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June 12, 2018

The Honorable Larry Obhof
President, Ohio Senate
Senate Building, 2nd Floor
1 Capitol Square
Columbus, OH 43215

Re: Invocations by Those Who Do Not Believe in God

Dear Senate President Obhof:

I have the honor of serving as the Executive Director of the Congressional Prayer Caucus Foundation. The Foundation serves nearly 100 members of Congress who are part of the Congressional Prayer Caucus (the names of those members of Congress who serve on the Congressional Prayer Advisory Team are listed on the left).

In addition, the Foundation serves Legislative Prayer Caucuses in over 30 states (including Ohio) that have nearly 1,000 state senators and state representatives as members. These leaders are working together to preserve the integrity of our founding principles and to protect First Amendment rights for all.

We recently learned that the Freedom From Religion Foundation ("FFRF") sent you a letter last December that claimed that you were committing "a serious constitutional violation concerning invocations" in the Ohio Senate. According to FFRF, an Ohio member of the "Northern Ohio Freethought Society" requested an opportunity to give a "secular" invocation prior to the opening of a Senate session. This request was studied by Senator Skindell and Clerk of the Senate Keeran, and eventually by your office, and apparently no approval was given for the secular invocation by presumably an avowed atheist.

FFRF argued in its letter that the Supreme Court in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) had approvingly cited the Town's policy of allowing "a minister or layperson of any persuasion, *including an atheist*, [to] give the

invocation.” *Id.* at 1816 (emphasis added). FFRF further argued that the Court in *Town of Greece* emphasized that invocations must be inclusive, and must not discriminate against minority faiths. Finally, FFRF cited a Florida federal district court case that had ruled that Brevard County’s practice of permitting only theistic invocations violated various constitutional provisions.

FFRF, however, glaringly omitted from its letter another federal district court opinion with which it was intimately involved. In *Barker v. Conroy*, 282 F. Supp. 3d 346 (D.D.C. 2017), FFRF’s co-president, Dan Barker, brought suit against the federal House of Representatives because it refused his request to open a House session with a secular invocation. In his suit, Mr. Barker argued, among other things, that the House’s refusal to allow him to give a secular invocation violated the First Amendment’s Establishment and Free Exercise Clauses. Barker’s constitutional arguments were, as you may have guessed, based on FFRF’s interpretation of the *Town of Greece* opinion. The federal district court opined that FFRF’s interpretation of *Town of Greece* was a misreading of the case’s facts, and that *Town of Greece* did not grant to atheists the right to give an invocation before a legislative session.

The district court in *Barker* concluded its discussion of the constitutional claims against you with the following discussion of legislative prayers:

Despite Mr. Barker’s repeated attempts to characterize his claims as not challenging the constitutionality of legislative prayer, the reality is that his request to open the House with a secular invocation, which resulted in the denial of his request to serve as a guest chaplain, was a challenge to the ability of Congress to open with a prayer. To decide that Mr. Barker was discriminated against and should be permitted to address the House would be to disregard the Supreme Court precedent that permits legislative prayer. *Marsh* definitively found that legislative prayer does not violate the Establishment Clause. See *Marsh*, 463 U.S. at 791, 103 S.Ct. 3330; see also *Town of Greece*, 134 S.Ct. at 1819 (“*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.”).

This Court concludes that the refusal of the House Chaplain to invite an avowed atheist to deliver the morning “prayer,” in the guise of a non-religious public exhortation as a “guest chaplain,” did not violate the Establishment Clause. For the same reasons that legislative prayer has been found consistent with the Establishment Clause, so is it consistent with the Equal Protection Clause. See *Kurtz II*, 829 F.2d at 1147 n.3 (“*Marsh* essentially affirmed that the historic practice of an opening prayer burdens no ‘fundamental right’ of non-theists. . . .”)

Chief Justice Burger in *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) describes well the time-honored tradition of legislative invocations that we seek to preserve:

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. 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; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, “[w]e are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

We applaud you for continuing the time honored tradition of opening sessions with prayer in the face of ongoing challenges from the FFRF. If we can be of any further service to you on this issue, feel free to contact us. We have First Amendment lawyers on staff who will work with you, without charge, if you need their services.

May God continue to bless you and the citizens of Ohio.

Sincerely,



Lea Carawan
Executive Director
Congressional Prayer Caucus Foundation