Nos. 18-2974 and 18-3167

United States Court of Appeals for the Third Circuit

BRIAN FIELDS, ET AL.,

Plaintiffs-Appellees,

V.

SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, ET AL.

Defendants-Appellants.

On Appeal from the U.S. District Court for the
Middle District of Pennsylvania,
No. 1-16-cv-01764 (Hon. Christopher C. Conner)

BRIEF OF *AMICI CURIAE* ALEPH INSTITUTE, *ET AL.*, IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4)(A), *Amici* state that they do not have any parent corporations, nor do they issue any stock.

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INTEREST OF *AMICUS 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) 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 command and in geographic regions worldwide. Collectively, they have served in every

[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. A supplemental statement further identifying *amici* is included at the end of this brief.

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 guest-chaplaincy prayer program of the Defendant-Appellants (collectively, the "Pennsylvania House") is inherently religious, and that the Pennsylvania House is not required by the Establishment Clause to include in the program secular statements from non-religious, non-praying individuals like Plaintiff-Appellees (collectively, "Plaintiffs"). Maintaining the religious nature of legislative prayer is fully consistent with the First Amendment's special solicitude for the role that religion plays in the lives of most Americans.

INTRODUCTION

This case presents a straightforward question ("Do legislative prayers violate the Establishment Clause?") that has a straightforward answer ("No."). The Supreme Court has twice addressed the same question and reached the same conclusion. In *Marsh v. Chambers*, it held that the Establishment Clause was not triggered when the Nebraska legislature paid a Presbyterian chaplain to provide prayers for its daily sessions over sixteen years, even though that largely excluded prayers from other religions. 463 U.S. 783 (1983). And in *Town of Greece v. Galloway*, it held that the Establishment Clause was not triggered when the town board invited individuals of

any persuasion to participate in providing prayers, even though a "steady drumbeat" of Christian prayers was what resulted. 572 U.S. 565, 574 (2014).

This case offers nothing new that could change these outcomes. The Pennsylvania House allows adherents of all religions to offer invocations. Since this practice has produced greater religious diversity than was the case in either *Marsh* or *Town of Greece*, *a fortiori* it cannot violate the Establishment Clause. Plaintiffs urge the Court to find a violation because the Pennsylvania House denied their requests to open sessions with non-religious statements extolling human wisdom and the power of science. But because the Establishment Clause is not violated by religious prayers, there is no basis for compelling the relief Plaintiffs seek.

The district court skirted this fundamental failure by treating Plaintiffs' secular atheism as a "minority religion" and their odes to human wisdom as "prayers." Mem. 17-18, 22, ECF No. 109. But rejecting religion altogether is not a religious act any more than refusing to do pushups is a form of athletic training. Plaintiffs themselves reject religion as irrational and prayer as a meaningless substitute for human reasoning.

Preserving religion's definition as excluding secular atheism is particularly important in the military context where servicemembers "experience 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" out of death's way. *Katcoff v. Marsh*, 755 F.2d 223, 227 (2d Cir. 1985). Religious service members have the right to access services that can meet their uniquely religious needs without the cynicism, rejection, and mockery that Plaintiffs would introduce.

ARGUMENT

I. Excluding non-religious, non-praying individuals from a legislative prayer practice does not violate the Establishment Clause.

A. Excluding secular invocations from legislative prayer is historically consistent with the Establishment Clause.

"[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece,* 572 U.S. at 576 (quoting *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989), *overruled in part by Town of Greece*, 572 U.S. 565 (opinion of Kennedy, J., concurring in part and dissenting in part)).[2] 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.*

The *Town of Greece* Court affirmed that—absent extreme circumstances—government sponsored chaplaincies and legislative prayer meet this standard. "The First

[2] Justice Kennedy's opinion in *Town of Greece* cited principles from his dissent in *Allegheny*, overruling those portions of *Allegheny* with which he had disagreed.

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." *Id*. at 575. 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*, 463 U.S. at 790 (cited with approval in *Town of Greece*, 572 U.S. at 575-77).

The district court accepted this basic premise, agreeing "it is well settled" that religious prayers are "entirely proper invocations for legislative sessions." Mem. at 1. It called this case, however, "a horse of a different color," claiming "there is no historical evidence of nontheists requesting, or being denied the opportunity," to give legislative invocations. *Id*. at 17. This misconstrues the historical test. A practice with a direct historical pedigree makes for an easy case: courts "*must* acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." 572 U.S. at 577 (emphasis added). But that does not mean a practice "would amount to a constitutional violation if not for its historical foundation." *Id*. at 576. Practices without historic provenance must still "be interpreted 'by reference to historical practices and understandings.'" *Id*. (citing *Allegheny*, 492 U.S. at 670). Courts must consider "other types of church-state contacts" that have gone "unchallenged throughout our history" or been upheld by the

courts and permit "any other practices with no greater potential for an establishment of religion." *Allegheny*, 492 U.S. at 662, 670 (adopted in *Town of Greece*, 572 U.S. at 576); *see also Marsh*, 463 U.S. at 791. In other words, the absence of historic evidence for a particular religious practice is insufficient to show an Establishment Clause violation; a complainant must show that the practice is analogous to what historically constituted an unlawful establishment.

At the founding, an "establishment of religion" had a well-defined meaning. Nine of the thirteen colonies had established churches of some sort, and the Founders were familiar with the centuries-old establishment in England. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003). Although these establishments varied in their particulars, they shared six common characteristics: (1) government control of the established church's doctrine and personnel; (2) government-mandated attendance in the established church; (3) financial support for the established church; (4) punishments for worshipping in dissenting churches; (5) restrictions against political participation by dissenters; and (6) granting the established church government authority to carry out civil functions. *See id*. These characteristics are absent here. Thus, even if there is no historical precedent for excluding non-religious individuals from offering legislative prayers—a dubious proposition—the practice must be upheld.

B. Excluding secular invocations from legislative prayer is consistent with the text of the First Amendment and the relevant case law.

The district court further distinguished *Town of Greece* on the ground that "[i]ntentional discrimination on the basis of religion" was not at issue in that case. Mem. at 19. It concluded that the *Town of Greece* majority's "concern with intentional discrimination against minority religions" had "presaged disposition of the instant matter" in Plaintiffs' favor. *Id*. at 22. But the district court's reading of the nondiscrimination principle in *Town of Greece* is overwrought. All nine justices agreed that religious prayer is constitutionally permissible. *See Town of Greece*, 572 U.S. at 622 & n.2 (Kagan, J., dissenting). The major point of departure for the dissenting justices was that—in their view—the town's prayers were "always identified with a single religion" and were not sufficiently "inclusive of different faiths." *Id*. at 622 n.2; *see also id*. at 611 (Breyer, J. dissenting) (contending that "the town must do more than it had previously done to try to make its prayer practices inclusive of other faiths"). Similarly, in *Marsh*, the majority dismissed concerns that the "long tenure" of the Nebraska legislature's Presbyterian chaplain had "the effect of giving preference to his religious views." 463 U.S. 793-94. Thus, the district court's suggestion that *Town of Greece* prohibits any line drawing, even among different faiths, does not accurately reflect the Supreme Court's more nuanced holdings.

Here, however, the Court need not delve into that issue, because it is well-established that—in the context of religious accommodations—the nondiscrimination

principle, whatever its scope, applies only among religions and not between religion and non-religion. For example, in *Allegheny*, the Supreme Court addressed whether holiday displays at a county court house violated the Establishment Clause. 492 U.S. at 578. Addressing statements like that in *Epperson v. Arkansas* concerning "neutrality . . . between religion and nonreligion," 393 U.S. 97, 104 (1968), Justice Kennedy concluded that they "must not give the impression of a formalism that does not exist." *Allegheny*, 492 U.S. at 657. Rather, "[g]overnment policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage." *Id*. Allowing a religious exercise that does not amount to an "establishment" simply gives equal treatment to religion as one among many activities.

Further, "the text of the First Amendment" gives "special solicitude" to religion. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 189 (2012); *Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981) ("[T]he 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," is 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; *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").

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 rights 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 significantly curtailed. *Id.* Concern that the "rights 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 a variety of 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. 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*, 565 U.S. 171 at 188. In *Hosanna-Tabor*, the Supreme Court unanimously rejected the argument 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*, 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." 483 U.S. 327, 329 (1987). 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 non-religious 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 Ky. L. J. 603 (2018) (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 unanimously 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. Upholding such a restrictive view would be hostile to religion and thus 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; *see also Freedom from Religion Found., Inc. v. City of Warren*, 707 F.3d 686, 696 (6th Cir. 2013) (noting that "Congress's creation of a National Day of Prayer on the First Thursday of May does not compel the legislature to recognize a National Day of Non-Prayer each year").

And there are 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 v. Tax Comm'n*, 397 U.S. 664 664, 678 (1970); *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).

Governments, of course, are free to create secular counterparts to legislative prayer if they so desire. But the Establishment Clause does not compel them to do so. And Plaintiffs are wrong to suggest that this impedes them in any way from fully participating in our nation's governance or that it reasonably makes them to feel like outsiders. To the contrary, it simply ensures that religious exercise—so long as it does not amount to a religious establishment—is given space in what is an already secular democratic process, as guaranteed by the Establishment Clause itself. The Establishment Clause does not require the government to manufacture yet additional markers of secularism to somehow offset the participation of religious individuals.

II. Plaintiffs' secular atheism is not religious.

The district court avoided the overwhelming case law upholding religious exercise in the public square and religious accommodations without secular counterparts by casually assuming, with no supporting analysis, that Plaintiffs' philosophical atheism is a form of religious belief and that their proposed philosophical statements are a form of prayer. Mem. at 17-18, 22. This blurring of the distinction between the philosophical and the religious is inconsistent with the law and with Plaintiffs' own statements and practices.

First, religion inherently contemplates transcendent experience, typically referring to a perceived supernatural reality. Philosophy, by contrast, does not necessarily refer to the transcendent, though as Aristotle or Aquinas show, it can. But Plaintiffs'

anti-religious and atheist philosophy specifically denies the hallmark of religious belief, transcendent truth. That variety of philosophy cannot in any way be considered religious.

Take Marx. It would be wrong to classify Marxist philosophy as a religion, even though most streams of Marxism include opinions on religious questions. Most notably, classical Marxism is strongly atheistic, defining religion as the "opium of the people." *See* Karl Marx, *Zur Kritik der Hegelschen Rechtsphilosophie*, 1 Karl Marx / Friedrich Engels, 5 Werke 378 (Dietz Verlag, Berlin 1976) ("*Die Religion . . . ist das Opium des Volkes*" – "Religion . . . is the opium of the people"). Yet Marxism is not rooted in any religious belief, nor are its practices in any way linked to the transcendent. Marx might well have been just as offended as Plaintiffs at the Pennsylvania House's prayer practices. But he could not have claimed discrimination against his "religion." In fact, he probably would have felt insulted that anyone might consider his carefully thought-out philosophy to be in any way religious.

Rejecting philosophical atheism as a religion is also consistent with this and other court's rulings. In *Africa v. Pennsylvania*, for example, this Court held that a philosophy of "living in accord with the dictates of nature" was not a religion where it did "not claim to be theistic," "recognize[d] no Supreme Being," and "refer[red] to no

transcendental or all-controlling force." 662 F.2d 1025, 1033 (3d Cir. 1981).[3] The Court further noted that the philosophy in question took no "position with respect to matters of personal morality, human mortality, or the meaning and purpose of life" and "ha[d] no functional equivalent of the Ten Commandments, the New Testament Gospels, the Muslim Koran, Hinduism's Veda, or Transcendental Meditation's Science of Creative Intelligence." *Id*. Finally, the Court noted that, while the individual in question had "discovered a desirable way to conduct his life," he "d[id] not contend . . . that his regimen [was] somehow morally necessary or required." *Id*. "Given this lack of commitment to overarching principles," his philosophy was "not sufficiently analogous to more 'traditional' theologies" to be deemed a religion. *Id*.

Similarly, 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

[3] The Court noted that theistic belief may not be *essential* to qualify as a religion, *id*. at 1032, and rightly so. Some religions, such as some forms of Buddhism, also teach that there is no God. *See, e.g.*, Paul Williams, *Mahāyāna Buddhism: The Doctrinal Foundations* 78 (Routledge 2d ed. 2009) (for "enlightened beings" "theistic Creator God" is a "complete fiction[]"). But atheist Buddhists reach that conclusion based on their religious beliefs and concept of the transcendent, not philosophical beliefs like Plaintiffs'. *See id*. The Court in *Africa* likewise distinguished concerns that were "philosophical" and "personal" rather than "spiritual or other-worldly" and "religious." *Africa*, 662 F.2d at 1033-34.

the First Amendment's meaning." *Id.* at 98.[4] The Court emphasized that "traditional notions of religion surely would not include humanism." *Id.* Indeed, the evidence before the Court "suggested that the American Humanis[t] Association's precepts were rooted in philosophy not religion." *Id.* at 99.

Plaintiffs here attempt to analogize their philosophical beliefs to religion by stating that they seek "to be a positive influence in the world"; value "justice, equality, and rationalism"; gather for "discussions of atheistic and Humanist beliefs"; "foster a community for fellow atheists"; admire the written works of "prominent nontheists"; and celebrate the Summer and Winter solstice. Am. Compl. ¶¶ 12-19. But as in *Africa*, the core is lacking. Plaintiffs' philosophy does not "address fundamental and ultimate questions having to do with deep and imponderable matters, nor are they comprehensive in nature." *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 492 (3d Cir. 2017). Rather, Plaintiffs believe that each individual should act as directed by his or her own reason and understanding; they have not alleged a "comprehensive system of beliefs about fundamental or ultimate matters" and no overarching beliefs about what is moral or immoral. *Id*.

[4] 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.

Plaintiffs' secular atheism is no different than the *Africa* Plaintiff's "philosophical naturalism" and "other single-faceted ideologies—such as economic determinism, Social Darwinism, or even vegetarianism"—all of which the Court concluded "would not qualify as religions under the [F]irst [A]mendment." *Africa*, 662 F.2d at 1035; *see also Fallon*, 877 F.3d at 492 (rejecting as religion the claimant's beliefs that called on him to use "observation and analysis" and "accept . . . and live up to" anything that "agrees with reason and is conducive to the good and benefit of one and all").

Perhaps most significant is that Plaintiffs themselves personally reject religion. *See* Am. Compl. ¶¶ 10 (Fields); 30 (Tucker); 41 (Weaver); 50 (Rhoades); 66 (Neiderhiser); 77 (Jones); 98 (Kiniry); 118 (Pennsylvania Nonbelievers, Inc.); 132 (Dillsburg Area FreeThinkers); 139 (Lancaster Freethought Society); 150 (Philadelphia Ethical Society).[5] They openly subscribe to the Humanist Manifesto III, which expressly rejects any transcendent beliefs or "supernaturalism," instead declaring that human life is best guided by "science" or "reason" and "experience."[6] And, as

[5] While "most" of the Philadelphia Ethical Society's "members are atheists or agnostics, some are not." Am. Compl. ¶ 150. There is no indication, however, that its theistic members would be disqualified from offering a prayer in the Legislature or that the Society's participation in this lawsuit seeks relief on behalf of those members.

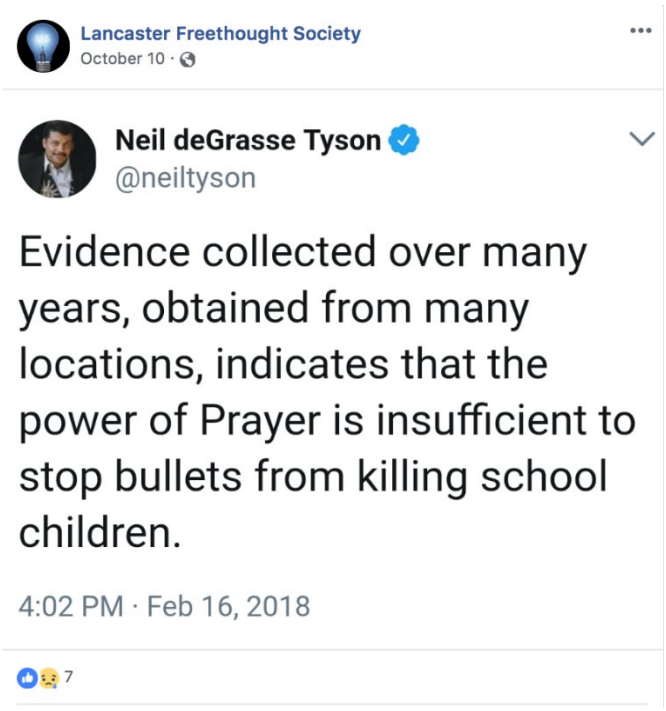
[6] American Humanist Association, *Humanism and Its Aspirations: Humanist Manifesto III, a Successor to the Humanist Manifesto of 1933*, https://americanhumanist.org/what-is-humanism/manifesto3/ (last visited January 7, 2018).

demonstrated by a small sampling of their social media postings, many (and perhaps all) of them proactively discourage and ridicule religious belief and mock and deride prayer as meaningless and ineffectual:

Dillsburg Area FreeThinkers - DAFT, Facebook (Feb. 20, 2018), https://bit.ly/2LTqMri.

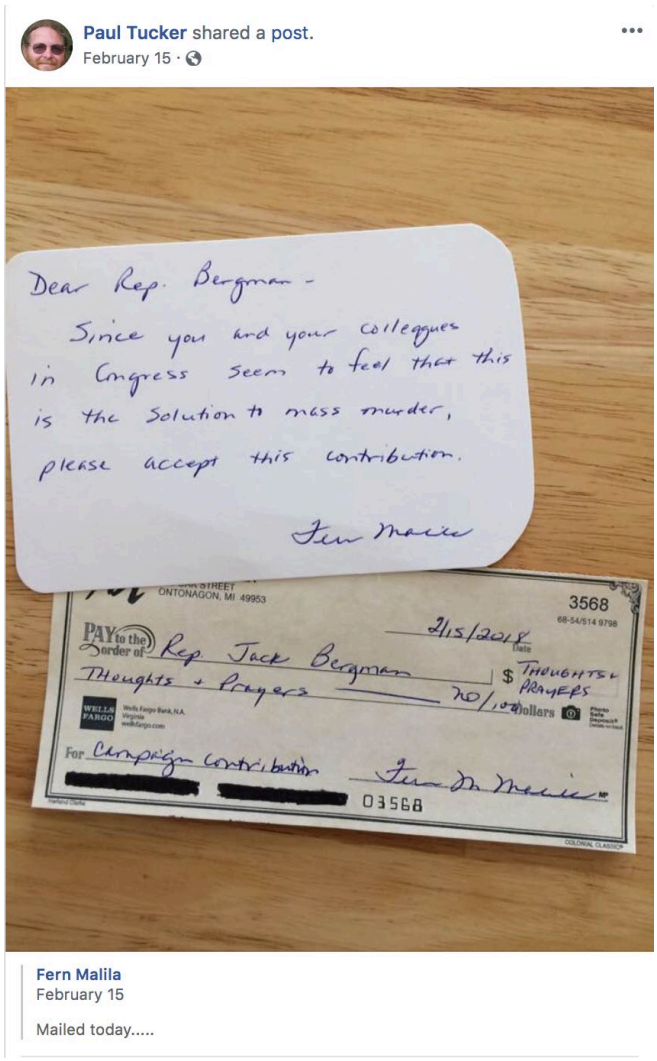
Dillsburg Area FreeThinkers - DAFT, Facebook (Mar. 3, 2018), https://bit.ly/2CVmuwM.

Dillsburg Area FreeThinkers - DAFT, Facebook (July 4, 2018), https://bit.ly/2Tu2LJW



Lancaster Freethought Society, Facebook (Oct. 10, 2018), https://bit.ly/2VBQ2qr.

Paul Tucker, Facebook (Feb. 15, 2018), https://bit.ly/2RdUhu6.



Paul Tucker, Facebook (Feb. 15, 2018), https://bit.ly/2AxMg8Y; *see also* Pennsylvania Nonbelievers, Facebook (Sept. 12, 2017), https://bit.ly/2GYNQWR (video of Pennsylvania Nonbeliever's Inc. mocking prayer and stating that "nothing fails like prayer").

Perhaps most telling is that Plaintiff Jones is the president of the board of trustees of counsel Americans United for Separation of Church and State, Am. Compl. ¶ 91, an organization that actively "opposes official government prayers" in any

"government meetings or public events." *See Official Prayer*, Americans United for Separation of Church and State, https://www.au.org/issues/official-prayer. Plaintiffs should not be heard to both disparage and ridicule prayer yet benefit from a ruling based on the false premise that they are religious and prayerful.

III. How the Court treats the Pennsylvania House's legislative prayer practices will affect 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. McConnell, *supra*, at 2119, 2166. 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*, 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, 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 will freely 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 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*, the Second Circuit rejected a challenge to the constitutionality of the Army chaplaincy program. 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 [they] 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.

Amici are concerned that a ruling that Plaintiffs are entitled by the First Amendment to participate in the Pennsylvania House's legislative prayers would have an adverse impact on the military chaplaincy. The resources of the military chaplaincy are already strained. Diverting resources to include "chaplains" who reject religion outright would contravene the military chaplaincy's constitutional obligation to ensure service member's First Amendment right to the free exercise of religion.

The threat is not illusory. 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*—the same manifesto adopted by many of the Plaintiffs here. Complaint at 2 (¶¶ 3, 40), *Heap v. Hagel*, No. 1:14-cv-01490 (E.D. Va. Nov. 5, 2014). And like the Plaintiffs here, the American Humanist Society has a history of actively

campaigning against religion—mocking adults[7] and children[8] alike 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 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.

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[7] American Humanist Association, *Humanists Launch Naughty Awareness Campaign,* https://bit.ly/2C44vTf (last visited July 18, 2018) (announcing "Join the Club" and other advertising campaigns).

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

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 that religion is "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).

CONCLUSION

For all these reasons, the Court should reverse the district court below and uphold the Pennsylvania House's legislative prayer practices.

Dated: January 7, 2019

Respectfully submitted,

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DETAILED IDENTITY OF *AMICI CURIAE*

- The Aleph Institute is a 35-year-old recognized Jewish endorsing agency that, among other things, supports Jewish service members' faith by providing religious materials on over 100 military bases and by providing thousands of copies of Jewish scriptures to service members.

- The Anglican Church in North America (ACNA) Jurisdiction of the Armed Forces and Chaplaincy is part of the Anglican Communion, the world's third largest Christian communion with over 85 million members. ACNA's endorser, Bishop Derek Jones, is a retired U.S. Air Force officer and decorated fighter pilot who served for 27 years and helped lead development of joint military religious affairs doctrine.

- Chaplain (Major General) Douglas L. Carver, United States Army, Retired, served as the Chief of Chaplains for the U.S. Army. In that role, he served over 2900 chaplains who support the religious and pastoral needs of the Army's 1.2 million soldiers and families. He was the first Southern Baptist chaplain to be promoted to the position of Chief of Chaplains in more than 50 years. Chaplain Carver has served at every level of the Army, from Platoon to the Department of the Army Staff. Chaplain Carver currently serves as Executive Director of Chaplaincy Services for the North American Mission Board of the Southern Baptist Convention, providing professional and pastoral support to 3700 Southern Baptist Chaplains who minister in various institutional settings around the world.

- Chaplain (Brigadier General) Douglas E. Lee, U.S. Army (Retired), served as a Reserve Component and Active Duty chaplain for 31 years, including as an Assistant Chief of Chaplains. He is the endorser for the Presbyterian and Reformed Commission on Chaplains & Military Personnel (PRCC).

- Chaplain (Col.) Jacob Z. Goldstein served 38 years as a chaplain in the U.S. Army National Guard and the U.S. Army Reserves. He retired in 2015 as the longest-serving Jewish chaplain in U.S. military history. He repeatedly served in deployed environments, including Granada, Israel, Iraq, Kuwait, Afghanistan, and Guantanamo Bay, Cuba. He was also mobilized in response to the September 11, 2001 World Trade Center attack and served five months at Ground Zero as the Senior Chaplain for all components and branches of the military assigned to that mission. He was also mobilized to serve during TWA Flight 800 recovery efforts and in the aftermath of Hurricane Katrina.

- The Lutheran Church—Missouri Synod ("the Synod") is an international Lutheran denomination with more than 6,000 member congregations, 22,000 ordained and commissioned ministers, and 2 million baptized members throughout the United States. In addition to numerous Synodwide related entities, it has two seminaries, nine universities, the largest Protestant parochial school system in America, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations throughout the country. Nearly two centuries ago, those who would eventually form The Lutheran Church—Missouri Synod came to the United States seeking the religious freedom guaranteed in our nation's Constitution. The Synod treasures and fully supports religious liberty and the preservation of all First Amendment protections, including the Establishment Clause, as intended by America's Founding Fathers. Accordingly, the Synod believes the government should be permitted latitude in recognizing and accommodating the central role religion plays in our society.

- Rabbi Mitchell Rocklin is a chaplain in the Army National Guard with the rank of Captain, a Research Fellow at the Tikvah Fund, and the President of the Jewish Coalition for Religious Liberty.

- The National Association of Evangelicals represents millions of evangelical Christians from 40 denominations, as well as churches, seminaries, colleges, charities, missions, and other ministries. The NAE Chaplain Commission endorses nearly 100 chaplains in all branches of the military and is led by Chaplain (Col.) Steven E. West, USAF (Retired), who stepped down from his distinguished career while senior chaplain for Joint Base Langley/Eustis.

- Imam Talib M. Shareef is the Imam of the historic Nation's Mosque in Washington, DC, the co-founder of the military's first Islamic chaplain endorser, and the first military veteran imam to offer prayer at a Congressional opening session. He served 30 years in the U.S. Air Force, retiring as a Chief Master Sergeant.

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Executed this 7th day of January 2019.

/s/ Eric Baxter

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND LOCAL RULE 31.1

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate procedure 29(d) and 32(a)(7)(B). It contains 6,347 words, including the Detailed Identity of *Amici Curiae* at the end of the brief, and excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii) and by Local Rule 29.1(b).
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.
3. This brief complies with the electronic filing requirements of Local Rule 31.1(c). The text of this electronic brief is identical to the text of the paper copies, and Bitdefender Endpoint Security Tools has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 7th day of January 2019.

/s/ Eric Baxter

Eric S. Baxter

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to the counsel of record for the parties. I further certify that all parties to this case are represented by counsel of record who are CM/ECF participants.

Executed this 7th day of January 2019.

/s/ Eric Baxter

Eric S. Baxter