IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL BARKER, Plaintiff, **v.** HOUSE OF REPRESENTATIVES CHAPLAIN PATRICK CONROY, ASSISTANT TO THE CHAPLAIN ELISA AGLIECO, CHAPLAIN'S LIAISON TO STAFF KAREN BRONSON, PAUL RYAN, SPEAKER OF THE HOUSE OF REPRESENTATIVES IN HIS OFFICIAL CAPACITY, THE UNITED STATES HOUSE OF REPRESENTATIVES, THE UNITED STATES OF AMERICA *Defendants.*	)	Case No. 1:16-cv-00850-RMC

MEMORANDUM IN OPPOSITION OF THE
OFFICIAL DEFENDANTS' MOTION TO DISMISS

Eric A. Baker, D.C. Bar No. 481394
Richard L. Bolton, Federal Bar No. WI0034

BOARDMAN &CLARK LLP
One South Pinckney Street, Fourth Floor
P.O. Box 927
Madison, WI 53701-0927
(608) 283-1783 (Telephone)
(608) 283-1709 (Facsimile)
Email: ebaker@boardmanclark.com
Email: rbolton@boardmanclark.com
Attorneys for Plaintiff Dan Barker

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

FACTS 2

STANDARD OF REVIEW 4

ARGUMENT 5

I. The Chaplain's conduct violates Barker's rights under theEstablishment Clause and Fifth Amendment equal protection. 5

A. The Establishment Clause does not permit the House Chaplain to discriminate based on religion. 5

(1) The Chaplain cannot discriminate against the nonreligious. 6

(2) The Chaplain has entangled the government in theological judgments. 8

B. The Chaplain's requirements violate Fifth Amendment equal protection guarantees. 10

II. The Chaplain violated Art. VI Cl. 3 by imposing a religious test on those seeking to serve the government as guest chaplains. 11

A. The Chaplain has imposed religious criteria (a religious test) to bar Barker from the guest chaplaincy. 13

B. The Chaplain has barred Barker from an office or public trust under the United States. 14

III. Barker has standing to assert claims for unlawful discrimination. 17

A. Barker has suffered actual, concrete, and particularized injuries and has alleged sufficient facts to establish these injuries. 18

(1) Barker has suffered a personal exclusion injury. 19

(2) Barker has suffered discrimination based on his religious beliefs and membership in a class. 19

(3) Barker has also suffered a stigmatic injury as a result of the government's discrimination. 21

B. The defendants' actions caused Barker's injury. 23

C. This court can redress the injury Barker has suffered. 26

IV. Barker's claims do not raise political questions that would preclude judicial review. Whether the House can discriminate against a guest chaplain because of his religious convictions is a justiciable question. 30

A. The Rulemaking Clause does not textually commit to the House the ability to discriminate amongst speakers in its legislative prayer program based on religious or nonreligious convictions. 31

B. The Speech or Debate Clause does not apply to the House Chaplain's legislative prayer program. 33

C. Judicial review for the violation of fundamental constitutional rights is consistent with the separation of powers. 36

V. Barker has established a *prima facie* claim under RFRA. 38

A. The House Rules were designed to be neutral and generally applicable. 38

B. The House Rules incidentally burden Barker's sincerely held beliefs. 40

VI. Sovereign immunity does not bar Plaintiff's RFRA claim against the House if the denial of Plaintiff's participation in the guest chaplain program is defended as an application of House Rules II.5 and XIV.1 42

CONCLUSION 43

TABLE OF AUTHORITIES

Cases

Allen v. Wright, 468 U.S. 737, 757 n. 22 21
Am. Atheists, Inc. v. Shulman, 21 F. Supp. 3d 856, 870 (E.D. Ky. 2014) 12
Atheists of Fla. v. City of Lakeland, 713 F.3d 577 (11th Cir. 2013) 8
Baker v. Carr, 369 U.S. 186 (1962) 29
Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 4
Bolling v. Sharpe, 347 U.S. 497 (1954) 11
Bostic v. Schaefer, 760 F.3d 352, 372 (4th Cir. 2014) 21
Brown v. Hansen, 973 F.2d 1118 (3rd Cir. 1992) 36
Burlington N. R.R. v. Ford, 504 U.S. 648 (1992) 11
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 38
City of Boerne v. Flores, 521 U.S. 507 (1997) 42
City of New Orleans v. Dukes, 427 U.S. 297 (1976) 11
Clements v. Fashing, 457 U.S. 957 (1982) 20
Consumers Union of U.S. Inc. v. Periodical Correspondents' Assn.,
515 F.2d 1341(1975) 34, 35
Davis v. Passman, 442 U.S. 228 (1979) 30
Dennis v. U.S., 384 U.S. 855 (1966) 14
Donovan v. Tony & Susan Alamo Found., 722 F.2d 397 (8th Cir. 1983) 16
Epperson v. Arkansas, 393 U.S. 97 (1968) 6
Estate of Thornton v. Caldor, 472 U.S. 703 (1985) 6
Feminist Women's Health Ctr. v. Codispoti, 69 F.3d 399 (9th Cir. 1995) 13, 14
Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) 40
Graham v. Richardson, 403 U.S. 365 (1971) 11
Gravel v. U.S., 408 U.S. 606 (1972) 33
Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) 36
Heckler v. Mathews, 465 U.S. 728 (1984) 21
Hernandez v. Comm'r, 490 U.S. 680 (1989) 8
In re McCarthey, 368 F.3d 1266 (10th Cir. 2004) 13, 14
In re United Mine Workers of Am. Emp. Benefit Plans Litig.,
854 F. Supp. 914 (D.D.C. 1994) 4
Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) 4
Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005) 40
Kurtz v. Baker, 829 F.2d 1133 (D.C. Cir. 1987) .... passim
Larson v. Valente, 456 U.S. 228 (1982) 6
Larsen v. U.S. Navy, 346 F. Supp. 2d 122 (D.D.C. 2004) 39
Lemon v. Kurtzman, 403 U.S. 602 (1971) 8, 9
Lexmark Int'l, Inc. v. Static Control Components, 134 S.Ct. 1377 (2014) 21, 23
Lujan v. Defenders of Wildlife, 497 U.S. 871, 889 (1990) 17
Marsh, 463 U.S. 783 (1983) .... passim
Martinez v. Clark County, 846 F. Supp. 2d 1131 (D. Nev. 2012) 16
McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) 6
McDaniel v. Paty, 435 U.S. 618 (1978) 13

Melcher v. Federal Open Market Comm., 836 F.2d 561 (D.C. Cir. 1987) 37
Miller v. Johnson, 515 U.S. 900 (1995) 11
Murray v. Buchanan, 720 F.2d 689 (D.C. Cir. 1983) 5, 18
Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,
508 U.S. 656 (1993) 19, 20
Newdow v. Eagen, 309 F. Supp. 2d 29 (D.D.C. 2004) 18
Nixon v. U.S., 506 U.S. 224 (1993) 31
Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008) 7, 8
Powell v. McCormack, 395 U.S. 486 (1969) 31, 33
Reed v. Great Lakes Cos., 330 F.3d 931 (7th Cir. 2003) 40
Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 20
Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir. 1981) 36, 37
San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 11
Schaefer v. Bostic, 135 S. Ct. 308 (2014) 22
Schuler v. U.S., 617 F.2d 605 (D.C. Cir. 1979) 4
Smith v. Cty. of Albemarle, Va., 895 F.2d 953 (4th Cir. 1990) 13
Smith v. Lindstrom, 699 F. Supp. 549 (W.D. Va. 1988) 13
Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991) 16
Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1997) 6
Thomas v. Review Bd., 450 U.S. 707 (1981) 41
Torcaso v. Watkins, 367 U.S. 488 (1961) .... passim
* *Town of Greece v. Galloway,* 134 S. Ct. 1811 (2014) .... passim
Turner v. Fouche, 396 U.S. 346 (1970) 20
U.S. v. Armstrong, 517 U.S. 456 (1996) 11
U.S. v. Ballin, 144 U.S. 1 (1892) 30
U.S. v. Brewster, 408 U.S. 501 (1972) 33
U.S. v. Jin Fuey Moy, 241 U.S. 394 (1916) 28
U.S. v. State of Miss., 229 F. Supp. 925 (S.D. Miss. 1964) 22
United States v. Carolene Products Company, 304 U.S. 144 (1938) 11
United States v. Germaine, 99 U.S. 508 (1878) 16
Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. App. 1983) 32, 36
Wallace v. Jaffree, 472 U.S. 38 (1985) 6
Walker v. Jones, 733 F.2d 923 (D.C. Cir.) 30, 33, 34
Wilderness Soc'y v. Norton, 434 F.3d 584 (D.C. Cir. 2006) 26

Other Authorities

Christopher Lund, *The Congressional Chaplaincies,*
7 WM. & MARY BILL RTS. J. 1171 (2009) 1
James Stormonth, *A Dictionary of the English Language* (1882) 28
John M. Greabe, *Remedial Discretion in Constitutional Adjudication*,
62 BUFF. L REV. 7 (2014) 37
Joseph Story, *Commentaries on the Constitution of the United States*.
Vols. 3:§1841 (Boston, 1833) 12, 15
The Humanitarian Theory of Punishment, (1952) 22

U.S. Constitution, Statutes, and House Rules

U.S. CONST. art. VI, cl. 3 .... 12, 15, 17
42 U.S.C. § 2000cc–5(7)(A) 40
42 U.S.C.A. §2000bb–1(c) 42
House Rule I. 3 25
House Rule I. 5 25
House Rule II 25
House Rule II. 5 .... 2, 26, 38, 42
House Rule V.4(b) 25
House Rule V.5 25
House Rule XIV.1 .... 2, 26, 35, 38, 42
House Rule XXIII 26

INTRODUCTION

Five weeks after the Supreme Court handed down its decision in *Town of Greece v. Galloway*, in which the Court approved a nondiscriminatory policy for holding opening invocations delivered by guest chaplains, Dan Barker sought to participate equally in the House's guest chaplaincy. He was denied. This case does not challenge the legislative invocations that begin each House session. Barker challenges the discriminatory requirements that the House Chaplain created in order to preclude Barker's participation as the first atheist guest chaplain. Barker urges this Court to follow the reasoning in *Galloway* and hold that when the government decides to open with prayer delivered by a guest chaplain, it cannot discriminate between potential invocation-givers based on their religious or nonreligious status.

The House of Representatives employs Reverend Patrick Conroy as House Chaplain and he allows guest chaplains to regularly deliver the opening invocation. At one time, it was unthinkable that the House Chaplain or guest chaplains would ever be Catholic, and later that they would ever be Jewish, or women, and most recently that they would be Muslim.[1] Chaplain Conroy, himself a Catholic, is a benefactor of the growing inclusivity of the chaplaincy. The guest chaplaincy is designed to advance religious pluralism and help counter the favoritism of dominant religious groups inherent in the chaplaincy.[2] In *Galloway*, the Supreme Court allowed legislative prayers in part because the selection of invocants did not "reflect an aversion or bias on the part of [government] leaders against minority faiths," 134 S. Ct. 1811, 1824 (2014), and partly because the town involved "at no point excluded or denied an opportunity to a would-be

---

[1] *See* Christopher Lund, *The Congressional Chaplaincies,* 17 WM. & MARY BILL RTS. J. 1171 (2009) (detailing the history of the chaplaincies, including the anti-Catholic sentiment at the chaplaincy's inception, the liberalizing of the chaplaincy, and the deliberate use of guest chaplain's to counter the majoritarian favoritism built into the chaplaincies), *available at* http://scholarship.law.wm.edu/wmborj/vol17/iss4/6.

[2] *Id.* at 1204.

prayer giver" and "maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation." *Id.* at 1815. Barker seeks inclusion under this rationale.

The House Chaplain allows guest chaplains to deliver about 40 percent of House invocations. But despite the inclusion of nearly 900 guest chaplains since the year 2000, when presented with an atheist who sought equal access, Conroy adopted discriminatory, *ad hoc* requirements that he disparately applied in order to prevent Barker's inclusion. The Chaplain's refusal to include Barker runs counter to the very idea of pluralism—embodied in both the guest chaplaincy and the House of Representatives itself—and the Court's reasoning in *Galloway*. The Chaplain has violated Barker's rights in several ways:

1. The Chaplain's actions favor majority religious denominations over minorities and religion over nonreligion, violating the nondiscrimination principle of the Establishment Clause of the First Amendment. *See* section 1.A., *infra*; Cmplt. ¶¶ 158–68.
2. The chaplain has discriminated against Barker in several distinct ways, all of which violated his right to equal protection under the Due Process Clause of the Fifth Amendment. *See* section 1.B., *infra*; Cmplt. ¶¶ 169–77.
3. The Chaplain has imposed a religious test for public office in violation of Article VI, Clause 3 of the Constitution. *See* section 2., *infra*; Cmplt. ¶¶ 194–200.
4. In the alternative, the Chaplain has substantially burdened Barker's religion under the Religious Freedom Restoration Act. *See* section 5., *infra*; Cmplt. ¶¶ 178–93.

Barker also raises a *Bivens* claim, which is addressed in a separate brief.

FACTS

Before each session, the House has an opening invocation. Guest chaplains give 40 percent of those prayers, nearly 900 from 2000 to 2015. The House Rules say nothing of guest chaplains or any requirements for the opening invocation, only "The Chaplain shall offer a prayer at the commencement of each day's sitting of the House," Rule II.5, and that the House's first "order of business . . . shall be . . . [p]rayer by the Chaplain." Rule XIV.1. There are no other codified requirements or duties for the House Chaplain. Serving as a guest chaplain is a

high honor that comes with important benefits, including recognition by the House and having the guest chaplain's name and invocation recorded in the Congressional Record. Cmplt. ¶¶ 60–68.

The plaintiff, Dan Barker, is an ordained former minister who sought to become the guest chaplain and deliver the opening prayer. When representatives for Barker first proposed his participation to the chaplain's office, the chaplain and his assistants imposed three unwritten, *ad hoc* requirements on Barker: (1) that he be sponsored by a House member, (2) that he be ordained, and (3) that he invoke a higher power during his remarks. None of these three restrictions has been consistently required of other guest chaplains. Cmplt. ¶¶ 118–56.

Barker's guest chaplaincy was sponsored by Rep. Mark Pocan, who first formally requested Barker's inclusion as a guest chaplain on February 18, 2015. Cmplt. ¶¶ 37, 93, Ex. A. The request made clear that Barker met the other unwritten requirements: Barker is ordained and agreed to direct a secular prayer to an appropriately inspirational higher power. Cmplt. ¶¶ 94–106. Upon realizing that Barker met these qualifications, the chaplain and his assistants refined the *ad hoc* requirements, stating that the guest chaplain had to be practicing in the faith in which he was ordained and that the higher power he invoked had to be a supernatural god. Cmplt. ¶¶ 111, 113–17, Ex. E. Other guest chaplains have delivered invocations when they were not ordained, when they were not actively using their ordination to practice, or without invoking a supernatural higher power. Cmplt. ¶¶ 118–156.

After a long delay, during which more than 50 other guest chaplains delivered invocations, the Chaplain denied the request for Barker's inclusion as a guest chaplain. Cmplt. ¶¶ 36–49. The Chaplain has admitted that he has the authority to allow guest chaplains to deliver

the opening invocation. Cmplt. Ex. C. The Chaplain has also admitted that he "cannot tell [guest chaplains] how to pray." Cmplt. ¶¶ 70, 153, Ex. G.

Barker asserts that he was not denied because he did not meet these unwritten *ad hoc* requirements, which have not been equally applied to other guest chaplains. Barker was discriminated against because he is an atheist. The Chaplain denied Barker because he is not religious. Cmplt. 107–117. It is this denial and the *ad hoc*, disparately applied requirements that Barker challenges in this suit.

STANDARD OF REVIEW

The defendants' motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to Barker, this Court finds that Barker has failed to set forth fair notice of what the claim is and the grounds upon which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–55 (2007). The Court must "construe the complaint in the light most favorable to [the] plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations." *In re United Mine Workers of Am. Emp. Benefit Plans Litig.,* 854 F. Supp. 914, 915 (D.D.C. 1994). The Court must give the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Schuler v. U.S.,* 617 F.2d 605, 608 (D.C. Cir. 1979).

A complaint will survive a Fed. R. Civ. P. 12(b)(6) motion if it states plausible grounds for the relief sought. *Twombly*, 550 U.S. at 555. Barker need only have alleged sufficient facts to raise his right to relief above the speculative level. *Id*. The issue is "not whether [Barker] will ultimately prevail but whether [he] is entitled to offer evidence to support the claims." *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167, 184 (2005) (citations omitted).

Barker has met this standard of review and this Court should deny the defendants' motion.

ARGUMENT

I. The Chaplain's conduct violates Barker's rights under the Establishment Clause and Fifth Amendment equal protection.

The defendants have mischaracterized Barker's complaint as either challenging the constitutionality of the House Chaplain as an institution or the practice of delivering opening invocations *at all*. Either of those challenges would be controlled by *Marsh v. Chambers* and its progeny. *See Marsh*, 463 U.S. 783 (1983) (rejecting challenge to practice of opening each legislative session with a prayer offered by a chaplain paid out of public funds); *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983) (rejecting challenge to the payment of salaries to House and Senate chaplains). But neither *Marsh* nor any of the other cases cited by the defendants dealt with facts that involved the systematic exclusion of a class of citizens from delivering regularly scheduled prayers based on their religious status. The cited cases do not directly address the situation presented in this case, let alone foreclose the relief sought by Barker. Defendants urge this court to expand the holding of *Marsh* far beyond its facts, and as such, they have raised an argument on the merits that is improper in a motion to dismiss under Rule 12(b)(6). Their argument does not speak to whether Barker has met his burden to state a claim. If this Court nevertheless entertains the defendants' argument at this early stage, then it should be rejected. Under the Establishment Clause and under the equal protection guaranteed by the Fifth Amendment's Due Process Clause, it is not permissible to exclude the nonreligious from a government program.

A. The Establishment Clause does not permit the House Chaplain to discriminate based on religion.

The Chaplain's conduct violates the Establishment Clause in two ways. First, the Chaplain discriminates along religious lines by imposing requirements that categorically prohibit atheists and other minority religions from giving invocations and by denying atheists who meet those requirements. Second, these requirements entangle government officers in religious judgments.

(1) The Chaplain cannot discriminate against the nonreligious.

The Establishment Clause prohibits governmental bodies from discriminating based on religion: "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). But the Clause extends beyond a mere prohibition on governmental preference between religious sects: "when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith *or none at all*." *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1985) (emphasis added). The U.S. Supreme Court has repeatedly recognized, "the government may not favor one religion over another, or religion over irreligion . . . ." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 875–76 (2005); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1997) (overturning sales tax exemption for religious literature that did not apply to nonreligious literature); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (invalidating law that gave religious adherents an unqualified right not to work on their Sabbaths because it did not give nonreligious employees any comparable right); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961)

(holding that the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers").

The Supreme Court has never been presented with a government prayer program systematically and explicitly engineered to exclude atheists. The closest the Court has come to considering the facts presented in this case was in *Town of Greece v. Galloway*, where the Court stated that it "disagrees . . . that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer." 134 S.Ct. 1811, 1824 (2014). But the Court in *Galloway* did not hold that the Establishment Clause wouldn't *apply* to a prayer program that systematically excluded one set of speakers from delivering prayers. Contrary to Defendants' interpretation, the Court appears to take for granted that the Establishment Clause *would* apply to such a scenario, stating that *Marsh*, on which *Galloway* relies, "requires an inquiry into the prayer opportunity as a whole . . . ." *Id.* at 1824. The Court made such an inquiry in *Galloway*, noted that the town "maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation," *Id.* at 1816, and conditioned its approval of the town's policy on that point: "*So long as the town maintains a policy of nondiscrimination*, the Constitution does not require [additional efforts toward diversity]." *Id.* at 1824 (emphasis added). Because the Chaplain has conjured up discriminatory requirements for participation in the House chaplaincy, those requirements *should* be reviewed under the Establishment Clause, as *Galloway* demonstrates, and they should be held unconstitutional.

At least one federal court reading *Marsh* and applicable Establishment Clause jurisprudence independently arrived at the same non-discrimination standard reiterated in *Galloway*. In *Pelphrey v. Cobb County*, the Eleventh Circuit held that a chaplain selection commission violated the Establishment Clause by removing Jews, Muslims, Jehovah's

Witnesses, and Mormons from a list it used to select invocation givers. 547 F.3d 1263, 1282 (11th Cir. 2008). The Circuit explained that the Clause "prohibits purposeful discrimination" and "the selection of invocational speakers based on an 'impermissible motive' to prefer certain beliefs over others." *Id.* at 1278, 1281 (quoting *Marsh*, 463 U.S. at 793). "The categorical exclusion of certain faiths based on their beliefs is unconstitutional." *Id.* at 1282; *accord Atheists of Fla. v. City of Lakeland*, 713 F.3d 577, 591 (11th Cir. 2013).

Nothing in the case law approving of our country's legislative prayer tradition supports the defendants' outrageous claim that "[t]here can be no 'impermissible government purpose' in excluding atheists" from the House's guest chaplaincy. Motion of the Official Defendants to Dismiss the Complaint ("Def's MTD") at 37. Systematic exclusion of a group of people based on their non-religious beliefs is absolutely an impermissible government purpose. The defendants point to the fact that *Marsh* upheld a state legislature's employment of the same chaplain for sixteen years. But it does not follow that the Supreme Court would allow the explicit exclusion of atheists from serving in that public office. The Chaplain's policies requiring ordination and that prayers be directed to an approved supernatural higher power are facially unconstitutional under the Court's articulated non-discrimination standard. Minority religions that do not ordain leaders or worship a supernatural higher power must be protected from the Chaplain's categorical exclusion. And so must atheists like Barker.

(2) The Chaplain has entangled the government in theological judgments.

The Establishment Clause prohibits governmental bodies from becoming excessively entangled with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 621–22 (1971); *see also Hernandez v. Comm'r*, 490 U.S. 680, 696–97 (1989). The prohibition on governmental entanglement precludes an intrusive inquiry into a person's religious beliefs or the tenets of their

faith. In *Galloway*, the Court applied this principle to reject an argument that invocations at government meetings must be nonsectarian, for such a rule would force governments to become "supervisors and censors of religious speech." 134 S. Ct. at 1822. "Our Government," noted the Court, "is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Id.* The Chaplain's unwritten requirements for guest chaplains and the contents of their invocations violate this principle.

The Chaplain's first requirement, that an invocation be directed to a supernatural higher power, is wholly inappropriate. The Chaplain has not defined the criteria by which he determines whether a higher power is sufficiently supernatural to receive government approval, but there is no acceptable standard for him to adopt. The inquiry itself violates the Establishment Clause. The requirement is tantamount to the evaluation of religious content that the *Lemon* Court held to be "fraught with the sort of entanglement that the Constitution forbids." 403 U.S. at 620 (rejecting a governmental inquiry into how much of a school's expenditures went toward secular education versus religious instruction). Both inquiries ask the government to evaluate the content of speech to determine its level of religiosity. The government "may not seek to define permissible categories of religious speech." *Galloway*, 134 S. Ct. at 1814. Based on this reasoning, the *Galloway* Court accepted that some prayers at Town of Greece meetings "invoked universal themes, e.g., by calling for a 'spirit of cooperation.'" *Id.* The Chaplain's more restrictive requirement is unconstitutional, as is the inquiry itself.

Additionally, the House Chaplain has become excessively entangled with religion by inquiring into the sufficiency of Barker's ordination, which was bestowed and never revoked by a religious entity. Though Barker regularly uses his ordination to perform weddings, the Chaplain determined that Barker is not "practicing" in the faith of his ordination. Being

"ordained" is not an official government designation. The Chaplain unilaterally determined that the changes in Barker's religious beliefs over time effectively nullified his otherwise legitimate ordination. The Chaplain's quest for "religious orthodoxy" "acceptable to the majority" is wholly antithetical to the Establishment Clause. *See Galloway*, 134 S. Ct. at 1822.

B. The Chaplain's requirements violate Fifth Amendment equal protection guarantees.

The defendants do not deny that the Chaplain's requirements for guest chaplains explicitly exclude atheists. They embrace the Chaplain's discriminatory scheme, but blame Barker for "exclud[ing] himself" by choosing to be an atheist. Def's MTD at 1, 37. Defendants ask this Court to reject Barker's equal protection claim "[b]ecause under controlling precedent no fundamental right of Plaintiff has been infringed." Def's MTD at 31 n. 12. Their legal conclusion is based on the flawed premise that *Marsh* and *Galloway* permit the government to overtly discriminate against atheists when selecting invocation givers. This conclusion must be rejected.

The defendants correctly assert, "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." Def's MTD at 35 (citing *Galloway*, 134 S. Ct. at 1819). But neither *Marsh* nor *Galloway* dealt with an historical practice that explicitly excluded atheists and the Supreme Court noted as much in both cases. *See Marsh*, 463 U.S. at 793–94 ("Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause."); *Galloway*, 134 S. Ct. at 1824 ("So long as the town maintains a policy of nondiscrimination, the Constitution does not require [additional efforts toward diversity]."). Barker's Establishment Clause claim is not precluded by *Marsh* or *Galloway* and the defendants offer no other reason for this Court to ignore the

government's overt violation of the equal protection guaranteed to religious minorities and the nonreligious under the Fifth Amendment's Due Process Clause.

The analysis of the Fifth Amendment's equality protection is the same as analysis of the Fourteenth Amendment's equality protection. *Bolling v. Sharpe,* 347 U.S. 497 (1954). The Equal Protection Clause of the Fourteenth Amendment prohibits government from treating citizens differently based on their religious beliefs. *See U.S. v. Armstrong*, 517 U.S. 456, 464 (1996); *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Religion is a "suspect classification" that triggers strict scrutiny. *See Burlington N. R.R. v. Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Strict scrutiny also applies when the government disfavors "a 'discrete and insular' minority," *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *United States v. Carolene Products Company*, 304 U.S. 144, 152-53 n.4 (1938)), that has been "subjected to . . . a history of purposeful unequal treatment, or relegated to . . . a position of political powerlessness." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The Chaplain's refusal to allow nontheists to give invocations is discrimination based on religion, deserving of strict scrutiny review. Strict scrutiny is proper because nontheists have long faced invidious discrimination and been relegated to political powerlessness. Under this standard, the Chaplain's policies and actions must further a compelling governmental interest and be narrowly tailored to that interest. *See, e.g.*, *Miller*, 515 U.S. at 920. Defendants cannot meet this standard.

II. The Chaplain violated Art. VI Cl. 3 by imposing a religious test on those seeking to serve the government as guest chaplains.

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; **but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States**.

U.S. CONST. art. VI, cl. 3 (emphasis added).

There is very little case law interpreting the No Religious Test Clause of our Constitution. *See Am. Atheists, Inc. v. Shulman*, 21 F. Supp. 3d 856, 870 (E.D. Ky. 2014) (recognizing the "limited case law discussing the No Religious Test Clause"). But the text, structure, purpose, and history of the Clause all support a broad, strong interpretation that disallows the government's treatment of Barker. The prohibition on religious tests is among the most emphatic clauses in the Constitution: "no religious test shall ever be required as a qualification to any office or public trust under the United States." The plain meaning of these words creates a comprehensive mandate and the provision should be interpreted in a way that recognizes that strength.

According to Justice Joseph Story, whose famous *Commentaries on the Constitution of the United States* were published in 1833: "This clause is not introduced merely for the purpose of satisfying the scruples of many persons, who feel an invincible repugnance to any religious test, or affirmation. It had a higher objective: to cut off for ever every pretence of any alliance between church and state in the national government." Story noted that the rationale for the religious test prohibition was to stop "bigotry" and "intolerance," what we might term "discrimination" today.[3]

The Clause has two clear components and Barker has pled both. To state a cause of action under the Clause, Barker must plead: (1) the government has imposed a religious test; and (2) the test was a requirement to serve an office or public trust. Barker has sufficiently pled his claim and it should survive the defendants' motion.

---

[3] Joseph Story, *Commentaries on the Constitution of the United States*. 3 vols. 3:§1841 (Boston, 1833) reprinted in *The Founders Constitution*, (The University of Chicago Press) Vol. IV, Art. VI, cl. 3, Document 27, *available at* http://press-pubs.uchicago.edu/founders/documents/a6_3s27.html.

A. The Chaplain has imposed religious criteria (a religious test) to bar Barker from the guest chaplaincy.

The No Religious Test Clause prohibits any bar to a public office or trust that is based on religion, which at the very least includes "religious adherence," *Smith v. Lindstrom*, 699 F. Supp. 549, 561 (W.D. Va. 1988), "fervently-held religious beliefs," *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995), and membership in a religious order or church. *See In re McCarthey,* 368 F.3d 1266, 1270 (10th Cir. 2004). The object of the Clause is "to keep participation in the political community from being narrowed on the basis of religious adherence." *Lindstrom*, 699 F. Supp. at 561. The Clause is a "statement[] about the composition of the American political community, the security of each citizen's status within that community, and their eligibility to participate in that community." *Id.*, *aff'd sub nom. Smith v. Cty. of Albemarle, Va.*, 895 F.2d 953 (4th Cir. 1990).

The Supreme Court noted in *Torcaso* that the government cannot "limit[] public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept." *Torcaso v. Watkins,* 367 U.S. 488, 494 (1961).[4] The government cannot prohibit ministers from taking public office, for a "law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants." *McDaniel v. Paty*, 435 U.S. 618, 632 (1978) (Brennan, J. & Marshall, J., concurring). Like *Torcaso*, *McDaniel* was decided under the Free Exercise Clause, but the same principles underlie both clauses. If ministers cannot be required to eschew their religious belief to provide a public service, then atheists cannot be required to adopt religious beliefs in order to provide a public service.

---

[4] *Torcaso* was not decided under Article VI, but under the Free Exercise Clause of the First Amendment. 367 U.S. at 489, n.1. Nevertheless, it is one of the few cases where the Supreme Court discusses Article VI., clause 3.

The defendants would have this Court read *Torcaso* narrowly, so as to undermine the plain meaning of the No Religious Test Clause. Defendants point out that Barker was not required "to swear an oath of any kind," Def's MTD at 44, but the Clause is necessarily broader and stronger than merely prohibiting religious oaths. The language of the Clause applies broadly to "religious test[s]," not narrowly to oaths. It would defy the plain meaning of "test" to apply it so narrowly and it would be formalistic in the extreme to hold that a mandatory religious oath is prohibited, because it would bar atheists from office, but allow atheists to be barred by means not involving an oath. But even under Defendants' narrow reading, the House Chaplain is essentially requiring a religious oath. The Chaplain requires all who serve the guest chaplaincy to say words that profess a belief in a supernatural higher power. The prayer itself has become an oath.

In addition to requiring that all prayers be to a supernatural higher power approved by the House Chaplain, the Chaplain has imposed another religious test: that guest chaplains be ordained in a church in which they practice. Federal courts have consistently rejected church membership as a permissible criteria for excluding a government officer. *See In re McCarthey,* 368 F.3d at 1270 (LDS Church membership); *Codispoti*, 69 F.3d at 400 (Catholic church membership); *see also Dennis v. U.S.*, 384 U.S. 855, 879 (1966) (posing and rejecting a hypothetical church membership requirement under Article VI). Barker has pled sufficient facts to conclude that the Chaplain has imposed a "religious test" on him for Article VI purposes.

B. The Chaplain has barred Barker from an office or public trust under the United States.

The guest chaplaincy should be considered a federal "office" under the United States because the guest chaplain fulfills every duty required of the Chaplain. Barker has alleged, and the defendants do not dispute, that the chaplaincy itself is "an office or public Trust," despite the fact that the officer has but one duty under the House Rules: to give the opening prayer before

Congress. When the entirety of an officer's official duties are transferred to another party, it stands to reason that the other party has assumed that office, if only for a limited time. The guest chaplain fills in as House Chaplain. Since the Chaplain is an officer subject to Article VI, the guest chaplaincy should also be subject to the No Religious Test Clause.

But even if this Court rejects the argument that the guest chaplaincy is an "office" under the meaning of the No Religious Test Clause, the guest chaplaincy is still subject to the Clause as a "public Trust." The No Religious Test Clause necessarily covers more than the federal offices enumerated in the language that precedes it. Clause 3 of Article VI begins by binding "Senators, Representatives, . . . Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States" to an oath. It then expands that list to ban religious tests for "*any* office *or* public trust under the United States." U.S. CONST. art. VI, cl. 3 (emphasis added). Had the Framers wished the religious test ban to have a more limited reach, the Clause would have reiterated or trimmed the list of federal officers just mentioned. Instead, the language expands the reach to public trusts under the United States.

The history of the Clause reveals a broad original intent, consistent with the plain meaning of the text. The Clause was in part a reaction to the religious tests imposed on citizens in England. *See, e.g.,* Story, *Commentaries*, 3:§1841 ("The history of the parent country, too, could not fail to instruct [the Framers] in the uses, and the abuses of religious tests."). The "parent country's" religious tests were not limited to government offices, but encompassed all manner of public trusts. "In England dissenters from the established church were subject to the civil disability of exclusion from public office, as well as from the practice of law, medicine, or any other liberal profession." *Donovan v. Tony & Susan Alamo Found.*, 722 F.2d 397, 401 n.15

(8th Cir. 1983), *aff'd sub nom. Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (citing J.R. Tanner, *Constitutional Documents of the Reign of James I*, 109 (1930)).

Federal courts have held true to this historically broad interpretation. While the Clause has not been read to "stretch" to 501(c)(3) nonprofits,[5] it likely includes marriage celebrants,[6] witnesses or jurors,[7] and notaries public.[8] Like the guest chaplaincy, these are all positions of public service to which the government controls access.

The defendants' cramped reading of this Clause, that it requires "the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary, " is based on *United States v. Germaine*, which did not involve the No Religious Test Clause, but a criminal statute with narrower language and a different structure and history. 99 U.S. 508, 511–12 (1878). The relevant part of the statute read: "Every officer of the United States," which does not include public trusts. *Id.* at 509. If not an "office" within the meaning of the Clause, the guest chaplaincy is at least a public trust, similar to the ceremonial position granting "the authority to solemnize marriages." *Martinez*, 846 F. Supp. 2d at 1145. Like the guest chaplain, a marriage celebrant performs a task that is traditionally considered religious, but is not exclusively so. Both positions are occasional or temporary and do not fit the more limited definition of an "officer" from *Germaine*.

Under the defendants' restricted reading of the Clause, the government could impose a religious test for a whole host of positions, including attorneys, officers of the court, poll

---

[5] *Am. Atheists, Inc. v. Shulman*, 21 F. Supp. 3d 856, 870–71 (E.D. Ky. 2014).
[6] *Martinez v. Clark County,* 846 F. Supp. 2d 1131, 1145 (D. Nev. 2012).
[7] *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1220–21 (5th Cir. 1991), *on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (Garwood, J., dissenting) (discussing the No Religious Test Clause applying by logical extension to "witnesses, jurors, or the like").
[8] *See Torcaso v. Watkins,* 367 U.S. 488, 494 (1961) (noting that in the underlying case it was "conceded that the office of notary public is an office of profit or trust").

observers, jurors, witnesses, and any position or profession that requires a government license such as notaries, doctors, nurses, psychologists, social workers, engineers, architects, and even tradesmen. This narrow reading is untenable. Government control of a position that serves the government or the public interest is the defining characteristic of a "public Trust under the United States," and those same characteristics apply to the guest chaplaincy. The position is wholly regulated by the House Chaplain and its purpose is to further Congress's "interest in solemnizing the day's legislative proceedings." *See* Def's MTD at 1. The Chaplain has refused to extend the high honor of serving as guest chaplain to Barker because of Barker's convictions regarding religion. This amounts to a religious test for an office or public trust under the United States, in violation of clause 3 of Article VI.

III. Barker has standing to assert claims for unlawful discrimination.

The question of standing is resolved by a three-part test, which the Supreme Court laid out in *Lujan v. Defenders of Wildlife*:

> 1. The plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.
> 2. There must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant.
> 3. It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. 555, 560–61 (1992). Barker has met his burden under each prong of the standing test, especially given that at the pleading stage "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889 (1990) (internal quotations and citations omitted)).

Many of the defendants' arguments on standing result from a misreading of the complaint. Barker is not challenging the constitutionality of the House Chaplain or the general practice of having daily prayers. This lawsuit is not an oblique or surreptitious attack on either the prayers or chaplaincies.[9] Barker is challenging the Chaplain's discrimination against him as an atheist.[10]

The Supreme Court has twice upheld legislative prayer, stating that even atheists and laypeople are permitted to give those prayers, and Barker seeks to be part of the hallowed tradition the defendants' motion so capably laid out in its first pages. Barker seeks to serve his government. His inclusion would also be a meaningful historic event for the nonreligious: he would be the first atheist to give the opening invocation before the House. But the House Chaplain has examined Barker's religious beliefs and barred him from serving as guest chaplain, denying him this unique, historic opportunity on account of his religious beliefs.

A. Barker has suffered actual, concrete, and particularized injuries and has alleged sufficient facts to establish these injuries.

Barker faced continually augmented *ad hoc* requirements during his request to serve as guest chaplain, requirements that were not imposed on anyone else. He suffered an extensive

[9] Defendants' cited cases addressing questions about the constitutionality of chaplains and legislative prayer in general, such as *Murray* and *Newdow*, simply do not apply because these questions are not at issue in the present case. *See Murray v. Buchanan*, 720 F.2d 689, 690 (D.C. Cir. 1983) ("The Court answered the question presented in *Marsh* with unmistakable clarity: The 'practice of opening each legislative day with a prayer by a chaplain paid by the State [does not] violate[ ] the Establishment Clause of the First Amendment.'"); *Newdow v. Eagen*, 309 F. Supp. 2d 29, 32 (D.D.C. 2004) (describing an "action to challenge Congress's practices regarding legislative prayer and chaplains"), *dismissed for lack of prosecution*, No. 04-5195, 2004 WL 1701043 (D.C. Cir. July 29, 2004).

[10] Barker does bring a claim under RFRA challenging the House Rules and the House of Representatives as the government entity in charge of adopting, carrying out, and modifying those rules. This is not done in an effort to repeal those Rules, but because the defendants have cited those House Rules as providing some sort of legal protection to the Chaplain. Barker contends that the House Rules provide no such protection and that they are, in fact, consistent with the relief Barker requests from this Court. *See* section 5., *infra*.

delay and an intrusive inquiry both into the depth of his religious beliefs and the content of his planned prayer. And in the end, he was denied the opportunity to serve the House as guest chaplain because he is an atheist. Defendants have caused Barker three distinct injuries: 1) a personal exclusion injury; 2) discrimination as a member of a class; and 3) a stigmatic injury.

(1) Barker has suffered a personal exclusion injury.

The Court need not conduct an extensive inquiry into the injuries suffered by Barker, since the Court of Appeals for the District of Columbia has previously recognized a concrete, particularized injury on nearly identical facts. *See Kurtz v. Baker*, 829 F.2d 1133, 1142 (D.C. Cir. 1987) (finding allegation "that Kurtz has been prevented from addressing each house of Congress . . . satisfies Article III's injury requirement because it is sufficiently personal and concrete.") Barker has suffered the same concrete, particularized exclusion injury suffered by Kurtz. Any factual differences between the two cases only exacerbate the injury suffered by Barker. As the complaint makes plain, unlike Kurtz, Barker had met all the requirements the Chaplain imposed, including sponsorship by a House member, and was still excluded. For the purposes of defendants' motion to dismiss, the Court can end its inquiry here. Still, unlike in *Kutz*, the exclusion injury is not "the sole allegation of injury reasonably implied in the complaint that is judicially cognizable." *Id.* Barker has also suffered other injuries.

(2) Barker has suffered discrimination based on his religious beliefs and membership in a class.

In cases involving equal protection and discrimination, "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, . . . [t]he 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 666 (1993). Individuals who are denied a government benefit

or the opportunity to participate equally in public service have standing to challenge that denial. *Id.*; *Turner v. Fouche,* 396 U.S. 346, 362 (1970) (noting that citizens have standing to vindicate "a federal constitutional right to be considered for public service," including jury duty, "without the burden of invidiously discriminatory disqualifications," such as race); *Clements v. Fashing,* 457 U.S. 957 (1982) (a justice of the peace had standing to raise an equal protection challenge to a statute imposing a two-year waiting requirement on seeking higher office); *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 281 n.14 (1978) (holding that denial of opportunity to compete for admittance into medical school class based on applicant's race was an injury that conferred standing).

To establish standing in discrimination cases the party "need only demonstrate that it is able and ready" to participate in the government program "and that a discriminatory policy prevents it from doing so on an equal basis." *City of Jacksonville*, 508 U.S. at 666. Barker is willing and able to give the opening prayer and has met all the legitimate requirements. The Supreme Court itself has recognized that atheists can participate in legislative prayer, and indeed must be granted the chance to do so if they seek it out. *Galloway* at 115; Cmplt. ¶¶ 1, 80–88. The only barriers to Barker's participation are the discriminatory *ad hoc* requirements added by the Chaplain in order to exclude Barker and other atheists from participating equally.

Unlike in *Kurtz*, Barker has also suffered an exclusion injury as a member of a class, not just as an individual. Cmplt. ¶¶ 75–80, Ex. F at 13. Kurtz's class injury failed because he made "no attempt to allege that the mere fact of receiving a favorable response from [the House or Senate Chaplain] would have been of any value to Kurtz, aside from its furtherance of his ultimate goal of actually addressing each house." *Id.* at 1141. The same cannot be said here. Barker has alleged that two classes of people: those who do not believe in a supernatural higher

power and those who have deeply held beliefs but do not issue ordinations, are excluded by the Chaplain's discriminatory requirements. As an atheist, Barker is a member of both classes.

(3) Barker has also suffered a stigmatic injury as a result of the government's discrimination.

The Supreme Court has "repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (*citing* eight other Supreme Court cases). Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy the injury requirement for standing if the plaintiff identifies "some concrete interest with respect to which [he is] personally subject to discriminatory treatment" and "[t]hat interest independently satisf[ies] the causation requirement of standing doctrine." *Allen v. Wright,* 468 U.S. 737, 757 n. 22, *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components,* 134 S.Ct. 1377 (2014).

In this case, Barker has personally suffered discrimination, humiliation, and denigration, plus a concomitant loss of benefits, honors, and congressional recognition, solely as a result of his religious convictions. *See Id.* at 755, (noting that a stigmatic injury confers standing "only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct"); *Heckler,* 465 U.S. at 740 (noting that plaintiff had standing because he was personally denied government benefits that similarly situated women received). Barker personally suffered the loss of government benefits and the opportunity to be considered for public service, and he has thus been personally subjected to the associated stigmatic injury. *See Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014) ("Because [plaintiffs] highlight specific, concrete instances of

discrimination rather than making abstract allegations, their stigmatic injuries are legally cognizable."), *cert. denied*, *Schaefer v. Bostic*, 135 S. Ct. 308 (2014).

Troublingly, the defendants attempt to downplay the harm to Barker by arguing that he "has derived more 'notoriety from the *denial* . . . than he could have hoped to gain from delivering a brief secular invocation." Def's MTD at 11. The contention that it is a benefit to suffer religious discrimination by the government should not be entertained. It is a common refrain of the oppressor that discrimination is done "for the good" of the oppressed. But it must be rejected.[11] Even if the publicity surrounding the discrimination were a benefit,[12] that does not mean Barker was not injured. Barker chose to shine a light on the injury and expose the discrimination, rather than silently accepting it. But he still suffered discrimination and was denigrated because of his atheism, stigmatizing him and all atheists. If the Chaplain's denial stands, Barker will not have the opportunity to serve the House, his remarks will not appear in the Congressional Record, he will not be introduced by his U.S. Representative, and he will not go down in history as the first atheist to deliver an invocation before the House. These injuries are real, not conjectural, and are easily traceable to the defendants' actions.

[11] To borrow from C.S. Lewis, "Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . those who torment us for our own good will torment us without end for they do so with the approval of their own conscience." *The Humanitarian Theory of Punishment*, (1952); *see also U.S. v. State of Miss.*, 229 F. Supp. 925, 986 (S.D. Miss. 1964) (noting that the true purpose Mississippi's 1890 constitutional convention was racial discrimination, and that the convention's president "Of the Negroes" reportedly stated, "We want them here, but their own good and our own demands that we shall devise some means by which they shall be practically excluded from government control") (Circuit Judge John R. Brown, dissenting and ultimately vindicated when the decision was *rev'd sub nom.* in *United States v. Mississippi*, 380 U.S. 128 (1965)).

[12] The defendants have also alleged that the Freedom From Religion Foundation, which works to end unwarranted stigma against atheists has placed ads regarding the discrimination Barker has faced. FFRF is not a party in this lawsuit and Barker did not seek to give the opening invocation in connection with his duties as a co-president of FFRF. Cmplt. ¶¶ 103, 112.

B. The defendants' actions caused Barker's injury.

The causation requirement for standing is not as strict as in other contexts; it "requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014) (distinguishing Article III causation requirement from proximate cause requirement). Defendants claim that this case is controlled by the outcome in *Kurtz*, where the court held the plaintiff's injuries were not fairly traceable to the defendants' actions "because (1) there is no allegation that the chaplains had discretion to grant appellant's requests, and (2) such an allegation would in any event be untenable." *Kurtz v. Baker*, 829 F.2d 1133, 1142 (D.C. Cir. 1987). Neither is true here. Barker has alleged that the Chaplain has discretionary authority to approve Barker as a guest chaplain and the now-existing case law demonstrates that Barker's request is tenable.

The causation analysis in this case significantly differs from *Kurtz*. Not only is there a "fairly traceable" causal connection between the defendants' discriminatory conduct and Barker's injuries, the connection is plain. Defendants discriminated against Barker in several distinct ways. The Chaplain and his staff disparately applied unwritten requirements to Barker that were not applied to other guest chaplains, they intrusively inquired into Barker's nonreligious beliefs and the message he hoped to deliver, and they extensively delayed processing Barker's request—more than 50 guest chaplains, including several who did not meet the ordination requirements, gave prayers from the time Barker met all the requirements until he was denied. *See* Compl. ¶¶ 123–41. Additionally, the denial itself violated Barker's rights and subjected him to discrimination based on his religious convictions.

There can be no doubt that the defendants, and in particular the Chaplain, have discretionary authority to allow Barker to serve as guest chaplain. He has admitted as much in

writing: "I . . . from time-to-time have *exercised my discretion* to invite guest chaplains . . . ." Cmplt. Ex. C (emphasis added). Not only has he admitted that he has the "discretion," the Chaplain and his assistants have scheduled and approved approximately 274 guest chaplains during Conroy's tenure in the Chaplain's Office.[13] Barker has alleged this and the defendants have admitted it.

Moreover, Barker's allegation is beyond tenable. While Kurtz was seeking special treatment—either to deliver a prayer despite his lack of legislative sponsor or in the alternative to address Congress after the prayer, *see Kurtz*, 829 F.2d at 1135–36—Barker is seeking to be treated equally within the House Chaplain's established guest chaplaincy practice. In essence, Kurtz wanted a privilege only extended to "the President of the United States and foreign heads of state." *Id.* at 1142. Barker seeks a benefit extended by Chaplin Conroy to more than 274 others since May 2011. And while the *Kurtz* court may have considered the delivery of a nonreligious statement during the time normally reserved for prayer "a suspension of ordinary common sense that this court need not indulge," *Kurtz*, 829 F.2d at 1138, the Supreme Court has since explicitly indulged this possibility in *Galloway* and found it tenable. *See Galloway*, 134 S.Ct. at 1816 (noting ". . . a minister or layperson of any persuasion, including an atheist, could give the invocation"); *id.* at 1824 (emphasizing that the town "would welcome a prayer by any minister or layman who wished to give one" and approving of its practice "[s]o long as the town maintains a policy of nondiscrimination").

[13] 274 guest chaplains were approved from May 25, 2011 through the end of 2015. From 2000 through the end of 2015, guest chaplains have delivered 857 opening invocations, about 40 percent of all opening invocations. The Chaplain argues that his discretion is limited by the House Rules, which call for a "prayer." But this argument is unavailing. The delivery of a secular invocation is equivalent to the delivery of a prayer. *See* section 2.C., *infra*.

What the *Kurtz* court did not indulge, the idea of secular prayer, has since taken place more than 75 times around the country. *See* Cmplt. ¶¶ 80–88. The *Galloway* Court recognized the consistency of prayers that "invoked universal themes, e.g., by calling for a 'spirit of cooperation.'" 134 S. Ct. at 1814. In fact, the House of Representatives itself, with defendant Conroy serving as House Chaplain, has opened with at least a few prayers that were not directed to a supernatural higher power, but to the "spirit of life that unites all people," "the spirit of truth and reconciliation," or to no specifically named higher power at all. *See* Compl. ¶¶ 146–151.

The government has argued that the Chaplain alone, and not the other defendants, are the cause of Barker's injury. Def's MTD at 12–13. But Barker has sufficiently alleged that each defendant is a cause of his injuries. The Chaplain's assistants, Aglieco and Bronson, were the first to communicate the unwritten requirements to plaintiff's attorneys, even explaining that they were unwritten. They were also the point of contact for Barker during the "extensive and unreasonable delay" he faced in getting approval, itself a form of discrimination. *See, e.g.,* Cmplt. ¶¶ 36, 42, 44–47, 172. Further discovery may reveal the extent of their role in the discrimination, but the allegations are sufficient to show that the delay that Barker has complained of is fairly traceable to Aglieco and Bronson, as is, possibly, the invention of the unwritten criteria which appear to have been applied only to Barker.

The Speaker has a duty to ensure officers comply with the House Rules, the law, and their oaths to uphold the Constitution, including the provisions that provide Barker his causes of action. Under the House Rules, Defendant Ryan controls the Capitol facilities (House Rules I.3), controls access to the floor (Rule V.4(b); V.5), decides Questions of Order (I.5), exercises a great measure of control over the House Officers (Rule II), and is generally responsible for the smooth running of the House. The first item of business, which is controlled by the Speaker, is the

prayer. Rule XIV. Speaker Ryan is also partially responsible for ensuring that House Rule XXIII, the House's Code of Official Conduct, is enforced and Rule 9 states "A Member, . . . officer, or employee of the House may not . . . otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the race, color, [or] religion . . . ." Speaker Ryan also injured Barker by failing to halt the chaplain's discrimination under these rules and permitting the chaplain and his assistants to create unwritten *ad hoc* requirements that only applied to Barker.

The House of Representatives caused Barker's injuries to the extent that House Rules II.5 and XIV.1 are determined to be the basis for his denial. Barker argues primarily that the House Chaplain's unwritten, *ad hoc* requirements for the guest chaplaincy are not required by the House Rules, but the defendants themselves have argued that "the House Rules do not permit [Barker] to deliver a secular invocation . . . ." Def's MTD at 13. As the entity with sole authority to change the House Rules, the House of Representatives is therefore potentially a cause of Barker's injury.[14]

C. This court can redress the injury Barker has suffered.

The final standing issue is the redressability inquiry, which "poses a simple question: If plaintiffs secured the relief they sought, would it redress their injury?" *Wilderness Soc'y v. Norton*, 434 F.3d 584, 590 (D.C. Cir. 2006) (punctuation omitted). Yes, it would. Defendants advance several alternative theories to avoid judicial review of the Chaplain's conduct. In addition to the Political Question Doctrine, addressed in section 4., *infra*, the defendants claim

[14] Moreover, the House of Representatives has waived sovereign immunity under the Religious Freedom Restoration Act and Barker has alleged a *prima facie* case under RFRA. *See* sections 5. & 6., *infra.*

that *Kurtz* precludes judicial review and that the House Rules prohibit a secular invocation. Both of these arguments lack merit.

As discussed above, *Kurtz* presented a different factual record to the present case. Paul Kurtz did not have a congressional sponsor, whereas Barker does. Kurtz sought special treatment to give an unprecedented speech to Congress, whereas Barker asks for equal treatment under a guest chaplaincy that has included nearly 900 guest chaplains since the year 2000. For Kurtz, even had the court ordered the relief he sought, there was little chance that he would have achieved his goal. For Barker, the only bar to his inclusion in the guest chaplaincy are the Chaplain's unwritten discriminatory requirements and denial, which can be properly redressed by this Court.

The crux of the government's other argument, that the House Rules preclude Barker's secular invocation, relies on an untenable assumption: that the word "prayer" in the House Rules confines the opening remarks to messages directed to a god. At its core, this is a question of statutory interpretation and the government has asserted, without support, that the definition of "prayer" should be confined to its most narrow meaning, the meaning used within the context of worship. *See* Def's MTD at 34 n.14. But not all prayers are messages to a god and the word enjoys broad use outside the confines of churches. Indeed, not all the prayers given before the House have met the government's narrow definition. *See* Cmplt. ¶¶ 146–53.

To understand what Congress might have meant in 1880 when it adopted a rule requiring "prayer" at the opening of each legislative day, we look to a contemporary definition of "pray," which meant "to entreat; to ask with earnestness; to supplicate; to address or petition the Supreme Being; to ask with reverence and humility." James Stormonth, *A Dictionary of the*

English Language (1882).[15] We see from this contemporary definition that the meaning of "prayer" is broader than the defendants contend. It encompasses divine supplication, to be sure, but the word also refers to additional acts that are not inherently religious. While Defendants have urged this Court to adopt a narrow reading of the term "prayer," claiming that it is the "plain meaning" of the word, *see* Def's MTD at 19, the Supreme Court itself has interpreted the term more broadly in the legislative prayer context. The *Galloway* court used "prayers" and "invocations" interchangeably throughout its decision and notes that prayers can "vary in their degree of religiosity" and invoke "values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." 134 S.Ct. at 1823. The *Marsh* court similarly referred to "prayers" and "invocations" interchangeably, in both the majority opinion and dissent. *Marsh v. Chambers*, 463 U.S. 783 (1983).

Additionally, the defendants' narrow interpretation of "prayer" is untenable as a legal matter because their interpretation would entangle the House of Representatives in religious ideology by requiring that the House be the final arbiter of what constitutes a god and what messages are sufficiently religious to qualify as prayer. When two possible statutory interpretations exist and one would create an unconstitutional outcome, it must be abandoned for the other interpretation. *See U.S. v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.").

Similarly, an argument from history is unpersuasive. Though the *Marsh* court observed in dicta that *at the time* all of the Nebraska Legislature's prayers shared the common feature of

---

[15] This dictionary was cited by Justice Antonin Scalia, known for the high value he placed in original intent, as one of "the most useful and authoritative" contemporaneous usage dictionaries for the English language for the period from 1851–1900. *See* Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2D 419, 425 (2013).

invoking "Divine guidance," it is fallacious to conclude that all prayers therefore *must* conform to that historical artifact. The same fallacious logic would preclude a woman from being President of the United States, since thus far all sitting presidents have been men. It is true that in reference to the President, Article II states "*He* shall hold *his* office during the term of four years . . ." and thus suggests that the original drafters may not have considered the possibility of a woman serving as president. But that historical artifact is not controlling. There is little evidence that the Framers actively considered whether women could serve as president and therefore no reason to conclude that the constitutional text precludes it. Similarly, there is no evidence that secular invocations were expressly considered and rejected when the House of Representatives adopted its Rules in 1880. Moreover, federal courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Both the "only men can be President" theory and the defendants' interpretation of the House Rules are constitutionally infirm, placing adjudication of their logical fallacies firmly within the purview of federal courts.

The House of Representatives and its officers have discriminated against Barker because he is nonreligious. Their actions and policies have violated Barker's rights under the nondiscrimination and entanglement principles of the Establishment Clause; under the equal protection component of the Fifth Amendment; the ban on religious tests in Article VI; and potentially under the Religious Freedom Restoration Act. This discrimination was caused by the defendants and can easily be remedied by this Court.

Barker has standing to challenge this discrimination and the Court should hear his claim.

IV. Barker's claims do not raise political questions that would preclude judicial review. Whether the House can discriminate against a guest chaplain because of his religious convictions is a justiciable question.

> "The constitution empowers each house to determine its rules of proceedings. *It may not by its rules ignore constitutional restraints or violate fundamental rights*, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."

U.S. v. Ballin, 144 U.S. 1, 5 (1892) (emphasis added).

Defendants urge this Court to decide that "federal courts cannot substitute their determination for that of the House regarding the content of its Rules or the identity of non-Members permitted to enter the floor of the House to address the House." Def's MTD at 17. But as the Supreme Court recognized in *Ballin*, there must be constitutional limits on how the House governs itself. Under the defendants' rationale, there could be no legal recourse if the House decided through its rules that no African American could ever serve as Clerk of the House or that a woman could never be Sergeant at Arms. This result would be both unjust and not in keeping with the Supreme Court's interpretation of the separation of powers. A decision by the House or its officer to withhold the benefits of the guest chaplain program from those who do not believe in a god is likewise constitutionally suspect and properly justiciable.

When an officer of the House has interpreted House Rules to preclude an entire class of citizens based on their nonreligious identity, that scenario raises precisely the type of constitutional question that is within the jurisdiction of federal courts. *Cf. Davis v. Passman*, 442 U.S. 228 (1979) (finding Fifth Amendment cause of action for sex discrimination against U.S. Congressman); *Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984) (finding cause of action in suit challenging sex discrimination in policy of the House Subcommittee on Services of the House of Representatives Committee on House

Administration). A controversy is only nonjusticiable as a political question where "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon v. U.S.*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). In *Nixon*, the Court was asked to exercise judicial power over the Senate's impeachment trial of a federal judge. 506 U.S. 224 (1993). The Court noted that the Senate's power to try impeachments is textually committed to the Senate by use of the words "sole Power" in U.S. Const. art. I, § 3, cl. 6. *Id.* at 229–34. Moreover, the Court noted that judicial review of the Senate's impeachment power would be inconsistent with the Framers' insistence on a system of checks and balances. The Senate's impeachment power "was designed to be the only check on the Judicial Branch by the Legislature," and thus, judicial review of that power would be "counterintuitive." *Id.* at 234–35. Unlike in *Nixon*, there is no similar "textually demonstrable constitutional commitment" under the Rulemaking Clause for the House to discriminate against guest chaplains (*see* subsection A., *infra*) or under the Speech or Debate Clause (*see* subsection B., *infra*). Furthermore, it would not be "counterintuitive" for this Court to review the House Chaplain's policy for violations of constitutionally protected rights. That review is consistent with our Constitution's system of checks and balances (*see* subsection C., *infra*).

A. The Rulemaking Clause does not textually commit to the House the ability to discriminate amongst speakers in its legislative prayer program based on religious or nonreligious convictions.

To determine if the text of the Constitution demonstrably commits a power to a co-equal branch of government, courts must "interpret the text in question and determine whether and to what extent the issue is textually committed." *Nixon*, 506 U.S. at 228 (citing *Powell v. McCormack*, 395 U.S. 486, 519 (1969)). Defendants first cite the Rulemaking Clause, U.S.

Const. art I, § 5, cl. 2, as the relevant constitutional provision. But when properly interpreted, the Clause does not commit to the House the power to discriminate amongst speakers based on their nonreligious status. Nor does it prevent the judiciary from reviewing such an illegal act.

Defendants incorrectly characterize Barker's request for relief as a request that this Court "substitute" its own rules for those adopted by the House. Def's MTD at 17. But Barker asks only that this Court review the House Chaplain's discriminatory requirements and rule them unconstitutional. Defendants cannot convincingly argue that this falls outside the Court's power, for the United States Court of Appeals for the District of Columbia has already rejected such an overbroad interpretation of the political question doctrine: "Art. I simply means that neither [the Judiciary] nor the Executive Branch may tell Congress what rules it must adopt. Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity." *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. App. 1983), *cert. denied* 464 U.S. 823 (1983). The House Chaplain's rules prohibiting otherwise qualified nonreligious persons from benefiting from the guest chaplain program are constitutionally infirm. This Court may rightfully rule as such.

But the Rulemaking Clause does not prohibit judicial review for a more fundamental reason: there is no legislative rule at issue. The U.S. District Court for the District of Columbia has had previous occasion to decide whether Congress's rulemaking authority prevents judicial review of the House and Senate Chaplains' guest chaplain programs. It concluded that judicial review was appropriate. In *Kurtz v. Baker*, the Honorable Judge Oberdorfer first noted, "no House or Senate rule authorizes the Chaplains to invite guest chaplains, and no rule authorizes disparagement of others' beliefs by the Chaplains," and then concluded, "plaintiff does not directly challenge House or Senate rules. He challenges the discretionary behavior of their

chosen Chaplains. The Chaplains occupy publicly-funded offices and thus their conduct in those offices is subject to judicial scrutiny for adherence to the Constitution." 630 F. Supp. 850 (1986) (*citing Vander Jagt*, 699 F.2d at 1173, *Ballin*, 144 U.S. at 5, *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir 1983)), *vacated on other grounds*, 829 F.2d 1133, 1137 (1987) ("[W]e do not reach the political question issue."). It cannot be the case that the House Chaplain's discretionary behavior is "textually committed" to Congress under Article I. The Rulemaking Clause does not apply.

B. The Speech or Debate Clause does not apply to the House Chaplain's legislative prayer program.

Defendants cite the Speech of Debate Clause as a second relevant constitutional provision, but the Clause does not apply to the House Chaplain's policy, which is not a legislative act and does not fall within the "legislative sphere" in a meaningful way. "The 'fundamental purpose' of the Speech or Debate Clause is to 'free[] the legislator from executive and judicial oversight that realistically threatens to control his conduct *as a legislator*.'" *Walker v. Jones*, 733 F.2d 923, 931 (D.C. Cir. 1984) (emphasis added by Ginsburg, J.) (citation omitted). The absolute immunity secured by the Clause is not all-encompassing. *Id.* at 929. "Activities 'casually or incidentally related to legislative affairs,' [*U.S. v. Brewster*, 408 U.S. 501, 507 (1972)] but not 'part and parcel of the legislative process,' [*Gravel v. U.S.*, 408 U.S. 606, 626 (1972)] are outside the realm of Speech or Debate protection." *Id.* Thus, the Clause protects "[a]ctivities integral to the legislative process," *id.*, such as conducting committee hearings, *Gravel*, 408 U.S. at 624; and "resolutions and the act of voting" *Powell*, 395 U.S. at 502. But is does not protect "peripheral activities not closely connected to the business of legislating," *Walker*, 733 F.2d at 929, such as the hiring and firing of a food service manager, *Id.* at 930; the accepting of bribes, *Brewster*, 408 U.S. at 510; or the private publication of classified information, *Gravel*, 408 U.S. at 625–26.

The Court need only follow the reasoning in its previous holding to conclude that the House's guest chaplain program falls into the latter category of "peripheral activities" and thus is not protected from judicial review by the Speech or Debate Clause. When the U.S. Court of Appeals for the District of Columbia previously heard a challenge to the House Chaplain's guest chaplain program, the majority did not reach the defendants' Speech or Debate Clause defense. But then-Circuit Judge Ruth Bader Ginsburg did reach that issue in her dissent: "In accord with the district court, *see* 630 F. Supp. at 856–57, I find no threshold blockage to Kurtz's claim against the chaplain[] . . . by reason of the Speech or Debate Clause. While inspirational, prayer in Congress does not appear to be 'integral to lawmaking.'" 829 F.2d at 1146 n. 2 (Ginsburg, J., dissenting as to lack of standing) (citing *Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984)). While prayers by guest chaplains physically occur on the floor of Congress, this does not place the prayers within the "legislative sphere" in a meaningful way. *See Kurtz*, 630 F. Supp. at 856. The prayers are not a matter of legislative business, as evidenced by the fact that a quorum need not be present during the Chaplains' prayers. *Id.* (citing 6 C. Cannon, Precedents of the House of Representatives § 663 (1936) (prayer by the Chaplain "is not a matter of business, but . . . a matter of ceremony")).

Rather than contend with the directly-on-point reasoning in *Kurtz*, the defendants offer up *Consumers Union* as an example of legislative activity that they claim is analogous to the ceremonial guest chaplaincy. But that case presented a far different situation, where the House and Senate had adopted extensive rules governing the management of, and access to, their press galleries. *See Consumers Union of U.S. Inc. v. Periodical Correspondents' Assn.*, 515 F.2d 1341, 1343–45, 1347 n. 12 (1975) (describing rules that require an application for admission with an exhaustive list of limitations, including certification that correspondents are "not engaged in paid

publicity or promotion work," not engaged in pending litigation against Congress, not employees of a legislative or executive department, not employees of a foreign government, and not employees of a stock exchange, board of trade, brokerage house, person or corporation having legislation before Congress, among others). All of these requirements were *explicit decisions* by Congress that the Court concluded were protected as legislative acts. In contrast, the House Rules make no mention of a guest chaplain program at all and there are no written requirements, let alone legislated requirements, for who can serve as a Guest Chaplain.

Moreover, in *Consumers Union* the House explicitly charged the Sergeant at Arms with maintaining order under the direction of the Speaker of the House. *Id.* at 1345. This charge necessarily included enforcing the House's rules governing its galleries, and thus, the Court rightfully concluded that there could be "no reasonable contention that appellants were acting in a private capacity or not pursuant to rules validly enacted by Congress." *Id.* at 1350. There is no similar Congressional charge for the House Chaplain. *See Kurtz*, 630 F. Supp. at 856. Indeed, the House Chaplain's adoption of a guest chaplaincy may *contradict* House Rules, which state that the first order of business at the start of each day's session shall be a prayer "*by the Chaplain*." Rule XIV.1 (emphasis added). It certainly cannot be the case that the Speech or Debate Clause was meant to insulate an officer of the House from liability for actions at odds with House Rules. Even if not explicitly contradictory to the House Rules, the guest chaplaincy was neither designed nor mandated by the House. The rationales justifying protection for legislators under the Speech or Debate Clause simply do not apply.

C. Judicial review for the violation of fundamental constitutional rights is consistent with the separation of powers.

Defendants raise the specter of separation of powers, arguing that by issuing relief in this case the Court would demonstrate a "lack of respect" for a co-equal branch of government. But the cases cited by Defendants where the court exercised equitable discretion all differ significantly from the present case: they all dealt with *internal* disputes between members of a legislative body. *See Brown v. Hansen*, 973 F.2d 1118, 1119 (3rd Cir. 1992) (describing the case as arising "out of a dispute between two factions of the Virgin Islands Legislature"); *Vander Jagt*, 699 F.2d at 1167 ("Fourteen Republican Members of the House of Representatives have sued the House Democratic leadership . . . ."); *Harrington v. Bush*, 553 F.2d 190, 214 (D.C. Cir. 1977) ("What appellant would have us do here is to intervene on behalf of one member of the Legislative Branch to change 'the rules of its proceedings' adopted by the entire body of the House. This we should not do."). The D.C. Appellate Court explicitly noted in *Vander Jagt* that it was exercising its remedial discretion to dismiss the case on separation of powers grounds *because* the case involved "some members of Congress against others." 699 F.2d at 1174–75. A private plaintiff's suit does not raise the same separation of powers concerns. The court found persuasive its earlier decision in *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir. 1981), a case where a senator sued officers of the executive branch:

> The court ultimately dismissed the suit because the senator's fellow legislators were 'capable of affording him substantial relief.' 656 F.2d at 882. The court further noted, however, that a private plaintiff challenging the same statute might well be able to resist dismissal. "Because such a private plaintiff's suit would not raise separation-of-powers concerns, the court would be obliged to reach the merits of the claim." 656 F.2d at 881.

Vander Jagt, 699 F.2d at 1174–75 n. 24.

The Court of Appeals has since called into question *Riegle*'s separate and distinct suggestion that suits by legislators should be dismissed *only* when a private party could bring the same claim. *See Melcher v. Federal Open Market Comm.*, 836 F.2d 561, 563–65 (D.C. Cir. 1987). But *Melcher* follows the *Riegle* court's holding on equitable discretion: "if a *legislator* could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain *the legislator's* action." 836 F.2d at 565 (emphasis added). Additionally, the court expressed concern "over whether the court-fashioned doctrine of equitable discretion 'is a viable doctrine upon which to determine the fate of constitutional litigation.' . . . As a panel, however, we are bound faithfully to follow the law of the circuit. . . . '[*Riegle*] must be followed until rejected by this court *en banc* or the Supreme Court.'" *Id.* at n. 4. Given the court's stated concerns over the viability of the equitable discretion doctrine in general—especially in the context of a constitutional challenge—this Court should reject the defendants' invitation to expand that doctrine to lawsuits brought by a private party.

The D.C. Court of Appeals is in harmony with Supreme Court precedent on the equitable or "remedial" discretion doctrine. The Supreme Court "has regarded *some* form of relief as obligatory" when, as in this case, a court is "faced with justiciable, properly raised, and meritorious claims for *specific* remedies to ameliorate *ongoing* constitutional harms rooted in government custom or policy . . . ."[16] The House Chaplain's custom or policy of denying any otherwise qualifying nonreligious person to participate in the guest chaplain program presents just such an ongoing constitutional harm for which Barker seeks, among other things, a specific remedy through prospective relief. Defendants offer no compelling rationale for this Court to exercise its equitable discretion. Because Barker's claim is otherwise justiciable, properly raised,

[16] John M. Greabe, *Remedial Discretion in Constitutional Adjudication*, 62 BUFF. L REV. 7 (2014) (emphasis in original).

and meritorious, it would not be in keeping with the Supreme Court's practices to decline to issue this remedy.

V. Barker has established a *prima facie* claim under RFRA.

The Religious Freedom Restoration Act applies to all neutral, generally applicable laws that have an incidental burden on the free exercise of a religious practice. When discussing the causation of Barker's injuries, the defendants argue that the House Chaplain's requirements for the guest chaplaincy are not *ad hoc*, but are necessary byproducts of the House Rules because "the House Rules do not permit a non-Member to deliver a secular invocation . . . ." Def's MTD at 13. Barker disagrees. It is the Chaplain's unwritten *ad hoc* requirements that are discriminatory. The House Rules do not require that a prayer be directed to a god or be delivered by someone who believes in a god. The Rules were designed to be neutral toward religion and to be generally applicable to any House Chaplain. If this Court nevertheless concludes that the House Rules restrict Barker's participation in the guest chaplaincy, then this incidental burden on Barker's nonreligious practice places the Rules squarely in the crosshairs of RFRA.

A. The House Rules were designed to be neutral and generally applicable.

House Rules II.5 and XIV.1 are facially neutral, were not designed to be covertly discriminatory, and are generally applicable.

A law is "neutral" unless its object or purpose "is the suppression of religion or religious conduct." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A court must look beyond facial neutrality to determine if a law "targets religious conduct for distinctive treatment." *Id.* at 534–36 (noting that "[t]he net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice"). While the Free Exercise Clause "protects against governmental hostility which is masked, as well as overt," "*Id.* at 534,

RFRA was enacted to deal with an alternative scenario, where a law that was never intended to have a disparate effect on a certain religious group or practice nevertheless has an unintended negative effect. That is precisely the situation presented to this Court if it determines that the House Rules prohibit a secular invocation. The Defendants have presented no evidence demonstrating that when its Rules were drafted the House intentionally meant to discriminate against atheists, humanists, or Buddhists, even though they may not believe in a higher power; or that the House meant to discriminate against Shintoists, Jains, Rastafarians, Buddhists, Baha'is, German Baptists, and Quakers, among others, who do not ordain or acknowledge clergy. *See* Cmplt. ¶¶ 79-91. Therefore, the House Rules are neutral and generally applicable.

The House Rules are also of "general applicability" for RFRA purposes. "All laws are selective to some extent," but the purpose of the general applicability requirement is to ensure that the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." 508 U.S. at 542. Defendants equate the House Rules to the policy in *Larsen v. U.S. Navy*, which was found to involve intentional discrimination and thus fell outside the scope of RFRA. The *Larsen* policy, however, explicitly divided applicants to the Navy's chaplaincy into three groups: Roman Catholics, Protestant liturgical, and non-liturgical Christian and Special Worship. 346 F. Supp. 2d 122, 125 (D.D.C. 2004). Moreover, the plaintiffs in *Larsen* alleged only that the "Thirds Policy" was "*deliberately* treat[ing] Plaintiffs in a discriminatory manner." *Id.* at 136 (emphasis added). The court naturally concluded that the rule was not generally applicable and thus RFRA did not apply. *See Id.* at 137–38. Conversely, the House Rules apply generally to any House Chaplain, without reference to their liturgical status or religious preference. Thus, RFRA applies.

B. The House Rules incidentally burden Barker's sincerely held beliefs.

If this Court finds that the Chaplain was operating under the House Rules when he discriminated against Barker, then the Rules incidentally burden Barker's sincerely held nonreligious beliefs. As a preliminary matter, atheism is protected under RFRA, just as it receives equal protection as a "religion" under the religion clauses of the Constitution. *See* section 1.A.(1), *supra* (describing the history of equal First Amendment protections for the nonreligious); *see also Torcaso v. Watkins*, 367 U.S. at 495 n.11 (ruling that no governmental body "can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"); *Glassroth v. Moore*, 335 F.3d 1282, 1294–95 (11th Cir. 2003) ("[F]or First Amendment purposes religion . . . includes the lack of any faith."); *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) (treating atheism like religions for the purposes of the Establishment Clause); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) ("religious freedom includes the freedom to reject religion").

In keeping with the First Amendment, RFRA defines "exercise of religion" broadly; it includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A). Barker has alleged that his "atheism and other nontheistic beliefs are sincerely held and occupy a place in his life equivalent to that of religious beliefs." Cmplt. ¶ 179. He has established that the House Rules incidentally burden his sincere beliefs because the government has conditioned an important benefit, appointment to the House chaplaincy, on several criteria that they contend are required by the rules. This creates a substantial burden on Barker's free exercise of his beliefs.

Among other scenarios, a substantial burden exists when the government "conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . thereby putting

substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). Defendants call into question and belittle the benefit that Barker seeks: becoming history's first nonreligious guest chaplain to deliver a prayer to the House. They substitute their own assessment of the value of this historic honor for Barker's and conclude that the pressure on Barker is not "substantial."[17] Defendants cite many examples of benefits deemed "substantial" in First Amendment cases predating RFRA, but only one benefit assessed under RFRA, which they describe as "paid federal employment." Def's MTD at 42. But the benefit deemed sufficiently substantial in that case was *not* paid federal employment. It was unpaid enrollment in the Hofstra ROTC program, which is considered a college elective.[18] *See Singh v. McHugh*, No. 14-1906, 2016 WL 2770874 at *6 (D.D.C. May 13, 2016). Barker hopes that the defendants consider the Chaplain's duty of addressing Congress on the floor of the House to be at least as important as a student enrolling in an elective college course. The House of Representatives certainly considered it important enough to codify the practice in its Rules. But more importantly, Barker considers this a prestigious honor. The assessment of what constitutes "substantial pressure" must relate to the value of the benefit in the eyes of the person being denied. Otherwise the court is not actually measuring the pressure placed on that person.

Barker has established that a neutral rule of general applicability has incidentally burdened his sincerely held beliefs as an atheist. This is all that RFRA requires to establish a *prima facie* case and all that is required to survive a motion to dismiss.

---

[17] Defendants also curiously state that Barker believes that "the practice of legislative chaplains violates the Constitution" without any citation to the record. Def's MTD at 41. Barker does not challenge the legality of the legislative chaplains in this case.

[18] *See* U.S. Army Cadet Command, *Frequently Asked Questions* (last visited Nov. 2, 2016), *available at* www.cadetcommand.army.mil/answers.aspx ("Q. By enrolling in ROTC, are you joining the Army? A. No. Students who enroll in ROTC don't join the Army. They take an ROTC class for which they receive credit. It's considered a college elective.").

VI. Sovereign immunity does not bar Plaintiff's RFRA claim against the House if the denial of Plaintiff's participation in the guest chaplain program is defended as an application of House Rules II.5 and XIV.1.

Plaintiff primarily challenges the unwritten, *ad hoc* policies of the House Chaplain as discriminatory under the First and Fifth Amendments. But in the alternative, Plaintiff challenges House Rules II.5 and XIV.1 directly, as violative of the Constitution and the Religious Freedom Restoration Act (RFRA), because the House Chaplain and his assistants have sought cover for their discriminatory practices by reference to those Rules. The House of Representatives is a proper defendant to Plaintiff's claim under RFRA because Congress has waived its sovereign immunity through the unequivocal language in the Act. *See* 42 U.S.C.A. § 2000bb–1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."). The Supreme Court has acknowledged Congress's intent that RFRA's mandate apply "to any 'branch, department, agency, instrumentality, and official . . . of the United States." *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (citing 42 U.S.C.A. § 2000bb–2(1)). The Court continued, "[t]he Act's *universal coverage* is confirmed in § 2000bb–3(a), under which RFRA 'applies to all Federal and State law, and the implementation of that law, whether statutory *or otherwise*, and whether adopted before or after [RFRA's enactment].'" *Id.* (emphasis added); *but see id.* at 536 (ultimately ruling RFRA unconstitutional as applied to the states, but leaving it in place as applied to the federal government). So long as the House of Representatives is considered a "branch" of the federal government, RFRA creates a cause of action against it.

CONCLUSION

Barker is not asking the House for special treatment, Barker is asking for equal treatment and the equal dignity due to all citizens under the law. By separating out Barker for uniquely unfavorable treatment due to his atheism, the defendants have acted in violation of the Establishment Clause and the Fifth Amendment's equal protection principle, which both embody the nondiscrimination ideal that the Supreme Court applied to legislative prayer in *Town of Greece v. Galloway*. The defendants do not deny that Barker is being excluded from the House's guest chaplaincy due to his atheism, but instead suggest that this case is nonjusticiable. But when a coequal branch of government ignores constitutional restraints or violates a citizen's fundamental rights, it falls squarely within the jurisdiction of federal courts to remedy that constitutional violation. Barker has stated a claim on which relief can and should be granted. The defendants' motion should be denied.

Dated this 14th day of November, 2016.

Respectfully submitted,

/s/ Richard L. Bolton

Eric A. Baker
DC Bar No. 481394
Richard L. Bolton
Federal Bar No. WI0034
One South Pinckney Street, Fourth Floor
P.O. Box 927
Madison, WI 53701-0927
(608) 283-1783 – Telephone
(608) 283-1709 – Facsimile
ebaker@boardmanclark.com
rbolton@boardmanclark.com
Attorneys for Plaintiff Dan Barker

CERTIFICATE OF SERVICE

I, Richard L. Bolton, hereby certify that on November 14, 2016, I caused to be electronically filed the attached Brief In Opposition with the Clerk of Court using the CM/ECF system.

/s/ Richard L. Bolton
Richard L. Bolton