No. 17-5278

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

DANIEL BARKER, APPELLANT

v.

PATRICK CONROY, CHAPLAIN, ET AL., APPELLEES

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA NO. 16-00850-RMC,
HON. ROSEMARY M. COLLYER, DISTRICT JUDGE

BRIEF FOR JEWISH COALITION FOR RELIGIOUS LIBERTY, THE COALITION FOR JEWISH VALUES, AND THE RABBINICAL ALLIANCE OF AMERICA AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

STEFFEN N. JOHNSON
JOHN W. H. HARDING
PAUL N. HAROLD
STEPHANIE A. MALONEY
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

Counsel for Amici Curiae
Jewish Coalition for Religious Liberty, The Coalition for Jewish Values, and The Rabbinical Alliance of America

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant and the Brief for Amici in Support of Appellant, except for the following:

Jewish Coalition for Religious Liberty

The Coalition for Jewish Values

The Rabbinical Alliance of America

Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

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

Amici are all nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

Jewish Coalition for Religious Liberty is an incorporated association of American Jews concerned with the current state of religious liberty jurisprudence. Its members are interested in protecting the religious liberty of their coreligionists as well as religious adherents nationwide.

The Coalition for Jewish Values ("CJV") advocates for classical Jewish ideas and standards in the public sphere. Representing the voice of over 1,000 traditional, Orthodox rabbis, the CJV is the largest Rabbinical public policy organization in America.

The Rabbinical Alliance of America is an Orthodox Jewish Rabbinical organization with more than 950 members that has, for many years, been involved in a variety of religious, social, and educational endeavors affecting Orthodox Jews. For several decades it has maintained a religious court for the adjudication and resolution of disputes brought to it by members of the Orthodox Jewish faith.

TABLE OF CONTENTS

Page

Certificate as to Parties, Rulings, and Related Cases i

Corporate Disclosure Statement ii

Introduction and Interests of *Amici Curiae* 1

Statement 3

Summary of Argument 4

Argument 6

I. The unbroken 200-year practice of legislative prayer upheld in *Marsh* and *Town of Greece* confirms that Congress may open its days with prayer. 6

II. Barker's view that Congress's practice of legislative prayer must be expanded to include secular invocations is contrary not only to *Marsh*, but the views of all nine Justices in *Town of Greece*. 13

III. Congress's practice of legislative prayer serves a unifying, civic purpose that promotes the accommodation of religious minorities. 18

IV. Congress's practice of allowing guest chaplains is a sign of solidarity among people of faith. 21

Conclusion 24

Certificate of Compliance 26

Certificate of Necessity of Separate Briefs 27

Certificate of Service 28

TABLE OF AUTHORITIES

Page(s)

Cases

Engel v. Vitale,
370 U.S. 421 (1962) 17

Goldman v. Weinberger,
475 U.S. 503 (1986) 19

Holy Trinity Church v. United States,
143 U.S. 457 (1892) 14

Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach,
778 F.3d 390 (2d Cir. 2015) 21

Kurtz v. Baker,
829 F.2d 1133 (D.C. Cir. 1987) 2, 16, 25

Marsh v. Chambers,
463 U.S. 783 (1983) 2, 3, 4, 5, 6, 7, 8, 10, 13, 14, 15, 16, 22, 24, 25

Newdow v. Bush,
355 F. Supp. 2d 265 (D.D.C 2005) 14

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014) 1, 2, 3, 4, 5, 6, 7, 8, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24

United States v. Lee,
455 U.S. 252 (1982) 18, 19

Zorach v. Clauson,
343 U.S. 306 (1952) 23

Statutes

10 U.S.C. § 774 19

26 U.S.C. § 3127 19

Other Authorities

121 Cong. Rec. 27739 (Sept. 5, 1975) 12

137 Cong. Rec. H4947-01 (June 25, 1991) 12

138 Cong. Rec. 1718 (1992) 12

153 Cong. Rec. 18657 (2007) 13

160 Cong. Rec. S1329-01 (Mar. 6, 2014) 13

Bertram W. Korn, *Eventful Tears and Experiences: Studies in Nineteenth Century American Jewish History* 11

The Book of Common Prayer (1789 American ed.), *available at* http://justus.anglican.org/resources/bcp/1789/1790/ 9, 10

Cong. Globe, 36th Cong. 1st Sess. 648 (1860) 11

Contemporary Hinduism: Ritual, Culture, and Practice (Robin Rinehart, ed., 2004) 13

House of Reps. R. II.5 5

House of Reps. R. XIV.1 5

Howard Rosenberg, *Orthodox Jews Seek a Symbolic Zone*, Washington Post (Mar. 15, 1990), *available at* https://www.washingtonpost.com/archive/local/1990/03/15/orthodox-jews-seek-a-symbolic-zone/faf27306-655f-4123-8e08-3390b2ed2f4f/ 21

Jonathan D. Sarna, "Rabbi Raphall goes to Washington," The Forward (Feb. 28, 2010) 11

Letters of Delegates to Congress 1774-1789 (Paul Smith et al., eds., 1976) 7, 8

Oxford English Dictionary (3d ed. 2007) 9

S. Rep. No. 376, 32d Cong., 2d Sess., 4 (1853) 24

Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986) 8

Thomas Sheridan, *A Complete Dictionary of the English Language* (London, Charles Dilly, 3d ed. 1790) 9

U.S. Const., amend. I 1, 2, 4, 6, 10, 16

Webster's Third New Int'l Dictionary (1981) 9

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae represent religious minorities who share the United States House of Representatives' view that it is proper and constitutional to "acknowledge[] our growing [religious] diversity" by "welcoming ministers of many creeds" to perform legislative prayer using "religious idiom." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1820–21 (2014).

America's tradition of having chaplains solemnize legislative sessions with prayer dates to the Founding. The First Congress, which drafted the First Amendment, authorized the appointment of congressional chaplains who have prayed for and ministered to members of Congress ever since. For nearly 250 years, Congress has followed an unbroken tradition of joining in prayer to seek divine guidance concerning the important work before it.

Appellant Daniel Barker does not seek to participate in this long tradition of legislative prayer. He "does not want to take part in the session opening traditionally maintained by Congress, for that opening does

[1] No counsel for a party authored this brief in whole or in part. No party or party's counsel—and no person other than amici, their members, or their counsel—contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

not include secular remarks." *Kurtz v. Baker*, 829 F.2d 1133, 1147 (D.C. Cir. 1987) (Ginsburg, J., dissenting). Barker's wishes, however, are no reason to set aside a tradition instituted at the Founding, continued by the Framers of the First Amendment, and still practiced today.

This Court should affirm the district court's decision. Congress's "unbroken history of more than 200 years" of opening its sessions each morning with prayer is a vital and constitutionally protected part of the "fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Although the tradition itself is strong evidence of the constitutionality of the practice, legislative prayer also furthers a fundamental purpose underlying the First Amendment's religion clauses: respecting the integrity and diversity of religious life in the United States. Legislative prayer fosters "the idea that people of many faiths may be united in a community of tolerance and devotion." *Town of Greece*, 134 S. Ct. at 1823.

Legislative prayer open to people of all faiths is especially beneficial to minority religions, as it fosters solidarity and confirms to all Americans that such minorities have an equal place in public society.

STATEMENT

"The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. Specifically, the House of Representatives has an "unbroken" tradition, dating to 1789, of commencing each legislative day with prayer. *See* Mot. to Dismiss (Dkt. 16) at 1.

Non-theists have repeatedly challenged this tradition of legislative prayer as unconstitutional, but the courts, including the Supreme Court, have always found that to "invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment." *Marsh*, 463 U.S. at 792; *see also Town of Greece*, 134 S. Ct. at 1815 ("It must be concluded, consistent with the Court's opinion in *Marsh* [] that no violation of the Constitution has been shown.").

Nevertheless, just weeks after the Supreme Court upheld legislative prayer that used "religious idiom," representatives from the Freedom From Religion Foundation—an organization "that has worked to end prayers at legislative meetings throughout its history" (Brief for Freedom From Religion Foundation as *Amicus Curiae* Supporting Respondents at

1, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696))—requested that their Co-President, Daniel Barker, be allowed to appear as a guest speaker and perform a "secular invocation" in lieu of a prayer before the House of Representatives. Op. 1. House Chaplain Father Patrick Conroy declined to allow Barker to perform this secular invocation. *Id.*

Barker subsequently filed suit, but the district court dismissed the case, holding that "the refusal of the House Chaplain to invite an avowed atheist to deliver the morning 'prayer,' in a guise of a non-religious exhortation as a 'guest chaplain,' did not violate the Establishment Clause." Op. 26. Barker appeals. This Court should affirm that secular invocations are not the functional equivalent of prayer.

SUMMARY OF ARGUMENT

In *Marsh v. Chambers*, the Supreme Court upheld legislative prayer on the ground that the practice was instituted by the authors of the First Amendment's Establishment Clause and "ever since ... has coexisted with the principles of disestablishment and religious freedom." 463 U.S. at 786. Ignoring this long history, Barker contends that "religion is not essential" to the House's legislative prayer practice and that the First Amendment forbids the House from beginning its days solely

with prayer. Br. 19. The House's rules, however, require that its days begin with "prayer"—not secular invocations. House Rules II.5 ("The Chaplain shall offer a prayer at the commencement of each day's sitting of the House."), XIV.1 ("The daily order of business ... shall be as follows: First. Prayer by the Chaplain.").

Notwithstanding the Supreme Court's acknowledgment that legislative prayer is an "invo[cation] of Divine guidance on a public body" (*Marsh*, 463 U.S. at 792), Barker asserts that a secular invocation qualifies as a prayer. But that extreme view is unsupported by both basic logic and precedent. Prayer by definition invokes a higher power and involves religious traditions. Indeed, all nine Justices in *Town of Greece* endorsed *Marsh* for this principle and agreed that legislative *prayer* is constitutional. Nor is that surprising. Opening *prayers* have been the practice in Congress from the Founding until today, and a "secular invocation" is not a prayer. Prayer is unique, both because of its impact on the listener and because of the role that religion has played in American history. And given the unique benefits associated with prayer, it is eminently reasonable and constitutional for Congress to prefer prayer to a secular invocation. This Court should not disturb that practice.

ARGUMENT

I. The unbroken 200-year practice of legislative prayer upheld in *Marsh* and *Town of Greece* confirms that Congress may open its days with prayer.

In sustaining the practice of legislative prayer in *Marsh*, the Supreme Court found it dispositive that the same Congress that drafted the First Amendment viewed legislative prayers as consistent with the Establishment Clause. As the Court recounted, "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer," and just "three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights." 463 U.S. at 787–88.

The Court explained that enactments of the Congress that framed the First Amendment are "weighty evidence of its true meaning," and that "an unbroken practice … is not something to be lightly cast aside." *Id*. at 790. "It can hardly be thought," the Court stated, "that in the same week Members of the First Congress voted to appoint and to pay a [c]haplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." *Id*.

In *Town of Greece*, the Supreme Court confirmed the conclusive force of Congress's historical practice: "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." 134 S. Ct. at 1819. Barker's attempts to convince the Court to apply a panoply of doctrinal tests (Br. 31–35) thus commits a category error—one that would turn *Marsh* and *Town of Greece* on their heads. The House's prayer practice is constitutional because it "fits within the tradition long followed in Congress." *Town of Greece*, 134 S. Ct. at 1819.

The practice of opening legislative sessions with prayer dates to the birth of our Republic, when the Continental Congress adopted the practice despite concerns about the divergent faiths of the delegates. As John Adams recounted,[2] a motion to open the Continental Congress's session with prayer was opposed by John Jay on the ground that the delegates were "so divided in religious Sentiments, some Episcopalians, some

---

[2] Letter from John Adams to Abigail Adams (Sept. 16, 1774), *in* 1 *Letters of Delegates to Congress* 1774-1789, at 75 (Paul Smith et al., eds., 1976) (hereinafter, "Smith, *Letters*").

Quakers, some [A]nabaptist, some Presbyterians and some Congregationalists … that [they] could not join in the same Act of worship." *Id.* In response, "Mr. S[amuel] Adams arose and said he was no Bigot, and could hear a Prayer from a Gentleman of Piety and Virtue, who was at the same time a Friend to his country." *Id.*

Samuel Adams then moved to invite a local Anglican minister, Jacob Duché, to lead a prayer the next morning. The motion carried, Duché's prayer met with wide approval, and the practice of opening sessions with prayer continued. *Id.* *Marsh* cited the Jay-Adams "interchange" as proof "that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.'" 463 U.S. at 792 (citation omitted).

Duché's prayer began with an address to the "Lord, our heavenly father, King of Kings and Lord of lords," and concluded as follows: "All this we ask in the name and through the merits of Jesus Christ thy son, Our Saviour, Amen."[3] Indeed, as one leading historian has observed, the Continental Congress "sprinkled its proceedings liberally with the mention of God, Jesus Christ, [and] the Christian religion." Thomas J. Curry,

[3] 25 Smith, *Letters*, at 551–52.

The First Freedoms: Church and State in America to the Passage of the First Amendment 217 (1986).

Prayer, which by definition invokes a higher power,[4] continued in the First Congress. The first two Senate Chaplains, Samuel Provoost and William White, were Episcopal bishops who followed *The Book of Common Prayer*.[5] Chaplain White, who served from 1790 until 1800, described his practice as follows:

> My practice, in the presence of each house of congress, was in the following series: the Lord's prayer; the collect Ash Wednesday; that for peace; that for grace; the prayer for the President of the United States; the prayer for Congress; the prayer for all conditions of men; the general thanksgiving; St. Chrysostom's Prayer; the grace of the Lord Jesus Christ, etc.

---

[4] *See* Thomas Sheridan, *A Complete Dictionary of the English Language* (London, Charles Dilly, 3d ed. 1790) (defining "prayer" as a "petition to heaven; entreaty, submissive importunity"); *Webster's Third New Int'l Dictionary* 1782 (1981) (defining "prayer" as "a solemn and humble approach to Divinity in word or thought usu[ally] involving beseeching, petition, confession, praise or thanksgiving"); *Oxford English Dictionary* (3d ed. 2007) (defining "prayer" as "[a] solemn request to God, a god, or other object of worship; a supplication or thanksgiving addressed to God or a god").

[5] *The Book of Common Prayer* (1789 American ed.), *available at* http://www.anglicansonline.org/resources/bcp.html; *The Book of Common Prayer* (1789 American ed.), *available at* http://justus.anglican.org/resources/bcp/1789/1790/.

Bird Wilson, Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episcopal Church of the State of Pennsylvania 322 (1939) (Letter to Rev. Henry V. D. Johns, Dec. 29, 1830). Notably, every prayer that White listed either appealed to Jesus or made other Christian references. A Prayer for Congress, for example, closes by stating: "These and all other necessaries … we humbly beg in the Name and mediation of Jesus Christ, our most blessed Lord and Saviour." Book of Common Prayer (Philadelphia, Hall & Sellers 1790) (no page numbers in original).[6] Thus, those "who wrote the First Amendment Religion Clauses" and established the practice of legislative prayer (*Marsh*, 463 U.S. at 788)—whose "actions reveal their intent" in drafting the Establishment Clause (*id.* at 790)—heard prayers, not secular invocations.

---

[6] *See also id.* (The Collect for Peace, ending "through the might of Jesus Christ our Lord"; The Collect for Grace, ending "through Jesus Christ our Lord"; *A Prayer for the President of the United States, and all in civil authority*, ending "through Jesus Christ our Lord"; *A Prayer for all Conditions of Men*, ending "[a]nd this we beg for Jesus Christ's sake"; *A General Thanksgiving*, ending "through Jesus Christ our Lord; to whom with thee and the Holy Ghost, be all honour and glory, world without end"; *A Prayer for St. Chrysostom*, including a reference that "when two [or] three are gathered together in thy Name, thou will grant their requests"; "The Grace of our Lord Jesus Christ, and the love of God, and the fellowship of the Holy Ghost, be with us all evermore" (quoting 2 Corinthians 13:14)).

The practice of praying to a higher power has continued even as the chaplaincy has expanded to reflect the Nation's religious diversity.

In 1860, Congress for the first time invited a rabbi—Morris Raphall, of New York's Congregation B'nai Jeshurun—to offer an opening prayer. The rabbi's prayer was delivered to the House, which at the time did not have a single Jewish member. Congressman Schulyer Colfax of Indiana had arranged for the rabbi's prayer after receiving a letter from a Jewish constituent. "[P]iously bedecked in a white tallit and a large velvet skullcap,"[7] Rabbi Raphall delivered a full-throated prayer to the "[a]lmighty and most merciful God," "Supreme Ruler of the universe," "Father," and "Lord God of Abraham, of Isaac, and of Jacob." Cong. Globe, 36th Cong. 1st Sess. 648–49 (1860).

In 1975, Chief Frank Fools Crow, a holy man of the Ogala Sioux, delivered an opening prayer in his native language to the Senate addressed to "Grandfather, the Great Spirit" and "Grandmother, the

[7] Jonathan D. Sarna, "Rabbi Raphall goes to Washington," The Forward (Feb. 28, 2010); *see also* Bertram W. Korn, *Eventful Tears and Experiences: Studies in Nineteenth Century American Jewish History*, Cincinnati: American Jewish Archives, at 110–12 (1954).

Earth." 121 Cong. Rec. 27739 (Sept. 5, 1975). Senator Hugh Scott remarked that Chief Fools Crow's "opening prayer ... represents for us a recognition of the original Americans of their culture and of their faith. We are all the better for having had another form of prayer which, in the last analysis, is the same prayer which ascends from every chaplain—namely, a prayer for salvation, a prayer for health, a prayer for guidance, and a prayer for wisdom." *Id.*

In 1991, Imam Siraj Wahaj, the first Muslim to deliver an opening prayer in Congress, delivered a prayer in the House addressed to "God, most gracious, most merciful." 137 Cong. Rec. H4947-01 (June 25, 1991). A year later, the Senate heard its first prayer from a Muslim leader, when Imam Wallace Mohammed of Chicago prayed to "Our Creator, the merciful benefactor, the merciful Redeemer" (138 Cong. Rec. 1718 (1992))—an Islamic description of Allah derived from the first verse of the Qu'ran. Al-Fatiha, 1:1.

In 2007, Rajan Zed, a Hindu cleric, offered an opening prayer to the Senate. He prayed the Gāyatrī Mantra—a Hindu prayer "honor[ing] the

sun as the giver of all things"[8] found in Rig Veda 3.62.10, one of the four canonical sacred texts (śruti) of Hinduism known as the Vedas: "We meditate on the transcendental Glory of the Deity Supreme, who is inside the heart of the Earth, inside the life of the sky, and inside the soul of the Heaven. May He stimulate and illuminate our minds." 153 Cong. Rec. 18657 (2007).

In 2014, the Dalai Lama, a self-described "simple Buddhist monk," opened the Senate's day with a prayer "to Buddha and all other gods." 160 Cong. Rec. S1329-01 (Mar. 6, 2014).

While the faiths represented by congressional guest chaplains continue to become ever more diverse, Congress's practice of beginning its days with prayer—not secular invocations—has remained constant.

II. Barker's view that Congress's practice of legislative prayer must be expanded to include secular invocations is contrary not only to *Marsh*, but the views of all nine Justices in *Town of Greece*.

Barker highlights (and frames as an "interpretation") that *Town of Greece* and *Marsh* use interchangeably the terms "prayer" and "invocation." Br. 26–27. By his lights, this shows that prayer is not confined to

[8] *Contemporary Hinduism: Ritual, Culture, and Practice* 127 (Robin Rinehart, ed., 2004).

"messages directed to a god," and his secular invocation fits within the meaning of "prayer" so understood. Br. 26. But Barker's expansive understanding would gut the very practice of legislative prayer, turning it from a time for "the spiritual needs of lawmakers" (see *Town of Greece*, 134 S. Ct. at 1826) to a time for opening remarks. The Supreme Court has never required (or even endorsed) so broad an interpretation. Rather, legislative prayer as practiced for centuries in Congress and repeatedly sanctioned by the Supreme Court has necessarily been "religious in nature." *Town of Greece*, 134 S. Ct. at 1818; *see also Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892) (acknowledging that this Nation has long observed a "custom of opening sessions of all deliberative bodies … with prayer"); *Newdow v. Bush*, 355 F. Supp. 2d 265, 285 n.23 (D.D.C 2005) (noting that "the legislative prayers at the U.S. Congress are overtly sectarian").

The Court in *Marsh* understood legislative prayer as the "invo[cation] of Divine guidance on a public body entrusted with making the laws." 463 U.S. at 792. So too in *Town of Greece*, where the Court reaffirmed *Marsh* and described legislative prayer as "religious in nature." 134 S. Ct. at 1818.

Indeed, all nine Justices in *Town of Greece* endorsed *Marsh* and agreed that legislative *prayer* is generally constitutional; the dissent disagreed with the majority only over the extent of *religious diversity* reflected in the prayers, all of which invoked the prayer-giver's conception of the divine. 134 S. Ct. at 1850–51 (Kagan, J., dissenting). As Justice Kagan put it for all four dissenting Justices: "[I]f the [Town of Greece] Board preferred, it might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does. When one month a clergy member refers to Jesus, and the next to Allah or [Hashem] … the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed." *Id.* Justice Kagan's dissent further observed that "*Marsh* upheld (I think correctly) the … opening [of] each day with a chaplain's prayer" and that "[n]one of this means that Greece's town hall must be religion- or prayer-free." *Id.* at 1845, 1850. Similarly, Justice Breyer's dissent readily acknowledged that "the Constitution does not forbid opening prayers" and affirmed the "U.S. House of Representatives['] … inclusive prayer practice." *Id.* at 1840–41 (Breyer, J., dissenting).

Barker's expansive reading of the Establishment Clause thus goes far beyond even the dissenting Justices' views in *Town of Greece*. His assertion that "religion is not essential to the solemnizing purpose of legislative invocations" (Br. 19) requires "a suspense of ordinary common sense that this court need not indulge," *Kurtz*, 829 F.2d at 1138. "Prayer to open each legislative day … was a *religious observance* acceptable to the drafters of the first amendment and is today 'part of the fabric of our society.'" *Id.* at 1146 (Ginsburg, J., dissenting) (emphasis added) (quoting *Marsh*, 463 U.S. at 792); *id.* (noting that "[t]he common feature" of legislative prayer since the Founding "is the invocation of 'Divine guidance'") (quoting *Marsh*, 463 U.S. at 792).

The tradition of legislative prayer has "consisted exclusively of *prayer*" as opposed to non-theist "opening remarks." *Id.* ("The congressional chaplains have no warrant themselves to utter words that do not compose a prayer, and they have no commission from the House or Senate to engage others to extend remarks of a secular character."); *see id.* at 1145 (denying the appellant an opportunity to make "secular remarks in [Congress] during the periods explicitly reserved for prayer"). And although "prayers vary in their degree of religiosity," it remains "possible

to discern in the prayers offered to Congress a commonality of theme and tone." *Town of Greece*, 134 S. Ct. at 1823. By definition, prayer is the invocation of a higher power. *See Engel v. Vitale*, 370 U.S. 421, 425 (1962) (acknowledging "[t]he religious nature of prayer"). A secular address or invocation is simply different in kind.

The work of the House is often divisive. But for a few moments before each session, politics and party are set aside. Instead of debate, congressmen reflect on their duty to represent every constituent, mindful of the Nation's core values and their need for divine assistance in carrying out their responsibilities. *See Town of Greece*, 134 S. Ct. at 1818 ("legislative prayer … reminds lawmakers to transcend petty differences in pursuit of a higher purpose"). Prayer itself is a humbling activity—by recognizing subservience to a higher power, however understood, congressmen are reminded that they are not free to act according to their own whims and preferences. Prayer offers these distinctive benefits, and Congress may validly choose to open its sessions with prayers instead of generic invocations.

III. Congress's practice of legislative prayer serves a unifying, civic purpose that promotes the accommodation of religious minorities.

For over two centuries, Congress's opening prayers "have been addressed to assemblies comprising many different creeds," and the practice has "strive[d] for the idea that people of many faiths may be united in a community of tolerance and devotion." *Town of Greece*, 134 S. Ct. at 1823. This practice reflects the perspective that "[e]ven those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being." *Id.* Taking the praying out of prayer, as Barker seeks to do, would rob Congress's prayer practice of its unifying, civic purpose.

Legislative prayer's inherent recognition of citizens' common "desire to show respect for the divine in all aspects of their lives and being" serves a special purpose for religious minorities like the *amici* here. *Id.* Religious minorities often need legislative accommodations to exercise their faith fully and freely.[9] Legislative prayer reminds those in political

[9] It is perhaps no surprise then that Congress, benefiting from the daily reminder of opening prayer, has often been more accommodating to religious minorities than the courts. In *United States v. Lee*, the Supreme Court rejected an Amish employer's claim that withholding social security taxes from his Amish employees' paychecks violated his free exercise

power of the all-encompassing obligations of faith, and the need to accommodate, where possible, the sincere religious convictions of all people of faith—and particularly those religious minorities at a disadvantage in the ordinary legislative process.

Legislative prayer serves as a public acknowledgement of faith's presence in society and of "the place religion holds in the lives of many private citizens." *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion). In so doing, legislative prayer normalizes faith's public presence and serves to facilitate public accommodations of religious minorities.

Some Jews, for example, require accommodations to observe the Sabbath. For many Jews, the religious obligation to rest on the Sabbath encompasses a prohibition against carrying (described in Jeremiah 17:19–27),[10] which requires them to refrain from moving objects between

---

rights. 455 U.S. 252, 255 (1982). Congress then enacted a law exempting from social security withholding employers and employees with religious objections. *See* 26 U.S.C. § 3127. In *Goldman v. Weinberger*, the Court rejected an Orthodox Jewish service-member's request for an accommodation that would permit him to wear a yarmulke, a religious head covering. 475 U.S. 503, 510 (1986). Congress then enacted a law that generally permits service-members to wear religious apparel. 10 U.S.C. § 774.

[10] *E.g.,* Jeremiah 17:21–22 ("Thus said [Hashem]: Guard yourselves for your own sake against carrying burdens on the Sabbath day, and bring-

private domains (e.g., from house to house), from a private domain to a public domain (e.g., from a house into the public streets) or vice versa, or within the public domain. This prohibition presents particular difficulties for those who observe it because, among other things, it prevents parents from carrying their children to synagogue or social gatherings on the Sabbath, or even carrying one's keys outside the home.

One way of accommodating Jews who observe the prohibition against carrying on the Sabbath is through the construction of an eruv, an unobtrusive structure that encircles an area and creates a single private domain within which Jews may carry. Creating an eruv typically involves obtaining approval from local governments and utility companies. For example, most of the District of Columbia is within an eruv. This eruv was made with the approval of the National Park Service and the D.C. Department of Public Works by designating 350 utility poles and

ing them through the gates of Jerusalem. Nor shall you carry out burdens from your houses on the Sabbath day, or do any work, but you shall hallow the Sabbath day, as I commanded your fathers.").

the wires between them as part of the eruv and running thin wire to complete any small gaps in the border.[11] Despite eruvs' being "nearly invisible," some object to them as publicly visible religious symbols. *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 395 (2d Cir. 2015) (per curiam) (rejecting an Establishment Clause challenge contending that an eruv would be an impermissible religious display).

As a public acknowledgement of faith, legislative prayer helps ensure that the public square is open to religious expression and accommodation. Removing faith from legislative prayer, as Barker seeks to do, would remove a powerful reminder that the public square must be open to people of all faiths, including religious minorities.

IV. Congress's practice of allowing guest chaplains is a sign of solidarity among people of faith.

A guest chaplaincy open to all faiths powerfully continues the "tradition long followed in Congress" and displays the solidarity shared by people of all faiths. *Town of Greece*, 134 S. Ct. at 1819. Legislative prayer

[11] Howard Rosenberg, *Orthodox Jews Seek a Symbolic Zone*, Washington Post (Mar. 15, 1990), *available at* https://www.washingtonpost.com/archive/local/1990/03/15/orthodox-jews-seek-a-symbolic-zone/faf27306-655f-4123-8e08-3390b2ed2f4f/.

is “deeply embedded in the history and tradition of this country,” *Marsh*, 463 U.S. at 786, and showcases the preeminent role that religion plays in the fabric of our society. “By inviting ministers to serve as chaplain” and “welcoming them to the front of the room alongside civic leaders,” Congress “is acknowledging the central place that religion, and religious institutions, hold in the lives of those present.” *Town of Greece*, 134 S. Ct. at 1827.

As our Nation’s religious diversity has grown, the range of faiths represented in the practice of legislative prayer has naturally broadened to include Jewish, Muslim, and Hindu clergy, among others. *Supra* at 12–14. And as the Supreme Court observed in *Town of Greece*, Congress “acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds.” 134 S. Ct. at 1820–21; *see id.* at 1842–43 (Kagan, J., dissenting) (“[P]luralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone.”).

Such openness is consonant with America’s character both as a nation of faith and as a country of free religious exercise and broad religious

belief. *See Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being."). In our religiously diverse Nation, the best means of respecting the requirements of the Establishment Clause in the context of legislative prayer is to allow those who pray to do so in accordance with the dictates of their consciences. Legislative bodies that permit those who pray to mention specific deities of their choosing—Jesus, Allah, Hashem, or others—cultivate genuine tolerance and diversity and protect the free speech of these individuals. *See Town of Greece*, 134 S. Ct. at 1851 (Kagan, J., dissenting). Legislative prayer thus "accommodate[s] the spiritual needs of lawmakers and connect[s] them to a tradition dating to the time of the Framers." *Id.* at 1826 (Kennedy, J., plurality). And importantly for these *amici*, exposing members of Congress to members of a wide variety of faiths helps ensure that Congress does not, even inadvertently, prefer or ignore any particular religious view in other contexts as well.

Barker does not seek to expand this tent. He seeks to kick the tent down. As a self-professed atheist and "nonbeliever," Barker does not subscribe to any religious faith and does not believe in any higher power. Br. 4–5. By his own admission, he stands outside (and here, opposed to) the

common vision proclaimed by all people of faith who have a stake in and appreciation for the "just expression of religious devotion by the legislators of this nation." S. Rep. No. 376, 32d Cong., 2d Sess., 4 (1853). As the district court recognized, "contrary to Mr. Barker's hopeful interpretation, *Town of Greece* did not reference atheists—who are, by definition, nontheists who do not believe in God or gods—but "any minister or layman who wished to give [a prayer]." Op. 25.

In attacking Congress's longstanding custom of opening its sessions with prayer, Barker seeks to render these traditionally solemn occasions devoid of religious meaning. In so doing, he would also render them incapable of fostering religious harmony and pluralism.

CONCLUSION

Legislative prayer both "accommodate[s] the spiritual needs of lawmakers" and provides "an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Town of Greece*, 134 S. Ct. at 1826. As the district court rightly found, "the reality is that [Barker's] request to open the House with a secular invocation … was a challenge to the ability of Congress to open with prayer." Op. 26. This Court should deny that request. *Marsh* and *Town*

of Greece "accepted legislative prayer against an establishment clause objection," and this Court's decision in *Kurtz* endorsed "opening legislative sessions *with prayer*, nothing more and nothing else." 829 F.2d at 1147 (Ginsburg, J., dissenting). Allowing for the invocation of divine guidance—whatever the deity—"on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion." *Marsh*, 463 U.S. at 791.

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: July 19, 2018

Respectfully submitted,

/s/ *Steffen N. Johnson*
STEFFEN N. JOHNSON
JOHN W. H. HARDING
PAUL N. HAROLD
STEPHANIE A. MALONEY
Winston & Strawn LLP
1700 K Street NW
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

Counsel for Amici

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 5,080 words.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word 2013 in 14-point Century Schoolbook font.

/s/ *Steffen N. Johnson*
STEFFEN N. JOHNSON
Counsel for Amici

CERTIFICATE OF NECESSITY OF SEPARATE BRIEFS

I certify that separate briefs are necessary for some groups of amici given the differences in amici's interests and positions. The amici on this brief offer the unique perspective of minority religions who benefit from the U.S. House of Representatives legislative prayer practice.

/s/ *Steffen N. Johnson*
STEFFEN N. JOHNSON
Counsel for Amici

CERTIFICATE OF SERVICE

I certify that on July 19, 2018, I filed this brief through the Court's CM/ECF system, which caused the brief to be electronically served on all parties, through the following counsel:

Richard Bolton (rbolton@boardmanclark.com)
Anita T. Gallucci (agallucci@boardmanclark.com)
Thomas G. Hungar (thomas.hungar@mail.house.gov)
Lowell Vernon Sturgill, Jr. (lowell.sturgill@usdoj.gov)
Matthew M. Collette (Matthew.Collette@usdoj.gov)

/s/ *Steffen N. Johnson*
STEFFEN N. JOHNSON
Counsel for Amici