

No. 09-16404

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

PATRICK M. McCOLLUM, et al.,
Plaintiffs-Appellants,

v.

**CALIFORNIA DEPARTMENT OF CORRECTIONS
AND REHABILITATION, et al.,**
Defendants-Appellees.

**Appeal from the District Court
for the Northern District of California
Case No. 3:04-cv-03339-CRB**

**BRIEF *AMICUS CURIAE* OF
WallBuilders, Inc,**
in support of Defendants-Appellees
Urging Affirmance

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FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae, WallBuilders, Inc., has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

Dated: January 27, 2010

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INTEREST OF THE *AMICUS*

As stated in the accompanying Motion for Leave to File a Brief *Amicus Curiae*, WallBuilders, is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority in American history and the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812. Lastly, due to his expansive work and knowledge in American history, Mr. Barton has received numerous national and international awards that have distinguished him as a leading scholar in his field.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. While precedents of the United States Supreme Court have added glosses to the original meaning of the Religion Clauses, WallBuilders desires to see America's

religious heritage treated accurately. WallBuilders has a large base of supporters that is also concerned with this issue.

Wallbuilders files this Brief pursuant to consent from Counsel for Plaintiffs-Appellants and pursuant to the accompanying Motion For Leave to File a Brief *Amicus Curiae*.

SUMMARY OF THE ARGUMENT

This Brief counters an argument made by Appellants' (hereinafter "McCollum's") *Amici*, namely that the intent of the Founders supports McCollum's claim to having standing. McCollum's *Amici* come to this conclusion because they ignore the fact that the definition of "religion" has changed since the founding era.

Eight of the nine justices then sitting on the United States Supreme Court have acknowledged this fact in the Court's recent Ten Commandments cases. Because the justices did not agree among themselves as to what that definition was, this Brief surveys the historical data to demonstrate that no matter which of several possible definitions is correct, none of them support McCollum's *Amici*'s assertion for the simple reason that the Founders did not intend the Religion Clauses to protect paganism and witchcraft as the eight Supreme Court justices correctly realized.

ARGUMENT

I. THE ISSUE OF STATE TAXPAYER STANDING SHOULD NOT BE MUDDIED BY THE INCORRECT UNDERSTANDING OF HISTORY OFFERED BY McCOLLUM'S AMICI.

Your *Amicus* agrees with the Appellees (hereinafter “CDCR”) that the Appellants (hereinafter “McCollum”) lack state taxpayer standing. However, your *Amicus* writes in order to emphasize that whether this Court agrees or disagrees with this assertion, this Court should, at a minimum, reject a second, allied assertion made by McCollum’s *Amici*. They assert that this Court must find that McCollum has standing to be faithful to the intention of the Founders. (*See, e.g., Amicus* Brief of Americans United for Separation of Church and State, *et al.* 10 n.3 (“The historical roots and importance of this principle are clear: The Founders repeatedly emphasized the need to maintain strict governmental neutrality both among sects and in all matters touching on religion.”); *id.* 16 (claiming “James Madison, chief architect of the Religion Clauses of the First Amendment” and his views as support for McCollum’s standing); *Amicus* Brief of Interfaith Community Representatives 12 (“Ours is a country founded by religious minorities who believed that people of all faiths should be able to practice religion freely, and that the government should not favor any single religion over another.”))

- A. McCollum's Amici mis-understand the history that they claim supports their assertion that taxpayer standing exists because they assume the definition of "religion" has remained static.

In invoking the Founders, *Amici* commit the logical fallacy of equivocation. They fail to realize that the word "religion" has a meaning today that was not the meaning the Founders, and specifically the Framers of the Bill of Rights used in drafting the First Amendment.

Unfortunately, this Court is precluded from completely honoring the true meaning of the Religion Clauses due to the United States Supreme Court's glosses upon those clauses, which glosses are binding on this Court. But this Court *can* refrain from making a bad situation worse. This seems especially important at a time when the Supreme Court itself has recently brought the historical picture front and center in the Ten Commandments cases, *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005). In *McCreary County*, Justice Scalia wrote that the word "religion" in the Religion Clauses means monotheism. 545 U.S. at 885-90 (Scalia, J., dissenting, joined in Part I by Rehnquist, C.J., and Thomas, J.). *Id.* (Scalia, J., dissenting). Justice Souter, writing for five justices, rejected this contention, arguing among other things that the historical record could be construed to understand "religion" as meaning "Christianity." *Id.* at 877-81. Justice Stevens, in his dissent in *Van Orden* (which was decided the same day as, but not consolidated with, *McCreary County*),

echoed Justice Souter's views. 545 U.S. at 726-736 (Stevens, J., dissenting).

Although one suspects that this dispute is not over, at least the issue has been raised. Furthermore, Justice Scalia's opinion highlights the error of the Supreme Court's various prior glosses on the Religion Clauses. It is simply untrue that "[n]either [the federal nor the state governments] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). Such pronouncements may be binding upon this Court as precedents, but they cannot be binding upon this Court as accurate readings of history. As then-Justice Rehnquist observed, the Religion Clauses do not

require[e] neutrality on the part of government between religion and irreligion. . . . The repetition of this error in the Court's opinion[s] . . . does not make it any sounder historically. . . . On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history. And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history.

Wallace v. Jaffree, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting) (citations omitted).

Justice Rehnquist's point is equally true of the other half of *Torcaso*'s claim, namely that government cannot distinguish between "religions based on a belief in the existence of God as against those religions founded on different beliefs." 367

U.S. at 495. Whether one believes in no god or in multiple gods, such belief systems were treated differently than monotheistic beliefs, as this Brief will show.

In order to demonstrate this, it is necessary to define religion. This was the very task that Justice Scalia undertook in his *McCreary County* opinion. After all, the approach of the district court in *Glassroth v. Moore*, 229 F.Supp.2d 1290, 1314 (M.D. Ala. 2002) is unacceptable. There the court wrote “the court lacks the expertise to formulate its own definition of religion for First Amendment purposes.” Nonetheless, the court went on to decide that that indefinable thing had been established.

When religion remains undefined, it opens the door for the error of equivocation that McCollum’s *Amici* make. In addition to the statements pointed out previously, *Amici* Interfaith Community Representatives spend ten pages of their Brief explaining why witchcraft and paganism are religions. The problem is that everything they write explains why witchcraft and paganism are religions as the term is *currently* used in non-legal circles; nothing they write addresses whether witchcraft and paganism are religions as that word was used by the Framers in drafting the Religion Clauses. Thus, *Amici* can quote all the Founders they want for the proposition that various religions and faiths must be treated neutrally, but they will have accomplished nothing unless they demonstrate that

paganism and witchcraft were included within the word “religion” as used in the Religion Clauses. This they have not done and cannot do.

B. The true historic meaning of “religion” excludes paganism and witchcraft, and thus, does not compel a conclusion that McCollum has state taxpayer standing.

As this Brief will now show, should his Court ultimately decide that McCollum has taxpayer standing, it should not do so by cloaking that decision in false history or in modern day equivocation of the word “religion.”

What then did “religion” mean in the Religion Clauses? A useful starting point for investigation is the dueling opinions in *McCreary County* and *Van Orden*, which have already been mentioned. Justice Scalia, as noted, argued that “religion” means monotheism. *McCreary County*, 545 U.S. at 885-90 (2005) (Scalia, J., dissenting). Again as noted previously, Justice Stevens counter-argued that much of the evidence pointed towards a narrow range of religious liberty, namely one aimed only at Christianity. *Van Orden*, 545 U.S. at 726-736 (Stevens, J., dissenting). This difference of opinion, ironically, led Justice Stevens to call for a broader ban on religious activities. *Id.* In turn, Justice Scalia wrote retorted that

Justice Stevens also appeals to the undoubted fact that some in the founding generation thought that the Religion Clauses of the First Amendment should have a *narrower* meaning, protecting only the Christian religion or perhaps only Protestantism. I am at a loss to see how this helps his case, except by providing a cloud of obfuscating smoke. (Since most thought the Clause permitted government invocation of monotheism, and some others thought it permitted

government invocation of Christianity, he proposes that it be construed not to permit any government invocation of religion at all.)

McCreary Co., 545 U.S. at 897 (Scalia, J., dissenting).

But the reason for Justice Stevens’s position is clear: While he claims that his views are “firmly rooted in our Nation’s history and our Constitution’s text,” *Van Orden*, 545 U.S. at 734 (Stevens, J., dissenting), he also more accurately admits that he does not feel “bound by the Framers’ expectations” *Id.* Justice Stevens admits that the definition of “religion” has changed and does not try to claim that paganism or witchcraft would have been included in the protections of those Clauses: “As religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems.” *Id.* In other words, Justice Stevens finds a principle of neutrality in the Religion Clauses; admits, however, that he does not want to be limited by the historic definition of religion; and boldly claims that the Court should change the definition of religion to extend further than the Framers intended.

McCollum’s *Amici* do not take such an approach; rather they assert that the Framers always intended to protect paganism and witchcraft. Should this Court conclude that McCollum has taxpayer standing—and it is worth re-emphasizing here that your *Amicus* does not agree with this assertion—this Court should at least acknowledge that its conclusion is compelled by Supreme Court precedent, not by history or the intent of the Framers.

However, rather than rely upon the historical snippets used by Justices Scalia and Stevens (and Souter), your *Amicus* will briefly survey the diversity of opinions held by the Framers to demonstrate that paganism and witchcraft were never intended to receive the protections of the Religion Clauses. Thus, in the present case there can be no violation of those clauses.

The first thing to note is that the debate between Justice Scalia and Justices Stevens and Souter is that has no winner for McCollum's *Amici*. Whether "religion" meant monotheism or some subset of it, such as Christianity, then whatever the Free Exercise and Establishment Clauses address, they do not address paganism or witchcraft. In reality, research shows that "religion" was *sometimes* used as a synonym for Christianity, but that it was also used for monotheism. But that still excludes paganism and witchcraft.

Research should perhaps start with James Madison's *Memorial and Remonstrance*, so often cited in the cases and literature. See J. Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 *The Writings of James Madison* 183 (G. Hunt ed. 1901) (hereinafter "*Memorial and Remonstrance*"). Here one sees the key definition of religion: "religion [is] the duty which we owe to our Creator and the manner of discharging it" *Id.* (quoting Virginia Declaration of Rights). In mathematical shorthand, one could parse this as religion = duty + manner. Furthermore,

[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.

Id.

Thus, religion is clearly cast in terms of duty to the Creator. From this fact, one may derive several corollaries. First, all references are to *the* Creator, singular. This is true of every reference to Him in the *Memorial and Remonstrance*. Justice Scalia challenged Justice Stevens on this point with regard to the wider usage of the word “God” by the Framers and Justice Stevens left the challenge unanswered.

Wrote Justice Scalia,

The Court thinks it ‘surpris[ing]’ and ‘truly remarkable’ to believe that ‘the deity the Framers had in mind’ . . . ‘was the God of monotheism.’ This reaction would be more comprehensible if the Court could suggest what other God (in the singular, and with a capital G) there *is*, other than ‘the God of monotheism.’ This is not *necessarily* the Christian God . . . but it is *inescapably* the God of monotheism.”

McCreary Co., 545 U.S. at 894 n.3 (Scalia, J., dissenting).

There are, of course, references to “heathens” and “pagans” among the writings of the Framers, but there is no indication that those belief systems, including polytheism, are considered “religion.” See, e.g., Lee J. Strang, *The*

Meaning of "Religion" in the First Amendment, 40 Duq. L. Rev. 181, 213-16 (2002), This may strike some as strange. But that is the whole point of trying to arrive at the Framers' definition. One cannot read a modern definition backwards into the First Amendment.

The second and easiest corollary is that atheism was not "religion" to the Framers. If religion is, in part, the duty one owes the Creator, and one does not believe in a Creator, one will do nothing out a duty that one does not acknowledge. While not directly germane to the issue of paganism or witchcraft, this corollary must be pursued to arrive at the Framers' definition of religion.

Here, one should consider another key passage from the *Memorial and Remonstrance*:

This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.

One can easily surmise why religious convictions and objections would be treated differently than moral or ethical objections of atheists. Professor Lee Strang has put it nicely:

[I]f a religious believer felt obligated to obey God as opposed to a command of the earthly sovereign, the conflict was not brought on by the individual believer (as would be understood today where all beliefs are seen as a product of individual will) but was a conflict between God and the sovereign where the believer could not but choose to follow God, the highest sovereign. As a result, religious beliefs were ordered differently than beliefs based on other, secular, rationale. Madison, building on Locke's separation of the religious and civil spheres in his *Memorial and Remonstrance*, argued for religious freedom based on the conflict of sovereigns' rationale.

Strang, *supra*, at 234 (2002) (footnotes and citations omitted) (citing among others Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1496-97 (1990)).

This also helps one understand the treatment of atheists in the colonial and early national period. It is one thing to allow freedom of conscience to all. It is another to trust atheists to testify at trial or hold office. This is so because, if one does not believe in God and in an eternal state of punishment or reward, one has no reason to fear that punishment and thus, the theory goes, will be more likely to engage in immoral or unethical behavior, to the detriment of one's fellow citizens and of society. *See*, Strang, *supra*, at 223-24; McConnell, *supra*, at 1503.

This leads to the question of whether a belief in eternal rewards and punishments was an essential part of the Framers' definition of religion. Professor

Strang argues that it was. He writes that religion for the Framers was “traditional theistic belief in a God with concomitant duties, which imply a future state of rewards and punishments.” Strang, *supra*, at 182. His last element is not evident on the face of the *Memorial and Remonstrance*. He looked elsewhere for that.

He looked to Blackstone and Locke, whose writings were so influential on the views of the Framers; relevant pre-colonial and colonial charters; and early state constitutions. Strang, *supra*, at 211-32. Professor Strang succeeds in demonstrating that there was much concern about allowing those who did not believe in an eternal state to fully participate in the body politic for the reasons already stated. However, the evidence that Professor Strang marshals does not create an air tight case that the belief in an eternal state was part and parcel of the definition of religion. In fact, the evidence seems to point in the opposite direction. The fact that a belief in eternal rewards and punishments was necessary for full participation in the body politic might lead one to conclude that such religions were a subset of a larger group of monotheistic religions.

This possible conclusion can be emphasized by way of analogy. Various state constitutions guaranteed freedom for religion exercise but prohibited office holding for all but Protestant Christians. *Id.* Yet clearly, Catholics and Jews, who were targeted by such restrictions, fit within the rest of the definition of “religion.” Similarly, those who do not fear a possible future state of punishment might still fit

the rest of the definition of religion. Such a group existed in early national America, namely the Universalists. In fact, this was one of the main points of opposition to the Universalists: “the Universalists by removing the fear of hell were supposed to reduce seriously the supports of morality.” XII *New Schaff-Herzog Encyclopedia of Religious Knowledge* at 96. Yet it is hard to imagine that the Framers would not have considered Universalism (as the term was used at that time) to be a religion, given the involvement of Universalists and men with universalist sympathies who helped organize the new nation. *See, e.g.*, “John Adams,” <http://www25.uua.org/uuhs/duub/articles/johnadams.html> (last visited January 27, 2010) (article on the Unitarian Universalist Association’s website discussing Adams’ religious views, as well as those of various contemporaries. Articles for other Founders can be located on this site as well).

Furthermore, the writings of various Founders are ambiguous. They often wrote of the need for citizens to believe in future state of punishment or reward. However, these writings do not emphatically show that the Framers saw this as a *definitional* aspect of religion. A few such quotations follow.

The first is from John Quincy Adams:

There are three points of doctrine the belief of which forms the foundation of all morality. The first is the existence of God; the second is the immortality of the human soul; and the third is a future state of rewards and punishments. Suppose it possible for a man to disbelieve either of these three articles of faith and that man will have no conscience, he will have no other law than that of the tiger or the

shark. The laws of man may bind him in chains or may put him to death, but they never can make him wise, virtuous, or happy.

John Quincy Adams, *Letters of John Quincy Adams to His Son on the Bible and Its Teachings 22-23* (Auburn: James M. Alden, 1850).

From John Carroll one reads:

Without morals a republic cannot subsist any length of time; they therefore who are decrying the Christian religion, whose morality is so sublime & pure, [and] which denounces against the wicked eternal misery, and [which] insured to the good eternal happiness, are undermining the solid foundation of morals, the best security for the duration of free governments.

Bernard C. Steiner, *The Life and Correspondence of James McHenry* 475 (Cleveland: The Burrows Brothers, 1907) (Letter from Charles Carroll to James McHenry of November 4, 1800).

Justice Story wrote:

Indeed, the right of a society or government to [participate] in matters of religion will hardly be contested by any persons who believe that piety, religion, and morality are intimately connected with the well being of the state and indispensable to the administrations of civil justice. The promulgation of the great doctrines of religion—the being, and attributes, and providence of one Almighty God; the responsibility to Him for all our actions, founded upon moral accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues—these never can be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive how any civilized society can well exist without them.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* §442 at 260 (New York: Harper & Brothers, 1847).

This latter quotation could be considered the strongest argument for including the belief in future rewards as a definitional part of “religion.” But here, too, the passage is susceptible to more than one interpretation.

Thus, one can come full circle and return to the *Memorial and Remonstrance*, which was itself in part influenced by the Virginia Declaration of Rights; was widely read both before and after it led to the enactment of the Virginia Statute of Religious Freedom; and was directly influential on the drafting of the First Amendment. In the *Memorial and Remonstrance*, more definitional evidence to be gleaned. Madison asked the rhetorical question: “Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?” From this use of the word “religions” we can clearly see that sometimes the word encompassed more than Christianity. Similarly in article twelve of the *Memorial*, Madison speaks of those who are “under the dominion of false Religions.”

Thus, it seems best to limit the definition of religion to monotheism. It is true, as Justice Stevens noted, that many Framers used the word “religion” as a synonym for Christianity. However, with both definitions clearly documented and

looking at the historical clues, especially the *Memorial and Remonstrance*, one must conclude that it was the broader, not the narrower usage that was enshrined in the Constitution. For present purposes, this is very significant. The Founders were well aware of Christianity, of non-Christian monotheistic belief systems, of atheism, and of heathens and pagans. Thus, whether this Court agrees that “religion” meant monotheism or believes that it meant Christianity; and whether this Court agrees that a belief in future rewards and punishments was part of the definition of “religion,” or believes the opposite; it is clear that atheism, heathenism, and paganism were not part of the definition of “religion.” Other than Justice Kennedy, every Justice that was a member of the Supreme Court at the time *McCreary County* and *Van Orden* were decided signed onto an opinion agreeing that the Framers intended “religion” to mean either Christianity or monotheism. *See McCreary County v. ACLU*, 545 U.S. 844, 885-90 (2005) (Scalia, J., dissenting); *id.* at 877-81.

Unfortunately, McCollum’s *Amici* have not followed the lead of the Supreme Court. Rather they have invested much effort in an attempt to shroud their position in the mantle of history. Your *Amicus* joins McCollum’s *Amici* in asking this Court to examine history. However, that history should be true history, not revisionist history. The Founders did not intend to extend the protection of the

Religion Clauses to paganism and witchcraft as eight of the then-sitting nine Justices of the Supreme Court have recently acknowledged.

Your *Amicus* concludes by reiterating that, for all the reasons stated in CDCR's Brief, it does not believe that McCollum has taxpayer standing. Furthermore, your *Amicus* acknowledges that CDCR's arguments have not examined the differences between paganism and witchcraft on the one hand and Christianity and monotheism on the other. Nor must it to prevail on its taxpayer standing argument. Rather, your *Amicus* has written as it has lest McCollum's *Amici*'s unhistorical argument go unanswered.

CONCLUSION

For the foregoing reasons and for other reasons stated in CDCR's Brief, the judgment of the district court should be affirmed.

Respectfully submitted,
this 27th Day of January, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32(a)(7)(C), the undersigned certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because it contains 4,413 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2007.

Dated: January 27, 2010

s/ Steven W. Fitschen
Steven W. Fitschen

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2010 I have electronically filed the foregoing Brief *Amicus Curiae* of WallBuilders, Inc., in the case of *McCollum, et al. v. California Department of Corrections and Rehabilitation, et al.*, No. 09-16404, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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