No. 17-5278

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL BARKER,

Plaintiff-Appellant,

v.

PATRICK CONROY, *et al.*,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the District of Columbia
Case No. 1:16-cv-00850-RMC, Hon. Rosemary M. Collyer

AMENDED BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN ETHICAL UNION; ANTI-DEFAMATION LEAGUE; CENTRAL CONFERENCE OF AMERICAN RABBIS; INTERFAITH ALLIANCE FOUNDATION; JEWISH SOCIAL POLICY ACTION NETWORK; MEN OF REFORM JUDAISM; NATIONAL COUNCIL OF JEWISH WOMEN; SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND; SIKH COALITION; UNION FOR REFORM JUDAISM; UNITARIAN UNIVERSALIST ASSOCIATION; AND WOMEN OF REFORM JUDAISM AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL

RICHARD B. KATSKEE
ALEX J. LUCHENITSER
Counsel of record
CLAIRE L. HILLAN
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234

(Additional counsel for amici curiae *are listed on the signature page.)*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant, except for the following:

- American Atheists, Inc.;
- American Humanist Association;
- Americans United for Separation of Church and State;
- Anti-Defamation League;
- American Ethical Union;
- Center for Inquiry;
- Central Conference of American Rabbis;
- Interfaith Alliance Foundation;
- Jamie Raskin;
- Jared Huffman;
- Jewish Social Policy Action Network;
- Mark Pocan;
- Men of Reform Judaism;
- National Council of Jewish Women;
- Sikh American Legal Defense and Education Fund;
- Sikh Coalition;
- Union for Reform Judaism;
- Unitarian Universalist Association; and

- Women of Reform Judaism.

Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

Related Cases

To *amici*'s knowledge, this case has not previously been before this Court or any other court, and there are no related cases pending in this Court or in any other court.

CORPORATE DISCLOSURE STATEMENT

Amici are all nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

Americans United for Separation of Church and State is a national, nonsectarian, nonpartisan educational and advocacy organization dedicated to advancing the constitutional principle of church–state separation as the only way to ensure freedom of religion, including the right to believe or not believe, for all Americans.

The **American Ethical Union** is a national federation of Ethical Societies, which are nontheistic religious congregations. Founded in 1889, the AEU has 24 member groups in 12 states and the District of Columbia, and over 2,300 members and supporters.

Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism.

Interfaith Alliance Foundation is a nonprofit organization founded in 1994 that celebrates religious freedom by championing

individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Its members belong to 75 different faith traditions as well as no faith tradition.

The **Jewish Social Policy Action Network** 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.

National Council of Jewish Women 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.

Sikh American Legal Defense and Education Fund envisions a United States where *all* Americans are respected and recognized as a vibrant and integral part of the fabric of this nation. For more than 20 years we have provided a strong voice that advocates on behalf of *all* Americans to counter negative stereotypes and misrepresentations.

The Sikh Coalition is a community-based civil-rights organization that defends civil liberties, including religious freedom, for

all Americans. Its mission is to promote educational awareness and advocacy and provide legal representation in moving toward a world where Sikhs and other religious minorities may freely practice their faith without bias or discrimination.

The **Union for Reform Judaism** consists of 900 congregations across North America that include 1.5 million Reform Jews; the **Central Conference of American Rabbis** includes more than 2,000 Reform rabbis; the **Women of Reform Judaism** represent more than 65,000 women in nearly 500 women's groups in North America and around the world; and the **Men of Reform Judaism** stimulate men's fellowship, interest in Jewish worship, Jewish studies, *Tikkun Olam*, and service to the Jewish community and the community at large. These four organizations have a longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity.

The **Unitarian Universalist Association** comprises more than 1,000 Unitarian Universalist congregations nationwide and is dedicated to the principle of separation of church and state.

TABLE OF CONTENTS

TABLE OF AUTHORITIES[†]

Cases

[†] Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Other Authorities

IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

The *amici curiae*—who are described in the Corporate Disclosure Statement above (*see* Circuit Rule 26.1(b))—consist of theistic religious organizations, nontheistic religious organizations, and civil-liberties organizations. Though they have different perspectives on matters of faith, *amici* all agree that one's rights and privileges should never depend on what one believes about the divine, and therefore that the honor of appearing before Congress to solemnize its sessions should be available not only to people who believe in God but also to people who do not. For when government conditions participation in its affairs on religious tests, it threatens the freedom of conscience of all, not just those whom it now expressly excludes.

SUMMARY OF ARGUMENT

The framers of the First Amendment recognized that governmental preference for any religion leads to religious strife and oppression while also weakening and corrupting the favored faith. The First Amendment's Establishment Clause therefore prohibits

---

[1] No counsel for a party authored this brief in whole or in part. No party or party's counsel—and no person other than *amici*, their members, or their counsel—contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

government from favoring any religion over another or over nonreligious belief systems. The Supreme Court has applied this principle in the legislative-prayer context to hold that governmental officials must not discriminate based on religion in selecting guest chaplains.

Yet the Chaplain of the U.S. House of Representatives has done exactly that by prohibiting atheist and Humanist leader Dan Barker from serving as a guest chaplain before the House. The federal courts, the U.S. military, and other federal departments have repeatedly recognized atheism, Humanism, and other nontheistic belief systems as religions entitled to equal treatment under the Establishment Clause. The House Chaplain's exclusionary conduct therefore violates the prohibition against favoring one religion over another. And even if Mr. Barker's beliefs did not as a matter of law warrant the same treatment as a traditional religion or denomination, the House Chaplain's discrimination would still violate the principle that government must not favor religion over nonreligion.

What is more, the Establishment Clause prohibits governmental officials from becoming entangled in theological inquiry, which degrades both government and religion. But the test that the House Chaplain

used to reject Mr. Barker necessitates such improper governmental entanglement: To decide who may serve as a guest chaplain, the House Chaplain determines whether candidates were ordained by a recognized religious body, continue to practice the faith in which they were ordained, and will invoke a higher power. Such inquiries into the internal workings of religious organizations, the personal religious practices of individuals, and the nature of a higher power are far beyond the proper role of government.

The district court concluded that the House Chaplain's discriminatory and entangling conduct was constitutional, largely because the court assumed that legislative prayers must appeal to a divine authority. That assumption is wrong: The Supreme Court has recognized that prayers and invocations may be nontheistic. And in recent years, numerous nontheists have delivered moving and inspiring nontheistic invocations to state legislatures and municipalities throughout the country.

The district court also referenced history in support of its ruling, but historical analysis cannot justify the House Chaplain's discriminatory policy. When Congress enacted its chaplaincy, it aspired toward diversity, requiring that the House and Senate chaplains be of

different denominations and that the chaplains rotate between the two chambers. Today, with nontheists representing approximately a tenth of America's population and serving in Congress and state legislatures, fulfilling that aspiration calls for inclusion of nontheists as guest chaplains. Any argument that the traditionally theistic nature of legislative invocations can support exclusion of nontheists today would equally justify exclusion of non-Protestants, for all Congressional chaplains were Protestants during the historical period relevant to ascertaining the intent of the Establishment Clause's framers. Of course, the Supreme Court does not tolerate such use of history to legitimize discrimination.

This Court should reverse the dismissal of the complaint and permit the case to proceed.

ARGUMENT

The Establishment Clause prohibits the House Chaplain from rejecting proposed guest chaplains based on their lack of belief in God.

A. Excluding nontheists from the guest chaplaincy violates the Establishment Clause's prohibition against religious discrimination.

1. The Establishment Clause prohibits religious discrimination in the selection of guest chaplains.

The Framers of our Constitution abhorred governmental preferences for any religious belief, most of all when such preferences limited participation in governmental affairs. James Madison wrote, "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785), http://bit.ly/2pPvjz5. Thomas Jefferson proclaimed, "our civil rights have no dependance on our religious opinions . . . therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion,

is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1785), http://bit.ly/1lfgdjl. Madison and Jefferson explained that governmental favoritism toward any religion "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority," triggers religious strife, opens the door to broader religious discrimination, and weakens and corrupts the preferred faiths. *See* Madison, *supra*, ¶¶ 3, 6, 9, 11; Jefferson, *supra*.

"[T]he views of Madison and Jefferson . . . came to be incorporated . . . in the Federal Constitution." *Sch. Dist. v. Schempp*, 374 U.S. 203, 214 (1963). The Supreme Court has thus repeatedly held that the Establishment Clause prohibits government from "favor[ing] one religion over another, or religion over [non]religion." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005); *accord id.* at 860; *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

The Supreme Court has reiterated this antidiscrimination principle in its legislative-prayer decisions. In *Town of Greece v. Galloway*, which upheld a town board's policy of opening meetings with

invocations that contained references to particular faiths, the Court emphasized that the town's "leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation." 134 S. Ct. 1811, 1816 (2014); *accord id.* at 1824. The Court made clear that governmental entities must "maintain[ ] a policy of nondiscrimination" in deciding who may present invocations, and that the selection of guest chaplains must "not reflect an aversion or bias on the part of [governmental] leaders against minority faiths." *Id.* at 1824; *see also id.* at 1826 (plurality opinion[2]) ("A practice that classified citizens based on their religious views would violate the Constitution . . . ."); *id.* at 1831 (Alito, J., concurring) ("I would view this case very differently if" minority faiths had been omitted "intentional[ly]" rather than "careless[ly]"). Similarly, in *Marsh v. Chambers*, 463 U.S. 783, 793 (1983), the Court warned that a legislature's choice of a legislative chaplain must not "stem[ ] from an impermissible motive" to "giv[e] preference to his religious views." *See also Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1281–82 (11th Cir. 2008) (county commission violated

[2] As the narrowest ground for the relevant portion of the judgment, the plurality section of the *Greece* opinion represents controlling precedent under *Marks v. United States*, 430 U.S. 188, 193 (1977).

Establishment Clause by discriminating based on religion in selection of guest chaplains).

2. Nontheistic belief systems such as atheism and Humanism are religions protected by the Establishment Clause's anti-discrimination principle.

Prohibiting Mr. Barker from serving as a guest chaplain on account of his nontheistic[3] beliefs violates the rule that government must not favor some religions over others. Mr. Barker identifies as an atheist and a Humanist; in addition to being ordained as a Christian minister, he was ordained by the American Humanists as a Humanist Officiant. (Appellant's App. at 68.) Federal jurisprudence establishes that atheism and Humanism[4]—as well as other nontheistic belief

---

[3] Though there are different definitions of the terms "theist" and "nontheist," here we use "theist" to refer to someone who holds a "belief in the existence of a god or gods" and "nontheist" to refer to "a person who does not believe that there is a god or gods." *See Theism*, Merriam-Webster, https://bit.ly/2wEHPJR (last visited May 16, 2018); *Nontheist*, Merriam-Webster, https://bit.ly/2L0IIzJ (last visited May 16, 2018).

[4] "Humanism encompasses a variety of nontheistic views (atheism, agnosticism, rationalism, naturalism, secularism, and so forth) while adding the important element of a comprehensive worldview and set of ethical values—values that are grounded in the philosophy of the Enlightenment, informed by scientific knowledge, and driven by a desire to meet the needs of people in the here and now." *About the American Humanist Association*, American Humanist Association, http://bit.ly/2HeSDyS (last visited May 16, 2018).

systems represented by some of the *amici*, such as Ethical Culture[5] and Unitarian Universalism[6]—are religions protected by the Constitution.

In *Torcaso v. Watkins*, 367 U.S. 488, 495 & n.11 (1961), the Supreme Court held that government must not "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs," and the Court specifically identified Humanism, Ethical Culture, Buddhism, and Taoism as "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God." Accordingly, federal and state appellate courts have repeatedly ruled that atheism, Humanism, and other nontheistic belief systems are religions for purposes of the Constitution, civil-rights laws, and tax laws. *See, e.g.*, *Kaufman v.*

---

[5] Ethical Culture, also known as Ethical Humanism, "is a humanist Movement focusing on human goodness and building ethical relationships with each other and the Earth." *Mission & Vision*, American Ethical Union, http://bit.ly/2FAuO7y (last visited May 16, 2018).

[6] Unitarian Universalism is a "liberal religious tradition" that welcomes both theists and nontheists, while "affirm[ing] and promot[ing] seven Principles." *See History of Unitarian Universalism,* Unitarian Universalist Association, http://bit.ly/2oScL2M (last visited May 16, 2018); *We Welcome People with Many Beliefs*, Unitarian Universalist Association, http://bit.ly/2FnBYsq (last visited May 16, 2018); *Our Unitarian Universalist Faith*, Unitarian Universalist Association, http://bit.ly/2FkqE4i (last visited May 16, 2018); *The Seven Principles*, Unitarian Universalist Association, http://bit.ly/2CQPwee (last visited May 16, 2018).

McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005) ("[t]he Supreme Court has recognized atheism as equivalent to a 'religion' for purposes of the First Amendment on numerous occasions"); *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."); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) ("atheism is indeed a form of religion" for purposes of Title VII); *United States v. Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (pointing to "the Unitarian Church" among examples of "religions which do not positively require the assumption of a God" for First Amendment purposes); *Theriault v. Silber*, 547 F.2d 1279, 1281 (5th Cir. 1977) (holding that definition of "religion" that excludes atheism or agnosticism is "too narrow" for Free Exercise and Establishment Clause purposes); *Wash. Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957) (Burger, J.) (holding that Ethical Culture congregation constituted "a religious corporation or society" under tax law); *Strayhorn v. Ethical Soc'y of Austin*, 110 S.W.3d 458, 468–72 (Tex. App. 2003) (holding that "Ethical Culture qualifies as a religion for First Amendment purposes").

Federal departments likewise recognize atheism, Humanism, and other nontheistic belief systems as religions. For example, the Department of Defense recognizes atheism, agnosticism, Humanism, and Unitarian Universalism as "faith groups" for servicemembers.[7] The Department of Veterans Affairs recognizes atheist, Humanist, and Unitarian Universalist symbols as "emblems of belief" available for placement on government-furnished headstones for deceased veterans.[8] The Bureau of Prisons recognizes Humanism as a religious preference for inmates.[9] And the I.R.S. recognizes the Humanist Society (which ordains Humanist clergy[10]) and the American Ethical Union (which ordains Ethical Culture clergy[11]) as religious organizations.[12]

---

[7] Memorandum from Lernes J. Hebert, Acting Deputy Assistant Sec'y of Def. for Military Pers. Policy, to various Dep't of Def. officials 1, 6–7 (Mar. 27, 2017), http://bit.ly/2qk8vYu.

[8] *Available Emblems of Belief for Placement on Government Headstones and Markers*, National Cemetery Administration, http://1.usa.gov/1ElvZM8 (last visited May 16, 2018).

[9] Steven DuBois, *Federal Prisons Agree to Recognize Humanism as Religion*, AP (July 28, 2015), http://bit.ly/2EANnnJ.

[10] *See Become a Humanist Celebrant*, The Humanist Society, https://bit.ly/2Hrthhq (last visited May 17, 2018).

[11] *See Meet Our Leaders*, American Ethical Union, https://bit.ly/2HTJw8i (last visited May 17, 2018).

[12] *See* Letter from Robert C. Padilla, Manager, Customer Serv., I.R.S., to Humanist Society of Friends (Dec. 28, 1999), http://bit.ly/2HDqylO (stating that Humanist Society is classified as an organization

Recognizing that the Establishment Clause prohibits religious discrimination in the selection of guest chaplains, and that "atheism and Humanism [are] religions entitled to First Amendment protection," a federal district court recently held that a county board violated the Establishment Clause by discriminating against atheists and Humanists in determining who could present opening invocations at board meetings. *See Williamson v. Brevard Cty.*, 276 F. Supp. 3d 1260, 1276–77, 1281, 1289 (M.D. Fla. 2017), *appeal docketed*, No. 17-15769 (11th Cir. Dec. 29, 2017), *cross-appeal docketed*, No. 18-10109 (11th Cir. Jan. 11, 2018). And another federal district court recently denied a motion to dismiss in a similar case against the Pennsylvania House of Representatives. *See Fields v. Speaker of the Pa. House of Representatives*, 251 F. Supp. 3d 772, 788–89 (M.D. Pa. 2017). Here too, the Establishment Clause forbids the House Chaplain to exclude nontheists based on their religious beliefs.

---

described in I.R.C. § 170(b)(1)(A)(i), which provides tax-exempt status to "church[es] or . . . convention[s] or association[s] of churches"); Letter from Holly O. Paz, Dir., Exempt Orgs. Rulings and Agreements, I.R.S., to American Ethical Union (Mar. 22, 2013), https://bit.ly/2IkpzuM (similar letter for American Ethical Union).

3. Even if atheism and Humanism were not entitled to treatment as religions, government must not favor religion over nonreligion.

But even if atheism and Humanism were not considered to be religions under the law, discriminating against atheists and Humanists in the selection of guest chaplains would still be unconstitutional. The Establishment Clause prohibits the government from favoring not only "one religion over another" but also "religion over [non]religion." *McCreary*, 545 U.S. at 875; *accord Epperson*, 393 U.S. at 104. In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14–15 (1989), for instance, the Supreme Court struck down a tax exemption for religious periodicals because it was denied to nonreligious publications. And in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 & n.9 (1985), the Court invalidated a law that gave religious adherents a right not to work on their Sabbaths, in part because the law did not give nonreligious employees any comparable right to a day off of their choosing. In other words, governmental bodies cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers." *Torcaso*, 367 U.S. at 495.

This principle applies with full force to the selection of guest chaplains. In *Greece*, the Supreme Court rejected the proposition that

legislative-prayer practices are immune from general Establishment Clause rules and are to be measured solely against historical tradition. The Court cautioned that its legislative-prayer precedents "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." 134 S. Ct. at 1819; *see also infra* at 25, 30–31. The Court then cited cases concerning other Establishment Clause issues to support rulings that governmental bodies must not discriminate based on religion when selecting invocation-speakers (*see supra* at 6–7), must not become entangled in religious judgments when implementing an invocation practice (an issue we discuss in Part B below), and must not coerce people to participate in invocations. *See Greece*, 134 S. Ct. at 1822, 1825–26 (plurality opinion at 1825–26) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso*, 367 U.S. 488).

To be sure, the Court has held that government may treat religion differently from nonreligion for the limited purpose of "alleviat[ing] exceptional government-created burdens on private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). For example, religious organizations may be given special exemptions from employment-

discrimination laws to prevent improper governmental interference with their internal affairs. *See, e.g.*, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987). But this principle cannot justify discrimination against nontheists in the selection of guest chaplains, because such discrimination does not lift any government-created burden on the religious exercise of members of Congress, who are free to attend services reflecting their specific beliefs in numerous houses of worship in and near the District of Columbia. *See Katcoff v. Marsh*, 755 F.2d 223, 238 (2d Cir. 1985).

Moreover, a religious accommodation must not "impose unjustified burdens on other[s]" (*Cutter*, 544 U.S. at 726), and exclusion of nontheistic guest chaplains harms not only the applicants themselves—in part by marking them as " 'outsiders, not full members of the political community' " (*see McCreary*, 545 U.S. at 860 (quoting *Santa Fe*, 530 U.S. at 309))—but also nontheist members of Congress. There are at least two current and two former openly nontheist members of the U.S. House.[13] Many state legislators around the country also have come out

[13] *See* Shadee Ashtari, *Barney Frank Explains Why He Hid His Atheism*, HuffPost (June 10, 2014), http://bit.ly/2oRoKhm; Michelle Boorstein, *This Lawmaker Isn't Sure That God Exists. Now, He's Finally Decided to Tell People*, Wash. Post, Nov. 9, 2017,

as nontheists.[14] And there is evidence that numerous other members of Congress are nontheists but fear to disclose their beliefs publicly,[15] for polls show that a large percentage of Americans would not vote for an atheist.[16]

"The principal audience for [legislative] invocations is . . . 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*, 134 S. Ct. at 1825 (plurality opinion). Fulfilling that purpose of legislative prayer supports occasional invocations by nontheistic guest chaplains, so that nontheistic legislators can fully be included in and benefit from the practice. Indeed, *Greece* emphasized that the "purpose and effect" of a legislative-invocation practice must not be "to exclude or coerce nonbelievers." *Id.* at 1827 (plurality

---

http://wapo.st/2DcCNSF; Kimberly Winston, *Arizona Democrat to Replace Defeated Pete Stark as Sole Atheist in Congress*, Wash. Post, Nov. 8, 2012, http://wapo.st/2oXTADW; *see also* Tara Isabella Burton, *The Latest Faith Group to Launch a Congressional Caucus? The Nonreligious*, Vox (May 1, 2018), https://bit.ly/2IGTNaM.

[14] *See Secular Elected Officials*, Center for Freethought Equality, https://bit.ly/2Kmu5FF (last visited May 17, 2018).

[15] *See* Brian Pellot, *Atheist Politicians May Run the UK, but They Remain Closeted in the US*, Wash. Post, Aug. 22, 2014, http://wapo.st/2DbF3tm.

[16] *See* Jeffrey M. Jones, *Atheists, Muslims See Most Bias as Presidential Candidates*, Gallup (June 21, 2012), http://bit.ly/2Fsxe4B.

opinion). Thus, whether the beliefs of nontheists are considered "religions" or not, excluding nontheists from the guest chaplaincy violates the Establishment Clause's antidiscrimination principles.

B. The House Chaplain's policy for selecting guest chaplains necessitates improper religious inquiries by government.

In addition to the prohibitions against religious discrimination, the House Chaplain's conduct violates the Establishment Clause's bar against religious entanglement. Jefferson wrote, "to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty." Jefferson, *supra*; *accord* Madison, *supra*, ¶¶ 2, 5, 11. The Supreme Court has thus repeatedly held that the Establishment Clause prohibits governmental bodies from becoming excessively entangled with religion, including through inquiries into or judgments about religious matters. *See, e.g.*, *Hernandez v. Comm'r*, 490 U.S. 680, 696–97 (1989); *Lemon v. Kurtzman*, 403 U.S. 602, 620–22 (1971). In *Greece*, the Court applied this principle to reject a claim that invocations at legislative meetings must be nonsectarian, explaining that such a requirement would cause public officials to become "supervisors and

censors of religious speech" and thus would improperly "involve government in religious matters." 134 S. Ct. at 1822.

The test that the House Chaplain has been using to determine who may serve as a guest chaplain and to exclude Mr. Barker inherently leads the House to become entangled in inappropriate religious inquiries and judgments, in three ways.

First, the House requires that a guest chaplain "be ordained by a recognized body." (Appellant's App. at 66.) This requirement invades the internal affairs of religious organizations by calling for governmental judgments about the theological standing of a proposed chaplain's ordaining authority. What is more, the requirement discriminates against adherents of faiths that do not ordain clergy, such as Muslims,[17] certain Buddhists,[18] Baha'is,[19] and Quakers.[20]

Second, the House requires that a guest chaplain's ordination be "in the faith in which he/she practices." (Appellant's App. at 66.) This requirement calls for intrusive inquiries into the personal beliefs and practices of guest-chaplain nominees.

---

[17] *See* John Renard, *101 Questions and Answers on Islam* 45 (1998).

[18] *See, e.g.*, *Introduction to Soka Gakkai Nichiren Buddhism*, World Tribune, http://bit.ly/2FrtOyU (last visited May 16, 2018).

[19] *See* Paula Hartz, *Baha'i Faith* 104 (3d ed. 2009).

[20] *See* Hans J. Hillerbrand, *Encyclopedia of Protestantism* 801 (2004).

Third, the House requires that a guest chaplain's invocation address a divine "higher power." (Appellant's App. at 38 ¶ 35(3); 52 ¶ 146; 54–55 ¶¶ 157, 168; 57 ¶ 180.) But just like the attempts to delineate whether prayers are sectarian that the *Greece* Court concluded were "difficult[ ]," "futil[e]," and unconstitutional (134 S. Ct. at 1822), inquiries into whether proposed invocations address a supernatural higher authority can be challenging or unanswerable, calling for judgments that are beyond the constitutional authority and competency of government. Consider Addendum B to this brief, which contains many invocations, given in recent years in the Connecticut Senate, that do not expressly mention a supreme being but could be construed—or not, depending on the listener—as implicitly addressing one. Neither *amici*, nor the House Chaplain, nor the courts are qualified to decide whether invocations of this type—*e.g.*, "May we be filled with kindness. May we be well. May we be peaceful and at ease. May we be happy." (Addendum B at 6)—address a divine higher authority.[21]

[21] The constitutional problems here are compounded by the complaint's allegations that the House Chaplain's criteria for determining who may serve as a guest chaplain have not been uniformly applied but instead served as a pretext to exclude Mr. Barker. (Appellant's App. at 49–53 ¶¶ 118–56.)

C. The assumptions underlying the district court's decision are wrong.

In spite of substantial allegations of unconstitutional religious discrimination and entanglement, the district court dismissed the complaint, based in large part on two assumptions: that legislative prayers must be theistic (*see* Appellant's App. at 18–19, 25–26), and that history supports excluding nontheists (*see id.* at 7–8, 10–11, 19, 26). Both assumptions are incorrect.

1. Legislative invocations need not be theistic.

Dictionary definitions and case law confirm that an "invocation" or "prayer"—words that *Greece* used interchangeably (*see* 134 S. Ct. at 1816–27)—need not be theistic. Black's Law Dictionary defines "invocation" as "the act of calling on for authority or justification." *Invocation*, Black's Law Dictionary (10th ed. 2014). Merriam-Webster defines the term as "the act of mentioning or referring to someone or something in support of your ideas." *Invocation*, Merriam-Webster, http://bit.ly/1Rua0bP (last updated May 14, 2018). And Oxford Dictionaries' definition is "[t]he action of invoking something or someone for assistance or as an authority." *Invocation*, Oxford Dictionaries, http://bit.ly/1WXlSf2 (last visited May 16, 2018).

"Prayer" isn't necessarily theistic either. It may be "an earnest request or wish." *See Prayer*, Merriam-Webster, http://bit.ly/1TLTnyb (last visited May 16, 2018); *see also Prayer*, Oxford Dictionaries, http://bit.ly/1sdhYkU (last visited May 16, 2018) ("an earnest hope or wish."). Or it may be "a request for specific relief." *See Prayer for Relief*, Black's Law Dictionary.

Consistent with these definitions, the Supreme Court recognized in *Greece* that legislative prayers may be nontheistic. Under the Town of Greece's policy, the Court emphasized, "an atheist[ ] could give the invocation." 134 S. Ct. at 1816; *accord id.* at 1826 (plurality opinion) ("here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions"); *id.* at 1829 (Alito, J., concurring) ("the town . . . would permit any interested residents, including nonbelievers, to provide an invocation"). The Court also noted that a "*religious* invocation" is the kind that is unconstitutionally coercive in the public-school context. *Id.* at 1827 (plurality opinion) (emphasis added).

Further, in describing the "constraints . . . on [the] content" of legislative prayers, the Court did not include any requirement that they be theistic. *Id.* at 1823. Rather, the Court explained that invocations

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

Proper invocations, added the Court, "often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." *Id.* And while "religious themes provide particular means to [such] universal ends," appropriate invocations may instead "invoke[] universal themes . . . by," for example, "celebrating the changing of the seasons or calling for a 'spirit of cooperation' among [governmental] leaders." *Id.* at 1823–24 (quoting an invocation given in the Town of Greece).

Thus, in recent years, nontheists have opened sessions of many governmental bodies across the country, delivering inspiring and moving nontheistic invocations that called on the kinds of nontheistic authorities and values approved of in *Greece*—such as the Constitution,

democracy, equality, inclusion, and justice. (*See* Addendum A.) Here is but one example delivered to the Arizona House by then-Representative Juan Mendez:

> Most prayers in this room begin with a request to bow your heads. I would like to ask that you not bow your heads. I would like to ask that you take a moment to look around the room at all of the men and women here, in this moment, sharing together this extraordinary experience of being alive and of dedicating ourselves to working toward improving the lives of the people in our state.
>
> This is a room in which there are many challenging debates, many moments of tension, of ideological division, of frustration. But this is also a room where, as my Secular Humanist tradition stresses, by the very fact of being human, we have much more in common than we have differences. We share the same spectrum of potential for care, for compassion, for fear, for joy, for love.
>
> Carl Sagan once wrote, "For small creatures such as we, the vastness is bearable only through love." There is, in the political process, much to bear. In this room, let us cherish and celebrate our shared humanness, our shared capacity for reason and compassion, our shared love for the people of our state, for our Constitution, for our democracy—and let us root our policymaking process in these values that are relevant to all Arizonans regardless of religious belief or nonbelief. In gratitude and in love, in reason and in compassion, let us work together for a better Arizona.

(*Id.* at 1–2.) Other governmental bodies that have welcomed invocations by nontheists include the Florida House, the Iowa House, the Maine House and Senate, the Maryland Senate, the Pennsylvania Senate, the

Washington State House, and the councils of major cities such as El Paso and Orlando. (*Id.* at 1–11, 13–14, 16–18.) In addition, officers of the Connecticut Senate often open its sessions with invocations that are nontheistic or arguably so. (*See* Addendum B.) And the U.S. House of Representatives itself recently permitted a Presbyterian minister to open a session with a prayer that had no theistic references. *See* 161 Cong. Rec. H5878 (daily ed. Sept. 10, 2015). The district court's assumption that legislative prayers must be theistic flies in the face of modern practice.[22]

2. History does not justify discrimination against nontheists in the selection of guest chaplains.

The district court's assumption that history supported its dismissal of the complaint (Appellant's App. at 7–8, 10, 19, 26) was constitutionally flawed and not based on any significant analysis of the pertinent history. In fact, history does not justify exclusion of nontheists from service as guest chaplains.

[22] Any suggestion that legislative prayers must be theistic made in *Kurtz v. Baker*, 829 F.2d 1133, 1143 (D.C. Cir. 1987)—a case, on which the district court significantly relied (*see* Appellant's App. at 9, 18–19, 26), that decided nothing beyond standing—is not binding on this Court given *Greece*'s subsequent recognition to the contrary and the rise of nontheistic invocations across the country.

To begin with, as noted above, the Supreme Court has cautioned that its legislative-prayer precedents "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Greece*, 134 S. Ct. at 1819. "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh*, 463 U.S. at 790. Rather, the Court's decisions to uphold opening invocations at legislative sessions were based on an " 'unambiguous and unbroken history of more than 200 years' " going back to the passage of the Bill of Rights. *Greece*, 134 S. Ct. at 1819 (quoting *Marsh*, 463 U.S. at 792). The Court has reasoned that because in 1789 the First Congress enacted a congressional chaplaincy the same week that it approved the First Amendment, the Amendment's framers must have believed that the Establishment Clause permits legislative invocations. *Id.* at 1818–19; *Marsh*, 463 U.S. at 787–92.

But there is no long and unbroken history going back to 1789 of Congress inviting members of the public to deliver invocations while discriminating based on creed or belief in doing so. Except for several years in the middle of the Nineteenth Century, the U.S. House and

Senate have always appointed permanent chaplains.[23] And there is no evidence that either chamber of Congress ever invited guest chaplains to deliver invocations before 1855.[24] Further, after extensive research, *amici* have found no evidence that any nontheist ever asked to give an opening invocation to any governmental body in the decades that followed adoption of our Constitution. That is not surprising: Few people during that era openly disclosed that they did not believe in God, for doing so could result not just in social ostracism but in criminal punishment.[25] As Congress did not use guest chaplains during the Founding Era, and nontheists did not make requests to present legislative invocations then, history cannot support exclusion of nontheistic guest chaplains today.[26]

---

[23] *See History of the Chaplaincy*, Office of the Chaplain: U.S. House of Representatives, http://bit.ly/2wlwNqH (last visited May 18, 2018); *Senate Chaplain*, U.S. Senate, http://bit.ly/2em2A0L (last visited May 18, 2018).

[24] *See* 2 Robert C. Byrd, *The Senate, 1789–1989* 302 (1982), http://bit.ly/2oU3mbg.

[25] *See, e.g.*, Leigh Eric Schmidt, *Village Atheists: How America's Unbelievers Made Their Way in a Godly Nation* 3–4 (2016); Amanda Porterfield, *Conceived in Doubt: Religion and Politics in the New American Nation* 14–42 (2012).

[26] As Justice Alito explained in his concurrence in *Greece*, it is only early Congressional history that should matter, not the history of state legislatures' practices. *See* 134 S. Ct. at 1832 (Alito, J., concurring). The

If history has anything to tell on this issue, it supports permitting legislative invocations that reflect diverse and minority beliefs. "Our tradition assumes that adult citizens . . . can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Greece*, 134 S. Ct. at 1823. To promote religious diversity in the invocations that it heard, when Congress first enacted its chaplaincy it required that the House and Senate chaplains be of different denominations and that they rotate between the two chambers. *See* 110

Establishment Clause did not apply to the states from the time when the First Amendment was ratified until it was incorporated against them in the 1940s through the Fourteenth Amendment. *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985). So Founding-era practices at the state level cannot speak to how the Framers understood the Establishment Clause. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 n.7 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Indeed, when the Bill of Rights was adopted, and in the decades that followed, many states had established churches, religious tests for office, and other constitutional provisions that discriminated based on religion—practices that unquestionably violate the Establishment Clause. *See, e.g.*, Stanley F. Chyet, *The Political Rights of the Jews in the United States: 1776–1840*, American Jewish Archives, Apr. 1958, at 24–67, http://bit.ly/2Fp6eCZ. In all events, like Congressional history, Founding-era state-legislative history cannot support exclusion of nontheistic guest chaplains today because the state legislatures did not use guest chaplains. In the decades after enactment of the Bill of Rights, state legislatures used permanent chaplains, relied on a limited number of rotating local clergy, or did not have opening prayers at all. *See* James S. Kabala, *"Theocrats" vs. "Infidels": Marginalized Worldviews and Legislative Prayer in 1830s New York*, Journal of Church and State, Winter 2009, at 91–92, 100–01.

Cong. Rec. 3176 (1964). At that time, in practice, this rule served to ensure diversity among Protestant denominations, because almost everyone in the country was Protestant.[27]

We are a much more pluralistic nation today. Thus Congress properly "acknowledges our growing diversity . . . by welcoming ministers of many creeds," including Buddhist, Hindu, Muslim, and Native American invocation-speakers. *See Greece*, 134 S. Ct. at 1820–21.[28] But the House still falls short: Today, nontheists represent at least nine percent of the American population.[29] Accordingly, as noted above, nontheists have in recent years delivered numerous nontheistic invocations before state legislatures and local governmental bodies across the country. (*See* Addendum A.) The growing acceptance of nontheistic invocations today effectuates the aspiration toward

---

[27] *See, e.g.*, Fr. Robert J. Fox, *The Catholic Church in the United States of America*, Catholic Education Resource Center (2000), https://bit.ly/2HXOdhi; *Vital Statistics: Jewish Population in the United States, Nationally (1654–Present)*, Jewish Virtual Library, http://bit.ly/2wLKNej (last visited May 18, 2018).

[28] *See also* Byrd, *supra*, at 304.

[29] *See* Pew Research Center, *U.S. Public Becoming Less Religious* 47–48 (2015), http://pewrsr.ch/1SETWFd; *see also* Pew Research Center, *America's Changing Religious Landscape* 4 (2015), http://pewrsr.ch/1rfd46z.

diversity reflected in the "different denominations" rule that Congress enacted at the inception of its chaplaincy.

A review of the annual messages to Congress of our first six Presidents—the equivalent of today's State of the Union addresses—also supports inclusion of nontheistic invocations. Most of those annual messages had some theistic reference—usually of thanks or entreaty—but some did not.[30] And in 1823, President James Monroe, after recounting various successes of our country, ended his annual message with a secular missive of thanks after it appeared that he was leading up to a theistic one:

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

James Monroe, *Seventh Annual Message* (1823), http://bit.ly/2G8n3Dp.

To contend that exclusion of nontheistic invocations is supported by a lack of evidence—apart from the above-quoted Monroe address—of such invocations during the Founding Era would prove too much: Historians believe that no non-Christian ever gave an opening prayer to

---

[30] *See State of the Union Addresses and Messages*, The American Presidency Project, http://bit.ly/M9VL27 (last visited May 18, 2018).

Congress before 1860 or to any state legislature before 1850.[31] Furthermore, there is at least circumstantial evidence of religion-based discrimination against Catholics in Congress's selection of legislative chaplains throughout much of American history, including as late as the year 2000.[32] Indeed, until 2000, except for one Catholic who served for only a year (from 1832–33), all of Congress's permanent chaplains were Protestants.[33]

Thus, if a lack of nontheistic invocations in early American history could support a bar on nontheists serving as guest chaplains today, history would equally support exclusion of all non-Christians and even of non-Protestants. Of course, that would be contrary to the law: *Greece* held that the selection of invocation-speakers must reflect a "policy of nondiscrimination," not "aversion or bias on the part of [governmental] leaders against minority faiths." 134 S. Ct. at 1824. And whatever role history may play in constitutional interpretation, the Supreme Court has repeatedly rejected efforts to use history to justify discriminatory

---

[31] *See* Bertram W. Korn, *Eventful Years and Experiences: Studies in Nineteenth Century American Jewish History* 98–99, 114–15 (1954), http://bit.ly/2G8eqsE.

[32] *See* Christopher C. Lund, *The Congressional Chaplaincies*, 17 Wm. & Mary Bill of Rts. J. 1171, 1187–93 (2009).

[33] *See id.* at 1187–96.

policies. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015); *United States v. Virginia*, 518 U.S. 515, 531 (1996); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966); *see also McDaniel v. Paty*, 435 U.S. 618, 623–24, 629 (1978) (striking down state constitutional provision prohibiting ministers from holding legislative offices even though many states maintained such provisions when U.S. Constitution was adopted).

CONCLUSION

The Constitution prohibits the House Chaplain—just like all other governmental officials—from discriminating based on religion. It is no more constitutionally permissible to exclude the one-tenth of Americans who are nontheists from eligibility to solemnize sessions of Congress than it would be to exclude Jews, Muslims, Hindus, or Sikhs from the guest chaplaincy based on disapproval of their beliefs. In Madison's words, such discrimination is a "signal of persecution" that "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *See* Madison, *supra*, ¶ 9. The Court should reverse the judgment below.

Respectfully submitted,

/s/ Alex J. Luchenitser

STEVEN M. FREEMAN
DAVID L. BARKEY
MELISSA GARLICK
Anti-Defamation League
605 Third Avenue
New York, NY 10158
(212) 885-7859

AMRITH KAUR
JULIAN DARWALL
GISELLE KLAPPER
The Sikh Coalition
50 Broad Street
Suite 504
New York, NY 10004
(212) 655-3095

RICHARD B. KATSKEE
ALEX J. LUCHENITSER
Counsel of record
CLAIRE L. HILLAN
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, D.C. 20005
(202) 466-7306
luchenitser@au.org

JEFFREY I. PASEK
Cozen O'Connor
277 Park Avenue
New York, NY 10172
(212) 453-3835

Counsel for Amici Curiae

Date: May 22, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 6,487 words.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word 2013 in 14-point Century Schoolbook font.

/s/ Alex J. Luchenitser
Alex J. Luchenitser
Counsel for amici curiae

CERTIFICATE OF NECESSITY OF SEPARATE BRIEFS

I certify that separate briefs are necessary for some groups of the *amici* supporting the plaintiff-appellant in this case because of differences in the *amici*'s interests and positions.

/s/ Alex J. Luchenitser
Alex J. Luchenitser
Counsel for amici curiae

CERTIFICATE OF SERVICE

I certify that on May 22, 2018, I filed this brief through the Court's CM/ECF system, which caused the brief to be electronically served on all parties, through the following counsel:

Richard Bolton (rbolton@boardmanclark.com)
Anita T. Gallucci (agallucci@boardmanclark.com)
Thomas G. Hungar (thomas.hungar@mail.house.gov)
Lowell Vernon Sturgill, Jr. (lowell.sturgill@usdoj.gov)
Matthew M. Collette (Matthew.Collette@usdoj.gov)

/s/ Alex J. Luchenitser
Alex J. Luchenitser
Counsel for amici curiae