

No. 17-5278

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

DANIEL BARKER,

Plaintiff-Appellant,

v.

PATRICK CONROY, CHAPLAIN, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Columbia
No. 1:16-cv-00850-RMC
Hon. Rosemary M. Collyer

**BRIEF OF REPRESENTATIVES MARK POCAN,
JARED HUFFMAN, AND JAMIE RASKIN AS *AMICI CURIAE*
SUPPORTING APPELLANT AND REVERSAL**

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**CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES**

Parties and *Amici*. All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant; Brief for *Amici Curiae* Americans United for Separation of Church and State, *et al.*; and Brief for *Amici Curiae* The Center for Inquiry and American Atheists, Inc., except for the following: Representative Jared Huffman and Representative Jamie Raskin.

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

Related Cases. The case on appeal has not previously been before this Court and *amici* are unaware of any related cases pending in this Court or in any other court.

TABLE OF CONTENTS

| | |
|---|-----|
| Certificate as to Parties, Rulings, and Related Cases | i |
| Table of Authorities | iii |
| Interests of <i>Amici Curiae</i> | 1 |
| Summary of Argument..... | 2 |
| Argument..... | 5 |
| I. Nothing about congressional invocation practices forecloses participation by atheists and agnostics. | 5 |
| A. Atheists and agnostics can and do solemnize legislative sessions..... | 5 |
| 1. Secular invocations at the Town of Greece’s legislature. | 6 |
| 2. Secular invocations at other local legislatures..... | 7 |
| 3. Secular invocations at state legislatures..... | 9 |
| B. Secular invocations comport with congressional practice..... | 12 |
| II. Excluding atheists and agnostics would disregard our nation’s religious diversity and further stigmatize already unpopular religious minorities..... | 19 |
| A. Atheists and agnostics are a large and growing minority of Americans. | 19 |
| B. Even when Congress is acting, courts do not hesitate to redress unconstitutional discrimination against members of vulnerable minority groups..... | 24 |
| Conclusion..... | 28 |
| Certificate of Compliance | |
| Certificate of Necessity of Separate Briefs | |
| Certificate of Service | |

TABLE OF AUTHORITIES

Cases

| | |
|---|------------------|
| <i>Kurtz v. Baker</i> , 829 F.2d 1133 (D.C. Cir. 1987) | 25 |
| <i>Marsh v. Chambers</i> , 463 U.S. 783 (1983) | 5, 24 |
| <i>Powell v. McCormack</i> , 95 U.S. 486 (1969) | 24, 25 |
| <i>Town of Greece v. Galloway</i> , 134 S. Ct. 1811 (2014)..... | 3, 6, 12, 13, 19 |
| <i>Walker v. Jones</i> , 733 F.2d 923 (D.C. Cir. 1984) | 25 |
| <i>Williamson v. Brevard County</i> , 276 F. Supp. 3d 1260, 2017 WL 4404444 (M.D. Fla. Sept. 30, 2017) | 11, 15 |

Other

| | |
|--|--------|
| <i>American FactFinder</i> , United States Census Bureau, https://tinyurl.com/y9ztnx5g | 20 |
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| Nanette Asimov, <i>Stanford Gets a Chaplain for Atheists</i> , S.F. Chronicle (Dec. 22, 2012), https://tinyurl.com/y8qtzzze | 22 |
| Antonia Blumberg, <i>Atheist Invocation in New York Town Meeting Speaks to Shared American Identity</i> , HuffPost (July 16, 2014), https://tinyurl.com/ycktbxah | 7 |
| Bridget Bowman, <i>Praying to Jesus on the House Floor</i> , Roll Call (June 7, 2015), https://tinyurl.com/yaqrnw3a | 15 |
| Gabe Bullard, <i>The World's Newest Major Religion: No Religion</i> (Apr. 22, 2016), Nat'l Geographic, https://tinyurl.com/y7j7hax7 | 21, 27 |

| | |
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| Tara Isabella Burton, <i>The Latest Faith Group To Launch a Congressional Caucus? The Nonreligious</i> , Vox (May 1, 2018), https://tinyurl.com/y9ftsbbbs | 23 |
| Kay Campbell, <i>See Video of Huntsville Atheist Opening City Council Meeting with Invocation Extolling American Virtues</i> , AL.com (Sep. 26, 2014), https://tinyurl.com/yar6qkph | 8 |
| Mary Carmichael, <i>Nonbelievers Striving for Humanist Connections</i> , Boston Globe (Oct. 17, 2011), https://tinyurl.com/yc4f7dd3 | 22 |
| Heather Caygle & Jake Sherman, <i>Democrats Furious at Ryan Over Ousting of House Chaplain</i> , Politico (Apr. 26, 2018), https://tinyurl.com/y994uqab | 17 |
| Dane County, <i>Wisconsin (WI) Religion Statistics Profile</i> , City-Data.com, https://tinyurl.com/yashdfpn | 20 |
| Charles Eichacker, <i>Atheist Delivers Invocation at Maine State House</i> , Portland Press Herald (Feb. 16, 2018), https://tinyurl.com/y9yy83fu | 11 |
| Charles Eichacker, <i>Litchfield Man Cries Foul Over Cancellation of “Secular” Invocation for Maine Senate</i> (May 31, 2017), Central Maine, https://tinyurl.com/y8mfvxk3 | 11 |
| Jerry Fallstrom & Jayna Omaye, <i>Lake Commissioners Start Meeting with Secular Invocation Rather than Christian Prayer</i> , Orlando Sentinel (Aug. 30, 2014), https://tinyurl.com/mqktqk7 | 9 |
| Peter Foster, <i>Is America Losing Faith? Atheism on the Rise but Still in the Shadows</i> , Telegraph (Feb. 8, 2014), https://tinyurl.com/y8gsjhvc | 22, 27 |
| Will M. Gervais & Maxine B. Najle, <i>How Many Atheists Are There?</i> , 9 Soc. Psychol. & Personality Sci. 3 (2018)..... | 21 |
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| | |
|--|------|
| <i>Invocations</i> , Central Florida Freethought Community, https://tinyurl.com/y9nukclg | 6 |
| Ashley Killough & Sarah Mucha, <i>House Chaplain Gives Opening Prayer After Rescinding His Resignation</i> , CNN (May 7, 2018), https://tinyurl.com/y7bjl5lf | 16 |
| Carol Kuruvilla, <i>Many Americans Prefer a “Higher Power” to the God of the Bible, Study Finds</i> , Huff. Post (Apr. 26, 2018), https://tinyurl.com/ycxlraaj | 24 |
| Michael Lipka, <i>10 Facts About Atheists</i> , Pew Research Center: FactTank (June 1, 2016), https://tinyurl.com/z2sgvbp | 27 |
| Christopher C. Lund, <i>The Congressional Chaplaincies</i> , 17 Wm. & Mary Bill Rts. J. 1171 (2009) | 28 |
| <i>Marsh v. Chambers</i> , Oyez, https://tinyurl.com/ybf24tu8 | 5 |
| Meaghan McDermott, <i>Atheist Gives “Historic” Invocation in Greece</i> , Rochester Democrat & Chronicle (July 14, 2014), https://tinyurl.com/yb7xx6rg | 6, 7 |
| Hemant Mehta, <i>An Atheist Member of the Arizona House of Representatives Delivered Another Godless Invocation This Week</i> , Friendly Atheist (Mar. 5, 2014), https://tinyurl.com/meblfzn | 10 |
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| <i>Opening Prayer: Imam Abdullah Antepli</i> , Office of the Chaplain: United States House of Representatives (Oct. 4, 2017), https://tinyurl.com/ycf2s3mh | 18 |
| <i>Opening Prayer: Rabbi Arnold E. Resnicoff</i> , Office of the Chaplain: United States House of Representatives (Aug. 18, 2017), https://tinyurl.com/y8kv39xs | 18 |

| | |
|--|------------|
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| <i>Opening Prayer: Reverend Andrew Walton, Office of the Chaplain:</i> United States House of Representatives (May 12, 2015), https://tinyurl.com/yc6kapdd | 14 |
| <i>Opening Prayer: Reverend Andrew Walton, Office of the Chaplain:</i> United States House of Representatives (Sept. 10, 2015), https://tinyurl.com/ya2j9azv | 14, 15 |
| <i>Opening Prayer: Reverend Michael Wilker, Office of the Chaplain:</i> United States House of Representatives (Oct. 16, 2015), https://tinyurl.com/y8s9lo45 | 15 |
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| Pew Research Center, <i>Political Polarization in the American Public</i> (2014), https://tinyurl.com/yd2fcpyv | 26 |
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| Kimberly Winston, <i>Atheist To Offer Invocation in N.Y. Town at the Center of Public Prayer Case</i> , Wash. Post (June 23, 2014), https://tinyurl.com/ychsdsu3 | 6, 8 |

INTERESTS OF *AMICI CURIAE*

Amici serve in the U.S. House of Representatives.¹

Representative Mark Pocan represents Wisconsin's Second District. He invited Plaintiff Daniel Barker, his constituent, to deliver an invocation to the House of Representatives. And he wishes to see Barker exercise his First Amendment right to deliver an invocation—an opportunity offered to guest chaplains with other religious beliefs.

Representative Jared Huffman represents California's Second District. Representative Jamie Raskin represents Maryland's Eighth District. Together, Representatives Huffman and Raskin also co-chair the Congressional Freethought Caucus, which they and two other members of Congress launched earlier this year.

Amici support religious diversity and freedom of religion for all, including the country's growing number of atheists and agnostics. Like other religious minorities, atheists and agnostics should not be excluded from important civic rituals—including rituals on the floor of Congress—on account of their religious beliefs.

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

SUMMARY OF ARGUMENT

In 2015, Representative Pocan wrote to Chaplain Conroy to request that “Daniel Barker be given consideration as a guest chaplain for morning invocation at the House of Representatives.” Barker App. 63. Barker, who resides in Representative Pocan’s district, intended “to offer the House of Representatives a hopeful invocation focusing on leading a happy, loving, moral, and purpose-filled life.” *Id.* The secular invocation would “respectfully emphasize the importance of our shared humanity and the urgency of working towards the common good as a legislative body.” *Id.*

Barker challenges the Chaplain’s decision to bar him from delivering an invocation on the ground that he does not believe in God. The First Amendment’s Establishment Clause does not permit Congress or its chaplains to discriminate against atheists and agnostics who have been duly invited by their elected representatives. Contrary to the suggestions of the district court, nothing about legislative invocations—in Congress, or elsewhere—forecloses participation by atheists, agnostics, or others who do not share the majority’s beliefs about the divine. And nothing forecloses this Court from redressing the First Amendment violation presented here.

First, nothing about an invocation precludes participation by those who do not believe in God. The legislative-prayer policy upheld by the Supreme Court in the 2014 decision of *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), allowed atheists and agnostics to deliver invocations. Since then, at least three atheists have delivered secular invocations at meetings held by the Greece Town Board, and dozens of atheists and agnostics have delivered secular invocations at state and local government meetings across the country.

Even some invocations in Congress, though delivered by religious clergy, have not invoked God or any other divinity. The fact and content of these invocations reflect that guest chaplains need not invoke a supernatural being to summon shared principles and common values and unite members as they serve their constituents.

Second, excluding atheists and agnostics from the invocation opportunity would ignore the nation's increasing religious diversity and subject atheists and agnostics to yet more stigma. Members of Congress represent constituents who are religiously diverse: Nearly 27 million Americans identify as atheist or agnostic, and those numbers continue to increase. Many more millions of Americans believe in a divine power but do not affiliate with any particular religion; many who believe in a higher power do not believe in a traditional divine being. There is more diversity

within Congress, too, as reflected by the recent founding of the Congressional Freethought Caucus.

Excluding atheists and agnostics from a significant civic ritual in Congress is especially insidious because many Americans continue to hold negative attitudes about atheists, including doubts about their fitness for public service. These attitudes resemble those faced by other religious minorities, past and present—including religious minorities who have sought to address Congress. And when this stigma and disfavor leads to violations of First Amendment rights, this court can and should redress those violations.

In excluding atheists and agnostics from serving as guest chaplains, Conroy is imposing a religious orthodoxy on members of Congress and their constituents. And for no reason. Nothing about congressional invocations should prevent members of Congress from inviting their atheist and agnostic constituents to serve as guest chaplains; the views of these constituents contribute to the nation's religious diversity and would enrich rather than undermine this congressional tradition.

ARGUMENT

I. **Nothing about congressional invocation practices forecloses participation by atheists and agnostics.**

A. **Atheists and agnostics can and do solemnize legislative sessions.**

As described and upheld by the Supreme Court, the tradition of legislative prayer is fully compatible with participation by atheists and agnostics.

From the beginning, the religious views of congressional chaplains were not to be scrutinized. Contemporaneous records from the First Congress “reported only the chaplains’ names, not their religions or church affiliations.” *Marsh v. Chambers*, 463 U.S. 783, 793 n.16 (1983). That is one reason why the Supreme Court upheld Nebraska’s practice in *Marsh*: The Nebraska chaplain was appointed not because of his religious beliefs, but “because his performance and personal qualities were acceptable to the body appointing him,” and “guest chaplains have officiated at the request of various legislators and as substitutes during [his] absences.” *Id.* at 793. Sometimes legislators would request particular guest chaplains; no such request was ever denied. *See Marsh v. Chambers*, Oyez, <https://tinyurl.com/ybf24tu8> (oral-argument discussion beginning at 10:10). Likewise, in upholding the Town of Greece’s invocation policy against constitutional challenge, the Supreme Court explained that “[t]he town at no point excluded or denied an opportunity to a would-be prayer giver,” and the town’s

leaders “maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation.” *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014).

Since *Town of Greece*, atheists and agnostics have delivered invocations before state and local legislative bodies across the country. *See generally* Kimberly Winston, *Atheist To Offer Invocation in N.Y. Town at the Center of Public Prayer Case*, Wash. Post (June 23, 2014), <https://tinyurl.com/ychsdsu3>. In particular, atheists and agnostics have delivered dozens of secular invocations at the Town of Greece, other local legislatures, and state legislatures. *See generally* *Invocations, Central Florida Freethought Community*, <https://tinyurl.com/y9nukclg>. These invocations addressed the common themes and shared values identified by the Supreme Court and traced back to the nation’s founders.

1. *Secular invocations at the Town of Greece’s legislature.*

Two months after the Supreme Court decided *Town of Greece*, a member of the Atheist Community of Rochester delivered a secular invocation before the Greece Town Board. *See* Meaghan McDermott, *Atheist Gives “Historic” Invocation in Greece*, Rochester Democrat & Chronicle (July 14, 2014), <https://tinyurl.com/yb7xx6rg>. His invocation “quoted the Declaration of Independence and called upon common principals that united all Americans,” *id.*

(italics omitted); and he asked the town board “to heed the counsel of the governed; to seek the wisdom of all citizens, and to honor the enlightened wisdom and the profound courage of [the Founding Fathers],” Antonia Blumberg, *Atheist Invocation in New York Town Meeting Speaks to Shared American Identity*, HuffPost (July 16, 2014), <https://tinyurl.com/ycktbxah>.

The next year, Greece hosted two more secular invocations—including one delivered by Linda Stephens, a plaintiff in *Town of Greece v. Galloway*. See Jay Wexler, *My Trip to the Town of Greece*, PrawfsBlawg (Dec. 3, 2015), <https://tinyurl.com/y9k4v8k7>. Stephens appeared on behalf of Sunday Assembly Rochester, a “‘godless congregation’ that meets monthly.” David Andreatta, *Humorist Finds Fodder in Greece*, Rochester Democrat & Chronicle (Oct. 19, 2015), <https://tinyurl.com/yatu3kkj>. Another secular invocation came, earlier that year, from Paul Grim, a member of the Atheist Community of Rochester. See Minutes of the Regular Meeting of the Town Board, Town of Greece (Apr. 21, 2015), <https://tinyurl.com/y8wv8uac>.

2. *Secular invocations at other local legislatures.*

Secular invocations have expanded well beyond the Town of Greece. For instance, a secular speaker delivered an invocation in Wheaton, Illinois, stating: “Let us rise each morning, and strive each day, to do only that which brings

happiness and joy to others, and avoid doing things that cause others hurt and pain. And let us, above all, love one another, not to obtain rewards for ourselves now or hereafter or to avoid punishment, but rather always to bring each other contentment and peace.” Winston, *supra*. In Huntsville, Alabama, a member of the North Alabama Freethought Association invoked “the highest values of Americans: wisdom, courage, moderation, with the added values added by the Enlightenment of the importance of diversity, protection of freedoms and constructing a society on egalitarian principles that protect the rights of all, especially minorities.” Kay Campbell, *See Video of Huntsville Atheist Opening City Council Meeting with Invocation Extolling American Virtues*, AL.com (Sep. 26, 2014), <https://tinyurl.com/yar6qkph>. With the audience-members’ heads bowed, the speaker stated: “Let doubt and skepticism be our lookouts,” and quoted Thomas Jefferson to proclaim, “Truth is great and will prevail, if left to herself.” *Id.* (quotation marks omitted).

Likewise, a member of the Central Florida Freethought Community delivered an invocation at a meeting of the Lake County Commission. The invocation invoked “the spirit of goodwill among all of us” and observed that “[w]e share the goal of making our Lake County the best place it can be.” Jerry Fallstrom & Jayna Omaye, *Lake Commissioners Start Meeting with Secular Invocation*

Rather than Christian Prayer, Orlando Sentinel (Aug. 30, 2014), <https://tinyurl.com/mqktqk7>. Meanwhile, in Waterloo, Iowa, a member of the Cedar Valley Atheists asked the city council to follow a Humanist tenet providing, “We are concerned with securing justice and fairness in society and with eliminating discrimination and intolerance.” Nick Wing, *An Atheist Gave a “Prayer” at a City Council Meeting, and the World Didn’t Collapse*, HuffPost (May 11, 2016), <https://tinyurl.com/y77u9fdz>. Quoting Carl Sagan, he added: “Every one of us is, in the cosmic perspective, precious.” *Id.*

3. *Secular invocations at state legislatures.*

Secular invocations have also come to more formal state legislative bodies, both before and after *Town of Greece*, in at least two states. These secular invocations have been delivered by both legislators and their invitees.

Arizona. In 2013, Juan Mendez, an atheist Arizona State Representative, delivered the invocation and proclaimed: “[A]s my secular humanist tradition stresses, by the very fact of being human, we have much more in common than we have differences. We share the same spectrum of potential for care, for compassion, for fear, for joy, for love.” Matthew Hendley, *Atheist State Lawmaker Quotes Carl Sagan Instead of Doing Prayer Before House Session*, Phoenix New Times (May 21, 2013), <https://tinyurl.com/yb56uoe9>. The next year, Representative

Mendez adapted a poem into “a prayer from my Humanist worldview that appeals to all our common humanness.” Hemant Mehta, *An Atheist Member of the Arizona House of Representatives Delivered Another Godless Invocation This Week*, Friendly Atheist (Mar. 5, 2014), <https://tinyurl.com/meblfzn>. In so doing, he “ask[ed] for us all to have the grace to listen when the many finally rise to speak and their words are an agony for us.” *Id.*

Earlier that year, another atheist colleague delivered a secular prayer, “asking that whichever God you pray to or whichever value system inspires you, let’s stay focused on beliefs we all share—like the idea that we should do for others what we want for ourselves.” Hemant Mehta, *Yesterday, Another Arizona Legislator Delivered a Godless Invocation on the House Floor*, Friendly Atheist (Feb. 7, 2014), <https://tinyurl.com/l64g59f>. The speaker sought guidance not from God but from the Golden Rule: “There is a version of the Golden Rule in nearly all religions and secular traditions. They all say we should treat people like we want to be treated.” *Id.*

Maine. In Maine, a speaker from the same organization as Barker has delivered a secular invocation to each house of the state legislature.

In 2018, a Maine State Senator invited the president of the Maine Chapter of the Freedom from Religion Foundation to deliver an invocation. Charles

Eichacker, *Atheist Delivers Invocation at Maine State House*, Portland Press Herald (Feb. 16, 2018), <https://tinyurl.com/y9yy83fu>. The secular invocation quoted Thomas Jefferson and John Quincy Adams, thanked the Senators for their sacrifice, and urged them “to rely on and trust in the collective character, honesty and integrity of your colleagues.” *Id.*

The same speaker had delivered a similar invocation to the Maine House of Representatives in 2017. Charles Eichacker, *Litchfield Man Cries Foul Over Cancellation of “Secular” Invocation for Maine Senate* (May 31, 2017), Central Maine, <https://tinyurl.com/y8mfvxk3>. There, he called for legislators “to use facts, reason and logic, tempered with compassion and empathy, in making your decisions, today and every day,” and asked them “to discard partisan dogma and to weigh, without bias, the merits of the various proposals being made.” *Id.* He concluded by “reading a Buddhist homily.” *Id.*

* * *

These and similar secular invocations highlight what a federal district court in Florida recently concluded: The First Amendment prohibits excluding atheists because they “are indeed ‘capable’ of providing an invocation within the meaning of *Town of Greece*.” *Williamson v. Brevard Cty.*, 276 F. Supp. 3d 1260, 2017 WL 4404444, at *22 (M.D. Fla. Sept. 30, 2017).

B. Secular invocations comport with congressional practice.

The types of practices described by the Supreme Court in *Town of Greece*—and reflected in invocations before state and local legislative bodies—also comport with the history and purpose of invocations in Congress. It is “possible to discern in the prayers offered to Congress a commonality of theme and tone. While these prayers *vary in their degree of religiosity*, they often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count *as universal* and that are embodied not only in religious traditions, but *in our founding documents and laws*.” *Town of Greece*, 134 S. Ct. at 1823 (emphases added).

Despite this universality of theme and varying degree of religiosity, Conroy “expressed to Representative Pocan that he was dubious that an atheist could craft an appropriate invocation.” *Barker* App. 38 ¶ 39. Even Conroy concedes that he asked, “somewhat rhetorically, what a ‘prayer’ from a man of Mr. Barker’s publicly professed beliefs might look like.” *Barker* App. 67. These inquiries were unwarranted—and not just because “[o]ur Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior.” *Town of Greece*, 134 S. Ct. at 1822.

Indeed, a guest chaplain like Barker is more than capable of delivering an invocation in line with Congress's traditions. Barker's proposed remarks sought to "rejoice in the inalienable liberty of conscience our forefathers and foremothers risked their lives to establish." Barker App. 64. He invoked the spirit of Thomas Jefferson, James Madison, and "the founding patriot Thomas Paine"; the "bravery and compassion of Ernestine L. Rose, the first canvasser for women's rights in America who was denied the opportunity to speak before Congress simply because she did not believe in God"; and the "tenacity and empathy of the atheist Elizabeth Cady Stanton[,] who battled for fifty years for women's rights." Barker App. 64. Barker, in other words, sought to "lend[] gravity to public business, remind[] lawmakers to transcend petty differences in pursuit of a higher purpose, and express[] a common aspiration to a just and peaceful society." *Town of Greece*, 134 S. Ct. at 1818.

Although Barker is an atheist, omitting God from his invocation would chart no new path. Even Christian clergymen have delivered invocations to Congress without referring to or invoking God. For instance, in May 2015 Reverend Andrew Walton began his prayer by stating: "As the gavel sounds and a new day of business begins, we pause to acknowledge the eternal, creative, redemptive spirit of life that unites all people, transcending political persuasion, personal bias, or cultural

creed.” *Opening Prayer: Reverend Andrew Walton*, Office of the Chaplain: United States House of Representatives (May 12, 2015), <https://tinyurl.com/yc6kapdd>.

He continued without invoking God or any other divine power, instead focusing only on seeking “the wisdom of the ages” and calling for a “common good”:

We come seeking the wisdom of the ages that points us away from easy choices of rigid certitude that divide and separate but, rather, guides us toward challenging compromises of flexible possibility that connect and unite.

May we seek a common good where all people know freedom, equality, justice, and mercy; a common good grounded in compassion, gratitude, and generosity. May we remember we are one human family in which the pain of one is the pain of all and the joy of one is the joy of all.

May we find this common good in the conversations, deliberations, and achievements of this day and in the countless opportunities that come our way each and every day.

Amen.

Id.

Reverend Walton delivered a similar prayer later that year. *See Opening Prayer: Reverend Andrew Walton*, Office of the Chaplain: United States House of Representatives (Sept. 10, 2015), <https://tinyurl.com/ya2j9azv>. Rather than petitioning God, he opened by stating: “As vacations and recesses draw to a close, we give thanks for the gift of rest and recreation afforded us while so many in our country and world have spent those same days in fear and suffering.” *Id.* He

continued by asking “every person associated with these Halls of power [to] remember their calling as public servants to humbly hold the hopes, dreams, and trust of people from every walk of life in every State, city, town, village, and neighborhood of our country and world.” *Id.*

And the next month, Reverend Michael Wilker invoked and addressed the “Spirit of truth and reconciliation”; warned that “[t]oo often we use religion to divide and justify one group’s triumph over another”; and asked it to “[r]estore our commitment to democratic values and strengthen us to practice them skillfully.” *Opening Prayer: Reverend Michael Wilker*, Office of the Chaplain: United States House of Representatives (Oct. 16, 2015), <https://tinyurl.com/y8s9lo45>.

The absence of divine reference in some prayers is unsurprising. “For a governmental entity to require, or attempt to require, ‘religious’ content in invocations is, in effect (or, at best, but a step removed from) that entity composing prayers for public consumption or censoring the content of prayers—in contravention of the principles set forth in the *Town of Greece*.” *Williamson*, 2017 WL 4404444, at *19. This rule should hardly surprise Conroy, whose office has reminded members of Congress that it “cannot tell people how to pray.” Bridget Bowman, *Praying to Jesus on the House Floor*, Roll Call (June 7, 2015), <https://tinyurl.com/yaqrnw3a>.

But for an appeal to God, moreover, Barker's invocation would be consistent in tone and message with yet more congressional invocations. For one, Conroy's prayers are often urge members to serve their constituents and implement sound public policy. The first prayer delivered by Father Conroy after he rescinded his resignation earlier this year began: "Let us pray. We give you thanks, oh God, for giving us another day. As the members return to Washington, may they be encouraged and empowered by their constituents to be their best selves in serving in the people's house." Ashley Killough & Sarah Mucha, *House Chaplain Gives Opening Prayer After Rescinding His Resignation*, CNN (May 7, 2018), <https://tinyurl.com/y7bjl5lf>.

Another of Father Conroy's recent prayers, which has since received significant attention, was even more specific. In November 2017, his invocation addressed the economic implications of the pending tax bill: "As legislation on taxes continues to be debated this week and next, may all Members be mindful that the institutions and structures of our great nation guarantee the opportunities that have allowed some to achieve great success, while others continue to struggle . . . May their efforts these days guarantee that there are not winners and losers under new tax laws, but benefits balanced and shared by all Americans." Heather Caygle

& Jake Sherman, *Democrats Furious at Ryan Over Ousting of House Chaplain*, Politico (Apr. 26, 2018), <https://tinyurl.com/y994uqab>.

Earlier that year, Conroy's invocation discussed the election results. He stated: "Though major change of party control did not take place in this Chamber, it is still the American experience that our streets are peaceful and winners and losers of elections move on with their lives in dignity." *Opening Prayer: Reverend Patrick J. Conroy, S.J.*, Office of the Chaplain: United States House of Representatives (Jan. 10, 2017), <https://tinyurl.com/yanncyq4>. Invoking the legacy of the "Nation's Founders," he added: "May the Members of this assembly, and all Americans, be worthy of that legacy." *Id.*

These are not outliers. As the House Chaplain, Father Conroy opening uses his invocations to address the work of Congress. Discussing the November 2017 tax-related prayer, he explained, "That is what I have tried to do for several years. . . . If you are hospital chaplain, you are going to pray about health. . . . If you are a chaplain of Congress, you are going to pray about what Congress is doing." Margaret Hartmann, *Paul Ryan Allegedly Ousted House Chaplain for Disrespecting His Tax Cuts*, N.Y. Mag. (Apr. 27, 2018), <https://tinyurl.com/y9ox733l>.

Several guest chaplains have similarly discussed current events, described American history, and praised the country's diversity:

- A rabbi observed that “[r]egardless of our faith traditions, we recognize a force in the universe calling each of us to fulfill our potential.” *Opening Prayer: Rabbi Mara Nathan*, Office of the Chaplain: United States House of Representatives (Jan. 19, 2018), <https://tinyurl.com/yavdzpnb>.
- An imam called upon the holy one to “Enable us to understand, appreciate, and celebrate our differences. Teach and guide us to turn these differences into opportunities, richness, and strength. Prevent us from turning them into sources of division, polarization, hate, and bigotry.” *Opening Prayer: Imam Abdullah Antepli*, Office of the Chaplain: United States House of Representatives (Oct. 4, 2017), <https://tinyurl.com/ycf2s3mh>.
- A rabbi recalled the anniversary of the ratification of the 19th Amendment, which gave women the constitutional right to vote. *See Opening Prayer: Rabbi Arnold E. Resnicoff*, Office of the Chaplain: United States House of Representatives (Aug. 18, 2017), <https://tinyurl.com/y8kv39xs>.
- A reverend quoted former UN Secretary-General Dag Hammarskjold. *See Opening Prayer: Reverend Michael Wilker*, Office of the Chaplain: United States House of Representatives (Sept. 18, 2017), <https://tinyurl.com/y7ow9m23>.

Secular invocations with similar themes, reflecting common values, and appealing to higher purposes or authorities—be they philosophers, humanists, or the nation’s founders—fit well within this tradition.

In total, the invocations delivered to Congress have been varied. Some speakers had no formal religious title or position. *See* Barker App. 50 ¶ 121 (House Parliamentarian served as a guest chaplain in August 2011). Others were clergy but did not mention or invoke the divine. Some invocations have been deeply religious; others, including those delivered by Conroy, have stressed more political themes.

These diverse practices reflect the Supreme Court’s admonition: The relevant constraint on invocations’ content comes not from belief in or appeal to God, but rather from the invocations’ “place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation’s heritage.” *Town of Greece*, 134 S. Ct. at 1823. And Barker is more than capable of fulfilling this goal.

II. Excluding atheists and agnostics would disregard our nation’s religious diversity and further stigmatize already unpopular religious minorities.

A. Atheists and agnostics are a large and growing minority of Americans.

Invocation practices, including those in Congress, must reflect that the United States “is in the midst of significant religious change.” Pew Research Center, *When Americans Say They Believe in God, What Do They Mean?*⁹ (2018), <https://tinyurl.com/ycq34mt3> (emphasis in original) (“Pew, *Belief in God*”). As part of this change, many more Americans identify as atheists and agnostics; even more do not affiliate with a particular religion, do not have a traditional understanding of God, or both.

For starters, “[t]he religiously unaffiliated population—including all of its constituent subgroups—has grown rapidly as a share of the overall U.S. Population.” Pew Research Center, *America’s Changing Religious Landscape* 30

(2015), <https://tinyurl.com/ydeymm5m> (“Pew, *Changing Landscape*”). In 2014, the number of religiously unaffiliated Americans increased from 16.1 percent to 22.8 percent. *See id.* at 3. That included 3.1 percent who identified as atheist (up from 1.6 percent in 2007) and 4 percent who identified as agnostic (up from 2.4 percent in 2014). *See id.* at 4. In total, eleven percent of adults—that is, nearly 27 million Americans—say that they do not believe in God, up from eight percent in 2007. *See* Pew Research Center, *U.S. Public Becoming Less Religious* 3 (2015), <https://tinyurl.com/ycqlapvz> (“Pew, *Less Religious*”).

This diversity is also reflected in the congressional district represented by Representative Pocan, who invited Barker to deliver an invocation. The district has approximately 751,000 people. *See American FactFinder*, United States Census Bureau, <https://tinyurl.com/y9ztmx5g>. As of 2010, Dane County, the district’s largest county, had about 487,000 residents. Of those residents, a majority—just over 54 percent, or 263,990 people—did not affiliate with any religion. *See Dane County, Wisconsin (WI) Religion Statistics Profile*, City-Data.com, <https://tinyurl.com/yashdfpn>.²

² If anything, these surveys likely underreport the number of atheists, because the stigma of atheism may lead survey respondents to conceal their true beliefs. *See* Brian Resnick, *How Many American Atheists Are There Really?*, Vox (May 17, 2017), <https://tinyurl.com/mjahjsc>; *see also* Will M. Gervais & Maxine B. Najle, *How*

More generally, by 2014, 22.8 percent of the adult population—55.8 million Americans—were religiously unaffiliated. Pew, *Less Religious*, *supra*, at 19. This percentage rose from 16.1 percent (36.6 million) in 2007. *Id.* Since 2006, these “nones” have “overtaken Catholics, mainline protestants, and all followers of non-Christian faiths.” Gabe Bullard, *The World’s Newest Major Religion: No Religion* (Apr. 22, 2016), Nat’l Geographic, <https://tinyurl.com/y7j7hax7>. Although not everyone who is religiously unaffiliated is an atheist or agnostic, “the ‘nones’ appear to be growing more secular.” Pew, *Changing Landscape*, *supra*, at 30. Indeed, 31 percent of “religious nones” are atheists and agnostics, up from 25 percent in 2007. *See id.* And the share of Americans who are “absolutely certain” that God exists has dropped from 71% in 2007 to 63% in 2014. Pew, *Less Religious*, *supra*, at 3.

These trends are likely to persist. The percentage of those who are religiously unaffiliated is progressively higher among younger generations. *See* Pew, *Changing Landscape*, *supra*, at 11. Among those, 77 percent of atheists are between ages 18–49, and 74 percent of agnostics are between ages 18–49. *See id.* at 50. And

Many Atheists Are There?, 9 Soc. Psychol. & Personality Sci. 3 (2018) (calculating degree to which surveys underestimate number of American atheists).

while beliefs can change as people age, “young adults who were raised as ‘nones’ are far more likely than their counterparts in previous generations to continue to identify as unaffiliated.” *Id.* at 41. This change is also clear on college campuses: In the past five years, “the number of student ‘freethinker’ groups in the US, has begun to snowball: from 100 in 2007 their number has leapt to more than 350 today.” Peter Foster, *Is America Losing Faith? Atheism on the Rise but Still in the Shadows*, Telegraph (Feb. 8, 2014), <https://tinyurl.com/y8gsjhvc>.

This, in turn, is leading to more atheist, agnostic, and humanist chaplains. A Humanist Chaplaincy Network supports and trains a worldwide network of chaplains who give “information, advice, and consultation about existential questions.” *What Is a Humanist Chaplain*, Humanist Chaplaincy Network, <https://tinyurl.com/yagl8a7r>. Colleges and universities are getting atheist chaplains. *See, e.g.*, Chris Stedman, *After Atheists Asked, Tufts Creates First University-Funded Humanist Position*, Religion News Service (Sept. 3, 2014), <https://tinyurl.com/ydeb4plb>; Nanette Asimov, *Stanford Gets a Chaplain for Atheists*, S.F. Chronicle (Dec. 22, 2012), <https://tinyurl.com/y8qtzzze>; Mary Carmichael, *Nonbelievers Striving for Humanist Connections*, Boston Globe (Oct. 17, 2011), <https://tinyurl.com/yc4f7dd3>. Addressing a common question, the head chaplain at Tufts explained that “[h]umanists have the same needs for inspiration,

reflection, caring, community, and service that religious people find in their faith traditions.” Stedman, *supra*.

These same needs exist in Congress, too. Earlier this year, four members of Congress—including two of *amici*—established the Congressional Freethought Caucus “to safeguard the interests of nontheists in government.” Tara Isabella Burton, *The Latest Faith Group To Launch a Congressional Caucus? The Nonreligious*, Vox (May 1, 2018), <https://tinyurl.com/y9ftsbbbs>. Among other work, the caucus provides a “forum for Members of Congress to discuss their moral frameworks, ethical values, and personal religious journeys.” Press Release, Rep. Jared Huffman, Reps. Huffman, Raskin, McNerney, & Kildee Launch Congressional Freethought Caucus (Apr. 30, 2018), <https://tinyurl.com/ya3qhahg>. Members like these are disserved by rigid restrictions on the beliefs of guest chaplains and the content of their prayers.

Finally, Conroy’s claim that guest chaplains must address a divine power is at odds with the evolving beliefs of even those who do recognize a higher power. According to a Pew study released earlier this year, “one-third of Americans say they do *not* believe in the God of the Bible, but that they do believe there is some other higher power or spiritual force in the universe.” Pew, *Believe in God*, *supra*, at 5 (emphasis in original). For these Americans, a higher power likely means

“something like the laws of nature or a sense of connection to all of humanity.”

Carol Kuruvilla, *Many Americans Prefer a “Higher Power” to the God of the Bible, Study Finds*, Huff. Post (Apr. 26, 2018), <https://tinyurl.com/ycxlraaj> (quoting University of Tampa professor Ryan T. Cragun). And with the number of atheists and agnostics rising, and with many others believing in a more secular higher power, rigid classifications about who may and may not deliver an invocation in Congress are especially suspect.

B. Even when Congress is acting, courts do not hesitate to redress unconstitutional discrimination against members of vulnerable minority groups.

As with challenges to prayer practices in state legislatures, *see Marsh v. Chambers*, 463 U.S. 783 (1983), applying the First Amendment to congressional invocations—and policing discrimination against religious minorities—is squarely within the Court’s mandate. It is especially important that the Court redress Conroy’s unconstitutional discrimination against atheists and agnostics, given that they still confront serious stigma that can be countered by participating in public life.

As in *Marsh*, evaluating the constitutionality of excluding atheists from congressional invocations “would require no more than an interpretation of the Constitution.” *Powell v. McCormack*, 395 U.S. 486, 549 (1969). Whether or not he

purports to exercise discretion, Conroy is applying an unconstitutional policy, to thwart the actions of a member of Congress on behalf of his constituent, on account of that constituent's religious beliefs. *Cf. Kurtz v. Baker*, 829 F.2d 1133, 1143 (D.C. Cir. 1987) (philosophy professor failed to satisfy Article III causation requirement in suit against chaplain seeking the right to deliver "opening remarks": "When appellant tried to obtain such a rare invitation, not one senator he contacted agreed to invite him.").

In these circumstances, protecting the First Amendment's religious-freedom guarantee implicates the Supreme Court's admonition: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell*, 395 U.S. at 549. That is especially true here, because invocations are distinct from the legislative process and the case involves claims of unconstitutional religious discrimination. *Cf. Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984) (Speech or Debate Clause "does not impregnably shield from court consideration allegedly unconstitutional personnel actions taken in the course of managing congressional food service facilities").

If, on the other hand, the Court did not enforce the First Amendment here, Conroy's practice will reinforce the all-too-common belief that atheists and agnostics are lesser Americans. Unfortunately, significant bias against atheists infects both private and public life.

On the private side, nearly half of Americans "would be unhappy if a family member were to marry someone who doesn't believe in God." Pew Research Center, *Political Polarization in the American Public* 49 (2014), <https://tinyurl.com/yd2fcpyv>. This percentage is far greater than that of people who would be unhappy if a family member married a Democrat (8 percent), a Republican (9 percent), a born-again Christian (9 percent), a gun owner (19 percent), someone of a different race (11 percent), someone who did not attend college (14 percent), and someone born and raised outside the United States (7 percent). *See id.* at 48–51.

This bias has significant implications for our democratic process as well. Attitudes are easing gradually over time, yet "being an atheist remains one of the biggest liabilities that a presidential candidate can have; fully half of American adults say they would be less likely to vote for a hypothetical presidential candidate who does not believe in God, while just 6% say they would be more likely to vote for a nonbeliever." Pew Research Center, *Faith and the 2016 Campaign 2* (2016),

<https://tinyurl.com/yc2woqs7>. Remarkably, “in the eyes of the public, being a nonbeliever remains a bigger drawback than having had an extramarital affair, having had personal financial troubles, or having used marijuana in the past.” *Id.* at 3 (parenthetical information omitted). Right now, only 56 percent of American adults say that it is “not necessary to believe in God to be moral and have good values.” Gregory A. Smith, *A Growing Share of Americans Say It’s Not Necessary To Believe in God To Be Moral*, Pew Research Center: FactTank (Oct. 16, 2017), <https://tinyurl.com/y8m36fxp> (emphasis omitted).

Given this severe and stubborn stigma, atheists remain less likely than others to share their views about religion with others. *See* Michael Lipka, *10 Facts About Atheists*, Pew Research Center: FactTank (June 1, 2016), <https://tinyurl.com/z2sgvbp>; *see also, e.g.*, Bullard, *supra* (dentist at atheist-oriented social event “didn’t want to go on the record out of a fear that patients wouldn’t want an atheist working on their teeth”). Young atheists are not immune, and many worry that identifying themselves as such will cause them to be “ostracized by friends, family, churches and even their employers.” Foster, *supra*.

Nor is discrimination against atheists and agnostics different in kind from discrimination against other religious minorities, which the courts do not hesitate to redress. Like atheists and agnostics, others with disfavored religious beliefs have

battled hostility and discrimination in the realm of congressional invocations. “In 1850, Unitarian chaplains were commonplace and Catholic chaplains were almost impossible to imagine.” Christopher C. Lund, *The Congressional Chaplaincies*, 17 Wm. & Mary Bill Rts. J. 1171, 1173–74 (2009). For decades, opposition to Catholic chaplains has persisted inside and outside of Congress, *see id.* at 1187–92, and has surfaced even recently, *see id.* at 1192–93. In addition, a 2007 invocation by a Hindu guest chaplain drew protests from certain Christian groups. *See id.* at 1205–06.

Wider exposure to atheists and agnostics, like exposure to other religious minorities, is crucial to combat this stigma. Those who personally know atheists are far more likely to view them positively than those who do not. *See* Pew Research Center, *How Americans Feel About Religious Groups* 1, 10 (2014). In the words of Linda Stephens, an atheist who delivered a secular invocation at the Town of Greece in 2015, “people are seeing that atheists and other secular types are not these monsters that they’re often portrayed as.” *Andreatta, supra*. By enforcing the First Amendment in this case, the Court can ensure that the humanity of atheists and agnostics is displayed in the nation’s capital as well.

CONCLUSION

The district court’s judgment should be reversed.

Respectfully submitted,

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May 21, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 5,898 words.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in 14-point Equity font, using Microsoft Word version 16.12.

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CERTIFICATE OF NECESSITY OF SEPARATE BRIEFS

Separate briefs are necessary for some groups of *amici* given the differences in *amici*'s interests and positions. The *amici* on this brief offer the unique perspective of members of the U.S. House of Representatives, whose invocation practices are directly at issue in this case.

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CERTIFICATE OF SERVICE

On May 21, 2018, I served a copy of this amicus brief on all counsel of record through the Court's ECF system.

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