No. 17-15769-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Appellees/Cross-Appellants,

v.

BREVARD COUNTY,

Appellant/Cross-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Middle District of Florida
Case No. 6:15-cv-01098-JA-DCI, Hon. John Antoon II

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE, CENTER FOR INQUIRY, CENTRAL CONFERENCE OF AMERICAN RABBIS, HADASSAH, HINDU AMERICAN FOUNDATION, INTERFAITH ALLIANCE, MEN OF REFORM JUDIAISM, NATIONAL COUNCIL OF JEWISH WOMEN, UNION FOR REFORM JUDIAISM, AND WOMEN OF REFORM JUDAISM IN SUPPORT OF APPELLEES/ CROSS-APPELLANTS AND AFFIRMANCE

Williamson, et al. v. Brevard County
Case No. 17-15769-FF

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici Curiae, by their undersigned counsel, and pursuant to Fed. R. App. P. 26.1(a) and 11th Cir. Local R. 26.1-1 through 26.1-3, hereby submit this Certificate of Interested Persons and Corporate Disclosure Statement as follows:

The names of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party, are as follows:

1. Abudu, Nancy Gbana
2. ACLU Foundation of Florida, Inc.
3. American Civil Liberties Union Foundation
4. Americans United for Separation of Church & State
5. Anti-Defamation League
6. Antoon, John, II, Senior United States District Judge
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43. Women of Reform Judaism
44. Yuan, Diana E.
45. Zeidman, Miriam, Anti-Defamation League

Pursuant to Rule 26.1-3(b) of the Rules of the United States Court of Appeals for the Eleventh Circuit, the undersigned states that, to the best of

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

the undersigned's knowledge and information, no publicly traded company or corporation has an interest in the outcome of this appeal.

/s/ Gregory E. Ostfeld
Counsel for *Amici Curiae*

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE, CENTER FOR INQUIRY, CENTRAL CONFERENCE OF AMERICAN RABBIS, HADASSAH, HINDU AMERICAN FOUNDATION, INTERFAITH ALLIANCE, MEN OF REFORM JUDIAISM, NATIONAL COUNCIL OF JEWISH WOMEN, UNION FOR REFORM JUDIAISM, AND WOMEN OF REFORM JUDAISM IN SUPPORT OF APPELLEES/CROSS-APPELLANTS AND AFFIRMANCE

Proposed *amici curiae*, Anti-Defamation League, Center for Inquiry, Central Conference of American Rabbis, Hadassah, the Women's Zionist Organization of America, Hindu American Foundation, Interfaith Alliance, Men of Reform Judaism, National Council of Jewish Women, Union for Reform Judaism, and Women of Reform Judaism (collectively, "*Amici*"), by their undersigned counsel, and pursuant to Fed. R. App. P. 29 and 11th Cir. R. 29-1, hereby respectfully move the Court for leave to file *instanter* the accompanying Brief of *Amici Curiae* Anti-Defamation League, Center for Inquiry, Central Conference of American Rabbis, Hadassah, Hindu American Foundation, Interfaith Alliance, Men of Reform Judaism, National Council of Jewish Women, Union for Reform Judaism, and Women of Reform Judaism in Support of Appellees/Cross-Appellants and Affirmance (the "Brief"). This motion is unopposed. In support of their motion, *Amici* state as follows:

1. *Amici* have an interest in this appeal. *Amici* are religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions but share a commitment to religious freedom and to ensuring that all Americans are free from religious discrimination, coercion, and governmental endorsement of religion.

2. *Amici* believe the Brevard County invocation practice and policy unconstitutionally discriminate against non-theistic legislative prayer. Furthermore, the County's rationale for the practice and policy, if accepted by this Court, could be used to justify discrimination against other minority faiths.

3. To the extent some local legislative bodies invoke U.S. Supreme Court legislative prayer precedent to open their meetings with prayer, *Amici* oppose the denial or exclusion of any public official, clergy member, or community member from the opportunity to give the opening prayer or invocation based on that person's faith tradition. Such exclusion is religious discrimination, and cannot be reconciled with the principles of religious freedom, diversity, pluralism, and freedom from persecution on which the United States was founded.

4. Accordingly, *Amici* have a substantial interest in this case, which places at issue core questions about the preservation of religious liberty and prevention of religious discrimination where opening prayers or invocations take place in public meetings of local legislative bodies.

5. *Amici* respectfully submit their Brief is desirable and relevant to the disposition of the case. The Brief provides additional context and insight from *Amici*'s perspective as organizations representing diverse beliefs, experiences, and faith traditions on two core matters at issue in this appeal: (1) explaining how Brevard County's exclusion of non-theistic belief systems is discriminatory, violates the establishment clause, and would

justify exclusion of other religious minorities; and (2) rebutting the view that history supports or justifies discrimination against non-theists in the selection of guest clerics or chaplains.

6. The role of an *amicus curiae* is to assist the Court "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A. C.P. v. Town of Harrison, N.J.*, 940 F.2d 792, 808 (3d Cir.1991) (citation omitted). *Amici* respectfully submit their Brief fulfills that role with respect to this appeal.

7. As certified in the accompanying Brief, on April 4, 2018, counsel for *Amici* conferred with counsel for Appellant Brevard County, who confirmed that Appellant does not oppose the filing of the Brief.

8. A copy of the proposed Brief accompanies this motion.

WHEREFORE, *Amici* respectfully request this Court grant them leave to file *instanter* the accompanying Brief of *Amici Curiae* Anti-Defamation League, Center for Inquiry, Central Conference of American Rabbis, Hadassah, Hindu American Foundation, Interfaith Alliance, Men of Reform Judaism, National Council of Jewish Women, Union for Reform Judaism, and Women of Reform Judaism in Support of Appellees/Cross-Appellants and Affirmance, and such other and further relief as the Court deems necessary or appropriate.

Dated: May 4, 2018

Respectfully submitted,

/s/ Gregory E. Ostfeld

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CERTIFICATE OF SERVICE

I certify that on May 4, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Gregory E. Ostfeld

Gregory E. Ostfeld
Counsel for Amici Curiae

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

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

/s/ Gregory E. Ostfeld
Counsel for *Amici Curiae*

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

1. No party's counsel authored this brief in whole or in part.

2. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

3. No person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld
Counsel for Amici Curiae

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IDENTITY OF THE *AMICI CURIAE*, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE

Amici are religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions but share a commitment to religious freedom and to ensuring that all Americans are free from religious discrimination, coercion, and governmental endorsement of religion.

The Brevard County invocation practice and policy unconstitutionally discriminate against non-theistic legislative prayer. Furthermore, the County's rationale for the practice and policy, if accepted by this Court, could be used to justify discrimination against other minority faiths.

To the extent some local legislative bodies invoke U.S. Supreme Court legislative prayer precedent to open their meetings with prayer, *Amici* oppose the denial or exclusion of any public official, clergy member, or community member from the opportunity to give the opening prayer or invocation based on that person's faith tradition. Such exclusion is religious discrimination, and cannot be reconciled with the principles of religious freedom, diversity, pluralism, and freedom from persecution on which the United States was founded.

Thus, *Amici* have a substantial interest in this case, which places at issue core questions about the preservation of religious liberty and prevention of religious discrimination where opening prayers or invocations take place in public meetings of local legislative bodies.

The *Amici* are:

Anti-Defamation League

Center for Inquiry

Central Conference of American Rabbis

Hadassah, the Women's Zionist Organization of America

Hindu American Foundation

Interfaith Alliance

Men of Reform Judaism

National Council of Jewish Women

Union for Reform Judaism

Women of Reform Judaism

Detailed descriptions of the *amici* appear in the accompanying Addendum.

STATEMENT OF THE ISSUES

1. The Establishment Clause prohibits government from favoring certain religions over others or from favoring theistic religions over non-theism. Appellant Brevard County asserts that that its practice of selecting invocation givers for its meetings did not violate the Establishment Clause because it was not impermissibly motivated by an intent to discriminate against certain religions or against non-religion. Did the district court correctly conclude that Brevard County's selection practice violated the Establishment Clause?

2. The Supreme Court has held that legislative prayers do not violate the Establishment Clause, in part, because there is historical precedent of legislative prayers going back to the adoption of the First Amendment. Brevard County implies that this historical precedent supports the County's continued and express exclusion of non-theists from its guest invocations. Did the district court correctly conclude that Brevard County's selection practice violated the Establishment Clause, regardless of whether non-theists have historically participated in legislative prayers?

SUMMARY OF ARGUMENT

The efforts of Brevard County to justify its overt and categorical exclusion of certain persons from the opportunity to participate in the opening invocation at public meetings, based on the tenets of those persons' religious beliefs, are deeply problematic. The County employs wholly flawed and illogical arguments to justify its practices. It asserts that:

(1) the Supreme Court has permitted legislative prayers as non-violative of the Establishment Clause based on historical evidence of such prayers going back to the adoption of the First Amendment; and (2) then asserts that local governments are free to exclude practitioners of non-theistic faiths from participating in legislative prayers. The County's position necessarily implies that historical legislative prayer practices dating back to the founding support such exclusion of non-theistic prayers. There are two fatal defects in this line of argument.

First, Brevard County's assertions are unsound on the face of the Establishment Clause and governing precedent, which prohibit the government from favoring certain religions or from discriminating among faiths or religious beliefs. Both the plain language of the First Amendment and decades of precedent make clear that these protections apply regardless of whether the religion at issue is theistic or non-theistic. Although the Supreme Court has held that legislative prayer is not prohibited by the Establishment Clause *per se*, it has also made clear that legislative prayer practices driven by a discriminatory motive do not pass constitutional muster. By asserting a right to discriminate against non-theists, and to categorically exclude practitioners of such faiths from its opening invocation, Brevard County would impermissibly open the door to discrimination against any religious minority whose views do not accord with putative community standards.

There is no serious question that Brevard County's methods of selecting invocation givers were driven by an impermissible motive. Multiple members of the County's Board of Commissioners stated, under oath, that they would not invite adherents of certain religions to give an invocation. These statements alone are sufficient to conclude that the district court was correct in holding that the County violated the Establishment Clause. But even if the record lacked any direct evidence of impermissible motive, the County's policy of selecting invocation-givers was discriminatory on its face. The County required prospective invocation-givers to believe in a "higher power" and categorically banned "secular" invocations from "any organization whose precepts, tenets or principles espouse or promote reason, science, environmental factors, nature, or ethics as guiding forces, ideologies, and philosophies." This policy clearly discriminates against non-monotheist and non-theistic minority religions that do not believe in a "higher power" as such. And the same logic Brevard County employs to exclude members of such "secular" belief systems from its invocation could as readily be extended to any other minority faith, or at least any such faith lacking affirmative proof that members of its clergy were invited to deliver legislative prayers or invocations at the Nation's founding.

Second, the putative absence of historical examples of non-theists participating in legislative prayer cannot bring Brevard County's otherwise discriminatory practice into harmony with the Establishment Clause. The

reasoning underlying this argument is inherently unsound, as the mere absence of non-theists (or various other minority faiths) from historical legislative invocations does not constitute evidence of their affirmative exclusion from such invocations. Nor does it convey the Founders' approval of religious discrimination against such religious minorities, particularly where the contemporaneous evidence of the Founders' disapproval of religious denomination discrimination is abundant. In short, while the historical practice of allowing theistic prayers has been a basis for finding that those prayers do not categorically violate the Establishment Clause, the opposite is not true; the putative lack of historical examples of non-theistic prayers cannot support their continued and express exclusion.

Moreover, even if Brevard County had come forward with affirmative evidence of historical exclusion of non-theistic belief systems from legislative invocations, which it did not, that would not justify carrying over such discriminatory practices to the present. The Supreme Court has observed that "standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). If it were otherwise, a government could discriminate against many historically underrepresented beliefs and ideologies, thereby discriminating against the evolving fabric of individual American beliefs.

ARGUMENT

I. BREVARD COUNTY'S EXCLUSION OF NON-THEISTIC BELIEF SYSTEMS IS DISCRIMINATORY, VIOLATES THE ESTABLISHMENT CLAUSE, AND WOULD JUSTIFY EXCLUSION OF OTHER RELIGIOUS MINORITIES.

Brevard County's efforts to construct an Establishment Clause rationale that authorizes deliberate exclusion of religious minorities from legislative invocations based on the tenets of their belief systems cannot be reconciled with the plain language of the First Amendment or decades of precedent. The text of the First Amendment draws no distinction between theistic and non-theistic faiths, and for more than fifty years, the Supreme Court has disallowed invidious discrimination between theistic and non-theistic belief systems. Here, both by the sworn testimony of its own officials and on the face of its invocation policy, Brevard County is attempting to do what the Constitution forbids: give one category of religious belief precedence over others. Such a rationale, if adopted, could as easily be used to exclude any other minority religious faith whose tenets conflict with the majority's views.

A. The Establishment Clause Forbids Discrimination Against Any Religious Minority, Including Polytheistic and Non-Theistic Belief Systems.

The Establishment Clause prohibits Congress—and by extension state and local legislative bodies—from making "any law respecting an establishment of religion." U.S. CONST., amend. I, § 1; *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 15, (1947) ("Neither a state nor the Federal

Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."). As the Supreme Court has recognized, the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The test for determining what constitutes a "religion" under the Establishment Clause is not based on an evaluation of the validity of any particular belief system, and does not distinguish between theists and non-theists, between majority and minority faiths, or even between those who believe or disbelieve in religion altogether. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Supreme Court struck down a provision of the Maryland constitution which stated that no religious test can be imposed as a qualification for any state office, "other than a declaration of belief in the existence of God." *Id.* at 489, 495. The Court recognized that the Establishment Clause prohibited Maryland from "aid[ing] all religions as against non-believers" and "aid[ing] those religions based on a belief in the existence of God as against those religions founded on different beliefs," specifically recognizing that the latter category included, among others, "Buddhism, Taoism, Ethical Culture, [and] Secular Humanism." *Id.* at 495 & n.11.

In the fifty-plus years since *Torcaso* was decided, this Court and others have consistently applied its inclusive definition of "religion" and

recognized that the First Amendment extends to atheism and various non-theist belief systems, including Humanism.[1] *See 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 belief in the Judeo-Christian God; indeed, it includes the lack of any faith."); *see also Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1102 n.91 (9th Cir. 2010) ("The Supreme Court has always held that atheists . . . enjoy the same First Amendment protections as everyone else."); *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 759 (7th Cir. 2001) ("[A] public university that had a *policy* of promoting atheism, or Satanism, or secular humanism, or for that matter Unitarianism or Buddhism, would be violating the religion clauses of the First Amendment.") (emphasis in original); *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (offering "the Unitarian Church" among examples of "religions which do not positively require the assumption of a God" in First Amendment context); *Theriault v. Silber*, 547

[1] "Humanism encompasses a variety of nontheistic views (atheism, agnosticism, rationalism, naturalism, secularism, and so forth) while adding the important element of a comprehensive worldview and set of ethical values—values that are grounded in the philosophy of the Enlightenment, informed by scientific knowledge, and driven by a desire to meet the needs of people in the here and now." *About the American Humanist Association*, American Humanist Association, https://bit.ly/2HeSDyS (last visited Apr. 14, 2018). Atheism may generally be described as "a lack of belief in gods." *What is Atheism*, American Atheists, Inc., https://bit.ly/2rYD619 (last visited Apr. 14, 2018).

F.2d 1279, 1281 (5th Cir. 1977) (holding a First Amendment criterion which excludes "agnosticism or conscientious atheism . . . is too narrow").

Indeed, the Supreme Court has recognized that constitutional protection is not dependent on the classification of a given belief system as a "religion" at all. Even if atheism, Humanism, and other non-theistic belief systems were not considered or described by their own adherents as "religions," discriminating against them would still be unconstitutional because "[t]he First Amendment mandates governmental neutrality . . . between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14–17 (1989) (holding that a tax exemption for religious periodicals in Texas violated the First Amendment, in part because Texas lacked "similar benefits for nonreligious publications"); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 & n.9 (1985) (holding that a law giving religious adherents a right not to work on their Sabbaths was unconstitutional because it "command[ed] that Sabbath religious concerns automatically control over all secular interests in the workplace").

B. Legislative Prayers Are Subject to the Establishment Clause's Protection of All Belief Systems.

The Establishment Clause's bedrock protection of all belief systems—including polytheistic and non-theistic belief systems—carries over to legislative prayer. In *Marsh*, the Supreme Court held that while legislative prayer was not unconstitutional *per se*, a legislature's choice of chaplain

may not stem "from an impermissible motive" to give "preference to his religious views." 463 U.S. at 793-94. The Court reiterated this anti-discrimination principle in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), where it upheld a town board's policy of opening meetings with explicitly sectarian invocations, "such as those 'given in Jesus' name.'" *Id.* at 1816, 1824. The *Town of Greece* Court emphasized that the town's informal method of selecting prayer-givers was permissible, but only so long as the town maintained "a policy of nondiscrimination" in deciding who may present invocations, and the town's selection process could not "reflect an aversion or bias on the part of town leaders against minority faiths." *Id.*; *see also id.* at 1826 (plurality opinion) ("A practice that classified citizens based on their religious views would violate the Constitution."); *id.* at 1831 (Alito, J., concurring) ("I would view this case very differently if the omission of [minority faiths] were intentional.").

Importantly, the legislative prayer policy in *Town of Greece* expressly recognized and allowed for non-theistic and non-religious prayers and invocations. The Court emphasized that, under the town's policy, "a minister or layperson of any persuasion, including an atheist, could give the invocation." *Id.* at 1816; *see also id.* at 1826 (plurality opinion) ("[H]ere, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions."); *id.* at 1829 (Alito, J., concurring) ("[T]he town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation . . . ."). The town policy at

issue did not include any "constraints" on the content of legislative prayers requiring that they be theistic or follow any particular principles of faith. *Id.* at 1823. Instead, as *Town of Greece* explained, "[t]he relevant constraint[s]" for purposes of the Establishment Clause were that the prayer be: (1) "solemn and respectful in tone," (2) "invite[ ] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing," and (3) not "denigrate nonbelievers or religious minorities, threaten damnation, . . . preach conversion," or "proselytize or advance any one, or . . . disparage any other, faith or belief." *Id.* (quoting *Marsh*, 463 U.S. at 794-95). Thus, *Marsh* and *Town of Greece* enshrine nondiscrimination—including with respect to individuals who do not adhere to any religion—as a predicate to legislative prayers under the Establishment Clause.

C. The Record Is Clear That Brevard County's Policy Is Discriminatory and Violates the Establishment Clause.

Brevard County is explicit in its efforts to depart from the text of the Establishment Clause and decades of precedent, including *Marsh* and *Town of Greece*, to give religious preference to theistic faiths over non-theistic faiths and belief systems in its invocations. Its impermissible discriminatory motives are apparent in the testimony of its own officials, and on the face of its justifications for the invocation policy. And carried to their logical conclusion, Brevard County's rationales for discriminating

against non-theists could just as readily be extended to any other religious minority whose beliefs do not accord with the majority.

The record is replete with statements made by various Brevard County Commissioners showing that the County's selection of prayer-givers was intended to exclude not only atheists and Humanists, but virtually any minority religion with whom the Commissioners were personally uncomfortable—most of which were non-monotheist. This evidence was well-summarized in the district court's Order. (R.105 at 34) (holding that the "overwhelming, undisputed record evidence" clearly "reveal[ed] [an] 'impermissible motive' in [Brevard County's] selection of invocation givers"). Examples from the parties' Amended Stipulation of Facts Regarding Cross-Motions for Summary Judgment include:

> (1) Commissioner Curt Smith told a news reporter that the purpose of Brevard County's invocation was to "worship the God that created us"—a God who he described as "[t]he one and only true God[,] [t]he God of the Bible." (R.83 at 32, ¶¶ 153-54). Commissioner Smith also stated he would not invite a Wiccan, a Satanist, a Rastafarian, a deist, a polytheist, or anyone who does not believe in a monotheistic religion to deliver an opening invocation at a Board meeting. (*Id.* at 33, ¶ 159).
>
> (2) Commissioner Jim Barfield stated that he would not invite a Satanist, a Rastafarian, a deist, or a polytheist to deliver an opening invocation at a Board meeting because these groups were "not representative of [his] community," and that atheists "do not count" for purposes of the invocation. (*Id.* at 34, ¶¶ 163-65). Commissioner Barfield was also uncertain as to whether he would invite a Wiccan or a Native American shaman to deliver an opening invocation at a Board meeting. (*Id.* at ¶ 166)

(3) Commissioner Robin Fisher stated that the Board allowing Christian invocations showed the Board's support for Christianity. (*Id.* at ¶168). He also stated that he would not invite a Wiccan, a Satanist, or a deist to deliver an opening invocation at a Board meeting, and that he would have to examine more closely the beliefs of Rastafarians, Hindus, and polytheists to determine whether to invite them to deliver an opening invocation at a Board meeting. (*Id.* at ¶¶ 169-70).

(4) Former Commissioner Bolin Lewis stated that the purpose of the invocation was "honoring the Christian community," and allowing non-theists to participate "would be a dishonor to the Christian community." (*Id.* at 35, ¶ 174). Former Commissioner Lewis would not invite a Wiccan, a Satanist, or a deist to deliver an opening invocation at a Board meeting. (*Id.* at ¶ 175). She also stated that she would have to examine the beliefs of Hindus, polytheists, and practitioners of traditional Native American religions to determine whether to invite them to deliver an opening invocation at a Board meeting. (*Id.* at ¶ 176).

(5) Commissioner Trudie Infantini stated that the Board's selection of invocation speakers was limited to "certain places." (*Id.* at 37, ¶ 182). She was uncertain as to whether she would invite a Satanist to deliver an opening invocation at a Board meeting. (*Id.* at ¶ 183).

(6) Former Commissioner Chuck Nelson stated that he would have to examine more closely the beliefs of Wiccans to determine whether to invite them to deliver an opening invocation at a Board meeting. (*Id.* at ¶ 184).

(7) Commissioners Barfield and Fisher agreed that their stance on the invocation was a reflection of "standing firm [t]o up[]hold Christian values." (*Id.* at 38, ¶ 188). Commissioner Andy Anderson agreed with an e-mail praising him as a "faithful Christian soldier." (*Id.* at ¶ 189).[2]

[2] Brevard County's Initial Brief does not address any of these highly revealing statements. It focuses instead upon: (1) statements the County sees as hostile to religion from the websites of non-party organizations affiliated with Plaintiff Central Florida Freethought Community; and (2) a

Brevard County further took wholly inappropriate and unconstitutional considerations into account when justifying its invocation selection process. For example, Brevard County attempted to justify its exclusionary selection practices by asserting that its invocation practices were in line with the beliefs of "a substantial body of Brevard constituents," while also implying that its faith-based community represented the "minority view." (R.83 at 21, ¶ 117; R.105-1 at 2, ¶¶ 7-11, 36). This type of rudimentary head-counting to determine what a "substantial body" of the community may tolerate could, again, be used to justify exclusion of virtually any minority religion, not just Secular Humanists or atheists. Regardless of whether the theistic community is in the majority or minority, numbers are irrelevant. "The First Amendment is not a majority rule, and government may not . . . define permissible categories of religious speech." *Town of Greece*, 134 S. Ct. at 1822. What the First Amendment demands is neutrality to different belief systems.

Brevard County further attempted to justify its discriminatory selection practices by dissecting the beliefs of Secular Humanists in

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statement by one Appellee/Cross-Appellant that the County attempts to interpret to impute insincerity to his intentions in seeking to give an invocation. (Appellant's Br. at 13-16, 33). Yet the County's own Commissioners posted disparaging statements about other belief systems on social media, and prior invocation speakers have made various offensive statements toward other religions on social media and their websites. (R.83 at 33, ¶ 158; at 36, ¶ 181; at 60-65, ¶¶ 283-301).

Resolution 2015-101.[3] Half of Resolution 2015-101's text is devoted to scrutinizing Secular Humanists' beliefs, as well as the offensiveness of those beliefs to other religions. (R.105-1 at 3-8, ¶¶ 18-31). Brevard County maintains that, under *Town of Greece*, it was permitted to "vet" the beliefs of invocation-givers to ensure that they did not "denigrate, proselytize, threaten damnation, or preach conversion." (Appellant's Br. at 37). However, the record clearly shows that monotheists were not similarly "vetted," even though many of Brevard County's monotheist invocation-givers have publicly made denigrating statements about other religions. (R.83 at 60-65, ¶¶ 283-301).

This type of religious preference by a legislative body, under the guise of "vetting" invocation-givers of a minority belief system more vigorously than invocation-givers of a favored belief system, is exactly the kind of entanglement between government and religion that the First Amendment abhors. *Town of Greece*, 134 S. Ct. at 1822 (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)) ("Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior."); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188-89 (2012) ("According the state the power to determine which individuals will

[3] Resolution 2015-101 was not "a novel statement" but "merely codifie[d] the County's previously existing practice." *Williamson v. Brevard Cty.*, 276 F. Supp. 3d 1260, 1278 (M.D. Fla. 2017).

minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."). At a minimum, the statements of past monotheist invocation-givers implies that Brevard County's threshold for "denigrating" people of other beliefs is quite different as applied to invocation-givers of a majority-approved faith than as applied to invocation-givers of a majority-disapproved faith.

D. Brevard County's Policy Is Facially Discriminatory.

Even if the record lacked any evidence of discriminatory intent, though there is ample evidence of such intent, Brevard County's invocation selection practices are discriminatory on their face. Any religious test for who may give an invocation inevitably results in discrimination against minority religions and governmental entanglement with religion. Resolution 2015-101 categorically forbids all pre-meeting "[s]ecular invocations and supplications from any organization whose precepts, tenets or principles espouse or promote reason, science, environmental factors, nature, or ethics as guiding forces, ideologies, and philosophies." (R.105-1 at 10-11, § 2). This language inevitably discriminates against theistic minority religions, in addition to non-theists.

Native American religions, for example, are generally not monotheist and many of them are deeply connected with nature and the environment. *See generally* Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1295-302 (1996) (explaining that "Native Americans'

concept of a supreme deity traditionally has not followed the exclusive monotheistic pattern of the Christian religion" and that "[u]nder tribal religions, all of creation, whether animated or not . . . have their own spirits and potential for life, and Native Americans pray through these spirits in much the same way that Christians pray to God through Christ and the saints."). Buddhism would also inevitably be excluded, as it enshrines a system of ethics not predicated on belief in a Supreme Being. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 42, (2004) (O'Connor, J., concurring) ("Of course, some religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being."). Furthermore, a religion like Hinduism does not fit into the Abrahamic binary of "monotheistic" and "polytheistic." Hinduism is best described as monism, as its teachings speak of one Absolute as the formless underlying reality which can manifest and be worshiped through infinite forms. As such, Hindus revere nature and the environment. Hinduism also embraces science as one of the ways in which humans seek to understand the world we live in.

The phrase "secular invocations and supplications" does not clarify what Resolution 2015-101 is trying to exclude because the term "secular" essentially just means "non-religious." *See Secular*, BLACK'S LAW DICTIONARY (3d ed 2009) ("Worldly, as distinguished from spiritual."); *Secular*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) ("Temporal; pertaining to temporal things, things of the world; worldly; distinguished from the holy or spiritual."); *cf.* Steven D. Smith, *Separation and the*

"Secular": Reconstructing the Disestablishment Decision, 67 TEX. L. REV. 955, 1003 (1989) ("Nearly all religious beliefs and practices have temporal consequences and implications that attract favor for earthly reasons."). Thus, in creating their own definition of what is "secular" and "religious," the Brevard County Commissioners are saying that they disagree with either (1) the definition of religion created in *Torcaso* and observed by the federal courts, or (2) the long-established constitutional precedent that government should remain neutral with respect to religion and non-religion.

Brevard County's feigned equal treatment in allowing Appellees/Cross-Appellants to give non-theistic invocations during the Board's Public Comment period is a pretext. As the district court accurately noted, this bifurcation is illusory because "the Public Comment period is . . . not reserved for secular invocations but is open to discussion of any subject involving County business, and a 'Christian prayer' would be permitted both at the beginning of the meeting and during Public Comment." *Williamson*, 276 F. Supp. 3d at 1286; (R:83 at 31, ¶¶147-48). "Thus, 'religious' invocators have multiple opportunities to speak, whereas 'secular invocations' can only be given during Public Comment." *Williamson*, 276 F. Supp. 3d at 1286. This, yet again, is inherently discriminatory without further need of record evidence.

II. HISTORY DOES NOT SUPPORT OR JUSTIFY DISCRIMINATION AGAINST NON-THEISTS IN THE SELECTION OF GUEST CLERICS OR CHAPLAINS.

Brevard County's erroneous assertion that historical practice with respect to legislative prayer supports its decision to exclude non-theists from offering invocations is wrong, both historically and legally. (Appellant's Br. at 25–28). Brevard County asserts that theistic prayers "lend gravity to the occasion and reflect values long part of the Nation's heritage." (*Id.* at 27 (quoting *Town of Greece*, 134 S. Ct. at 1823)). An examination of actual historical practice, however, does not substantiate the exclusion of beliefs that Brevard County finds disagreeable, nor does it support the discriminatory view that an invocation of non-theistic beliefs cannot "lend gravity" to government proceedings or somehow runs contrary to "values long part of the Nation's heritage." Quite the opposite, the historical record rebuts the view that this Nation's heritage countenances exclusion of minority religious views. Regardless, reliance on history cannot displace the central tenet that it is unconstitutional for Brevard County to decide which beliefs are worthy of invocation, and which should be excluded.

A. There Is No Evidence That Congress Excluded Chaplains Based on the Content of Their Beliefs at the Time of the First Amendment's Ratification.

Brevard County's implicit historical-practice argument rests on an unsound inversion of the Supreme Court's rulings in *Marsh* and *Town of Greece*. There, the Court upheld opening invocations at governmental

meetings based on an "unambiguous and unbroken history of more than 200 years" going back to the ratification of the Bill of Rights. *Town of Greece*, 134 S. Ct. at 1819 (quoting *Marsh*, 463 U.S. at 792). The Court emphasized that because "the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment," the framers of the Bill of Rights must have "accepted" that legislative invocations do not violate the Establishment Clause. *Town of Greece*, 134 S. Ct. at 1819; *see also Marsh*, 463 U.S. at 787–92.

Brevard County implies that the tradition of the Framers supports their exclusionary practices. (Appellant's Br. at 23-26). That conclusion does not follow, logically or factually. The mere absence of evidence that non-theists gave prayers or invocations in the early days of the republic does not support a positive inference that they were excluded from legislative prayer. It is equally if not more plausible that this question simply did not confront the First Congress or any early Congress, and indeed the available historical evidence points to that explanation.

There is no historical evidence to suggest that the First Congress (or any Congress for the first 150 years of the Nation's history) invited members of the public to deliver invocations, while discriminating against or excluding beliefs the Congress found objectionable or outside of the beliefs of the "substantial body" of its constituents. To the contrary, the historical evidence is clear that guest chaplains or guest invocations formed little or no part of Congress' historical practices, in which permanent,

appointed chaplains were the norm. *See, e.g.*, *History of the Chaplaincy*, Office of the Chaplain: U.S. House of Representatives, http://bit.ly/2wlwNqH (last visited Mar. 8, 2018); *Senate Chaplain*, United States Senate, http://bit.ly/2em2AoL (last visited Mar. 8, 2018). A diligent search has also turned up no evidence of any non-theist ever requesting to give an opening invocation to any governmental body in the decades following adoption of the Constitution, much less of a non-theist being denied or excluded from doing so.

Efforts to draw affirmative conclusions from circumstances that did not confront the Founders are dubious at best. As Justice Black long ago observed, it goes "beyond reason and common experience to maintain . . . that in legislation any more than in other affairs silence or inaction is acquiescence equivalent to action." *Cleveland v. United States*, 329 U.S. 14, 22 (1946) (Black, J., concurring). "There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated and in the clarity and certainty of the expression of its will." *Id.* Accordingly, it is dangerous to "imput[e] to Congress, as a result of its failure to take positive or affirmative action through normal legislative processes," ideas it has not affirmatively expressed. *Id.* at 23; *see also Waterman S.S. Corp. v. United States*, 381 U.S. 252, 269 (1965), *reh'g denied*, 382 U.S. 873 (1965) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)) (stating that subsequent

perception of actions of an earlier Congress "form[s] a hazardous basis for inferring the intent" of the earlier Congress).

Brevard County also incorrectly relies on the plurality's observation in *Town of Greece* that the "principal audience" for legislative invocations is "lawmakers themselves." (Appellant's Br. at 28-29 (quoting *Town of Greece*, 134 S. Ct. at 1826)). Lawmakers are not religiously homogeneous.[4] There are, for example, at least two current and two former openly non-theist members of the U.S. House. *See* Shadee Ashtari, *Barney Frank Explains Why He Hid His Atheism*, HuffPost (June 10, 2014), http://bit.ly/2oRoKhm; Michelle Boorstein, *This Lawmaker Isn't Sure That God Exists. Now, He's Finally Decided to Tell People*, Wash. Post, Nov. 9, 2017, http://wapo.st/2DcCNSF; Kimberly Winston, *Arizona Democrat to Replace Defeated Pete Stark as Sole Atheist in Congress*, Wash. Post, Nov. 8, 2012, http://wapo.st/2oXTADW. A number of state legislators around the country also have come out as non-theists. *See, e.g.*, Shadee Ashtari, *Atheist Senator Ernie Chambers Tells Religious Organizations: 'PAY YOUR TAXES,'* HuffPost (Jan. 24, 2014),

[4] Nor are lawmakers expected to be so unyielding in their beliefs that they cannot abide an invocation by a practitioner of another faith. "Our tradition assumes that adult citizens . . . can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Town of Greece*, 134 S. Ct. at 1823. Thus, Congress today "acknowledges our growing diversity . . . by welcoming ministers of many creeds," including Buddhist, Hindu, Muslim, and Native American invocation-speakers. *Id.* at 1820–21

http://bit.ly/2FFRVNI; James H. English, *A Humanist in Action: Pennsylvania House Rep. Brian Sims*, TheHumanist.com (Feb. 13, 2014), http://bit.ly/2G7O5Ln; Hemant Mehta, *Atheist Wins Re-Election to New Jersey General Assembly*, Friendly Atheist (Nov. 8, 2017), http://bit.ly/2IfrwVI; Cary Shaw, *Agnostic Atheist State Legislator to Speak*, Westport Patch, http://bit.ly/2G6LfpO (last visited Mar. 8, 2018); Kimberly Winston, *Athena Salman, Atheist Legislator, on Secular Values and Godless Invocations*, Religion News Service (June 19, 2017), http://bit.ly/2DbWdXS.[5] Thus, contrary to the very observation cited by the County, excluding non-theistic legislative prayer would effectively prevent non-theistic legislators from having their beliefs represented and included before the legislative body.

The historical record, in short, does not corroborate Brevard County's view that "the Nation's heritage" calls for the exclusion of minority, non-theistic or non-monotheistic belief systems from legislative prayer. The First Congress and its successors were silent on the specific issue of non-theistic invocations, but it expressed a policy favoring multi-denominational inclusion from the very start, and that policy has become

[5] There is also evidence that other members of Congress are non-theists but fear to publicly disclose their beliefs. *See* Brian Pellot, *Atheist Politicians May Run the UK, but They Remain Closeted in the US*, Wash. Post, Aug. 22, 2014, http://wapo.st/2DbF3tm; Jeffrey M. Jones, *Atheists, Muslims See Most Bias as Presidential Candidates*, Gallup (June 21, 2012), http://bit.ly/2Fsxe4B.

more inclusive over time as the religious diversity of the Nation has expanded.

B. The Absence of Non-Theistic Invocations in Early Congresses Cannot Support Modern Discrimination Against Historically Underrepresented Beliefs.

Even if Brevard County had presented evidence of deliberate exclusion of non-theists from legislative prayers at the time of the Establishment Clause's ratification—which it did not—such evidence would not support exclusion of non-theists from legislative prayer today. "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh*, 463 U.S. at 790. Though the Founders' understanding of what constitutes improper official advancement of or entanglement with religion bears upon the present dispute, it is not dispositive. The Supreme Court emphasized in *Town of Greece* that its precedent "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." 134 S. Ct. at 1819.

Indeed, following the argument that non-theistic invocations were not part of historic legislative prayer to its logical conclusion demonstrates its absurdity and inherent flaws. Such an argument would equally justify religious discrimination against theistic religions that were not represented in historical legislative prayers. Historians believe that no non-Christian ever gave an opening prayer to Congress before 1860 or to any state legislature before 1850. *See* Bertram W. Korn, *Eventful Years and*

Experiences: Studies in Nineteenth Century American Jewish History 98–99, 114–15 (1954), http://bit.ly/2G8eqsE. If these historical facts were sufficient to justify exclusion of non-theistic invocations, they would equally justify exclusion of Muslims, Jews, and other non-Christian theistic faiths. In fact, if a lack of non-theistic invocations in early American history could support exclusion of non-theists from opportunities to present legislative invocations today, history would similarly support exclusion of any non-Christian and even discrimination against non-Protestant Christians whose denominations were not selected as legislative chaplains by Congress for much of American history. Of course, that would plainly be contrary to the law. *Town of Greece* held that the selection of invocation-speakers must reflect a "policy of nondiscrimination," not "aversion or bias on the part of [governmental] leaders against minority faiths." 134 S. Ct. at 1824

Moreover, in light of Brevard County's rationale that its invocation policy seeks to represent the beliefs of "a substantial body of Brevard constituents," the County's own legislative prayer record in conjunction with application of this exclusionary historical perspective would seem to justify exclusion of non-Christian invocation speakers. The vast majority of guest chaplains delivering Brevard County's invocations provided a Christian invocation—and a predominately Protestant invocation at that. As the stipulated facts show, "[o]f the 195 invocations given before the Board from January 1, 2010 through March 15, 2016, ***all but seven*** were given by Christians or contained Christian content." (R.83, ¶53 (emphasis

added)). Of the 188 Christian invocations, "only five were delivered by Catholics." (*Id.* ¶ 55). Thus, there is an equal absence of history of Muslim or Hindu invocations within Brevard County as non-theistic invocations, and only scant evidence of non-Protestant invocations. If the lack of historical inclusion of non-theists supports their continued exclusion from invocations, that same lack of history could be used to justify exclusion of other beliefs—a result which is clearly repugnant to the Establishment Clause.

The Supreme Court has made clear that this country's history does not provide license to discriminate. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) ("[T]he Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)) (observing that, despite "'long and unfortunate history of sex discrimination,'" "gender-based government action [now requires] an 'exceedingly persuasive justification'"); *McDaniel v. Paty*, 435 U.S. 618, 623–24, 629 (1978) (holding that a state constitutional provision prohibiting ministers from holding legislative offices was unconstitutional "[n]otwithstanding the presence of such provisions in seven state constitutions when the Constitution was being written"); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966) ("In determining what lines are unconstitutionally discriminatory, we have

never been confined to historic notions of equality."). History informs this discussion, but it cannot rationalize the discriminatory exclusion of religious minorities from legislative prayers in a manner repugnant to present understandings of religious diversity and inclusion.

CONCLUSION

The Establishment Clause requires neutrality in the government's treatment of different belief systems. Government may not favor one religion over another, nor may it preference religion over non-religion. This foundational principle extends to legislative prayer. Brevard County's attempt to categorically favor theistic belief systems over non-theistic belief systems in its selection of invocation-givers, and to exclude belief systems it finds disagreeable, cannot pass constitutional muster. For these reasons, *Amici* respectfully submit that the district court's ruling should be affirmed.

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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/s/ Gregory E. Ostfeld
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I certify that on May 4, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld
Counsel for Amici Curiae

CERTIFICATE OF CONFERENCE

I certify that on April 4, 2018, I conferred with counsel for Appellant Brevard County, who confirmed that Appellant does not oppose the filing of this amicus brief.

/s/ Vitaliy Kats
Vitaliy Kats
Counsel for Amici Curiae

ADDENDUM
DESCRIPTIONS OF *AMICI CURIAE*

Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America and to the protection of minority religions and their adherents.

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting a secular society based upon reason, science, freedom of inquiry, and humanist values, Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care and other initiatives in Israel,

Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah is a strong supporter of the strict separation of church and state as critical in preserving the religious liberties of all Americans, and especially of religious minorities.

The Hindu American Foundation ("HAF") is a non-profit advocacy organization for the Hindu American community. Founded in 2003, HAF's work impacts a range of issues—from the portrayal of Hinduism in K-12 textbooks to civil and human rights to addressing contemporary problems, such as environmental protection and inter-religious conflict, by applying Hindu philosophy. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF's three areas of focus are education, policy, and community. Since its inception, the Hindu American Foundation has made church-state advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending the fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about the impact of such issues on Hindu Americans as well as various aspects of Hindu belief and practice in the context of religious liberty.

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting

diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all Americans and is not misused to favor the rights of some over others.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain democratic society." Consistent with our Principles and Resolutions, NCJW joins this brief.

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis, the Women of Reform Judaism which represents more than 65,000 women in nearly 500 women's groups, and the Men of Reform Judaism come to this issue out of our longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity.