

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

**BRIAN FIELDS, PAUL TUCKER, DEANA WEAVER, SCOTT RHOADES,
JOSHUA NEIDERHISER, REV. DR. NEAL JONES, RICHARD KINIRY,
PENNSYLVANIA NONBELIEVERS, INC., DILLSBURG AREA FREETHINKERS,
LANCASTER FREETHOUGHT SOCIETY, AND PHILADELPHIA ETHICAL SOCIETY,**

Plaintiffs - Appellees/Cross – Appellants,

v.

**SPEAKER, PARLIAMENTARIAN, AND DIRECTOR OF SPECIAL EVENTS OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND REPRESENTATIVES FOR
PENNSYLVANIA HOUSE DISTRICTS 92, 95, 97, 165, 167, 193, AND 196,**

Defendants - Appellants/ Cross - Appellees,

and

REPRESENTATIVE FOR PENNSYLVANIA HOUSE DISTRICT 182,

Non-Appealing, Nonparticipating Defendant.

**ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
CASE NO. 16-1764, HON. CHRISTOPHER C. CONNER**

**BRIEF OF AMERICAN HUMANIST ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF APPELLEES BRIAN FIELDS, ET AL.**

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United States Court of Appeals for the Third Circuit

**Corporate Disclosure Statement and
Statement of Financial Interest**

18-2974 & 18-3167

No. _____

BRIAN FIELDS, et al.,
Plaintiffs—Appellees,

v.

SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, et al.,
Defendants—Appellants.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, American Humanist Association
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

s/Monica L. Miller
(Signature of Counsel or Party)

Dated: 03/01/2019

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The American Humanist Association (“AHA”) is a national nonprofit membership organization based in Washington, D.C., with over 239 local chapters and affiliates in 43 states and the District of Columbia, and over 34,000 members and supporters, including many in Pennsylvania. 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. Two of the individual plaintiffs are ordained as Humanist clergy by The Humanist Society.

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 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 a legislative prayer practice must be inclusive and nondiscriminatory towards religious minorities and nonbelievers. The District Court’s ruling, which forbids 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. (J.A. 948, 963, 1203-32).

ARGUMENT

I. Secular Humanism is treated as a “religion” for constitutional and practical purposes.

A. The District Court’s ruling harmonizes 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) (recognizing “Secular Humanism” as a “religion” for First Amendment purposes). 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.” *Id.*¹ This Court recently reiterated that Supreme Court precedent makes “clear that belief in God or divine beings was not necessary; nontheistic beliefs could also be religious.” *Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487, 491 (3d Cir. 2017) (citations omitted).

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

¹ The *Torcaso* ruling was based on the Establishment Clause, not the “no religious test” clause of Article 6, Clause 3 of the U.S. Constitution. 367 U.S. at 495.

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; *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); *Fallon*, 877 F.3d at 491; *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); *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 440-41 (M.D. Pa. 2015) (“secular humanism” is a religion); *see also Smith v. Bd. 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 v. Perry*, 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).

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 Clause[] 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 “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).

Separately, the Equal Protection Clause also “prohibits the Government from impermissibly discriminating among persons based on religion.” *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (citation omitted). Atheism and Humanism constitute “religions” for Equal Protection purposes as well. *See Perry*, 2018 WL 1701356, at *4; *American Humanist Association*, 63 F. Supp. 3d at 1284. In *American Humanist Association*, the U.S. District Court of Oregon found that by “[a]llowing followers of other faiths to join religious group meetings while denying [Humanist inmates] the same privilege is discrimination on the basis of religion.” 63 F. Supp. 3d at 1284. The U.S. District Court of North Carolina agreed that discriminating against Humanists violates the Equal Protection Clause. 2018 WL 1701356, at *4. *See also TWA v. Hardison*, 432 U.S. 63, 90 n.4 (1977) (Marshall, J., dissenting) (noting that the “EEOC has sensibly defined [religious practitioner] to include atheists”); *Hatzfeld v. Goord*, 2007 U.S. Dist. LEXIS 98782, *13-14 (N.D.N.Y. Feb. 5, 2007) (“atheist” is a religion under Equal Protection Clause); *Goguen v. Clifford*, 304 F. Supp. 958, 961-62 (D.N.J. 1969) (“atheists or heretics” are entitled to equal protection).

Accordingly, the District Court in the present case properly held that the House policy, by categorically excluding Humanists and atheists from delivering secular invocations, unconstitutionally “discriminates among invocation presenters on the basis of religion.” (J.A. 38). *Accord 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*), *appeal docketed*, No. 17-15769 (11th Cir. Jan. 2, 2018). Reversal of this sound ruling would not only place this Court directly at odds with binding Supreme Court and Third Circuit precedent, *supra*, but it would also place this Court directly at odds with the authority of the other circuits and their district courts, as follows:

- **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.”)

- **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) (opinion of Lay, J.) (same)

- *United States v. Levy*, 419 F.2d 360, 366 (8th Cir. 1969) (finding that nontheistic beliefs in “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.”)²
- *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)

² 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”); *id.* at 1537 (Canby, J., concurring) (suggesting that an organized group of Secular Humanists is religious for First Amendment purposes).

- *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*)
- *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)

- **Eleventh Circuit**

- *Glassroth v. Moore*, 335 F.3d 1282, 1294 (11th Cir. 2003) (“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.”).
- *Smith*, 827 F.2d at 689 (assuming Secular Humanism is a religion)

- **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.³ 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.⁴

³ 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>.

⁴ 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).

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 naming ceremonies, and other life-cycle events.⁵ Humanist celebrants are accorded the same rights and privileges granted by law to priests, ministers, and rabbis of traditional theistic religions.⁶

C. Secular Humanism is treated 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.⁷ Other federal departments recognize Humanism as a

⁵ Humanist Society, <http://thehumanistsociety.org/> (last visited Feb. 28, 2019). 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).

⁶ American Humanist Association, *Become a Humanist Celebrant*, <https://americanhumanist.org/get-involved/become-a-humanist-celebrant/> (last visited Mar. 5, 2018).

⁷ See <https://perma.cc/UH63-SM8L>.

religion, including the Internal Revenue Service,⁸ the Department of Defense,⁹ and the Department of Veterans Affairs.¹⁰

The inclusion of 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.¹¹ Hospitals sometimes enlist Humanist chaplains to console and advise patients and their families.¹² Humanist celebrants perform weddings, funerals, and other ceremonies that are similar to those in faith-based traditions.¹³

⁸ IRS Manual, 7.25.3.6.5 (02-23-1999), *Religious Belief Defined*, <https://perma.cc/JRV5-6QKA>.

⁹ 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>.

¹⁰ 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).

¹¹ *Humanist Chaplaincies*, <http://humanistchaplaincies.org/humanist-chaplaincies/> (last visited Mar. 5, 2018).

¹² Joshua Berg, *A Secular Humanist Chaplain Learns to Pray* <http://www.professionalchaplains.org/content.asp?pl=463&sl=823&contentid=823> (last visited Feb. 28, 2019).

¹³ The Humanist Society, *About*, <http://thehumanistsociety.org/about/> (last visited Mar. 23, 2018).

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.¹⁴ This number goes up to about one in three among those under 30. Both these figures are historic highs.¹⁵ According to Pew, the “unaffiliated” category showed the most growth of any category from 2007 to 2014.¹⁶

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 numbers showed the unaffiliated demographic growing from 8.2 percent in 1990 to 15 percent in 2008.¹⁷

¹⁴ Daniel Cox, PhD, Robert P. Jones, PhD, *America’s Changing Religious Identity* (Sept. 06, 2017), <https://www.ppri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf>.

¹⁵ Pew Research Center, *America’s Changing Religious Landscape* (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.

¹⁶ *Id.*

¹⁷ *American Religious Identification Survey (ARIS 2008): Summary Report 2009*, https://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf (last visited Mar. 23, 2018).

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.¹⁸ 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.¹⁹ 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 2014.²⁰

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 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.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Gallup, “Religion,” *Do You Believe in God?*, <http://news.gallup.com/poll/1690/religion.aspx> (last visited Mar. 26, 2018).

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.²¹ 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.²² Scientist and television personality Neil DeGrasse Tyson accepted the group's award for contributions to science.²³

The conflict created by Charles Darwin's theory of evolution by natural selection, published in 1859 and resulting in immediate condemnation from religious authorities, is well known, and is emblematic of how science is often seen as incompatible to religious doctrine.²⁴ Whether this is so or not, the fact that Darwin's theories today stand as the

²¹ American Humanist Association, <https://americanhumanist.org/what-is-humanism/humanist-of-the-year-awards/> (last visited Mar. 26, 2018).

²² 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).

²³ 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).

²⁴ 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).

basis for understanding biology (and thus, medicine as well) is testament to the value of 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.²⁵ Thomas Jefferson, a deist, was overt in his rejection of religious superstition, even advising his nephew to "question even the existence of God."²⁶ 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, were both agnostic, with Stanton being boldly critical of Christianity for its role in oppressing women.²⁷ This tradition is carried forward by modern feminist leaders,

²⁵ 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).

²⁶ 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).

²⁷ Internet Encyclopedia of Philosophy, *Elizabeth Cady Stanton (1815-1902)*, <http://www.iep.utm.edu/stanton/> (last visited Mar. 26, 2018).

such as Betty Friedan, Gloria Steinem and many others.²⁸ 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.²⁹

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:

- Jared Huffman (U.S. House of Representatives, re-elected in 2018 to a two-year term. This is his fourth term)
- Jamie Raskin (U.S. House of Representatives, re-elected to Congress in 2018 and has served a decade in the Maryland State Senate as Majority Whip)
- Jennifer Jermaine (Arizona House of Representatives, elected in 2018 to a two-year term)
- Bill Quirk (California State Assembly, re-elected in 2018 to a two-year term. This is his fourth term)
- Chris Kennedy (Colorado General Assembly, re-elected in 2018 to a two-year term. This is his second term)

²⁸ American Humanist Association, *Famous Humanists in History*, <https://americanhumanist.org/what-is-humanism/famous-humanists-in-history/> (last visited Mar. 26, 2018).

²⁹ 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); *A. Phillip Randolph*, <https://ffrf.org/news/day/dayitems/item/21209-a-philip-randolph> (last visited Mar. 26, 2018); *Harvey Milk*, <https://ffrf.org/news/day/dayitems/item/14969-harvey-milk> (last visited Mar. 26, 2018).

- Josh Elliot (Connecticut General Assembly, re-elected in 2018 to a two-year term. This is his second term)
- Roland Lemar (Connecticut General Assembly, re-elected in 2018 to a two-year term. This is his fifth term)
- Carlos Guillermo Smith (Florida House of Representatives, re-elected in 2018 to a two-year term. This is his second term)
- William Brownsberger (Massachusetts State Senate, re-elected in 2018 to a two-year term)
- Jim Hawkins (Massachusetts House of Representatives, re-elected in 2018 to a two-year term. This is his second term)
- Jeff Irwin (Michigan State Senate, elected in 2018 to a four-year term. Irwin served in the Michigan State House from 2010 to 2017)
- Ernie Chambers (Nebraska State Senate, re-elected in 2016 to a four-year term)
- Megan Hunt (Nebraska State Senate, elected in 2018 to a four-year term)
- Chris Balch (New Hampshire House of Representatives, elected in 2018 to a two-year term)
- John Bordenet (New Hampshire House of Representatives, re-elected in 2018 to a two-year term. This is his third term)
- Sherry Frost (New Hampshire House of Representatives, re-elected in 2018 to a two-year term. This is her second term)
- Amanda Gourgue (New Hampshire House of Representatives, re-elected in 2018 to a two-year term. This is her second term)
- 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)

- Jan Schmidt (New Hampshire House of Representatives, re-elected in 2018 to a two-year term. This is her third term. She served one term in the New Hampshire State House from 2012 to 2014)
- Susan Smith (New Hampshire House of Representatives, re-elected in 2018 to a two-year term. This is her sixth term)
- Tim Smith (New Hampshire House of Representatives, re-elected in 2018 to a two-year term. This is his fourth term)
- Heidi Swank (Nevada State Assembly, re-elected in 2018 to a two-year term. This is her second term)
- Andrew Zwicker (New Jersey General Assembly, elected in 2017 to a two-year term. This is his second term)
- Harvey Epstein (New York State Assembly, re-elected in 2018 to a two-year term. This is his second term)
- Jeff Barker (Oregon House of Representatives, re-elected in 2018 to a two-year term. This is his ninth term)
- Julie Fahey (Oregon House of Representatives, re-elected in 2018 to a two-year term. This is her second term)
- Mitch Greenlick (Oregon House of Representatives, re-elected in 2018 to a two-year term. This is his ninth term)
- Diego Hernandez (Oregon House of Representatives, re-elected in 2018 to a two-year term. This is his second term. Hernandez is also an elected board member of the Reynolds School District)
- Pam Marsh (Oregon House of Representatives, re-elected in 2018 to a two-year term. This is her second term)
- Marty Wilde (Oregon House of Representatives, elected in 2018 to a two-year term)

- Brian Sims (Pennsylvania House of Representatives, re-elected in 2018 to a two-year term. This is his fourth term)
- Jon Rosenthal (Texas House of Representatives, elected in 2018 to a two-year term)
- Warren Kitzmiller (Vermont House of Representatives, re-elected in 2018 to a two-year term. This is his eleventh term)
- Dick McCormack (Vermont State Senate, re-elected in 2018 to a two-year term. This is his seventh term)
- Mona Das (Washington State Senate, elected in 2018 to a four-year term)
- Amanda Stuck (Wisconsin State Assembly, re-elected in 2018 to a two-year term)
- Charles Pelkey (Wyoming House of Representatives, re-elected in 2018 to a two-year term)
- 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.³⁰ An article by two leading researchers on the rise of secularism noted atheists “are one of the most despised people in the US today.”³¹ 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%).³²

Not much has changed, with 42% of Americans stating in 2015 that they still would not vote for an atheist for president.³³ The 2008 ARIS report stated that 42.9% of atheists and agnostics had experienced discrimination because of their lack of religious affiliation.³⁴ The discrimination atheists suffer has resulted in job loss, harassment, death threats, physical violence, and assault.³⁵

Indeed, nontheistic attorneys are subjected to vitriol and death threats for bringing Establishment Clause cases. *E.g.*, Hemant Mehta, *Christians Are Harassing the Atheist Lawyer Who Won the Pensacola Cross Case*, Patheos (June

³⁰ 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>.

³¹ 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>.

³² The Pew Forum on Religion & Public Life, July 24, 2003: *Many Wary of Voting For an Atheist or a Muslim*, 1, 10-14 (2003).

³³ Gallup, *Support for Nontraditional Candidates Varies by Religion* (Jun. 24, 2015), <http://bit.ly/2d46Z5V>.

³⁴ Cragun, *supra*, at 111, 114.

³⁵ Margaret Downey, *Discrimination Against Atheists: The Facts*, 24 *Free Inquiry No.* 4 (2004), <http://bit.ly/2cXO1jc>.

21, 2017), <https://perma.cc/6KD6-LLYR> (discussing threats and vitriol against the undersigned, including “Atheist moron hypocrit [sic]. Needs to go bye bye,” and “run her out of town”); David Gonzales, *Pensacola Man's Facebook Post Targets AHA Lawyer In Cross Case, Ignites Firestorm*, ABC3, WEARTV.com (June 22, 2017), <https://perma.cc/5XSW-SPMY> (“Some attack Miller with derogatory names and gun emojis. One comment even asks for violence wishing her death.”).

Reversing the District Court’s ruling would only perpetuate the notion that marginalizing atheists and Humanists is politically and socially acceptable.

III. In accordance with *Town of Greece*, nontheistic invocations are frequently given before governmental bodies across the country.

The Establishment Clause mandates that the government “be a neutral in its relations with groups of religious believers and *non-believers*.” *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 218 (1963) (emphasis added).³⁶ 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. It is now firmly settled that the Establishment Clause demands neutrality between “religion and *nonreligion*.” *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (emphasis added).

³⁶ *Accord Everson v. Bd. of Educ.*, 330 U.S. 1, 9 (1947).

There is no exception to this rule for legislative prayer. In *Town of Greece v. Galloway*, 572 U.S. 565, 571, 585-86 (2014), the Supreme Court held that a legislative prayer practice, to pass constitutional muster, must be nondiscriminatory and inclusive of everyone including atheists. The Court upheld that town's practice because a "minister or layperson of any persuasion, *including an atheist*, could give the invocation." *Id.* at 571 (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 585. 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 583 (emphasis added). A practice that classifies "citizens based on their religious views would violate the Constitution." *Id.* at 589. It was critical to the Court in upholding the practice that "[t]he town at no point excluded or denied an opportunity to a would-be prayer giver." *Id.* at 571. 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 of *Town of Greece's* clear command, 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, the

Humanist Society trains and certifies individuals to deliver solemnizing invocations at government meetings.³⁷ The Humanist Society 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.”³⁸ Candidates are required to certify that they agree with the Humanist worldview and meet the Society’s ethical standards.³⁹

The purpose of a legislative invocation, according to the Supreme Court, is to “lend gravity to the occasion” and “to solemnize the occasion.” *Town of Greece*, 572U.S. at 583. 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 . . . 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

³⁷ The Humanist Society, <http://thehumanistsociety.org/invocations/> (last visited Feb. 27, 2018).

³⁸ *Id.*

³⁹ The Humanist Society, *Give Secular Invocations*, <http://thehumanistsociety.org/invocations/apply/> (last visited Feb. 27, 2018); *Join The Humanist Society*, <http://thehumanistsociety.org/apply/> (last visited Mar. 5, 2018).

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.⁴⁰

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.⁴¹ 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 legislatures have also opened sessions with solemnizing secular invocations, including:

⁴⁰ Juan Mendez, *Arizona State House of Representatives* (May 21, 2013), <http://cflfreethought.org/arizona-house-of-representatives-2013-may-21>.

⁴¹ J.A. 964, 1061-77.

- The Arizona House (J.A. 1227-29)
- 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 (April 5, 2017), <http://bit.ly/2o53XWq>
- The Maine House (Feb. 7 2017), <http://bit.ly/2BpQGjb>
- The Maine Senate (Feb. 15, 2018), <https://bit.ly/2IMKMNs>
- The Maryland Senate, *7 Journal of Proceedings of the Senate of Maryland, 2015 Regular Session 30*, <http://bit.ly/2o2bK7k>
- The Pennsylvania Senate (J.A. 1211-12)
- The Washington State House (J.A. 1212-13)

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 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.

Respectfully submitted on the 1st day of March, 2019

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COMBINED CERTIFICATIONS

I certify that:

I am a member of the bar of the Third Circuit Court of Appeals.

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,485 words, excluding the parts of the brief exempted by Rule 32(f).

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I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. All parties are appellate CM/ECF filing users and will receive service via the appellate CM/ECF system.

Dated: March 1, 2019

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