[ORAL ARGUMENT NOT SCHEDULED]

No. 17-5278

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL BARKER,
Plaintiff-Appellant,

v.

PATRICK CONROY, CHAPLAIN, ET AL.,
Defendants-Appellees.

On Appeal from a Final Order of the U.S. District Court for the District of Columbia (No. 16-cv-00850) (Rosemary M. Collyer, U.S. District Judge)

BRIEF FOR DEFENDANTS-APPELLEES

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July 12, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici Before the District Court

- *Plaintiff*: Daniel Barker
- *Defendants*: Fr. Patrick Conroy (Chaplain, U.S. House of Representatives), in both his individual and official capacities; Elisa Aglieco (Assistant to the Chaplain, U.S. House of Representatives), in her official capacity; Karen Bronson (Chaplain's Liaison to Staff, U.S. House of Representatives), in her official capacity; the Honorable Paul Ryan (Speaker of the U.S. House of Representatives), in his official capacity; U.S. House of Representatives
- No intervenors or amici appeared before the district court

B. Parties and Amici Before this Court

- *Plaintiff-Appellant*: Daniel Barker
- *Defendants-Appellees*: Defendant Elisa Aglieco was terminated as a defendant by the district court on November 15, 2016. The district court dismissed the claims against all remaining defendants on October 11, 2017. Plaintiff-Appellant initially appealed as to all remaining defendants, but has now abandoned his appeal as to all defendants except Defendant-Appellee Fr. Patrick Conroy (Chaplain, U.S. House of Representatives) in his official capacity. *See* Appellant's Opening Br. at 3.

- *Amici in support of Plaintiff-Appellant*: American Atheists, American Ethical Union, American Humanist Association, Americans United for Separation of Church and State, Anti-Defamation League, Center for Inquiry, Central Conference of American Rabbis, Interfaith Alliance Foundation, the Honorable Jamie Raskin (U.S. Representative, 8th congressional district of Maryland), the Honorable Jared Huffman (U.S. Representative, 2nd congressional district of California), Jewish Social Policy Action Network, the Honorable Mark Pocan (U.S. Representative, 2nd congressional district of Wisconsin), Men of Reform Judaism, National Council of Jewish Women, Sikh American Legal Defense and Education Fund, Sikh Coalition, Union for Reform Judaism, Unitarian Universalist Association, Women of Reform Judaism
- No *amici* have appeared before this Court in support of Defendants-Appellees to date

Rulings Under Review

Plaintiff-Appellant appeals from the district court's order (ECF No. 25) and accompanying memorandum opinion (ECF No. 24) issued by the Honorable Rosemary M. Collyer in No. 16-CV-00850 (D.D.C.), dated October 11, 2017, granting Defendants' motion to dismiss. *Barker v. Conroy*, 282 F. Supp. 3d 346 (D.D.C. 2017) (App. 1-33).

Plaintiff-Appellant dismissed his appeal from the district court's order dismissing the individual capacity claims against Defendant-Appellee Conroy. Order, No. 17-5278 (D.C. Cir. June 13, 2018). In his opening brief, Plaintiff-Appellant abandoned his appeal from the dismissal of Chaplain Liaison Karen Bronson, Speaker Paul Ryan, and the U.S. House of Representatives, and also abandoned his claims arising under the Due Process Clause, the Religious Test Clause, and the Religious Freedom Restoration Act. *See* Appellant's Opening Br. at 3.

Related Cases

The case on review has not previously been before this Court. Appellees are unaware of any other related cases.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Daniel Barker invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331. Defendant-Appellees contest jurisdiction based on Plaintiff's lack of standing, the political-question doctrine, and the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1. The remainder of Plaintiff's jurisdictional statement is complete and correct.

STATEMENT OF ISSUES ON APPEAL

This appeal presents the following issues:

1. Whether Plaintiff lacks standing under *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987);

2. Whether Plaintiff's suit is non-justiciable under *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341 (D.C. Cir. 1975); and

3. Whether Plaintiff's Establishment Clause claim fails under *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014).

PERTINENT STATUTES AND REGULATIONS

Rules of the U.S. House of Representatives

RULE II
OTHER OFFICERS AND OFFICIALS

> *Chaplain*
>
> 5. The Chaplain shall offer a prayer at the commencement of each day's sitting of the House.
>
> * * * *
>
> RULE XIV
> ORDER AND PRIORITY OF BUSINESS
>
> 1. The daily order of business (unless varied by the application of other rules and except for the disposition of matters of higher precedence) shall be as follows:
>
> First. Prayer by the Chaplain.
>
> * * * *

STATEMENT OF THE CASE

This case arises out of the U.S. House of Representatives' unbroken tradition of commencing each legislative day with a prayer – a religious invocation of a higher power – for the benefit of its Members. Both the Congress and the Supreme Court have long recognized that the House's legislative-prayer practice is consistent with the Establishment Clause. U.S. Const. amend. I. For most of the Nation's history, that practice has been codified in Rules adopted pursuant to the House's exclusive constitutional authority to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2. Those Rules, which expressly require a "prayer" as the first order of legislative business at each day's sitting of the House, are no mere formality or historical relic. They reflect not only a coequal branch of

government's undeniably legitimate interest in solemnizing its legislative proceedings, invoking divine guidance over the activities of the day, and acknowledging the role of religious faith in the Nation's history and traditions, but also the considered judgment of House Members regarding the continued necessity of the prayer practice for their own benefit as legislators, as reflected in their readoption of the prayer requirement at the start of each new Congress. Rules reflecting this historical practice have been continually adopted for well over a century without regard to majority party affiliation.

Typically, the House Chaplain – an Officer of the House elected by its Members – gives the opening prayer required by House Rules. In keeping with long-established practice, however, the current Chaplain, Father Patrick J. Conroy, at times allows visiting religious leaders to give the required prayer. *See generally* 1 Hinds' Precedents § 272, n.2 (describing practice of inviting guest clergy). Fr. Conroy declined to permit Plaintiff, an atheist, to deliver the opening prayer. Plaintiff claims that this decision was "discriminatory" because it was based on his lack of religious belief. App. 56 (¶175). But Plaintiff overlooks the fact that he has "excluded himself" from the prayer opportunity, because he "will not pray and yet asks to participate in [the House's] moment of prayer." *Kurtz v. Baker*, 829 F.2d 1133, 1142 (D.C. Cir. 1987).

I. THE HISTORY OF CONGRESSIONAL PRAYER

Under the Rules of the House, adopted pursuant to the Rulemaking Clause, U.S. Const. art. I, § 5, cl. 2, each legislative day must start with a prayer:

- Rule II.5 (Other Officers and Officials): "The Chaplain shall offer a prayer at the commencement of each day's sitting of the House."
- Rule XIV.1 (Order and Priority of Business): "The daily order of business (unless varied by the application of other rules and except for the disposition of matters of higher precedence) shall be as follows: First. Prayer by the Chaplain."

See H. Doc. No. 113-181, §§ 665, 869 (2015); H. Doc. No. 114-142, §§ 665, 869 (2017). The House formally adopted a Rule requiring the opening of the legislative day with prayer in 1880, "but the sessions of the House were opened with prayer from the first." H. Doc. No. 113-181, § 665. That legislative-prayer requirement has an unimpeachable historical pedigree.

The first Continental Congress met on September 5, 1774, and the following day resolved that Reverend Jacob Duché, an Episcopalian clergyman, should open the next day's meeting with prayer. 1 Journals of the Continental Congress ("Journals") 26 (1774). Reverend Duché did so, marking September 7, 1774, as the first recitation of a legislative prayer in the Continental Congress. *Id.* at 27. On May 10, 1775, the first day of the new session of the Continental Congress, Reverend Duché was again invited to deliver an opening prayer the following day, which he did. 2 Journals 12-13 (1775).

When Continental Congress delegates met in July 1776 to proclaim the Declaration of Independence, they changed the chaplaincy to a formal Congressional office. 5 Journals 530 (1776). Reverend Duché was "appointed chaplain to Congress" and was requested to open each day's session. *Id*. Following Reverend Duché's resignation, the Continental Congress elected two new chaplains on December 23, 1776. 6 Journals 886-87, 1034 (1776). In 1784, the delegates decided that the elections for these offices should be held annually. 27 Journals 683 (1784).

The inclusion of chaplains among Congressional officers continued upon the convening of the First Congress in April 1789. On April 7 and 9, within days of securing the initial quorum, both the Senate and House formed committees to confer on conference rules and determine the manner in which chaplains would be selected. S. Journal, 1st Cong., 1st Sess. ("S. Journal") 10 (1789); H. Journal, 1st Cong., 1st Sess. ("H. Journal") 11-12 (1789). The committees reached agreement, and the first House and Senate chaplains were elected on May 1 and April 25, 1789, respectively. H. Journal 26; S. Journal 16. On September 22, 1789, the House and Senate adopted the first statutory authority for the compensation of Members and officers, including each chaplain. Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70. Just three days later, the House and Senate reached agreement on the Bill of Rights, including the First Amendment. H. Journal 121; S. Journal 88. "Clearly the men who wrote the First Amendment Religion Clause did not view

paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Marsh v. Chambers*, 463 U.S. 783, 788 (1983).

The original procedure for selecting chaplains under the Constitution was "[t]hat two Chaplains, of different denominations, be appointed to Congress," one by each house, "which Chaplains shall commence their services in the Houses that appoint them, but shall interchange weekly." H. Journal 16; S. Journal 12. On February 21, 1856, the practice of maintaining a joint chaplaincy for Congress was abandoned in favor of each chamber electing its own chaplain. *See* Cong. Globe, 34th Cong., 1st Sess. 486 (1856).

In the late 1850s, both houses of Congress experimented with local volunteer clergy to deliver the opening prayer, rather than elected chaplains. *See, e.g.*, Cong. Globe, 35th Cong., 1st Sess. 13-14 (1857). (One primary reason for the change was a concern about "electioneering" among chaplain candidates' supporters in Congress. *See id.*) The experiment was quickly abandoned because of dissatisfaction with the use of rotating volunteers, *see, e.g.*, Cong. Globe, 36th Cong., 1st Sess. 97-98 (1859), and both houses returned to the election and appointment of chaplains as officers, *see id.* at 162 (1859), 1016 (1860). The House Chaplain, however, continued the practice of occasionally inviting volunteer clergy to deliver

the opening prayer. *See* 1 Hinds' Precedents § 272, n.2.[1] In 1880, the House codified its longstanding practice by formally adopted a rule requiring a prayer to open the legislative day. H. Doc. No. 113-181, § 665.

Based in substantial part on this "unbroken history" of Congressional chaplains opening legislative sessions with religious prayer, the Supreme Court in *Marsh* upheld the constitutionality of Nebraska's legislative chaplaincy. 463 U.S. at 792. "To invoke Divine guidance on a public body entrusted with making the laws," the Court concluded, "is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*

[1] In more recent times, guest chaplains representing a variety of both monotheistic and non-monotheistic faiths have opened House legislative sessions with prayer, thus "acknowledg[ing] our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds," *Town of Greece*, 134 S. Ct. at 1820-21. *See, e.g.*, 163 Cong. Rec. H7760 (daily ed. Oct. 4, 2017) (Imam Abdullah Antepli, Duke Univ.); 163 Cong. Rec. H5189 (daily ed. June 27, 2017) (Rabbi Gary Klein, Temple Ahavat Shalom); 161 Cong. Rec. H4602 (daily ed. June 24, 2015) (Dr. Chandra Bhanu Satpathy, Shri Sai Cultural & Cmty. Ctr.); 161 Cong. Rec. H4015 (daily ed. June 10, 2015) (Rabbi Claudio Kogan, Temple Emanuel); 160 Cong. Rec. H5504 (daily ed. June 19, 2014) (Mr. Rajan Zed, Universal Soc'y of Hinduism); 159 Cong. Rec. H5182 (daily ed. July 31, 2013) (Imam Talib Shareef, Masjid Muhammad); 159 Cong. Rec. H3024 (daily ed. June 4, 2013) (Satguru Bodhinatha Veylanswami, Kauai Aadheenam Hindu Monastery); 147 Cong. Rec. H2389 (daily ed. May 22, 2001) (Gurudev Shree Chitrabhanuji, Jain Meditation Int'l Ctr.); 146 Cong. Rec. H7579 (daily ed. Sept. 14, 2000) (Priest Venkatachalapathi Samuldrala, Shiva Hindu Temple).

In 2014, the Supreme Court reaffirmed the constitutional legitimacy of legislative prayer, rejecting an Establishment Clause challenge to the practice of opening monthly town board meetings with prayers by local volunteer clergy. *Town of Greece*, 134 S. Ct. at 1815. Notably, the Court rejected the plaintiffs' argument that legislative prayer must be nonsectarian, pointing to the long history of faith-specific Congressional prayers and finding it entirely consistent with the First Amendment. *Id.* at 1820-22; *see also id.* at 1823 ("Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith."). The Court also rejected the assertion that the Establishment Clause was offended by the predominantly Christian nature of the prayers, explaining that any judicial attempt to impose guidelines regarding the number or frequency of different religious faiths that should be represented by guest ministers would inevitably produce an impermissible "form of government entanglement with religion." *Id.* at 1824.

II. PLAINTIFF'S COMPLAINT

Shortly after the Supreme Court's decision in *Town of Greece*, lawyers from the Freedom From Religion Foundation visited Fr. Conroy's office "to inquire about a nonreligious citizen serving as guest chaplain[.]" App. 38 (¶34). According to the complaint, Fr. Conroy's staff explained that guest chaplains were permitted to give an opening prayer if (i) they are sponsored by a House Member,

(ii) they are ordained, and (iii) their prayer addresses a "higher power." App. 38 (¶35).

Several months later, the Honorable Mark Pocan, U.S. Representative for the 2nd Congressional district of Wisconsin, requested that Plaintiff, co-president of the Freedom From Religion Foundation, "be given consideration as a guest chaplain" and allowed to deliver a "secular" "invocation" during the time set aside for morning prayer. App. 63 (Ex. A). Plaintiff had previously been ordained as a Christian minister but later "lost faith in faith" and disavowed his religious beliefs. App. 36 (¶16). He now "belie[ves] that there are no gods or other supernatural higher powers." App. 36 (¶17).

Fr. Conroy declined to invite Plaintiff to serve as a guest chaplain, explaining that Plaintiff's proffered ordination certificate was not adequate because he had disavowed his religious faith. App. 65-66 (Ex. C). Fr. Conroy also noted that House Rules require a "prayer," whereas Rep. Pocan's request indicated that Plaintiff would deliver a "secular invocation." App. 65 (Ex. C).

On May 5, 2016 (the National Day of Prayer), Plaintiff filed this suit against Fr. Conroy in his official capacity.[2] Plaintiff sought, among other things, (i) a dec-

[2] Plaintiff additionally sued Fr. Conroy in his personal capacity but subsequently dropped that claim. *See* Order, No. 17-5278 (June 13, 2018). Plaintiff also sued

laration that barring atheists and nonreligious individuals from delivering the opening prayer is a violation of the Constitution; (ii) a declaration that guest chaplains cannot be required to invoke "a supernatural or god-like higher power"; (iii) injunctive relief that would bar Fr. Conroy from selecting guest chaplains to give the opening prayer on the basis of inherently religious qualifications; and (iv) an order approving Plaintiff's "appointment to the post of guest chaplain" and requiring Fr. Conroy to "schedule Barker to give an invocation as soon as possible." App. 60-62 (pt. V).

III. THE DISTRICT COURT'S DECISION

The district court granted Defendants' motion to dismiss Plaintiff's complaint. The court determined that Plaintiff lacked standing under the "functionally identical" facts of this Court's decision in *Kurtz*, 829 F.2d at 1143. App. 18. The court reasoned that, "[l]ike the plaintiff in *Kurtz* …, Mr. Barker has failed to allege that the chaplain 'had the power to permit him to address the House … in the manner he sought' – through a secular invocation." App. 18.

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two members of Fr. Conroy's staff and Speaker Paul Ryan, and asserted claims under the Due Process Clause, Religious Test Clause, and Religious Freedom Restoration Act, but Plaintiff has abandoned his appeal with respect to those defendants and claims. *See* AOB 3 ("At this time, Barker is electing to pursue on appeal the court's dismissal of official capacity claims against Chaplain Conroy."); *id*. at 29-41 (addressing only the Establishment Clause claim). For that reason, this brief will not address the abandoned legal theories or defendants.

The district court rejected Defendants' contention that the political-question doctrine and the Speech or Debate Clause barred relief. App. 23. On the merits, the court rejected Plaintiff's Establishment Clause claim. App. 24-27. The court explained that Plaintiff's "request to open the House with a secular invocation, which resulted in the denial of his request to serve as a guest chaplain, was a challenge to the ability of Congress to open with a prayer," a challenge that must fail in light of the Supreme Court's decisions in *Town of Greece* and *Marsh*. App. 26.[3]

SUMMARY OF THE ARGUMENT

I. Plaintiff lacks Article III standing. As the district court explained, this issue is controlled by this Court's holding in *Kurtz v. Baker*, 829 F.2d 1133, 1143 (D.C. Cir. 1987), which involved what the district court correctly described as "functionally identical" facts, App. 18. *Kurtz* held that a plaintiff who "attempt[ed] to compel the chaplains of the Senate and the House to allow him to address secular remarks in their respective chambers during the periods explicitly reserved for prayer" lacked standing to proceed with his Establishment Clause challenge. 829 F.2d at 1145. The Court reasoned that because the plaintiff "ha[d] not alleged, and c[ould] not plausibly allege, that the chaplains ha[d] the authority to satisfy his

[3] The district court also dismissed Plaintiff's Due Process Clause, Religious Test Clause, and Religious Freedom Restoration Act claims against the other defendants and dismissed the personal capacity claim against Fr. Conroy. App. 24-33.

requests, the cognizable injury he allege[d] is not fairly traceable to them" and thus the "dispute is not one 'traditionally thought to be capable of resolution through the judicial process.'" *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)). Precisely the same is true here.

II. Plaintiff's claim is also non-justiciable based on the political-question doctrine and the Speech or Debate Clause under this Court's decision in *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341 (D.C. Cir. 1975). In *Consumers Union*, a publishing organization was denied admission to the Periodical Press Galleries by the executive committee of reporters charged by House Rules with authority to grant admission to the galleries. *Id.* This Court rejected the plaintiff's constitutional challenge to the denial of its application, explaining that the case was "not justiciable upon the ground that, performed in good faith, the acts of [the defendants] were within the spheres of legislative power committed to the Congress and the legislative immunity granted by the Constitution." *Id.* at 1351. Because Plaintiff challenges the Chaplain's implementation of House Rules requiring that the legislative day must commence with a prayer, this suit similarly represents an impermissible challenge to a House official's exercise of delegated House authority to implement internal House rules promulgated pursuant to the House's exclusive rulemaking power to govern access to House premises and Members.

III. Plaintiff's Establishment Clause claim also fails on the merits. Plaintiff asserts that the practice of legislative prayer must include secular invocations in order to pass constitutional muster, but history and precedent are squarely to the contrary. The Supreme Court held in *Marsh v. Chambers*, 463 U.S. 783 (1983), and reaffirmed in *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014), that legislative prayer, "*while religious in nature*," "has long been understood as compatible with the Establishment Clause," 134 S. Ct. at 1818 (emphasis added). The *Marsh* Court described the Founders' view of opening prayers as "conduct whose … effect … harmonized with the tenets of some or all *religions*." 463 U.S. at 792 (emphasis added) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). The dissent in *Marsh* recognized it as "self-evident" that the "'purpose' of legislative prayer is preeminently religious rather than secular." *Id.* at 797 (Brennan, J., dissenting); *see also Kurtz*, 829 F.2d at 1147 (Ruth Bader Ginsburg, J., dissenting from standing ruling) (Congress's opening prayer practice, which "does not include secular remarks … is not subject to constitutional assault[.]") And *Town of Greece* rejected "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard." 134 S. Ct. at 1820.

Neither *Town of Greece* nor *Marsh* supports Plaintiff's claim that a legislative body is obligated to provide an opportunity for nonreligious individuals to deliver secular remarks during the time set aside for prayer. To the contrary, this

Court previously concluded that an atheist taxpayer's Establishment Clause challenge to Congressional chaplaincies "retain[ed] no vitality" after *Marsh*. *Murray v. Buchanan*, 720 F.2d 689, 690 (D.C. Cir. 1983) (en banc) (per curiam); *see also Kurtz*, 829 F.2d at 1152 (Ruth Bader Ginsburg, J., dissenting) ("[A]fter *Marsh*, it is evident that [plaintiff] has stated no federal question of genuine substance."). Plaintiff's Establishment Clause challenge is foreclosed by binding precedent.

ARGUMENT

I. STANDARD OF REVIEW

The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). This Court reviews both standing and merits grounds *de novo*. *See Rangel v. Boehner*, 785 F.3d 19, 22 (D.C. Cir. 2015) (jurisdiction); *Gonzalez-Vera v. Townley*, 595 F.3d 379, 381 (D.C. Cir. 2010) (merits).

II. THE DISTRICT COURT CORRECTLY HELD THAT IT LACKED SUBJECT MATTER JURISDICTION OVER THIS ACTION

The Court should affirm the district court's dismissal of Plaintiff's complaint under Rule 12(b)(1) because the district court correctly held that it lacked subject matter jurisdiction over this action. App. 12-24. Subject matter jurisdiction is lacking for two independent reasons. *First*, Plaintiff lacks standing to challenge Fr. Conroy's denial of his request to serve as a guest chaplain, because this Court's decision in *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987), rejected standing on materially indistinguishable facts. *Second*, even if Plaintiff had standing, his claims

would be non-justiciable under this Court's decision in *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341 (D.C. Cir. 1975).

A. Plaintiff Lacks Standing to Challenge Fr. Conroy's Denial of His Request to Serve as a Guest Chaplain

The law of this Circuit establishes that Plaintiff lacks standing to challenge Fr. Conroy's denial of his request to serve as a guest chaplain. Article III of the Constitution limits federal jurisdiction to "Cases" and "Controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). As the Supreme Court has repeatedly explained, "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id.* (alteration and punctuation omitted). And "[o]ne element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Id.* (punctuation omitted). This "law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.*

The "irreducible constitutional minimum of standing," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), requires plaintiffs to establish "an injury [that is] concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 568 U.S. at 409 (punctuation omitted). "The party invoking federal jurisdiction bears the burden of

establishing these elements." *Lujan*, 504 U.S. at 561. Moreover, the "standing inquiry [is] especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper*, 568 U.S. at 408; *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) (same). In this case, Circuit precedent forecloses Plaintiff's attempts to meet his burden of establishing that his purported injury is "fairly traceable to the challenged action" and would be "redressable by a favorable ruling."

1. Plaintiff's Purported Injury Is Not Fairly Traceable to Fr. Conroy

In order to establish causation for purposes of Article III standing, "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, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (alteration and punctuation omitted). In this case, the district court correctly held that Plaintiff lacks standing because controlling precedent "dooms [his] causation claim." App. 17.

This Court's decision in *Kurtz* governs this case. In *Kurtz*, a secular humanist challenged the refusal of the U.S. House and Senate chaplains to invite him "to deliver a moral but 'non-theistic' invocation in the Senate and the House" "during

the period each house reserves for morning prayer." 829 F.2d at 1134. The plaintiff had written to the House Chaplain requesting permission "to appear as a guest speaker and to open a daily session with a short statement in which he would remind the [Members] of their moral responsibilities." *Id.* at 1135 (alteration and punctuation omitted). The House Chaplain denied the request, explaining that "[t]he rules of the [House] provide that each session will open with a prayer" and that it was "therefore impossible … for me to invite you." *Id.* The plaintiff sued, claiming that the exclusion of "non-theists" from serving as guest chaplains in the House and Senate was unconstitutional. *Id.* at 1136.

This Court held that the plaintiff lacked standing, because his "inability to address the Senate or the House" was not "fairly traceable to the chaplains' rejection of [his] requests." *Kurtz*, 829 F.2d at 1142-44. The Court reached that conclusion "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." *Id.* at 1142. With respect to the first point, the Court explained that the plaintiff "d[id] not even allege that each house has granted its chaplain discretionary authority such that, with the chaplain's assent, there would have been a 'substantial probability' of him addressing either house of Congress." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 504 (1975)). And "[i]n the absence of an allegation that the chaplains had the power to permit him to address the House and Senate in the manner

he sought, the court could not conclude that the chaplains 'caused' appellant's exclusion." *Id.*[4]

With respect to the second point, the Court explained that "[e]ven if appellant had alleged that the chaplains had the authority to grant him floor privileges, such an allegation could not be seriously entertained." *Kurtz*, 829 F.2d at 1142. In particular, taking "judicial notice of the fact that the opportunity to address either house is a privilege rarely extended to outsiders, and then only with the approval of the members of the respective houses," the Court reasoned that "[e]ven if the chaplains had agreed to invite Kurtz, it would be unreasonable to imagine that they could have provided him with the actual opportunity to deliver non-religious remarks to either house of Congress during the time expressly set aside for prayer." *Id.*

In particular, the Court noted, House Rules stated "that '[t]he Chaplain shall attend at the commencement of each day's sitting of the House and open the same with prayer'" and "that '[t]he daily order of business shall be as follows: First.

[4] The Court further rejected the proposition that standing could be predicated on the notion that the chaplains might disregard the limits on their discretion: "It is true that *if* a chaplain decided to ignore the limits to his authority, and *if* he decided to smuggle [plaintiff] into his house's chamber, [plaintiff] might have a chance to attain his goal of addressing the Senate or the House before his purpose was discovered. But Article III requires a chain of causation less ephemeral than a coin tossed into a wishing well." *Kurtz*, 829 F.2d at 1143.

Prayer by the Chaplain.'" *Kurtz*, 829 F.2d at 1143 (citations omitted). These Rules in no manner authorize "a free-for-all in which any interested person could appear for the purpose of self-expression on moral and philosophical issues." *Id.* (punctuation omitted). Accordingly, the Chaplain had no discretion "to transform the period reserved for prayer into … an 'opening ceremony' in which 'non-theistic' remarks could be delivered, however uplifiting." *Id.* at 1142-43.[5]

The Court therefore concluded that because the plaintiff "[could not] plausibly allege[] that the chaplains ha[d] the authority to satisfy his requests, the cognizable injury he alleges is not fairly traceable to them." *Kurtz*, 829 F.2d at 1145. Thus, the "dispute [was] not one 'traditionally thought to be capable of resolution through the judicial process.'" *Id.* at 1145 (quoting *Allen*, 468 U.S. at 752).

In an attempt to circumvent *Kurtz*, Plaintiff proffers three purported distinctions, but none is persuasive. At bottom, as the district court explained, Plaintiff's "request to address the House is functionally identical to the request made by Mr. Kurtz and must fail for the same reason." App. 18.

[5] The Court further explained that "[w]ere that not impediment enough, Senate and House rules place strict limitations on access to their respective chambers," and so "even if [the Chaplain] were to agree to invite him to deliver a non-prayer, it would require action by only one [member] to force his expulsion from the chamber." *Kurtz*, 829 F.2d at 1143.

First, Plaintiff argues that "[d]ismissal at this stage was … improper because the court could conclude that the House Rules do not, in fact, preclude a nonreligious prayer and that Chaplain Conroy's discriminatory policy was made and enforced of his own accord." Appellant's Opening Br. (hereinafter "AOB") 23-24. In Plaintiff's view, *Kurtz* is inapposite because his complaint "alleges that Chaplain Conroy has the power and discretion" to invite him to serve as a guest chaplain. AOB 24.

Plaintiff's complaint, however, alleges only that Fr. Conroy "has the power and discretion to invite guest chaplains to fulfill the responsibilities of the Chaplain's Office by offering *a prayer*." App. 41 (¶69) (emphasis added); *see* App. 65 (referencing Chaplain's "discretion to invite guest chaplains to fulfill these responsibilities by offering *a prayer*" (emphasis added)). That allegation serves only to confirm that this case is on all fours with *Kurtz*, in which the chaplains likewise were free to "invite guest chaplains of various denominations … to deliver the opening prayer." 829 F.2d at 1134.

As the district court cogently explained, Plaintiff's argument to the contrary rests on a wholly implausible misreading of Fr. Conroy's letter to Plaintiff. "Although Fr. Conroy's letter used the word 'discretion,' it did not state that Fr. Conroy has absolute discretion to permit any or all individuals to address the House." App. 18. Rather, the letter indicated only that Fr. Conroy had discretion

to invite guest chaplains to "*offer[] a prayer*." *Id.* (citation omitted). Thus, Plaintiff "has failed to allege that the chaplain 'had the power to permit him to address the House … in the manner he sought' – *through a secular invocation*." *Id.* (emphasis added) (citation omitted).

Even if Plaintiff had made such an allegation, moreover, *Kurtz* would still compel dismissal. This Court could not have been more emphatic in repeatedly holding that any such allegation "would not have been tenable if made." 829 F.2d at 1138; *id.* at 1142 (same); *id.* at 1144 (same). Indeed, this Court stated that "[t]o believe that the two chaplains could have authorized appellant to address a non-religious statement to the United States Senate and House of Representatives during periods explicitly reserved for prayer requires a suspension of ordinary common sense that this court need not indulge." *Id.* at 1138. *Kurtz* therefore plainly forecloses any argument that Fr. Conroy had "discretion" to invite Plaintiff to serve as a guest chaplain.[6]

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[6] Plaintiff alleges that on two occasions guest chaplains have offered prayers that did not explicitly reference a "deity." AOB 15-16, 24. Plaintiff appears to argue that, based on these two alleged instances, the Court should conclude that the House Rules permit secular remarks in lieu of a prayer. But the House Rules plainly limit chaplains to offering a "prayer." Plaintiff offers no reason to doubt the religious nature of the two guest chaplain's prayers; the mere absence of an express reference to an identified deity hardly establishes that the prayers were not intended to invoke a higher power. And even if those two prayers had arguably violated House Rules, that would not lead to the conclusion that the Rules do not require a prayer. *Cf. Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1823 (2014) ("Although these two remarks strayed from the rationale set out in *Marsh*,

Second, Plaintiff contends that, unlike in this case, the plaintiff in *Kurtz* "did not seek an opportunity to give an invocation but rather he sought to independently address the House." AOB 25. That argument is frivolous. This Court expressly acknowledged that the plaintiff in *Kurtz* was seeking to deliver "a moral but 'non-theistic' *invocation* in … the House" during the period reserved for morning prayer, 829 F.2d at 1134 (emphasis added) – precisely as Plaintiff seeks to do here. *See also id.* at 1135 (*Kurtz* plaintiff's request letter stated that "I would not, of course, invoke any deity" but "my remarks would otherwise fall within the traditional format"). Like Plaintiff here, the plaintiff in *Kurtz* was a non-religious individual who challenged the chaplains' denial of his request to speak from the floor of the House during the time the House Rules reserve for an opening prayer. *Id.* at 1134. And, also like Plaintiff here, the plaintiff in *Kurtz* argued that allowing religious but not secular speakers during this time violated the Constitution. *Id.* at 1136. In short, both suits concern plaintiffs' "attempt to compel the chaplain[] of the … House to allow him to address secular remarks … during the period[] explicitly reserved for prayer." *Kurtz*, 829 F.2d at 1145.[7]

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they do not despoil a practice that on the whole reflects and embraces our tradition.").

[7] Plaintiff also contends that *Kurtz* did not involve "an acknowledged guest invocation practice." AOB 24. That is not true. *See Kurtz*, 829 F.2d at 1134 ("The official chaplains of the Senate and the House occasionally invite guest chaplains of

Contrary to Plaintiff's argument, therefore, the fact that he labels his proposed remarks an "invocation" is of no legal significance. AOB 25. Plaintiff's choice of terminology does serve, however, to reemphasize the Chaplain's inability to grant his request. The House Rules do not provide for an "invocation," they require a "prayer," so it is telling that Plaintiff apparently cannot bring himself to call his proposed remarks a "prayer." *See* AOB 11-13, 16, 19-22, 25, 27, 29 (consistently referring to his proposed remarks as an "invocation" and not a "prayer"). In any event, Plaintiff's personal interpretation of the word "prayer" is irrelevant. As confirmed by over two hundred years of practice, the House Rules plainly call for a religious prayer. *See* App. 1; *infra* pp. 40-42. And this Court in *Kurtz* repeatedly recognized that allowing individuals to offer secular remarks would violate the House Rules. 829 F.2d at 1142-43. Indeed, as the Supreme Court recognized in *Town of Greece* itself, "legislative prayer" is by definition "religious in nature." 134 S. Ct. at 1818. Thus, it is "unreasonable to imagine" that Fr. Conroy "could have provided [Plaintiff] with an actual opportunity to deliver non-religious remarks." 829 F.2d at 1142.

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various denominations, some not ordained, to deliver the opening prayer.").

Third, citing *Heckler v. Mathews*, 465 U.S. 728 (1984), Plaintiff argues that "[i]t is common place to sue implementing officers even though they may otherwise have no discretion to grant a complainant's request." App. 22-23. *Kurtz*, however, squarely rejected that argument.

Specifically, the dissent in *Kurtz* cited *Heckler* and "suggest[ed] that the court could order the chaplains to end the guest chaplain programs of the Senate and the House." 829 F.2d at 1144. The Court held that "[t]his argument is unavailing because it avoids, rather than resolves, the causation analysis essential to any determination of standing." *Id.* "Unlike the defendants here," the Court explained, "the defendant in *Heckler* had sufficient discretion, but for the challenged statute, to grant the plaintiff the benefits he sought." *Id.* And, like Plaintiff here, the plaintiff in *Kurtz* "d[id] not challenge a directive from the House or the Senate that their chaplains not admit [him] to benefits otherwise available to him." *Id.* "Rather, [the plaintiff] challenge[d] the chaplains' failure to arrogate authority which the complaint does not convincingly allege they had." *Id.* Because Plaintiff "cannot plausibly allege[] that [Fr. Conroy] ha[s] the authority to satisfy his request[], the cognizable injury he alleges is not fairly traceable" to Fr. Conroy, and Plaintiff has failed to satisfy the causation element of Article III standing. *Id.* at 1145.

2. Plaintiff's Purported Injury Is Not Redressable by a Favorable Ruling

Plaintiff also cannot show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (citation omitted). The redressability inquiry poses a simple question: "[I]f 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).

In this case, the relief that Plaintiff seeks against Fr. Conroy cannot redress his purported injury. As the Court in *Kurtz* explained, Congressional chaplains have "no authority to compel either house to accede to appearances of a guest chaplain." 829 F.2d at 1144; *see also Lujan*, 504 U.S. at 568 (finding that relief against the Secretary of Interior "would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question"). Indeed, the Court in *Kurtz* emphasized that even if a court ordered the House chaplain to invite the plaintiff to speak, the "Senate and House rules place strict limitations on access to their respective chambers," and thus any one Member's objection could suffice to initiate the plaintiff's removal. 829 F.2d at 1144; *see id.* (citing Lewis Deschler & Wm. Holmes Brown, Procedure in the U.S. House of Representatives 26 (1982)); *see also* Rule II.3(d), Rules of the U.S. House of Representatives (115th Cong.) ("The Sergeant-at-Arms … shall see that the floor is cleared of all persons except those privileged to remain."); Charles

W. Johnson et al., *House Practice: A Guide to the Rules, Precedents and Procedures of the House*, ch. 10, § 2 at 235 (2017) ("During a regular meeting, a point of order will lie to object to the presence of any unauthorized persons.").

Thus, even if the Court were to order that "Chaplain Conroy's policy and practices with regard to guest invocation-givers is unenforceable," App. 28, *Kurtz* forecloses Plaintiff's ability to satisfy the redressability requirement. Any relief in this case would at most only "provoke a conflict on a matter of constitutional principle between the houses of Congress and this court" that "would involve a test of political will rather than of law because this court is without authority to act outside the boundaries of Article III." *Kurtz*, 829 F.2d at 1144-45. Because Plaintiff lacks Article III standing, the Court should affirm the district court's dismissal of his complaint.

B. Even If Plaintiff Had Standing, His Claims Would Be Non-justiciable Under the Political-Question Doctrine and the Speech or Debate Clause

Even if Plaintiff could satisfy the requirements of Article III standing, dismissal pursuant to Rule 12(b)(1) would still be required because Plaintiff's claim is non-justiciable under the political-question doctrine and the Speech or Debate Clause, as established by this Court's decision in *Consumers Union*.

The plaintiff in that case – the publisher of Consumer Reports – sought accreditation to the Periodical Press Galleries of the House and Senate. 515 F.2d at

1342. The plaintiff applied to the Executive Committee of the Periodical Correspondents' Association ("Association"), a body created by House and Senate Rules and charged with governing access to the Periodical Press Galleries. *Id.* at 1345. "Accreditation by the Association provides members with certain privileges including special seating in the [House and Senate chamber] galleries [and] a variety of other facilities." *Id.* The Association rejected the plaintiff's application because Consumer Reports was "not an independent publication, as required by Rule Two of the Rules Governing Periodical Press Galleries." *Id.* (alteration and punctuation omitted). The plaintiff sued the Association, alleging that "Rule Two constituted a prior restraint … in violation of [its] rights under the First Amendment, and that in denying accreditation to Consumer Reports the Association acted in a discriminatory, arbitrary, capricious, and unreasonable manner" in violation of the Fifth Amendment. *Id.* at 1346.

This Court held that the case was "not justiciable upon the ground that, performed in good faith, the acts of appellants were within the spheres of legislative power committed to the Congress and the legislative immunity granted by the Constitution." *Id.* at 1351. In reaching that conclusion, the Court relied on both the political-question doctrine and the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1. *Id.* at 1346-51. The Court explained that it was "unnecessary and, indeed, improper to consider the constitutional commitment of power over internal rules to

the Congress and the Congressional immunity by virtue of the Speech or Debate Clause in isolation from each other." *Id.* at 1351. Rather, both doctrines, working together, compelled the conclusion that the Association's exercise of delegated authority to determine access to the legislative chambers was immune from judicial review. *Id.* at 1346-51.

As in *Consumers Union*, this case is non-justiciable by virtue of the political-question doctrine and the Speech or Debate Clause.[8]

1. The Political-Question Doctrine Supports the Determination That This Case Is Non-justiciable

A claim presents a political question if it involves "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *El-Shifa*

[8] In the alternative, the Court should invoke its remedial discretion "to withhold equitable and declaratory relief" because "this case raises separation-of-powers concerns." *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1175, 1177 (D.C. Cir. 1982).

*Pharm. Indus. Co. v. United State*s, 607 F.3d 836, 841 (D.C. Cir. 2010) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). "To find a political question, [the Court] need only conclude that one of these factors is present." *Id.* (alteration and punctuation omitted). As in *Consumers Union*, this case involves the textually demonstrable constitutional commitment of exclusive authority to the House to "determine the Rules of its Proceedings." U.S. Const. art. 1, § 5, cl. 2.

In *Consumers Union*, the Court emphasized that, pursuant to the "broad grant of authority" under the Rulemaking Clause, "each House has exercised power to extend to those members of the press determined eligible, and otherwise to deny, admission to the floors and galleries of Congress." 515 F.2d at 1343. The plaintiff's challenge therefore concerned "internal rules" of Congress, the purpose of which was "to assure that the Periodical Press Galleries, within space limitations, will be used by bona fide reporters who will not abuse the privilege of accreditation by importuning Members on behalf of private interests or causes[.]" *Id.* at 1347. Consequently, the Association's denial of the plaintiff's request concerned "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker*, 369 U.S. at 186, because "[t]he [C]onstitution empowers each house to determine its rules of proceedings," *United States v. Ballin*, 144 U.S. 1, 5 (1892).

The district court deemed *Consumers Union* inapposite here, on the ground that "Mr. Barker is not challenging a Rule under the Rulemaking Clause, but the application of the Rule to him, and Fr. Conroy's use of his authority to provide the opening prayer before the House himself or through a guest chaplain." App. 21. But the plaintiff in *Consumers Union* likewise challenged the application of the Press Galleries' rules to Consumer Reports. 515 F.2d at 1345-46 ("Appellee then brought the action below for declaratory relief, alleging that the Rules Governing Periodical Press Galleries are unconstitutional both on their face *and as applied to Consumer Reports*." (emphasis added)).

Consumers Union held that the plaintiff's challenge to the Association's implementation of the Press Galleries' rules implicated the political-question doctrine, explaining that "[t]he manner of assuring independence of those accredited" under the Press Galleries' rules "is for the Congress to determine as a matter of constitutional power," because "the internal rules involved constituted a demonstrable constitutional commitment to the legislative branch of government." 515 F.2d at 1347. Indeed, the Court opined that "[t]he execution of internal rules is so identified with the legislative process as to lend additional force to the historic legislative treatment of the subject of the rule in question." *Id.* at 1351; *see also NLRB v. Canning*, 134 S. Ct. 2550, 2574 (2014) (noting "the Constitution's broad delegation of authority to the Senate to determine how and when to conduct its

business").

The district court also declined to follow *Consumers Union* on the ground that "the rulemaking authority of the House does not permit it to enact or enforce Rules that violate the Constitution, which Mr. Barker claims has occurred here." App. 22. But Plaintiff's allegation of a constitutional violation does not distinguish this case from *Consumers Union*, because the plaintiff in *Consumers Union* alleged a violation of its First Amendment right to freedom of the press and Fifth Amendment rights to equal protection and due process. *See* 515 F.2d at 1341, 1346.

Indeed, the concerns implicating the political-question doctrine are *stronger* in this case than in *Consumers Union*. Here, Plaintiff contends that the word "prayer" in the House Rules is ambiguous and that this Court should undertake its own interpretation of the Rules in adjudicating this dispute. *See* AOB 25-26. Remarkably, in fact, Plaintiff suggests that "this is a question of statutory interpretation." AOB 26. But this Court has held that "judicial interpretation of an ambiguous House Rule runs the risk of the court intruding into the sphere of influence reserved to the legislative branch under the Constitution." *United States v. Rostenkowski*, 59 F.3d 1291, 1306-07 (D.C. Cir.), *opinion supplemented on denial of reh'g*, 68 F.3d 489 (D.C. Cir. 1995). Thus, Plaintiff's request for this Court to construe the House's Rules in a manner different from the interpretation placed upon them by the House serves only to confirm the non-justiciability of Plaintiff's

claims. Moreover, while the plaintiff in *Consumers Union* sought only a judicial order granting entry to the Periodical Press Galleries, Plaintiff seeks a judicial order mandating his access *to the floor of the House itself* in order to deliver a speech to the Members – an unprecedented intrusion into the seat of legislative power. This case lies at the heart of the political-question doctrine.

2. The Speech or Debate Clause Confirms That This Case Is Non-justiciable

The Speech or Debate Clause confirms that this case is non-justiciable. The Clause provides that "for any Speech or Debate in either House," House and Senate members "shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. "The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently," and "[w]ithout exception, [the Supreme Court] ha[s] read the … Clause broadly to effectuate its purposes." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501-02 (1975).

It is well settled that "[t]he Speech or Debate Clause protects more than just words spoken on the floor of the House …; it extends to all matters that are 'an integral part of the deliberative and communicative processes by which Members participate' in their constitutional duties." *Rostenkowski*, 59 F.3d at 1302 (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)). Thus, the Clause's protections extend beyond "the consideration and passage or rejection of proposed legislation"

to encompass all "other matters which the Constitution places within the jurisdiction of either House." *Eastland*, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625).

The Clause applies not just to Members but also to their "aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel*, 408 U.S. at 618; *Rangel v. Boehner*, 785 F.3d 19, 24-25 (D.C. Cir. 2015) (same). And where the Clause applies, "it is an absolute bar to interference," even when the plaintiff alleges a constitutional or other legal violation. *Eastland*, 421 U.S. at 503, 509-11; *see Rangel*, 785 F.3d at 24 ("Such is the nature of absolute immunity, which is – in a word – absolute.").

In *Consumers Union*, this Court held that the Association's challenged conduct was protected legislative activity under the Speech or Debate Clause. The Court explained that the Association was "enforcing internal rules of Congress validly enacted under authority specifically granted to the Congress and within the scope of authority appropriately delegated by it," and therefore was "engaging in a sense in acts generally done in relation to the business before Congress, an integral part of the deliberative and communicative processes." *Consumers Union*, 515 F.2d at 1350 (citation and punctuation omitted). Thus, the Association's actions fell within "the sphere of legislative activity" protected by the Speech or Debate

Clause. *Id.*; *accord Walker v. Jones*, 733 F.2d 923, 930 (D.C. Cir. 1984) ("*Consumers Union* held that arrangements for seating the press in the House and Senate galleries were 'integral' to 'the legislative machinery,' and thus were immune from judicial review by virtue of the Speech or Debate Clause." (citation omitted)).

The district court declined to apply *Consumers Union* in this case, on the ground that "[t]he daily prayer is not similar legislative action" to the conduct at issue in *Consumers Union*. App. 23. The district court erred for two independent reasons.[9]

First, the daily prayer itself is a legislative action. The House's Rules have long reflected the view that the opening prayer is legislative in nature, by specifying that the prayer must be offered "at the commencement of each day's *sitting of the House*" and constitutes the first item in the House's "daily order of *business*." House Rules II.5, XIV.1 (emphases added). And the opening prayer is an integral

[9] The district court additionally noted that "Members are not compelled to attend" the legislative prayer. App. 23. But neither are Members compelled to attend committee hearings, participate in drafting committee reports, or attend investigative fact-finding interviews – yet all of these are legislative actions protected by the Clause. *See Gravel*, 408 U.S. at 624 ("committee hearings"); *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1202 (D.C. Cir. 2009) ("fact-finding"); *United States v. Rose*, 28 F.3d 181, 187-88 (D.C. Cir. 1994) ("'preparing a report'") (citation omitted). Indeed, there is no quorum requirement for any legislative activity conducted on the floor of the House, other than voting. Rule XX.7(a). Significantly, Members have no obligation to interact with reporters in the Press Galleries, but *Consumers Union* still determined that the Association's decisions about whom to admit to the Galleries constituted a legislative act. 515 F.2d at 1350-51.

component of the House's business: "As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, [and] reminds lawmakers to transcend petty differences in pursuit of a higher purpose[.]" *Town of Greece*, 134 S. Ct. at 1818. Indeed, each opening prayer is recorded in the Congressional Record, the official "verbatim report" of the House's "proceedings." 44 U.S.C. § 901 (2012). The House's own view that the opening prayer is an element of its legislative business is entitled to deference from the courts. *See Eastland*, 421 U.S. at 509 ("The wisdom of congressional approach or methodology is not open to judicial veto."); *Consumers Union*, 515 F.2d at 1351 (Congressional ratification of challenged actions "is supportive of their occurrence within the scope of the legislative process").

From time to time, in fact, a Member of the House has been called upon to deliver the opening prayer.[10] It can hardly be doubted that a prayer delivered by a Member of the House, speaking from the floor of the House, for the benefit of the House, as the first order of business in the House's legislative day, constitutes a "Speech … in either House" for which the Member "shall not be questioned in any

[10] *See, e.g.*, 119 Cong. Rec. 17,441 (1973) (Rep. William H. Hudnut III); 58 Cong. Rec. 7841 (1919) (Speaker "request[ed]" that Members "join[] in the Lord's prayer"); 27 Cong. Rec. 1584 (1895) (Rep. Everett); 27 Cong. Rec. 1629 (1895) (Rep. Everett); 26 Cong. Rec. 5878 (1894) (Rep. Everett); 23 Cong. Rec. 5571 (1892) (Rep. McKinney).

other Place." U.S. Const. art. I, § 6, cl. 1. That is dispositive for purposes of establishing the applicability of the Speech or Debate Clause, because the Supreme Court has made clear that the "Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel* 408 U.S. at 617-18. Since a legislative prayer delivered by a Member is unquestionably covered by the Clause, the same is necessarily true of legislative prayer generally.

Second, even if legislative prayer were not a part of "the legislative process itself," *Consumers Union*, 515 F.2d at 1348, the Speech or Debate Clause would still bar Plaintiff's suit. Just like the denial of an application for accreditation and admission to the Press Galleries, Fr. Conroy's denial of Plaintiff's request to gain access to the House floor and serve as a guest chaplain was an act "done in relation to the business before Congress," *id.* at 1350, and a "matter[] which the Constitution places within the jurisdiction of either House.'" *Id.* at 1349 (quoting *Gravel*, 408 U.S. at 625).

Consumers Union is again instructive. In that case, the Association exercised House-delegated authority to grant or deny "admission to the floors and galleries of Congress." 515 F.2d at 1343. The same is true of the Chaplain in determining whether to invite an individual to serve as a guest chaplain by opening the House's daily legislative session from the floor of the House. *Cf. Schreibman v.*

Holmes, 1999 WL 963070 at *1, 203 F.3d 53 (D.C. Cir. 1999) (Table) (unpublished per curiam judgment) ("[M]aking decisions about whom to admit to congressional galleries is a legislative function."). Just as the Association sought "to assure that the Periodical Press Galleries … will be used by bona fide reporters who will not abuse the privilege of accreditation by importuning Members on behalf of private interests or causes," 515 F.2d at 1347, so the Chaplain is charged with selecting guest chaplains who will not abuse the privilege and violate House Rules by delivering a secular message to the Members (something that no private citizen is permitted to do from the House floor) instead of offering a "prayer" to a higher power. The Chaplain's decision affects "the very atmosphere in which lawmaking deliberations occur" and is therefore legislative in nature. *Walker*, 733 F.2d at 930.

Reporters admitted to the Press Galleries do not themselves engage in legislative activities, yet *Consumers Union* held that the decision whether to grant them special access to House-controlled premises (and thus to House Members) pursuant to House Rules is a legislative determination within the scope of the Clause's protections. The Clause applied because "[w]e are dealing in effect with 'acts that occur in the regular course of the legislative process,' although perhaps not with

the legislative process itself. And we are concerned within the scope of that process with internal rules of the Congress." *Consumers Union*, 515 F.2d at 1348 (citation omitted).

Precisely the same is true here. Even if not part of "the legislative process itself," the selection of guest chaplains unquestionably entails "acts that occur in the regular course of the legislative process" pursuant to "internal rules of the Congress." *Id.* And the "execution of internal rules is … identified with the legislative process," *id.* at 1351, and falls within the category of "legislative acts," because it is a "matter[] which the Constitution places within the jurisdiction of either House," *id.* at 1349 (quoting *Gravel*, 408 U.S. at 625). The Chaplain's implementation of the House's Rules is therefore a legislative act.

Accordingly, as in *Consumers Union*, "this cause is not justiciable upon the ground that, performed in good faith, the acts of [Fr. Conroy] were within the spheres of legislative power committed to the Congress and the legislative immunity granted by the Constitution." 515 F.2d at 1351. The Court should affirm the district court's dismissal of the complaint under Rule 12(b)(1) for this additional reason.

III. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF'S ESTABLISHMENT CLAUSE CLAIM IS FORECLOSED BY SUPREME COURT PRECEDENT

The district court also correctly dismissed Plaintiff's Establishment Clause claim under Rule 12(b)(6) because, at bottom, it is an attack on the practice of legislative prayer itself. For that reason, Plaintiff's suit is foreclosed by the Supreme Court's decisions in *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece*.

A. House Rules Require a Prayer, Not a Secular Invocation

The prayer required by House Rules, and incorporated into the legislative day since the first Continental Congress, is a *religious* invocation. In *Marsh v. Chambers*, after reciting the extensive history of legislative prayer as practiced in Congress and state legislatures from before the Founding, the Court equated legislative prayer with "invok[ing] *Divine guidance* on a public body entrusted with making the laws." 463 U.S. at 792 (emphasis added). In *Town of Greece*, the Court recognized that the prayer practice upheld in *Marsh* was "religious in nature" and referred to the "decidedly Christian nature" of early Congressional prayers as well as the "religious idiom" in more contemporary guest chaplain Congressional prayers. 134 S. Ct. at 1818, 1820; *see id*. at 1819 (Framers viewed Congressional prayer as "a benign acknowledgment of religion's role in society"); *see also Kurtz*, 829 F.2d at 1147 (Ruth Bader Ginsburg, J., dissenting) ("[T]he session

opening traditionally maintained by Congress … does not include secular remarks.").

The opening prayer has always been a religious invocation. Both houses of Congress confirmed as much in the mid-1800s in response to petitions seeking the abolition of Congressional chaplains. The petitions raised various grounds, including the purportedly "unconstitutional" nature of the chaplaincies in light of the Establishment Clause. *See, e.g.*, S. Misc. Doc. No. 2, 30th Cong., 2d Sess. (1848). The petitions objected to the inherently religious nature of the chaplaincies, and claimed that the practice of paying chaplains amounted to "ecclesiastical despotism." *See id.*

The petitions were referred to the respective judiciary committees of each house, which rejected them. The House Judiciary Committee explained that the House's prayer practice was simply a reflection of the fact that a "due regard for religion is the sentiment of our country," and accordingly that "an acknowledgment on behalf of the people of this happy land of their gratitude to Divine Providence" was "peculiarly proper and right." H. Rep. No. 31-171, at 4 (1850). The Committee revisited the issue in 1854, concluding that "[i]f wisdom from above, that is profitable to direct, be given in answer to the prayers of the pious, then Congress need those devotions, as they surely need to have their views of personal importance daily chastened by the reflection that they are under the government of a

Supreme Power[.]" H. Rep. No. 33-124, at 7 (1854). The Senate Judiciary Committee also recognized the inherently religious nature of the chaplain's prayers, noting that "[t]he range of selection is absolutely free in each house amongst all existing professions of religious faith" and explaining that many Members "are professed members of religious societies" who desire "the blessing of God invoked upon them in their legislative capacities[.]" S. Rep. No. 32-376, at 2 (1853).

The House's longstanding prayer requirement, and the House's understanding of the inherently religious nature of that requirement, is consistent with the Supreme Court's recognition that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). All three Branches of our government acknowledge the role of religion in American life. *See Lynch v. Donnelley*, 465 U.S. 668, 674-78 (1984) ("Our history is replete with official references to the value and invocation of Divine guidance[.]"). The House's practice of legislative prayer as one form of such "invocation[s] of Divine guidance," *id.*, is "deeply embedded in the history and tradition of this country," *Marsh*, 463 U.S. at 786.

Plaintiff argues strenuously that secular invocations are sufficiently meaningful to solemnize official events. AOB 34-36. In this regard, Plaintiff repeatedly describes the House's practice of legislative prayer as a mere "invocation." AOB 34-36. But while it may be true that a secular invocation can be meaningful and

solemnizing, that is beside the point. The Supreme Court has made clear that legislative prayer serves permissible purposes in addition to the solemnizing function that Plaintiff emphasizes, and those permissible purposes necessarily entail prayers that are religious in nature. Thus, in *Town of Greece*, the Court emphasized that legislative prayer serves to "acknowledg[e] the central place that *religion*, and religious institutions, hold in the lives of those present." 134 S. Ct. at 1827 (emphasis added). The Court described legislative prayer as "but a recognition that … willing participation in civic affairs can be consistent with a brief acknowledgment of their *belief in a higher power*[.]" *Id.* at 1827-28 (emphasis added). And the Court observed that a key "purpose" of legislative prayer is "to accommodate the *spiritual needs* of lawmakers." *Id*. at 1826 (emphasis added). Similarly, in *Marsh* the Court reasoned that "[t]o invoke Divine guidance on a public body entrusted with making the laws … is simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792.

The House has an unbroken tradition of *prayer* as required by the Rules of the House. The Constitution does not require the abandonment of that historical practice or the redrafting of House Rules in order to permit a secular invocation in lieu of a prayer. *Town of Greece*, 134 S. Ct. at 1820-22; *Marsh*, 463 U.S. at 792; *Murray*, 720 F.2d at 690; *see also Kurtz*, 829 F.2d at 1146 (Ruth Bader Ginsburg, J., dissenting) ("The congressional chaplains have no warrant themselves to utter

words that do not compose a prayer, and they have no commission from the House or Senate to engage others to extend remarks of a secular nature.").

B. The Requirement of a Prayer Is Constitutional

Plaintiff states that he is not challenging "religious-themed invocations," AOB 17, and observes, quite correctly, that "[c]onstitutionally acceptable invocations may include religious references," AOB 19. But Plaintiff attempts to turn that unremarkable proposition on its head by suggesting that a legislative *prayer* program must also permit non-religious references. In Plaintiff's view, Fr. Conroy must interpret House Rules to allow persons who do not subscribe to any religious faith to deliver secular remarks on the House floor during the time set aside for prayer. AOB 18. As the district court recognized, Plaintiff's theory is nothing less than an attack on the practice of legislative prayer itself – a practice that is undeniably constitutional. Because legislative prayer, "while religious in nature," does not violate the Establishment Clause, *Town of Greece*, 134 S. Ct. at 1818, Fr. Conroy cannot be compelled to extend invitations to guest "chaplains" who refuse to offer a religious prayer and instead insist on making non-religious statements during the time reserved for legislative prayer.

In *Marsh*, the Supreme Court upheld the Nebraska state legislature's chaplaincy program, relying heavily upon our Nation's "deeply embedded … history

and tradition" of legislative prayer. 463 U.S. at 786. The Court traced, from "colonial times through the founding of the Republic and ever since," the coexistence of legislative prayer and "the principles of disestablishment and religious freedom." *Id.* These historical circumstances "shed[] light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent." *Id.* at 790. Such a "unique history" led the Court "to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice" of legislative prayer. *Id.* at 791. Accordingly, the Court concluded:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

Id. at 792.

Significantly, the *Marsh* Court was unmoved by the fact that the legislative practice at issue had resulted in prayers that were exclusively "in the Judeo-Christian tradition." *Id.* at 793, 794-95. "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been

exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95. The Court recognized that it would be inappropriate for judges "to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795.

Shortly after the Supreme Court issued its decision in *Marsh*, this Court, sitting *en banc*, reached a similar conclusion in *Murray v. Buchanan*, in which federal taxpayers who did not "believe[] in any Supreme Being" or "practice[] any religion" challenged the constitutionality of Congressional chaplains' salaries. *Murray v. Morton*, 505 F. Supp. 144, 145 (D.D.C. 1981), *vacated and dismissed*, *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983). The unanimous *en banc* Court held that, in light of *Marsh*, "the complaint in this action retains no vitality." 702 F.2d at 690. Indeed, this Court observed, the Supreme Court had "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.'" *Id.* (quoting *Marsh*, 463 U.S. at 784). Because this Court saw "no tenable basis for a claim that the very congressional practice deliberately traced by the Court in *Marsh* should be subject to further review," the Court dismissed the plaintiffs' appeal and remanded "with instructions to dismiss the complaint for want of a substantial constitutional ques-

tion." *Id.*; *see also Newdow v. Eagen*, 309 F. Supp. 2d 29, 40 (D.D.C. 2004) (holding that Congress may limit chaplain positions to those willing to "invoke Divine guidance").

In 2014, the Supreme Court reaffirmed its holding in *Marsh*, recognizing that "legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause." *Town of Greece*, 134 S. Ct. at 1818. The Court applied its ruling in *Marsh* to a town board's practice of opening meetings with invocations performed by guest clergy from the local community. In so holding, the Court "reject[ed] the suggestion that legislative prayer must be nonsectarian," given our Nation's continuous history of Congressional prayer. *Id.* at 1823.

In light of these controlling precedents, the House's consistent practice of opening its legislative proceedings with a daily religious prayer to a higher power does not constitute an impermissible establishment of religion.

C. The Legislative Time Reserved for Prayer May Be Reserved for Those Willing to Pray

In *Town of Greece*, the Court adopted a straightforward shorthand for resolving challenges to a legislative prayer practice: if "the prayer practice … fits within the tradition long followed in Congress and the state legislatures," it comports with the Establishment Clause. 134 S. Ct. at 1819. That is unquestionably the case here – guest chaplains are expected to perform the long-standing duties of

the House Chaplain, *i.e.*, to deliver a prayer at the start of the legislative day, and Plaintiff does not contend that the House has *ever* invited a self-described atheist to deliver a secular invocation in lieu of a prayer. The House's requirement that guest chaplains be willing to pray is entirely consistent with the traditional practice of legislative prayer in this Nation, and it is therefore constitutional under Supreme Court precedent. *Id.*; *see also supra* pp. 4-7 (describing House's traditional prayer practices and historical use of volunteer clergy).

Plaintiff claims that *Town of Greece* forbids "exclusion of non-believers" as prayer-givers, AOB 37, but that is plainly wrong. In *Marsh*, the legislative-prayer practice systematically excluded atheists by empowering a single Christian chaplain to deliver exclusively Judeo-Christian prayers, despite the objection of the plaintiff in that case, a state legislator who was an atheist. 463 U.S. at 792-94; *see also* Br. Opp'n to Cert., *Marsh*, 463 U.S. 783 (No. 82-23), 1982 WL 1034559, at *2-3 ("All witnesses agreed that the [Nebraska state legislature] probably would never appoint a non-Christian to be its chaplain."); *Marsh*, Oral Arg. at 37:05 ("Senator Chambers doesn't believe in God at all, so the prayers themselves were offensive to him.").[11]

[11] *Available at* https://www.oyez.org/cases/1982/82-23.

In addition, the Supreme Court has focused not on the precise factual scenarios of the particular practice of legislative prayer, but rather on whether the practice itself comports with historical traditions. *See Town of Greece*, 134 S. Ct. at 1819. The *Town of Greece* Court treated the practices in *Marsh* (a single chaplain from a single denomination) and *Town of Greece* (rotating guest chaplains) as indistinguishable for Establishment Clause purposes. In short, *Town of Greece* did not hold that *Marsh* should be limited to its precise facts, as Plaintiff apparently would have it. The district court correctly concluded that *Town of Greece* and *Marsh* foreclose Plaintiff's claims.

Plaintiff ignores the dispositive effect of historical tradition under the test enunciated in *Town of Greece*, and asserts that the Court's decision demands a "neutral selection process" for "guest invocation-givers." AOB 30. Plaintiff then concludes that the process cannot be neutral if non-prayer-givers are excluded. AOB 35-36.[12] The district court correctly rejected Plaintiff's misreading of *Town of Greece*. App. 25-26. Were Plaintiff correct, *Town of Greece* would be directly

[12] Plaintiff cites *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in support of his argument that Fr. Conroy has discriminated against him. But the *Marsh* Court declined to apply either the *Lemon* test or the test adopted in *Larson v. Valente*, 456 U.S. 228 (1982), in evaluating the constitutionality of legislative prayer. The Court reaffirmed the inapplicability of those tests in *Town of Greece*: "*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." 134 S. Ct. at 1819.

inconsistent with *Marsh*, which upheld a state legislature's employment of the same chaplain from a single Christian denomination for a period of 16 years (and thus upheld a practice that excluded atheists, over the express objection of an atheist legislator). *See Marsh*, 463 U.S. at 793. Far from rejecting *Marsh*, *Town of Greece* reaffirmed and extended its holding.

The Court in *Town of Greece* also expressly disagreed with the reasoning of the Second Circuit below, which had concluded that the town's practice of selecting a guest speaker violated the Establishment Clause because it had the effect of producing overwhelmingly Christian prayers. *See* 134 S. Ct. at 1824. The Court rejected the contention that the town had to look beyond its borders to ensure a broader range of religious viewpoints during the opening prayer, characterizing that view as requiring "'wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each,' a form of government entanglement with religion that is far more troublesome that the current approach." *Id.* at 1824 (quoting *Lee v. Weisman*, 505 U.S. 577, 617 (1992)).[13]

[13] Plaintiff contends that limiting the prayer opportunity to individuals who are willing to pray produces similar entanglement problems, AOB 35-36, but that is plainly not so. In order to comply with constitutional and statutory protections applicable to religious conduct, government officials routinely determine whether conduct is religious in nature; the question whether a proposed guest chaplain will

At oral argument before the Supreme Court, counsel for the *Town of Greece* plaintiffs rightly conceded that "we take *Marsh* to … imply that atheists can not get full relief in this context." *Town of Greece*, Oral Arg., at 32.[14] The same is true here. By advocating that an atheist must be given access to the House floor to deliver a "secular" "invocation" rather than a prayer, Plaintiff has launched "an attack on Congress' customary, opening-with-prayer observance," *Kurtz*, 829 F.2d at 1147 (Ruth Bader Ginsburg, J., dissenting). That attack necessarily fails on the merits. *See Marsh*, 463 U.S. at 791; *Town of Greece*, 134 S. Ct. at 1823; *Murray*, 720 F.2d at 690 ("We perceive no tenable basis for a claim that the very congressional practice [of legislative prayer] deliberately traced by the Court in *Marsh* should be subject to further review.").

Nor can Plaintiff establish a constitutional violation under the *Marsh* test reaffirmed in *Town of Greece*, because he fails to allege facts demonstrating any "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose," such as prayers that "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." 134 S. Ct. at 1823, 1824. To

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invoke a higher power or instead intends to offer a secular invocation is no different.

[14] *Available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/12-696_3jqa.pdf.

the extent that Plaintiff equates mere denial of the prayer opportunity with "denigration" or "an impermissible government purpose," AOB 30, he is incorrect. Exclusion and denigration are not synonyms. "Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." 134 S. Ct. at 1823. If mere exclusion of atheists were sufficient to violate the *Marsh* test, the Court would have reached a different result in *Marsh* itself.

Plaintiff attempts to mischaracterize the guest chaplain practice as an opportunity to deliver a secular invocation in order to bolster the claim that his exclusion from the prayer opportunity due to his nonbelief is impermissible discrimination. AOB 31-33 (citing, among others, *Torcaso v. Watkins*, 367 U.S. 488 (1961) and *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).[15] To be sure, the Supreme Court has recognized that government may not coerce individuals to engage in religious practices through, for example, the denial of employment or other secular benefits. But the Court has never held or suggested that where the government opportunity is itself the performance of a religious act, individuals who are plainly unwilling to perform it must nonetheless be given the opportunity to try.

[15] Plaintiff's argument mirrors arguments made by the dissent – to no avail – in *Marsh v. Chambers*. *See* 463 U.S. at 798 n.4, 802, 803 n.13, 806 (Brennan, J., dissenting) (citing *Epperson* and *Torcaso*).

Instead, the Supreme Court has noted with approval that Congress "acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds." *Town of Greece*, 134 S. Ct. at 1820-21. The Court expressly "reject[ed] the suggestion that legislative prayer must be non-sectarian," *id.* at 1823, explaining that "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer" and that "our history and tradition have shown that prayer in this limited context [i.e., legislative prayer] could 'coexis[t] with the principles of disestablishment and religious freedom,'" *id.* at 1820 (quoting *Marsh*, 463 U.S. at 786). There can be no "impermissible government purpose" in excluding atheists in light of decades of Establishment Clause jurisprudence upholding legislative prayer.

Finally, Plaintiff's reliance on out-of-Circuit district court decisions cannot resurrect his claim. The district court in *Williamson v. Brevard Co.*, 276 F. Supp. 3d 1260 (M.D. Fla. 2017), *appeal pending*, No. 17-15769 (11th Cir. 2017), was faced with a county board prayer practice in which government officials intentionally excluded not only atheists, but also minority faiths. *See id.* at 1279-80 (officials were "unsure if they would allow a Muslim to give an invocation" and "expressed doubt about allowing a member of a polytheistic religion – including Hinduism – to give an invocation"). The district court concluded that the "overwhelming, undisputed record evidence clearly demonstrates that the County's invocation

practice runs afoul of the principles set forth in *Marsh*, *Town of Greece*, and [the Eleventh Circuit's decision in] *Pelphrey*." *Id.* at 1280. Plaintiff does not even attempt to allege any similar record of discrimination against minority faiths here (nor could he), and he has abandoned (and would lack standing to assert) any claim regarding the alleged exclusion of minority faiths. *See* AOB 17-18.

Notably, in *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008), the Eleventh Circuit upheld a county commission's practice of selecting guest chaplains primarily from Yellow Pages advertisements of "religious organizations," a selection process that necessarily excludes atheists. *Id.* at 1267, 1278. The *Pelphrey* court separately concluded, however, that the Establishment Clause was violated when another local commission "categorically excluded" certain religious faiths from its Yellow Pages list of potential guest speakers, as evidenced by a "long and continuous line" crossing out categories such as "'Churches–Islamic,' 'Churches–Jehovah's Witnesses,' 'Churches–Jewish,' and 'Churches–Latter Day Saints.'" *Id.* at 1282. Similarly, in *Atheists of Fla. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013), the Eleventh Circuit upheld a guest chaplain selection practice that utilized a list pulled from Yellow Pages advertisements of "'churches,' 'congregations,' or other religious assemblies," notwithstanding the plaintiffs' claim that the list "'exclude[d] non-religious groups such as atheists, agnostics, secularists and humanists from participation.'" *Id.* at 584, 593.

Plaintiff also cites the district court opinion in *Fields v. Speaker of the Pa. House of Representatives*, 251 F. Supp. 3d 772 (M.D. Pa. 2017), in which the district court concluded that the plaintiffs, who were nontheists, had pleaded a "plausible violation" of "purposeful[] discrimination … on the basis of religion" by virtue of their exclusion from the state house's guest chaplain program. *Id.* at 789. The district court declined to determine at the pleadings stage "[w]hether history and tradition sanctify the [state] [h]ouse's line of demarcation between theistic and nontheistic chaplains," nor did it address the "more nuanced constitutional questions – *e.g.*, whether plaintiffs practice 'religion' and are capable of 'praying,' or whether tradition dictates that legislative prayer addresses a 'higher power'[.]" *Id.* Of course, the "history and tradition" of the House's practice of legislative prayer is well-established and undisputed, so there is no need for further factual development here.

Accordingly, Plaintiff's Establishment Clause challenge to the requirement that prayer-givers address a higher power – a requirement inherent in the very concept of "prayer" as mandated by House Rules – is foreclosed by binding Supreme Court and Circuit precedent. This Court should affirm the dismissal of Plaintiff's Establishment Clause claim. In light of Plaintiff's atheist beliefs, this Court should conclude that he "has excluded himself" from the ability to deliver a prayer, because he is "cling[ing] to beliefs that are incompatible with what he desires."

Kurtz, 829 F.2d at 1142; *see also Newdow*, 309 F. Supp. 2d at 36 ("[B]ecause *Marsh* held that a legislative body may employ a chaplain to 'invoke Divine guidance,' it follows that Congress may limit the chaplain position to those who are willing to perform that task.").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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* Attorneys in the U.S. House of Representatives Office of General Counsel are "entitled, for the purpose of performing the counsel's functions, to enter an appearance in any proceeding before any court of the United States or of any State or political subdivision thereof without compliance with any requirements for admission to practice before such court." 2 U.S.C. § 5571(a).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,897 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point Times New Roman type.

/s/ Thomas G. Hungar
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I certify that on July 12, 2018, I filed the foregoing document via the Court's CM/ECF system, which I understand caused delivery of a copy to all registered parties.

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