Nos. 18-2974 & 18-3167

IN THE

United States Court of Appeals for the Third Circuit

Brian Fields, *et al.*,
Plaintiffs-Appellees/Cross Appellants,
v.

Speaker of the Pennsylvania House of Representatives, *et al.*,
Defendants-Appellants/Cross Appellees.

On Appeal from United States District Court
for the Middle District of Pennsylvania
Chief Judge Christopher C. Conner
Civil Action No. 1-16-cv-01764

Brief *Amici Curiae* of Congressional Prayer Caucus Foundation, International Conference of Evangelical Chaplain Endorsers, National Legal Foundation, and Veterans in Defense of Liberty
in support of Defendant-Appellants/Cross Appellees and urging reversal

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INTERESTS OF *AMICI CURIAE*[1]

The **Congressional Prayer Caucus Foundation** (CPCF) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer, including in Congress and other deliberative bodies. It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-three states.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse non-denominational chaplains to the military and other organizations, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. A proper understanding of Religion Clauses of the First Amendment is essential to allow ICECE to achieve its purposes.

The **National Legal Foundation** (NLF) is a public interest law firm

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* state that no party's counsel authored this brief either in whole or in part, and that no party or party's counsel, or person or entity other than *Amici*, *Amici's* members, and their counsel, contributed money intended to fund preparing or submitting this Brief.

dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Pennsylvania, seek to ensure that a historically accurate understanding of the Religion Clauses is presented to our country's judiciary.

Veterans in Defense of Liberty is a national advocacy group of veterans dedicated to restoring and sustaining the original moral and constitutional principles of our Republic. Members of Veterans in Defense of Liberty continue to serve with the same passion and dedication to our country as we did in combat. We continue to honor our sacred oath to support and defend the Constitution. And we act with a sense of continued duty to ensure that the sacrifices of our brethren who did not come home were not made in vain.

When we raised our hands, we did not "solemnly swear," 10 U.S.C. § 502—a life-long pledge which still ends with, "So help me God"—to merely defend a piece of paper enshrined in our collective history. Rather we also pledged to defend the country it has established and guided for 229 years. It doesn't matter if the topic is voter ID, immigration, national security, or religious liberty. They are all veterans' issues.

Amici file this Brief pursuant to consent from all parties.

SUMMARY OF THE ARGUMENT

Above all, the Supreme Court taught in *Town of Greece v. Galloway*[2] that, to apply the Establishment Clause to a legislative prayer situation properly, a court must determine and act consistently with the clause's historical understanding.[3] The district court misread that history, improperly equating atheism with *religion* as used in the clause. This error led to the faulty premise that atheists must be treated the same as theists and so atheists basically have a "heckler's veto" over any expression of religion in the public square, unless they are given "equal" opportunities.

Far from being consistent with the Establishment Clause, the district court's ruling is a perversion of the clause's proper working. History shows that the Founders held a theistic view of religion that did not include atheism or other non-theistic worldviews. It also demonstrates that the Establishment Clause is pro-religion, designed both to protect religion from the Federal Government's interference and to encourage theistic religion's salutary effects among the populace. Thus, the Establishment Clause did not when enacted, and does not now, allow atheists to veto or "horn in" on public displays of religion. This applies to prayers of those invoking Divine favor and wisdom at beginning of legislative

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2 134 S. Ct. 1811 (2014).

3 *Id.* at 1818-19, citing *Cty. of Allegheny v. ACLU,* 492 U.S. 573, 670 (Kennedy, J., concurring in part and dissenting in part).

sessions, to adoption of the national motto of "In God We Trust," to the adding of "So help me God" to oaths of office, to issuance of proclamations thanking the Creator for his blessings (as the Declaration of Independence does[4]). The district court erred in holding otherwise, improperly equating all "worldviews" with what the First Amendment calls "religion."

ARGUMENT

I. *Religion* Under the Establishment Clause Does Not Include Atheism, and the Clause Is Pro-Religion in the Public Square.

The court below ruled that the practice of limiting invocations to actual prayers—*i.e.*, to petitions invoking the blessing of "a higher power"—violates the Establishment Clause primarily because it runs contrary to the guidance provided by the Supreme Court in *Town of Greece*. Your *Amici* leave the exposure of the district court's misreading of *Town of Greece* to others. We will focus on a proper understanding of the term *religion* as it appears in the First Amendment.

A. The Common Understanding When the States Enacted the First Amendment Was That Religion Did Not Include Atheism.

The court below correctly noted that "[t]here is no historical evidence of nontheists requesting, or being denied the opportunity, to give the invocation in

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[4] The Declaration of Independence relies on rights granted by "Nature's God" and the "Creator" and "appeal[s] to the Supreme Judge of the world ... with a firm reliance on the protection of Divine Providence," with the signers pledging to each other "our sacred Honor." https://www.ushistory.org/declaration/document/ (last visited Nov. 6, 2018).

either chamber of Congress,"[5] but, rather, that "history and tradition convincingly support sectarian and theistic content in legislative prayers."[6] The court nevertheless held that a policy excluding non-theistic invocations violates the Establishment Clause.

The court grounded its decision on silence and the following speculation of an expert witness: there is no historical record of attempts at, or denials of, non-theistic invocations because non-theists were afraid to ask.[7] But in so concluding, the court ignored the common understanding of the term *religion*, both then and now, and an abundance of relevant history.

It is, of course, common knowledge that the Establishment was adopted in reaction to the laws of England establishing a national religion, the Church of England. The meaning of *religion* in the Religion Clauses must be understood in that context, as that is the context in which it was formed. And what the laws of England were at the time is best understood by reference to Sir William Blackstone's *Commentaries on the Laws of England (1765-1769)*. As stated by the Supreme Court in *Schick v. United States*,[8] "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the

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5 *Fields v. Speaker*, 327 F. Supp. 3d 748, 757 (E.D. Pa. 2018).
6 *Id*.
7 *Id*.
8 195 U.S. 65 (1904).

time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the Framers of the Constitution were familiar with it."[9]

Blackstone in his *Commentaries* devotes Book 4, Chapter 4, to "Of Offenses Against God and Religion."[10] It is beyond peradventure that he uses the term *religion* to mean a devotion to the Divine and, most particularly, to Christianity and the Church of England. It is also clear beyond dispute that *religion* excluded non-theists. Blackstone defines the laws collected as those related to offenses "against the revealed law of God."[11] In his "First" category he collects "such crimes and misdemeanors, as more immediately offend Almighty God, by openly transgressing the precepts of religion either natural or revealed,"[12] such as "apostasy, or a total renunciation of Christianity, by embracing either a false religion, or no religion at all."[13] He continues as follows:

> Doubtless the preservation of Christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a

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9 *Id*. at 69; *see also D.C. v. Heller*, 554 U.S. 570, 593-95 (2008) (relying on Blackstone's Commentaries to determine original meaning of Second Amendment).

10 https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-404/#fn1u (last visited Nov. 6, 2018).

11 *Id.*

12 *Id.*

13 *Id.*

> future state of rewards and punishments, the entertaining just ideas of the moral attributes of the supreme being, and a firm persuasion that he superintends and will finally compensate every action in human life (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our savior Christ) these are the grand foundation of all judicial oaths; which call to witness the truth of those, which perhaps may be only know to him and the party attesting: all moral evidence therefore, all confidence in human veracity, must be weakened by irreligion, and overthrown by infidelity. Wherefore all affronts to Christianity, or endeavors to depreciate its efficacy, are highly deserving of human punishment.

Another category Blackstone collects are "offenses against religion ... which affect the established church. And these are either positive, or negative. Positive, as by reviling its ordinances: or negative, by non-conformity to its worship."[14] Blackstone notes that the tolerance of non-conformists had been suitably expanded from the Elizabethan period forward, but continues that there were still exceptions, including oaths of office relating to "popish" matters, in "order the better to secure the established church against perils from nonconformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries ...."[15] And perhaps most directly on point here, Blackstone organized a "fourth species of offenses" that were even "more immediately against God and religion," those being "blasphemy against the Almighty, by denying his being or providence ...."[16]

To be sure, the Religion Clauses of the First Amendment were designed to

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14 *Id.*
15 *Id.*
16 *Id.*

ensure that our Federal Government would not dictate an established religion and would be more tolerant of religious nonconformity than had been the case in England. But it is clear from Blackstone that, when the laws used the term *religion*, it was addressing theistic belief, that which acknowledged a Divine Presence. He expressly identified infidels and atheists as irreligious and committing both common-law and English statutory crimes against God and religion.

This understanding also comports with the definition of *religion* found in Noah Webster's 1828 dictionary, the first of American English. His definitions are centered on the fact that religion entails a belief in a higher power, even specifying that a practice of moral duties "without a belief in a divine lawgiver, and without reference to his will or commands, is not *religion"*:[17]

> **1.** *religion* in its most comprehensive sense, includes a belief in the being and perfections of God, in the revelation of his will to man, in man's obligation to obey his commands, in a state of reward and punishment, and in man's accountableness to God; and also true godliness or piety of life, with the practice of all moral duties. It therefore comprehends theology, as a system of doctrines or principles, as well as practical piety; for the practice of moral duties without a belief in a divine lawgiver, and without reference to his will or commands, is not *religion.*
>
> **2.** *religion* as distinct from theology, is godliness or real piety in practice, consisting in the performance of all known duties to God and our fellow men, in obedience to divine command, or from love to God and his law. James 1:26.

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[17] http://webstersdictionary1828.com/Dictionary/religion (last visited Nov. 9, 2018) (a fifth definition relates to religious rites).

> **3.** *religion* as distinct from virtue, or morality, consists in the performance of the duties we owe directly to God, from a principle of obedience to his will. Hence we often speak of *religion* and virtue, as different branches of one system, or the duties of the first and second tables of the law.
>
> Let us with caution indulge the supposition, that morality can be maintained without *religion.*
>
> **4.** Any system of faith and worship. In this sense, *religion* comprehends the belief and worship of pagans and Mohammedans, as well as of christians; any *religion* consisting in the belief of a superior power or powers governing the world, and in the worship of such power or powers. Thus we speak of the *religion* of the Turks, of the Hindoos, of the Indians, etc. as well as of the christian *religion.* We speak of false *religion* as well as of true *religion.*[18]

In sum, any objective reader of the Religion Clauses at the time they were adopted would have understood *religion* as used in the clauses to refer to a system of belief in God. Conversely, they would have understood *religion* to exclude atheism or any other non-theistic belief system.

B. The Legislative History of the Religion Clauses Shows That *Religion* Did Not Include Non-Theistic Beliefs.

The issue of whether the non-religious would be provided protection under the First Amendment was given express consideration by the First Congress. It had no less a champion than James Madison, who pushed for inclusion of "rights of conscience." While successful in getting such language in the House version of the amendment, the Senate refused to expand protection to non-theists, and general

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[18] *Id.*

conscience protections were not submitted to the States for ratification. This legislative history confirms that *religion* as used in what was adopted as the First Amendment did not include non-theistic worldviews.[19]

Madison proposed the following language in the House that began the drafting process:

> The amendments which have occurred to me, proper to be recommended by Congress to the State Legislatures, are these:
> ....
> Fourthly. ... The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.
> ....
> Fifthly. ... No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.[20]

In seeking to enact conscience protections, Madison was attempting to extend protections to both non-Christians and atheists.[21]

The House in July 1789 referred Madison's proposals to a select committee of one member of each of the eleven states that had by that time ratified the Constitution (Madison represented Virginia).[22] The committee retained Madison's

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19 *See generally* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, nn.184-307 & accompanying text (hereinafter, "Esbeck").

20 1 Annals of Cong. 450-51 (June 8, 1789).

21 *See* Esbeck at 535.

22 1 Annals of Cong. 690-91 (July 21, 1789).

"rights of conscience" language. It provoked some dissent when it was reported to the floor of the House, in particular from Benjamin Huntington, a Federalist from Connecticut, who objected that "equal rights of conscience" would be "hurtful to the cause of religion" because it would protect the nonreligious. He wanted it revised to secure "a free exercise of the rights of religion, but not to patronize those who professed no religion at all."[23] Nonetheless, the House sent to the Senate a provision including protection for both the free exercise of religion and the rights of conscience: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[24]

The Senate did not acquiesce in the "rights of conscience" language. On September 3, they struck it from the proposed amendment.[25] This led to submittal to a Committee of Conference with the House to resolve the disagreement. There are no minutes of the committee, but the House acceded to the Senate version that deleted coverage of the rights of conscience, providing only for protection of the free exercise of religion.[26] That version was then passed by both houses for submission to the States.[27]

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23 *Id.* at 758 (Aug. 15, 1789).
24 *Id.* at 795-96 (Aug. 20, 1789).
25 S. Journal, 1st Cong., 1st Sess. 117 (Sept. 3, 1789).
26 S. Journal, 1st Cong., 1st Sess. 145 (Sept. 24, 1789).
27 The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 8 (Neil H. Cogan ed., 1997).

The legislative history of the First Amendment debunks the district court's view that the term *religion* covers non-theistic worldviews. Instead, it shows that the Framers expressly rejected protections for atheists' "rights of conscience" as potentially harmful to sustaining the republican form of government that the Constitution had just put in place.[28]

C. The Founders Understood *Religion* to Refer to Theistic Beliefs, Not Atheistic Ones.

Although the Founders and Framers of the First Amendment were not monolithic in their views on religion, their views did not include non-theistic worldviews. A helpful starting point is where many courts have, in fact, started—James Madison's 1785 *Memorial and Remonstrance*.[29] Madison wrote that "'religion [is] the duty which we owe to our Creator and the manner of discharging

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[28] The debates on the Religion Clauses have been canvassed several times by the Supreme Court. For instance, Justice Scalia and Justice Stevens wrote dueling opinions in *ACLU of Kentucky v. McCreary County,* 545 U.S. 844 (2005), and *Van Orden v. Perry.* 545 U.S. 677 (2005). Justice Scalia argued that *religion* as used in the Religion Clauses was monotheism. *McCreary Cty.,* 545 U.S. at 893-97 (Scalia, J., dissenting). Justice Stevens argued that many of the Founders and Framers used "religion" in the narrower sense of Christianity. *Van Orden,* 545 U.S. at 726-28 (Stevens, J., dissenting). The point for present purposes is that both recognized that the Founders understood *religion* as the term is used in the Religion Clauses to be a belief system in God.

[29] https://founders.archives.gov/documents/Madison/01-08-02-0163, cited in, *e.g. Trinity Lutheran Church of Colum., Inc. v. Comer,* 137 S. Ct. 2012, 2033 (2017); *Hasan v. City of New York,* 804 F.3d 277, 302 (3d Cir. 2015); and *Jingrong v. Chinese Anti-Cult World Alliance,* 311 F. Supp. 3d 514, 539 (E.D.N.Y. 2018).

it ...."[30] Thus, Madison clearly casts *religion* in terms of duty to the Creator. When he wanted to protect atheists, he used different language, the language of the "rights of conscience."

No Founder or Framer can be quoted otherwise.[31] To the contrary, the Founders broadly recognized the positive effect of religion, its reliance on a Divine Creator and Judge, and its secular benefit of assisting in the working of a representative democracy. They showed by their conduct that they did not understand the Establishment Clause to prohibit them from enacting laws that encouraged religion and religious activity that was openly theistic and contrary to non-theistic worldviews.[32] For example,

- as noted by the Supreme Court in *Marsh v. Chambers*[33] and *Town of Greece*,[34] the First Congress paid for a Christian chaplain, a tradition that has continued uninterrupted to this day;

- President Washington issued the first Thanksgiving Proclamation, a

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30 *Id.*, quoting Va. Dec. of Rights.

31 For example, Rep. Abraham Baldwin, despite being Georgia's representative on the House Select Committee, approved of the Senate's removal of Madison's proposal that no State "shall infringe the equal rights of conscience." He voted in favor of the amendments that Congress sent to the States to be ratified. *See* Mark J. Chadsey, "Abraham Baldwin and the Establishment Clause," 51 *J. of Cath. Legal Studies* 17 (2012). Baldwin opposed the federal government being able to impose a national religion, but he also thought it appropriate for government to support and encourage religion. *See generally id*. 1-40.

32 *See generally* Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 23-24, 53-55 (1982).

33 463 U.S. 783, 787-88 (1983).

34 134 S. Ct. at 1818.

practice that has been continued by presidents to this day;[35]

- the Founders openly considered religious symbolism for our country's Great Seal, ultimately adopting the eye of "Providence" atop a pyramid (alluding to the Hebrews' deliverance from Egypt and representing the Trinity) and a motto, *Annuit Coeptis*, meaning, "He [God] has favored our undertakings"[36]; and

- Congress approved use of the Capitol building for regular, Protestant church services.[37]

Why would the Founders take these steps? Because the Founders understood that theistic religious beliefs and ethical principles provided a foundation for, and helped the preservation of, the type of government set up in the Constitution. In this way, these enactments served a critical, *secular* purpose.

Many of the Founders articulated this, perhaps most famously President Washington in his Farewell Address:

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. ... Let it simply be asked where is the security for prosperity, for reputation, for Life, if the sense of religious obligation *desert* the oaths, which are the instruments in the Courts of

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35 *See* George Washington, Proclamation: A National Thanksgiving (Oct. 3, 1789), http://press-pubs.uchicago.edu/founders/documents/amendI_religions54.html (last visited Dec. 11, 2018).

36 U.S. Dep't of State Bureau of Pub. Affairs, *The Great Seal of the United States* 4, 6, 15 (2003), https://www.state.gov/documents/organization/27807.pdf (last visited Dec. 10, 2018). The Continental Congress in 1776 appointed a committee of Franklin, Jefferson, and Adams to propose the seal's design. Both Jefferson and Franklin proposed biblical themes related to the people of Israel's deliverance from Egypt. *See id.* at 2; Richard S. Patterson & Richardson Dougall, *The Eagle and the Shield: A History of the Great Seal of the United States Government* 12-13,16 (1976).

37 1 Debates and Proceedings 797, 6th Cong., 1st Sess. (Dec. 4, 1800).

> Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[39]

President John Adams made the same point in his address to the Massachusetts Militia in 1798:

> We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry [sexual licentiousness], would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made for a moral and religious people. It is wholly inadequate to the government of any other.[40]

The positive influence of theistic religion on society and our system of government, as noted repeatedly by the Founders, has not been eroded by time.[41]

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39 1 *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 220 (James D. Richardson, ed., 1899). As shown above, Noah Webster quoted part of President Washington's address in his definitions of *religion*.

40 https://founders.archives.gov/documents/Adams/99-02-02-3102 (last visited Mar. 28, 2018); *see also Van Orden v. Perry,* 545 U.S. 677, 727-28 n.29 (2005) (Stevens, J., dissenting, quoting Justice Story: "Christianity is indispensable to the true interests and solid foundations of all free governments.").

41 *See generally* Steven W. Fitschen, *Religion in the Public Schools After* Santa Fe Independent School District v. Doe: *Time for a New Strategy*, 9 Wm. & Mary Bill of Rts. J. 433, 446-49 (2001) (noting that the Framers distinguished between acknowledgment, accommodation, encouragement, and establishment of theistic religion and only the last was forbidden).

D. The Establishment Clause Is Pro-Religion and Does Not Prohibit All Laws Respecting Religion or Acknowledgement of Theistic Religion by Government.

The First Amendment is pro-freedom of speech, pro-freedom of press, and pro-freedom of assembly. It accomplishes those purposes by providing that "Congress shall make no law ... abridging" those freedoms. Similarly, the First Amendment in the Religion Clauses is pro-religion, not religion-hostile, prohibiting Congress from establishing a state religion or restricting the free exercise of religion.

The Establishment Clause protects religion by keeping government out of church doctrine and prohibiting the government from favoring one religion or sect over another. This protects minority sects from being marginalized, and it makes sure that citizens can define and practice doctrine without fear of government interference. It enforces a *one-way* "wall" of separation, restraining government interference with religion and its practice; it does not attempt to keep theistic religion out of public life. [42]

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[42] In *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), the Court remarked that the Establishment Clause's "line of separation, far from being a 'wall,' is blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Better stated, the separation is a one-way barrier similar to the tire-puncture strip commonly embedded in car rental lots—it allows travel one way, but not in reverse.

From Appellees/Cross Appellants' arguments, one would think that the Establishment Clause reads that "Congress shall make no law respecting [ ] religion," period. Of course, it does not. It reads "Congress shall make no law respecting *an establishment of* religion."[43] It obviously does not prohibit all legislation dealing with or mentioning religions or their organizations or adherents. If it did, the Constitution would be inconsistent with itself, as the next phrase of the First Amendment deals with the "free exercise" of religion, and the Constitution prohibits a religious test for officeholders[44] and thrice allows affirmation instead of oaths to accommodate Quakers and others who had religious objections to oaths.[45] Much less does the Establishment Clause proscribe prayers or mention of God during public events.

As recounted above, the Founders understood the secular benefits to our system of government that fostering theistic religion engenders. This benefit has continued throughout our country's history and is as simple to understand as the Golden Rule: "Do unto others as you would have them do unto you." Religions inculcate their adherents not to look primarily to their own, individual interests, but to those of others. It is no accident that religious principles and motivations have

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43 U.S. Const. amend. I (emphasis added).

44 *Id*. art. VI, cl. 3.

45 *Id*. art. I, § 3, cl. 6; art. II, § 1, cl. 8; art. VI, cl. 3. *See generally* Esbeck at 593-96.

fueled the great social advances of our country, from the abolition of slavery to provision of voting rights for women to, more recently, protection of civil rights . Religious beliefs of those active in those causes bonded together people of different races, incomes, and ethnicity in a shared purpose for the common good of justice for all. Of course, it is religion that motivates many individuals to donate both time and money to improve the plight of their fellow citizens and immigrants in hospitals, prisons, detention centers, and slums, relieving the public at large from these obligations.[46] Religion is a powerful social force that motivates individuals to put the common good before their own interests. This motivation serves important secular goals.

II. There Is a Difference Between a Worldview and a Religion.

Let us bring the matter up to the present. The main failing of the district court was to assume *sub silentio* that every worldview is the same as a religion. There are, of course, both atheistic worldviews—*i.e.*, ones that have no place for the divine—and theistic worldviews—*i.e.*, ones that believe there is a reality beyond that manifested in our physical universe. The total set of worldviews contains both religious and non-religious ones. However, that does not make non-

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[46] *See generally* James A. Davids, *Putting Faith in Prison Programs, and Its Constitutionality Under Thomas Jefferson's Faith-Based Initiative*, 6 Ave Maria L. Rev. 341 (2008) (discussing faith-based initiatives to support and rehabilitate prisoners and analogous historical examples).

religious worldviews "religions" of their own.

An atheistic worldview, because it recognizes no transcendent being, is left with only humans themselves to define what is virtue and truth and how life should be practiced. Each man becomes his own "god." This is what the atheists who object to being excluded from giving their own version of an opening "prayer" believe. They want to know why their purely humanist invocation is not the same as one addressed to a "mythical" divine presence. Since the atheist rejects, *a priori*, the idea that a non-human being could have intervened in this world to create it and then define what is true, just, and virtuous; the atheist assumes that those who spout religious belief have just made it up for themselves and so he, despite being non-theistic, has just as much of a "religion" as they do.[47]

The religious, and particularly Christians who made up the large majority of the population at its founding and still do today, reject these *a priori* assumptions.

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[47] The contemporary understanding of *religion* still typically associates it with acknowledgement of a Divine Presence. The first definition in Webster's New World Dictionary is this: "belief in a divine or superhuman power or powers to be obeyed and worshiped as the creator(s) and ruler(s) of the universe." http://www.yourdictionary.com/religion?direct_search_result=yes (last visited Nov. 7, 2018). This is not to say, of course, that atheism or other non-theistic philosophies are not sometimes referred to as a "religion" in the theoretical sense of any ultimate belief system to which one adheres. *See, e.g.*, Daniel J. Mahoney, *The Idol of Our Age: How the Religion of Humanity Subverts Christianity* (2018). *Amici* here are expounding on the way the term *religion* is used in a constitutional sense in the First Amendment.

To the Christian (and other monotheists), the atheist's desire to define his own ultimate reality is an error as old as the Garden of Eden, where the Serpent's first temptation to Eve was that, if she violated what God had commanded of her, she, too, could be a god, able to adjudge good and evil for herself. (Gen. 3:4.) Instead, theists believe that there is a Creator other than ourselves and that the Creator, independently of man, determines what is true and just and virtuous. As recited above, our Founding Fathers held the theistic view and believed it essential for preservation of the fabric of our public polity.

The atheist, of course, believes these views to be wrongheaded, irrational, and unfit for consideration by any rational individual, especially a federal judge. This, again, follows from the atheist's *a priori* assumption that belief in a divinity is balderdash and an exercise either in self-deception or willful blindness. But, to the theist, it is the atheist who is irrational and unable to answer even the most basic question of how this world came into existence. When applied to daily life, the contrast is stark. Although many atheists are good citizens, it is not illogical to ask, why *would* an atheist sacrifice his own interests for others? Without divine reckoning and revelation of truth and justice, there logically remains only the use of power to maximize one's individual comfort and pleasure in the here and now. Thus, the weaker and poorer a person is, the less likely others will desire to help him, because the chance of incurring a compensating benefit from the one assisted

is similarly reduced. The atheist does not have to fear being called to account at his death by a just divinity.

The theist has the same natural inclinations as the atheist to put his own interests first and foremost, and often he (improperly) does. But these inclinations are greatly tempered in the theist by his belief that there is a God who gives dignity to all humans, whatever their personal circumstances, that he has been ordered by God to put others' interests before his own, and that he will be judged by God for what he has done on earth and be recompensed appropriately in the afterlife. This is not self-deception. But even if it were, it is a self-deception that is called *religion* in the constitutional sense and is a bulwark belief that sustains our constitutional system of government.[48]

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[48] Charitable giving is an example of how religious people are more likely than non-religious people to behave selflessly. A Pew Research Center study that assessed the religiosity of the 50 states ("How Religious is Your State?" Feb. 26, 2016, http://www.pewresearch.org/fact-tank/2016/02/29/how-religious-is-your-state/?state=alabama (last visited Dec. 20, 2018)) ranked the six most religious states as Alabama (1T), Mississippi (1T), Tennessee (3), Louisiana (4), Arkansas (5T), and South Carolina (5T). The five least religious states were Massachusetts (50T), New Hampshire (50T), Maine (48T), Vermont (48T), and Connecticut (47). A study by the Urban Institute reported the 2013 average charitable contribution by state as a percentage of adjusted gross income ("Profiles of Individual Charitable Contributions by State: 2013," https://www.urban.org/research/publication/profiles-individual-charitable-contributions-state-2013 (last visited Dec. 20, 2018)). The six most religious states in the Pew study gave, respectively, these percentages: 2.9%, 2.8%, 2.4%, 2.0%, 2.4%, and 2.6%. The five least religious states gave, respectively, these percentages: 1.9%, 2.1%, 1.3%,

A non-religious belief system is a worldview, but it is not a religious worldview. Non-religion is not *religion* as specified in our Constitution.

III. Equating an Atheistic Worldview with a Religion Would Give Every Atheist a Heckler's Veto.

The district court accepted the atheist's belief that any worldview is a religious one. But an atheistic worldview believes religious worldviews to be wrongheaded. The atheist sees religious symbols and speech being used in public spaces, despite his disagreement with them and, in his light, their irrationality. In his view, equality demands either that such religious speech be squelched or that the atheist be given equal opportunity to speak.

This only follows if an atheistic worldview is considered *religion* for purposes of the First Amendment. But it is not. If it were considered so, then it would have major consequences in our country's jurisprudence. This was exactly the point Justice Scalia made in his dissent in *McCreary County*, where he noted the unique nature of prayer in Establishment Clause jurisprudence. He reacted to the *McCreary* majority's statement that "government cannot favor one religion over another"[49] by noting its needed clarification:

That is indeed a valid principle where public aid or assistance to religion is

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1.5%, and 2.1%.) These data suggest a not coincidental relationship between the religiosity of a people and their generosity.

[49] 545 U.S. at 893, citing *McCreary Co*., 545 U.S. at 860 (Scalia, J., dissenting).

> concerned or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists. The Thanksgiving Proclamation issued by George Washington at the instance of the First Congress was scrupulously nondenominational but it was monotheistic.[50]

As Justice Scalia explained in his common-sense way, prayer in legislative settings does not have to be a free-for-all, and refusing to make it so does not mean that an atheist can shut down the practice. If it were otherwise, other applications of this atheistic "principle" would also be required. Two examples will suffice. One is closer to the examples Justice Scalia gave; the other, more extreme. However, the second example follows just as naturally from the district court's flawed reasoning as does the former.

A. Equating Atheistic Worldviews with *Religion* Would Mean the End of the National Motto.

Atheists have repeatedly attacked the use of "In God We Trust" on our currency. Their logic leaves a couple options: (a) either insist on at least some

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[50] *Id*. (citations omitted).

currency having printed on it a counter-message such as "Some of Us Do Not Trust in God" or (b) eliminate the religious statement altogether. Of course, atheists have pursued the latter.

To date, they have done so uniformly without success.[51] But the point here is that, if atheists are given a heckler's veto like the district court gave them here, then these cases were wrongly decided. But they were not; it was the district court here that erred.

B. Equating Atheistic Worldviews with *Religion* Would Mean the End of Public Schools

Another natural consequence of defining every worldview as a religion would be the end of public schools as we know them. Every person has a worldview, including every teacher.

And a teacher communicates that worldview to her students every day in various direct and indirect ways. This is well understood by many of the parents who are willing to pay both property taxes to support public schools and private school tuition so that their children will be imbued with what they consider to be a superior worldview (*e.g.*, a theistic rather than a secular humanist worldview).

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[51] *See, e.g.*, *New Doe Child #1 v. United States*, 901 F.3d 1015 (8th Cir. 2018); *Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018); *Newdow v. Peterson*, 753 F.3d 105 (2d Cir. 2014); *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010); *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979).

It follows that, if every worldview were a religion, religion is being taught to impressionable students each day. As the public schools may not articulate any particular religion, then the entire enterprise would be unconstitutional. For instance, in *Smith v. Board of Commissioners of Mobile County*, the district court, which was reversed, found that many public school textbooks taught a non-theistic worldview of secular humanism and, equating that with establishment of religion, enjoined their usage.[52] If it were accurate to treat non-theistic worldviews as religion in a constitutional sense, then the district court was correct in its analysis and the public schools would have to be disbanded or sharply reorganized. If public funding for education were desired, a voucher or similar system would have to be put in place.[53]

CONCLUSION

The Religion Clauses of the First Amendment speak of theistic *religion*, excluding atheistic belief systems. The Establishment Clause prohibits a national religion, but it does not do so to restrict religion from the public square, but to

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52 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd on other grounds*, 827 F.2d 684 (11th Cir. 1987).

53 *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (publicly funded vouchers given to parents, many of which select religious schools for their children, is not a state establishment of religion). By making the argument above, *Amici* do not argue either that secular humanism should be the worldview taught in the public schools or that the typical public school system is superior to a voucher system.

protect religion against state intrusion. Indeed, both the English legal background against which the Framers and Founders adopted the Religion Clauses, their debates over the wording of the clauses, and their own practices and publications thereafter demonstrate that they were pro-theistic religion and encouraged its use on public occasions. They harbored no similar regard for atheistic worldviews, labeling them, instead, as a threat to public morals and to the representative democracy set up by the Constitution.

The district court erred when it equated an atheistic worldview with *religion* as used in the First Amendment. Atheists do not have a heckler's veto over theistic speech in the public square and cannot constitutionally insist on equal treatment when theistic speech is used.

Respectfully submitted,
this 7th day of January 2019,

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COMBINED CERTIFICATES

1. I, Steven W. Fitschen, Counsel of Record for *Amici Curiae*, am admitted to the bar of the Third Circuit Court of Appeals.

2. I certify that this Brief complies with the type-volume limitations of F.R.A.P. 32(a)7(B)(i) and F.R.A.P. 29(a)(5). Exclusive of the exempted portions, this Brief contains 6,496 words, including footnotes, in 14 point Times New Roman font. This total was calculated with the Word Count function of Microsoft Office Word 2016.

3. On January 7, 2018, I filed this Brief with the Clerk of the Third Circuit Court of Appeals using the CM/ECF system, which will send notice of the electronic filing to all Counsel for the Parties, all of whom are registered users.

4. The electronic version of this Brief was scanned and found virus-free using the anti-virus component of AVG Internet Security, version 19.1.3705, updated January 6, 2018.

5. The text of the hard copy of this Brief and the text of the Brief filed electronically via the CM/ECF system are identical.

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