No. 18-2974

In the United States Court of Appeals
for the Third Circuit

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

Plaintiffs/Appellees/Cross-Appellants,

v.

SPEAKER 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/Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania, Case No. 1:16-CV-1764

BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE, CENTRAL CONFERENCE OF AMERICAN RABBIS, HINDU AMERICAN FOUNDATION, INTERFAITH ALLIANCE FOUNDATION, JEWISH SOCIAL POLICY ACTION NETWORK, KESHET, MEN OF REFORM JUDAISM, NATIONAL COUNCIL OF JEWISH WOMEN, OCA – ASIAN PACIFIC AMERICAN ADVOCATES, PEOPLE FOR THE AMERICAN WAY FOUNDATION, T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS, UNION FOR REFORM JUDAISM, AND WOMEN OF REFORM JUDAISM

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Corporate Disclosure Statement and Statement of Financial Interest

No. 18-2974

Brian Fields, Paul Tucker, Deana Weaver, Scott Rhoades, Joshua Neiderhiser, Rev. Dr. Neal Jones, Richard Kiniry, Pennsylvania Nonbelievers, Inc., Dillsburg Area Freethinkers, Lancaster Freethought Society, and Philadelphia Ethical Society,

v.

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,

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure. If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Anti-Defamation League, Central Conference of American Rabbis, Hindu American Foundation, Interfaith Alliance Foundation, Jewish Social Policy Action Network, Keshet, Men of Reform Judaism, National Council of Jewish Women, OCA – Asian Pacific American Advocates, People For the American Way Foundation, T'ruah: The Rabbinic Call for Human Rights, Union for Reform Judaism, and Women of Reform Judaism each makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: N/A

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3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant. N/A

/s Gregory E. Ostfeld Dated: March 1, 2019
(Signature of Counsel or Party)

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are religious and civil rights organizations that represent diverse beliefs, experiences, and faith traditions, and share a commitment to religious freedom and to ensuring that all Americans are free from religious discrimination, coercion, and governmental endorsement of religion.

To the extent state legislative bodies invoke U.S. Supreme Court legislative prayer precedent to open their sessions with prayer, *amici* oppose the denial or exclusion of any public official, clergy member, or community member from a legislative prayer opportunity based on that person's faith tradition or belief system. Such exclusion, which is at issue in this case, is religious discrimination and cannot be reconciled with the principles of religious diversity, pluralism, and freedom from persecution on which the United States was founded.

Thus, *amici* have a substantial interest in this case, which places at issue their core concern with preserving religious liberty and preventing religious discrimination with respect to legislative prayer.

The *amici* are:

Anti-Defamation League

Central Conference of American Rabbis

Hindu American Foundation

Interfaith Alliance Foundation

Jewish Social Policy Action Network

Keshet

Men of Reform Judaism

National Council of Jewish Women

OCA – Asian Pacific American Advocates

People For the American Way Foundation

T'ruah: The Rabbinic Call for Human Rights

Union for Reform Judaism

Women of Reform Judaism

Detailed descriptions of *amici* appear in the accompanying Addendum.

Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this brief.

Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned certifies that: (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Pennsylvania House of Representatives (the "House")[1] has violated this command by excluding nontheistic chaplains from participating in the opening prayer of legislative sessions. This overt and categorical exclusion of persons of certain faiths and belief systems is both disturbing and unconstitutional for two main reasons.

First, the House's position that it may exclude nontheistic belief systems from legislative prayer violates the plain language of the Establishment Clause, which prohibits legislative favoritism and discrimination among religions. Indeed, taken to its logical conclusion, the categorical exclusion of nontheists from legislative prayer opportunities would impermissibly open the door to discrimination against *any* religious minority whose views do not accord with legislators' tailored "preferences."

Here, there is no factual controversy over the preferential and discriminatory motives behind the House's legislative prayer practices.

[1] General references to "the House" are intended to encompass all Appellees in this case, including the: (1) Speaker of the Pennsylvania House of Representatives; (2) Parliamentarian of the Pennsylvania House of Representatives; (3) Director of Special Events of the of the Pennsylvania House of Representatives; and (4) Representatives for Pennsylvania House Districts 92, 95, 97, 165, 167, 193 and 196.

Multiple House members and officials were explicit in declaring their intention to exclude faiths and belief systems that do not subscribe to a "divine" or "higher" being. The House's brief does nothing to distinguish or explain these statements; to the contrary, it endorses the espoused discriminatory motive as constitutionally permissible. This, standing alone, is sufficient to affirm the District Court's holding that the policy is unconstitutional.

Second, the House's reliance upon "historical standards of diversity"—in other words, that no nontheist gave a legislative prayer in the early years of the republic—does not bring the House's discriminatory practices into harmony with the Establishment Clause. The absence of nontheists (or other minority faiths) from historical offerings of legislative prayer does not constitute evidence of affirmative exclusion from such prayer. Nor does it convey the Founders' approval of religious favoritism, particularly where the contemporaneous evidence of the Founders' disapproval of religious discrimination is abundant. Moreover, like other discriminatory practices once tolerated but now rightly seen as constitutionally impermissible, state exercises of religious bias and marginalization cannot be justified based on putative historical exclusion. Many historically underrepresented beliefs are widely exercised today, and the House cannot properly point to their historical absence to rationalize discrimination against America's evolving religious diversity.

For these reasons, this Court should reject the House's attempt to

exclude from legislative prayer belief systems it finds disagreeable on religious grounds and affirm the District Court ruling.

ARGUMENT

I. The House's Exclusion of Nontheistic Belief Systems Is Discriminatory, Violates the Establishment Clause, and Would Justify Exclusion of Other Religious Minorities.

The Supreme Court has prohibited state-sanctioned discrimination between theistic and nontheistic belief systems for more than fifty years. Both on the face of its legislative prayer policy and according to the sworn testimony of its own officials, the House is attempting to give one category of religious belief preference over others. This position, if adopted, could readily be used to exclude any other minority religious faith whose tenets conflict with the majority's "preferences."

A. The Establishment Clause Forbids Discrimination Against Any Religious Minority, Including Polytheistic and Nontheistic Belief Systems.

The Establishment Clause prohibits Congress—and by extension state legislative bodies—from making "any law respecting an establishment of religion." U.S. Const., amend. I, § 1; *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."). Indeed, more than 35 years ago, the U.S. Supreme Court unequivocally stated that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The test of what constitutes a "religion" under the Establishment

Clause is not based on an evaluation of the validity of a belief system and does not distinguish between theists and nontheists, majority and minority faiths, or even those who believe or disbelieve in religion altogether. These factors were specifically rejected in *Torcaso v. Watkins*, when the U.S. Supreme Court examined a Maryland constitutional provision permitting "a declaration of belief in the existence of God" as a requirement for public office. 367 U.S. 488, 489 (1961). In striking down that provision, the Court recognized that the Establishment Clause prohibited Maryland from "aid[ing] all religions as against non-believers," as well as "aid[ing] those religions based on a belief in the existence of God as against those religions founded on different beliefs," including, for example, "Buddhism, Taoism, Ethical Culture, [and] Secular Humanism." *Id.* at 495 & n.11.

In the fifty-plus years since *Torcaso*, this Court and others have consistently applied that decision's inclusive definition of "religion" to recognize that the First Amendment extends to atheism and nontheist belief systems.[2] *See Malnak v. Yogi*, 592 F.2d 197, 206 (3d Cir. 1979) (Adams, J. concurring in result) (explaining that *Torcaso* "represents a rejection of the view that religion may, consonant with first amendment

[2] The individual Appellees in this case subscribe to a variety of nontheistic belief systems, including Humanism, atheism, agnosticism, Unitarian Universalism, Ethical Culture/Ethical Humanism, and Freethought. Definitions and short summaries of each belief system were entered in the record. (A395-591, 3218-46).

values, be defined solely in terms of a Supreme Being"); *see also Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1102 n.91 (9th Cir. 2010) ("The Supreme Court has always held that atheists . . . enjoy the same First Amendment protections as everyone else."); *Glassroth v. Moore*, 335 F.3d 1282, 1294 (11th Cir. 2003) ("The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess belief in the Judeo-Christian God; indeed, it includes the lack of any faith."); *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 759 (7th Cir. 2001) (emphasis in original) ("[A] public university that had a *policy* of promoting atheism, or Satanism, or secular humanism, or for that matter Unitarianism or Buddhism, would be violating the religion clauses of the First Amendment."); *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (offering Buddhism and the Unitarian Church among examples of "religions which do not positively require the assumption of a God" in First Amendment context).

Moreover, the Supreme Court has also recognized that constitutional protection is not dependent on the classification of a given belief system as a "religion" at all. Even if atheism, Humanism, and other nontheistic belief systems were not considered or described by their own adherents as "religions," discriminating against them would still be unconstitutional because "[t]he First Amendment mandates governmental neutrality . . . between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *see also Texas Monthly, Inc. v.*

Bullock, 489 U.S. 1, 14–17 (1989) (holding that a tax exemption for religious periodicals in Texas violated the First Amendment, in part because Texas lacked "similar benefits for nonreligious publications").[3]

B. Establishment Clause Protections Apply to Legislative Prayer.

The Establishment Clause's bedrock protection of all belief systems—including polytheistic and nontheistic belief systems—carries over to legislative prayer. In *Marsh v. Chambers*, for example, the Supreme Court held that while legislative prayer was not unconstitutional *per se*, a legislature's choice of chaplain may not stem "from an impermissible motive" to give "preference to his religious views." 463 U.S. 783, 793-94 (1983). The Court reiterated this nondiscrimination principle in *Town of Greece v. Galloway*, where it upheld a town board's policy of opening meetings with explicitly sectarian invocations, "such as those 'given in Jesus' name." 572 U.S. 565, 572, 584-85 (2014). In *Town of*

[3] Indeed, for purposes of the Free Exercise Clause, government cannot question the validity of an individual's religious beliefs or assert that they are "mistaken or insubstantial." *Burwell v. Hobby Lobby*, 573 U.S. 682, 725 (2014); *see also Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (although animal sacrifice may seem "abhorrent" to some, Santerian belief is religious in nature and is protected by the First Amendment); *United States v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) ("one man's religion will always be another man's heresy"). Rather, public entities can only inquire as to whether an individual's religious beliefs reflect "an honest conviction." *Hobby Lobby*, 134 S. Ct. at 2779; *Thomas*, 450 U.S. at 716.

Greece, the Court emphasized that the municipality's informal method of selecting prayer-givers was permissible, provided that the town maintained "a policy of nondiscrimination" in deciding who may present invocations, and that the town's selection process did not "reflect an aversion or bias on the part of town leaders against minority faiths." *Id.* at 585-86.

Importantly, the policy at issue in *Town of Greece* recognized and allowed for nontheistic and nonreligious invocations. The Court emphasized that, under the town's own policy, "a minister or layperson of any persuasion, including an atheist, could give the invocation." *Id.* at 571; *see also id.* at 589 (plurality opinion) ("[H]ere, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions."); *id.* at 594 (Alito, J., concurring) ("[T]he town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation . . . ."). The policy did not include any "constraints" requiring that legislative prayers be theistic or follow any particular faith. *Id.* at 582.[4]

In short, *Marsh* and *Town of Greece* enshrine nondiscrimination—

[4] Instead, "[t]he relevant constraint[s]" were that the prayer be: (1) "solemn and respectful in tone," (2) "invite[ ] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing," and (3) not "denigrate nonbelievers or religious minorities, threaten damnation, . . . preach conversion," or "proselytize or advance any one, or . . . disparage any other, faith or belief." *Id.* at 582-83 (quoting *Marsh*, 463 U.S. at 794-95).

including with respect to individuals who do not adhere to any religion—as a predicate to constitutionally acceptable legislative prayers under the Establishment Clause.[5]

C. The House's Legislative Prayer Policy Is Overtly Discriminatory.

According to House General Operating Rule 17, the chamber's daily business must begin with "[p]rayer by the Chaplain," who in turn "shall be a member of a regularly established church or religious organization or shall be a member of the House of Representatives." (A1546). This Rule is discriminatory on its face because it demands impermissible distinctions between faith and nonfaith prohibited by *Torcaso*. Moreover, by construing the word "prayer" to mean an appeal to God or a supernatural higher power, the House has necessarily taken sides among religions and endorsed a policy by which it can exclude virtually any minority religion its leadership finds uncomfortable. (A505:7-9, 506:18-22, 617:5-11, 619:2-10, 692:18-25, 696:23-25, 757:23-758:14, 921). Not only is this

[5] Much of the House's initial brief is devoted to arguing that the nondiscrimination language in *Town of Greece* was mere *dicta*. (House Br. 14-29). Multiple appellate courts disagree. *See Bormuth v. Cty. of Jackson,* 870 F.3d 494, 514 (6th Cir. 2017) (explaining that *Town of Greece's* "holding" was that religions heterogeneity in legislative prayer-givers was not required so long as the county maintains a policy of nondiscrimination); *Lund v. Rowan Cty., N. Carolina,* 863 F.3d 268, 304 (4th Cir. 2017) (en banc) (explaining that *Town of Greece* had "three distinct, but related holdings," one of them being that sectarian prayers were constitutionally permissible as long as "the town maintains a policy of nondiscrimination").

unconstitutional, but it runs afoul of the values of diversity and inclusion that are central to any democracy.

1. Rule 17 Is Discriminatory on its Face Because it Limits Prayer-Givers to Those Who Are Members of a Regularly Established Church or Religious Organization.

As a preliminary matter, Rule 17 demands impermissible distinctions between faith and nonfaith prohibited by *Torcaso*. This is because, on its face, the Rule limits prayer-givers to those who are members of a "regularly established *church or religious organization*." (A1546) (emphasis added). Both the current Speaker of the House Mike Turzai and Parliamentarian Clancy Myer have contended, for example, that this requirement would exclude an atheist—even one from an established atheist organization—because an atheist is not a member of a "regularly established church." (A515:2-5, A625:21-626:11).

Thus, enforcement of the House's policy inescapably turns on subjective, discriminatory, and religiously-entangled judgments as to who is part of a "regularly established church." These types of determinations are clearly improper under the First Amendment. *See Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."); *see also Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural

interpretation."); *Davila v. Gladden*, 777 F. 3d 1198, 1204 (11th Cir. 2015) ("A secular, civil court is a poor forum to litigate the sincerity of a person's religious beliefs, particularly given that faith is, by definition, impossible to justify through reason.").

2. Rule 17 Has Been Interpreted in a Discriminatory Manner by House Leadership, Who Define "Prayer" to Include Only Appeals to God or a Supernatural Power.

The House's interpretation of the word "prayer" in Rule 17 to apply only to religions that appeal to God or a supernatural higher power is also discriminatory. This interpretation automatically bars individuals who follow religious traditions or beliefs that do not subscribe to a "higher power" from the opportunity to give a legislative prayer because, according to the House, they are incapable of offering a prayer. Yet the plain meaning of "prayer" is not constrained to worship of a "higher power." *See* Deanna N. Pihos*, Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 Cornell L. Rev. 1349, 1360 n.79 (2005) (emphasis added) (quoting American Heritage Dictionary of the English Language 1029 (New College ed. 1980)) ("One dictionary defines 'prayer' as '[a] reverent petition made to a deity *or other object of worship*.'")

For example, Native American religions, many of which are deeply connected to nature and the environment, would be excluded because they do not generally subscribe to a monotheistic "higher power" found in

the Christian, Jewish or Muslim traditions. *See* Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 Ariz. L. Rev. 1291, 1295-302 (1996). Buddhism would also be excluded, as it enshrines a system of ethics "not based upon a belief in a separate Supreme Being." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 42 (2004) (O'Connor, J., concurring). Hinduism would likely also be excluded as it does not fit neatly into the Abrahamic binary of "monotheistic" or "polytheistic"—its teachings speak of one Absolute that can manifest and be worshiped through infinite forms.

Such religious parsing by a legislative body is exactly the kind of entanglement between government and religion that the First Amendment abhors. *Town of Greece*, 572 U.S. at 581 (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)) ("Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior."); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188-89 (2012) ("According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."). Any religious test to select who may give a legislative prayer will thus inevitably result in discrimination against minority religions and governmental entanglement with religion as the

government chooses what objects of worship are deserving of "prayer."

3. House Officials' Statements Interpreting Rule 17 Make Clear That Their Intent Is to Discriminate Against Religious Minorities.

In addition, multiple statements from current and former House officials indicate that they interpret Rule 17 to exclude not only atheists and Humanists, but virtually any minority religion with which the House's leadership is uncomfortable.

Speaker Turzai testified, for example, that a "prayer" under Rule 17 meant "an appeal to a higher being for guidance" or "an appeal to a benevolent higher being," and that this would not include a "secular higher authority," but necessarily had to mean "God in the sense of a broad definition of a higher being." (A617:8-11, 619:8-10, 650:12-18).

Speaker Turzai stated that a Satanist would not be allowed to offer the prayer because such a prayer would be to a "malevolent force." (A620:13-25). Likewise, he would not permit a prayer by a deist[6] who believed in the existence of a supreme being that did not listen to prayer. (A622:21-623:16). He testified he would have to know more about Wicca, Rastafarianism, Zoroastrianism, Native American religions, or any religion that involves belief in "[a] spirit or spirits that it does not call God" before allowing any adherent of those religions to offer the prayer.

[6] Many of the Founders were deists. *See* Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. Rev. 1, 6-7 (2008).

(A619:20-620:9, 621-22, 624:16-25). He did not know whether he would invite a polytheist because he had not "encountered anybody who is a polytheist." (A621:5-9). He stated that he would not permit an atheist leader to give the prayer—even if the leader agreed to give a theistic prayer to God—because that leader would not be a member of a "regularly established church." (A625:21-626:11).

Speaker Turzai's views were broadly echoed by several other current and former House officials. For example:

(1) Former Speaker Sam Smith defined a prayer under Rule 17 as "a reverent sincere appeal to God for guidance." (A695:23-696:2). He testified that atheists and humanists would not be permitted to give a prayer. (A697:22-698:18). He was "doubtful" that a Satanist, polytheist, or a believer in "spirits" not called "God" would be allowed to give the prayer. (A700:4-701:16, 705:11-17). He stated that he would have to do more research on whether Rastafarianism is "a legitimate religion or is it, you know, something that's sort of conjured up." (A701:20-702:4). He was not sure whether a Wiccan could give the prayer and doubted whether a deist could. (A698:20-699:14, 704:20-705:10).

(2) Parliamentarian Myer defined prayer as seeking "divine intervention [and] addressing the thankfulness or request to God, the supreme being." (A505:6-9). He testified that a prayer under Rule 17 must be directed to "some sort of divine or a supernatural

entity," or "God, a higher power, or the divine." (A506:18-22, 507:4-8). Mr. Myer stated that it would be "very doubtful" whether a Satanist would be allowed to give the prayer. (A508:19-509:23). He did not believe Rule 17 permitted a Christian minister to give a secular prayer or an atheist to give any prayer. (A514:8-515:23). When shown sample invocations that did not explicitly mention a supreme being, Mr. Myer said that he would have "concerns" about their content, that he would "express these concerns to the Speaker," and that the samples were "certainly not the type of prayer [the House] would be looking for." (A517:10-523:25).

(3) House Director of Special Events Kelly Fedeli (who schedules guest chaplains) stated that a prayer under Rule 17 was "a petition to a higher being" who "transcends in the heavens, somebody with divine power and divine strength." (A757:23-758:14). When asked if a Wiccan, Satanist, Rastafarian, polytheist, or deist could give the prayer, she said that she would have to do more research and consult with the Parliamentarian. (A758:15-761:18).

(4) Will Tallman, who had previously invited guest chaplains as a member of the House, testified that a prayer was "making a request . . . [t]o a higher authority" who is "divine." (A815:1-10). He testified that he would have to "know what the doctrinal statement" of a Wiccan or Unitarian Universalist would be

before inviting them to give the prayer. (A816:1-2, 818:21-819:8). He stated that he would "likely not" invite a Satanist. (A816:3-8). He further explained that he would have to have a "conversation" with or "dig into [the] doctrine" of a polytheist, Rastafarian, or deist before inviting them to give the prayer. (A816:9-817:11, 819:9-16). Mr. Tallman stated that having a religion that did not believe in a divine being was a "contraindicat[ion]." (A819:21-820:7).

These statements reflect that the House's overt acceptance of a prospective guest chaplain are based on impermissible and subjective considerations, such as whether the legislators consider the "higher being" invoked by the guest chaplains to be "malevolent" or "benevolent," whether the guest chaplains' religious beliefs are "legitimate" in the legislators' eyes, or whether the guest chaplains are even capable of "praying" based on their belief (or lack thereof) in a supreme being.

The House's brief embraces these same views. In several passages, it refers to the Appellees as "non-believers." (House Br. 2, 10, 11, 14, 17). At one point, it outright states that the District Court's ruling "forc[es] the House to include *non-religion* in its practice." (House Br. 46) (emphasis added). These statements indicate that unconstitutional religious exclusion and discrimination were the underlying motives for the interpretation and implementation of Rule 17.

D. The House's Rationale for Failing to Abide by Nondiscrimination Protections in Selecting Guest

Chaplains for Legislative Prayer Is Unpersuasive.

The House does not attempt to explain or clarify its legislators' declarations. Instead, it simply denies the existence of any nondiscrimination principle in *Town of Greece* and characterizes legislative prayer as "an internal act" whose sole purpose is to accommodate the "spiritual needs" of legislators. (House Br. 17-20, 23, 40-49). In this view, which disregards the inescapably public character of a legislative session, the "accommodation" of legislators' spiritual "preferences" can justify any form of discrimination—save preference for a "single sect"—all in the name of "governmental speech." (*Id.*).

Although the contents of a legislative prayer may be "internally" directed to the members of the House (setting aside any members of the public who are present, or who are watching the session via the Internet (*see* A892, A908 ¶ 215)), the discriminatory application of Rule 17 cannot be salvaged by exclusively conditioning the scope of legislative prayer on the religious beliefs of those legislators who are present to hear it. A rule that announces to members of minority faiths that they are categorically unfit to lead the House in legislative prayer because of their beliefs sends a powerful official message of religious exclusion and preferentialism to the public. A claim of "government speech" is no defense to such blatant discrimination in violation of the Establishment Clause. *See Town of Greece*, 572 U.S. at 585-86; *see also Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009) (noting that while the government

has the right to engage in its own speech, this speech "must comport with the Establishment Clause").

The House's narrow definition of the "spiritual needs" served by legislative prayer is similarly inconsistent with *Town of Greece*. As the Supreme Court explained, legislative prayer is meant to "invite[] lawmakers to reflect upon shared ideals and common ends" and "solemnize the occasion." 572 U.S. at 583-84. That is a far cry from authorizing discrimination in the selection of guest chaplains based on the subjective spiritual "preferences" of the legislature's membership. Such a constrained approach to legislative prayer—insulating legislators from being exposed to any belief system outside their comfort zone—could be used to justify exclusion of virtually any minority faith or religious belief.

II. History Cannot Support or Justify Discrimination against Nontheists in Legislative Prayer

In a last-ditch effort to justify its discriminatory practices, the House suggests an entirely new purpose for legislative prayer—a "self-defined need" for a "Divine aspect that the House seeks from its Prayer practice" (House Br. at 14, 47–48)—and insists that "historical evidence" supports "a practice dictated by legislative preference." (House Br. 36-37). An examination of actual historical practice, however, does not support this position. Quite the opposite is true. Furthermore, history is not dispositive, because it cannot displace the central tenet that it is unconstitutional for government to favor or prefer theistic religious

beliefs over nontheistic ones.

A. There Is No Evidence Congress or the Pennsylvania Legislature Excluded Chaplains Based on the Content of Their Beliefs at the Time of the First Amendment's Ratification.

The House's historical argument rests in large part on an unsound inversion of the Supreme Court's rulings in *Marsh* and *Town of Greece*. There, the Court upheld opening invocations at governmental meetings based on an "unambiguous and unbroken history of more than 200 years" going back to the ratification of the Bill of Rights. *Town of Greece*, 572 U.S. at 629 (quoting *Marsh*, 463 U.S. at 792). The Court emphasized that because "the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment," the framers of the Bill of Rights must have "accepted" that legislative invocations do not violate the Establishment Clause. *Town of Greece*, 572 U.S. at 576; *see also Marsh*, 463 U.S. at 787–92.

The House relies on this precedent to insist that "historical standards of diversity" attributed to the Framers support its exclusionary practices today. (House Br. 30–40). This conclusion does not follow logically or factually. The mere absence of evidence that nontheists gave prayers or invocations in the early days of the Republic does not support a positive inference that legislatures intentionally excluded chaplains whose beliefs did not "recognize divine authority." It is equally if not more plausible that this question simply did not confront the First Congress or

any early Congress, and indeed the available historical evidence points to that explanation.

In fact, the record is clear that guest chaplains formed little or no part of Congress' or the Pennsylvania Legislature's historical practices. As reflected in the unrebutted expert report of Professor Paul Finkelman, "[a]t the federal level, instead of relying significantly on guests, the U.S. Senate and House have—except for several years in the middle of the Nineteenth Century—always had permanent chaplains." (A2756). More tellingly, in Pennsylvania, "from at least the 1780s until 1848, it appears that the House did not even have opening prayers at all." (*Id.*) Thus, there are no "historical standards of diversity" for legislative prayers in Pennsylvania, as historically there were no prayers.

Similarly, Professor Finkelman explained that there is no "evidence that any nontheist ever asked to give an opening invocation before a governmental body during our county's founding era or in the decades that followed." (A2757). "Few people, much less public figures, openly disclosed themselves to be nonbelievers in God during the era when the U.S. Constitution was adopted." (*Id.*)

As a result, efforts to draw affirmative conclusions from circumstances that did not confront the Founders are dubious, at best. As Justice Black long ago observed, it goes "beyond reason and common experience to maintain . . . that in legislation any more than in other affairs silence or inaction is acquiescence equivalent to action." *Cleveland*

v. United States, 329 U.S. 14, 22 (1946) (Black, J., concurring).

The House also asserts that because the "principal audience" for legislative invocations is "lawmakers themselves," the lawmakers should be permitted to "self-define" that legislative prayer be limited to an invocation of the Divine. (House Br. 26 (quoting *Town of Greece*, 572 U.S. at 587–88)). The only limitation the House would acknowledge is one against affiliation with a "single sect." (*Id.* 40-45). That again lacks historical grounding. "When the chaplaincy in the U.S. Congress was first created, Congress demonstrated an aspiration of ensuring that the chaplaincy reflect *diverse views*, requiring that the House and Senate chaplains be of different denominations." (A2757 (emphasis added)). Furthermore, these chaplains "rotated between" the House and Senate, "presumably so the members would have *exposure to clergy of different denominations*." (*Id.* (emphasis added)). Thus, there is some historical evidence that legislative prayer encouraged, if not required, legislators (as well as audience members) to be exposed to the prayers of faiths that were not their own.

To be sure, history also supplies unfortunate examples of religious bigotry and persecution in Pennsylvania and across the United States.[7]

[7] Unfortunately, outside the legislative prayer context, religious discrimination, particularly against religious minorities, is not relegated to history and continues to this day. *See, e.g.*, *Paletz v. Adaya*, No. B247184, 2014 WL 7402324, at *2 (Cal. Ct. App. Dec. 29, 2014) (alteration in original) (hotel owner in Santa Monica, California, ordered the closing of a poolside event hosted by a Jewish group, telling an employee, "I don't

For example, the U.S. Congress' appointment of two Catholic chaplains in 1832 and 2000 and a Unitarian chaplain in 1821 "generated significant religious controversy" and "anti-Catholic animus." (A2758–59). Some of this kind of historical discrimination is still reflected in various states' constitutions or statutes. (A2759). But these examples hardly set an aspirational mark for future generations to follow, nor do they support discrimination or religious preferentialism in legislative prayer today. Indeed, to accept that view would equally justify excluding Catholic, Jewish, Muslim, or other minority faiths based on past "historical standards of diversity" that sanctioned overt religious discrimination.

B. The Assumption That a Majority of Pennsylvania Legislators Believe in a Divine Being Does Not Support Excluding Nontheistic Prayer.

Implicit in the House's argument that legislative prayer may be limited to "belief systems capable of 'invoking divine guidance'" is the false supposition that legislators' "spiritual needs" must be unsatisfied on days when they are exposed to a different belief system that does not

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want any [f—ing] Jews in the pool"); *Khedr v. IHOP Rests., LLC*, 197 F. Supp. 3d 384, 385 (D. Conn. 2016) (Muslim family was refused service at an International House of Pancakes by a manager who, in front of the family's twelve-year-old child, told his staff "not to serve 'these people' any food"); *Nappi v. Holland Christian Home Ass'n*, No. 11-cv-2832, 2015 WL 5023007, at *2 (D.N.J. Aug. 21, 2015) (Catholic maintenance worker was repeatedly harassed by his supervisor and colleagues, who called Catholicism "a 'Mickey Mouse religion' and criticized Catholics for worshipping saints").

include an invocation of the divine. (*See* House Br. 11–12, 31, 46–47, 57). From both historical and modern perspectives, however, there seems to be little basis for the House's parochial assumption that Pennsylvania's legislators require such "tailored" spiritual nourishment during an invocation, much less that they must be assiduously protected against alternative faiths or ideas.

As noted above, Pennsylvania's legislature did not have legislative prayer from at least the 1780s until 1848. (A2756). And today, at least one member of the House openly identifies as a secular agnostic, while another stated that he would be "more than happy" to sponsor an atheist's request to give an opening invocation. (A799:19–800:–24, A865:22–25). In fact, the Pennsylvania Senate has invited plaintiff Weaver—a self-identified Freethinker—to give an invocation, "invoking the ideals of compassion, understanding, and tolerance." (A10). This is consistent with Professor Finkelman's observation that "numerous nontheists have given nontheistic invocations before state legislatures and local governmental bodies" throughout the country. (A2758).

House members have already demonstrated their ability to not only tolerate, but welcome, the invocations of clergy or ministers from different faiths. Although the "vast majority of guest chaplains represented Christian denominations," the House nevertheless has received one Sikh and one Native American invocation. (A13). There is no evidence in the record that any House member is a Sikh or practices any

Native American religion, and yet the members saw fit to welcome expressions of faith different from their own.

Put simply, lawmakers are not expected to be so unyielding in their beliefs that they cannot accept an invocation by a practitioner of another faith. "Our tradition assumes that adult citizens . . . can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Town of Greece*, 572 U.S. at 584 (internal citation omitted). The House's assertion that a nontheistic invocation fails some "central purpose" of legislative prayer thus fails the tests of both history and modernity.

C. The Absence of Nontheistic Invocations in Early Congresses Cannot Support Discrimination against Historically Underrepresented Beliefs.

Finally, even if there were a history of affirmative, intentional exclusion of nontheists from legislative prayers (there is not), such historical discrimination would not support continued discrimination. "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . ." *Marsh*, 463 U.S. at 790. Though the Founders' understanding of what constitutes improper official advancement of or entanglement with religion bears upon the present dispute, it is not dispositive. The Supreme Court emphasized in *Town of Greece* that its precedent "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." 572 U.S. at 591.

The House seeks to avoid these central holdings in *Marsh* and *Town of Greece* by asserting incorrectly that "'discrimination' was not before the Court in [*Town of*] *Greece*, leaving any discussion of it pure *obiter dictum*." (House Br. 27–29). This argument stands on a hollow foundation—namely, that history validates religious discrimination in the context of legislative prayer.

Such a myopic reading of these decisions is inconsistent with decades of Supreme Court precedent. The Supreme Court has made clear that this country's history does not provide license to discriminate. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) ("[T]he Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)) (observing that, despite "'long and unfortunate history of sex discrimination,'" "gender-based government action [now requires] an 'exceedingly persuasive justification'"); *McDaniel v. Paty*, 435 U.S. 618, 623–24, 629 (1978) (holding that a state constitutional provision prohibiting ministers from holding legislative offices was unconstitutional "[n]otwithstanding the presence of such provisions in seven state constitutions when the Constitution was being written"); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966) ("In determining what lines are unconstitutionally discriminatory, we have

never been confined to historic notions of equality . . . ."). History informs this discussion, but it cannot rationalize the discriminatory exclusion of religious minorities from legislative prayer in a manner repugnant to present understandings of religious diversity and inclusion.

Following the argument that nontheistic invocations were not part of historic legislative prayer to its logical conclusion demonstrates its absurdity. Such an argument would equally justify religious discrimination against theistic religions that were not represented in historical legislative prayers. (*See* A2758–59 (noting "ugly side" to American history of religious tolerance)). If this history were sufficient to justify exclusion of nontheistic invocations, it would equally justify exclusion of "Catholics, Jews, Orthodox Christians, Copts, Mormons, Wiccans, Muslims, Druze, Zoroastrians, Buddhists, Hindus, or any other non-Protestant" religions that were not represented during historical legislative prayers. (A2759–60). That would, of course, be plainly contrary to the law.

CONCLUSION

The Establishment Clause precludes Pennsylvania from giving preference to belief in a "divine authority" over other belief systems, and likewise prohibits favoring religion over non-religion. These foundational principles extend to legislative prayer. The House's attempt to categorically favor belief in a benevolent higher being over nontheistic, secular, Humanist, or atheist belief systems, and to exclude belief systems

it finds disagreeable, cannot pass constitutional muster. For these reasons, *amici* respectfully submit that the district court's ruling should be affirmed.

Dated: March 1, 2019

Respectfully submitted,

/s Gregory E. Ostfeld
Counsel for Amici Curiae Anti-Defamation League, Central Conference of American Rabbis, Hindu American Foundation, Interfaith Alliance Foundation, Jewish Social Policy Action Network, Keshet, Men of Reform Judaism, National Council of Jewish Women, OCA – Asian Pacific American Advocates, People For the American Way Foundation, T'ruah: The Rabbinic Call for Human Rights, Union for Reform Judaism, and Women of Reform Judaism

COMBINED CERTIFICATES OF ADMISSION AND COMPLIANCE

1. The undersigned certifies that he is an attorney admitted to practice in the United States Court of Appeals for the Third Circuit.

2. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,299 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft® Word 2010, version 14, in Georgia 14-point typeface.

4. The text of the electronic version of this brief is identical to the text of the paper copies, and the electronic brief has been scanned through a virus detection program before it was filed on the Court's electronic filing system, in accordance with Local Rule 31.1(c).

Dated: March 1, 2019

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld

CERTIFICATE OF SERVICE

I certify that on March 1, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld

ADDENDUM

DESCRIPTIONS OF *AMICI CURIAE*

ADL (Anti-Defamation League) is a leading anti-hate organization. Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, its timeless mission is to stop the defamation of the Jewish people and to secure justice and fair treatment to all. Today, ADL continues to fight all forms of hate with the same vigor and passion. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

The Hindu American Foundation ("HAF") is a non-profit advocacy organization for the Hindu American community. Founded in 2003, HAF's work impacts a range of issues—from the portrayal of Hinduism in K-12 textbooks to civil and human rights to addressing contemporary problems, such as environmental protection and inter-religious conflict, by applying Hindu philosophy. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF's three areas of focus are education, policy, and community. Since its inception, HAF has made church-state advocacy one of its main areas of focus. From issues of religious accommodation and

religious discrimination to defending the fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about the impact of such issues on Hindu Americans as well as various aspects of Hindu belief and practice in the context of religious liberty.

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization committed to advancing religious freedom for all Americans. Founded in 1994, Interfaith Alliance Foundation champions individual rights, promotes policies that strengthen the boundary between religion and government, and unites diverse voices to challenge extremism. Our membership reflects the rich religious and cultural diversity of the United States, adhering to over 75 faith traditions as well as no faith tradition.

The Jewish Social Policy Action Network ("JSPAN") is a membership organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. Representing a minority religious faith, some of whose members regularly express their faith through nontheistic prayer, JSPAN finds its members' religious rights of conscience violated by any requirement that a rabbi or other officiant could be required to meet a theistic religious test before being able to deliver an invocation before the Pennsylvania legislature.

Keshet works for the full equality of LGBTQ Jews in Jewish life. We turn values at the heart of Judaism—equality, inclusion, and human

dignity—into action in Jewish communities because when we stand by and allow LGBTQ Jews to be excluded, we hold all of Jewish life back from reaching its full potential. We equip Jewish organizations with the tools to build LGBTQ-affirming communities, create spaces for queer Jewish teens to feel valued as queer and Jewish, and mobilize the Jewish community to fight for LGBTQ justice nationwide. Consistent with our mission and our commitment to religious liberty and nondiscrimination, Keshet joins this brief.

National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain democratic society." Consistent with our Principles and Resolutions, NCJW joins this brief.

OCA – Asian Pacific American Advocates ("OCA") is a nonprofit, nonpartisan organization that is dedicated to advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders ("AAPIs"). As a membership-driven organization with over 50 chapters and affiliates, OCA advances its mission through advocacy, policy, and programs designed to build the next generation of leaders.

OCA has a long-standing history of promoting fair treatment and the elimination of discrimination, stereotyping, and hate crimes for AAPIs and other disenfranchised communities. OCA has supported ADL in the past by signing on to previous amicus briefs and supports this brief as well.

People For the American Way Foundation ("PFAWF") is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty, as well as American values like equality and opportunity for all. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that both the Free Exercise and Establishment Clauses of the First Amendment are important to protect religious freedom, and that where opening prayer occurs at a legislative body, it is crucial that religious minorities, including non-theists, not be discriminated against and excluded from that practice.

T'ruah: The Rabbinic Call for Human Rights ("T'ruah") brings together rabbis and cantors from all streams of Judaism with all members of the Jewish community to act on the Jewish imperative to respect and advance the human rights of all people. T'ruah trains and mobilizes a network of 1,800 rabbis and cantors and their communities to bring Jewish values to life through strategic and meaningful action. As

members of a religious minority, T'ruah supports efforts to preserve religious liberty and prevent religious discrimination with respect to legislative prayer.

The Union for Reform Judaism, whose 900 congregations across North America include 1.8 million Reform Jews, the Central Conference of American Rabbis ("CCAR"), whose membership includes more than 2,000 Reform rabbis, Women of Reform Judaism that represents more than 65,000 women in nearly 500 women's groups in North America and around the world, and the Men of Reform Judaism come to this issue rooted in our proud legacy defending both religious freedom and the separation of church and state.