

## STATEMENT OF THE CASE

In response to the terrorist attacks of September 11, 2001, the General Assembly created the Kentucky Office of Homeland Security through Kentucky Revised Statutes Chapter 39G. KRS 39G.010 outlines the duties of the executive director of the Kentucky Office of Homeland Security and, in relevant part, states that the director shall:

Publicize the findings of the General Assembly stressing the dependence on Almighty God as being vital to the security of the Commonwealth by including the provisions of in its agency training and educational materials. The executive director shall also be responsible for prominently displaying a permanent plaque at the entrance to the state's Emergency Operations Center stating the text of KRS 39A.285(3)...

The challenged text of KRS 39A.285 states:

The General Assembly hereby finds that:

(1) No government by itself can guarantee perfect security from acts of war or terrorism.

(2) The security and well-being of the public depend not just on government, but rest in large measure upon individual citizens of the Commonwealth and their level of understanding, preparation and vigilance.

(3) The safety and security of the Commonwealth cannot be achieved apart from reliance upon Almighty God as set forth in the public speeches and proclamations of American Presidents, including Abraham Lincoln's historic March 30, 1863, Presidential Proclamation urging Americans to pray and fast during one of the most dangerous hours in American history and the text of President John F. Kennedy's November 22, 1963, national security speech which concluded: "For as was written long ago: 'Except the Lord keep the city, the watchman waketh but in vain.'"

KRS 39A.285 became effective on March 28, 2002, while KRS 39G.010 was enacted on July 12, 2006.

Plaintiffs alleged in Franklin Circuit Court that the challenged statutes establish religion by endorsing belief in God over non belief and by attempting to "indoctrinate Kentucky citizens

and state employees in theistic religious beliefs.” (Complaint, ¶ 16, p. 7). Plaintiffs also argued that the mere existence of the challenged statutes have caused them to suffer both physically and emotionally from the belief that “their very safety as Kentucky residents may be in the hands of fanatics, traitors or fools.” (Complaint, ¶ 17, p. 8). Civil Action Number 08-CI-1950 was filed in Franklin Circuit Court on December 2, 2008.

In response, Appellants, by and through the Office for the Attorney General of the Commonwealth of Kentucky, filed a Motion to Dismiss or, in the alternative, for Summary Judgment. Appellees filed their own Motion for Summary Judgment. In its opinion dated August 26, 2009, the Franklin Circuit Court, Hon. Thomas D. Wingate, Judge, denied Appellants’ motion and granted Appellees’ motion.<sup>1</sup> The instant appeal ensued.

## **ARGUMENT**

### **1. The Trial Court Erred in Finding that the Challenged Statutes Failed the *Lemon* Analysis**

#### **A. The Challenged Statutes Pass the Third Prong of the *Lemon* Analysis**

In examining challenged legislation or official action to determine whether it establishes a religion or religious faith, or tends to do so, the United States Supreme Court has often deferred to the test established by *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The Court will consider 1) whether the challenged law or conduct has a secular purpose; 2) whether the principal or primary effect of the law or conduct is to advance or inhibit religion; and 3) whether it creates an excessive entanglement of government with religion. The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking,

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<sup>1</sup> Appellants’ motion was granted as to American Atheists, Inc. The trial court held that American Atheists, Inc. did not have standing to challenge the constitutionality of these statutes. That ruling is being challenged before this Honorable Court.

but only after concluding that there was “no question that the statute or action was motivated wholly by religious considerations. *Lynch v. Donnelly*, 465 U.S. 668, 680 104 S.Ct. 1355, 1362 (1984) (citing *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 193, 66 L.Ed.2d 199 (1980)). The purpose prong of the *Lemon* “test” is not satisfied by the mere existence of some secular purpose. In her concurring opinion, Justice O’Connor suggests that proper inquiry under this purpose prong is “whether the government intends to convey a message of endorsement or disapproval of religion.” *Lynch*, 465 U.S. at 691, 104 S.Ct. at 1368.

In the case at bar, the Franklin Circuit Court has correctly ruled that these statutes require little to no governmental entanglement with religion. Therefore the third prong of the *Lemon* analysis has been satisfied.

**B. The Trial Court Erred in Finding That the Challenged Statutes Lack a Sincere Legislative Purpose and Tend to Promote Religion**

The trial court erroneously concluded that the challenged statutes lack a sincere legislative purpose and that they promote religion by creating an affirmative duty to rely on God for the protection of the Commonwealth. This, the court reasoned, makes KRS 39G.010 and KRS 39A.285 “exceptional among thousands of others, and therefore, unconstitutional.” (Opinion and Order, ¶2, p. 10). The Court continued:

The nature of this statute is much more than an acknowledgement that people have historically looked to God for protection. The statute pronounces very plainly that current citizens of the Commonwealth cannot be safe, neither now, nor in the future, without the aid of Almighty God. The historical significance, if any, is lost because the General Assembly requires present dependence on an Almighty God.

The lower court in this case argues that the General Assembly has effectively “created an official government position on God.” (Opinion and Order, ¶1, p. 12). This simply is not the case. The challenged statutes are no different from the national motto, “In God We Trust” which

is statutorily prescribed by 36 U.S.C. § 302, and, pursuant to 31 U.S.C. § 324, the inscription of which is *mandated* on our currency. Under the lower court's reasoning, the motto "pronounces very plainly" a trust in God shared by all current citizens of the United States. This shared trust existed in the past, in the present and ostensibly extends to the future. Kentucky obviously shares this trust as illustrated by KRS 6.330. KRS 6.330 provides in relevant part:

...the General Assembly hereby directs the Legislative Research Commission to display the national motto "In God We Trust" on the wall directly above and behind the dais of the Speaker of the Kentucky House of Representatives. The display shall be consistent with the historic and patriotic display of the national motto located directly above and behind the dais of the Speaker of the United States House of Representatives.<sup>2</sup>

There is no discernible difference between the General Assembly directing LRC to place the national motto on the dais and directing the executive director of Kentucky Homeland Security to place this plaque in the Office of Homeland Security. These mandates are similar to Congress, through 31 U.S.C. § 324, mandating the Comptroller of Currency to imprint United States currency with the national motto. None of these statutory provisions have been found to be unconstitutional.

The trial court opinion seems to return to a rather artificial and arbitrary distinction between KRS 39G.010 and KRS 39A.285 and other examples of the interplay between Church and State. The trial court opines that the Kentucky statutes do not give dissenters the option to excuse themselves from participation in the religious aspects. Appellants are unclear exactly what participation these statutes compel from the Appellees. The Appellees have not been required to participate in any activities. Nor have the Appellees been directed to take any action. Clearly, no one has forced any of the Appellees to walk through the Office of Homeland Security

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<sup>2</sup> KRS 7.090(11) also directs LRC to display the national motto above and behind the dais of the Speaker of the House

so as to gaze upon the plaque.<sup>3</sup> No one is forcing the Appellees to believe that God is responsible for the protection of the Commonwealth. Their belief system remains inviolate as the statute does not require such belief or allegiance from them. Likewise, the executive director himself is not required to believe in God, nor is anyone is being trained to believe in God.

The trial court's same argument, when applied to KRS 6.330 and KRS 7.090, *supra*, falls flat. LRC, like the executive director of Homeland Security, is required to prominently display the national motto, "In God We Trust", on the dais of the Speaker of the House. The members and directors of LRC are under no obligation to believe in the motto or even to believe in God. Their only obligation is to carry out the directive of the General Assembly. To extend the trial court's argument further in the vein of KRS 6.330 and KRS 7.090, atheistic legislators who have to stare at the dais while the General Assembly is in session have even less of an option to excuse themselves from participation than the Appellees do with the challenged statutes. What is the key distinction between KRS 6.330 and KRS 7.090 and KRS 39A.285 and 39G.010? The former two have never been ruled unconstitutional.

The trial court erred in finding that these statutes endorse and adopt religious belief over the lack of such belief. These statutes are no more unconstitutional than other statutory recognitions of the interplay between religion and the state. KRS 39A.210, for example, outlines the oath of persons connected with disaster and emergency response organizations. KRS. 70.010(1) is the special oath of sheriffs. Section 228 of the Kentucky Constitution is the oath of attorneys and state officers. All of these oaths end with the words "so help me God." Each of these provisions requires these particular oaths or affirmations to be made, and none have been declared unconstitutional. In fact, section 232 of the Kentucky Constitution mandates that the

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<sup>3</sup> The Kentucky Office of Homeland Security is a secured area. There are no general public walkthroughs unless they are scheduled and approved and conducted with an escort.

manner of administering these or any other oaths or affirmations “shall be esteemed by the General Assembly the most solemn appeal to God.”

KRS 2.035 is the Pledge of Allegiance to the State Flag and states:

The following shall be the official pledge of allegiance to the flag of the Commonwealth of Kentucky: "I pledge allegiance to the Kentucky flag, and to the Sovereign State for which it stands, one Commonwealth, blessed with diversity, natural wealth, beauty, and grace from on High."

While the words “Almighty God” are not used in KRS 2.035, the reference to “grace from on High” almost certainly refers to the God contemplated in KRS 2.105, the Commonwealth’s Official Latin motto. The Latin phrase "*Deo gratiam habeamus*” translates to “let us be grateful to God”. This sentiment is also reflected in the Preamble to the Kentucky Constitution. The Preamble states:

"We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution."

None of these conventions – the various oaths, the pledge, the Latin motto or the Preamble – have ever been held to be unconstitutional. Appellants remain uncertain how KRS 39A.285 and KRS 39G.010 are any different, or how they are the straws which break the proverbial camel’s back. Their language is not exclusively secular, but that does not, in and of itself, invalidate the statutes. The statutes are not coercive, nor do they compel belief or command participation in any form of religious exercise. Contrary to the arguments of the Appellees and the findings of the trial court, these statutes in no way impose any religious test as a qualification for holding political office. In short, there is nothing to suggest that the actions of the General Assembly represent a step calculated to lead to any prohibited ends.

Because KRS 39G.010 and KRS 39A.285 are in no discernible way different from any of the other recognitions of religious faith currently accepted by Kentucky law, the trial court erred when it found that the statutes promote religion and lack any sincere legislative purpose.

**2. The Trial Court Erred When it Held KRS 39G.010 and KRS 39A.285 Violate Section 5 of the Kentucky Constitution and the First Amendment to the Constitution of the United States**

The trial court erred in finding that the two challenged statutes violate §5 of the Kentucky Constitution. Section 5 provides:

no preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity.; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister or religion; nor shall any man be compelled to send his child to school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.”

The court’s *singular* reason for concluding that KRS 39G.010 and KRS 39A.285 are in violation of §5 was that because §5 of the Kentucky Constitution is more detailed and provides greater protections against the Commonwealth’s infringement on religious freedoms, any violation of the First Amendment of the United States Constitution must naturally be a violation of §5. As mentioned throughout this brief, the trial court erred in that determination. The court’s holding does not take into account the fact that the statutes do not compel the Appellees to take or refrain from any action. No rights or privileges to believe or not believe are enlarged, diminished or in any way affected. The trial court had *absolutely nothing* before it which factually illustrated that the rights or privileges of the Appellees were being abridged. The Appellees may not like or agree with the text of these two statutes, but there was no factual

showing that their rights to disagree or continue with their current belief system were in any way adulterated.

The court's reasoning also seems faulty when compared to the text of the Preamble to the Kentucky Constitution. The Preamble unequivocally states:

We, the people of the Commonwealth of Kentucky, *grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings*, do ordain and establish this Constitution. (Emphasis added)

The text to the very document Appellees claim is violated by the two statutes strikes with those statutes a resonant chord. The Preamble to the Kentucky Constitution acknowledges the gratefulness of the citizens of the Commonwealth to Almighty God for the civil, political and religious liberties that we *all* enjoy. The Preamble further seeks to invoke the continuance of those blessings. There is nothing that can even remotely be construed as an abridgment of the rights of non believers or an advancement of those who believe. Further, the Preamble is in the same vein as other historical documents and acts as previously discussed. The trial court offered no guidance as to what factors or elements of these statutes separate them from any of the other statutes and government actions presented in Appellants earlier pleadings. There being no perceptible differences between the express terms and language of the Preamble – which the trial court presumably does not find to be in violation of §5 – and KRS 39G.010 and KRS 39A.285, it logically follows that the two statutes do not violate §5 of the Kentucky Constitution.

### **CONCLUSION**

The trial court erred in finding that KRS 39G.010 and KRS 39A.285 constitute impermissible government action in contravention of the First Amendment of the United States Constitution and §5 of the Kentucky Constitution. The court also erred in denying Appellants' Motion for Dismissal or Summary Judgment and in granting Summary Judgment for the

Appellees. Appellants respectfully request that the judgment of the Franklin Circuit Court in this matter as to the standing of American Atheists, Inc. be affirmed. Appellants request that the judgment, in all other respects, be reversed.