IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIAN FIELDS, *et al.*,	**:**	**Civil Action No. 1:16-CV-1764**
	:	
Plaintiffs,	**:**	**(Chief Judge Conner)**
	:	
v.	**:**	
	:	
SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, *et al.*,	**:**	
	:	
Defendants.	**:**	

PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Religious discrimination by the government is intolerable under the Constitution: "the government may not favor one religion over another, or religion over irreligion." *McCreary Cty. v. ACLU*, 545 U.S. 844, 875 (2005). Accordingly, while governmental bodies may choose to open their meetings with invocations, they must "maintain[] a policy of nondiscrimination" in deciding who may deliver the invocations. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014). That basic principle is what this case is all about.

The Pennsylvania House of Representatives maintains an explicitly discriminatory policy. As many legislative bodies do, the House chooses to open most of its sessions with an invocation. The House does not employ a permanent chaplain and therefore invites members of the public to deliver invocations as guest chaplains — but only if they believe in God.

The plaintiffs are atheist, Humanist, and other nontheist Pennsylvania residents and organizations who wish to deliver invocations before the House. Their invocations would celebrate universal American ideals, such as democracy, equality, and strength in diversity. There is nothing objectionable about their intended invocations, and the defendants do not suggest that there is. The only reason that the House refuses to let the plaintiffs deliver invocations is that they do not believe in God.

That is religious discrimination, plain and simple, and the Establishment Clause does not allow it. The federal courts have held that atheism and Humanism must be treated as religions protected from governmental discrimination. And even if they were not, the Establishment Clause prohibits government from favoring believers over nonbelievers. Moreover, by establishing a theological test for determining who may open its meetings, the House has excessively entangled itself in inappropriate religious judgments.

The Speaker of the House's practice of directing the audience to stand for invocations also violates the Establishment Clause. When an invocation consists of a religious prayer, directing members of the public to rise for it coerces religious exercise.

The House's discrimination in selecting invocation-speakers further violates the Free Exercise Clause, by conditioning access to a governmental program on the participants' religious affiliations. Similarly, the House is violating the plaintiffs' rights under the Free Speech Clause by denying them the opportunity to give invocations based on their constitutionally protected beliefs and associations. And the House is violating the Equal Protection Clause by discriminating on the basis of religion, a suspect classification, without a compelling or even legitimate state interest.

As for standing, the plaintiffs all have the right to challenge the House's discriminatory policy for selecting invocation-speakers because, solely based on the plaintiffs' beliefs, the House has denied requests by each of them to deliver an invocation. And two of the plaintiffs have the right to challenge the Speaker's requests to stand for the prayers because they have been subjected to those requests. The House's arguments to the contrary ignore these simple points and conflate standing with the merits.

FACTS

Invocations before the House

The House begins most of its daily sessions with an invocation by either an invited guest or a member of the House. Compl. ¶¶ 151-55, 161. Immediately after calling the House to order, the Speaker announces the identity of the invocation-presenter and (if a guest) the name of the presenter's church or organization. *Id.* ¶¶ 152-53. Next, the Speaker directs everyone in the chamber to rise for the invocation. *Id.* ¶¶ 154. The presenter then delivers the invocation from the Speaker's chair. *Id.* ¶ 155. Guest invocation-presenters subsequently receive a commemorative gavel and a photograph with their Representative. *Id.* ¶¶ 171-72.

In recent years, about half the invocations have been delivered by invited guests from around the Commonwealth. *See id.* ¶¶ 173-75, 179. The vast majority

of the guests represented Christian denominations, and all were affiliated with monotheistic faiths or gave monotheistic invocations. *Id.* ¶¶ 180-85.

Guests ordinarily are selected by their Representative and approved and scheduled by the Speaker. *Id.* ¶¶ 162-66. The Speaker sends the guests a letter asking them to "craft a prayer that is respectful of all religious beliefs" but does not review draft invocations before they are delivered. *Id.* ¶¶ 167-70. Though most recent guest invocation-presenters were ordained clergy serving as leaders of houses of worship, some of them were not — including prison, police, healthcare, and military chaplains; a missionary; a religious college's chancellor; a religious sisterhood's member; and a person with no identified affiliation. *Id.* ¶¶ 187-88.

The plaintiffs' desire to deliver invocations

The plaintiffs are five nontheist Pennsylvania residents and three nontheist Pennsylvania organizations. *Id.* ¶¶ 9, 29, 40, 49, 65, 76, 91, 99. All the individual plaintiffs are atheists; four also identify as Humanists, and the fifth identifies as a freethinker. *Id.* ¶¶ 10, 30, 41, 50, 66. As explained by the American Humanist Association, "Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity." *Id.* ¶ 11. A document entitled Humanist Manifesto III sets forth a detailed statement of basic

Humanist beliefs. *Id.* Similarly, freethought is a nontheistic philosophy that professes and advances ethical values premised on secular principles. *Id.* ¶ 41.

The individual plaintiffs' nontheistic beliefs are strongly held and centrally important to them, having a place in their lives parallel to the significance of God in the lives of adherents to theistic religions. *Id.* ¶¶ 20, 35, 44, 59, 71. Indeed, two of the plaintiffs are ordained as Humanist clergy by the Humanist Society, an institution that is incorporated as a religious organization and recognized as such by the Internal Revenue Service. *Id.* ¶¶ 52, 67. As Humanist clergy, these plaintiffs have the same legal status as ministers of theistic religions, including the right to solemnize weddings. *Id.* ¶¶ 52-53, 67.

The three organizational plaintiffs strive to create communities for nontheists in Pennsylvania. *Id.* ¶¶ 79, 93, 101. Their members are principally atheists, Humanists, freethinkers, and other nontheists. *Id.* ¶¶ 78, 92, 100. The groups regularly hold meetings and events where members discuss nontheism, educate the public about their beliefs, engage in community service, and observe celebratory occasions. *Id.* ¶¶ 79-85, 93-94, 101-03. The organizational plaintiffs play important roles in the lives of their members, akin to the role that a traditional theistic congregation serves in the lives of its congregants. *Id.* ¶¶ 86, 95, 104.

Three of the five individual plaintiffs are leaders of the organizational plaintiffs — they conduct and coordinate meetings and events, lead discussions of

nontheistic beliefs at meetings, and act as their organization's principal contact — thus serving roles similar to that of a congregational leader of a church or synagogue. *Id.* ¶¶ 13, 31, 55. The other two are members of the organizational plaintiffs. *Id.* ¶¶ 42, 68.

The individual plaintiffs' beliefs and practices parallel those of theistic believers in many other ways too. The plaintiffs engage in community service based on their nontheistic beliefs, read and study seminal texts about their belief systems, follow leading authors of such texts, and have special days of the year on which they observe their beliefs. *Id.* ¶¶ 16-19, 33-34, 43, 57-58, 69-70.

To benefit the House and the community, advance equality for nontheists, and demonstrate that nontheists can offer meaningful messages on morality, the plaintiffs would like to give invocations at House sessions. *Id.* ¶¶ 25, 37, 46, 61, 73. None of the plaintiffs would proselytize their nontheistic beliefs to the House or disparage anyone's faith. *Id.* ¶¶ 199-200. Rather, they seek to deliver invocations that are positive, uplifting, unifying, and respectful toward all — similar to the moving and inspiring invocations that have been delivered by nontheists at many governmental meetings around the country, which have invoked authorities or principles such as the Founding Fathers, the U.S. Constitution, democracy, equality, fairness, and justice. *Id.* ¶¶ 25, 37, 46, 61, 73, 199-209. In fact, one of the plaintiffs has already given such an invocation before

the Pennsylvania Senate, in which she prayed for compassion, understanding, and tolerance. *Id.* ¶¶ 45, 202.

These universal ideals are important to nontheists, who are a disfavored and even despised minority in the United States today (*id.* ¶¶ 233-38), even though their population has been growing (*id.* ¶¶ 210-15) and they have made important contributions to society in a wide variety of professions (*id.* ¶¶ 220-32). Indeed, like nontheists across the United States, many of the plaintiffs and plaintiffs' members have suffered discrimination in employment, social, and other contexts as a result of their atheistic beliefs. *Id.* ¶¶ 21, 36, 72, 87, 105, 239-40.

The House's discrimination against the plaintiffs

The House maintains a policy that mirrors the ugly discrimination that nontheists regularly face. In 2014 and 2015, the plaintiffs sent the defendants — the House's Speaker and Parliamentarian, and the plaintiffs' Representatives — a series of requests to give invocations. *Id.* ¶¶ 189-90, 193, 195 & Exs. 2-3, 6, 8-11. These requests were refused on the ground that the plaintiffs were "non-adherents or nonbelievers." *Id.* ¶¶ 191, 194, 196 & Exs. 4, 7, 13. The House also made its discriminatory policy official, enacting a rule requiring guest invocation-presenters to "be a member of a regularly established church or religious organization," which the House interprets as barring nontheists. *See id.* ¶¶ 194, 196 & Exs. 7, 13.

The House's discriminatory policy makes the plaintiffs feel disfavored and unrepresented on account of their nontheistic beliefs. It sends them a message that the House approves of others' religious views while disapproving of theirs, marking them as second-class citizens and outsiders whose beliefs should not receive equal respect, and exacerbating the negative treatment that atheists suffer in other aspects of life. The House's policy thus makes the plaintiffs feel offended, stigmatized, insulted, humiliated, and discriminated against. *Id.* ¶¶ 26, 28, 38, 47, 62, 64, 74, 89, 97, 107, 241-45.

The Speaker's commands to rise for invocations

The House's invocation practices not only discriminate based on religion but also coerce participation in prayer. Immediately before the invocation is given, the Speaker ordinarily directs everyone in the House chamber to rise. *Id.* ¶ 154. From his position on a raised dais at the front of the House chamber, the Speaker can see members of the public in the House visitors' gallery and whether they have followed his directive. *See id.* ¶¶ 145-48, 156-57, 160. The members of the House and the visitors in the gallery typically all stand for the invocation. *Id.* ¶¶ 158-59.

Plaintiff Brian Fields attends House daily sessions once or twice per year and plans to continue to do so. *Id.* ¶ 22. Plaintiff Scott Rhoades has attended one House daily session and intends to attend other sessions in the future. *Id.* ¶ 60. At *each* (the defendants misread the complaint in arguing otherwise, *see* Defs.' Br.

14) daily session that Mr. Fields or Mr. Rhoades attended, the Speaker directed visitors to rise for a monotheistic invocation. Compl. ¶¶ 23, 60. These directives make these plaintiffs feel pressured to participate in prayer and to recognize the validity of monotheistic religious beliefs. *Id.* ¶¶ 27, 63. Plaintiff Fields also perceives that, by not rising for the invocations, he stands out as a religious dissenter and incurs the disapprobation of the House's leadership. *Id.* ¶ 27.

Indeed, on one occasion, after plaintiffs Fields and Rhoades disregarded the Speaker's command to rise for a prayer, the Speaker repeatedly directed them to do so and then publicly instructed a security officer to keep pressuring them. *Id.* ¶¶ 24, 60. Contrary to what the defendants suggest (Defs.' Br. 13), however, the plaintiffs' coercion claim challenges the Speaker's general practice of directing the audience to rise for invocations, not just this one incident of harassment. Compl. ¶¶ 254, 278, 280.

QUESTIONS PRESENTED

1. Do the plaintiffs state a claim under the Establishment, Free Exercise, Free Speech, or Equal Protection Clauses in alleging that the House facially discriminates based on religion against atheists, Humanists, and other nontheists in deciding who may open House sessions with ceremonial invocations?

2. Do the plaintiffs state a claim under the Establishment Clause in alleging that the Speaker coerces attendees at House sessions to participate in prayer by directing them to rise for invocations?

3. Do the plaintiffs, who were denied the opportunity to deliver invocations after making requests, and two of whom were subjected to the Speaker's directives to rise, have standing to challenge these discriminatory and coercive practices?

STANDARD OF REVIEW

On a motion to dismiss, the court "must take all facts alleged in Plaintiffs' Complaint as true and draw all reasonable inferences that arise therefrom in their favor." *Hassan v. City of N.Y.*, 804 F.3d 277, 285 (3d Cir. 2015). And in deciding a challenge to standing, the court "'must assume that the party asserting federal jurisdiction is correct on the legal merits of his claim, that a decision on the merits would be favorable[,] and that the requested relief would be granted.'" *Id.* at 289 (alteration in original) (quoting *Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1179 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 877 (2016)).

ARGUMENT

I. The plaintiffs state a claim for violation of the Establishment Clause.

Contrary to the defendants' assertion that the plaintiffs "seek[] to raze well-established legislative prayer jurisprudence" (Defs.' Br. 30), the plaintiffs' claims

flow directly from the Supreme Court's last word on the topic: *Greece*, 134 S. Ct. 1811. *Greece* prohibits government from discriminating based on religion in selecting invocation-speakers (*id.* at 1824), yet the House does exactly that. *Greece* bars governmental officials from prescribing what beliefs may be expressed in invocations (*id.* at 1822), yet the House does that too. And *Greece* forbids public officials to coerce participation in prayers by directing audience members to rise for them (*id.* at 1826), yet the House does that also.

A. The plaintiffs state a claim that the House's discriminatory invocation-speaker selection policy violates the Establishment Clause.

1. The Establishment Clause prohibits government from discriminating based on religion in selecting invocation-speakers or prescribing what beliefs may be expressed in invocations.

The defendants seem oblivious to the basic principle that they cannot discriminate based on religion when selecting invocation-speakers. They even make the remarkable assertion that they have "the right to limit invocations to sectarian, and even Judeo-Christian, prayers." Defs.' Br. 30. The Supreme Court's decisions are wholly to the contrary.

The Court has repeatedly emphasized that the Establishment Clause prohibits government from discriminating based on religion: "[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause."

McCreary, 545 U.S. at 875-76. "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). "[T]he 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary*, 545 U.S. at 860 (quoting *Epperson v. Arkansas*, 383 U.S. 97, 104 (1968)).

The Court reiterated this anti-discrimination principle in *Greece*. In upholding a town board's policy of opening meetings with invocations that contained references to particular faiths, the Court emphasized that the town's "leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation." 134 S. Ct. at 1816. The Court ruled that governmental entities must "maintain[] a policy of nondiscrimination" in deciding who may present invocations, and that the selection of invocation-speakers must "not reflect an aversion or bias on the part of [government] leaders against minority faiths." *Id.* at 1824; *see also id.* at 1826 ("[a] practice that classified citizens based on their religious views would violate the Constitution"); *id.* at 1831 (Alito, J., concurring) ("I would view this case very differently" if minority faiths had been omitted "intentional[ly]" rather than "careless[ly]").

The defendants seem to think that they can discriminate in selecting invocation-speakers because the Court's earlier decision in *Marsh v. Chambers*,

463 U.S. 783, 793 (1983), upheld a sixteen-year tenure in the Nebraska legislature by a single chaplain of a particular faith. *See* Defs.' Br. 34-35. But *Marsh* explained that having a single chaplain is constitutional only so long as his selection does not "stem[] from an impermissible motive," and noted that guest chaplains periodically gave invocations in Nebraska. 463 U.S. at 793-94. Together, *Greece* and *Marsh* prohibit governmental officials from discriminating based on religion in deciding who may give invocations, regardless of whether they are selecting a single chaplain or guest speakers.

Following this principle, in *Pelphrey v. Cobb County*, 547 F.3d 1263, 1282 (11th Cir. 2008), the Eleventh Circuit held that a county commission violated the Establishment Clause by "categorically exclud[ing] specific faiths based on their beliefs" from its "list of potential invocational speakers." The court explained that the Clause "prohibits purposeful discrimination" — "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); *see also Rubin v. City of Lancaster*, 710 F.3d 1087, 1097 (9th Cir. 2013) (upholding invocation practice where city "[took] every feasible precaution . . . to ensure its own evenhandedness" and "never removed a congregation's name from the list of invitees or refused to include one"); *Jones v. Hamilton Cty. Gov't*, 530 F. App'x 478, 488 (6th Cir.

2013) (upholding policy that "ensures that any organization that calls itself 'religious' may participate, regardless of the specific beliefs it espouses").

The defendants misread *Greece* and *Marsh* in contending that the complaint should be dismissed because the plaintiffs have not alleged that the theistic invocations given at House sessions are proselytizing or disparaging. *See* Defs.' Br. 33-34. The prohibition against proselytizing or disparaging legislative prayers is just one of *Greece*'s and *Marsh*'s mandates; the decisions also forbid religious discrimination in the selection of invocation-speakers. *See Greece*, 134 S. Ct. at 1823-24; *Marsh*, 463 U.S. at 793-95. Governments must satisfy both requirements. Thus, in *Pelphrey*, the court rejected the argument that "the selection process is immaterial when the content of the prayer is constitutional," striking down the discriminatory selection practice at issue notwithstanding that the selecting body's prayers were proper in content. *See* 547 F.3d at 1277-78, 1281-82. "[T]he categorical exclusion of certain faiths based on their beliefs is unconstitutional," emphasized the court. *Id.* at 1282.

Greece also makes clear that — contrary to what the defendants contend (*see* Defs.' Br. 30) — the House cannot mandate that invocations have content that accords with the beliefs of most of its members. The decision prohibits invocation policies that "prescribe a religious orthodoxy" "acceptable to the majority." 134 S. Ct. at 1822. The *Greece* Court thus rejected an argument that government must

ensure that legislative prayers are nonsectarian, as such a rule would cause governments to become "supervisors and censors of religious speech." *Id.* "Our Government," the Court noted, "is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Id.*

2. The Establishment Clause prohibits government from discriminating against nontheists in selecting invocation-speakers.

The House's policy barring atheists and Humanists from giving invocations is facially unconstitutional under *Greece*, *Marsh*, and *Pelphrey*. Supreme Court jurisprudence establishes that atheism and Humanism are religions protected by the Constitution. In *Torcaso v. Watkins*, 367 U.S. 488, 495 & n.11 (1961), the Supreme Court held that government must not "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs," and the Court specifically identified Humanism as "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God." Circuit and district courts have agreed that atheism and Humanism are religions for purposes of the Constitution and civil-rights laws. *See Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) ("[t]he Supreme Court has recognized atheism as equivalent to a 'religion' for purposes of the First Amendment on numerous occasions"); *Glassroth v. Moore*, 335 F.3d 1282, 1294

(11th Cir. 2003) ("The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess belief in the Judeo-Christian God; indeed, it includes the lack of any faith."); *Theriault v. Silber*, 547 F.2d 1279, 1281 (5th Cir. 1977) (holding that definition of "religion" that excludes atheism or agnosticism is "too narrow" for Free Exercise and Establishment Clause purposes); *see also Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317, 329-30 (E.D. Pa. 2016) (atheism); *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014) (Humanism).

The Third Circuit has also specifically held that "religion . . . include[s] non-theistic ideologies." *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981). And the plaintiffs satisfy the three-prong test adopted by the Circuit for determining whether a belief-system is a religion. The first prong asks whether the belief-system "addresses fundamental and ultimate questions" such as "life and death, right and wrong, and good and evil." *Id.* at 1032-33. The plaintiffs' belief-systems concern whether God exists, whether there is life after death, what the right way to live is, and how best to accomplish good. *See* Compl. ¶¶ 11-12, 30, 41, 50-51, 66; *Humanist Manifesto III*, American Humanist Association, http://bit.ly/2bmo0tR (last visited Nov. 8, 2016) (incorporated in Compl. ¶¶ 11, 51, 66). The second prong asks whether the belief-system is "comprehensive in nature

. . . as opposed to an isolated teaching." *Africa*, 662 F.2d at 1032. The plaintiffs' belief-systems present comprehensive teachings on the existence of divinity and how to live one's life (which are discussed in detail in leading nontheist texts that the plaintiffs have read (*see* Compl. ¶¶ 11, 16, 33, 41, 57)), and the belief-systems hold a place in the plaintiffs' lives parallel to the place that belief in God has in the lives of monotheists (*see id.* ¶¶ 20, 35, 44, 59, 71). The third prong looks for "certain formal and external signs," such as "'formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions.'" *Africa*, 662 F.2d at 1032, 1035 (quoting *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring)). Like members of traditional religions, the plaintiffs belong to structured organizations that hold meetings where members discuss their beliefs, outreach events to propagate those beliefs, service events that aid their community based on their beliefs, and celebratory events on special days of the year; indeed, two of the plaintiffs are ordained Humanist clergy. *See* Compl. ¶¶ 13-14, 18-19, 31-32, 34, 42-43, 52-55, 67-68, 70, 76-86, 91-95, 99-104.

In addition, the federal government has recognized Humanism and atheism as religions. The U.S. Army recognizes Humanism as a religious preference for soldiers (Jason Torpy, *Now You Can Have "Humanist" on Your Army Tag*, The

Humanist.com, Apr. 23, 2014, http://bit.ly/1No4nkj), and the Bureau of Prisons does so for inmates (Steven DuBois, *Federal Prisons Agree to Recognize Humanism as Religion*, AP: The Big Story, July 28, 2015, http://apne.ws/1VMpEXl). The Department of Veterans Affairs recognizes atheist and Humanist symbols as "emblems of belief" available for placement on government-furnished headstones for deceased veterans. *Available Emblems of Belief for Placement on Government Headstones and Markers*, National Cemetery Administration, http://1.usa.gov/1ElvZM8. And the I.R.S. recognizes the Humanist Society — which ordained two of the plaintiffs as Humanist clergy — as a religious organization. Compl. ¶¶ 52, 67.

What is more, even if the plaintiffs' beliefs were not considered religions, the House's discriminatory policy would still be unconstitutional. "The First Amendment mandates governmental neutrality . . . between religion and nonreligion" (*Epperson*, 393 U.S. at 104); "the government may not favor . . . religion over irreligion" (*McCreary*, 545 U.S. at 875). For instance, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989), the Supreme Court struck down a tax exemption for religious periodicals because it was denied to nonreligious publications. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 & n.9 (1985), the Court invalidated a law that gave religious adherents a right not to work on their Sabbaths because it did not give nonreligious employees any comparable

right. In other words, governmental bodies cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers." *Torcaso*, 367 U.S. at 495. The House has done just that by prohibiting invocations by people who do not believe in God.

The House's invocation policy also entangles House officials in improper religious judgments. The Establishment Clause bars government from becoming excessively entangled with religion, such as by inquiring into religious doctrine. *See, e.g.*, *Hernandez v. Comm'r*, 490 U.S. 680, 696-97 (1989); *Lemon v. Kurtzman*, 403 U.S. 602, 620-22 (1971). Concern about such entanglement not only led the *Greece* Court to reject the proposition that legislative prayers must be nonsectarian (*see* 134 S. Ct. at 1822), but also to hold that towns cannot ("[s]o long as [they] maintain[] a policy of nondiscrimination") be forced to reach beyond their borders "to promote 'a diversity of religious views'" at invocations: this would require towns "'to make wholly inappropriate judgments about the number of religions [they] should sponsor and the relative frequency with which [they] should sponsor each.'" *Id.* at 1824 (quoting *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring) (internal quotation marks omitted)).

Yet, by prohibiting the plaintiffs from giving invocations because they are "non-adherents or nonbelievers" (Compl. ¶ 191), the House has judged theism to be a "preferred system of belief." *See Greece*, 134 S. Ct. at 1822. And House

officials will need to conduct invasive theological inquiries into the beliefs and affiliations of proposed invocation-speakers to determine whether they satisfy the House's requirement of being theistic "Chaplain[s]" who are "member[s] of a regularly established church or religious organization." *See* Compl. ¶ 194.

Moreover, the House's policy results in the "the very divisions along religious lines that the Establishment Clause seeks to prevent." *See Greece*, 134 S. Ct. at 1819; *see also McCreary*, 545 U.S. at 876. The policy marks nontheists as outsiders and communicates to the public that it is acceptable to treat nontheists as second-class citizens. *See* Compl. ¶¶ 242-45.

3. An invocation need not be theistic.

The defendants contend that legislative invocations must be theistic. Defs.' Br. 36-37. Not so. Black's Law Dictionary defines "invocation" as "the act of calling on for authority or justification." *Invocation*, Black's Law Dictionary (10th ed. 2014). Merriam-Webster defines the term as "the act of mentioning or referring to someone or something in support of your ideas." *Invocation*, Merriam-Webster, http://bit.ly/1Rua0bP. And Oxford Dictionaries' definition is "[t]he action of invoking something or someone for assistance or as an authority." *Invocation*, Oxford Dictionaries, http://bit.ly/1WXlSf2.

And indeed, "prayer" isn't necessarily religious either. It may be "an earnest request or wish." *See Prayer*, Merriam-Webster, http://bit.ly/1TLTnyb; *see also*

Prayer, Oxford Dictionaries, http://bit.ly/1sdhYkU ("an earnest hope or wish."). Or "a request for specific relief." *See Prayer for Relief*, Black's Law Dictionary. Thus, the court in *Allen v. Consolidated City of Jacksonville*, 719 F. Supp. 1532, 1534 (M.D. Fla.), *aff'd mem.*, 880 F.2d 420 (11th Cir. 1989), concluded that a city resolution designating "a day of non-denominational voluntary prayer" encompassed nonreligious "earnest[] request[s]." The statement the defendants cite from *Coleman v. Hamilton County*, 104 F. Supp. 3d 877, 890 (E.D. Tenn. 2015), that "[p]rayer, by its very definition, is religious in nature" ignored all of that.

The Supreme Court, by contrast, has not. In *Greece*, the Court recognized that while legislative invocations may be religious, they may also be nontheistic. The Court emphasized that, under the Town of Greece's policy, "an atheist[] could give the invocation." 134 S. Ct. at 1816; *accord id.* at 1826 ("here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions"); *id.* at 1829 (Alito, J., concurring) ("the town . . . would permit any interested residents, including nonbelievers, to provide an invocation").

Thus, in describing the "constraints . . . on [the] content" of legislative invocations, the Court did not include any requirement that the invocations be theistic. *Id.* at 1823. Rather, the Court explained that invocations should "lend gravity to the occasion," "reflect values long part of the Nation's heritage," be

"solemn and respectful in tone," "invite[] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing," and not "denigrate nonbelievers or religious minorities, threaten damnation, . . . preach conversion," or "'proselytize or advance any one, or . . . disparage any other, faith or belief.'" *Id.* (quoting *Marsh*, 463 U.S. at 794-95).

Proper invocations, added the Court, "often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." *Id.* And while "religious themes provide particular means to [such] universal ends," appropriate invocations may instead "invoke[] universal themes . . . by," for example, "celebrating the changing of the seasons or calling for a 'spirit of cooperation' among [government] leaders." *Id.* at 1823-24 (quoting an invocation given in Greece). Here, the plaintiffs want to give invocations that call on the kinds of nontheistic authorities and values approved of in *Greece*, such as the Constitution, democracy, equality, inclusion, and justice. *See* Compl. ¶ 200.

4. History cannot justify the House's discriminatory policy.

The defendants appeal to "nearly two hundred and fifty years of historical legislative tradition" to justify their exclusionary policy. Defs.' Br. 4. But history does not help them. "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh*, 463 U.S. at 790.

The Court's decisions to uphold opening invocations at governmental meetings were based on an "unambiguous and unbroken history of more than 200 years" going back to the passage of the Bill of Rights. *Greece*, 134 S. Ct. at 1819 (quoting *Marsh*, 463 U.S. at 792). The Court emphasized that because the First Congress enacted a congressional chaplaincy the same week that it approved the First Amendment, the framers of the Bill of Rights must have believed that the Establishment Clause permits legislative invocations. *Greece*, 134 S. Ct. at 1818-19; *Marsh*, 463 U.S. at 787-91.

But there is no long, unbroken history going back to the First Congress of what the House does: inviting members of the public to deliver invocations, while discriminating based on creed in doing so. Instead, with the exception of a brief period in the 1850s, Congress always had permanent chaplains. Christopher C. Lund, *The Congressional Chaplaincies*, 17 Wm. & Mary Bill Rts. J. 1171, 1200-02 (2009). Because Congress did not invite members of the public to open its sessions with invocations at the time the Bill of Rights was approved, history does not support the proposition that the framers of the First Amendment intended that discrimination like the House's be permitted.

If anything, history shows that invocations reflecting unpopular or minority beliefs have long been accepted. The First Continental Congress permitted an Anglican invocation, even though it reminded many delegates of the religious

persecution they had escaped. *See Greece*, 134 S. Ct. at 1833 (Alito, J., concurring). "Our tradition assumes that adult citizens . . . can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith," stated the *Greece* Court. *Id.* at 1823. Thus, today, Congress "acknowledges our growing diversity . . . by welcoming ministers of many creeds," including Buddhist and Hindu invocation-speakers. *Id.* at 1820-21.

And while nontheistic invocations may not have been delivered before the First Congress, that does not justify discriminating against nontheists today, any more than the lack of Buddhist and Hindu invocations before the First Congress could justify barring Buddhist or Hindu invocation-speakers now. Likewise, in selecting its permanent chaplains, Congress could not constitutionally discriminate against non-Protestants on the ground that every Congressional chaplain to date has been Christian and until 2000 only one was Catholic. *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 Nw. U. L. Rev. 1097, 1135 (2006); Lund, *supra*, at 1187-93.

For in *Greece*, the Court emphasized that its legislative-prayer precedents "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." 134 S. Ct. at 1819. The *Greece* Court harmonized legislative-invocation law with general

Establishment Clause jurisprudence, citing cases concerning other Establishment Clause issues to support rulings that governmental bodies must not discriminate based on religion when selecting invocation-speakers, must not become entangled in religious judgments when implementing an invocation practice, and must not coerce citizens to participate in invocations. *Id.* at 1822, 1824-26. In the end, arguments that history can justify discrimination such as the House's are squarely foreclosed by *Greece*'s unambiguous ruling that invocation-speakers must be picked through a "policy of nondiscrimination," not based on "aversion or bias . . . against minority faiths." *Id.* at 1824.

5. The House relies on cases that are inconsistent with *Greece*.

Bereft of an answer to what *Greece* clearly held, the defendants rely on cases that are inconsistent with *Greece* or are otherwise inapposite:

• *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 284-87 (4th Cir. 2005), which upheld a county's policy of allowing only monotheists to serve as invocation-speakers, is plainly contrary to the anti-discrimination mandate that *Greece* subsequently announced. *See* 134 S. Ct. at 1824. Indeed, *Simpson*'s analysis was based on two legal propositions that *Greece* rejected: that government can heavily regulate invocations to prescribe an "ecumenical" "civic faith" that "seeks guidance that is not the property of any sect" (*compare* 404 F.3d at 287 *with*

134 S. Ct. at 1822) and that general Establishment Clause rules do not apply to legislative prayer (*compare* 404 F.3d at 281 *with* 134 S. Ct. at 1819).

• *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1235-36 (10th Cir. 1998), ruled that a citizen had no right to present a politically charged prayer to his city council because the prayer proselytized and disparaged particular religious beliefs. The plaintiffs here would not deliver such improper invocations; they would give ones that are uplifting, positive, unifying, and respectful. *See* Compl. ¶¶ 25, 37, 46, 61, 73, 199-207.

• *Center for Inquiry v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014), struck down a state statute that allowed clergy of theistic religions, but not Humanists, to solemnize marriages. The court noted that "[t]he Supreme Court . . . has forbidden distinctions between religious and secular beliefs that hold the same place in adherents' lives." *Id.* at 873. In dicta, the court stated that "a government may . . . open legislative sessions with Christian prayers while not inviting leaders of other religions." *Id.* at 874. That statement is consistent with *Greece* only if it is construed as referring to an invocation policy that is facially neutral but happens to result in only Christian prayers — for example, if a town allows anyone to volunteer to give invocations, but all the volunteers happen to be Christian.

• *Coleman*, 104 F. Supp. 3d at 888, upheld a policy that "require[d] invocation givers to be part of an eligible and established assembly or

congregation." But that policy prohibited excluding any assembly or congregation "based on the religious perspective of the organization, even religious perspectives that do not teach what would generally be considered a belief in the existence of God." *Id.* at 881 n.4. Moreover, the policy permitted not only "prayer[s]" but also "short solemnizing message[s]." *Jones*, 530 F. App'x at 488 (earlier opinion in same case). The plaintiffs here all belong to nontheistic assemblies or congregations, so they would be able to give invocations under the *Coleman* policy. *See* Compl. ¶¶ 13, 31, 42, 54, 68.

• Finally, *Newdow v. Eagen*, 309 F. Supp. 2d 29, 35-37 (D.D.C. 2004), did not reach the merits of an atheist's claim that the federal House and Senate discriminated against him by refusing to hire him as a chaplain. The court instead dismissed for lack of standing because (1) the plaintiff failed to sue anyone who had authority to hire the chaplains, and (2) he claimed that the chaplaincies themselves were unconstitutional. *Id.* at 35-36. The plaintiffs here are suing the House officials with authority to select invocation-speakers (*see* Compl. ¶¶ 109-42, 162-66, 189-96) and do not contend that legislative prayers are unconstitutional.

B. The plaintiffs state a claim that the House violates the Establishment Clause by coercing participation in religious exercise.

The defendants contend that the complaint's allegations about the Speaker's directives to rise for invocations do not state a claim. Defs.' Br. 40-44. But "[i]t is an elemental First Amendment principle that government may not coerce its

citizens 'to support or participate in any religion or its exercise.'" *Greece*, 134 S. Ct. at 1825 (quoting *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part)).[1] The Supreme Court has thus held that governmental bodies may not sponsor prayer in coercive environments. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310-12 (2000); *Lee*, 505 U.S. at 599.

In *Greece*, the Court concluded that the invocation practice before it was not coercive. *See* 134 S. Ct. at 1824-27. "Although [town] board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public." *Id.* at 1826. While "audience members were asked to rise for the prayer" on a few occasions, "[t]hese requests . . . came not from town leaders but from the guest ministers . . . accustomed to directing their congregations in this way." *Id.* "[T]he analysis would be different," emphasized the Court, "if town board members directed the public to participate in the prayers." *Id.*

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[1] Though the coercion section of *Greece* is a plurality opinion, it represents controlling precedent under *Marks v. United States*, 430 U.S. 188, 193 (1977), because the other opinions in the case make clear that a majority of the Court would uphold practices that the plurality would uphold, and that a different majority would strike down practices that the plurality would invalidate. *See Jackson v. Danberg*, 594 F.3d 210, 219-22 (3d Cir. 2010).

Two district courts accordingly have ruled that governmental officials violated the Establishment Clause by asking citizens to rise for opening invocations. *See Hudson v. Pittsylvania Cty.*, 107 F. Supp. 3d 524, 535 (W.D. Va. 2015); *Lund v. Rowan Cty. ("Lund I")*, 103 F. Supp. 3d 712, 733 (M.D.N.C. 2015). And a 2-1 panel opinion reversing one of these rulings has been vacated by a grant of en banc rehearing. *See Lund v. Rowan Cty. ("Lund II")*, 837 F.3d 407 (4th Cir. 2016), *reh'g en banc granted*, 2016 WL 6441047 (4th Cir. Oct. 31, 2016); 4th Cir. R. 35(c). As the dissenter from the vacated panel opinion explained, "[a] request to an audience to stand or pray carries special weight when conveyed in an official capacity by an elected [governmental official] facing his constituents, with his [colleagues] arrayed behind or beside him, directly before discharging his official duties." 837 F.3d at 436 (Wilkinson, J., dissenting).

Here, flanked by the House Parliamentarian and at times others, the Speaker regularly directs audience members to rise for invocations. *See* Compl. ¶¶ 145-48, 154. From his position on the House chamber's dais, the Speaker can see members of the public in the visitors' gallery and whether they have followed his directive. *Id.* ¶¶ 156-57, 160. The visitors in the gallery typically all stand for invocations, as do the members of the House. *Id.* ¶¶ 158-59. Moreover, the coercive effect of the Speaker's directives to rise is compounded by the fact that, unlike in *Greece*, "any

member of the public is [not] welcome in turn to offer an invocation reflecting his or her own convictions." *See* 134 S. Ct. at 1826.

Contrary to what the defendants suggest (Defs.' Br. 41-42), historical practice does not legitimize the Speaker's requests to stand. The history that matters under *Greece* and *Marsh* is that of the U.S. Congress. *See Greece*, 134 S. Ct. at 1832 (Alito, J., concurring). Founding-era practices at the state level are not indicative of the Establishment Clause's intent, as the Clause did not originally apply to the states, and some states maintained established churches and prohibited non-Protestants from holding public office into the early nineteenth century. *See* Charles B. Blackmar, *The Constitution and Religion*, 32 St. Louis U. L. J. 599, 600 (1988); Daniel J. Morrissey, *The Separation of Church and State: An American-Catholic Perspective*, 47 Cath. U. L. Rev. 1, 5 (1997). Today, no request to stand for invocations is made in either chamber of Congress. *See, e.g.*, *Legislative Day of September 28, 2016*, Office of the Clerk, U.S. House of Representatives (Sept. 28, 2016), http://bit.ly/2eWjT7B; *Senate Floor Proceedings*, U.S. Senate (Sept. 29, 2016), http://bit.ly/2emzl0x. There is no evidence that historical practice was any different, and there is certainly no "unbroken history" continuing to the present. *See Greece*, 134 S. Ct. at 1819 (quoting *Marsh*, 463 U.S. at 792).

The defendants err in contending that there is no unconstitutional coercion because the plaintiffs have not followed the Speaker's directives to rise and can

leave the gallery during the prayers. *See* Defs.' Br. 41-43. The Supreme Court has repeatedly rejected the argument that a governmental employee's directive to participate in prayer is rendered non-coercive by an option to stay silently seated or leave the room. *See Lee*, 505 U.S. at 596; *Sch. Dist. v. Schempp*, 374 U.S. 203, 224-25 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962). Such public non-participation outs the objector as a religious dissenter.

Indeed, on one occasion, the Speaker and a House security officer exacerbated the coercion that results from the Speaker's requests to stand by repeatedly demanding that plaintiffs Fields and Rhoades rise after they declined to do so. Compl. ¶¶ 24, 60. The defendants misconstrue the complaint in suggesting that the plaintiffs challenge only that one incident, however. *See* Defs.' Br. 13-14, 43 n.13. The plaintiffs challenge the Speaker's standard, ongoing practice of directing the audience to rise for invocations, and plaintiff Fields has been subjected to those directives on many occasions. *See* Compl. ¶¶ 22-23, 27, 154, 197-98, 254, 278, 280. That the haranguing incident that the defendants highlight may have occurred outside the statute of limitations (*see* Defs.' Br. 13 n.4) does not preclude it from being used as background evidence illustrating how the practice the plaintiffs challenge can be abused. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

II. The plaintiffs state a claim that the House's discriminatory invocation-speaker selection policy violates the Free Exercise, Free Speech, and Equal Protection Clauses.

A. The plaintiffs state a claim under the Free Exercise and Free Speech Clauses.

The First Amendment's Free Exercise and Free Speech Clauses prohibit governmental bodies from conditioning participation in governmental activities on a person's religious or other beliefs or affiliations. The Free Exercise Clause in particular bans governmental bodies from making adoption or profession of any religious belief a condition for taking part in governmental affairs. In *Torcaso*, 367 U.S. at 489-90, 495-96, the Supreme Court held that a state could not require people seeking commissions as notaries to declare a belief in God. The Court concluded that such a "religious test for public office" not only violates the Establishment Clause (*see id.* at 492-95) but also "unconstitutionally invades the [plaintiff]'s freedom of belief and religion" (*id.* at 496). Subsequently, in ruling in *McDaniel v. Paty* that a law barring ministers from holding public office violated the Free Exercise Clause, the Court confirmed that the law struck down in *Torcaso* violated that Clause too. *See* 435 U.S. 618, 626-27 (1978) (four-Justice plurality); *id.* at 634-35 (Brennan, J., concurring); *id.* at 642-43 (Stewart, J., concurring).

Similarly, the Free Speech Clause prohibits government from denying citizens opportunities to take part in governmental activities based on their beliefs or affiliations. In *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), for

example, the Court noted that Congress would be barred from "enact[ing] a regulation providing that no Republican [or] Jew . . . shall be appointed to federal office." In *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990), the Court held that conditioning hiring decisions for public employment on political belief and association violates applicants' First Amendment rights. *Accord, e.g.*, *Branti v. Finkel*, 445 U.S. 507, 516-17 (1980); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609-10 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966). And in *Agency for International Development v. Alliance for Open Society International*, 133 S. Ct. 2321, 2332 (2013), the Court ruled that participation in a federal anti-AIDS program could not be conditioned on adoption of a policy opposing sex work. *See also Cuffley v. Mickes*, 208 F.3d 702, 711-12 (8th Cir. 2000) (state violated Free Speech Clause by excluding Ku Klux Klan from Adopt-A-Highway program based on disapproval of Klan's "repellent philosophy").

The House's policy of excluding nontheists from delivering invocations violates these First Amendment principles. As in *Torcaso*, 367 U.S. at 496, the House is violating the Free Exercise Clause by conditioning participation in a governmental function — here, solemnizing public meetings — on profession of belief in God. Likewise, the House is violating the Free Speech Clause by excluding the plaintiffs based on their nontheistic beliefs and affiliations.

What is more, the Supreme Court relied partly on free-exercise and free-speech principles in *Greece* to support its rejection of the proposition that legislative invocations must be nonsectarian. The Court did note that governmental bodies must regulate invocations to ensure that they do not proselytize or disparage any faith (134 S. Ct. at 1823-24) — meaning that the Court did not consider opening invocations to be a public forum in which content- and viewpoint-based restriction of speech would be prohibited. Yet, looking to free-exercise principles, the Court explained that (beyond the foregoing restrictions) the government cannot "require ministers to set aside their nuanced and deeply personal beliefs" but instead "must permit a prayer giver to address his or her own God or gods as conscience dictates." *Id.* at 1822. Following free-speech principles, the Court added that requiring invocations to be nonsectarian would force governmental bodies to "act as supervisors and censors of religious speech" or to "define permissible categories of religious speech," neither of which the Constitution allows. *Id.* Contrary to these teachings, the House refuses to permit the plaintiffs to open House sessions in a manner consistent with their "deeply personal beliefs" and has defined theistic speech as the only "permissible categor[y] of religious speech."

B. The plaintiffs state a claim under the Equal Protection Clause.

The Equal Protection Clause prohibits states from treating citizens differently based on their religious beliefs. *E.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Religion is a suspect classification that triggers strict scrutiny. *E.g.*, *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Schumacher v. Nix*, 965 F.2d 1262, 1266 (3d Cir. 1992).[2] Strict scrutiny also applies when government disfavors "a 'discrete and insular' minority" (*Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938))) that has been "subjected to . . . a history of purposeful unequal treatment, or relegated to . . . a position of political powerlessness" (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

The House's refusal to allow nontheists to present invocations triggers strict scrutiny by discriminating based on religion. Strict scrutiny is also proper because nontheists have long faced invidious discrimination and long been relegated to political powerlessness. *See* Compl. ¶¶ 21, 36, 72, 87, 105, 233-40. The House's

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[2] In *Hassan*, 804 F.3d at 301, the Third Circuit did not take a position on whether religious discrimination triggers strict or intermediate scrutiny, but the above-cited decisions do not appear to leave any room to conclude that the scrutiny should be only intermediate.

policy thus must further a compelling governmental interest and be narrowly tailored to that interest. *See, e.g.*, *Miller*, 515 U.S. at 920. The House does not — and cannot — offer any interest that can satisfy this demanding standard.

C. The House's government-speech argument is not a valid defense.

The defendants' principal argument in opposition to the plaintiffs' Free Exercise, Free Speech, and Equal Protection Clause claims is that those clauses are inapplicable because legislative prayer is government speech. *See* Defs.' Br. 46. But it isn't under the facts here, and even if it were, that would not provide a defense to the plaintiffs' specific arguments under these three clauses.

If legislative prayers given by private citizens before the House were to be treated as government speech, that would not give the House a right to discriminate based on religion in deciding who may give the prayers. The cases cited above prohibit governmental bodies from discriminating based on religious belief or affiliation even when picking individuals to deliver government speech — for instance, when deciding who may hold public office or employment. *See, e.g.*, *Torcaso*, 367 U.S. at 496; *Mitchell*, 330 U.S. at 100. Indeed, if a city planned to randomly select a private citizen to read a city-drafted proclamation at city hall, excluding a religious minority from the selection process would surely violate the Free Exercise, Free Speech, and Equal Protection Clauses even though the proclamation would be government speech.

In any event, legislative invocations delivered by private citizens — at least under the circumstances here — are not government speech but rather a form of hybrid speech. The contention that legislative prayers must be government speech is incompatible with *Greece*. For *Greece* tightly circumscribes the government's authority to control the content of invocations: although governmental officials can (and must) prohibit proselytizing or disparaging invocations, they cannot require invocations to be "nonsectarian or ecumenical," "prescribe a religious orthodoxy," "mandate a civic religion," "prescrib[e] prayers to be recited," "permit [only] those religious words . . . that are acceptable to the majority," "define permissible categories of religious speech," or otherwise "act as supervisors and censors of religious speech." 134 S. Ct. at 1820, 1822.

A number of courts apply a four-factor test for determining what is government speech, considering:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.

Pittsburgh League of Young Voters Educ. Fund v. Port Auth., No. 2:06-CV-1064, 2008 WL 4965855, at *8 (W.D. Pa. Aug. 14, 2008) (quoting *Sons of Confederate Veterans ex rel. Griffin v. Comm'r of Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)). Although the purpose of legislative invocations is governmental,

the other three factors weigh heavily against a conclusion that invocations delivered by private citizens before the House are government speech. First, the House does not exercise editorial control over the invocations, as it does not review draft invocations in advance. *See* Compl. ¶ 170. Second, the House's guest chaplains — who deliver about half of all invocations before the House — are private citizens. *Id.* ¶¶ 162-66, 175-79. Finally, the private citizens are ultimately responsible for the content of the invocations: they compose the invocations without review by the House (*see id.* ¶ 170), and *Greece* requires that the House "permit a prayer giver to address his or her own God or gods as conscience dictates" (134 S. Ct. at 1822).

As the House sponsors the legislative invocations delivered to it, but can control them only to a very limited extent, the invocations should be classified as "hybrid speech" — speech that has First Amendment protection because it "has aspects of both private speech and government speech." *See WV Ass'n of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 298, 301 (4th Cir. 2009). All the cases that the defendants cite for the proposition that legislative invocations are government speech either predate *Greece* and assume that government can control legislative invocations to a much greater degree than *Greece* allows (*see Turner v. City Council*, 534 F.3d 352, 354-55 (4th Cir. 2008); *Simpson*, 404 F.3d at 284, 288; *Atheists of Fla. v. City of Lakeland*, 779 F. Supp. 2d 1330, 1339, 1342

(M.D. Fla. 2011)) or rely on pre-*Greece* cases without analyzing whether their conclusions are consistent with *Greece* (*see Bormuth v. Cty. of Jackson*, 116 F. Supp. 3d 850, 853 (E.D. Mich. 2015), *appeal argued*, No. 15-1869 (6th Cir. Apr. 19, 2016); *Coleman*, 104 F. Supp. 3d at 891).

To the extent that cases cited by the defendants conclude that legislative-prayer practices are governed solely by the Establishment Clause, those conclusions are based on the mistaken assumption that legislative prayer is purely government speech. *See Simpson*, 404 F.3d at 288; *Coleman*, 104 F. Supp. 3d at 891; *Lakeland*, 779 F. Supp. 2d at 1342. Beyond that, any suggestion that the Court should consider only the Establishment Clause because legislative-prayer cases typically focus on the Establishment Clause is contrary to the elementary principle that governmental actions — including those touching on religion — can violate more than one constitutional provision. *See, e.g.*, *Torcaso*, 367 U.S. at 492-96 (religious test for public office violated Establishment and Free Exercise Clauses); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (prohibiting Jehovah's Witnesses from giving Bible talks in public park due to disdain for their views violated Free Speech, Free Exercise, and Equal Protection Clauses); *Ctr. for Inquiry*, 758 F.3d at 874-75 (religious discrimination in marriage-solemnization statute violated First Amendment's Religion Clauses and Equal Protection Clause); *see also Police Dep't v. Moseley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal

Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."). As in these cases, the House's religious discrimination is offensive to fundamental values that are expressed throughout our Constitution, in multiple clauses.

III. The plaintiffs have standing.

The plaintiffs easily satisfy the requirements for standing because they have been directly affected by the challenged conduct. All of them have the right to challenge the House's discriminatory invocation-speaker selection policy because each of them has applied to deliver an invocation and been rejected. Compl. ¶¶ 189-96. And two of them have the right to challenge the Speaker's directives to rise for invocations because they have been subjected to those demands. *Id.* ¶¶ 22-23, 60. The defendants' arguments against jurisdiction erroneously conflate standing with the merits.

In *Simpson*, 404 F.3d at 279 n.2, the court held that a county's refusal to include a Wiccan — because of her religion — on its list of invocation-speakers gave her standing to sue. While *Simpson*'s merits analysis has been abrogated by *Greece* (*see supra* pp. 25-26), its standing ruling remains consistent with long-extant case law.

The Supreme Court and the Third Circuit have held that discriminatory treatment is — by itself — a sufficient injury for standing, even when ending the discrimination would confer no tangible benefit on a plaintiff. *See Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984); *Hassan*, 804 F.3d at 289-91 (citing numerous other cases holding same). For "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler*, 465 U.S. at 739-40 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). "'[D]iscriminatory classification is itself a penalty' . . . and thus qualifies as an actual injury for standing purposes . . . ." *Hassan*, 804 F.3d at 290 (quoting *Saenz v. Roe*, 526 U.S. 489, 505 (1999)). The House's rejection of requests made by each plaintiff to deliver invocations (Compl. ¶¶ 189-96) is thus sufficient, without more, to confer standing on each of them. *See Hassan*, 804 F.3d at 289-91.

Yet there is more: the House's discriminatory policy both deprives the plaintiffs of tangible benefits and inflicts specific psychological harms on them. Delivering an invocation before the House carries with it the prestige associated with the heart of state government and an opportunity to increase the visibility of

one's organization: the Speaker announces the invocation-presenter's name and organization; the presenter speaks from the Speaker's chair; and the invocation is heard by the House's members, the visitors in the gallery, and members of the public who are watching on the internet. *See* Compl. ¶¶ 143, 147, 152-55, 246. The invocation-presenters then receive substantive tokens of appreciation: a commemorative gavel and a photograph with their Representative. *Id.* ¶¶ 171-72, 247. All of these benefits are denied to the plaintiffs because of their nontheistic beliefs. *See id.* ¶ 247.

The House's discriminatory policy further makes the plaintiffs feel disfavored and unrepresented on account of their nontheistic beliefs. It sends them a message that the legislative body charged with representing them favors theistic religions, scorns their beliefs, and views them as amoral outsiders and second-class citizens. *Id.* ¶¶ 26, 28, 38, 47, 62, 64, 74, 89, 97, 107, 241-45. Such governmental conveyance of endorsement or favoritism of particular religious views has long been held to inflict psychological injury sufficient for standing in Establishment Clause cases where plaintiffs observed religious displays (*see Freedom From Religion Found. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476-79 (3d Cir. 2016) (citing numerous other cases)) or listened to legislative prayers (*see, e.g.*, *Pelphrey*, 547 F.3d at 1279-80) representing beliefs different from their own. *See also Catholic League for Religious & Civil Rights v. City of S.F.*, 624 F.3d

1043, 1048 (9th Cir. 2010) (en banc) (Catholic residents of city had standing to challenge city resolution criticizing Catholic Church directive, because "adherents to a religion have standing to challenge an official condemnation by their government of their religious views"); *Awad v. Ziriax*, 670 F.3d 1111, 1123 (10th Cir. 2012) (Muslim citizen had standing to challenge proposed state constitutional amendment that "condemn[ed] his religion").

The harm suffered by the plaintiffs here is greater than in those cases: the plaintiffs here receive a message of religious disfavor by personally experiencing discrimination by the House, instead of merely observing displays, prayers, or resolutions. That plaintiffs Fields and Rhoades have witnessed monotheistic invocations at House sessions (Compl. ¶¶ 22-23, 60) compounds their harm — listening to a theistic invocation reminds them that they are being discriminated against in that they cannot give an invocation themselves (*cf. Greece*, 134 S. Ct. at 1826) — but is not necessary for standing (*see Hassan*, 804 F.3d at 289-91).

Plaintiffs Fields and Rhoades also have standing to challenge the Speaker's directives to rise for prayers. These two plaintiffs have been subjected to these directives each time they have attended a House session — on many occasions in the case of Mr. Fields — and they both plan to attend future sessions. Compl. ¶¶ 22-24, 60. The Supreme Court has repeatedly held that individuals directly

subjected to coercion to take part in prayer have standing to challenge that coercion. *See Lee*, 505 U.S. at 584, 594; *Schempp*, 374 U.S. at 224 n.9.

The defendants improperly confuse standing with the merits of the case. Their lead argument on standing is that the plaintiffs "do not have a private right" that was violated. Defs.' Br. 20. Essentially, the defendants contend that there is no standing because there is no constitutional violation. *See id.* at 1-6, 20-23. But "federal standing . . . 'in no way depends on the merits of the [claim].'" *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (final alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)); *accord, e.g.*, *City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 83-84 (1958).

For example, duplicating an argument they make on the merits (*see* Defs.' Br. 46-48), the defendants contend that the plaintiffs lack standing to bring their Free Exercise, Free Speech, and Equal Protection claims because legislative prayers are government speech (*id.* at 20-23). As explained above, this argument fails because (1) the legislative invocations here are hybrid speech, not pure government speech; and (2) even if the invocations were government speech, denying people, on the grounds of their religious or other beliefs or affiliations, an opportunity to participate in governmental activity — including activity that involves delivering government speech — is actionable under the Free Speech, Free Exercise, and Equal Protection Clauses. *See supra* Part II.C. Courts have

affirmed the standing of people — including, as here, volunteers — to challenge under the First Amendment and the Equal Protection Clause denials of opportunities to take part in governmental affairs. *See Wagner v. FEC*, 793 F.3d 1, 4-5 (D.C. Cir. 2015) (en banc) (government contractor for program involving delivery of government speech had standing to challenge under Free Speech and Equal Protection Clauses threatened denial of contract), *cert. denied*, 136 S. Ct. 895 (2016); *Brown v. Disciplinary Comm.*, 97 F.3d 969, 972-73 (7th Cir. 1996) (volunteer firefighter had standing to challenge loss of his position under Free Speech Clause); *Hyland v. Wonder*, 972 F.2d 1129, 1135-36 (9th Cir. 1992) (loss of volunteer position with governmental program involving delivery of government speech inflicted injury entitling volunteer to proceed with Free Speech claim).

The standing discussion thus far has focused on the plaintiffs' injuries, but the plaintiffs also readily satisfy the other requirements for standing: causation and redressability. *See, e.g.*, *Hassan*, 804 F.3d at 289. The defendants have caused the discriminatory and coercive conduct that has harmed the plaintiffs: the defendants have authority over the selection of invocation-speakers; they have denied the plaintiffs' requests to deliver invocations; and the Speaker has directed plaintiffs Fields and Rhoades to rise for invocations. *See* Compl. ¶¶ 23, 60, 109-142, 154, 162-66, 189-98. And a favorable judgment would redress the plaintiffs' injuries by

prohibiting the defendants from discriminating against nontheists in selecting invocation-speakers and by ending the Speaker's practice of directing the audience to stand. *See id.* ¶ 278. The defendants' argument that the plaintiffs' injuries are not redressable because most invocations will continue to be theistic (Defs.' Br. 25-26) misapprehends the plaintiffs' injuries: the plaintiffs do not object to theistic prayers being given, but only to the House's discriminatory prohibition against nontheists delivering invocations and to the Speaker's coercive directives to rise.

Finally, the three organizational plaintiffs meet the requirements for standing, in two ways. First, the organizational plaintiffs have direct standing because they have been directly victimized by the House's discriminatory policy: they have requested the opportunity to deliver invocations and have been denied. *See* Compl. ¶¶ 193-96. Second, they have organizational standing under the three-prong test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977): Their members have standing to sue in their own right. *See supra* pp. 40-44. Their interests in this case are germane to their purposes. Compl. ¶¶ 88, 96, 106. And the participation of their individual members in the case is not necessary; the Third Circuit has held that this prong is satisfied unless damages are sought (here they are not) or the claims require the participation of *all* of an organization's members. *See Hosp. Council v. City of Pittsburgh*, 949 F.2d 83, 89-90 (3d Cir. 1991).

IV. The defendants' references to legislative immunity and the political-question doctrine are both waived and meritless.

In footnotes, the defendants refer to the legislative-immunity and political-question doctrines, without presenting fully formed arguments. *See* Defs.' Br. 28 n.9, 38 n.11. The Court should not consider these doctrines, for "arguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived." *John Wyeth & Brother Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (Alito, J.). Moreover, because the defendants' counsel represented at the parties' case-management conference that the defendants would not raise legislative immunity in their motion to dismiss (*see* Nellis Decl.), any such argument is judicially estopped. *See, e.g.*, *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 779 (3d Cir. 2001). In any event, neither doctrine applies.

Legislative immunity applies only when the challenged conduct is "an integral part of the deliberative and communicative processes by which [legislators] participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of [the legislature]." *Gravel v. United States*, 408 U.S. 606, 625 (1972). The doctrine "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself" (*United States v.*

Brewster, 408 U.S. 501, 528 (1972)) and applies "to matters beyond pure speech or debate in [a legislative chamber] . . . 'only when necessary to prevent indirect impairment of such deliberations'" (*Gravel*, 408 U.S. at 625 (quoting appeals court opinion in case)). Accordingly, every court to consider the question has concluded that legislative immunity does not apply to challenges to legislative invocations. *See, e.g.*, *Chambers v. Marsh*, 675 F.2d 228, 232 (8th Cir. 1982) ("The prayer practice . . . bears no substantive relation to the process of enacting legislation."), *cert. denied on legislative immunity and decision rev'd on the merits*, 463 U.S. at 786 & n.4; *Lund I*, 103 F. Supp. 3d at 718 ("[P]rayer can hardly be considered necessary or integral to . . . government's legislative processes."); *Doe v. Pittsylvania Cty.*, 842 F. Supp. 2d 906, 916 (W.D. Va. 2012) ("[L]egislative immunity . . . does not embrace non-legislative acts such as opening prayers.").

The political-question doctrine is likewise inapplicable. That doctrine can apply only in lawsuits involving judicial review of actions by the executive or legislative branches of the federal government, not in cases involving judicial review of state or local conduct. *Baker v. Carr*, 369 U.S. 186, 210 (1962); *Larsen v. Senate*, 152 F.3d 240, 246 (3d Cir. 1998). In addition, the doctrine applies only "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*,

132 S. Ct. 1421, 1427 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)). The Constitution does not mention legislative prayer, and the relief that the plaintiffs seek is simple and straightforward.

CONCLUSION

Throughout the defendants' brief runs the view that the defendants are exempt from fundamental constitutional restrictions prohibiting religious discrimination and coercion by governmental officials. Indeed, virtually all the arguments that the defendants make — both on the merits and on standing — would, if accepted, permit them to discriminate in selecting invocation-speakers not only against nontheists but also against members of *any* religious faith that the House might disfavor. And some of the defendants' arguments would even allow them to discriminate against proposed invocation-speakers based on race and gender.

That cannot be the law. Having invited members of the public into its chamber to deliver invocations, the House cannot now limit that opportunity to people who hold religious beliefs or affiliations of which the House approves. Such discrimination expresses an official preference for particular religious beliefs that is at the heart of what the Constitution's clauses concerning religion and equality prohibit. The motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 18, 2016, I served the foregoing document and the accompanying declaration on counsel for all parties via the Court's ECF system.

By: /s/ Alex J. Luchenitser Date: November 18, 2016
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