NO. 17-5278

In the United States Court of Appeals for the D.C. Circuit

DANIEL BARKER,

Plaintiff - Appellant

V.

PATRICK CONROY, CHAPLAIN; KAREN BRONSON, CHAPLAIN'S LIAISON TO STAFF; PAUL RYAN, SPEAKER OF THE HOUSE OF REPRESENTATIVES IN HIS OFFICIAL CAPACITY; UNITED STATES HOUSE OF REPRESENTATIVES,

Defendants - Appellees

On Appeal from the United States District Court for the District of Columbia
CAUSE NO. 1:16-CV-00850-RMC,
The Honorable Rosemary M. Collyer, Presiding.

BRIEF OF *AMICI CURIAE* 48 MEMBERS OF CONGRESS, IN SUPPORT OF APPELLEES AND AFFIRMANCE

David A. Cortman
Nathaniel Bruno
ALLIANCE DEFENDING FREEDOM
440 First Street N.W., Suite 600
Washington, D.C. 20001
Telephone: (202) 393-8690

Jonathan A. Scruggs
Kristen K. Waggoner
Brett Harvey
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
Telephone: (480) 444-0020

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are a group of 48 Members of Congress in the United States Senate and the United States House of Representatives and are individually named in the addendum to this brief. These elected Members of Congress regard legislative prayer as vital for policymaking bodies and consider it to be an important time to seek Divine blessing, wisdom, and guidance in making consequential decisions for the country—not just a rote ceremony designed to solemnize an event. Amici believe that the free exercise of religion means the freedom to practice any faith or choose no faith at all. But there are certain positions and occupations that are solely religious in nature. A principle duty of a Congressional Chaplain is to open legislative sessions by invoking Divine guidance. Legislative prayer is an inherently religious act, the purpose and character of which would be inevitably altered by the introduction of wholly secular sentiments, irrespective of their calming or affirming tone.

SUMMARY OF THE ARGUMENT

Since its creation, the U.S. Congress has opened its daily legislative sessions with prayer. Whether the prayer is led by a salaried chaplain or by a guest chaplain,

[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or any person other than *Amici Curiae* or their counsel contributed money intended to fund preparation or submission of this brief. This brief is filed with consent of the parties.

its function is, and has always been, the same: to invoke Divine guidance and seek the blessing of God on the people's elected Representatives as they perform their official duties. The Supreme Court has affirmed this practice of invoking Divine guidance multiple times, most recently in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Both the consistent descriptions of legislative participants and the Supreme Court's precedents reflect a correct understanding of the purpose of legislative prayer and the history upon which the practice is based.

Congress's practice of opening legislative sessions with a prayer invoking Divine guidance is deeply embedded in the history and tradition of this country and can be traced back to its pre-revolutionary national assemblies. To perform this important task, Congress has always looked to people of piety to lead prayers asking for the assistance of a Higher Power and the Divine's blessing upon the day's deliberations. Whether selecting a salaried chaplain or a guest chaplain the process is nonsectarian, but it has always been an opportunity only for those who practice a religious faith and are capable of offering a prayer invoking Divine guidance. There is no record of anyone ever offering secular remarks in the place of a prayer.

Also, Congress has always had wide discretion when selecting its chaplains. That discretion is limited only by a prohibition on impermissible motives, such as an aversion or bias against minority *faiths*. Thus, while Congress may not categorically exclude the members of any religion from serving as chaplains, it may

exclude proposed prayer givers that will not further the traditional purpose of legislative prayer. Here, because Daniel Barker, by his own admission, neither practices a religion nor is willing to seek Divine guidance, he has excluded himself from consideration to be a guest chaplain. *See Barker v. Conroy*, 282 F. Supp. 3d 346, 351 (D.D.C. 2017) (describing Barker as an "atheist activist" who "'lost faith in faith,' and disavowed religious beliefs"). Accordingly, his request to serve as guest chaplain was properly denied, and the district court was correct to dismiss his claims.

ARGUMENT

I. The Supreme Court and Congress have always viewed the primary purpose of legislative prayer as invoking Divine guidance over the legislature's activities.

The purpose of legislative prayer is defined by its early participants and those members of Congress that enacted the practice. And the Supreme Court has consistently recognized that such prayers are distinctly religious acts that "coexisted with the principles of disestablishment and religious freedom." *See Town of Greece*, 134 S.Ct. at 1820 (quoting *Marsh v. Chambers*, 463 U.S. 783, 786 (1983)).

A. The early practitioners and legislators that enacted the practice of legislative prayer demonstrate it has *always* been about invoking Divine guidance over legislative proceedings.

"The opening of sessions of legislative and other deliberative bodies with prayer is deeply embedded in the history and tradition of this country." *Marsh*, 463

U.S. at 786. And the purpose of such prayer has always been, and is now, to invoke Divine guidance over the legislative proceedings.

The practice of opening legislative sessions with prayer can be traced back to the pre-revolutionary Continental Congress, where one of the first orders of business in 1774 was a motion to start each legislative session with prayer. *See* Christopher C. Lund, *The Congressional Chaplaincies*, 17 Wm. & Mary Bill Rts. J. 1171, 1177 (2009). Some opposition arose, largely because not all delegates shared the same religious sentiments. But Samuel Adams countered that "he was no Bigot, and could hear a Prayer from a Gentleman of Piety and Virtue . . . ." *See* Letter from John Adams to Abigail Adams (Sept. 16, 1774).[2] The body agreed, and the Congress invited a local Anglican minister, Jacob Duche, to lead the first prayer, in which he asked God for wisdom and to "direct the councils of this honorable assembly; enable them to settle things on the best and surest foundation." First Prayer of the Continental Congress, 1774.[3] From the beginning, then, our nation's leaders have sought to invoke spiritual guidance to aid in the task of governing.

---

[2] *John Adams to Abigail Adams, 16 September 1774*, Founders Online, National Archives, http://founders.archives.gov/documents/Adams/04-01-02-0101. (last modified June 13, 2018) [Original source: *The Adams Papers: Adams Family Correspondence*, vol. 1, at 156-157 (Lyman H. Butterfield ed., Harvard Univ. Press, 1963) (December 1761–May 1776).]

[3] *First Prayer of the Continental Congress, 1774*, U.S. House of Representatives Office of the Chaplain, Prayer Archive, https://chaplain.house.gov/archive/continental.html (last visited July 19, 2018)

And history demonstrates this practice was much more than a solemnizing event to the Founders. The powerful effect the first prayer at the Continental Congress had upon those present demonstrates the strength our Founders derived from asking a Higher Power for wisdom and guidance as they made important decisions during troubled times. *See* Letter from John Adams to Abigail Adams (Sept. 16, 1774), *supra*, (stating the first prayer "filled the Bosom of every man present" and "had an excellent Effect upon every Body here").

This purpose did not change at the Constitutional Convention. At first, the delegates did not institute a daily prayer. But after some time spent "groping . . . in the dark to find political truth," Benjamin Franklin questioned why no one had thought to "humbly apply[] to the Father of lights to illuminate our understandings." Madison's Notes (June 28, 1787), *in* 1 The Records of the Federal Convention of 1787, at 451–52 (Max Farrand ed., 1911), http://lf-oll.s3.amazonaws.com/titles/1057/0544-01_Bk.pdf; s*ee also* Louis J. Sirico, Jr., *Benjamin Franklin, Prayer, and the Constitutional Convention: History as Narrative*, 10 Legal Comm. & Rhetoric: JALWD 89, 92–93 (2013). So he motioned that "prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate that service." *Id.* at 93. In other words, Franklin asked that prayer might be instituted

to seek Divine guidance. A lack of funding to pay for a chaplain (and perhaps chagrin for failing to open sessions in prayer from the outset) prevented the Convention from adopting the practice, but Franklin's motion shows that the early legislative prayer practice was clearly meant to invoke Divine guidance—nothing less. *Marsh*, 463 U.S. at 787 n.6.

The Framers of the First Amendment certainly saw invoking Divine guidance as consistent with the Establishment Clause they drafted. In 1789, the First Congress adopted a daily prayer practice as one of its first acts. By April 25, 1789, the Senate had its first chaplain; and by the next week, so did the House. 1 Annals of Congress 24, 242 (1789) (Joseph Gales ed., 1834). Later that year, "[a] statute providing for the payment of these chaplains was enacted into law." *Marsh*, 463 U.S. at 788. And then, just "three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights." *Id.* (citation omitted). Given all this, the Supreme Court has aptly observed: "[c]learly 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 [legislative] sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* (emphasis added).[4]

[4] Since 1789, Congress has welcomed chaplains from various faiths to invoke Divine guidance. *Officers and Staff: Senate Chaplain*, U.S. Senate,

Even so, Congress has not blindly relied on tradition in upholding its legislative-prayer practice. In the 1850s, for example, Congress reexamined its practice, eventually characterizing legislative prayer as "a just expression of religious devotion by the legislators of the nation . . . ." Kurt T. Lash, *Power and the Subject of Religion*, 59 Ohio St. L.J. 1069, 1135 (1998) (quoting S. Rep. No. 376, at 4 (1853)). A Senate Report issued in 1853 remarked that selection of the chaplain was nonsectarian, but it assumed *a faith*: "The range of selection is absolutely free in each house *amongst all existing professions of religious faith*." *Id.* at 1136 (quoting S. Rep. No. 376, at 2) (emphasis added). The House Report was similar: "There is no standard of faith to be measured by, or form of worship that must be followed." *Id.* at 1135-36 (quoting H.R. Rep. No. 171, at 2 (1850)).[5] And just four years ago, the Supreme Court observed that legislative prayers inherently invoke divinity: "From the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds. . . . Even those who

---

https://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm (last visited July 19, 2018); *History of the Chaplaincy: Chaplains of the House*, U.S. House of Representatives Office of the Chaplain, The Chaplaincy, https://chaplain.house.gov/chaplaincy/history.html (last visited July 19, 2018).

[5] "Although the selection had until [the 1850s] always involved Christian chaplains, 'that [was] not in consequence of any legal right or privilege, but by the voluntary choice of those who have power of appointment,'"—that is, it was due to the individual choices of Members of Congress. Kurt T. Lash, *Power and the Subject of Religion*, 59 Ohio St. L.J. 1069, 1136 (1998).

disagree as to religious doctrine may find common ground in the desire *to show respect for the divine* in all aspects of their lives and being." *Town of Greece*, 134 S. Ct. at 1823 (emphasis added).

The practice of allowing guest chaplains can likewise be traced to the late antebellum era, Lund, 17 Wm. & Mary Bill Rts. J. at 1200–02, although the modern practice probably dates back to the mid-1900s. *See* 94 Cong. Rec., June 9, 1948, pp. 7597–99; 2 Robert C. Byrd, The Senate 1789–1989: Addresses on the History of the United States Senate 305 (Wendy Wolff ed., 1991), https://www.senate.gov/artandhistory/history/resources/pdf/Chaplain.pdf. This practice has allowed for guests from a multitude of faith perspectives to seek Divine guidance on behalf of Congress—including Buddhists, Christians, Jews, Hindus, and Muslims. *See Town of Greece*, 134 S. Ct. at 1820–21 (noting examples of congressional prayer-givers). But the invitation is not open to anyone that seeks the microphone: only those who acknowledge the Divine and are willing to offer a prayer seeking Divine guidance are invited.[6] *See id.* This, too, is in keeping with the longstanding congressional tradition.

[6] *See, e.g.*, *Guest Chaplains*, U.S. House of Representatives Office of the Chaplain, The Chaplaincy, https://chaplain.house.gov/chaplaincy/guest_chaplains.html (listing guest chaplains from 2000–2018) (last visited July 19, 2018).

Never has Congress invited anyone who explicitly disavows the existence of the Divine to pray. While some of these prayers may "vary in their degree of religiosity," *see id.* at 1823, there is no record of anyone ever offering secular remarks in the place of an invocation or prayer. This is no anomaly. Rather, it is a result tethered to the nature, history, and purpose of legislative prayer.

B. The Supreme Court has recognized the primary purpose of legislative prayer as invoking Divine guidance.

The Supreme Court has long recognized, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Marsh*, 463 U.S. at 792 (brackets in original) (citing *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). Thus, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). Perhaps the most striking of these acknowledgments is Congress's daily practice of inviting a chaplain to offer a prayer at the beginning of each session. Indeed, this uninterrupted, 229-year tradition "has become part of the fabric of our society." *Town of Greece*, 134 S. Ct. at 1819 (quoting *Marsh*, 463 U.S. at 792).

While these prayers are "religious in nature, [they have] long been understood as compatible with the Establishment Clause." *Id.* at 1818. The Supreme Court has explained that invoking "Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion" but rather an acknowledgement of

the central role religion plays in the lives of many members of Congress and millions of Americans, as well as an opportunity for our nation's leaders to draw strength and wisdom from those religious beliefs. *Marsh*, 463 U.S. at 792; *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion) (stating the purpose of legislative prayer "is largely to accommodate the spiritual needs of lawmakers"); *Lee v. Weisman*, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) (describing legislative prayer as a time for legislators to "invoke spiritual inspiration entirely for their own benefit"). Thus, the Supreme Court has always understood that the purpose of legislative prayer is appealing to a Higher Power for blessings and guidance as legislators go about the business of governing.

This understanding of legislative prayer is consistent with the Supreme Court's prayer cases more generally. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306–07 (2000) (defining an invocation as "an appeal for divine assistance"); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (describing a school's daily prayer as being "a religious activity" and "a solemn avowal of divine faith and supplication for the blessings of the Almighty"). These cases show that prayer innately invokes the Divine. And, indeed, any holding implying that prayer can be secular would cast doubt upon many of the Supreme Court's precedents involving prayer. *See, e.g.*, *Lee*, 505 U.S. at 598 (holding that inviting clergy to offer prayers at a middle school graduation ceremony violated the Establishment Clause because

it "compelled attendance and participation in an explicit religious exercise"); *Engel*, 370 U.S. at 424–25 (stating "[t]he nature of . . . prayer has always been religious").

The Supreme Court recently reaffirmed the religious nature of prayer in *Town of Greece*, where it not only upheld the constitutionality of prayers offered by guest chaplains, but also declared that such prayers may be offered in explicitly sectarian terms. 134 S. Ct. at 1820 (approving of Congress's continual practice of "permit[ting] its appointed and visiting chaplains to express themselves in a religious idiom"). The Court repeatedly recognized the religious nature of legislative prayer and forbade the government from separating prayer from its religious foundation. *See id.* at 1822–23 (describing prayer as "religious speech" and explaining 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"). The Court also recognized certain incidental secular benefits from these invocations, including "lend[ing] gravity to public business, remind[ing] lawmakers to transcend petty differences in pursuit of a higher purpose, and express[ing] a common aspiration to a just and peaceful society." *Id.* at 1818 (citing *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)). But the law is clear: none of these benefits displace the religious nature of the legislative-prayer practice. *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) ("That [a prayer] may contemplate some

wholly secular objective cannot alter the inherently religious character of the exercise.").

The Supreme Court's review in *Town of Greece* demonstrates a correct understanding of the purpose of legislative prayer and the history on which the practice is based. As explained by the Supreme Court, the relevant inquiry is "to determine whether the prayer practice [at issue] fits within the tradition long followed in Congress." *Town of Greece*, 134 S. Ct. at 1819. Here, history shows that Congress has a well-established practice of limiting its guest chaplains to religious adherents who are willing to offer a prayer invoking Divine guidance over the pending legislative session *Supra* sec I.A. (demonstrating that the use of guest chaplains predates the Civil War and the current practice has been in place for more than half a century). Given this unambiguous and unbroken history, the practice of limiting prayer to clergy who address a Higher Power does not violate the Establishment Clause. *Marsh*, 463 U.S. at 792 ("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").

II. In light of legislative prayer's history and purpose, limiting guest chaplains to religious persons seeking to invoke Divine guidance does not constitute impermissible discrimination.

Limiting participation in an activity to those capable of furthering its core purpose is an act of fidelity and prudence, not animus. Opening any activity to a person unwilling to further the core purpose of the activity both diminishes the purpose and transforms the activity into something with an altered purpose.

A. Congress's traditions give it the discretion to select only guest chaplains who are religious and will offer a prayer.

Courts have given legislative bodies wide discretion in conducting their legislative-prayer proceedings. *Town of Greece*, 134 S. Ct. at 1819 (stating "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted").[7] This is especially true of Congress, whose practices courts have uniformly held up as the constitutional benchmark

[7] Indeed, any judicial attempt to dictate Congress's internal rules that govern the operation of its meetings would raise serious separation-of-powers issues. *See Kurtz v. Baker*, 829 F.2d 1133, 1149 n.9 (D.C. Cir. 1987) (Ginsburg, J., dissenting) (citation omitted) (stating "there is no warrant for the judiciary to interfere with the internal procedures of Congress" so long as "constitutional rights are not violated"). The Supreme Court has already upheld the constitutionality of legislative prayer on multiple occasions. Thus, this Court should defer to Congress's judgment that such prayers be limited to those capable of invoking Divine guidance. *See id.* at 1149–50 (stating it is untenable to argue the Establishment Clause forbids Congress from opening its proceedings exclusively with a prayer); *see also United States v. Rostenkowski*, 59 F.3d 1291, 1306-07 (D.C. Cir. 1995) ("[I]n that circumstance the court would effectively be making the Rules—a power that the Rulemaking Clause reserves to each House alone.").

against which other legislative-prayer practices are evaluated. *See id.* (stating the correct inquiry "must be to determine whether the prayer practice . . . fits within the tradition long followed in Congress"). Thus, Congress may appoint and reappoint a paid chaplain representing a single faith. *See Marsh*, 463 U.S. at 793–94 (holding that the 16-year tenure of a single chaplain did not violate the Establishment Clause). Or it may invite guest clergy from a multitude of religions to offer sectarian prayers specific to their religion. *Town of Greece*, 134 S. Ct. at 1822–23. Either way, the Supreme Court has never suggested that Congress must achieve religious balancing or adopt a policy that yields the microphone to any person who demands it. *See id.* at 1824 (quoting *Lee*, 505 U.S., at 617) (stating "[t]he quest to promote 'a "diversity" of religious views' would require the [government] 'to make wholly inappropriate judgments about the number of religions it should sponsor and the relative frequency with which it should sponsor each'"). Nor has the Court ever required Congress to allow secular remarks in the place of the prayers that have opened congressional sessions for over 200 years.

The only limitation courts have placed on the selection of chaplains is that a selection cannot stem from an "impermissible motive" such as an "aversion or bias . . . against minority faiths." *Id.*; *Marsh*, 463 U.S. at 793–94. Thus, courts have struck down chaplain-selection methods that demonstrate a bias against minority faiths. For example, in *Pelphrey v. Cobb County*, the Eleventh Circuit struck down

a selection process that "categorically excluded" certain faiths. 547 F.3d 1263, 1282 (11th Cir. 2008). In *Pelphrey*, the government administrator relied primarily on the church listings in a phone book to select guest chaplains but refused to invite clergy of minority faiths, such as Muslims, Jehovah's Witnesses, Jews, or Latter-Day Saints. *Id.* at 1267–68. The court held such a "categorical exclusion of certain faiths based on their beliefs" was unconstitutional. *Id.* at 1282.

Conversely, in *Snyder v. Murray City Corp.*, the en banc Tenth Circuit upheld the authority of legislatures to limit invocations to those that comported with the traditional purpose of legislative prayer. 159 F.3d 1227, 1233 (10th Cir. 1998) (en banc). There, the plaintiff sent an unsolicited request to a city council to offer a "prayer" that called upon government officials "to cease the practice of using religion in public affairs." *Id.* at 1228. Upholding the city's limitation of the proposed invocation, the court reasoned that the practice of legislative prayer could not exist without the government choosing someone to offer such prayers—and if *Marsh* allows legislatures to choose such a person, it must also allow them to exclude others. *Id.* at 1233. Thus, the court held that a legislature could reject a speaker whose prayer would fall outside the "long-accepted genre of legislative prayer"—a genre that involves "requests for wisdom and solemnity, as well as calls for divine blessing on the work of the legislative body." *Id.* at 1234.

These cases reflect what the Supreme Court has held since *Marsh*: though Congress may not discriminate against different types of religions, it has no obligation to allow any and every person to pray on behalf of legislators and may select only those prayer givers who will further the purpose of legislative prayer. *See Town of Greece*, 134 S. Ct. at 1824 *see also Snyder*, 159 F.3d at 1234 (holding legislatures may limit their guest chaplains to those who would offer prayers that fall within the "long-accepted genre of legislative prayer").[8] No doubt legislatures are free to allow "prayers" that would fall outside the tradition established by Congress—but nothing in the Constitution *requires* them to do so. *Cf. Town of Greece*, 134 S. Ct. at 1816 (noting that the town of Greece permitted an atheist to give an invocation).

As discussed above, the congressional tradition requires chaplains to both: (1) be a recognized practitioner of a religious tradition and (2) offer a prayer to the

[8] Such a limitation is both logical and practical. If Congress were required to allow secular remarks in the place of invoking Divine guidance, one could easily imagine citizens coming forward to advocate for a particular policy preference under the guise of offering a "prayer." *See Snyder v. Murray City Corp.*, 159 F.3d 1227, 1228 (10th Cir. 1998) (en banc). These kinds of "prayers" would undermine the very purpose of opening legislative proceedings with a prayer at all, and Congress has the discretion to limit its chaplains to those who will fulfill the purpose of legislative prayer. *Cf. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985) (stating "[t]he reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances").

Divine. *See* U.S. Senate Rule IV; U.S. House of Representatives Rule II, Clause 5. While Barker may be able to deliver his message to open another legislative body, he cannot do so before Congress, because, by his own admissions, he meets neither criterion.[9]

B. Barker's beliefs do not animate a religious exercise for him and are not entitled to the same protections as minority faiths.

Turning first to the requirement that a chaplain be a recognized practitioner of a religious tradition, Barker describes himself as an "atheist" and a "nonreligious citizen." Barker App. at 36, 38. But though Barker might believe he has "deeply held convictions" that equate with religious beliefs, *id.* at 36, courts have long distinguished between religious and nonreligious beliefs. This Court has said that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." *Kalka v. Hawk*, 215 F.3d 90, 98 (D.C. Cir. 2000) (quoting

[9] Additionally, much like the remarks in *Snyder*, Barker's remarks were also excludable because they improperly sought to disparage the faiths and beliefs of others. *See Town of Greece v. Galloway*, 134 S.Ct. 1811, 1823 (2014); *Snyder*, 159 F.3d at 1234. Specifically, Barker's remarks advocated for "Common Sense over dogma," and ethics aimed at wellbeing in the natural world, "not to appease a deity." *See* Barker App. at 48, 64. Further, his remarks implied that prayer had no power and that the natural world was "the only world we have." *See id.* at 64. Thus, Barker was also properly excluded based on the improper disparaging message of his remarks that ridicules and dismisses the importance many members of Congress place on their religious beliefs in guiding their daily decisions. *See Town of Greece*, 134 S. Ct. at 1823.

Davis v. Beason, 133 U.S. 333, 342 (1890)). And although the Supreme Court has recognized that nonreligious beliefs can occupy the same space as religion in some contexts, like conscientious objections to war, such recognition remains the exception to the general rule differentiating between religious and nonreligious beliefs. *Cf. United States v. Seeger*, 380 U.S. 163, 165 (1965) (differentiating between religious views and those that were "essentially political, sociological, or philosophical"). There is a simple, practical reason for this distinction: "[i]f anything can be religion, then anything the government does can be construed as favoring one religion over another, and . . . the government is paralyzed." *Alvarado v. City of San Jose*, 94 F.3d 1223, 1230 (9th Cir. 1996) (internal quotations omitted) (citing 6 Seton Hall Const. L.J. at 70).

Indeed, in the Free Exercise context, the Supreme Court has held claims seeking First Amendment protection "must be rooted in religious belief[s]" as opposed to "philosophical and personal" ones. *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972); *cf. Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (stating Free Exercise claims under RLUIPA "must be sincerely based on a religious belief and not some other motivation"). In fact, it is the act of prayer– a petition to a higher power – that can distinguish religious exercise from philosophical beliefs. "Prayer is fundamentally and necessarily religious. 'It is prayer which distinguishes religious phenomena from all those which resemble them or lie near to them, from the moral

sense, for example, or aesthetic feeling." *Marsh*, 463 U.S. at 810 (Brennan, J. dissenting) (quoting A Sabatier, Outlines of a Philosophy of Religion 25-26 (T. Seed, trans., 1957 ed).; and citing W. James, The Varieties of Religious Experience 352-353 (New American Library ed., 1958); F. Heller, Prayer xiii-xvi (S. McComb, trans., 1958 ed.); Accord, *Engel*, 370 U.S. at 424)

Drawing a line between philosophical and religious beliefs is "a most delicate question," *Yoder*, 406 U.S. at 215, but it is sometimes a necessary one, and courts have long been required to draw such lines to determine which beliefs are entitled to constitutional protections. *See, e.g.*, *Africa v. Pennsylvania*, 662 F.2d 1025, 1031–36 (3d Cir. 1981) (analyzing whether to recognize a claimed religion based on various factors).

But no "delicate question" is presented here. By explicitly calling himself a "nonreligious citizen," Barker has distinguished himself from minority religions. *Cf. Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981) (stating "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to . . . religion"). In fact, because Barker expressly disavows the teaching of the faith tradition from which he claims ordination and makes no attempt to assert adherence to any other religious teachings—his claim should be viewed with even greater skepticism than those based on other atheistic beliefs such as humanism. *See Founding Church of*

Scientology of Washington, D.C. v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969) (expressing doubt that a self-proclaimed religion "without the underlying theories of man's nature or his place in the Universe which characterize recognized religions" should be treated the same as a bona fide religion); *Kalka*, 215 F.3d at 99 (stating skepticism that humanism "no matter in what form and no matter how practiced, amounts to a religion under the First Amendment"). Thus, any argument grouping Barker with minority religions should be rejected. And any omission of nonreligious citizens in this context is no different than limiting the protections of the Free Exercise clause to only religious citizens, a principle well-established by the Supreme Court. *See e.g. Yoder*, 406 U.S. at 215–16.

Barker cannot assail the congressional practice when history shows Congress has traditionally distinguished between religious and nonreligious people when selecting its chaplains. *See Town of Greece*, 134 S. Ct. at 1819 (stating the relevant inquiry is "to determine whether the prayer practice [at issue] fits within the tradition long followed in Congress"). Congressional chaplains have always been limited to persons of "piety"—from any *faith*. *See* Letter from John Adams to Abigail Adams (Sept. 16, 1774); *see also* 1 The Records of the Federal Convention of 1787, at 451–52 (recounting Benjamin Franklin's motion to invite local clergy to lead opening

prayers). This intuitive limitation on *prayer*-givers[10] has remained consistent throughout the history of the congressional chaplaincy. *See* H.R. Rep. No. 171, at 2 (stating that chaplains should be "ministers"); *see also Guest Chaplains*, U.S. House of Representatives Office of the Chaplin, The Chaplaincy, https://chaplain.house.gov/chaplaincy/guest_chaplains.html (listing all guest chaplains from 2000–2018) (last visited July 19, 2018). And, importantly, the Supreme Court recently recognized as much, reaffirming that legislative prayer is "religious in nature." *Town of Greece*, 134 S. Ct. at 1818.

Although Supreme Court justices evaluating legislative prayer practices have differed on the constitutional impact of the prayers, there is no debate that the prayers are inextricably religious acts. In *Marsh*, Justice Brennan's dissent makes plain that it is the religious significance of legislative prayer that distinguishes it from other mechanisms to open a meeting when he notes:

> That the "purpose" of legislative prayer is preeminently religious rather than secular seem to me to be self-evident. 'To invoke Divine guidance on a public body entrusted with making the laws,' is nothing but a religious act. Moreover, whatever secular functions legislative prayer might play-formally opening the legislative session, getting the members of the body to quiet down, and imbuing then with a sense of seriousness and high purpose- could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose for the prayer is an

[10] By definition, "prayer" invokes religion and divinity. The common meaning of (and the first definition in *Webster's* for) *prayer* is "an address (as a petition) *to God or a god* in word or thought." Webster's Collegiate Dictionary 975 (11th ed. 2003) (emphasis added).

> insult to the perfectly honorable individuals who instituted and continue the practice.

463 U.S. at 797-98 (Brennan, J. dissenting) (quoting the majority). Barker practices no religion. Therefore, Barker will not be offering a legislative "prayer."

C. Secular remarks do not invoke Divine guidance and fundamentally alter the purpose of legislative prayers.

In addition to Barker's beliefs not constituting a religion, he would still be incapable of offering a prayer that fits within the tradition established by Congress. As discussed above, prayer inherently invokes the Divine. Neither Congress nor the Supreme Court has ever thought anything different, and the current practice affirms this truth. Recent prayers offered by guest chaplains—from various faiths and creeds—show as much. 163 Cong. Rec. H7760 (October 4, 2017) (Imam Abdullah Antepli) (pleading for the "holy One" to "[t]each and guide us"); 164 Cong. Rec. H3067 (April 10, 2018) (Reverend Sam Smucker) (praying that God "would fill the men and women in this Chamber with [His] wisdom as they consider the business at hand"); *Id.* at H3509 (April 25, 2018) (Rabbi Shlomo Segal) (asking the "Master of the universe" to "[g]uide the Members of this House").

Given this, any remarks given by Barker would not—and could not—fall within the legislative-prayer tradition established by Congress. His complaint states he is an atheist and believes "there are no gods or other supernatural higher powers." Barker App. at 36. Because these beliefs explicitly reject the existence of any Higher

Power, Barker's own admissions demonstrate that he will not seek guidance from a Higher Power. Hence, just as these allegations would place him outside of the protection of the Free Exercise Clause, they also place him outside the tradition of legislative prayer. *Cf. Yoder*, 406 U.S. at 215–16. Barker's own admissions and arguments have disqualified him from serving as a guest chaplain, and Congress may choose not to accept his application without violating the Constitution. *See Kurtz v. Baker*, 829 F.2d 1133, 1142 (D.C. Cir. 1987) (noting that an atheist who refuses to pray but still "asks to participate in each house's moment of prayer" has arguably "excluded himself" from consideration for the position); *Newdow v. Eagen*, 309 F. Supp. 2d 29, 36 (D.D.C. 2004), *dismissed*, 04-5195, 2004 WL 1701043 (D.C. Cir. July 29, 2004) (holding that an atheist's beliefs were incompatible with his alleged desire to serve as the House or Senate chaplain).

In any event, an attempt to offer secular remarks in the place of a prayer does not seek to participate in Congress's traditional ceremony at all; it seeks to alter it. Members of the Continental Congress, delegates to the Constitutional Convention, Members of the First Congress, reports from each house of Congress in the 1850's and these amici consistently define the purpose of legislative prayer as a petition to a higher power for wisdom, guidance, and blessing. *Supra* sec. I.A. It is not a time for a personal affirmation, message of encouragement, or political statement from the speaker at the microphone, no matter how benevolent. And experience

demonstrates that expanding the opening ceremony to include secular remarks and anti-religious remarks can lead to the prayer opportunity being exploited to push a political agenda and cast aspersions on the faith of law makers, thereby spurring divisiveness and undermining the very purpose of the practice. See *Snyder*, 159 F.3d at 1228.

Then-Judge Ginsburg made this point well: An atheist seeking to give an invocation to Congress "does not want to take part in the session opening traditionally maintained by Congress, for that opening does not include secular remarks." *Kurtz*, 829 F.2d at 1147 (Ginsburg, J. dissenting). Barker repeatedly tries to analogize himself to a member of a minority religion. He is not. Instead, this Court should see his claim for what it is: "an attack on Congress' customary, opening-with-prayer observance," a practice which "is not subject to constitutional assault given the High Court's recent and resounding declaration" upholding it. *Id.*

Barker's claim should be dismissed in accordance with the Supreme Court's holdings in *Marsh* and *Town of Greece*.

CONCLUSION

For over 200 years, Congress has opened its proceedings with a prayer. Far from being an empty, symbolic expression, this tradition has become part of the fabric of our society. Indeed, it is precisely because of its distinctly religious nature that our society holds this tradition in such high regard. For those who believe that

God governs the affairs of mankind, these moments of reverence and humility offer a vital opportunity for people from all walks of life to not only recognize the existence of a Higher Power, but also to ask that Higher Power for wisdom and guidance as they go about the business of governing.

Because invoking Divine guidance is the central function of legislative prayer, prudence limits this practice to those who believe in the existence of the Divine. The limitation merely recognizes that such beliefs allow those individuals to satisfy the purpose of legislative prayer. As a result, the House of Representatives must be permitted to create rules that ensure the opening of its meetings with prayer is done in furtherance of its intended purpose. This Court should affirm the district court's dismissal of the case.

Respectfully Submitted,

/s/ Jonathan A. Scruggs

Jonathan A. Scruggs
Kristen K. Waggoner
Brett Harvey
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
Telephone: (480) 444-0020

David A. Cortman
Nathaniel Bruno
ALLIANCE DEFENDING FREEDOM
440 First Street N.W., Suite 600
Washington, D.C. 20001
Telephone: (202) 393-8690

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 2018, I electronically transmitted the attached document to the Clerk of the Court of the D.C. Circuit Court of Appeals using the ECF System of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Jonathan A. Scruggs
Jonathan A. Scruggs

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

■ This brief contains 6,215 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(i).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

■ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

/s/ Jonathan A. Scruggs
Jonathan A. Scruggs

ADDENDUM

U.S. Senate

James Lankford (OK)

Roy Blunt (MO)

U.S. House of Representatives

Ralph Abraham, M.D. (LA-5)

Robert Aderholt AL-4)

Brian Babin (TX-36)

Jim Banks (IN-3)

Andy Biggs (AZ-5)

Diane Black (TN-6)

Marsha Blackburn (TN-7)

Dave Brat (VA-7)

Michael C. Burgess, M.D. (TX-26)

K. Michael Conaway (TX-11)

John Curtis (UT-3)

Jeff Duncan (SC-3)

Bill Flores (TX-17)

Bob Gibbs (OH-18)

Paul A. Gosar, D.D.S. (AZ-4)

Glenn Grothman (WI-6)

Andy Harris, M.D. (MD-1)

Vicky Hartzler (MO-4)

Jody Hice (GA-10)

Randy Hultgren (IL-14)

Mike Johnson (LA-4)

Walter B. Jones (NC-3)

Mike Kelly (PA-3)

Steve King (IA-4)

Doug LaMalfa (CA-1)

Doug Lamborn (CO-5)

Debbie Lesko (AZ-8)

Barry Loudermilk (GA-11)

Roger Marshall, M.D. (KS-1)

Mark Meadows (NC-11)

Ralph Norman (SC-5)

Pete Olson (TX-22)

Steven Palazzo (MS-4)

Steve Pearce (NM-2)

John Ratcliffe (TX-4)

David P. Roe, M.D. (TN-1)

Todd Rokita (IN-4)

David Rouzer (NC-7)

Steve Russell (OK-5)

Adrian Smith (NE-3)

Christopher H. Smith (NJ-4)

Ann Wagner (MO-2)

Tim Walberg (MI-7)

Randy Weber (TX-14)

Brad R. Wenstrup (OH-2)

Ted S. Yoho, DVM (FL-3)