

Case No. 16-11220

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

AMERICAN HUMANIST ASSOCIATION; ISAIAH SMITH,
Plaintiffs – Appellants

v.

**BIRDEVILLE INDEPENDENT SCHOOL DISTRICT; JACK
MCCARTY, in his individual and official capacity; JOE D. TOLBERT,
in his individual and official capacity; BRAD GREENE, in his
individual and official capacity; RICHARD DAVIS, in his individual
and official capacity; RALPH KUNKEL, in his individual and official
capacity; CARY HANCOCK, in his individual and official capacity;
DOLORES WEBB, in her individual and official capacity,**
Defendants – Appellees

On Appeal from the United States District Court,
Northern District of Texas, Fort Worth Division

**BRIEF OF *AMICUS CURIAE* FREEDOM FROM RELIGION
FOUNDATION, CENTER FOR INQUIRY, AMERICAN ATHEISTS,
RICHARD DAWKINS FOUNDATION FOR REASON & SCIENCE, AND
SECULAR COALITION FOR AMERICA IN SUPPORT OF APPELLANTS**

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Defendants – Appellees

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Freedom From Religion Foundation
Center for Inquiry
American Atheists
Richard Dawkins Foundation for Reason & Science
Secular Coalition for America

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TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS	i
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. Due to rising secularism in the United States, the nonreligious play an increasingly important role in society.....	5
II. Shifting demographics coupled with state-sponsored religion leads to alienation, division, and friction within the community, which the First Amendment seeks to avoid.....	9
III. Birdville ISD’s prayer policy negatively impacts the nonreligious and violates the First Amendment.....	14
CONCLUSION	16
CERTIFICATE OF SERVICE.....	17
CERTIFICATE OF COMPLIANCE WITH RULE 32(a).....	18

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Doe v. Duncanville Indep. Sch. Dist.</i> , 70 F.3d 402 (5th Cir. 1995)	14
<i>Doe v. Elmbrook Sch. Dist.</i> , 687 F.3d 840 (7th Cir. 2012)	14
<i>Doe v. Jackson City School District</i> , No. 2:13-cv-112 (S.D. Ohio 2013).....	14
<i>Doe I v. Sch. Bd. of Giles Cnty.</i> , No. 7:11-cv-00435-MFU (W.D. Va. 2012).....	14
<i>Does v. Enfield Public Sch.</i> , 716 F. Supp. 2d 172 (D. Conn. 2010).	14
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	4, 10
<i>Everson v. Board of Educ. of Ewing</i> , 330 U.S. 1 (1947).....	10
<i>Freedom From Religion Found., Inc., and Does v. Connellsville Area Sch. Dist.</i> ,	
No. 2:12-CV-1406 (W.D. Pa. 2013)	14
<i>Freedom From Religion Found., Inc., and Does v. New Kensington-Arnold Sch.</i>	
<i>Dist.</i> , 919 F. Supp. 2d 648 (W.D. Pa. 2013)	14
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992).....	10
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971).....	10
<i>McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.</i> , 545 U.S. 844	
(2005)	10, 11
<i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000).....	9, 13-14
<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005).....	11
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	5-6

Wallace v. Jaffree, 472 U.S. 38 (1985) 10

Weiss v. District Board, 44 N.W. 967 (1890) 11

OTHER AUTHORITIES

Abby Goodnough, *Student Faces Town’s Wrath in Protest Against a Prayer* (Jan. 26, 2012), <http://nyti.ms/1Ff3c0o>..... 13

America’s Changing Religious Landscape, Pew Research Center (May 12, 2015), <http://pewrsr.ch/2czcSe6>..... 5, 6

Barry Kosmin, *National Religious Identification Survey* (1989-1990), <http://bit.ly/2dhF8PI> 5

Exodus: Why Americans are Leaving Religion—and Why They’re Unlikely to Come Back, Public Religion Research Institute (Sept. 22, 2016), <http://bit.ly/2dasqao>..... 6

The Federalist No. 10 (James Madison)..... 11

The Federalist No. 19 (James Madison)..... 11

John Stossel, Sylvia Johnson, and Lynn Redmond, *The Black Sheep of Handesty* (May 11, 2007), <http://abcn.ws/2dDWvhg> 13

Margaret Downey, *Discrimination Against Atheists: The Facts*, 24 Free Inquiry No. 4 (2004), <http://bit.ly/2cXO1jc>..... 9

Nones on the Rise: One-in-Five Adults Have No Religious Affiliation, The Pew Forum on Religion and Public Life (October 9, 2012), <http://pewrsr.ch/2cT94SH> 5

Penni Crabtree, *Prayer issue rips apart congress . . . religious Oklahoma township*, 20 National Catholic Reporter No. 21 (March 16, 1984), <http://bit.ly/2d6Mk4M>..... 13

Penny Edgell, Joseph Gerteis, and Douglas Hartmann, *Atheists as “Other”*: *Moral Boundaries and Cultural Membership in American Society*, 71 Am. Soc. Rev. 211, 218 (2006), <http://bit.ly/2daChwS>..... 8

Rachel Bauchman, *Rachel Bauchman Versus Utah*, Freethought Today (Oct. 1996), <http://bit.ly/1Edko5F> 13

Ryan T. Cragun, Barry Kosmin, et al., *On the Receiving End: Discrimination toward the Nonreligious in the United States*, 27 J. Contemp. Religion 105, 105 (2012), <http://bit.ly/2czdyQvX>..... 7, 8

Support for Nontraditional Candidates Varies by Religion, Gallup (June 24, 2015), <http://bit.ly/2d46Z5V> 7-8

INTEREST OF *AMICUS CURIAE*¹

Amicus curiae the Freedom From Religion Foundation (“FFRF”) is a national nonprofit organization based in Madison, Wisconsin, and is currently the largest national association of freethinkers, representing atheists, agnostics and others who form their opinion about religion based on reason, rather than faith, tradition or authority. FFRF has members in every state in the United States and in the District of Columbia and Puerto Rico, including 1,000 members in Texas. FFRF’s two purposes are to educate the public about nontheism, and to defend the constitutional principle of separation between state and church. FFRF works to achieve these purposes by advocating for and representing the views of its membership in Establishment Clause cases.

FFRF’s interest in this case arises from both of its purposes, to defend the separation of church and state and to educate the public on why prayer at a school board meeting marginalizes a significant, growing portion of the population. The Establishment Clause of the First Amendment to the United States Constitution prohibits the government from giving preference to religion over nonreligion. FFRF and its members view the inclusion of prayers at school board meetings as an impermissible endorsement of religion under the Establishment Clause. They

¹ Counsel for either party has not authored this brief, in whole or in part. No monetary contribution has been made to the preparation or submission of this brief other than the *amicus curiae*, their members or their counsel. Consent to file this brief has been given by all parties.

are also divisive—giving preferential treatment to religious individuals alienates and excludes FFRF’s members, other nonbelievers, and all nonreligious organizations.

Amicus curiae the Center for Inquiry (“CFI”) is a nonprofit, educational organization whose mission is to foster a secular society based on science, reason, 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 currently represents tens of thousands of members across the United States, including members in the state of Texas.

CFI’s interest in this case springs from its belief that a strict interpretation and enforcement of the First Amendment’s Establishment Clause benefits all Americans, including both those of religious faith and those of no faith. CFI believes that the separation of church and state as envisioned by the Founding Fathers and enshrined in the Constitution is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy. By including prayers before school board meetings, the authorities are placing their official endorsement on specific religious beliefs, to the detriment of those who hold different or no religious beliefs, including CFI’s members, as well as to the detriment of society at large.

Amicus curiae American Atheists is a national educational, non-political, nonprofit corporation. American Atheists is a membership organization whose interest in this case arises from its mission of advancing and promoting the complete and absolute separation of religion and government, and to preserving equal rights under the law for atheists. American Atheists encourages the development and public acceptance of a humane, ethical system that stresses the mutual sympathy, understanding, and interdependence of all people and the corresponding responsibility of each individual in relation to society.

Amicus curiae the Richard Dawkins Foundation for Reason & Science is a nonprofit organization headquartered in Washington, D.C., whose interest in this case arises from its mission to promote scientific literacy, remove the influence of religion in science education and public policy, and eliminate the stigma that surrounds atheism and non-belief.

Amicus curiae the Secular Coalition for America (“SCA”) is a national nonprofit advocacy organization headquartered in Washington, D.C., dedicated to amplifying the diverse and growing voice of the nontheistic community in the United States. Representing 19 voting member organizations and nearly 300 local endorsing organizations, the mission of SCA is to increase the visibility of and respect for nontheistic viewpoints in the United States, and to protect and strengthen the secular character of our government as the best guarantee of

freedom for all. SCA's interests in the defense of a strong wall of separation between church and state are impacted by a policy which introduces religion and worship into school board meetings.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Today, more and more Americans express no religious faith or religious affiliation. Despite representing a sharply rising percentage of the population, and making important contributions to society, the nonreligious are still viewed with hostility by the majority of Americans, and face discrimination and exclusion for their lack of religious belief.

When that discrimination and exclusion comes from any level of the government, federal, state, or local, it moves from being simply unfair to being unconstitutional. The Constitution prohibits the government from preferencing adherents to one religion over adherents to other religions, or the religious over those who follow no religion. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). When the Birdville Independent School District Board of Trustees ("Birdville ISD") selects students to deliver prayers to the public at its meetings, it unconstitutionally endorses religion. It also encourages community backlash and antagonism towards any nontheists who disagree with the prevailing religious sentiment, a problem courts have long acknowledged. Such governmental approval

of prayer engenders religious divisiveness in the community, which is precisely the harm that the First Amendment's religion clauses seek to avoid.

ARGUMENT

I. Due to rising secularism in the United States, the nonreligious play an increasingly important role in society.

America is rapidly losing its religion. Repeated surveys of the religious views of Americans have made this clear. Overall, 23% of adult Americans are religiously unaffiliated – a group commonly referred to as the “nones.” *America's Changing Religious Landscape*, Pew Research Center (May 12, 2015), <http://pewrsr.ch/2czcSe6>. This represents an 8-point increase in the unaffiliated since 2007 and a 15-point jump since 1990, making the “nones” the fastest growing identification in America. *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, The Pew Forum on Religion and Public Life (October 9, 2012), <http://pewrsr.ch/2cT94SH>; Barry Kosmin, *National Religious Identification Survey* (1989-1990), <http://bit.ly/2dhF8PI>.

It is not just the unaffiliated “nones” that are growing as a percentage of the population: 7% of Americans, more than 20 million people, are avowed atheists or agnostics. That is a larger group than Mormons, Jews, Hindus, Muslims, Jehovah's Witnesses, and Buddhists—groups that courts have long recognized may not be excluded or discriminated against by government—combined. *See, e.g., W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (recognizing the right of the

children of Jehovah's Witnesses to refuse to salute the national flag); *America's Changing Religious Landscape, supra*. Among Millennials, those born between 1981-1996, the youngest group surveyed in the 2015 Pew survey, this pattern is even more pronounced. Approximately 35% of Millennials are not religiously affiliated, and 12% are atheistic or agnostic. *Id.*

As each generation surveyed is less religious than the last, by larger and larger margins, it is highly likely that an even greater percentage of current schoolchildren are not religious. "While previous generations were also more likely to be religiously unaffiliated in their twenties, young adults today are nearly four times as likely as young adults a generation ago to identify as religiously unaffiliated." *Exodus: Why Americans are Leaving Religion—and Why They're Unlikely to Come Back*, Public Religion Research Institute (Sept. 22, 2016), <http://bit.ly/2dasqao>. These surveys indicate strongly that the students in the Birdville ISD are likely to be part of the least religious generation in this country.

The Birdville ISD should not write off atheists, agnostics, and other nontheists in the Birdville ISD community as undeserving of a seat at the table, which is the message sent when the Board of Trustees routinely favors religion over nonreligion. The nonreligious have made important contributions to society in a wide variety of disciplines. A small fraction of the diverse group of businesspeople, scientists, artists, and other prominent figures who have made their

nonbelief known include investor Warren Buffett, Facebook founder and CEO Mark Zuckerberg, molecular biologist Francis Crick, theoretical physicist Stephen Hawking, computer scientists Alan Turing and Steve Wozniak, physicist and chemist Marie Curie, psychologist B.F. Skinner, suffragist Elizabeth Cady Stanton, athlete Arian Foster, painter Claude Monet, painter and sculptor Pablo Picasso, writers Douglas Adams, Albert Camus, Neil Gaiman, and Kurt Vonnegut, jazz musician Charlie Parker, singer/songwriter and pianist Billy Joel, composer Dmitri Shostakovich, humanitarian and actress Angelina Jolie, actress Katharine Hepburn, director James Cameron, comedian Sarah Silverman, martial artist and actor Bruce Lee, tennis player Rafael Nadal, and football player and soldier Pat Tillman.

Despite the increasing presence of atheists and the nonreligious in the population and their contributions to society, surveys demonstrate that the nonreligious remain a highly disfavored minority in multiple ways. As an article by two of the leading researchers on the rise of secularism noted, atheists “are one of the most despised people in the US today.” Ryan T. Cragun, Barry Kosmin, et al., *On the Receiving End: Discrimination toward the Nonreligious in the United States*, 27 J. Contemp. Religion 105, 105 (2012), <http://bit.ly/2czdyQv>. Forty-two percent of Americans state that they would not vote for an atheist for president, making atheists the least-accepted religion-based group politically. *Support for Nontraditional Candidates Varies by Religion*, Gallup (June 24, 2015),

<http://bit.ly/2d46Z5V>. According to a 2003 study, the American Mosaic Project Survey, 47.6% of Americans would disapprove if their child wanted to marry an atheist, again the highest percentage of disapproving responses of all religious groups asked about in this survey question. Penny Edgell, Joseph Gerteis, and Douglas Hartmann, *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*, 71 Am. Soc. Rev. 211, 218 (2006), <http://bit.ly/2daChwS>. Atheists also drew the highest disapproval level by far of all groups listed when survey respondents were asked whether they agreed with the statement, "This group does not at all agree with my vision of American society," with 39.6% of respondents agreeing with this statement with respect to atheists. *Id.* Thus, very large parts of the population do not view atheists are worthy of holding political leadership positions, joining their families, or even of sharing in their concept of America.

For many nonbelievers, opportunities to contribute to political or social discourse are limited by the prejudice they experience. The 2008 American Religious Identification Survey reported that 42.9% of atheists and agnostics had experienced discrimination because of their lack of religious identification or affiliation in the five preceding years, including 26.1% in a social context and 13% in school. Cragun, *supra*, at 111, 114. The discrimination that nontheists suffer has included loss of jobs, abusive family situations, organized shunning campaigns in

their communities, harassing telephonic and written communications, death threats, physical violence against property, and physical assault. *See, e.g.*, Margaret Downey, *Discrimination Against Atheists: The Facts*, 24 Free Inquiry No. 4 (2004), <http://bit.ly/2cXO1jc>. By systematically endorsing religion at the start of each school board meeting, the Birdville ISD perpetuates the idea that the marginalization of the nonreligious is socially acceptable and that their contributions to the school community can be silenced and ignored.

II. Shifting demographics coupled with state-sponsored religion leads to alienation, division, and friction within the community, which the First Amendment seeks to avoid.

History demonstrates that mixing religion and government is divisive. Though demographics are shifting, the majority remains religious. This means that religion remains the default state of being in the United States, while more of the nonreligious than ever are affected by these frequent reminders of their status as outsiders.

When that exclusion comes from the government, it becomes an impermissible message to nonadherents “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)). This is unconstitutional because, as

the Supreme Court has said time and again, the “First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.” *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); *Epperson*, 393 U.S. at 104; *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). By favoring a particular religious group over other religions, or by favoring the religious in general over the nonreligious, the government feeds the isolation and exclusion that the disfavored groups suffer in society. Such policies magnify the discrimination and other harms, noted *supra*, suffered by atheists.

The Supreme Court has specifically stated that the government selecting individuals to give prayers in the school context, as the Birdville ISD does, is divisive: “the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.” *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Government selection of prayer-givers is divisive precisely because it selects, and thereby advances, one religion over another.

The Supreme Court has also recognized the divisiveness that comes with mixing government and religion. Avoiding “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.” *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971). In *McCreary County*, the Supreme Court said, “The Framers and the citizens of their time intended to guard

... against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society....” *McCreary*, 545 U.S. at 876. It continued, “[T]he divisiveness of religion in current public life is inescapable.” *Id.* at 881. Justice Breyer has described the purpose of the First Amendment as to “avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.” *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring). An early Wisconsin Supreme Court justice put it most eloquently: “There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution, and war, and all evil in the state, as religion. Let it once enter our civil affairs, our government would soon be destroyed.” *Weiss v. District Board*, 44 N.W. 967, 981 (1890) (Orton, J. concurring).

The potential for conflict in society engendered by religion has been noted since our country’s founding: “A zeal for different opinions concerning religion... [has], in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good.” *The Federalist No. 10* (James Madison). *See also*, *The Federalist No. 19* (Madison) (“The controversies on the subject of religion, which in three instances have kindled violent and bloody contests, may be said in fact to have severed the [Germanic] league.”).

This divisiveness is particularly acute in education, as is borne out in history, which shows that when religion enters the public schools, it often leads to serious conflict in the community. It puts minority community members in one of two positions: they may either cast their eyes down, remain silent, and show deference to a religious sentiment in which they do not believe, but which their school board members clearly do, simply to get along and not stand out as someone different from the mainstream, or challenge the practice and face a severe backlash. Placing any citizen in this position, of swallowing their own beliefs or risking hostility, strikes to the very heart of the guarantees granted by the First Amendment. Requiring such a decision to be taken by schoolchildren is even more unconscionable.

In the cases of which we know, that is, cases actually litigated and where the conflict entered the court records, individuals from minority belief systems who have stood up for their constitutional rights have faced extensive abuse. Students and parents who are publicly identified as being against the majority's religious views at their schools in separation of church and state matters have faced harsh backlash. Rachel Bauchman, a Jewish student who challenged choir performances of Christian music at her high school, faced daily harassment in the hallway of her school and her community. She received a constant stream of threats, accusations, and anti-Semitic slurs, including having swastikas scrawled on

posters she put up when she ran for student council. Rachel Bauchman, *Rachel Bauchman Versus Utah*, Freethought Today (Oct. 1996), <http://bit.ly/1Edko5F>. Jessica Ahlquist, who challenged a prayer banner hanging in her school, required a police escort to school because of all the online threats she received, and even her state representative called her “an evil little thing” on a talk radio show. Abby Goodnough, *Student Faces Town’s Wrath in Protest Against a Prayer* (Jan. 26, 2012), <http://nyti.ms/1Ff3c0o>. Nicole Smalkowski, who decided not to participate in Christian prayers given by her basketball teammates in a public high school in Oklahoma, found herself forced off the team and harassed by both students and teachers. John Stossel, Sylvia Johnson, and Lynn Redmond, *The Black Sheep of Handesty* (May 11, 2007), <http://abcn.ws/2dDWvhg>. Joann Bell, a mother in Little Axe, Oklahoma, who protested religious activity in her children’s public schools in 1981, was physically assaulted by a school cafeteria worker and had her home burned down by an arsonist. Penni Crabtree, *Prayer issue rips apart congress . . . religious Oklahoma township*, 20 National Catholic Reporter No. 21 (March 16, 1984), <http://bit.ly/2d6Mk4M>.

Courts have acknowledged this hostility faced by both the nonreligious and by members of minority religious faiths when dealing with religious matters in the public schools, routinely granting protective orders for student plaintiffs to proceed anonymously in cases dealing with controversial religious issues. *See, e.g., Santa*

Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995); *Doe v. Jackson City School District*, No. 2:13-cv-112 (S.D. Ohio 2013); *Freedom From Religion Found., Inc., and Does v. Connellsville Area Sch. Dist.*, No. 2:12-CV-1406 (W.D. Pa. 2013); *Freedom From Religion Found., Inc., and Does v. New Kensington-Arnold Sch. Dist.*, 919 F. Supp. 2d 648 (W.D. Pa. 2013); *Doe I v. Sch. Bd. of Giles Cnty.*, No. 7:11-cv-00435-MFU (W.D. Va. 2012); *Does v. Enfield Public Sch.*, 716 F. Supp. 2d 172 (D. Conn. 2010).

With the growing number of nonreligious Birdville students, parents, and community members that statistics predict, the potential for such harmful divisiveness only increases the longer the Board of Trustees includes prayer at its meetings.

III. Birdville ISD's prayer policy negatively impacts the nonreligious and violates the First Amendment

The Constitution of the United States does not permit government at any level, federal or state, county or city, to favor one religious group over others, or to favor the religious over the nonreligious. It is this equality of treatment before the law that lies at the heart of the First Amendment's religion clauses. A court, legislature, city council, or school board may not treat citizens differently because of their religious beliefs or lack thereof. Nor may it exalt a chosen religious faith, or religious faith in general, and grant it the imprimatur of the government. To do

so denigrates those of other faiths, and the nonreligious, and sends a message that they are lesser in the eyes of government.

Thomas Jefferson's wall of separation between church and state was erected to protect all Americans from a situation where their civic duties, such as involvement in the local school board, might conflict with their deeply held moral conscience. Attendance at a school board meeting should not require a parent, or particularly a student, to either violate their conscience, or to risk social stigma and opprobrium. Birdville ISD's invocation policy does precisely that. It requires the nonreligious to choose. It forces nonreligious parents and students to select from an unpalatable menu of options. They can choose not to attend the school board meetings; attend the meetings despite the presence of a prayer that marginalizes and excludes them, and which certainly does not represent their deeply held beliefs and principles; or they may stand up and object, risking the social and personal consequences already experienced by far too many nonreligious citizens who were unwilling to sit idly by in the face of government sponsored religion. This choice, imposed by Birdville ISD, is unfair and unnecessary. Moreover, it places an unconstitutional and unconscionable burden upon parents and students of minority religious faiths and of no religious faith. As such, it cannot stand.

CONCLUSION

For the above reasons, this Court must reverse the decision of the United States District Court for the Northern District of Texas, and rule that the prayer policy of Birdville ISD is unconstitutional as a violation of the Establishment Clause of the First Amendment to the Constitution of the United States.

Dated: October 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 14, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 3,501 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 version 14.6.4 in 14-point Times New Roman font.

Dated: October 14, 2016

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