IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CHRISTA SCHULTZ and DANNY SCHULTZ, both Individually and as Parents and Guardians of Minor Child C.S., a Minor (CORWYN SCHULTZ, now an Adult and Formerly a Student in the Medina Valley Independent School District); and TREVOR SCHULTZ, Individually,	)	
Plaintiffs,	)	
V.	)	**CIVIL ACTION NO. SA-11-CA-422-FB**
MEDINA VALLEY INDEPENDENT SCHOOL DISTRICT,	)	
Defendant.	)	

APPENDIX II

An Ironic Venue for Separation of Church and State Litigation

Henri Castro, a man of Jewish descent whose family converted to Catholicism, was instrumental in the emigration of Alsatians from Europe to the United States.[1]

Alsace, a small geographic region with its own unique language and religious diversity,[2] was long fought over by Germany and France.[3] There being no independent constitutional judicial system to protect the rights of the Alsatian minority from the imposition of German or French

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[1] BRYAN EDWARD STONE, THE CHOSEN FOLKS: JEWS ON THE FRONTIERS OF TEXAS 33 (Univ. of Tex. Press 2010) (explaining how Henri Castro, an "Alsatian descendant of Jewish converts to Catholicism . . . established a settler colony and the town of Castroville near San Antonio"); BOBBY D. WEAVER, CASTRO'S COLONY: EMPRESARIO DEVELOPMENT IN TEXAS, 1842-1865 (TAMU Press 1985) (explaining how Castro secured colonization grants and recruited Europeans to immigrate to Texas).

[2] JAMES MINAHAN, ONE EUROPE, MANY NATIONS: A HISTORICAL DICTIONARY OF EUROPEAN NATIONAL GROUPS, 37-38 (Greenwood Press 2000).

[3] STEFAN WOLFF, DISPUTED TERRITORIES: THE TRANSNATIONAL DYNAMICS OF ETHNIC CONFLICT SETTLEMENT 39 (Berghahn Books 2004).

government rule, the Alsatians chose freedom from the majority by coming to America,[4] some of them settling in Castroville in the Medina Valley of Texas.[5]

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[4] *See* Robert Weinland, *D'Alsace en Lorraine, Histoires de Familles: Emigration*, http://www.robert-weinland.org/emig.php?lang=en (last visited Jan. 2, 2012) (many Alsatian Protestants found asylum in the English colonies). Additionally, some Alsatian Lutherans suffered religious persecution by France and subsequently emigrated to Louisiana in 1750. *Id.*

[5] NATALIE ORNISH, PIONEER JEWISH TEXANS 49 (TAMU Press 2011) ("Instead . . . of continuing to submit to silence, oppression, and crushing, in this antiquated Europe . . . it appeared to us certain that the best thing we could do . . . was to transport ourselves to America.") *See also* Wayne M. Ahr "*Henri Castro and Castroville*" in THE FRENCH IN TEXAS 128 (Francois Lagarde, ed. 2003) ("Castroville [has] preserved and nurtured their Alsatian dialect, their predominant Catholicism, and many of their traditions."). Alsatian colonists who came to Texas brought with them their combined French and German heritage, which made "a distinct impression on area . . . religion." Castroville, Texas, www.texasescapes.com/TexasHillCountryTowns/CastrovilleTexas/CastrovilleTx.htm (last visited Jan. 4, 2012).

Diversity of *Homo Sapien* Religious and Life After Death Beliefs

Eternity is a Long Time

Though most of the seven billion *Homo sapiens*[6] have no knowledge they are traveling 66,000 miles per hour around the sun,[7] they have evolved over several million years to be the only species which knows it will die.

Not wanting their existence to end, *Homo sapiens* developed a multitude of theories and hopes, encompassed in thousands of religions,[8] of how they can avoid simply returning to the Earth from whence they and other species came. Or, as the country western song says: "Everybody wanna go to heaven, but nobody wanna go now."[9] In the past 10,000 years of human societal development, those belief systems have included the multiple gods of the ancient Romans, Greeks and Egyptians, the monotheism of the Abrahamic religions of Judaism, Christianity and Islam, the reincarnation beliefs of Buddhism, and the various religious beliefs and practices of the Shintoists, Hindus, Maya, Aztecs and Incas, to name but a few.

Some monopolistically believe theirs is the one and only true religion and path to eternal life. On the other hand, some *Homo sapiens*, known as Atheists, believe they know the only truth: That

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[6] United Nations Population Fund, *State of World Population 2011: People and Possibilities in a World of 7 Billion* (Oct. 26, 2011), available at http://foweb.unfpa.org/SWP2011/reports/EN-SWOP2011-FINAL.pdf.

[7] EDMUND LEDGER, THE SUN: ITS PLANETS AND THEIR SATELLITES 57 (Hazell, Watson and Viney 1882).

[8] LEWIS M. HOPFE AND MARK R. WOODWARD, RELIGIONS OF THE WORLD 11 (Prentice Hall, 7th ed. 1998) ("In the long period of human life on earth, there have been thousands of religions."); ENCYCLOPEDIA OF AMERICAN RELIGIONS (J. Gordon Melton, ed. 7th ed. 2002) (presenting coverage of more than 2,500 North American religious groups in the U.S. and Canada); *Adherents.com: National & World Religion Statistics-Church Statistics-World Religions*, www.adherents.com (last visited on Jan. 5, 2012) (collecting "statistics for over 4,200 religions, churches, denominations, religious bodies, faith groups, tribes, cultures, movements, ultimate concerns, etc.").

[9] KENNY CHESNEY, EVERYBODY WANTS TO GO TO HEAVEN (BNA Records 2008).

there is nothingness after physical death.[10] Still others postulate a parallel universe.[11] And those called Agnostics do not claim to know what happens after the final breath is expelled.[12]

Grace and Torture

While religious institutions bestow many blessings and try to alleviate suffering, those acts of Grace are newtralized by religious *Homo sapiens* who exhibit an historical and continuing pernicious and pervasive tendency to kill other humans and confiscate the property of those, sometimes even within the same religion, who do not believe as they do. Christians slaughtered other Christians.[13] In Europe, the blood of Irish Protestants and Catholics flowed freely.[14] Similar

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[10] Stephen Hawking, British physicist and author, dismisses belief in God and an afterlife. Ian Sample, *Stephen Hawking: "There is no Heaven: It's a Fairy Story,"* THE GUARDIAN (May 15, 2011) ("I regard the brain as a computer which will stop working when its components fail. There is no heaven or afterlife for broken down computers; that is a fairy story for people afraid of the dark."). Some Atheists do, however, believe in an afterlife. DAVID STAUME, THE ATHEIST AFTERLIFE: THE ODDS OF AN AFTERLIFE REASONABLE. THE ODDS OF MEETING GOD THERE: NIL 159-60 (Agio 2009) ("being an atheist or rationalist does not prohibit belief in the possibility of an afterlife. . . . [A]n afterlife can be removed from its religious context and examined on its own merit").

[11] MICHAEL B. MENSKY, CONSCIOUSNESS AND QUANTUM MECHANICS: LIFE IN PARALLEL WORLDS 179-80 (World Scientific Publishing Co. 2010) ("when the consciousness of man being turned-off, his soul obtains access to parallel worlds").

[12] *See* ANTHONY KENNY, THE UNKNOWN GOD 9 (Continuum 2004).

[13] *See generally* CROSS, CROWN & COMMUNITY: RELIGION GOVERNMENT AND CULTURE IN EARLY MODERN ENGLAND 1400-1800 (David J.B. Trim & Peter J. Balderstone, eds. 2004); PERSECUTION AND PLURALISM: CALVINISTS AND RELIGIOUS MINORITIES IN EARLY MODERN EUROPE 1550-1700 (Richard Bonney & David J. B. Trim, eds. 2006). *See also* David J.B. Trim, *The Christian Persecutory Impulse: Part One in a Series*, LIBERTY, January/February 2011 (exploring the history of persecution of Christians by Christians); David J.B. Trim, *The Christian Persecutory Impulse: The Medieval Not Quite Reformed: Part Two in a Series*, LIBERTY, March/April 2011; David J.B. Trim, *The Christian Persecutory Impulse: Tough Love: Part Three in a Series*, LIBERTY, May/June 2011; David J.B. Trim, *The Christian Persecutory Impulse: The Emergence of Toleration: Part Four in a Series*, LIBERTY, July/August 2011; David J.B. Trim, *The Christian Persecutory Impulse: Reformation, Tolerance, and Persecution*, LIBERTY, November/December 2011.

[14] MARTIN N. MARGER, RACE AND ETHNIC RELATIONS: AMERICAN AND GLOBAL PERSPECTIVES 477-78 (Wadsworth, 9th ed. 2011) (describing incidents of sectarian violence between Catholics and Protestants in Ireland in the 1970's and 1980's); RICHARD ENGLISH, IRISH FREEDOM: THE HISTORY OF NATIONALISM IN IRELAND 63 (Macmillan 2008) ("Political violence between Protestant and Catholic abounded in early and mid-seventeenth century Europe, [including] . . . the massacres of Irish Protestants by Irish Catholics in 1641 . . . [and] slaughter of thousands of Protestants by Catholics in Magdeburg in 1631").

conflict between Protestants and Catholics existed in the United States as well.[15] In colonial Salem, Massachusetts, Christians savagely punished women accused of being witches.[16] Other Christians rejected the Church of Jesus Christ of Latter-Day Saints as cultists, using brute force against them.[17] Radical Islamic Sunni and Shiites create chaos within their culture.[18] Christians attempted to exterminate Jews.[19] Some Muslims view non-Muslims as infidels.[20] Christians crusaded against

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[15] JAY P. DOLAN, THE IRISH AMERICANS: A HISTORY 61 (Bloomsbury Press 2008) (describing outbreaks of riots and mob violence against Catholics in Boston, New York, and Philadelphia in the 1830's and 1840's).

[16] The role of religion in the Salem witch trials has been described as follows:

> [W]ithout religion these charges would never have been filed, much less acted on. Without a belief in the devil as a genuine corrupting force, no one would have believed in witches. Religion also influenced the trials in that the judges looked to the ministers for guidance, since the judges had no previous experience with witchcraft. . . . [The trials became] one of the largest outbreaks of religiously related legal prosecution in American history, with nearly a score executed, five score jailed, and another ten score accused.

SCOTT A. MERRIMAN, RELIGION AND THE LAW IN AMERICA: AN ENCYCLOPEDIA OF PERSONAL BELIEF AND PUBLIC POLICY 448 (ABC-CLIO, Inc. 2007).

[17] Richard L. Bushman, *Mormon Persecutions in Missouri, 1883*, 3 BYU STUDIES 11 (1961) (describing mob violence against Mormons in Missouri). *See also* RICHARD ABANES, INSIDE TODAY'S MORMONISM 253 (Harvest House 2004) ("Most mainstream Christian denominations . . . are united in their outright rejection of Mormonism."); RICHARD LYMAN BUSHMAN, MORMONISM: A VERY SHORT INTRODUCTION 2 (Oxford Univ. Press 2008) ("Frequently Mormonism is labeled a cult rather than a church. Some say it is not Christian.").

[18] Peter Lyon, *Islam*, *in* CONFLICT BETWEEN INDIA AND PAKISTAN: AN ENCYCLOPEDIA 86 (ABC-CLIO, Inc. 2008) (describing bloody conflict between extremist Sunni and Shia Muslim groups).

[19] ROBERT MICHAEL, HOLY HATRED: CHRISTIANITY, ANTISEMITISM, AND THE HOLOCAUST 3 (Palgrave MacMillan, 1st ed. 2006) ("During the Holocaust, . . . most Christian Churches and most Christians . . . stood by in silence, or collaborated, when Jews were taken away by other Christians to be tortured and murdered."); WILLIAM NICHOLLS, CHRISTIAN ANTISEMITISM: A HISTORY OF HATE 225 (Rowman & Littlefield Publishers 1993) (In the Middle Ages, "Jews were massacred and tortured, and soon whole Jewish populations were expelled from countries where they had long resided.").

[20] PATRICIA CRONE, GOD'S RULE: GOVERNMENT AND ISLAM: SIX CENTURIES OF MEDIEVAL ISLAMIC POLITICAL THOUGHT 358 (Columbia Univ. Press 2004) ("Humans were divided in Muslims and infidels. . . . A Muslim was someone who surrendered to God and lived as His servant in a society based on His law. Infidels were rebels against God whose societies could never be more than the robbers' nests with which St. Augustine had compared kingdoms devoid of justice."); Ronald A. Pachence, *Infidels*, *in* AN INTRODUCTORY DICTIONARY OF THEOLOGY AND RELIGIOUS STUDIES 630 (Orlando O. Espin and James B. Nickoloff, eds. 2007) ("today, some Muslim extremists apply the term infidel to all non-Muslims, especially those living in the Western world").

Muslims.[21] Conflict between Orthodox Jews and secular Jews in Israel begets harsh and uncivil acts.[22]

Even poor old Abraham was ostracized by his own family for believing in one God and rejecting the multiple gods of his fathers.[23] His descendants, the cousins Moses, Jesus and Mohammed, would be perplexed by the blood spilled by their followers against each other.

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[21] KAREN ARMSTRONG, ISLAM: A SHORT HISTORY 93-95 (Modern Library 2000) ("[I]n July 1099, . . the Christian Crusaders from western Europe attacked Jerusalem, . . . [and] massacred its inhabitants. . . . The Crusades were disgraceful . . . [and] devastating for the Muslims of the Near East.").

[22] OREN YIFTACHEL, ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE 118 (Univ. of Pennsylvania Press, 2006) ("During the 1990s, greater tensions surfaced between Orthodox and secular Jews [in Israel]. . . . [F]or most Orthodox individuals, the Jewish nature of the state is clearly superior to its Western or democratic orientation [and] Orthodox parties support the increasing imposition of religious (Halacha) rule in Israel."). *See also* Joel Greenberg, *Religious Limits on Women Spur Controversy in Israel*, WASH. POST (December 27, 2011), www.washingtonpost.com/world/middle_east/religious-limits-on-women-spur-controversy-in-israel/2011/12/27/gIQAg8INLP_story.html ("A community of 86,000 . . . Beit Shemesh has a growing ultra-Orthodox population. The town has become a cauldron of tension . . . [because of] Israeli media reports about ultra-Orthodox Jews in the town who . . . hounded local religious schoolgirls, spitting and hurling abuse at them for what they deemed insufficiently modest dress.").

[23] *Quran* 19: 43-48 ("He (the father) said: 'Do you reject my gods, O Abraham? If you stop not (this), I will indeed stone you. So get away from me safely before I punish you.' Abraham said: 'Peace be on you! I will ask Forgiveness of my Lord for you. Verily! He is unto me, Ever Most Gracious. And I shall turn away from you and from those whom you invoke besides Allah.'"). Abraham's parents "were likely to have been worshipers of the moon-god Sin and his daughter Inanna, the patron deities of the city of Ur. . . . [T]he family names show a fairly standard homage to the Akkadian/Sumerian pantheon . . . [including] the goddess Ningal [and] Sin's daughter Malkatu." SUSAN WISE BAUER, THE HISTORY OF THE ANCIENT WORLD: FROM THE EARLIEST ACCOUNTS TO THE FALL OF ROME 128 (W. W. Norton & Company 2007).

The American Colonial Religious Experience

The Alsatians who immigrated to the Medina Valley were neither the first nor the last group to come to America in search of freedom from government controlled religion. Before them came the Pilgrims persecuted by the government-controlled Church of England,[24] the French Protestant Huguenots persecuted by the French Catholic government of Louis XIV,[25] and the European Jews persecuted by European Christian governments.[26]

They voted with their feet for separation of church and state by coming to the new world. But old practices die hard, and the American colonists themselves established official government religions.[27] For instance, the Rhode Island Charter of 1663 promised to "preserve unto [its inhabitants] that liberty in the true Christian faith and worship of God."[28] Other Rhode Island laws

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[24] BERKIN ET AL., MAKING AMERICA: A HISTORY OF THE UNITED STATES VOLUME 1: TO 1877 62 (Wadsworth, 6th ed. 2011) (describing Pilgrim voyage to America in search of religious freedom); SMITH BURNHAM, OUR BEGINNINGS IN EUROPE AND AMERICA: HOW CIVILIZATION GREW IN THE OLD WORLD AND CAME TO THE NEW 293-94 (John C. Winston Co. 1936) (explaining Pilgrims who became the first settlers in New England were Separatists driven to America by the persecution of the English government based on the Separatists' refusal to join the Church of England).

[25] JACKSON J. SPIELVOGEL, WESTERN CIVILIZATION SINCE 1300 456 (Wadsworth, 8th ed. 2011) ("In October 1685, Louis issued the Edict of Fontainebleu, . . . provid[ing] for the destruction of Huguenot churches and the closing of Protestant schools. It is estimated that 200,000 Huguenots defied the prohibition against their leaving France and sought asylum in England, the.United Provinces, and the German states."); *See also* Bertrand Van Ruymbeke, *From Ethnicity to Assimilation: The Huguenots and the American Immigration History Paradigm*, *in* FROM STRANGERS TO CITIZENS: THE INTEGRATION OF IMMIGRANT COMMUNITIES IN BRITAIN IRELAND AND COLONIAL AMERICA, 1550-1750 332 (Randolph Vigne and Charles Littleton, eds. 2001).

[26] ANTI-IMMIGRATION IN THE UNITED STATES: AN HISTORICAL ENCYCLOPEDIA 295 (Kathleen Arnold, ed. 2011) ("The history of Jewish immigration to the United States highlights America's legacy as a safe haven for the oppressed from around the world. . . . Jews were among the earliest European settlers to arrive in North America during the 17th century."); JAMES S. OLSON AND HEATHER OLSON BEAL, THE ETHNIC DIMENSION IN AMERICAN HISTORY (Wiley-Blackwell, 4th ed. 2010) ("Toward the end of the seventeenth century, groups of persecuted Ashkenazi Jews immigrated from central and eastern Europe. . . . Some came to America, and by 1776 nearly 3,000 Jews resided in the colonies.").

[27] *See* RUSSELL FREEDMAN, IN DEFENSE OF LIBERTY: THE STORY OF AMERICA'S BILL OF RIGHTS 26 (Holiday House 2003) ("Many [early Americans] sailed to the New World to escape religious persecution in the Old. . . . And yet . . . [m]ost of the early colonies established official government-sponsored churches, which all residents were required by law to support and attend.").

[28] SHELDON J. GODFREY & JUDITH C. GODFREY, SEARCH OUT THE LAND: THE JEWS AND THE GROWTH OF EQUALITY IN BRITISH COLONIAL AMERICA, 1740-1867 47 (McGill Queens Univ. Press 1995) ("[t]he Rhode Island charter of 1663 . . . made the colony undeniably Christian.").

restricted admission to the colony to those professing the Christian religion.[29] Similar laws existed in Massachusetts[30] and New York.[31] In Virginia in 1776, although it was declared "all men are equally entitled to the free exercise of religion, according to the dictates of conscience," it was also declared that "it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."[32] In Maryland, which was originally settled as a safe haven for Catholics, a Protestant majority became dominant and persecuted and marginalized Catholic residents.[33] Seventh-Day Adventists were similarly persecuted by the majority for their beliefs.[34]

Recognizing the danger of the integration of church and state, Reverend Isaac Backus wrote in 1773:

> [W]here [church and state] and the weapons which belong to them are well distinguished and improved according to the true nature and end of their institutions, the effects are happy, and they do not at all interfere with each other. But where they have been confounded together no tongue nor pen can fully describe the mischiefs that have ensued of which the Holy Ghost gave early and plain warnings.[35]

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[29] *Id.*

[30] The 1780 Massachusetts Constitution required certain public officeholders to recite an oath "declar[ing] [they] believe the Christian religion, and have a firm persuasion of its truth." FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1908 (Washington Government Printing 1909).

[31] The 1777 New York State Constitution guaranteed free exercise of religion, but its laws required an oath for government office that excluded Roman Catholics. CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION 30 (John J. Patrick and Gerald P. Long, eds. 1999).

[32] THE FOUNDING FATHERS AND THE DEBATE OVER RELIGION IN REVOLUTIONARY AMERICA: A HISTORY IN DOCUMENTS 60 (Matthew L. Harris and Thomas S. Kidd, eds. 2012) (citing the Virginia Declaration of Rights of 1776).

[33] "The colonial history of Maryland is one of religious unrest between Catholics and Protestants. While the colony was settled as a safe haven for English Catholics, Protestants made up a large number of the initial settlers and soon were a majority." ENCYCLOPEDIA OF RELIGION IN AMERICAN POLITICS 155 (Jeffrey D. Schultz, et al., eds. 1999). When Protestants "took control of the colony, [they] disenfranchised Catholics." *Id. See also* THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE VOLUME I: TO 1877 55 (Boyer et al., eds. 2011).

[34] Ronald Lawson, *Tensions, Religious Freedom, and the Courts: The Seventh-day Adventist Experience, in* RELIGION AND SOCIAL POLICY 73 (Paula D. Nesbitt, ed. 2001).

[35] Rev. Isaac Backus, *An Appeal to the Public for Religious Liberty, 1773, in* READINGS IN BAPTIST HISTORY: FOUR CENTURIES OF SELECTED DOCUMENTS 19 (Joseph Early, Jr., ed. 2008).

Government and Religion Joining Hands

One picture from the modern era speaks silently and poignantly of the danger of majoritarian government and religion joining hands:[36]

If government-run public schools also joined hands with religion and had the power to impose religious views, questions arise: Which holy books and prayers would be preferred? The Torah? The Book of Mormon? The Catholic Bible? The New Testament? The Bible as edited by Thomas Jefferson?[37] The Koran? Would Christians be required to face Mecca or observe Hebrew prayer? Would Jews and Muslims be obligated to stand and recite the Lord's Prayer?

One need only look at the states of Israel and Iran to see the conflicts which arise when government and religion become closely intertwined.[38]

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[36] David J.B. Trim, *The Christian Persecutory Impulse: Reformation, Tolerance, and Persecution*, LIBERTY, November/December 2011 (citing BPK Art Resources New York) (depicting Hitler greeting Reich Bishop Ludwig Müller and Abbott Albanus Schachleitner as honorary guests at the "Reich Party Rally for Unity and Strength" in 1934).

[37] THOMAS JEFFERSON, THE JEFFERSON BIBLE: THE LIFE AND MORALS OF JESUS OF NAZARETH: EXTRACTED TEXTUALLY FROM THE GOSPELS, TOGETHER WITH A COMPARISON OF HIS DOCTRINES WITH THOSE OF OTHERS (N.D. Thompson Publishing Co. 1902).

[38] *See generally* S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L J. 109 (1997).

The Debate Continues Through American History

"Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contribution. Keep the church and state forever separate."

-President Ulysses S. Grant[39]

"80 percent of the American people want Bible readings and prayer in the schools . . . Why should the majority be so severely penalized by the protests of a handful?"

-Reverend Billy Graham[40]

"Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"

-Supreme Court Justice Sandra Day O'Connor[41]

"God and the ten commandments and school prayer have all been expelled from the public schools. Pass a constitutional amendment to allow voluntary prayer."

-Presidential Candidate Pat Buchanan[42]

"I'm a Catholic and I hope a devout one, but I think that the public school classroom is no place for me to try and impose my world formula for prayer on children who don't share it, and for that very reason, I don't want my children in a public school classroom to be exposed to someone else's religion or formula."

-Senator Philip A. Hart (D-Michigan)[43]

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[39] PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 322 (Harvard Univ. Press 2004) (quoting President Ulysses S. Grant's 1875 speech given "to rally his troops for the coming election [and warn] of the danger of a second civil war").

[40] *Billy Graham Voices Shock Over Decision*, N. Y. TIMES, June 18, 1963, at 17.

[41] *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

[42] Pat Buchanan, Remarks at Bob Jones University (Sept. 18, 2000), available at Pat Buchanan on Education, http://www.issues2000.org/Celeb/Pat_Buchanan_Education.htm (last visited on Jan. 3, 2012).

[43] R. MURRAY THOMAS, GOD IN THE CLASSROOM: RELIGION AND AMERICA'S PUBLIC SCHOOLS 125 (Praeger Publishers 2007) (quoting Senator Phillip A. Hart).

"We can change education in America if you put Christian principles in and Christian pedagogy in."

-Reverend Pat Robertson[44]

"When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some."

-Supreme Court Justice Harry Blackman[45]

"As many of you know, I strongly support an amendment that will permit our children to hold prayer in our schools. The amendment would allow communities to determine for themselves whether voluntary prayer should be permitted in their public schools."

-President Ronald Reagan[46]

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[44] JAMES W. FRASER, BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA 187 (Palgrave MacMillan 2000) (quoting Pat Robertson on *The 700 Club*).

[45] *Lee v. Weisman*, 505 U.S. 577, 606-07 (1992) (Blackmun, J., concurring).

[46] Ronald Reagan, Radio Address to the Nation on Domestic Social Issues (Jan. 22, 1983), available at Ronald Reagan Presidential Library Archives, http://www.reagan.utexas.edu/archives/speeches/1983/12283a.htm (last visited Jan. 20, 2012).

The United States Has No King: The People Are Sovereign

The Constitution invokes, and is based upon, the people as having ultimate sovereignty and power over the three branches of government through the electoral and amendment processes vested in them. That power, for example, has been exercised to allow women to vote, to prohibit, and then allow, liquor and to limit the President of the United States to two terms.[47]

The people could exercise that same power to amend the Constitution to favor a particular religion, to turn the United States into a religious state such as Israel or Iran or to suppress religion as in the Soviet Union,[48] China[49] or Cambodia under the Khmer Rouge.[50]

Thus far, that power has not been exercised in such a manner, and this Court's obligation is to follow the Constitution as written, as intended by the Framers and as interpreted by the Supreme Court of the United States.

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[47] U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *id.* at amend. XVIII (prohibiting "manufacture, sale, or transportation of intoxicating liquors"); *id.* at amend. XXI (repealing amend. XVIII); *id.* at amend. XXII (setting term limits for persons elected to the office of the President).

[48] *See Generally* CHRISTOPHER MARSH, RELIGION AND THE STATE IN RUSSIA AND CHINA: SUPPRESSION, SURVIVAL, AND REVIVAL (Continuum Int'l Publishing 2011). *See also* RELIGIOUS POLICY IN THE SOVIET UNION 4 (Sabrina Petra Ramet, ed. 1993) ("A fundamental tenet of Marxism-Leninism is that religion will ultimately disappear. If it began to seem unlikely to do so, the authorities would naturally adopt measures to promote its disappearance, since its continued presence was a rebuke to the claims of the ideology.").

[49] FENNNANG YANG, RELIGION IN CHINA: SURVIVAL & REVIVAL UNDER COMMUNIST RULE 6 (Oxford Univ. Press 2011) ("China went even further, experimenting with a ban on all religions for more than a decade. Despite the best efforts of the Party-state, religion survived. The Chinese government has also failed to keep religion at a reduced level during the reform era since 1979. All kinds of religions are thriving in China today.").

[50] Jeffrey Haynes, *Conflict, Conflict Resolution and Peace-Building: The Role of Religion in Mozambique, Nigeria and Cambodia*, Vol. 47, No. 1 COMMONWEALTH AND COMP. POL. 52, 68 (2009) (explaining how the Khmer Rouge regime of the 1970's "tried energetically to exterminate religion in the country . . . while killing millions of Cambodians as a central facet of state policy.").

Original Intent of the Framers of the United States Constitution

Reasonable minds differ on the Constitution as a living, evolving document or one to be interpreted strictly as the Framers originally intended.[51] Some issues not foreseen by the leaders of an agrarian slave holding nation do not lend themselves to providing insight into the intent of those authors.

Religion though and its relationship to government was one on which the Founders did speak clearly. Having witnessed and learned from the bloodshed and persecution of European church-state partnerships the Founders wrote:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[52]

Known as the Father of the Constitution, James Madison expressed his intent this way:

> Whilst we assert for ourselves a freedom to embrace, to profess, and to observe the religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offense against God, not against man.[53]

In an 1802 letter to members of the Danbury Baptist Association, Thomas Jefferson wrote:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that

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[51] *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 112th Cong. 20-21 (2011) (statements of Supreme Court Justices Scalia and Breyer).

[52] U.S. CONST. amend. I.

[53] James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* THE AMERICAN CONSTITUTIONAL EXPERIENCE: SELECTED READINGS & SUPREME COURT OPINIONS 151 (Curry et al., eds. 2000).

> their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[54]

Mr. Jefferson reaffirmed his intent in an 1822 letter: "And a strong proof of the solidity of the primitive faith, is its restoration, as soon as a nation arises which vindicates to itself the freedom of religious opinion, and its external divorce from the civil authority."[55]

Similarly, in 1817, John Adams wrote to Thomas Jefferson, warning of the dangers of state religion:

> Oh! Lord! Do you think a Protestant Popedom is annihilated in America? Do you recollect, or have you ever attended to the ecclesiastical strifes in Maryland Pennsylvania, New York, and every part of New England? What a mercy it is that these People cannot whip and crop, and pillory and roast, as yet in the U.S.! If they could they would. . . . Quakers, Anabaptists, Moravians, Swedenborgians, Methodists, Unitarians, Nothingarians in all Europe are employing underhand means to propagate their sectarian Systems in these States.
>
> The multitude and diversity of them, you will say, is our security against them all. God grant it. But if we consider that the Presbyterians and Methodists are far more numerous and the most likely to unite; let a George Whitefield arise, with a military cast, like Mahomet, or Loyola, and what will become of all the other Sects who can never unite?[56]

Benjamin Franklin also expressed a desire for separation of church and state, writing in 1780:

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[54] THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE VOL. VIII 113 (H.A. Washington, ed. 1854).

[55] THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 703 (Adrienne Koch & William Peden, eds. 1972).

[56] THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE VOL. VII 69 (H.A. Washington, ed. 1854).

> When a Religion is good, I conceive that it will support itself; and, when it cannot support itself, and God does not take care to support, so that its Professors are oblig'd to call for the help of the Civil Power, it is a sign, I apprehend, of its being a bad one. But I shall be out of my Depth, if I wade any deeper in Theology.[57]

Thomas Paine likewise called for this separation, explaining "To God, and not to man, are all men accountable on the score of religion."[58] To Paine, "[p]ersecution is not an original feature in any religion; but it is always the strongly-marked feature of all law-religions, or religions established by law."[59]

The Framers' own religious beliefs were quite diverse. According to Arthur Schlesinger, Jr.:

> George Washington was a nominal Anglican who rarely stayed for Communion. John Adams was a Unitarian, which Trinitarians abhorred as heresy. Thomas Jefferson, denounced as an [A]theist, was actually a [D]eist who detested organized religion and who produced an expurgated version of the New Testament with the miracles eliminated. Jefferson and James Madison, a nominal Episcopalian, were the architects of the Virginia Statute of Religious Freedom. James Monroe was another Virginia Episcopalian. John Quincy Adams was another Massachusetts Unitarian.[60]

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[57] THE PAPERS OF BENJAMIN FRANKLIN 389-90 (Barbara Oberg, ed. 1997).

[58] ALFRED OWEN ALDRIDGE, THOMAS PAINE'S AMERICAN IDEOLOGY 87 (Associated Univ. Press 1984) (describing Thomas Paine's address as "a fundamental statement on the doctrine of the separation of church and state").

[59] THOMAS PAINE, RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE'S ATTACK ON THE FRENCH REVOLUTION VOL. I 81 (J.S. Jordan 1791).

[60] JAMES LARUE, THE NEW INQUISITION: UNDERSTANDING AND MANAGING INTELLECTUAL FREEDOM CHALLENGES 9 (Libraries Unlimited 2007) (citing Arthur Schlesinger, Jr.). *See also Separation of Church and State*, http://www.theocracywatch.org/separation_church_state2.htm (last visited on Jan. 3, 2012).

American Legal History

The United States Supreme Court recently surveyed significant historical events relevant to the development of First Amendment jurisprudence in our country, noting that "[c]ontroversy between church and state . . . is hardly new."[61] Indeed, legal controversy concerning the promotion and support of a particular religious viewpoint in public schools dates back to as early as 1890, when the Wisconsin Supreme Court grappled with the issue of whether public school teachers should be permitted to read to students from the Bible as a textbook. *State ex rel. Weiss v. Dist. Bd.,* 44 N.W. 967 (1890). In concluding that such reading of the Bible was prohibited, the court wrote:

> The priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and, above all, by parents in the home circle. There, these truths may be explained and enforced, the spiritual welfare of the child guarded and protected, and his spiritual nature directed and cultivated, in accordance with the dictates of the parental conscience. The constitution does not interfere with such teaching and culture. It only banishes theological polemics from the district schools. It does this, not because of any hostility to religion, but because the people who adopted it believed that the public good would thereby be promoted, and they so declared in the preamble. Religion teaches obedience to law, and flourishes best where good government prevails. The constitutional prohibition was adopted in the interests of good government; and it argues but little faith in the vitality and power of religion to predict disaster to its progress because a constitutional provision, enacted for such a purpose, is faithfully executed.

Id. at 976.

Though the court's holding in *Weiss* was based on the Wisconsin state constitution, the underlying principles espoused in that early decision remained relevant in later federal cases challenging religious practices in public schools. The early 1960's brought two landmark

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[61] *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 702-704 (2012) (describing religious controversy pertaining to the Magna Carta, the English monarchy, the escape of Puritans to New England, religious establishment in the colonies, and the drafting of the First Amendment).

Establishment Clause decisions by the Supreme Court of the United States. First, in 1962, the Court held a public school district's practice of daily classroom invocation of God's blessings as prescribed in a prayer promulgated by its Board of Regents was an impermissible use of the public school system inconsistent with the Establishment Clause. *Engel v. Vitale*, 370 U.S. 421, 424-425 (1962). Then, in 1963, when parents like Madalyn Murray O'Hair[62] objected to a public school's practice of requiring Bible reading at the opening of the school day and recitation of the Lord's Prayer by the students in unison, the Court held such practices violated the Establishment Clause. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963).

In the half century that has passed since these important decisions, the Supreme Court of the United States and the Court of Appeals for the Fifth Circuit have attempted to more clearly define the contours of the Establishment Clause as it relates to prayer in public schools, and more specifically, as it relates to prayer at graduation. In *Lee v. Weisman*, 505 U.S. 577, 587, (1992), the Court granted permanent injunctive relief to prevent the inclusion of clergy-led invocations in the form of prayer in graduation ceremonies of city public schools. That same year, the Court of Appeals for the Fifth Circuit held student-led prayer that was approved by a vote of the students and was non-sectarian and non-proselytizing was permissible at high school graduation ceremonies. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 969 (5th Cir. 1992). Other Fifth Circuit cases relied on *Jones* for similar holdings. *See Ingebretsen on Behalf of Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996). However, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 310-12 (2000), the Supreme Court granted injunctive relief to prevent the inclusion of

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[62] Madalyn Murray O'Hair was the leader of the American Atheist movement. JAMES S. OLSON, HISTORICAL DICTIONARY OF THE 1960S 349 (Greenwood Publishing 1999). She opposed the practice of mandatory prayers in public schools, and in the 1962 case of *Engel v. Vitale*, "the Supreme Court essentially agreed with O'H[air]'s position." *Id.* The "decision . . . made Madalyn Murray [O'Hair], in the words of one journalist, '[t]he most hated woman in America.'" *Id. See also* BRYAN F. LE BEAU, THE ATHEIST: MADALYN MURRAY O'HAIR 2 (N.Y.U. Press 2003) ("O'Hair became American [A]theism's leading proponent, educator, spokesperson, and symbol.").

student-led prayer invocations before football games at Texas public schools. *Sante Fe* has been interpreted as implicitly overruling the Fifth Circuit's *Jones* decision to the extent that it approves a majoritarian election on prayer. *See Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735, 747-50 (W.D. Tex. 2007) (Sparks, J).

Courts outside of the Fifth Circuit have provided further guidance. *See ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1488 (3d Cir. 1996) (en banc) (invalidating school policy under which prayers could be given at graduations if approved by student vote); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101-03 (9th Cir. 2000) (ruling that sectarian and proselytizing valedictory speech at graduation would violate the Establishment Clause); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983-85 (9th Cir. 2003) (ruling that school could not constitutionally allow student who was selected as graduation speaker based on his academic standing to give proselytizing religious speech at graduation); *Deveney v. Bd. of Educ. of Cnty. of Kanawha*, 231 F. Supp. 2d 483, 485-88 (S.D. W.VA. 2002) (issuing TRO against offering of prayer by student at graduation pursuant to vote of student class officers); *Skarin v. Woodbine Cmty. Sch.*, 204 F. Supp. 2d 1195, 1198 (S.D. Iowa 2002) (issuing injunction prohibiting school choir from singing Lord's Prayer at graduation ceremony); *Appenheimer v. Sch. Bd.*, No. 01-1226, 2001 WL 1885834, at *6-9 (C.D. Ill. May 24, 2001) (issuing TRO against offering of prayer by student at graduation pursuant to vote of senior class student board).

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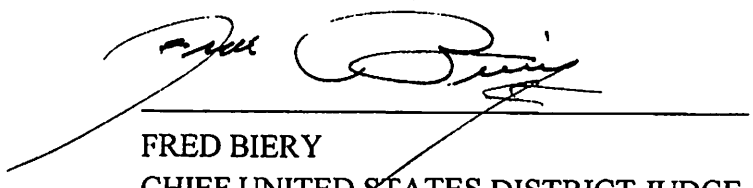

FRED BIERY
CHIEF UNITED STATES DISTRICT JUDGE
February 9, 2012