ORAL ARGUMENT NOT YET SCHEDULED

APPEAL NO. 17-5278

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL BARKER,

Appellant,

vs.

PATRICK CONROY, CHAPLAIN, ET AL.,

Appellees.

Appeal From the U.S. District Court
District of Columbia (Washington, DC)
Civil Docket For Case #: 1:16−cv−00850−RMC
Honorable Rosemary M. Collyer

OPENING BRIEF OF APPELLANT DANIEL BARKER

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May 14, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) PARTIES BEFORE THE DISTRICT COURT.

Plaintiff is Daniel Barker. Defendants are Father Patrick Conroy, Elisa Aglieco, Karen Bronson, Paul Ryan, and the United States House of Representatives. No Intervenors or Amici appeared before the District Court.

(1) Parties in This Court:

Same as above. As of now, no Intervenors or Amici have appeared in this Court.

(B) RULING UNDER REVIEW.

Order entered on October 11, 2017 dismissing Plaintiff's Complaint, based upon Memorandum Opinion, also entered on October 11, 2017.

(C) RELATED CASES.

The case on appeal has not previously been before this Court or any court other than the District Court from which this appeal arises. Counsel is not aware of any other related cases currently pending in this Court or in any other court.

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I. JURISDICTIONAL STATEMENT.

The district court had federal question jurisdiction over this case under 28 U.S.C. §1331 because it involves claims arising under the First and Fifth Amendments of the Constitution and the Religious Freedom Restoration Act of 1993, 42 U.S.C. §200bb-1(b). Venue was proper in the District of Columbia because the challenged actions took place at the House of Representatives located in the District. 28 U.S.C. §1391.

The Court of Appeals for the District of Columbia has jurisdiction of this appeal pursuant to 28 U.S.C. §1291. This is an appeal from the Final Order of the District Court for the District of Columbia.

The Appellant timely filed his Notice of Appeal, as required by 28 U.S.C. §2107(b), within 60 days after entry of the district court's Final Order. The parties to this suit included a United States officer or employee sued in an official capacity, triggering a 60-day appeal period. The district court's Final Order in this matter was entered on October 11, 2017, and the Appellant filed his Notice of Appeal on December 8, 2017.

II. ISSUES PRESENTED FOR REVIEW.

1. House Chaplain Patrick Conroy intentionally denied Daniel Barker an opportunity to present an invocation to members of the House of Representatives because Barker is an atheist. **Is Barker's alleged injury fairly traceable to**

Chaplain Conroy's decision?

District Court Answer: The District Court concluded that Barker's alleged injury was not caused by Chaplain Conroy because House Rules require substantively religious invocations.

2. Chaplain Conroy oversees and implements a policy and practice of allowing self-written guest invocations to be delivered before commencement of House business. Chaplain Conroy, however, refuses to allow atheists an opportunity to give guest invocations. **Does Chaplain Conroy's intentional exclusion of atheists as invocation-givers violate the Establishment Clause?**

District Court Answer: The District Court concluded that a pluralistic program of guest chaplains can intentionally exclude atheists and other nonbelievers.

III. STATEMENT OF THE CASE.

A. Nature Of Case And Procedural History.

The Appellant, Daniel Barker, commenced this action because he was excluded by the Chaplain of the United States House of Representatives from a program of guest invocation-givers. (App. at 34-78.) The House Chaplain, Father Patrick Conroy, intentionally excluded Barker from the opportunity to deliver an invocation to the members of the House because he is an atheist. (App. at 35.)

Barker named Chaplain Conroy as a defendant, as well as others involved with the House Chaplaincy. Barker alleged claims arising under the United States

Constitution, including the Establishment Clause, and the Religious Freedom Restoration Act. (App. at 35.)

The Defendants filed motions to dismiss based upon alleged lack of standing; failure to state claims upon which relief may be granted; and various prudential considerations. (R. 14 and 16.)

The district court granted the Defendants' motions to dismiss in a Memorandum and Opinion entered on October 11, 2017. (App. at 1-33.) The court rejected the Defendants' prudential defenses, but ruled that Barker lacked standing to pursue his claims because his alleged injury was not fairly traceable to actions by any of the Defendants, including Chaplain Conroy. The court also concluded that Barker failed to state claims upon which relief may be granted.

The district court entered Judgment of Dismissal on October 11, 2017. (R. 25.) Barker then timely filed his Notice of Appeal on December 8, 2017. (R. 26.) Barker appealed the entirety of the district court's judgment as to all named Defendants. At this time, however, Barker is electing to pursue on appeal the district court's dismissal of official capacity claims against Chaplain Conroy.

B. Statement Of Alleged Facts.

1. Background of parties.

The U.S. House of Representatives employs a chaplain, Father Patrick Conroy, who coordinates and approves "guest chaplains," historically allowing them

to deliver about 40% of invocations, including more than 800 in the last 15 years. (App. at 34-35.)

Chaplain Conroy has imposed requirements for guest chaplains that intentionally discriminate against the nonreligious and minority religions, pursuant to which he refused to allow the Plaintiff, Daniel Barker, to deliver a guest invocation because Barker is nonreligious. (App. at 35.)

Barker is co-president of the Freedom From Religion Foundation. (App. at 36.) He was ordained to the Christian ministry in 1975, however, after which he was a pastor in three California churches, a missionary to Mexico, a Christian songwriter, and a traveling evangelist. (App. at 36.)

After 19 years in the ministry, Barker "lost faith in faith" and became an atheist. As an atheist, Barker has deeply held convictions that occupy the place of religious beliefs. (App. at 36.) Barker retains his ordination, moreover, and uses it to perform weddings, though he no longer preaches the tenets of his former religion. (App. at 36.)

2. Chaplain Conroy Refuses To Allow Barker To Deliver An Invocation Even Though He Meets The Chaplain's Requirements.

Barker has deeply and sincerely held beliefs that are ethical or moral in source and content but which impose upon him a duty of conscience parallel to his former religion. (App. at 36.) Barker believes in the power of reason, not the supernatural,

to guide lives. (App. at 36.) Despite Barker's deeply and sincerely held beliefs, he is no longer a member of any entity that issues ordinations. (App. at 36-37.)

In 2014, Barker's representatives visited the U.S. Capitol on his behalf and met in the House Chaplain's Office to inquire about a nonreligious citizen delivering the opening invocation at the House. (App. at 38.) Chaplain Conroy's staff explained that there are no written requirements to become a guest chaplain, but that guest chaplains are permitted to give invocations if:

(1) they are sponsored by a member of the House,
(2) they are ordained, and
(3) they do not directly address House members and instead address a "higher power."

(App. at 38.)

By February 2015, the Chaplain's Office had documentation showing that Barker met or would meet all indicated requirements. (App. at 38.) In fact, Representative Mark Pocan, Barker's representative to the House, officially requested that Chaplain Conroy grant Barker permission to serve as a guest chaplain and deliver the morning invocation. (App. at 38.)

Two days after Representative Pocan's request, the Chaplain's Office requested Barker's contact information, biography, and ordination certificate "to check his credentials." All requested information was quickly provided. (App. at 38.) Chaplain Conroy, nonetheless, subsequently told Representative Pocan that he was dubious that an atheist could craft an appropriate invocation. (App. at 38.)

Chaplain Conroy eventually indicated that review of a draft copy of Barker's invocation might allay his concerns. (App. at 38.) Barker was reluctant though to provide his remarks because Chaplain Conroy was imposing requirements on Barker, due to his atheism, that the Chaplain does not impose on other guest chaplains. (App. at 38-39.)

After months of silence from the Chaplain's Office, Barker felt forced to submit his invocation rather than forgo this unique and prestigious opportunity. (App. at 39.) Barker, therefore, provided a draft of his proposed invocation in June 2015. (App. at 39.)

Having met all requirements, Barker waited to be scheduled as a guest chaplain. (App. at 39.) Four months later, however, the Chaplain's Office still had not acted. (App. at 39.) When asked about the delay, the Chaplain's Office claimed that it had not considered Barker's request to be "genuine." (App. at 39.)

The Chaplain's Office then formally denied Barker permission in December 2015. (App. at 39.) That denial came nearly 18 months after first contacting the Chaplain's Office, and nearly 10 months after Barker submitted requested documentation. (App. at 39.) The Chaplain's Office reaffirmed its initial denial a month later. (App. at 39.)

3. The House Chaplain Has A Policy And Practice Of Approving Guest Chaplains Who Have Been Overwhelmingly Christian.

The House of Representatives' Rules provide for the election of a chaplain at the beginning of each Congress. (App. at 39.) The House Chaplain holds office until a successor is elected. (App. at 39.) The chaplain's sole specified duty is to offer a prayer at the commencement of each day's sitting of the House. (App. at 39.)

The House Rules do not include requirements for guest chaplains. (App. at 40.) There are no written rules or requirements for opening invocations by guest chaplains. (App. at 40.) Instead, the Chaplain's Office approves guest chaplains. (App. at 40.)

Each day that the House is in session, the Chaplain or a guest chaplain gives an invocation. (App. at 40.) Guest chaplains have been giving opening invocations in the House since at least 1948. (App. at 40.) On average, two guest chaplains deliver invocations every week. (App. at 40.)

Representatives who want to invite guests write letters to the Chaplain, who makes arrangements. (App. at 40.) Typically, the sponsoring Representative introduces the guest chaplain. (App. at 40.) The Representative gives a short biography of the guest chaplain, which introduction is recorded in the Congressional Record. (App. at 40.) The introduction is alternatively listed as "honoring," "recognizing," "welcoming," or "a special tribute to" the guest chaplain. (App. at

40.) Local media often cover the Congressional introduction and the delivery of the invocation by the guest chaplain. (App. at 40.)

Barker views the opportunity to give an invocation, to be introduced by a member of the U.S. House of Representatives, and to have that tribute recorded for posterity in the Congressional Record and memorialized on C-SPAN as a great honor and an opportunity to participate in solemnizing the venerable work of the U.S. government. (App. at 41.) Chaplain Conroy's denial prevents Barker from receiving the prestige and status that comes with giving an invocation before the U.S. House. (App. at 41.)

Chaplain Conroy has the power and authority to invite guest chaplains to fulfill the responsibilities of the Chaplain's Office by offering a prayer at the commencement of a session of the House, and to permit Members to recommend particular clergy for consideration as guest chaplains. (App. at 41.) Though the Chaplain's Office typically recommends inclusive invocations, the Chaplain has admitted he cannot tell people how to pray. (App. at 41.)

4. The House Chaplain's Policies And Practices Needlessly Restrict And Inhibit Minority Believers And Nonbelievers From Delivering Guest Invocations.

Chaplain Conroy's requirements disparately burden nonreligious and minority groups. (App. at 44.) The House of Representatives has never had an openly atheist or agnostic person deliver an invocation. (App. at 44.) Also, the

House rarely has minority religions assume the office of guest chaplain and deliver an invocation. (App. at 41-44.) Like atheists, many minority religions also have never had the opportunity to deliver an invocation. (App. at 44.)

Nothing is inherent in atheism, Jainism, Rastafarianism, Buddhism, or any other minority religion that would logically prohibit their leaders from performing the duties of the guest chaplain. (App. at 44.) In fact, nonreligious individuals, most of them lacking religious ordinations, have frequently delivered invocations before government meetings. (App. at 44.)

Since 2004, nonreligious individuals have given more than 75 documented invocations at legislative meetings, including state legislatures, around the country. (App. at 44.) No legislative meeting has suffered because of a secular invocation. (App. at 44.)

The Supreme Court has recognized that nonreligious individuals can effectively deliver invocations: "The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, *including an atheist*, could give the invocation." (App. at 44-45.)

Shortly after *Galloway* was decided by the Supreme Court, an atheist, Dan Courtney, delivered a nonreligious invocation to a town board. (App. at 45.) In his invocation, Courtney invoked the signers of the Declaration of Independence and

We the People, "as citizens." As this and other nonreligious invocations show, nonreligious speakers are well able to solemnize proceedings by delivering an opening invocation at government meetings. (App. at 45.)

Secular invocations, in fact, have been delivered at government meetings with requirements that are less restrictive and more narrowly tailored to the invocation's purpose than Chaplain Conroy's unwritten requirements. (App. at 45.)

Some religious groups, however, such as Shintoists, Jains, Rastafarians, Buddhists, Baha'is, German Baptists, and Quakers, among others, do not ordain or acknowledge clergy. (App. at 45.) Nor do atheists or agnostics ordain or acknowledge clergy. (App. at 45.) Some of these religions and others also do not worship or acknowledge supernatural or god-like higher powers, although all are capable of invoking some power outside of themselves when delivering an invocation. (App. at 45.)

5. Even Though Chaplain Conroy's Requirements Are Inherently Discriminatory Against Non-Religious And Minority Religions, Barker Met All Three.

Barker met the sponsorship and ordination requirements demanded by Chaplain Conroy and he also agreed not to address the House but a higher power. Barker even provided a draft of his invocation, a predicate inquiry not made of religious guest chaplains. (App. at 46.) Barker satisfied the first requirement on

February 18, 2015, when Representative Mark Pocan officially requested that Barker deliver a guest invocation. (App. at 46.)

Barker satisfied the second requirement a week later when the Chaplain's Office received copies of Barker's ordination, biography, and contact information to confirm the validity of that ordination. (App. at 46.) Barker was ordained by the Standard Christian Center in Standard, California on May 25, 1975. (App. at 46.) A copy of Barker's Certificate of Ordination contains the signature of four SCC officials and was provided to the Chaplain's Office. (App. at 46.) Neither Barker's certificate nor his ordination have been rescinded or otherwise abrogated. (App. at 46.)

Barker regularly uses his ordination to perform marriages. (App. at 46.) Barker has performed marriages in many states, including more than a dozen in Dane County, Wisconsin, which Congressman Pocan represents, and others such as Alabama, California, Colorado, Indiana, Iowa, and Washington. (App. at 46.) Barker most recently performed a wedding in Minnesota, which recognized his ordination and the subsequent marriage. (App. at 46.) The U.S. Air Force Academy in Colorado Springs also has allowed Barker to officiate a nonreligious wedding in its chapel using this ordination. (App. at 46-47.) None of the weddings Barker has performed using his ordination have been questioned or annulled even though he

now holds deep and sincere beliefs that are different than the ones he held when he was ordained. (App. at 47.)

Barker satisfied Chaplain Conroy's third requirement by submitting a copy of his draft remarks, which did not directly address House members. (App. at 47.) Barker invoked a higher power, although not a god or supernatural power, in his draft remarks. (App. at 47.)

6. Chaplain Conroy Denied Barker Permission To Deliver A Guest Invocation Because He Is Non-Religious.

Chaplain Conroy barred Barker from delivering a guest invocation despite receiving evidence that he met each demand from the Chaplain's office. But for Chaplain Conroy's denial, Barker would have delivered an opening invocation to the House, and received all the concomitant benefits and notoriety of that position. (App. at 48.)

Chaplain Conroy cited several reasons for his decision, all of which were pretextual. (App. at 48.) Barker was denied because he is an atheist. (App. at 48.) The Chaplain's Office obfuscated its decision by claiming that "Daniel Barker was ordained in a denomination in which he no longer practices," and "all guest chaplains have been practicing in the denomination in which they were ordained." (App. at 48.)

FFRF attorneys objected to this denial: "When the government allows invocation speakers to deliver remarks, government officials, including chaplains,

cannot legally determine whether or not a message is 'religious enough' or approve the content of messages," nor can they "legally determine whether or not a person is 'religious enough' " to deliver an invocation. (App. at 48.)

Chaplain Conroy doubled down on his denial by stating that Barker's ordination certificate "is not current or legitimate for purposes of my considering your recommendation that he be invited to offer an opening invocation." (App. at 49.)

Chaplain Conroy's letter also stated that Barker was denied because he left "the faith in which he [had] practice[d]." (App. at 49.) More to the point, Chaplain Conroy denied Barker because he is not "a religious clergyman." He had "part[ed] with his religious beliefs." (App. at 49.)

7. Chaplain Conroy Used The Three Unwritten Requirements As A Pretext For Excluding Barker, But Has Not Enforced These Requirements To Exclude Religious Invocation-Givers.

The requirements of Chaplain Conroy's guest policy serve to exclude minority religious and nonreligious applicants from delivering invocations to the House. (App. at 49.) Chaplain Conroy enforced these policy against Barker, effectively denying him equal opportunity to be an invocation giver, but he has not enforced the same requirements against other applicants. (App. at 49.)

On August 5, 2011, Thomas J. Wickham, the House Parliamentarian, served as guest chaplain, approved by Chaplain Conroy. (App. at 50.) Wickham did not have a Representative sponsor and he was not ordained. (App. at 50.)

Since 2000, Muslims identified as imams have given eight invocations. (App. at 50.) Islam does not have formal or ordained clergy. (App. at 50.) None of the Muslim guest chaplains were ordained. (App. at 50.)

As guest chaplain, Yolanda Adams gave the opening invocation on April 18, 2013. (App. at 50.) Ms. Adams, a former schoolteacher, is now a gospel singer and a radio show host, but she was not ordained when she served as guest chaplain. (App. at 50.)

As guest chaplain, Rajan Zed gave opening invocations on July 12, 2007 and June 19, 2014. (App. at 50.) Mr. Zed is the President of Universal Society of Hinduism, but he was not ordained when he served as guest chaplain. (App. at 50.)

As guest chaplain, Chandra Bhanu Satpathy gave the opening invocation on June 24, 2015. (App. at 50.) Satpathy visited the Holy Shrine of Shri Sai Baba located in Shirdi (Maharashtra) in 1989 and he has since been spreading that philosophy, but he was not ordained when he served as guest chaplain. (App. at 50-51.)

As guest chaplain, Randy Bezet, gave the opening invocation on June 25, 2015. (App. at 51.) Randy Bezet is a pastor at Bayside Church in Florida but he

was not ordained when he served as guest chaplain. (App. at 51.) Bayside Church is a member of the Association of Related Churches, which does not require its pastors to be ordained. (App. at 51.) Both Satpathy and Bezet served as unordained guest chaplains four months after Chaplain Conroy enforced the ordination requirement against Barker by demanding a copy of his ordination. (App. at 51.)

The Chaplain's Office approves guest chaplains either without investigating their ordination status or with knowledge that they were not ordained. (App. at 51.) Not only were some guest chaplains unordained, some guest chaplains were also not "practicing" in the religion in which they were ordained when they delivered opening invocations. (App. at 18.)

Other guest chaplains were ordained in one denomination, switched denominations, and delivered invocations as guest chaplains representing their subsequent faith, a denomination in which they lacked an ordination. (App. at 51-52.)

Other guest chaplains have invoked higher powers that are not a deity or even supernatural. Reverend Andrew Walton served as guest chaplain on May 5, 2015 and he did not invoke a supernatural higher power, but rather the "spirit of life that unites all people." (App. at 52.) Four months after this invocation, Chaplain Conroy again approved Andrew Walton to serve as guest chaplain on September 10, 2015. (App. at 52.) Walton gave his second invocation three months after Chaplain

Conroy received a draft copy of Barker's invocation, and once again he did not address a supernatural higher power. (App. at 52-53.)

Reverend Michael Wilker served as guest chaplain on October 16, 2015, and he did not invoke or address a god but instead addressed the "Spirit of truth and reconciliation." (App. at 53.) Reverend Wilker served as guest chaplain without addressing a supernatural higher power only four months after the Chaplain's Office received Barker's draft remarks. (App. at 53.)

Chaplain Conroy also does not require other potential guest chaplains to submit written drafts of their invocations as a prior restraint. (App. at 53.) Indeed, Chaplain Conroy has admitted that he cannot tell people how to pray or censor what guests can say. (App. at 53.) The Chaplain's Office, nonetheless, solicited Barker's draft remarks before denying his application to serve as guest speaker. (App. at 53.)

The three requirements Chaplain Conroy imposed on Dan Barker are disparately applied. (App. at 53.) Chaplain Conroy and the Chaplain's Office have used the three requirements as a pretext to censor content and viewpoints with which they do not agree. (App. at 53.)

C. District Court's Reasoning For Dismissal.

The district court granted the Defendants' motion to dismiss Barker's official capacity claims, including as to Chaplain Conroy, on two bases. The court first concluded that Barker lacks Article III standing because his alleged injury is not

fairly traceable to the Defendants' actions. (App. at 19.) In particular, with respect to claims against Chaplain Conroy, the district court concluded that Barker's exclusion from the guest invocation program due to his atheism did not cause Barker's harm because House Rules otherwise prohibit non-religious invocations. (App. at 17.) The court, in effect, conflated its standing analysis with its later merits analysis.

The district court, in its merits analysis of Barker's claim, concluded that House Rules require religious-themed invocations directed to a religious deity, which the court held to be constitutionally permissible. The court reasoned that religious invocations do not violate the Establishment Clause under *Marsh v. Chambers*, 463 U.S. 783 (1983), and therefore a program of self-directed guest speakers necessarily is constitutional regardless of intentional discrimination in the selection of speakers. (App. at 26.) If a unitary chaplain can give exclusively religious invocations, then a program of plural invocation-givers must be held to the same standard, according to the court. (App. at 26.)

IV. SUMMARY OF ARGUMENT.

This is not a case that attacks the concept of legislative invocations. This is not a case that challenges the delivery of religious-themed invocations. This is not even a case about the gross disproportion of invocations by Christians. Instead, this case is simply, but disturbingly, about the intentional and purposeful exclusion of

nonbelievers as invocation-givers by the Chaplain of the United States House of Representatives. This case is about intentional discrimination and blatantly unfair treatment by Chaplain Conroy, meted out to nonbelievers.

The district court erred by dismissing the Complaint of the Plaintiff, Daniel Barker. The court concluded that Barker lacks standing because Chaplain Conroy was merely implementing a discriminatory program that he lacked discretion to disregard. Discrimination, however, is not inherent in the underlying House Rule, and if it were, Chaplain Conroy is still an appropriate party. The district court employed a flawed analysis that would preclude standing to challenge any allegedly unconstitutional law, statute, policy, or procedure against those charged with its implementation or execution. Chaplain Conroy, in fact, is the single most appropriate defendant in this matter, precisely because he is the "person-in-charge" of the House invocation practices and procedures.

The district court also erred in its conclusion that intentional discrimination against nonbelievers is not actionable under the Establishment Clause. The district court incorrectly reasoned that only discrimination among certifiably religious speakers is prohibited by the Establishment Clause. Supreme Court precedent is clear that the Establishment Clause also prohibits discrimination against nonbelievers, like Barker.

God does not an invocation make. Constitutionally acceptable invocations may include religious references, but religion is not essential to the solemnizing purpose of legislative invocations. On the contrary, the tradition of invocations sanctioned by the United States Supreme Court emphasizes universal aspirations that nonbelievers like Barker are wholly competent to deliver. Chaplain Conroy's disqualification of Barker as an invocation-giver is constitutionally wrong and misguided as a practical matter.

V. ARGUMENT.

A. Standard Of Review.

The Court of Appeals reviews dismissal of claims under Rule 12(b)(1) or Rule 12(b)(6) *de novo*. *Abdelfattah v. U.S. Dept. of Homeland Security*, 787 F.3d 524, 532-33 (D.C. Cir. 2015). In doing so, the Court construes the complaint liberally, granting the plaintiff the benefit of all reasonable inferences that can be derived from the facts alleged. *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004). The Court should not affirm a district court's dismissal under this standard unless the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief. *Id.* at 1202.

In determining whether there is jurisdiction on a motion to dismiss under Rule 12(b)(1), the Court of Appeals considers the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts

plus the court's resolution of disputed facts. *Coalition For Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2009). Here, the district court considered only Barker's Complaint, as to which allegations therein and reasonable inferences must be accepted as true. When considering whether a plaintiff has Article III standing, moreover, a federal court must assume *arguendo* the merits of his or her legal claim. *Schnitzler v. United States*, 761 F.3d 33, 40 (D.C. Cir. 2014). In this case, the district court conducted a merits analysis as a basis for its standing conclusion.

Under Rule 12(b)(6), a complaint should only be dismissed if it makes merely naked assertions devoid of factual enhancement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Under this standard, a complaint is sufficient if it includes factual allegations that are plausible. *Twombly*, 550 U.S. at 570. A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678.

B. Barker's Injury Is Attributable To The Actions Of Chaplain Conroy, Who Was A Cause Of Barker's Injury.

The district court incorrectly concluded that Barker's injury was not fairly traceable to any actions by Chaplain Conroy. Although an undeniable connection exists between Barker's exclusion as a guest invocation-giver and his injury, the court reasoned that Chaplain Conroy's hands were otherwise tied by the House Rule

requiring religious-themed invocations. The district court's reasoning is flawed because Chaplain Conroy can be sued in his official capacity for executing or implementing an unconstitutional rule or law. The court also erred by conflating its construction of the House Rule on the merits with its standing analysis. The court's construction of the underlying House Rule as requiring a religious invocation is questionable at this stage of litigation and Chaplain Conroy can certainly be liable for implementing the Rule in a discriminatory manner. Finally, the district court failed to give Barker the benefit of reasonable inferences drawn from the Complaint supportive of Chaplain Conroy's authority to allow a respectful invocation by a nonbeliever.

1. Standing Requires Injury Traceable To Chaplain Conroy.

The 'irreducible constitutional minimum of standing" contains three requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First and foremost, there must be alleged an "injury in fact"-- a harm suffered by the plaintiff that is concrete, actual or imminent, and not conjectural or hypothetical. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Second, there must be "causation," marked by a failure traceable connection between the plaintiff's injury and the complained-of-conduct by the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Finally, there must be redressability, *i.e.*, a likelihood that the requested relief will redress the alleged injury. *Id.* at 45-46. This triad of

injury and fact, causation, and redressability constitute the core of Article III's case-or-controversy requirement.

The district court ruled that Barker lacked standing based upon the causation element. In the first instance, the court found that Barker alleged a concrete and particularized injury for purposes of standing. (App. at 13.) The court concluded, however, that Barker failed to sufficiently allege that Chaplain Conroy's actions caused Barker's injury, *i.e.*, because Chaplain Conroy ostensibly lacked the discretion and/or authority to allow a secular invocation even as part of a guest invocation program. The district court relied on *Kurtz v. Baker*, 829 F.2d 1133, 1138 (D.C. Cir. 1987), in which this Court stated that "to believe the two chaplains [House and Senate] 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."

2. The District Court Misapprehended And Misapplied The Test For Causation.

The district court's reliance on *Kurtz* is misplaced in this case, including because Chaplain Conroy is an appropriate defendant, not just as to the guest invocation policy, but also more generally as to the constitutionality of a rule or law implemented by the Chaplain. It is common place to sue implementing officers even though they may otherwise have no discretion to grant a complainant's request. In

Heckler v. Mathews, 465 U.S. 728 (1984), for example, in a constitutional challenge to an act of Congress, the plaintiff properly sued the Department secretary charged with enforcement. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court held that plaintiff properly sued a cabinet officer who executed a Presidential Executive Order.

If public officers were not proper parties in a constitutional challenge to laws, statutes, or rules, because such officers lack discretion to act in opposition to a legislature's directives, then most actions of Congress would be immune from judicial review. That proposition is not the law and, in fact, Chaplain Conroy is a particularly appropriate party in this challenge of the rules, practices, and policies of the Chaplain's Office. "Causation focuses on whether a particular party is appropriate in a challenge of governmental action." *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996). Here, Chaplain Conroy is the most appropriate party.

The district court's causation analysis in this case is based on flawed reasoning. The court essentially concluded that the practices and procedures of the Chaplain's Office cannot be challenged because Chaplain Conroy is allegedly obligated to comply with House Rules that impose an unconstitutional obligation. The logic would preclude review of practically any legislative or administrative law or rule. Dismissal at this stage was also improper because the court could conclude

that the House Rule do not, in fact, preclude a nonreligious prayer and that Chaplain Conroy's discriminatory policy was made and enforced of his own accord.

The district court's conclusion that Chaplain Conroy lacked discretion required the district court to make an incorrect merits determination to support a standing ruling. Unlike in *Kurtz*, where this Court concluded that the possibility of chaplain discretion to allow guest speakers "required a suspension of ordinary common sense," the present case involves an acknowledged guest invocation practice, with hundreds of invocation-givers approved by the House Chaplain, including invocations not directed to an external deity.

The district court misread or incompletely read Barker's Complaint as not alleging discretion by Chaplain Conroy. In fact, however, Barker's Complaint explicitly alleges that Chaplain Conroy has the power and discretion to invite guest chaplains to fulfill the responsibility of the Chaplain's Office by offering a prayer at the commencement of a session of the House, and to permit members to recommend particular clergy for consideration as guest chaplains. (App. at 41.) Chaplain Conroy, moreover, over his own signature, admitted that he has the discretion which the court said he does not have. (App. at 65-67.) Chaplain Conroy, in particular, admitted that he has "from time-to-time exercised my discretion to invite guest chaplains to fulfill these responsibilities by offering a prayer at the commencement of a session of the House, and to permit members to recommend particular clergy

for consideration as guest chaplains." (App. at 65.) Chaplain Conroy further refers to his own decisionmaking authority noting that "I was unable to accede to your [Representative Pocan] recommendation." (App. at 65.) He also states that "I do not invite Member-recommended individuals who have obtained an internet-generated ordination." (App. at 66.) In short, there can be no doubt that Chaplain Conroy has discretionary authority to allow Barker to give an invocation, as alleged.

In *Kurtz*, by contrast, the plaintiff did not seek an opportunity to give an invocation but rather he sought to independently address the House and the Senate, as to which request "the court may take 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." *Kurtz*, 829 F.2d at 1142. The Court went on to note that only the President of the United States and foreign heads of state and government are permitted, on special occasions, to address the Senate and the House, but again, only with the approval of members. *Id*. The present case does not deal with such an extraordinary request beyond the authority of Chaplain Conroy. Here, Chaplain Conroy is clearly the "person-in-charge" of the policies and practices related to guest invocations.

The district court, however, in construing the House Rules to preclude Barker's invocation, relied on an untenable assumption, *i.e.*, that the word "prayer" in the House Rules confine the opening remarks to messages directed to a god. At

its core, this is a question of statutory interpretation and the district court apparently assumed, without support, that the definition of "prayer" should be limited to its most narrow meaning, as used within the context of worship. But not all prayers are messages to a god and the word enjoys broad use outside the confines of churches. Indeed, not all the prayers given before the House have met the narrow definition assumed by the district court. (App. at 52-53.)

To understand what Congress might have meant in 1880 when it adopted a rule requiring "prayer" at the opening of each legislative session, a contemporary definition of the word "pray" is instructive: "to entreat; to ask with earnestness; to supplicate; to address or petition the Supreme Being; to ask with reverence and humility." James Stormonth, *A Dictionary of the English Language* (1882). One sees from this definition that the meaning of "prayer" is broader than the district court assumed. It may include divine supplication, to be sure, but the word also refers to additional acts that are not inherently religious.

The Supreme Court itself has interpreted the term "prayer" more broadly in the legislative context. The *Town of Greece v. Galloway* Court used "prayers" and "invocations" interchangeably throughout its decision and noted that prayers can "vary in their degree of religiosity" and invoke "values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." 134 S.Ct. at 1823. The *Marsh* Court similarly referred to "prayers" and

"invocations" interchangeably, in both the majority opinion and dissent. *Marsh v. Chambers*, 463 U.S. 783 (1983).

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

In short, the district court erred in its causation analysis, and impliedly also erroneously found a lack of redressability. Here, a determination that the Chaplain's Office violates the Establishment Clause by intentionally excluding nonbelievers would obviously diminish the obstacles preventing Barker from delivering a guest invocation. Faced with such a decision from a federal court, Chaplain Conroy is unlikely to maintain or enforce a policy of excluding nonbelievers. *Orangeburg v. Federal Energy Regulatory Commission*, 862 F.3d 1071, 1084 (D.C. Cir. 2017). Therefore, if the court were to declare Chaplain Conroy's actions to be in violation of the Constitution, such a determination would likely alleviate Barker's injury. *Id.*, citing *Florida Audubon Society*, 94 F.3d at 663-64.

This Court could also simply order as a remedy that Chaplain Conroy's policy and practices with regard to guest invocation-givers is unenforceable in its entirety. Where a constitutional defect exists because of underinclusion, two remedial alternatives are available to the court: A court may either declare a complete nullity and order that benefits not extend to the underinclusive class, or it may extend coverage to includes those who are aggrieved by exclusion. *Califano v. Westcott*, 443 U.S. 76, 89 (1979). *See also Heckler v. Mathews*, 465 U.S. 728, 739 n. 5 (1984). The district court's hands, therefore, were not tied in granting meaningful relief to Barker.

3. The District Court Refused To Accept The Detailed Allegations And Reasonable Inferences Of Barker's Complaint.

The district court not only ventured into merits territory as a basis for denying standing, but also unfairly resolved factual issues against Barker contrary to the applicable standard for such motions. As this Court recently held in *Feldman v. Federal Deposit Ins. Corp.*, 879 F.3d 347, 351 (D.C. Cir. 2018), a district court when considering subject matter jurisdiction "at this threshold stage, prior to any discovery," must afford the plaintiff the benefit of all reasonable inferences. The Court went on to state that absent any evidentiary offering, "weighing the plausibility" of plaintiff's allegations "was for a later stage of the proceedings." *Id.*

The district court in the present case similarly ignored the allegations of Barker's Complaint. The court incorrectly concluded instead that Barker failed to allege that Chaplain Conroy could have allowed him to give an invocation, which conclusion is also an obvious inference from Barker's detailed allegations relating to Chaplain Conroy's actual practices, in fact, with respect to guest invocations. The Complaint also clearly indicates that the House, at a minimum, acquiesced in decisions made by Chaplain Conroy.

The district court's ruling on standing is premised on an incorrect methodology that precludes Barker's constitutional challenge to the Chaplain's practices as a matter of law -- ironically, according to the district court, because those practices allegedly are limited by House Rules that bind the Chaplain's discretion. This conclusion is factually disputed by the Complaint, and disturbingly implies that no appropriate defendant exists against whom to proceed. Having found that Barker alleges a concrete injury, the district court incorrectly concluded that Chaplain Conroy is not an appropriate party against whom to proceed.

C. A Program Of Guest Invocation-Givers That Intentionally Discriminates Against Nonbelievers Violates The Establishment Clause.

1. Intentional Discrimination Among Potential Invocation-Givers Is Prohibited.

The district court erred by concluding that Barker's Establishment Clause claim fails to state a legal theory upon which relief may be granted. The court failed

to acknowledge the distinction between a legislative invocation practice involving a solitary chaplain and a program involving a multitude of guest invocation-givers, which requires a neutral selection process.

The court's error derived from the failure to recognize the significance of a discriminatory selection process, which was not at issue in the *Marsh v. Chambers*, 463 U.S. 783 (1983). The Supreme Court's recent decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), however, clearly holds that a neutral selection process must undergird a program of rotating or guest invocation-givers. The district court misapprehended *Galloway* as only requiring neutrality between religious officials, while allowing discrimination against nonbelievers. Establishment Clause *jurisprudence* consistently holds that discrimination against nonbelievers, including atheists, is prohibited.

The district court misconstrued Barker's claim to necessitate a rejection of *Marsh*. The Supreme Court's decision in *Marsh* did not deal with the systematic exclusion of a class of citizens from delivering regularly-scheduled invocations based on their religious status. The *Marsh* Court, nonetheless, did recognize that the lack of "impermissible motive" was essential to the Court's conclusion that the long tenure of a minister representing a single faith did not violate the Establishment Clause. *Id.* at 793-94.

Thirty-one years after *Marsh*, the Supreme Court revisited legislative prayer in *Galloway*, which involved rotating invocations delivered by local clergy. The Supreme Court concluded that the Town of Greece's program of rotating invocation-givers did not violate the Establishment Clause "so long as the Town maintains a policy of non-discrimination." In the absence of intentional discrimination, the Court further concluded that the Constitution does not require a legislature to achieve any particular quota or numerical balance of viewpoints. The Establishment Clause, in other words, prohibits intentional discrimination but does not require an affirmative action selection process. Nonetheless, neutrality is required, as becomes obvious by considering an alternative invocation practice that excluded religious speakers.

The district court implicitly understood *Galloway* to prohibit a discriminatory selection process, but limited the protected class to certifiably religious invocation-givers. The court, therefore, did recognize *Galloway* as a legal development going beyond *Marsh*, but misconstrued *Galloway* as allowing intentional discrimination against non-religious officials. This distinction is contrary to well-developed Establishment Clause precedent.

2. Discrimination Against Nonbelievers Also Is Prohibited By The Establishment Clause.

The Establishment Clause prohibits governmental bodies from discriminating based on religion. "The clearest command of the Establishment Clause is that one

religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). But the Clause extends beyond a mere prohibition on governmental preference between religious sects. "When the underlying principle has been examined in the crucible of litigation, the [Supreme] Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985). The Supreme Court, moreover, has repeatedly recognized that "the government may not favor one religion over another, or religion over irreligion." *McCreary Co. v. ACLU*, 545 U.S. 844, 875-76 (2005); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1997) (overturning sales tax exemption for religious literature that did not apply to non-religious literature); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (invalidating law that gave religious adherents an unqualified right not to work on their Sabbaths because it did not give non-religious employees any comparable right; *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (holding that the government cannot "constitutionally pass laws or impose requirements which aid all religions as against nonbelievers.").

The Supreme Court's decision in *Torcaso* provides particular insight regarding the protection extended under the Establishment Clause to both believers and nonbelievers in god. The Court held that to qualify as a religion, a belief system must deal with matters of ultimate concern. Thus, in its decision, the Court listed several religions that do not profess any belief in god, including Buddhism, Taoism, Ethical Culture, Secular Humanism and others. *Torcaso*, 367 U.S. at 495 n. 11.

In *United States v. Seeger*, 380 U.S. 163 (1965), the Supreme Court held that a person could be given conscientious objector status even if he did not have a belief in a supreme being as required by statute so long as he holds a sincere and meaningful belief that occupies a parallel place in his life to that filled by orthodox belief in god.

Similarly, in *Welsh v. United States*, 398 U.S. 333 (1970), the Court held that if an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content, but which nevertheless impose upon him a duty of conscience, such individual is entitled to conscientious objector status even if he does not profess a belief in god. "If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience . . . those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons." *Id.* at 340. *See also Kaufman v. McCaughtry*, 419 F.3d 678, 681-82 (7th Cir. 2005)(holding that

where prison officials allow prisoners to form religious groups, the denial of the right to form an atheist group violates the Establishment Clause.)

3. Invocations By NonBelievers Fully Satisfy The Ceremonial And Solemnizing Purpose Of Legislative Invocations.

The case against discrimination toward nonbelievers as invocation-givers is particularly strong. The Supreme Court has upheld religious-themed invocations, albeit as ceremonial speech intended to solemnize official events. Religious speech, as such, therefore, is not the animating *sine qua non* for constitutional acceptability. In fact, the invocation policy at issue in *Galloway* expressly permitted atheists and nonbelievers as potential invocation-givers. Barker's Complaint, moreover, specifically identifies numerous legislative invocations delivered without incident by nonbelievers.

The Supreme Court has consistently recognized legislative prayer as "symbolic expression." *Marsh*, 463 U.S. at 792. "As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Galloway*, 134 S.Ct. at 1818, citing *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). "It is thus 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."

The Supreme Court, in fact, has often emphasized temporal themes as more central to the acceptable tradition of legislative invocations than incidental religious references. In discussing the prayers at issue in *Galloway*, for example, the Court noted that "the prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a 'spirit of cooperation' among town leaders." *Id.* at 1824.

While invocations by nonbelievers are certainly capable of serving an intended ceremonial function, a program of otherwise requiring sufficient religious content would actually run afoul of the Establishment Clause. The Religion Clauses of the Constitution prohibit governmental bodies from becoming excessively entangled with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 621-22 (1971); *see also Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989). Thus, the prohibition on governmental entanglement precludes an intrusive inquiry into a person's religious beliefs or the tenets of their faith. In *Galloway*, the Court applied this principle to reject an argument that invocations must be non-sectarian, for such a rule would force governments to become "supervisors and censors of religious speech." 134

S.Ct. at 1822. "Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Id.*

4. Chaplain Conroy Intentionally Discriminated Against Barker.

In the present case, however, Chaplain Conroy's requirements for guest invocation-givers, including the contents of their invocations, violate these principles. Chaplain Conroy's first requirement, that an invocation be directed to a supernatural higher power, is obviously inappropriate. Chaplain Conroy has not defined the criteria by which he determines whether a higher power is sufficiently supernatural to receive government approval, nor is any acceptable standard identified or known. The inquiry, by itself, moreover, violates the Establishment Clause. The requirement is tantamount to the evaluation of religious content that the *Lemon* Court held to be "fraught with the sort of entanglement that the Constitution forbids." 403 U.S. at 620. This inquiry by Chaplain Conroy requires the government to evaluate the content of speech to determine its level of religiosity, but the government "may not seek to define permissible categories of religious speech." *Galloway*, 134 S.Ct. at 1814.

Additionally, Chaplain Conroy has become excessively entangled with religion by inquiring into the sufficiency of Barker's ordination, which was bestowed and never revoked by a religious entity. Though Barker regularly uses his

ordination to perform weddings, Chaplain Conroy determined that Barker is not "practicing" in the faith of his ordination. Being "ordained," however, is not an official government designation. Instead, Chaplain Conroy unilaterally "determined" that the changes in Barker's religious beliefs over time effectively nullified his otherwise legitimate ordination. Chaplain Conroy's quest for "religious orthodoxy" that is "acceptable to the majority" is antithetical to the Establishment Clause. *Galloway*, 134 S.Ct. at 1822.

The district court, for its part, fundamentally erred by ignoring Chaplain Conroy's intentional discrimination against Barker based on his status as a nonbeliever. Neutrality is required in the selection of invocation-givers, rather than a focus on identity and beliefs of the speaker. "The prayer opportunity as a whole, rather than the contents of a single prayer," is decisive in evaluating necessary neutrality. *Galloway*, 134 S.Ct. at 1824, citing *Marsh*, 463 U.S. at 794-95. The district court overlooked this nuance, which other courts have recognized.

5. Precedent Supports The Requirement Of Neutral Selection Procedures For Guest Invocation-Givers.

The recent decision in *Williamson v. Brevard Co.*, 276 F.Supp.3d 1260 (M.D. Fla. 2017), is particularly instructive regarding intentional exclusion of nonbelievers as invocation-givers. (A copy of the *Williamson* decision is included in the Appendix at pp. 79-121.) The district court in *Williamson* concluded that the exclusion of nonbelievers provided "overwhelming evidence of purposeful

discrimination and 'impermissible purpose'" demonstrating the constitutional infirmity of the invocation practice at issue. *Id.* at 1276. "*Marsh*, *Galloway*, and *Pelphrey*, thus make clear that while legislative prayer -- even sectarian legislative prayer-- is, as a general matter, constitutional, intentional discrimination and improper motive can take a prayer practice beyond what the Establishment Clause permits." *Id.* at 1277.

The court in *Williamson* also considered, and rejected, the argument that invocations must invoke a higher power. The court debunked this argument in the following quite certain language:

> As Plaintiffs note, the Supreme Court and other courts have recognized atheism and Humanism as religions entitled to First Amendment protection. *See, e.g.*, *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961)(noting that 'among religions in this country which do not teach what would generally be considered a belief in the existence of God is . . . Secular Humanism'); *Glassroth v. Moore*, 335 F.3d 1282, 1294 (11th Cir. 2003)('The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess a belief in the Judeo-Christian God; indeed, it includes the lack of any faith.').

Williamson, 276 F.Supp.3d at 1281.

The district court reached a similar decision in *Fields v. Speaker of the Pennsylvania House of Representatives*, 251 F.Supp.3d 772 (M.D. Pa. 2017). (A copy of the *Fields* decision is included in the Appendix at 122-140.) In *Fields*, the court considered whether a challenge to Pennsylvania's guest chaplain policy stated

a claim upon which relief might be granted. The defendants in that case did not dispute that the implementation of Pennsylvania's guest chaplain policy prohibited non-theists from serving as chaplains, whereupon the court concluded that the plaintiffs' Complaint stated a claim based upon the admitted discrimination. The court explained its holding as follows:

> The *Town of Greece Court* did not link its nondiscrimination mandate to the language of the town's policy. Justice Kennedy tethered the requirement to the Constitution itself: 'So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.' He further signaled that a policy which 'reflects an aversion or bias . . . against minority faiths' may violate this principle. The rule is a logical corollary to the settled edict that government may not 'prescribe prayers' with an aim to 'promote a preferred system of belief or code of moral behavior.'

Fields, 251 F.Supp.3d at 788-89.

Thoughtful consideration of the issues raised by Barker's Complaint clearly support judicial consideration of his Establishment Clause claim. In fact, far from being insulated from review, programs of guests or rotating invocation-givers warrant heightened wariness because of the risk of discriminatory application. *See Jeremy G. Mallory*, An Officer Of The House Which Chooses Him, And Nothing More: How Should Marsh v. Chambers Apply To Rotating Chaplains, 73 U. Chi. L. Rev. 1421 (2006). (A copy of the *Mallory* article is included in the Appendix at 141-170.) Professor Mallory performs a thoughtful analysis of legislative prayer by

contrasting "situated" and "rotating" chaplains. *Id*. at 1426. A "situated" chaplain has a formalized, ongoing relationship with a legislature, like Chaplain Conroy, that is similar to employment, while a rotating chaplain does not; rotating chaplains deliver invocations both by invitation and as volunteers. *Id.*

The differences between institutional chaplains and rotating invocation-givers is significant, according to Professor Mallory, including because of the heightened risk of improper motives infecting the selection process of rotating or guest chaplains. Professor Mallory explains his conclusion as follows:

> When applied to rotating chaplaincies, the principle of deference to the legislature's choice as embodied by *Marsh* should be amended due to the different relationship involved. Specifically, there is a higher likelihood of Establishment Clause problems where rotating chaplains are concerned, and courts should be correspondingly more vigilant when evaluating these chaplaincies. It is relatively easy to mask what would otherwise be impermissible motives when there is no ongoing pastoral relationship, in part because rotating chaplains' relationships to the institution are more attenuated. This attenuated relationship makes inclusion of some faiths -- and the concomitant exclusion of others -- less obvious and more harmful than it would be in the context of a situated chaplain. Second, and paradoxically, the rotating chaplain's location external to the legislative institution makes his position more likely to be seen as an entanglement between church and state.

Id. at 1447.

Intentional discrimination in the present case is hardly "masked," and it is patently actionable under all known Establishment Clause tests. Vigorous debate continues as to whether the *Lemon* test, or Justice O'Connor's endorsement test, or

Marsh's unbroken history test should be used in any given case. Here, however, Chaplain Conroy's policy and practice of intentional discrimination against nonbelievers as invocation-givers is actionable under any of the various tests applied by the Supreme Court. None of the Court's tests allow for intentional and purposeful discrimination.

The district court, therefore, erred by dismissing Barker's Establishment Clause claim under Rule 12(b)(6). Barker's Complaint undeniably and overwhelmingly makes plausible claims of discrimination, pretext, and hostility toward Barker, based upon his status as a nonbeliever. Even as to the articulated "criteria" for guest invocation-givers, Chaplain Conroy facially applied them in a disparate and discriminatory manner. As the Complaint makes clear, Barker satisfied Chaplain Conroy's ostensible criteria.

The district court, in the final analysis, clearly erred by concluding that Barker's Complaint fails to state a claim under the Establishment Clause for which relief may be granted.

VI. CONCLUSION.

For all the above reasons, the Appellant, Daniel Barker, requests that the court reverse the district court's dismissal and remand for further proceedings.

Dated this 14th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limitations of Fed. R. App. P. 32(a)7(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(a)(7)(f) this document contains 9,181 words.

Dated this 14th day of May, 2018.

BOARDMAN & CLARK LLP

/s/ Richard L. Bolton
Richard L. Bolton

CERTIFICATE ON SERVICE

I hereby certify that on May 14, 2018, I caused the foregoing brief to be filed via this Court's CM/ECF system, which I understand caused it to be served on all registered parties.

Dated this 14th day of May, 2018.

BOARDMAN & CLARK LLP

/s/ Richard L. Bolton
Richard L. Bolton

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ORAL ARGUMENT NOT YET SCHEDULED

APPEAL NO. 17-5278

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL BARKER,

Appellant,

vs.

PATRICK CONROY, CHAPLAIN, ET AL.,

Appellees.

Appeal From the U.S. District Court
District of Columbia (Washington, DC)
Civil Docket For Case #: 1:16−cv−00850−RMC
Honorable Rosemary M. Collyer

APPENDIX TO OPENING BRIEF OF APPELLANT DANIEL BARKER

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May 14, 2018

APPENDIX TABLE OF CONTENTS

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief is an appendix that complies with Rule 32(a)(1), (2), (3), and (4), and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the district court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the district court's reasoning regarding those issues.

I further certify that if this appeal is taken from a district court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of May, 2018.

BOARDMAN & CLARK LLP

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Federal Bar No. WI0034

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL BARKER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 16-850 (RMC)**
	)	
PATRICK CONROY, Chaplain, U.S. House of Representatives, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Since the Continental Congress met in 1774, the States' representatives to the federal government have employed, and paid, clergy who perform as chaplains and offer a daily prayer before each session begins. Daniel Barker, an atheist and co-President of the Freedom from Religion Foundation, challenges the modern practice in the House of Representatives, whereby he was denied the opportunity to be a guest chaplain and to deliver a secular invocation in lieu of a prayer. Mr. Barker asserts that the Supreme Court's decision in *Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014) requires his inclusion as a guest chaplain. His interpretation of *Town of Greece* is flawed. The legislative prayer practice of the House of Representatives is consistent with the decisions of the Supreme Court and this Circuit, as well as the Rules of the House. Mr. Barker has failed to state a claim on which he is entitled to relief. The Court also finds that extending *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) to this context is unwarranted. The Complaint will be dismissed.

I. BACKGROUND

The U.S. House of Representatives (House) commences each legislative day with a prayer, a tradition that originated during the first Continental Congress and continues today.

See Motion of the Official Defendants to Dismiss the Complaint [Dkt. 16] at 3-5 (Official Capacity MTD) (describing the history of legislative prayer); *see also Marsh v. Chambers*, 463 U.S. 783, 788 (1983). A "prayer" is required under the House Rules and is consistent with the Establishment Clause. *See* U.S. Const. art. I § 5, cl. 2 ("Each House may determine the rules of its proceedings, . . ."); *see also* H.R. Doc. No. 114-192, § 665, Rule II, cl. 5 ("The Chaplain shall offer a prayer at the commencement of each day's sitting of the House."); H.R. Doc. No. 114-192, § 869, Rule XIV, cl. 1 (finding the House's first "order of business . . . shall be . . . Prayer by the Chaplain"); *Marsh*, 463 U.S. at 791. Current House Chaplain and a Defendant in this case, Father Patrick J. Conroy, is a Roman Catholic priest. *See* Compl. [Dkt. 1] ¶ 25. The House Chaplain, an Officer of the House elected by members, typically delivers the opening prayer, but guest chaplains have given opening prayers since 1948, although there are no written rules instructing this practice. *See id.* ¶¶ 55-58; *see also* IDA A. BRUDNICK, Cong. Research Serv., R41807, HOUSE AND SENATE CHAPLAINS: AN OVERVIEW 1 (2011). Between 2000 and 2015, 39% of opening prayers were made by guest chaplains. *See* Compl. ¶¶ 71-72. A guest chaplain is either invited by Fr. Conroy or sponsored by a member of the House. *See id.* ¶ 60.

Daniel Barker is an American atheist activist and co-President of the Freedom From Religion Foundation (FFRF). *See id.* ¶¶ 13, 16. FFRF is a legal and political advocacy group for non-theists, and a frequent Establishment Clause litigant. *See id.* ¶ 13; *see also* Official Capacity MTD at 6. On behalf of Mr. Barker, FFRF members visited Defendants Elisa Aglieco, Fr. Conroy's assistant, and Karen Bronson, Chaplain's Liaison to Staff, to inquire about "a nonreligious citizen" delivering an "opening invocation at the House." Compl. ¶ 34. Fr. Conroy's staff explained that guest chaplains are permitted to give the opening prayer if (1) they

are sponsored by a House Member, (2) they are ordained, and (3) their prayer addresses a "higher power." *Id.* ¶ 35.

Mr. Barker alleges that he satisfied these requirements. *See id.* ¶ 36. Mr. Barker's representative in the House, Mark Pocan, sponsored him by asking Fr. Conroy to grant Mr. Barker permission to deliver the morning invocation. *See id.* ¶ 37. Two days later, upon Ms. Aglieco's request, Mr. Barker provided his contact information, biography, and ordination certificate for review. *See id.* ¶ 38. Mr. Barker explained that he was ordained a Christian minister in 1975, but "lost faith in faith," and disavowed religious beliefs in 1994. *Id.* ¶¶ 14, 16. Mr. Barker maintains his ordination, using it to perform marriages, but no longer preaches the tenets of Christianity. *See id.* ¶ 20. Mr. Barker also alleges that in a draft of his proposed invocation that he provided to Fr. Conroy, he addressed a "higher power," though not a god or supernatural power. *Id.* ¶ 105.

Fr. Conroy denied Mr. Barker's request to conduct the opening prayer in December 2015 because he is "ordained in a denomination in which he no longer practices" and "is not a religious clergyman [because he had] parted with his religious beliefs." *Id.* ¶¶ 111, 115; *see also* Official Capacity MTD at 7.

Mr. Barker filed suit on May 5, 2016, against Fr. Conroy, Ms. Aglieco, Ms. Bronson, Speaker of the House Paul Ryan, all in their official capacities, and the House and United States of America. *See* Compl. Mr. Barker's Complaint also includes a claim against Fr. Conroy in his individual capacity under *Bivens*. *See id.* ¶¶ 201-06. Mr. Barker alleges that the requirements expressed by Fr. Conroy's staff were a pretext for excluding and discriminating against him because the same requirements are not enforced against other potential guest chaplains. *See id.* ¶¶ 118-19. Mr. Barker challenges the denial of an opportunity to deliver an

invocation as a guest chaplain and the requirements imposed on him but not others as violations of the Establishment, Due Process, and Religious Test Clauses of the Constitution, and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq*. *See id.* ¶¶ 157-200.

Mr. Barker seeks: (1) a declaration that barring atheists and nonreligious individuals from delivering the opening prayer to the House of Representatives violates the Constitution and the RFRA; (2) a declaration that guest chaplains cannot be required to invoke "a supernatural higher power"; (3) injunctive relief barring Fr. Conroy from selecting a guest chaplain on the basis of inherently religious qualifications; and (4) an order approving Mr. Barker as guest chaplain. *Id.* at Section V; *see also* Official Capacity MTD at 8.

Defendants jointly filed a Motion to Dismiss the official capacity claims on September 30, 2016, contending that Mr. Barker does not have Article III standing, his claim is non-justiciable, and he has failed to state a claim.[1] *See* Official Capacity MTD at 2. Mr. Barker filed a Memorandum in Opposition of Defendants' Motion to Dismiss on November 14, 2016, *see* Memorandum in Opposition of the Official Defendants' Motion to Dismiss [Dkt. 18] (Official Capacity Opp'n), to which Defendants replied. *See* Reply Memorandum in Support of the Official Defendants' Motion to Dismiss [Dkt. 21] (Official Capacity Reply). Additionally, Fr. Conroy filed a separate motion to dismiss the individual *Bivens* claim against him. *See* Defendant Patrick Conroy's Motion to Dismiss All Individual-Capacity Claims [Dkt. 14] (Conroy MTD). Mr. Barker opposed, *see* Memorandum Opposing Defendant Patrick Conroy's Motion to Dismiss All Individual-Capacity Claims [Dkt. 19] (Conroy Opp'n), and Fr. Conroy

[1] This Court granted Defendants' Motion to Dismiss all claims against Ms. Aglieco on November 15, 2016, because she is no longer employed by the House. *See* 11/15/16 Minute Order.

replied. *See* Reply Memorandum in Support of Defendant Patrick Conroy's Motion to Dismiss All Individual-Capacity Claims [Dkt. 20] (Conroy Reply).

II. LEGAL STANDARD

A. Standing

Standing is one feature of the Constitution's case-or-controversy limitation on federal judicial authority. *See* U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies."); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015).

Standing turns on whether a plaintiff "alleged such a personal stake in the outcome of the controversy" as to meet federal court jurisdiction and justiciability requirements. *Baker v. Carr*, 369 U.S. 186, 204 (1962). To have Article III standing, a plaintiff must establish that: (1) he has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is fairly traceable to the defendants' actions; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *United States v. Windsor*, 133 S. Ct. 2675, 2685-86 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992)). Plaintiff bears the burden of establishing his standing because he is the party invoking federal jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

Where a party's standing is challenged in a motion to dismiss, a reviewing court "must construe the complaint in favor of the complaining party." *Kurtz v. Baker*, 829 F.2d 1133, 1138 (D.C. Cir. 1987) (*Kurtz II*) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

B. Motion to Dismiss – Fed. R. Civ. P. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) requires a complaint to be sufficient "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). Although a complaint does not need to include detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The facts alleged "must be enough to raise a right to relief above the speculative level." *Id.* A complaint must contain sufficient factual matter to state a claim for relief that is "plausible on its face." *Id.* at 570. When a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, then the claim has facial plausibility. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* A court must treat the complaint's factual allegations as true, "even if doubtful in fact." *Twombly*, 550 U.S. at 555. But a court need not accept as true legal conclusions set forth in a complaint. *Iqbal*, 556 U.S. at 678.

In deciding a motion under Rule 12(h)(6), a court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits or incorporated by reference, and matters about which the court may take judicial notice. *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007). Generally, when a court relies upon matters outside the pleadings, a motion to dismiss must be treated as one for summary judgment and disposed of pursuant to Rule 56. *See* Fed. R. Civ. P. 12(d). "However, where a document is referred to in the complaint and is central to the plaintiff's claim, such a document attached to the motion

papers may be considered without converting the motion to one for summary judgment." *Nat'l Shopmen Pension Fund v. Disa*, 583 F. Supp. 2d 95, 99 (D.D.C. 2008).

C. Precedent on Legislative Prayer

One starts with *Marsh v. Chambers*, 463 U.S. 783 (1983), which addressed a challenge by a state legislator to the century-old practice of the Nebraska legislature of opening each session with a prayer by a chaplain paid with public funds. The Supreme Court held that the practice did not violate the Establishment Clause even though a single clergyman had offered the prayers for many years and they were all in the Judeo-Christian tradition. *See id.* at 795. The Court's analysis is highly instructive.

> The Court began its discussion noting certain historical facts:
>
> > The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. . . .
> >
> > [T]he Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. . . . [T]he First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. . . .
> >
> > On Sept[ember] 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. 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.

Id. at 786-88 (citations omitted). "In this context, historical evidence sheds 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; *see also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (noting that Acts adopted by the First Congress are "contemporaneous and weighty evidence of [the Constitution's] true meaning").

Plaintiff Earnest Chambers, himself a Nebraska representative who was offended by the legislative prayers, argued that opposition by some Founding Fathers significantly undercut any reliance on early practices. The Supreme Court disagreed:

> [E]vidence of opposition . . . infuses [the historical argument] with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society.

Marsh, 463 U.S. at 791. The Court concluded its historical discussion by summarizing:

> 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. As Justice Douglas observed, "we are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Id. at 792.

Turning to the actual practices of the Nebraska legislature, the Court noted the long tenure of its chaplain but also that "guest chaplains have officiated at the request of various legislators and as substitutes during [Chaplain] Palmer's absences." *Id.* at 793. Without evidence of "an impermissible motive," the Court found no conflict with the Chaplain's tenure and the Establishment Clause. *Id.* The nature of the Chaplain's prayers did not offend the Constitution, nor did the use of public funds to pay the Chaplain cause the Court any pause. *Id.* at 794 ("Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature's chaplaincy; remuneration is grounded in historic practice . . . ."). Thus,

the Supreme Court concluded that there was no risk of the establishment of religion from the practice of the Nebraska legislature. *See id.* at 795 (citing *Abington School Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring) ("[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.")).

Following *Marsh*, the U.S. Court of Appeals for the District of Columbia Circuit had occasion to address the same question in *Kurtz v. Baker*, 829 F.2d 1133, 1136 (D.C. Cir 1987), when a nontheist professor brought suit after being denied the opportunity to present opening remarks to both the Senate and House. Mr. Kurtz challenged the exclusion of nontheists from the ranks of guest chaplains and the requirement that the guest chaplain utter a "prayer" as violations of the Free Speech and Religion Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment. *See id.* The D.C. Circuit ultimately dismissed Mr. Kurtz's claims for lack of standing.

Although the D.C. Circuit found that the allegation "that Kurtz has been prevented from addressing each house of Congress . . . [satisfied] Article III's injury requirement because it is sufficiently personal and concrete," *id.* at 1142, it ultimately held that Mr. Kurtz failed to allege causation because Mr. Kurtz did not allege that even with the Chaplain's assent, there would be a "substantial probability" that he could address the House. *Id.* at 1142. Mr. Kurtz did not allege that the Chaplain had discretion to grant his request and his desired secular invocation was irreconcilable with the Court's interpretation of prayer as required by the House Rules. *See id.* The Circuit did not address the merits of Mr. Kurtz's constitutional claims.

In 2014, the Supreme Court had another opportunity to consider the constitutionality of legislature prayer in *Town of Greece*. *See* 134 S. Ct. 1811. *Town of Greece*

involved the complaint of two residents of the Town who appeared before the Town board on various items of civic business and objected to its practice of an opening prayer by an unpaid volunteer "chaplain for the month." *Id.* at 1816. Chaplains were identified by contacting those clergymen with congregations within Town limits and listed in the local directory, which meant that since "nearly all of the congregations in town were Christian; . . . from 1999 to 2007, all of the participating ministers were too." *Id.* The Town allowed guest clergy to write their own prayers which "often sounded both civic and religious themes." *Id.*

Plaintiffs in *Town of Greece* alleged that the prayer "violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers." *Id.* at 1817. Plaintiffs sought an injunction to limit the prayers to "inclusive and ecumenical prayers that referred only to a generic God and would not associate the government with any one faith or belief." *Id.* The District Court rejected the argument that an acceptable prayer must be nonsectarian, while finding no inherent problem with sectarian prayer. *See id.* at 1818. The Second Circuit reversed, finding that the "steady drumbeat of Christian prayer, unbroken by invocations from other faith traditions, tended to affiliate the town with Christianity." *Id.*

In reversing the Second Circuit, the Supreme Court cited *Marsh v. Chambers*, which it said had "concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause" and as a "'tolerable acknowledgement of beliefs widely held.'" *Id.* (quoting *Marsh*, 463 U.S. at 792). Indeed, *Marsh* "supported the conclusion that legislative invocations are compatible with the Establishment Clause." *Id.* Adding to the relevant historical record reviewed in *Marsh*, *Town of Greece* noted that in the middle of the Nineteenth Century, the Senate and House had reviewed their practice of official

chaplaincies and "concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily prayer, no faith was excluded by law, nor any favored, and the cost . . . imposed a vanishingly small burden." *Id.* at 1819. Comparing the practices in *Town of Greece* to those of Congress, the Court noted approvingly that "Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds." *Id.* at 1820-21. It further emphasized that "*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content." *Id.* at 1821.

The place and purpose of legislative prayers cabin their content to avoid any constitutional offense. Prayers at the opening of a legislative session are "meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. . . . These religious themes provide particular means to universal ends . . . to solemnize the occasion" as long as they do not lead to proselytizing or advancement of a particular faith or belief. *Id.* at 1823. *Town of Greece* did not alter the permissibility of legislative prayers or hold that Congress must permit nonsectarian or nontheist statements by guest chaplains.[2]

[2] The Court has jurisdiction over Mr. Barker's case under 28 U.S.C. § 1331 because it involves a federal question arising under the First and Fifth Amendments of the Constitution and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b). Political question immunity is inapplicable and venue is proper within the District of Columbia because the actions took place at the House of Representatives located in the District. *See* 28 U.S.C. § 1391.

III. ANALYSIS

A. Standing

1. Injury-in-Fact

Allegations of speculative or possible future injury are insufficient to satisfy the Article III standing requirements. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). When an alleged injury has not yet occurred, courts must determine whether it is imminent. An injury is imminent if the threatened injury is "certainly impending" or if there is substantial risk that the harm will occur. *Id.* "[P]laintiffs bear the burden of pleading . . . concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court." *Id.* at 1150 n.5 (internal quotation and citation omitted).

Defendants argue that Mr. Barker failed to allege an injury-in-fact sufficient to satisfy the requirements for standing under Article III because the alleged injury—the denial of an opportunity to deliver a secular invocation—is the "loss of a speculative hope of 'notoriety'" and not a judicially cognizable injury. Official Capacity MTD at 12. Mr. Barker contends he suffered three distinct injuries-in-fact, all of which are sufficient to satisfy the first requirement for standing under Article III: (1) personal exclusion injury, (2) exclusion based on discrimination due to religious beliefs and membership in a class, and (3) stigmatic injury. *See* Official Capacity Opp'n at 19-21.

a. Personal Exclusion Injury

Mr. Barker first contends he suffered a personal exclusion injury because he was barred from delivering an invocation to the House after satisfying the Chaplain's requirements. *See id.* at 19. Mr. Barker cites *Kurtz II*, a factually similar case involving a secular humanist who was denied the opportunity to offer secular remarks to Congress during the time for prayer. *See*

829 F.2d at 1142. Mr. Barker argues that this Court should follow *Kurtz II* and find the injury-in-fact requirement satisfied because he alleges, as did Mr. Kurtz, and he was prevented from addressing the House, which is "sufficiently personal and concrete." *Id.* at 1142; *see also* Official Capacity Opp'n at 19.

Defendants respond that Mr. Barker's "'exclusion from' or 'deprivation of' the ability to address the House" is a procedural exclusion injury, a type of injury the Supreme Court has ruled insufficient to create Article III standing in the absence of some nexus to cognizable personal harm, which Mr. Barker has not demonstrated. Official Capacity Reply at 2-3 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). *Summers* instructs that where plaintiffs did not have an individual stake in the application of a challenged rule, or had not personally been affected by it, they had no standing. *See Summers*, 555 U.S. at 496-97. Important to the decision in *Summers* was that the plaintiffs had already resolved through settlement their individual claim about the application of the challenged rule and were only seeking to make a facial challenge to the rule. *See id.* at 494.

Kurtz II and the instant case are distinguishable and not decided by *Summers*. Messrs. Kurtz and Barker each challenged the application of a rule to them personally, not the rule itself. Mr. Barker's personal exclusion from addressing the House is sufficient for an injury-in-fact for Article III standing because, just as in *Kurtz II*, Mr. Barker's exclusion was concrete, particularized, and non-speculative. *See Kurtz II*, 829 F.2d at 1142.

b. Exclusion Based on Religious Beliefs and Membership in a Class

Mr. Barker also argues that he suffered an injury-in-fact because he was excluded from participating as guest chaplain due to discrimination because he is an atheist and is thus a member of two classes: (1) those who do not believe in a supernatural higher power and (2)

those whose faith does not issue ordinations. *See* Official Capacity Opp'n at 21. Defendants attempt to reformulate this injury to be contending classwide exclusion, which they argue that Mr. Barker does not properly allege and is preempted by *Kurtz II*. *See Kurtz II*, 829 F.2d at 1141. The Court, however, interprets Mr. Barker's allegations of injury, both due to personal exclusion and exclusion based on discrimination, as allegations of the same concrete and imminent injury, but with different causes. Mr. Barker has alleged he was excluded, which the Court found above was sufficient for injury-in-fact; whether the exclusion came as a result of religious discrimination or due to another action by Defendants, it is sufficient to satisfy injury-in-fact.

c. Stigmatic Injury

Mr. Barker's last injury-in-fact claim alleges stigmatic injury, resulting in a "loss of benefits, honors, and congressional recognition" from his exclusion by Fr. Conroy. Official Capacity Opp'n at 21. Mr. Barker alleges that he was denied the "prestige and status" of having served as guest chaplain. Compl. ¶ 68. Defendants counter that this "loss of an unspecified and speculative, potential reputational enhancement" is insufficient to confer standing. Official Capacity Reply at 4.

The Court agrees the stigmatic injury Mr. Barker alleges is not sufficiently "concrete and particularized" to satisfy the injury-in-fact threshold for Article III standing because the future manifestation of the benefit he describes is entirely uncertain. *Lujan*, 504 U.S. at 560. Standing must affirmatively appear in the record, and may not be inferred from argument. *See Advanced Mgmt. Tech., Inc. v. FAA*, 211 F.3d 633, 636-37 (D.C. Cir. 2000).

It is well established that "allegations of *possible* future injury are not sufficient." *Clapper*, 133 S. Ct. at 1147 (emphasis in original); *see also Newdow v. Eagen*, 309 F. Supp. 2d

29, 37 (D.D.C. 2004) (finding a "threat of future stigmatic injury is too speculative to qualify as an injury in fact"). Mr. Barker's alleged future injury from an alleged loss of reputational benefits is too speculative because Mr. Barker fails to show that his alleged stigmatic injury is concrete or particularized, providing no examples of how or when such an injury may be likely to occur. This "conjectural or hypothetical" alleged injury is insufficient to satisfy Article III requirements. *Lujan*, 504 U.S. at 560-61.[3]

2. Causation

The second element of standing is causation, which requires "a causal connection between the injury and the conduct complained of." *Id.* at 560. The injury must be "fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014).

a. Ms. Bronson, Speaker Ryan, and the House of Representatives

Mr. Barker contends that his injuries are fairly traceable, not only to Fr. Conroy, but also his assistant Ms. Bronson, Speaker Ryan, and the House itself. *See* Official Capacity Opp'n at 25-26. Defendants argue that Mr. Barker failed to allege any actions by Ms. Bronson, Speaker Ryan, or the House that are fairly traceable to his alleged injuries. *See* Official Capacity Reply at 6-7. This is true—no such actions were alleged. The claims against Ms. Bronson, Speaker Ryan, and the House must be dismissed for lack of causation because Mr. Barker has failed to show that either individual, or the House, is the source of his injury.

As established above, Mr. Barker's alleged injuries stem from his personal exclusion from serving as guest chaplain. Mr. Barker fails to allege facts that link any conduct

[3] *Kurtz II* found stigmatic injury did not satisfy injury-in-fact, because plaintiff did not allege a personal benefit that had been denied. *See Kurtz II*, 829 F.2d at 1141.

by Ms. Bronson, Speaker Ryan, or the House to this injury. Mr. Barker alleges the "extensive and unreasonable delay" he experienced was itself a form of discrimination which may be fairly traceable to Ms. Bronson, but he does not allege that this delay is the source of his injury, nor does he explain why such a delay would give rise to a cognizable injury. *See* Compl. ¶ 172; *see also* Official Capacity Opp'n at 25-26; *but see* Official Capacity Reply at 6 n.3. Mr. Barker offers no allegations that link the potential delay of his application to serve as guest chaplain, or the act of passing along the requirements for serving as guest chaplain, to his ultimate exclusion. There are no allegations that Ms. Bronson played any role in the ultimate determination that Mr. Barker could not address the House.

Mr. Barker further claims that Speaker Ryan caused his injuries by failing to halt the ongoing discrimination by Fr. Conroy, *see* Official Capacity Opp'n at 26, but Mr. Barker failed to include any specific factual allegations of action or inaction by Speaker Ryan in the Complaint. In fact, the only reference to Speaker Ryan in the Complaint is in paragraphs 28-30 describing the role of the Speaker of the House and indicating Speaker Ryan has been sued in his official capacity. *See* Compl. ¶¶ 28-30. Additional claims of actions taken by Speaker Ryan included in Mr. Barker's opposition, but not his Complaint, will not be considered. *See Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.C. Cir. 2003) ("It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.").

Finally, Mr. Barker contends that the House is "potentially" a cause of his alleged injury because it is the only entity with the authority to change the House Rules. Official Capacity Opp'n at 26. Causation is not satisfied where "speculative inferences" are needed to tie an alleged injury to the challenged actions. Where Mr. Barker's allegations are based in

speculation and rely on a significant inference, they are insufficient to provide the link for Article III standing.[4] *See West v. Holder*, 60 F. Supp. 3d 197, 201 (D.D.C. 2015). In sum, Mr. Barker's purported injuries are not fairly traceable to the alleged conduct or inaction by Ms. Bronson, Mr. Ryan or the House and they will be dismissed as defendants.

b. Fr. Conroy

Defendants recognize that Mr. Barker's causation argument with respect to Fr. Conroy is most palatable, although they contend that *Kurtz II* dooms Mr. Barker's causation claim. Defendants argue that *Kurtz II* found causation lacking because the denial to Mr. Kurtz of the opportunity to address the House was compelled by the House Rules, not by the Chaplain's discretion. *See* Official Capacity MTD at 13-14. Here, too, the House Rules similarly dictate that a guest chaplain may only recite a prayer, which precludes Mr. Barker's desired secular invocation. *See* Official Capacity Reply at 7; *see also* Official Capacity MTD at 13-14. Defendants argue that Mr. Barker's theory of causation layers speculation on speculation, creating a chain of events too attenuated to establish causation. *See* Official Capacity MTD at 13.

Mr. Barker would distinguish *Kurtz II* in two respects. He argues that the D.C. Circuit found Mr. Kurtz's injury not traceable to those defendants' actions "because (1) there is no allegation that the chaplains had discretion to grant appellant's requests, and (2) such an allegation would in any event be untenable." Official Capacity Opp'n at 23 (quoting *Kurtz*, 829 F.2d at 1142). In contrast, he alleges that Fr. Conroy exercises discretion when selecting guest chaplains and Mr. Barker satisfied the requirements to become guest chaplain. *See id.* Mr.

[4] The Court also notes that, as with Speaker Ryan, the Complaint is devoid of specific allegations of actions taken by the House with respect to Mr. Barker's request to appear as guest chaplain.

Barker also argues that the Supreme Court in *Town of Greece* determined that a nonreligious statement is permissible under a government rule for prayer.

Mr. Barker argues that Fr. Conroy admitted that the Chaplain had the discretion to permit Mr. Barker to address the House and he satisfied the three requirements described by Fr. Conroy's staff, but he was still denied the opportunity to speak. He cites Fr. Conroy's letter to Representative Pocan. *See* Ex. C, Compl. [Dkt. 1-3] at 1 (Fr. Conroy letter to Rep. Pocan) (writing "I . . . from time-to-time have exercised my discretion to invite guest chaplains"). 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. Fr. Conroy specifically stated that he sometimes uses his "discretion to invite guest chaplains to fulfill [the chaplain's] responsibilities by *offering a prayer* at the commencement of a session of the House." *Id.* (emphasis added). Fr. Conroy added that Members can also recommend individuals to fulfill this duty. *See id.* Additionally, Fr. Conroy explained to Representative Pocan why Mr. Barker failed to satisfy the three requirements to serve as guest chaplain. *See id.* at 1-2. Despite Mr. Barker's arguments to the contrary, his request to address the House is functionally identical to the request made by Mr. Kurtz and must fail for the same reason. Like the plaintiff in *Kurtz II*, 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. *Kurtz II*, 829 F.2d at 1142. Under *Kurtz II*, Mr. Barker has failed to allege that Fr. Conroy caused his injury.[5]

[5] *Kurtz II* went on to hold that even if plaintiff had alleged the chaplain had the authority to grant floor privileges for a secular invocation, plaintiff "failed to show in any concretely demonstrable way that but for his exclusion from the chaplains' guest speaker programs, there is a substantial probability he would have been able to address a *non*-prayer to [the House]." *Kurtz II*, 829 F.2d at 1144.

To avoid the binding nature of *Kurtz II*, Mr. Barker argues that *Town of Greece* expanded the definition of prayer at public events to permit secular invocations. *See* Official Capacity Opp'n at 24-25. Defendants respond that *Town of Greece* merely upheld the Town's practice of prayer before its monthly board meetings, but did not expand or alter the Supreme Court's understanding of permissible prayers as described in *Marsh* and recognized in *Kurtz II*. *See* Official Capacity Reply at 8. The Court agrees that *Town of Greece* did not alter the understanding that a legislature, such as the House, may open its proceedings with a prayer. *Town of Greece* did not define prayer as necessarily including invocations by atheists, but instead found that the Town's policy of a prayer or invocation before its monthly board meetings—for which Town leaders indicated that a lay person, including an atheist, could provide the invocation—did not violate the Establishment Clause. *Town of Greece*, 134 S. Ct. at 1816, 1828. *Town of Greece* does not alter this Court's reading of *Kurtz II* and, therefore, as described above, Mr. Barker's claims must fail for the same reasons as those of the plaintiff in *Kurtz II*. Mr. Barker has failed adequately to allege that Fr. Conroy caused his injury and he thus lacks standing to sue. A close look at Mr. Barker's individual claims fares no better.

B. Claims Against Defendants in Their Official Capacity

The history of legislative prayer and its judicial treatment are critical to appreciating the nature of Mr. Barker's argument and its resolution. In effect, his effort to thread a tiny needle—an inferred change in the law—is unavailing: there is no needle.

1. Political Question

Defendants contend that Mr. Barker's claims should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) because they raise non-justiciable political questions. *See* Official Capacity MTD at 17-29. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value

determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The underlying rationale is that "courts are fundamentally underequipped to formulate national policies or develop standards of conduct for matters not legal in nature." *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981).

"The political question doctrine is 'primarily a function of the separation of powers.'" *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 258 (D.D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005) (quoting *Baker*, 369 U.S. at 210). In *Baker*, the Supreme Court enumerated six factors that could render a case non-justiciable:

> Prominent on the surface of any case held to involve a political question is found (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.

Baker, 369 U.S. at 217 (numbers not in original); *see also Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 313 (D.C. Cir. 2014). "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker*, 369 U.S. at 217.

Defendants argue that the House's rulemaking function has been committed by the Constitution to the House alone as the Rulemaking Clause grants the House the ability to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, and the Speech or Debate Clause precludes judicial review of the implementation of House Rules, the conduct in

proceedings, and the decisions on who may address the House during a session. U.S. Const. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, they shall not be questioned in any other Place."); *see also* Official Capacity MTD at 18-27. Defendants also argue that recognition and consideration of Mr. Barker's claims would demonstrate a lack of respect for a co-equal branch of government. *See* Official Capacity MTD at 27-29. These arguments can be boiled down to two points. First, Congress' rule establishing legislative prayer is constitutional, *see Marsh*, 463 U.S. at 794-95, and Congressional rulemaking authority is exclusively committed to the Congress. Second, because the prayer rule does not "ignore constitutional restraints or violate fundamental rights," *United States v. Ballin*, 144 U.S. 1, 5 (1892), the political question doctrine dictates the Court should refrain from deciding the issue. *See* Official Capacity MTD at 18-20.

Mr. Barker retorts that the decisions of Fr. Conroy are not protected by the Rulemaking Clause because there are no House Rules related to guest chaplains or the procedures for approving or denying a request to give the opening prayer. Official Capacity Opp'n at 31-33. Defendants argue that Fr. Conroy was operating under the broader Rule that requires each session of the House to be opened with a prayer and any decision by this Court would infringe on the House's ability to determine the Rules of its proceedings and control who would be admitted to the floor and gallery. *See* Official Capacity MTD at 18-20. The Court agrees that Mr. Barker is not challenging a Rule under the Rulemaking Clause, but the application of that 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. *See Kurtz v. Baker*, 630 F. Supp. 850, 856 (D.D.C. 1986) (*Kurtz I*), *vac'd on other grounds* 829 F.2d 1133 ("[P]laintiff does not directly challenge House or Senate rules. He challenges the discretionary behavior of their

chosen Chaplains. The Chaplains occupy publicly-funded offices and thus their conduct in those offices is subject to judicial scrutiny for adherence to the Constitution.").

Additionally, Mr. Barker cites *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982) for the proposition that while courts have been cautioned to treat Congress' authorization to make its own rules with "special care," that "simply means that neither [the courts] nor the Executive Branch may tell Congress what rules it must adopt," but that "does not alter [the courts'] judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity." *Id.* at 1173. Therefore, 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. Thus, the Rulemaking Clause does not provide immunity from Mr. Barker's claims.[6]

Mr. Barker also argues that the Speech or Debate Clause does not prevent his suit because that Clause only protects actions that occur within the legislative sphere and the selection of guest chaplains is not "part and parcel of the legislative process." *Gravel v. United States*, 408 U.S. 606, 626 (1972); *see also* Official Capacity Opp'n at 33-35. Defendants liken Mr. Barker's case to *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341 (1975) where the District of Columbia Circuit held that the Speech or Debate Clause committed exclusively to Congress the power to determine who was admitted into

[6] This analysis applies equally to Defendants' argument that court action in this case would demonstrate a lack of respect for a co-equal branch of government. Defendants cite a number of cases dealing with internal disputes between members of Congress where the courts decided not to exercise jurisdiction to show respect for the internal decision-making of the Congress. *See* Official Capacity MTD at 28-29 (citing *Brown v. Hansen*, 973 F.2d 1118, 1119 (3rd Cir. 1992); *VanderJagt*, 699 F.2d 1166; and *Harrington v. Bush*, 553 F.2d 190, 214 (D.C. Cir. 1977)). Determining whether Mr. Barker has suffered discrimination at the hands of Fr. Conroy does not interfere with the legislature's ability to resolve internal disputes or signify a lack of respect for the tradition of legislative prayer.

the galleries and on the floor of Congress and made non-justiciable the question of whether Consumers Union was improperly denied accreditation and access to the press gallery. *Id.* at 1351; *see also* Official Capacity MTD at 23-25. Defendants argue that like the Correspondents' Association, Fr. Conroy was "acting by virtue of an express delegation of authority as [an] aide[] or assistant[] of Congress" when he denied Mr. Barker's request to serve as guest chaplain. *Id.* at 1350. Had the decision been made directly by a member of Congress, Defendants posit, that member would unquestionably be "immune from inquiry under the Speech or Debate Clause." *Id.* Therefore, they reason, so should Fr. Conroy.

The Court distinguishes Mr. Barker's claims from *Consumers Union* because the *Consumers Union* plaintiffs were challenging the Act of Congress that enacted the Rules which prohibited their admittance to the press balcony. The daily prayer is not similar legislative action. "An act is 'legislative' if it is 'generally done in a session of the House by one of its members in relation to the business before it.'" *Rangel v. Boehner*, 785 F.3d 19, 23 (D.C. Cir. 2015) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)). Legislative prayer is conducted at the beginning of the session and Members are not compelled to attend. *See Kurtz II*, 829 F.2d at 1146 n.2 (Ginsburg, J., concurring) ("I find no threshold blockage to Kurtz's claim against the chaplains and Treasury officers by reason of the Speech or Debate Clause. While inspirational, prayer in Congress does not appear to be 'integral to lawmaking.'") (quoting *Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984); *see also Kurtz I*, 630 F. Supp. at 856-57 ("The practice of legislative prayer does not provide meaningful input into legislative decisionmaking."); 6 C. Cannon, *Precedents of the House of Representatives* § 663 (1936) (Prayer by the Chaplain "is not a matter of business, but . . . a matter of ceremony."). Therefore

the prayer and any action taken by Fr. Conroy to designate a guest chaplain are not legislative actions and are not protected by Speech or Debate Clause immunity.

2. Failure to State a Claim

a. Establishment and Equal Protection Clauses

Defendants argue that Mr. Barker's Establishment Clause claim is barred because *Marsh* upheld the constitutionality of legislative prayer and, because *Marsh* recognized an exception for legislative prayer from the Establishment Clause, Mr. Barker's Equal Protection Clause claim must also fail. *See* Official Capacity MTD at 31. Mr. Barker counters that his claim is not barred by *Marsh* because it is an individual claim of discrimination, not a challenge to the constitutionality of legislative prayer as a practice. *See* Official Capacity Opp'n at 5.

There is logic to the argument Mr. Barker presents under the Establishment Clause. He asserts that the Chaplain to the House cannot discriminate against the nonreligious. He relies on *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.") and *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) ("[I]ndividual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."). He also notes that the Supreme Court has recognized that "the government may not favor one religion over another, or religion over irreligion." *McCreary Cty. v. ACLU*, 545 U.S. 844, 875-76 (2005).

Relying particularly on *Town of Greece*, Mr. Barker argues that the House practice of opening prayers constitutes "a government prayer program systematically and explicitly engineered to exclude atheists." Official Capacity Opp'n at 7. As he interprets *Town of Greece*, the Supreme Court held that prayer practices must include opportunities for prayers

from secularists. Mr. Barker stresses that the Town "maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation." *Town of Greece*, 134 S. Ct. at 1816. In view of this description of the Town's practice, Mr. Barker concludes that the Court "conditioned its approval of the town's policy on that point: '*So long as the town maintains a policy of nondiscrimination*, the Constitution does not require additional efforts toward diversity.'" Official Capacity Opp'n at 7 (quoting *Town of Greece*, 134 S. Ct. at 1824).

Mr. Barker's logic is persuasive within its confines, but it is not traceable to the opinion in *Town of Greece*. Mr. Barker confuses apples with oranges by connecting the *facts* of the Town's practice as described in the majority opinion early on, *Town of Greece*, 134 S. Ct. at 1816, and the *analysis* of whether those practices "reflect an aversion or bias on the part of town leaders *against minority faiths*." *Id.* at 1824 (emphasis added). The entire paragraph from *Town of Greece* puts its point in context:

> Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote a diversity of religious views would require the town to make 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 than the current approach.

Id. at 1824 (internal citation omitted). Thus, contrary to Mr. Barker's hopeful interpretation, *Town of Greece* did not reference atheists—who are, by definition, nontheists who do not believe in God or gods—but "any minister or layman who wished to give [a prayer]." *Id. Town of*

Greece is not an extension of the Supreme Court's decision in *Marsh*, but rather an affirmance that legislative prayer does not violate the Constitution. *See id.* at 1815 (concluding, "consistent with the Court's opinion in *Marsh* . . . , that no violation of the Constitution has been shown"); *id.* at 1818 (explaining that *Marsh* held that "legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause").

Despite Mr. Barker's repeated attempts to characterize his claims as not challenging the constitutionality of legislative prayer, the reality is that his 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. To decide that Mr. Barker was discriminated against and should be permitted to address the House would be to disregard the Supreme Court precedent that permits legislative prayer. *Marsh* definitively found that legislative prayer does not violate the Establishment Clause. *See Marsh*, 463 U.S. at 791; *see also Town of Greece*, 134 S. Ct. at 1819 ("*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.").

This Court concludes that the refusal of the House Chaplain to invite an avowed atheist to deliver the morning "prayer," in the guise of a non-religious public exhortation as a "guest chaplain," did not violate the Establishment Clause. For the same reasons that legislative prayer has been found consistent with the Establishment Clause, so is it consistent with the Equal Protection Clause. *See Kurtz II*, 829 F.2d at 1147 n.3 ("*Marsh* essentially affirmed that the historic practice of an opening prayer burdens no 'fundamental right' of non-theists. Thus Kurtz cannot salvage his failed First Amendment claim by cloaking it in a Fifth Amendment due process (equal protection component) mantle.") (citing *Perry Educ. Ass'n v. Perry Local*

Educators' Ass'n, 460 U.S. 37, 54 (1983) (concluding that the entitlement-to-access argument that the Supreme Court rejected under the First Amendment freedom-of-speech rubric "fares no better in equal protection garb")).

b. Religious Freedom Restoration Act

Defendants move to dismiss Mr. Barker's claim that they violated RFRA because Mr. Barker has failed adequately to allege that preventing him from serving as guest chaplain prevented him from following his secular practices free from government interference. *See* Official Capacity MTD at 38-43. RFRA protects bona fide exercises of religion from government interference. *See* 42 U.S.C. §§ 2000bb, 2000bb-1(a). It prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability." *Id.* § 2000bb-1(a). Taking as true Mr. Barker's allegations that atheism is his religion and assuming, but not finding, that RFRA applies to the House, the Court finds Mr. Barker has failed adequately to allege a claim under RFRA because he fails to allege a substantial burden.

A substantial burden "exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). A plaintiff can demonstrate a substantial burden by alleging that government action (1) "force[d] [the plaintiff] to engage in conduct that [his] religion forbids," *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001); (2) "prevent[ed] [him] from engaging in conduct [his] religion requires," *id.*; or (3) forced him "to choose between following the precepts of [his] religion and forfeiting benefits." *Kaemmerling*, 553 F.3d at 678. Mr. Barker alleges that he was prevented from serving as a guest chaplain, but fails to allege that serving as a guest chaplain was required by his

religion or that Fr. Conroy or any other individual at the House forced him to engage in any conduct contrary to his religion.

To overcome *Kaemmerling*, Mr. Barker argues that he was forced to choose between following his religion by giving a secular prayer and serving as the guest chaplain, which he describes as a benefit. *See* Official Capacity Opp'n at 40-41. The Complaint contains no allegations that Mr. Barker would have been permitted to serve as guest chaplain had he agreed to deliver a prayer inconsistent with his atheist beliefs. To the contrary, Fr. Conroy's letter to Representative Pocan stated that the decision was not based on the content of Mr. Barker's proposed invocation, but rather the inconsistency between his certificate of ordination and his claimed religion. *See* Fr. Conroy letter to Rep. Pocan at 1. Additionally, the types of benefits addressed in previous RFRA cases include distinct government benefits from "otherwise available public programs" such as unemployment benefits, *see Thomas*, 450 U.S. at 718; *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963); and veterans' educational benefits. *See Johnson v. Robison*, 415 U.S. 361, 385-86 (1974). The Court finds that the opportunity to serve as a guest chaplain is not the type of benefit covered by RFRA. Selection as a guest chaplain is more akin to an honor, not a benefit afforded to all. Accordingly, Mr. Barker's RFRA claim will be dismissed.

c. Religious Test Clause

Finally, Defendants move to dismiss Mr. Barker's claim under the Religious Test Clause, which states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," U.S. Const. art. VI, cl. 3, because the position of guest chaplain is not an office or position of public trust. *See* Official Capacity MTD at 43-45. Mr. Barker argues that the guest chaplain is an officer because he fulfills the duties of the official

Chaplain, who is a permanent employee of the House. *See* Official Capacity Opp'n at 14-15. An "officer of the United States" is traditionally considered to "embrace[] the ideas of tenure, duration, emolument, and duties," which are "continuing and permanent, not occasional or temporary." *United States v. Germaine*, 99 U.S. 508, 511-12 (1878). The guest chaplain position is therefore not an office of the United States because it is a temporary position, lasting only as long as the prayer itself.

In the alternative, Mr. Barker argues that a guest chaplain holds a position of public trust akin to those of jurors and notaries public, which have been found by other courts to constitute offices of public trust. *See* Official Capacity Opp'n at 15; *see also Torcaso v. Watkins*, 367 U.S. 488, 489 (1961) (noting that a notary public is an office of trust); *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1220-21 (5th Cir. 1991) (applying the no Religious Test Clause to witnesses and jurors). The position of guest chaplain is easily distinguishable from that of notaries public and trial witnesses and jurors. Notaries public are individuals authorized to swear to the validity of signatures on significant documents. The public must trust that authorization in order to conduct business and complete legal documents. Similarly, witnesses and jurors are in a position of public trust because they are entrusted with assisting in the carrying out of the law and serve under oaths. Without this trust, the judicial system would lack credibility.

In contrast, the position of guest chaplain comes with no public expectations of trust. It is surely an honor to serve as guest chaplain and open a session of the House with prayer, but while members of the public might recognize that opportunity as unique or significant, there is no indication or allegation in the Complaint that guest chaplains hold a position of public trust or special recognition. Because Mr. Barker has failed to demonstrate

with factual allegations that the guest chaplain is an office or position of public trust, his Religious Test Clause claim will be dismissed.

C. Claim Against Fr. Conroy in his Personal Capacity

In addition to Mr. Barker's claims that Fr. Conroy acted in his official capacity when he prevented Mr. Barker from delivering the opening prayer to a session of the House, Mr. Barker also argues that Fr. Conroy is liable in his personal capacity for discriminating against Mr. Barker under the First and Fifth Amendments. *See* Compl. ¶¶ 201-206. Mr. Barker's personal capacity claims are brought under *Bivens*. *See* 403 U.S. 388. Fr. Conroy moves to dismiss Mr. Barker's *Bivens* claim, arguing *Bivens* has not previously been extended to cover the facts of this case and that extension is inappropriate if the Court considers special factors such as separation of powers. *See* Conroy MTD at 1.

Bivens recognized an implied right of action for damages when federal officials violate the Fourth Amendment. *See Bivens*, 403 U.S. 388. The Supreme Court has only recognized two other implied rights of action under *Bivens*. *See Carlson v. Green*, 446 U.S. 14 (1980) (recognizing a *Bivens* remedy under the Eighth Amendment for a prisoner against federal prison officials); *Davis v. Passman*, 442 U.S. 228 (1979) (recognizing a *Bivens* remedy for a claim of employment discrimination by a congressman in violation of the Fifth Amendment's Due Process Clause). The Supreme Court and circuit courts, including the D.C. Circuit, have since "tread carefully before recognizing *Bivens* causes of actions." *Meshal v. Higgenbotham*, 804 F.3d 417, 421-22 (D.C. Cir. 2015).

When determining whether or not to extend *Bivens*, courts take a "case-by-case approach" rather than asking "categorically[] whether a *Bivens* action can lie." *Id.* at 422. First, courts consider whether an "alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding

remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Second, even if no alternative process exists, courts evaluate "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* A court does not extend *Bivens* "simply for want of any other means for challenging a constitutional deprivation in federal court." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001).

Recognizing the Supreme Court's reluctance to extend *Bivens* further, Mr. Barker argues that his claims are already permitted under *Davis v. Passman*. *See* Conroy Opp'n at 2-6. However, "[e]ven though the right and the mechanism of injury [are] the same . . . the contexts [may still be] different." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017). "The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Id.* For example:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Id. at 1859-60. Mr. Barker's *Bivens* claims are not covered by *Davis* merely because he also invokes the Fifth Amendment's prohibition on discrimination based on protected activities. Mr. Barker's claim is distinct from *Davis* because he alleges discrimination based on an absence of religious beliefs; the alleged discrimination was not in employment, but was related to offering a prayer before the daily session of the House; and he was denied that opportunity by the House Chaplain.

Fr. Conroy concedes there is no alternative system or process for Mr. Barker to challenge the denial of his request to open the House in prayer. Mr. Barker is not an employee of the House and, therefore, cannot challenge the action under the Congressional Accountability Act of 1995, § 207, 2 U.S.C.A. § 1317. Congress has not created a separate system for appealing a denial of the opportunity to be guest chaplain. Fr. Conroy's motion to dismiss focuses on the "special factors" that he argues weigh against extending *Bivens*, including (1) separation of powers concerns, (2) the availability of alternative remedies, (3) administrability concerns, and (4) Congress' activity in a particular field suggesting that its inaction here has not been inadvertent. *See* Conroy MTD at 13-23.

The Supreme Court has directed lower courts to be cautious about extending *Bivens* into realms already maintained by the executive or legislative branches. Separation of powers concerns have led the Supreme Court to deny a *Bivens* remedy to individuals in the military and in situations covered by the executive and legislative authority over national defense. *See Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (citing *Rostler v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("[O]ver national defense and military affairs, and perhaps in no other area[,] has the Court accorded Congress greater deference."). Congress has exclusive authority over its Rules and the manner in which it conducts its affairs. As such, the House has long since deemed it appropriate and necessary to open each session with a prayer, enacted a Rule to such affect, and hired a Chaplain to conduct the prayer or provide guest chaplains to fulfill that responsibility. As Congress is able to design the position of Chaplain, so to may Congress "tailor any remedy" to any abuse by its Chaplain. *Wilkie*, 551 U.S. at 562. The Court will not insert itself between the House and its own rulemaking process and will not extend *Bivens* to

First[7] or Fifth Amendment claims of discrimination against the House Chaplain based on a decision not to permit an individual to serve as guest chaplain.

IV. CONCLUSION

For the foregoing reasons, both motions to dismiss will be granted. A memorializing Order accompanies this Opinion.

Date: October 11, 2017

/s/
ROSEMARY M. COLLYER
United States District Judge

[7] The Court also notes that no other courts have extended a *Bivens* remedy to the First Amendment context. *See, e.g., Iqbal*, 556 U.S. at 675; *Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012); *Bush v. Lucas*, 462 U.S. 367, 390 (1983); *Rezaq v. Fed. Bureau of Prisons*, No. 13-990, 2016 WL 97763, at *9 (S.D. Ill. Jan. 8, 2016).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL BARKER,	)	
	)	
Plaintiff,	)	
v.	)	**Civil Action No. _____**
	)	
HOUSE OF REPRESENTATIVES	)	
CHAPLAIN PATRICK CONROY;	)	
ASSISTANT TO THE CHAPLAIN	)	
ELISA AGLIECO;	)	
CHAPLAIN'S LIAISON TO STAFF	)	
KAREN BRONSON;	)	
PAUL RYAN, SPEAKER OF THE HOUSE	)	
OF REPRESENTATIVES IN HIS	)	
OFFICIAL CAPACITY; and	)	
THE UNITED STATES HOUSE OF	)	
REPRESENTATIVES,	)	
	)	
Defendants.	)	

COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The Supreme Court recently upheld the legislative prayer exception to state-church separation largely because the town involved "at no point excluded or denied an opportunity to a would-be prayer giver" and "maintained that a minister or ***layperson of any persuasion, including an atheist***, could give the invocation." *Town of Greece, N.Y. v. Galloway*. 134 S. Ct. 1811, 1815 (2014) (emphasis added).

2. Using this legislative prayer exception, "guest chaplains" regularly deliver invocations before the U.S. House of Representatives.

3. The House employs a chaplain who coordinates and approves guest chaplains,

historically allowing them to deliver about 40% of invocations—more than 800—in the last 15 years.

4. The current House Chaplain, Father Patrick Conroy, has imposed requirements for guest chaplains that discriminate against the nonreligious and minority religions, and has explicitly refused to allow Plaintiff Dan Barker, who actually met the requirements, to serve as guest chaplain because Barker is nonreligious.

5. Barker challenges this discriminatory denial and the rules and practice on which it is based.

I. JURISDICTION AND VENUE

6. The Court has jurisdiction under 28 U.S.C. § 1331.

7. This is an action to remedy deprivations, actual and imminent, under color of law, of individual rights secured to plaintiff by the First and Fifth Amendments to the United States Constitution, the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb–1(b), and Article 6 of the Constitution.

8. Plaintiff also asserts a *Bivens* action against Defendant Conroy in his individual capacity for violating plaintiff's constitutional rights.

9. This is an action for a declaratory judgment under 28 U.S.C. § 2201, injunctive relief under 28 U.S.C. § 1343, and a mandamus order under 28 U.S.C. § 1361.

10. The Court has subject matter jurisdiction under 28 U.S.C. § 1343a(4) and jurisdiction to award costs and reasonable fees to prevailing plaintiffs under 42 U.S.C. § 1988.

11. Venue is proper under 28 U.S.C. § 1391.

II. PARTIES

12. The plaintiff, Dan Barker, is a federal taxpayer who resides in Madison, Wisconsin.

13. Barker is co-president and a lifetime member of the Freedom From Religion Foundation, a non-profit that promotes non-belief and works to keep state and church separate.

14. Barker was ordained to the Christian ministry in 1975.

15. Barker was a pastor in three California churches, a missionary to Mexico, a Christian songwriter, and a traveling evangelist.

16. After 19 years in the ministry, Barker "lost faith in faith" and became an atheist. As an atheist, Barker has deeply held convictions that occupy the place of religious beliefs.

17. Barker's convictions include his opposition to governmental preferences and favoritism toward religion and a belief that there are no gods or other supernatural higher powers.

18. Barker now tours the country and the world giving lectures and participating in debates with theists, all in an effort to educate the public about nontheism.

19. Barker also co-founded The Clergy Project, an online community support service for former and active religious professionals who no longer believe in a supernatural higher power.

20. Barker retains his ordination and uses it to perform weddings, though he no longer preaches the tenets of his former religion.

21. Barker has deeply and sincerely held beliefs that are purely ethical or moral in source and content but that impose upon him a duty of conscience parallel to his former religion.

22. Barker believes in the power of reason, not the supernatural, to guide lives.

23. There is no governing entity behind Barker's deeply and sincerely held beliefs

that issues ordinations.

24. Defendant Father Patrick Conroy holds the office of U.S. House of Representatives Chaplain.

25. Conroy was elected and sworn in on May 25, 2011. He is a Roman Catholic priest.

26. Defendant Elisa Aglieco is Assistant to the Chaplain, an official position in the Chaplain's Office and the U.S. House of Representatives.

27. Defendant Karen Bronson is the Chaplain's Liaison to Staff, an official position in the Chaplain's Office and the U.S. House of Representatives.

28. Defendant Speaker of the House of Representatives Paul Ryan is the presiding officer of the House and performs certain administrative and procedural duties.

29. Speaker Ryan oversees the other House officers, including the chaplain, can dismiss those officers, and can temporarily fill the Office of Chaplain if there is an unexpected vacancy.

30. Conroy, Aglieco, Bronson, and Ryan are all sued in their official capacities.

31. Barker also brings a *Bivens* action for damages against Conroy in his individual capacity.

32. Defendant United States House of Representatives employs Chaplain Conroy, Aglieco, and Bronson and has the power to regulate their practices.

33. The United States of America is an appropriate defendant under 28 U.S.C.A. § 1346.

III. FACTS

A. The House Chaplain refuses to allow Barker to deliver an invocation, even

though he meets the chaplain's unwritten requirements for guest chaplains.

34. Five weeks after the Supreme Court handed down the *Galloway* decision, Barker's representatives visited the U.S. Capitol and met in the chaplain's office with Elisa Aglieco and Karen Bronson to inquire about a nonreligious citizen serving as guest chaplain and delivering the opening invocation at the House.

35. Bronson and Aglieco explained that there are no written requirements to become a guest chaplain, but that guest chaplains are permitted to give invocations if:

(1) they are sponsored by a member of the House,

(2) they are ordained, and

(3) they do not directly address House members and instead address a "higher power."

36. By February 2015, the Chaplain's Office had documentation showing that Barker met or would meet all these requirements.

37. Representative Mark Pocan, Barker's representative to the House, officially requested that Chaplain Conroy grant Barker permission to serve as a guest chaplain and deliver the morning invocation. (*See* February 18, 2015 letter, *Exhibit A*.)

38. Two days later, Aglieco requested Barker's contact information, biography, and ordination certificate because the Chaplain's Office wanted "to check his credentials." All of which was quickly provided.

39. Chaplain Conroy subsequently expressed to Representative Pocan that he was dubious that an atheist could craft an appropriate invocation.

40. Chaplain Conroy indicated that reviewing a draft copy of Barker's invocation might allay his concerns.

41. Barker was reluctant to provide his remarks because he believed that Chaplain

Conroy was imposing requirements on him because of his atheism that the chaplain would not impose on other guest chaplains, including a more substantial vetting process and submitting the invocation for pre-approval.

42. After months of silence from the Chaplain's Office, Barker felt forced to submit his invocation rather than forgo this unique, prestigious opportunity.

43. Barker provided a draft of his proposed invocation in June 2015. (*See Exhibit B.)*

44. Meeting all the requirements, Barker waited to be scheduled as a guest chaplain.

45. Four months later, the Chaplain's Office had still not acted on Barker's requests.

46. When asked about the delay, the Chaplain's Office claimed, without explanation, that it did not think the previous requests were "genuine."

47. The Chaplain's Office formally denied Barker permission in December 2015.

48. That denial came nearly 18 months after Aglieco and Bronson were asked about a nonreligious citizen acting as guest chaplain and nearly 10 months after Barker had submitted all his documentation.

49. The Chaplain's Office reaffirmed that initial denial a month later. (*See* January 7, 2016 letter, *Exhibit C.)*

B. The House Chaplain has a policy and practice of approving guest chaplains; guest chaplains have been overwhelmingly, disproportionately Christian.

50. The House of Representatives' Rules provide for the election of a chaplain at the beginning of each Congress.

51. The House chaplain holds office until a successor is elected. Rule II.1

52. The chaplain's sole codified duty is to "offer a prayer at the commencement of each day's sitting of the House." Rule II.5

53. At the start of each day's session, the House's first "order of business . . . shall be

[a] . . . [p]rayer by the Chaplain." Rule XIV.1.

54. The House Rules do not include requirements for guest chaplains.

55. There are no other official, written rules or requirements for the opening invocations or guest chaplains.

56. The Chaplain's Office approves guest chaplains.

57. Each day that the House is in session, the chaplain or a guest chaplain gives an invocation.

58. Guest chaplains have been giving opening invocations in the House since at least 1948. *See* Cong. Rec., June 9, 1948, pp. 7597-7599.

59. On average, two guest chaplains deliver invocations every week and the chaplain has said that no more than two guest chaplains are allowed per week.

60. Representatives who want to invite guests write letters to the chaplain, who makes arrangements.

61. Typically, the sponsoring Representative introduces the guest chaplain.

62. The Representative gives a short biography of the guest chaplain and usually mentions the church, temple, or other organization the chaplain represents.

63. This introduction is recorded in the Congressional Record.

64. The introduction is alternatively listed as "honoring," "recognizing," "welcoming," or "a special tribute to" the guest chaplain.

65. Local media often cover the congressional introduction and the invocation the guest chaplain delivers.

66. When an invocation is broadcast on C-SPAN or other video outlets, the chaplain's name and organization typically appear on the video.

67. Barker views the opportunity to give an invocation, to be introduced by a member of the U.S. House of Representatives, and to have that tribute recorded for posterity in the Congressional Record and memorialized on C-SPAN as a great honor and an opportunity to participate in solemnizing the venerable work of the U.S. government.

68. Chaplain Conroy's denial prevents Barker from receiving the prestige and status that comes with giving an invocation before the U.S. House.

69. Chaplain Conroy has the power and discretion to invite guest chaplains to fulfill the responsibilities of the Chaplain's Office by offering a prayer at the commencement of a session of the House, and to permit Members to recommend particular clergy for consideration as guest chaplains. (*See* January 7, 2016 letter, *Exhibit C.)*

70. The Chaplain's Office typically recommends inclusive invocations, but it has admitted "that the [Chaplain's] office cannot tell people how to pray." *See* Bowman.

71. From 2000 to 2015, the religious breakdown of chaplains and guest chaplains was:

96.7%	**Christian**	**(2,085 invocations)**
2.7%	**Jewish**	**(59 invocations)**
<0.4%	**Muslim**	**(8 invocations)**
<0.2%	**Hindu**	**(3 invocation)**
<0.05%	**Other non-Christian**	**(1 invocation)**
n/a	**Atheist/Agnostic**	**(0 invocations)**

72. 857 of the 2,198 invocations were delivered by guest chaplains, about 39%

73. These numbers contrast with the religious makeup of the people the House represents, according to *America's Changing Religious Landscape*, Pew Research Center (May 12, 2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape:

70.6%	**Christian**
1.9%	**Jewish**
0.9%	**Muslim**

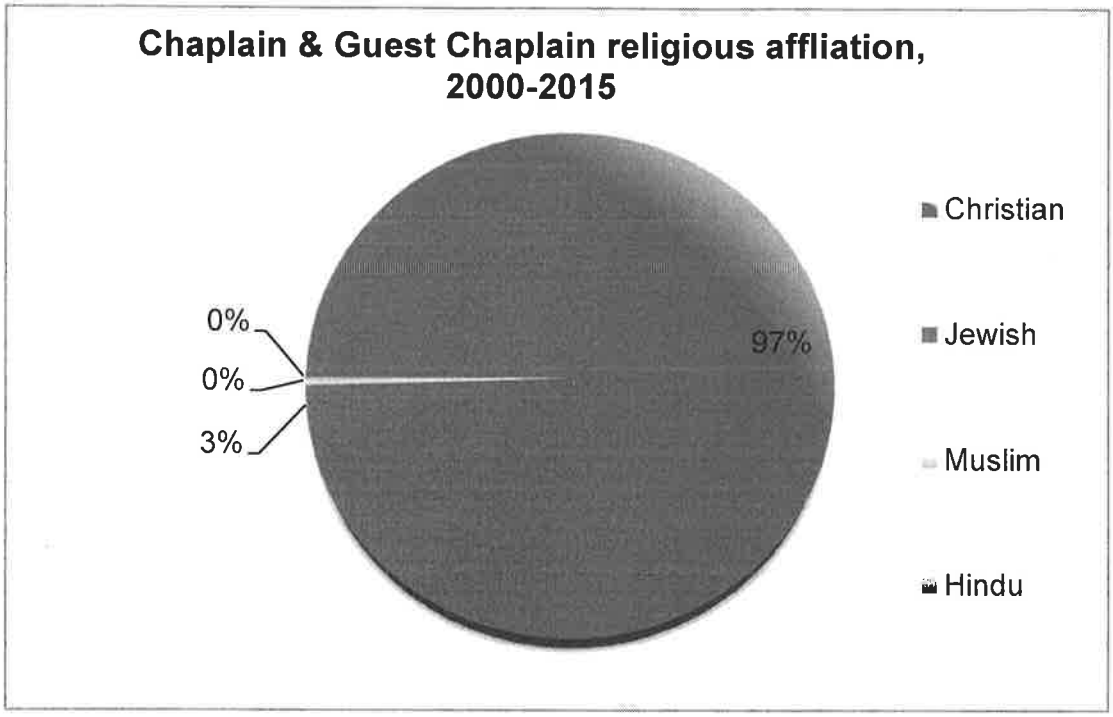
0.7% **Hindu**
7.1% **Unaffiliated, Atheist/Agnostic**
15.8% **Unaffiliated, nothing in particular**

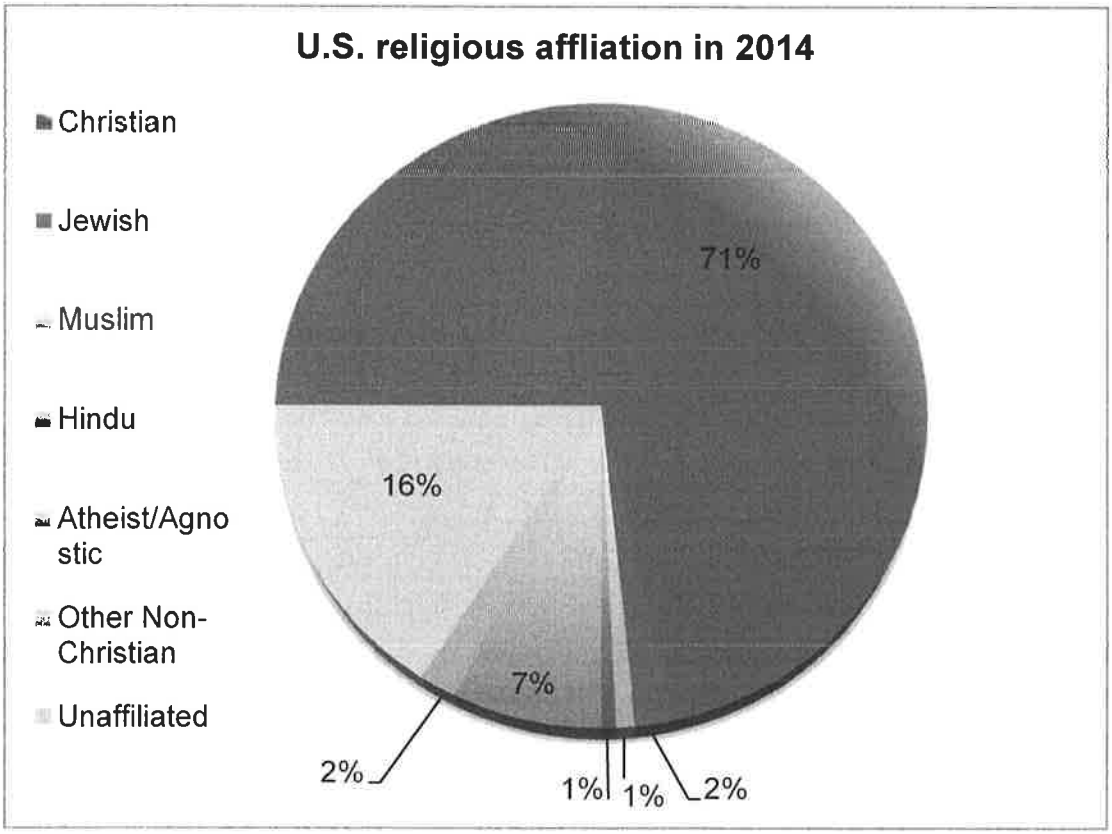
[Note: That 23% (7.1 + 15.8) makes "Nones," those who self-identify as "nonreligious," the second largest "denomination" after evangelical Protestants at 25.4%.]

0.7% **Buddhist**
1.8% **Other non-Christian religions**

74. Put another way, Abrahamic religions gave 99.8% of all invocations from 2000 to 2015—all but four—even though they make up less than 75% of the population:

[please see charts on next page]


Chaplain & Guest Chaplain religious affliation, 2000-2015
0%
0%
3%
97%
Christian
Jewish
Muslim
Hindu


U.S. religious affliation in 2014
Christian
Jewish
Muslim
Hindu
Atheist/Agnostic
Other Non-Christian
Unaffiliated
71%
16%
7%
2%
1%
1%
2%

C. The House Chaplain's policies and practices needlessly restrict and inhibit minority believers and nonbelievers from acting as guest chaplain.

75. Chaplain Conroy's imposed requirements disparately burden nonreligious and minority groups.

76. The House of Representatives has never had an open atheist or agnostic assume the office of guest chaplain and deliver an invocation.

77. The House rarely has minority religions assume the office of guest chaplain and deliver an invocation.

78. Like atheists, many minority religions also have never had the opportunity to deliver an invocation.

79. There is nothing inherent in atheism, Jainism, Rastafarianism, Buddhism, or any other minority religion known to the plaintiffs that would prohibit their leaders from performing the duties of the guest chaplain.

80. Nonreligious individuals, most of them lacking religious ordinations, have delivered invocations before local government meetings.

81. The Central Florida Freethought Community, a local chapter of the Freedom From Religion Foundation, maintains a list of those invocations on its website at http://cflfreethought.org/invocations/.

82. Since 2004, nonreligious individuals have given more than 75 documented invocations at legislative meetings, including state legislatures, around the country.

83. No legislative meeting has suffered because of a secular invocation.

84. The Supreme Court has recognized that nonreligious individuals can deliver invocations: "The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, ***including an atheist***, could

give the invocation." *Galloway*, at 1815 (2014) (emphasis added).

85. The *Galloway* decision concerned the Town of Greece, New York, and shortly after it was decided, an atheist, Dan Courtney, delivered a nonreligious invocation to the town board.

86. In his invocation, Courtney invoked the signers of the Declaration of Independence and We the People, "as citizens":

> "...We, as citizens, the beginning and the end, the alpha and the omega of our destiny, are not, as the great philosopher Immanuel Kant warned, mere means to the ends of another, but we are ends in ourselves. This basic premise, this profound idea, guides us such that we need not kneel to any king, and we need not bow to any tyrant."

87. As this and other nonreligious invocations show, nonreligious speakers are perfectly capable of solemnizing proceedings by delivering an opening invocation at government meetings.

88. Secular invocations, in fact, have been delivered at government meetings with requirements that are less restrictive and more narrowly tailored to the invocation's purpose than Chaplain Conroy's unwritten requirements.

89. Some religions, such as Shintoists, Jains, Rastafarians, Buddhists, Baha'is, German Baptists, and Quakers, among others, do not ordain or acknowledge clergy.

90. Nor do atheists or agnostics ordain or acknowledge clergy.

91. Some of these religions and others do not worship or acknowledge supernatural or god-like higher powers, although all are capable of invoking some power outside of themselves when delivering an invocation.

D. Even though the guest chaplain requirements are inherently discriminatory against the nonreligious and minority religions, Dan Barker met all three.

92. Barker met the sponsorship and ordination requirements and he agreed to the third requirement—not addressing the House but a higher power—and he even provided a draft of his invocation, a predicate inquiry not made of religious guest chaplains.

93. **Barker satisfied the first requirement** on February 18, 2015, when Representative Mark Pocan officially requested that Mr. Barker serve as a guest chaplain. (*Exhibit A).*

94. **Barker satisfied the second requirement** a week later when the Chaplain's Office received copies of Barker's ordination, biography, and contact information to confirm the validity of that ordination.

95. Barker was ordained by the Standard Christian Center in Standard, California on May 25, 1975.

96. A copy of Barker's Certificate of Ordination contains the signature of four SCC officials and was provided to the Chaplain's Office. (*Exhibit D).*

97. Neither Barker's certificate nor his ordination have been rescinded or otherwise abrogated.

98. Barker regularly uses his ordination to perform marriages.

99. Barker has performed marriages in many states, including more than a dozen in Dane County, Wisconsin, which Rep. Pocan represents, and others such as Alabama, California, Colorado, Indiana, Iowa, and Washington.

100. Barker most recently performed a wedding in Minnesota, which recognized his ordination and the subsequent marriage.

101. The U.S. Air Force Academy in Colorado Springs also has allowed Barker to

officiate a nonreligious wedding in its chapel using this ordination.

102. None of the weddings Barker has performed using his ordination have been called into question or annulled even though he now holds deep and sincere beliefs that are different than the ones he held when he was ordained.

103. Although Barker is ordained and uses his ordination to perform marriages and other duties, he has not done so as an employee of or in the course of his duties at the Freedom From Religion Foundation.

104. **Barker satisfied the third requirement** by submitting a copy of his draft remarks, which did not directly address House members, to the Chaplain's Office. *(See Exhibit B.)*

105. Barker invoked a higher power, although not a god or supernatural power, in his draft remarks:

> Celebrating the wondrous fact that the sovereign authority of our great nation is not a monarch, lord, supreme master or any power higher than "We, the people of these United States," and recognizing that we Americans, a proudly rebellious people, fought a Revolutionary War to shatter the bonds of tyranny, let us rejoice in the inalienable liberty of conscience our forefathers and foremothers risked their lives to establish and our country continues to defend against those enemies who despise freedom of religion, freedom of speech, and freedom of thought.
>
> An invocation is meant to invoke the assistance and guidance of someone outside of ourselves. In the United States, our "higher power" is the authority the electorate has provisionally bestowed upon the guidance of our representatives, who work not for a king or dictator, but for the public good.
>
> Representing tens of millions of good Americans who are not religious and millions of patriotic citizens who do not believe in a god, I cannot invoke a spirit or supernatural agency before this esteemed body.

> But I *can* invoke the "spirit" of the founding patriot Thomas Paine, a nonChristian deist who argued for Common Sense over dogma.

. . .

106. Chaplain Conroy barred Barker from performing as guest chaplain despite receiving evidence that he met each demand from the Chaplain's office.

E. The Chaplain's Office denied Dan Barker permission to be a guest chaplain because he is nonreligious.

107. Chaplain Conroy denied Dan Barker the opportunity to serve in the office of guest chaplain to the United States House of Representatives and to give the opening invocation.

108. But for Chaplain Conroy's denial, Barker would have served as guest chaplain, delivered an opening invocation to the House, and received all the concomitant benefits and notoriety of that position.

109. Chaplain Conroy cited several reasons for the denial, all of which were pretextual.

110. Barker was denied because he is an atheist.

111. The Chaplain's Office tried to rationalize its decision by explaining that "Daniel Barker was ordained in a denomination in which he no longer practices," and that "All guest chaplains have been practicing in the denomination in which they were ordained." (*See* December 10, 2015 email, *Exhibit E.)*

112. Acting for Dan Barker as a lifetime member of the Freedom From Religion Foundation, FFRF attorneys objected to this denial: "When the government allows invocation speakers to deliver remarks, government officials, including chaplains, cannot legally determine whether or not a message is 'religious enough' or approve the content of messages," nor can they "legally determine whether or not a person is 'religious enough' " to deliver an invocation. (*See* December 17, 2015 letter, *Exhibit F.*)

113. Chaplain Conroy reiterated his Office's denial by stating that Barker's ordination certificate "is not current or legitimate for purposes of my considering your recommendation that he be invited to offer an opening invocation." (*See Exhibit C.*)

114. Chaplain Conroy's letter also stated that Barker was denied because he left "the faith in which he [had] practice[d]."

115. Stated even more clearly in the letter, the Chaplain's Office denied Barker because he is not "a religious clergyman." He had "part[ed] with his religious beliefs."

116. Through this denial, Chaplain Conroy, acting as a government official, has made an intrusive inquiry into the particular religious beliefs (or lack thereof) of a candidate for the office of guest chaplain and judged his fitness for that office on the basis of the perceived quality of those beliefs.

117. Had Barker stayed in "the faith in which he practice[d]," or been "a *religious* clergyman," or had he not "part[ed] with his religious beliefs," he would have been approved to deliver an invocation, but as a *nonreligious* officiant with a valid ordination, he was denied.

F. The Chaplain's Office used the three unwritten requirements as a pretext for excluding Barker and has *not* enforced these requirements against other guest chaplains.

118. Chaplain Conroy's unwritten requirements serve to exclude minority religious and nonreligious applicants from acting in the role of guest chaplain and from receiving the benefits and notoriety that come with that position.

119. Chaplain Conroy enforced these unwritten requirements against Barker, effectively denying him equal opportunity to act as guest chaplain, but he has not enforced the same requirements against other, religious applicants.

120. **Not all guest chaplains have had a Representative sponsor.**

121. On August 5, 2011, Thomas J. Wickham, the House Parliamentarian, served as guest chaplain, approved by Chaplain Conroy.

122. Wickham did not have a Representative sponsor and he is not ordained.

123. **Not all guest chaplains have been ordained.**

124. Since 2000, Muslims identified as imams have given eight invocations.

125. Islam does not have formal or ordained clergy.

126. None of the Muslim guest chaplains were ordained, at least not in Islam.

127. As guest chaplain, Yolanda Adams gave the opening invocation on April 18, 2013.

128. Chaplain Conroy approved Ms. Adams as a guest chaplain.

129. Ms. Adams, a former schoolteacher, is now a gospel singer and a radio show host, but was not ordained when she served as guest chaplain.

130. As guest chaplain, Rajan Zed gave opening invocations on July 12, 2007 and June 19, 2014.

131. Chaplain Conroy approved Mr. Zed as a guest chaplain in 2014 and Chaplain Conroy's predecessor in the office approved Zed in 2007.

132. Mr. Zed is the President of Universal Society of Hinduism, but was not ordained when he served as guest chaplain.

133. As guest chaplain, Chandra Bhanu Satpathy gave the opening invocation on June 24, 2015.

134. Chaplain Conroy approved Satpathy as a guest chaplain.

135. Satpathy visited the Holy Shrine of Shri Sai Baba located in Shirdi (Maharashtra) in 1989 and has since been spreading that philosophy, but he was not ordained when he served as

guest chaplain.

136. As guest chaplain, Randy Bezet, gave the opening invocation on June 25, 2015.

137. Chaplain Conroy approved Bezet as a guest chaplain.

138. Randy Bezet is a pastor at Bayside Church in Florida but was not ordained when he served as guest chaplain.

139. Bayside Church is a member of the Association of Related Churches, which does not require its pastors to be ordained.

140. Both Satpathy and Bezet served as unordained guest chaplains four months after Chaplain Conroy enforced the unwritten ordination requirement against Barker by demanding a copy of his ordination.

141. The Chaplain's Office approved these guest chaplains either without investigating their ordination status or with knowledge that they were not ordained.

142. **Not only were some guest chaplains unordained, some guest chaplains were also not "practicing" in the religion in which they were ordained when they delivered opening invocations.**

143. John Clark Buchanan served as the guest chaplain on June 3, 2003, yet, at the time he was "the retired Episcopal bishop of West Missouri." 149 Cong. Rec. H4795 (daily ed. Jun 3, 2003) (statement of Rep. Karen McCarthy) (emphasis added).

144. Fred Holloman served as the guest chaplain on April 27, 2005, yet, "Reverend Holloman retired in 2002 after serving 50 years in the ministry." 151 Cong. Rec. H2553 (daily ed. Apr. 27, 2005) (prayer by Guest Chaplain Fred S. Holloman) (emphasis added).

145. Other guest chaplains were ordained in one denomination, switched denominations (a common occurrence), and delivered invocations as guest chaplains

representing their subsequent faith, a denomination in which they lacked an ordination.

146. **Chaplain Conroy disparately enforces the supernatural higher power requirement.**

147. Reverend Andrew Walton served as guest chaplain on May 5, 2015 and did not invoke a supernatural higher power, but rather the "spirit of life that unites all people":

> 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.
>
> 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.

148. Four months after this invocation, Chaplain Conroy again approved Andrew Walton to serve as guest chaplain on September 10, 2015.

149. Walton gave his second invocation three months after Chaplain Conroy received a draft copy of Barker's invocation, and once again he did not address a supernatural higher power:

> 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.

> May we leave business as usual in the shadows of yesterday, seeking to shine with renewed purpose, inspired wisdom, and transformative action.
>
> May every person associated with these Halls of power 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.
>
> As numerous streams of opinion, interest, and need flow into the procedures, process, and decisions of this day and days ahead, may there be wisdom and patience to allow them to find their way to pools and ponds of peace, rivers of mercy, and eventually oceans of compassion and common good for all people. (Sept. 10, 2015 invocation)

150. Reverend Michael Wilker served as guest chaplain on October 16, 2015, and he did not invoke or address a god but instead addressed the "Spirit of truth and reconciliation."

151. Reverend Wilker served as guest chaplain without addressing a supernatural higher power, about four months after the Chaplain's Office received Barker's draft remarks.

152. Chaplain Conroy does not require other potential guest chaplains to submit written drafts of their invocations prior to approval.

153. Indeed Chaplain Conroy has admitted that he "cannot tell people how to pray" or "censor what [guest chaplains] can say…" (*See Exhibit G.)*

154. The Chaplain's Office, nonetheless, requested Barker's draft remarks before denying his application to serve as guest chaplain.

155. The three requirements Chaplain Conroy imposed on Dan Barker are not written down and are disparately applied.

156. Chaplain Conroy and the Chaplain's Office have used the three requirements as a pretext to censor content and viewpoints with which they do not agree.

IV. GROUNDS FOR RELIEF

157. Plaintiff challenges:

- the denial of the opportunity to give an invocation as an instance of discrimination against a citizen for lacking religious belief and his chosen means of expressing that belief (i.e., invoking a non-supernatural higher power);
- the requirement that guest chaplains be ordained and practicing in the religion in which they were ordained, be it a written rule, tradition, or practice of the House or House Chaplain; and
- the requirement that guest chaplains address a supernatural higher power, be it a written rule, tradition, or practice of the House or House Chaplain.

A. The Establishment Clause of the First Amendment.

158. The clearest command of the Establishment Clause of the First Amendment is that one religious denomination cannot be officially preferred over another.

159. The Supreme Court reaffirmed that this principle applies to government invocation policies in Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811, 1816, 1824 (2014) (emphasizing that the town's "leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation" and ruling that the government must "maintain[] a policy of nondiscrimination" in deciding who will deliver an invocation).

160. The Chaplain's unwritten requirements discriminate against those whose religious beliefs do not include a belief in a supernatural higher power or those who practice a religion that does not have ordinations.

161. The Chaplain, moreover, has applied the unwritten requirements in a manner that excludes atheists and other minority religions, in violation of the Establishment Clause's

nondiscrimination principle.

162. The Chaplain's refusal to allow Barker to be guest chaplain, and the unwritten requirements cited as justification for that denial, create a preference by the Chaplain's Office and the House of Representatives for certain religions over others, and religion over nonreligion.

163. The only purpose behind the Chaplain's unwritten requirements is a religious one: To limit guest chaplains and the invocations they give to those meeting a specific, inherently religious standard.

164. The effect of the Chaplain's unwritten requirements is to disproportionately favor speakers holding a narrow range of religious beliefs over speakers with other minority religious or nonreligious beliefs.

165. The Chaplain's unwritten requirements impermissibly entangle the Chaplain's Office in quintessentially religious inquiries, including determinations as to whether guest chaplains are "practicing" in the religion in which they were ordained and whether a higher power is sufficiently supernatural to be invoked before the House of Representatives.

166. The Chaplain's unwritten requirements enmesh religion in the processes of government.

167. In this case, at the seat of our national government—in the congressional chamber based on proportional representation—the Chaplain is dividing and excluding citizens based on their religious or nonreligious beliefs.

168. The Chaplain's unwritten requirements also coerce applicants for the guest chaplain position to actively practice a religion that provides ordinations and to address a supernatural higher power when speaking before Congress. The Chaplains Office has conditioned the receipt of a significant honor and benefit on these inherently religious

requirements.

B. The Due Process Clause of the Fifth Amendment.

169. The Fifth Amendment's "due process" clause requires the federal government to afford equal protection of the laws to all citizens.

170. Equal protection requires that citizens in similar situations be treated equally and not discriminated against because of their religion or lack thereof.

171. Because of his nonreligious beliefs, Barker was discriminated against compared to other, similarly situated or less qualified religious guest chaplains.

172. Barker was subjected to:

(a) an extensive governmental vetting process that exceeded the scope permissible for a government agent inquiring into a citizen's religion;

(b) an extensive and unreasonable delay—at least ten months—before a final decision on his application to become guest chaplain was made, including the offensive supposition that his request was not genuine;

(c) pre-approval and prior restraint on his chosen language and the form of his invocation;

(d) the application of unwritten rules that were not applied to other guest chaplains; and

(e) the denial of his request even though he satisfied onerous, unconstitutional requirements.

173. Barker was denied equal treatment solely because he no longer believes in god.

174. Chaplain Conroy's requirements for guest chaplains classify applicants on the basis of their religion, a suspect classification, and discriminate against nontheists and other minority religions.

175. Chaplain Conroy applied the guest chaplain requirements against Barker in an intentionally discriminatory manner because of Barker's status as an atheist.

176. Chaplain Conroy's requirements for guest chaplains have an adverse effect on nontheists and many minority religious leaders who are otherwise capable of serving their country as guest chaplains.

177. Plaintiff seeks declaratory, injunctive, and mandamus relief under this ground for relief.

C. The Religious Freedom Restoration Act.

178. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb et seq., provides that the federal government, which includes the House Chaplain, "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-l(a)(b).

179. Barker's atheism and other nontheistic beliefs are sincerely held and occupy a place in his life equivalent to that of religious beliefs.

180. By conditioning a significant government benefit, the opportunity to be a guest chaplain before the House of Representatives, on requirements that exclude atheists—that applicants be ordained, be practicing in the religion in which they were ordained, and that they address a supernatural higher power—the Chaplain's Office is putting substantial pressure on Barker to modify his behavior and to violate his sincerely held beliefs.

181. By requiring Barker to maintain religious activity in the church that originally ordained him, the Chaplain's office is placing a substantial burden on Barker, forcing him to either act in opposition to his sincerely held beliefs or forego a government benefit and opportunity that he is otherwise qualified to receive.

182. To meet the unwritten ordination requirement, for example, Barker must give up his current belief system, which does not have ordinations, and either: 1) convert to Christianity (the religion of his current ordination) or 2) convert to another religion with ordinations and acquire an ordination in that religion.

183. *There is no greater free exercise burden than the government requiring a person to convert to a different religion.*

184. By requiring Barker to craft an invocation to a supernatural higher power, a higher power that the Chaplain's Office finds acceptable but in which Barker does not believe, the government is coercing him to either: 1) abandon his beliefs and adopt beliefs the government deems more acceptable or 2) forego the government benefit that he is otherwise qualified to receive.

185. Forcing Barker to choose between his beliefs and the opportunity to deliver an invocation places a substantial burden on the free exercise of his chosen belief system.

186. Chaplain Conroy's restrictive rules for guest chaplains—that applicants be ordained, be practicing in the religion in which they were ordained, and that they address a supernatural higher power—do not further a compelling state interest.

187. There is no compelling state interest in limiting guest chaplains to those who are ordained and actively practicing in the religion in which they were ordained.

188. No compelling state interest requires guest chaplains to address a supernatural higher power while delivering their invocation.

189. Any articulated interest is a pretext, meant to obscure the actual purpose of the unwritten requirements, which is to filter out otherwise qualified guest chaplains of whom Chaplain Conroy does not approve.

190. Defendants' requirements for guest chaplains also are not the least restrictive means of furthering a compelling state interest.

191. Indeed, many government bodies currently operate successfully with less restrictive requirements for guest chaplains.

192. The Chaplain's Office's unwritten rules currently exclude not only atheists, but any minority religion that does not recognize a supernatural higher power or does not have the equivalent of an ordination.

193. Plaintiff accordingly is entitled to declaratory, injunctive, and mandamus relief pursuant to the Religious Freedom Restoration Act.

D. U.S. Constitution, Article 6, Paragraph 3.

194. The Religious Test Clause compels that "no religious test shall ever be required as a qualification of any office or public trust under the United States." U.S. Const. art. VI, ¶3.

195. Requiring that a guest chaplain "be ordained by a recognized body in the faith in which he/she practices" or even that a guest chaplain possess an ordination "certificate" that is "current or legitimate" amounts to a religious test.

196. Requiring that a guest chaplain direct an invocation to a supernatural higher power is a religious test.

197. The House Chaplain is an "office . . . under the United States," and by assuming the House Chaplain's duties, the guest chaplain is also an "office or public trust under the United States."

198. The Chaplain's requirements prohibit any nonreligious individual, including Barker and individuals from some minority religions, from occupying the office of guest chaplain, however briefly.

199. The Supreme Court has recognized that nonreligious individuals are capable of fulfilling any opening invocation requirement, and therefore, no government interest justifies prohibiting nonreligious citizens from occupying the guest chaplain office.

200. Plaintiff accordingly also seeks declaratory, injunctive, and mandamus relief compelling compliance with the Religious Test Clause.

E. *Bivens* action against Chaplain Conroy in his personal capacity for discriminating against plaintiff for his personal religious choices.

201. Plaintiff has a constitutionally protected right to equal treatment vis-à-vis similarly situated guest chaplains under the First and Fifth Amendments, as alleged above.

202. Chaplain Conroy, a federal official, has intentionally violated Barker's constitutional right to equal treatment by discriminating against him.

203. Chaplain Conroy's discrimination occurred under color of federal law.

204. Defendant cannot raise any appropriate immunity defense to this claim.

205. If this Court cannot otherwise grant Barker effective relief from Chaplain Conroy's discrimination, it can do so under *Bivens*.

206. Plaintiff seeks monetary damages against Chaplain Conroy in his personal capacity, as outlined in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the injury he has suffered.

V. REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

a. Declare that barring atheists and other nonreligious individuals from the position of guest chaplain violates the Religious Freedom Restoration Act, Article 6 of the U.S. Constitution, and the First and Fifth Amendments to the U.S. Constitution.

b. Declare that requiring guest chaplains to invoke a supernatural or god-like higher power violates the Religious Freedom Restoration Act, Article 6 of the U.S. Constitution, and the First and Fifth Amendments to the U.S. Constitution.

c. Declare that requiring guest chaplains to be ordained and currently practicing in a religion that has ordinations violates the Religious Freedom Restoration Act, Article 6 of the U.S. Constitution, and the First and Fifth Amendments to the U.S. Constitution.

d. Enjoin defendants from barring otherwise qualified atheist and nonreligious individuals from the position of guest chaplain on the basis of their lack of religion.

e. Enjoin defendants from censoring the invocations of guest chaplains or requiring that those invocations address a supernatural higher power.

f. Enjoin defendants from requiring that guest chaplains be ordained and practicing in an approved religious sect.

g. Enjoin defendants from selectively imposing restrictions on guest chaplains in a way that inhibits the equal participation of minority religions or nonreligious citizens.

h. Issue a mandamus order requiring Defendant Conroy to approve Dan Barker's appointment to the post of guest chaplain to the U.S. House of Representatives and schedule Barker to give an invocation as soon as possible.

i. Award reasonable damages to Barker, to be assessed against Defendant Conroy in his personal capacity for violating plaintiff's clearly established rights.

j. Award plaintiff the reasonable costs and expenses of this action, including attorneys' fees, under the Equal Access to Justice Act, 28 U.S.C. § 2412; the Civil Rights Act, 42 U.S.C. § 1988; the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb; and/or any other applicable statute or rule of law or equity.

k. Award or order such further relief as the Court deems just and equitable.

Dated this 5th day of May, 2016.

BOARDMAN & CLARK LLP
By:

/s/ Eric A. Baker
Eric Baker
DC Bar Number: 481394
One South Pinckney Street, Fourth Floor
P.O. Box 927
Madison, WI 53701-0927
(608) 283-1783 – Telephone
(608) 283-1709 – Facsimile
ebaker@boardmanclark.com

Andrew L. Seidel (*Pro Hac Vice* pending)
Samuel T. Grover (*Pro Hac Vice* pending)
Freedom From Religion Foundation, Inc.
PO Box 750
Madison, WI 53701

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Eric A. Baker, hereby certify that on May 5, 2016, I caused to be electronically filed the Complaint for Declaratory and Injunctive Relief with the Clerk of Court using the CM/ECF system.

/s/ Eric A. Baker
Eric A. Baker

F:\docs\wd\26318\25\a2458902.docx

MARK POCAN
2ND DISTRICT, WISCONSIN

COMMITTEE ON THE BUDGET

COMMITTEE ON EDUCATION
AND THE WORKFORCE

ASSISTANT WHIP

10 EAST DOTY STREET, SUITE 405
MADISON, WI 53703
(608) 258-9800

313 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
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POCAN.HOUSE.GOV

UNITED STATES
HOUSE OF REPRESENTATIVES

February 18, 2015

The Reverend Patrick J. Conroy, Chaplain,
U.S. House of Representatives
U.S. Capitol, Room HB25
Washington, DC 20515-6655

Dear Reverend Conroy;

I write to request Daniel Barker be given consideration as a guest chaplain for morning invocation at the House of Representatives. Mr. Barker is currently serving as President of the nonprofit Freedom From Religion Foundation, which works to uphold the Constitution, located in my district in Madison, Wisconsin. Mr. Barker intends to offer the House of Representatives a hopeful invocation focusing on leading a happy, loving, moral, and purpose-filled life.

Daniel holds a certificate of ordination from the Standard Christian Center. He intends for his invocation to be secular, but will respectfully emphasize the importance of our shared humanity and the urgency of working towards the common good as a legislative body.

Thank you for your consideration of this request. If you have any questions or concerns, please contact Alicia Molt (Alicia.Molt@mail.house.gov), a member of my staff.

Sincerely,

Mark Pocan
Member of Congress

EXHIBIT
A

Invocation by Dan Barker
(draft)

Celebrating the wondrous fact that the sovereign authority of our great nation is not a monarch, lord, supreme master or any power higher than "We, the people of these United States," and recognizing that we Americans, a proudly rebellious people, fought a Revolutionary War to shatter the bonds of tyranny, let us rejoice in the inalienable liberty of conscience our forefathers and foremothers risked their lives to establish and our country continues to defend against those enemies who despise freedom of religion, freedom of speech, and freedom of thought.

An invocation is meant to invoke the assistance and guidance of someone outside of ourselves. In the United States, our "higher power" is the authority the electorate has provisionally bestowed upon the guidance of our representatives, who work not for a king or dictator, but for the public good.

Representing tens of millions of good Americans who are not religious and millions of patriotic citizens who do not believe in a god, I cannot invoke a spirit or supernatural agency before this esteemed body.

But I *can* invoke the "spirit" of the founding patriot Thomas Paine, a nonChristian deist who argued for Common Sense over dogma.

I can invoke the "spirit" of Thomas Jefferson, another nonChristian deist, who stated that our Constitution "erects a wall of separation between church and state" creating the first nation in history to dissolve the formal bonds between religion and government.

I can invoke the "spirit" of James Madison, who stated that "being under the direction of reason and conviction only, not of violence or compulsion, all men are entitled to the full and free exercise of [religion], according to the dictates of conscience."

I can invoke the courage of revolutionary leaders who strove to create a nation where the pursuit of human happiness is unhampered by imposed tradition or coerced doctrine, declaring that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

I can invoke 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.

I can invoke the tenacity and empathy of the atheist Elizabeth Cady Stanton who battled for fifty years for women's rights and who, with her agnostic friend Susan B. Anthony, wrote the Nineteenth Amendment that now affirms the once-radical principle that *all* citizens can participate in their own democracy. Their close friend, the abolitionist Frederick Douglass said, "I prayed for twenty years but received no answer until I prayed with my legs."

But mainly, today, I invoke the people's choice, we know that laws should be based on fairness, not ancient codes. That policy should be based on reason, not privilege. That ethics should be aimed at wellbeing, to reduce real violence in the real world, not to appease a deity or flatter a lord. I invoke the "higher power" of *human* wisdom to solve natural problems in the natural world, the only world we have.

When it comes to government, it doesn't matter who is right or wrong in matters of religion. We are all free to think for ourselves. As the great nineteenth-century agnostic orator Robert Green Ingersoll said, let's agree to take it "one world at a time."

EXHIBIT
B

PATRICK J. CONROY, S.J.
CHAPLAIN

Office of the Chaplain
U.S. House of Representatives
Washington, DC 20515–6655

January 7, 2016

BY HAND DELIVERY

The Honorable Mark Pocan
U.S. House of Representatives
313 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Pocan:

On February 18, 2015, you wrote to me to recommend that I permit Daniel Barker, President of the Freedom from Religion Foundation ("Foundation"), to give a morning "invocation" in the United States House of Representatives. Your letter, a copy of which is attached, stated that Mr. Barker intended his proposed "invocation to be secular," and it would "focus[] on leading a happy, loving, moral, and purpose-filled life."

I write now regarding a letter, dated December 17, 2015, that I received recently from two attorneys for the Foundation. The letter, a copy of which is attached, requests that Mr. Barker's "application to give an opening invocation before Congress be expeditiously approved." Because the letter concerns your recommendation, and because it appears to have been written in contemplation of litigation arising out of your recommendation, I am responding to you.

As you are aware, as an elected officer of the House, my responsibilities are prescribed by the Rules of the House. House Rule II.5 provides that "[t]he Chaplain shall offer a prayer at the commencement of each day's sitting of the House," and House Rule XIV.1, which governs the daily order of business in the House, provides that the first order of business each day that the House is in session is a "Prayer by the Chaplain."

As you also are aware, I, in keeping with the practices of House Chaplains who preceded me, from time-to-time have exercised my discretion to invite guest chaplains to fulfill these responsibilities by offering a prayer at the commencement of a session of the House, and to permit Members to recommend particular clergy for consideration as guest chaplains.

Leaving aside the questions of (i) whether the "secular invocation" that your February 18 letter indicated Mr. Barker proposed to deliver would constitute a "prayer" within the meaning of the House Rules, and (ii) if not, whether I could permit Mr. Barker to deliver such an invocation consistent with my responsibilities under the House Rules, I was unable to accede to your recommendation for a more basic, threshold reason.

EXHIBIT
C

As your staff was advised, one long-standing requirement for an individual recommended by a Member for consideration as a guest chaplain is that he/she be ordained by a recognized body in the faith in which he/she practices. This is a substantive requirement – not a mere mechanical or check-the-box requirement. For example, I do not invite Member-recommended individuals who have obtained an Internet-generated ordination to serve as guest chaplains, even if they hold deep and long-standing religious beliefs.

In Mr. Barker's case, you provided me with a copy of a 1975 certificate from the "Standard Christian Center" stating that Mr. Barker was a "Minister of Christ." A copy of this certificate is attached. However, the biographical statement concerning Mr. Barker that your staff also provided to my office, and a copy of which is attached, states that Mr. Barker "outgrew his religious beliefs," and "announced his atheism publicly in January, 1984." The Foundation's website repeats these statements; also describes Mr. Barker as a "Minister Turned Atheist"; and also states that Mr. Barker is the author of several books that concern his parting with his religious beliefs. In addition, a recent judicial decision states that Mr. Barker is not a minister of the gospel. *See Freedom From Religion Foundation, Inc. v. Lew*, 773 F.3d 815, 818 (7th Cir. 2014) ("Mr. Barker [and another Foundation co-president] are not ministers," and therefore did not exclude from their income for tax purposes certain income that "minister[s] of the gospel" are permitted to exclude pursuant to 26 U.S.C. § 107.); *id.* at 823 ("The only reason, they [Mr. Barker and the other Foundation co-president] argue, that they cannot take advantage of § 107(2) is that they are not 'ministers of the gospel.'"); *see also* Declaration of Dan Barker (July 25, 2013) (filed with lower court in *Freedom From Religion Foundation, Inc. v. Lew*, and making clear that Mr. Barker does not view himself as a religious clergyman), copy attached.

In short, the information you provided to me, along with Mr. Barker's own statements and other publicly available information, indicate that his certificate is not current or legitimate for purposes of my considering your recommendation that he be invited to offer an "opening invocation" in the House of Representatives. At best, the certificate represents a facet of Mr. Barker's life that is long past and which no longer has meaning for him.

In closing, I note that the Foundation's letter contains several inaccuracies, some of which are factual in nature. While I will not attempt to itemize each, I wish to bring to your attention one particular misstatement because it concerns a conversation between the two of us that took place earlier this year on the floor of the House. The letter states that "at the Chaplain's Office's insistence, [the Foundation's attorneys] forwarded a copy of Barker's draft remarks" to me. Neither I nor my office requested, let alone insisted upon receiving, a draft of remarks that Mr. Barker may have wished to deliver, nor did I or my office ever state that he must "submit[] his remarks in advance for approval."

As I recall, I may have asked you, somewhat rhetorically, what a "prayer" from a man of Mr. Barker's publicly professed beliefs might look like. Your staff subsequently voluntarily sent to my office a document entitled "Invocation by Dan Barker (draft)," a copy of which is attached. I did not take the draft into account in determining that I was unable to accede to your recommendation.

Thank you for your attention. I trust that, if appropriate, you will communicate the contents of this letter to Mr. Barker's attorneys.

Sincerely,

Reverend Patrick Conroy

Enclosures

FREEDOM FROM RELIGION *foundation*
P.O. BOX 750 · MADISON, WI 53701 · (608) 256-8900 · WWW.FFRF.ORG

Daniel Barker Biography

Prepared for House of Representatives Guest Chaplaincy request
December 10, 2014

Daniel Barker was ordained to the Christian ministry in 1975 and served as associate pastor in three California churches. He has a B.A. in religion from Azusa Pacific University. He spent 19 years as a pastor, missionary, evangelist, and Christian songwriter. Today he is co-President of the Freedom From Religion Foundation, an atheist, and a humanist promoting the good news of freethought. The American Humanists ordained Dan as a Humanist Officiant fifteen years ago. The United States Air Force Academy allowed Dan to officiate a freethought wedding at their chapel. Barker is a member of the Lenni Lenape (Delaware Tribe) of Native Americans.

Dan is an author. His most recent book, *Life Driven Purpose: How an Atheist Finds Meaning* (2015), offers words of enrichment and inspiration, explaining to readers how millions of atheists lead happy, loving, moral, and purpose-filled lives. Dan has also written several children's books and *Losing Faith in Faith: From Preacher to Atheist* (1992), *Godless: How An Evangelical Preacher Became One of America's Leading Atheists* (2009), and *The Good Atheist: Living a Purpose-Filled Life Without God* (2011).

Dan is a talented composer and musician. He has released four albums including *Adrift on a Star* (2013), which includes a collaboration with Broadway icon and seven-time Tony winner, Charles Strouse (*Annie*; *Bye, Bye, Birdie*).

Dan is also an accomplished public speaker. He has appeared on countless television and radio shows discussing a meaningful life without god. His first public appearance as an atheist was on Oprah Winfrey's "A.M. Chicago" where he met his future wife, Annie Laurie Gaylor. Dan currently co-hosts a weekly radio show, "Freethought Radio," that is broadcast nationally. He travels the country speaking and advocating for FFRF, and has given more than 75 talks in the last two years.

EXHIBIT
D

CERTIFICATE OF ORDINATION

Standard Christian Center

TO ALL CHURCHES AND CHRISTIANS EVERYWHERE

Greetings

This will certify that our dearly beloved brother,

Daniel E. Barker

was set apart to the ministry of the gospel of Christ,
at Standard, California
and is hereby cordially commended to the churches and brethren everywhere as a

Minister of Christ

By the order of Christian Center *at* Standard, Ca.
NAME OF CHURCH LOCATION

Robert L. Wright, Pastor
Robert W. Stone
Barry J. Acker
Ernest L. Heegenroeder
CLERK OR OTHER AUTHORIZED SIGNATURE

Date May 25, 1975

From: **Molt, Alicia** Alicia.Molt@mail.house.gov
Subject: Call Follow Up
Date: December 10, 2015 at 4:44 PM
To: Andrew Seidel (aseidel@ffrf.org) aseidel@ffrf.org

Hi Andrew-

As Rep. Pocan mentioned a few minutes ago, the Chaplain's office was not able to provide a written document with these points, however, here are the sentences I copied down from my call with Elisa Angelico from the Chaplain's office explaining why the request was denied.

"Daniel Barker was ordained in a denomination in which he no longer practices."

"All guest chaplains have been practicing in the denomination in which they were ordained."

Alicia Molt
Legislative Director
Congressman Mark Pocan
313 Cannon HOB
Tel: (202) 225-2906
alicia.molt@mail.house.gov
Twitter | Facebook | YouTube

EXHIBIT
E

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 | MADISON, WI 53701 | (608) 256-8900 | FFRF.ORG

December 17, 2015

Sent via U.S. Mail and Email to: Elisa.Aglieco@mail.house.gov
Karen.Bronson@mail.house.gov

Rev. Patrick Conroy
Chaplain, U.S. House of Representatives
Office of the Chaplain
HC-2, The Capitol
Washington, DC 20515

Re: Denial of equal treatment to Daniel Barker on basis of religion

Dear Reverend Conroy, Ms. Aglieco, and Ms. Bronson:

We're writing to you on behalf of Freedom From Religion Foundation Co-President Dan Barker, to request that his application to give an opening invocation before Congress, made by Representative Pocan, be expeditiously approved. Continually delaying and denying his invocation request is discrimination based on Mr. Barker's religious identification. Before we address the issues, we'd like to remind you of your own words from a few months ago: "I don't have any veto and I don't have any editorial rights. That's not my position. This belongs to the members of Congress,"[1] and point out that a member of Congress has asked for Mr. Barker to appear. Nothing else should matter. It's frankly surprising to see such disrespectful treatment of a Representative's request by an officer meant to serve all House members.

As you may remember, as staff attorneys for FFRF, we first raised the possibility of Mr. Barker delivering an invocation during a June 13, 2014 meeting with Ms. Aglieco and Ms. Bronson in the Chaplain's office. Though there are no written requirements that a guest chaplain must meet, Bronson and Aglieco explained that guests were allowed to give invocations if (1) they are sponsored by a member of the House, (2) they are ordained, and (3) they do not address the members of the House directly. We followed up this meeting with a June 18 email to confirm that Mr. Barker could meet criteria #2 and #3, including a link to more than 25 secular invocations. We never received the courtesy of a response.

On February 18, 2015, Rep. Pocan officially requested that Mr. Barker serve as a guest chaplain, completing all three requirements. By February 25, the Chaplain's Office had copies of Barker's ordination, biography, and contact information for a person to confirm that ordination. By June 22, at the Chaplain's Office's insistence, we forwarded a copy of Barker's draft remarks, which do not include a direct address to the members of the House.

[1] Rob Hotakainen, "Shall we pray? For Congress, it's a sensitive question," *Seattle Times*, March 20, 2015. http://www.seattletimes.com/seattle-news/shall-we-pray-for-congress-its-a-sensitive-question/

EXHIBIT
F

We now understand that, despite meeting the three "requirements" (which are apparently not recorded or written down anywhere) and after submitting his remarks in advance for approval (something required of no other guest chaplains), this office is now attempting to deny Rep. Pocan's request because: "Daniel Barker was ordained in a denomination in which he no longer practices. All guest chaplains have been practicing in the denomination in which they were ordained." This new "requirement," which is also not recorded anywhere, was imposed only after Mr. Barker clearly met the other requirements.

It is not clear on what basis the Chaplain's Office asserts that Mr. Barker "no longer practices." This determination by the Chaplain's Office was made without any factual basis. Moreover, this justification for his denial rests on an intrusive inquiry, which a government office does not have the power to make. A religion, not the federal government, determines when a minister is "practicing" in accordance with the tenets of that religion.

Mr. Barker regularly uses his ordination to perform marriages. He has conducted marriages in California (where he was ordained), as well as more than a dozen in Dane County, Wisconsin, which Rep. Pocan represents, and other states. He most recently performed one in Minnesota earlier this fall, and the state recognized his ordination and the subsequent marriage. This should not be surprising because it is no business of any government, including a federally funded chaplain, whether or not a minister is practicing in accordance with a particular religion. The government does not get to make that type of intrusive inquiry or bar people from equal treatment because it deems them insufficiently compliant with denominational requirements. But that is precisely what the Office of the Chaplain is doing.

There are other serious problems with your treatment of Rep. Pocan's request to invite Mr. Barker to give an invocation.

Disparate application of rules based on a citizen's religion or message is discriminatory.
It is clear that Mr. Barker is being forced to meet requirements that other guests are not. The Chaplain's Office has admitted as much:

> …guest chaplains are sent guidelines for the prayer. According to Karen Bronson, the chaplain's office liaison to staff, the guest chaplains are sent three points to keep in mind: Keep the prayer short, don't get political and remember that the House constitutes a variety of faiths.
>
> "And we sort of leave it at that," Bronson said, explaining that the office has to walk a fine line between reminding guest chaplains of the variety of faiths in the House and respecting a person's right to pray as he or she chooses.
>
> "You wouldn't ask a Muslim to pray without referencing Allah usually. Some Christians will argue that they can't pray without mentioning Jesus. So we have to be sensitive to that," Bronson said. "We also have to be sensitive to the Jewish staffers or Jewish members."[2]

[2] Bridget Bowman, "Praying to Jesus on the House Floor," *Roll Call.com* (June 7, 2015) http://blogs.rollcall.com/hill-blotter/praying-to-jesus-on-the-house-floor/?dcz

Requiring that Mr. Barker submit his remarks, which he has willingly done, is a double constitutional violation. First, this is not required of other guests. Disparate application of rules based on your perception of Mr. Barker's religion is illegal. Second, when the government allows invocation speakers to deliver remarks, the government cannot censor or approve invocations based on their content, as will be made clear below.

When the government allows invocation speakers to deliver remarks, government officials, including chaplains, cannot legally determine whether or not a message is 'religious enough' or approve the content of messages.

This was made clear in *Galloway*. Government officials cannot "act as supervisors and censors of religious speech" because doing so "would involve government in religious matters to a far greater degree than … [either] editing or approving prayers in advance nor criticizing their content after the fact." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1822, 188 L. Ed. 2d 835 (2014). Indeed, it seems that the Chaplain's office is aware that its attempt to police Mr. Barker's speech is impermissible: "The members [of Congress] then have to be reminded that the [Chaplain's] office cannot tell people how to pray."[3] Though some members of Congress already understand this rule, "We don't censor what they can say…"[4]

Put another way, the Court explicitly stated: "Our Government is prohibited from prescribing prayers to be recited in our public institutions. . . ." *Galloway*, 134 S. Ct. at 1822 (citing *Engel v. Vitale,* 370 U.S. 421, 430 (1962)). As a government office, the Office of the Chaplain cannot dictate what is said or not said by prayer givers.

Government officials, including chaplains, cannot legally determine whether or not a person is 'religious enough.'

The Supreme Court has explained that the purpose of the religion clauses of the First Amendment is "to prevent, as far as possible, the **intrusion** of either [the church or the state] into the precincts of the other." *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971).

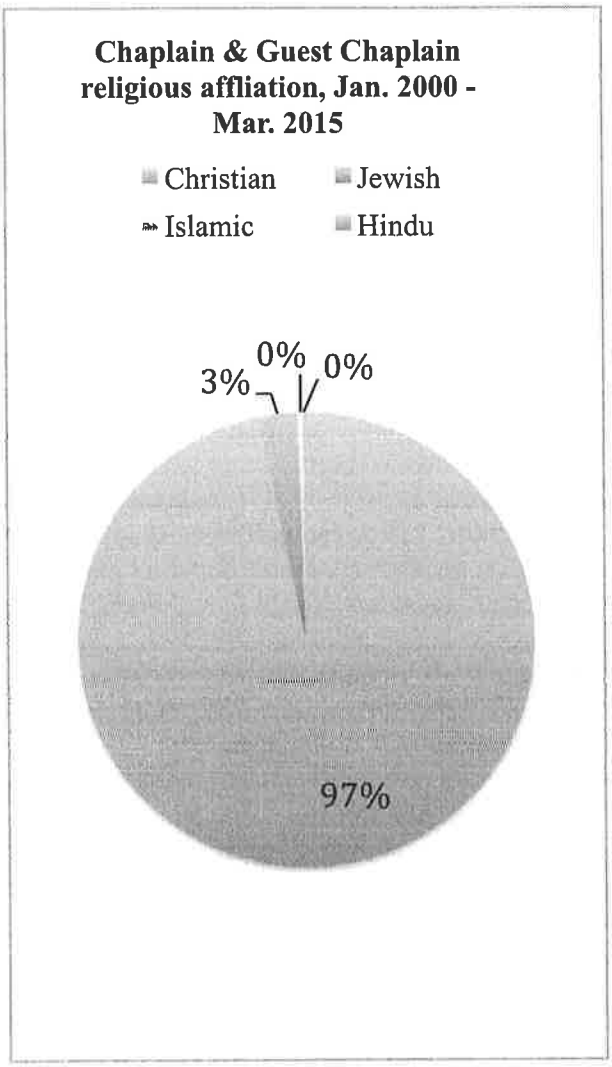
The Office of the Chaplain's suffocating oversight and systematic obstruction of Rep. Pocan's request on behalf of Mr. Barker amounts to an "intrusion of government in the constitutional sense" that may "result in establishment of religion." *Id. at* 634 ("The intrusion of government into religio[n] … through … supervision, or surveillance may result in establishment of religion in the constitutional sense when what the State does enthrones a particular sect for overt or subtle propagation of its faith.")

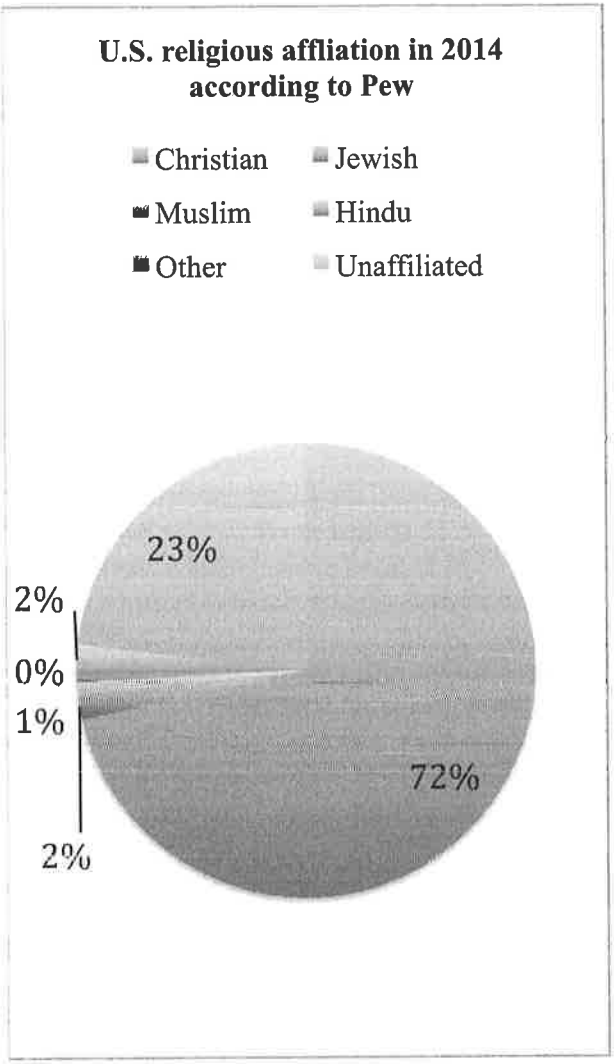
The Office of the Chaplain should be welcoming the opportunity to feature a non-Christian guest chaplain given the overwhelming favoritism showed toward Christianity and the Abrahamic religions in practice. From January of 2000 to March of 2015, the prayer givers were as follows:

97%	Christian	(1,971 prayers)
<3%	Jewish	(57 prayers)
<0.1%	Islamic	(2 prayers)
<0.05%	Hindu	(1 prayer)

[3] Bowman, *supra* note 2.
[4] *Id.*

In that same time frame, the House Chaplains gave 60% of the prayers (about 1239 prayers) and guests gave 40% (about 800 guest chaplain prayers). Here are those numbers in chart form, something we're happy to make available to you or the press.





This breakdown of prayers before Congress is not at all representative of the breakdown of the religious and secular beliefs in the country. It shows a clear bias in favor of Christianity over all minority faiths and over nonreligion.

The "addressing a higher power" and clergy requirements are discriminatory.

There are many religions—Shintoism, Jainism, Rastafarianism, Buddhism, Unitarian Universalism—that do not worship a higher power or have "clergy." The Office of the Chaplain does not have the power to determine which religions are worthy enough to be presented to the House. The office's unwritten rules effectively prohibit a considerable number of minority religions from taking part in the guest chaplaincy.

The chaplain office's unwritten rules are not only unconstitutional, but could lead to absurd results: "It is absurd to give the Church of Satan, whose high priestess avows that her powers derive from having sex with Satan, and the Universal Life Church, which sells credentials to anyone with a credit card, a preferred position over Buddhists, who emphasize love and peace." *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 875 (7th Cir. 2014). But that is precisely what your unwritten rules would mandate. Satanists have priests and priestesses that practice and believe in a higher power, while other religions the chaplain might be more comfortable with cannot meet those two criteria.

Once the government invites a guest to deliver an invocation, it cannot dictate how that guest chooses to direct his or her invocation. However, as we noted at our first meeting with this office nineteen months ago, and as we reiterated in our follow up email, and as Mr. Barker has shown, plenty of messages can address a "higher power" without addressing the Christian god. More than 75 have been delivered at government meetings all around the country—none of those bodies ceased to function because the prayer wasn't directed at the Christian god.

Delaying approval is discriminatory.

It is our understanding that upon request by a Representative, "the guest chaplain is assigned the earliest possible date."[5] There can be no possible legitimate excuse for further delaying Rep. Pocan's request and Mr. Barker's opportunity.

In conclusion, we reiterate our request that the Office of the Chaplain immediately approve Representative Mark Pocan's request that Mr. Barker be a guest chaplain and work with us to schedule him for the next available invocation that is convenient to all parties.

We look forward to a written response from this office by Wednesday, January 13, 2015.

Sincerely,

Andrew L. Seidel
Staff Attorney
Freedom From Religion Foundation

Samuel T. Grover
Staff Attorney
Freedom From Religion Foundation

[5] *See, e.g.*, Rep. Cynthia Lummis's website, "Be a Guest Chaplain," *at* http://lummis.house.gov/constituentservices/chaplain.htm.

EXHIBIT G

Policy

Praying to Jesus on the House Floor

Conroy does not invoke Jesus' name on the House floor to be more inclusive to members of different faiths. (Tom Williams/CQ Roll Call File Photo)

Bridget Bowman (/author/bridgetbowmancqrollcall-com)
@Bridget Bowman (//www.twitter.com/bridgetbhc)

Posted at Jun 7, 2015 5:00 AM

Rev. Gregory Goethals of Los Angeles closed his House opening prayer on May 19 by saying, "We ask this in the name of your Son, Jesus Christ, our Lord."

The prayer was another example of guest chaplains invoking Jesus' name as the House began its day. For one Hill staffer, specific references to religion are alienating.

"It bothers me, not being a Christian, to hear that Jesus is our savior or we should be thankful to be here because of Jesus," the staffer, who asked to remain anonymous, recently told CQ Roll Call. "It bothers me more as an American."

The staffer pointed to the notion of separation and church and state, which was at the center of a recent Supreme Court case surrounding legislative prayer. In May 2014, the Supreme Court endorsed prayer at the start of legislative meetings (http://blogs.rollcall.com/wgdb/legislative-prayer-wins-broad-endorsement-from-supreme-court/?dcz=), with Justice Anthony M. Kennedy writing that such prayer "has a permissible ceremonial purpose" and "is not an unconstitutional establishment of religion." The question of beginning with a prayer recently came up in Congress, when the Agriculture Committee began opening its meetings (http://blogs.rollcall.com/hawkings/prayer-congress-agriculture-committee-conaway/?dcz=) with a prayer.

For some in the Capitol, a prayer that kicks off the House session and refers to a specific religion can be off-putting. Nearly 18 percent of the prayers read at the beginning of each House session in this Congress have referred to Jesus, and all of those prayers have been given by guest chaplains.

Of the 29 guest chaplains who have addressed the House in the 114th Congress, 13 of them have made a specific religious reference, all of them to Jesus. All but one of the guest chaplains have been Christian.

Guest chaplains are nominated by members of the House, and, given that more than 90 percent of House members are Christian (http://www.pewforum.org/2015/01/05/faith-on-the-hill/), the probability that a guest chaplain is Christian is high, because members typically invite clergy from their home churches.

Once they are selected by House Chaplain Patrick J. Conroy, guest chaplains are sent guidelines for the prayer. According to Karen Bronson, the chaplain's office liaison to staff, the guest chaplains are sent three points to keep in mind: Keep the prayer short, don't get political and remember that the House constitutes a variety of faiths.

"And we sort of leave it at that," Bronson said, explaining that the office has to walk a fine line between reminding guest chaplains of the variety of faiths in the House and respecting a person's right to pray as he or she chooses.

"You wouldn't ask a Muslim to pray without referencing Allah usually. Some Christians will argue that they can't pray without mentioning Jesus. So we have to be sensitive to that," Bronson said. "We also have to be sensitive to the Jewish staffers or Jewish members."

Bronson said the phrasing pertaining to guest chaplains has been in place for at least 15 years, but every once in a while a member of Congress approaches Conroy about the subject. The members then have to be reminded that the office cannot tell people how to pray.

While invoking Jesus' name on the House floor may bother some members and staffers, others don't mind specific religious references.

"It is not something I really thought about a lot," said Rep. Alan Lowenthal, D-Calif., who is Jewish. "I respect that the vast majority of members are Christian and believe in it. I like the fact that when we have opening prayers we do have members of different faiths. ... We don't censor what they can say also."

The House chaplain has not made one reference to Jesus in the 44 prayers he has given in the 114th Congress. Conroy, who became the chaplain in 2011, consistently begins his prayers by referencing "eternal God" or "gracious God" and usually concludes them by saying, "May all that is done this day be for your greater honor and glory."

"I understand my responsibility is to offer prayers that all the members of the House can say 'Amen' to," Conroy said, "which is the difference in my mind between a chaplain and a pastor. A pastor is responsible for his or her denomination and nurturing their shared faith. So if that's Christian, you do pray in the name of Jesus. But if your congregation, so to speak, is inter-religious, I try to word it in such a way that everybody present can say, 'Amen.'"

Prayer in Congress: Not Just for House and Senate (http://blogs.rollcall.com/hawkings/prayer-congress-agriculture-committee-conaway/?dcz=)

Legislative Prayer Wins Broad Endorsement From Supreme Court (http://blogs.rollcall.com/wgdb/legislative-prayer-wins-broad-endorsement-from-supreme-court/?dcz=)

Supreme Court Invokes Senate Pages in Prayer Case (http://blogs.rollcall.com/wgdb/supreme-court-invokes-senate-pages-in-prayer-case/)

The 114th: CQ Roll Call's Guide to the New Congress (http://info.cqrollcall.com/NewMemberGuide2014.html)

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Original Image of 276 F.Supp.3d 1260 (PDF)

276 F.Supp.3d 1260
Only the Westlaw citation is currently available.
United States District Court,

Williamson v. Brevard County
United States District Court, M.D. Florida, Orlando Division. September 30, 2017 276 F.Supp.3d 1260 *(Approx. 39 pages)*

Orlando Division.

David WILLIAMSON, Chase Hansel, Keith Becher, Ronald Gordon, Jeffery Koeberl, Central Florida Freethought Community, Space Coast Freethought Association and Humanist Community of the Space Coast, Plaintiffs,

v.

BREVARD COUNTY, Defendant.

Case No: 6:15-cv-1098-Orl-28DCI
Signed 09/30/2017

Synopsis

Background: Citizens, who identified as atheists and Secular Humanists, and organizations for nontheists brought action against county, alleging invocations given before board meetings violated the First and Fourteenth Amendments, as well as the Florida Constitution. Parties cross-moved for summary judgment.

Holdings: The District Court, John Antoon, II, J., held that:
1 invocation practice was purposeful discrimination against those who do not believe in monotheistic religion;
2 invocation practice entangled county in religion;
3 invocation practice was not coercing participation;
4 invocation practice violated the First Amendment free exercise and free speech clauses;
5 invocation practice violated Fourteenth Amendment equal protection; and
6 under Florida law, as predicted by the District Court, county's religious invocation practice did not violate no-aid clause of Florida Constitution.

Motions granted in part and denied in part.

West Headnotes (13)

Change View

1 **Constitutional Law** Local governmental entities
Counties Meetings
County's invocation practice before board meetings was purposeful discrimination against those who do not believe in monotheistic religion in violation of the First Amendment establishment clause; county did not allow everyone to give an invocation, but gave the limited opportunity to those it deemed capable based on beliefs of the would-be prayer giver, citizens who identified as atheists and Secular Humanists requested opportunity to give invocation, but were denied, county policy denied nontheists opportunity to give invocation, several board commissioners believed only certain religions or belief systems could give invocation, including one commissioner stating that the purpose of invocation was to support the "Christian community," county asserted that invocation must be "religious" and "invoke a higher power," but board allowed a moment of silence on occasion, which did not invoke "higher power," or would have audience member do invocation without having vetted audience member's beliefs, nontheists could give a secular invocation during a public comment period during meetings, but

SELECTED TOPICS

Freedom of Religion and Conscience

Free Exercise Clause of the First Amendment Bars Government Regulation of Religious Beliefs

Secondary Sources

s 271. Challenges under Free Exercise Clause

10A Fla. Jur 2d Constitutional Law § 271

Before the constitutional right to free exercise of religion is implicated, the threshold inquiry is whether the conduct sought to be regulated is rooted in religious belief. In order to launch a free

s 1:3. Analytical frameworks for adjudication of religion issues in the school context under the federal constitution

1 Education Law § 1:3

The Free Exercise Clause of the First Amendment of the federal Constitution guarantees the freedom of religious belief. It does not, however, guarantee the freedom to engage in all religiously based pr

JEFFERSONIAN WALLS AND MADISONIAN LINES: THE SUPREME COURT'S USE OF HISTORY IN RELIGION CLAUSE CASES

85 Or. L. Rev. 563

In Everson v. Board of Education, Justice Wiley Rutledge observed that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause o

See More Secondary Sources

Briefs

BRIEF AMICI CURIAE OF CHRISTIAN LEGAL SOCIETY, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL, FOCUS ON THE FAMILY, LUTHERAN CHURCH-MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, AND SOUTHERN CENTER FOR LAW AND ETHICS IN SUPPORT OF PETITIONERS

1997 WL 86252
Rachel Agostini v. Betty-Louise Felton Chancellor of Board of Education of City of New York v. Betty-Louise Felton Christian Legal Society
Supreme Court of the United States
Feb. 28, 1997

FN* Counsel of Record The interest of each amicus curiae is set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk.

Brief of Amici Curiae Anti-Defamation League; Hadassah, the Women's Zionist Organization of America; Jewish Council for Public Affairs; and the Commission on Social Action of Reform Judaism in Support of Petitioners

that time was not reserved for such an invocation, while pre-meeting invocation was meant to solemnize the entire meeting, and restrictions were not viewpoint neutral. U.S. Const. Amend. 1.

2 **Constitutional Law** Government Meetings and Proceedings
While legislative prayer, even sectarian legislative prayer, is, as a general matter, constitutional, intentional discrimination and improper motive can take a prayer practice beyond what the First Amendment establishment clause permits. U.S. Const. Amend. 1.

3 **Constitutional Law** Limited Public Forum in General
Under the First Amendment when the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech, the State may be justified in reserving its forum for certain groups or for the discussion of certain topics. U.S. Const. Amend. 1.

4 **Constitutional Law** Limited Public Forum in General
Constitutional Law Justification for exclusion or limitation
Under the First Amendment, the State's power to restrict speech in a limited public forum is not without limits, the restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be reasonable in light of the purpose served by the forum. U.S. Const. Amend. 1.

5 **Constitutional Law** Local governmental entities
Counties Meetings
County's invocation practice before board meetings entangled county in religion in violation of the First Amendment establishment clause, county did not allow everyone to give an invocation, but gave the limited opportunity to those it deemed capable based on beliefs of the would-be prayer giver, citizens who identified as atheists and Secular Humanists requested opportunity to give invocation, but were denied, county policy denied nontheists opportunity to give invocation, and county vetted beliefs of groups with whom it was unfamiliar before deciding whether to grant permission for an invocation. U.S. Const. Amend. 1.

6 **Constitutional Law** Local governmental entities
Counties Meetings
County commissioner asking audience, including children, to stand during county's religious invocation practice before board meetings was not coercing participation in religious exercise, as would violate First Amendment establishment clause; there was no legal coercion involved. U.S. Const. Amend. 1.

7 **Constitutional Law** Local governmental entities
Where a claimant both objects to a government prayer practice as establishing and imposing religion on citizens and is denied the opportunity to give an invocation while others are invited or allowed to do so, constitutional claims other than under the First Amendment establishment clause may indeed be independently viable, in other words, when a governmental entity opens up the invocation opportunity to volunteers and then discriminates among those volunteers on an impermissible basis, an additional type of violation is not necessarily foreclosed even where an establishment clause claim is presented. U.S. Const. Amend. 1.

8 **Constitutional Law** Local governmental entities
Counties Meetings
County's invocation practice before board meetings violated the First Amendment free exercise clause, where invocation practice was open to volunteers but required those citizens believe in a "higher power" before they were permitted to solemnize a meeting. U.S. Const. Amend. 1.

2003 WL 21692828
Gary Locke v. Joshua Davey, Anti-Defamation League
Supreme Court of the United States
July 17, 2003

FN1. Pursuant to Rule 37.3(a) of the Rules of this Court, Amici have obtained and lodges the written consents of all parties to the submission of this Amici Curiae brief. Pursuant to Rule 37.6, Amici a

BRIEF AMICUS CURIAE OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF PETITIONERS

1997 WL 86237
Rachel Agostini v. Betty-Louise Felton; Chancellor of Board of Education v. Betty-Louise Felton; U.S. Catholic Conference
Supreme Court of the United States
Feb. 28, 1997

FN* Counsel of Record. The United States Catholic Conference ("USCC") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCC advocates and promotes

See More Briefs

Trial Court Documents

Freeman v. State

2003 WL 25883518
Sultaana Lakiana Myke FREEMAN, Plaintiff, v. State of Florida, Department of Highway Safety and Motor Vehicles, Defendant
Florida Circuit Court
June 06, 2003

THIS MATTER comes before the Court after a non-jury trial held May 27-29, 2003. Plaintiff Sultaana Freeman filed suit on March 22, 2002, asking this Court to declare the revocation of Plaintiff's drive

City of Cape Coral, Florida v. The Nelsen Residence, Inc.

2017 WL 8184357
The CITY OF CAPE CORAL, FLORIDA, Plaintiff/Counter-Defendant, v. THE NELSEN RESIDENCE, INC., Defendant/Counter Plaintiff
Florida Circuit Court
June 05, 2017

THIS CAUSE, having come on before this Court on May 8, 2017, upon Plaintiff/Counter-Defendant CITY OF CAPE CORAL'S, Motion for Final Summary Judgment on Defendant/Counter Plaintiff THE NELSEN RESIDENC

Florida Nat. Organization for Women, Inc. v. State

2003 WL 25836869
FLORIDA NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs, v. State of Florida, and Fred Dickinson, in his official capacity as Executive Director of the Florida Department of Highway Safety and Motor Vehicles, Defendants.
Florida Circuit Court
Nov. 10, 2003

THIS CAUSE came before the court upon the defendants' Motion for Summary Judgment, filed September 24, 2003, and the plaintiffs' Motion for Summary Judgment, filed November 5, 2003. Considering the mot

See More Trial Court Documents

9 **Constitutional Law** Government Meetings and Proceedings
Counties Meetings
County's invocation practice before board meetings violated the First Amendment free speech clause, where county barred certain individuals from giving invocations based on their nontheistic beliefs and affiliations. U.S. Const. Amend. 1.

10 **Constitutional Law** Other particular issues and applications
Counties Meetings
County's invocation practice before board meetings violated Fourteenth Amendment equal protection, where county treated citizens differently based on their religious beliefs, policy excluded nontheists from giving invocation, and neutral policy would not convey message of endorsement or hostility. U.S. Const. Amend. 14.

11 **Constitutional Law** Federal/state cognates
Constitutional Law Religion
Clause of Florida Constitution providing that all natural persons are equal before the law and shall not be deprived of any right because of religion is construed like the Fourteenth Amendment equal protection clause. U.S. Const. Amend. 14; Fla. Const. art. 1, § 2.

12 **Constitutional Law** Establishment of Religion
The Florida establishment clause and the First Amendment establishment clause have nearly identical wording and are interpreted in the same manner. U.S. Const. Amend. 1; Fla. Const. art. 1, § 3.

13 **Constitutional Law** Local governmental entities
Counties Meetings
Under Florida law, as predicted by the District Court, county's religious invocation practice before board meetings did not violate no-aid clause of Florida Constitution that prohibited tax dollars to directly or indirectly aid any church or religious denomination; even though county commissioners used county resources, such as e-mail, mail, or phones, to invite and communicate with those giving the invocations, such resources were incidental costs. Fla. Const. art. 1, § 3.

Attorneys and Law Firms

Alex J. Luchenitser (argued), Bradley S. Girard (argued), Americans United for Separation of Church and State, Washington, DC; Nancy G. Abudu and Daniel S. Tilley, ACLU of Florida, Miami, FL; Rebecca S. Markert and Andrew L. Seidel, Freedom From Religion Foundation, Madison, WI; and Daniel Mach, ACLU Program on Freedom of Religion and Belief, Washington, DC, for Plaintiffs.

Scott L. Knox (argued), Viera, FL, for Defendant.

ORDER

JOHN ANTOON II, United States District Judge

The Board of County Commissioners of Brevard County, Florida, holds regular meetings to conduct the business of the county, and it begins its meetings with invocations delivered by citizens. But the County has a policy and practice barring certain citizens from giving the invocation based on those citizens' religious beliefs.

The Plaintiffs in this case primarily assert that the County's invocation practice violates the Establishment Clause of the First Amendment of the United States Constitution. They also bring claims under the Free Exercise and Free Speech Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Article I, Sections 2 and 3 of the Florida Constitution. Plaintiffs seek injunctive and declaratory relief as well as money

damages. The case is before the Court on the parties' cross-motions for summary judgment, and as set forth below, both motions are granted in part and denied in part.

1. Factual and Procedural Background [1]

A. The Parties

This case was brought by eight Plaintiffs—five individuals and three organizations. The individual Plaintiffs—David Williamson, Chase Hansel, Keith Becher, Ronald Gordon, and Jeffrey Koeberl—identify themselves as atheists, and all but Gordon also identify themselves as Secular Humanists. (ASOF ¶ 85). The American Humanism Association describes Humanism as "a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity." (Id. ¶ 86). Becher, Koeberl, and Williamson are ordained as Humanist clergy by the Humanist Society; all three are Humanist Celebrants, and Koeberl is also a Humanist Chaplain. (Id. ¶ 93).

Plaintiffs do not profess a belief in the existence of God. (Id. ¶ 209). Their beliefs are strongly held, having a place in their lives equal to the significance of theistic beliefs in the lives of monotheists. (Id. ¶ 91). They consider their beliefs to be a religion. (Id. ¶ 92). Four of the individual Plaintiffs are residents of **Brevard** County; **Williamson** lives in neighboring Seminole County. (Id. ¶ 83). Hansel and Gordon own homes in Brevard County and pay property taxes there. (Id. ¶ 84).

The three organizational Plaintiffs are the Humanist Community of the Space Coast (HCSC), the Space Coast Freethought Association (SCFA), and the Central Florida Freethought Community (CFFC), all of which "are organizations for nontheists" whose members are principally atheists, agnostics, Humanists, and other nontheists. (Id. ¶¶ 94–95). HCSC and SCFA are headquartered in Brevard County, where most of their members live. (Id. ¶ 96). CFFC is headquartered in Seminole County, but some of its members reside in Brevard County. (Id.). Plaintiff Gordon is a member of SCFA, (id. ¶ 101), and the other individual Plaintiffs are leaders of the organizational Plaintiffs, [2] (id. ¶¶ 98–99).

Defendant Brevard County is a political subdivision of the State of Florida that had a population of nearly 550,000 in 2010. (Id. ¶ 1, Doc. 53–8 at 50). The County is known as Florida's Space Coast because of the presence of NASA and the Kennedy Space Center. (Doc. 53–8 at 37). The Brevard County Board of County Commissioners (the Board) is the legislative and governing body of the County. (ASOF ¶ 2). The Board has five Commissioners, each of whom represents, and is elected by, voters residing in one of five numbered single-member districts that make up the County. (Id. ¶ 8). Pursuant to a state statute, "[t]he county commissioners shall sue and be sued in the name of the County." (Id. ¶ 9; § 125.15, Fla. Stat.).

B. Board Meetings

The Board meets regularly—typically more than once per month—to discuss issues, hear from citizens, and carry out its responsibilities. (ASOF ¶ 10). The meetings are conducted in a boardroom that is approximately sixty feet wide and seventy feet deep and has 196 seats for audience members and a total capacity of 270. [3] (Id. ¶¶ 10, 18, & 22). During Board meetings, the five Commissioners, the County Manager, and the County Attorney sit on a raised dais facing the audience; the number of attendees varies from fewer than ten to a full house. (Id. ¶¶ 20–21, 27). Board meetings proceed according to printed agendas, are open to the public, are carried live on cable television, are available for public viewing on the Board's website, and can be watched live on a television in a lobby just outside the boardroom entrance. (Id. ¶¶ 12–13). During its meetings, the Board sometimes considers and votes on matters that affect only one person or a small group of people. (Id. ¶ 30).

Board meetings typically begin with a call to order that is then followed by: an invocation; the pledge of allegiance; "resolutions, awards, and presentations"; consent agenda items, and other scheduled matters, including at least one "Public Comment" period. [4] (Id. ¶¶ 35, 64, & 141–43). During the "resolutions, awards, and presentations" segment of the meetings, individuals or groups are recognized for contributions they have made to the community, and children sometimes appear before the Board to be honored or to watch those who are being honored. (Id. ¶¶ 36–39). Generally, those who attend the "resolutions, awards, and presentations" segment are also present in the boardroom during the invocation. (Id. ¶¶ 38 & 42). Ordinarily, there are more people at the beginning of Board meetings than at the end; usually, some attendees leave before the "Public Comment" segment. (Id. ¶ 145).

C. Invocations and Selection of Invocation Speakers in the County

Board meetings "are typically opened with a religious invocation" that is "generally, but not always, given by a cleric from the faith-based community." (Id. ¶¶ 14, 56). Invocation speakers are unpaid volunteers invited by an individual Commissioner or his or her staff; the five Commissioners take turns inviting speakers according to an annual schedule assigning that task for each meeting. (Id. ¶¶ 43, 45, & 49; Anderson Dep., Doc. 42, at 12–13; see also 2013–2014 Invocation and Pledge Schedule, Pls.' Ex. 64[5]). On occasion, the assigned Commissioner has difficulty finding someone to give an opening invocation or a scheduled speaker does not show up, and on those occasions either a Commissioner gives the invocation, a member of the audience is permitted to give the invocation, or a moment of silence is held in lieu of the invocation. (ASOF ¶¶ 50–51 & 203; see also, e.g., Pls.' Exs. 30 & V2[6] (transcript and video of Dec. 15, 2015 and Mar. 15, 2016 invocations) (pastor did not show up and a commissioner gave the invocation); Pls.' Exs. 29, 30, & V2 (speaker list, transcript, and video of Mar. 9, 2010 invocation) (reverend did not show up and a Commissioner's assistant gave the invocation); Pls.' Exs. 30 & V2 (transcript and video of Sept. 13, 2011 invocation) (unidentified audience member gave invocation when no one was scheduled); Pls.' Exs. 30 & V2 (transcript and video of Aug. 19, 2014 invocation) (moment of silence observed when pastor did not arrive on time to meeting)).

Not all invited speakers are clergy; non-clergy who have delivered opening invocations include police officers, staff members of a Congressman's office, a state judge, aides to the Commissioners, and a lay leader of the Church of Jesus Christ of Latter-day Saints. (ASOF ¶ 57). Chaplains of hospitals, a baseball team, the Brevard County Sheriff's Office, and a city police department have also given invocations. (Id. ¶ 59).

The selected invocation speaker's name, along with the name of the organization he or she represents, often appears on the meeting agenda. (Id. ¶ 65; see also July 7, 2015 Agenda, Doc. 54–2 at 6). The Commissioner who invites the speaker typically introduces the speaker. (ASOF ¶ 66). Some Board Chairpersons ask the audience to stand up for the invocation "out of respect for the religion of the person giving the invocation." (Id. ¶¶ 67–68). Other Chairpersons merely stand up and the other Commissioners and the audience generally follow suit and stand as well, though on occasion some audience members do not stand. (Id. ¶¶ 69–72).

The invocation speaker stands at a lectern at the front of the boardroom and usually, but not always, faces the Commissioners rather than the audience. (Id. ¶ 76; see Pls.' Exs. V2 & V14 (videos of invocations at Board meetings)). The inviting Commissioner often encourages the invocation speaker to tell the audience about his or her house of worship or organization and its activities before giving the invocation itself. (ASOF ¶ 77). After the invocation is given, a Commissioner usually leads the audience in the Pledge of Allegiance, and after the Pledge the inviting Commissioner thanks the invocation speaker for giving the invocation. (Id. ¶¶ 78–79).

Neither the Commissioners nor their staffs review drafts of invocations before they are given. (Id. ¶ 52). From January 1, 2010, through March 15, 2016, 195 invocations were given at Board meetings, and all but seven of those were given by Christians or contained Christian content. (Id. ¶ 53). Six of the seven "non–Christian" invocations were given by Jews, and the other was "generally monotheistic." (Id. ¶ 54). All 195 invocations "had at least some theistic content," (id. ¶ 60), and "[t]o the parties' knowledge, all the opening invocations delivered at [Board] meetings have appealed to or invoked a divine authority," (id. ¶ 204).

D. Requests to Give an Invocation and the Board's Reactions

On May 5, 2014, the United States Supreme Court issued its opinion in Town of Greece v. Galloway, ---- U.S. ----, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014), upholding against an Establishment Clause challenge the invocation practice employed at town board meetings in the town of Greece, New York; that town's practice also involved invocations given by invited speakers. At that time, the five Commissioners in Brevard County were Chairwoman Mary Bolin Lewis and Commissioners Andy Anderson, Robin Fisher, Trudie Infantini, and Chuck Nelson. Four days after the Town of Greece decision, on May 9, 2014, Plaintiff Williamson, as Founder and Chair of Plaintiff CFFC, sent a letter to Chairwoman Lewis noting the decision and requesting the opportunity to offer invocations at Brevard County Board meetings. (ASOF ¶ 112; May 9, 2014 Letter, Pls.' Ex. 43). Williamson wrote to Chairwoman Lewis again two months later, stating in a July 22, 2014 letter that he had not received a response to his May 9 letter and demanding that the County permit a member of CFFC to deliver an invocation and "ensure its selection procedures for invocations comport with the Constitutions of Florida and the United States." (ASOF ¶ 113; July 22, 2014 Letter, Pls.' Ex. 44).

Williamson's second letter did prompt a response from the Board, but it was not the response he had hoped for. Before responding, the Board considered a proposed letter to Williamson that was attached to the agenda for its August 19, 2014 meeting. During that meeting, after hearing comments from Williamson and others, the Board unanimously approved the sending of the pre-drafted response letter.[3] (ASOF ¶¶ 114–15; Pls.' Ex. V3 (video excerpt of Aug. 19, 2014 Board meeting)). The letter thanked Williamson and CFFC for their request but then stated:

> The Invocation portion of the agenda is an opening prayer presented by members of our faith community. The prayer is delivered during the ceremonial portion of the County's meeting and typically invokes guidance for the County Commission from the highest spiritual authority, a higher authority which a substantial body of Brevard constituents believe to exist. The invocation is also meant to lend gravity to the occasion, to reflect values long part of the County's heritage and to acknowledge the place religion holds in the lives of many private citizens in Brevard County.
>
> Your website leads us to understand your organization and its members do not share those beliefs or values which, of course, is your choice under the laws of the United States. However, this Commission chooses to stand by the tradition of opening its meetings in a manner acknowledging the beliefs of a large segment of its constituents ...

(ASOF ¶ 117, Aug. 19, 2014 Letter, Pls.' Ex. 46)

The Board's August 19 letter went on to explain that although Williamson and CFFC members would not be permitted to deliver an invocation at the beginning of Board meetings, they could address the Board for three minutes during the Public Comment portion of the meetings, which as of that date was held at the end of each meeting. (Aug. 19, 2014 Letter ("This Commission respectfully takes issue with the claim that members of your organization are being excluded from presenting their viewpoint at County Commission meetings. You or your Brevard members have the opportunity to speak for three minutes on any subject involving County business during the Public Comment portion of our meeting."); ASOF ¶ 141). The letter noted that in the past, during the Public Comment portion of the meeting the Board had "listened to Bible readings, political points of view of all varieties, and some of our citizens' sharpest critiques and criticisms of County staff and the County Commission, among other things." (Aug. 19, 2014 Letter).

During discussion of the issue at the August 19, 2014 meeting, several of the Commissioners commented. Commissioner Anderson stated: "For you to say that Christianity isn't under attack, I'd like you to look over at Iraq right now and let me know if Christianity is not under attack", "I need all the prayer in my life I can get to get through these meetings"; and "I just never understood the concept on—and this is no personal slight to anybody—how you could possibly be offended by something that you do not believe exists. I just never understood that." (ASOF ¶¶ 177–79; Pls.' Ex. V3 (video excerpt of Aug. 19, 2014 Board meeting)). In addressing how speakers are chosen, Commissioner Infantini stated: "My staff and I, we search—I mean I don't have any specific religion—we will go anywhere to find somebody. No, not anywhere. Okay, correct, not anywhere. Not anywhere. There are certain places." (ASOF ¶ 182, Pls.' Ex. V3 (video excerpt of Aug. 19, 2014 Board meeting)). And after seconding the motion to approve the response letter, Commissioner Fisher stated: "I think the Public Comment section ... will give them an opportunity to speak, we are opening the Commission up to that, ... when I looked at their website one of the things I noticed was it wasn't so much about prayer as it was about trying to separate ... state and church, and if that's the issue, state and church, then I think the Public Comment section of the agenda is probably the best place anyway." (Pls.' Ex. V3 (video excerpt of Aug. 19, 2014 Board meeting)).

In August and September 2014, Plaintiff Gordon emailed Commissioner Infantini, asking that a member of CFFC be allowed to deliver an invocation and stating that he was a Brevard County atheist who was willing to give an invocation. (ASOF ¶ 118, Pls.' Ex. 47). Commissioner Infantini did not accept Gordon's offer. (ASOF ¶ 118).

On August 21, 2014, Brevard County resident Reverend Ann Fuller emailed all five Commissioners, stating that she was "ordained clergy" and a "known humanist in the community" and requesting "an opportunity to give an invocation at an upcoming board meeting." (Id. ¶ 119). Reverend Fuller explained that she had "served Brevard County humanists as a Community Minister since 2006 affiliated with the [Unitarian Universalist] Church of Brevard." (Id.). That same day, Commissioner Infantini responded in an email that stated in part: "I am willing to have most anyone offer an invocation. However, by definition,

an invocation is seeking guidance from a higher power. Therefore, it would seem that anyone without a 'higher power' would lack the capacity to fill that spot.... Further, I welcome 'freethinkers[,]' being the only 'freethinker' on the board. It just doesn't seem like the invocation is the correct place for it is all." (Id. ¶ 120).

On August 28, 2014, the Board received a letter from the Anti–Defamation League objecting to the Board's decision on the issue of nontheistic invocations and suggesting that the Board's "decision to prohibit an atheist from delivering an invocation would most likely violate the standards set forth in the U.S. Supreme Court's recent decision in" Town of Greece. (ASOF ¶ 121, Anti–Defamation League Letter, Pls.' Ex. 48). At its November 6, 2014 meeting, the Board unanimously approved a response letter to be sent to the Anti–Defamation League attempting to explain the Board's practice of excluding nontheists. (ASOF ¶ 122; November 6, 2014 Letter, Pls.' Ex. 49). That November 6 response letter stated in part:

> [Y]our suggestion to allow atheists to provide the invocation would, in fact, show hostility toward the faith-based community—as evidenced by the content on social media webpages maintained by [CFFC] and the Freedom from Religion Foundation.... Therefore, this Board has no desire to follow your suggested action since that action could be easily construed, either overtly or by implication, as evidencing vicarious disdain, scorn or disrespect for the beliefs of our faith-based community.
>
> ... It follows that the Board's decision to avoid hostility toward the faith-based community precludes any claim of discrimination. Indeed, if your characterization of secular humanism as a religion is valid, modifying the county's time-honored pre-meeting tradition by affording a secular humanist the opportunity to recite a secular "prayer" during the faith-based invocation portion of the Board's agenda could be perceived as [ ] endorsing a specific religion—*secular humanism*—in violation of the Establishment Clause because all Board actions at the meeting held following such a *secular "prayed"* invariably involve an underlying *secular purpose*. Atheists or secular humanists are still afforded an opportunity to speak their thoughts or supplications during the secular business portion of the agenda under "public comment."

(ASOF ¶ 124, Nov. 6, 2014 Letter, Pls.' Ex. 49) (emphasis in original). Thus, the Board maintained its stance that atheists and Secular Humanists could speak only during the Public Comment period and could not give the opening invocation.

Prior to December 16, 2014, the Public Comment segment of a Board meeting occurred at the end of the meeting. (ASOF ¶¶ 141–42). But on that date, the Board adopted a resolution—Resolution No. 14–219—moving up the first thirty minutes of the Public Comment section so that it occurs after the "consent agenda" section and before the "public hearings" section of each regular Board meeting. (Id. ¶ 142; Mins. of Dec. 16, 2014 Board Meeting, Pls.' Ex. 33; see also, e.g., Agenda for July 7, 2015 Board Meeting, Ex. A to Whitten Aff., Doc. 54–2). Under that December 16 resolution, if the Public Comment section is not concluded within thirty minutes, the remainder occurs "at the conclusion of business specified on the regular commission agenda." (ASOF ¶ 143).

The terms of Commissioners Lewis and Nelson ended in November 2014, and at that time new Commissioners Curt Smith and Jim Barfield began their terms. (Id. ¶ 150). On January 26, 2015, the then-legal Director for Americans United for Separation of Church and State sent a letter to all five Commissioners with the subject line "Nontheists' Delivery of Opening Invocations." (Id. ¶ 125; Jan. 26, 2015 Letter, Pls.' Ex. 50). The letter noted that "requests from nontheists have been denied on the ground that belief in a higher power is a precondition to offering the invocation" and stated that "[i]n light of the recent change in the Board's leadership, we write on behalf of several national legal organizations"—Americans United for Separation of Church and State, the Freedom From Religion Foundation,[3] the ACLU of Florida, and the ACLU Program on Freedom of Religion and Belief—"to ask that you reconsider this limitation." (ASOF ¶¶ 125–26; Jan. 26, 2015 Letter, Pls.' Ex. 50). The letter requested that Plaintiff Williamson, non-party Reverend Ann Fuller, and Plaintiff Hansel be added to the roster of invocation givers and granted the opportunity to give an opening invocation at a Board meeting. (ASOF ¶ 127, Jan. 26, 2015 Letter, Pls.' Ex. 50).

Neither the Board nor any individual Commissioner responded to the January 26 letter, (ASOF ¶ 128), and on May 26, 2015, the same four organizations sent another letter to all five Commissioners, (id. ¶ 129; May 26, 2015 Letter, Pls.' Ex. 51). In that letter, the organizations requested that one of the five individual Plaintiffs or another representative of one of the three organizational Plaintiffs be permitted to deliver nontheistic invocations at a

Board meeting. (ASOF ¶ 129, May 26, 2015 Letter, Pls.' Ex. 51). The County Attorney responded to the letter on May 28, 2015, advising that the Board's next meeting was on July 7, 2015, and that the attorney would present the letter to the Board at that time and seek a response. (ASOF ¶ 130; May 28, 2015 Letter, Pls.' Ex. 52).

At its July 7, 2015 meeting, the Board "responded to the May 26, 2015 letter by adopting Resolution 2015–101." (ASOF ¶ 131; Resolution 2015–101, Doc. 53–8 at 34 through 93[10]). Resolution 2015–101, which is attached as an appendix to this Order, is eleven pages long and consists of five "whereas clauses" followed by thirty-nine numbered paragraphs of "findings" and "conclusions"; it concludes with an amendment to the Board's Operating Procedures. In the whereas clauses, the Resolution notes the Board's "longstanding tradition of calling for an invocation before commencing a regular meeting at which the secular business of the County will be reviewed and acted upon", the Board's prior responses to requests from atheists, which "identified an informal policy addressing the issue of pre-meeting prayer", that the Board had "not yet enacted a formal policy relating to pre-meeting prayer"; that Board members had received letters requesting "the Board to allow ... atheists, agnostics and secular humanists to give a pre-meeting prayer at a regular Board meeting"; and that "the Board wishes to formalize a policy on invocations that is not hostile to faith-based religions and that does not endorse secular humanism or non-belief over traditional faith-based religions comprised of constituents who believe in God." (Resolution 2015–101 at 1, Doc. 53–8 at 35).

The "findings" paragraphs in Resolution 2015–101 recount the County's tradition of pre-meeting invocations, provide demographic data regarding Brevard County, including that only 34.9% of the County's total population "claimed to be adherents to any religious faith" in 2010; describe a webpage of the Freedom From Religion Foundation, with whom CFFC is noted to be affiliated, that includes "Godless quotes," as well as a webpage of Americans United for Separation of Church and State that "makes clear the organization's calculated goal" to eliminate activity that it considers violative of its "views of what the principles of separation of church and state should be"; examine Secular Humanism; and discuss CFFC's Facebook page, on which CFFC "strategically seeks to offend faith-based religions in open forums in order to pressure the local government into closing the forum or censoring the content and exposing itself to liability." (Resolution 2015–101 at 1–9, Doc. 53–8 at 35–43).

The resolution then states "conclusions" based on the findings, including that: "yielding ... by supplanting traditional ceremonial pre-meeting prayer ... with an 'invocation' by atheists, agnostics or other persons represented or associated with [the Freedom From Religion Foundation] or [Americans United for Separation of Church and State] could be viewed as County hostility toward monotheistic religions whose theology and principles currently represent the minority view in Brevard County"; that allowing the requesting organizations to give an invocation and "displac[e] representatives of the minority faith-based monotheistic community ... could be viewed as ... Board endorsement of Secular Humanist and Atheist principles" because of "the overwhelmingly secular nature of the Board's business meeting following the invocation" and "evidence suggesting that the requesting organizations are engaged in nothing more than a carefully orchestrated plan to promote or advance principles of Secular Humanism through the displacement or elimination of ceremonial deism [sic][11] traditionally provided by monotheistic clerics giving pre-meeting prayers", that "[a]ll of the organizations seeking the opportunity to provide an invocation have tenets or principles paying deference to science, reason and ethics, which, in most cases, are the disciplines the Board must consider, understand and utilize when acting upon secular items presented for consideration during the Board's secular business agenda" and that "deferring consideration or presentation of a secular humanist supplication during the Public Comment portion of the agenda immediately after the consent agenda ... does not deny or unreasonably restrict the opportunity of the requesting parties to present their Secular Humanist or atheistic invocations, supplications, instruction, petitions for redress of grievances or comments." (Resolution 2015–101 at 9–10, Doc. 53–8 at 43–44).

The amendment portion of Resolution 2015–101 adds a new section to the Board's Operating Procedures and provides:

> In view of the requests by secular, humanist, atheist and Secular Humanist organizations to provide a secular, Secular Humanist or an atheist invocation, the Board hereby clarifies the intent of the Board's existing policies allowing Public Comment to include individual or representative comments intended to instruct the Board, to petition for redress of grievances, to comment upon matters within the control, authority and jurisdiction of the Board, and to

> comment on matters that are relevant to business of the County Commission, as well as matters upon which the Board has traditionally expressed a position for the betterment of the community interest. Secular invocations and supplications from any organization whose precepts, tenets or principles espouse or promote reason, science, environmental factors, nature or ethics as guiding forces, ideologies, and philosophies that should be observed in the secular business or secular decision making process involving Brevard County employees, elected officials, or decision makers including the Board of County Commissioners, fall within the current policies pertaining to Public Comment and must be placed on the Public Comment section of the secular business agenda. Pre–meeting invocations shall continue to be delivered by persons from the faith-based community in perpetuation of the Board's tradition for over forty years.

(Resolution 2015–101 at 10–11, Doc. 53–8 at 44–45). Thus, as stipulated by the parties, the resolution "adopted a formal policy that allows the traditional faith-based invocation prior to the beginning of the Board's secular business agenda and subsequent 'secular invocations' during the Public Comment section of that secular agenda." (ASOF ¶ 133 (further internal quotation omitted)). None of the Plaintiffs has ever delivered a "secular invocation" during the Public Comment segment of a Board meeting. (Id. ¶ 149).

E. This Lawsuit

After the Board passed Resolution 2015–101, Plaintiffs filed this lawsuit. (Compl., Doc. 1). In their six-count Amended Complaint (Doc. 28), Plaintiffs allege violations of: the Establishment Clause of the First Amendment to the U.S. Constitution (Count I); the Free Exercise Clause of the First Amendment (Count II); the Free Speech Clause of the First Amendment (Count III); the Equal Protection Clause of the Fourteenth Amendment (Count IV); Article I, Section 2 of the Florida Constitution (Count V); and Article I, Section 3 of the Florida Constitution (Count VI). (Doc. 28 at 66–71). The Amended Complaint seeks an injunction, a declaratory judgment, and damages. (Id. at 72–74). However, at mediation the parties resolved the issue of damages. (See Mediation Report, Doc. 39). Plaintiffs' counsel explained during oral argument on the parties' cross-motions for summary judgment that at mediation the parties reached a settlement on what the amount of the damages should be if the Plaintiffs prevail on the merits and that the Court should allow the parties to file their settlement agreement with the Court if it finds in favor of Plaintiffs. (See Hr'g Tr., Doc. 93, at 32–33). The parties agree that no facts are in dispute and that this case may be appropriately resolved on their cross-motions.[12] (See Mins., Doc. 69).

II. Analysis[13]

A. Establishment Clause (Count I)

Plaintiffs' primary claim is under the Establishment Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. This clause, like the other clauses of the First Amendment, applies to the states and their subdivisions via the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), accord Sch. Dist. of Abington Twp. v. Pennsylvania, 374 U.S. 203, 215–16, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

Plaintiffs contend that the County's invocation practice violates the Establishment Clause in three ways: by purposefully discriminating based on religious beliefs, by entangling public officials in religious judgments, and by coercing audience members to take part in religious exercises. The County, on the other hand, maintains that its invocation practice "conforms to Establishment Clause principles promulgated by the U.S. Supreme Court." (Doc. 54 at 1). Each side asserts that Supreme Court jurisprudence—especially the Court's 2014 decision in Town of Greece v. Galloway—supports its position.

Marsh v. Chambers and *Town of Greece v. Galloway*

Although Establishment Clause claims are typically analyzed using one of several formal "tests" established by the Supreme Court for such claims—such as the coercion test,[14] the endorsement test,[15] or the Lemon test[16]—the Supreme Court has declined to apply any of those tests in the context of legislative prayer. But relying on other principles, the Supreme Court has addressed legislative prayer in two landmark cases—Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), and Town of Greece—and those decisions inform this Court's analysis here.

At issue in Marsh was the prayer practice of the Nebraska Legislature. That body opened each of its sessions with a prayer given by a chaplain who was paid with public funds and chosen every two years by the Executive Board of the Legislative Council. By the time the case made its way to the Supreme Court, the same Presbyterian minister had served as chaplain for nearly twenty years. Although some of the minister's earlier prayers "were often explicitly Christian," the minister "removed all references to Christ after a 1980 complaint from a Jewish legislator." 463 U.S. at 793 n. 14, 103 S.Ct. 3330. The plaintiff—a member of the legislature and a Nebraska taxpayer—brought an Establishment Clause challenge, seeking to enjoin the prayer practice.[1/] The district court found no violation of the Establishment Clause from the prayers themselves but concluded that the paying of the chaplain with public funds did violate the clause. Chambers v. Marsh, 504 F.Supp. 585 (D.Neb. 1980). On appeal, the Eighth Circuit applied the Lemon test, found that the Nebraska practice failed all three prongs of that test, and prohibited Nebraska from continuing to engage in the prayer practice. Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982).

The Supreme Court reversed, finding—without applying Lemon or any other formal test—that neither the prayers themselves nor the use of public funds to pay the chaplain violated the Establishment Clause. The Marsh Court noted that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country" and that throughout this country's history "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." 463 U.S. at 786, 103 S.Ct. 3330. After tracing the history of legislative prayer and noting that the First Congress selected a chaplain to open each session with prayer, the Court concluded that "[t]his unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause from a practice of prayer similar to that now challenged." Id. at 791, 103 S.Ct. 3330.

The Marsh Court explained:

> 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 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. As Justice Douglas observed [in Zorach v. Clauson, 343 U.S. 306, 313, 72 S.Ct. 679, 96 L.Ed. 954 (1952)], "[w]e are a religious people whose institutions presuppose a Supreme Being."

Id. at 792 (citation omitted). The Court rejected the plaintiff's contention that the Establishment Clause was violated due a minister of only one denomination having been selected for sixteen years. Perceiving no "suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church," the Court concluded that "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive, ... his long tenure does not in itself conflict with the Establishment Clause." Id. at 793–94, 103 S.Ct. 3330.

Nor was the Marsh Court troubled by the fact that the prayers given in the Nebraska Legislature were in the Judeo–Christian tradition. The Court explained that "[t]he 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 advance any one, or to disparage any other, faith or belief" and that under those circumstances "it is not for [the Court] to embark on a sensitive evaluation or to parse the content of a particular prayer." Id. at 794–95, 103 S.Ct. 3330.

The Supreme Court took up the issue of legislative prayer again in 2014 in Town of Greece. In the town of Greece, New York, for some time prior to 1999 the town board began its monthly board meetings with a moment of silence. But in 1999, a newly elected town supervisor began inviting local clergymen to deliver invocations at the beginnings of meetings. "The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures." 134 S.Ct. at 1816. Prayer givers in Greece were unpaid volunteers, and the town "followed an informal method for selecting prayer givers"—a town employee called congregations listed in a local directory until she found an available minister for that month's meeting. Id. And "[t]he town eventually compiled a list of willing 'board chaplains' who had accepted invitations and agreed to return in the future." Id. The town "at no point excluded or denied an opportunity to a would-be prayer giver," and "[i]ts leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation." Id. The town did not review the prayers in advance or

provide guidance on tone or content; "[t]he town instead left the guest clergy free to compose their own devotions." Id. From 1999 to 2007, all of the participating minsters were Christian, and "[s]ome of the ministers spoke in a distinctly Christian idiom." Id.

The two plaintiffs in Town of Greece—one Jewish, the other an Atheist[18]—attended town board meetings to address issues of local concern, and they took offense to the prayers and the pervasive Christian themes in them. Id. at 1817. After the plaintiffs complained, the town invited a Jewish layman and the chairman of a Baha'i temple to give prayers, additionally, a Wiccan priestess requested and was given a chance to give an invocation. Id. The plaintiffs nevertheless filed suit, alleging that the town's prayer practice violated the Establishment Clause. They sought not to end the practice but to limit the prayers to "nonsectarian" prayers—"inclusive and ecumenical" prayers referring only to a "generic God" and "not identifiable with any one religion." Id. at 1817 & 1820.

After the district court upheld the practice and the Second Circuit reversed, the Supreme Court reversed the appellate court, finding that the town's invocation practice passed muster under the Establishment Clause. The Court began by discussing Marsh, noting that "Marsh is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to 'any of the formal "tests" that have traditionally structured' this inquiry." 134 S.Ct. at 1818 (quoting Marsh, 463 U.S. at 796 & 813, 103 S.Ct. 3330 (dissenting opinion of Brennan, J.)). "The Court in Marsh found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause." Id. The Town of Greece Court noted that like Congressional prayer, the practice of local legislative bodies opening their meetings with prayer also "has historical precedent," id. at 1819, but the Court emphasized that "Marsh must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation" and explained that Marsh "teaches instead that the Establishment Clause must be interpreted by reference to historical practices and understandings," id. (internal quotation and citation omitted).

The Supreme Court then turned to "whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." Id. The plaintiffs made two arguments: first, that Marsh does not countenance sectarian prayers, and second, that the town's practice was coercive because the setting and nature of the town meetings "create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending [those who] sponsor the prayer and will vote on matters citizens bring before the board." Id. at 1820. The Supreme Court rejected both of these contentions.

First, the Court concluded that "insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases." Id.[19] The Town of Greece Court explained that Marsh upheld the Nebraska legislative prayers "because our history and tradition have shown that prayer in this limited context could 'coexis[t] with the principles of disestablishment and religious freedom' " rather than "because they espoused only a generic theism." Id. (alteration in original) (quoting Marsh, 463 U.S. at 786, 103 S.Ct. 3330). The Marsh Court did not "imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed," id. at 1821, and "[t]o hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact," id. at 1822.[20]

The Town of Greece Court emphasized that "[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" and that "[g]overnment may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." Id. And "[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." Id. at 1822–23.

Although the Town of Greece Court rejected the notion that legislative prayer must be nonsectarian, it did "not imply that no constraints remain on its content." Id. at 1823. "The relevant constraint derives from its 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." Id. "Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon

shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function." Id.

The Town of Greece Court also rejected the Second Circuit's conclusion that the town violated the Establishment Clause "by inviting a predominantly Christian set of ministers to lead the prayer." Id. at 1824. Noting that "[t]he town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one," the Court emphasized that "[s]o long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." Id., see also id. at 1831 (Alito, J., concurring) ("I would view this case very differently if the omission of ... synagogues [from the list of congregations] were intentional").

Second, the Town of Greece Court addressed plaintiffs' assertions that the prayer practice was unconstitutionally coercive. The plaintiffs asserted "that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling," id. at 1825, arguing that prayer in the setting of a town board meeting "differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation," id. at 1824–25. Though no rationale garnered a majority of votes, five justices rejected the plaintiffs' coercion argument.

Application

In view of this precedent, this Court must assess Plaintiffs' Establishment Clause claim. Plaintiffs assert that the County's invocation practice is distinguishable from the practice approved in Town of Greece, while the County maintains that its practice is consistent with the facts of, and principles established in, that case. As set forth below, the facts of this case indeed distinguish it from Town of Greece, and the overwhelming evidence of purposeful discrimination and "impermissible purpose" here demonstrates the constitutional infirmity in the County's invocation practice.

1 Purposeful Discrimination

1 Although the County contends that its invocation practice passes constitutional muster under Town of Greece, the Supreme Court's opinion in that case cannot be read to condone the deliberate exclusion of citizens who do not believe in a traditional monotheistic religion from eligibility to give opening invocations at County Board meetings. Neither Town of Greece nor any other binding precedent supports the County's arguments, and none of the County's asserted justifications for its practice holds water.

The Town of Greece Court upheld an invited-speaker invocation practice that resulted in the prayers being given predominantly by Christians, but in doing so it repeatedly emphasized the inclusiveness of the town's practice. There was no evidence in that case that the town leaders intended to exclude anyone from participation in the giving of invocations; in fact, there was evidence to the contrary. "The town at no point excluded or denied an opportunity to a would-be prayer-giver." 134 S.Ct. at 1816. That invitees were solely Christian was not the product of intentional discrimination but instead due merely to the fact that the speakers were selected from a directory of the town's religious organizations. The Supreme Court expressly noted a lack of evidence of "an aversion or bias on the part of town leaders against minority faiths," and, on the contrary, there was evidence of "a policy of nondiscrimination" with regard to who was allowed to give the invocation. Id. at 1824. Similarly, thirty years earlier, the Marsh Court noted lack of evidence of "impermissible motive" in the repeated reappointment of the same chaplain.

And after Marsh but six years prior to Town of Greece, the Eleventh Circuit—in a decision entirely consistent with Town of Greece—found that an invocation practice violated the Establishment Clause where there was evidence of intentional discrimination in the selection of invocation speakers. In that case, Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008), two county commissions allowed volunteer religious leaders to offer invocations at the commissions' meetings on a rotating basis. The Eleventh Circuit agreed with the district court's finding that the invocation practice of one of the two commissions was unconstitutional during two years of the time period at issue because of the way in which speakers were selected, finding that "the selection procedures [in those two years] violated the 'impermissible motive' standard of Marsh." 547 F.3d at 1281. The Pelphrey court noted that the "impermissible motive" standard "prohibits intentional discrimination," id., and during the two years at issue, the employee who selected speakers for one of the commissions "

'categorically excluded' certain faiths from the list of potential invocation speakers," Id. at 1282.[21] The Eleventh Circuit "agree[d] with the district court that the categorical exclusion of certain faiths based on their beliefs is unconstitutional." Id.

2 Marsh, Town of Greece, and Pelphrey thus make clear that while legislative prayer—even sectarian legislative prayer—is, as a general matter, constitutional, intentional discrimination and improper motive can take a prayer practice beyond what the Establishment Clause permits. Cf. Lund v. Rowan Cty., N.C., 863 F.3d 268, 278 (4th Cir. 2017) (en banc) ("Marsh and Town of Greece, while supportive of legislative prayer, were measured and balanced decisions. ... Town of Greece told the inferior federal courts ... to grant local governments leeway in designing a prayer practice that brings the values of religious solemnity and higher meaning to public meetings, but at the same time to recognize that there remain situations that in their totality exceed what Town of Greece identified as permissible bounds."). The undisputed facts of the case at bar establish that the bounds of the clause have been exceeded in Brevard County.

The facts here differ in significant ways from those in Town of Greece. In Greece, "a minister or layperson of any persuasion, including an atheist, could give the invocation," Id. at 1816. "[A]ny member of the public [wa]s welcome ... to offer an invocation reflecting his or her own convictions," Id. at 1826. And when the plaintiffs complained about the pervasive Christian themes in the prayers, the town responded by inviting non-Christians to give prayers and granted a Wiccan priestess's request for an opportunity to give the invocation. Id. at 1817; accord Id. at 1829 (Alito, J., concurring) ("[W]hen complaints were received, the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation.")

What happens in Brevard County is a far cry from what happens in the town of Greece. Brevard County does not allow everyone to give an invocation. Instead, it limits the prayer opportunity to those it "deems capable" of doing so—based on the beliefs of the would-be prayer giver. And after Plaintiffs requested to give an invocation at a Board meeting, the County responded not with an attitude of inclusion but with an express statement and policy of exclusion. Cf. Lund, 863 F.3d at 282 ("By opening its prayer opportunity to all comers, the town [of Greece] cultivated an atmosphere of greater tolerance and inclusion. Rowan County regrettably sent the opposite message.")

With regard to the County's "policy," Resolution 2015-101—the resolution that the Board passed in July 2015 in response to Plaintiffs' repeated requests to give an invocation—is neither a novel statement of the County's position with regard to "nonbelievers" giving invocations nor a complete invocation policy. The resolution merely codifies the County's previously existing practice of denying nontheists an opportunity to give an invocation and relegating them to the Public Comment portion of Board meetings—a practice described in the August 19, 2014 letter (Pls.' Ex. 46) from the Board to Plaintiff Williamson. And although the resolution concludes with the statement that "Pre-meeting invocations shall continue to be delivered by persons from the faith-based community in perpetuation of the Board's tradition for over forty years," (Resolution 2015-11 at 11), the resolution does not define "faith-based community" or explain how invocation givers are invited or selected. Thus, at issue here is not just Resolution 2015-101 but the County's actual, overall invocation practice, which is evidenced by the events of this case, the text of the resolution itself, and statements made by the Commissioners in their depositions and elsewhere.[22]

When Plaintiff Williamson wrote to the Board in 2014 requesting an opportunity to give an invocation, the Board eventually responded with a letter that the Commissioners approved at the August 19, 2014 meeting. As earlier noted, that letter stated in part, that the invocation was "an opening prayer presented by members of our faith community", that the invocation "typically invokes guidance ... from the highest spiritual authority, a higher authority which a substantial body of Brevard constituents believe to exist"; that CFFC's website "leads [the Board] to understand [that CFFC] and its members do not share those beliefs or values" and that the Board "chooses to stand by the tradition of opening its meetings in a manner acknowledging the beliefs of a large segment of its constituents." (Aug. 19, 2014 Letter, Pls.' Ex. 46). Two days later, Commissioner Infantini responded to a Humanist who requested to give an invocation with an email stating that "by definition, an invocation is seeking guidance from a higher power" and that therefore "anyone without a 'higher power' would lack the capacity to fill that spot." (ASOF ¶¶ 119-20).

And when letters were sent to the Board in January and May 2015 asking that one of the five individual Plaintiffs or another representative of one of the three organizational Plaintiffs be permitted to give an invocation, the Board ultimately responded by passing Resolution 2015

–101 at its July 7, 2015 meeting. That resolution states in one of its "whereas" clauses that "the Board wishes to formalize a policy on invocations that is not hostile to faith-based religions and that does not endorse secular humanism or non-belief over traditional faith-based religions comprised of constituents who believe in God." (Resolution 2015–101 at 1). The resolution then notes that "[o]n a rotating basis, individual Board members have predominately selected clerics from monotheistic religions and denominations—including Christian, Jewish, and Muslim—to present the invocation," (id. at 2), and that "[p]rior to the invocation, in recognition of the traditional positive role faith-based monotheistic religions have historically played in the community, the Board ... typically ... offer[s] the cleric the opportunity to tell the Board, meeting attendees and the viewing audience something about their religious organization." (id.).

The resolution then purports to describe the "relevant demographics" of the County, stating that "[i]n Brevard County, the faith-based community is a minority component of the larger majority community [sic] represented by the Board" and that data from the Association of Religious Data Archives indicate that in 2010, only 34.9% of the County's residents claimed to be adherents to any religious faith. (Id.). The "demographics" section of the resolution also notes that the County "is home to a large population of rocket scientists" and a technological university that offers programs in various scientific areas (Id. at 3).

Three pages of Resolution 2015–101 describe Secular Humanism, noting that the website of the Council on Secular Humanism describes Secular Humanism as "nonreligious" and "espousing no belief in a realm or [sic] beings imagined to transcend ordinary experience" and that Secular Humanism "is philosophically naturalistic." (Id. at 6). Further, the resolution refers to the requesting organizations as wanting to "conduct a pre-meeting invocation by displacing representatives of the minority faith-based monotheistic community which has traditionally given the pre-meeting prayer" and expresses the concern that this "displac[ement]" "could be viewed as ... Board endorsement of Secular Humanist and Atheist principles." (Id. at 9–10).

In their depositions, the seven Commissioners who served on the Board during 2008 to 2016 were asked about whom they would allow to give an invocation and what the purpose of the invocation is. Several testified that they would "say no" to invocation givers of certain religions or belief systems or that they would "have to look into" or "do more research" about whether to allow those potential speakers to give an invocation. For example, several Commissioners would not allow a Wiccan to give an invocation, (see, e.g., Fisher Dep., Doc. 46, at 10; Smith Dep., Doc. 43, at 10), would "want to do more research to understand what that particular religion was about" before allowing it, (Nelson Dep., Doc. 47, at 8), "guess[e]d" she would allow it, (Infantini Dep., Doc. 45, at 9), or "would probably suggest that they do it during" the Public Comment period, (Lewis Dep., Doc. 44, at 8). Similar testimony was given regarding whether an adherent to a Native American religion would be permitted to give an invocation. (See, e.g., id. at 9 (would "have to think on" traditional Native American religion); (Barfield Dep., Doc. 48, at 10 (unsure about a Native American shaman); Doc. 43 at 11 (would "talk to them" and "see what they had to say")). Others were unsure if they would allow a Muslim to give an invocation, (Doc. 47 at 8; Doc. 44 at 8), and several would not allow a deist to do so, (Doc. 46 at 11; Doc. 44 at 8–9; Doc. 48 at 10; Doc. 43 at 12).

Several Commissioners expressed doubt about allowing a member of a polytheistic religion—including Hinduism—to give an invocation. (See, e.g., Doc. 46 at 11–12; Doc. 44 at 9). One Commissioner would not consider inviting a member of a polytheistic religion or anybody who does not believe in a monotheistic religion. (Doc. 43 at 12). Another testified that he would not invite an adherent of a polytheistic religion because he "just doesn't think that's representative of our community," yet he inexplicably maintained that he would be willing to invite a Hindu. (Doc. 48 at 10).

One Commissioner testified that she has never invited someone she knew not to be a Christian to give an invocation because "[t]he purpose of the prayer or the invocation was in respect to the Christian community." (Doc. 44 at 10–11). That Commissioner explained that she would be willing to invite a believer in any "God-fearing religion" to give an invocation, (id. at 9), and that the invocation is "a long-standing tradition of honoring the Christian community in Brevard County," (id. at 27).

Another Commissioner stated in his deposition that invocations "are reserved for faith-based organizations to introduce their church," and "[i]t gives them an opportunity to promote their church, established church, recognized church." (Doc. 42 at 38). Another said that an invocation is "more for a faith-based monotheological type of situation" where people can speak about whatever they believe. (Doc. 48 at 19). Another explained that he believes in

business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." Id. at 1818. These purposes and effects may have bases in monotheistic religions, but they are not necessarily dependent on "religion." In discussing permissible constraint on the content of legislative prayer, the Town of Greece Court stated that an opening invocation "is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage," id. at 1823—again, functions that do not necessitate religious references—and the Court then explained that "[p]rayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function," id.

Other aims of legislative prayer identified in Town of Greece include "to elevate the purpose of the occasion and to unite lawmakers in their common effort." Id. And while the Court did note that "[t]he tradition reflected in Marsh permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths," id., it then stated that "[t]hese religious themes provide particular means to universal ends," id., suggesting that religiously themed invocations are but one method of achieving the overarching goal of solemnizing governmental proceedings. The Court further noted that prayers offered to Congress "vary in their degree of religiosity" but "often seek peace for the Nation, wisdom for its lawmakers, and justice of its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." Id. And, of course, the Town of Greece Court emphasized that the town would allow anyone, "including an atheist," to "give the invocation." Id. at 1816; accord id. at 1829 (Alito, J., concurring) (noting that the town "would permit any interested residents, including nonbelievers, to provide an invocation"). This suggests that an atheist or other "nonbeliever" is capable of giving an invocation and that an "invocation" need not "invoke a higher power." A recent decision of the en banc Sixth Circuit buttresses this conclusion. See Bormuth v. Cty of Jackson, 870 F.3d 494, 498 (6th Cir. 2017) (en banc) (upholding commissioner-led legislative prayer practice where each commissioner, "regardless of his religion or lack thereof, is afforded an opportunity to open a session with a short invocation based on the dictates of his own conscience"); id. at 514 (noting that the county's "prayer policy permits prayers of any—or no—faith") (emphasis removed).

Moreover, as earlier noted, on those occasions when a speaker is not scheduled in Brevard County or does not show up, either a moment of silence is observed or an audience member is solicited to give an invocation. Obviously, a moment of silence does not invoke "a higher power" or anything else. And when audience members fill in for an absent speaker, they apparently do not have their beliefs vetted before being permitted to speak. These facts only further emphasize the differential treatment to which Plaintiffs have been subjected in Brevard County. The record also reflects that Plaintiffs and other nontheists have given invocations before other governmental bodies and have even been invited back. Those invocations do not "invoke a higher power," yet they fit within the purposes described in Town of Greece—to solemnize the meeting, "lend gravity to the occasion and reflect values long part of the Nation's heritage." 134 S.Ct. at 1823.[24]

Furthermore, in holding that legislative prayer was not required to be "nonsectarian" in order to pass constitutional muster, the Supreme Court emphasized in Town of Greece that "government may not seek to define permissible categories of religious speech" and that "[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates." Id. at 1822. The Court explained that "[t]o hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech." Id. And, "[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." Id.

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. Here, the County is attempting to require that God be mentioned in invocations by limiting the sphere of invocation givers to those who believe—or who the County thinks believe—in one God. This practice cannot be squared with controlling precedent, and the County's invocation practice cannot be defended based on a "religiosity" requirement.

The Minority and the Majority

Resolution 2015–101 because he believes "that the long history in this country gives people of the faith-based community the ability to speak and speak freely" and that "the Constitution says we have freedom of religion, not from religion." (Doc. 43 at 21). That same Commissioner explained, "[W]e don't set time aside for non faith-based people to speak during the invocation," (id. at 24), and the Board "endorses faith-based religions," (id. at 27). Additionally, that Commissioner acknowledged saying to a radio station that "[t]he invocation is for worshiping the God that created us," by which he means "[t]he one and only true God"—"[t]he God of the Bible." (Id. at 37, see also Pls.' Ex. V13 (audio recording of radio interview)). He also acknowledged being quoted as saying that "[i]f they were a religion and they honored the word of God" set forth in "[t]he Holy Bible" "they would have every opportunity to speak to us during that period that we set aside to honor God." (Doc. 43 at 38).

This 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 Pelphrey. It reveals "impermissible motive" in the selection of invocation givers, Marsh, 463 U.S. at 793, 103 S.Ct. 3330, and reflects a "policy of [ ]discrimination," Town of Greece, 134 S.Ct. at 1824, as well as "purposeful discrimination" and "categorical [ ] exclusion" of certain potential invocation givers, Pelphrey, 547 F.3d at 1281 & 1282. It also demonstrates that through its practice, the County has strayed from invocations' traditional purpose.

The County cannot and does not deny that it has imposed a categorical ban on Plaintiffs and other nontheists as givers of opening invocations at its Board meetings. Nevertheless, the County describes its invocation practice as "purposefully inclusive" rather than exclusive, (see Doc. 59 at 7–8 & 20), and it attempts to justify its practice on several bases. None of these asserted justifications, however, withstands analysis.

"Invocations Must Invoke A Higher Power"

The County attempts to defend its exclusion of Plaintiffs as invocation-givers by imposing a "theism" requirement for invocations. As is apparent from evidence already discussed, the County maintains that an invocation must be "religious" and "invoke a higher power" and that because the Plaintiffs are not "religious" and do not believe in a higher power they are "not qualified" to give an opening invocation at Board meetings. The Court rejects this asserted justification or the County's policy and practice of exclusion.

As Plaintiffs note, the Supreme Court and other courts have recognized atheism and Humanism as religions entitled to First Amendment protection. See, e.g., Torcaso v. Watkins, 367 U.S. 488, 495 n.11, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (noting that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God [is] ... Secular Humanism"); Glassroth v. Moore, 335 F.3d 1282, 1294 (11th Cir. 2003) ("The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess a belief in the Judeo–Christian God; indeed, it includes the lack of any faith."). To this, the County responds that atheism and Humanism are not necessarily religions "for all purposes," (see Doc. 93 at 52), and insists that an invocation is "an appeal to divine authority" that Plaintiffs are "incapable" of offering.

The County's assertion that a pre-meeting, solemnizing invocation necessarily requires that a "higher power" be invoked is an overly narrow view of an invocation. The County relies largely on the Supreme Court's description in Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), of "invocation" as "a term that primarily describes an appeal for divine assistance." 530 U.S. at 306–07, 120 S.Ct. 2266. But, as Plaintiffs counter, " 'primarily' does not mean 'exclusively,' " (Doc. 60 at 5), and the Santa Fe Court also noted that the purpose of the message there was "to solemnize the event" and, in striking down a prayer practice as improperly encouraging religious messages at high school football games, "[a] religious message is the most obvious method of solemnizing an event," id. at 306, 120 S.Ct. 2266, "most obvious" does not mean "exclusive" either.

And Town of Greece, though addressing whether "sectarian" religious prayer is permissible in the legislative setting rather than whether a legislative invocation necessarily is religious, suggests that there is no such requirement. There, the Court noted that the invocation in that town was—apparently as described by the parties—"intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures," 134 S.Ct. at 1816 (record citation omitted). The Supreme Court noted in Town of Greece that "[a]s practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public

The County also argues that it is not discriminating against a minority because atheists and secularists are a "clear majority" and "religious adherents ... are the statistical minority in Brevard County." (Doc. 59 at 13). This contention touches on a confusing and sometimes conflicting theme in the record evidence and the County's filings—the notion of a "majority" versus a "minority." At times, the County casts the facts as if the "faith-based community" is an endangered and oppressed minority in the County, while at others it relies on the "substantial" number of monotheists in the County as part of its justification for rejecting Plaintiffs' requests to give an invocation. (See, e.g., Aug. 19, 2014 Letter from Board to Plaintiffs Williamson and CFFC, Pls.' Ex. 46 (referring to "a higher authority which a **substantial body** of Brevard constituents believe to exist" and stating that "this Commission chooses to stand by the tradition of opening its meetings in a manner acknowledging the beliefs of a **large segment** of its constituents" (emphasis added)); Resolution 2015–101 at 2 ("In Brevard County the faith-based community is a minority component of the ... community represented by the Board ..."); id. at 9 (stating that allowing atheist invocations "could be viewed as County hostility toward monotheistic religions whose theology and principles currently represent the minority view in Brevard County"); id. (referring to "displacing representatives of the minority faith-based monotheistic community"); Cty.'s Resp. Mem., Doc. 59, at 7 (referring to the County as one "where 94% of persons with a religious affiliation belong to Christian congregations"); id. at 13 ("[T]his case does not involve discrimination against a minority faith because atheists, as a subset of secularists[,] are members of a clear majority when compared to the number of people who regularly attend religious services. It is religious adherents ... who are the statistical minority in Brevard County."); id. at 16 (referring to "faith-based" invocators as "representing a substantial body—though a minority—of constituents" and noting that "the County Commission currently governs an overwhelmingly secular community"); id. at 18 (referring to the Board as "placed in the tenuous position of governing a secular county"); id. at 19 (referring to the County's "minority faith-based community")).

Although the County attempts to ascribe relevance to the statistical breakdown of "religious adherents" versus "those who attend religious services" versus "nonbelievers," it is not germane to Establishment Clause analysis whether a particular segment of the County's population is the majority or minority. "The First Amendment is not a majority rule ..." Town of Greece, 134 S. Ct. at 1822; see also McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 884, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (O'Connor, J., concurring) ("[W]e do not count heads before enforcing the First Amendment."); Doe v. Pittsylvania Cty., Va., 842 F. Supp. 2d 906, 927 (W.D. Va. 2012) ("The Bill of Rights exists to protect the rights of individuals from popular tyranny.") In sum, the County's vacillating assertions regarding majorities and minorities do not advance its cause here.

The Public Comment Period

The County next insists that it has not denied Plaintiffs the opportunity to give an invocation because it allows nontheists to give a "secular invocation" during the Public Comment portion of Board meetings—which the County describes as "an alternative and comparable opportunity." (Doc. 62 at 3).[25] The County maintained at oral argument that anyone can give an invocation and "[i]t's just a matter of where [and when] they're gonna give it"—at the beginning of the meeting or during Public Comment. (Hr'g Tr., Doc. 93, at 49). This argument fails.

First of all, the County's argument that an "invocation"—"secular" or otherwise—given during the Public Comment period is comparable to an opening, pre-meeting invocation is unpersuasive. A pre-meeting invocation is given before the meeting starts and serves to solemnize the entire meeting. That is its purpose. The Town of Greece Court noted the invocation's "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." 134 S. Ct. at 1823. Here, Plaintiffs are not seeking to discuss their beliefs in a Public Comment setting but to participate in the solemnizing function that is afforded to others at the outset of meetings; they "want to give invocations that call on the kinds of nontheistic higher authorities and values approved in [Town of Greece], such as the U.S. Constitution, democracy, equality, cooperation, fairness, and justice." (Doc. 60 at 4).

The County cites Town of Greece in support of its Public Comment justification, but in doing so it distorts the Supreme Court's opinion. The County relies on the statement that in the town of Greece, "any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions." 134 S. Ct. at 1826 (emphasis added). In the County's view, this "in turn" language means that the Supreme Court did not "say it has to be at the

beginning of the meeting, as long as they have an opportunity to do it." (Hr'g Tr., Doc. 93, at 50)

But the County's argument that "in turn" supports the validity of its practice of allowing "separate invocations" during different parts of a meeting fails. First of all, this "in turn" language is from the discussion of coercion in Justice Kennedy's plurality opinion in Town of Greece—not from the part of the opinion that addresses the requirement of a policy of nondiscrimination with regard to inviting invocation-givers. In context, the sentence reads: "Adults often encounter speech they find disagreeable, and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome **in turn** to offer an invocation reflecting his or her own convictions." 134 S.Ct. at 1826 (emphasis added). Moreover, Town of Greece did not involve bifurcated invocation-presentation periods, and there is no basis to infer that Justice Kennedy was using "in turn" to refer to different parts of a meeting. In context, it is clear that Justice Kennedy was referring to an opportunity to give an invocation at the beginning of a future meeting rather than during a later "Public Comment" period or other section of the agenda after a meeting is already underway and has been solemnized.

In attempting to justify its "bifurcated invocation periods," the County also seizes on language from Town of Greece referring to the need for a court to make "inquiry into the prayer opportunity as a whole." Id. at 1824 (citing Marsh, 463 U.S. at 794–95, 103 S.Ct. 3330). The County argues that "as a whole," it "affords an invocation opportunity to the Plaintiffs." (Doc. 54 at 24). Again, however, the County takes language from Town of Greece out of context. The "prayer opportunity as a whole" language appears in the Supreme Court's discussion of the plaintiffs' assertions regarding the allegedly disparaging content of some of the prayers given there. In that vein, the Court explained:

> Although these two remarks strayed from the rationale set out in Marsh, they do not despoil a practice that **on the whole** reflects and embraces our tradition. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. Marsh, indeed, requires an inquiry into **the prayer opportunity as a whole,** rather than into the contents of a single prayer.

134 S.Ct. at 1824 (emphasis added). Here, although the County has conceded that some of the invocations at its meetings have crossed the line into proselytizing, (see Hr'g Tr., Doc. 93, at 57), Plaintiffs' claims are not based on the content of the prayers, and Plaintiffs are not arguing this aspect of Town of Greece. The "prayer opportunity as a whole" language in Town of Greece does not lend viability to the County's requiring separation of "religious invocations" from "secular invocations," the latter being relegated to the Public Comments portions of the meeting.

Furthermore, as a factual matter the County's description of two "separate but comparable" invocation periods—one for "religious invocations" at the outset of the meeting and one for "secular invocations" during Public Comment is belied by the record in this case. It is undisputed that the Public Comment period is indeed not reserved for secular invocations but is open to discussion of any subject involving County business, and a "Christian prayer" would be permitted both at the beginning of the meeting and during Public Comment. (ASOF ¶ 148). Thus, "religious" invocators have multiple opportunities to speak, whereas "secular invocations" can only be given during Public Comment.

Limited Public Forums and "Avoiding an Establishment Clause Violation"

The County also attempts to justify its invocation practice by asserting that the invocation period is a "limited public forum" as to which the County has defined the permissible content." And the County avers that in creating these separate forums, it was trying to *avoid an* Establishment Clause violation because allowance of atheist or Secular Humanist invocations would show hostility toward monotheism or "faith-based" religions and because it is trying to avoid "a pattern of proselytizing secular invocations." These arguments are also rejected.

The County asserts that it has created two limited public forums—one for "religious invocations" and one for "secular invocations." As stated by the County, "under [its] policy, only members of the faith-based community are permitted to give the invocation during the limited public forum set aside by the Commission solely for the purpose of recognizing the faith-based community prior to the commencement of the secular business meeting." (Doc.

54 at 16). And, says the County, it has created not one but "two limited public forums for secular invocations" during the two Public Comment periods. (Id. at 17).

Plaintiffs urge that the invocation portion of a meeting is not a limited public forum and that even if it is, the County has engaged in impermissible viewpoint discrimination by excluding nontheists from it. The Court agrees with Plaintiffs on the latter point and thus need not resolve the first.

3 4 "[W]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech." Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001). "The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.' " Id. (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)) (alteration in original). But "[t]he State's power to restrict speech ... is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be 'reasonable in light of the purpose served by the forum.' " Id. (citations omitted) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)).

The County insists that its restrictions are viewpoint neutral, but this Court disagrees. The County discriminates among invocation speakers on the basis of viewpoint, and its restriction on invocation givers is not reasonable in light of the purpose of the invocation. Thus, even if the pre-meeting invocation period is a limited public forum, this viewpoint discrimination renders the County's practice unconstitutional.

The County tries to define its proposed forum as available "to members of the faith-based community capable and desirous of delivering faith-based religious invocations," (Doc. 54 at 23), and asserts that Plaintiffs' "secular invocations" "do not fit within the limitations of the limited public forum established for [these] religious invocations." (Id.). Again, however, the purpose of an invocation is to solemnize a meeting, "lend gravity to the occasion," and "reflect values long part of the Nation's heritage." Town of Greece, 134 S.Ct. at 1823. The County declares that *its* purpose for the invocations is to "recogni[ze] the contribution of the faith-based community to the county," (ASOF ¶ 199), (and the Commissioners themselves described the purpose in various ways, including to "worship[ ] ... the one and only true God, the God of the Bible" and "to honor God". Doc. 43 at 37–38) and then tries to justify exclusion of nontheists using its "faith-based" requirement. But exclusion of nontheists—who, as discussed earlier, are indeed "capable" of providing an invocation within the meaning of Town of Greece—is impermissible viewpoint discrimination.

The County argues that its creation of different forums was attempt to avoid an Establishment Clause violation rather than to commit one. The County asserts that allowing nontheistic invocations would send a message of hostility toward "believers" and that because nontheistic invocations are secular and the Board's meeting agendas deal with secular business, allowing secular invocations would violate the Establishment Clause by "establishing" secularism. This argument is baseless. The Court simply cannot fathom how the County would be committing an Establishment Clause violation or showing hostility toward anyone by allowing Plaintiffs to give an invocation at the beginning of a Board meeting. "While the Supreme Court has recognized that 'the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe,' that Court also has made it clear that the neutrality commanded by the establishment clause does not itself equate with hostility towards religion." Smith v. Bd. of Sch. Comm'rs of Mobile Cty., 827 F.2d 684, 692 (11th Cir. 1987) (citations omitted) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). As noted earlier, moments of silence are sometimes observed in lieu of a "religious invocation," and the County does not claim that such silence represents hostility toward religion—nor could it. Indeed, obviously the County need not have any kind of invocation practice at all, and not having one could not reasonably be construed as hostility toward the "religious."

The County's argument regarding "avoiding a pattern of proselytization" is also misguided. This argument is based on the County's assertion that because Plaintiffs or affiliates of Plaintiffs have posted on websites invocations that are hostile to theistic religions, it must refuse to allow them to give an invocation in order to avoid running afoul of Town of Greece. Here, however, the County is mixing apples and oranges. The portion of Town of Greece that the County relies upon here pertained to the plaintiffs' reliance, in support of their "nonsectarian" argument—on "invocations that disparaged those who did not accept the town's prayer practice." 134 S.Ct. at 1824. The Court then acknowledged a few invocations

that strayed in their content from what Marsh approved, but the Court held that "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation." Id.

The relevant pattern is the pattern that might appear over time in the governmental venue, not a pattern of statements by would-be invocation givers outside the invocation forum. That Town of Greece instructs that assessment of the pattern of invocations given at a government meeting may sometimes be called for to determine whether a prayer practice has crossed the line to disparaging or proselytizing does not mean that the County is justified in denying Plaintiffs the opportunity to give an invocation based on website contents or past invocations—most of which occurred prior to Town of Greece[27]—especially not where, as here, Plaintiffs have repeatedly attested in sworn declarations that they understand the purpose of an invocation and will not proselytize or disparage, (see, e.g., Williamson Decl. Pls', Ex. 7, ¶ 25, Second Williamson Decl., Pls', Ex. 138, ¶ 4). The County's alleged concern about "allowing such patterns to manifest" is not realistic, Plaintiffs are not seeking to give an invocation at every meeting, and surely if they crossed the line once they would not be invited back, so no "pattern" could emerge. Moreover, Plaintiffs have countered with evidence of disparaging and proselytizing comments made in sermons or on the Internet by those whom the County has allowed to give "religious invocations." (See Pls.' Exs. 147–163, V14–18). So long as an invocation giver—whether nontheistic or theistic—does not disparage or proselytize during the invocation itself, the County need not be concerned. Again, the relevant "pattern" is the pattern at the meetings, not outside them.

Conclusion as to Intentional Discrimination

In sum, the County's attempted justifications for its policy and practice ring hollow. The County's reliance to support its position is misplaced. Both Marsh and Town of Greece establish that theistic invocations are permissible in legislative prayer, but they did not establish that a governmental entity may require theistic content in invocations. Indeed, Town of Greece made clear that an invocation giver must be permitted to give an invocation as his conscience dictates, limited only by a prohibition on proselytizing and disparaging. And although the cases speak of permissible effects of theistic invocations, permissible effects are not the same as permissible purposes for an invocation in the first instance. By straying from the historical purpose of an invocation and intentionally discriminating against potential invocation-givers based on their beliefs, the County runs afoul of the Establishment Clause. Plaintiffs are thus entitled to summary judgment on this claim.

2. Entanglement

5 Plaintiffs also argue that the County's invocation policy violates the Establishment Clause because it excessively entangles the County with religion. Plaintiffs note that Resolution 2015–101 includes "a five-page dissection of the beliefs of Secular Humanists and organizations affiliated with" Plaintiffs, (Doc. 55 at 19), and that the Commissioners testified in their depositions that they would "have to examine" the beliefs of various other groups before deciding whether to allow a representative of that group to give an invocation, (id.)

In support of their entanglement argument, Plaintiffs cite Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which established a three-part test for Establishment Clause cases, one part of which examines whether a law fosters "an excessive government entanglement with religion." Id. at 612; Hernandez v. Comm'r, 490 U.S. 680, 696–97, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989), which applied the Lemon test; and Town of Greece. As noted earlier, in Marsh and Town of Greece the Supreme Court declined to apply the Lemon test in the legislative prayer context, and to the extent Plaintiffs are urging application of all or part of that test here, this Court declines to formulaically apply it.

Nevertheless, entanglement remains relevant to Establishment Clause analysis even when legislative prayer is involved. In rejecting the argument that the town of Greece violated the Establishment Clause "by inviting a predominantly Christian set of ministers to lead the prayer," the Town of Greece Court noted that a "quest to promote a diversity of religious views would require the town to make 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 than the current approach." 134 S.Ct. at 1824 (alteration in original) (internal quotations and citation omitted). As made plain by the discussion of Plaintiffs' purposeful discrimination argument above, the County is clearly entangling itself in religion by vetting the beliefs of those groups with whom it is unfamiliar before deciding whether to grant permission to give invocations.

3. Coercion

Next, Plaintiffs assert that the County's invocation practice violates the Establishment Clause by coercing participation in religious exercises. Plaintiffs base this argument on the fact that "Commissioners regularly direct audience members to rise for invocations ... in the coercive environment of meetings in a small boardroom that are sometimes attended by [fewer] than ten people" and "go on to vote on issues, such as zoning variances, that may greatly affect attendees, who may need to address the Board about those items." (Doc. 55 at 21). The County denies that its practice is coercive. Again, both sides rely on Town of Greece in support of their positions.

In arguing coercion in Town of Greece, the plaintiffs contended "that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation." 134 S. Ct. at 1824–25. In the town board meeting setting, on the other hand, "[c]itizens attend ... to accept awards, speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances." Id. at 1825. In light of these differences, the plaintiffs argued "that the public may feel subtle pressure to participate in the prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling." Id. In Greece, "board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, [but] they at no point solicited similar gestures by the public"; although audience members were sometimes "asked to rise for the prayer," the plurality noted that those requests to rise "came not from town leaders but from the guest ministers." Id. at 1826.

As earlier noted, the Town of Greece plaintiffs' coercion argument was rejected by a divided Court, with no majority rationale. The plurality—Justices Kennedy and Alito and Chief Justice Roberts—was "not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance," but it emphasized that "[t]he inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." Id. at 1825 (plurality opinion). Although it found no coercion on the facts of Town of Greece, the plurality noted that "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."[23] Id. at 1826. And while the Town of Greece plaintiffs stated in declarations that the prayers offended them and made them "feel excluded and disrespected," the plurality held that "[o]ffense ... does not equate to coercion." Id.

Concurring with the plurality's conclusion that the town's invocation practice was not coercive, Justice Thomas, joined by Justice Scalia, noted that historically, coercion meant " 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.' " Id. at 1837 (Thomas, J., concurring) (emphasis in original) (quoting Lee v. Weisman, 505 U.S. 577, 640, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)). "Thus," said Justice Thomas, "to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt by respondents in this case." Id. at 1838. Justices Thomas and Scalia agreed with the plurality's conclusion that "[o]ffense ... does not equate to coercion" and noted that they "would simply add ... that '[p]eer pressure, unpleasant as it may be, is not coercion' either." Id. (alterations in original) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004)).

6 Here, Plaintiffs focus their coercion argument on the fact that from 2010–2016, sometimes—indeed, more often than not—a Commissioner in Brevard County asked the audience to stand before the invocation was given, followed by the Pledge of Allegiance.[24] In addition to noting the "coercive environment" of the boardroom, Plaintiffs urge that the presence of children at some of the meetings supports their coercion argument, citing Doe v. Indian River Sch. Dist., 653 F.3d 256, 275–80 (3d Cir. 2011), a case involving prayer at school board meetings. In Doe, the Third Circuit reiterated "the Supreme Court's observation that students are particularly vulnerable to peer pressure in social context." Id. at 277 (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000)).

Regardless of whether Justice Kennedy's plurality opinion or Justice Thomas's Town of Greece concurrence governs the coercion issue,[25] on the facts of this case the Court

cannot find that any of the Plaintiffs was subjected to unconstitutional coercion under either rationale. The evidence does not support a finding of "actual legal coercion," and many of the arguments made here—including the notion that a municipal board meeting setting is different from a state legislature setting—were noted by Justice Kennedy in the plurality opinion. Analyzing the specific facts here, this Court does not conclude that the occasional presence of children or the fact that requests to stand—for both the invocation and the Pledge of Allegiance that followed—were often made by Commissioners, without more, amounts to unconstitutional coercion, especially where the two Plaintiffs—adults—who have attended Board meetings did not feel so pressured that they actually stood if asked to do so. See, e.g., Williamson Dep., Doc. 53–1, at 44–45 (testimony that Williamson was filling out a comment card at the time of the invocation, had not yet taken a seat, and did not recall whether the audience was asked to stand for the invocation during meeting he attended); Becher Dep., Doc. 52–1, at 12–13 (testimony that Becher attended several meetings, did not stand up when asked to stand for the invocations, and had no business on the agenda before the Board at those meetings). And to the extent Plaintiffs were offended, "[o]ffense ... does not equate to coercion." 134 S.Ct. at 1826 (plurality opinion); id. at 1838 (Thomas, J., concurring) ("The majority properly concludes that 'offense ... does not equate to coercion.' " (emphasis in original)). Thus, insofar as Plaintiffs' Establishment Clause claim is based on coercion, the claim fails.

B. Other Federal Constitution Claims

In addition to their Establishment Clause claim, Plaintiffs also bring claims under the Free Exercise and Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Some courts have held that challenges to legislative prayer practices are appropriately analyzed only under the Establishment Clause and that claims under other clauses are not viable in this context. Although the County does not rely on that proposition in defending against these "other clause" claims,[21] the Court will nevertheless discuss it before proceeding to analyze Plaintiffs' Free Exercise, Free Speech, and Equal Protection claims.

Before Town of Greece, the Fourth Circuit twice found legislative prayer claims subject to analysis only under the Establishment Clause. In Simpson v. Chesterfield Cty. Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005), a Wiccan who requested but was denied an opportunity to give an invocation sued under all four of the clauses asserted in the instant case. In affirming the district court's grant of summary judgment on the plaintiff's free exercise, free speech, and equal protection claims, the Fourth Circuit "agree[d] with the district court's determination that the speech in th[at] case was government speech 'subject only to the proscriptions of the Establishment Clause.' " 404 F.3d at 288 (quoting the district court decision). The district court had noted that "[t]he invocation is not intended for the exchange of views or other public discourse" or "for the exercise of one's religion" and that "the Board may regulate the content of what is or is not expressed when it 'enlists private entities to convey its own message.' " Simpson v. Chesterfield Cty. Bd. of Supervisors, 292 F.Supp.2d 805, 819 (E.D. Va. 2003), quoted in Simpson, 404 F.3d at 288.

Three years after Simpson, the Fourth Circuit again addressed the issue in Turner v. City Council of the City of Fredericksburg, Va., 534 F.3d 352 (2008), cert. denied, 555 U.S. 1099, 129 S.Ct. 909, 173 L.Ed.2d 109 (2009). There, the city council began each meeting with an opening prayer delivered by one of the Council's elected members, and the council required that prayers be nondenominational and not invoke Jesus Christ. One of the council members, wanting to pray in the name of Jesus Christ, was denied his turn to give a prayer and filed suit, claiming that the "nondenominational" requirement violated the Establishment, Free Exercise, and Free Speech Clauses. The Fourth Circuit concluded that the prayers were government speech, that the plaintiff "was not forced to offer a prayer that violated his deeply-held religious beliefs," and that instead "he was given the chance to pray on behalf of the government." Id. at 356. The Turner court thus found no violation of any of the clauses. Id.

In addition to the Fourth Circuit's Simpson and Turner opinions, several district court decisions have addressed the viability of legislative prayer claims grounded in clauses other than the Establishment Clause. In Atheists of Fla., Inc., v. City of Lakeland, 779 F.Supp.2d 1330 (M.D. Fla. 2011) (Kovachevich, J.), atheists sued to enjoin a prayer practice involving invocations given by religious ministers, asserting claims under the Establishment, Free Speech, and Equal Protection Clauses. The district court found that the Establishment Clause claim survived the defendants' motion to dismiss. 779 F.Supp.2d at 1340–41. However, with regard to the free speech and equal protection claims, the plaintiffs conceded that the prayers involved were "government speech" and the court, relying on Simpson,

concluded that as such, the prayers at issue were " 'subject only to the proscriptions of the Establishment Clause.' " Id. at 1342 (quoting Simpson, 404 F.3d at 288); see also id. ("The proper analytical device in this case is the Establishment Clause, and not the Equal Protection or Free Speech [C]lauses .... Plaintiffs' concession that the prayers at issue here are government speech is simultaneously a recognition that the Establishment Clause, and the Establishment Clause only, governs the conduct at issue in this case.").

And in Coleman v. Hamilton Cty., Tenn., 104 F.Supp.3d 877 (E.D. Tenn. 2015), the plaintiffs challenged a legislative prayer practice under both the Establishment Clause and the Equal Protection Clause.[12] Citing Simpson and Atheists of Florida without discussion, the Coleman court concluded that "legislative prayer cases ... are subject to analysis only under the Establishment Clause of the First Amendment, and not under the Equal Protection Clause of the Fourteenth Amendment." 104 F.Supp.3d at 891.

The most recent discussion of this issue appears in Fields v. Speaker of the Pennsylvania House of Representatives, 251 F.Supp.3d 772 (M.D. Pa. 2017). The Pennsylvania House of Representatives opens its sessions with an invocation delivered by either a House member or a guest chaplain; guest chaplains, according to an internal rule, must be "member[s] of a regularly established church or religious organization," and the Speaker interprets that rule as excluding "nonadherents" and "nonbelievers" from "the guest chaplain program." 251 F.Supp.3d at 775. After nontheists requested and were denied an opportunity to give an invocation, they—represented by the same counsel as Plaintiffs here—brought claims under the same four constitutional clauses at issue in this case.

In its April 28, 2017 order, the Fields district court granted in part and denied in part the defendants' motion to dismiss, finding that the Establishment Clause claim was plausibly pleaded but dismissing the claims under the other clauses. The Fields court noted that because "courts generally regard legislative prayer as 'government speech,' they 'have thus declined to entertain legislative prayer challenges cast under the Free Speech, Free Exercise, and Equal Protection Clauses.' " 251 F.Supp.3d at 791 (citing Simpson, Turner, Coleman, Atheists of Florida, and Coleman). The court rejected the plaintiffs' assertion that cases construing legislative prayer as government speech either predated Town of Greece or "fail[e]d to account for" Town of Greece. The Fields court also rejected the plaintiffs' argument that legislative prayer is "hybrid speech," id., and it "join[ed] the unanimous consensus of courts ... to conclude that legislative prayer is subject to review under the Establishment Clause alone," id.

Having considered these cases, Town of Greece, the facts of this case, and the manner in which Plaintiffs couch their claims, this Court is not persuaded that legislative prayer claims are necessarily subject to analysis under only the Establishment Clause. Instead, the viability of the various potential causes of action depends on the circumstances of each case and the nature of the claim being asserted. In some cases, an Establishment Clause claim may indeed be the only available type of challenge—under facts like those in Town of Greece, for example. There, the plaintiffs did not seek to give an invocation themselves; they only attempted to have the court limit the content of the "sectarian" prayers to which they were subjected at town meetings. They only brought an Establishment Clause claim, and it is hard to imagine how they could have framed a free exercise, free speech, or equal protection claim on those facts. And if there had been an Establishment Clause violation, that violation would seemingly have run to all upon whom an unconstitutional prayer practice was imposed.

7 Where, however, a claimant both objects to the prayer practice as establishing and imposing religion on citizens and, as here, is denied the opportunity to give an invocation while others are invited or allowed to do so, other types of constitutional claims may indeed be independently viable. In other words, when a governmental entity opens up the invocation opportunity to volunteers and then discriminates among those volunteers on an impermissible basis, an additional type of violation is not necessarily foreclosed even where an Establishment Clause claim is presented.

Thus, although the County does not raise this argument, to the extent that these other cases are not distinguishable on their facts or as not surviving Town of Greece—which prohibits discrimination in selection of speakers, and does not bar sectarian references, and prohibits proselytizing and disparaging—this Court respectfully disagrees with them and other cases categorically limiting legislative prayer cases to only Establishment Clause analysis under all circumstances. One caveat to this, of course, is that a claimant may not avoid the holdings of Town of Greece merely by casting claims in terms of a different Constitutional clause. For example, a claimant cannot, after Town of Greece, insist on a right to say whatever he or

she wants—such as proselytizing or disparaging remarks—at an invocation under the guise of a right to free speech or free exercise of religion; Town of Greece forbids such comments because of the limited purpose of an invocation. Plaintiffs do not attempt any such avoidance here—instead focusing on the fact that they have been treated differently than other invocation-givers during the selection process—and the Court will examine Plaintiffs' other federal constitutional claims on their merits.

1. Free Exercise Clause (Count II)

8 The Free Exercise Clause provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. amend. I, cl. 2. Plaintiffs claim in Count II that the County violates this provision by making adoption or profession of a religious belief a precondition for taking part in governmental affairs.[12] This argument has merit.

Plaintiffs primarily rely on Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), in support of this claim. In that case, the plaintiff was appointed as a notary public in Maryland "but was refused a commission to serve because he would not declare his belief in God." 367 U.S. at 489, 81 S.Ct. 1680. The Maryland Constitution prohibited "religious tests"—"other than a declaration of belief in the existence of God"—as a requirement for a qualification for office. Id. The plaintiff filed suit, bringing claims under the First and Fourteenth Amendments. The Supreme Court held that the "test oath" required of plaintiff "unconstitutionally invade[d]" his "freedom of belief and religion and therefore [could not] be enforced against him." Id. at 495, 81 S.Ct. 1680, see also McDaniel v. Paty, 435 U.S. 618, 626–27, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (describing Torcaso as a free exercise case).

Although, as earlier discussed, legislative prayer occupies a unique place in Supreme Court jurisprudence, under Torcaso and the circumstances of this case the Court finds that the County's invocation practice violates not only the Establishment Clause but the Free Exercise Clause as well. By opening up its invocation practice to volunteer citizens but requiring that those citizens believe in "a higher power" before they will be permitted to solemnize a Board meeting, the County is violating the freedom of religious belief and conscience guaranteed by the Free Exercise Clause. Plaintiffs thus prevail on this claim.

2. Free Speech Clause (Count III)

9 Plaintiffs allege in Count III that the County's invocation practice violates the Free Speech Clause of the First Amendment, which provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I, cl. 3. Plaintiffs assert that the Free Speech Clause "prohibits government from denying citizens opportunities to take part in governmental activities based on their beliefs or affiliations," and that the County bars Plaintiffs from giving invocations based on their nontheistic beliefs and affiliations.[13] (Doc. 55 at 22–23).

Cases cited by Plaintiffs support their "belief and affiliation" argument. See, e.g., Branti v. Finkel, 445 U.S. 507, 516–17, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) (noting that "the First Amendment prohibits dismissal of a public employee solely because of his private political beliefs"); Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205, 133 S.Ct. 2321, 186 L.Ed.2d 398 (2013), see also Cuffley v. Mickes, 208 F.3d 702, 707 (8th Cir. 2000) (concluding the state violated the Ku Klux Klan's free speech right by prohibiting it from participating in the state's adopt-a-highway program based on its beliefs and advocacy); Wishnatsky v. Rovner, 433 F.3d 608 (8th Cir. 2006) (upholding the plaintiff's claim that denial of representation by public defender based on the plaintiff's beliefs was a violation of his free speech right). Thus, Plaintiffs are entitled to summary judgment on their Free Speech Clause claim.

3. Equal Protection Clause (Count IV)

10 In their fourth and final federal claim, Plaintiffs assert that the County's invocation practice violates the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Plaintiffs contend that the County's practice violates this clause because the County is treating citizens differently based on their religious beliefs. The Court agrees.

It is clear from the undisputed evidence that in selecting invocation speakers, the County is categorizing its citizens along religious lines—both by dividing, in Resolution 2015–101, "religious" citizens from "secular" citizens, and by dividing, in practice, "monotheistic, faith-based" citizens from all other citizens. Plaintiffs correctly note that religion is a suspect classification under the Equal Protection Clause. See, e.g., Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651, 112 S.Ct. 2184, 119 L.Ed.2d 432 (1992); City of New Orleans v. Dukes,

427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). Thus, strict scrutiny applies to the County's practice, and it can withstand an equal protection challenge only if it is "narrowly tailored to achieve a compelling interest." See Miller v. Johnson, 515 U.S. 900, 920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). As correctly argued by Plaintiffs, the County's practice does not satisfy strict scrutiny.

Plaintiffs note that in Resolution 2015–101, the County attempts to justify its policy of excluding them from the invocation practice by citing a desire to recognize "faith-based monotheistic religions," to avoid "displacing ... the minority faith-based monotheistic community" or appearing "hostil[ ]e toward monotheistic religions," and to avoid an appearance of approving atheism or Secular Humanism. (See Resolution 2015–101 ¶¶ 5, 36, & 37). These interests are not by any means "compelling." And a neutral policy that allowed citizens of all belief systems to provide an opening invocation would not, as argued by the County, convey a message of endorsement or hostility. Accordingly, Plaintiffs prevail on their federal equal protection claim.

C. Florida Constitution (Counts V and VI)

1. Art. I, Section 2 (Count V)

11 In their fifth claim, Plaintiffs allege a violation of Article I, Section 2 of the Florida Constitution, which provides in part that "[a]ll natural persons ... are equal before the law" and that "[n]o person shall be deprived of any right because of ... religion." This clause is construed like the Equal Protection Clause of the U.S. Constitution. See, e.g., Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249, 251 (Fla. 1987). For the reasons discussed in the preceding section with regard to Count IV, Plaintiffs prevail on Count V as well.

2. Art. I, Section 3 (Count VI)

Finally, Plaintiffs allege violations of Article I, Section 3 of the Florida Constitution. This section, titled "Religious freedom," provides, among other things, [3] that "[t]here shall be no law respecting the establishment of religion" and that "[n]o revenue of the state or any political subdivision thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Fla. Const. art. I, § 3. Plaintiffs assert violations of both of these parts of section 3—the establishment clause and the "no-aid" clause. (See Doc. 55 at 25).

a. Florida Establishment Clause

12 The Florida Establishment Clause and the federal Establishment Clause have nearly identical wording and are interpreted in the same manner by courts. See, e.g., Todd v. State, 643 So.2d 625, 626 & n.3 (Fla. 1st DCA 1994); see also Bush v. Holmes, 886 So.2d 340, 344 (Fla. 1st DCA 2004) (en banc) ("[T]he first sentence of article I, section 3 is synonymous with the federal Establishment Clause in generally prohibiting laws respecting the establishment of religion."). Plaintiffs make the same arguments with regard to the Florida Establishment Clause as they do with respect to the federal clause. For the reasons stated earlier in this order in the discussion of Plaintiff's claim under the Establishment Clause of the U.S. Constitution in Count I, to the extent Count VI is based on the Establishment Clause of the Florida Constitution Plaintiffs likewise prevail in part.

b. Florida "No–Aid" Clause

13 The "no-aid" clause of section 3—which provides that "[n]o revenue of the state or any political subdivision thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution"—"imposes 'further restrictions on the state's involvement with religious institutions than [imposed by] the Establishment Clause.' " Council for Secular Humanism, Inc. v. McNeil, 44 So.3d 112, 119 (Fla. 1st DCA 2010) (alteration in original) (quoting Holmes, 886 So.2d at 344). The no-aid clause "contains a broad prohibition against the expenditure of state revenues." Holmes, 886 So.2d at 359.

Plaintiffs contend that the County violates the no-aid clause by "using tax dollars to fund an invocation practice that prefers monotheism over atheism, Humanism, and other religions." (Doc. 55 at 25). Plaintiffs rely on the fact that "[t]he Commissioners use County resources funded with taxpayer dollars—such as email, mail, and phones—to invite and communicate with invocators." (Id. at 3). Additionally, Plaintiffs note that invocation-givers sometimes "orally give the audience promotional information about their houses of worship before delivering their invocations." (Id.)

In Atheists of Florida, Inc. v. City of Lakeland, 713 F.3d 577 (11th Cir. 2013), a case in which administrative employees contacted potential invocation speakers from a list of religious leaders, the plaintiffs argued that the time and expense of printing and mailing invitations to the speakers constituted an impermissible expenditure "in aid of" religion. The City estimated that the annual cost of updating the list and mailing out invitations was $1200 to $1500. The Eleventh Circuit concluded that based on the record before it, the plaintiffs did not demonstrate that the city's expenditures on arranging invocational speakers resulted in a direct or indirect pecuniary benefit to any group or showed that any religious organization received financial assistance from the city to promote and advance its theological views. 713 F.3d at 596. Although Plaintiffs argue that Atheists of Florida is distinguishable and that here, the County used public funds to advance religion, Atheists of Florida weighs against Plaintiffs' no-aid clause claim. Clearly there is no payment of funds to any church or sect here, and Plaintiffs have not presented any evidence or estimate of how much it cost the County to use existing email and telephone systems to contact potential invocation speakers.

Plaintiffs have cited no case—and the Court has found none—where an incidental cost incurred by a public entity sufficed to give rise to a violation of the no-aid clause. This issue is, of course, a matter of Florida law, and if the Supreme Court of Florida has not spoken on the topic at issue, this Court "must predict how [that] court would decide" the question presented. Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1348 (11th Cir. 2011).

This Court's research uncovered a Supreme Court of Florida case that lends some guidance here. In Southside Estates Baptist Church v. Board of Trustees, School Tax District No. 1, in and for Duval County, 115 So.2d 697 (Fla. 1959), the court rejected a no-aid clause claim involving incidental costs incurred by a municipal entity. There, the school district's Board of Trustees allowed several churches to use school buildings on Sundays. The plaintiffs argued that such use of the school buildings "constitute[d] an indirect contribution of financial assistance to a church" in violation of the predecessor provision to the current no-aid clause, id. at 115 So.2d at 698, and that "regardless of how small the amount of money might be, ... if anything of value can be traced from the public agency to the religious group, the Constitution has been thereby violated," id. at 699. The Board countered that the record did not "reveal any direct expenditure of public funds" and that "any indirect expense to the public because of depreciation resulting from use by the churches is of such small consequence that the law should refuse to notice it." Id.

The Supreme Court of Florida took note "of [the plaintiffs'] insistence that the use of the building is something of value and that the wear and tear is an indirect contribution from the public treasury," id., but concluded that it "might here properly apply the maxim *De minimis non curat lex*," id., which translates to "The law does not concern itself with trifles," Black's Law Dictionary (10th ed. 2014). The Court continued: "Nothing of substantial consequence is shown and we see no reason to burden this opinion with a discussion of trivia." Id. at 699–700. See also Holmes, 886 So.2d at 356 ("[N]o disbursement was made from the public treasury in [Southside] a fact which significantly distinguishes it from the instant case" (in which a scholarship program authorized state funds to be paid to sectarian schools)).

In light of the Southside court's refusal to find a use of public funds from incidental expense due to use of buildings, and in the absence of any case finding a no-aid clause violation in similar circumstances, this Court concludes that the Supreme Court of Florida would not find a violation of the no-aid clause on the facts of this case. Thus, to the extent that Count VI of the First Amended Complaint is grounded in the no-aid clause of the Florida Constitution, Plaintiffs' motion for summary judgment is denied and the County's motion for summary judgment is granted.

III. Conclusion

As the Fourth Circuit recently noted in Lund, "[t]he great promise of the Establishment Clause is that religion will not operate as an instrument of division in our nation." 863 F.3d at 272. Regrettably, religion has become such an instrument in Brevard County. The County defines rights and opportunities of its citizens to participate in the ceremonial pre-meeting invocation during the County Board's regular meetings based on the citizens' religious beliefs. As explained above, the County's policy and practice violate the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 3 of the Florida Constitution.

It is **ORDERED** as follows:

1. Defendant's Motion for Summary Judgment (Doc. 54) is **GRANTED in part** and **DENIED in part** as set forth in this Order.

2. Plaintiffs' Motion for Summary Judgment (Doc. 55) is **GRANTED in part and DENIED in part** as set forth in this Order.

3. No judgment shall be entered at this time. Instead, in accordance with the parties' prior agreement,[37] **on or before October 13, 2017,** the parties shall file their settlement agreement as to damages along with proposed language for the final judgment, including but not limited to language regarding injunctive relief and incorporation of the parties' settlement agreement into the final judgment.

DONE and **ORDERED** in Orlando, Florida, on September 30th, 2017.

APPENDIX

Image 1 within Williamson v. Brevard County

Image 2 within Williamson v. Brevard County

Image 3 within Williamson v. Brevard County

Image 4 within Williamson v. Brevard County

Image 5 within Williamson v. Brevard County

Image 6 within Williamson v. Brevard County

Image 7 within Williamson v. Brevard County

Image 8 within Williamson v. Brevard County

Image 9 within Williamson v. Brevard County

Image 10 within Williamson v. Brevard County

Image 11 within Williamson v. Brevard County

All Citations

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Footnotes

1 The facts are not in dispute. After the Court heard oral argument on the parties' cross-motions for summary judgment (Docs. 54 & 55), the parties submitted a 67–page, 301–paragraph Amended Stipulation of Facts Regarding Cross–Motions for Summary Judgment (Doc. 83). The factual background is taken largely from that Amended Stipulation of Facts, though other record evidence is also cited herein. References to the Amended Stipulation of Facts are indicated by "ASOF" followed by the paragraph number(s).

2 Specifically, Becher is President and Organizer of HCSC and a member of the boards of directors of all three organizational Plaintiffs. (ASOF ¶ 98). Hansel is President of SCFA and a member of its board of directors. (Id.). Koeberl is Vice–President and Co–Organizer of HCSC and a member of its board and SCFA's board. (Id.). Williamson is the founder and Chair of CFFC and a member of its board. (Id.)

3 The parties note in their stipulated facts that the Board also holds "workshop" meetings and other special meetings outside the boardroom described in the text. (ASOF ¶ 15). Those meetings are not opened with an invocation and are not at issue in this lawsuit. (Id. ¶¶ 16–17).

4 As explained later in this Order, the Board changed the timing and number of Public Comment periods during the timeframe of the events at issue in this case

5 References to Plaintiffs' Exhibits 1 through 163 are to the exhibits filed with Plaintiffs' summary judgment motion and their response to the County's motion. Exhibits 1–133 are attachments to their motion (Doc. 55), and Exhibits 134–163 are attachments to their response (Doc. 60).

6 In addition to Exhibits 1 through 163, Plaintiffs have submitted two USB flash drives containing video and audio evidence, and those exhibits are numbered V1 through V18. (See Notices of Physical Filing, Docs. 57 & 61). Exhibits V1 through V13 are contained on the USB flash drive that was filed with the first Notice of Physical Filing (Doc. 57), and Exhibits V14 through V18 are contained on the USB flash drive that was filed with the second Notice of Physical Filing (Doc. 61). Exhibit V2 contains all available videos of invocations given at Board meetings between March 19, 2010, and March 15, 2016, and Exhibit V14 contains all available videos of invocations given at Board meetings between March 29, 2016, and May 26, 2016. (See Pls.' App. of Exs., Doc. 55–1, at 14 (listing and describing Pls.' Ex. V2); Pls.' App. of Suppl. Exs., Doc. 60–1, at 5 (listing and describing Pls.' Ex. V14)).

7 During one invocation, the invited clergyman, after remarking, "Not quite sure where I need to face; my congregation [gesturing to the audience] or my choir [gesturing to the Board members]," faced the audience while giving his invocation. (See Pls. Ex. V2 (Mar. 3, 2016)). Another speaker, a chaplain, asked which way he should face, and the Chairwoman instructed him to face the Board. (See Pls.' Exs. 30 & V2 (Sept. 16, 2014)).

8 Incidentally, the pastor who was scheduled to give the invocation at the August 19, 2014 Board meeting was late, and in lieu of an invocation a moment of silence was observed. (See Pls.' Exs. 30 & V2 (Aug. 19, 2014 invocation)).

9 Plaintiff CFFC is a Freedom From Religion Foundation chapter. (ASOF ¶ 207).

10 Resolution 2015–101 appears in several places in the record, including as an exhibit (Docs. 24–3 through 24–11) to the County's original Answer (Doc. 24) and as Exhibit 77 to the deposition of Plaintiff Williamson (Doc. 53–8 at 34 through 93). The parties represent in their Amended Stipulation of Facts that the version that is Exhibit 77 to Williamson's deposition is a true and correct copy with all exhibits attached to it, and the Court accordingly refers to that version. (See ASOF ¶ 131).

11 The word "deism" appears to be a clerical error in the resolution. "Deism" is "a movement or system of thought advocating natural religion, emphasizing morality, and in the 18th century denying the interference of the Creator with the laws of the universe." Merriam Webster's Collegiate Dictionary (10th ed. 1993). Scholars have noted that "[m]any of our founding fathers, including Thomas Paine, Thomas Jefferson, [and] Benjamin Franklin, ... were flat-out deists, and many others, such as John Adams, James Madison, Alexander Hamilton, James Monroe, and George Washington, were at least partial deists." Geoffrey V. Stone, The World of the Framers, A Christian Nation?, 56 UCLA L. Rev. 1, 7 (Oct. 2008). In light of the deposition testimony of several Commissioners that they would not allow a deist to give an invocation, (see, e.g., Doc. 43 at 12, Doc. 44 at 9; Doc. 46 at 11; & Doc. 48 at 10), it is likely that "theism"—"belief in the existence of a god or gods," Merriam Webster's Collegiate Dictionary (10th ed. 1993)—was the word that was intended in this sentence of Resolution 2015–101.

12 In addition to the declarations, depositions, voluminous exhibits, several notices of supplemental authority, and the Amended Stipulation of Facts (Doc. 83), the pertinent filings are: the County's Motion for Summary Judgment (Doc. 54); Plaintiffs' Motion for Summary Judgment (Doc. 55); the County's Notice of Filing Supplemental Inadvertently Omitted Footnote References (Doc. 58); the County's Response to Plaintiffs' Motion for Summary Judgment (Doc. 59); Plaintiffs' Opposition to the County's Motion for Summary Judgment (Doc. 60); the County's Reply regarding its motion (Doc. 62); Plaintiffs' Reply regarding

its motion (Doc. 63); the County's Supplemental Memorandum of Law (Doc. 84); Plaintiffs' Supplemental Brief (Doc. 85); Plaintiffs' Supplemental Summary–Judgment Brief on Their Free–Speech Claim (Doc. 95); the County's Corrected Supplemental Summary Judgment Brief on Plaintiffs' Free Speech Claim (Doc. 97–1); and Plaintiffs' Supplemental Summary–Judgment Reply Brief on Their Free–Speech Claim (Doc. 98).

13 In some of its filings the County asserts, albeit cursorily, that Plaintiffs lack standing to bring one or more of their claims. (See, e.g., Doc. 54 at 19 (asserting that "none of the Plaintiffs has standing to sue for coercion because none has alleged a concrete and particular injury in fact"); id. at 21 (arguing lack of standing because "Plaintiffs cannot show an injury that can be redressed by a favorable decision from this Court"); Doc. 62 at 7 (averring that Plaintiffs lack standing because their injuries are "self-created" and because of "their inability to give a religious prayer"). These contentions are without merit. The Court is satisfied that Plaintiffs have standing to pursue their claims, and the County's arguments go to the merits of Plaintiffs' claims rather than to the issue of standing.

14 See, e.g., Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

15 See, e.g., Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

16 See Lemon v. Kurtzman, 403 U.S. 602, 612–13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (establishing three-part test providing that to pass muster under the Establishment Clause, (1) a statute "must have a secular legislative purpose," (2) the statute's "principal or primary effect must be one that neither advances nor inhibits religion," and (3) "the statute must not foster 'an excessive government entanglement with religion.' " (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970))).

17 It is not clear from the court opinions whether the plaintiff in Marsh was the legislator who complained about references to Christ in the prayers. The district court opinion describes him as "a non–Christian member of the legislature." Chambers v. Marsh, 504 F.Supp. 585, 591 n.14 (D.Neb. 1980).

18 See Galloway v. Town of Greece, 732 F.Supp.2d 195, 196 (W.D.N.Y. 2010).

19 Prior to Town of Greece, some courts had held that only "nonsectarian" legislative prayers were permissible under the Establishment Clause. See, e.g., Wynne v. Town ofGreat Falls, S.C., 376 F.3d 292 (4th Cir. 2004), accord Joyner v. Forsyth Cty., N.C., 653 F.3d 341 (4th Cir. 2011). The Eleventh Circuit, however, did not, pre-Greece, read Marsh as authorizing only nonsectarian prayers. See generally Pelphrey v. Cobb Cty., 547 F.3d 1263 (11th Cir. 2008).

20 In holding that legislative prayer need not be nonsectarian in order to remain within the confines of the Establishment Clause, the Town of Greece Court receded from dictum in County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). See Town of Greece, 134 S.Ct. at 1821 (finding some statements in County of Allegheny "irreconcilable with the facts of Marsh and with its holding and reasoning" and explaining that "Marsh nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content").

21 That practice was evidenced by a "long and continuous line through certain categories of faiths" in the phone book that the employee used to compile the list of potential speakers. Pelphrey, 547 F.3d at 1282.

22 The Court asked the parties whether it was appropriate to consider the deposition testimony and other statements of the Commissioners, and the parties briefed that issue. (See Docs. 84 & 85). The County (despite citing Commissioner deposition testimony in its own summary judgment filings. (see, e.g., Doc. 59 at 10)), took the position that the Court could properly consider only statements made prior to or contemporaneous with Resolution 2015–101, but the Court disagrees. The Supreme Court and the Eleventh Circuit have

relied on statements of legislators in gauging motive and intent. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 57, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (considering district court testimony of legislator); Church of Scientology Flag Serv. Org. v. City of Clearwater, 2 F.3d 1514, 1530 (11th Cir. 1993) (considering materials including newspaper articles, that "tend[ed] to show sectarian motivation"). This Court finds an even more compelling basis for doing so here than in those cases, as noted in the text, this case concerns not only Resolution 2015–101 but also the County's overall invocation policy and practice, and the statements of the Commissioners both before and after passage of Resolution 2015–101 bear on that overall practice.

23 See n. 11 supra.

24 Examples of these invocations include the following:

> Martin County is a diverse community representing a wide spectrum of religious, secular, political, ethnic, and racial perspectives. Despite our diversity we are united by the democratic principles of equal treatment for all as contained in our Constitution and Bill of Rights. We are also united in our desire to develop policies and legislation for the benefit of Martin County and its residents.
>
> We come to this meeting with divergent points of view that need to be discussed and carefully evaluated to ensure that wise decisions are made. While we may believe that our perspectives on issues like All Aboard Florida or the Indian River Lagoon are preferable, it is important that we express ourselves in ways that demonstrate respect for others as we plant the seeds of cooperation that are necessary for us to work together for the common good.
>
> Let us be guided by reason and compassion in our quest to solutions for life's problems. Should we find ourselves becoming displeased over what someone has said it can be helpful to remember that harsh words don't educate others about our points of view. They only create tension and interfere with decision making.
>
> Let us be guided by the advice that Aristotle offered the world twenty-four hundred years ago when he said, "We should conduct ourselves towards others as we would have them act towards us."
>
> (Invocation given by Joe Beck at the June 17, 2014 Meeting of the Martin County, Florida Board of County Comm'rs, Pls.' Ex. 14 at 23). And:
>
> Through the millennia we as a society have learned the best way to govern the people is for the people to govern themselves. Today, in this tradition, we travel from our homes and businesses across the county; citizens, staff, and those elected converge on this chamber to work as one community united and indivisible by nearly every measure. Each of us arrives as individuals with unique ideas and experiences but all with a need or, in a spirit of goodwill, to fulfill the needs of others.
>
> Citizens request assistance and offer their concerns and we are ever grateful for their interest and for their trust in the process. Staff provides invaluable expertise in their particular field and we truly appreciate their continued service. Elected officials listen, debate, and choose the path forward for us all out of a sincere desire to serve and honor the people of Osceola County while shaping its future. We all offer our thanks in that often thankless task.
>
> When we leave this chamber this evening let us carry with us this same spirit of service and goodwill tomorrow and every day that follows.
>
> This is how we assemble to serve and to govern, ourselves.
>
> (Invocation given by David Williamson at the June 16, 2014 Meeting of the Osceola County, Florida Board of County Comm'rs, Pls.' Ex. 14 at 24).

25 The County also argues that it created separate "limited public forums" in its invocation period and Public Comment periods. That contention is addressed in the next subsection of this Order.

26 The County argues that "[l]ike Greece, the Brevard policy allows atheists to present invocations in a separate limited public forum during the Public Comment section of the agenda." (Doc. 54 at 18–19). The County's likening of its policy to the invocation practice in Greece is puzzling. Greece's practice did not involve separate invocation "forums," and there, anyone—including an atheist—could give an invocation at the beginning of a meeting.

27 Plaintiff Williamson explains in his Second Declaration that before Town of Greece, he "sometimes advocated against the inclusion of invocations" at local government meetings but that he recognizes that the Supreme Court has ruled that invocations are permissible. (Second Williamson Decl., Pls.' Ex. 138, ¶ 2). Abiding by Town of Greece, he and CFFC no longer seek to end invocations but "to receive treatment equal to that of the theists and theistic organizations who are welcome to present opening invocations." (Id. ¶ 3).

28 Plaintiffs do not allege that they were "singled out ... for opprobrium" or that the Board members "indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." Their coercion argument is based only on the requests from Commissioners to stand for the invocation.

29 The parties phrased their stipulated facts regarding the audience being asked to stand in terms of Chairpersons—suggesting that some Chairpersons ask the audience to stand and some do not, as a matter of individual practice or habit. (See ASOF ¶ 67 ("[S]ome Board chairpersons ask the audience to stand for a prayer and the Pledge of Allegiance.")). However, the Court's review of the transcripts and videos of the invocations given from 2010 through May 2016 reveals that during a clear majority of those invocations, a Commissioner asked the audience to stand; individual Commissioners were inconsistent in whether they asked the audience to stand; and every Commissioner asked the audience to stand on at least two occasions, with several doing so much more frequently. (See Pls.' Exs. 30, 144, V2, & V14). There is, however, a noticeable change in the regular practice beginning in 2016: only once (on March 29, 2016) did a Commissioner ask the audience to stand from January 2016 through May 26, 2016—the date of the last transcript and video in the record. (See Pls.' Exs. 30, 144, V2, & V14). This lawsuit was filed in July 2015.

30 Even though Justice Kennedy's opinion on coercion garnered three votes and Justice Thomas's only two, Justice Kennedy's plurality opinion is not necessarily controlling on the coercion issue. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ...,' " Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (alteration in original) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). Judges have disagreed as to whether Justice Kennedy's plurality opinion or Judge Thomas's concurrence constitutes the "narrowest grounds" on the coercion issue. See, e.g., Bormuth v. Cty. of Jackson, 870 F.3d 494, 515 & n. 10 (6th Cir. 2017) (en banc) (finding it unnecessary to resolve the issue but noting division among Sixth Circuit judges about which opinion is narrowest, with at least three judges viewing Judge Thomas's opinion as narrowest), id. at 515 (Rogers, J., concurring) (discussing the issue and concluding that Justice Thomas's opinion is not controlling); Smith v. Jefferson Cty. Bd. of Sch. Comm'rs, 788 F.3d 580, 602 n.9 (6th Cir. 2015) (Batchelder, J., concurring in part) (concluding that Justice's Kennedy's plurality opinion "is controlling on the lower courts, as it is narrower than the accompanying two-justice concurring opinion); Lund v. Rowan County, 837 F.3d 407, 426–28 (4th Cir. 2016) (panel opinion) (mentioning the different rationales of the Town of Greece coercion opinions and then applying Justice Kennedy's opinion without mentioning "narrowest grounds" analysis), rev'd on other grounds on reh'g en banc, 863 F.3d 268 (2017); Fields v. Speaker of the Pa. House of Representatives, 251 F.Supp.3d 772, 790 (M.D. Pa. 2017) (concluding that Justice Kennedy's "three-Justice plurality represents the narrowest grounds to" the coercion ruling); see also Elmbrook Sch. Dist. v. Doe, —— U.S. ——, 134 S.Ct. 2283, 2285, 189 L.Ed.2d 795 (2014) (Scalia, J., dissenting from denial of certiorari

petition) ("It bears emphasis that the original understanding of the kind of coercion that the Establishment Clause condemns was far narrower than the sort of peer-pressure coercion that this Court has recently held unconstitutional ...." (citing Justice Thomas's Town of Greece concurrence)). In the instant case, the parties did not brief the issue of which coercion opinion is controlling. Because this Court reaches the same conclusion under either opinion, it need not determine which opinion constitutes the "narrowest grounds."

31 The County does not defend these claims on any basis other than the "avoidance of an Establishment Clause violation" argument discussed and rejected elsewhere in this Order.

32 The Coleman court noted at the summary judgment stage of the case that the plaintiffs also attempted to argue a free speech claim, but the court did not allow that challenge because plaintiffs had not pleaded a free speech claim. See 104 F. Supp. 3d at 884 & n. 9. The court also found the pleading of the equal protection claim to be "vague" but concluded that it failed even if deemed sufficiently asserted. Id. at 890–91.

33 Plaintiffs do not argue in this claim that they have the right to say whatever they want if given an opportunity to give an invocation, and they do not seek to run afoul of the constraints imposed in Town of Greece on what can be said during an invocation. They instead limit this claim to the "religious test" theory described in Torcaso. It is on this basis—and this basis only—that this Court finds that they prevail.

34 As with their free exercise claim, Plaintiffs do not argue in their free speech claim that they have the right to say whatever they want during an invocation, instead couching this claim in terms of being denied an opportunity to participate based on their beliefs or affiliations. In this sense, their freedom of speech claim has merit.

35 This section provides in full:

> Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Fla. Const. art. I, § 3. Although this section contains a free exercise clause ("There shall be no law ... prohibiting or penalizing the free exercise [of religion]"), Plaintiffs do not include a free exercise claim among their Florida constitutional challenges. Instead, they rely only on the establishment, equal protection, and "no-aid" clauses. (See Doc. 55 at 25–26; Hr'g Tr., Doc. 93, at 4–5).

36 The provision at issue in Southside was Section 6 of the Declaration of Rights of the 1885 Florida Constitution, which provided that "No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution." The constitution was revised in 1966–68. See generally Bush v. Holmes, 886 So. 2d 340, 348–351 (Fla. 1st DCA 2004) (tracing the history of the no-aid clause and noting that the current clause is "much the same as under section 6 of the 1885 Constitution").

37 During oral argument on parties' cross-motions for summary judgment, Plaintiffs' counsel reminded the Court that at mediation the parties reached a settlement agreement as to the amount of damages and that that agreement allows the parties to file it with the Court if Plaintiffs prevail on the merits. (See Hr'g Tr., Doc. 93, at 32–33; see also Mediation Report, Doc. 39, at 2).

End of Document

Disagreed With by Williamson v. Brevard County, M.D.Fla., September 30, 2017

Original Image of 251 F.Supp.3d 772 (PDF)

Fields v. Speaker of the Pennsylvania House of Representatives
United States District Court, M.D. Pennsylvania. April 28, 2017 251 F.Supp.3d 772 (Approx. 31 pages)

United States District Court,
M.D. Pennsylvania.

Brian **FIELDS**, et al., Plaintiffs
v.
SPEAKER OF THE **PENNSYLVANIA** HOUSE OF REPRESENTATIVES, et al., Defendants

CIVIL ACTION NO. 1:16-CV-1764
Signed 04/28/2017

Synopsis

Background: Non-theist belief communities and their leaders filed § 1983 action against state house of representatives' speaker, parliamentarian, and representatives alleging that house practices of refusing to permit them to deliver opening invocations at commencement of legislative sessions and requiring visitors to rise for opening invocations violated Establishment, Free Speech, Free Exercise, and Equal Protection Clauses. Defendants moved to dismiss.

Holdings: The District Court, Conner, Chief Judge, held that:
1 leaders had standing to assert Establishment Clause claims;
2 leaders had standing to assert claims under Free Speech, Free Exercise, and Equal Protection Clauses,
3 communities had organizational standing to seek declaratory and injunctive relief;
4 leaders plausibly pled policy of religious discrimination with regard to house's guest chaplain program sufficient to state claim under Establishment Clause;
5 leaders plausibly pled coercion claim under Establishment Clause, and
6 legislative prayer was subject to review under Establishment Clause alone, not Free Speech, Free Exercise, or Equal Protection Clauses.

Motion granted in part and denied in part.

West Headnotes (21)

Change View

1 **Federal Civil Procedure** In general, injury or interest
Doctrine of standing requires party to have requisite stake in lawsuit's outcome before invoking court's jurisdiction. U.S. Const. art. 3, § 2, cl. 1.

2 **Federal Civil Procedure** In general, injury or interest
Federal Civil Procedure Causation, redressability
At irreducible minimum, Article III requires plaintiffs to establish three elements: injury in fact, causation, and redressability. U.S. Const. art. 3, § 2, cl. 1.

3 **Constitutional Law** Freedom of Religion and Conscience
Standing in Establishment Clause context requires only direct and unwelcome personal contact with alleged establishment of religion. U.S. Const. Amend. 1.

SELECTED TOPICS

Freedom of Speech, Expression, and Press
Rulings of the Supreme Court

Establishment, Organization, and Procedure
Prior Published Panel Decision of Court of Appeals

Declaratory Judgment

Proceedings
Establishment Clause Plaintiff

Secondary Sources

P790 OTHER FEDERAL LAWS

Employer's Guide to Self-Insuring Health Benefits ¶790

Employers that offer health and other welfare benefit plans are subject to numerous federal and state laws. Of all the statutes governing employee welfare benefit plans, the most comprehensive is the E...

P180 FDA AND STATE AND LOCAL AGENCIES

FDA Enforcement Man. ¶180

Forty-six states have adopted the Uniform Food and Drug Law, which was patterned on the Federal Food, Drug and Cosmetic Act (FD&C Act). As a result, state laws generally define adulteration and misbran...

APPENDIX IV: FCC RULINGS AND COURT CASES

Multichannel Video Compliance Guide Broadband Law & Reg. Appendix IV

The 9th U.S. Circuit Court of Appeals ruled that California's Unfair Practices Act's (UPA) ban on predatory pricing does not directly regulate cable rates and is not inconsistent with the 1984 and 1992...

See More Secondary Sources

Briefs

Brief of Colorado Mining Association, Nevada Mining Association, Utah Mining Association, Wyoming Mining Association, and Montana Coal Council Amici Curiae in Support of the Appellants

1987 WL 880344
Richard E. LYNG, Secretary of Agriculture, et al., Appellants, v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION, et al., Respondents
Supreme Court of the United States
July 28, 1987

FN* Counsel of Record FN1. Counsel of record to the parties in the case described above have consented to the filing of this brief. Letters of consent have been filed with the Clerk pursuant to Rule 36...

Brief Amicus Curiae of the National Legal Foundation, in support of the Petitioner

2006 WL 1455403
Alberto R. GONZALEZ, Petitioner, v. Leroy CARHART, et al., Respondents
Supreme Court of the United States
May 22, 2006

4 **Constitutional Law** Freedom of Religion and Conscience
Leaders of non-theist belief communities suffered injury in fact required to establish standing to bring claim that state house of representatives' practice of refusing to permit them to deliver opening invocations at commencement of legislative sessions violated Establishment Clause, where house permitted adherents of conventional, monotheistic religions to deliver invocations in its guest chaplain program, and each plaintiff applied for and was denied opportunity to present invocation, purportedly as direct and exclusive result of antipathy toward non-theism. U.S. Const. Amend. 1.

5 **Constitutional Law** Freedom of Religion and Conscience
Leaders of non-theist belief communities suffered injury in fact required to establish standing to bring claim that state house of representatives' practice of requiring visitors to rise for opening invocations violated Establishment Clause, where two plaintiffs had been ordered to rise during opening invocation. U.S. Const. Amend. 1.

6 **Constitutional Law** Freedom of Religion and Conscience
Constitutional Law Freedom of Speech, Expression, and Press
Constitutional Law Equal Protection
Leaders of non-theist belief communities had standing to bring claims that state house of representatives' practices of refusing to permit them to deliver opening invocations at commencement of legislative sessions and requiring visitors to rise for opening invocations violated Free Speech, Free Exercise, and Equal Protection Clauses. U.S. Const. Amends. 1, 14.

7 **Associations** Actions by or Against Associations
Organization may sue in representative capacity when (1) its members would have standing on their own behalf; (2) interests sought to be defended by lawsuit are germane to organization's purpose; and (3) claims asserted and relief sought do not require individual member participation.

8 **Associations** Actions by or Against Associations
Organizational standing is generally not appropriate in actions for monetary damages.

9 **Declaratory Judgment** Subjects of relief in general
Non-theist belief communities had organizational standing to seek declaratory and injunctive relief in action alleging that state house of representatives' practices of refusing to permit them to deliver opening invocations at commencement of legislative sessions and requiring visitors to rise for opening invocations violated Establishment, Free Speech, Free Exercise, and Equal Protection Clauses, where organizations' claims required no individualized proof beyond testimony as to their members' respective experiences with house's legislative prayer practice. U.S. Const. Amends. 1, 14.

10 **Civil Rights** Nature and elements of civil actions
To state claim under § 1983, plaintiffs must show deprivation of right secured by Constitution and laws of United States by person acting under color of state law. 42 U.S.C.A. § 1983.

11 **Constitutional Law** Legislature
Legislative prayer is permissible under Establishment Clause only so far as it fits within tradition long followed in Congress and state legislatures. U.S. Const. Amend. 1.

2 Cases that cite this headnote

12 **Constitutional Law** Legislature

FN1. The parties have consented to the filing of this brief. Copies of the letter of consent accompany this brief. No counsel for any party has authored this brief in whole or in part. No person or ent...

Brief in Opposition

2010 WL 4902265
NEVADA COMMISSION ON ETHICS, Petitioner, v. Michael A. CARRIGAN, Respondent.
Supreme Court of the United States.
Nov. 29, 2010.

The opinion of the Nevada Supreme Court (Pet. App. 1a-39a) is reported at 236 P.3d 616. The opinion of the First Judicial District Court of Nevada (Pet. App. 40a-95a) is not reported. The administrativ...

See More Briefs

Trial Court Documents

Ambrose v. Township of Robinson, PA

2000 WL 35904886
Terry L. AMBROSE, Plaintiff, v. TOWNSHIP OF ROBINSON, PA, Defendant.
United States District Court, W.D. Pennsylvania.
Oct. 11, 2000.

AMBROSE, District Judge. Pending is Defendant's Motion for Summary Judgment as to Plaintiff's Fourteenth Amendment due process claims and his First Amendment claims pursuant to 42 U.S.C. §1983, as well...

In re Trico Marine Services, Inc.

2010 WL 8033207
In re: TRICO MARINE SERVICES, INC., et al., Debtors.
United States Bankruptcy Court, D. Delaware.
Aug. 25, 2010.

FN1. The Debtors are the following entities (followed by the last four digits of their tax identification numbers): Trico Marine Services, Inc. (2405); Trico Marine Assets, Inc. (2404); Trico Marine Op...

USA, v. MAALI, et al.

2005 WL 6073954
USA, v. MAALI, et al.
United States District Court, M.D. Florida.
Sep. 08, 2005.

The defendant was found guilty on Counts 54, 56, 57, 58, 59-71 of the Third Superseding Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses: The de...

See More Trial Court Documents

Sectarian legislative prayer is permissible under Establishment Clause absent pattern of denigration, proselytization, or impermissible government purpose. U.S. Const. Amend. 1.

2 Cases that cite this headnote

13 **Constitutional Law** Legislature
Government may not intentionally discriminate against religious minorities when selecting guest chaplains to provide legislative prayer. U.S. Const. Amend. 1.

14 **Constitutional Law** Legislature
States Sessions and meetings
Non-theist belief communities' leaders plausibly pled policy of religious discrimination sufficient to state claim under Establishment Clause by alleging that they were members of or represented minority religions, that state house of representatives opened its chamber to guest chaplains of more conventional faiths deemed suitable by its speaker, and that they were purposefully excluded from house's guest chaplain program on basis of their beliefs. U.S. Const. Amend. 1.

15 **Courts** Number of judges concurring in opinion, and opinion by divided court
In determining legal standard to be drawn from Supreme Court decision, courts may combine votes of dissenting Justices with plurality and concurring votes to establish majority consensus, and when no one rationale enjoys majority support, courts adopt view of members concurring in judgment on narrowest grounds.

16 **Courts** Number of judges concurring in opinion, and opinion by divided court
In determining legal standard to be drawn from Supreme Court decision, narrowest grounds rubric applies only when one opinion can be meaningfully regarded as narrower than another.

17 **Courts** Number of judges concurring in opinion, and opinion by divided court
If no opinion in case decided by Supreme Court qualifies as majority rule, lower courts are not bound by any particular standard.

18 **Constitutional Law** Inhibiting, interfering with, or coercing religion
Constitutional Law Particular Issues and Applications
Coercion to comply with dictates of one religion, in violation of Establishment Clause, is real likelihood when government itself (1) directs public participation in prayers, (2) critiques dissenters, or (3) retaliates in its decisionmaking against those who choose not to participate. U.S. Const. Amend. 1.

19 **Constitutional Law** Legislature
States Sessions and meetings
Members of non-theist belief communities plausibly pled coercion claim under Establishment Clause by alleging that, while attending daily sessions of state house of representatives, they refused to rise for opening invocations, and that speaker publicly singled them out for opting to remain seated and directed legislative security officer to "pressure" them to stand. U.S. Const. Amend. 1.

1 Case that cites this headnote

20 **Constitutional Law** Government-sponsored speech
Government can say what it wishes subject only to Establishment Clause and will of electorate and political process. U.S. Const. Amend. 1.

Constitutional Law Legislature

21 Constitutional Law Government Meetings and Proceedings
Constitutional Law Other particular issues and applications
Legislative prayer is subject to review under Establishment Clause alone, not Free Speech, Free Exercise, or Equal Protection Clauses. U.S. Const. Amend. 1.

1 Case that cites this headnote

Attorneys and Law Firms

*775 Alex J. Luchenitser, Andrew L. Nellis, Carmen N. Green, Richard B. Katskee, Americans United for Separation of Church and State, Washington, DC, Allen C. Warshaw, Mechanicsburg, PA, Eric O. Husby, Law Office of Eric O. Husby, Esq., Tampa, FL, for Plaintiffs

Karl S. Myers, Mark E. Chopko, Spencer R. Short, Johnathan F. Bloom, Stradley, Ronon, Stevens & Young, LLP, Philadelphia, PA, for Defendants

MEMORANDUM

Chief Judge Conner

The Pennsylvania House of Representatives commences legislative sessions with an opening invocation delivered by either a member of the House or a guest chaplain. Pursuant to an internal House rule, a guest chaplain must be "a member of a regularly established church or religious organization." [1] The Speaker of the House interprets this rule to exclude "non-adherents" and "nonbelievers" from the guest chaplain program. [2] Plaintiffs are atheist, agnostic, Secular Humanist, and freethinking individuals who have been denied the opportunity to deliver an opening invocation due to the nontheistic nature of their beliefs. Plaintiffs challenge the exclusionary House policy under the First and Fourteenth Amendments to the United States Constitution.

I. Background

Brian Fields, Paul Tucker, Deana Weaver, Scott Rhoades, and Joshua Neiderhiser are nontheists who actively adhere to and practice their respective beliefs. [3] As employed herein, our nontheist designation includes atheists, agnostics, Secular Humanists, freethinkers, and other persons who do not believe in a deity. [4] Many features of plaintiffs' respective ideologies parallel the practice of traditional theistic religions. Plaintiffs assemble to explore *776 and discuss their beliefs, study texts and films anent their belief systems, observe annual celebrations, and coordinate service activities and community outreach. [5]

Plaintiffs are leaders in their belief communities. **Fields** is president of **Pennsylvania** Nonbelievers. Tucker is founder and chief organizer of Dillsburg Area Freethinkers, and Rhoades is founder and president of Lancaster Freethought Society. [6] These nontheist organizations and their leaders represent the functional equivalent of traditional religious congregations in the lives of their members. [7] For example, Rhoades and Neiderhiser are ordained Humanist Celebrants who regularly perform wedding ceremonies and memorial services. [8]

Each of the individual plaintiffs would like to deliver an invocation before the House. [9] Plaintiffs intend to offer uplifting and inspirational messages—to champion such unobjectionable themes as equality, unity, and common decency, and to demonstrate that nontheists can offer meaningful commentary on morality and reflections valuable to public governance. [10]

A. The Opening Invocation

The House convenes daily legislative sessions which are open to the public and streamed live on the House website. [11] Members of the public attending the sessions observe proceedings from the visitor gallery located in a balcony at the rear of the House chamber. [12] Fields and Rhoades have attended daily sessions in the past and intend to do so in the future. [13]

Before the opening invocation, the Speaker directs members of the House and visitors in the gallery to rise. [14] Members of the House and most visitors oblige, [15] but Fields and Rhoades apparently prefer to remain seated. [16] On one occasion, the Speaker publicly singled out Fields and Rhoades and ordered them to rise for the invocation. [17] When they refused, the Speaker directed a legislative security officer to "pressure" them to stand. [18] Plaintiffs believe that the Speaker's direction to rise coerces them (and others) to recognize the validity of religious beliefs with which they disagree. [19]

B. The Guest Chaplain Policy

House members may nominate guest chaplains by submitting a request to the Speaker's office.[20] The request must identify the proposed chaplain's name, house of worship or affiliated organization, and contact information.[21] The Speaker reviews and selects guest chaplains from among *777 the submitted nominees.[22] The Speaker then sends a form letter to selected chaplains which asks them to "craft a prayer that is respectful of all religious beliefs."[23] The Speaker does not review the content of an opening invocation before it is delivered.[24] Guest chaplains receive a commemorative gavel and a photograph with the House member who nominated them.[25]

Between January 8, 2008 and February 9, 2016, the House convened 678 daily sessions and began 575 of them with an invocation.[26] Members of the House delivered 310 of those invocations, and guest chaplains delivered the remaining 265 invocations.[27] Of the guest chaplains, 238 were Christian clergy, twenty-three were Jewish rabbis, and three were of the Muslim faith.[28] Only one guest chaplain was not "recognizably affiliated" with a particular religion, but that person nonetheless delivered a monotheistic message.[29] According to the complaint, no invocation was free of theistic content, and none had content associated with faiths other than Christianity, Judaism, or Islam.[30]

On August 12, 2014, Weaver emailed a request to her House representative on behalf of Dillsburg Area Freethinkers seeking to deliver an invocation.[31] Two weeks later, Carl Silverman, a member of Pennsylvania Nonbelievers, wrote his House representative, requesting that either he or Fields be permitted to deliver an invocation on behalf of their organization.[32] The Speaker denied Silverman's request by letter dated September 25, 2014, stating that the House is not "required to allow non-adherents or nonbelievers the opportunity to serve as chaplains."[33] Weaver's representative forwarded the Silverman response to her via email on September 26, 2014.[34] Thereafter, the House amended its General Operating Rules to include House Rule 17.[35] Per the new rule, "The Chaplain offering the prayer shall be a member of a regularly established church or religious organization or shall be a member of the House of Representatives."[36]

On January 9, 2015, plaintiffs' counsel wrote to the Speaker and House Parliamentarian requesting that a representative of Pennsylvania Nonbelievers be permitted to serve as guest chaplain.[37] In a response dated January 15, 2015, the Parliamentarian denied Pennsylvania Nonbelievers' request, citing House Rule 17.[38] On August 6, 2015, plaintiffs' counsel sent a final letter to all defendants requesting that Fields, Tucker, Weaver, Rhoades, or Neiderhiser, or a representative of their organizations, be given an opportunity to deliver *778 an invocation.[39] By separate letter of the same date, counsel asked the Speaker and Parliamentarian to cease directing House visitors to stand for invocations.[40] The Parliamentarian denied plaintiffs' guest chaplaincy request by letter dated September 9, 2015.[41] Plaintiffs received no response to their letter concerning the directive to rise for opening invocations.[42]

C. Procedural History

Plaintiffs commenced this action by filing a complaint on August 25, 2016.[43] Plaintiffs name as defendants the Speaker of the House, the Parliamentarian of the House, and the Representatives of Pennsylvania House Districts 92, 95, 97, 193, and 196.[44] Defendants are named in their official capacities alone. Plaintiffs claim that the House policy of preferring theistic over nontheistic religions contravenes the First and Fourteenth Amendments. Plaintiffs request declaratory judgment as to the constitutionality of House Rule 17 (as interpreted by the Speaker) and the House practices of favoring theists to nontheists and directing visitors to rise for opening invocations.[45] Plaintiffs seek injunctive relief requiring the House to permit plaintiffs to deliver nontheistic invocations, prohibiting defendants from discriminating against nontheistic speakers, and enjoining the Speaker from directing visitors to rise for invocations.[46]

Defendants moved to dismiss plaintiffs' complaint *in extenso*,[47] and the parties thoroughly briefed defendants' motion.[48] The court convened oral argument on February 22, 2017,[49] and the motion is ripe for disposition.

II. Legal Standards

Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a claim for lack of subject matter jurisdiction.[50] Such jurisdictional challenges take of one two forms: (1) parties may levy a "factual" attack, arguing that one or more of the pleading's factual allegations are untrue, removing the action from the court's jurisdictional ken; or (2) they may assert a "facial" challenge, which assumes the veracity of the complaint's allegations but nonetheless

argues that a claim is not within the court's jurisdiction. [21] In either instance, it is the plaintiff's burden to establish jurisdiction. [22]

*779 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of complaints that fail to state a claim upon which relief may be granted. [23] When ruling on a motion to dismiss under Rule 12(b)(6), the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." [24] In addition to reviewing the facts contained in the complaint, the court may also consider "matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." [25]

Federal notice and pleading rules require the complaint to provide "the defendant fair notice of what the ... claim is and the grounds upon which it rests." [26] To test the sufficiency of the complaint, the court conducts a three-step inquiry. [27] In the first step, "the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' " [28] Next, the factual and legal elements of a claim must be separated; well-pleaded facts must be accepted as true, while mere legal conclusions may be disregarded. [29] Once the court isolates the well-pleaded factual allegations, it must determine whether they are sufficient to show a "plausible claim for relief." [30] A claim is facially plausible when the plaintiff pleads facts "that allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [31]

Courts should grant leave to amend before dismissing a curable pleading in civil rights actions. [32] Courts need not grant leave to amend *sua sponte* in dismissing non-civil rights claims pursuant to Rule 12(b)(6), [33] but leave is broadly encouraged "when justice so requires." [34]

III. Discussion

Plaintiffs adjure that defendants' prescript for theistic religions offends a quartet of constitutional provisions. *first*, the Establishment Clause, by favoring theism to nontheism and excessively entangling the House in religious judgment, and coercing *780 House visitors to participate in theistic prayer; *second*, the Free Exercise Clause, by requiring nontheists to adopt or profess theistic beliefs and proscribing nontheistic beliefs; *third*, the Free Speech Clause, by denying nontheists the opportunity to participate in government activities based on the perceived nonconformity of their beliefs, and censoring invocations to prohibit reflection of those beliefs; and *fourth*, the Equal Protection Clause, by permitting theists but not nontheists to serve as guest chaplains.

Defendants' motion tests the justiciability and the merits of all four claims. Defendants oppugn plaintiffs' standing under the Establishment Clause for failure to plead cognizable harm. Defendants contest plaintiffs' standing under the Free Speech, Free Exercise, and Equal Protection Clauses for want of a legally protected interest. Assuming standing *arguendo*, defendants attack the merits of plaintiffs' Establishment Clause claim, asserting that the House invocation policies embodied in Rule 17 find support in Supreme Court precedent. Defendants also remonstrate that the Free Speech, Free Exercise, and Equal Protection Clauses do not apply to government speech. We address each argument *seriatim*.

A. Justiciability

1 2 Article III of the United States Constitution limits the scope of the federal judicial power to those cases involving actual "cases" and "controversies." [35] The doctrine of "standing" safeguards this essential limitation by requiring a party to have a "requisite stake in the outcome" of the lawsuit before invoking the court's jurisdiction. [36] At an "irreducible ... minimum," Article III requires plaintiffs to establish three elements: injury in fact, causation, and redressability. [37]

1. *Standing of the Individual Plaintiffs*

3 The Third Circuit has held that standing in the Establishment Clause context "requires only direct and unwelcome personal contact with the alleged establishment of religion." [38] This is not to say that every fleeting contact with state-established religious preference is justiciable. A plaintiff must plead "a concrete grievance that is particularized to him." [39] Generalized, attenuated disagreements will not suffice. [40]

The Supreme Court, recognizing the abstract nature of religious injury, has articulated three distinct theories of Establishment Clause standing: (1) direct harm standing; (2) denied benefit standing; and *781 (3) taxpayer standing. [41] Plaintiffs do not invoke taxpayer standing. [42] Nor do plaintiffs suggest they have been denied a benefit as a result of

defendants' interpretation of House Rule 17.[73] Hence, we examine plaintiffs' standing under a "direct harm" theory.

4 Defendants assert broadly that plaintiffs do not allege sufficient "personal contact" with a state-established religious preference.[74] At the outset, defendants posit that only Fields and Rhoades have been exposed to theistic legislative prayer because only Fields and Rhoades have attended House daily sessions.[75] This argument misapprehends plaintiffs' harm: plaintiffs do not claim injury from experiencing theistic prayer, but from the House's refusal to include nontheistic messages in its guest chaplain program.[76] All plaintiffs have adequately pled exposure to the alleged establishment of religion.

Defendants contend that plaintiffs' exposure is not sufficiently direct or immediate to confer standing.[77] We flatly reject this contention. Plaintiffs' harm is hardly "attenuated." To the contrary, each plaintiff applied for and was denied the opportunity to present an invocation—an opportunity provided to adherents of conventional, monotheistic religions.[78] According to the complaint, the House denied plaintiffs' requests as a direct and exclusive result of antipathy toward nontheism.[79] Notably, the only other federal court to address this question held unequivocally that "exclusion from the list of those eligible to give an invocation" is injury sufficient to satisfy Article III.[80] We agree. Plaintiffs allege cognizable injury in fact for purposes of the Establishment Clause.

5 With respect to plaintiffs' coercion claims, defendants also dispute redressability. Defendants concede that Fields' and Rhoades' "glancing exposure to religious expression" at House sessions "might in some instances suffice to confer standing."[81] They rejoin that even if the court orders the House to invite nontheist chaplains, plaintiffs will continue to experience *782 theistic prayer in the House chamber.[82] Defendants again misapprehend the nature of the alleged constitutional injury and requested relief—plaintiffs do not seek to eliminate all theistic content; they challenge the practice of permitting *only* theistic content.[83] A more inclusive policy would directly redress plaintiffs' alleged injury.

Defendants also contend that plaintiffs cannot establish injury under the Free Speech, Free Exercise, and Equal Protection Clauses because legislative prayer is circumscribed by the Establishment Clause alone.[84] Defendants are correct that courts generally hold legislative prayer to be "government speech"[85] which is not subject to review under the Free Speech, Free Exercise, and Equal Protection Clauses.[86] The flaw in defendants' position is that it erroneously conflates justiciability with merit. No case that defendants cite—and none that research has unveiled—dismisses a legislative prayer claim brought pursuant to the Free Speech, Free Exercise, and Equal Protection Clauses on *standing* grounds.[87] Defendants conceded as much at oral argument.[88] *Per contra*, several courts have expressly resolved that plaintiffs *do* have standing to sue when excluded from government speech.[89]

6 Defendants' position is in direct tension with recent Third Circuit precedent holding that "[t]he indignity of being singled out [by the government] ... on the basis of one's religious calling ... is enough to get in the courthouse door."[90] It is undermined further by the fundamental principle that standing inquiries focus on parties and not on issues.[91] We are satisfied that plaintiffs have standing under the Free Speech, Free Exercise, and Equal Protection Clauses, and we will proceed to a merits analysis on these claims.

2. *Standing of the Organizational Plaintiffs*

7 Defendants contest organizational *783 standing in a footnote.[92] An organization may establish standing in two ways: on its own behalf and on behalf of its members. Courts measure an organization's standing to sue in its own right against the same rubric outlined *supra* for individual standing.[93] An organization may also sue in a representative capacity when (1) its members would have standing on their own behalf; (2) the interests sought to be defended by the lawsuit "are germane to the organization's purpose"; and (3) the claims asserted and relief sought do not require individual member participation.[94] The organizational plaintiffs *sub judice* articulate no basis for individual standing—their claims are purely derivative. The court tests the organizations' standing in their representative capacities alone.

8 9 Organizational standing is generally not appropriate in actions for monetary damages.[95] In such cases, proof tends to be largely individualized and nuanced as to each member, rendering representative standing impracticable.[96] But "*some* individual participation" does not violate this principle.[97] The Supreme Court and Third Circuit have squarely held that requests for declaratory and injunctive relief generally "do not require participation by individual association members."[98] Plaintiffs assert uniform and systemic harms, and they seek only declaratory and injunctive relief. The organizational plaintiffs'

claims require no individualized proof beyond testimony as to their members' respective experiences with the House's legislative prayer practice. We conclude that Pennsylvania Nonbelievers, Dillsburg Area Freethinkers, and Lancaster Freethought Society have properly asserted organizational standing.[99]

B. Constitutional Claims

10 Section 1983 of Title 42 of the United States Code creates a private cause of action to redress constitutional wrongs committed by state officials.[100] The statute is not a source of substantive rights, but serves as a mechanism for vindicating rights otherwise protected by federal law.[101] To state a claim under Section 1983, *784 plaintiffs must show a deprivation of a "right secured by the Constitution and the laws of the United States ... by a person acting under color of state law."[102] There is no dispute that the House defendants are state actors within the purview of Section 1983. We must thus determine whether the House legislative prayer practice deprives plaintiffs of rights secured by the United States Constitution. We begin with the Establishment Clause.

1. *Establishment Clause*

The First Amendment prohibits the government from making any law "respecting an establishment of religion."[103] Courts ordinarily apply one of three tests to evaluate government practices under the Establishment Clause: the coercion test, the endorsement test, and the Lemon test.[104] Legislative prayer, however, occupies *sui generis* status in Supreme Court jurisprudence and our nation's history. In its only two cases on the subject, Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), and Town of Greece v. Galloway, ---- U.S. ----, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014), the Court upheld state and municipal prayer practices without resort to traditional Establishment Clause principles.

In its first legislative prayer case, Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), the Court examined a legislature's practice of opening sessions with a prayer delivered by a chaplain. The Nebraska state legislature appointed the same Presbyterian minister to serve as chaplain for sixteen years.[105] The chaplain was paid a monthly salary from legislative funds.[106] A member of the legislature sued, challenging the practice as an unlawful establishment of religion.[107] The district court upheld the chaplaincy, but enjoined payment of a salary from public coffers.[108] The Eighth Circuit Court of Appeals affirmed in part and reversed in part, applying the Lemon test to hold that the prayer practice *in toto* violated the Establishment Clause.[109]

The Supreme Court reversed. Writing for the majority, Justice Burger chronicled the ubiquity of legislative prayer in the annals of our nation.[110] He noted that the First Congress set about appointing and compensating legislative chaplains the very week it drafted the Bill of Rights, suggesting the Framers did not perceive the practice as violative of the First Amendment.[111] The Court pronounced that an "unambiguous and unbroken history of more than 200 years" of legislative prayer had woven the ritual into the very "fabric of our society." *785[112] The Court concluded that "[t]o invoke Divine guidance" before engaging in the important work of public governance is not establishment of religion but "a tolerable acknowledgement of beliefs widely held" among citizens.[113]

Turning to the particulars of Nebraska's practice, the Court found that no aspect transcended the bounds of permissible legislative prayer. Absent proof of an "impermissible motive," the 16–year tenure of a minister representing a single faith did not violate the Establishment Clause.[114] Nor was the Court troubled that public monies funded the chaplaincy, citing again the First Congress.[115] As for content, the Court jettisoned concerns with the principally Judeo–Christian nature of the messages, resolving that content is of no moment when, as in Nebraska, "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."[116]

The Supreme Court subsequently explored Marsh in County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), a case concerning public-sponsored holiday displays. The deeply-divided Court resolved that government display of a crèche, a uniquely Christian symbol, contravened the Establishment Clause.[117] Tasked by Justice Kennedy's dissent to square its result with Marsh, the majority highlighted the content of the Nebraska chaplain's prayers, contrasting his general religious references with the "specifically Christian symbol" of a crèche.[118] Following County of Allegheny, some courts construed Marsh to authorize only nonsectarian legislative prayer.[119]

Thirty-one years after Marsh, the Court revisited legislative prayer in Town of Greece v. Galloway, 572 U.S. ——, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). In 1999, the town of Greece, New York, opened its monthly meetings with invocations delivered by local clergy.[120] A clerical employee would contact congregations listed in a local directory until she found a willing clergyperson.[121] Town leaders described their policy as welcoming ministers and laypersons "of any persuasion," including atheists.[122] In practice, nearly all invocations given from 1999 to 2007 were Christian in nature, reflecting the principal religious disposition of the town's population.[123]

Susan Galloway and Linda Stephens attended the monthly meetings and objected to the invocation practice on religious and philosophical grounds.[124] The town thereafter invited a Jewish layman, the chairman of a local Baha'i temple, and a Wiccan ***786*** priestess to serve as chaplains, but soon reverted to Christian themes.[125] Galloway and Stephens filed suit, asserting that the town committed a twofold violation of the Establishment Clause, by: (1) sponsoring sectarian as opposed to "inclusive and ecumenical" messages and (2) fostering a coercive environment where attendees felt pressured to participate in religious observance with which they disagreed.[126] The district court rejected both claims.[127] The Court of Appeals for the Second Circuit reversed, holding that a "steady drumbeat" of exclusively Christian content effectively affiliated the town with a single religion.[128] The town of Greece appealed, and the Supreme Court granted *certiorari*.[129]

In an opinion authored by Justice Kennedy, the Court addressed plaintiffs' claims in two parts, with the first (Part II–A) garnering majority support. Justice Kennedy, joined by the Chief Justice as well as Justices Thomas, Alito, and Scalia, held that the Constitution tolerates even sectarian legislative prayer.[130] According to the majority, the Marsh result attained not because the chaplain's messages were nonsectarian, but because such prayer practices had for centuries existed in quiet equipoise with the First Amendment.[131] The Court framed its inquiry as "whether the prayer practice ... fits within the tradition long followed in Congress and the state legislatures," and held that a requirement of ecumenical or nonsectarian prayer is inconsistent with that tradition.[132] In closing, the majority perceptibly amplified Marsh, observing that a given prayer practice will not likely violate the Constitution unless the prayers reflect a *pattern* of denigrating or proselytizing content or an impermissible purpose.[133] The Court forewarned, however, that history and tradition cannot save an otherwise unconstitutional practice.[134]

The majority then addressed the Second Circuit's finding that the town violated the Establishment Clause by inviting guest chaplains of "predominantly Christian" faiths.[135] The Court held that, "[s]o long as the town maintains a policy of nondiscrimination," the First Amendment does not require it to achieve religious stasis.[136] The Court found no evidence of an "aversion or bias" toward minority faiths by the town of Greece; contrarily, the town undertook reasonable efforts to identify all prospective guest chaplains, and its policy welcomed ministers and laity of all creeds.[137] In his concurring opinion, Justice Alito suggested that the outcome should differ when omission of a particular religion is "intentional" rather than "at worst careless."[138]

787 Part II–B of the opinion was joined only by the Chief Justice and Justice Alito. Justice Kennedy began with the "elemental" principle that "government may not coerce its citizens 'to support or participate in any religion or its exercise.' "[139] The three-Justice plurality opined that claims of coercion must be measured in view of both setting and audience.[140] As for setting, a "brief, solemn and respectful prayer" at the start of a meeting is consistent with "heritage and tradition" familiar to the public.[141] Attendees are presumed to understand that the purpose of the exercise is not to proselytize but to "lend gravity" to the proceedings.[142] Concerning audience, the plurality found that the chaplain's messages were intended to "accommodate the spiritual needs of lawmakers" rather than preach to the visiting public.[143] These considerations together weighed against a finding of coercion.[144]

In a concurring opinion, Justice Thomas took exception to the plurality's coercion analysis.[145] In Part I of his opinion, Justice Thomas renewed his unique view that the Establishment Clause ought not apply to state governments or to municipalities like the town of Greece.[146] In Part II, Justice Thomas, joined by Justice Scalia, submitted that claims of religious coercion must be viewed through the prism of that which our Founders sought to escape: "religious orthodoxy ... by force of law and threat of penalty."[147] Justice Thomas proposed that only claims of actual *legal* coercion violate the Establishment Clause.[148] Claims of subtle pressure, like requests to rise for prayer, would not offend this heightened standard.[149]

Against this framework, we consider plaintiffs' Establishment Clause challenges to (*a*) the House's guest chaplain policy and (*b*) the House's opening invocation practice.

a. Guest Chaplain Policy

Defendants maintain that legislative prayer is presumed constitutional unless employed to denigrate or proselytize. According to defendants, plaintiffs' failure to allege an instance (much less a pattern) of proselytization or denigration is fatal to their Establishment Clause claim.[149] Defendants further contend that Marsh and Town of Greece cloak legislators with discretion to choose what type of prayer they would like to hear and from whom they would like to hear it.[150] Defendants posit that purposeful exclusion of nontheists is consistent with the view of legislative prayer endorsed in Marsh and Town of Greece.[151] Thus, according to defendants, it is *'788* entirely proper for the House to welcome only those religions which embrace a higher power and only those chaplains who will "appeal to the Almighty."[152]

Plaintiffs rejoin that they claim not disparagement or proselytization but discrimination, *viz* , a practice by the House of preferring theistic faiths to the total and deliberate exclusion of nontheists.[153] Plaintiffs emphasize that they do not seek to suppress God-oriented messages from the House floor, but to include their own messages among them.[154]

That the parties diverge on the contours of our inquiry is unsurprising. The gravamen of the Supreme Court's legislative prayer decisions is clear: legislative prayer of even a sectarian genre survives judicial scrutiny unless it results from an impermissible motive. Yet there is much uncertainty in the wake. The majorities in Marsh and Town of Greece established what does *not* violate the Establishment Clause without drawing a bright line. Each case plainly raised the constitutional bar—sanctioning first legislative prayer and then sectarian prayer, and extending those permissions from the state house to the town hall—but it is unclear exactly how high.

11 12 13 Plaintiffs' claims, however, do not necessitate a constitutional sea change. Rather, their claims present a novel set of facts to test the established principles of Marsh and Town of Greece. These principles are threefold. *First*, and most fundamentally, legislative prayer is permissible only so far as it "fits within the tradition long followed in Congress and the state legislatures."[155] This axiom informs any analysis under the Court's constituent holdings—that, *second*, sectarian legislative prayer is permissible absent a pattern of denigration, proselytization, or impermissible government purpose,[156] and *third*, government may not intentionally discriminate against religious minorities when selecting guest chaplains.[157] Plaintiffs claim that defendants violate the third of these precepts by maintaining a policy of discrimination against nontheists.

Defendants do not dispute that the House's implementation of Rule 17 prohibits nontheists from serving as chaplains.[158] Indeed, defendants' double down on that policy, asserting that it is the House's "prerogative" to determine the content of opening invocations.[159] Defendants contend the Town of Greece Court's directive of nondiscrimination is case specific because the town had endeavored to include a variety of creeds.[160] That governments *may* choose to invite nontheist chaplains, defendants suggest, does not mean that all governments *must* do so.[161]

But the Town of Greece Court did not link its nondiscrimination mandate to the language of the town's policy. *Per contra*, Justice Kennedy tethered the requirement to the Constitution itself: "So long as the town maintains a policy of nondiscrimination, the *Constitution* does not require it *'789* to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing."[162] He further signaled that a policy which "reflect[s] an aversion or bias ... against minority faiths" may violate this principle.[163] The rule is a logical corollary to the settled edict that government may not "prescrib[e] prayers" with an aim to "promote a preferred system of belief or code of moral behavior."[164]

14 We reject the assertion that defendants may discriminate on the basis of religion simply because their internal operating rules do not proscribe it. Town of Greece installs a new metric in the legislative prayer analysis: when a legislature opens its door to guest chaplains and other prayer givers, it may not purposefully discriminate among them on the basis of religion.[165] The complaint articulates a plausible violation of this tenet. Plaintiffs allege that they are members of (or represent) minority religions, and that they have been purposefully excluded from the House's guest chaplain program on the basis of their beliefs. They further allege that the House regularly opens its chamber to guest chaplains of more conventional faiths deemed suitable by the Speaker. Plaintiffs plead a policy of religious discrimination sufficient to state a First Amendment claim.

Whether history and tradition sanctify the House's line of demarcation between theistic and nontheistic chaplains is a factual issue for a later day. Establishment Clause issues are inherently fact-intensive, and we must resist the academic intrigue of casting the salient inquiry too narrowly at this juncture. To the extent the parties' arguments evoke more nuanced constitutional questions—*e.g.*, whether plaintiffs practice "religion" and are capable of "praying," or whether tradition dictates that legislative prayer address a "higher power"—any such determination demands, and deserves, a fully developed record. As it stands, plaintiffs' challenge to the House's legislative prayer policy survives Rule 12 scrutiny.

b. Opening Invocation Practices

15 16 17 Resolution of plaintiffs' coercion claim requires us to identify the prevailing standard from the Court's split opinion on the constitutionality of a request to rise for an invocation in Town of Greece. Our goal in parsing a fragmented decision of the Court is to distill "a single legal standard" that "produce[s] results with which a majority of the Justices ... would agree."[167] Courts may combine ***790** votes of dissenting Justices with plurality and concurring votes to establish a majority consensus.[168] When no one rationale enjoys majority support, courts adopt the view of the members concurring in the judgment on the "narrowest grounds."[169] Certain cases defy orderly classification; thus, the narrowest grounds rubric applies only when "one opinion can be meaningfully regarded as 'narrower' than another."[170] If no opinion qualifies as the majority rule, lower courts are not bound by any particular standard.[171]

The Town of Greece Court adjudged that a request to rise for an invocation did not amount to unconstitutional coercion under the Establishment Clause. The three-Justice plurality represents the narrowest grounds to that judgment.[172] It developed a standard which tests the facts of each coercion claim against the barometer of historical practices.[173] Justice Thomas, on the other hand, would wholly rescript our Establishment Clause benchmarks.[174] In other words, while the plurality rejected the particular coercion claim before it as factually deficient, Justice Thomas would reject nearly *all* coercion claims as *legally* deficient. We adopt Justice Kennedy's plurality opinion as the narrowest grounds on coercion.

18 The Town of Greece plurality tasks courts to review the contested practice to assess whether it is consonant with the tradition upheld in Marsh or whether coercion is indeed likely.[175] According to the plurality, coercion is a real likelihood when the government itself (1) directs public participation in prayers, (2) critiques dissenters, or (3) retaliates in its decisionmaking against those who choose not to participate.[176] All Justices agreed that the coercion analysis is "fact-sensitive."[177]

19 Plaintiffs Fields and Rhoades state a plausible coercion claim against this framework. At least two district courts have held that a public official's directive to stand and pray is materially distinct from the requests upheld in Town of Greece,[178] which were rendered not by the town board but guest chaplains "accustomed to directing their congregations in ***791** this way."[179] Fields and Rhoades each attend House daily sessions, and both have been exposed to the Speaker's directive to rise for opening invocations.[180] Moreover, both were subjected to reproach and humiliation on at least one occasion when the Speaker publicly singled them out for opting to remain seated.[181] Defendants' rejoinder that plaintiffs may choose not to participate rings hollow against a historical example of public censure for electing to do so.[182]

Defendants also adjure that the plurality opinion in Town of Greece must be limited to its circumstance, *viz.*, the intimate and interactive setting of a local government meeting.[183] Specifically, they aver that the increased risk of coercion motivating the plurality's approach does not attend prayer in a state house, where the public is isolated from the deliberative body and its activities.[184] Whether the state legislative chamber is distinct enough from town board meetings to make a constitutional difference cannot be determined without a factual record.[185] We will deny defendants' motion to dismiss Fields' and Rhoades' coercion claims.

One additional matter warrants discussion. It is not entirely clear from the complaint whether all plaintiffs join in the coercion claim. According to the *allegata*, only Fields and Rhoades have been exposed to coercive legislative prayer practices.[186] The complaint does not indicate that any other plaintiff attended a House daily session, and counsel did not offer additional facts when asked at oral argument to detail the alleged coercion.[187] This absence of exposure is fatal to any coercion claim. To the extent any plaintiff other than Rhoades or Fields joins the coercion component of Count I, their claim must be dismissed. Because plaintiffs ostensibly concede that Rhoades and Fields alone attended daily sessions, leave to amend is unnecessary.[188]

3. *Free Speech, Free Exercise, and Equal Protection Clauses*

20 As noted *ante*, courts generally regard legislative prayer as "government speech."[189] Courts have thus declined to entertain legislative prayer challenges cast under the Free Speech, Free Exercise, and Equal Protection Clauses.[190] Within the realm of "government speech," the law is resolute that government can "say what it wishes" subject only to the Establishment Clause and the will of "the electorate and the political process."[191] On this basis, **792* defendants ask the court to dismiss plaintiffs' legislative prayer claims pursuant to the Free Speech, Free Exercise, and Equal Protection Clauses.

Plaintiffs reply that case law construing legislative prayer as government speech either predates Town of Greece or fails to account for it.[192] They theorize that Town of Greece "tightly circumscribes" the permissible content of legislative prayer such that the practice has lost its status as "government speech."[193] As we conclude elsewhere in this opinion, Town of Greece does not reduce the standard for legislative prayer cases—*a contrario*, the decision expands permissible content by sanctioning even sectarian religious messages. History and precedent bestow special status upon legislative prayer, and neither Marsh nor Town of Greece diminish that status.

Nor do we agree with plaintiffs' assertion that legislative prayer is "hybrid speech" subject to lesser scrutiny. Plaintiffs cite a Fourth Circuit decision, W.V. Association of Club Owners & Fraternal Services v. Musgrave, 553 F.3d 292 (4th Cir. 2009), for its proposition that hybrid speech "has aspects of both private speech and government speech."[194] Not only is Musgrave factually distinct (concerning state-licensed video lottery machines placed in privately-owned bars), it is authored by the same jurist who concluded three years earlier that citizen-led legislative invocations are "government speech 'subject *only* to the proscriptions of the Establishment Clause.'"[195]

21 We join the unanimous consensus of courts before us to conclude that legislative prayer is subject to review under the Establishment Clause alone. Hence, we will grant defendants' motion to dismiss plaintiffs' Free Speech, Free Exercise, and Equal Protection claims.

IV. Conclusion

The court will grant in part and deny in part defendants' motion to dismiss, as stated more fully herein. An appropriate order shall issue.

All Citations

251 F.Supp.3d 772

Footnotes

1 GEN. OPERATING RULES OF THE PA. HOUSE OF REP. R. 17.

2 Doc. 1 ¶ 191.

3 Doc. 1 ¶¶ 10, 30, 41, 50, 66.

4 Humanism is "a progressive philosophy of life that, without theism or other supernatural beliefs, affirms [the] ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity." *What is Humanism*, AM. HUMANIST ASS'N, http://americanhumanist.org/Humanism. A "freethinker" is a person who forms "opinions about religion based on reason, independently of established belief, tradition, or authority." Doc. 1 ¶ 41.

5 Id. ¶¶ 13–19, 31–34, 42–43, 52–58, 67–70; see also id. ¶¶ 79–86, 93–95, 101–104.

6 Id. ¶¶ 13, 31–32, 55.

7 Id. ¶¶ 86, 95, 104.

8 Id. ¶¶ 52–53, 67.

9 Id. ¶¶ 25, 37, 46, 61, 73.

10 See id.

11 Id. ¶ 143.

12 Id. ¶ 147.

13 Id. ¶¶ 22–23, 60.

14 Id. ¶ 154.

15 Id. ¶¶ 158–59.

16 Id. ¶¶ 23–24, 60.

17 Id. ¶¶ 24, 60.

18 Id.

19 Id. ¶¶ 27, 63.

20 Id. ¶¶ 162–63.

21 See id.

22 Id. ¶¶ 165–66.

23 Id. ¶¶ 167–69.

24 Id. ¶ 170.

25 Id. ¶¶ 171–72.

26 Id. ¶¶ 173–75.

27 Id. ¶¶ 177, 179.

28 Id. ¶¶ 180–82.

29 Id. ¶ 183.

30 Id. ¶¶ 184–86.

31 Id. ¶ 189; Doc. 1–4.

32 Doc. 1 ¶ 190; Doc. 1–5.

33 Doc. 1 ¶ 191; Doc. 1–6 at 2.

34 Doc. 1 ¶ 192; Doc. 1–7.

35 See Doc. 1 ¶ 194.

36 Id. ¶ 161; GEN. OPERATING RULES OF THE PA. HOUSE OF REP. R. 17.

37 Id. ¶ 193; Doc. 1–8.

38 Doc. 1 ¶ 194; Doc. 1–9.

39 Doc. 1 ¶ 195; Docs. 1–10 to 1–13.

40 Doc. 1 ¶ 195; Doc. 1–14.

41 Doc. 1 ¶ 196; Doc. 1–15.

42 Doc. 1 ¶ 197.

43 Doc. 1.

44 Id. ¶¶ 109, 118, 123, 127, 131, 135, 139. As of this writing, the Speaker of the House is the Honorable Mike Turzai, the Parliamentarian is Clancy Myer, and the Honorable Dawn Keefer, Carol Hill–Evans, Steven Mentzer, Will Tallman, and Seth Grove serve as representatives of House Districts 92, 95, 97, 193, and 196, respectively. See MEMBERS OF THE HOUSE OF REPRESENTATIVES, http://www.legis.state.pa.us/cfdocs/legis/home/member_information/pdf/addr_hse.pdf (updated Apr. 28, 2017).

45 Doc. 1 ¶ 280.

46 Id. ¶¶ 276–78.

47 Doc. 31.

48 Docs. 33, 36, 39.

49 See Docs. 41, 43.

50 See FED. R. CIV. P. 12(b)(1).

51 See Lincoln Benefit Life Co. v. AEI Life, LLC, 800 F.3d 99, 105 (3d Cir. 2015) (quoting CNA v. United States, 535 F.3d 132, 139 (3d Cir. 2008)); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977).

52 See Mortensen, 549 F.2d at 891.

53 FED. R. CIV. P. 12(b)(6).

54 Phillips v. Cty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (quoting Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)).

55 Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); see Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

56 Phillips, 515 F.3d at 232 (alteration in original) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

57 See Santiago v. Warminster Twp., 629 F.3d 121, 130–31 (3d Cir. 2010).

58 Id. at 130 (alteration in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

59 Id. at 131–32; see also Fowler v. UPMC Shadyside, 578 F.3d 203, 210–11 (3d Cir. 2009).

60 Iqbal, 556 U.S. at 679, 129 S.Ct. 1937 (citing Twombly, 550 U.S. at 556, 127 S.Ct. 1955); Twombly, 550 U.S. at 556, 127 S.Ct. 1955.

61 Iqbal, 556 U.S. at 678, 129 S.Ct. 1937.

62 See Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 251 (3d Cir. 2007); Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002).

63 Fletcher-Harlee Corp., 482 F.3d at 252–53.

64 FED. R. CIV. P. 15(a)(2).

65 U.S. CONST. art. III, § 2.

66 Constitution Party of Pa. v. Aichele, 757 F.3d 347, 356–57, 360 (3d Cir. 2014) (quoting Davis v. FEC, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)).

67 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

68 Freedom From Religion Found., v. New Kensington Arnold Sch. Dist., 832 F.3d 469, 476–77 (3d Cir. 2016) (citing Red River Freethinkers v. City of Fargo, 679 F.3d 1015, 1023 (8th Cir. 2012); Cooper v. USPS, 577 F.3d 479, 491 (2d Cir. 2009); Vasquez v. L.A. Cty., 487 F.3d 1246, 1253 (9th Cir. 2007); ACLU of Ohio Found. v. Ashbrook, 375 F.3d 484, 489–90 (6th Cir. 2004); Suhre v. Haywood Cty., 131 F.3d 1083, 1086 (4th Cir. 1997); Foremaster v. City of St. George, 882 F.2d 1485, 1490–91 (10th Cir. 1989); Saladin v. City of Milledgeville, 812 F.2d 687, 692 (11th Cir. 1987)).

69 Id. at 478 (citing Valley Forge Christian Coll. v. Am. United for Separation of Church and State, 454 U.S. 464, 482–83, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)).

70 Id.

71

See Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129–30, 131 S.Ct. 1436, 179 L.Ed.2d 523 (2011).

72 The Supreme Court's first legislative prayer case relied in part on taxpayer standing, affirming the Eighth Circuit's conclusion that the plaintiff, "as a member of the Legislature *and* as a taxpayer whose taxes are used to fund the chaplaincy," had standing to sue. Marsh v. Chambers, 463 U.S. 783, 786 n.4, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (emphasis added). Only one other court has found taxpayer standing in Pelphrey v. Cobb Cty., 547 F.3d 1263 (11th Cir. 2008), the Eleventh Circuit concluded that municipal taxpayers had standing to pursue a First Amendment challenge when the county "expend[ed] municipal funds, in the form of materials and personnel time, to select, invite, and thank the invocational speakers." Id. at 1267, 1280–81. Plaintiffs herein offer no argument or allegation inviting a *sua sponte* finding of taxpayer standing.

73 See Ariz. Christian Sch. Tuition Org., 563 U.S. at 130, 131 S.Ct. 1436 (explaining that denied benefit standing exists when plaintiffs "have incurred a cost or been denied a benefit on account of their religion").

74 See Doc. 33 at 24–29.

75 See id.

76 See Doc. 1 ¶¶ 26, 38, 47, 62, 74; Doc. 50 at 45:24–46:25.

77 See Doc. 33 at 27–29.

78 Doc. 1 ¶¶ 189–96; Docs. 1–4 to 1–15; see also Doc. 1 ¶¶ 26, 38, 47, 62, 74.

79 See Doc. 1 ¶ 191.

80 See Simpson v. Chesterfield Cty. Bd. of Supervisors, 404 F.3d 276, 279 n.2 (4th Cir. 2005).

81 Doc. 33 at 25.

82 Id. at 25–26.

83 See Doc. 50 at 45:24–46:25.

84 See Doc. 33 at 20–23.

85 See Simpson, 404 F.3d at 288; Coleman v. Hamilton Cty., 104 F.Supp.3d 877, 890–91 (E.D. Tenn. 2015).

86 See, e.g., Simpson, 404 F.3d at 288; Coleman, 104 F.Supp.3d at 890–91; Atheists of Fla., Inc. v. City of Lakeland, 779 F.Supp.2d 1330, 1341–42 (M.D. Fla. 2011) (quoting Simpson, 404 F.3d at 288); see also Turner v. City Council of City of Fredericksburg, 534 F.3d 352, 356 (4th Cir. 2008) (O'Connor, J., sitting by designation) (quoting Simpson, 404 F.3d at 288).

87 For example, defendants cite Choose Life Illinois, Inc. v. White, 547 F.3d 853 (7th Cir. 2008), for their assertion that "there can be no injury-in-fact as necessary to confer standing" in government speech cases under the Free Speech or Free Exercise Clauses. Doc. 33 at 21. But the court in Choose Life Illinois found that plaintiffs *did* have standing to assert a Free Speech claim before ultimately rejecting the claim on the merits. Choose Life Ill., Inc., 547 F.3d at 858–67, 858 n.3. Other cases cited by defendants reject Free Speech, Free Exercise, and Equal Protection prayer challenges on the merits rather than for lack of standing. See Simpson, 404 F.3d at 288; Coleman, 104 F.Supp.3d at 890–91; Atheists of Fla., Inc., 779 F.Supp.2d at 1341–42.

88 See Doc. 50 at 7:23–8:10, 15:21–25.

89 See Simpson, 404 F.3d at 279 n.2; see also Choose Life Ill., Inc., 547 F.3d at 858 n.3.

90 Hassan v. City of N.Y., 804 F.3d 277, 299 (3d Cir. 2015) (first and second alterations in original) (quoting Locke v. Davey, 540 U.S. 712, 731, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) (Scalia, J., dissenting)).

91 Flast v. Cohen, 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

92 Doc. 33 at 18–19 n.5.

93 See Pa. Prison Soc'y v. Cortes, 508 F.3d 156, 163 (3d Cir. 2007) (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 372–79, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), Warth v. Seldin, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

94 Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); Pa. Prison Soc'y v. Cortes, 622 F.3d 215, 228 (3d Cir. 2010).

95 See Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278, 284 (3d Cir. 2002) (citing United Food & Commercial Workers Union Local 751 v. Brown Gr., Inc., 517 U.S. 544, 546, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996); Hunt, 432 U.S. at 343, 97 S.Ct. 2434).

96 See id. (citing United Food, 517 U.S. at 546, 116 S.Ct. 1529; Hunt, 432 U.S. at 343, 97 S.Ct. 2434).

97 Id. at 283–84 (emphasis added).

98 Hosp. Council of W. Pa. v. City of Pittsburgh, 949 F.2d 83, 89 (3d Cir. 1991) (citing Pennell v. City of San Jose, 485 U.S. 1, 7 n.3, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988); UAW v. Brock, 477 U.S. 274, 287–88, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986)).

99 Defendants raise other justiciability concerns in their Rule 12(b)(6) briefing, to wit, legislative immunity and the political question doctrine. See Doc. 33 at 28 n.9, 38 n.11. At oral argument, counsel confirmed that defendants are not pursuing these defenses at this juncture. Doc. 50 at 27:23–28:14.

100 See 42 U.S.C. § 1983.

101 Gonzaga Univ. v. Doe, 536 U.S. 273, 284–85, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); Knepp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996).

102 Knepp, 95 F.3d at 1204 (quoting Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995)).

103 U.S. CONST. amend. I.

104 See Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (coercion); Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (endorsement); Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

105 See Marsh v. Chambers, 463 U.S. 783, 784–85, 793, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983).

106 Id. at 785, 793, 103 S.Ct. 3330.

107 Id. at 785, 103 S.Ct. 3330.

108 Chambers v. Marsh, 504 F.Supp. 585, 588–93 (D. Ne. 1980).

109 Chambers v. Marsh, 675 F.2d 228, 233–235 (8th Cir. 1982).

110 See Marsh, 463 U.S. at 786–91, 103 S.Ct. 3330.

111 Id. at 787–88, 103 S.Ct. 3330.

112 Id. at 792, 103 S.Ct. 3330.

113 Id.

114 Id. at 793–94, 103 S.Ct. 3330.

115 Id. at 794, 103 S.Ct. 3330.

116 Id. at 794–95, 103 S.Ct. 3330.

117 See Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U S. 573, 603, 109 S Ct. 3086, 106 L Ed 2d 472 (1989).

118 Id. at 602–05, 109 S Ct. 3086.

119 See, e.g., Joyner v. Forsyth Cty., 653 F 3d 341, 349–50 (4th Cir. 2011); Wynne v. Town of Great Falls, 376 F 3d 292, 298–302 (4th Cir. 2004).

120 Town of Greece v. Galloway, 572 U S. ——, 134 S Ct. 1811, 1816, 188 L Ed 2d 835 (2014).

121 Id.

122 Id.

123 See id.

124 Id. at 1817.

125 Id.

126 Id. at 1817, 1819–20.

127 See Galloway v. Town of Greece, 732 F Supp 2d 195, 215–243 (W D N Y 2010).

128 Galloway v. Town of Greece, 681 F 3d 20, 32 (2d Cir. 2012).

129 Town of Greece v. Galloway, —— U S. ——, 133 S Ct. 2388, 185 L. Ed 2d 1103 (2013) (mem.).

130 Town of Greece, 134 S Ct. at 1820–24.

131 Id. at 1820 (quoting Marsh, 463 U S. at 786, 103 S Ct. 3330).

132 Id. at 1819–21.

133 Id. at 1824.

134 Id. at 1819.

135 Id. at 1824.

136 Id.

137 Id.

138 Id. at 1830–31 (Alito, J., concurring).

139 Id. at 1825 (plurality opinion) (quoting Cty. of Allegheny, 492 U S. at 659, 109 S Ct. 3086).

140 Id.

141 Id.

142 Id.

143 Id. at 1825–26.

144 Id. at 1825–27.

145 Id. at 1835–38 (Thomas, J., concurring in part and concurring in the judgment).

146 Id. at 1835–37 (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U S. 1, 45–46, 124 S Ct. 2301, 159 L. Ed 2d 98 (2004) (Thomas, J., concurring in the judgment)).

147 Id. at 1837 (emphasis omitted) (quoting Lee, 505 U S. at 640, 112 S Ct. 2649).

148 Id. at 1837–38 (quoting Newdow, 542 U S. at 52, 124 S Ct. 2301).

149 Id. at 1838.

150 Doc. 33 at 33–34.

151 Id. at 30; see also Doc. 50 at 56:25–57:25.

152 Doc. 39 at 2, 22.

153 Doc. 50 at 56:25–57:25.

154 See Doc. 36 at 11–20.

155 Doc. 50 at 45:24–46:25.

156 Town of Greece, 134 S. Ct. at 1819.

157 Id. at 1824; see Marsh, 463 U.S. at 794–95, 103 S. Ct. 3330.

158 Town of Greece, 134 S. Ct. at 1824; see also Marsh, 463 U.S. at 793–95, 103 S. Ct. 3330.

159 See Doc. 33 at 30.

160 See Doc. 33 at 1, 30; Doc. 39 at 15–26.

161 Doc. 50 at 11:1–12:12, 14:7–19.

162 Id. at 13:10–23, 15:3–15.

163 Town of Greece, 134 S. Ct. at 1824 (emphasis added).

164 Id.

165 Id. at 1822 (citing Engel v. Vitale, 370 U.S. 421, 430, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962)).

166 Id. at 1824. Only two appellate courts have explored the anti-discrimination principle since the Supreme Court decided Town of Greece in 2014. A Fourth Circuit panel described the "policy of nondiscrimination" language as prohibiting the government from "favor[ing] one religious view to the exclusion of others." Lund v. Rowan Cty., 837 F.3d 407, 423 (4th Cir. 2016) (citing Town of Greece, 134 S. Ct. at 1824; Marsh, 463 U.S. at 793, 103 S. Ct. 3330). And a Sixth Circuit panel held that "[e]xcluding unwanted prayers is discrimination" violative of the Establishment Clause. Bormuth v. Cty. of Jackson, 849 F.3d 266, 290 (6th Cir. 2017). Both decisions have been vacated for rehearing *en banc*. See Bormuth v. Cty. of Jackson, 855 F.3d 694, 2017 WL 744030 (6th Cir. Feb. 27, 2017); Lund v. Rowan Cty., 670 Fed. Appx. 106, 2016 WL 6441047 (4th Cir. Oct. 31, 2016).

167 Binderup v. Att'y Gen., 836 F.3d 336, 356 (3d Cir. 2016) (first alteration in original) (quoting United States v. Donovan, 661 F.3d 174, 182 (3d Cir. 2011)); Donovan, 661 F.3d at 182 (quoting Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 693 (3d Cir. 1991), rev'd on other grounds, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)).

168 Binderup, 836 F.3d at 356.

169 Id.

170 Jackson v. Danberg, 594 F.3d 210, 220 (3d Cir. 2010) (quoting Berwind Corp. v. Comm'r of Soc. Sec., 307 F.3d 222, 234 (3d Cir. 2002)).

171 Id.

172 The Bormuth court also adopted Justice Kennedy's plurality opinion as the majority rule. The court applied the Sixth Circuit's narrowest grounds standard, which considers which opinion represents "the least doctrinally far-reaching-common ground" and "the least change to the law." Bormuth, 849 F.3d at 279–81.

173 See Town of Greece, 134 S. Ct. at 1825–27 (plurality opinion).

174 Id. at 1835–38 (Thomas, J., concurring in part and concurring in the judgment).

175 Id. at 1826–27 (plurality opinion) (Kennedy, J.).

176 Id. at 1826.

177 Id. at 1825; id. at 1838 (Breyer, J., dissenting); id. at 1851–52 (Kagan, J., dissenting); see also id. at 1828–29 (Alito, J., concurring).

178 Lund v. Rowan Cty., 103 F Supp 3d 712, 733 (M D N C 2015), rev'd, Lund, 837 F 3d 407, vacated for reh'g en banc, 2016 WL 6441047, 670 Fed Appx 106; Hudson v. Pittsylvania Cty., 107 F Supp 3d 524, 535 (W D Va 2015).

179 Town of Greece, 134 S Ct at 1826 (plurality opinion).

180 Doc. 1 ¶¶ 22–24, 60.

181 Id. ¶¶ 23–24, 60.

182 See Doc. 39 at 47.

183 Id. at 40–45.

184 Id. at 42–43.

185 See Town of Greece, 134 S Ct at 1825 (plurality opinion).

186 Doc. 1 ¶¶ 22–24, 60.

187 See Doc. 50 at 43:15–44:19.

188 See Doc. 1 ¶¶ 22–24, 60; Doc. 36 at 8–9, 31, 43–44, see also Fletcher–Harlee Corp., 482 F 3d at 251; Grayson, 293 F 3d at 108.

189 See Lund, 837 F 3d at 413; Simpson, 404 F 3d at 287–88; Coleman, 104 F Supp 3d at 890–91.

190 See, e.g., Simpson, 404 F 3d at 287–88; Coleman, 104 F Supp 3d at 890–91; Atheists of Fla., Inc., 779 F Supp 2d at 1341–42 (quoting Simpson, 404 F 3d at 288); see also Turner, 534 F 3d at 356 (O'Connor, J., sitting by designation) (quoting Simpson, 404 F 3d at 288).

191 Pleasant Grove City v. Summum, 555 U S 460, 467–69, 129 S Ct 1125, 172 L Ed 2d 853 (2009).

192 See Doc. 36 at 36–40.

193 Id. at 37.

194 W V Ass'n of Club Owners & Fraternal Servs. v. Musgrave, 553 F 3d 292, 298 (4th Cir 2009).

195 Simpson, 404 F 3d at 287–88 (emphasis added).

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Jeremy G. Mallory, 73 U. Chi. L. Rev. 1421 (2006)
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Comments

Jeremy G. Mallory[d1]

"AN OFFICER OF THE HOUSE WHICH CHOOSES HIM, AND NOTHING MORE": HOW SHOULD MARSH V CHAMBERS APPLY TO ROTATING CHAPLAINS?

Introduction

The occasions for legislative prayer include the everyday, the farcical, and the momentous. The people delivering legislative prayers have ranged from the traitorous Jacob Duché[1] to the stirring Peter Marshall (who became a celebrity in his own right[2]), to the thunderous John Brackenridge (who foreshadowed the burning of the Capitol and the White House during the War of 1812[3]). Many, like the chaplains to Congress, are employed on a continuing basis; others are local ministers called in on a rotating basis to deliver an invocation before the meeting of a legislative body.[4]

*1422 In Marsh v Chambers,[5] the Supreme Court essentially set aside legislative chaplaincies as exceptions to the Establishment Clause,[6] but it did not distinguish between these two types of chaplain—situated and rotating. Marsh specifically found unobjectionable the chaplaincy practices of the Nebraska State Legislature and the United States Congress (both of which included chaplains as regular employees of the body), but did not address itself to other types of practice.[7] The Court sustained the practice of legislative chaplaincies based on the "unique history" of the congressional chaplaincies, arguing that the Framers of the First Amendment would not have created such an institution if it violated the amendment they had just written.[8] The Court then applied the same reasoning to the Nebraska chaplaincy (and by implication other state chaplaincies, whether similar or not).[9] Later courts have simply referred directly to Marsh's approval of legislative chaplaincies, failing to distinguish between these two species of chaplain.[10] Because the Supreme Court has not had a chance to revisit Marsh directly, the precise boundaries of the exception have become *1423 ambiguous. Phrased starkly, chaplains employed by the legislature as counselors are treated under the same rubric as chaplains who deliver a single prayer and leave.

The Fourth Circuit's decision in Simpson v Chesterfield County Board of Supervisors[11] demonstrates that this ambiguity can mask threats to core Establishment Clause values such as nonhostility.[12] In Simpson, a minister was denied a (rotating) opportunity to deliver an invocation before the county board explicitly because of her religion: she was a Wiccan priestess.[13] The Fourth Circuit deferred to the county board's choice of minister, citing the holding in Marsh[14] and dismissing the possible presence of religious hostility in a footnote.[15] The Fourth

Circuit did not take seriously a substantial allegation of hostility, giving little consideration to the admonition in Lynch v Donnelly [16] that "the Constitution forbids hostility toward any [religion]." [17]

There is a looming dispute over whether practices that resemble, but do not duplicate, the situated chaplaincies at stake in Marsh should enjoy the same protection from Establishment Clause scrutiny. In Simpson, the Fourth Circuit extended Marsh to protect a rotating chaplaincy from scrutiny even when a core Establishment Clause value, nonhostility, was allegedly infringed. [18] In Snyder v Murray City Corp, [19] however, from the Tenth Circuit, a concurring opinion questioned whether Marsh should be extended to cover anything other *1424 than situated, institutionalized chaplaincies. [20] The interpretive problem is therefore how far to extend the rationale of Marsh to institutions that resemble, but do not duplicate, the specific chaplaincy institutions in question there.

This Comment offers a solution to the interpretive problem: a finer-grained analysis of how rotating chaplaincies fit into the reasoning of Marsh. It approaches legislative chaplaincies by examining them from the vantage point of the legislature's actions and the chaplain's prayers. Essentially, an analysis of the legislature's actions is more important for judging whether a rotating chaplaincy violates the Establishment Clause, but the content of the chaplain's prayers will be more relevant for a situated chaplaincy.

Analyzed in terms of the legislature's actions, a rotating chaplaincy program allows a legislature to mask motives, such as a desire for a religious test for office, which would be constitutionally impermissible if acted upon in the context of a situated chaplaincy program. As a result, courts must scrutinize the legislature's proffered motivations more closely where rotating chaplaincies are concerned in order to preserve the core Establishment Clause principle of nonhostility within the Marsh exception. [21]

Analyzed in terms of chaplains' prayers, both situated and rotating chaplains are equally able to run afoul of the Establishment Clause by delivering sectarian prayers, [22] but rotating chaplains may face a greater temptation to do so because of the nature of the selection process and the lack of ongoing pastoral connection. Nevertheless, delivering sectarian prayers is not inevitable, and a judicious rotating chaplain poses no greater threat than a situated chaplain. A court should be aware of the temptations, however, and should scrutinize the overall rotating chaplaincy program closely to ensure that there is no structural Establishment Clause violation. Because of the *1425 greater temptations and dangers, the level of scrutiny for rotating chaplaincies should be higher than that afforded to situated chaplains.

This Comment will proceed from background to foreground, beginning in Part I with an overview of legislative chaplaincies as they exist today, both in Congress and in the states. Part II examines the relevant legal standards, most notably Marsh itself (high deference to legislative choices in structuring chaplaincy programs) and Lemon v Kurtzman [23] (low deference, as a matter of background Establishment Clause jurisprudence). Part II goes on to discuss Marsh's progeny, which have taken one of two forms: a challenge to the legislature's administration of the chaplaincy program or to the chaplain's prayers themselves. Part III gives a fine-grained analysis of the characteristics of both types of challenges, illuminating how the different functions of the two types of chaplain impact the legal assessment of the threat to the Establishment Clause. Rotating chaplaincies will call for a greater scrutiny of the legislature's administration of the chaplaincy program, due to the ease of masking impermissible motives within an otherwise-innocuous rotating chaplaincy program, and the lack of structural incentives for a rotating chaplain to minister to a plural congregation. On the other hand, an analysis of the content of prayers is more important in the context of a situated chaplaincy.

I. Background: from "an Apostate and Traitor" to "the Most Powerful Man in Washington"

Legislative chaplaincies have evolved from a history more checkered than that of Congress itself, arriving at a multifaceted institution found in both the federal Congress and the state legislatures. In 1777, John Adams tersely remarked to his wife Abigail, with regard to the first chaplain of the Continental Congress: "Mr. Duché, I am sorry to inform you, has turned out an apostate and traitor."[24] Through a series of raucous interludes, such as the brief period of rotating chaplains in Congress,[25] the institution took on a more dignified and stately mien. By 1995, columnist Cal Thomas could, with only a little hyperbole, say of retiring Senate Chaplain Richard Halverson, "according to some who know him best, he has been the most powerful man in Washington."[26] This history of colorful characters has generated a set of practices on both the state and federal levels that skirts the edges of the *1426 Establishment Clause.[27] First, this Part will discuss the crucial distinction between situated and rotating chaplaincies, and then will briefly survey the institutions as they have developed.

A. Situated and Rotating Chaplains

The chief difference between situated and rotating chaplains is the nature of their relationship with the legislative body; a situated chaplain has a formalized, ongoing relationship with the legislature, similar to employment, while a rotating chaplain does not. Rotating chaplains deliver invocations both by invitation and as volunteers.[28]

Situated chaplains are generally viewed as part of the legislative institution itself. According to one judge, "[c]ongressional chaplains, like the chaplain at issue in Marsh, are not members of the public invited on some representative or wholly open basis to give legislative prayers. They are officers of the state, who hold official government positions."[29] This would extend, by analogy, to situated chaplains at other levels of government.[30] In addition to delivering invocations, situated chaplains take on the general pastoral care of the legislative body. This may include outreach such as Bible study groups, individual counseling, and prayers.[31]

Rotating chaplains, by contrast, are generally only involved with saying an invocation before the beginning of official business.[32] They are not usually described as providing any sort of further pastoral *1427 care. Any ongoing relationship with a rotating chaplain takes place outside of the chaplaincy context, such as in the case of a rotating chaplain who is also the minister at a specific legislator's church. There may be an ongoing pastoral relationship in such a case, but it takes place outside the chaplaincy, which ends when the chaplain finishes with the invocation.

B. Federal and State Practices

The practice of picking a chaplain in Congress has largely become a formality, although it was once an unseemly competition among the clergy of Washington, D.C.[33] The Chaplain of each chamber is considered an "Officer" under Article I, § 3 of the U.S. Constitution, along with others such as the Secretary and Sergeant at Arms.[34] The majority party nominates the chaplain and the election is virtually always pro forma.[35] In practice, a congressional chaplain serves for as long as he wishes: only once has a chaplain been deprived of the post against his will.[36] The federal congressional chaplains are models of the "situated" type of chaplaincy.

*1428 Outside the federal government, the practice varies between situated institutionalized chaplains such as those in Congress and rotating invitational chaplaincies such as those discussed in Simpson. Some legislative bodies have members leading the prayer, as in Wynne v Town of Great Falls,[37] but that practice is rare.[38] At other levels of government, the tendency seems to be toward using rotating chaplains.[39] Three states will serve as examples of the different ways a legislative body can configure a rotating chaplaincy: Indiana, North Carolina, and Oregon.

Indiana's program is an example of a mainstream rotating chaplaincy. The Rules of both houses of the Indiana General Assembly stipulate that prayer is the second order of business after the call to order and before the Pledge of Allegiance,[40] but the Rules do not specify who shall give the prayer. Under informal but longstanding practice, members of the local clergy deliver the invocations at the invitation of the Majority Caucus Chair and with the official permission of the Speaker.[41] When a local minister delivers the invocation, the legislature incurs certain nominal costs.[42] The Seventh Circuit has recently thrown light on Indiana's chaplaincy program in Hinrichs v Bosma,[43] refusing to stay an injunction against the chaplaincy program in the Indiana House of Representatives.[44]

*1429 North Carolina,[45] by contrast, has a situated chaplain for each house of its General Assembly, listed as officers of the body.[46] The House Rules stipulate that the chaplain is appointed by the Speaker; the Senate Rules do not mention the chaplain per se, but do indicate that an opening prayer is offered pursuant to an order by the Presiding Officer.[47] The current House Chaplain, out of respect for the pluralism of the legislators, mentions God but tries to avoid mentioning Jesus. This effort is appreciated by Jewish lawmakers,[48] but has provoked, in the chaplain's words, "healthy feedback from Christian lawmakers who sometimes feel like [he is] selling out God by not including Jesus."[49]

Oregon's legislature had an unofficial chaplain for many years who took it up as a full time position in 1998 after meeting the chaplain to the Arizona Legislature. The informal, part-time chaplain to the Oregon Legislative Assembly had been undertaking his ministry on his own, as part of his own spirituality. Meeting with the Arizona chaplain (situated) encouraged him to turn a part-time voluntary practice into an institutionalized job.[50] The position is financed by donations from legislators and others that total to about $1,500 per month.[51] While the current chaplain is nonpartisan and avoids policy discussions in order to focus on spirituality,[52] he is also part of the Faith and Freedom Network, a clearly sectarian and evangelical organization, "desir[ing] to *1430 reach out to all legislators regardless of political or religious affiliation, as well as to members of the lobby, and members of the staff."[53] It is the organization's "mission to share Christ and His Love" and to "enter the Capitol as an Ambassador of Christ."[54] The chaplain hopes to become a member of Capitol Ministries, a network started by a former chaplain to the California Assembly focused on placing a volunteer situated chaplain on this same model in all fifty state legislatures.[55]

II. Legal Standards: Lemon, Marsh, and Progeny

Legislative chaplaincies are essentially held out as naked exceptions to the Establishment Clause,[56] "a sui generis legal question."[57] The Court made legislative chaplaincies an exception to the often-derided three-prong test of Lemon v Kurtzman.[58] Based on the "unique history" of legislative chaplaincies—the Founders created the congressional chaplaincies then voted on the text of the First Amendment in the same week—the Court held such chaplaincies facially inoffensive to the Establishment Clause.[59] The Court noted areas where a court could step in to scrutinize or strike down a practice, however, giving some potential limits to the practice.[60] Justice Brennan's dissent in Marsh tried mightily to constrain the boundaries of the exception, calling the Court's opinion "narrow," "careful," and "little threat to the overall fate of the Establishment Clause."[61]

*1431 Justice Brennan proved to be partially prophetic.[62] Marsh has borne few direct progeny in the circuits, and none at the Supreme Court level. One of the difficulties surrounding Marsh's progeny is that none of the cases that analyze it on the Supreme Court level actually involve legislative chaplaincies: most of them present different facts which are analogized or compared to legislative chaplaincies.[63] Thus, most of

the doctrine regarding chaplains arising from Marsh has not been developed by the Supreme Court, but rather by circuit courts or in parallel areas of jurisprudence.

The decisions following Marsh reveal two aspects of chaplaincies that can potentially pose threats to the Establishment Clause by moving beyond the limits of the exception: the legislature's actions and the chaplain's prayers. A legislature can run afoul of the First Amendment when it appears to adopt an official religion or denomination through its choices of chaplains or its administration of the program.[64] In the alternative, a chaplain can raise an inference of unconstitutional establishment by seeming to affiliate the government with a particular faith through sectarian prayers.[65] The cases following Marsh generally focus on only one or the other of these aspects, viewing the chaplaincy as a whole and not distinguishing the two different actors involved. However, *1432 chaplaincies can be analyzed more clearly by teasing apart the two different sides of the question.

A. Lemon

Lemon v Kurtzman is best known for providing a prevalent test for violations of the Establishment Clause:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[66]

A major modification to the Lemon test came in Lynch v Donnelly, where Justice O'Connor suggested that endorsement of, as well as entanglement with, religion would constitute a violation of the Establishment Clause.[67] This new phrasing served to broaden Lemon's entanglement prong so that messages of favor or disfavor, even when not rising to the level of outright proselytization or demonization, would suffice to prove a violation of the Establishment Clause.[68] While the endorsement prohibition has entered into the evaluation of several cases, it has also failed to command an enthusiastic and consistent majority of the Court.[69]

The Lemon test was further modified in Agostini v Felton.[70] The Court essentially collapsed the "entanglement" prong into the "effects" prong and weakened the purpose inquiry by rewording the test. The Court articulated "three primary criteria currently use[d] to *1433 evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[71] While entanglement was separate in Lemon, here it is one criterion for determining the effect of the government action. The Lemon inquiry asks whether there is a "secular legislative purpose,"[72] but the Agostini inquiry asks a seemingly tougher question, whether the government is indoctrinating people. Overall, this seems to make proving an establishment more difficult.

B. Marsh

Aside from noting that the Eighth Circuit had based its opinion below on Lemon,[73] the majority in Marsh never again mentioned the word "entanglement" or Lemon itself, and never wrote the phrase "separation of church and state." The majority argued that "this concern [about establishment of religion] is not well founded" with respect to legislative chaplaincies, reassuring the respondent that there is "no real threat 'while this Court sits.'"[74]

The original suit in Marsh was filed under 42 USC § 1983 by a Nebraska state legislator and taxpayer against the state treasurer, alleging that the continued employment of the same chaplain for sixteen years, paid from public funds, violated

the Establishment Clause.[75] The district court held that the chaplaincy itself did not violate the Establishment Clause, but paying for it from public funds did.[76] The district court examined the chaplaincy according to the Lemon criteria and found no violation: [77] the purpose was primarily secular, the effect was not to advance religion, and there was no significant entanglement on the facts presented.[78] The court did, however, find that making a law directing payment *1434 of the chaplain constituted an establishment of religion.[79] Upon appeals by both parties, the Eighth Circuit joined together what the district court put asunder, considering the payment from state funds and the saying of prayers together as part of a single office.[80] Ultimately, the Eighth Circuit found the whole practice to be unconstitutional.[81]

The Court granted review on the question of "whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment. ""[82] The 6-3 decision, written by Chief Justice Burger with Justices Brennan, Marshall, and Stevens dissenting, was divided into a broader consideration of the general practice of legislative prayer, the practices surrounding the congressional chaplaincies as models, and a specific examination of the practice at stake in Nebraska.[83]

The consideration of legislative prayer in general began with the observation that it "is deeply embedded in the history and tradition of this country."[84] The Court examined the origins of the congressional chaplaincies, which were established three days before the language of the Bill of Rights was finalized.[85] Based on this history of the practice, the Court noted that "[c]learly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment."[86]

The majority took this historical origin, so closely coeval with the First Amendment itself, as evidence of the Framers' intentions regarding both the boundaries of the nascent Establishment Clause and how the Clause applied to the congressional chaplains.[87] The Court's majority *1435 placed great emphasis on the fact that Congress sent the Establishment Clause to the states in the very same week that it approved legislation appointing and paying the first chaplains. The Court reasoned that the Framers would not lightly adopt a measure they thought contrary to the amendment just ratified.[88]

The majority noted that there was indeed debate over the practice during the period of its inception, but found that this disputation strengthened, rather than weakened, the case for its constitutionality. The Court took the debate to indicate that "the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society."[89]

The Court's consideration of the specific practices at stake in Nebraska was much shorter by comparison and resulted in the majority's rejection of all three of the challengers' objections. First, the Court found it unimportant that a clergyman of one denomination had been selected for sixteen years running.[90] The Court found the evidence to *1436 show that he had been reappointed "because his performance and personal qualities were acceptable to the body appointing him."[91] Indicating that it would give only a very low level of scrutiny to the legislative reappointment decision, the Court stated that "[a]bsent proof that the reappointment stemmed from an impermissible motive" it would not conclude that the chaplain's tenure violated the Establishment Clause.[92]

Second, the Court found the payment of the chaplain from the public coffers unproblematic. The Court relied almost completely on the historical precedent of paying chaplains from public funds.[93] The reasoning followed largely the same path as with the congressional chaplaincies themselves: "remuneration is grounded in historic practice initiated, as we noted earlier, by the same Congress that drafted the Establishment Clause of the First Amendment."[94] The Court also noted that both state

legislatures and Congress currently paid chaplains.[95] Because it was initiated by the First Congress contemporaneously with wording the First Amendment and because it had continued since then, payment of legislative chaplains was deemed constitutional.

Third, the Court felt no need to parse the content of specific prayers because "there [was] no indication that the prayer opportunity [had] been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[96] Notably, the Court did not distinguish between exploitation by the chaplain, on the one hand, and exploitation by the legislature itself, on the other. Not only could, in theory, the chaplain herself "exploit[ ] or proselytize," but the chaplaincy practice itself, as constructed by the legislature, could also exert a similar undue influence.[97]

Of the two dissents written in Marsh, Justice Stevens's is the narrower. Although he did not lay out clear standards for determining when the institutionalization of a practice tacitly agreed to by a majority of legislators might become establishment, he found the Nebraska legislative chaplaincy program to be in clear violation of the Establishment Clause. For Stevens, the sixteen year tenure of Nebraska's Presbyterian chaplain was a clear indication of denominational preference. ***1437** [98] Stevens concluded that notwithstanding the legislature's benign motivation, the effect of the program was to establish religion.[99]

Stevens also raised the more difficult issue of a silent majority within the Nebraska legislature. By nature, he argued, "the tenure of the chaplain must inevitably be conditioned on the acceptability of [the prayers'] content to the silent majority."[100] Whether or not it is explicit, he argued that the very nature of the chaplaincy would tend to marginalize minority viewpoints by catering to the views of the silent, mainstream majority.[101]

Justice Brennan's dissent, joined by Justice Marshall, was more comprehensive in scope than Stevens's. He relied more on the principle of government neutrality among faiths implicit in the Establishment Clause to reject legislative chaplaincies, rather than grounding his dissent solely on the specific practices of the Nebraska legislature.[102] Brennan admitted that he had erred in an earlier opinion, in which he had approved legislative prayer in dictum,[103] and found, in Marsh, that the practice of legislative prayer was flatly unconstitutional.[104]

Brennan began his dissent by analyzing legislative chaplaincies under the Lemon standard. To him, it was a fairly simple question: "I have no doubt that, if any group of law students were asked to apply the principles of Lemon to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."[105] ***1438** Brennan thought the predominantly religious purpose of legislative prayer was "self-evident."[106] Indeed, he believed that thinking of legislative prayer in merely secular terms would demean the very tradition of the chaplaincy. As he put it, "to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice."[107] Further, Brennan found that the primary effect of legislative prayer was clearly religious—it linked the state's temporal power (here directly in the context of lawmaking) to a religion and tacitly placed the state's imprimatur on that religious practice.[108] Even adult legislators (for Establishment Clause purposes, often compared to children in school[109]) would have a difficult time not participating in the invocation. It would be impolitic, to say the least, to walk out or not participate.[110]

Finally, Justice Brennan noted that legislative prayer entangles the state with religion in two ways. First, legislative prayer results in the state "impermissibly monitoring and overseeing religious affairs."[111] The legislature must choose a chaplain, specify her duties, and perhaps even monitor the content of the prayers she delivers. Brennan noted that this monitoring is "precisely the sort of supervision that agencies of government should if at all possible avoid."[112] Second, entanglement arises from "the divisive political potential" of a legislative issue, including the selection of a chaplain,

splitting along religious lines.[113] Brennan described several events from Marsh as well as from *1439 congressional history fitting this description (namely, the committee reports of the 1850s and the short-lived switch to a rotating chaplaincy).[114] This account included controversies in Congress over the appointment of chaplains, several members of the Oregon Legislature walking out in protest over a prayer by an Indian guru, and a California legislator being called "an irreverent and godless man" by a local clergyman for requesting that the State Senate Chaplain not use the name of Christ.[115] Chaplains, he demonstrated, could become a source of religious controversy within the legislature, coupling religious and political fissures in the explosive manner that the Establishment Clause was enacted to prevent.

Beyond the Lemon analysis, Brennan attacked legislative chaplaincies on more general grounds—neutrality and separation of church and state, which he saw as "the underlying function[s] of the Establishment Clause."[116] He admitted that these two principles "do not exhaust the full meaning of the Establishment Clause as it has developed,"[117] but suggested that none of the recognized exceptions to the Clause pertain to the case of legislative prayer.[118] Finally, Brennan rejected the predominantly historical analysis offered by the majority as well as the insinuation that legislative prayer was a de minimis violation at worst.[119]

C. Marsh's Progeny in the Circuits

While Marsh has been influential in other areas,[120] its more direct progeny have followed a fairly predictable line. Most of the legislative prayer decisions following Marsh have upheld the chaplaincy practice in question; where the practice has been struck down, it has usually been because of the prayers' content. Only recently has the practice been enjoined because of a legislature's actions, and even there it was the legislature's acquiescence to sectarian prayers that proved problematic.[121]

*1440 Overall, the cases can be divided according to whether the challenge was based on the legislature's actions or the chaplain's prayers. The cases following Marsh generally have not examined the differing dynamics of those two sides of the question, nor have the holdings distinguished between situated and rotating chaplains.[122] This Comment will first examine the challenges to the legislature's actions, and second turn to the challenges brought against a chaplain's specific prayers.

1. Challenges to legislative action.

Challenges to a legislature's power to invite, employ, and pay chaplains have been upheld under Marsh with minimal scrutiny. Indeed, the first post-Marsh challenge to the hiring of congressional chaplains was dismissed per curiam after Marsh rendered the constitutional question moot.[123]

*1441 The legislature's power to withhold an invitation to be a chaplain or an opportunity for a chaplain to pray before legislative business has likewise been upheld without difficulty. In Snyder v Murray City Corp, the Tenth Circuit held that a city may refuse any citizen the opportunity to deliver a prayer that city officials view as insulting to the institution of legislative prayer.[124] In that case, a citizen requested to be allowed to deliver a controversial prayer mocking the concept of legislative prayer during the "reverence portion" of the council meeting (a routine period for prayer before business), and was denied the opportunity to do so based on the overtly insulting content of the prayer.[125] In Simpson, the Fourth Circuit upheld the county board's decision not to invite a Wiccan priestess to deliver an invocation because it would only accept prayers "consistent with the Judeo-Christian tradition."[126] Although the content of the prayer was not directly adverse to the institution of legislative prayer, as in Snyder, the legislative body in Simpson was allowed to decline to invite a chaplain on the basis of the religious content of her prayer.[127]

The most recent Establishment Clause challenge to legislative chaplains to reach the circuit courts of appeal—Hinrichs v Bosma, one of the few to be decided against a legislature—blurs the distinction between challenges to the legislature's action and the chaplain's prayers. The Indiana Legislature's practice of inviting rotating chaplains and paying some incidental costs, such as postage, was held to violate the Establishment Clause when the chaplains' prayers were sectarian.[128] The legal issue that the court in Hinrichs confronted was ***1442*** the extent to which a chaplain—whether situated or rotating—is seen as an agent of the legislature. The Seventh Circuit saw the legislature as implicitly ratifying the chaplains' prayers through repeated invitations.[129] Making the legislature responsible for the chaplains' words here could, like in Simpson, forecast an expansion of Marsh's protective aegis to apply to situated and rotating chaplaincies alike. Notably, however, the Seventh Circuit still focused its scrutiny on the legislature's actions when the chaplain was rotating, even though it was the chaplain's prayers that were ultimately the problem.

2. Challenges to chaplains' prayers.

When a complaint has challenged a chaplain's prayers themselves, the results have been more mixed and sparser on the circuit court level. Generally, where a chaplain can be shown to have given consistently sectarian prayers, the practice is struck down. Where the practice is only inconsistently sectarian, or when the chaplain stops delivering such prayers, the chaplaincy is generally upheld.

Marsh itself has been cited elsewhere as an example of how nonsectarian prayers can vitiate a challenge to a chaplaincy practice.[130] Marsh's admonition that courts should not parse the content of prayers "where 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" has still allowed courts to strike down practices they viewed as "sectarian."[131] The Fourth Circuit took this path in Wynne v Town of Great Falls,[132] where the opening and closing prayers for a city council meeting—usually delivered by a member of the council—were almost always given in Jesus's name.[133] Similarly, the ***1443*** Ninth Circuit struck down a school board's prayers consistently invoking Jesus's name.[134]

In Kurtz v Baker,[135] by contrast, the complaint was mooted after the chaplain promised to deliver nonsectarian prayers.[136] A philosophy professor and secular humanist, Dr. Paul Kurtz, alleged that the U.S. Senate Chaplain routinely used his invocation as an opportunity to disparage nonbelievers.[137] After a court-moderated status conference on this count, the Senate Chaplain, Reverend Richard Halverson, initiated an exchange of letters with Dr. Kurtz, apologizing for the disparagement and promising to rectify the situation.[138] The district court felt that this reconciliation attenuated the dispute enough to render it moot.[139]

III. Analysis: "That System Has Failed Entirely"

Disentangling the two threads running through the legislative chaplaincies jurisprudence brings to the surface countervailing considerations that make the uniform application of Marsh to all forms of ***1444*** chaplaincy inapposite. Examining the legislative action side of the question shows that rotating chaplaincy programs pose a greater threat to the Establishment Clause than do situated chaplaincy programs, and therefore warrant closer scrutiny under Marsh than many courts have given either to them or to situated chaplaincies. Examining the potential for unconstitutional establishment in the chaplains' prayers, it becomes clear that both situated and rotating chaplains can violate the Establishment Clause in the same ways, but rotating chaplains are more likely to be tempted to recite constitutionally problematic prayers. Even though a rotating chaplaincy may pose a greater Establishment Clause threat on the legislative side and a temptation on the chaplain's

side, those dangers can be avoided by a careful legislature, a mindful chaplain, and an observant court.

A. Establishment through Legislative Action

The mere appointment of a chaplain by a legislature has ramifications for the Establishment Clause even absent any consideration of the specific prayers the chaplain delivers. This practice was approved by Marsh and, as indicated in Murray, rapidly became uncontroversial. Uncontroversial, however, does not mean unthreatening. Examining what Marsh allows a legislature to do in the context of a situated chaplain and applying it to the different situation of a rotating chaplain indicates that the latter, perhaps counterintuitively, poses a threat of establishment for which courts ought to be vigilant.

Read narrowly, Marsh allows a legislature to hire a chaplain, pay the chaplain's salary out of public money, and even retain the same chaplain for sixteen years "[a]bsent proof that the chaplain's reappointment stem[s] from an impermissible motive."[140] This paraphrasing of the Marsh holding gives a high degree of deference to a legislature structuring a situated chaplaincy. It can largely arrange the office and choose its chaplain as it sees fit, so long as it does not exhibit an impermissible motive.[141] Given that some courts have been willing to shield the entire process behind political question and separation of ***1445** powers deference,[142] it seems unlikely that the impermissible motive inquiry would have much bite absent fairly compelling proof.[143]

In the case of a situated chaplain, this deference is understandable and perhaps necessary. A situated chaplain must establish an ongoing pastoral relationship with the members of the legislature, even with members of different faiths. Ministering to a group that does not all share one's faith can be disconcerting for some, but it is an elemental part of the job.[144] The situated chaplain plays a designated role within the legislative institution. The Senate Judiciary Report of 1854, responding to petitions to abolish the congressional and military chaplaincies, compared the chaplain's tasks to more mundane—but necessary—errands such as carrying notes and depositing checks.[145] In essence, the situated chaplain is internal to the workings of the legislature.[146] This realization was decisive in Judge Lucero's concurrence in Snyder: "[T]he nature of the chaplaincy with which Marsh deals does not involve people acting as members, leaders, or spokespersons of particular religions. Rather, they are people who are first and foremost *1446 acting as officers of the various legislative bodies they serve."[147] Because of the close and ongoing pastoral relationship between the chaplain and the legislature, Marsh justifiably gives high deference to legislatures trying to structure a situated chaplaincy practice, screening only for impermissible motive, and fairly weakly at that.

Rotating chaplaincies, however, do not involve the same sort of ongoing, pastoral relationship. Congress tried to use such a system and found it insufficient for that reason. Not long after both of the congressional Judiciary Committees considered and ignored petitions to abolish the congressional and military chaplaincies,[148] both houses of Congress decided to switch to a rotating chaplaincy.[149] At the beginning of the Thirty-sixth Congress, Senator Henry Wilson of Massachusetts voiced his dissatisfaction with the rotating chaplaincy. He protested that "these clergymen cannot become acquainted with us. We cannot look to them as we should look to a Chaplain of the Senate."[150] Instead, he called for a Chaplain of the Senate "to whom we can look *1447 and consider as such; a Chaplain who would become acquainted with us, and who would know the interests and wants of the body."[151] With only a little discussion, the resolution setting an election for the following Thursday was adopted and the Senate turned to discussion of the events at Harper's Ferry.[152] The House's reaction, although coming later (March 1860) and wrought with much more parliamentary wrangling,[153] was tersely summarized by Representative Thomas

Florence of Pennsylvania. In response to an offer to repeat the rotating plan of the Thirty-fifth Congress, Florence replied, "Well, but that system has failed entirely." [154] The fervent objections of some members notwithstanding, the majority ratified his view, and proceeded to an election the next day. [155] The deciding factor for Congress was that a rotating chaplain could not sustain the ongoing pastoral relationships that it sought, but a situated chaplain could.

This difference has ramifications for courts considering the Establishment Clause and legislative chaplaincies. When applied to rotating chaplaincies, the principle of deference to the legislature's choice as embodied by Marsh should be amended due to the different relationship involved. Specifically, there is a higher likelihood of Establishment Clause problems where rotating chaplains are concerned, and courts should be correspondingly more vigilant when evaluating these chaplaincies. It is relatively easy to mask what would otherwise be impermissible motives when there is no ongoing pastoral relationship in part because rotating chaplains' relationships to the institution are more attenuated. First, this attenuated relationship makes inclusion of some faiths—and the concomitant exclusion of others—less obvious and more harmful than it would be in the context of a situated chaplain. Second, and paradoxically, the rotating chaplain's location external to the legislative institution makes his position more likely to be seen as an entanglement between church and state.

The lack of an ongoing pastoral relationship in a rotating chaplaincy program may allow a legislature to mask an impermissible motive that would be unacceptable if it arose in a situated chaplaincy program. In Simpson, the county board set a blanket exclusion based on faith, inviting only rotating chaplains who would offer a prayer in ***1448** the Judeo-Christian tradition. [156] If the same were set as a requirement for employment as a situated chaplain—an officer of the legislature [157] —it would clearly be unconstitutional: "no non-Judeo-Christians need apply" would be a religious test for office prohibited by Article VI. [158] Read this way, Simpson permits a legislature to take actions in the rotating chaplaincy context that the Establishment Clause would bar it from taking with respect to a situated chaplaincy: the exception Marsh "carv[es] out [of] the Establishment Clause" [159] ends up swallowing the rule.

The second problem posed by legislative actions in the rotating chaplaincy context is the location of those chaplains outside the legislative institution. A situated chaplain is "an officer of the house which chooses him, and nothing more." [160] He is located within the legislative institution, focusing on it and its pastoral needs. In Marsh, the Presbyterian chaplain of the Nebraska Legislature "was reappointed because his performance and personal qualities were acceptable to the body appointing him." [161] Thus, an ongoing pastoral relationship gave the legislature some objective indicators of job performance on which to evaluate the chaplain, which in turn satisfied the Court that there was no impermissible motive involved in his sixteen year tenure. A court can more easily evaluate whether a chaplain situated within an institution is doing a good job, and therefore whether the legislature might have an impermissible motive in reappointing him.

A rotating chaplain, by contrast, has a more attenuated relationship to the institution and no ongoing pastoral relationship on which a legislative body could base an objective evaluation. The legislature lacks an adequate basis on which to evaluate performance or to select for certain personal qualities—and therefore so would a court. Most of the criteria involved in selecting a single situated chaplain are simply not in play (or are to a much lesser degree) when it comes to a ***1449** rotating chaplaincy. There are fewer objectively available institutional cues a court can read when the chaplain is not situated within an institution. For that reason, courts ought to be more vigilant to ensure that proffered justifications do not manifest impermissible motivations.

Under this heightened standard, Simpson was wrongly decided. Applying Marsh without taking into consideration the rotating nature of the chaplaincy may have allowed a legislative body to use Marsh to protect an otherwise impermissible motivation. The Fourth Circuit therefore extended Marsh improperly in arguing that the decision to exclude Simpson was analogous to the decision in Marsh to select only a Presbyterian clergyman. [167] The Marsh Court did scrutinize the selection process, albeit lightly, and found sufficient grounds in "performance and personal qualities." [168] In Simpson, no criteria were given except for "Judeo-Christian tradition," yet the Fourth Circuit read Marsh as requiring no scrutiny at all. [169] The lack of remand in Marsh is quite consistent with a low level of scrutiny. Based on the record before it, however, the Marsh Court was satisfied that there were adequate reasons given for hiring the same minister over sixteen years. The Fourth Circuit misread low scrutiny for no scrutiny, and looked past a facially problematic motivation.

On the other hand, this heightened scrutiny of rotating chaplaincies would not overturn the Tenth Circuit's decision in Snyder. The Tenth Circuit properly concluded that the proposed prayer would disparage another's faith, and that the town council therefore legitimately excluded it. [170] The Seventh Circuit's decision not to lift the injunction against legislative prayer in Hinrichs was likewise correct. It was properly alert to the possibility that a legislature could mask establishmentarian motivations behind a rotating chaplaincy. [171] The potential problems of holding the legislature responsible for the words of a rotating chaplain might have been avoided, however, by focusing more tightly on the legislature's actions in repeatedly choosing sectarian chaplains, rather than on the content of the chaplains' prayers.

Extending Marsh to protect the legislature's freedom to choose rotating chaplains allows a legislature to do under cover of night what it could not do in the daylight: systematically exclude disfavored religious *1450 groups from a chaplaincy. Courts should be careful that legislatures are not using rotating chaplaincies as a way to open up the Marsh exception to swallow the Establishment Clause.

Arguably Judge Lucero may be correct in his concurrence in Snyder, in which he concludes that Marsh simply should not be extended to rotating chaplaincies at all. Instead, Judge Lucero suggested they should be evaluated under Lemon. [172] This position fails to recognize, however, that situated chaplaincies may not be the best fit for every legislative body. Granted, Congress decided, rather emphatically, that a rotating chaplaincy did not meet its needs. [173] The history of rotating chaplaincies is just as long, however, if not as glamorous. [174] The historical justifications offered by Marsh apply, if with somewhat weaker force, to rotating chaplaincies. It should not be the case that a rotating chaplaincy will always violate the Establishment Clause; courts should merely be more alert to the possibility of violation where rotating chaplaincies are concerned.

B. Establishment through Chaplain Prayers

What the chaplain says as an officer of the legislature can also violate the Establishment Clause. One of the acknowledged limits to the Marsh exception is that the prayers, taken as a whole and in context, should not "advance any one, or [ ] disparage any other, faith or belief." [175] In a sense, rotating and situated chaplains stand on equal ground here: both of them can breach this limit. [176] The difference is that rotating chaplains, because of their location outside the legislative institution, may face a greater temptation to cross this line than situated chaplains. [177]

The integration of a situated chaplain into the life of the legislature itself is significant in this respect. A chaplain who knows that he must frequently minister to people outside of his own faith poses less of a risk of religious favoritism or exclusion than one who knows he is *1451 giving an invocation as a representative of his faith. For example, interfaith Bible study groups—including Jewish, Catholic, and Protestant

senators—began under Senate Chaplain Richard Halverson. At Halverson's retirement, Senator Joseph Lieberman called him "a true student of both the Old and the New Testament."[172] On the other hand, a Methodist chaplain who knew the next invocation would be delivered by a rabbi might have no incentive to minister to the Jewish legislator herself, preferring to leave that task to the rabbi. The ministers invited in Simpson were sent invitations specifically because they were "religious leaders,"[174] not because of any special attachment to personal qualities or job performance. They were necessarily leaders in their own denominations, so the invitations were effectively issued to them as Methodist leaders, Muslim leaders, and Catholic leaders. The plural nature of the situated chaplain's congregation forces her to take a position that is generally neutral among the competing faiths. A rotating chaplain, by contrast, has precisely the opposite incentive: when invited as a leader in her own denomination, the natural incentive is to speak as a leader of that faith rather than as person situated within the legislative institution itself.

This tension is illustrated by the different resolutions in Wynne and Kurtz. In Wynne, councilors delivered invocations before each town council meeting, naming and including the people of the town in the prayer.[175] A citizen of the town sued, arguing that the invocation of Jesus's name was an impermissible establishment, and the Fourth Circuit agreed.[176] When confronted with a multidenominational audience, rotating chaplains had no incentive to minister to people outside of their own denomination, and it took a lawsuit ending in an injunction to resolve the problem.[177] Kurtz, by contrast, had a happier ending. Because Reverend Halverson had an ongoing pastoral relationship with the Senate, he saw it as important to open a dialogue with Kurtz and deal with the allegations of sectarianism and disparagement.[178] These two cases demonstrate that a rotating chaplain has less of an incentive to deal with the pluralistic nature of her "congregation," while a situated chaplain has no choice but to do so.

***1452** This is not to say that rotating chaplains will always run afoul of the Establishment Clause in this manner. The Fourth Circuit properly noted "Marsh's insight that ministers of any given faith can appeal beyond their own adherents."[179] The mere presence of a minister of a particular faith does not mean that the prayers said will necessarily be prejudicial; only the chaplains' words, over time and taken as a whole, will raise the inference of sectarianism.[180] It should be possible for rotating chaplains to remain sensitive to the needs of the rhetorical occasion at hand and speak from within their own tradition to everyone.[181]

The Seventh Circuit made the point in Hinrichs that evaluating a rotating chaplaincy over time means essentially holding the legislature responsible if that cumulative analysis does indeed show a tendency to advance or disparage a faith.[182] This argument underscores (by way of contrast) the fact that situated chaplains, as institutional officers, are more easily held accountable for a cumulative effect than rotating chaplains, any one of whom may or may not have contributed to the effect. In holding the legislature responsible for the cumulative sectarian effect of the chaplains' prayers, the Seventh Circuit underlined the greater dangers posed to the Establishment Clause by a rotating chaplaincy, and the concomitant need for a watchful judiciary in this area. Although the prayers of both situated and rotating chaplains can violate the Establishment Clause, it is easier and more tempting for a rotating chaplain to run afoul of its limits, and there are fewer methods of redress short of lawsuit and injunction.

Conclusion

The institution of legislative chaplaincies validated by Marsh enjoys a historical pedigree that can hardly be matched by other institutions. The chaplains preexisted the Constitution and even the Union itself. Congress tried to do without them, and could not. The states ***1453** adopted them wholeheartedly, suiting the institution to

their own needs individually. As a result, "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt" of the Marsh majority's somewhat Burkean observation "that the practice of opening legislative sessions with prayer has become part of the fabric of our society." [15]

"Unambiguous" might be somewhat wishful, however. The decision was ambiguous enough not to specify with precision what institution was being removed from Establishment Clause scrutiny. By blurring the distinction between situated and rotating chaplaincies lower courts have turned Marsh into a threat to the Establishment Clause where it was not one before, holding that its deference protects both situated and rotating chaplaincies to the same degree regardless of the potential for hostility or proselytization.

A finer-grained analysis of both sides of the chaplaincy institution—both legislative action and chaplains' prayers—that reckons with the difference between situated and rotating chaplaincies, however, would clarify Marsh and prevent it from threatening the Establishment Clause. Recognizing that rotating chaplaincies pose a greater threat of establishment of religion than situated chaplaincies, a court could extend Marsh's protections to practices that uphold the tradition—"so venerable and so lovely, so respectable and respected" [16]—while preventing the unfortunately equally-venerable tradition of religious exclusion.

Footnotes

d1 B.A. 1995, Swarthmore College; Ph.D. 2004, The University of Chicago Divinity School; J.D. Candidate 2007, The University of Chicago.

1 See Jacob Duché to George Washington (Philadelphia, Pa, Oct 8, 1777), in Worthington Chauncey Ford, ed, The Washington-Duché Letters 9 (privately printed Brooklyn, NY 1890) (urging General Washington to give up on "the fatal declaration of Independency").

2 See Mary Elizabeth Goin, Catherine Marshall: Three Decades of Popular Religion, 56 J Presbyterian Hist 219, 221 (1978) (observing that by the time of his appointment to the chaplaincy in 1947, "Peter Marshall had become more than a leader in his denomination; he was a recognized spiritual leader for all America").

3 See Margaret Bayard Smith, The First Forty Years of Washington Society 16-17 (Scribner's Sons 1906) (Gaillard Hunt, ed) (describing Brackenridge's sermon, made prior to the British attack of the Capitol, which warned, "it is the government that will be punished").

4 For example, the chaplaincy at issue in Simpson v Chesterfield County Board of Supervisors, 404 F3d 276 (4th Cir 2005), is such a rotating position. See id at 279 (noting that instead of choosing a single chaplain, the Board invites religious leaders from various congregations in the county). For the purposes of this Comment, the term "rotating chaplaincy" signifies a legislative prayer practice that does not involve a chaplain hired on a permanent basis by the legislature. A rotating chaplain might even be a private citizen. Further, the term "minister," both as a noun and as a verb, is used in a broad sense, encompassing diverse forms of pastoral care and types of people who may give it, regardless of denomination, religion, or the particular connotations of the title. The foundational part of both chaplaincy practices is the invocation delivered before a legislative body begins official business. For a rotating chaplain, this is where the job usually ends. For a situated chaplain, the job will also include other types of pastoral care and outreach, including Bible study, individual counseling, and prayer. Further, in this Comment "legislative body" and "legislature" are used generically to refer to any level of government—federal,

state, county, local, school district—unless specific reference or context makes clear that it refers to a particular level. Finally, the term "institution" (especially "legislative institution") is used to indicate the voting body itself as well as all of the officers, employees, and others who comprise a legislative branch of some level of government.

5 463 US 783 (1983) (holding that the Nebraska legislature's practice of opening each session with a prayer led by a situated chaplain paid with public funds did not violate the Establishment Clause).

6 The majority did not explicitly characterize Marsh as an exception to the Establishment Clause, but did acknowledge the "unique history" forming the backdrop to the decision. See id at 791. The dissent, however, explicitly noted its exceptional nature. Id at 796 (Brennan dissenting) ("[T]he Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine."). Further, this is the characterization that has been adopted by subsequent courts. See, for example, Lee v Weisman, 505 US 577, 585 (1992) (affirming a district court decision declining to extend Marsh beyond the legislative prayer context); Snyder v Murray City Corp, 159 F3d 1227, 1232 (10th Cir 1998) (en banc) (describing the issue in Marsh as "a sui generis legal question"); Kurtz v Baker, 829 F2d 1133, 1147 (DC Cir 1987) (Ginsburg dissenting) (describing Marsh as "a special nook—a narrow space tightly sealed off from otherwise applicable first amendment doctrine").

7 See Marsh, 463 US at 794 n 18 (mentioning that state practices vary widely with some states using rotating chaplains, but not addressing the legal implications of the diverging practices).

8 See id at 791 ("This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.").

9 See id at 792-95 (noting and rejecting challenges to the Nebraska practice based on the single denomination of the chaplain, his payment from public coffers, and the Judeo-Christian nature of the prayers).

10 See, for example, Snyder, 159 F3d at 1232-33 (interpreting Marsh as defining a "genre" of legislative prayer "separate from the particular nuances of the practice there under review").

11 404 F3d 276 (4th Cir 2005).

12 See Lynch v Donnelly, 465 US 668, 673 (1984) ("[The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

13 404 F3d at 280 (noting that the County Attorney told Simpson that the nonsectarian invocations before the board are "traditionally made to a divinity that is consistent with the Judeo-Christian tradition"—a divinity that would not be invoked by Simpson, a Wiccan).

14 See id at 285 (finding the county's clergy selection policy consistent with the types of chaplaincy programs sustained by Marsh).

15 The Fourth Circuit did acknowledge prejudicial comments from members of the Board of Supervisors in a footnote, but did not deem them of constitutional import. Id at 285 n 4 (noting that one member of the Board called Simpson's faith "a mockery" in an interview and another said she hoped Simpson was "a good witch like Glenda," then deciding that neither indicated that the county did not "seriously consider[ ] Simpson's request").

16 465 US 668 (1984).

17 Id at 673 (holding that a city did not violate the Establishment Clause by including a nativity scene in its Christmas display). Although other portions of Lynch have come into question, this statement of the core value of nonhostility has not. See generally Richard S. Myers, The Establishment Clause and Nativity Scenes: A Reassessment of Lynch v. Donnelly, 77 Ky L J 61 (1988) (analyzing lower court complications resulting from Lynch and other legal commentary that criticizes Lynch, but making no reference to any objections to the nonhostility value).

18 See Simpson, 404 F3d at 287.

19 159 F3d 1227 (10th Cir 1998).

20 Id at 1238 (Lucero concurring) ("[W]hen the person giving a legislative prayer does not speak from an established chaplaincy position, then Marsh is inapplicable."). There is no outright circuit split on this point yet, but one could develop in the future.

21 There are, of course, other core Establishment Clause principles, such as neutrality and separation. Justice Brennan examined these in his Marsh dissent and found legislative chaplaincies violated both of them. Marsh, 463 US at 795-808 (Brennan dissenting). Whether or not Justice Brennan was correct in his argument is an interesting discussion that would take this Comment too far afield. This Comment will focus on nonhostility as a core Establishment Clause value that can easily be lost through blanket applications of Marsh to dissimilar facts.

22 See id at 794-95 (majority) (approving of prayers "where 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"). See also Hinrichs v Bosma, 440 F3d 393, 399 (7th Cir 2006) (interpreting Marsh as forbidding sectarian prayer); Bacus v Palo Verde School District, 52 Fed Appx 366, 366 (9th Cir 2002) (finding prayers before school board meetings unconstitutional due to their sectarian content).

23 403 US 602 (1971).

24 John Adams to Abigail Adams (Yorktown, Pa, Oct 25, 1777), in Frank Shuffleton, ed, The Letters of John and Abigail Adams 320 (Penguin 2004).

25 See note 149 (discussing this period).

26 Cal Thomas, Soul of the U S. Senate Was No Mere Accessory, Times Union (Albany, NY) A15 (Nov 9, 1994).

27 The history itself, as alluded to here and in text accompanying notes 1-3, is fascinating, but largely aside from the content of this Comment with only a few exceptions. For a deeper analysis and summary of the history, see generally Robert C. Byrd, The Senate, 1789-1989: Addresses on the History of the United States Senate 297-310 (GPO 1991); **Jeremy G. Mallory**, If There Be a God Who Hears Prayer: An Ethical Account of the United States Senate Chaplain 25-94, unpublished PhD dissertation, The University of Chicago (2004).

28 See, for example, Hinrichs v Bosma, 440 F3d 393, 395 (7th Cir 2006) (noting that chaplains are sponsored by state representatives); Simpson v Chesterfield County Board of Supervisors, 292 F Supp 2d 805, 807 (ED Va 2003) (explaining that the Board places congregations with an established presence in the community on a list from which leaders are invited on a "first-come first-serve basis" to offer an invocation); Snyder v Murray City Corp, 902 F Supp 1444, 1447 (D Utah 1995) ("The Murray City Council invites individuals representing a broad cross section of religious faiths to give these opening

prayers."). It should be noted that the distinction between invited and self-selected chaplains is quite thin. the plaintiffs in both Simpson and Snyder volunteered to receive an invitation. Simpson, 404 F3d at 280; Snyder, 159 F3d at 1229.

29 Snyder, 159 F3d at 1237 (Lucero concurring).

30 See id at 1238 (noting that Marsh drew a direct analogy between the situated chaplains in Congress and the situated chaplains in the Nebraska Legislature).

31 See, for example, Karen M. Feaver, The Soul of the Senate, 39 Christianity Today 26, 29 (Jan 9, 1995) (describing the pastoral care provided by Richard Halverson); Byrd, The Senate at 303 (cited in note 27) (same).

32 See, for example, Simpson, 404 F3d at 278-79 (explaining how a guest chaplain is selected to deliver an invocation); Snyder, 159 F3d at 1228-29 (noting a "reverence period" during which a rotating chaplain delivers a prayer).

33 See Senator James Mason's remarks to the Senate, Cong Globe, 35th Cong, 1st Sess 13 (Dec 9, 1857) ("Every Senator, I have no doubt, has had some experience that a sort of competition has grown up by the usage of the Senate in electing a Chaplain."). In the past, individual chaplains were nominated on the floor of Congress and successive votes were taken until one name garnered a majority. See, for example, the multiple ballots in Cong Globe, 34th Cong, 1st Sess 486 (Feb 21, 1856) (detailing the two rounds of votes necessary to elect Daniel Waldo as Chaplain of the House).

34 See Senate Organization Chart, online at http://www.senate.gov/pagelayout/reference/e_one_section_no_teasers/org_chart.htm (visited Oct 16, 2006) (placing the Chaplain position within the "Officers" branch along with the Secretary and Sergeant at Arms). See also the Senate Chaplain's page at http://www.senate.gov/reference/office/chaplain.htm (visited Oct 16, 2006) ("The role of the Chaplain has expanded over the years from a part-time position to a full-time job as one of the Officers of the Senate.").

35 See Byrd, The Senate at 298-302 (cited in note 27). But see, for example, the wrangling that can take place in the Senate, 80th Cong, 1st Sess, in 93 Cong Rec S 111-13 (Jan 4, 1947) (describing the partisan election of the Senate chaplain and quoting Senator Alben Barkley as insisting that "the chaplaincy ought to be above politics, and be based upon a man's qualifications").

36 See Richard Baker, The Senate Elects a Chaplain, Senate Historical Minute (Oct 10, 1942), from the files of the United States Senate Historical Office, online at http://www.senate.gov/artandhistory/history/minute/The_Senate_Elects_A_Chaplain.htm (visited Oct 16, 2006). The debate was particularly rancorous in 1947, leading to charges on both sides of playing politics with the chaplain's office and resulting in the first and only "firing" of a congressional chaplain, Frederick Brown Harris. Instead of naming Harris, the nomination motion had the name of Peter Marshall. The debate ended when Senator Bridges from New Hampshire, a member of the new Republican majority, threatened a nasty retaliation if the debate turned political, and Senator Hill, a disgruntled Democrat, offered a pointed quotation from Ralph Waldo Emerson ("[W]hat you are cries out so loudly I cannot hear what you say."). The amendment returning Harris's name to the motion was defeated and the original motion, nominating Peter Marshall, was passed. See 80th Cong, 1st Sess, in 93 Cong Rec S 111-13 (Jan 4, 1947). After Marshall died in office, Harris was reelected and became the then-longest serving chaplain in history. See Baker, The Senate Elects a Chaplain.

37 2003 US Dist LEXIS 21009, at *4 (D SC).

38 The Florida Legislature has a situated chaplain, Fla Leg House Rule 10.3 (2004), but in many cases legislators themselves deliver the opening prayer. See, for example, Journal of the House of Representatives of Florida, Special Sess A 2 (Dec 13, 2004).

39 See, for example, Simpson, 292 F Supp 2d at 807-08 (stating that congregations within the community are eligible to be placed on a list from which leaders are invited to offer invocations before the county board); Wynne, 2003 US Dist LEXIS 21009, at *4 (describing the city council members delivering prayers), Snyder, 902 F Supp at 1447 (noting that the city council invites individuals representing a broad cross section of religious faiths to give opening prayers). Perhaps controversially, this Comment categorizes Wynne as a rotating chaplaincy. Although the people delivering the prayers did have an ongoing relationship with the legislature—they were legislators themselves—the relationship was not pastoral in nature. While the Wynne program avoided the problem of including or excluding different ministers by not inviting any, it ran afoul of the dangers on the other side of the practice, namely the chaplains' prayers themselves. See Part II.C.2 (discussing challenges to chaplaincies on the basis of the prayers given) and note 133 (addressing the difficulties posed by Wynne).

40 See Ind House Rule 10.2 (2005); Ind Sen Rule 5(a)(3) (2005).

41 See Hinrichs v Bosma, 400 F Supp 2d 1103, 1105 (SD Ind 2005) (describing the process by which ministers are selected to deliver invocations in the Indiana legislature).

42 See id at 1105-06 (listing postage for invitations and thank-you notes, photographs with legislators, and streaming video as cost items associated with clerical invocations).

43 440 F3d 395 (7th Cir 2006), affg 400 F Supp 2d 1103.

44 440 F3d at 403. See Hinrichs, 400 F Supp 2d at 1131 (enjoining further legislative prayer as part of the official proceedings of the Indiana House of Representatives because the chaplain's prayers were too sectarian, and the Indiana Legislature effectively ratified them by repeated invitations).

45 Unlike Indiana, North Carolina has not seen a challenge to its legislature's chaplaincy practice in the federal courts. It is, however, the only state to have heard a federal case about judicial prayer from the bench. See generally North Carolina Civil Liberties Union v Constangy, 751 F Supp 552 (WD NC 1990) (holding that a judge's prayers from the bench violated the Establishment Clause), affd 947 F2d 1145 (4th Cir 1991).

46 See the North Carolina House and Senate leadership webpages at http://www.ncleg.net/House/houseleadership.html (visited Oct 16, 2006) (listing Chaplain as a House Officer) and http://www.ncleg.net/Senate/senateleadership.html (visited Oct 16, 2006) (listing Chaplain as a Senate Officer).

47 See NC House Rule 47 (2005), NC Sen Rule 3 (2005).

48 See, for example, Leah Friedman, Prayer Opens Local Government Meetings, News & Observer (Raleigh, NC) E6 (Feb 17, 2006). See also John Zebrowski, Public Meetings, Christian Prayers, News & Observer (Raleigh, NC) A19 (July 20, 2003) (mentioning a Jewish legislator who said she did not feel excluded by the prayers performed before the Legislature).

49 Friedman, Prayer Opens Local Government Meetings, The News & Observer (Raleigh, NC) at E6 (cited in note 48).

50 Lisa Grace Lednicer, Capitol Chaplain Gets the Word in Edgewise, Oregonian C01 (Jan 26, 1999). Ironically, the chaplain to the Arizona Legislature would come out as a homosexual two years later, be stripped of his clergy credentials and ousted from his position, and lead the Arizona Legislature to reconsider a situated chaplaincy entirely. See Religion Briefs: Gay Chaplain Finds Way to Stay Ordained, Washington Times C8 (Jan 13, 2001). See also Amanda Scioscia, Steers and Queers, Phoenix New Times, Features Section (Feb 15, 2001) ("After Reverend Charlie Coppinger, the recently outed and ousted chaplain to the state Legislature, gives the prayer [at a gay rodeo], cowboy hats go back on and it's time to bring on the bulls.").

51 Lednicer, Capitol Chaplain Gets the Word in Edgewise, Oregonian at C01 (cited in note 50).

52 See id (quoting the chaplain as saying that "[t]he fastest way to kill a chaplaincy is to discuss legislation" and that it is "[b]etter for a chaplain to encourage people to seek God's wisdom").

53 See Oregon Chaplain Ministry page, Faith and Freedom Network, online at http://faithandfreedom.us/or_chaplain.html (visited Oct 16, 2006).

54 Id.

55 See Lednicer, Capitol Chaplain Gets the Word in Edgewise, Oregonian at C01 (cited in note 50). See also the Capital Ministries homepage at http://www.capitolministries.org/index.htm, and the mission statement at http://www.capitolministries.org/about.htm (visited Oct 16, 2006) (stating the mission is to "communicate the Gospel of Jesus Christ to every legislator, in every capitol, every year, by placing a full-time, skilled ambassador for Christ in each of America's 50 state capitols [and to] work to build up the body of Christ within the political people group").

56 See Marsh, 463 US at 796 (Brennan dissenting).

57 Snyder, 159 F3d at 1232.

58 403 US at 612-13 (examining cases for a "secular legislative purpose," "primary effect neither advanc[ing] nor inhibit[ing] religion," and "not foster[ing] an excessive government entanglement with religion") (internal quotations omitted). For a sampling of the derision, see, for example, Lamb's Chapel v Center Moriches Union Free School District, 508 US 384, 398 (1993) (Scalia concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys."); Glassroth v Moore, 335 F3d 1282, 1295 (11th Cir 2003) ("[T]he Lemon test is often maligned.").

59 See Marsh, 463 US at 790-91.

60 See id at 793 (limiting the chaplaincy when an "impermissible motive" motivates the legislature), 794-95 (allowing a future court to examine proselytizing prayers).

61 Id at 795 (Brennan dissenting) (emphasizing the "limited rationale" of the majority opinion).

62 This Comment as a whole is a mild challenge to Justice Brennan's assertion that Marsh would not threaten the "overall fate of the Establishment Clause." Id.

63 See for example, Van Orden v Perry, 545 US 677, 125 S Ct 2854, 2861-62 (2005) (Rehnquist plurality) (drawing a parallel between the "history and tradition" of legislative chaplains acknowledged in Marsh with the "role played

by the Ten Commandments in our Nation's heritage"), McCreary v ACLU, 545 US 844, 125 S Ct 2722, 2748-49 (2005) (Scalia dissenting) (pointing toward the history of legislative chaplains as support for the constitutionality of Ten Commandments displays at county courthouses); Lee v Weisman, 505 US 577, 596-97 (1992) (Kennedy) (insisting upon the "obvious differences" between the legislative chaplaincy at issue in Marsh and clergy who offer prayer as part of an official public school graduation ceremony); Allegheny v ACLU, 492 US 573, 595 n 46 (1989) (Blackmun plurality) (noting the "unique history" of legislative chaplains as one basis of evaluating the constitutionality of crèche displays on public property); Wallace v Jaffree, 472 US 38, 63 (1985) (Powell concurring) (citing Marsh while discussing whether a state's school prayer and meditation statute violated the Establishment Clause); Grand Rapids School District v Ball, 473 US 373, 401 (1985) (Rehnquist dissenting) ("[O]ne wonders how the teaching of [community education classes in sectarian schools], which is struck down today, creates a greater 'symbolic link' than the legislative chaplain upheld in Marsh ") (internal citation omitted); Lynch, 465 US at 692-93 (1984) (O'Connor concurring) ("[T]he government's display of the crèche [is] no more an endorsement of religion than such governmental 'acknowledgements' of religion as legislative prayers."). Marsh has been applied to legislative chaplaincies in the lower courts. See generally, for example, Pelphrey v Cobb County, 410 F Supp 2d 1324 (ND Ga 2006); Hinrichs v Bosma, 400 F Supp 2d 1103 (SD Ind 2005); Simpson v Chesterfield County Board of Supervisors, 292 F Supp 2d 805 (ED Va 2003); Snyder v Murray City Corp, 902 F Supp 1444 (D Utah 1998).

64 The legislature's action here would provoke scrutiny under the "impermissible motive" limit on chaplaincies. See Marsh, 463 US at 793.

65 The chaplain's prayers here would need to be parsed to see if they "proselytize or advance any one, or disparage any other, faith or belief." Id at 794-95.

66 Lemon, 403 US at 612-13 (internal citations omitted). For an analysis of legislative chaplaincies under the Lemon standard, see Marsh, 463 US at 796-801 (Brennan dissenting).

67 Lynch, 465 US at 688 (O'Connor concurring) ("The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.") This "endorsement" test was eventually (and controversially) applied by a majority of justices in Allegheny, 492 US at 592-94 ("Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion.")

68 See Lynch, 465 US at 669 (O'Connor concurring) (arguing that divisiveness alone is not enough to show entanglement, but might be evidence of impermissible endorsement).

69 See Adam Samaha, Endorsement Retires, From Religious Symbols to Anti-Sorting Principles, 2005 S Ct Rev 135, 144 & n 43 (citing Santa Fe Independent School District v Doe, 530 US 290, 308 (2000), and Allegheny, 492 US at 593 (1989), as embracing the endorsement approach).

70 521 US 203 (1997).

71

Id at 234 (finding constitutional a federally funded program under which the city sent public school teachers to parochial schools to provide remedial education to disadvantaged children).

72 Lemon, 403 US at 612.

73 See Marsh, 463 US at 786 (noting that the court of appeals applied the Lemon three-part test).

74 Id at 795, quoting Panhandle Oil Co v Knox, 277 US 218, 223 (1928) (Holmes dissenting).

75 See Marsh, 463 US at 784-85 (alleging a violation of the Establishment Clause for both the existence of the chaplaincy and the use of public funds to support it).

76 See Chambers v Marsh, 504 F Supp 585, 592 (D Neb 1980) (holding that "prayers may be had but not at public expense," and noting a parallel recommendation by James Madison).

77 The district court applied the Lemon criteria as articulated in Committee for Public Education and Religious Liberty v Nyquist, 413 US 756 (1973).

78 See Chambers, 504 F Supp at 588-91. The purpose was to give order to the legislature, and was therefore secular. Id at 588-89. The effect, while generally religious in nature, was neither "primarily" religious nor very pervasive. Id at 589 ("[T]he actual effect of these prayers on religion, I am persuaded by the record made in this case, is virtually nonexistent."). The court, following a circuit precedent, Bogen v Doty, 598 F2d 1110, 1114 (8th Cir 1979), found no entanglement on the record, but recognized that it might exist when "refusing volunteers of one religious persuasion while inviting others to give prayers." Chambers, 504 F Supp at 591.

79 See Chambers, 504 F Supp at 591-93 (finding the payment of a chaplain representing a single denomination to have a predominantly religious effect).

80 See Chambers v Marsh, 675 F2d 228, 233 (8th Cir 1982) ("[T]he established practice must be viewed as a whole.").

81 Id at 234-35. The circuit court also cited to the warnings in Bogen, which was a case involving a county's unpaid rotating chaplaincy, noting that the state legislature in Chambers had gone too far into "the quagmire" by paying the chaplain and keeping one from the same denomination for such a long time. Id at 234. Having the same minister for sixteen years violated all three of the Lemon standards. Id at 234-35. Notably, however, the circuit explicitly refrained from declaring unconstitutional all legislative chaplaincies or even all paid chaplaincies, allowing that "some invocation practices can be constitutionally conducted." Id at 235.

82 Marsh, 463 US at 784.

83 See id at 786-95 (discussing Nebraska's practice).

84 Id at 786.

85 See id at 788.

86 Id.

87 See id at 790 ("[H]istorical evidence sheds 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.")

88

See id ("It can hardly be thought that they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable"). Some have cast doubt on this argument from historical timing by pointing out that the same First Congress also passed the Alien and Sedition Acts, which by today's standards clearly violate the First Amendment. See, for example, Van Orden, 125 S Ct at 2885 n 27 (Stevens dissenting) (insisting that an "interpretive approach would [be] misguided[] [to] give authoritative weight to the fact that the Congress that passed the First Amendment also enacted laws, such as the Alien and Sedition Act, that indisputably violated our present understanding of the First Amendment"). Arguably, however, this is merely a trick of time. Finding the Alien and Sedition Acts contemporarily unconstitutional is relatively easy in hindsight against the background of Brandenburg v Ohio, 395 US 444, 449 (1969) (holding that state acts which punished mere advocacy and forbade assembly with others violated the First and Fourteenth Amendments), and United States v O'Brien, 391 US 367, 386 (1968) (holding that the First Amendment did not bar the government from convicting the defendant for burning his selective service registration certificate), but far from obvious at the time: the Sedition Act of 1798 expired on its own, but was never overturned on First Amendment grounds even though it drew vehement opposition from Thomas Jefferson and the Democratic-Republican Party. See Kathleen Sullivan and Gerald Gunther, First Amendment Law 3-4 (Foundation 2d ed 2003) (noting that "although the Supreme Court did not rule on the [Sedition] Act's constitutionality at the time, several lower federal courts, partly manned by Supreme Court Justices riding circuit, upheld it"), Thomas Jefferson, The Kentucky Resolution, Nov 10, 1798, in Philip B. Kurland and Ralph Lerner, eds, 5 The Founders' Constitution 131-34 (Chicago 1987). A chaplain, however, was just as facially troubling to the First Amendment then, see James Madison, Detached Memoranda, in Elizabeth Fleet, ed, Madison's "Detached Memoranda," 3 Wm & Mary Q 558-59 (1946) ("Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom? In the strictness the answer on both points must be negative"), as it is now, see Marsh, 463 US at 798 (Brennan dissenting) ("[T]here can be no doubt that the practice of legislative prayer leads to excessive 'entanglement' between the State and religion"). Thus, the fact that it has persisted from that unique historical genesis up to the present without interruption, as the Marsh majority points out, id at 788, is indeed remarkable, giving force to the idea that the Framers contemporaneously considered and rejected the idea that chaplains violated the First Amendment.

89 Marsh, 463 US at 791.

90 See id at 793.

91 Id.

92 Id at 793-94.

93 Id at 794.

94 Id (internal citation omitted).

95 See id. See also 2 USC § 61d (2000) (giving compensation for the Senate Chaplain, roughly equivalent to an Assistant Cabinet Secretary, as given in 5 USC § 5315 (2000)); National Conference of State Legislatures Amicus Curiae Brief, Marsh v Chambers, No 82-23, *3 (filed Dec 16, 1982) (available on Lexis at 1982 US Briefs 23) ("NCSL Amicus Brief").

96 Marsh, 463 US at 794-95.

97

See Part I.A (describing the differences between rotating and permanent chaplaincies).

98 See Marsh, 463 US at 822-23 (Stevens dissenting) (dispensing with a subjective inquiry into the permissibility of legislators' motivations and finding that the bare fact of the long tenure was sufficient to establish a violation).

99 See id at 823 ("[I]t seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause.").

100 Id at 824. Ostensibly, given the fact-intensive focus of the rest of his dissent, Stevens was speaking specifically about the Nebraska Legislature, but the argument could still be available in a challenge to another practice.

101 See id at 823 ("I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature.") One of the strengths of a rotating chaplaincy practice (or a guest chaplain program in the context of a situated chaplaincy) is that it is more likely to evade this objection. The greater freedom to diversify, however, also makes exclusion less conspicuous. See Part III.A (describing the greater danger of establishment through legislative actions within a rotating chaplaincy program) and III.B (noting the incentives rotating chaplains have to infringe the Establishment Clause).

102 See id at 802 (Brennan dissenting) (noting that the First Amendment mandates governmental neutrality between religions).

103 See Abingdon County School District v Schempp, 374 US 203, 299-300 (1963) (Brennan concurring) (finding legislative prayer constitutional under the Establishment Clause, because, as compared to school prayer, legislators have more power to exit than do students).

104 See Marsh, 463 US at 769 (Brennan dissenting) (describing Justice Brennan's change of position).

105 Id at 800-01. Although Lemon figured most prominently, Justice Brennan also discussed other tests used to find Establishment Clause violations. For instance, discrimination among religions, or in favor of religion generally, should trigger strict scrutiny, and Brennan would have found neither a compelling state interest nor a tight fit between ends and means. Id at 801, citing Larson v Valente, 456 US 228, 247 (1982). Justice Brennan also felt that legislative prayer would violate the second and third prongs of the test announced in Schempp, which he favored. See Marsh, 463 US at 801 (Brennan dissenting), citing Schempp, 374 US at 294-95 (holding that the Establishment Clause forbids "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions, (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice"). In the end, Brennan rested his dissent less on Lemon than on his more general observation that "[t]he Establishment Clause embodies a judgment, born of a long and turbulent history, that, in our society, religion must be a private matter for the individual, the family, and the institutions of private choice." Marsh, 463 US at 802 (Brennan dissenting) (internal citations and quotation marks omitted).

106 Marsh, 463 US at 797 (Brennan dissenting).

107 Id at 797-98.

108 See id at 797.

109 See, for example, Engel v Vitale, 370 US 421, 431 (1962) (finding that official prayers in public schools had a uniquely coercive effect on children and violated the Establishment Clause). See also Brennan's confession of a change in heart on this subject. Marsh, 463 US at 796 (Brennan dissenting) (referring to his concurrence in Schempp).

110 Marsh, 463 US at 798 n 5 (Brennan dissenting). This argument proved prophetic: a citizen's attempt to enter a city council meeting late in order to avoid the prayer resulted in her being dropped from the agenda. See Wynne, 2003 US Dist LEXIS 21009, at *5.

111 Marsh, 463 US at 799-98 (Brennan dissenting), citing Lemon, 403 US at 614-22.

112 Marsh, 463 US at 799.

113 Id at 799, citing Lemon, 403 US at 622.

114 See Marsh, 463 US at 799-800 & nn 9-10.

115 See id. See also note 144 and accompanying text.

116 Marsh, 463 US at 802.

117 Id at 809.

118 See id at 809-13 (distinguishing the chaplaincies from recognized exceptions such as religious organizations receiving government aid based on secular criteria, Sunday closing laws, civil religion, tax exemptions for religious institutions, and accommodation of religious free exercise).

119 See id at 813-21.

120 Marsh has been cited in cases ranging over a wide area of issues other than legislative prayer. For examples, see note 63.

121 See Hinrichs, 440 F3d at 402 ("The House's current practice is to ask clergy to 'strive for an ecumenical prayer.' It is simply the toleration of the failure to follow this practice that has produced this litigation and required the action of the federal court.") (internal citations omitted).

122 The analysis in some cases has made such a distinction, but the holdings following Marsh have applied a blanket rule and have failed to distinguish between the two types of chaplain. Compare, for example, Snyder, 159 F3d at 1228-36 (majority) (characterizing legislative prayers, pursuant to Marsh, as a "religious genre" that does not violate the Establishment Clause, even if "this genre of government religious activity cannot exist without the government actually selecting someone to offer such prayers"), with id at 1236-43 (Lucero concurring) (arguing that "the city's choice of [a rotating chaplain] format proscribes regulation of the content of the prayers offered," lest the city get entangled in supervising chaplains). The majority here downplayed the difference between a situated and rotating chaplain by bringing them both under the cope of the "religious genre" and not placing much weight on the exclusionary aspect of picking chaplains. The concurrence, by contrast, took the distinction seriously and contemplated the ramifications of excluding chaplains on the basis of the content of their prayers.

123 See Murray v Morton, 505 F Supp 144, 147 (DDC 1981) (dismissing for lack of standing and because case presented a political question), revd and remanded as Murray v Buchanan, 674 F2d 14, 1982 US App LEXIS 21153 (DC Cir 1982) (finding standing, denying that the political question doctrine should force abstention, and remanding for trial on Establishment Clause merits), vacd and

dismissed as Murray v Buchanan, 720 F2d 689, 690 (DC Cir 1983) (en banc) (per curiam) ("The Supreme Court's decision in Marsh v Chambers is dispositive."). The chief dispute in the opinion was over justiciability issues, which caused the district court and initial circuit panel to decline to reach the merits because the plaintiffs lacked standing and because it presented a political question. See Murray, 1982 US App LEXIS at *23. Judge Ginsburg's concurrence en banc found the matter justiciable because the Supreme Court decided Marsh on the merits. See Murray, 720 F2d at 699 (Ginsburg concurring). The en banc per curiam vacatur vitiated those holdings. By contrast, the initial panel's dissenter reprinted his dissent in the en banc decision, which not only reached the merits but, taking a step beyond Marsh, also found the case nonjusticiable as a political question and because it violated the separation of powers doctrine. See id at 690-91 (MacKinnon concurring) (arguing, on the merits, that Congress had been entrusted the power to create and fund a chaplaincy, thus "textually committing" the matter in a way that makes it a political question evading judicial scrutiny). Judge Ginsburg designated this argument "novel." Id at 692 n 5. In response to the D.C. Circuit's opinion in Murray, the U.S. House of Representatives unanimously passed a resolution reaffirming its support for congressional chaplaincies. See HR Res 413, 97th Cong H, 2d Sess (Mar 25, 1982), in 128 Cong Rec H 5890-96 (Mar 30, 1982) ("Resolved, That the House of Representatives considers its historic establishment of a chaplaincy to be an appropriate and constitutional exercise of exclusively conferred powers.").

124 See 159 F3d at 1234 (noting that Marsh imposed an impermissible-motive limitation on the legislature's choice of a chaplain, but finding no such motive existed in Snyder). The proposed invocation criticized the practice of prayer before council meetings in colorful terms. See Snyder, 902 F Supp at 1447 n 2 ("We pray that you prevent self-righteous politicians from misusing the name of God in conducting government meetings."). Judge Lucero, concurring in Snyder, notably argued that the en banc majority overextended Marsh, which he felt should not apply to rotating chaplaincies. See Snyder, 159 F3d at 1236-43 (Lucero concurring) (asserting that Marsh involves, and should be limited to, situated chaplaincies—chaplaincies that are so structured that they become an arm or an office of the legislature).

125 See Snyder, 902 F Supp at 1447-48. The Tenth Circuit found the prayer to be outside the genre of legislative prayer protected by Marsh because of its proselytizing effect. Snyder, 159 F3d at 1235 (finding that the record failed to demonstrate any evidence to indicate legislative intent to promote or disparage any religion).

126 See 404 F3d at 280.

127 See id.

128 See Hinrichs, 400 F Supp 2d at 1129 (holding that plaintiffs are entitled to a permanent injunction against the Speaker in his official capacity, barring him from permitting sectarian prayer as part of the official proceedings of the Indiana House of Representatives). See also the description of the Indiana Legislature's practice in Part I.B. Hinrichs's holding is loosely analogous to a Ninth Circuit decision applying similar reasoning to a school board prayer case, thus tying together the school prayer (Lee) and the legislative prayer (Marsh) lines of cases. See Bacus v Palo Verde Unified School District Board of Education, 52 Fed Appx 355, 356 (9th Cir 2002) (finding that the prayers in question were clearly unconstitutional under the school prayer line of cases, but also holding that the prayers "in the Name of Jesus" impermissibly advanced Christianity, contrary to Marsh). See also Lee, 505 US at 598-99 (holding that it is a violation of the Establishment Clause to allow clerical members to deliver

prayers as part of an official public high school graduation ceremony); Coles v Cleveland Board of Education, 183 F3d 538, 541 (6th Cir 1999) (Merritt concurring) ("The annual graduation exercises here are analogous to the sessions referred to in Marsh and should be governed by the same principles.")

129 See Hinrichs, 440 F3d at 402.

130 See Pelphrey v Cobb County, 410 F Supp 2d 1324, 1330 (ND Ga 2005) (finding that the plaintiffs failed to show sectarian references promoted a particular religious view or principles unique to Christianity).

131 Marsh, 463 US at 794-95.

132 376 F3d 292 (4th Cir 2004), affg 2003 US Dist LEXIS 21009.

133 See 2003 US Dist LEXIS 21009, at *1-4 (finding the practice of praying before town meetings invoking the name of Jesus and encompassing both legislators and citizens to violate the Establishment Clause). Notably, the plaintiff in Wynne tried to enter the meeting late in order to avoid the prayer but "was not allowed to participate in the meeting although she had signed up to speak at the meeting and was listed on the agenda." Id at *5. This Comment generally treats legislators delivering prayers as rotating chaplains, see note 39, which makes Wynne an exception to the general rule that a legislature's actions ought to be more closely scrutinized when dealing with a rotating chaplaincy. When a legislator delivers the prayer, the distinction between "legislative action" and "chaplain's prayer" collapses. In such a case, Wynne indicates that the content of the prayer is decisive. See Wynne, 376 F3d at 301-02 (arguing that the city council unconstitutionally advanced one religion by praying in Jesus's name at the beginning of meetings). Notably, Wynne never takes up the "impermissible motive" line of inquiry; the phrase never appears in the opinion.

134 See Bacus, 52 Fed Appx at 357 ("These prayers advanced one faith, Christianity, providing it with a special endorsed and privileged status in the school board.") As discussed in note 128, the Ninth Circuit struck down the practice following both Marsh and a line of school prayer cases. See Bacus, 52 Fed Appx at 356.

135 There are two district court opinions associated with this case: 630 F Supp 850 (DDC 1986), vacd and remd 829 F2d 1133 (DC Cir 1987), and 644 F Supp 613 (DDC 1986) (dismissing a claim that the Senate Chaplain had disparaged atheists using overly sectarian prayers). The first dismissed the "discrimination against atheists" claim but held over the "disparagement of atheists through sectarian prayer" claim; the second opinion dismissed the disparagement claim as practically moot. Only the first claim from the first suit was appealed to the D.C. Circuit.

136 Kurtz, 644 F Supp at 617-19.

137 Kurtz, 829 F2d at 1136 (discussing the plaintiff's contention that the "Senate and House rules require guest speakers to utter a prayer" and therefore "violate [d] the Free Speech, Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution"). Kurtz also alleged that he was being prevented from delivering an invocation because it was "non-theistic," but that claim was ultimately dismissed. Id at 1142-45 (finding insufficient the causal link between the defendant and the claimed injury, thus denying standing under Article III of the U.S. Constitution).

138 Kurtz, 644 F Supp at 616-17 (describing the exchange of letters).

139

See id at 617-19 (acknowledging Kurtz's stipulation that as long as this correspondence was kept public in order to deter future chaplains from disparaging atheists, the court's concerns would be met). Following the policy of United States v Munsingwear, 340 US 36, 41 (1950), the court also vacated the jurisdictional holdings of the earlier case because it was found moot before final resolution. See Kurtz, 644 F Supp at 619-21 ("Because it is so unlikely that future events will revive this controversy, there is no reason to preserve the jurisdictional holdings in anticipation of that day.").

140 Marsh, 463 US at 793 (1983).

141 For a description of how the chaplain's duties have changed over time, see Feaver, 39 Christianity Today at 29 (cited in note 31); Byrd, The Senate at 301 (cited in note 27). The most notable change described is the transition from a part-time position, charged merely with delivering invocations, to a full-time pastoral job. See Mallory, If There Be a God at 83-89 (cited in note 27) (describing Halverson's chaplaincy). See also Jim Castelli, Senate Republicans Nominate Bethesda Pastor New Chaplain, Washington Star 6 (Dec 1980).

142 For a discussion of the political question doctrine, see note 123.

143 For instance, evidence that a legislature specifically and repeatedly selects sectarian preachers may prove that a legislature prefers some faiths to others. See Hinrichs, 440 F3d at 402 (describing the Indiana Legislature's failure to secure ecumenical prayer as part of an "irreparable injury" warranting injunction). This admittedly blurs the distinction between the legislature's actions and the chaplain's prayers, making the analysis of the first dependent upon a parsing of the second. This blurring underscores, however, current courts' unwillingness to pierce the veil of legislative action under Marsh. In Hinrichs, the Seventh Circuit used the chaplain's prayers as evidence of the legislature's impermissible motive rather than making a more direct inquiry into the behavior of the legislature. Yet notably, the Indiana Legislature uses a rotating chaplaincy system. In imputing the choice of sectarian chaplains to the legislature as an impermissible motive, the Seventh Circuit recognized the greater establishment threat rotating chaplains posed. See id at 402 (noting that the Speaker of the House cut off all prayer rather than comply with "the House's articulated desire that the prayer not be identified with any particular denomination").

144 See Feaver, 39 Christianity Today at 29 (cited in note 31).

In spite of the sensitive nature of the job, the senators have placed no restrictions on the office of the chaplain. Halverson recalls that early in his tenure a few Jewish senators gently reminded him that they felt excluded when he prayed "in the name of Jesus." Not wanting to offend them—but also not wanting to compromise his calling—the chaplain has sometimes closed his prayers in the name of Jesus and, at other times, in an analogous title like "the Way, the Truth, and the Life." And he has often said to his Jewish friends in the Senate, "You know everything about my faith is Jewish, and my best friend [Jesus] is Jewish."

145 See Committee on the Judiciary, S Rep No 376, 32d Cong, 2d Sess 2 (1853) (likening chaplains to "messengers who attend to our private business, take checks to the bank for us, receive the money, or procure bank drafts").

146 This has extensive ramifications for, among other things, institutional values. For example, the U S. Senate Chaplain arguably plays a role in helping to sustain the values of probity, wisdom, and deliberation that the Senate is supposed to embody. See generally Mallory, If There Be a God at 150-263 (cited in note 27).

147 Snyder, 159 F3d at 1238 (Lucero concurring). This is further underscored by looking closely at the definition of the term "chaplain." A chaplain is a member of the clergy attached to an institution (whether a specific chapel, prison, hospital, royal court, branch of the armed forces, or legislature). The American Heritage Dictionary of the English Language 311 (Houghton Mifflin 4th ed 2000). Notably, these are institutions defined by something other than religious denomination or faith (except for the attachment to a chapel). By definition, a chaplain serves an institution, not a particular denomination or faith. Notably, a rotating chaplain would fit this definition much more awkwardly than a situated chaplain. In the former case, the chaplain's loyalties are divided between his denomination and his temporary position vis-à-vis the legislature. In the latter case, the chaplain simply serves the legislature, regardless of denominational loyalty. This Comment still treats both as "chaplains," but the ill fit of the term for rotating chaplains is worth remarking.

148 See S Rep No 376 (cited in note 145); Chaplains in Congress and in the Army and Navy, HR Rep No 124, 33d Cong, 1st Sess (1854).

149 See Cong Globe, 35th Cong, 1st Sess 13-14 (Dec 9, 1857) (proposing and adopting a rotating chaplaincy in the Senate). Some sources report that the House's switch to a rotating chaplaincy lasted for six years, from the Thirty-fourth through the Thirty-sixth Congress. See House Chaplain Website, online at http://chaplain.house.gov/histInfo.html (visited Oct 16, 2006) (noting that "from 1855 to 1861 the local clergy in the District of Columbia conducted the opening prayer," and "[t]hereafter, the House has elected a Chaplain at the beginning of each Congress"); Byrd, The Senate at 302 (cited in note 27) (noting that in 1855, the House "decided to discontinue its practice of electing a regular chaplain" and instead "various members of the District of Columbia clergy were invited to take turns opening each session and preaching the sermon on Sundays"). The Congressional Globe, however, indicates that situated chaplains were elected for at least some of this time; only during the Thirty-fifth Congress did the House use a rotating chaplaincy program exclusively. In the Thirty-fourth Congress, the House took up the nominations on February 20 and elected Daniel Waldo as chaplain for the First Session of the Thirty-fourth Congress. Cong Globe, 34th Cong, 1st Sess 486 (Feb 21, 1856). In the Thirty-sixth Congress, the nominations were taken on March 6, 1860, and voted upon that day, electing Thomas Stockton. Cong Globe, 36th Cong, 1st Sess 1015, 1016 (Mar 6, 1860). Throughout the debates in these two Congresses, various proposals to invite the clergy of the District of Columbia were offered, but none succeeded in being adopted.

150 Cong Globe, 36th Cong, 1st Sess 98 (Dec 12, 1859).

151 Id.

152 See Byrd, The Senate at 302 (cited in note 27). See also Cong Globe, 36th Cong, 1st Sess 98 (Dec 12, 1859) (adopting the amendment).

153 See, for example, Cong Globe, 36th Cong, 1st Sess 992-94 (Mar 5 and 7, 1860) (recording the debate over whether or not electing a chaplain should be considered a privileged motion).

154 Id at 994.

155 Id at 1015-16.

156 See Simpson, 404 F3d at 280 (describing the reasons for rejecting Simpson's request to be put on the list of rotating chaplains).

157

See US Const Art I, § 2, cl 5 ("The House of Representatives shall chuse their other Officers."); US Const Art I, § 3, cl 5 ("The Senate shall chuse their other Officers.").

158 See US Const Art VI, § 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public trust under the United States."); Torcaso v Watkins, 367 US 488, 495 (1961) (striking down a requirement that state public officials swear an oath professing belief in a supreme being).

159 Marsh, 463 US at 796 (Brennan dissenting).

160 S Rep No 376 at 2 (cited in note 145). Indeed, the Senate Judiciary Committee followed this analysis all the way through, comparing Senate Chaplains to messengers, pages, and other officers: "Where, then, is the impropriety of having an officer to discharge these duties? And how is it more a subject of just complaint than to have officers who attend to the private secular business of members?" Id.

161 Marsh, 463 US at 793.

162 See Simpson, 404 F3d at 285 ("A party challenging a legislative invocation practice cannot, therefore, rely on the mere fact that the selecting authority chose a representative of a particular faith, because some adherent or representative of some faith will invariably give the invocation.")

163 463 US at 793.

164 See Simpson, 404 F3d at 285 (noting that the Marsh Court did not remand for a factual finding on impermissible motive).

165 See Snyder, 159 F3d at 1236.

166 See Hinrichs, 440 F3d at 401.

167 See Snyder, 159 F3d at 1238-43 (Lucero concurring) (emphasizing that "an open prayer system has the potential, in its mere administration, to violate the Establishment Clause"). See also note 124 (discussing Lucero's argument that Marsh should be limited to situated chaplaincies).

168 See notes 148-55 and accompanying text.

169 See Marsh, 463 US at 788-90; NCSL Amicus Brief at *1-6 (recounting the results of a survey of the ninety-eight state legislative bodies, showing that chaplains' compensation levels are generally very meager).

170 Marsh, 463 US at 794-95. These are the sentences from Marsh that tend to reappear the most frequently, as pointed out by Pelphrey v Cobb County, 410 F Supp 2d 1324, 1337 (ND Ga 2006) (noting the "two oft-quoted sentences").

171 See, for example, Hinrichs, 440 F3d at 402 (describing the legislature's failure to cabin in the prayers of a rotating chaplain); Kurtz, 829 F2d at 1134-36 (detailing the exchange of letters between Kurtz and the congressional chaplain, and the latter's refusal to let Kurtz deliver a lesson that would disparage the chaplain).

172 See note 147 (discussing the competing loyalties of a rotating chaplain).

173 104th Cong, 1st Sess in 141 Cong Rec S 3763 (Mar 10, 1995) (Sen Lieberman).

174 Simpson, 292 F Supp 2d at 808.

175 See 2003 US Dist LEXIS 21009 at *6-7 (noting how the content of the invocation is determined and the its overarching guidelines).

176 See Wynne, 376 F3d at 302.

177 This Comment classifies the councilors here as rotating chaplains because they do not have an ongoing pastoral relationship with the listeners. See note 133 (analyzing the complications posed by Wynne).

178 829 F2d at 1135.

179 Simpson, 404 F3d at 287.

180 See Pelphrey, 410 F Supp 2d at 1339 ("Where the invocation of sectarian concepts or beliefs, viewed from a cumulative perspective, reaches a certain level of ubiquity and exclusivity, the appearance of a legislative preference for one particular faith may well become constitutionally intolerable."). This is seen in action in Hinrichs, when the Seventh Circuit examined the tenor of the rotating chaplains' prayers over time and attributed the sectarian tone to the legislature. See Hinrichs, 440 F3d at 402.

181 Contrary to Lucero's concurrence in Snyder, this will not require judges to listen to every prayer, "gavel ready," to parse the wording. See Snyder, 159 F3d at 1239 (Lucero concurring) (arguing that expanding Marsh beyond situated chaplaincies would result in the need for continued policing and surveillance). As Marsh specified, the prayers themselves are examined over time, cumulatively, and in context. See Marsh, 463 US at 794-95. See also Wynne, 376 F3d at 298, 298 n 4; Pelphrey, 410 F Supp 2d at 1339.

182 See Hinrichs, 440 F3d at 402 (emphasizing that the litigation arose because of the Indiana House's failure to provide the "ecumenical prayer" it ostensibly sought).

183 Marsh, 463 US at 792.

184 S Rep No 376 at 4 (cited in note 145).

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