COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO._____

AMERICAN ATHEISTS, INC., ET AL. MOVANTS

V. MOTION FOR DISCRETIONARY REVIEW

KENTUCKY OFFICE OF HOMELAND SECURITY, ET AL. RESPONDENTS

Respectfully submitted:

_____

Edwin F. Kagin
KBA # 37136
10742 Sedco Drive
P.O. Box 559
Union, KY 41091
Phone: (859) 384-7000
Fax: (859) 384-7324
Email: edwin@edwinkagin.com
Attorney for Movants

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of this Motion were served upon the following named individuals by first class mail, postage prepaid, on the _____ day of November, 2011: Clerk of the Court, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601-9229; Jack Conway, Attorney General of Kentucky, Capitol Suite 118, 700 Capitol Ave., Frankfort, KY 40601-3449; Tad Thomas, Assistant Deputy Attorney General, 239 S. Fifth St., Suite 1800, Louisville, KY 40202.

_____
Edwin F. Kagin

Come now the Movants, by and through the undersigned counsel, and, for their Motion for Discretionary Review, state as follows:

1) The Movants, and each of them, hereby move the Kentucky Supreme Court for Discretionary Review of the holding of the Kentucky Court of Appeals, NO. 2009-CA-001650-MR, Rendered October 28, 2011, and ordered to be published. The opinion is appended hereto, and is incorporated by reference, as fully as if set out verbatim herein.

2) The names of the Movants are:

American Atheists, Inc.

Michael G. Christerson

James F. Coffman

Lucinda Hedden Coffman

Jan Ewing

Emmett F. Fields

Alex Grigg

Edwin Hensley

Helen Kagin

Gary Maryman

David Ryan

James K. Willmot.

(Helen Kagin died on February 17, 2010, during the pendency of this action. No party has moved that she be removed from the action, and other Movants have requested that she remain as a party in this case—both to preserve her memory and because it is known to a moral certainty that she would have wished to remain included).

3) The name and address of Movants' counsel is:

Edwin F. Kagin

10742 Sedco Drive

P.O. Box 559

Union, KY 41091.

4) The names of Respondents are:

Kentucky Office of Homeland Security

Thomas Preston, in his official capacity as the Director of the Kentucky Office of Homeland Security.

5) The names and addresses of Respondents' counsel are:

Jack Conway, Attorney General of Kentucky

Capitol Suite 118

700 Capitol Ave.

Frankfort, KY 40601-3449;

and

Tad Thomas

Assistant Deputy Attorney General

239 S. Fifth St., Suite 1800

Louisville, KY 40202.

6) October 28, 2011, is the date of final disposition by the Kentucky Court of Appeals of the case sought to be reviewed. The case number is: 2009-CA-001650. A true copy is appended hereto.

7) No supersedeas bond, or bail on appeal, has been executed, and none is required.

8) The material facts involved in this case are: Following the horrors of the September 11, 2001, attack on the United States, the Kentucky Legislature passed, as did the legislatures of other states, Homeland Security laws designed to protect the citizens of Kentucky from further attacks.

> The text of KRS 39A.285, styled Legislative Findings, provides: 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 39G.010(2)(a) requires the executive director of the KOHS to:

> 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 KRS 39A.285(3) 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)[.]

Judge Thomas Wingate, of the Circuit Court of Franklin County, Kentucky, agreed with Movants and declared the challenged laws to be unconstitutional. In declaring the challenged statutes unconstitutional under Federal and State Constitutions, Judge Wingate found:

> KRS 39A.285 is more than an ephemeral general reference to God. The statute places an affirmative duty to rely on Almighty God for the protection of the Commonwealth. This makes the statute exceptional among thousands of others, and therefore, unconstitutional. 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. Even assuming that most of this nation's citizens have historically depended upon God, **by choice,** for their protection, this does not give the General Assembly the right to coerce citizens to do so now. That is the very reason the Establishment Clause was created: to protect the minority from the oppression of the majority. The Commonwealth's history does not exclude God from the statutes, but it has **never** permitted the General Assembly to **demand** that its citizens depend on Almighty God. (Opinion and Order, appended hereto pp.10-11)

The words used are far more than "...simply a more specific rewording of 'In God We Trust,'" as argued by the thirty-five *amicus* Senators, and as tacitly approved by the ninety-six *amicus* Representatives.

Judge Wingate's opinion is appended hereto. The Kentucky Department of Homeland Security, through the Attorney General of Kentucky, appealed Judge Wingate's ruling to the Kentucky Court of Appeals. The three judge panel to whom the case was assigned, by a vote of two to one, reversed the findings of unconstitutionality made by Judge Wingate.

Senior Judge Ann O'Malley Shake filed a dissent which, Movants argue, more correctly states the law than does the majority opinion reversing. The opinion of the Court of Appeals, including Judge Shake's dissent, is appended hereto, and incorporated by reference, as fully as if set out verbatim herein.

This Motion for Discretionary Review followed.

9) The questions of law involved in this action arose when, following the horrors of the September 11, 2001, attack on the United States, Kentucky, together with other states,

passed “Homeland Security” laws designed to help protect the citizens of the state from enemy attacks. The questions of law thereby created are:

Did the Court of Appeals err in finding, by a 2 to 1 vote, that the Franklin Circuit Court was wrong in holding two Kentucky Statutes unconstitutional under the First Amendment to the U.S. Constitution and under Section 5 of the Constitution of Kentucky?

Was the Senior Judge of the three judge panel wrong when she opined, in a strong dissent, that the challenged statutes were patently unconstitutional?

Did the Court of Appeals err when it upheld the ruling of the Franklin Circuit Court that American Atheists, Inc., a New Jersey nonprofit corporation registered to do business in Kentucky, did not have standing to bring this action?

10) The ruling of the Court of Appeals should be reviewed by this Court because this Honorable Court is the final arbiter of the constitutionality of the laws of Kentucky. If this matter is not reviewed and reversed, the ruling that it is okay for the state Legislature to say we must rely on a god for our safety will become a fixed part of our law. And such a determination needs to be made here. A three judge panel heard this action and voted 2 to 1 to reverse the Franklin Circuit Court’s finding that the challenged laws were indeed unconstitutional as had been argued by the Movants. The third judge of the panel, a Senior Judge of the Court of Appeals, strongly dissented and, in the view of Movants, correctly presented overwhelming case law to support her strong opinion that the laws challenged were indeed unconstitutional as the Circuit Court had said.

It is respectfully argued that the dissent contains the correct law that should be applied and that the reasoning of the dissent should be substituted for the majority opinion as the ruling in this case. A dissent as powerful, as factually accurate, and as overwhelmingly correct on whether or not it is constitutional for our state Homeland Security laws, which affect all Kentuckians, to proclaim that our legislature finds that the security of the Commonwealth requires reliance on "Almighty God," that this religious "finding" be publicized on a publicly posted plaque and in state training materials, and that criminal penalties can attach if any state employee fails to follow this law, simply cries out for review by this Honorable Court. This Honorable Court is the final arbitrator of the constitutionality of Kentucky's laws. If this matter is not reviewed and reversed, the ruling that it is okay for the state Legislature to say we must rely on a god for our safety will become a fixed part of our law. It will also become precedent for the future unconstitutional attempts to establish religion in our state that are certain to follow. President Madison saw this kind of thing coming, and he warned us against permitting such precedents to become law. He admonished us:

> It is proper to take alarm at the first experiment on our liberties... 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? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever**?** - Memorial and Remonstrance Against Religious Assessments, 1785

Had the three judge panel assigned to this case ruled unanimously against Movants, Movants' request for this Court to review the decision of the state Court of Appeals might be less compelling. But such is not the case. A Senior Judge of the

Kentucky Court of Justice has, in persuasive presentation, correctly analyzed the challenged statutes and their constitutionality and has, in an opinion ordered to be published, found them wanting. Judge Shake's dissent appears in the appended ruling of the Court of Appeals sought to be reviewed.

Movants argue that the Court of Appeals ruling was incorrect and that the rulings of the Franklin County, Kentucky, Circuit Court Judge were essentially correct save in his finding that American Atheists, Inc. (hereinafter "American Atheists") does not have standing to bring this action.

The United States Supreme Court has ruled that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). In so ruling, the Supreme Court refined *Warth v. Seldin's* (422 U.S. 490) requirements into a three-part test for associational standing.

Then it was later held that the organization must stay outside of the court system unless it proffers as a plaintiff a member of the organization who has a claim for actual damages suffered in consequence of the conduct complained of. *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007). Thus, American Atheists took care to assure that, in addition to the organization, real, living, damaged plaintiffs were introduced into the complaint to set forth their causes of action. American Atheists, in its view, properly alleged how the organization, as well as its members, were suffering, and would continue

to suffer damages, and the arguments regarding the relief sought in a request for a finding of the unconstitutionality of the challenged statutes was not a claim or a request for relief that required the participation of individual members in the lawsuit.

Then we learn the great truth that over-analysis and dissection of what should be fairly straightforward and simple issues can produce bizarre and unforeseen ends. An attempt to follow the rulings correctly leads to this result. American Atheists cannot bring a cause of action on their own because they must have individual plaintiffs who can bring the action in their individual names if they seek to allege and prove actual damages. And the organization, American Atheists, when it brings such members, or other persons, before the bar with complaints of actual damages to persons and to places, is then told, by the ruling of the lower court in Kentucky, and by affirmation of the Court of Appeals, that the organization American Atheists cannot now be a plaintiff because there are individual members of the organization available who can protect the organization's interests. And the organization has already been told that it cannot be a plaintiff in its own right if it wants to seek damages, other relief, or attorney fees. Here only live damaged plaintiffs need apply. If American Atheists is the plaintiff, it is out because it has not met the threshold requirements of *Heim*. If it meets the *Heim* requirements, then American Atheists cannot be a plaintiff because it has individual members who are carrying forward its interests.

The result of such analysis is that American Atheists is effectively barred from use of the Courts. American Atheists cannot be a plaintiff unless they have injured members as plaintiffs, and, if American Atheists has injured members as plaintiffs, then American Atheists cannot be a plaintiff. American Atheists has thus been denied due

process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In would seem, in what is perhaps a simpler and more naive world view, that American Atheists has standing to challenge the constitutionality of any statutes that affect the organization and its members. It would also seem that the individual plaintiffs have their own right to challenge the statutes, and to make their claims for damages. In short, both the organization and the members should have standing to bring the action. And despite attempts to thwart this right, it is argued that both do have such a right.

The United States Supreme Court has recently ruled that a corporation is a person with rights that corporations were not previously thought to enjoy. *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010). If a corporation can spend its members' money on partisan political activities, can it not represent its members in challenges to the constitutionality of laws it finds offensive? The appellant in "Citizens United" was a corporation. And it was given standing to assert its interests. If this corporation can assert rights under the First Amendment for the benefit of its corporate purpose, why cannot American Atheists similarly assert the rights of its members under the Constitutions of the United States and of Kentucky? The U.S. Supreme Court has created a new way of looking at some things, like standing, to assert constitutional rights. This ruling, as incorrect as it might otherwise seem to American Atheists, now appears, in the fact situation *sub judice*, to support the right of American Atheists to assert standing. And American Atheists unhesitatingly invokes the ruling for that happy purpose.

Movants further argue that the dissenting opinion of Chief Judge Shake in the Court of Appeals should become the law of this case, save for the one assignment of error in which Judge Shake agreed with the majority, and with Judge Wingate, in holding that American Atheists does not have standing to bring this action.

Judge Shake wrote:

> I adopt the sound reasoning of the trial court. The trial court analyzed KRS 39G.010 under the *Lemon* test and the statute was found to have the impermissible effect of endorsing religion because it was enacted for a predominantly religious purpose and conveyed a message of mandatory religious belief. *See Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). KRS 39A.285 was analyzed by the standard articulated in *Van Orden*. *See Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005). The trial court concluded that unlike an ephemeral, general reference to Almighty God nestled in the middle of a statute, KRS 39A.285 "places an affirmative duty to rely on Almighty God for the protection of the Commonwealth. " The court opined that the Kentucky General Assembly had effectively "created an official government position on God" beyond a general acknowledgement that people have historically looked to God for protection.
>
> In finding the statutes unconstitutional, Judge Shake further concluded:
>
> I agree with the majority opinion that historical recognition of the role of religion in American life has been permitted by the U.S. Supreme Court. However, KRS 39A.285 and KRS 39G.010 go beyond merely acknowledging the historical role of religion and instead require dependence upon Almighty God to secure the Commonwealth's safety. More troublesome though, is that the statutes are located within a chapter of the Kentucky Revised Statutes which further states "any person violating any provision of this chapter *or any administrative regulation or order promulgated pursuant to this chapter* for which another penalty is not specified shall be guilty of a Class A misdemeanor." KRS 39A.990 (emphasis added). Therefore, failure to abide by the challenged statutes is a crime punishable by up to twelve months in the county jail.[11] The Court in *Lemon* noted that, although a law "might not establish a state religion," it could "nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." *Lemon v. Kurtzman*, 403 U.S. at 612, 91 S. Ct. at 2111.

And, at footnote 11 Judge Shake observed:

> *Amicus Curiae* Ninety-six Kentucky State Representatives argues that the statutes are merely resolutions which are not open to constitutional interpretation by this Court. Such an argument is weakened by the legislative requirement to make those "resolutions" public and emphasize their essential nature. Moreover, the very fact that a crime is committed should one not abide by the challenged statutes removes any merit from such an argument.

If the laws sought to be declared unconstitutional are thought not to be of religious significance, and these laws are held to convey no meaning other than a simple notation of an historic fact, as argued by Respondents, there should be little cause to object to the removal of such unnecessary language when it is complained of by an organization, and by several citizens of Kentucky who find it offensive enough to object by instituting litigation. Yet, surprisingly, in the context of Respondents' arguments, a great effort has been undertaken by religious bodies, thought to represent the Religious Right, who insist the god talk remain. This is revealed by the large number of interests represented by the various *amicus curie* who share the view that we are a Christian state in a Christian nation and that there is a need to broadcast that fact to our citizens in our Homeland Security laws, to publicly post that fact, and to mandatorily present that fact to Kentucky employees in state training manuals. Not only to inform them, but to threaten the expressed fear of the Kentucky Legislature that we cannot be safe without a "reliance" on an entity named "Almighty God."

Your Movants are atheists. They do not believe in an "Almighty God" or in any other gods, named or unnamed. They do not believe that the security of our Commonwealth requires a "reliance on Almighty God." They find such a legislative mandate to be repugnant to the Constitutions of the United States and of Kentucky, and an insult both to those citizens who do not share the religious beliefs of the drafters, and

to those States that do not find it necessary, in their homeland security laws, to rely on supernatural assistance to be safe.

This Honorable Court should grant Discretionary Review and should, upon briefing and argument, hold that the decision of the Court of Appeals should be reversed, and an opinion issued holding that the challenged statutes are indeed, as both Judge Wingate and Judge Shake have found, unconstitutional, and a finding that American Atheists, has, together with the other Movants, standing to bring this action.

For the security of the Commonwealth.

For our own safety's sake.

11) The Movants do not have a petition for rehearing or a motion for reconsideration pending in the Court of Appeals.

12) No other party to this proceeding has a petition for rehearing or a motion for reconsideration pending in the Court of Appeals.

Respectfully submitted:

_____

Edwin F. Kagin
KBA # 37136
10742 Sedco Drive
P.O. Box 559
Union, KY 41091
Phone: (859) 384-7000
Fax: (859) 384-7324
Email: edwin@edwinkagin.com
Attorney for Movants