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In The  
**United States Court Of Appeals  
For The Eleventh Circuit**

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**DAVID WILLIAMSON, CHASE HANSEL, KEITH BECHER,  
RONALD GORDON, JEFFERY KOEBERL,  
CENTRAL FLORIDA FREETHOUGHT COMMUNITY,  
SPACE COAST FREETHOUGHT ASSOCIATION,  
HUMANIST COMMUNITY OF THE SPACE COAST,**

*Plaintiffs – Appellees – Cross Appellants,*

**v.**

**BREVARD COUNTY,**

*Defendant – Appellant – Cross Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA**

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**BRIEF OF *AMICI CURIAE*  
AMERICAN HUMANIST ASSOCIATION,  
UNITARIAN UNIVERSALIST ASSOCIATION, AND  
AMERICAN ETHICAL UNION  
IN SUPPORT OF APPELLEES – CROSS APPELLANTS**

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**Monica L. Miller  
AMERICAN HUMANIST ASSOCIATION  
1821 Jefferson Place, NW  
Washington, DC 20036  
(202) 238-9088  
mmiller@americanhumanist.org  
dniose@americanhumanist.org**

*Counsel for Amici Curiae*

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, *amici curiae*, the American Humanist Association, Unitarian Universalist Association, and American Ethical Union make the following disclosure: Each is a nonprofit membership association, exempt from taxation under 26 U.S.C. § 501(c)(3). Each has no parent or publicly held company owning ten percent or more of the corporation.

**OTHER ORGANIZATIONS**

*Amici* further certify that the following persons and entities have or may have an interest in the outcome of this appeal, as previously provided to the Court by Brevard County:

1. Abudu, Nancy Gbana
2. American Civil Liberties Union Foundation, Inc.
3. American Civil Liberties Union Foundation of Florida, Inc.
4. American Humanist Association
5. American Ethical Union
6. Americans United for Separation of Church and State
7. Anderson, Andy
8. Antoon, John, II, Senior United States District Judge
9. Baker, David A., United States Magistrate Judge

10. Barfield, Jim
11. Becher, Keith
12. Bell & Roper, P.A.
13. Brevard County, Florida
14. Central Florida Freethought Community
15. Fisher, Robin
16. Freedom From Religion Foundation, Inc.
17. Gordon, Ronald
18. Hansel, Chase
19. Humanist Community of the Space Coast
20. Infantini, Trudie
21. Irick, Daniel C., United States Magistrate Judge
22. Isnardi, Kristine
23. Katskee, Richard B.
24. Knox, Scott L.
25. Koeberl, Jeffery
26. Lewis, Mary Bolin
27. Luchenitser, Alex J.
28. Mach, Daniel
29. Mari, Frank M.

30. Markert, Rebecca Susan
31. Miller, Monica L.
32. Nelson, Chuck
33. Preferred Governmental Insurance Trust
34. Pritchett, Rita
35. Roper, Michael J.
36. Seidel, Andrew L.
37. Smith, Curt
38. Space Coast Freethought Association
39. Tanner, Alison
40. Tilley, Daniel B.
41. Tobia, John
42. Unitarian Universalist Association
43. Williamson, David
44. Yuan, Diana E.

Pursuant to Rule 26.1-3(b) of the Rules of the United States Court of Appeals for the Eleventh Circuit, the undersigned states that no publicly traded company or corporation has an interest in the outcome of this appeal.

**AUTHORITY TO FILE *AMICUS* BRIEF**

*Amici curiae* have obtained written consent from all parties to file this brief.

Fed. R. App. P. 29(a).

**AUTHORSHIP AND FUNDING OF *AMICUS* BRIEF**

Counsel for *amici* authored this brief in whole. No party or party's counsel authored this brief in any respect, and no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

Dated this 24<sup>th</sup> day of April, 2018.

*/s/ Monica L. Miller* \_\_\_\_\_  
**MONICA L. MILLER**  
American Humanist Association  
1821 Jefferson Place NW  
Washington, DC 20036  
Telephone: (202) 238-9088  
mmiller@americanhumanist.org

*Counsel for Amici Curiae*

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## **IDENTITY AND INTEREST OF THE *AMICI CURIAE***

The American Humanist Association (“AHA”) is a national nonprofit membership organization based in Washington, D.C., with over 236 local chapters and affiliates in 47 states and the District of Columbia, and over 650,000 members and supporters, including many in Florida. Founded in 1941, AHA is the nation’s oldest and largest Humanist organization. Humanism is a progressive lifestance that affirms, without theism or other supernatural beliefs, a responsibility to lead a meaningful, ethical life that adds to the greater good of humanity. AHA’s adjunct organization, The Humanist Society, is a religious 501(c)(3) organization, incorporated in 1939 under the laws of California to issue charters anywhere in the world and to train and certify Humanist clergy. The Humanist Society specifically trains and certifies citizens to deliver secular invocations before government bodies across the country. Three of the individual plaintiffs are ordained as Humanist clergy by The Humanist Society.

*Amicus curiae* Unitarian Universalist Association (“UUA”) comprises more than 1,000 Unitarian Universalist congregations nationwide. The UUA includes in its fellowshiped ministry humanists and non-theists.

The American Ethical Union (“AEU”) is a national nonprofit membership organization based in New York, NY, with over 24 member groups in 12 states and the District of Columbia, and over 2,300 members and supporters. Founded in 1889,

the AEU is a federation of congregations known as “Ethical Societies” that are nontheistic, that is, the organization takes no stand on the existence or non-existence of deity, and humanistic. Our groups are 501(c)(3) religious organizations, and the national body trains and certifies professional clergy, known as “Leaders,” who officiate for weddings, memorial services, and other rites of passage as well as deliver nontheistic invocations for all manner of public events.

### **STATEMENT OF THE ISSUES**

Does the government violate the Establishment Clause of the First Amendment, and Equal Protection Clause of the Fourteenth Amendment, when it categorically excludes atheists and Humanists from delivering secular invocations as part of legislative invocation practices?

### **SUMMARY OF THE ARGUMENT**

At its core, the Establishment Clause of the First Amendment mandates religious neutrality. It prevents the government from favoring some religions over others, and religion over nonreligion. Further, Supreme Court precedent holds that Humanism and atheism constitute “religions” for Establishment Clause purposes. The Supreme Court has made clear that even in the context of legislative prayer — a unique exception to the Establishment Clause’s general prohibition against governmental prayer — the practice must be inclusive and nondiscriminatory towards religious minorities and nonbelievers. The District Court’s ruling, which prohibits the

government from categorically excluding atheists and Humanists from delivering a solemnizing secular invocation before government sessions, adheres to that mandate. It also adheres to the Equal Protection mandate, which requires the most exacting judicial scrutiny in cases involving religious discrimination.

The District Court correctly understood that an “invocation” need not involve the divine or supernatural, and that secular invocations are no less solemnizing than their theistic counterparts. Indeed, incontrovertible evidence shows that secular invocations are not only theoretically feasible, but in fact have been utilized widely to solemnize and lend gravity to government meetings.

## **ARGUMENT**

### **I. Secular Humanism is a “religion” for constitutional and practical purposes.**

#### **A. The District Court’s ruling is in accord with decades of precedent holding that Secular Humanism must be treated as a religion for constitutional purposes.**

Supreme Court precedent requires that Secular Humanism be treated as a religion for First Amendment purposes. *See Torcaso v. Watkins*, 367 U.S. 488, 495 & n.11 (1961) (explicitly recognizing “Secular Humanism” as a “religion” for First Amendment purposes). As this Court recognized in *Glassroth v. Moore*: “The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess a belief in the Judeo-Christian God; indeed, it includes the lack of any faith.” 335 F.3d 1282, 1294 (11th Cir. 2003). In

striking down a statute requiring notaries to affirm their belief in the existence of God, the Supreme Court in *Torcaso* declared that the government must not “aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” 367 U.S. at 495 & n.11.

Establishment Clause protection undoubtedly “extends beyond intolerance among Christian sects – or even intolerance among ‘religions’ – to encompass intolerance of the disbeliever and the uncertain.” *Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985). The Establishment Clause has long guaranteed “religious liberty and equality to ‘the infidel, the atheist, or the adherent of a non-Christian faith.’” *Allegheny v. ACLU*, 492 U.S. 573, 589-90, 593 (1989) (citation omitted).

It is therefore apodictic that the government must treat atheism and Humanism as favorably as theistic religions. *See Torcaso*, 367 U.S. at 495 & n.11; *Smith v. Board of Sch. Comm'rs of Mobile County*, 827 F.2d 684, 689 (11th Cir. 1987) (assuming Secular Humanism is a religion for Establishment Clause purposes); *Wash. Ethical Soc’y v. District of Columbia*, 249 F.2d 127, 128 (D.C. Cir. 1957) (nontheistic ethical society qualified for tax exemption as church); *American Humanist Association & Kwame Jamal Teague v. Frank L. Perry, et al.*, No. 5:15-CT-3053-BO, 2018 WL 1701356, at \*4 (E.D.N.C. Mar. 29, 2018) (treating Humanism as a religion for Establishment Clause and Equal Protection Clause purposes and concluding that prison department violated both by refusing to recognize Humanism and authorize

Humanist study group meetings on the same terms as theistic faiths); *Am. Humanist Ass'n v. Perry*, 2017 U.S. Dist. LEXIS 38600, \*2 n.1 (E.D.N.C. Mar. 17, 2017) (“the Supreme Court has held that Secular Humanism is, a religion”); *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1284 (D. Or. 2014) (recognizing that Humanism is a religion for Establishment Clause and Equal Protection Clause purposes). See also *Gillette v. United States*, 401 U.S. 437, 439, 461-62 (1971) (entertaining claim “based on a humanist approach to religion”); *McDaniel v. Paty*, 435 U.S. 618, 633 n.4 (1978) (Brennan, J., concurring) (condemning discrimination “among religions” including “*humanistic faiths*”) (emphasis added); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 716 (1994) (O'Connor J., concurring) (“A draft law may exempt conscientious objectors, but it may not exempt conscientious objectors whose objections are based on theistic belief (such as Quakers) as opposed to nontheistic belief (such as Buddhists) or atheistic belief”); *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring) (a policy that treats theistic religions similarly is not sufficient to avoid Establishment Clause concerns because many religions are non-theistic).

The U.S. District Court of Oregon correctly ruled that the law was “clearly established” as of 2014 that “Secular Humanism is a religion for Establishment Clause purposes,” and thus denied federal officials qualified immunity for refusing to recognize Humanism and authorize Humanist group meetings in prisons. *American Humanist Ass'n*, 63 F. Supp. 3d at 1284, 1286-87. It has indeed been

well settled that “religious beliefs protected by the . . . Establishment Clauses need not involve worship of a supreme being.” *Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013). The “Supreme Court has recognized atheism as equivalent to a ‘religion’ for purposes of the First Amendment on numerous occasions.” *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005).

In sum, the District Court properly understood that the “disparate treatment of theistic and non-theistic religions is as offensive to the Establishment Clause as disparate treatment of theistic religions.” *Am. Humanist Ass’n*, 63 F. Supp. 3d at 1283 (citation omitted). *See Williamson v. Brevard Cty.*, 276 F. Supp. 3d 1260, 1281 (M.D. Fla 2017) (“the Supreme Court and other courts have recognized atheism and Humanism as religions entitled to First Amendment protection.”) (citing *Torcaso*). Reversal of this sound ruling would not only place this Court directly at odds with Supreme Court and Eleventh Circuit precedent, *supra*, but it would also place this Court directly at odds with the authority of the other circuits and their district courts, including the:

- **First Circuit**

- *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 850, 854 (1st Cir. 1980) (Secular Humanism may be a religion)
- *Bates v. Commander, First Coast Guard Dist.*, 413 F.2d 475, 479-80 (1st Cir. 1969) (religion need not be based on belief in a “supernatural deity”) (citing *United States v. Seeger*, 380 U.S. 163, 166, 174-76 (1965))

- *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125, 1143 (D. Mass. 1982) (Supreme Court in *Torcaso* “explicitly recognized as religions Buddhism, Taoism, Ethical Culture and Secular Humanism”)

- **Second Circuit**

- *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439-40 (2d Cir. 1981) (a “religion” “need not be founded on a belief” in a supreme being, as the Supreme Court “stated that several non-theistic belief-systems are *commonly recognized* as ‘religions,’ including . . . *Secular Humanism*.”) (citing *Torcaso*) (emphasis added)
- *United States v. Seeger*, 326 F.2d 846, 852-53 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965) (“a requirement of belief in a Supreme Being . . . cannot embrace all those faiths which can validly claim to be called ‘religious.’ Thus it has been noted that, among other *well-established* religious sects, Buddhism, Taoism, Ethical Culture and *Secular Humanism* do not teach a belief in the existence of a Supreme Being.”) (citing *Torcaso*) (emphasis added)
- *Equal Opportunity Emp't Comm'n v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 397 (E.D.N.Y. 2016) (citing *Torcaso* as “characterizing ‘Buddhism, Taoism, Ethical Culture, [and] Secular Humanism’ as religions”)
- *Hatzfeld v. Eagen*, 2010 U.S. Dist. LEXIS 139758, \*17-18 (N.D.N.Y. 2010) (“Atheists are protected by the First Amendment.”)



- **Third Circuit**

- *Real Alts., Inc. v. Sec'y of HHS*, 867 F.3d 338, 349 (3d Cir. 2017) (citing Seventh Circuit precedent for the proposition that Humanism is a religion)
- *Fallon v. Mercy Catholic Med. Ctr.*, 2017 U.S. App. LEXIS 25241, \*6-7 (3d Cir. Dec. 14, 2017) (noting that the Supreme Court “made clear that belief in God or divine beings was not necessary; nontheistic beliefs could also be religious”)
- *Fields v. Speaker of the Pa. House of Representatives*, 251 F. Supp. 3d 772, 775-76 (M.D. Pa. 2017) (treating Humanism as religious for purposes of challenge to legislative prayer practice)
- *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 440-41 (M.D. Pa. 2015) (“secular humanism” is a religion)

- **Fourth Circuit**

- *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 411 (4th Cir. 2005) (Motz, J., concurring) (“The Supreme Court has long recognized that some religions practiced in this country ‘do not teach what would generally be considered a belief in the existence of God.’”) (quoting *Torcaso*)
- *United States v. Eades*, 430 F.2d 1300, 1301-02 (4th Cir. 1970) (“belief in a Supreme Being” is not necessary) (citing *Welsh v. United States*, 398 U.S. 333, 342-43 (1970))
- *Perry*, 2017 U.S. Dist. LEXIS 38600, \*2 n.1 (“the Supreme Court has held that Secular Humanism is, a religion”) (citing *Torcaso* and *Myers*); *see also*

*Perry*, 2018 WL 1701356, at \*4 (treating Humanism as a religion on summary judgment)

- *Coward v. Robinson*, 2017 U.S. Dist. LEXIS 138263, \*44 (E.D. Va. Aug. 28, 2017) (“As the Supreme Court has recognized, there are many religions in this country that ‘do not teach what would generally be considered a belief in the existence of God’ including ‘. . . Secular Humanism’”) (quoting *Torcaso*)
- *Desper v. Ponton*, 2012 U.S. Dist. LEXIS 166546, \*5-6 (E.D. Va. 2012) (“sincerely held beliefs need not be . . . based on the existence of a supreme being [*Torcaso* and *Myers*] . . . [A]nd, as the Supreme Court noted in . . . *McCreary*, [] such beliefs may even be encompassed in the practice of atheism.”) (internal citations omitted); *Muhammad v. Wade*, 2011 U.S. Dist. LEXIS 22234, \*14 (E.D. Va. Mar. 2, 2011) (same)
- *Crockett v. Sorenson*, 568 F. Supp. 1422, 1425 (W.D. Va. 1983) (“secular humanism is a religion”)

- **Fifth Circuit**

- *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.”) (citing *Seeger* and *Torcaso*)

- *Young v. Sw. Sav. & Loan Assoc.*, 509 F.2d 140, 142 (5th Cir. 1975) (Atheism is a religion under Title VII)
- *ACLU v. Eckels*, 589 F. Supp. 222, 227, 239 n.20 (S.D. Tex. 1984) (“The Supreme Court recognized Humanism as a religion”)

- **Seventh Circuit**

- *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) (“If we think of religion as taking a position on divinity, then atheism is indeed a form of religion.”)
- *United States v. Bush*, 509 F.2d 776, 780-84 (7th Cir. 1975) (en banc) (finding religious the ethical beliefs of an Atheist)
- *Kaufman v. Pugh*, 2014 U.S. Dist. LEXIS 84532, \*5 (W.D. Wis. 2014) (“There is a colorable argument that defendants were violating clearly established law by refusing to allow prisoners to designate atheism as a religious preference.”)

- **Eighth Circuit**

- *Chess v. Widmar*, 635 F.2d 1310, 1318 n.10 (8th Cir. 1980) (“Secular Humanism” is a “religion”); *In re Weitzman*, 426 F.2d 439, 457 & n.5 (8th Cir. 1970) (same)
- *United States v. Levy*, 419 F.2d 360, 366 (8th Cir. 1969) (finding that nontheistic beliefs “in essence a community of the human conscience, requiring men to do that which is right,” constitute religion under *Seeger*)
- *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 829 (D. Neb. 2016) (“humanism or atheism . . . have been found to be ‘religious’”)

- *Loney v. Scurr*, 474 F. Supp. 1186, 1194 (S.D. Iowa 1979) (citing *Torcaso* as holding that Secular Humanism is a religion)

- **Ninth Circuit**

- *Newdow v. U.S. Cong.*, 313 F.3d 500, 504 n.2 (9th Cir. 2002) (“recognized religions exist that do not teach a belief in God, e.g., secular humanism.”)
- *Kong v. Scully*, 341 F.3d 1132, 1138 (9th Cir. 2003) (quoting *Seeger*) (stressing that belief in a supreme being is not required to be considered a religion)
- *United States v. Ward*, 989 F.2d 1015, 1017-18 (9th Cir. 1993) (recognizing that religion need not be theistic)
- *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988) (“atheistic beliefs” are protected “against religious discrimination.”).<sup>1</sup>
- *McDonald v. W. Contra Costa Narcotics Enf’t Team*, 2015 U.S. Dist. LEXIS 36125, \*6-7 (N.D. Cal. Mar. 20, 2015) (citing Seventh Circuit precedent for proposition that Atheism is a religion)
- *Conner v. Tilton*, 2009 U.S. Dist. LEXIS 111892, \*18-19 (N.D. Cal. Dec. 2, 2009) (“theistic system of beliefs is not an essential requirement of a religion.”) (citing *Torcaso*)

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<sup>1</sup> See also *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1534 (9th Cir. 1985) (noting without deciding that “Secular humanism may be a religion”); *and id.* at 1537 (Canby, J., concurring) (suggesting that an organized group of Secular Humanists is religious for First Amendment purposes).

- *O'Connor v. California*, 855 F. Supp. 303, 307-08 (C.D. Cal. 1994) (“even atheism falls within the protection of the First Amendment.”) (citation omitted)

- **Tenth Circuit**

- *Wells v. City & Cty. of Denver*, 257 F.3d 1132, 1152 (10th Cir. 2001) (assuming Atheism is a religion for First Amendment purposes)

- **D.C. Circuit**

- *Wash. Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 128 (D.C. Cir. 1957) (nontheistic ethical society qualified for tax exemption as church)

**B. Secular Humanism holds a central position in its adherents' lives comparable to theistic religions.**

Apart from the Supreme Court and circuit court cases expressly holding that Humanism and atheism constitute “religions” for First Amendment purposes, *supra*, the Supreme Court has long forbidden distinctions between religious and secular beliefs that hold the same place in adherents' lives. *E.g.*, *Welsh*, 398 U.S. at 342-43 (moral or ethical beliefs about what is right and wrong held with the strength of traditional religious convictions qualify as “religious” beliefs); *Seeger*, 380 U.S. at 166, 174-76. In *Seeger*, the Court held that while a “religion” can involve belief in “a supernatural deity,” it also includes “a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace.” *Id.* at 174. Much like Humanism, *Seeger*'s was a “belief in and devotion

to goodness and virtue for their own sakes and a religious faith in a purely ethical creed.” *Id.* at 166.

Secular Humanism is comprehensive in nature and explores fundamental and ultimate questions of life, existence, and even end of life.<sup>2</sup> Humanism has a formal structure akin to many religions, with clergy (usually known as celebrants), chaplains, and entities dedicated to the practice of Humanism, such as the American Ethical Union (based on the Ethical Culture movement founded in 1876) and the Society for Humanistic Judaism, among others.<sup>3</sup>

AHA’s adjunct organization, The Humanist Society, is a religious 501(c)(3) organization, incorporated in 1939 to issue charters anywhere in the world and to train and certify Humanist clergy. The Humanist Society endorses and trains Humanist celebrants, chaplains, lay leaders, and invocators to conduct observances across the nation and worldwide, including weddings, commitment/same-sex unions, memorial services, baby namings, and other life-cycle events.<sup>4</sup> Humanist celebrants

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<sup>2</sup> See also British Humanist Association, *Death, Dying And Meaning, Trainer’s Course Book* (2012), <https://humanism.org.uk/wp-content/uploads/death-dying-and-meaning-trainer-course-book.pdf>.

<sup>3</sup> American Ethical Union, “About Us,” <https://aeu.org/who-we-are/ethical-humanism/> (last visited Mar. 5, 2018); Society for Humanistic Judaism, “About SHJ,” <http://www.shj.org/about-shj/> (last visited Mar. 5, 2018).

<sup>4</sup> Humanist Society, <http://thehumanistsociety.org/> (last visited Feb. 27, 2018). The Association for Professional Chaplains recognizes The Humanist Society as an endorser of chaplains. *Humanist Society Guidelines*, <https://perma.cc/FD8A-PWW9> (<http://thehumanistsociety.org/about/guidelines/>) (last visited Jan. 31, 2018).

are accorded the same rights and privileges granted by law to priests, ministers, and rabbis of traditional theistic religions.<sup>5</sup>

**C. Secular Humanism is recognized as a religion by government bodies and private entities.**

The inclusion of atheists and Humanists within the realm of “religion” has become the standard within governmental activity. The federal Bureau of Prisons (BOP) officially recognizes Humanism as a religion and provides Humanist inmates the same rights as other theistic religions for religious programming purposes.<sup>6</sup> Other federal departments recognize Humanism as a religion, including the Internal Revenue Service,<sup>7</sup> the Department of Defense,<sup>8</sup> and the Department of Veterans Affairs.<sup>9</sup> State prison systems and facilities also recognize Humanism as

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<sup>5</sup> American Humanist Association, “Become a Humanist Celebrant,” <https://americanhumanist.org/get-involved/become-a-humanist-celebrant/> (last visited Mar. 5, 2018).

<sup>6</sup> *American Humanist Association, et al v. Perry, et al.*, 5:15-ct-03053-BO, DE-93-1 (E.D.N.C. Oct. 13, 2017), <https://ecf.nced.uscourts.gov/doc1/13115642124>. See also <https://perma.cc/UH63-SM8L> (BOP’s *Manual on Inmate Beliefs and Practices*, which includes a detailed section on Humanism).

<sup>7</sup> IRS Manual, 7.25.3.6.5 (02-23-1999), *Religious Belief Defined*, <https://perma.cc/JRV5-6QKA> (see also [https://www.irs.gov/irm/part7/irm\\_07-025-003](https://www.irs.gov/irm/part7/irm_07-025-003)).

<sup>8</sup> Religion News Service, *Department of Defense Expands its list of recognized religions* (Apr. 21, 2017), <http://religionnews.com/2017/04/21/defense-department-expands-its-list-of-recognized-religions/>; AHA, *Faith and Belief Codes For Reporting Personnel Data of Service Members*, <https://perma.cc/WR4H-5V34>.

<sup>9</sup> Department of Veterans Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, <https://www.cem.va.gov/hmm/emblems.asp> (last visited Jan. 31, 2018).

a religion, including but not limited to the Iowa State Penitentiary,<sup>10</sup> Fort Dodge Correctional Facility,<sup>11</sup> Wisconsin Department of Corrections,<sup>12</sup> Virginia Department of Corrections,<sup>13</sup> and the Mike Durfee State Prison in South Dakota.<sup>14</sup>

The inclusion of atheists and Humanists within the scope of interfaith practice goes beyond the government. Humanist chaplaincies are established at prominent educational institutions including Harvard University, New York University, Yale University, Stanford University, Columbia University, Rutgers University, and American University.<sup>15</sup> Humanist chaplains and clerics can be found in many other capacities as well. Hospitals, for example, sometimes enlist Humanist chaplains to console and advise patients and their families. Humanist celebrants perform weddings, funerals, and other ceremonies that are similar to those in faith-based traditions.<sup>16</sup> Humanist clergy are certified by organizations

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<sup>10</sup> Paul Knupp, *The Story of Humanists Behind Bars* (Dec. 6, 2017), <https://thehumanist.com/commentary/story-humanists-behind-bars>.

<sup>11</sup> The Humanist, *Humanist Inmates in Iowa are Busy Keeping it Real*, <https://thehumanist.com/news/secularism/humanist-inmates-iowa-busy-keeping-real> (Nov. 15, 2017)

<sup>12</sup> *Wisconsin Department of Corrections Opportunities and Options Resource Guide* (March 2017), <https://perma.cc/KVM6-VBNP>, at p.11.

<sup>13</sup> *Perry*, DE-90-4 (Sam Grover Declaration), (<https://perma.cc/RQ8Q-YQFC>), <https://ecf.nced.uscourts.gov/doc1/13115602482>.

<sup>14</sup> *Id.*

<sup>15</sup> *Humanist Chaplaincies*, <http://humanistchaplaincies.org/humanist-chaplaincies/> (last visited Mar. 5, 2018).

<sup>16</sup> The Humanist Society, “About,” <http://thehumanistsociety.org/about/> (last visited Mar. 23, 2018).



such as The Humanist Society, the American Ethical Union, and the Society for Humanistic Judaism.<sup>17</sup>

**II. A legislative prayer practice that categorically excludes secular invocations by atheists and Humanists unduly excludes a growing and influential segment of American society.**

**A. Nontheists are a growing minority in the United States.**

Any invocation practice that excludes atheists and Humanists necessarily excludes an enormous and growing segment of American society. In terms of both religious affiliation and belief, American demographics have been trending steadily in the direction of secularity for at least two decades, to the point that about one in four Americans now identify as religiously unaffiliated.<sup>18</sup> This number goes up to about one in three among those under 30. Both these figures are historic highs.<sup>19</sup> According to Pew, the “unaffiliated” category showed the most growth of any category from 2007 to 2014.<sup>20</sup> These figures on the growth of the religiously unaffiliated are backed up by a separate study, the American Religious Identity Survey (ARIS) conducted by Trinity College in Hartford, Connecticut. ARIS

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<sup>17</sup> The Humanist Society, “Humanist Society Guidelines,” <http://thehumanistsociety.org/about/guidelines/> (last visited Mar. 26, 2018).

<sup>18</sup> Daniel Cox, PhD, Robert P. Jones, PhD, (Sept. 06, 2017) “America’s Changing Religious Identity,” <https://www.ppri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf>.

<sup>19</sup> Pew Research Center, “*America’s Changing Religious Landscape*” (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.

<sup>20</sup> *Id.*

numbers showed the unaffiliated demographic growing from 8.2 percent in 1990 to 15 percent in 2008.<sup>21</sup>

On the subject of God-belief, the ARIS polling showed that almost one in five Americans do not express an affirmative belief in a divinity. Specifically, 69.5 percent state that they believe in God, while 12.1 claim belief in a “higher power,” for a total of 81.6 percent.<sup>22</sup> The remaining 18.4 percent are split between those who affirmatively reject such a belief, those who state there is no way to know, those who are unsure, and those who refuse to answer.<sup>23</sup> Gallup polling, meanwhile, which goes back decades, shows the steady increase in atheist numbers. In response to the question, “Do you believe in God?” only 1 percent answered “No” in 1944 and 1967, but that number rose to 11 percent by 2014.<sup>24</sup>

**B. Many prominent individuals who have made important contributions to society are nontheists.**

Religious skeptics, unwilling to simply accept majoritarian views on questions of God, morality, truth, and authority, have played a vital role in human progress. Throughout history, those willing to challenge dogma have often been the

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<sup>21</sup> *American Religious Identification Survey (ARIS 2008): Summary Report 2009*, [https://commons.trincoll.edu/aris/files/2011/08/ARIS\\_Report\\_2008.pdf](https://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf) (last visited Mar. 23, 2018).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Gallup, “Religion,” *Do You Believe in God?*, <http://news.gallup.com/poll/1690/religion.aspx> (last visited Mar. 26, 2018).

protagonists in humanity's emergence from darkness to modern enlightenment. This is the case not just in the sciences and the arts, where nontheists abound, but even in government, public affairs, and politics.

A quick perusal of the American Humanist Association's list of Humanists of the Year (Humanist individuals who have been honored for their contributions to society) provides a hint of the immense contributions made by nontheists. Among the honorees are Jonas Salk, Carl Sagan, Margaret Sanger, Kurt Vonnegut (who also served as the AHA's honorary president) and many others.<sup>25</sup> Katharine Hepburn, the Oscar-winning actress who boldly proclaimed her atheism even during the Cold War when doing so was far from fashionable, received the AHA's arts award.<sup>26</sup> Neil DeGrasse Tyson accepted the group's award for contributions to science.<sup>27</sup> The conflict created by Charles Darwin's theory of evolution by natural selection, published in 1859 and resulting in immediate condemnation from religious

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<sup>25</sup> American Humanist Association, "Humanist of the Year Awards," <https://americanhumanist.org/what-is-humanism/humanist-of-the-year-awards/> (last visited Mar. 26, 2018).

<sup>26</sup> American Humanist Association, "Humanists Applaud Release of Katharine Hepburn Commemorative Stamp," <https://americanhumanist.org/press-releases/2010-05-humanists-applaud-release-of-katharine-hepburn-commem/> (last visited Mar. 23, 2018).

<sup>27</sup> American Humanist Association, "Celebrated Biologist PZ Myers, Popular Astrophysicist Neil deGrasse Tyson and Other Top Names Headline Humanist Conference," <https://americanhumanist.org/press-releases/2009-05-celebrated-biologist-pz-myers-popular-astrophysicist-neil-degrasse-tyson-and-other-top-names-headline-humanist-conference/> (last visited Mar. 23, 2018).

authorities, is well known, and is emblematic of how science is often seen as incompatible to religious doctrine.<sup>28</sup> Whether this is so or not, the fact that Darwin's theories today stand as the basis for understanding biology (and thus, medicine as well) is testament to the value of a secularity to modern society, regardless of whether one chooses to reject traditional religious doctrine on a personal level.

Few would contest the contributions of nonbelievers to the sciences and the arts, but many would insist that, for better or worse, a fence of piety surrounds the area of government and politics, at least in the United States. This is only partly true, however, as secularity has long existed even there. Even in the founding era, skepticism played an important role. Thomas Paine's "The Age of Reason" can only be described as a polemical challenge to Christian doctrine.<sup>29</sup> Thomas Jefferson, a deist, was overt in his rejection of religious superstition, even advising his nephew to "question even the existence of God."<sup>30</sup> Moreover, as one follows the chronology of American history, one sees religious skeptics throughout the narrative. Elizabeth Cady Stanton and Susan B. Anthony, both vital to the early women's movement,

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<sup>28</sup> Pew Research Center, "Darwin and his Theory of Evolution" <http://www.pewforum.org/2009/02/04/darwin-and-his-theory-of-evolution/> (last visited Mar. 26, 2018).

<sup>29</sup> Thomas Paine National Historical Association, "The Age of Reason-Part I," <http://thomaspaine.org/major-works/the-age-of-reason-part-1.html> (last visited Mar. 26, 2018).

<sup>30</sup> National Archives, "From Thomas Jefferson to Peter Carr, with Enclosure, 10 August 1787," <https://founders.archives.gov/documents/Jefferson/01-12-02-0021> (last visited Mar. 26, 2018).

were both agnostic, with Stanton being boldly critical of Christianity for its role in oppressing women.<sup>31</sup> This tradition is carried forward by modern feminist leaders, such as Betty Friedan, Gloria Steinem and many others.<sup>32</sup> Major figures in civil rights, such as W.E.B. Du Bois and A. Philip Randolph, and gay rights (Harvey Milk, for example) were also freethinkers.<sup>33</sup>

A long and growing list of openly atheist and non-religious elected officials can be found at <http://www.cfequality.org/secular-elected-officials/>. A mere sampling of this list includes:

- Pete Stark (Congress, 1973-2013)
- Barney Frank (Congress, 1981-2013)
- Jared Huffman (U.S. House of Representatives, re-elected in 2016 to a two-year term. This is his third term)
- Jamie Raskin (U.S. House of Representatives, elected to Congress in 2016 after serving a decade in the Maryland State Senate as Majority Whip)

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<sup>31</sup> Internet Encyclopedia of Philosophy, “Elizabeth Cady Stanton (1815-1902),” <http://www.iep.utm.edu/stanton/> (last visited Mar. 26, 2018).

<sup>32</sup> American Humanist Association, “Famous Humanists in History,” <https://americanhumanist.org/what-is-humanism/famous-humanists-in-history/> (last visited Mar. 26, 2018).

<sup>33</sup> Freedom from Religion Foundation, “W.E.B. Du Bois,” <https://ffrf.org/news/day/dayitems/item/14226-w-e-b-du-bois> (last visited Mar. 26, 2018); Freedom from Religion Foundation, “A. Phillip Randolph,” <https://ffrf.org/news/day/dayitems/item/21209-a-philip-randolph> (last visited Mar. 26, 2018); Freedom from Religion Foundation, “Harvey Milk,” <https://ffrf.org/news/day/dayitems/item/14969-harvey-milk> (last visited Mar. 26, 2018).

- Juan Mendez (Arizona State Senate, 2016-present, Arizona State House, 2013-2016)
- Athena Salman (Arizona State House, elected in 2016 to a two-year term)
- Chris Kennedy (Colorado State House elected in 2016 to a two-year term)
- Josh Elliot (Connecticut State House, elected in 2016 to a two-year term)
- Roland Lemar (Connecticut State House, re-elected in 2016 to a two-year term. This is his fourth term)
- Pinny Beebe-Center (Maine State House, re-elected in 2016 to a two-year term)
- William Brownsberger (Massachusetts State Senate, re-elected in 2016 to a two-year term. This is his third term. Brownsberger served in the Massachusetts House of Representatives from 2007-2012)
- Ernie Chambers (Nebraska State Senate, re-elected in 2016 to a four-year term. He has served his this position from 1971 to 2009 and from 2013 to the present)
- Martha Hennessey (New Hampshire State Senate, elected in 2016 to a two-year term. She served one term in the New Hampshire State House, 2015-2016)

- Brandon Phinney (New Hampshire State House, elected in 2016 to a two-year term)
- Tim Smith (New Hampshire State House, re-elected in 2016 to a two-year term. This is his third term)
- Andrew Zwicker (New Jersey General Assembly, elected in 2017 to a two-year term. This is his second term)
- Jeff Barker (Oregon State House, re-elected in 2016 to a two-year term. This is his eighth term)
- Julie Fahey (Oregon State House, elected in 2016 to a two-year term)
- Diego Hernandez (Oregon State House, elected in 2016 to a two-year term)
- Pam Marsh (Oregon State House, elected in 2016 to a two-year term)
- Carolyn Tomei (Oregon House of Representatives 2003-2015)
- Brian Sims (Pennsylvania State House, re-elected in 2016 to a two-year term. This is his third term)
- Warren Kitzmiller (Vermont State House, re-elected in 2016 to a two-year term. This is his tenth term)
- Sam Young (Vermont State House, re-elected in 2016 to a two-year term. This is his fourth term)

- Beth Doglio (Washington State House, elected in 2016 to a two-year term)
- Strom Peterson (Washington State House, re-elected in 2016 to a two-year term. This is his second term)
- Melissa Sargent (Wisconsin State House, re-elected in 2016 to a two-year term. This is her third term)
- Amanda Stuck (Wisconsin State House, re-elected in 2016 to a two-year term. This is her second term)
- Culbert Olson (Governor of California, 1939-1943)
- Jesse Ventura (Governor of Minnesota, 1999-2003)

**C. Despite their growing numbers and contributions to society, nontheists continue to face invidious discrimination in America.**

“Some classifications are more likely than others to reflect deep-seated prejudice.”

*Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Unfortunately, this rings especially true for atheists. Despite all of their numerous contributions, *supra*, nonbelievers face widespread discrimination in American society. A study published in *American Sociological Review* in 2006 ranked atheists as the most disliked and distrusted minority group in the country, below immigrants, Muslims, and gays.<sup>34</sup> An article by

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<sup>34</sup> Penny Edgell, Joseph Gerteis, and Douglas Hartmann, *Atheists as “Other”:* *Moral Boundaries and Cultural Membership in American Society*, 71 *Am. Soc. Rev.* 211, 218 (2006), <http://bit.ly/2daChwS>.



two leading researchers on the rise of secularism noted atheists “are one of the most despised people in the US today.”<sup>35</sup> In 2003, a study revealed that while a significant number of Americans would be reluctant to vote for a well-qualified candidate if they were Muslim (38%), many more expressed reservations about voting for an atheist (52%).<sup>36</sup> Not much has changed, with 42% of Americans stating in 2015 that they still would not vote for an atheist for president.<sup>37</sup> The aforementioned 2008 ARIS report stated that 42.9% of atheists and agnostics had experienced discrimination because of their lack of religious affiliation.<sup>38</sup> The discrimination atheists suffer has resulted in job loss, harassment, death threats, physical violence, and assault.<sup>39</sup> Reversing the District Court’s ruling would serve to perpetuate the notion that marginalizing atheists and Humanists is both politically and socially acceptable.

**III. Nontheistic invocations have been frequently given before governmental bodies across the country in accordance with *Town of Greece*.**

At its core, the Establishment Clause mandates religious neutrality. The Supreme Court declared over fifty years ago that the government must “be a neutral

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<sup>35</sup> Ryan T. Cragun, Barry Kosmin, et al., *On the Receiving End: Discrimination toward the Nonreligious in the United States*, 27 J. Contemp. Religion 105, 105 (2012), <http://bit.ly/2czdyQv>.

<sup>36</sup> The Pew Forum on Religion & Public Life, July 24, 2003: *Many Wary of Voting For an Atheist or a Muslim*, 1, 10-14 (2003).

<sup>37</sup> *Support for Nontraditional Candidates Varies by Religion*, Gallup (Jun. 24, 2015), <http://bit.ly/2d46Z5V>.

<sup>38</sup> Cragun, *supra*, at 111, 114.

<sup>39</sup> Margaret Downey, *Discrimination Against Atheists: The Facts*, 24 *Free Inquiry* No. 4 (2004), <http://bit.ly/2cXO1jc>.

in its relations with groups of religious believers and *non-believers*.” *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 218 (1963) (emphasis added).<sup>40</sup> In *Schempp*, the Supreme Court “rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another.” *Id.* at 216. The Supreme Court recently reiterated that the Establishment Clause demands neutrality between “religion and *nonreligion*.” *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (emphasis added).

There is no exception to this rule for legislative prayer. In *Town of Greece v. Galloway*, the Supreme Court held that a legislative prayer practice, to pass constitutional muster, must be “nondiscriminatory” and inclusive of everyone including atheists. 134 S. Ct. 1811, 1823 (2014). The Court upheld that town’s practice because a “minister or layperson of any persuasion, *including an atheist*, could give the invocation.” *Id.* at 1816 (emphasis added). The Court indicated that a practice would fail if it reflected “an aversion or bias on the part of town leaders against minority faiths.” *Id.* at 1824. The Court admonished that “[i]f the course and practice over time . . . denigrate[s] *nonbelievers* or religious minorities,” it “fall[s] short” of constitutionality. *Id.* at 1823 (emphasis added). A practice that classifies “citizens based on their religious views would violate the Constitution.” *Id.* at 1826. It was relevant to the Court that “[t]he town at no point excluded or

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<sup>40</sup> *Accord Everson v. Bd. of Educ.*, 330 U.S. 1, 9 (1947).

denied an opportunity to a would-be prayer giver.” *Id.* at 1816. The Second Circuit also stressed that the town permitted anyone “to give an invocation, including adherents of any religion, atheists, and the nonreligious,” and it had “never rejected such a request.” *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012).

As a result, the practice of secular invocations has become widespread and commonplace, with atheists and Humanists frequently participating in invocation-giving at the state and local level. In fact, Humanists are formally trained to deliver secular invocations through AHA’s adjunct organization, The Humanist Society.<sup>41</sup> The Humanist Society trains and certifies individuals to deliver solemnizing invocations at government meetings, and defines a “secular invocation” in part as follows: “In a sense it is calling upon all those involved to exercise their humanity in a way that is dignified while allowing the same for others.”<sup>42</sup> Candidates are required to register and apply online and certify that they agree with the Humanist worldview.<sup>43</sup> Invocators must satisfy the Society’s ethical standards.<sup>44</sup>

The purpose of a legislative invocation, according to the Supreme Court, is intended to “lend gravity to the occasion” and “to solemnize the occasion.” *Town of*

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<sup>41</sup> The Humanist Society, <http://thehumanistsociety.org/invocations/> (last visited Feb. 27, 2018).

<sup>42</sup> *Id.*

<sup>43</sup> The Humanist Society, “Give Secular Invocations,” <http://thehumanistsociety.org/invocations/apply/> (last visited Feb. 27, 2018).

<sup>44</sup> The Humanist Society, “Join The Humanist Society,” <http://thehumanistsociety.org/apply/> (last visited Mar. 5, 2018).

*Greece*, 134 S. Ct. at 1823. There is no convincing argument that the conveyance of solemnity, gravity, or inspiration requires theistic references. Whether the author is Shakespeare, Whitman, Thoreau, or a figure less esteemed, many have demonstrated that carefully crafted words, lacking even the slightest hint of a deity, can generate awe, wonder, and profound appreciation. Take for instance, the invocation delivered by Juan Mendez in the Arizona State House of Representatives:

Most prayers in this room begin with a request to bow your heads. I would like to ask that you not bow your heads. I would like to ask that you to [sic] take a moment to look around the room at all of the men and women here, in this moment, sharing together this extraordinary experience of being alive and of dedicating ourselves to working toward improving the lives of the people in our state.

This is a room in which there are many challenging debates, many moments of tension, of ideological division, of frustration. But this is also a room where, as my Secular Humanist tradition stresses, by the very fact of being human, we have much more in common than we have differences. We share the same spectrum of potential for care, for compassion, for fear, for joy, for love...

Carl Sagan once wrote, “For small creatures such as we, the vastness is bearable only through love.” There is, in the political process, much to bear. In this room, let us cherish and celebrate our shared humanness, our shared capacity for reason and compassion, our shared love for the people of our state, for our Constitution, for our democracy — and let us root our policymaking process in these values that are relevant to all Arizonans regardless of religious belief or nonbelief. In gratitude and in love, in reason and in compassion, let us work together for a better Arizona.<sup>45</sup>

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<sup>45</sup> Juan Mendez, *Arizona State House of Representatives* (May 21, 2013), <http://cflfreethought.org/arizona-house-of-representatives-2013-may-21>.

The fact of secular invocations serving a solemnizing purpose is not just theoretical, but well documented. The Connecticut Senate often opens its sessions with nontheistic invocations given by Senate officers.<sup>46</sup> The U.S. House recently permitted a Presbyterian minister to open its session with a prayer that had no theistic references. See 161 Cong. Rec. H5878 (daily ed. Sept. 10, 2015). Other state governments have also opened sessions with solemnizing secular invocations, a mere sample of which include:

- The Colorado House, *House Journal, Seventy-First General Assembly, State of Colorado, First Regular Session 1177* (2017), <http://bit.ly/2BTqY83>
- The Florida House, *3rd Day of Regular Session, Fla. Senate* (Jan. 11, 2018), <http://bit.ly/2HaIxjo>
- The Iowa House, *Iowa Legislature* (April 5, 2017), <http://bit.ly/2o53XWq>
- The Maine House (Feb. 7 2017), <http://bit.ly/2BpQGjb>)
- The Maryland Senate, *7 Journal of Proceedings of the Senate of Maryland, 2015 Regular Session 30*, <http://bit.ly/2o2bK7k>

## CONCLUSION

“One of the great causes which led to the settlement of the American colonies was the desire of the immigrants” that their “belief or disbelief on religious topics

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<sup>46</sup> *E.g.*, Connecticut General Assembly, “Senate Session Transcript for 06/03/2017” (Jun. 3, 2017), <https://www.cga.ct.gov/2017/trn/S/2017STR00603-R00-TRN.htm>; Connecticut General Assembly, “Senate Session Transcript for 06/04/2017” (Jun. 4, 2017), <https://www.cga.ct.gov/2017/trn/S/2017STR00604-R00-TRN.htm>.

should not debar them from rights which the laws afforded to other subjects.” *State v. Powers*, 51 N.J.L. 432, 433-35 (1889) (rejecting argument that “disbelief cannot be called a religious principle”). In the North Carolina Convention on the adoption of the U.S. Constitution, James Iredell, later a Supreme Court Justice, said: “It is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?” *Torcaso*, 367 U.S. at 495 n.10. For the foregoing reasons, this Court should affirm the order of the District Court.

Dated: April 24, 2018

Respectfully submitted,

/s/ Monica L. Miller

**MONICA L. MILLER**

American Humanist Association

1821 Jefferson Place, NW

Washington, DC 20036

Telephone: (202) 238-9088

mmiller@americanhumanist.org

*Counsel for Amici Curiae*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 6,299 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: April 24, 2018

/s/ Monica L. Miller

MONICA L. MILLER

*Counsel for Amici Curiae*

## **CERTIFICATE OF FILING AND SERVICE**

I hereby certify that, on this 24<sup>th</sup> day of April, 2018, I caused the foregoing to be filed with the Clerk of the Court, via the CM/ECF System, which will send notice of such filing to all registered users.

I further certify that the required paper copies have been dispatched to the Clerk of the Court, via United Parcel Service, for delivery within three business days.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Priscilla C. Winkler

Priscilla C. Winkler

GIBSON MOORE APPELLATE SERVICES, LLC

206 East Cary Street

Richmond, VA 23219

(804) 249-7770