Nos. 18-2974 & 18-3167

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIAN FIELDS, et al.,

Plaintiffs—Appellees/Cross Appellants,

v.

SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, et al.,

Defendants—Appellants/Cross Appellees.

On Appeal From The United States District Court
For The Middle District of Pennsylvania,
The Honorable Christopher C. Conner, U.S.D.J.,
Civil No. 1-16-cv-01764

BRIEF *AMICUS CURIAE* OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 18-2974 & 18-3167

BRIAN FIELDS, et al.,
Plaintiffs—Appellees,

v.

SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, et al.,

Defendants—Appellants.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

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The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Freedom From Religion Foundation, Inc.
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makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

s/ Patrick C. Elliott
(Signature of Counsel or Party)

Dated: 03/01/2019

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation, Inc. ("FFRF")[1] is a nationally recognized 501(c)(3) educational nonprofit incorporated in 1978. Its two purposes are to educate the public about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF works as an umbrella for those who are free from religion (freethinkers, atheists, agnostics, and nonbelievers) and who are committed to upholding the Establishment Clause. FFRF currently has more than 31,000 U.S. members, with members in every state, including over 950 in Pennsylvania, and a chapter located in Harrisburg.

FFRF's interest in this case arises from its work to ensure that its members and other nonbelievers are able to fully participate in legislative functions. Because of FFRF's educational efforts, many

[1] No counsel for any party authored this brief, in whole or in part. No monetary contribution has been made to the preparation or submission of this brief other than by the amicus curiae, its members or its counsel. Consent to this brief has been given by all parties.

legislative bodies have allowed nonbelievers to deliver invocations. FFRF also is representing individuals in two ongoing lawsuits challenging discriminatory invocation policies.

SUMMARY OF ARGUMENT

Constitutional protections under the Establishment Clause of the First Amendment are not limited to preferred religious groups. Both the U.S. Supreme Court and the Framers of the Constitution recognized that nonbelievers are entitled to the same constitutional protections as believers. It is within this framework that the actions of the Pennsylvania House of Representatives must be examined.

Purposeful discrimination by the government on the basis of religion strikes at the heart of the Establishment Clause. It is the discriminatory conduct itself, and corresponding governmental disapproval of a religious position, that gives rise to the violation. In numerous cases this Court has recognized that the protections of the Establishment Clause apply, even when the challenged conduct was ceremonial in nature. Other courts are in agreement with the district court's finding that limiting invocations to certain religious groups violates the Establishment Clause. Finally, because the House lacks a legitimate basis to exclude the individual plaintiffs from participating in the guest chaplain program, its discriminatory motive is plain to see.

The House may not exclude some of its citizens from participating in its guest chaplain program on the basis of religion.

ARGUMENT

I. The Establishment Clause prohibits discrimination against nonbelievers.

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 sects: "when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith *or none at all*." *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1985) (emphasis added). The U.S. Supreme Court has repeatedly recognized, "the government may not favor one religion over another, or religion over irreligion . . . ." *McCreary Cty. v. ACLU*, 545 U.S. 844, 875–76 (2005); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1997)

(overturning sales tax exemption for religious literature that did not apply to nonreligious literature); *Epperson v. Ark.*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (holding that the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers").

The rights of conscience of all, including nonbelievers, have been recognized since the founding of this country. The Framers, some of whom were Deists in the classical sense of the Enlightenment, made the United States the first among nations to adopt an entirely secular Constitution, whose only references to religion were exclusionary. The Framers understood that to deny nonbelievers the same rights as believers would set a dangerous precedent that could stifle religious liberty for all. James Madison warned against allowing the government to recognize such a distinction between believers and nonbelievers, arguing, "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not

yet yielded to evidence which has convinced us." James Madison, *Memorial and Remonstrance Against Religious Assessments* in *The Founders Constitution*, Vol. V at 82 (Phillip B. Kurland and Ralph Lerner, eds. 1987).

Thomas Jefferson, speaking of the protections for religious liberty in his Virginia Statute for Religious Freedom—the precursor to our First Amendment—said that "its protection of opinion was meant to be universal." Thomas Jefferson, *Autobiography* in *The Founders Constitution*, Vol. V at 85. When it was proposed in the legislature that a specific mention of "Jesus Christ" be inserted into the bill, "the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of protection, the Jew and the Gentile, the Christian and the Mahomoten, the Hindoo, and Infidel of every denomination," wrote Jefferson. *Id.*

In a similar vein, James Iredell, a staunch advocate of the Constitution and later one of the first associate justices of the Supreme Court, specifically addressed the rights of nonbelievers to hold public office under the "No Religious Test" clause of the U.S. Constitution (art. VI, cl. 3), saying, "But it is objected that the people of America may,

perhaps, choose representatives who have no religion at all... But how is it possible to exclude any set of men, without taking away the principle of religious freedom which we ourselves so warmly contend for?" James Iredell, *Debate in North Carolina Ratifying Convention, 30 July 1788* in *The Founders Constitution*, Vol. V at 90. Rev. Daniel Shute argued along similar lines to the Massachusetts ratifying convention: "there are worthy characters among men of every denomination… even among those who have no other guide, in the way to virtue and heaven, than the dictates of natural religion." Rev. Daniel Shute, *Debate in Massachusetts Ratifying Convention, 30 Jan. 1788* in *The Founders Constitution*, Vol. IV at 643 (Phillip B. Kurland and Ralph Lerner, eds. 1987). The principle that our laws and institutions must respect a person's freedom to believe—and, consequently, to *not* believe—has been with us since the very beginning.

Under this nation's history, as well as decisions by the U.S. Supreme Court, the government may not treat persons who are nonbelievers less favorably than those who are believers. Nor may the government constitutionally take sides on religious matters. It is within this framework that the actions of the Pennsylvania House must be

reviewed and it is this basic Establishment Clause foundation that prohibits the discriminatory policies of the House.

II. The Pennsylvania House's policy discriminates against nonbelievers in direct violation of the Establishment Clause.

By rule and practice, the Pennsylvania House has disallowed a particular group of individuals from participating in the guest chaplain program. The House has done so precisely because of what those people believe or disbelieve on matters of religion. This type of purposeful exclusion is not permissible under the Establishment Clause. While courts have allowed legislative bodies to open with invocations, legislatures cannot categorically exclude persons from full participation in government functions due to religious animus against their beliefs.

A. Discriminatory conduct by the government in itself is sufficient to demonstrate an Establishment Clause violation.

The harm to the individuals in this case is similar to the harm alleged in many Establishment Clause cases. Their government has weighed in on a religious matter and has done so in a way that gives a

public impression that certain religious beliefs are officially sanctioned and that others are wrong. The House has argued that it may discriminate because the House is allowed "permissible expressive activity," which permits it to select what it wants to say. See Opening Brief of Appellants/Cross-Appellees, p. 46. This position conflicts with well-settled Establishment Clause precedent. Members of the House are also wrong in asserting that they have a "long-standing right to tailor their ceremonial religious observation to their own prerogatives – a right shielded from judicial intrusion as long as they stop shy of outright affiliation." Opening Brief at p. 45. Because of the Establishment Clause, governments cannot simply say or do whatever they wish on matters of religion.

While the House may select certain things to say, it may not weigh in on a religious debate by excluding religious viewpoints that some of its members do not like. This is precisely what the Establishment Clause seeks to prevent. Avoiding "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971). The Supreme Court has recognized, "The Framers

and the citizens of their time intended to guard … against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society..." *McCreary*, 545 U.S. at 876.

This Court has recognized that the government's disapproval of a religious position violates the Establishment Clause. *See Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 269 (3d Cir. 2011) ("The Establishment Clause was 'designed as a specific bulwark against [the] potential abuses of governmental power.' It therefore prohibits the government from 'promot[ing] or affiliat[ing] itself with any religious doctrine or organization, ...[and] discriminat[ing] among persons on the basis of their religious beliefs and practices ...'" (internal citations omitted)); *ACLU of N. J. v. Schundler*, 104 F.3d 1435, 1444 (3d Cir. 1997) (reviewing whether religious display was "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by non-adherents as a disapproval of their individual religious choices." (quoting *Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 597(1989))); *ACLU of N. J. v. Black Horse Pike Reg'l Bd. of Educ.,* 84 F.3d 1471, 1486 (3d Cir. 1996) ("We

must determine whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion.").

Conduct by the government must comport with the Establishment Clause regardless of whether it serves an essential government function or a function that the government has undertaken for purely ceremonial purposes. Many cases brought under the Establishment Clause have involved purely ceremonial or celebratory conduct. In those cases, this Court has recognized limits upon governmental involvement in religion because it is an abuse of power. In *Schundler,* the Court addressed the religious entanglement issue:

> [T]he City's continuing role in deciding how to celebrate various religions will be, in reality, inevitably guided by politics. For example, it would be unlikely that Mayor Schundler (or any other head of a municipality) would erect a display that would offend a majority of his constituents. That such a political calculation is possible confirms that these types of religious judgments should not be placed in the hands of an elected official.

104 F.3d 1435, 1450. Government actors have likewise been prohibited from becoming entangled with religion by prescribing the content of ceremonial prayers. In *Indian River,* the Court recognized the difficulty

with such actions: "[W]e take to heart the observation in *Engel* that '[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves.'" 653 F.3d 256, 290 (citing *Engel v Vitale* 370 U.S. 421, 435 (1962)).

In sum, the House's desire to do what it wants, even when it relates to ceremonial functions, is limited by the Establishment Clause on matters of religion.

B. Other courts have ruled that limiting an invocation opportunity demonstrates an impermissible government motive.

Several courts have ruled that the intentional exclusion of nonbelievers and minority faiths from a legislative invocation practice violates the Establishment Clause. These opinions are consistent with the district court's opinion in this case.

In *Williamson v. Brevard Cty.,* the court found that *Town of Greece* "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." 276 F. Supp. 3d 1260, 1276 (M.D. Fla. 2017), *appeal docketed*, No. 17-15769 (11th Cir. Jan. 2, 2018). That was because "[n]either *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." *Id.* Like this case, the prayer opportunity was limited to those the county "deems capable" of doing so, which was "based on the beliefs of the would-be prayer giver." *Id.* at 1278.

The court in *Williamson* also addressed an argument that the exclusion was permissible because an invocation necessarily requires invoking a "higher power." *Id.* at 1281. In reviewing *Town of Greece,* the court recognized that the Supreme Court's decision suggests that there is no such requirement. *Id.* The court reviewed the purposes of legislative prayer as recognized by the Supreme Court. The court found that the Supreme Court's decisions in *Marsh* and *Greece* support a finding that an atheist is capable of giving an invocation that does not invoke a higher power. *Id.* at 1282. The court also noted that the plaintiffs in the case had already delivered invocations that did not "invoke a higher power" to solemnize meetings by other governmental

bodies and that they were even invited back. *Id.* The court found the exclusion by the county violated the principles in *Marsh, Town of Greece,* and *Pelphrey v. Cobb County,* 547 F.3d 1263 (11th Cir. 2008).

In *Pelphrey*, the Eleventh Circuit held in part that a county planning commission violated the Establishment Clause by removing Jews, Muslims, Jehovah's Witnesses, and Mormons from a list it used to select invocation givers. 547 F.3d at 1282. The court explained that the Establishment Clause "prohibits purposeful discrimination" and "the selection of invocational speakers based on an 'impermissible motive' to prefer certain beliefs over others." *Id.* at 1278, 1281 (quoting *Marsh*, 463 U.S. at 793). "The categorical exclusion of certain faiths based on their beliefs is unconstitutional." *Id.* at 1282; *accord Atheists of Fla. v. City of Lakeland*, 713 F.3d 577, 591 (11th Cir. 2013).

An Alaska trial court likewise held that rules targeted at restricting invocations to certain religious groups violated the Alaska Constitution's equivalent to the Establishment Clause. *Hunt v. Kenai Peninsula Borough*, No. 3AN-16-10652 CI, (Super. Ct. of Alaska, Oct. 9, 2018) *available at* https://www.acluak.org/sites/default/files/3an-16-10652ci.pdf. The plaintiffs included borough residents who were atheist

and Jewish. *Id.* at 5. They challenged a Borough resolution that restricted invocation speakers to only chaplains or persons from associations that have "an established presence in the borough, that regularly meet[] for the purpose of sharing a religious perspective, and that qualif[y] for I.R.C. § 501(c)(3) tax-exempt status." *Id.* at 15–16. The court reviewed the legislative prayer tradition as described in *Marsh* and *Town of Greece*, finding that under the Establishment Clause, the borough could not "put in place requirements that in effect exclude minority faiths or beliefs." *Id.* at 18.

These decisions are congruent with *Town of Greece* and provide persuasive analysis as to the impropriety of invocation restrictions that are based on the beliefs of the speaker.

C. There is no legitimate basis to exclude the individual plaintiffs from participating as guest chaplains.

The House has liberally bestowed benefits and honors to those whom it views as having government-approved religious beliefs. The House's guest chaplain program carries with it official recognition. Guest chaplains consider delivering the opening invocation to be an honor. (A1764; A1769; A1772; A1776). Guest chaplains are allowed to

bring in as many as a dozen additional guests to sit in the chamber during the invocation. (A3221/A3543 ¶ 5.) They are also provided with a complimentary reserved parking spot on the day of their invocation. (A1764; A1772). Among other accolades, guest chaplains receive a commemorative gavel and a thank-you letter from the Speaker. (A3222/A3543 ¶ 9.). Based on how the program has operated, the House has provided tangible benefits to guest chaplains who are from approved religions.

In contrast, the House has excluded the individual plaintiffs in this case. There is no basis to exclude these individuals from participating as a guest chaplain other than animus against their religious beliefs. They have declared under penalty of perjury that they will not deliver proselytizing or disparaging invocations. (See A0409–10 ¶ 33, A0422 ¶ 18, A0431 ¶ 9, A0446–47 ¶ 26, A0457 ¶ 14, A0473 ¶ 24, A0488–89 ¶ 29.). In addition, five of the plaintiffs have declared that they would not address policy issues in their invocations. (A3298 ¶ 1; A3307 ¶ 1; A3310 ¶ 1; A3313 ¶ 1; A3316 ¶ 1.) The other two plaintiffs declared that they would follow the House's rules and any practices generally followed by theistic guest chaplains, including refraining from

addressing policy issues. (A3301 ¶ 1; A3304 ¶ 1) (Under current practice, theistic guest chaplains sometimes address policy issues in their invocations to the House. (*See* A1870; A1875; A1891; A1939; A2123; A2142; A2290; A2508; A2608; A2615.)).

Based on the facts in this case, the invocations by the individual plaintiffs are intended to be solemnizing and inclusive. They are being excluded from the honor and benefits of being guest chaplains because of their personal beliefs or viewpoints, not because of any bona fide concerns of legislators.

Any concern about allowing these invocations should be alleviated by the fact that legislatures and local government bodies around the country have opened up their invocation practices following *Town of Greece.* The sky is not falling. Other governmental bodies have carried on with their business as usual while allowing atheists, humanists, and others to participate fully in their invocation proceedings.

CONCLUSION

The Pennsylvania House's purposeful exclusion of certain citizens from the guest chaplain program cannot withstand scrutiny under the

Establishment Clause. This Court should affirm the district court's decision.

Respectfully Submitted,

Dated: March 1, 2019

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COMBINED CERTIFICATIONS

I certify that:

I am a member of the bar of the Third Circuit Court of Appeals.

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 3,025 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word for Mac, Version 16.20 in 14-point Century Schoolbook font.

This brief complies with the electronic filing requirements of Third Circuit Local Appellate Rule 31.1(c) because the text of the electronic brief is identical to the text of the paper copies, and because Trend Micro Security Agent version 3.0.1141 has been run on the file containing the electronic version of this brief and no viruses have been detected.

I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. All parties are appellate CM/ECF filing users and will receive service via the appellate CM/ECF system.

Dated: March 1, 2019

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