No. 17-5278

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAN BARKER,

Appellant,

v.

PATRICK CONROY, CHAPLAIN, ET AL,

Appellees.

On Appeal from the United States District Court
for the District of Columbia (Washington, D.C.),
Civil Docket for Case #: No. 1-16-cv-00850-RMC
The Honorable Judge Barbara B. Crabb

BRIEF OF THE CENTER FOR INQUIRY AND AMERICAN ATHEISTS, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

ALISON GILL
Counsel of Record
AMERICAN ATHEISTS, INC.
1220 L St. NW
Suite 100-313
Washington, DC 20005
(908) 276-7300
legal@atheists.org

Attorney for Amici Curiae

May 21, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*. Except for the following, all parties, intervenors, and *amici* appearing before this court are listed in the Brief for Appellant:

- American Atheists; and
- Center for Inquiry.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in Plaintiff-Appellant's brief.

C. Related Cases. The only related case of which *amici* are aware is identified in Plaintiff-Appellant's brief.

CORPORATE DISCLOSURE STATEMENT

Both the Center for Inquiry and American Atheists are non-profit corporations, and have been granted 501(c)(3) status by the IRS. Neither has a parent company nor have they issued stock.

American Atheists is a national educational, nonpolitical, non-profit corporation with members, offices, and meeting locations nationwide. American Atheists is a membership organization dedicated to advancing and promoting, in all lawful ways, the complete and absolute separation of religion and government, and to preserving equal rights under the law for atheists. American Atheists promotes the stimulation and freedom of thought and inquiry regarding religious belief, creeds, dogmas, tenets, rituals, and practices. American Atheists encourages the development and public acceptance of a humane, ethical system that stresses the mutual sympathy, understanding, and interdependence of all people and the corresponding responsibility of each individual in relation to society.

Center for Inquiry is a non-profit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church

and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

Pursuant to Circuit Rule 29(d), American Atheists and the Center for Inquiry certify that a separate brief is necessary to emphasize the importance of a strict interpretation of the Establishment Clause. As atheists and secular humanists, *amici* do not seek constitutional protection as another in a list of religions, but instead note that the First Amendment exists to protect the non-religious, including those who actively reject all religious dogma, as much as it protects any individual religion. Secular humanists and atheists are protected without having to claim their views as a religion; any government action which preferences belief in one or more deities over non-belief privileges religion over non-religion, and thereby violates the Constitution.

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INTERESTS OF *AMICI*

This *amici curiae* brief in support of the Appellant is being filed on behalf of the Center for Inquiry ("CFI") and American Atheists, Inc. ("American Atheists").

Amici comprise secular and humanist organizations that advocate on behalf of the separation of religion and government and offer a unique viewpoint concerning the importance of religious freedom in the United States. *Amici*'s missions include addressing and preventing discrimination against atheists and all non-theists.

SUMMARY OF ARGUMENT

The religious landscape of America is a diverse and rapidly changing one. One quarter of Americans, a population increasing daily, describe themselves as atheist, agnostic, or having no affiliation to any particular religion. Yet each day the House of Representatives begins its business with a prayer, and, according to the rules imposed by the House Chaplain, that prayer or invocation cannot be delivered by an atheist. *Amici* believe that this is not only out of touch with an evolving society, but also unconstitutionally discriminates against non-theistic Americans.

By refusing appellant Dan Barker an opportunity to deliver his invocation to the House of Representatives, based solely on his identification as an atheist,

Chaplain Conroy and the House of Representatives have infringed on his freedom of religion. By requiring the giver of any invocation to follow a religion, they have elevated theistic religions over and above atheism in the eyes of the law, a fundamental violation of the Establishment Clause. And by denying appellant the ability to speak, despite his meeting all other qualifications, based on the non-religious content of his address, they have violated his freedom of speech. Controlling precedent shows these violations cannot be justified by any legislative prayer exemption.

The source of these constitutional violations is clearly the source of the rules – Chaplain Conroy and the House of Representatives; no other party's actions can be seen to have caused the harm. The District Court erred in dismissing appellant's complaint, and this court should reverse that decision.

ARGUMENT

A. The House Rules Exclude a Large and Rapidly Growing Segment of the US Population

The United States was founded as, and remains, a religiously pluralistic nation. In fact, the degree of religious pluralism is increasing, and increasing rapidly. According to research undertaken by the Pew Research Center, between 2007 and 2014, the percentage of Americans self-identifying as Christian fell from 78.4% to 70.6%. *America's Changing Religious Landscape*, Pew Research Center

(May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ (last visited May 20, 2018). Over the same time period, the percentage of Americans following non-Christian religions, including Judaism, Islam, and Hinduism, rose by more than a quarter, from 4.7% to 5.9%. *Id.* Most noticeable, however, is the explosion in the number of the "nones," or the religiously unaffiliated, over this period. This group, consisting of atheists, agnostics, and those who identify with no religion in particular, increased from 16.1% of the population to 22.8%, an increase of more than one third. *Id.* This number represents 75 million Americans without religious affiliation, a group second only to the number of Evangelical Protestants according to the survey. *Id.*

It would be inconceivable that Congress could operate a program that excluded any of the other religious minority groups in this country without immediate sanction. Were the 1.6% of Americans who identify as Mormons, or the 1.9% of Americans who follow the Jewish faith, or the 20.8% of Roman Catholic Americans, *id.*, to be categorically and explicitly excluded from delivering an invocation to Congress, there is not a court in the country that would permit such a constitutional violation to stand. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.") Yet almost one quarter of the country, the religiously unaffiliated Americans, are

excluded by rules established by the House of Representatives from delivering an invocation to that body. Americans without religious belief are entitled to constitutional protection and respect from the government. Policies explicitly excluding them cannot stand.

B. The United States was Founded on the Separation of Religion and Government

It is important to note that *amici* oppose the existence of the office of House Chaplain, and the practice of opening the legislative day with an invocation. *Amici* believe that the existence of such a position is both unnecessary and unconstitutional. The Founding Fathers themselves recognized the dangers of the intermingling of religion and government, seeing it as harmful to both religious freedom and good governance. As James Madison, the Father of the Constitution, noted, "[R]eligion and Govt. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), https://tinyurl.com/madisonletter (last visited May 17, 2018).

Madison saw the dangers of religious involvement with government. As he stated:

> What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have

> found an established Clergy convenient auxiliaries. A just Government instituted to secure & perpetuate it needs them not.

Memorial and Remonstrance to the General Assembly of the Commonwealth of Virginia (June 20, 1787), https://tinyurl.com/MemRemon (last visited May 17, 2018). In light of this danger, the First Amendment was enacted, declaring "that [Congress] should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State." Letter from Thomas Jefferson to the Danbury Baptist Association (July 1, 1802), https://tinyurl.com/danburybaptists (last visited May 17, 2018).

Amici believe that the existence of a religious chaplain in the employ of the United States House of Representatives violates this constitutionally mandated wall of separation. Moreover, *amici* believe the practice of daily invocations to be unnecessary, as elected representatives are more than capable of undertaking their work without first partaking in a prayer. Those members who wish to pray before their day's work are able to do so either on their own, or with like-minded colleagues. However, if there is to be a daily invocation delivered by the House Chaplain, or by invited guest speakers, as is currently the case, then the process by which such an invocation is given, and by which guests to deliver the invocation are selected and invited, must itself be constitutional. *Amici* argue that the House Chaplain's rules, used in this instance to exclude appellant, an atheist, from

delivering an invocation, violate Article VI and the First Amendment to the Constitution of the United States and so cannot be permitted to continue.

C. The House of Representatives' Rules for Selection of Guests to Deliver Invocations Violate the Constitution

Prior to passage of the Bill of Rights, the original seven articles of the US Constitution included only one reference to religion. "[N]o religious test shall ever be required as a qualification to any office or public trust under the United States." U.S. Const. art VI § 3. The office in question here is that of guest deliverer of an invocation to the House of Representatives. Chaplain Conroy, under the authority of the House, has established a series of tests for that position. Appellant passed all but one of the tests imposed by the Chaplain. He received an invitation from a sitting member of the house. He is an ordained minister. He submitted a copy of his proposed invocation for vetting, despite other guest speakers not being required to do so. However, he was an atheist, failing Chaplain Conroy's final test.

That the test here is administered by a private individual (albeit an individual in a position appointed by the government) rather than the House of Representatives itself cannot be dispositive. Congress may not rely on private parties to perform unconstitutional tasks on its behalf. The House of Representatives has appointed Chaplain Conroy, and his actions in the establishment of rules for who may give a guest invocation reflect on the House

itself. A law requiring military officers to be Christian would violate the No Religious Test clause. Such an abhorrent law could not have its constitutionality rescued by Congress instead deputizing a private organization, such as Focus on the Family, to approve all military commissions, with that organization then announcing it would only approve commissions for Christians.

Excluding appellant from delivering an invocation on the grounds that he is an atheist represents a governmental preference for religion over non-religion. The Supreme Court has consistently ruled that such a preference violates the fundamental basis of the First Amendment. *Epperson v. Ark.*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates government neutrality between religion and religion, and between religion and non-religion.") Were Chaplain Conroy to be refusing to permit ministers of other Christian denominations, or of other religions, to deliver invocations, the precedent is clear that this would represent an unconstitutional establishment of religion. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.")

When determining what belief systems are protected under both the Establishment Clause and the Free Exercise Clause of the First Amendment, courts have been expansive. When courts have sought to determine whether atheism, the lack of belief in gods, is protected under the First Amendment, they have ruled that it is. In *Torcaso v. Watkins*, 367, U.S. 488 (1961), a constitutional provision in Maryland which stated that there could be no religious qualification for holding any state office "other than a declaration of belief in the existence of God," *id.*at 489, was held to be unconstitutional by the Supreme Court, as it violated the Free Exercise rights of an atheist individual seeking to become a Notary Public. *Id.* at 496. ("This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.") In its ruling, the Court emphasized that "neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers." *Id.* at 495.

In multiple decisions, the Supreme Court has recognized that atheism, or the absence of belief in gods, receives constitutional protection under the First Amendment, and has recognized that privileging religion in general, or a particular religion, over non-theistic belief systems constitutes an establishment of religion and violates the Constitution. *Epperson*, 393 U.S. at 104 ("Government may not be

hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite."). A state tax exemption available to religious periodicals in Texas was held to violate the First Amendment for reasons including that the state lacked "similar benefits for nonreligious publications." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-17 (1989). Granting religious employees a legal right to not work on their chosen Sabbath was unconstitutional because it placed religious grounds for wanting time off above any non-religious grounds. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 & n.9 (1985) ("The State thus commands that Sabbath religious concerns automatically control over all secular interests in the workplace.")

Courts of Appeals have also recognized that the breadth of protections of belief provided by the First Amendments twin guarantees of no establishment and free exercise extend to include protection for the non-religious, for atheists, agnostics, secular humanists, and for other non-theists. *See Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1102 n. 91 (9th Cir. 2010) ("The Supreme Court has always held that atheists … enjoy the same First Amendment protections as everyone else."); *see also Glassroth v. Moore*, 335 F.3d 1282, 1294 (11th Cir. 2003) ("The Supreme Court has instructed that for First Amendment purposes religion includes non-Christian faiths and those that do not profess belief in the

Judeo-Christian God; indeed, it includes the lack of any faith."); *see also Theriault v. Silber*, 547 F.2d 1279, 1281 (5th Cir. 1977) ("To the extent that *Kuch* includes within its test criteria the requirement that one possess a '. . . belief in a Supreme being . . .' and such a criterion excludes, for example, agnosticism or conscientious atheism, from the Free Exercise and Establishment shields, that requirement is too narrow.")

Chaplain Conroy has established a test directly akin to that in *Torcaso*, 367 U.S. 488. Appellant met every requirement placed upon him to deliver an invocation save one. He remained an atheist in face of Father Conroy's requirement that he have belief in a god. As a result, much as Torcaso was denied appointment as a Notary Public, appellant was denied the chance to deliver an invocation to the House of Representatives. It is not determinative that the position at issue here is an unpaid one, and delivering the invocation is voluntary. *Id.* at 495-96 ("The fact … that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.") Congress may no more condition the award of an honor on the professing of religious belief than it may do so with a paid job. Were the Medal of Honor, the Presidential Medal of Freedom, or the Congressional Gold Medal to be restricted to members of specific faiths, or to theists in general, this would be immediately viewed as unacceptable. Were Barker a Christian, or a

Muslim, or a Hindu, he would have been granted the honor of giving an invocation. The sole reason he was denied this was his atheism, and that denial violates the First Amendment.

D. The Policy Cannot be Saved by the Supreme Court's Precedent Regarding Legislative Prayer

That this discrimination against atheists occurred in the context of legislative prayers does not alter this analysis. The Supreme Court has reviewed such prayers and made clear that they are not exempt from Establishment Clause review. While the Court ruled legislative prayer to be not unconstitutional *per se*,[1] it also ruled that were the choice of chaplain by a state legislature to stem "from an impermissible motive" and give "preference to his religious views" it would "conflict with the Establishment Clause." *Marsh v. Chambers*, 463 U.S. 783, 793-94 (1983). When the Court more recently readdressed the issue, in allowing some explicitly sectarian invocations before legislative meetings it stressed again that the selection process could not involve discrimination against individuals who did not belong to majority faiths. *Town of Greece v. Galloway*, 134 S. Ct. 1811. The Court found the town's method of selecting those to give an invocation permissible, but only as long as it maintained a "policy of nondiscrimination," and that the selection criteria did not "reflect an aversion or bias on the part of the town leaders against

[1] *Amici* continue to believe the Supreme Court was in error in upholding the constitutionality of religious addresses to legislative bodies.

minority faiths." *Id.* at 1824. The policy challenged was one which the Court noted explicitly permitted atheists to give invocations, and on this basis it was found to be constitutional. *Id.* at 1826 ("[H]ere, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions."); *id.* at 1829 (Alito, J. concurring) ("[T]he town made clear that it would permit any interested residents, including nonbelievers, to provide an invocation.").

Under the rules established for guests to give invocations to the House of Representatives, atheists are explicitly excluded. Indeed, the only distinguishing factor between appellant and others who have been invited and have given such invocations is his status as an atheist. Congress has thus established a post, and excluded the non-religious from it. As the Supreme Court has made clear, such exclusion establishes an impermissible religious test. *Torcaso,* 367 U.S. at 495. It preferences religion over non-religion in a fashion which violates the Establishment Clause. *Epperson,* 393 U.S. at 104. And it fails to fall under any legislative prayer exemption recognized by the Supreme Court in that it fails to contain a "policy of nondiscrimination" and reflects "an aversion or bias … against" atheists. *Town of Greece,* 134 S. Ct. at 1824. As such, it is unconstitutional, and cannot stand.

E. The House Rules and Chaplain Conroy's Guest Chaplain Policy Caused Mr. Barker's Injury by Creating a Limited or Non-public Forum from Which Mr. Barker was Excluded for No Other Reason Than His Religious Viewpoint.

In addition to violating the Establishment and No Religious Test clauses, the Guest Chaplain program as currently implemented violates Mr. Barker's right to free speech. The House's imposition of a requirement that each day's sitting begin with a prayer and Chaplain Conroy's policy of permitting outside individuals to deliver remarks of their own choosing to fulfill that requirement established either a limited public forum or a non-public forum. Chaplain Conroy's exclusion of Mr. Barker from that forum because of his religious viewpoint, whether pursuant to his own unwritten policy or pursuant to the specific wording of the rules adopted by the House of Representative, was the cause of Mr. Barker's injury.

1. The Guest Chaplain Program constitutes a limited public forum in which viewpoint discrimination is constitutionally prohibited.

Where the government has specifically designated public property for use by members of the public as a place for expressive activity, the government may limit the purpose for which the forum can be used and impose reasonable restrictions on the time, place, and manner of the use. Content-based prohibitions, however, "must be narrowly drawn to effectuate a compelling state interest." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45-46 (1983). The floor of the House,

while generally not open to use by members of the public for expressive purposes, has been specifically designated by the House, through the House Rules, as the location from which the House Chaplain, or his designee, may deliver the "prayer" at the start of each day that the House is in session. For years, the Chaplain has designated individuals to deliver remarks from the floor and has not reviewed or otherwise exercised control over the content of the remarks delivered by the guest chaplains. Despite the unwritten requirements imposed on Mr. Barker, the House Chaplain has permitted individuals to speak from the house floor without regard to ordination, sponsorship by a House member, or whether the "prayer" addressed a supernatural higher power. The practice of permitting guest chaplains to deliver remarks from the floor of the House, as specifically required by the House Rules, thus creates a limited public forum.

Having created a limited public forum, neither the House nor the House Chaplain may place content-based restrictions on the use of that forum. *Perry*, 460 U.S. at 45-46. Chaplain Conroy's extraordinary decision to review and veto Mr. Barker's remarks, thereby precluding him from taking advantage of the forum provided to other individuals, because his remarks were not addressed to a supernatural higher power is perhaps the quintessential content-based restriction. By excluding Mr. Barker because his proposed remarks lacked theistic content, contrary to the requirements imposed by Chaplain Conroy and the House of

Representatives, their actions caused Mr. Barker's injury by excluding him from a limited public forum because of his viewpoint, in violation of his right to free speech.

2. If the Guest Chaplain Program constitutes a non-public forum, viewpoint discrimination in nonetheless unconstitutional.

Even if the House Rules and Chaplain Conroy's unwritten policies, taken together, do not create a limited public forum, Chaplain Conroy and the House of Representatives nevertheless caused Mr. Barker's injury by excluding him from a non-public forum because they disagreed with his viewpoint concerning religion. Property that has neither been traditionally held open for public communication, nor specifically designated by the government for that purpose constitutes a non-public forum. *Perry*, 460 U.S. at 46. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Id.* at 49. However, regulations imposed on such non-public forums cannot "suppress expression merely because public officials oppose the speaker's view." *Id.* at 46.

Chaplain Conroy expressly denied Mr. Barker the opportunity to participate in the guest chaplain program because he no longer ascribed to the faith in which he was ordained, would deliver remarks that did not invoke a supernatural higher power, and because the House Members view it as necessary and vital that the

House Chaplain and his designated guest chaplains deliver an expressly theistic prayer. That Chaplain Conroy and the House permitted ordained members of the clergy to deliver nontheistic remarks merely underscores that the act of denying Mr. Barker the opportunity to do the same was the result of opposition or animosity on the part of Chaplain Conroy and the House of Representatives toward Mr. Barker's religious viewpoint. By excluding Mr. Barker from a non-public forum, a forum which he was otherwise qualified to access, because of his non-theistic point of view, Chaplain Conroy and the House of Representatives caused Mr. Barker's injury by burdening his freedom of speech. Excluding Mr. Barker from this non-public forum, in which the government has near-total control of the message being delivered, creates an impermissible establishment of religion over non-religion.

F. Mr. Barker has Standing to Bring Suit Against Chaplain Conroy and the U.S. House of Representatives

The District Court erred in concluding that Mr. Barker lacked standing to bring suit. In reaching that conclusion, the District Court stated that Mr. Barker had failed to allege facts sufficient to support the claim that his injury (exclusion from the floor of the House for the purposes of delivering an invocation) was fairly traceable to conduct of the House of Representatives or Chaplain Conroy. The court stated that Mr. Barker's argument that the House was "potentially" the cause

of his injury invited "speculative inferences" that could not support a finding of causation. Mem. Opinion at 23. Conversely, the court determined that Mr. Barker failed to allege that Chaplain Conroy caused his injury because he "failed to allege that the chaplain 'had the power to permit him to address the House . . . in the manner he sought'—through a secular invocation." Mem. Opinion at 26, citing *Kurtz v. Baker*, 829 F.2d 1133, 1142 (D.C. Cir. 1987). The District Court erred in each instance.

A trial court's dismissal for lack of standing is reviewed *de novo*. *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008). To meet the causation element of Article III standing, the plaintiff must allege facts from which the court can conclude that the plaintiff's injury is fairly traceable to the actions of the defendant. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In his complaint and memorandum in opposition to the defendants' motion to dismiss, Mr. Barker traced a direct and concrete line from the House of Representatives' enactment of the House Rules to his exclusion from the guest chaplain program, requiring no "speculative inferences." The facts alleged in the complaint directly undercut that Chaplain Conroy lacked the power to permit Mr. Barker to address the House through a secular invocation, identifying three specific instances in which Chaplain Conroy in fact did permit guest chaplains delivered secular invocations. Taken together, the rules and policies created and implemented by the

House of Representatives and Chaplain Conroy, respectively, created a limited public forum and made participation in that forum contingent on the viewpoint of the prospective speaker. These policies resulting in impermissible viewpoint discrimination were the direct cause of the injury Mr. Barker suffered.

1. Mr. Barker alleged facts sufficient to conclude that the actions of the U.S. House of Representatives were the cause of his injury.

The District Court erred in concluding that it would be required to make "speculative inferences" in order to conclude that the U.S. House of Representatives was a cause of Mr. Barker's injury. The District Court concluded that Mr. Barker's argument that the U.S. House of Representatives was the cause of his injuries was "based in speculation and rel[ied] on a significant inference" and was therefore "insufficient to provide the link for Article III standing." Mem. Opinion at 23. The court based this conclusion on two factors: Mr. Barker's use of the word "potentially" in a single sentence of his Memorandum in Opposition, Mem. Opinion at 23, and the fact that the complaint is "devoid of specific allegations of actions taken by the House with respect to Mr. Barker's request to appear as guest chaplain." Mem. Opinion at 23, n. 4.

The District Court misconstrued Mr. Barker's use of the word "potentially." Mr. Barker argued that, to the extent the District Court agreed with the defendants' assertion that the requirements placed on the guest chaplain program by Chaplain

Conroy were required by the House Rules, the House was a cause of his injury. Contrary to the District Court's interpretation, Mr. Barker was not stating that the House was *potentially* the cause of his injury. He was arguing in the alternative that, should the District Court conclude that he was excluded not by Chaplain Conroy but rather by the House Rules, then the House would be a cause of his injury. It can be taken as axiomatic that the House is the cause of an injury resulting from the application of the House Rules. No "speculative inferences" are necessary to reach that conclusion.

While the District Court is correct that the complaint is "devoid of specific allegations of actions taken by the House with respect to Mr. Barker's request to appear as guest chaplain," Mem. Opinion at 23, n. 4, the complaint contains factual allegations supporting the claim that the House's adoption of the House Rules were a cause of Mr. Barker's injury. The complaint states that Rule II.5 directs the chaplain to "offer a prayer at the commencement of each day's sitting of the House" and that Rule XIV.1 requires that the first "order of business . . . shall be [a] . . . [p]rayer by the Chaplain." To the extent that these rules, adopted by the House, require a prayer to higher power or deity, to the exclusion of secular invocations, the House is a cause of Mr. Barker's injury. The District Court itself adopts the defendants' own argument that the House Rules "compel" the denial of a request to deliver a secular invocation. Mem. Opinion at 24. If the House Rules

"compel" a constitutional injury, then the House's act adopting those rules is a cause of the resulting injury. The House need not have taken, and Mr. Barker need not allege, an action taken by the House *specifically* regarding Mr. Barker's individual request for the court to conclude that the House was a cause of his injury for the purposes of Article III standing.

2. Mr. Barker alleged facts sufficient to conclude that Chaplain Conroy's discriminatory application of his guest chaplain policy to Mr. Barker was the cause of his injury.

The District Court erred in concluding that Mr. Barker failed to allege facts showing that Chaplain Conroy's actions were a cause of Mr. Barker's injury. In summarizing its conclusion, the District Court stated, "Mr. Barker has failed to allege that the chaplain had the power to permit him to address the House in the manner he sought—through a secular invocation." Mem. Opinion at 26 (internal quotation omitted). The District Court bases this conclusion exclusively on the reasoning of this Court in *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987) (*Kurtz II*). In *Kurtz II*, this Court determined that:

> Even if the chaplains had agreed to invite Kurtz, it would be unreasonable to imagine that they could have provided him with the actual opportunity to deliver non-religious remarks to either house of Congress during the time expressly set aside for prayer.
>
> In addition, members of both houses have expressed strong endorsement of congressional prayer. That fact would further undermine any contention that the leadership of either house has authorized the chaplains to transform the period reserved for prayer

> into what appellant has styled an "opening ceremony" in which "non-theistic" remarks could be delivered, however uplifting.

Kurtz II, 829 F.2d at 1142-43.

Unlike that case, however, Mr. Barker's complaint contains specific factual allegations supporting the claim that the House leadership permitted Chaplain Conroy to allow a guest chaplain to deliver "non-religious remarks" on multiple occasions. Chaplain Conroy twice permitted Rev. Andrew Walton to deliver "prayers" making no mention of a deity or other supernatural higher power, first on May 5, 2015 when he "acknowledge[d]" the "spirit of life that unites all people," Complaint at ¶ 147, and again four months later, on September 10, 2015, Complaint at ¶¶ 148-49. On October 16, 2015, barely one month after Rev. Walton's second secular invocation, Chaplain Conroy again permitted a guest chaplain, Rev. Michael Wilker, to deliver "prayer" that was not directed to any supernatural higher power, but rather to the "spirit of truth and reconciliation." Complaint at ¶ 150.

Whatever the reasoning and factual allegations relied on by this Court in deciding *Kurtz II*, the facts alleged by Mr. Barker cannot support the conclusion that House leadership somehow denied Chaplain Conroy the authority to permit a guest chaplain to deliver "non-theistic remarks." Not only did he have such authority, but he exercised that authority on multiple occasions contemporaneously to his denial of Mr. Barker's request.

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted,

/s/ Alison M. Gill

NICHOLAS J. LITTLE
Center for Inquiry
1020 19th Street, Northwest
Washington, DC 20036
(202) 629.2403
legal@centerforinquiry.net

ALISON GILL
Counsel of Record
GEOFFREY T. BLACKWELL
American Atheists, Inc.
1220 L St. NW
Suite 100-313
Washington, DC
20005 (908) 276-7300
legal@atheists.org

Counsel for amici curiae

Date: May 21, 2018

CERTIFICATION OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(1)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 5,254 words.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule(a)(6) because it has been prepared using 14-point Times New Roman font.

/s/ Alison M. Gill
Alison M. Gill
Counsel for amici curiae

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 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/ Alison M. Gill
Alison M. Gill
Counsel for amici curiae