[ORAL ARGUMENT NOT YET SCHEDULED]
No. 17-5278

In the United States Court of Appeals for the District of Columbia Circuit

DANIEL BARKER,

Plaintiff-Appellant,

v.

PATRICK CONROY, CHAPLAIN, *ET AL.*,

Defendants-Appellees.

Appeal from the United States District Court for the District of Columbia, No. 1:16-cv-00850-RMC

BRIEF OF *AMICI CURIAE* ALEPH INSTITUTE, *ET AL.*, IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF PARTIES, RULING, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and Amici. All parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief of Defendants-Appellees, except for the following: Aleph Institute; the Anglican Church in North America; the Lutheran Church-Missouri Synod; the National Association of Evangelicals; Chaplain (Major General) Cecil R. Richardson, U.S. Air Force (Retired); Chaplain (Major General) Douglas L. Carver, U.S. Army (Retired); Chaplain (Brigadier General) Douglas E. Lee, U.S. Army (Retired); Chaplain (Colonel) Jacob Z. Goldstein, U.S. Army (Retired); Chaplain (Captain) Mitchell Rocklin, U.S. Army Reserve; and Chief Master Sergeant Talib M. Shareef, U.S. Air Force (Retired).

B. Ruling Under Review. An accurate reference to the ruling at issue appears in the Brief for Defendants-Appellees.

C. Related Cases. To *amici*'s knowledge, this case has not previously been before this Court or any other court, and there are no related cases pending in this Court or in any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, institutional *amici* Aleph Institute; the Anglican Church in North America, the Lutheran Church-Missouri Synod; and the National Association of Evangelicals state that they do not have parent corporations and do not issue stock.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are organizations and individuals with extensive experience with the chaplaincies for the Armed Forces of the United States. *Amici* include the Aleph Institute; the Anglican Church in North America; the Lutheran Church-Missouri Synod; the National Association of Evangelicals; Chaplain (Major General) Cecil R. Richardson, U.S. Air Force (Retired); Chaplain (Major General) Douglas L. Carver, U.S. Army (Retired); Chaplain (Brigadier General) Douglas E. Lee, U.S. Army (Retired); Chaplain (Colonel) Jacob Z. Goldstein, U.S. Army (Retired); Rabbi Mitchell Rocklin, member of the Executive Committee of the Rabbinical Council of America; and Imam Talib M. Shareef, Imam of the historic Nation's Mosque in Washington, DC.

The institutional *amici* have an ongoing relationship with the military as faith groups responsible for certifying (or "endorsing") individual chaplains for military service. The individual *amici* are current or former military chaplains or religious leaders, several of whom now act as chaplain endorsers. They have decades of experience providing for the religious needs of service members at all levels of

[1] All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief. The individual *amici* appear in their individual capacities and not on behalf of any entity or organization.

command and in geographic regions worldwide. Collectively, they have served in every branch of the military and in every major U.S. conflict since Vietnam. Through their experience, they have deep personal familiarity with the critical role that the military chaplaincies and religion generally play in the lives of our nation's service members and their families.

Amici believe that the chaplaincy of the United States House of Representatives is inherently religious in nature and that legislative prayer in the House need not include non- or anti-religious statements. Recognizing the religious nature of the House chaplaincy is consistent with the First Amendment's special solicitude for the role that religion plays in the lives of most Americans. And absent religious coercion or abuse of the prayer opportunity, government-sponsored chaplaincies and legislative prayer are consistent with our nation's traditions and do not trigger the Establishment Clause. Affirming the district court's ruling will help ensure that members of our Armed Forces who sacrifice so much of their lives—including sometimes life itself—for the security and preservation of our nation have access to chaplains who can help meet their *religious* needs wherever they are in the world.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005). Nor does it insist that every manifestation of religion in connection with a government activity be paired with a secular expression or practice of equal weight and significance. Some religious activity—even when government sponsored or funded—is a benign reflection of the fact that religion is an integral part of most Americans' lives and has played, and continues to play, a unique and authentic role in our nation's history, culture, and economy. That influence does not amount to an establishment of religion.

This case lies at the crossroad of two such practices—legislative prayer and government-funded chaplaincies—that, while religious in nature, are not establishments triggering the Establishment Clause. The same Congress that drafted the First Amendment was simultaneously funding chaplain-led prayers to solemnize its own deliberations, clearly signaling that these were not the "establishments" it was looking for.

The deliberations expressly included consideration of whether the First Amendment's Religion Clauses should protect "religion" only, or "conscience" more broadly, ultimately settling on the former. Religion is thus afforded special solicitude under our system of government, giving ultimate latitude for its free

exercise by all Americans who so desire, while averting true establishments to protect both those who do believe and those who do not. Thus the Courts have long upheld religious accommodations, religious expressions at public events, and even some public support of religion, as long as it does not rise to the level of what the Founders deemed an establishment. Indeed, with respect to the military chaplaincies, at least one court of appeals has held that government funding is not only permissible, but mandatory to preserve the free exercise rights of service members who must go whenever and wherever they are sent to defend our nation. Recognizing and upholding the religious nature of the military chaplaincies is thus essential to our nation's service men and women of faith and their families.

Plaintiff Daniel Barker is an open and avowed atheist who has devoted his life to dismantling religion and religious belief, including through disparagement and mockery. The First Amendment protects his beliefs and activities, but it does not require that he be allowed to participate in the constitutionally permissible *religious* activities that he openly seeks to destroy. This Court thus should affirm the lower court's ruling that Mr. Barker has failed to state a claim for relief based on his philosophical objection to Congress's decision to fund chaplain-led prayer in its own proceedings.

ARGUMENT

I. The Establishment Clause has no application in this case.

A. The House's chaplaincy and legislative prayers do not trigger the Establishment Clause.

Mr. Barker's Establishment Clause claim must be dismissed. Congress's decision to begin its daily deliberations with prayer simply does not trigger the Establishment Clause. "[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (quoting *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (opinion of Kennedy, J., concurring in part and dissenting in part)). At minimum, therefore, "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change" is necessarily consistent with the Establishment Clause. *Id.* And for modern practices with no clear historical corollary, courts must still uphold any practice that "accords with history and faithfully reflects the understanding of the Founding Fathers." *Id.* (citation omitted).

Town of Greece affirmed that chaplaincies and legislative prayer will typically meet these standards. "The First Congress made it an early item of business to appoint and pay official chaplains" to provide "legislative invocations," a practice that has continued "virtually uninterrupted since that time." 134 S. Ct. at 1818. It would be "incongruous" to conclude that the Congress that "voted to approve the

draft of the First Amendment for submission to the States" "intended the Establishment Clause … to forbid" the legislative prayer that likely opened their deliberations that same day. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (cited with approval in *Town of Greece*, 134 S. Ct. at 1818-19). Thus, "'there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society.'" *Town of Greece*, 134 S. Ct. at 1819 (citing *Marsh*, 463 U.S. at 792).

The Court further indicated that it would be rare for legislative prayer practices to fall so far outside the bounds of tradition as to trigger the Establishment Clause. For example, the Court "reject[ed] the suggestion that legislative prayer must be nonsectarian," stating that "the 'content of the prayer is not of concern to judges,'" so long as the prayer is not "'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* at 1823, 1821-22 (citing *Marsh*, 463 U.S. at 794-95). Rather, tradition is maintained where legislative prayer is "place[d] at the opening of legislative sessions" where it can "lend gravity to the occasion and reflect values long part of the Nation's heritage." *Id.* at 1823. "Prayer that is solemn and respectful in tone" and that "invites lawmakers to reflect upon shared ideals and common ends" satisfies the standard. *Id.*

And even were legislative prayer to take on some aspect not tied directly to history, courts still must look to history to determine whether the challenged action

is something the Founders would have thought violated the Establishment Clause. *County of Allegheny*, 492 U.S. at 669-70 (cited with approval in *Town of Greece*, 134 S. Ct. at 1819). The Founders understood that the "essential … ingredients" of an establishment took specific, identifiable forms, *see* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2118, 2131 (2003), including public financial support of the church, *id.* at 2147; state control over the institutional church, *id.* at 2132; coercion of religious beliefs and practices, *id.* at 2144, 2159, and 2176; and the government assignment of important civil functions to church authorities, *id.* at 2171-76. Laws imposing these elements created an established church. Laws that lacked these elements did not. *Cf. Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970) (an establishment of religion "connoted sponsorship, financial support, and active involvement of the sovereign in religious activity").

Focusing on the element of coercion, *Town of Greece* confirmed that legislative prayer generally does not violate the historical understanding of what constitutes an establishment: "offense does not equate to coercion" and "an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." *Id.* at 1815, 1826. In general, "legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need

not participate." *Id.* at 1827. Rather, legislative prayer is "a benign acknowledgement of religion's role in society" that "fits within the tradition long followed in Congress and the state legislatures." *Id.* at 1819.

The Court emphasized that it was not "carving out an exception" from the Establishment Clause. *Id.* at 1818. Rather, the Establishment Clause's scope is itself defined "'by reference to historical practices and understandings.'" *Id.* at 1819 (citation omitted). Thus, where such practices have persisted since the founding or are otherwise consistent with a historical understanding of the Establishment Clause, the Establishment Clause simply does not apply.

Mr. Barker alleges no facts to suggest that the prayer traditions espoused by the House Chaplain somehow fall outside historical practices or are coercive. Rather, Mr. Barker claims that government can never benefit religion without equally aiding secularism. Relying for example on *Epperson v. Arkansas*, 393 U.S. 97 (1968), Mr. Barker asserts that "[t]he First Amendment mandates governmental neutrality between religion and religion, *and between religion and nonreligion*." Appellant's Br. at 32 (emphasis added). But by adopting Justice Kennedy's opinion in *County of Allegheny*, the majority in *Town of Greece* rejected a formal reading of such statements.

In *Allegheny*, the Court addressed whether holiday displays at a county court house violated the Establishment Clause. 492 U.S. at 578. Noting statements like

that in *Epperson*, Justice Kennedy acknowledged that "[t]he requirement of neutrality" in such rulings "has sometimes been stated in categorical terms." *Id.* at 656. But he concluded that "[t]hese statements must not give the impression of a formalism that does not exist." *Id.* at 657. Rather, "[g]overnment policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage." *Id.* Thus, the Establishment Clause does not "requir[e] government to avoid any action that acknowledges or aids religion," but rather "permits government some latitude in recognizing and accommodating the central role religion plays in our society." *Id.* He warned that "[a]ny approach less sensitive to our tradition would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." *Id.*

By adopting Justice Kennedy's analysis from *Allegheny*, the majority in *Town of Greece* affirmed that legislative prayer is constitutional as a *religious* practice. 134 S. Ct. at 1818 (by definition, "legislative prayer" is "religious in nature"). *Town of Greece* thus confirms that some government-supported religious practices, such as the government-funded chaplaincy and legislative prayer at issue here, simply do not trigger the Establishment Clause. Accordingly, there is no basis for this Court to intervene in those practices and grant Mr. Barker the right to participate in them.

B. Excluding Mr. Barker from participating in the House's chaplaincy and legislative prayers is consistent with the Religion Clauses and case law.

The First Amendment's support of religion over competing secular philosophies is common sense. The text itself "accords religion (and no other manner of belief) special constitutional protection." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting). *See also Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 833 (1989) (noting that only beliefs rooted in religion are protected by the Free Exercise Clause and that "secular views do not suffice"); *Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981) (stating that "the Free Exercise Clause . . . , by its terms, gives special protection to the exercise of religion."). In *Wisconsin v. Yoder*, the Court emphasized that the Religion Clauses protect claims "rooted in religious belief" and that "[a] way of life, however virtuous and admirable," was not protected by the Free Exercise Clause. 406 U.S. 205, 215 (1972). Indeed, even Thoreau's celebrated rejection of "the social values of his time" while at Walden Pond, would "not rise to the demands of the Religion Clauses" because it "was philosophical and personal rather than religious." *Id.* at 216.

This distinction between religious beliefs and philosophical or personal matters of conscience predates the ratification of the First Amendment. During the First Congress, James Madison proposed expansive language for what would become the First Amendment to protect "the full and equal right of conscience" from being "in any manner, or on any pretext, infringed." Carl H. Esbeck, *Uses and Abuses of*

Textualism and Originalism in Establishment Clause Interpretation, 2011 Utah L. Rev. 489, 532 (2011). But during the ratification debate, Madison's broad language was dramatically curtailed. *Id.* Concern that the "right of conscience" language would be detrimental to the vitality of religion led to the adoption of the narrower phrase "free exercise" of religion. *Id.* at 557. The language of the First Amendment thus reflects the founding generation's determination that religious beliefs merited special protection.

The First Amendment's special solicitude for religion manifests in specific ways. For example, the Supreme Court has long recognized the "spirit of freedom" and "independence from secular control or manipulation" that exists under the First Amendment for religions organizations. *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)). This freedom includes the right of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* It includes the right of a religious organization to select "those who will personify its beliefs," free from government interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). In *Hosanna-Tabor*, the Supreme Court unanimously rejected the argument advanced by the EEOC that the First Amendment treats all organizations the same, whether secular or religious. The

Court emphasized that this was "hard to square with the text of the First Amendment itself," because the First Amendment gives "special solicitude to the rights of religious organizations" in contrast with other secular organizations such as "a labor union, or a social club." *Id.* at 189.

Similarly, in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the Supreme Court upheld against an Establishment Clause challenge a provision exempting "religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion." *Id.* at 329. The district court had declared the exemption unconstitutional, reasoning in part that the exemption improperly gave religious entities a benefit that was not extended to nonreligious organizations. *Id.* at 333. The Supreme Court rejected the argument that "statutes that give special consideration to religious groups are *per se* invalid. *Id.* at 338. Instead, religious accommodations can be considered on their own merits even if they do not "come[] packaged with benefits to secular entities." *Id.*; *see also* Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?* 106 Kty. L.J. (No. 4, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2952370 (collecting ten Supreme Court cases upholding religious exemptions in the face of claims that they violate the Establishment Clause).

Likewise, in *Cutter v. Wilkinson*, 544 U.S. 709, 724–25 (2005), the Supreme Court rejected an Establishment Clause challenge to the Religious Land Use and

Institutionalized Persons Act (RLUIPA). The Sixth Circuit had invalidated RLUIPA because it "[gave] greater protection to religious rights than to other constitutionally protected rights." *Id.* at 724. The Supreme Court unanimously rejected that conclusion. It emphasized that "[w]ere the Court of Appeals' view the correct reading of our decisions, all manner of religious accommodations would fall." *Id.* The Court provided numerous examples of permissible laws that would be drawn into question by such a standard, including laws accommodating religious apparel for members of the armed forces, laws providing soldiers with chaplains "but not with publicists or political consultants," and laws allowing "prisoners to assemble for worship, but not for political rallies." *Id.* at 724-25. Such a standard would be hostile to religion and therefore incompatible with the First Amendment.

Nor does the principle that government may protect religious exercise apply only to carve outs or exemptions for religious organizations. In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Supreme Court upheld a school district's released-time program which allowed students to leave school grounds during the school day to take religious classes at local religious institutions. It upheld the program even though there was no similar released-time program for secular or non-religious classes. The Supreme Court emphasized that this accommodation of religion was consistent with "the best of our traditions." *Id.* at 314.

There are also over 2,600 federal and state tax laws providing religious exemptions, many without secular analogues. Nina J. Crimm & Laurence H. Winer, *Politics, Taxes, and the Pulpit: Provocative First Amendment Conflicts* 43, 74-76 (2011). Such laws have been upheld as constitutional even when religion is given distinct treatment. *See Walz*, 397 U.S. at 678; *see also Cohen v. City of Des Plaines*, 8 F.3d 484, 490-91 (7th Cir. 1993) (bright-line zoning exemption for daycares located in churches avoided "governmental meddling" in whether a daycare's activities were religious and was therefore constitutional).

Barker argues that since religious prayers are offered in Congress, non-religious non-prayer statements must similarly be allowed. But the argument that non- or anti-religious viewpoints must be given expression on par with religious ones has been rejected on numerous occasions.

In *Kalka v. Hawk*, the D.C. Circuit rejected the claims of a member of the American Humanist Association who was turned down when he attempted to form a humanist group in prison. 215 F.3d 90 (D.C. Cir. 2000). The Court considered the question of whether humanism was "clearly established" as a religion "within the First Amendment's meaning." *Id.* at 98.[2] The Court emphasized that "traditional

[2] In *Kalka*, the Court considered whether prison officers had qualified immunity against the humanist's lawsuit. Accordingly, the Court assumed *arguendo* that humanism could qualify as a religion but concluded that even if it did, that fact was not "clearly established" in law.

notions of religion surely would not include humanism." *Id.* Indeed, the evidence before the Court "suggested that the American Humanist Association's precepts were rooted in philosophy not religion." *Id.* at 99.

Similarly, in *Freedom from Religion Foundation, Inc. v. City of Warren*, 707 F.3d 686, 696 (6th Cir. 2013) (Sutton, J.), the Sixth Circuit rejected FFRF's argument that a city was required to include a secular winter solstice message critical of religion alongside its nativity scene and other holiday symbols.[3] Because the nativity scene "when accompanied by this collection of secular and seasonal symbols, d[id] not amount to an establishment of religion or for that matter an impermissible endorsement of it," *id.* at 690, the display was constitutional. And the Establishment Clause did not require the government to create "a seasonal public forum" or "add all comers to the mix." *Id.* at 694. Just because the government allowed the expression of religious voices did not mean that it had to allow for the expression of all other secular voices. To hold otherwise would require the government to "recognize a National Day of Non-Prayer each year" alongside the National Day of Prayer, or to require the post office to "add all kinds of stamps, religious and nonreligious alike, to its December collection." *Id.* at 696-97. Barker's theory of the

[3] The anti-religious message would have declared that "There are no gods, no devils, no angels, No heaven or hell. There is only our natural world, Religion is but Myth and superstition That hardens hearts And enslaves minds." *City of Warren*, 707 F.3d at 689.

Establishment Clause would, if followed, require giving voices hostile to religion equal time whenever religious messages are expressed. That is not what the Constitution requires.

II. Upholding the religious nature of the House's chaplaincy and prayers has particular significance for the military chaplaincies.

Another constitutional manifestation of the "special solicitude" that government extends to religion is the military chaplaincies. The chaplaincy had its beginnings well before our nation's founding. In 1758, during the French and Indian War, Colonel George Washington requested that Virginia create a chaplain corps that could minister to the varied faith-specific needs of his troops. 1 Anson Phelps Stokes, *Church and State in the United States* 268 (1950). This was remarkable: Virginia imprisoned some thirty Baptist preachers between 1768 and 1775 because of their undesirable "evangelical enthusiasm," and horsewhipped others for the same offense. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2119, 2166 (2003). Yet Virginia responded to Washington's call with both Anglican chaplains and chaplains from minority religious groups, and it specifically protected minority chaplains' ability to "celebrate divine worship, and to preach to soldiers." Stokes, *supra*, at 268. Later, as commander of the Continental Army, Washington showed the success of his original effort by "giv[ing] every Regiment an

Opportunity of having a chaplain of their own religious Sentiments." *Id.* at 271; *see also Katcoff v. Marsh*, 755 F.2d 223, 225 (2d Cir. 1985).

That same robust respect for authentic religious pluralism is reflected in the modern U.S. military chaplaincies. Every chaplain is duty-bound to respectfully provide for the "nurture and practice of religious beliefs, traditions, and customs in a pluralistic environment to strengthen the spiritual lives of [Service Members] and their Families"—including those who do not share the chaplain's beliefs and may even oppose them. U.S. Dep't of Army, Reg. 165-1, Army Chaplain Corps Activities § 3-2(a) (23 Jun 2015) [hereinafter AR 165-1]; *accord* U.S. Dep't of Air Force, Instruction 52-101, Chaplain § 1 (5 Dec. 2013) [hereinafter AFI 52-101]; U.S. Dep't of Navy, Instruction 1730.1E, Religious Ministry in the Navy § 4(a) (25 Apr. 2012) [hereinafter OPNAV 1730.1E]. But chaplains must, as a matter of law and conscience, make this provision while remaining distinct, faithful representatives of their faith groups who preach, teach, and counsel according to their faith group's beliefs. *See, e.g.*, 10 U.S.C. § 6031(a) ("An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member."); AFI 52-101 § 3.2.3; AR 165-1 § 3-5(b); S. Rep. 114-49, at 135 (2015) ("The committee expects that commanders will ensure a chaplain's right to religious expression and to provide religious exercise and guidance that accurately represent the chaplain's faith are protected, respected, and unencumbered.").

Thus, if a Hindu service member needs a copy of the Vedas or a Catholic service member needs a rosary or a Muslim service member needs a prayer mat, then a Baptist chaplain for those service members must willingly and promptly provide for those religious needs. But if the Catholic service member needs a specific religious service to be performed, such as a Mass or a confession, then the Baptist chaplain cannot personally perform that service. This is necessary to respect the faith of the Catholic service member, the Baptist service members who share the chaplain's faith and rely on his religious support, and the faith of the chaplain personally. Notably, though, while the Baptist chaplain cannot perform the Catholic sacrament, he will find a priest who can.

While military chaplains thus must serve a "religious diverse population," U.S. Department of Defense, Directive 1304.19, Appointment of Chaplains for the Military Departments § 4.2 (11 Jun 2004) [hereinafter DoDD 1304.19], they all share one thing in common: religion. By statute, their core duties include holding regular "religious" worship services and "religious" burial services for religious service members who die while serving. 10 U.S.C. §§ 3547, 8547 (1956). They "advise and assist commanders" in their responsibility "to provide for the free exercise of *religion* in the context of military service." DoDD 1304.19 § 4.1 (emphasis added). They provide "comprehensive *religious* support" for the soldiers within their assignments. *Id*. § 4.2 (emphasis added). And they provide the "essential

elements of *religion*" such as "worship, religious rites, sacraments and ordinances, holy days and observances, pastoral care and counseling, and religious education." AR 165-1 § 2-3(a). Chaplains provide these religious services to service members and their family members. AR 165-1 § 1-6(b) & (c); OPNAV 1730.1E § 4.

In *Katcoff v. Marsh*, the Second Circuit rejected a challenge to the constitutionality of the Army chaplaincy program. *Katcoff*, 755 F.2d at 224. The Second Circuit described in depth the vital purpose that the chaplaincy serves, noting soldiers' "increased needs for religion as the result of being uprooted from their home environments, transported often thousands of miles to territories entirely strange to them, and confronted there with new stresses that would not otherwise have been encountered if they had remained at home." *Id*. at 227. Without chaplains, troops around the world, including "as they face possible death," would be "left in the lurch, religiously speaking." *Id*. at 228. And soldiers seeking religious guidance among "tensions created by separation from their homes, loneliness when on duty . . . , fear of facing combat or new assignments, financial hardships, personality conflicts, and drug, alcohol or family problems" would not have the usual ability "to consult [their] spiritual adviser[s]." *Id*. at 228.

In these circumstances, Congress is "obligate[d] . . . to make religion available to soldiers." *Id*. at 234. "Otherwise the effect of compulsory military service could be to violate their rights under both Religion Clauses of the First Amendment." *Id*.

Thus, even though the "effect" of the military's government-funded chaplaincies is "to advance the practice of religion," it is not only constitutionally permissible, but constitutionally required. *Id*. at 232.

A ruling that Mr. Barker is entitled to participate in the House chaplaincy's religious activities would have significant adverse effects on the military chaplaincies. In 2014, Jason Heap and the Humanist Society sued the United States Navy for denying Mr. Heap the right to serve as a military chaplain. Mr. Heap expressly disavowed any belief in "a god or gods," instead embracing "a system of ethical principles" set forth in the American Humanist Association's *Humanist Manifesto*. Complaint at 2 (¶¶ 3, 40), *Heap v. Hagel*, No. 1:14-cv-01490 (E.D. Va. Nov. 5, 2014). The manifesto expressly rejects any transcendent beliefs or "supernaturalism," instead declaring that human life is best guided by "science" or "reason and experience."[4] *Id*. ¶ 40. And the American Humanist Society has a

[4] American Humanist Association, *Humanism and Its Aspirations: Humanist Manifesto III, a Successor to the Humanist Manifesto of 1933*, https://americanhumanist.org/what-is-humanism/manifesto3/ (last visited July 18, 2018).

history of actively campaigning against religion—mocking adults[5] and children[6] who do believe in God or a transcendent power:

While such activity is constitutionally protected, that protection does not create a right for anti-religious activists to participate in a chaplaincy program designed to give religious military members and their families access to *religion*. Rather, the

[5] American Humanist Association, *Humanists Launch Naughty Awareness Campaign*, https://americanhumanist.org/press-releases/2011-11-american-humanist-association-naughty-atheist-awaren/ (last visited July 18, 2018) (announcing "Join the Club" and other advertising campaigns).

[6] *Kids Without a God*, http://little.kidswithoutgod.com/ (last visited July 18, 2018).

military has an obligation to ensure that service members have access to chaplains who will inherently respect their religious beliefs, not reject and ridicule them.

Similarly, military chaplains serve a vital role as "principal advisors to commanders for all issues regarding the impact of religion on military operations." H.R. Rep No. 113-446 at 144 (2014). A representative of a philosophical movement dedicated to mocking and disparaging religious belief and believers cannot fairly represent the needs of religious servicemen and servicewomen or provide the necessary respect. And if non-religious philosophies are entitled to equal representation in the chaplaincies than where can the military draw the line? Would the military be required, for instance, to have a Marxist chaplain because of that philosophy's position on religious issues ("the opium of the people")? Opening the door to secular and disparaging philosophies would dilute the ability of the chaplaincies to serve the religious needs of all members of the military. "The chaplaincy program itself has withstood constitutional challenge, and it follows that ensuring that chaplains can do the job they were hired to do within that program is also constitutionally sound." *Heap v. Carter*, 112 F. Supp. 3d 402, 426 (E.D. Va. 2015).

III. Mr. Barker's militant rejection of religion makes clear that he is not suited to participate in the House's chaplaincy or legislative prayers.

Barker's claim of entitlement to open Congress with a non-religious "prayer" is particularly galling considering he is an avowed atheist who has made disavowing

religion his life's profession—often through disparagement and mockery. Although a devout Christian and minister through his early thirties,[7] Mr. Barker has since described his early beliefs as a "psychological delusion" and devoted the remainder of his life to attacking religion.[8] Since 2004, he has served as co-president of the Freedom From Religion Foundation ("FFRF"), an organization whose aim is to dissuade people from religious belief and eradicate any evidence of religion from government activity, property, monuments, buildings, and so forth.

FFRF and Mr. Barker are particularly critical of prayer and seek to overturn *Town of Greece* to prohibit any form of legislative prayer. For example, FFRF issues an annual "Nothing Fails Like Prayer Award" to encourage its members to "flood government meetings with secular invocations that illustrate why government prayers are unnecessary, ineffective, embarrassing, exclusionary, divisive or just plain silly."[9]

On a more personal level, Mr. Barker expresses his disdain for religion through anti-religious music. One of his more notable ditties equates religion to superstition:

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[7] Dan Barker, *Losing Faith in Faith,* https://www.skeptical-science.com/essays/losing-faith-faith-dan-barker/ (last visited July 18, 2018).

[8] FFRF, *Dan and Annie meet on Oprah*, YouTube (Sept. 12, 2012), https://www.youtube.com/watch?v=r-zbZWL6Sis (at 8:59).

[9] Freedom From Religion Foundation, *'Nothing Fails Like Prayer Award' Contest,* https://ffrf.org/outreach/nothing-fails-like-prayer (last visited July 18, 2018).

> When they try to get you hooked on their psychedelic book, what do you say?/Just say no!/Religion is a fiction, it is like a drug addiction./Just say no!/Just say no to religion/No more myth and superstition/Just say no![10]

Others expressly criticize prayer:

> Faith won't fix the budget,/Prayer won't pay the bills./Hope will never nudge it/But taxing churches will.[11]

> How many centuries will it take us/Before we realize/There are no magic forces in nature,/No watchful eyes in the skies?/A single plow is much more effective/Than a hundred prayers a day./The hands that help are better far/Than lips that pray.[12]

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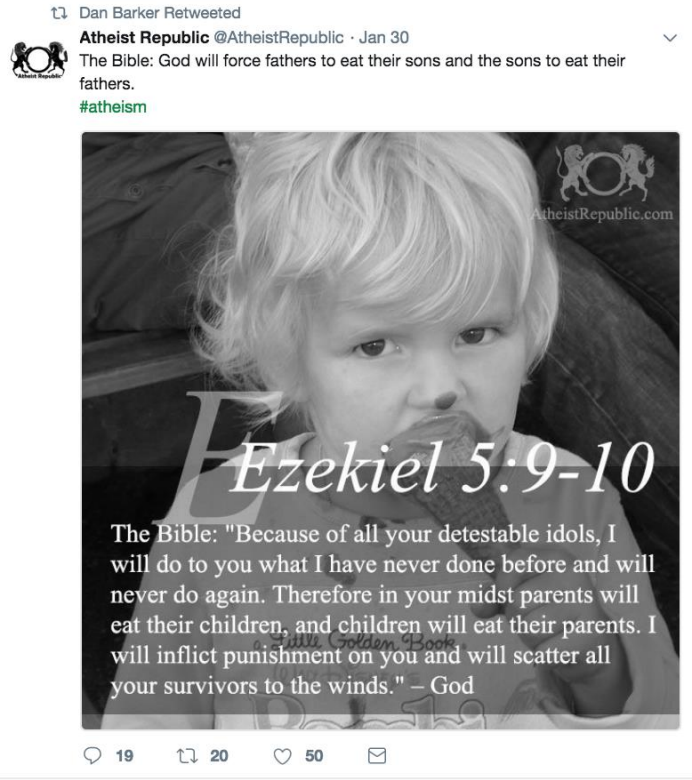
[10] Dan Barker, Just Say 'NO' to Religion (Dan Barker 2001), https://shop.ffrf.org/ffrf-media/music/friendly-neighborhood-atheist-2-cd-album.

[11] Jerry Rauser, *Get Off Your Knees - Dan Barker*, YouTube (Oct. 24, 2013), https://www.youtube.com/watch?v=YX6SUFQFYJk.

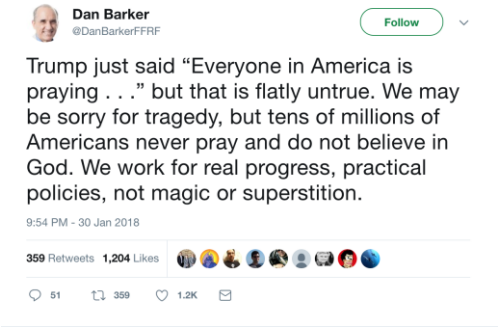
[12] Prozim, *Nothing Fails Like Prayer*, YouTube (May 5, 2011), https://www.youtube.com/watch?v=qPZPGlBgXUY.

His Twitter feed follows a similar pattern, casting religious beliefs in the worst possible light[13];

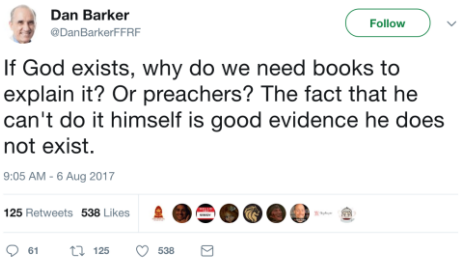


[13] Dan Barker (@DanBarkerFFRF), Twitter (Jan. 30, 2018), https://twitter.com/AtheistRepublic/status/958539135190470656; (Aug. 17, 2017 5:05 PM), https://twitter.com/DanBarkerFFRF/status/898289780336844802.

decrying religion as superstition;[14]



disparaging religious practices;[15]



and criticizing prayer.[16]

[14] Dan Barker (@DanBarkerFFRF), Twitter (Jan. 30, 2018 6:54 PM), https://twitter.com/DanBarkerFFRF/status/958533897792425992.

[15] Dan Barker (@DanBarkerFFRF), Twitter (Aug. 6, 2017 6:05 PM), https://twitter.com/DanBarkerFFRF/status/894182625291751424.

[16] Dan Barker (@DanBarkerFFRF), Twitter (Jan. 30, 2018), https://twitter.com/FFRF/status/958534707116900352.

Barker has also published numerous books promoting atheism and attacking religion, including his most recent work entitled "GOD: The Most Unpleasant Character in All Fiction" (Sterling Publishing, 2016). And he maintains a busy schedule of public debates, challenging religion and promoting atheism.[17] As demonstrated in one recent debate, Mr. Barker makes no effort to hide his rejection of religion and religious belief, ardently encouraging listeners to forsake their faith:

> Christians don't have knowledge. Belief is not knowledge. I lack a belief in God because there's no coherent definition of a god [. . .], there's a lack of good evidence for a god, there's no good argument for a god, there's no agreement among believers about the nature or moral principles of a god, there is no good reply to the problem of evil, and, there's no need for a god![18]

Barker himself admits that he is not a religious minister. In another case where Barker is a plaintiff, he has vigorously argued that he is not a member of the "religious clergy" and therefore does not qualify as a minister for purposes of tax provisions such as the ministerial housing allowance. Complaint at 2 (¶ 3), *Gaylor v. Mnuchin*, No. 3:16-cv-00215 (W.D. Wis. April 6, 2016). In the early stages of that case, the IRS argued that Barker lacked standing to challenge the exemption because Barker might qualify as a minister. In response to those arguments, Barker made revealing

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[17] Freedom from Religion Foundation, *Dan Barker, Minister Turned Atheist*, https://ffrf.org/about/getting-acquainted/dan-barker/ (last visited July 19, 2018).

[18] SnnyHernandez, *Debate: Does God Exist? Dan Barker vs. Sonny Hernandez*, YouTube (Jun 5, 2017), https://www.youtube.com/watch?v=ekMQL3JdXzM (at 22:20-23:07).

concessions. He acknowledged that FFRF "is not a church or a religious organization," that his role as president of FFRF does "not constitute an ordination, commissioning or licensing as [a] minister[]," and "that the foundation does not engage in worship." *Freedom from Religion Found., Inc. v. Lew*, 983 F. Supp. 2d 1051, 1058 (W.D. Wis. 2013), *vacated and remanded*, 773 F.3d 815 (7th Cir. 2014). Barker further conceded that many of the activities that he performs that could at first glance appear to be religious in nature such as performing "debaptism" ceremonies instead serve as "a tongue-in-cheek way to bring attention to opting out of religion." *Id.* at 1059. In a subsequent deposition, Barker further conceded that his counseling activities for FFRF were not "counseling in a religious sense." Dep. of Dan Barker at 48, *Freedom from Religion Found., Inc. v. Lew*, 983 F. Supp. 2d 1051 (W.D. Wis. 2013) (No. 11-CV-626), ECF No. 38.

The Western District of Wisconsin agreed with Barker and emphasized that "there is a difference between non-theistic faiths such as Buddhism and having no faith at all." *Id.* And in any event, "even assuming that atheism is a religion" it was clear that FFRF was "not an 'atheist' organization in the sense that the purpose of the group is to 'practice atheism.'" *Id.* In other words, Barker and his organization did not "engage in the activities that a minister performs." *Id.*[19]

[19] The Seventh Circuit ultimately found that there was no standing because Barker had not requested an exemption, but it did not upset the District Court's analysis

Barker's draft "invocation" also reveals that he inappropriately seeks to exploit the opportunity to pray before Congress as a chance to bash or put down religious belief. App. 64. Barker concedes that invocations are "meant to invoke the assistance and guidance of someone outside of ourselves" but admits that his "invocation" does not "invoke a spirit or supernatural agency" and instead calls on "human wisdom." Hence, rather than qualifying as an "invocation," Barker's proposed "invocation" is in fact a stunt: a polemic against religion delivered from the well of the House. Barker draws a sharp contrast between faith in a higher power which he denounces as "dogma," "imposed tradition," or "coerced doctrine," and what he declares to be "reason and conviction." *Id.* But since "[t]he principal audience for these invocations is not, indeed, the public but lawmakers themselves," Barker's polemic would completely disserve the purpose of prayers in the House. *Town of Greece*, 134 S. Ct. at 1825. Indeed, Barker's proposed tongue-lashing is extremely unlikely to "set[ ] the mind to a higher purpose and thereby ease[ ] the task of governing." *Id.*

From all this, it is clear that Mr. Barker's purpose is not to participate in Congress's tradition for opening its deliberations with prayer, but to change the nature of Congress' tradition altogether. His organization has "no faith at all," and Barker actively disparages religion and even mocks religious rituals, including

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regarding Barker's status, instead labeling it "irrelevant." *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 825 n. 6 (7th Cir. 2014).

specifically prayer. His viewpoints are at best "philosophical and personal" rather than religious, and at worst simply polemical. *Yoder*, 406 U.S. at 216. His participation would turn a solemnizing event into a forum for anyone with a philosophical or other viewpoint informed by hostility towards religion. If anything would be an exploitation of the prayer opportunity to "disparage" others' beliefs, forcing the House to give Dan Barker airtime in the well would be it. *Town of Greece*, 134 S. Ct. at 1822 (citing *Marsh*, 463 U.S. at 795). Happily, the Constitution requires no such thing.

CONCLUSION

For all the foregoing reasons, amici urge the Court to affirm the district court's ruling below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29 and 32(a)(7) because it contains 6302 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in 14-point Times New Roman font, a proportionally spaced typeface.

/s/ *Eric S. Baxter*
Eric S. Baxter

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Eric S. Baxter*
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