

**NO. 18-2974**

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES,  
ET AL.,  
*DEFENDANTS - APPELLANTS***

**V.**

**BRIAN FIELDS, ET AL.,  
*PLAINTIFFS - APPELLEES***

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**BRIEF OF *AMICI CURIAE* MEMBERS OF PENNSYLVANIA'S  
CONGRESSIONAL DELEGATION SUPPORTING APPELLANTS AND  
REVERSAL**

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**On Appeal from the U.S. District Court, Middle District of Pennsylvania  
No. 1:16-cv-1764, Hon. Christopher C. Conner, presiding**

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## **INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

*Amici Curiae* are members of Pennsylvania’s Congressional delegation. These elected Members of the U.S. 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 their state—not just an empty ceremony designed to solemnize an event. As such, they believe 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. Just as they want the ability, in Congress, to seek Divine blessing, they believe state legislative bodies like the Pennsylvania House of Representatives should be free to do so as well.

### **SUMMARY OF THE ARGUMENT**

For over 150 years, the Pennsylvania House of Representatives has opened its daily sessions with prayer. This practice aligns with the U.S. Congress’s longstanding tradition that dates back to our country’s founding. Whether the prayer is led by a salaried chaplain or by a guest chaplain, its function is, and has always been, the same: to invoke Divine guidance and seek the blessing of God on the

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<sup>1</sup> 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.

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 prayer 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.

The 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, legislatures have always looked to people of piety to lead prayers asking for the assistance of a Higher Power and its blessings upon the day's deliberations. While the chaplain selection process is nonsectarian, it has always been an opportunity only for those who are able and willing to offer a prayer invoking Divine guidance. This is true both in the U.S. Congress and the Pennsylvania House. There is no record of anyone ever offering remarks declared to be secular or purposely in avoidance of the Divine in the place of a prayer before either legislative body. After all, this is a prayer invocation, not an opportunity for public comment.

Because of this tradition's important place in our society, state legislatures have always had wide discretion when selecting their chaplains. The only requirements are that the traditions comport with Congress's longstanding practice,

and that the chaplain selection process not be based on impermissible motives, such as an intent to promote a particular faith. Thus, while state legislatures may not categorically exclude the members of any religion from serving as guest chaplains, they may exclude proposed invocations that fail to comport with the traditional purpose of legislative prayer.

Here, Plaintiffs have announced that they do not intend to seek Divine guidance in an invocation; their entire purpose is to reject the Divine. Accordingly, Plaintiffs have excluded themselves from consideration to be guest chaplains, their requests to serve as guest chaplains was properly denied, and the district court erred in holding otherwise.

## **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.**

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

The Supreme Court has long recognized that “we are a religious people whose institutions presuppose a Supreme Being.” *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (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 the



daily practice in Congress and many state legislatures around the country of inviting a chaplain to offer a prayer at the beginning of each session. This important tradition “has become part of the fabric of our society.” *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (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 legislators 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 (Kennedy, J.) (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) (legislative prayer is 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 is true even among the dissenting justices in *Marsh* and *Town of Greece*. See *Marsh*, 463 U.S. at 797 (Brennan, J., dissenting) (stating that invoking Divine guidance “is nothing but a religious act”); *Town of*

*Greece*, 134 S. Ct. at 1853 (Kagan, J., dissenting) (stating the sectarian prayers at issue were “statements of profound belief and deep meaning,” not “mere ceremony”).

This understanding of legislative prayer is consistent with the Supreme Court’s prayer cases more generally. *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306–07 (2000) (an invocation is “an appeal for divine assistance”); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (a school’s daily prayer is “a solemn avowal of divine faith and supplication for the blessings of the Almighty”). These cases show that prayer innately invokes the Divine. And any holding implying that legislative prayer can be secular or intentionally avoid an appeal to the Divine would cast doubt on many of the Supreme Court’s precedents involving prayer. *See, e.g.*, *Lee*, 505 U.S. at 598 (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 (“[t]he nature of . . . prayer has always been religious”).

The Supreme Court recently reaffirmed the religious nature of prayer in *Town of Greece v. Galloway*, where it not only upheld the constitutionality of prayers offered by guest chaplains, it declared that such prayers may be offered in explicitly sectarian terms. 134 S. Ct. at 1820 (approving 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 inherent purpose or 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 history-focused analysis in *Town of Greece* reflects a correct understanding of the purpose of legislative prayer and the history on which the practice is based. Here, too, history is instructive. As explained by the Supreme Court, the relevant inquiry when examining a state legislature’s legislative prayer practice is “to determine whether the prayer practice [at issue] fits within the tradition long followed in Congress.” *Id.* 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. Given this unambiguous and unbroken history, the practice of limiting prayer to those 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”).

**B. Congress’s history of legislative prayer shows 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. 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.” Letter from John Adams to

Abigail Adams (Sept. 16, 1774).<sup>2</sup> 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.<sup>3</sup> From the beginning, then, our nation’s leaders have sought to invoke spiritual guidance to aid in the task of governing.

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. 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 everybody here”).

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<sup>2</sup> *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).]

<sup>3</sup> *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 December 27, 2018)

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.”<sup>4</sup> 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.” Madison’s Notes. 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 at 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

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<sup>4</sup> Madison’s Notes (June 28, 1787), in 1 *The Records of the Federal Convention of 1787*, at 451–52 (Max Farrand ed., 1911), <https://www.consource.org/document/james-madisons-notes-of-the-constitutional-convention-1787-6-28/> [hereinafter Madison’s Notes]; see also Louis J. Sirico, Jr., *Benjamin Franklin, Prayer, and the Constitutional Convention: History as Narrative*, 10 *LEGAL COMM. & RHETORIC: JALWD* 89, 92–93 (2013).

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).<sup>5</sup>

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 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

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<sup>5</sup> Since 1789, Congress has welcomed chaplains from various faiths to invoke Divine guidance. *Officers and Staff: Senate Chaplain*, U.S. Senate, [https://www.senate.gov/artand-history/history/common/briefing/Senate\\_Chaplain.htm#2](https://www.senate.gov/artand-history/history/common/briefing/Senate_Chaplain.htm#2) (last visited December 27, 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 December 27, 2018).

(1853)). 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 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.<sup>6</sup> 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 all: only those who acknowledge the Divine and are willing to offer a prayer seeking Divine guidance are invited.<sup>7</sup> *See id.* This, too, is in keeping with the longstanding congressional tradition.

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<sup>6</sup> *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>.

<sup>7</sup> *See, e.g., Guest Chaplains*, U.S. House of Representatives Office of the Chaplain, The Chaplaincy, [https://chaplain.house.gov/chaplaincy/guest\\_chaplains.html](https://chaplain.house.gov/chaplaincy/guest_chaplains.html) (listing guest chaplains from 2000–2018) (last visited December 27, 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.

**C. Similarly, the Pennsylvania House’s history demonstrates its legislative prayer practice has always been about invoking Divine guidance.**

The Pennsylvania House’s history of legislative prayer is equally rich and remarkably similar to the congressional tradition discussed above. When the Supreme Court upheld the Nebraska legislature’s legislative prayer practice in *Marsh*, it observed “Nebraska’s practice of over a century, consistent with two centuries of national practice” was “not something to be lightly cast aside.” *Marsh*, 463 U.S. at 790. The same is true of the Pennsylvania’s longstanding legislative prayer practice.

Although Pennsylvania did not begin regularly opening its legislative sessions with prayer until around 1865, its records indicate that members of the Pennsylvania House moved for the commencement of the practice as early as 1817. On December 8, 1817, two members of the Pennsylvania House moved for the House to begin opening its sessions by “offer[ing] up prayers to Almighty God, imploring his gracious presence and assistance in our important deliberations.” Appx 649.

Similarly, a report in 1826 from a committee charged with evaluating whether to appoint a chaplain stated: “It is respectful and highly becoming in the collected representatives of the people . . . to evince their gratitude, and render unfeigned thanks to Almighty God for his mercies, and implore his blessing while they are engaged in the discharge of the important duties devolving upon them.” Appx 650–51. Much like Benjamin Franklin’s early motion for legislative prayer, neither of these efforts immediately resulted in the institution of legislative prayer, but they nonetheless demonstrate that those advocating for the institution of a legislative prayer practice in Pennsylvania sought to invoke Divine guidance. *Cf. Marsh*, 463 U.S. at 787 n.6.

These efforts did eventually bear fruit, and in 1837, Pennsylvania’s constitutional convention passed a resolution allowing for paid chaplains to open the convention’s sessions with prayer.<sup>8</sup> Additionally, as early as 1848 the Pennsylvania House began inviting local clergy to open its legislative sessions with prayer. Appx 643, 652. This practice was amended to replace rotating local clergy with a permanent chaplain, but its underlying purpose remained the same. As explained by a resolution adopted by the House in 1865, the chaplaincy was created based on the

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<sup>8</sup> *See* Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania, to Propose Amendments to the Constitution: Commenced at Harrisburg, on the Second Day of May, 1837 (Harrisburg: Packer, Barrett and Parke, 1837), 317–30, <https://archive.org/details/proceedingsandd03aggggoog>.

belief that “the being of a God should be acknowledged.” Appx 657. This practice continued unbroken for over 100 years until 1994, when the Pennsylvania House opted to replace a permanent chaplaincy with either rotating or guest chaplains. Appx 567.

Pennsylvania’s history of inviting guest chaplains to offer prayers is equally longstanding. Pennsylvania House Journals show the House inviting guest chaplains as early as 1883. Appx 567, 644. In fact, starting around 1935, guest chaplains regularly offered the opening invocation in the place of the permanent chaplain. Appx 663. Describing the practice in 1939, the Pennsylvania Speaker of the House expressed appreciation for the reverence show by all members during the prayers, and he stated the tradition was “intimately linked with a belief in the Supreme Being and the relationship of that Supreme Being, in one way or another, with each of us.” Appx 663. Thus, the Pennsylvania House has always understood its opening invocations to be about invoking Divine guidance, not merely solemnizing their sessions.

Also, like Congress, the Pennsylvania House’s practice of inviting guest chaplains has allowed for guests from many faiths to seek Divine guidance on behalf of the House. See Appx 701–28 (listing the faiths of guest chaplains). But never has a guest chaplain been allowed to offer *secular* remarks in the place of a prayer. This too is no accident but is rather the result of the House’s unbroken practice of

over 150 years—a practice consistent with two centuries of national practice” that cannot “be lightly cast aside,” *Marsh*, 463 U.S. at 790.

**II. In light of legislative prayer’s history and purpose, limiting guest chaplains to those willing to invoke Divine guidance does not constitute impermissible discrimination.**

Limiting participation in an activity to those willing to further 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. The Pennsylvania House’s legislative prayer practice is constitutional if it fits with Congress’s longstanding tradition.**

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”). The correct inquiry when examining a state legislature’s prayer practice is “whether the prayer practice . . . fits within the tradition long followed in Congress.” *Id.* Thus, the Pennsylvania House’s practice must be upheld so long as it fits within this longstanding tradition.

Under this tradition, it may appoint and reappoint a paid chaplain representing a single faith. *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 legislatures must achieve religious balancing or hand over the microphone to those who reject the existence of the Divine. *Id.* at 1824 (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 legislatures 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 intent to promote a particular faith. *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, Georgia*, 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 Corporation*, 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 state legislatures may not discriminate against different types of religions, they have no obligation to ensure access to all and may select only those proposed invocations that fit the purpose of legislative prayer. *Town of Greece*, 134 S. Ct. at 1824 (“[T]he Constitution does not require . . . [legislatures] to achieve religious balancing”); *accord, e.g., 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”).<sup>9</sup> 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* at 1816 (noting that the town of Greece permitted an atheist to give an invocation).

As discussed above, the traditions of both Congress and the Pennsylvania House require chaplains to offer a prayer to the Divine. General Operating Rules of the Pennsylvania House of Representatives Rule 17 (requiring the chaplain to “offer a prayer”). While Plaintiffs may be able to deliver their remarks to other legislative bodies around the country, they cannot do so before the Pennsylvania House because, by their own admissions, they cannot satisfy this crucial criterion.

**B. Plaintiffs are ineligible to serve as a guest chaplain because their secular remarks would not invoke Divine guidance.**

As discussed above, prayer, as a religious act, inherently invokes the Divine. Neither Congress, the Supreme Court, nor the Pennsylvania House have ever thought anything different, and the current practice affirms this truth. By definition,

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<sup>9</sup> Such a limitation is both logical and practical. If state legislatures 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*, 159 F.3d at 1228. These kinds of “prayers” would undermine the very purpose of opening legislative proceedings with a prayer at all, and legislatures have 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”).

“prayer” invokes 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). Recent prayers offered by guest chaplains—from various faiths and creeds—show as much. Commonwealth of Pennsylvania Legislative Journal (May 25, 2016) (Imam Bekir Aksoy) (pleading for the “God of Abraham” to help the members of the House “administer all affairs of State fairly”); *Id.* (June 15, 2016) (Rabbi David Rich Kaplan) (praying that the “Father, who is in heaven” will “bless, safeguard, preserve, help, exalt, make great, extol, and raise high” the members of the House); *Id.* (April 30, 2018) (Pastor Kevin Kirkpatrick) (asking the “Heavenly Father” for His “blessings upon the proceedings of” the House).

Given this, any remarks given by Plaintiffs would not—and could not—fall within the legislative-prayer tradition established by Congress and the Pennsylvania House. Plaintiffs have admitted that they are “nontheist Pennsylvania residents.” *See* Dist. Ct. Doc. at 5. Because they explicitly reject the existence of any Higher Power, Plaintiffs’ own allegations show they will not pray or seek guidance from a Higher Power. Accordingly, they are disqualified from serving as guest chaplains, and the Pennsylvania House may choose not to accept their applications 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 the Pennsylvania House's traditional ceremony at all; it seeks to alter it. As discussed above in Section I.C., members of the Pennsylvania House have consistently defined the purpose of legislative prayer as a petition to a higher power for wisdom, guidance, and blessing. 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. *Snyder*, 159 F.3d at 1228.

Then-Judge Ginsburg made this point well when considering a virtually identical challenge to Congress's legislative prayer practice: 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). Plaintiffs claim their secular remarks can satisfy the purpose of the legislative act. They cannot. Instead, this Court should see their claims for what they are: “an attack on [the Pennsylvania House’s] 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.*

The district court’s erroneous conclusion should be reversed in accordance with the Supreme Court’s holdings in *Marsh* and *Town of Greece*.

## CONCLUSION

For over 150 years, the Pennsylvania House of Representatives has opened its proceedings with a prayer. This tradition is part of a widespread practice that 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 willing to call on the Divine. The limitation merely recognizes that such beliefs allow those individuals to satisfy the purpose of

legislative prayer. As a result, the Pennsylvania House 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 reverse the district court's erroneous conclusion to the contrary.

Respectfully Submitted,

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