capacities

Dated: December 31, 2018

COMBINED CERTIFICATIONS OF COUNSEL

1. Bar Membership: The undersigned certifies that Jonathan F. Bloom, Karl S. Myers, Spencer R. Short, Mark E. Chopko, and Kyle A. Jacobsen are members of the bar of this Court.

2. Word Count: The undersigned certifies that the foregoing brief uses a proportionally spaced, 14-point Times New Roman typeface, and that the text of the brief contains 12,766 words according to the word count provided by Microsoft Word.

3. Service: The undersigned certifies that the foregoing brief was served by the Court's electronic filing system on the date below on all counsel of record in this case.

4. Identical Text: The undersigned certifies that the text of the electronically-filed brief is identical to the text of the 7 hard copies that will be delivered within 5 days of this electronic filing to the Clerk of the Court.

5. Virus Check: The undersigned certifies that he caused virus detection to be performed on the electronically-filed copy of this brief using McAfee VirusScan Enterprise+AntiSpyware Enterprise 8.8 and that no virus was detected.

/s/ Karl S. Myers
Karl S. Myers

Dated: December 31, 2018

APPENDIX VOLUME 1 OF 7
(A1 TO A78)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIAN FIELDS, *et al.*, Plaintiffs, v. SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, *et al.*, Defendants.	Civ. No. 16-1764 (Chief Judge Conner)

NOTICE OF APPEAL

Notice is hereby given that the Speaker of the Pennsylvania House of Representatives, Parliamentarian of the Pennsylvania House of Representatives, Director of Special Events of the Pennsylvania House of Representatives, and Representatives for Pennsylvania House Districts 92, 95, 97, 165, 167, 193, and 196, all solely in their official capacities, Defendants in the above named case, hereby appeal to the United States Court of Appeals for the Third Circuit from the Judgment entered August 30, 2018 (doc. 111) and Order entered August 29, 2018

(doc. 110), and the associated Memorandum entered August 29, 2018 (doc. 109).

Respectfully submitted,

/s/ Karl S. Myers

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Counsel for the Pennsylvania
House of Representatives

Dated: September 5, 2018

CERTIFICATE OF SERVICE

I, Karl S. Myers, hereby certify that I am this day serving the foregoing document upon counsel for the parties via the Court's electronic filing system.

/s/ Karl S. Myers
Karl S. Myers

Dated: September 5, 2018

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

MIDDLE DISTRICT of PENNSYLVANIA

BRIAN FIELDS, ET AL.,

Plaintiffs

v.

SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, ET AL.,

Defendants

Civil Action No. 1:16-CV-1764

(Chief Judge Conner)

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

☐ the plaintiff _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus postjudgment interest at the rate of _____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (*name*) _____ recover costs from the plaintiff (*name)* _____ .

X other: SUMMARY JUDGMENT be and is hereby ENTERED in favor of Plaintiffs, BRIAN FIELDS, ET AL., and against Defendants, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, ET AL., on Plaintiffs' Establishment Clause challenges to the guest chaplain policy and pre-2017 opening invocation practices of the Pennsylvania House of Representatives, in accordance with the court's order (Doc. 110), dated August 29, 2018.

SUMMARY JUDGMENT be and is hereby ENTERED in favor of Defendants, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, ET AL., and against Plaintiffs, BRIAN FIELDS, ET AL., on Plaintiffs' Establishment Clause claim regarding the current House opening invocation practices, in accordance with the court's order (Doc. 110), dated August 29, 2018.

DECLARATORY JUDGMENT be and is hereby ENTERED in favor of Plaintiffs, BRIAN FIELDS, ET AL., and against Defendants, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, ET AL., on the Establishment Clause claims, brought pursuant to 42 U.S.C. § 1983, challenging the House's guest chaplain policy and pre-2017 opening invocation practices, as follows: It is ORDERED and DECLARED that the House's guest chaplain policy and pre-2017 opening invocation practices are unconstitutional in violation of the Establishment Clause of the First Amendment to the United States Constitution, and continuance and enforcement thereof is permanently ENJOINED, in accordance with the court's order (Doc. 110), dated August 29, 2018.

This action was *(check one)*:

☐ tried by a jury with Judge or Magistrate Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge or Magistrate Judge _____ without a jury and the above decision

X decided by Judge or Magistrate Judge Chief Judge Christopher C. Conner

MOTIONS FOR SUMMARY JUDGMENT

Date: Aug 30, 2018

CLERK OF COURT PETER WELSH, Acting Clerk of Court

K. McKinney

Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIAN FIELDS, *et al.*,	:	**CIVIL ACTION NO. 1:16-CV-1764**
	:	
Plaintiffs	:	**(Chief Judge Conner)**
	:	
v.	:	
	:	
SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, *et al.*,	:	
	:	
Defendants	:	

ORDER

AND NOW, this 29th day of August, 2018, upon consideration of the parties' cross-motions (Docs. 77, 80) for summary judgment pursuant to Federal Rule of Civil Procedure 56, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. Plaintiffs' motion (Doc. 77) for summary judgment is GRANTED in part and DENIED in part, as follows:

    a. Summary judgment is GRANTED in plaintiffs' favor on their Establishment Clause challenges to the guest chaplain policy and pre-2017 opening invocation practices of the Pennsylvania House of Representatives.

    b. Summary judgment is DENIED as to plaintiffs' Establishment Clause claim regarding the current House opening invocation practices.

2. Defendants' motion (Doc. 80) for summary judgment is GRANTED in part and DENIED in part as follows:

    a. Summary judgment is GRANTED in defendants' favor on plaintiffs' Establishment Clause claim regarding the current House opening invocation practices.

b. Summary judgment for defendants is DENIED in all other respects.

3. It is ORDERED and DECLARED that the House's guest chaplain policy and pre-2017 opening invocation practices are unconstitutional in violation of the Establishment Clause of the First Amendment to the United States Constitution, and continuance and enforcement thereof is permanently ENJOINED.

4. The Clerk of Court shall enter declaratory judgment in plaintiffs' favor on the Establishment Clause claims, brought pursuant to 42 U.S.C. § 1983, challenging the House's guest chaplain policy and pre-2017 opening invocation practices. The Clerk of Court shall enter judgment in defendants' favor on plaintiffs' Establishment Clause claim challenging the current House opening invocation practices.

5. The Clerk of Court shall thereafter close this case.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIAN FIELDS, *et al.*,	:	**CIVIL ACTION NO. 1:16-CV-1764**
	:	
Plaintiffs	:	**(Chief Judge Conner)**
	:	
v.	:	
	:	
SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, *et al.*,	:	
	:	
Defendants	:	

MEMORANDUM

We begin by delineating what the issue in this case is and what it is not. This matter concerns the constitutionality of a policy regarding who may present invocations at the commencement of a legislative session. It is not a challenge to the religious content of legislative prayer. To the contrary, it is well settled that sectarian prayers are entirely proper invocations for legislative sessions.

The Pennsylvania House of Representatives opens legislative sessions with an invocation delivered by a member of the House or a guest chaplain. The Speaker of the House maintains a guest chaplain policy that categorically excludes those who would present an uplifting message of hope, mutual respect, and peace yet—based upon their nontheistic beliefs—would fail to incorporate theistic entreaties to a divine or higher power. Each of the individual plaintiffs desires to deliver an opening invocation before the House. The Speaker has denied plaintiffs this opportunity due solely to the nontheistic nature of their beliefs. In light of the Supreme Court's decision in Town of Greece, we find that the House policy violates

the Establishment Clause of the First Amendment to the United States Constitution.

I. Factual Background and Procedural History[1]

Plaintiffs Brian Fields, Paul Tucker, Deana Weaver, Scott Rhoades, Joshua Neiderhiser, Rev. Dr. Neal Jones, and Richard Kiniry are nontheist Pennsylvania residents.[2,3] (Doc. 90 ¶ 16). They desire to act as guest chaplains and deliver nontheistic invocations at House sessions. (Id. ¶ 39). Plaintiffs aver that such invocations would not proselytize or disparage any faith and would be "positive, uplifting, unifying, and respectful toward all—similar to moving and inspiring

[1] Local Rule 56.1 requires that a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 be supported "by a separate, short, and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried." LOCAL RULE OF COURT 56.1. A party opposing a motion for summary judgment must file a separate statement of material facts, responding to the numbered paragraphs set forth in the moving party's statement and identifying genuine issues to be tried. Id. Unless otherwise noted, the factual background herein derives from the parties' Rule 56.1 statements of material facts. (See Docs. 81, 90, 92, 97). To the extent the parties' statements are undisputed or supported by uncontroverted record evidence, the court cites directly to the Rule 56.1 statements.

[2] Fields, Tucker, Rhoades, and Neiderhiser identify both as Humanists and as atheists or agnostics; Rev. Dr. Jones identifies as a Unitarian Universalist, Humanist, and agnostic; Weaver identifies as a Freethinker; and Kiniry identifies as an Ethical Humanist (also known as an Ethical Culturist). (Doc. 90 ¶ 16). Four plaintiffs are ordained clergy or clergy-like members: Rhoades and Neiderhiser are ordained Humanist Celebrants, Rev. Dr. Jones is a Unitarian Universalist senior minister, and Kiniry is an Ethical Humanist Clergy Leader. (Id. ¶¶ 25, 34).

[3] Other named plaintiffs include Pennsylvania Nonbelievers, Inc., Dillsburg Area FreeThinkers, Lancaster Freethought Society, and Philadelphia Ethical Society. For purposes of this opinion, "plaintiffs" will be used primarily to refer to all individual plaintiffs, but occasionally will also be used to refer to all named plaintiffs.

invocations that have been delivered by nontheists at many governmental meetings around the country, which have invoked authorities or principles such as the Founding Fathers, the U.S. Constitution, democracy, equality, inclusion, fairness, and justice." (Id.) Interestingly, plaintiff Weaver has given just such an invocation in the Pennsylvania Senate, invoking ideals of compassion, understanding, and tolerance. (Id. ¶ 40).

A. The Opening Invocation

The Pennsylvania House of Representatives opens most of its daily legislative sessions with an invocation delivered by either a House member or an invited guest chaplain.[4] (Id. ¶ 1). After calling the House to order, the Speaker of the House announces the invocation presenter, and, if a guest chaplain, the name of the presenter's church or organization and the name of the sponsoring representative. (Id. ¶ 2). The Speaker then requests that everyone in the chamber rise for the invocation, after which the presenter delivers the invocation from the Speaker's position on the Speaker's rostrum. (Id.) The Pledge of Allegiance immediately follows. (Doc. 81 ¶¶ 6, 38).

[4] Defendants dispute the use of the term "invocation" and assert that House sessions begin with a "prayer." (Doc. 97 ¶ 1). We will use the terms "prayer" and "invocation" interchangeably throughout this opinion, following the example of the Supreme Court in Town of Greece v. Galloway, 572 U.S. __, 134 S. Ct. 1811 (2014), and Marsh v. Chambers, 463 U.S. 783 (1983), as well as other federal courts addressing legislative prayer questions. See, e.g., Lund v. Rowan County, 863 F.3d 268 (4th Cir. 2017) (*en banc*), *cert.* denied, 138 S. Ct. 2564 (2018) (mem.); Hudson v. Pittsylvania County, 107 F. Supp. 3d 524 (W.D. Va. 2015).

Guest chaplains, if inclined, are permitted to bring additional guests to sit in the House chamber during the invocation, and one or two of the guests may sit on the raised dais along with the invocation giver and other House leaders. (Doc. 90 ¶¶ 4-5). Before delivering the invocation, guest chaplains usually meet the Speaker, the Parliamentarian of the House, and their representative. (Id. ¶ 7). Guest chaplains also receive a commemorative gavel, a photograph with the Speaker and their representative, a thank-you letter from the Speaker, and recognition on social media by the Speaker's office. (Id. ¶ 9). Guest chaplains testified that they consider the opportunity to be an honor. (Id. ¶ 3).

B. The Guest Chaplain Policy

Beginning in 1865 and continuing largely uninterrupted until 1994, the House annually or biannually appointed a permanent chaplain to deliver the opening invocation. (Doc. 81 ¶¶ 3-4; Doc. 77-7 at 67, Expert Report and Decl. of Professor Paul Finkelman, Ph. D. ("Expert Rpt.") at 17). During the following ten years, the House invited guest chaplains occasionally in addition to using monthly rotating chaplains. (Expert Rpt. at 17). The House began frequently utilizing guest chaplains or House members to deliver the opening invocation around 2004. (Doc. 81 ¶ 5; Doc. 92 ¶ 5; Expert Rpt. at 17). By 2008, the House had established the current practice of exclusively inviting guest chaplains or having House members deliver the invocation. (Expert Rpt. at 17-18).

Representatives nominate potential guest chaplains by passing their names along to the Speaker's office. (Doc. 81 ¶ 10). Those interested in giving the invocation may also petition the Speaker's office directly. (Id.) Additionally, House

staff may recommend guest chaplains. (Doc. 92 ¶ 10; Doc. 90 ¶ 13). The Speaker's office performs "non-intrusive background research" on proposed guest chaplains "to ensure compliance with House Rules and avoid any public[-]relations issues." (Doc. 81 ¶ 12). The Speaker's office is responsible for selection of guest chaplains. (Doc. 90 ¶ 60). Selected guest chaplains receive a standard letter explaining that "[t]here are 203 members of the House coming from a wide variety of faiths," asking the guest chaplain to "craft a prayer that is respectful of all religious beliefs," and noting that "efforts to deliver an inter-faith prayer are greatly appreciated." (Doc. 81 ¶ 13; Doc. 64-2 at 2).

House Rule 17 states, in pertinent part, 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." GEN. OPERATING RULES OF THE PA. HOUSE OF REP. R. 17. The House, through its interpretation of House Rule 17 and particularly the word "prayer," has established a policy that permits only guest chaplains who adhere to, or are members of a religious organization that subscribes to, a belief in "God" or a "divine" or "higher" power. (Doc. 90 ¶ 44; Doc. 77-3 at 15-28, Myer Dep. 10:15-23:11 ("Myer Dep."); Doc. 77-4 at 29-39, Turzai Dep. 15:5-25:4 ("Turzai Dep."); Doc. 77-5 at 4-20, Smith Dep. 12:13-28:25 ("Smith Dep.")). As defendants describe the policy, "the opportunity to offer the prayer is dependent upon the prayer-giver's willingness to . . . provide a theistic communication to God or a higher power seeking blessing, guidance, or inspiration." (Doc. 58 at 5). The Parliamentarian plays a key role in determining whether a potential guest chaplain qualifies under this House policy. (Myer Dep. 9:6-19). The Speaker, however, is

ultimately responsible for interpreting the House Rules and for deciding whether someone is qualified to serve as guest chaplain. (Turzai Dep. 10:15-16, 11:5-9).

Guest chaplains are given priority over House members in presenting the invocation, but the House does not receive enough requests to enable a guest chaplain to deliver the opening prayer before every session. (Doc. 90 ¶ 65). From January 2008 to July 2017, approximately half the House invocations were delivered by guest chaplains and half were delivered by House members. (Id. ¶¶ 10, 65). The vast majority of guest chaplains represented Christian denominations, and all represented monotheistic faiths or delivered monotheistic invocations. (Id. ¶ 10). Only two prayers over this period represented religious traditions other than Christianity, Judaism, or Islam: one delivered by a Sikh guest chaplain in 2017, and one Native American invocation delivered by a Christian House member in 2015. (Id. ¶ 11). Most guest chaplains during this time period were ordained clergy; others included prison, police, healthcare, and military chaplains; a missionary; a college chancellor; a member of a religious healthcare sisterhood; a lay president of a Jewish temple; and a person unaffiliated with a particular religious organization. (Id. ¶ 12).

C. Plaintiffs' Invocation Requests and Denials

In August 2014, Weaver emailed then-Representative Mike Regan on behalf of Dillsburg Area FreeThinkers, requesting an opportunity for someone from the organization to deliver the opening prayer. (Doc. 81 ¶ 28). Several weeks later, Carl Silverman (a non-party to this litigation) sent correspondence on Pennsylvania Nonbelievers' letterhead to then-Representative Glen Grell, copying the Speaker,

the Parliamentarian, and Fields, requesting that either Silverman or Fields be permitted to deliver an opening invocation. (Id. ¶ 29). Both requests were denied. (Id. ¶ 31). In a letter dated September 25, 2014, then-Speaker Samuel Smith told Silverman that the House "would not honor" the request for a member of Pennsylvania Nonbelievers to serve as guest chaplain. (Doc. 64-5 at 3). The letter explained that the House did "not believe that governmental bodies are required to allow non-adherents or nonbelievers the opportunity to serve as chaplains." (Id.) Representative Regan responded to Weaver's email request with a copy of the September 25, 2014 letter, explaining only that "[t]his [letter] was forwarded to all legislative offices relative to an atheist offering the opening of session." (Doc. 64-6). Thereafter, the House approved its 2015-2016 General Operating Rules, which amended House Rule 17 to require that every guest chaplain "shall be a member of a regularly established church or religious organization or shall be a member of the House of Representatives." (Doc. 90 ¶ 42; Doc. 64-8); GEN. OPERATING RULES OF THE PA. HOUSE OF REP. R. 17.

On January 9, 2015, plaintiffs' counsel sent a letter to the Speaker and Parliamentarian requesting that a member of Pennsylvania Nonbelievers be allowed to deliver the House's opening invocation. (Doc. 81 ¶ 32; Doc. 92 ¶ 32; Doc. 64-7). The Parliamentarian denied the request, referencing the September 25, 2014 letter from Speaker Smith and also citing the recent amendment to House Rule 17. (Doc. 81 ¶ 33; Doc. 64-8). Plaintiffs' counsel subsequently sent separate letters to the Speaker, the Parliamentarian, and various representatives on behalf of Fields, Tucker, Weaver, Rhoades, Neiderhiser, Pennsylvania Nonbelievers, Dillsburg Area

FreeThinkers, and Lancaster Freethought Society, requesting that the individuals named therein be permitted to deliver a nontheistic opening invocation. (Doc. 81 ¶ 34; Doc. 92 ¶ 34; Doc. 77-21 at 11-21). The Parliamentarian denied the requests. (Doc. 81 ¶ 35). In his denial letter, the Parliamentarian emphasized House Rule 17 and its recent amendment and concluded that "[t]he individuals about whom you inquired do not meet the requirements of House Rule 17." (Doc. 64-14). The letter did not specify how the individuals failed to satisfy the requirements of House Rule 17. (Id.)

On May 19, 2017, plaintiffs' counsel sent a similar letter on behalf of Rev. Dr. Jones, Kiniry, and the Philadelphia Ethical Society. (Doc. 81 ¶ 36; Doc. 77-21 at 32-33). This time, the Parliamentarian's denial letter indicated that "[b]ecause the individuals and organization you represent are unwilling to offer a prayer appealing to a higher power, they do not meet the requirements under House Rule 17. We therefore need not address whether they are members of a regularly established church or religious organization." (Doc. 77-21 at 38).

D. The House's Opening Invocation Practices

Before the invocation and Pledge of Allegiance, the Speaker calls the House to order and, typically, introduces the guest chaplain. (Doc. 90 ¶¶ 73, 75). The Speaker then states, "Members and guests, please rise as able," pounds his gavel three times, and steps aside to allow the guest chaplain to deliver the prayer from the Speaker's rostrum. (Id. ¶ 75).

The Speaker's present practice differs from that in effect at the time this litigation commenced. Prior to January 2017, the Speaker simply stated, "Members

and all guests, please rise." (Id. ¶ 77). The House at that time maintained a policy that visitors in the gallery must stand for the opening prayer. (Id. ¶ 81; Doc. 77-20 at 48-66; Doc. 77-25 at 36). When visitors did not stand, a Sergeant at Arms (otherwise known as a legislative security officer) would sometimes approach seated visitors and tell them to follow the Speaker's directive to stand. (Doc. 90 ¶ 81; Doc. 77-2 at 16, 54; Myer Dep. 99:1-100:5, 102:20-23, 103:14-22; Smith Dep. 58:6-18; Doc. 77-20 at 48, 65-66; Doc. 77-25 at 36-37). Fields and Rhoades attended a House session in February 2012 and chose to remain seated after the Speaker's directive to rise for the opening invocation. (Doc. 77-2 at 16, 54). Both recalled that a Sergeant at Arms approached them in the gallery and loudly and repeatedly directed them to stand.[5] (Id.) The Parliamentarian testified that he had not been aware of the Sergeants at Arms' practice and that this policy was changed in January 2017 "mostly because of the [current] litigation." (Myer Dep. 100:3-11).

Posted signage also addresses visitors' conduct during House sessions. A sign located directly outside the visitors' gallery states, "Session days begin with an inter-faith prayer and the pledge of allegiance. All guests who are able are requested to stand during this order of business." (Doc. 90 ¶¶ 71-72). Prior to October 16, 2017, the sign was nearly identical except that the word "physically" appeared before the word "able." (Id.)

[5] After discovery, plaintiffs abandoned their allegations that the Speaker publicly singled out Fields and Rhoades for refusing to stand during the invocation. (See Doc. 101 at 20; Doc. 64 ¶¶ 24, 60).

E. Procedural History

Plaintiffs commenced this action in August 2016. In their original complaint, plaintiffs named as defendants the Speaker, the Parliamentarian, and five House representatives in their official capacities. Plaintiffs asserted claims under the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment, and under the Equal Protection Clause of the Fourteenth Amendment. Defendants moved to dismiss the complaint in its entirety.

After briefing and oral argument, we dismissed the Free Exercise, Free Speech, and Equal Protection claims but permitted the Establishment Clause challenges—both to the House guest chaplain policy and the opening invocation practices—to proceed. In July 2017, plaintiffs amended their complaint to include three additional plaintiffs (Rev. Dr. Jones, Kiniry, and the Philadelphia Ethical Society) and four additional defendants (the House Director of Special Events and three other House representatives).[6] Discovery is complete, and the parties have filed cross-motions for summary judgment. After extensive and excellent briefing, the motions are ripe for disposition.

II. Legal Standard

Through summary adjudication, the court may dispose of those claims that do not present a "genuine dispute as to any material fact" and for which a

[6] As of this writing, the Speaker of the House is the Honorable Mike Turzai, the Parliamentarian is Clancy Myer, and the Honorable Dawn Keefer, Carol Hill-Evans, Steven Mentzer, Alexander Charlton, Duane Milne, Brian Sims, Will Tallman, and Seth Grove serve as representatives of House Districts 92, 95, 97, 165, 167, 182, 193, and 196, respectively. See MEMBERS OF THE HOUSE OF REPRESENTATIVES, http://www.legis.state.pa.us/cfdocs/legis/home/member_information/pdf/addr_hse.pdf (updated Aug. 3, 2018).

jury trial would be an empty and unnecessary formality. FED. R. CIV. P. 56(a). The burden of proof tasks the non-moving party to come forth with "affirmative evidence, beyond the allegations of the pleadings," in support of its right to relief. Pappas v. City of Lebanon, 331 F. Supp. 2d 311, 315 (M.D. Pa. 2004); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the non-moving party on the claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-57 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-89 (1986). Only if this threshold is met may the cause of action proceed. See Pappas, 331 F. Supp. 2d at 315.

Courts are permitted to resolve cross-motions for summary judgment concurrently. See Lawrence v. City of Philadelphia, 527 F.3d 299, 310 (3d Cir. 2008); see also Johnson v. Fed. Express Corp., 996 F. Supp. 2d 302, 312 (M.D. Pa. 2014); 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2720 (3d ed. 2015). When doing so, the court is bound to view the evidence in the light most favorable to the non-moving party with respect to each motion. FED. R. CIV. P. 56; Lawrence, 527 F.3d at 310 (quoting Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968)).

III. Discussion

The facts in this case are largely undisputed. Two legal questions remain: *first*, whether the House guest chaplain policy that facially discriminates against nontheistic religions violates the Establishment Clause of the First Amendment to the United States Constitution; and *second*, whether the pre-2017 or current iteration of the House opening invocation practices involving directives to stand for

prayer are unconstitutionally coercive and violative of the Establishment Clause. We will address these difficult issues *seriatim*.

A. Establishment Clause Challenge to House Guest Chaplain Policy

Plaintiffs contend that the House guest chaplain policy violates the Supreme Court of the United States' recent Town of Greece decision and other long-held Establishment Clause principles. They argue that the policy, which intentionally excludes nontheists and nontheistic belief systems, cannot pass constitutional muster even in the *sui generis* legislative prayer context. Plaintiffs maintain that the policy contravenes Town of Greece because it discriminates based on the prospective guest chaplain's religious beliefs and results in state officials prescribing what beliefs may be expressed in invocations.

Defendants counter that the House policy is grounded in the longstanding tradition of offering theistic opening prayers. They posit that the policy does not offend the Establishment Clause because adherents to multiple different religious beliefs are welcome to serve as guest chaplains. According to defendants, the House's purposeful exclusion of nontheistic religions is permissible because the policy allows guest chaplains from many different theistic faiths and thus does not have the effect of favoring or establishing one particular religion.

The First Amendment prohibits the government from making any law "respecting an establishment of religion." U.S. CONST. amend. I. As we have previously explained, legislative prayer occupies distinct space in Establishment Clause jurisprudence. Only two Supreme Court cases directly address the subject: Marsh v. Chambers, 463 U.S. 783 (1983), and Town of Greece v. Galloway, 572 U.S.

__, 134 S. Ct. 1811 (2014). In both cases, the Court upheld state and municipal prayer practices without application of traditional Establishment Clause principles. Accordingly, we review the instant legislative prayer challenge through the unique prism of Marsh and Town of Greece.

1. *Legislative Prayer Under Marsh and Town of Greece*

Our Rule 12(b) opinion examined the Supreme Court's legislative prayer jurisprudence *in extenso*. Fields v. Speaker of the Pa. House of Reps., 251 F. Supp. 3d 772, 784-87 (M.D. Pa. 2017) (Conner, C.J.). Several salient principles must be reiterated in order to address the parties' Rule 56 arguments.

In Marsh v. Chambers, the Court rejected a constitutional challenge to the Nebraska state assembly's repetitive appointment of a Presbyterian minister as chaplain. Marsh, 463 U.S. at 784-85. The Court observed that legislative prayer is diffuse in our nation's history, noting that the First Congress appointed legislative chaplains during the same week it drafted the Bill of Rights. Id. at 787-88. The Court held that an "unambiguous and unbroken history of more than 200 years" of legislative prayer had woven the ritual into the very "fabric of our society." Id. at 792. It concluded that "[t]o invoke Divine guidance" before legislative sessions is not establishment of religion but "a tolerable acknowledgement of beliefs widely held" among citizens. Id. The Court also found that, barring an "impermissible motive," the lengthy tenure of a minister of a single faith was not problematic. Id. at 793-94. As to concerns with the principally Judeo-Christian nature of the prayers, the Court resolved that content is of no moment when "there is no

indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." Id. at 794-95.

In County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989), the Court determined that the display of a crèche on public property violated the Establishment Clause. See County of Allegheny, 492 U.S. at 603. Tasked to harmonize its decision with Marsh, the majority contrasted the "specifically Christian symbol" of a crèche with the general religious references offered by the Nebraska chaplain. See id. at 602-05. Following County of Allegheny, some courts construed Marsh to authorize only nonsectarian legislative prayer. See, e.g., Joyner v. Forsyth County, 653 F.3d 341, 349-50 (4th Cir. 2011); Wynne v. Town of Great Falls, 376 F.3d 292, 298-302 (4th Cir. 2004).

Recently, the Court thoroughly examined legislative prayer practices in Town of Greece v. Galloway, 572 U.S. __, 134 S. Ct. 1811 (2014). The town of Greece, New York, invited local clergy to offer invocations before monthly board meetings. Town of Greece, 134 S. Ct. at 1816. A clerical employee selected presenters by contacting congregations listed in a local directory. Id. Town leaders described their policy as welcoming ministers and laypersons "of any persuasion," including atheists, but in practice, nearly all invocations from 1999 to 2007 were Christian in nature. See id. After two local residents objected to the homogenous nature of the prayers, the town invited a Jewish layman, the chairman of a local Baha'i temple, and a Wiccan priestess to serve as presenters, but subsequently reverted to Christian themes. Id. The two objectors filed suit, asserting that the town violated the Establishment Clause by permitting sectarian prayer and by fostering a

coercive environment where attendees felt pressured to participate in religious observances. Id. at 1817, 1819-20.

In an opinion authored by Justice Kennedy, the Court addressed plaintiffs' claims in two parts, with the first (Part II-A) garnering majority support. Justice Kennedy, joined by the Chief Justice as well as Justices Thomas, Alito, and Scalia, held that the Establishment Clause permits sectarian legislative prayer. See id. at 1820-24. Following a distillation of Marsh, the Court identified the essential inquiry as whether the practice at issue "fits within the tradition long followed in Congress and the state legislatures." Id. at 1819. That tradition, the Court held, does not mandate ecumenical or nonsectarian prayer. Id. at 1820-21. In closing, the majority observed that a prayer practice will not likely violate the Establishment Clause unless it reflects a pattern of denigration or proselytization or an otherwise impermissible purpose. Id. at 1824. The Court nonetheless cautioned that history and tradition cannot save an otherwise unconstitutional practice. Id. at 1819.

The majority then addressed whether the town had violated the Establishment Clause by inviting "predominantly Christian" invocation presenters. Id. at 1824. The Court held that "[s]o long as the town maintains a policy of nondiscrimination," the Establishment Clause does not require it to actively seek out diverse prayer givers from beyond its borders. Id. The Court emphasized that the record contained no evidence of "aversion or bias" toward minority faiths and that, contrarily, the town undertook reasonable efforts to identify all prospective presenters, welcoming ministers and laity of all creeds. Id.

Part II-B of Justice Kennedy's opinion was joined only by the Chief Justice and Justice Alito. The three-Justice plurality opined that religious coercion claims necessitate careful examination of both setting and audience. Id. at 1825 (plurality opinion). As for setting, the Justices stated that a "brief, solemn and respectful prayer" is consistent with "heritage and tradition" familiar to the public, and that attendees understand that the purpose of the prayer is to "lend gravity" to the proceedings. Id. Concerning audience, the plurality found that the messages were intended to "accommodate the spiritual needs of lawmakers" rather than preach to the public. Id. at 1825-26. Under such conditions, the plurality concluded, there was no unconstitutional coercion. Id. at 1825-27.

2. *Historical Practices and Tradition*

Town of Greece makes clear that a court examining the constitutionality of a legislative prayer practice must determine whether that practice "fits within the tradition long followed in Congress and the state legislatures." Town of Greece, 134 S. Ct. at 1819. Defendants maintain that historical practices and tradition are on their side. They view the House's interpretation of "prayer" as consistent with the traditional understanding of that term as it appears in Supreme Court jurisprudence. Defendants further cite the long history of primarily theistic invocations given in Congress and state legislatures.

After Town of Greece, the permissibility of sectarian content in legislative prayers is no longer a matter of debate. Defendants argue that their invocation policy is entirely consistent with the general tradition of sectarian legislative prayer incorporating theistic themes. But sectarian content is *not* the issue. Our inquiry

must focus on the "prayer opportunity as a whole," Town of Greece, 134 S. Ct. at 1824, which includes the prayer-giver selection process, id.; Marsh, 463 U.S. at 793-94; Pelphrey v. Cobb County, 547 F.3d 1263, 1282 (11th Cir. 2008). The House's selection process invites members of the public to serve as guest chaplains but draws a qualifying line of demarcation between theistic and nontheistic belief systems. This is a horse of a different color from prayer practices previously found to be consistent with history and tradition.

Professor Finkelman's comprehensive report confirms that neither federal nor state legislative history supports defendants' intentional exclusion of nontheistic guest chaplains. Except for several years in the mid-19th century, the United States Senate and House of Representatives have always appointed permanent chaplains. (Expert Rpt. at 8). Guest chaplains did not exist at the federal level until 1855. (Id. at 14). There is no historical evidence of nontheists requesting, or being denied the opportunity, to give the invocation in either chamber of Congress. (Id. at 19). As Professor Finkelman notes, this is most likely because, in the 17th, 18th, and 19th centuries, those who did not believe in the existence of God were afraid to let their beliefs become public due to the threat of "severe physical punishment[]" as well as imprisonment. (Id. at 19-21).

Defendants correctly observe that history and tradition convincingly support sectarian and theistic content in legislative prayers. Indeed, the Town of Greece Court relied on this history to buttress its decision. Town of Greece, 134 S. Ct. at 1818-24. But defendants have produced little, if any, evidence that the House's "specific practice is permitted" or "was accepted by the Framers and has withstood

the critical scrutiny of time and political change." Id. at 1819 (quoting County of Allegheny, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part)). That history has tolerated the natural prevalence of theistic legislative prayer is hardly evidence that the Framers would abide deliberate and categorical exclusion of nontheists. Accordingly, the House's prayer practice finds no refuge in history and tradition.

3. *Defendants' Additional Arguments in Support of the House's Prayer Practice*

Defendants raise several additional arguments to justify the House's guest chaplain policy. They assert that the policy does not establish a single religious viewpoint, that nontheists cannot satisfy House requirements or the purposes of legislative prayer, and that prohibiting screening would eliminate the House's ability to regulate the invocations.

a. **Policy Does Not Establish a Single Religious Viewpoint**

Defendants posit that there are only three ways that a legislative prayer practice can violate the Establishment Clause: "open proselytization, blatant disparagement [of other faiths], or the government's alignment with a *particular* sect or creed." (Doc. 82 at 20-21). Stated differently, a prayer practice which does not proselytize or disparage will offend the Establishment Clause only if it affiliates the government with a "*single* religious perspective." (Id. at 55-60 (emphasis added)). Defendants argue that because plaintiffs do not allege disparagement or proselytization, the instant prayer practice must be found constitutional as it does not align the government with one religious viewpoint. (Doc. 100 at 15).

We reject this argument for three reasons. *First*, Town of Greece provides legislative prayer guidance that cannot be reconciled with defendants' argument.[7] *Second*, defendants' reasoning would result in outcomes antithetical to the purposes undergirding the Establishment Clause. And *third*, of the two legislative prayer decisions issued after Town of Greece that discuss intentional discrimination in invocation-presenter selection, one is closely analogous and well-reasoned while the other is entirely unpersuasive.

i. Town of Greece Nondiscrimination Guidance

Intentional discrimination on the basis of religion when selecting guest chaplains was not directly before the Court in Town of Greece. Nonetheless, the Court highlighted the nondiscriminatory practices of the town and the United States Congress, as well as the potential constitutional problems with legislative prayer policies that intentionally discriminate against minority faiths.

In its relatively short recitation of facts, the Court was careful to note that "[t]he town at no point excluded or denied an opportunity to a would-be prayer giver" and that, under the town's policy, "a minister or layperson of any persuasion, including an atheist, could give the invocation." Town of Greece, 134 S. Ct. at 1816, 1824. The Court further noted that after receiving complaints, "the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers" in

[7] Plaintiffs also cite to Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008). The Pelphrey court reviewed an intentionally discriminatory invocation-presenter policy and held that "the categorical exclusion of certain faiths based on their beliefs is unconstitutional." Pelphrey, 547 F.3d at 1282. Although Pelphrey predates Town of Greece and is non-binding as an out-of-circuit decision, its persuasive *ratio decidendi* is consonant with our holding *sub judice*.

addition to granting a Wiccan priestess's request to give the invocation. Id. at 1817. Recounting the district court's ruling, the Court highlighted that the district court had "found no impermissible preference for Christianity, noting that the town had opened the prayer program to all creeds and excluded none." Id. The Court stated that, in its view, the fact that most invocation presenters were Christian reflected "only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths." Id.

The Court reviewed the historical practices and understandings of legislative prayer, underscoring that in the 1850s, the chaplain policies of United States House of Representatives and Senate were found to pose no threat to the Establishment Clause in part because "no faith was excluded by law, nor any favored[.]" Id. at 1819. The Court observed that Congress "acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds," citing congressional invocations given by a Buddhist monk, a Jewish Rabbi, a Hindu Satguru, and an Islamic Imam. Id. at 1820-21.

As we observed at the Rule 12 stage, the Court repeatedly admonished against intentional discrimination in prayer practices. Justice Kennedy, writing for the majority and addressing the issue of diversity among presenters, explained that "*[s]o long as the town maintains a policy of nondiscrimination*, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." Id. at 1824 (emphasis added). He signaled that a policy that "reflect[s] an aversion or bias . . . against minority faiths" may be constitutionally suspect. Id. Addressing the issue of sectarian versus nonsectarian

content, Justice Kennedy explained: "The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. *Once it invites prayer into the public sphere*, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." Id. at 1822-23 (emphasis added).

In a concurring opinion, Justice Alito similarly emphasized that plaintiffs had not claimed the principally Christian composition of the pool of invocation presenters was "attributable to religious bias or favoritism" or "religious animus." Id. at 1829 (Alito, J., concurring) (citation and internal quotation marks omitted). He stressed that when complaints were made, "the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request for an invocation." Id. Justice Alito observed that although some Jewish residents who attended synagogues outside the town's borders were not represented by the town's unsophisticated selection process, id. at 1830, the mistake was "at worst careless, and it was *not done with discriminatory intent*," id. at 1831 (emphasis added). He cautioned that he would view the case "very differently" if the town had intentionally omitted the synagogues. Id.

That the Supreme Court has not yet weighed in on the constitutionality of an invocation practice like the one before us is not surprising. From the Founding era to present day, the Court has directly considered constitutional limitations on legislative prayer just twice. Moreover, much of the above-quoted

language from Town of Greece is *dicta*: the question of intentional religious discrimination in guest chaplain selection was not squarely before the Court. See United States v. Warren, 338 F.3d 258, 265 (3d Cir. 2003) (quoting RUPERT CROSS, PRECEDENT IN ENGLISH LAW 80 (2d ed. 1968)). Yet the Third Circuit has repeatedly observed that *dicta* in Supreme Court opinions "'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)). Disregarding persuasive statements from the Supreme Court imperils a lower court's analysis and rulings. Galli, 490 F.3d at 274. This is especially true when there are only two Supreme Court cases on the subject.

We find it significant that both Justice Kennedy (writing for the majority) and Justice Alito (joined by the late Justice Scalia) expressed concern with intentional discrimination against minority religions in a legislative prayer practice. The fact that their remarks were not dispositive of the ultimate issues in Town of Greece does not make their admonitory words any less compelling in the matter *sub judice*. When these Justices repeatedly warned against intentional discrimination on the basis of religion, we believe they presaged disposition of the instant matter.

ii. Defendants' Interpretation Offends the Purposes of the Establishment Clause

Defendants' restrictive interpretation of legislative prayer jurisprudence also transgresses the purposes of the Establishment Clause. Under defendants' interpretation, deliberate exclusion of minority religions is permissible so long as

the selection process does not align the government with a *single* sect or creed. Taken to its logical extension, defendants' argument implies that a guest chaplain policy explicitly permitting, for example, only Christian and Jewish presenters would not offend the Constitution because the government is not affiliating itself with a "single" religious perspective. We believe the Establishment Clause prohibits such intentional discrimination.

The Framers adopted the Establishment Clause to protect against government's establishment of one religious viewpoint to the exclusion of others. See Town of Greece, 134 S. Ct. at 1822; Marsh, 463 U.S. at 793, 794-95; Larson v. Valente, 456 U.S. 228, 244 (1982); Engel v. Vitale, 370 U.S. 421, 429 (1962). More than 50 years ago, the Supreme Court explained that, at time of adoption of the Constitution, "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services." Engel, 370 U.S. at 429. We are hard pressed to believe that establishment of "two" religious viewpoints would sit well with the Founding Fathers or allay their concerns about state-sponsored religion, even in the nonpareil legislative prayer context. As Justice Blackmun commented in County of Allegheny, the "simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." County of Allegheny, 492 U.S. at 615. Relevant to the instant prayer practice, we find it equally unimaginable that the Framers would sanction the government placing its imprimatur on one *category*

of preferred religious beliefs in the legislative prayer realm. See Town of Greece, 134 S. Ct. at 1844 & n.1 (Kagan, J., dissenting).

This determination finds footing in the origins of legislative prayer and the selection of chaplains in the First Congress. Professor Finkelman notes that when Congress first created chaplaincies in 1789, it passed a resolution that attempted to reflect religious diversity. (Expert Rpt. at 21). The resolution required the House and Senate chaplains to represent different denominations and to rotate between the two chambers every week. (Id.) The policy only ensured diversity between Protestant denominations, but during the Founding era nearly everyone in the country was a Protestant Christian. (Id. at 22). Moreover, as explained in Justice Stevens' historical analysis in dissent in Van Orden v. Perry, 545 U.S. 677 (2005), "many of the Framers understood the word 'religion' in the Establishment Clause to encompass only the various sects of Christianity." Id. at 726-29 (Stevens, J., dissenting).

Thus, in the Founding era, the primary evil that Framers sought to prevent through the Establishment Clause may well have been the establishment of a state religion aligning with one particular sect of Protestant Christianity. Id.; (Expert Rpt. at 22). Over centuries that understanding has evolved and, quite naturally, broadened. As evinced by modern legislative prayer cases and other Establishment Clause jurisprudence, constitutional challenges to prayer practices typically allege an impermissible government preference for Christianity in general, rather than one particular Christian denomination. See, e.g., Town of Greece, 134 S. Ct. at 1817-18; Bormuth v. County of Jackson, 870 F.3d 494, 509 (6th Cir. 2017) (*en banc*)

cert. denied, 138 S. Ct. 2708 (2018) (mem.); Lund, 863 F.3d at 281, 283; Rubin v. City of Lancaster, 710 F.3d 1087, 1097 (9th Cir. 2013); Hudson v. Pittsylvania County, 107 F. Supp. 3d 524, 534 n.8, 536, 538 (W.D. Va. 2015). None of these decisions suggests that if different Christian sects were represented, a legislative prayer practice solely advancing Christianity would pass constitutional muster. In light of this nation's vastly diverse religious tapestry, there is no justification to sanction government's establishment of a category of favored religions—like monotheistic or theistic faiths—through legislative prayer.

iii. Post-Town of Greece Decisions

Recently, the district court for the Middle District of Florida found a practice strikingly similar to the Pennsylvania House of Representatives' policy to be unconstitutional. In Williamson v. Brevard County, 276 F. Supp. 3d 1260 (M.D. Fla. 2017), atheist and Secular Humanist plaintiffs challenged a county policy permitting only theistic presenters to deliver the opening prayer at county board meetings. Plaintiffs had requested the opportunity to deliver the invocation and were denied. Williams, 276 F. Supp. 3d at 1266-67. In response to the nontheists' requests, the county adopted a resolution that required presenters delivering the pre-meeting prayer to be from the "faith-based community." Id. at 1269-71. The court explained that, while the resolution did not define "faith-based community," the meaning of the phrase and the "actual, overall invocation practice" could be gleaned from the resolution's text, evidence of events in the case, and statements made by county commissioners. Id. at 1278. The actual policy, the court found, was a "categorical

ban on . . . nontheists as givers of opening invocations" at county board meetings. Id. at 1281.

The court determined, after reviewing Marsh and Town of Greece, that the county's intentionally discriminatory policy violated the Establishment Clause. Id. at 1272-76, 1289. The court rejected the county's arguments that its selection policy was sufficiently inclusive and comported with Town of Greece. Id. at 1281. Like defendants here, the county argued that opening prayers necessarily must invoke a higher power and, because nontheists do not believe in a higher power, they are not qualified to deliver the invocation. Id. The court repudiated this "overly narrow" view of an opening invocation, explaining that nontheistic invocations, like their theistic counterparts, can serve the solemnizing and unifying purposes of legislative prayer. Id. at 1281-82. The court concluded that "[b]y straying from the historical purpose of an invocation and intentionally discriminating against potential invocation-givers based on their beliefs," the county violated the Establishment Clause. Id. at 1289.[8]

At first blush, Barker v. Conroy, 282 F. Supp. 3d 346 (D.D.C. 2017), appeal filed, No. 17-5278 (D.C. Cir. Dec. 20, 2017), appears to provide some support for defendants' position. Plaintiff Daniel Barker—an atheist previously ordained as a Christian minister—disputed the United States House of Representatives' denial of his request to deliver the opening invocation. Barker, 282 F. Supp. 3d at 351. The

[8] The Williamson court also found the county's policy violated the Establishment Clause because the county "entangle[ed] itself in religion by vetting the beliefs of those groups with whom it is unfamiliar" before determining whether to allow a member of the group to give the invocation. Id.

House's policy, promulgated by its chaplain, required guest chaplains to be sponsored by a House member, be ordained, and deliver an invocation that addresses a "higher power." Id. The House chaplain denied Barker's request because he was "ordained in a denomination in which he no longer practice[d]" and was "not a religious clergyman [because he had] parted with his religious beliefs." Id. (citation omitted) (second alteration in original). Barker filed suit, raising, *inter alia*, an Establishment Clause claim oppugning the House's policy of facially excluding atheists and nonreligious guest chaplains. Id. at 351-52, 363. In rather cursory fashion, the district court dismissed Barker's claim. Id. at 363-64.

We find the court's abbreviated analysis unconvincing. Contrary to the court's explanation, see id. at 364, the House did not deny Barker's request because of his desire to give a secular invocation. The House chaplain rejected Barker's request because Barker no longer practiced or represented the faith in which he was ordained. Id. at 351. More importantly, although Barker contended that he was challenging the constitutionality of intentional discrimination against atheists and nontheists rather than theistic legislative prayer itself, see id. at 363, 364, the court construed his claims as "a challenge to the ability of Congress to open with a prayer." Id. at 364. The court reasoned that to side with Barker "would be to disregard the Supreme Court precedent that permits legislative prayer." Id. This construction of Barker's claim doomed it from the start: after Marsh and Town of Greece, no serious dispute remains as to the constitutionality of legislative prayer.

Furthermore, seeking to include secular or nontheist invocations does not automatically impugn the constitutionality of legislative prayer. As plaintiffs in the

instant case exhaustively demonstrate, many legislative bodies have granted requests from atheists, Secular Humanists, and other nontheists to deliver opening invocations while simultaneously permitting theistic invocations. (See Doc. 91 at 48; Expert Rpt. at 10, 25; Doc. 77-10 at 15-43). Granting such requests has not resulted in a concomitant challenge to the ability of the legislative body to open with prayer. The two concepts are not mutually exclusive. To hold otherwise implies that "prayer" in the legislative prayer context *must* be defined as a theistic invocation, which of course is not so.[9]

b. Nontheists Cannot Satisfy House Requirements or Legislative Prayer Purposes

Defendants next argue that because the House has defined "prayer" in House Rule 17 to mean an appeal to a higher or divine power, the nontheist plaintiffs are incapable of providing an opening invocation meeting this definition. Defendants further contend that plaintiffs cannot fulfill the purposes of legislative prayer, to wit: to "accommodate the spiritual needs" of the legislators and to solicit "divine guidance for the benefit of the legislators." (Doc. 82 at 28, 29, 39-41).

We reject defendants' narrow view of legislative prayer and its objectives. First, while the Speaker of the House may interpret "prayer" and House Rule 17 to

[9] Defendants also cite Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276 (4th Cir. 2005), Atheists of Florida v. City of Lakeland, 713 F.3d 577 (11th Cir. 2013), and then-Judge Ginsburg's dissent in Kurtz v. Baker, 829 F.2d 1133, 1145-52 (D.C. Cir. 1987). We find these cases equally unhelpful to defendants' cause, primarily because they predate Town of Greece. Atheists of Florida is also inapplicable because the court of appeals never actually reached the issue of intentional discrimination against nontheists in guest chaplain selection. Atheists of Florida, 713 F.3d at 592-95.

require an appeal to a higher or divine power, that definition does not dictate the constitutionality of the House's prayer practice. The Speaker could, presumably, define "prayer" in an exclusively Christian manner and apply that definition to categorically exclude every non-Christian from delivering opening prayers in the House. Such exclusion through definition would unquestionably run afoul of the Establishment Clause.

Second, defendants' perception of the purposes of legislative prayer is myopic. In Town of Greece, the Court explained that legislative prayer "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." Town of Greece, 134 S. Ct. at 1818 (citing Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)). It is meant to "reflect values long part of the Nation's heritage" and to be "solemn and respectful in tone," inviting our legislators "to reflect upon shared ideals and common ends before they embark on the fractious business of governing[.]" Id. at 1823. As Justice O'Connor observed in an earlier case, legislative prayer serves "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." Lynch, 465 U.S. at 693 (O'Connor, J., concurring).

Nontheistic invocations are equally capable of satisfying these lofty objectives. We reiterate that many legislative bodies across this nation have opened with nontheistic invocations, and there is no evidence that such prayers fared worse than their theistic counterparts at fulfilling the foregoing purposes. We further

observe that *both* theistic and nontheistic invocations could contravene the purposes of legislative prayer if they were divisive, exclusionary, or disparaging. In other words, it is the content of the prayers, rather than their theistic or nontheistic nature, that matters.

Finally, we find no merit in defendants' insistence that plaintiffs could not deliver invocations that accommodate the spiritual needs of the lawmakers. (See Doc. 82 at 28, 29, 39-41). At least one House member openly identifies as a secular agnostic. (Doc. 90 ¶ 62). He testified that he occasionally would like to hear secular opening invocations. (Id.) Another member testified that he would be "more than happy" to sponsor an atheist's request to give an opening invocation. (Id. ¶ 63). Further exploration of the scope of lawmakers' spiritual needs is unnecessary, as we do not understand defendants to argue that the spiritual needs of the minority are less important than those of the majority.

c. Prohibiting Discrimination Based on Religion Would Remove Ability to Regulate Invocations

Defendants warn that if the House policy is found to be unconstitutionally discriminatory, the House will be obligated to invite as guest chaplain any person who "practices religion," resulting in "no permissible means of excluding faiths and belief systems that might be abhorrent or antithetical to its Members or legislative mission." (Doc. 82 at 48). Defendants reference fringe religious groups that align with white supremacy, mockery of religion, and subjugation of women, as well as extremist sects like Westboro Baptist Church, known for its virulent anti-LGBTQ

beliefs and rhetoric, see Snyder v. Phelps, 562 U.S. 443, 448 (2011). We find defendants' floodgate concerns misplaced.

Defendants insist that "if the House is constitutionally prohibited from excluding 'minority faiths,' it is also constitutionally required to invite any number of groups who embrace hateful (or otherwise unwelcome) religious beliefs." (Doc. 100 at 26 (emphasis omitted)). This is plainly incorrect. Town of Greece specifically found that legislatures do not have to attempt to "achieve religious balancing" by seeking out and inviting diverse religious viewpoints. Town of Greece, 134 S. Ct. at 1824. Moreover, ending a practice of intentional discrimination against minority faiths does not remove all discretion in guest chaplain selection. Defendants' doomsday predictions imply that the House's current selection policy is the only method to ensure traditional and solemn guest-led invocations that serve the purposes of legislative prayer. But of course this is not the case.

As plaintiffs observe, there would be no constitutional infirmity with a policy barring invocations that promote white supremacy, disparage other religious views, encourage subjugation of women, or exhibit animus toward the LGBTQ community. Such loathsome and abhorrent objectives obviously have no place in legislative prayer.

We conclude that the House guest chaplain policy facially violates the Establishment Clause of the First Amendment to the United States Constitution. The House policy intentionally discriminates among invocation presenters on the basis of religion and thereby transcends the bounds of permissible legislative prayer. Accordingly, we will grant plaintiffs' motion for summary judgment on

their Establishment Clause challenge to the guest chaplain policy and deny defendants' related motion for summary judgment.

B. Establishment Clause Challenge to House Invocation Practices

Plaintiffs also contend that the House's pre-2017 and current invocation practices directing visitors to rise for the opening prayer unconstitutionally coerce participation in a religious exercise. They maintain that the Speaker's instruction to stand and the related sign outside the visitors' gallery coerce visitors to take part in prayer, thus violating the Establishment Clause. Plaintiffs further argue that the pre-2017 practice—which included legislative security officers instructing seated visitors to comply with the Speaker's directive—is likewise constitutionally infirm and is not moot because it easily could be reinstated.

As we explained in our prior opinion, Town of Greece had no majority consensus on the subject of Establishment Clause coercion in the legislative prayer context. Fields, 251 F. Supp. 3d at 789-90. We found that Justice Kennedy's three-Justice plurality opinion represents the narrowest grounds to the Court's judgment and provides the prevailing standard against which to judge plaintiffs' coercion claims. Id. at 790. That opinion tasks us to review the contested practice to assess whether it is consonant with the tradition upheld in Marsh or whether coercion is indeed likely. Town of Greece, 134 S. Ct. at 1826-27 (plurality opinion). We must consider "both the setting in which the prayer arises and the audience to whom it is directed." Id. at 1825. Under the plurality's test, coercion is a real and substantial likelihood when the government itself (1) directs public participation in prayers,

(2) critiques dissenters, or (3) retaliates in its decisionmaking against those who choose not to participate. Id. at 1826. All Justices agreed that this analysis is "fact-sensitive." Id. at 1825; id. at 1838 (Breyer, J., dissenting); id. at 1851-52 (Kagan, J., dissenting); see also id. at 1828-29 (Alito, J., concurring).

The current House invocation practice is not unconstitutionally coercive. Unlike an intimate local government meeting, the prayer practice here involves legislative sessions of the Pennsylvania House of Representatives. The House has 203 members and convenes in the state capitol building's largest chamber, which contains an elevated and removed visitors' gallery that holds 80 to 90 people. Visitor attendance is voluntary and unrelated to actual lawmaking. The invocation is directed primarily to the House members, as opposed to many municipal settings where the invocation is delivered predominantly to the citizen-visitors in attendance, see, e.g., Town of Greece, 134 S. Ct. at 1846-48 (Kagan, J., dissenting); Lund, 863 F.3d at 286-87; Hudson, 107 F. Supp. 3d at 536-37. Finally, the invocation is followed directly by the Pledge of Allegiance, during which House members and visitors are also invited to stand.

These circumstances do not permit the conclusion that the Speaker's directive and the sign asking House members and visitors to "please rise as able" amount to unconstitutional coercion that would violate the Establishment Clause. See Williamson, 276 F. Supp. 3d at 1291-92. Plaintiffs are free to remain seated during the invocation and need not participate in the prayer practice. Under the current policy, there does not appear to be any retaliation against visitors who choose not to rise, nor any type of censure or singling out of "dissidents."

The pre-2017 invocation practice is a different matter.[10] Requiring 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. Such a scenario is precisely the "singl[ing] out [of] dissidents for opprobrium" that the plurality cautioned would offend the Establishment Clause. Town of Greece, 134 S. Ct. at 1826. Coercion under those circumstances "is a real and substantial likelihood." Id. at 1827. We hold that the pre-2017 House invocation practice is unconstitutionally coercive and contravenes the Establishment Clause. We will therefore grant plaintiffs' motion for summary judgment as to the pre-2017 House practice but grant defendants' motion as to the current practice.

C. Permanent Injunctive Relief

Our inquiry does not end with a determination that plaintiffs have prevailed on the merits of some of their Establishment Clause claims. Before the court may grant permanent injunctive relief, plaintiffs must prove: *first*, that they will suffer irreparable injury absent the requested injunction; *second*, that legal remedies are inadequate to compensate that injury; *third*, that balancing of the respective

[10] Simply because the pre-2017 practice has been voluntarily abandoned due to litigation does not remove it from the purview of the court. "[V]oluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (citation omitted). The issue would be moot only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Id. (citation omitted). We find no such absolute clarity that the pre-2017 practice could not be re-implemented. Plaintiffs' challenge to this policy is not moot. Cf. Pelphrey v. Cobb County, 448 F. Supp. 2d 1357, 1374 (N.D. Ga. 2006).

hardships between the parties warrants a remedy in equity; and *fourth*, that the public interest is not disserved by an injunction's issuance. See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (citations omitted).

The injury here is irreparable, as "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." K.A. *ex rel.* Ayers v. Pocono Mountain Sch. Dist., 710 F.3d 99, 113 (3d Cir. 2013) (alteration in original) (quoting Elrod v. Burns, 427 U.S. 347, 373-74 (1976) (plurality opinion)). We have previously explained that injunctive relief is "especially appropriate" when First Amendment rights are violated, because money damages are usually inadequate relief. Jamal v. Kane, 105 F. Supp. 3d 448, 462-63 (M.D. Pa. 2015) (Conner, C.J.) (quoting Stilp v. Contino, 743 F. Supp. 2d 460, 470 (M.D. Pa. 2010) (Conner, J.)). Furthermore, sovereign immunity would bar money damages claims against defendants in their official capacities. Edelman v. Jordan, 415 U.S. 651, 663 (1974). Because there is no adequate legal remedy to compensate plaintiffs' constitutional injuries, declaratory and injunctive relief will ensure that plaintiffs do not continue to suffer irreparable harm.

As to the respective hardships between the parties, we fail to ascertain any real hardship defendants would suffer from an award of permanent injunctive relief. Defendants have identified none, save for its arguments regarding the purported loss of ability to screen objectionable guest chaplains, which we have squarely addressed. Plaintiffs, *per contra*, would continue to suffer the First Amendment injuries described in this opinion if a permanent injunction were not granted. The balancing of hardships thus militates in favor of plaintiffs' requested

injunction. Finally, we find the public interest is advanced, rather than disserved, by permanently enjoining a House policy and practice that violate the Constitution. Cf. Jamal, 105 F. Supp. 3d at 463. We will grant plaintiffs' request for permanent injunctive relief.

IV. Conclusion

The Pennsylvania House of Representatives' current guest chaplain policy facially violates the Establishment Clause of the First Amendment to the United States Constitution. The policy purposefully discriminates among invocation presenters on the basis of religion and thus exceeds the constitutional boundaries of legislative prayer. The House's pre-2017 opening invocation practice, which coerces visitors to stand during the opening prayer and thereby participate in a religious exercise, likewise offends the Establishment Clause. We will grant partial summary judgment, declaratory judgment, and permanent injunctive relief to plaintiffs. An appropriate order shall issue.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

Dated: August 29, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIAN FIELDS, *et al.*,	:	**CIVIL ACTION NO. 1:16-CV-1764**
	:	
Plaintiffs	:	**(Chief Judge Conner)**
	:	
v.	:	
	:	
SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, *et al.*,	:	
	:	
Defendants	:	

ORDER

AND NOW, this 28th day of April, 2017, upon consideration of defendants' motion (Doc. 31) to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. Defendants' motion (Doc. 31) is GRANTED in part and DENIED in part as follows:

    a. The motion (Doc. 31) is GRANTED to the extent it seeks dismissal of plaintiffs' claims pursuant to the Free Speech and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

    b. The motion (Doc. 31) is further GRANTED to the extent it seeks dismissal of ostensible coercion claims pursuant to the Establishment Clause of the First Amendment by plaintiffs other than Brian Fields and Scott Rhoades.

    c. The motion (Doc. 31) is DENIED in all other respects.

2. Counts II, III, and IV of plaintiffs' complaint (Doc. 1) are DISMISSED with prejudice.

3. Count I of plaintiffs' complaint (Doc. 1) is DISMISSED only to the extent that Count can be read to assert coercion claims on behalf of plaintiffs other than Brian Fields and Scott Rhoades.

4. This action shall proceed on Count I as follows:

   a. On the Establishment Clause challenge to defendants' implementation of House Rule 17 as to all plaintiffs, and

   b. On the Establishment Clause coercion claim as to plaintiffs Brian Fields and Scott Rhoades.

5. The court will issue a case management schedule by separate order.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIAN FIELDS, *et al.*,	:	**CIVIL ACTION NO. 1:16-CV-1764**
	:	
Plaintiffs	:	**(Chief Judge Conner)**
	:	
v.	:	
	:	
SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, *et al.*,	:	
	:	
Defendants	:	

MEMORANDUM

The Pennsylvania House of Representatives commences legislative sessions with an opening invocation delivered by either a member of the House or a guest chaplain. Pursuant to an internal House rule, a guest chaplain must be "a member of a regularly established church or religious organization."[1] The Speaker of the House interprets this rule to exclude "non-adherents" and "nonbelievers" from the guest chaplain program.[2] Plaintiffs are atheist, agnostic, Secular Humanist, and freethinking individuals who have been denied the opportunity to deliver an opening invocation due to the nontheistic nature of their beliefs. Plaintiffs challenge the exclusionary House policy under the First and Fourteenth Amendments to the United States Constitution.

[1] GEN. OPERATING RULES OF THE PA. HOUSE OF REP. R. 17.
[2] Doc. 1 ¶ 191.

I. Background

Brian Fields, Paul Tucker, Deana Weaver, Scott Rhoades, and Joshua Neiderhiser are nontheists who actively adhere to and practice their respective beliefs.[3] As employed herein, our nontheist designation includes atheists, agnostics, Secular Humanists, freethinkers, and other persons who do not believe in a deity.[4] Many features of plaintiffs' respective ideologies parallel the practice of traditional theistic religions: plaintiffs assemble to explore and discuss their beliefs, study texts and films anent their belief systems, observe annual celebrations, and coordinate service activities and community outreach.[5]

Plaintiffs are leaders in their belief communities. Fields is president of Pennsylvania Nonbelievers, Tucker is founder and chief organizer of Dillsburg Area Freethinkers, and Rhoades is founder and president of Lancaster Freethought Society.[6] These nontheist organizations and their leaders represent the functional equivalent of traditional religious congregations in the lives of their members.[7] For example, Rhoades and Neiderhiser are ordained Humanist Celebrants who regularly perform wedding ceremonies and memorial services.[8]

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[3] Doc. 1 ¶¶ 10, 30, 41, 50, 66.

[4] Humanism is "a progressive philosophy of life that, without theism or other supernatural beliefs, affirms [the] ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity." *What is Humanism*, AM. HUMANIST ASS'N, http://americanhumanist.org/Humanism. A "freethinker" is a person who forms "opinions about religion based on reason, independently of established belief, tradition, or authority." Doc. 1 ¶ 41.

[5] Id. ¶¶ 13-19, 31-34, 42-43, 52-58, 67-70; see also id. ¶¶ 79-86, 93-95, 101-104.

[6] Id. ¶¶ 13, 31-32, 55.

[7] Id. ¶¶ 86, 95, 104.

[8] Id. ¶¶ 52-53, 67.

Each of the individual plaintiffs would like to deliver an invocation before the House.[9] Plaintiffs intend to offer uplifting and inspirational messages—to champion such unobjectionable themes as equality, unity, and common decency; and to demonstrate that nontheists can offer meaningful commentary on morality and reflections valuable to public governance.[10]

A. The Opening Invocation

The House convenes daily legislative sessions which are open to the public and streamed live on the House website.[11] Members of the public attending the sessions observe proceedings from the visitor gallery located in a balcony at the rear of the House chamber.[12] Fields and Rhoades have attended daily sessions in the past and intend to do so in the future.[13]

Before the opening invocation, the Speaker directs members of the House and visitors in the gallery to rise.[14] Members of the House and most visitors oblige,[15] but Fields and Rhoades apparently prefer to remain seated.[16] On one occasion, the Speaker publicly singled out Fields and Rhoades and ordered them to rise for the invocation.[17] When they refused, the Speaker directed a legislative security officer to "pressure" them to stand.[18] Plaintiffs believe that the Speaker's direction to rise

[9] Id. ¶¶ 25, 37, 46, 61, 73.
[10] See id.
[11] Id. ¶ 143.
[12] Id. ¶ 147.
[13] Id. ¶¶ 22-23, 60.
[14] Id. ¶ 154.
[15] Id. ¶¶ 158-59.
[16] Id. ¶¶ 23-24, 60.
[17] Id. ¶¶ 24, 60.
[18] Id.

coerces them (and others) to recognize the validity of religious beliefs with which they disagree.[19]

B. The Guest Chaplain Policy

House members may nominate guest chaplains by submitting a request to the Speaker's office.[20] The request must identify the proposed chaplain's name, house of worship or affiliated organization, and contact information.[21] The Speaker reviews and selects guest chaplains from among the submitted nominees.[22] The Speaker then sends a form letter to selected chaplains which asks them to "craft a prayer that is respectful of all religious beliefs."[23] The Speaker does not review the content of an opening invocation before it is delivered.[24] Guest chaplains receive a commemorative gavel and a photograph with the House member who nominated them.[25]

Between January 8, 2008 and February 9, 2016, the House convened 678 daily sessions and began 575 of them with an invocation.[26] Members of the House delivered 310 of those invocations, and guest chaplains delivered the remaining 265 invocations.[27] Of the guest chaplains, 238 were Christian clergy, twenty-three were Jewish rabbis, and three were of the Muslim faith.[28] Only one guest chaplain was

[19] Id. ¶¶ 27, 63.
[20] Id. ¶¶ 162-63.
[21] See id.
[22] Id. ¶¶ 165-66.
[23] Id. ¶¶ 167-69.
[24] Id. ¶ 170.
[25] Id. ¶¶ 171-72.
[26] Id. ¶¶ 173-75.
[27] Id. ¶¶ 177, 179.
[28] Id. ¶¶ 180-82.

not "recognizably affiliated" with a particular religion, but that person nonetheless delivered a monotheistic message.[29] According to the complaint, no invocation was free of theistic content, and none had content associated with faiths other than Christianity, Judaism, or Islam.[30]

On August 12, 2014, Weaver emailed a request to her House representative on behalf of Dillsburg Area Freethinkers seeking to deliver an invocation.[31] Two weeks later, Carl Silverman, a member of Pennsylvania Nonbelievers, wrote his House representative, requesting that either he or Fields be permitted to deliver an invocation on behalf of their organization.[32] The Speaker denied Silverman's request by letter dated September 25, 2014, stating that the House is not "required to allow non-adherents or nonbelievers the opportunity to serve as chaplains."[33] Weaver's representative forwarded the Silverman response to her via email on September 26, 2014.[34] Thereafter, the House amended its General Operating Rules to include House Rule 17.[35] Per the new rule: "The 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."[36]

On January 9, 2015, plaintiffs' counsel wrote to the Speaker and House Parliamentarian requesting that a representative of Pennsylvania Nonbelievers be

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[29] Id. ¶ 183.
[30] Id. ¶¶ 184-86.
[31] Id. ¶ 189; Doc. 1-4.
[32] Doc. 1 ¶ 190; Doc. 1-5.
[33] Doc. 1 ¶ 191; Doc. 1-6 at 2.
[34] Doc. 1 ¶ 192; Doc. 1-7.
[35] See Doc. 1 ¶ 194.
[36] Id. ¶ 161; GEN. OPERATING RULES OF THE PA. HOUSE OF REP. R. 17.

permitted to serve as guest chaplain.[37] In a response dated January 15, 2015, the Parliamentarian denied Pennsylvania Nonbelievers' request, citing House Rule 17.[38] On August 6, 2015, plaintiffs' counsel sent a final letter to all defendants requesting that Fields, Tucker, Weaver, Rhoades, or Neiderhiser, or a representative of their organizations, be given an opportunity to deliver an invocation.[39] By separate letter of the same date, counsel asked the Speaker and Parliamentarian to cease directing House visitors to stand for invocations.[40] The Parliamentarian denied plaintiffs' guest chaplaincy request by letter dated September 9, 2015.[41] Plaintiffs received no response to their letter concerning the directive to rise for opening invocations.[42]

C. Procedural History

Plaintiffs commenced this action by filing a complaint on August 25, 2016.[43] Plaintiffs name as defendants the Speaker of the House, the Parliamentarian of the House, and the Representatives of Pennsylvania House Districts 92, 95, 97, 193, and 196.[44] Defendants are named in their official capacities alone. Plaintiffs claim that the House policy of preferring theistic over nontheistic religions contravenes the First and Fourteenth Amendments. Plaintiffs request declaratory judgment as to

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[37] Id. ¶ 193; Doc. 1-8.
[38] Doc. 1 ¶ 194; Doc. 1-9.
[39] Doc. 1 ¶ 195; Docs. 1-10 to 1-13.
[40] Doc. 1 ¶ 195; Doc. 1-14.
[41] Doc. 1 ¶ 196; Doc. 1-15.
[42] Doc. 1 ¶ 197.
[43] Doc. 1.
[44] Id. ¶¶ 109, 118, 123, 127, 131, 135, 139. As of this writing, the Speaker of the House is the Honorable Mike Turzai, the Parliamentarian is Clancy Myer, and the Honorable Dawn Keefer, Carol Hill-Evans, Steven Mentzer, Will Tallman, and Seth Grove serve as representatives of House Districts 92, 95, 97, 193, and 196, respectively. See MEMBERS OF THE HOUSE OF REPRESENTATIVES, http://www.legis.state.pa.us/cfdocs/legis/home/member_information/pdf/addr_hse.pdf (updated Apr. 28, 2017).

the constitutionality of House Rule 17 (as interpreted by the Speaker) and the House practices of favoring theists to nontheists and directing visitors to rise for opening invocations.[45] Plaintiffs seek injunctive relief requiring the House to permit plaintiffs to deliver nontheistic invocations, prohibiting defendants from discriminating against nontheistic speakers, and enjoining the Speaker from directing visitors to rise for invocations.[46]

Defendants moved to dismiss plaintiffs' complaint *in extenso*,[47] and the parties thoroughly briefed defendants' motion.[48] The court convened oral argument on February 22, 2017,[49] and the motion is ripe for disposition.

II. Legal Standards

Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a claim for lack of subject matter jurisdiction.[50] Such jurisdictional challenges take of one two forms: (1) parties may levy a "factual" attack, arguing that one or more of the pleading's factual allegations are untrue, removing the action from the court's jurisdictional ken; or (2) they may assert a "facial" challenge, which assumes the veracity of the complaint's allegations but nonetheless argues that a claim is not

[45] Doc. 1 ¶ 280.
[46] Id. ¶¶ 276-78.
[47] Doc. 31.
[48] Docs. 33, 36, 39.
[49] See Docs. 41, 43.
[50] See FED. R. CIV. P. 12(b)(1).

within the court's jurisdiction.[51] In either instance, it is the plaintiff's burden to establish jurisdiction.[52]

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of complaints that fail to state a claim upon which relief may be granted.[53] When ruling on a motion to dismiss under Rule 12(b)(6), the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief."[54] In addition to reviewing the facts contained in the complaint, the court may also consider "matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case."[55]

Federal notice and pleading rules require the complaint to provide "the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[56] To test the sufficiency of the complaint, the court conducts a three-step inquiry.[57] In the first step, "the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.'"[58] Next, the factual and legal elements of a claim must be separated;

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[51] See Lincoln Benefit Life Co. v. AEI Life, LLC, 800 F.3d 99, 105 (3d Cir. 2015) (quoting CNA v. United States, 535 F.3d 132, 139 (3d Cir. 2008)); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977).

[52] See Mortensen, 549 F.2d at 891.

[53] FED. R. CIV. P. 12(b)(6).

[54] Phillips v. Cty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (quoting Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)).

[55] Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); see Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

[56] Phillips, 515 F.3d at 232 (alteration in original) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[57] See Santiago v. Warminster Twp., 629 F.3d 121, 130-31 (3d Cir. 2010).

[58] Id. at 130 (alteration in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

well-pleaded facts must be accepted as true, while mere legal conclusions may be disregarded.[59] Once the court isolates the well-pleaded factual allegations, it must determine whether they are sufficient to show a "plausible claim for relief."[60] A claim is facially plausible when the plaintiff pleads facts "that allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[61]

Courts should grant leave to amend before dismissing a curable pleading in civil rights actions.[62] Courts need not grant leave to amend *sua sponte* in dismissing non-civil rights claims pursuant to Rule 12(b)(6),[63] but leave is broadly encouraged "when justice so requires."[64]

III. Discussion

Plaintiffs adjure that defendants' prescript for theistic religions offends a quartet of constitutional provisions: *first*, the Establishment Clause, by favoring theism to nontheism and excessively entangling the House in religious judgment, and coercing House visitors to participate in theistic prayer; *second*, the Free Exercise Clause, by requiring nontheists to adopt or profess theistic beliefs and proscribing nontheistic beliefs; *third*, the Free Speech Clause, by denying nontheists the opportunity to participate in government activities based on the

[59] Id. at 131-32; see also Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009).

[60] Iqbal, 556 U.S. at 679 (citing Twombly, 550 U.S. at 556); Twombly, 550 U.S. at 556.

[61] Iqbal, 556 U.S. at 678.

[62] See Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 251 (3d Cir. 2007); Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002).

[63] Fletcher-Harlee Corp., 482 F.3d at 252-53.

[64] FED. R. CIV. P. 15(a)(2).

perceived nonconformity of their beliefs, and censoring invocations to prohibit reflection of those beliefs; and *fourth*, the Equal Protection Clause, by permitting theists but not nontheists to serve as guest chaplains.

Defendants' motion tests the justiciability and the merits of all four claims. Defendants oppugn plaintiffs' standing under the Establishment Clause for failure to plead cognizable harm. Defendants contest plaintiffs' standing under the Free Speech, Free Exercise, and Equal Protection Clauses for want of a legally protected interest. Assuming standing *arguendo*, defendants attack the merits of plaintiffs' Establishment Clause claim, asserting that the House invocation policies embodied in Rule 17 find support in Supreme Court precedent. Defendants also remonstrate that the Free Speech, Free Exercise, and Equal Protection Clauses do not apply to government speech. We address each argument *seriatim*.

A. Justiciability

Article III of the United States Constitution limits the scope of the federal judicial power to those cases involving actual "cases" and "controversies."[65] The doctrine of "standing" safeguards this essential limitation by requiring a party to have a "requisite stake in the outcome" of the lawsuit before invoking the court's jurisdiction.[66] At an "irreducible . . . minimum," Article III requires plaintiffs to establish three elements: injury in fact, causation, and redressability.[67]

[65] U.S. CONST. art. III, § 2.

[66] Constitution Party of Pa. v. Aichele, 757 F.3d 347, 356-57, 360 (3d Cir. 2014) (quoting Davis v. FEC, 554 U.S. 724, 734 (2008)).

[67] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

1. *Standing of the Individual Plaintiffs*

The Third Circuit has held that standing in the Establishment Clause context "requires only direct and unwelcome personal contact with the alleged establishment of religion."[68] This is not to say that every fleeting contact with state-established religious preference is justiciable. A plaintiff must plead "a concrete grievance that is particularized to him."[69] Generalized, attenuated disagreements will not suffice.[70]

The Supreme Court, recognizing the abstract nature of religious injury, has articulated three distinct theories of Establishment Clause standing: (1) direct harm standing; (2) denied benefit standing; and (3) taxpayer standing.[71] Plaintiffs do not invoke taxpayer standing.[72] Nor do plaintiffs suggest they have been denied a

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[68] Freedom From Religion Found. v. New Kensington Arnold Sch. Dist., 832 F.3d 469, 476-77 (3d Cir. 2016) (citing Red River Freethinkers v. City of Fargo, 679 F.3d 1015, 1023 (8th Cir. 2012); Cooper v. USPS, 577 F.3d 479, 491 (2d Cir. 2009); Vasquez v. L.A. Cty., 487 F.3d 1246, 1253 (9th Cir. 2007); ACLU of Ohio Found. v. Ashbrook, 375 F.3d 484, 489-90 (6th Cir. 2004); Suhre v. Haywood Cty., 131 F.3d 1083, 1086 (4th Cir. 1997); Foremaster v. City of St. George, 882 F.2d 1485, 1490-91 (10th Cir. 1989); Saladin v. City of Milledgeville, 812 F.2d 687, 692 (11th Cir. 1987)).

[69] Id. at 478 (citing Valley Forge Christian Coll. v. Am. United for Separation of Church and State, 454 U.S. 464, 482-83 (1992)).

[70] Id.

[71] See Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129-30 (2011).

[72] The Supreme Court's first legislative prayer case relied in part on taxpayer standing, affirming the Eighth Circuit's conclusion that the plaintiff, "as a member of the Legislature *and* as a taxpayer whose taxes are used to fund the chaplaincy," had standing to sue. Marsh v. Chambers, 463 U.S. 783, 786 n.4 (1983) (emphasis added). Only one other court has found taxpayer standing: in Pelphrey v. Cobb Cty., 547 F.3d 1263 (11th Cir. 2008), the Eleventh Circuit concluded that municipal taxpayers had standing to pursue a First Amendment challenge when the county "expend[ed] municipal funds, in the form of materials and personnel time, to select, invite, and thank the invocational speakers." Id. at 1267, 1280-81. Plaintiffs herein offer no argument or allegation inviting a *sua sponte* finding of taxpayer standing.

benefit as a result of defendants' interpretation of House Rule 17.[73] Hence, we examine plaintiffs' standing under a "direct harm" theory.

Defendants assert broadly that plaintiffs do not allege sufficient "personal contact" with a state-established religious preference.[74] At the outset, defendants posit that only Fields and Rhoades have been exposed to theistic legislative prayer because only Fields and Rhoades have attended House daily sessions.[75] This argument misapprehends plaintiffs' harm: plaintiffs do not claim injury from experiencing theistic prayer, but from the House's refusal to include nontheistic messages in its guest chaplain program.[76] All plaintiffs have adequately pled exposure to the alleged establishment of religion.

Defendants contend that plaintiffs' exposure is not sufficiently direct or immediate to confer standing.[77] We flatly reject this contention. Plaintiffs' harm is hardly "attenuated." To the contrary, each plaintiff applied for and was denied the opportunity to present an invocation—an opportunity provided to adherents of conventional, monotheistic religions.[78] According to the complaint, the House denied plaintiffs' requests as a direct and exclusive result of antipathy toward nontheism.[79] Notably, the only other federal court to address this question held unequivocally that "exclusion from the list of those eligible to give an invocation" is

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[73] See Ariz. Christian Sch. Tuition Org., 563 U.S. at 130 (explaining that denied benefit standing exists when plaintiffs "have incurred a cost or been denied a benefit on account of their religion").

[74] See Doc. 33 at 24-29.

[75] See id.

[76] See Doc. 1 ¶¶ 26, 38, 47, 62, 74; Doc. 50 at 45:24-46:25.

[77] See Doc. 33 at 27-29.

[78] Doc. 1 ¶¶ 189-96; Docs. 1-4 to 1-15; see also Doc. 1 ¶¶ 26, 38, 47, 62, 74.

[79] See Doc. 1 ¶ 191.

injury sufficient to satisfy Article III.[80] We agree. Plaintiffs allege cognizable injury in fact for purposes of the Establishment Clause.

With respect to plaintiffs' coercion claims, defendants also dispute redressability. Defendants concede that Fields' and Rhoades' "glancing exposure to religious expression" at House sessions "might in some instances suffice to confer standing."[81] They rejoin that even if the court orders the House to invite nontheist chaplains, plaintiffs will continue to experience theistic prayer in the House chamber.[82] Defendants again misapprehend the nature of the alleged constitutional injury and requested relief—plaintiffs do not seek to eliminate all theistic content; they challenge the practice of permitting *only* theistic content.[83] A more inclusive policy would directly redress plaintiffs' alleged injury.

Defendants also contend that plaintiffs cannot establish injury under the Free Speech, Free Exercise, and Equal Protection Clauses because legislative prayer is circumscribed by the Establishment Clause alone.[84] Defendants are correct that courts generally hold legislative prayer to be "government speech"[85] which is not subject to review under the Free Speech, Free Exercise, and Equal

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[80] See Simpson v. Chesterfield Cty. Bd. of Supervisors, 404 F.3d 276, 279 n.2 (4th Cir. 2005).

[81] Doc. 33 at 25.

[82] Id. at 25-26.

[83] See Doc. 50 at 45:24-46:25.

[84] See Doc. 33 at 20-23.

[85] See Simpson, 404 F.3d at 288; Coleman v. Hamilton Cty., 104 F. Supp. 3d 877, 890-91 (E.D. Tenn. 2015).

Protection Clauses.[86] The flaw in defendants' position is that it erroneously conflates justiciability with merit. No case that defendants cite—and none that research has unveiled—dismisses a legislative prayer claim brought pursuant to the Free Speech, Free Exercise, and Equal Protection Clauses on *standing* grounds.[87] Defendants conceded as much at oral argument.[88] *Per contra*, several courts have expressly resolved that plaintiffs *do* have standing to sue when excluded from government speech.[89]

Defendants' position is in direct tension with recent Third Circuit precedent holding that "[t]he indignity of being singled out [by the government] . . . on the basis of one's religious calling . . . is enough to get in the courthouse door."[90] It is undermined further by the fundamental principle that standing inquiries focus on parties and not on issues.[91] We are satisfied that plaintiffs have standing under the

[86] See, e.g., Simpson, 404 F.3d at 288; Coleman, 104 F. Supp. 3d at 890-91; Atheists of Fla., Inc. v. City of Lakeland, 779 F. Supp. 2d 1330, 1341-42 (M.D. Fla. 2011) (quoting Simpson, 404 F.3d at 288); see also Turner v. City Council of City of Fredericksburg, 534 F.3d 352, 356 (4th Cir. 2008) (O'Connor, J., sitting by designation) (quoting Simpson, 404 F.3d at 288).

[87] For example, defendants cite Choose Life Illinois, Inc. v. White, 547 F.3d 853 (7th Cir. 2008), for their assertion that "there can be no injury-in-fact as necessary to confer standing" in government speech cases under the Free Speech or Free Exercise Clauses. Doc. 33 at 21. But the court in Choose Life Illinois found that plaintiffs *did* have standing to assert a Free Speech claim before ultimately rejecting the claim on the merits. Choose Life Ill., Inc., 547 F.3d at 858-67, 858 n.3. Other cases cited by defendants reject Free Speech, Free Exercise, and Equal Protection prayer challenges on the merits rather than for lack of standing. See Simpson, 404 F.3d at 288; Coleman, 104 F. Supp. 3d at 890-91; Atheists of Fla., Inc., 779 F. Supp. 2d at 1341-42.

[88] See Doc. 50 at 7:23-8:10, 15:21-25.

[89] See Simpson, 404 F.3d at 279 n.2; see also Choose Life Ill., Inc., 547 F.3d at 858 n.3.

[90] Hassan v. City of N.Y., 804 F.3d 277, 299 (3d Cir. 2015) (first and second alterations in original) (quoting Locke v. Davey, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting)).

[91] Flast v. Cohen, 392 U.S. 83, 99 (1968).

Free Speech, Free Exercise, and Equal Protection Clauses, and we will proceed to a merits analysis on these claims.

2. *Standing of the Organizational Plaintiffs*

Defendants contest organizational standing in a footnote.[92] An organization may establish standing in two ways: on its own behalf and on behalf of its members. Courts measure an organization's standing to sue in its own right against the same rubric outlined *supra* for individual standing.[93] An organization may also sue in a representative capacity when (1) its members would have standing on their own behalf; (2) the interests sought to be defended by the lawsuit "are germane to the organization's purpose"; and (3) the claims asserted and relief sought do not require individual member participation.[94] The organizational plaintiffs *sub judice* articulate no basis for individual standing—their claims are purely derivative. The court tests the organizations' standing in their representative capacities alone.

Organizational standing is generally not appropriate in actions for monetary damages.[95] In such cases, proof tends to be largely individualized and nuanced as to each member, rendering representative standing impracticable.[96] But "*some*

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[92] Doc. 33 at 18-19 n.5.

[93] See Pa. Prison Soc'y v. Cortes, 508 F.3d 156, 163 (3d Cir. 2007) (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 372-79 (1982); Warth v. Seldin, 422 U.S. 490, 511 (1975)).

[94] Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977); Pa. Prison Soc'y, 622 F.3d at 228.

[95] See Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278, 284 (3d Cir. 2002) (citing United Food & Commercial Workers Union Local 751 v. Brown Gr., Inc., 517 U.S. 544, 546 (1996); Hunt, 432 U.S. at 343).

[96] See id. (citing United Food, 517 U.S. at 546; Hunt, 432 U.S. at 343).

individual participation" does not violate this principle.[97] The Supreme Court and Third Circuit have squarely held that requests for declaratory and injunctive relief generally "do not require participation by individual association members."[98] Plaintiffs assert uniform and systemic harms, and they seek only declaratory and injunctive relief. The organizational plaintiffs' claims require no individualized proof beyond testimony as to their members' respective experiences with the House's legislative prayer practice. We conclude that Pennsylvania Nonbelievers, Dillsburg Area Freethinkers, and Lancaster Freethought Society have properly asserted organizational standing.[99]

B. Constitutional Claims

Section 1983 of Title 42 of the United States Code creates a private cause of action to redress constitutional wrongs committed by state officials.[100] The statute is not a source of substantive rights, but serves as a mechanism for vindicating rights otherwise protected by federal law.[101] To state a claim under Section 1983, plaintiffs must show a deprivation of a "right secured by the Constitution and the laws of the

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[97] Id. at 283-84 (emphasis added).

[98] Hosp. Council of W. Pa. v. City of Pittsburgh, 949 F.2d 83, 89 (3d Cir. 1991) (citing Pennel v. City of San Jose, 485 U.S. 1, 7 n.3 (1988); UAW v. Brock, 477 U.S. 274, 287-88 (1986)).

[99] Defendants raise other justiciability concerns in their Rule 12(b)(6) briefing, to wit: legislative immunity and the political question doctrine. See Doc. 33 at 28 n.9, 38 n.11. At oral argument, counsel confirmed that defendants are not pursuing these defenses at this juncture. Doc. 50 at 27:23-28:14.

[100] See 42 U.S.C. § 1983.

[101] Gonzaga Univ. v. Doe, 536 U.S. 273, 284-85 (2002); Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996).

United States . . . by a person acting under color of state law."[102] There is no dispute that the House defendants are state actors within the purview of Section 1983. We must thus determine whether the House legislative prayer practice deprives plaintiffs of rights secured by the United States Constitution. We begin with the Establishment Clause.

1. *Establishment Clause*

The First Amendment prohibits the government from making any law "respecting an establishment of religion."[103] Courts ordinarily apply one of three tests to evaluate government practices under the Establishment Clause: the coercion test, the endorsement test, and the Lemon test.[104] Legislative prayer, however, occupies *sui generis* status in Supreme Court jurisprudence and our nation's history. In its only two cases on the subject, Marsh v. Chambers, 463 U.S. 783 (1983), and Town of Greece v. Galloway, 134 S. Ct. 1811 (2014), the Court upheld state and municipal prayer practices without resort to traditional Establishment Clause principles.

In its first legislative prayer case, Marsh v. Chambers, 463 U.S. 783 (1983), the Court examined a legislature's practice of opening sessions with a prayer delivered by a chaplain. The Nebraska state legislature appointed the same Presbyterian

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[102] Kneipp, 95 F.3d at 1204 (quoting Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995)).

[103] U.S. CONST. amend. I.

[104] See Lee v. Weisman, 505 U.S. 577 (1992) (coercion); Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (endorsement); Lemon v. Kurtzman, 403 U.S. 602 (1971).

minister to serve as chaplain for sixteen years.[105] The chaplain was paid a monthly salary from legislative funds.[106] A member of the legislature sued, challenging the practice as an unlawful establishment of religion.[107] The district court upheld the chaplaincy, but enjoined payment of a salary from public coffers.[108] The Eighth Circuit Court of Appeals affirmed in part and reversed in part, applying the Lemon test to hold that the prayer practice *in toto* violated the Establishment Clause.[109]

The Supreme Court reversed. Writing for the majority, Justice Burger chronicled the ubiquity of legislative prayer in the annals of our nation.[110] He noted that the First Congress set about appointing and compensating legislative chaplains the very week it drafted the Bill of Rights, suggesting the Framers did not perceive the practice as violative of the First Amendment.[111] The Court pronounced that an "unambiguous and unbroken history of more than 200 years" of legislative prayer had woven the ritual into the very "fabric of our society."[112] The Court concluded that "[t]o invoke Divine guidance" before engaging in the important work of public governance is not establishment of religion but "a tolerable acknowledgement of beliefs widely held" among citizens.[113]

Turning to the particulars of Nebraska's practice, the Court found that no aspect transcended the bounds of permissible legislative prayer. Absent proof of an

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[105] See Marsh v. Chambers, 463 U.S. 783, 784-85, 793 (1983).
[106] Id. at 785, 793.
[107] Id. at 785.
[108] Chambers v. Marsh, 504 F. Supp. 585, 588-93 (D. Ne. 1980).
[109] Chambers v. Marsh, 675 F.2d 228, 233-235 (8th Cir. 1982).
[110] See Marsh, 463 U.S. at 786-91.
[111] Id. at 787-88.
[112] Id. at 792.
[113] Id.

"impermissible motive," the 16-year tenure of a minister representing a single faith did not violate the Establishment Clause.[114] Nor was the Court troubled that public monies funded the chaplaincy, citing again the First Congress.[115] As for content, the Court jettisoned concerns with the principally Judeo-Christian nature of the messages, resolving that content is of no moment when, as in Nebraska, "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[116]

The Supreme Court subsequently explored Marsh in County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989), a case concerning public-sponsored holiday displays. The deeply-divided Court resolved that government display of a crèche, a uniquely Christian symbol, contravened the Establishment Clause.[117] Tasked by Justice Kennedy's dissent to square its result with Marsh, the majority highlighted the content of the Nebraska chaplain's prayers, contrasting his general religious references with the "specifically Christian symbol" of a crèche.[118] Following County of Allegheny, some courts construed Marsh to authorize only nonsectarian legislative prayer.[119]

Thirty-one years after Marsh, the Court revisited legislative prayer in Town of Greece v. Galloway, 572 U.S. __, 134 S. Ct. 1811 (2014). In 1999, the town of

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[114] Id. at 793-94.
[115] Id. at 794.
[116] Id. at 794-95.
[117] See Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989).
[118] Id. at 602-05.
[119] See, e.g., Joyner v. Forsyth Cty., 653 F.3d 341, 349-50 (4th Cir. 2011); Wynne v. Town of Great Falls, 376 F.3d 292, 298-302 (4th Cir. 2004).

Greece, New York, opened its monthly meetings with invocations delivered by local clergy.[120] A clerical employee would contact congregations listed in a local directory until she found a willing clergyperson.[121] Town leaders described their policy as welcoming minsters and laypersons "of any persuasion," including atheists.[122] In practice, nearly all invocations given from 1999 to 2007 were Christian in nature, reflecting the principal religious disposition of the town's population.[123]

Susan Galloway and Linda Stephens attended the monthly meetings and objected to the invocation practice on religious and philosophical grounds.[124] The town thereafter invited a Jewish layman, the chairman of a local Baha'i temple, and a Wiccan priestess to serve as chaplains, but soon reverted to Christian themes.[125] Galloway and Stephens filed suit, asserting that the town committed a twofold violation of the Establishment Clause, by: (1) sponsoring sectarian as opposed to "inclusive and ecumenical" messages and (2) fostering a coercive environment where attendees felt pressured to participate in religious observance with which they disagreed.[126] The district court rejected both claims.[127] The Court of Appeals for the Second Circuit reversed, holding that a "steady drumbeat" of exclusively

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[120] Town of Greece v. Galloway, 572 U.S. __, 134 S. Ct. 1811, 1816 (2014).
[121] Id.
[122] Id.
[123] See id.
[124] Id. at 1817.
[125] Id.
[126] Id. at 1817, 1819-20.
[127] See Galloway v. Town of Greece, 732 F. Supp. 2d 195, 215-243 (W.D.N.Y. 2010).

Christian content effectively affiliated the town with a single religion.[128] The town of Greece appealed, and the Supreme Court granted *certiorari*.[129]

In an opinion authored by Justice Kennedy, the Court addressed plaintiffs' claims in two parts, with the first (Part II-A) garnering majority support. Justice Kennedy, joined by the Chief Justice as well as Justices Thomas, Alito, and Scalia, held that the Constitution tolerates even sectarian legislative prayer.[130] According to the majority, the Marsh result attained not because the chaplain's messages were nonsectarian, but because such prayer practices had for centuries existed in quiet equipoise with the First Amendment.[131] The Court framed its inquiry as "whether the prayer practice . . . fits within the tradition long followed in Congress and the state legislatures," and held that a requirement of ecumenical or nonsectarian prayer is inconsistent with that tradition.[132] In closing, the majority perceptibly amplified Marsh, observing that a given prayer practice will not likely violate the Constitution unless the prayers reflect a *pattern* of denigrating or proselytizing content or an impermissible purpose.[133] The Court forewarned, however, that history and tradition cannot save an otherwise unconstitutional practice.[134]

The majority then addressed the Second Circuit's finding that the town violated the Establishment Clause by inviting guest chaplains of "predominantly

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[128] Galloway v. Town of Greece, 681 F.3d 20, 32 (2d Cir. 2012).
[129] Town of Greece v. Galloway, 133 S. Ct. 2388 (2013) (mem.).
[130] Town of Greece, 134 S. Ct. at 1820-24.
[131] Id. at 1820 (quoting Marsh, 463 U.S. at 786).
[132] Id. at 1819-21.
[133] Id. at 1824.
[134] Id. at 1819.

Christian" faiths.[135] The Court held that, "[s]o long as the town maintains a policy of nondiscrimination," the First Amendment does not require it to achieve religious stasis.[136] The Court found no evidence of an "aversion or bias" toward minority faiths by the town of Greece; contrarily, the town undertook reasonable efforts to identify all prospective guest chaplains, and its policy welcomed ministers and laity of all creeds.[137] In his concurring opinion, Justice Alito suggested that the outcome should differ when omission of a particular religion is "intentional" rather than "at worst careless."[138]

Part II-B of the opinion was joined only by the Chief Justice and Justice Alito. Justice Kennedy began with the "elemental" principle that "government may not coerce its citizens 'to support or participate in any religion or its exercise.'"[139] The three-Justice plurality opined that claims of coercion must be measured in view of both setting and audience.[140] As for setting, a "brief, solemn and respectful prayer" at the start of a meeting is consistent with "heritage and tradition" familiar to the public.[141] Attendees are presumed to understand that the purpose of the exercise is not to proselytize but to "lend gravity" to the proceedings.[142] Concerning audience, the plurality found that the chaplain's messages were intended to "accommodate

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[135] Id. at 1824.
[136] Id.
[137] Id.
[138] Id. at 1830-31 (Alito, J., concurring).
[139] Id. at 1825 (plurality opinion) (quoting Cty. of Allegheny, 492 U.S. at 659).
[140] Id.
[141] Id.
[142] Id.

the spiritual needs of lawmakers" rather than preach to the visiting public.[143] These considerations together weighed against a finding of coercion.[144]

In a concurring opinion, Justice Thomas took exception to the plurality's coercion analysis.[145] In Part I of his opinion, Justice Thomas renewed his unique view that the Establishment Clause ought not apply to state governments or to municipalities like the town of Greece.[146] In Part II, Justice Thomas, joined by Justice Scalia, submitted that claims of religious coercion must be viewed through the prism of that which our Founders sought to escape: "religious orthodoxy . . . by force of law and threat of penalty."[147] Justice Thomas proposed that only claims of actual *legal* coercion violate the Establishment Clause.[148] Claims of subtle pressure, like requests to rise for prayer, would not offend this heightened standard.[149]

Against this framework, we consider plaintiffs' Establishment Clause challenges to (*a*) the House's guest chaplain policy and (*b*) the House's opening invocation practice.

a. Guest Chaplain Policy

Defendants maintain that legislative prayer is presumed constitutional unless employed to denigrate or proselytize. According to defendants, plaintiffs' failure to allege an instance (much less a pattern) of proselytization or denigration is fatal to

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[143] Id. at 1825-26.
[144] Id. at 1825-27.
[145] Id. at 1835-38 (Thomas, J., concurring in part and concurring in the judgment).
[146] Id. at 1835-37 (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45-46 (2004) (Thomas, J., concurring in the judgment)).
[147] Id. at 1837 (emphasis omitted) (quoting Lee, 505 U.S. at 640).
[148] Id. at 1837-38 (quoting Newdow, 542 U.S. at 52).
[149] Id. at 1838.

their Establishment Clause claim.[150] Defendants further contend that Marsh and Town of Greece cloak legislators with discretion to choose what type of prayer they would like to hear and from whom they would like to hear it.[151] Defendants posit that purposeful exclusion of nontheists is consistent with the view of legislative prayer endorsed in Marsh and Town of Greece.[152] Thus, according to defendants, it is entirely proper for the House to welcome only those religions which embrace a higher power and only those chaplains who will "appeal to the Almighty."[153]

Plaintiffs rejoin that they claim not disparagement or proselytization but discrimination, *viz.*, a practice by the House of preferring theistic faiths to the total and deliberate exclusion of nontheists.[154] Plaintiffs emphasize that they do not seek to suppress God-oriented messages from the House floor, but to include their own messages among them.[155]

That the parties diverge on the contours of our inquiry is unsurprising. The gravamen of the Supreme Court's legislative prayer decisions is clear: legislative prayer of even a sectarian genre survives judicial scrutiny unless it results from an impermissible motive. Yet there is much uncertainty in the wake. The majorities in Marsh and Town of Greece established what does *not* violate the Establishment Clause without drawing a bright line. Each case plainly raised the constitutional bar—sanctioning first legislative prayer and then sectarian prayer, and extending

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[150] Doc. 33 at 33-34.
[151] Id. at 30; see also Doc. 50 at 56:25-57:25.
[152] Doc. 39 at 2, 22.
[153] Doc. 50 at 56:25-57:25.
[154] See Doc. 36 at 11-20.
[155] Doc. 50 at 45:24-46:25.

those permissions from the state house to the town hall—but it is unclear exactly how high.

Plaintiffs' claims, however, do not necessitate a constitutional sea change. Rather, their claims present a novel set of facts to test the established principles of Marsh and Town of Greece. These principles are threefold. *First*, and most fundamentally, legislative prayer is permissible only so far as it "fits within the tradition long followed in Congress and the state legislatures."[156] This axiom informs any analysis under the Court's constituent holdings—that, *second*, sectarian legislative prayer is permissible absent a pattern of denigration, proselytization, or impermissible government purpose,[157] and *third*, government may not intentionally discriminate against religious minorities when selecting guest chaplains.[158] Plaintiffs claim that defendants violate the third of these precepts by maintaining a policy of discrimination against nontheists.

Defendants do not dispute that the House's implementation of Rule 17 prohibits nontheists from serving as chaplains.[159] Indeed, defendants' double down on that policy, asserting that it is the House's "prerogative" to determine the content of opening invocations.[160] Defendants contend the Town of Greece Court's directive of nondiscrimination is case specific because the town had endeavored to

[156] Town of Greece, 134 S. Ct. at 1819.
[157] Id. at 1824; see Marsh, 463 U.S. at 794-95.
[158] Town of Greece, 134 S. Ct. at 1824; see also Marsh, 463 U.S. at 793-95.
[159] See Doc. 33 at 30.
[160] See Doc. 33 at 1, 30; Doc. 39 at 15-26.

include a variety of creeds.[161] That governments *may* choose to invite nontheist chaplains, defendants suggest, does not mean that all governments *must* do so.[162]

But the Town of Greece Court did not link its nondiscrimination mandate to the language of the town's policy. *Per contra*, Justice Kennedy tethered the requirement to the Constitution itself: "So long as the town maintains a policy of nondiscrimination, the *Constitution* does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing."[163] He further signaled that a policy which "reflect[s] an aversion or bias . . . against minority faiths" may violate this principle.[164] The rule is a logical corollary to the settled edict that government may not "prescrib[e] prayers" with an aim to "promote a preferred system of belief or code of moral behavior."[165]

We reject the assertion that defendants may discriminate on the basis of religion simply because their internal operating rules do not proscribe it. Town of Greece installs a new metric in the legislative prayer analysis: when a legislature opens its door to guest chaplains and other prayer givers, it may not purposefully

[161] Doc. 50 at 11:1-12:12, 14:7-19.
[162] Id. at 13:10-23, 15:3-15.
[163] Town of Greece, 134 S. Ct. at 1824 (emphasis added).
[164] Id.
[165] Id. at 1822 (citing Engle v. Vitale, 370 U.S. 421, 430 (1962)).

discriminate among them on the basis of religion.[166] The complaint articulates a plausible violation of this tenet. Plaintiffs allege that they are members of (or represent) minority religions, and that they have been purposefully excluded from the House's guest chaplain program on the basis of their beliefs. They further allege that the House regularly opens its chamber to guest chaplains of more conventional faiths deemed suitable by the Speaker. Plaintiffs plead a policy of religious discrimination sufficient to state a First Amendment claim.

Whether history and tradition sanctify the House's line of demarcation between theistic and nontheistic chaplains is a factual issue for a later day. Establishment Clause issues are inherently fact-intensive, and we must resist the academic intrigue of casting the salient inquiry too narrowly at this juncture. To the extent the parties' arguments evoke more nuanced constitutional questions—*e.g.*, whether plaintiffs practice "religion" and are capable of "praying," or whether tradition dictates that legislative prayer address a "higher power"—any such determination demands, and deserves, a fully developed record. As it stands, plaintiffs' challenge to the House's legislative prayer policy survives Rule 12 scrutiny.

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[166] Id. at 1824. Only two appellate courts have explored the anti-discrimination principle since the Supreme Court decided Town of Greece in 2014. A Fourth Circuit panel described the "policy of nondiscrimination" language as prohibiting the government from "favor[ing] one religious view to the exclusion of others." Lund v. Rowan Cty., 837 F.3d 407, 423 (4th Cir. 2016) (citing Town of Greece, 134 S. Ct. at 1824; Marsh, 463 U.S. at 793). And a Sixth Circuit panel held that "[e]xcluding unwanted prayers is discrimination" violative of the Establishment Clause. Bormuth v. Cty. of Jackson, 849 F.3d 266, 290 (6th Cir. 2017). Both decisions have been vacated for rehearing *en banc*. See Bormuth v. Cty. of Jackson, __ F.3d __, 2017 WL 744030 (6th Cir. Feb. 27, 2017); Lund v. Rowan Cty., __ F. App'x __, 2016 WL 6441047 (4th Cir. Oct. 31, 2016).

b. Opening Invocation Practices

Resolution of plaintiffs' coercion claim requires us to identify the prevailing standard from the Court's split opinion on the constitutionality of a request to rise for an invocation in Town of Greece. Our goal in parsing a fragmented decision of the Court is to distill "a single legal standard" that "produce[s] results with which a majority of the Justices . . . would agree."[167] Courts may combine votes of dissenting Justices with plurality and concurring votes to establish a majority consensus.[168] When no one rationale enjoys majority support, courts adopt the view of the members concurring in the judgment on the "narrowest grounds."[169] Certain cases defy orderly classification; thus, the narrowest grounds rubric applies only when "one opinion can be meaningfully regarded as 'narrower' than another."[170] If no opinion qualifies as the majority rule, lower courts are not bound by any particular standard.[171]

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[167] Binderup v. Att'y Gen., 836 F.3d 336, 356 (3d Cir. 2016) (first alteration in original) (quoting United States v. Donovan, 661 F.3d 174, 182 (3d Cir. 2011)); Donovan, 661 F.3d at 182 (quoting Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 693 (3d Cir. 1991), rev'd on other grounds, 505 U.S. 833 (1992)).

[168] Binderup, 836 F.3d at 356.

[169] Id.

[170] Jackson v. Danberg, 594 F.3d 210, 220 (3d Cir. 2010) (quoting Berwind Corp. v. Comm'r of Soc. Sec., 307 F.3d 222, 234 (3d Cir. 2002)).

[171] Id.

The Town of Greece Court adjudged that a request to rise for an invocation did not amount to unconstitutional coercion under the Establishment Clause. The three-Justice plurality represents the narrowest grounds to that judgment.[172] It developed a standard which tests the facts of each coercion claim against the barometer of historical practices.[173] Justice Thomas, on the other hand, would wholly rescript our Establishment Clause benchmarks.[174] In other words, while the plurality rejected the particular coercion claim before it as factually deficient, Justice Thomas would reject nearly *all* coercion claims as *legally* deficient. We adopt Justice Kennedy's plurality opinion as the narrowest grounds on coercion.

The Town of Greece plurality tasks courts to review the contested practice to assess whether it is consonant with the tradition upheld in Marsh or whether coercion is indeed likely.[175] According to the plurality, coercion is a real likelihood when the government itself (1) directs public participation in prayers, (2) critiques dissenters, or (3) retaliates in its decisionmaking against those who choose not to participate.[176] All Justices agreed that the coercion analysis is "fact-sensitive."[177]

Plaintiffs Fields and Rhoades state a plausible coercion claim against this framework. At least two district courts have held that a public official's directive to

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[172] The Bormuth court also adopted Justice Kennedy's plurality opinion as the majority rule. The court applied the Sixth Circuit's narrowest grounds standard, which considers which opinion represents "the least doctrinally far-reaching-common ground" and "the least change to the law." Bormuth, 849 F.3d at 279-81.

[173] See Town of Greece, 134 S. Ct. at 1825-27 (plurality opinion).

[174] Id. at 1835-38 (Thomas, J., concurring in part and concurring in the judgment).

[175] Id. at 1826-27 (plurality opinion) (Kennedy, J.).

[176] Id. at 1826.

[177] Id. at 1825; id. at 1838 (Breyer, J., dissenting); id. at 1851-52 (Kagan, J., dissenting); see also id. at 1828-29 (Alito, J., concurring).

stand and pray is materially distinct from the requests upheld in Town of Greece,[178] which were rendered not by the town board but guest chaplains "accustomed to directing their congregations in this way."[179] Fields and Rhoades each attend House daily sessions, and both have been exposed to the Speaker's directive to rise for opening invocations.[180] Moreover, both were subjected to reproach and humiliation on at least one occasion when the Speaker publicly singled them out for opting to remain seated.[181] Defendants' rejoinder that plaintiffs may choose not to participate rings hollow against a historical example of public censure for electing to do so.[182]

Defendants also adjure that the plurality opinion in Town of Greece must be limited to its circumstance, *viz*., the intimate and interactive setting of a local government meeting.[183] Specifically, they aver that the increased risk of coercion motivating the plurality's approach does not attend prayer in a state house, where the public is isolated from the deliberative body and its activities.[184] Whether the state legislative chamber is distinct enough from town board meetings to make a constitutional difference cannot be determined without a factual record.[185] We will deny defendants' motion to dismiss Fields' and Rhoades' coercion claims.

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[178] Lund v. Rowan Cty., 103 F. Supp. 3d 712, 733 (M.D.N.C. 2015), rev'd, Lund, 837 F.3d 407, vacated for reh'g *en banc*, 2016 WL 6441047; Hudson v. Pittsylvania Cty., 107 F. Supp. 3d 524, 535 (W.D. Va. 2015).

[179] Town of Greece, 134 S. Ct. at 1826 (plurality opinion).

[180] Doc. 1 ¶¶ 22-24, 60.

[181] Id. ¶¶ 23-24, 60.

[182] See Doc. 39 at 47.

[183] Id. at 40-45.

[184] Id. at 42-43.

[185] See Town of Greece, 134 S. Ct. at 1825 (plurality opinion).

One additional matter warrants discussion. It is not entirely clear from the complaint whether all plaintiffs join in the coercion claim. According to the *allegata*, only Fields and Rhoades have been exposed to coercive legislative prayer practices.[186] The complaint does not indicate that any other plaintiff attended a House daily session, and counsel did not offer additional facts when asked at oral argument to detail the alleged coercion.[187] This absence of exposure is fatal to any coercion claim. To the extent any plaintiff other than Rhoades or Fields joins the coercion component of Count I, their claim must be dismissed. Because plaintiffs ostensibly concede that Rhoades and Fields alone attended daily sessions, leave to amend is unnecessary.[188]

3. *Free Speech, Free Exercise, and Equal Protection Clauses*

As noted *ante*, courts generally regard legislative prayer as "government speech."[189] Courts have thus declined to entertain legislative prayer challenges cast under the Free Speech, Free Exercise, and Equal Protection Clauses.[190] Within the realm of "government speech," the law is resolute that government can "say what it wishes" subject only to the Establishment Clause and the will of "the electorate and

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[186] Doc. 1 ¶¶ 22-24, 60.

[187] See Doc. 50 at 43:15-44:19.

[188] See Doc. 1 ¶¶ 22-24, 60; Doc. 36 at 8-9, 31, 43-44; see also Fletcher-Harlee Corp., 482 F.3d at 251; Grayson, 293 F.3d at 108.

[189] See Lund, 837 F.3d at 413; Simpson, 404 F.3d at 287-88; Coleman, 104 F. Supp. 3d at 890-91.

[190] See, e.g., Simpson, 404 F.3d at 287-88; Coleman, 104 F. Supp. 3d at 890-91; Atheists of Fla., Inc., 779 F. Supp. 2d at 1341-42 (quoting Simpson, 404 F.3d at 288); see also Turner, 534 F.3d at 356 (O'Connor, J., sitting by designation) (quoting Simpson, 404 F.3d at 288).

the political process."[191] On this basis, defendants ask the court to dismiss plaintiffs' legislative prayer claims pursuant to the Free Speech, Free Exercise, and Equal Protection Clauses.

Plaintiffs reply that case law construing legislative prayer as government speech either predates Town of Greece or fails to account for it.[192] They theorize that Town of Greece "tightly circumscribes" the permissible content of legislative prayer such that the practice has lost its status as "government speech."[193] As we conclude elsewhere in this opinion, Town of Greece does not reduce the standard for legislative prayer cases—*a contrario*, the decision expands permissible content by sanctioning even sectarian religious messages. History and precedent bestow special status upon legislative prayer, and neither Marsh nor Town of Greece diminish that status.

Nor do we agree with plaintiffs' assertion that legislative prayer is "hybrid speech" subject to lesser scrutiny. Plaintiffs cite a Fourth Circuit decision, W.V. Association of Club Owners & Fraternal Services v. Musgrave, 553 F.3d 292 (4th Cir. 2009), for its proposition that hybrid speech "has aspects of both private speech and government speech."[194] Not only is Musgrave factually distinct (concerning state-licensed video lottery machines placed in privately-owned bars), it is authored

[191] Pleasant Grove City v. Summum, 555 U.S. 460, 467-69 (2009).
[192] See Doc. 36 at 36-40.
[193] Id. at 37.
[194] W.V. Ass'n of Club Owners & Fraternal Servs. v. Musgrave, 553 F.3d 292, 298 (4th Cir. 2009).

by the same jurist who concluded three years earlier that citizen-led legislative invocations are "government speech 'subject *only* to the proscriptions of the Establishment Clause.'"[195]

We join the unanimous consensus of courts before us to conclude that legislative prayer is subject to review under the Establishment Clause alone. Hence, we will grant defendants' motion to dismiss plaintiffs' Free Speech, Free Exercise, and Equal Protection claims.

IV. Conclusion

The court will grant in part and deny in part defendants' motion to dismiss, as stated more fully herein. An appropriate order shall issue.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

Dated: April 28, 2017

[195] Simpson, 404 F.3d at 287-88 (emphasis added).