# In The Supreme Court of the United States

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, AND JAMES K. WILLMOT,

Petitioners,

v.

KENTUCKY OFFICE OF HOMELAND SECURITY AND THOMAS PRESTON, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE KENTUCKY OFFICE OF HOMELAND SECURITY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Kentucky

#### PETITION FOR A WRIT OF CERTIORARI

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#### **QUESTIONS PRESENTED**

- 1. Given widespread governmental defiance of this Court's 1980 and 2005 directives, does Kentucky legislation backed by criminal penalties violate the Establishment Clause when it requires the executive director of the local Office of Homeland Security to publicize prominently in multiple, permanent places, training and educational materials that the "Dependence on Almighty God [is] Vital to the Security of the Commonwealth" and that the "safety and security of the Commonwealth cannot be achieved apart from reliance upon Almighty God?"
- 2. Does American Atheists, Inc., have standing to seek relief in this Court on behalf of its undisclosed members, the least popular and most distrusted group in the nation since 9-11 and often politically ostracized as being un-American?

#### PARTIES TO THE PROCEEDING

Petitioners, who were the appellees below, 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, and James K. Willmot.

Respondents, who were the appellants below, are: Kentucky Office of Homeland Security and Thomas Preston, in his Official Capacity as the Director of the Kentucky Office of Homeland Security.

#### CORPORATE DISCLOSURE STATEMENT

Petitioner, American Atheists, Inc., is a New Jersey non-profit, nonpolitical, educational corporation, exempt from taxation under I.R.S. § 501(c)(8), dedicated to the complete and absolute separation of state and church, accepting the explanation of Thomas Jefferson that the First Amendment to the Constitution of the United States was meant to create a "wall of separation" between state and church. It does not have parent companies and is not publicly held.

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#### PETITION FOR CERTIORARI

In the wake of 9/11, the Kentucky legislature enacted a statute, enforceable via criminal penalty, which requires the executive director of the Kentucky Office of Homeland Security ("KOHS") to publish legislative statements endorsing God. These statements must be published in KOHS training and educational materials and on a permanent plaque displayed prominently in KOHS headquarters. In reviewing this statute, the Franklin County Circuit Court found that "the plain language of the statute in question leaves no doubt that the plague and inclusion of its language in training manuals is indeed a purposeful effort to express 'government advocacy' of what is clearly a religious message." Circuit Court Opinion, at 12, Appendix ("App.") 41; id. at 13-16, App. 41-46.

The law challenged in this case goes beyond a passive display of religious symbolism or a fleeting ceremonial statement to solemnize an occasion or try to unite Kentuckians. The Circuit Court emphasized that "training is the antithesis of passive" and that the statute "does not allow mature adults who disagree with this position to excuse themselves from participating in the religious aspects of this legislation." Circuit Court Opinion, at 9 and 13, App. 37 and 42. Consequently, in light of "Kentucky's history of dubious statutes," the Circuit Court held:

It is clear that the purpose underlying the display of the plaque and the contents of the [KOHS] training materials is not to celebrate the historical reasons for our great nation's

survival in the face of terror and war. Its purpose is to declare publicly that the official position of the Commonwealth of Kentucky is that an Almighty God exists and that the function of that God is to protect us from our enemies. Consequently, a reading of the statute's plain language makes that clear. Effectively, the General Assembly has created an official government position on God. The recitation of the beliefs of past Presidents does not mask the clear purpose of the statutes.

Circuit Court Opinion, at 12, App. 41. On appeal, the Circuit Court's decision on the merits was reversed, over the dissent of one judge. *Kentucky Office of Homeland Security v. Christerson*, 371 S.W.3d 754 (Ky. Ct. App. 2011), App. 1-22.

This legislation is part of a popular legislative and judicial pattern of defiance of this Court's 1980 and 2005 interventions in the Commonwealth on Kentucky. The Kentucky legislature's persistent religious advocacy precludes non-Christians from being "free to ignore [their message], or even to turn their backs. . . ." County of Allegheny v. ACLU, 492

<sup>&</sup>lt;sup>1</sup> See Parts III.A and B, *infra* (illuminating "Kentucky's history of dubious statutes" never before brought to this Court's attention and recent judicial opinions defying this Court's jurisprudence); see also Ky. Rev. Stat. Ann. § 158.175 (West 2012) (authorizing recitation of *The Lord's Prayer* in elementary schools as "a continuation of the policy of teaching our country's history and as an affirmation of the freedom of religion in this country").

U.S. 573, 664 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part). Like the high school election process in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000), a series of Kentucky laws, resolutions and other political statements "undermines the essential protection of minority viewpoints," as well as this Court's Establishment Clause jurisprudence. Poignant examples are found in the amicus briefs in this case, signed by almost all of the Kentucky legislators, urging the elected appellate judges not to follow this Court's purportedly "extra-constitutional" jurisprudence and claiming that the United States is a "Christian nation."

#### **OPINIONS BELOW**

The opinion of the Franklin County Circuit Court, granting Respondents' Motion to Dismiss as to American Atheists for lack of standing, and denying it in all other respects on the ground that Ky. Rev. Stat. §§ 39G.010 and 39A.285 (West 2012) violate the Fourteenth Amendment of the United States Constitution and Kentucky Constitution § 5, is reprinted at App. 23-48. The Court of Appeals opinion affirming the dismissal of American Atheists for lack of standing and reversing on the merits, from which Senior Judge Shake dissented as to the merits, is published at *Kentucky Office of Homeland Security v. Christerson*, 371 S.W.2d 754 (Ky. Ct. App. 2011)

("American Atheists II"), and is reprinted at App. 1-22.

#### **JURISDICTION**

The Kentucky Supreme Court denied discretionary review on August 15, 2012. This petition was timely filed within ninety days thereafter, and this Court has jurisdiction under 28 U.S.C. § 1257(a).

# CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment's incorporation<sup>2</sup> of the Religion Clauses of the First Amendment to the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

<sup>&</sup>lt;sup>2</sup> "No State shall make or enforce any law which shall abridge the privileges of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." E.g.,  $McCreary\ County\ v.\ ACLU\ of\ Ky.$ , 545 U.S. 844, 853 (2005).

#### STATEMENT OF THE CASE

A. Kentucky Legislation Requires the Head of the Kentucky Department of Homeland Security to Publicize that "Dependence on Almighty God [is] Vital to the Security of the Commonwealth" and the "Safety and Security of the Commonwealth Cannot be Achieved Apart from Reliance upon Almighty God..." in Training and Educational Materials and on a Prominently Displayed, Permanent Plaque

On July 12, 2006, shortly after this Court ruled in *McCreary County*, the Kentucky General Assembly enacted Ky. Rev. Stat. Ann. § 39G.010, which 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). . . .

Ky. Rev. Stat. Ann. § 39A.285(3) (West 2012) states:

The General Assembly hereby finds that:

(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.'"

If the KOHS executive director were to reverse his compliance, it would be punishable by up to twelve months in the county jail. *See* Ky. Rev. Stat. § 39A.990 (West 2012).

#### B. The Franklin Circuit Court Opinion

The court first held that the individually named Petitioners had standing under Kentucky's liberal taxpayer standing doctrine,<sup>3</sup> but that American

<sup>&</sup>lt;sup>3</sup> Other jurisdictions may follow more stringent Establishment Clause taxpayer standing doctrine than Kentucky. *See*, *e.g.*, *Books v. City of Elkhart*, 235 F.3d 292, 299 (7th Cir. 2000) ("special burden" and alteration of behavior standards); see also, *e.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (standing in Establishment Clause tax case); *accord Flast v. Cohen*, 392 U.S. 83 (1968) (same). The individual Petitioners' taxpayer standing was established at the trial court level and was never appealed. It is now law of the case. *Lebow v. Cameron*, 394 S.W.2d 773, 778 (Ky. 1965) (holding that "where a contention was not made, if it could or should have been made on appeal, the doctrine of *res judicata* prevented re-litigation [sic] of the same contention in a subsequent appeal").

Atheists as an organization did not. The court held that standing for the organization was lacking because, in addition to an injunction, damages were demanded and the individually named Petitioners had alleged physical and emotional suffering. Circuit Court Opinion at 8, App. 35. It found that American Atheists could not participate under *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), because doing so "requires the participation of individual members in the lawsuit." *Id.* 

The court then found Ky. Rev. Stat. § 39G.010 unconstitutional, noting that unlike the passive monument in *Van Orden v. Perry*, 545 U.S. 677 (2005), the Kentucky plaque was commanded to be "prominently displayed." *Id.* at 9, App. 37. "In addition, the protective statement to be included in the training material is afforded its own page." *Id.* "Moreover and perhaps most importantly, *training is the antithesis of passive*." *Id.*, *Id.* (emphasis added).

The court next found Ky. Rev. Stat. § 39A.285 unconstitutional. It stated that it

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.

Id. at 10, App. 39 (emphasis added).

The court noted, "The recitation of the beliefs of past Presidents does not mask the clear purpose of the statutes." *Id.* at 12, App. 41. It concluded, "Here, in contrast [to *Lynch v. Donnelly*, 465 U.S. 668 (1984)], the plain language of the statute in question leaves no doubt that the plaque and inclusion of its language in training manuals is indeed a purposeful effort to express 'government advocacy' of what is clearly a religious message." *Id.*; see also *id.* at 13-16, App. 41-46.

The court continued to hold, in light of "Kentucky's history of dubious statutes," as follows:

It is clear that the purpose underlying the display of the plaque and the contents of the [KOHS] training materials is not to celebrate the historical reasons for our great nation's survival in the face of terror and war. Its purpose is to declare publicly that the official position of the Commonwealth of Kentucky is that an Almighty God exists and that the function of that God is to protect us from our enemies. Consequently, a reading of the statute's

<sup>&</sup>lt;sup>4</sup> See Part III.A, infra.

plain language makes that clear. Effectively, the General Assembly has created an official government position on God. The recitation of the beliefs of past Presidents does not mask the clear purpose of the statutes.

Circuit Court Opinion, at 12, App. 41, at 16, App. 46 (holding statute "lack[s] sincere legislative purpose").

#### It also held:

[P]assing a law that requires statements about God and the nature of God to be included in training and educational materials, and mandates memorializing legislators' belief in God on government buildings does not allow mature adults who disagree with this position to excuse themselves from participating in the religious aspects of this legislation.

*Id.* at 13, App. 42. In distinguishing the Kentucky statute from constitutional deism, the court noted that it "has neither historical approval nor the option for dissenters to excuse themselves from participation." *Id.* It also stated, "*It is abundantly clear* that including the Commonwealth's reliance upon 'Almighty God' in Homeland Security educational materials constitutes state-sponsored religious belief, which is impermissible and violates the Establishment Clause." *Id.* at 14 (emphasis added).<sup>5</sup>

<sup>&</sup>lt;sup>5</sup> The statute stating "that the Commonwealth is unsafe without the protection of 'Almighty God' takes a clear stance on (Continued on following page)

### C. The Amicus Briefs Filed By 35 of 38 State Senators and 96 of 100 State Representatives, the Former Represented by Roy S. Moore

Thirty-five of thirty-eight Kentucky senators, represented by Roy S. Moore, filed a brief encouraging the elected judges of the Kentucky Court of Appeals to defy this Court's jurisprudence, and instead apply the senators interpretation of the First Amendment. Brief for Thirty-Five Kentucky State Senators as Amicus Curiae, *American Atheists II*, available at http://kysecurity.files.wordpress.com/2010/05/motion-1\_0001.pdf ("Senators Brief"). They stated, "The [lower] court's fundamental error was in turning from the clear language of the First Amendment to apply instead the extra-constitutional Lemon Test and

the nature of God, which constitutes an impermissible purpose not comparable to 'In God We Trust.'" Circuit Court Opinion, at 14, App. 43-44. "In proclaiming the existence and interventional and protective power of God, the General Assembly has clearly taken a side, namely that of religion." *Id.* at 15, App. 44. "Here, although the General Assembly's action . . . strongly endorses religious belief over the lack of such belief and adopts this belief as the official position of the Commonwealth." *Id.* 

<sup>&</sup>lt;sup>6</sup> The ex-Alabama Chief Supreme Court Justice was removed from the bench for refusing to comply with another federal directive to remove a massive Decalogue monument he had installed in the courthouse rotunda, which resulted in years of wasting resources. *See McGinley v. Houston*, 361 F.3d 1328 (11th Cir. 2004) (one of the opinions in various resulting cases). Kentucky has 38 Senators and 100 Representatives. Ky. Const. § 35 (West 2012).

 $<sup>^{\</sup>scriptscriptstyle 7}$  Ky. Rev. Stat. §§ 118A.040 and 118A.050 (West 2012).

the Van Orden Test." Id. at 7 (internal footnote omitted) (emphasis added). They also stated, "All Kentucky judges are sworn to 'support the Constitution of the United States and the Constitution of this Commonwealth,' not a person, office, government body, or judicial opinion. Ky. Const. § 228." Id. at 7-8 (emphasis added). It continued, "These constitutions and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of this court." Id. at 8 (emphasis added). A heading stated, "C. The Van Orden/ McCreary compare-and-contrast test, the Lemon test, and other case-made tests form a confusing labyrinth that contradicts the text of the 'supreme Law of the Land." Id. at 4 (emphasis added). They also argued that Petitioners have no reason to complain because the statute directed only the KOHS director, not Petitioners, to publicize their beliefs. *Id.* at 18.

Ninety-six of one-hundred Kentucky representatives offered similar sentiments in another amicus brief misrepresenting Supreme Court authority, especially *Salazar v. Buono*, 130 S.Ct. 1803 (2010).<sup>8</sup> Brief for Ninety-Six Kentucky State Representatives as Amicus Curiae, *American Atheists II*, at 8-9, 12, 18, *available at* http://kysecurity.files.wordpress.com/2010/05/motion-2\_0001.pdf ("Representatives' Brief"). The theme is that judges should defer to the legislators:

 $<sup>^{\</sup>rm 8}$  See generally Christopher C. Lund, Salazar v. Buono and the Future of the Establishment Clause, 105 Nw. U. L. Rev. 1387 (2011) (explaining narrowness of opinion).

The Kentucky General Assembly has determined that placing the plaque in the Office of Homeland Security serves the public interest and complies with the Constitution, and the Kentucky Attorney General defends that decision and seeks to carry it out. The court below had no warrant to revisit that decision – and to risk replacing the people's judgment with its own.

*Id.* at 11. They also seek to revive Justice David Josiah Brewer's widely discredited statement in *Church of The Holy Trinity v. United States*, 143 U.S. 457 (1892), that the United States was a "Christian nation." *Id.* at 18.

#### D. The Court of Appeals Opinion

The Kentucky Court of Appeals, in a single-judge opinion with concurrence, reversed the lower court on the merits, upheld the legislation and also ruled that American Atheists lacked standing. *American Atheists II*, at 756, App. 3. First, the opinion likened the case to *ACLU of Ohio v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001) (*en banc*),

<sup>&</sup>lt;sup>9</sup> See, e.g., Steven K. Green, Justice David Josiah Brewer and the "Christian Nation" Maxim, 63 Alb. L. Rev. 427, 427-28 (1999) ("Judges and commentators have panned the Christian nation pronouncement as 'arrogant' and anachronistic, an 'aberration,' or at best, as stating a mere 'truism.'"). Even Justice Brewer himself did not seem to truly believe the mantra had legal significance. See David J. Brewer, The United States: A Christian Nation 12 (1905).

which upheld the Ohio motto, "With God All Things Are Possible." *Id.* at 291, App. 8. The motto had been put into place in "1959, three years after Congress passed and President Eisenhower signed legislation making 'In God We Trust' our national motto." *Ibid.* The opinion went on to find significant the fact that the KOHS executive director need not agree with the findings he is forced to publicize and held:

Like the Ohio state motto, these laws broadly recognize a belief that the welfare of our Commonwealth, in part, depends on an "Almighty God." The Kentucky legislature has not attempted to compel belief or participation in any form of religious exercise, nor does it seek to prefer one belief over another. A simple reference to a generic "God" acknowledges religion in a general way.

Id. at 758, App. 3, citing Elk Grove Unified School District v. Newdow, 542 U.S. 1, 42 (2004).

It then emphasized that the Preamble to the Kentucky Constitution mentions "Almighty God" and that a majority of this Court endorsed historically-based ceremonial deism in *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). It rejected the trial court's conclusion "that the legislation seeks to place an affirmative duty upon the Commonwealth citizenry to rely on 'Almighty God' for protection of the Commonwealth." *American Atheists II*, at 759, App. 10. It stated, "The legislation complained of here does not seek to advance religion, nor does it have the effect of advancing religion, but instead seeks to recognize the

historical reliance on God for protection." *Ibid.* It concluded on this point:

Here the legislative finding [i.e., Ky. Rev. Stat. Ann. § 39A.285 (West 2012)] neither mandates exclusive reliance on Almighty God nor belief in a particular deity. Rather, it makes reference to historic instances where American leaders have prayed for Divine protection in trying times. Accordingly, [the statutes] do not violate the Establishment Clause.

Ibid.

Senior Judge Ann O'Malley Shake, sitting as Special Judge by assignment, dissented on the merits, writing a separate opinion in this "clear case of religious endorsement and 'sponsorship.'" Id. at 761, App. 18-19 (Shake, J., dissenting and concurring in part). She endorsed the lower court's opinion applying Lemon v. Kurtzman, 403 U.S. 62 (1971) to § 39G.010 and Van Orden v. Perry, 545 U.S. 677 (2005), to § 39A.285 and concluding that § 39A.285 "places an affirmative duty to rely on Almighty God for the protection of the Commonwealth" and that the General Assembly had effectively "'created an official government position on God' beyond a general acknowledgement that people have historically looked to God for protection." American Atheists II, at 761-62, App. 15. 10 She specifically distinguished *ACLU* of *Ohio*:

<sup>&</sup>lt;sup>10</sup> She also rejected the Ninety-Six State Representatives' argument that the statutes are merely resolutions not open to (Continued on following page)

The Ohio state motto, which indicates that all things are *possible* with God, is strikingly dissimilar to a statute which mandates reliance upon God to achieve statewide safety. The prior is a passive aphorism which places a duty upon no one. The latter is a legislative finding, avowed as factual, that the Commonwealth is not safe absent reliance on Almighty God. Furthermore, KRS 39G.010(2)(a) places a duty upon the executive director to publicize that assertion while stressing to the public that dependence upon Almighty God is *vital*, or necessary, in assuring the safety of the Commonwealth. This declaration is then given great publicity and emphasized by placement on a plaque prominently displayed at the state's Emergency Operations Center; in the 2010 KOHS Annual Report under the heading "Protection Statement;" within KOHS training materials; and within a KOHS pamphlet that is distributed to the public. 11

I agree with the majority that historical recognition of the role of religion in American

constitutional interpretation by the court. American Atheists II, at 761 n.11, App. 17 (Shake, J., dissenting). "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." Id.

 $<sup>^{^{11}}</sup>$   $\it Citing~$  http://homelandsecurity.ky.gov/nr/rdonlyres/064a0665-affa-4ada-8d65-91200e25cc7b/0/eaonkybrochure.pdf.

life has been permitted by the 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.

Id. at 761, App. 16-17. She found it even more troublesome that "failure to abide by the challenged statutes is a crime punishable by up to twelve months in the county jail." *Ibid.*, App. 17; accord Ky. Rev. Stat. Ann. § 39A.990 (West 2012) (twelve months); Ky. Rev. Stat. Ann. § 39A.190 (West 2012) (authorizing arrest without warrant if violation made in presence of uniformed officer).

Judge Shake then explained how the statute is unconstitutional under *McCreary County*, *Lemon*, *Salazar* and *Stone*, as well as the Kentucky Constitution. *American Atheists II*, at 762, App. 17. <sup>12</sup> She noted:

Indeed, religious freedom means not only the freedom to practice one's religion of choice, but also the freedom to actively remove oneself from the practice of any religion whatsoever. A legislative mandate squarely placing our Commonwealth's security with an Almighty God, and legally requiring such a message to be publicized, is a direct affront to that freedom.

<sup>&</sup>lt;sup>12</sup> If this Court reinstates Petitioner's claims under the U.S. Constitution, the Kentucky claims are likewise revived. *See Neal v. Fiscal Court of Jefferson County*, 986 S.W.2d 907 (Ky. 1999).

*Id.*, App. 18. In finding the statutes also violate the Kentucky Constitution, she concluded, "To declare that the safety of the Commonwealth can only be achieved by its citizens' 'reliance upon Almighty God,' the legislature has not only interfered with the rights of conscience, it has disregarded them altogether." *Id.* at 763, App. 21.

All three judges voted to affirm the lower court's ruling that American Atheists lacked standing (and Judge Shake did not write separately on the point). The court noted that under *Hunt*, an association may 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 the individual members in the lawsuit.

American Atheists II, at 760, App. 13. The court agreed with the lower court, without exploring any other cases applying *Hunt*, that the first two requirements were satisfied, but that American Atheists could not participate because the lawsuit requires the participation of the individual members of the lawsuit. *Id.* It based its decision on the fact that the complaint alleged the group's members "suffered physical and emotional damages, which included somatic discomforts, mental pain and anguish, and anxiety." *Id.* It concluded: "Without the participation

of the members who allegedly suffered such damages, a court would have no way to determine the appropriateness of any such award." *Id*.

# E. Kentucky Supreme Court Denial of Discretionary Review

The Kentucky Supreme Court denied discretionary review on August 15, 2012.

#### REASONS FOR GRANTING THE PETITION

Beyond the coercive nature of the religious legislation at issue in this case, described by the trial court as the "antithesis of passive," a number of bills promoted by Kentucky State Representative Tom Riner, a Baptist minister in Louisville, were passed in an assault upon this Court's 1980 Stone opinion, which struck down a law sponsored by his spouse, and the 2005 McCreary County opinion. Just one example is the law he sponsored authorizing school boards to inject The Lord's Prayer into elementary schools vet again. See Ky. Rev. Stat. § 158.175 (West 2012); see also Doe v. Harlan County Sch. Dist., 96 F.Supp.2d 667 (E.D. Ky. 2000) (striking Ten Commandments postings in Kentucky schools); Part III.A, infra (discussing Kentucky legislation never before brought to this Court's attention).

The legislation in the present case, supported by amicus briefs signed by almost every member of the General Assembly, coerces an executive official in the federally funded KOHS to publicize – in training and educational materials and on a permanent, prominently displayed plaque – that it is vital to the future of the Commonwealth to rely upon "Almighty God." This new legislation should not be swept under the ceremonial deism rug, especially as it ostracizes atheists from politics. The legislation implies they are dangerous to the post-9/11 security of the Commonwealth and contributes to bias and stereotypes about atheists, the most distrusted group in America. Moreover, this legislation and the amicus briefs filed in the case are part of a coordinated effort to challenge this Court's legitimacy as the final arbiter of law affecting religion. This case presents the ideal vehicle for the Court to insure that its Establishment Clause jurisprudence protects non-religious citizens and stop Kentucky government officials from deliberately undermining this Court's legitimacy.

## I. THE HISTORICAL CEREMONIAL DEISM DOCTRINE SHOULD NOT BE EXTENDED GIVEN TODAY'S PLURALISTIC SOCIETY AND COERCIVE BACKLASH AGAINST ATHEISTS SINCE 9/11

Presumably, those improperly using government to perpetuate religiosity hope they will buy time such that the logic of *Van Orden* will ultimately save most of their physical testimonials even if someone has the litigation budget, time, and endurance to challenge some displays one by one. If Petitioners are forced to fight in Kentucky on a micro, case-by-case level despite the overwhelming Establishment Clause

violations, they eventually will find themselves, like those in *Van Orden*, faced with multitudes of Ten Commandments monuments the Fraternal Order of Eagles successfully maneuvered to install on government property forty years earlier.

Alienation of non-believers from American politics today was likely preordained by the enthusiastic injection of God into politics to distinguish America from the Soviet bloc during the Cold War.<sup>13</sup> While Petitioners believe the unfortunate precedent is inapplicable and should in no way be extended given today's significantly more pluralistic society,<sup>14</sup>

<sup>&</sup>lt;sup>13</sup> See Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1042-44 (9th Cir. 2010) (Reinhardt, J., dissenting) (maintaining that Congress added "under God" to the Pledge of Allegiance to indoctrinate children with belief in God, not just country); Françoise Choay, The Invention of the Historic Monument (Cambridge U. Press, Lauren M. O'Connell, transl. 2001) (describing historical role monuments play in shaping society and history); Douglas Laycock, The Benefits of the Establishment Clause, 42 DePaul L. Rev. 373, 380 (1992) ("By making such statements, the government says the real American religion is watered-down Christianity, and everybody else is a little bit un-American."); Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2024-26 (1996) (describing how legal documents and statements contribute to social norms, including faith).

<sup>&</sup>lt;sup>14</sup> See Allegheny, 492 U.S. at 603 (noting that in Marsh the Court recognized that "contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief" are impermissible); B. Jessie Hill, Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time, 59 DUKE L.J. 705 (2010) (explaining how meaning of ceremonial speech can change over time); (Continued on following page)

Petitioners understand the value of respecting preexisting Establishment Clause jurisprudence to ensure the rule of law. They concur with the words of the Eleventh Circuit (in a case also instigated by Mr. Moore):

This system embodies the rule of *stare decisis* that "courts should not lightly overrule past decisions . . . " because "[s]tability and predictability are essential factors in the proper operation of the rule of law."

The rule of law requires "fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of *maintaining public faith in the judiciary* as a source of impersonal and reasoned judgments.

*McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) (emphasis added and citations omitted).

# II. THE KENTUCKY COURT OF APPEALS INCORRECTLY APPLIED THIS COURT'S STANDING DOCTRINE

The Kentucky Court of Appeals fundamentally erred in applying this Court's longstanding jurisprudence when it determined that American Atheists

Frank Newport, *This Christmas*, 78% of Americans Identify as Christian, Gallup, Dec. 24, 2009, http://www.gallup.com/poll/124793/this-christmas-78-americans-identify-christian.aspx, at 5 (noting the 1950s were "a very religious decade, based on Gallup indicators.").

lacked standing on the ground that the individual members of the organization were indispensable to the litigation. See American Atheists II, at 760, App. 14. Such a requirement would destabilize public interest litigation across the country and before this Court. See, e.g., Warth v. Seldin, 422 U.S. 490 (1975). "Standing is emphatically not a doctrine for shutting the courthouse door to those whose causes we do not like." Catholic League for Religious and Civil Rights v. San Francisco, 624 F.3d 1043, 1049 (9th Cir. 2010).

## A. Protecting American Atheists' Standing is Essential to Protect its Undisclosed Members, the Most Hated and Politically Ostracized Group in America

The standing of American Atheists to pursue this litigation is essential to preserve the rights of atheistic citizens, routinely unjustly branded "un-American" in McCarthy-like fashion. "Nonbelievers still make up a small minority in the United States, and they remain disliked, distrusted, and not truly American in the eyes of many. As a result, many atheists are hesitant to reveal their religious views, and those who do risk discrimination or attack." Caroline M. Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 349 (2012) (documenting extensive discrimination and threats of violence).

A 2011 study, the first of its depth in compiling and analyzing recent polling data and studies on the subject, states the following:

- "In a contemporary poll, only 45% of American respondents said that they would vote for a qualified atheist presidential candidate: the lowest percentage of several hypothetical minority candidates and the only one who could not garner a majority vote."
- "Americans rated atheists as the group that least agrees with their vision of America and the group that they would most disapprove of their children marrying."
- "A description of a criminally untrustworthy individual was seen as comparably representative of atheists and rapists but not representative of Christians, Muslims, Jewish people, feminists or homosexuals."
- "[A]theists were systematically socially excluded only in high-trust domains; belief in God, but not authoritarianism, predicted this discriminatory decisionmaking against atheists in high trust domains."

Will M. Gervais, et al., Do You Believe in Atheists? Distrust Is Central to Anti-Atheist Prejudice, 101 J. of Personality and Social Psychology 1189, 1189 (2011) (citations omitted and sentences are not linked

or in a particular order), http://www2.psych.ubc.ca/~will/Gervais%20et%20al-%20Atheist%20Distrust.pdf. 15

The legislation in question here, reactive to 9/11, effectively equates atheists with terrorists, further encouraging their alienation from the political process. As stated simply by one scholar, "In most parts of the country, an avowed atheist or agnostic who has the bad judgment to announce that fact will have no chance of winning a political contest." Steven G. Gey, Rewriting the Establishment Clause for One Nation Under (a) God, 41 Tulsa L. Rev. 737, 757 (2006). At all levels of political participation it is relevant that "[o]utspoken atheists regularly receive death threats" from fellow Americans – one even while serving in Iraq. Corbin, supra, at 368 n.151. Another study found:

Atheists are at the top of the list of groups that Americans find problematic in both public

<sup>&</sup>lt;sup>15</sup> See also Phil Zuckerman, *Atheism, Secularity, and Well-Being: How the Findings of Social Science Counter Negative Stereotypes and Assumptions*, 3 SOCIOLOGY COMPASS 949, 953 (2009) (stating "Being godless does not mean being without values" and finding that on average atheists compared to believers in God are "markedly less nationalistic, less prejudiced, less anti-Semitic, less racist, less dogmatic, less ethnocentric, less close-minded, and less authoritarian") (extensive citations omitted).

<sup>&</sup>lt;sup>16</sup> In fact, the *New York Times* has recently reported that only one member of the Kentucky legislature is not Christian (and reportedly adheres to the Jewish faith). Ian Urbina, *Lawmaker in Kentucky Mixes Piety and Politics*, N.Y. TIMES, Jan. 4, 2009, at A12.

and private life, and the gap between acceptance of atheists and acceptance of other racial and religious minorities is large and persistent. It is striking that the rejection of atheists is so much more common than rejection of other stigmatized groups.

Penny Edgell, et al., Atheists as "Other": Moral Boundaries and Cultural Membership in American Society, 1 Am. Soc. Rev. 211, 230 (2006).<sup>17</sup>

In sum, without the ability of American Atheists to challenge such legislation, the political ostracism will fester and continue to grow. First, as already stated, many atheists are closeted out of legitimate fear of persecution, and even attack. Corbin, *supra*, at 368 n.151 (collecting information on physical attacks and threats thereof). Second, as Justices Souter, Stevens and Ginsburg noted in 2005, "Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent." *Van Orden*, 545 U.S. at 746 (Souter, J., dissenting).

<sup>&</sup>lt;sup>17</sup> Accord Pew Forum on Religion & Pub. Life & Pew Research Ctr. for the People & the Press, Views of Religious Similarities and Differences 22 (2009), available in iPollDatabank, Roper Ctr. for Pub. Op. Research, Univ. of Conn., http://www.ropercenter.uconn.edu/data\_access/ipoll/ipoll.html (last visited Oct. 11, 2012); Pew Forum on Religion & Pub. Life, Being Good for Goodness' Sake, Dec. 11, 2008, http://www.pewforum.org/Being-Good-for-Goodness-Sake.aspx (reporting 2007 studying finding that 57% of Americans believe that one must believe in God to be moral).

B. The Kentucky Court of Appeals Improperly Applied *Hunt* to Find that American Atheists Lacked Standing to Challenge Ky. Rev. Stat. §§ 39G.010 and 39A.285

Under the *Hunt* standing analysis, American Atheists is "an appropriate representative of its members, entitled to invoke the [C]ourt's jurisdiction," because its individual members are not indispensable to properly obtain the relief sought. *See Hunt*, 432 U.S. at 342-43. The Franklin County Circuit Court found that American Atheists satisfied the first two prongs of the *Hunt* standing test for associations,<sup>18</sup> but failed the third because the complaint generally sought damages. *See* Circuit Court Opinion at 8, App. 34-35. However, because American Atheists also sought injunctive relief, a claim for which individual participation of its members would be entirely unnecessary, the Circuit Court and the Kentucky Court of Appeals erred.

Even though neither the Franklin County Circuit Court nor the Kentucky Court of Appeals found any issue with a state taxpayer's standing to contest the constitutionality of a state law that violates the Establishment Clause, it bears emphasis that such a

<sup>&</sup>lt;sup>18</sup> See Circuit Court Opinion at 8, App. 34 (holding that American Atheists' members would "have the right to sue in their own right" by virtue of being state taxpayers and that the interests the organization sought to protect were "germane to the organization's purpose.").

conclusion is consistent with this Court's holding in Flast, 392 U.S. 83 (1968). In Flast, this Court held that when government spends public monies on endeavors that violate the Establishment Clause, a citizen has both a stake and standing as a taxpayer to contest that expenditure when he alleges that the government has "spent in violation of specific constitutional protections." Id. Individual Petitioners have alleged exactly that in the present case and both lower courts properly found no issue with standing on those grounds, particularly as Kentucky courts have more readily found standing for state taxpayers when contesting state expenditures. See Circuit Court Opinion at 7, App. 34.

Yet, American Atheists was improperly excluded by the Circuit Court because the complaint also alleged individualized injuries and sought damages. In so holding, the Circuit Court stated: "Certainly, had the plaintiffs prayed solely for the removal of the plaque, for the statement to be removed from the literature, and for the costs of the action with reasonable attorney fees," the individual members would not have been indispensable to the case and standing would have been proper. *Id.* at 8, App. 34-35. The Kentucky Court of Appeals affirmed the Circuit Court without addressing the notion conceded by the lower

<sup>&</sup>lt;sup>19</sup> Petitioners will stipulate to amending their complaint upon remand to remove their generalized demand for "any appropriate damages" to seek solely an injunction and attorney fees.

court that American Atheists did in fact satisfy the *Hunt* factors in its claim for injunctive relief and attorney fees. *See American Atheists II*, at 760, App. 13-14. The decisions of both courts as to standing is inconsistent with both *Flast* and *Hunt*, in that they dismiss out of hand the fact that American Atheists satisfied both tests established by this Court for determining taxpayer and organizational standing.

Moreover, the lower courts' misapplication of standing doctrine also departs widely from the usual and accepted course of judicial proceedings. See SUPREME COURT RULE 10(a). Thus, the fact that the organization may not be awarded compensatory damages for physical and emotional injuries in no way affects its standing to seek the injunction and attorney fees also requested. This is standard fare in public interest litigation across the country. See, e.g., Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981) (stating when one of the plaintiffs "has standing, we do not consider the standing of the other plaintiffs"). As Justice Scalia pointed out in another Establishment Clause case in 2010, Salazar, 130 S.Ct. at 1826, 20 each type of relief must be analyzed separately.

 $<sup>^{\</sup>tiny 20}$  Discussing Summers v. Earth Island Inst., 555 U.S. 488 (2009); Los Angeles v. Lyons, 461 U.S. 95 (1983).

- III. THE KENTUCKY LEGISLATURE FLOUTS
  THIS COURT'S ESTABLISHMENT JURISPRUDENCE AND IS A COMPONENT
  OF A LARGE-SCALE DRIVE TO IMPROPERLY MIX GOVERNMENT AND RELIGION
  - A. A Popular Legislator-Minister, the Spouse of the Religious Leader Whose Actions Required this Court to Intervene in 1980, Has Led the Kentucky Legislature to Flout this Court's Jurisprudence

The main origins of the expensive efforts to proselytize via legislation is captured in the following excerpts from the *New York Times*:

Tom Riner looks for God everywhere, and in places he does not find him, he tries to put him there.

For more than 30 years, Mr. Riner's singular devotion has been to inject God into the public arena. [...]

"The church-state divide is not a line I see," Mr. Riner, a Baptist minister, said of [this KOHS] lawsuit. "What I do see is an attempt to separate America from its history of perceiving itself as a nation under God." [...]

Ian Urbina, *Lawmaker in Kentucky Mixes Piety and Politics*, N.Y. TIMES, Jan. 4, 2009, at A12 (also reporting that as of 2009, the Commonwealth had spent \$160,000 on this litigation and \$400,000 as of 2005 on the *McCreary County* litigation).

Rep. Riner has led the General Assembly to pass wildly unconstitutional religious bills and inject religious resolutions into various bills' histories. Petitioners first provide just three examples of the resolutions. The first is a 2000 resolution "commending those churches and religious organizations that pray and fast for the leaders of the Commonwealth and the Nation." H.R. Res. 191, 2000 Leg., Reg. Sess. (Ky. 2000) (adopted Apr. 14, 2000), available at http:// www.lrc.ky.gov/recarch/00rs/hr191.htm. It states that those who pray and fast for the leaders "are to be highly commended for making a contribution to the Commonwealth which is vastly beyond man's ability to calculate." Id. at  $\P$  3. The second example was passed in conjunction with Ky. Rev. Stat. Ann. § 158.195 (West 2012) in 2000, which, after a long series of statements cherry-picking religious aspects of history, authorized using the Foundations Display from McCreary County in schools. S.J. Res. 57, 2000 Reg. Sess., 2000 Ky. Acts 1535, available at http:// www.lrc.state.ky.us/Statrev/ACTS2000/0444.pdf. This resolution stated, "There shall be no content-based censorship of American history or heritage in the Commonwealth based on religious references in these writings, documents, and records." Id. 21 Ironically, despite the protestations about censorship, Ky. REV. STAT. ANN. § 158.190 (West 2012) (emphasis added), passed in 1990, banned any teaching or "book

 $<sup>^{^{21}}</sup>$  The bill at  $\S~8$  also authorizes reinstalling a previously removed Ten Commandments monument on capitol grounds.

or publication of a sectarian, **infidel**, **or immoral character**, or that reflects on any religious denomination" from schools.

The final example resolution, passed in 2004, after three pages of religious references stated:

Section 1. Believers and churches that fast and pray for the leaders of the nations, including the leaders of the three institutions ordained by God – the Family, the Church, and the Government – are to be highly commended for making that a priority which is most important for the safety and welfare of the nations and future generations.

Section 2. Because of the great need for wise and righteous leaders to steer the nations through the troubled waters of the Twenty-First Century, this honorable body expresses special gratitude for those believers who pray and fast each election day during the hours the polls are open for voting to the end that God might be glorified and the nations blessed through the lives of just and wise leaders.

H.R. Res. 35, 2004 Leg., Spec. Sess. (Ky. 2004) (adopted Oct. 19, 2004), http://www.lrc.ky.gov/record/04ss/HR35.htm.

More than resolutions of such a nature have been passed. One 2000 law encourages school boards to inject *The Lord's Prayer* alongside the Pledge of Allegiance in contravention of *Stone v. Graham*, 449 U.S. 39 (1980). *See* Ky. Rev. Stat. Ann. § 158.175

(West 2012). Another bill enacted in 1990 authorized teachers teaching evolution also to teach "the theory of creation as presented in the Bible, and may accordingly read such passages in the Bibles as are deemed necessary for instruction on the theory of creation, thereby affording students a choice as to which such theory to accept." Ky. Rev. Stat. Ann. § 158.177(1) (West 2012). It further states, "This section is not to be construed as being adverse to any decision which has been rendered by any court of competent jurisdiction." Id. at 158.177(4). An earlier bill expressly stated that the legislature was creating a "safe harbor for schools desiring to avoid litigation and to allow the free speech and religious liberty rights of students to the extent permissible under the establishment clause." Ky. Rev. Stat. Ann. § 158.181(2) (West 2012).

Local politicians are unlikely to resist this type of impropriety because, as stated by one scholar of the Kentucky situation, "Politicians are afraid of attack ads that will say they voted against God if they vote against measures like the ones that Riner puts up." Urbina, *supra*, at 12 (quoting Al Cross, Director of the Institute for Rural Journalism and Community Issues, University of Kentucky). As stated by Kentucky Senator Kathy W. Stein, "Tom [Riner] is as pious as he is persistent. He's also prone to legislative stunts that are embarrassing and expensive for this state." *Id*.

This Court's jurisprudence needs to be reinforced in the Commonwealth of Kentucky. "It is beyond dispute that, at a minimum, the Constitution guarantees

that the government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so." Lee v. Weisman, 505 U.S. 577, 587-88 (1992), citing Lynch, 465, U.S. at 668; Everson v. Bd. of Ed. of Ewing, 330 U.S. 1, 15-16 (1947). Coercion "may not be limited to the context of public schools ... " Lee, 505 U.S. at 592, citing Allegheny, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part). Although Lee did not reach who, besides high school students, should not have to endure being put "in the dilemma of participating, with all that implies, or protesting," the reality in Kentucky is that everyone, including elected officials, is subject to enormous pressure to conform. Unlike *Lee*'s passing reference to legislators being able to freely come and go during legislative prayer, id. at 597, vote after vote has been called on bills to inject God into all facets of Kentucky government, including numerous legislative resolutions, courthouses, schools and now the KOHS.

### B. What Is Happening in Kentucky Is Part of a Large, Misguided Push to Improperly Mix Religion and Government and Defy This Court's Jurisprudence

Unfortunately, what is happening in this case is representative of what is happening in the interior of the country. Many American Christians since 9/11 have been misled to fear there is a war on religion being waged against them by other Americans, even

our President, in addition to the war being waged against our nation by terrorists we truly must fear. *E.g.*, Barbara B. Hagerty, *Has Obama Waged a War on Religion?*, NPR, Jan. 8, 2012, http://www.npr. org/2012/01/08/144835720/has-obama-waged-a-war-on-religion. Out of their misplaced fear, prejudices, and belief in the Great Commission requiring them to spread the word of God,<sup>22</sup> there is a widespread movement to mix Christianity and politics in impermissible ways. *E.g.*, Adam Cohen, *Pulpit Politics: Pastors endorse candidates, thumbing nose at IRS*, M. Alex Johnson, NBCNews, Nov. 4, 2012, http://usnews.nbcnews.com/\_news/2012/11/04/14703656-pulpit-politics-pastors-endorse-candidates-thumbing-noses-at-the-irs? lite.

To physically memorialize their victories in this perceived war and to reach youth and future generations in ways prohibited by this Court's jurisprudence, they seek to flout this Court's Establishment Clause jurisprudence *en masse*. One can get a hint of the movement's origins from one article in 2005:

Notwithstanding Supreme Court rulings suggesting that religious symbols standing alone on government property are unconstitutional, a number of organizations, the most well-known of which are the Family Research Council and Focus on the Family,

<sup>&</sup>lt;sup>22</sup> Matthew 28:16-20. This religious requirement is known as "the Great Commission." http://en.wikipedia.org/wiki/Great\_Commission.

have mobilized support for defending Ten Commandments displays on government property. Lawmakers in Kentucky and Indiana have made a concerted effort to post Ten Commandments in schools.<sup>23</sup> Indeed, Justice Roy Moore built his career on posting the Ten Commandments in courthouses – a career that even contemplated a third-party run for the presidency.

Susanna Dokupil, "Thou Shalt Not Bear False Witness": "Sham" Secular Purposes in Ten Commandments Displays, 28 HARV. J.L. & Pub. Pol'y 609, 613-14 (2005); see also Part III.A, supra (discussing Kentucky laws and resolutions). <sup>24</sup> In Kentucky, home of the nation's Creation Museum, http://creationmuseum.org/, the movement has become radical.

This Court's jurisprudence concerning the Foundations Display in courthouses, the issue in *McCreary* 

<sup>&</sup>lt;sup>23</sup> This Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

<sup>&</sup>lt;sup>24</sup> Incidentally, the three-fold mission of the Foundation of Moral Law, of which Mr. Moore is the president, was openly stated in 2004 to be: "(1) defend the 'right to acknowledge Almighty God' (including the defense of Roy Moore); (2) 'educate the public about the U.S. Constitution and the Godly foundation of the United States of America; and (3) 'reestablish society with good morals and values as set forth in the Holy Bible.'" Dokupil, *supra*, at 614 n.15, *citing About the Foundation*, Foundation for Moral Law, Inc., *at* http://www.morallaw.org/about.htm (last visited Nov. 15, 2004).

County, is also suffering a blow in a way never brought to this Court's attention in prior certiorari petitions. See ACLU of Ky. v. Mercer County, 432 F.3d 624, 634 n.7 (6th Cir. 2005) ("what five justices of the Supreme Court would include in a display commemorating Kentucky and American legal history has no bearing on the constitutionality of the display as erected."), reh'g en banc denied, 446 F.3d 651, 651-52 (2006) (five judges stating this Court's directive had been "ignored," "deviated from" and "flouted"); ACLU of Ky. v. Rowan County, 513 F.Supp.2d 889, 898-99 (E.D. Ky. 2007) ("what five justices . . . "). Even if one did not believe initially that the Foundations Display should have been ordered removed from the McCreary County courthouse upon remand, given the subsequent proliferation of the Foundations Display and other religious legislation in Kentucky, one "would probably suspect that the Counties [and politicians] were simply reaching for any way to keep a religious document on the walls of the courthouse constitutionally required to embody religious neutrality." See McCreary County, 545 U.S. at 873; ACLU of Ky. v. McCreary County, 607 F.3d 439, 446-47 (6th Cir. 2010).

The ability of non-religious citizens to stop the widespread violations is being shut down as the perpetrators become more sophisticated about masking their fingerprints in false history. Over-emphasis of the burden of proof negates the ability to win any but the most egregious cases, like the current one. See ACLU of Ky. v. Grayson County, 591 F.3d 837, 856

(6th Cir. 2010) ("it is those objecting to a display of the Ten Commandments who bear the burden of producing evidence sufficient to *prove* that the governmental entity's secular purpose is a sham. . . ."). <sup>25</sup> The Honorable Karen Nelson Moore of the U.S. Court of Appeals for the Sixth Circuit correctly called out the governmental purpose behind the Foundations Display in Grayson County as a "sham" in part because "a religious leader" proposed that the Ten Commandments – not specifically the Foundations Display – be hung. <sup>26</sup> In the case *sub judice*, the trial court correctly rejected the effort to preemptively trump Establishment Clause challenges by leaving no

<sup>&</sup>lt;sup>25</sup> But see Grayson County, 591 F.3d at 850-51, 860-61 (Moore, J., dissenting) (documenting the role of Reverend Shartzer and stating that the government's stated purpose was a "sham"); ACLU of Ky. v. Grayson County, No. 4:01CV-202, 2008 WL 859279, at \*10 (W.D. Ky. 2008) (record of government officials seeking to display Ten Commandments without judges having even viewed the "historical documents"); see also Mercer County, 432 F.3d at 652 (dissent) ("As the panel acknowledged, the stories of the Ten Commandment displays erected in the State of Kentucky are intertwined.").

<sup>&</sup>lt;sup>26</sup> ACLU of Ky. v. Grayson County, 605 F.3d 426, 430-32 (6th Cir. 2010) (Moore, J., dissenting from opinion assessing costs against ACLU) (describing Reverend Shartzer and Fiscal Court Judge Executive Logsdon conduct of a religious ceremony after being forced to remove the Foundations Display wherein Shartzer promised to "safeguard" it "until the County was permitted to rehang it" and Logsdon's demand that those in attendance "state their religious affiliation"); accord McCreary County, 545 U.S. at 851 (describing ceremony to install Foundations Display overseen by county judge's executive accompanied by his pastor).

religious fingerprints in the legislative history of the KOHS legislation in light of "Kentucky's history of dubious statutes." Circuit Court Opinion, at 12 n.18, App. 40. It rejected the argument that a court "must determine the 'objective purpose' only from 'openly available data'" relative to the specific incident being challenged. *Id*.

Judge Moore, considering the *McCreary County* remand, seems to understand what has been happening:

[T]he fact that more time has passed since the Supreme Court decision is meaningless in this case, because Defendants have spent the time since the Supreme Court decision continuously seeking to accomplish their initial purpose of posting the Ten Commandments as a religious document. Unlike a case in which the passage of time might have some significance, there has been no dormant period here; Defendants have continuously sought to defend their actions and accomplish what they initially set out to do.

McCreary County, 607 F.3d at 448.

#### **CONCLUSION**

The coercive statute in the case *sub judice* is even more constitutionally flawed than the passive Foundations Display at issue in *McCreary County*. *See* Circuit Court Opinion at 9, App. 37 (stating "training")

is the antithesis of passive" and noting legislation's command for a permanent prominent display of the plaque); accord Lee, 505 U.S. at 588 (noting in secondary school environment difficulties arising from "subtle coercive pressure" where "no real alternative" would have allowed a student "to avoid the fact or appearance of participation"). Petitioners hope this Court will take the opportunity to insure its Establishment Clause jurisprudence protects non-believers, the group of Americans most maligned in McCarthylike fashion as "un-American," from religious coercion. See Van Orden, 545 U.S. at 683 ("Our institutions presuppose a Supreme Being, yet these institutions must not press religious observations upon their citizens."). <sup>27</sup> Ignoring the growing defiance

<sup>&</sup>lt;sup>27</sup> Allegheny, 492 U.S. at 627 (O'Connor, J., concurring) ("government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community"); id. at 590 (majority opinion) (holding that the First Amendment "guarantee[s] religious liberty and equality to 'the infidel, the atheist, or the adherent of the non-Christian faith such as Islam or Judaism."), quoting Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) ("the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldbert, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion."). In addition to the authorities cited throughout this petition, see also Mueller v. Allen, 463 U.S. 388 (1983), Widmar v. Vincent, 454 U.S. 263 (1981), Epperson v. Arkansas, 393 U.S. 97 (1968), and Everson v. Bd. of Ed. of Ewing, 330 U.S. 1 (1947).

of this Court in Kentucky emboldens those seeking to weaken this Court's institutional legitimacy. No American should have to choose between submitting to religious coercion or moving to a state where this Court's jurisprudence has the rule of law.<sup>28</sup>

The Court should grant the petition.

Respectfully submitted,

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<sup>&</sup>lt;sup>28</sup> Douglas Laycock, *Voting with Your Feet Is No Substitute* for Constitutional Rights, 32 Harv. J.L. & Pub. Pol'y 29, 39-40 (2009) (describing violence, intimidation and harassment of non-Christians in Santa Fe, Texas). Petitioners would submit that Kentucky has as significant a need for additional correction by this Court as did Santa Fe.

# RENDERED: OCTOBER 28, 2011; 10:00 A.M. TO BE PUBLISHED

## Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001650-MR

KENTUCKY OFFICE OF HOMELAND SECURITY; AND THOMAS PRESTON, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE KENTUCKY OFFICE OF HOMELAND SECURITY

**APPELLANTS** 

APPEAL FROM FRANKLIN CIRCUIT COURT W. HONORABLE THOMAS D. WINGATE, JUDGE ACTION NO. 08-CI-01950

MICHAEL G. CHRISTERSON;
JAMES F. COFFMAN; LUCINDA
HEDDEN COFFMAN; JAN EWING;
EMMETT F. FIELDS; ALEX GRIGG;
EDWIN HENSLEY; HELEN KAGIN;
GARY MARYMAN; DAVID RYAN;

AND JAMES K. WILLMOT

**APPELLEES** 

AND NO. 2009-CA-001676-MR

AMERICAN ATHEISTS, INC.

CROSS-APPELLANTS

v. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT HONORABLE THOMAS D. WINGATE, JUDGE ACTION NO. 08-CI-01950 COMMONWEALTH OF KENTUCKY,
KENTUCKY OFFICE OF
HOMELAND SECURITY;
AND THOMAS PRESTON,
IN HIS OFFICIAL CAPACITY
AS THE DIRECTOR OF
THE KENTUCKY OFFICE
OF HOMELAND SECURITY CROSS-APPELLEES

### OPINION AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

\* \* \*

BEFORE VANMETER AND WINE, JUDGES; SHAKE, SENIOR JUDGE.

VANMETER, Judge: The Kentucky Office of Homeland Security ("KOHS") and Thomas Preston, as the director of the KOHS (hereinafter collectively referred to as "KOHS"), appeal from the order of the Franklin Circuit Court that granted summary judgment in favor of Appellees<sup>2</sup> and American Atheists, Inc. ("American Atheists") on the basis that KRS 39A.285<sup>3</sup> and KRS 39G.010 violate the First and

<sup>&</sup>lt;sup>1</sup> Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>&</sup>lt;sup>2</sup> Michael G. Christerson, James F. Coffman, Lucinda Hedden Coffman, Jan Ewing, Emmett F. Fields, Alex Grigg, Edwin Hensley, Helen Kagin, Gary Maryman, David Ryan, and James K. Willmot.

<sup>&</sup>lt;sup>3</sup> Kentucky Revised Statutes.

Fourteenth Amendments to the United States Constitution and Section 5 of the Kentucky Constitution. American Atheists cross-appeals from the same order, which held that American Atheists lacked standing in the underlying action. After a thorough review of the parties' written and oral arguments, the record, and the applicable law, we affirm that portion of the Franklin Circuit Court judgment finding the American Atheists lacked standing. However, we find reversible error in finding the challenged statutes violate the First and Fourteenth Amendments of the United States Constitution and Section 5 of the Kentucky Constitution and, accordingly, reverse and remand this matter to the trial court for further proceedings.

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)[.]

On December 2, 2008, Appellees and American Atheists filed a complaint against KOHS, alleging that KRS 39A.285 and KRS 39G.010 violate the federal and Kentucky constitutions by establishing a religion in Kentucky.<sup>4</sup> They further alleged that as a result of the legislation, they suffered physical and

<sup>&</sup>lt;sup>4</sup> Jack Conway, Attorney General of the Commonwealth of Kentucky, was also named as a defendant but was summarily dismissed as a party by agreed order.

emotional damages. KOHS filed a motion to dismiss, or in the alternative, for summary judgment. Appellees and American Atheists also filed a motion for summary judgment. By order entered August 26, 2009, the trial court granted summary judgment in favor of Appellees and dismissed American Atheists as a party for lack of standing. This appeal and crossappeal followed.<sup>5</sup>

Summary judgment shall be granted only if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citation omitted). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing

<sup>&</sup>lt;sup>5</sup> Following the filing of the notice of appeal, multiple counsel representing the American Civil Liberties Union, the Family Foundation of Kentucky, Thirty-five Kentucky State Senators, and Ninety-six Kentucky State Representatives, filed motions with this court requesting leave to file *amicus curiae* briefs. Those motions were granted and the *amicus* parties' briefs were filed.

<sup>&</sup>lt;sup>6</sup> Kentucky Rules of Civil Procedure.

that there is a genuine issue of material fact for trial." *Id.* at 482 (citations omitted).

On appeal from a granting of summary judgment, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App.2004).

The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion[.]" This portion of the First Amendment, known as the Establishment Clause, was held to apply likewise to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940).

The United States Supreme Court has a long history of applying the Establishment Clause to state legislation, drawing a line with reference to three activities the Establishment Clause seeks to prohibit: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745 (1971) (citation omitted). From these

cases have emerged two methods by which the court reviews legislation purported to violate the Establishment Clause. The first method, known as the Lemon test, establishes the following criteria to determine whether a law establishes a religion or religious faith: (1) whether the challenged law has a secular purpose; (2) whether the principal or primary effect of the law is to advance or inhibit religion; and (3) whether it creates an excessive entanglement of government with religion. 403 U.S. at 612-13, 91 S. Ct. at 2111. The second method, recognized in Van Orden v. Perry, 545 U.S. 677, 686, 125 S. Ct. 2854, 2861, 162 L. Ed. 2d 607 (2005), looks to the relevant religious and historical significance, as well as the nature of the entity affected by the legislation. In Van Orden, the Court noted that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." Id. at 690.

In the case at bar, the trial court opined that KRS 39G.010 was enacted for a predominantly religious purpose and conveyed a message of mandatory religious belief, thereby violating the Establishment Clause under the *Lemon* test. Further, the trial court concluded that KRS 39A.285 "places an affirmative duty to rely on Almighty God for the protection of the Commonwealth[,]" and thus "created an official government position on God[,]" which is incompatible with any historical significance possibly found in the legislation.

We find the current case analogous to the United States Court of Appeals Sixth Circuit opinion in ACLU of Ohio v. Capitol Square Review and Advisory Bd., 243 F.3d 289 (6th Cir. 2001) (en banc). In Capitol Square, the court held that legislation in Ohio making "With God, All Things Are Possible" the official state motto does not violate the Establishment Clause. Id. at 309-10.7 In doing so, the Court emphasized a long history of all three government branches recognizing the role of religion in American life. *Id.* at 293. Such a history includes countless political leaders who thanked God and "prayed that the nation might continue to enjoy His favor." Id. at 299. The Court held the motto to be "merely a broadly worded expression of a religious/philosophical sentiment[,]" stating it "involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination[.]" Id. Ultimately, the Court found the motto simply paid "lip service to the puissance of God," rather than seeking to or having the effect of advancing religion within the state. *Id.* at 308.

Here, the Kentucky legislature made legislative findings in KRS 39A.285(3), which references the Commonwealth being protected by an "Almighty God" and requires such findings to be publicized in KOHS

 $<sup>^{\</sup>scriptscriptstyle 7}$  Similar to the instant case, the motto was to be publicly displayed in the Ohio capitol square in Columbus.

training materials and posted at the State Emergency Center. While KRS 39G.010(2)(a) requires the executive director of the Kentucky Office of Homeland Security to publicize these findings, no requirement exists that the director agree with or believe in them or that citizens read the posting. Like the Ohio state motto, these laws broadly recognize a belief that the welfare of our Commonwealth, in part, depends on an "Almighty God." The Kentucky legislature has not attempted to compel belief or participation in any form of religious exercise, nor does it seek to prefer one belief over another. A simple reference to a generic "God" acknowledges religion in a general way. Elk Grove Unified School District v. Newdow, 542 U.S. 1, 42, 124 S. Ct. 2301, 2326, 159 L. Ed. 2d 98 (2004).

The Preamble to the fourth and present Constitution of Kentucky, enacted in 1891, provides: "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." Given the historical acceptance of

The preambles to the constitutions of no fewer than 43 other states likewise refer in one way or another to a Supreme Being. (The states in question are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, (Continued on following page)

government reference requesting that we "continue to enjoy His favor[,]" a historical review of the application of the Establishment Clause would not prohibit the Kentucky legislation. Such broad declarations have been viewed as "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S. Ct. 3330, 3336, 77 L. Ed. 2d 1019 (1983).

We disagree with the trial court's assertion that the legislation seeks to place an affirmative duty upon the Commonwealth's citizenry to rely on "Almighty God" for protection of the Commonwealth. The legislation merely pays lip service to a commonly held belief in the puissance of God. The legislation complained of here does not seek to advance religion, nor does it have the effect of advancing religion, but instead seeks to recognize the historical reliance on God for protection. We are also mindful that legislative findings are not conclusive.

Constitutional guaranties would amount to nothing, if there was no way to protect them. The court will not adjudge bad a legislative act on doubtful evidence, but, where it is plain that the Constitution has been violated, it is

Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.) Of the six state constitutions that do not contain a preambular reference to God, three – New Hampshire's, Virginia's, and Vermont's – have establishment clauses that themselves refer explicitly to God or speak approvingly of religion.

the duty of the court to say what the law is, and protect private rights. Otherwise the Constitution may be disregarded, and power may be exercised by the Legislature in a case where, under the Constitution, it is without power to act at all, and those whose rights are thus destroyed will be left without remedy.

Zimmerman v. Brooks, 118 Ky. 85, 80 S.W. 443, 447 (Ky. 1904). Here the legislative finding neither mandates exclusive reliance on Almighty God nor belief in a particularly deity. Rather, it makes reference to historic instances where American leaders have prayed for Divine protection in trying times. Accordingly, KRS 39A.285 and KRS 39G.010 do not violate the Establishment Clause.

Section 5 of the Kentucky Constitution similarly does not mandate the result argued by Appellees. This section 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 of religion; nor shall any man be compelled to send his child to any 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.

Appellees cite us to, and we have found, no Kentucky case that has adopted the reasoning that this section prohibits a statutory reference to God of the sort embodied in the statutes in question. In fact, that rationale would place this section at odds with the Constitution's Preamble noted above. Kentucky's four constitutions have all included a form of the "no preference" clause, and Kentucky's highest court has stated that the purpose of the Section 5 of the present constitution, as well as of its predecessors, is to guarantee religious freedom. Lawson v. Commonwealth, 291 Ky. 437, 443-45, 164 S.W.2d 972, 975-76 (1942). When viewed against this historical background, the statutory references to God, like the other constitutional references to God, do not violate the prohibition

<sup>&</sup>lt;sup>9</sup> In addition to the Preamble and Section 5, the Kentucky Constitution includes several religious references: Section 1, Bill of Rights, Second, secures "[t]he right of worshipping Almighty God according to the dictates of . . . conscience[]." Section 170 exempts from taxation property owned by religious institutions. Section 189 prohibits the use of public funds for "church, sectarian or denominational schools." Section 228 mandates that the constitutional oath of office conclude with the words "so help me God." And, finally, Section 232 concerning the manner of administering an oath "shall be such as is most consistent with the conscience of the deponent, and shall be esteemed by the General Assembly the most solemn appeal to God."

of Section 5, or impinge on the freedom of the Appellees to believe or disbelieve as they deem fit.

In Neal v. Fiscal Court of Jefferson County, 986 S.W.2d 907 (Ky. 1999), the Kentucky Supreme Court, citing Fiscal Court of Jefferson County v. Brady, 885 S.W.2d 681, 686 (Ky. 1994), stated that Sections 5 and 189, which prohibit appropriations to church schools, "mandate a much stricter interpretation than the Federal counterpart found in the First Amendment's 'establishment . . . clause.'" 986 S.W.2d at 909-10. The dispute in the case, however, was the constitutionality of the Jefferson County Fiscal Court conferring a benefit in the form of school bus transportation to nonpublic and parochial schools. The Court upheld the benefit.

On cross-appeal, American Atheists argues that the trial court erred by finding it to not have standing to bring this action on behalf of its members. We disagree.

An association may 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 the individual members in the lawsuit.

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383 (1977); accord Com. ex rel. Brown v. Interactive Media Entm't & Gaming Ass'n, Inc., 306 S.W.3d 32, 38 (Ky. 2010). In the case at bar, the trial court found that the first two requirements were met, but held that since American Atheists sought damages on behalf of its members, relief required the participation of its individual members.

In its complaint, American Atheists specifically alleged its members suffered physical and emotional damages, which included somatic discomforts, mental pain and anguish, and anxiety. Without the participation of the members who allegedly suffered such damages, a court would have no way to determine the appropriateness of any such award. Accordingly, the trial court's determination that American Atheists did not having standing was not in error.

For the foregoing reasons, the opinion of the Franklin Circuit Court is affirmed in part, and reversed in part and remanded for entry of summary judgment in favor of the Kentucky Office of Homeland Security and Thomas Preston, in his official capacity as the Director of the Kentucky Office of Homeland Security.

WINE, JUDGE, CONCURS.

SHAKE, SENIOR JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

SHAKE, SENIOR JUDGE, CONCURRING AND DISSENTING: I concur with the portion of the majority opinion which affirms that portion of the Franklin Circuit Court's judgment which found that American Atheists lacked standing based on its claim for damages by its members. However, I dissent from the remainder of the opinion.

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.

Respectfully, I disagree with the majority that this case is analogous to the Sixth Circuit case of *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001) (en banc). The Ohio state motto, which indicates that all things

are possible with God, is strikingly dissimilar to a statute which *mandates reliance* upon God to achieve statewide safety. The prior is a passive aphorism which places a duty upon no one. The latter is a legislative finding, avowed as factual, that the Commonwealth is not safe absent reliance on Almighty God. Furthermore, KRS 39G.010(2)(a) places a duty upon the executive director to publicize that assertion while stressing to the public that dependence upon Almighty God is vital, or necessary, in assuring the safety of the Commonwealth. This declaration is then given great publicity and emphasized by placement on a plaque prominently displayed at the state's Emergency Operations Center; in the 2010 KOHS Annual Report under the heading "Protection Statement;" within KOHS training materials; and within a KOHS pamphlet that is distributed to the public. 10 In addition, the Capitol Square case was decided on federal constitutional principles and this case must as well be analyzed based on Section 5 of the Kentucky Constitution, as discussed below.

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

 $<sup>^{^{10}}</sup>$  See http://homelandsecurity.ky.gov/nr/rdonlyres/064a0665-affa-4 ada-8d65-91200e25cc7b/0/eaeonkybrochure.pdf.

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.

The Court also expressed that:

Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding, reached ... after decades of religious war, that liberty and social stability demand a religious

<sup>&</sup>lt;sup>11</sup> 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.

tolerance that respects the religious views of all citizens... By showing a purpose to favor religion, the government sends the ... message to ... nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members....

McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 860, 125 S. Ct. 2722, 2733, 162 L. Ed. 2d 729 (2005) (citations omitted) (emphasis added). Indeed, religious freedom means not only the freedom to practice one's religion of choice, but also the freedom to actively remove oneself from the practice of any religion whatsoever. A legislative mandate squarely placing our Commonwealth's security with an Almighty God, and legally requiring such a message to be publicized, is a direct affront to that freedom.

Although the majority opines that the statutes at issue do not "attempt[] to compel belief or participation in any form of religious exercise, nor do [] [they] seek to prefer one belief over another," they nonetheless unequivocally state a clear preference for "adherence to religion generally." See McCreary County, 545 U.S. at 860, 125 S. Ct. at 2733. The statutes are a sweeping declaration that the Commonwealth will not survive absent reliance on Almighty God, that the citizens of the Commonwealth are to be so informed, and that failure to comply with the mandatory provisions may result in prosecution. This is a clear case of

religious endorsement and "sponsorship." *See Lemon*, 403 U.S. at 612, 91 S. Ct. at 2111.

Moreover, application of the "reasonable observer" test, as outlined in a more recent opinion of the United States Supreme Court, has been argued as appropriate. Salazar v. Buono, 130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010) (challenge of a cross placed upon federal land by private persons [members of the Veterans of Foreign Wars] and the statute attempting to transfer that land to the private persons). "That test requires the hypothetical construct of an objective observer who knows all the pertinent facts and circumstances surrounding the symbol and its placement." Id. at 1819-20. According to Amicus Curiae Ninety-six Kentucky State Representatives, under the reasonable observer test, a well-informed reasonable observer would be aware that the purpose of the challenged statutes before us would be "to acknowledge the admitted fact that our Republic has always, in times of crisis, sought the protection of a Higher Power." However, by their very words, defenders of the statute acknowledge a purpose of the challenged statutes that is in no way secular. Accordingly, the challenged statutes fail to pass constitutional muster even under the reasonable observer test.

The United States Supreme Court has previously held that a Kentucky statute which required the posting of the Ten Commandments in public schools had a preeminent religious purpose in violation of the Establishment Clause. *Stone v. Graham*, 449 U.S. 39,

101 S. Ct. 192, 66 L. Ed. 2d 199 (1980). The Court found this to be true, even though a provision in the statute required that a footnote be included on the plaque which stated: "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Stone*, 449 U.S. at 41, 101 S. Ct. at 193. The statutes before us offer no such footnote indicating an adoption of "Almighty God" as a historically recognized protector of our nation. If a footnote denoting secular application cannot make it so, then certainly these statutes, completely lacking of such a secular legislative purpose, cannot survive.

Lastly, and perhaps most significantly, Section 5 of the Kentucky Constitution mandates that "[n]o preference shall ever be given by law to any religious sect, society or denomination." Ky. Const. § 5. "No preference" indicates a stricter adherence to the Establishment Clause and would preclude even legislative "acknowledge[ment] [of] religion in a general way," as the majority opinion identifies the statutes in question. The Court in Neal v. Fiscal Court, 986 S.W.2d 907, reiterated the opinion of Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983), which held that state provisions regarding religious establishment mandate a much stricter interpretation than the Federal counterpart. Although the facts of Neal are not an exact duplication of those before us, the sentiment remains. Religious establishment can take many forms. In Neal and Fannin, it took the form of educational funding; in this case it has taken the form of a state statute. The Constitutional mandate of "no preference" should be applied to all religious inclinations, regardless of the container in which they are delivered. The Kentucky Constitution further mandates that "[n]o human authority shall, in any case whatever, control or interfere with the rights of conscience." Ky. Const. § 5. To declare that the safety of the Commonwealth can only be achieved by its citizens' "reliance upon Almighty God," the legislature has not only interfered with the rights of conscience, it has disregarded them altogether.

For the foregoing reasons, I would affirm the August 26, 2009, order of the Franklin Circuit Court in its entirety.

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# COMMONWEALTH OF KENTUCKY FRANKLIN CIRCUIT COURT DIVISION II CIVIL ACTION NO 08-CI-1950

AMERICAN ATHEISTS, INC., et al.

**PLAINTIFFS** 

V.

#### **OPINION AND ORDER**

COMMONWEATH [sic] OF KENTUCKY, et al.

**DEFENDANTS** 

This matter is before the Court upon Defendants' Motion to Dismiss or for Summary Judgment and Plaintiffs' cross-motion requesting summary judgment.

### I. Background

In response to the terrorist attacks of September 11, 2001, the Kentucky legislature created the Kentucky Office of Homeland Security with KRS Chapter 39G. In addition to providing organizational structure and oversight, the statutory provisions also require certain statements to be posted publicly. KRS 39G.010 requires the executive director of the Office of Homeland Security to "[p]ublicize 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 in its agency training and educational materials." The executive director is also given responsibility "for prominently displaying a permanent plaque at the entrance to the state's Emergency Operations Center stating the text of KRS 39A.285(3)." *Id.* KRS 39A.285 provides as follows:

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, around six months after the attacks on September 11, 2001. KRS 39G.010 became effective on July 12, 2006, more than four years after KRS 39A.285 was passed.

The Plaintiffs claim that these two statutes violate provisions of the federal and state constitutions. Plaintiffs further contend that the enactment and execution of the contested statutes has caused them considerable harm. The Court will now address standing and the constitutionality of the statutes in question, and will leave the calculation of damages, if necessary, for later proceedings.

#### II. Commonwealth's Position

The Commonwealth argues that "[f]or more than 200 years all three branches of the United States government have acknowledged the role of religion in the American way of life[,]"and contends that if this Court were to adopt the Plaintiff's position it could lead to a wholly secular society completely divorced from religion, unavoidably causing harm to the American society. \*\*Defendants' Memorandum of Law in \*\*Defendants' Memorandum of Law in \*\*End \*\*End

<sup>&</sup>lt;sup>1</sup> Benjamin Franklin cautioned that combining law and religion was a precarious endeavor, claiming "A man compounded of Law and Gospel, is able to cheat a whole country with his Religion, and then destroy them under Colour of Law." BROOKE ALLEN, MORAL MINORITY, OUR SKEPTICAL FOUNDING FATHERS. 17 (Ivan R. Dee, Chicago 2006) *citing* Franklin writing as "Silence Dogwood," *New England Courant*, July 23, 1730.

Support of Motion to Dismiss or for Summary Judgment at 1 (hereinafter Defendants' Memorandum). The Court finds this fear tenuous. The Commonwealth also asserts that the U.S. Constitution does not require that absolute separation of Church and state, but concedes that the raison d'être2 for the Establishment Clause is "to prevent, as far as possible, the intrusion of either [the church or the state] in to the precincts of the other." Id. at 5 citing Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). Given this concession, it is curious that the Commonwealth seeks to uphold this law. Finally, the Commonwealth attempts to justify its position by contending that the obvious purpose of KRS 39A.285 and KRS 39G.010 is the protection of the Commonwealth and its citizens. The omission of Almighty God does not make this purpose more contemptible to Christians or any other faith,

<sup>&</sup>lt;sup>2</sup> The claimed reason for the existence of something

<sup>&</sup>quot;It is easy to make a plausible logical argument in favor of the proposition that the state cannot be neutral, that no-religion is irreligion, and that non-Christian is anti-Christian. But facts disprove logic. The world is full of happy and unhappy inconsistencies. Christ says, indeed, 'Who is not for me is against me,' but he says also, with the same right, 'Who is not against me is for me.' It is the latter, and not the former truth which applies to the American state, as is manifest from its history down to the present time. A mere verbal recognition of God and Christ might be construed as an empty patronizing formality. Having the substance, we may dispense with the shadow, which might cast suspicion upon reality." Church and State in the United States or The American Idea of Religious Liberty and its Practical Effects, Philip Schaff, 42 (G.P. Putnam's Sons, New York 1888).

nor does including the name make the purpose more commendable.<sup>4</sup>

This Court does not postulate that Plaintiff's argument that KRS 39A.285 and KRS 39G.010 are an attempt to "Christianize" Kentucky. *Memorandum in* 

<sup>&</sup>lt;sup>4</sup> "The Constitution of the Confederate States, framed at Montgomery, Alabama, during the civil war (March 11, 1861), actually did insert Almighty God in the preamble, but that constitution died with the Confederacy in 1865. The name of God did not make it more pious or justifiable." *Id.* at 39.

<sup>&</sup>lt;sup>5</sup> Assuming but not stating that the United States was founded on Christian principles, this supports rather than disproves the importance of separation between church and state. For "[i]f we speak of a Christian Nation we must take the word in the qualified sense of the prevailing religious sentiment and profession; for in any nation and under any relation of church and state, there are multitudes of unbelievers, misbelievers, and hypocrites. Moreover, we must not measure the Christian character of a people by outward signs. such as crosses, crucifixes. pictures, [plaques, training materials,] processions, clerical coats, and monastic cowls, all of which abound in Roman Catholic countries and in Russia, on the streets and in public places, but are seldom seen in the United States. We must go to the churches and Sunday-Schools, visit the houses and family altars, attend the numerous meetings of synods, conferences, conventions, observe the sacred stillness of the Lord's Day, converse with leading men [and women] of all professions and grades of culture, study the religious literature and periodical press with its accounts of the daily thoughts, words, and deeds of the people. A foreigner may at first get bewildered by the seeming confusion of ideas, and be repelled by strange novelties or eccentricities; but he will gradually be impressed with unity and strength of the national sentiment on all vital questions of religion and morals. With this understanding we may boldly assert that the American nation is as religious and as Christian as any nation on earth, and in some (Continued on following page)

Support of Plaintiff's Response to Defendants' Motion to Dismiss and for Summary Judgment and Plaintiff's Motion for Summary Judgment at 5 (hereinafter Plaintiff's Response). However, indulging the argument, it is baffling that Christians would seek government endorsement of their respective religion, and give a secular government an opportunity to taint an unadulterated church. Prudent Christians have long recognized the innate dangers present in a church-state union. In 1777 an astute Virginian championed the following words, based out of the book of Revelation:

The Church has been long since betrothed to another. She is espoused . . . unto Christ. He is her husband; and she is the bride, the lamb's wife. And if so, was she to be joined to the State, it would be committing spiritual adultery, the most detestable of all enormities! . . . This union [church and state] we know, has often been productive of the most pernicious consequences. They have always corrupted, and often ruined one another; as wine and water mingled, turns to vinegar. The State, I say, has always corrupted the Church. . . . The very establishment corrupts the Church. And such a Church will consequently corrupt the State.

respects even more so, for the very reason that the profession and support of religion is left entirely free. State-churchism is apt to breed hypocrisy and infidelity, while free-churchism favors the growth of religion." *Id.* at 55 (emphasis added).

PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 55 (Harvard University Press. 2002) citing "Freeman of Virginia," Freeman's Remonstrance against an Ecclesiastical Establishment, 6, 7-8.

The Lutherans have declared "in the following pronouncement of the conservative Missouri Synod" that "Forasmuch as our Lord Jesus Christ says, 'My Kingdom is not this world," and, 'Render unto Caesar the things which are Caesar's and unto God the things that are God's,' the separation of Church and State is for all times to be acknowledged as in accordance with the Word of God; and since God has in this country vouchsafed unto us the precious boon of religious liberty, we may not as faithful stewards approve of any legislation which tends toward a confusion of spiritual and secular affairs and endangers our religious liberty." Id. at 500-501 citing Pronouncement made by the Missouri Synod at its 21st convention, 1890, recorded in the Proceedings of the convention, pp. 85, 86 (emphasis added).

(Continued on following page)

<sup>&</sup>lt;sup>6</sup> Likewise, many Christian sects have affirmatively pledged to vehemently protect the religious liberty of others in an effort to protect their own. For example, the Southern Baptist Convention, the Northern Baptist Convention, and the National Baptist Convention approved a declaration in 1939 which provided that: "Believing religious liberty to be not only an inalienable human right, but indispensable to human welfare, a Baptist must exercise himself to the utmost in maintenance of absolute religious liberty for his Jewish neighbor, his Catholic neighbor, his Protestant neighbor, and everybody else. Profoundly convinced that any deprivation of this right is a wrong to be challenged. Baptists condemn every form of compulsion or restraint of the free consideration of the claims of religion. We stand for a civil state 'with full liberty in religious concernments." Anson Phelps Stokes, Church and State in the UNITED STATES v. III 487 (1st ed.) (Harper and Brothers 1950) citing Rufus W. Weaver., The Road to the Freedom of RELIGION, 17-18 (emphasis added).

#### III. Standing

#### A. Named Plaintiffs

The threshold issue before the Court is whether the named plaintiffs have standing to bring this claim. It is this Court's continuing duty to examine subject matter jurisdiction because plaintiffs who do not have standing are not entitled to relief from this Court. *Theisen v. Estate of Wilson*, 226 S.W.3d 59, 61 (Ky. 2007). Without standing this Court has no choice but to dismiss for failure to state a claim for which relief can be granted. *Id.* Peculiarly, the named plaintiffs do not specifically allege taxpayer status in their

The Presbyterians have adopted a resolution that "all men have the right to freedom of worship and to religious belief, association, practice and proclamation according to their conscience, subject only to the requirement of public order and morality as determined under the law by the state[,]...[and] the equality of all religious bodies before the state should be safeguarded, nationally and internationally, by constitutional provision, legal enactment and administrative action. *Id.* at 503 citing Christian Century, June 19, 1946 (emphasis added.)

The Presbyterians also found "that it is the responsibility of the church people to maintain . . . [t]hat no church should seek for itself, or tolerate others seeking for themselves, a privileged position or status. . . . That government should put no discriminatory limitation upon the liberty of any one religious body or group. We will join with the Roman Catholic Church, and with any other religious body, in resisting any limitation upon it as we would resist if any such limitation were directed toward ourselves. Id. citing Christian century, June 19, 1946 (emphasis added).

<sup>&</sup>lt;sup>7</sup> American Atheist, Inc. alleges that it has standing for unnamed plaintiffs. This shall be addressed later in the Opinion.

complaint, and standing must be determined from the allegations of the complaint; on the other hand, all assertions are taken as true and construed in favor of the plaintiffs. *J.N.R. v. O'Reilly*, 264 S.W.3d 587, 608-609 (Ky. 2008). Consequently, the only germane question is whether the named plaintiffs have alleged matters in the complaint sufficient to establish standing. *Id.* Kentucky follows a very liberal approach to interpreting the complaint.

In regard to pleadings, Kentucky has always followed the notice pleading theory which only requires a short and plain statement of claim demonstrating that relief is warranted and necessary. In scrutinizing whether a pleading yields standing, "We no longer approach pleadings searching for a flaw, a technicality upon which to strike down a claim or defense, as was formerly the case at common law. Whereas the old common law demur searched the pleadings for a reason to dismiss, now a Motion to Dismiss is directed at the substance of the pleading. In McCollum v. Garrett, 880 S.W.2d 530 (Kv.1994), this Court affirmed that the sufficiency of the pleadings should be resolved by a commonsense reading so as to do substantial justice. To that end, all that is necessary is that a pleading sufficiently identify the basis of the claim.

*Id.* (emphasis added) (internal citations and quotations omitted). Furthermore, five plaintiffs have filed affidavits asserting that they are residents and taxpayers in the Commonwealth, and counsel for the

named plaintiffs alleges taxpayer standing in his *Response*. Consequently, this Court finds that the named plaintiffs have sufficiently *alleged* taxpayer standing.<sup>8</sup>

Price v. Commonwealth of Kentucky, Transportation Cabinet, 945 S.W2d 429 (Ky.App. 1997) defines the requirements to satisfy taxpayer standing in Kentucky. The Kentucky Court of Appeals acknowledged that the federal line of cases addressing tax payer standing were not applicable to a state taxpayer action. Id. at 431. After an extensive discussion of previous state cases addressing taxpayer standing, the court concluded that "[t]he right of a single taxpayer to maintain such an action is no longer in doubt." Id. at 432. Moreover, the Court noted that a taxpayer had standing to challenge a ministerial act required by law to be done, and affirmed that a taxpayer was not required to "show a special interest to be affected by the act." Id. All named plaintiffs are residents and taxpayers of Kentucky. 10 There is no

<sup>&</sup>lt;sup>8</sup> Likewise, the Court recognizes that plaintiffs allege the "challenged Kentucky statutory is facially violative of the First Amendment to the Constitution of the United States of American [sic]," rather than a violation under the Fourteenth Amendment to the United States Constitution, but the Court finds this mistake inconsequential under Kentucky's notice pleading approach.

<sup>&</sup>lt;sup>9</sup> In *Price* the citizen taxpayer was suing to require the official to perform, but this distinction is insignificant.

<sup>&</sup>lt;sup>10</sup> The Court recognizes that "Kentucky's Homeland Security programs, and administration and staffing are financed (Continued on following page)

question that the named plaintiffs have standing under Kentucky law.<sup>11</sup>

almost entirely thought federal dollars." Kentucky Receives \$11.7 million in Homeland Security Grants, Press Release (Kentucky Office of Homeland Security) June 18, 2009 available at http://migration.kentucky.govinewsroom/homeland\_security/khospr061809.htm (last visited August 19, 2009), but finds this fact immaterial. Nor does the Court need to address the tax money spent on the floor of the General Assembly, and the immunity to which those acts are entitled. The dissemination of the KRS statutes in question to the public via the internet (see http://www.lrc.state.ky.us/Law.htm) and law libraries across the Commonwealth is funded through state tax dollars. As a result, plaintiffs have state taxpayer standing.

11 The Court takes notice of the recent case of Pedreira, et al., Kentucky Baptist Homes for Children, Inc. et al., 553 F.Supp.2d 853 (W.D.Ky. 2008), which came on the heels of Hein v. Freedom From Religion Foundation, 551 U.S. 587 (2007). Judge Simpson found that state taxpayers did not have standing in federal court to bring a claim that state spending violated the establishment clause in the absence of some direct injury. Pedreira, 553 FSupp.2d at 859-861. In Pedreira, "[t]he Commonwealth of Kentucky was sued on the ground that it violated the Establishment Clause of the First Amendment [sic.] by providing government funds to K[entucky] B[aptist] H[omes] [for] C[hildren]." Id at 857. Nevertheless, this Court notes that standing is a procedural issue, and "[s]tate courts are not bound by the standing requirements applicable in federal courts, but rather by their own constitutional limitations and discretionary doctrines. Accordingly, state courts are free to fashion their own law of standing consistent with their own notions of substantial justice and sound judicial administration. Consequently, while state standing requirements do, in some instances, parallel federal requirements, in other instances they are different and, in some cases, more liberal." 1A C.J.S. Actions § 103 (2009)

#### B. American Atheist

American Atheist, Inc. does not allege injury to itself; nor can it can it [sic] have taxpayer standing because it is a not-for-profit 501(c)(3) corporation. Therefore, standing is only proper if American Atheist, Inc. can sue on behalf of its members. The U.S. Supreme Court has declared that an organization will have standing to sue on its members behalf when "its members would otherwise have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333, 343 (1977). The first two requirements are easily met. This Court has already stated that individual state taxpayers have standing to sue, and American Atheist, Inc. has members who are taxpayers throughout Kentucky. See First Amended Complaint at 3. Likewise, American Atheist, Inc. states that it is a "nationwide movement, having among its goals the defense of the civil liberties of Atheists, and the total absolute separation of government and religion." Id. Obviously, the interests American Atheist seeks to protect are germane to the organization's purpose. However, the third requirement for standing, that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit is more complex. Certainly, had the plaintiffs prayed solely for the removal of the plaque, for the statement to be

removed from the literature, and for the costs of the action with reasonable attorney fees: the case would not have required the participation of American Atheist. Inc.'s members. Nonetheless, the complaint alleges that "[t]he plaintiffs, and each of them, have suffered, are suffering, and will continue to suffer, damages, both physical and emotional, . . . [including] somatic discomforts, and mental pain and anguish...." Id. at 7. Plaintiffs also assert that they continue to suffer from "anxiety from the belief that the existence of these unconstitutional laws suggest that their very safety as residents of Kentucky may be in the hands of fanatics, traitors, or fools. . . . [And] demand ... damages as may appear to be appropriate, within the jurisdictional limits of the Court." Id. at 8. This Court is in no position to determine what damages if any are appropriate to the unnamed plaintiffs represented by American Atheist, Inc.. For that reason, the relief requested requires the participation of individual members in the lawsuit and American Atheist, Inc. has no standing to challenge the constitutionality of the statutes in question.

## IV. United States Constitution First & Fourteenth Amendment

The First Amendment of the United States Constitution, binding on the states by incorporation through the Fourteenth Amendment, prohibits the establishment of religion by the government: "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. 1. Although the

language of the First Amendment (hereinafter the "Establishment Clause") seems facially clear, understanding of exactly what it requires in a given situation has been notoriously difficult to ascertain. Lemon v. Kurtzman, 430 U.S. 602, 612 (1971). In defending their respective positions, both the Plaintiffs and the Defendants make historical arguments about the intent of the country's founders in creating the Establishment Clause. Their opposing stances are well documented, and the battle in which they seek to engage is nearly as old as the country itself. See 8 Rutgers J. L. & Religion 14, 24 (2007). The important and difficult task for this Court, then, is to infer the purposes of the Establishment Clause as it applies to the specific circumstances of the case.

# A. Does Lemon still Apply; Van Orden & Pleasant Grove City, Utah

The test enunciated in *Lemon v. Kurtzman*, is not always necessary to determine the constitutionality of government actions which involve religion. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). This nation's highest Court affirmed that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of *passive monument* that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Id.* In contrast, this Court finds that the requirements of KRS 39G.010 make the posting of the plague [sic] and the

printing of the statement in the training materials anything but passive. In Van Orden the monument displaying the Ten Commandments was alongside 16 other historical monuments surrounding the Texas State Capital. Id. at 677. This plague is required by statute to be prominently displayed. This is by definition, not passive. In addition, the protective statement to be included in the training material is afforded its own page. Moreover and perhaps most importantly, training is the antithesis of passive. It would be disingenuous for this Court to hold that the plaque and training materials were passive documents, and thus, entitled to the Van Orden analysis rather than the Lemon test. However, this Court finds Van Orden helpful in determining whether KRS 39A.285 violates the Establishment Clause. This statute is more akin to the passive monument described in Van Orden, and appropriately the Court's analysis of KRS 39A.285 shall be "driven both by the nature of the monument and by our Nation's history." Id. at 686.

There is no question that both the United States Constitution and the Kentucky Constitution permit a passing reference to Almighty God nestled in the middle of the Commonwealth's statutes. Amid Kentucky's diverse laws are 10 references to God in the Kentucky Regulations, <sup>12</sup> 18 references to God in the

 $<sup>^{^{12}}</sup>$  787 KAR 1:160; 804 KAR 4:110; 807 KAR 5:506; 401 KAR 45:040; 806 KAR 7:090; 401 KAR 47:130; 787 KAR 1:110; 811 KAR 1:120; 401 KAR 5:070; and 807 KAR 5:061.

Kentucky Revised Statutes, 13114 <sup>13</sup>/<sup>14</sup> 2 references to God in the Kentucky Constitution, <sup>15</sup> and 2 references to Almighty God in the Kentucky Constitution. <sup>16</sup> However, 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. <sup>17</sup> The nature of this statute is much more than an acknowledgement that people have historically looked to God for protection.

Likewise, KRS 2.035 references a general deity or deities but does not use the word God. The statute provides that 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."

 <sup>&</sup>lt;sup>13</sup> KRS 280.040; KRS 304.17A-730; KRS 350.475; KRS 243.650; KRS 243.540; KRS 383.650; KRS 304.17A-576; KRS 371.405; KRS 262.910; KRS 7.090; KRS 190.045: KRS 6.330; KRS 39A.210: KRS 39A.020; KRS 383.220; KRS 70.010

<sup>&</sup>lt;sup>14</sup> KRS 2.105 does not use the word "God". Instead the statute provides that the phrase "Deo gratiam habeamus" is named and designated the Commonwealth's official Latin motto. Translated to English the phrase means "Let us be grateful to God."

<sup>&</sup>lt;sup>15</sup> KY. Const. §§ 228, 232.

<sup>&</sup>lt;sup>16</sup> KY. CONST. preamble, § 1.

<sup>&</sup>lt;sup>17</sup> Because this Court finds that KRS 39A.285 is unconstitutional under *Van Orden*, it shall not endeavor to determine whether it would also be unconstitutional under *Pleasant Grove City*, *Utah v. Summun*, 129 S.Ct. 1125, 1131-1132 (2009) involving "government speech." *See Plaintiffs' Response* at 13.

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 force 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.

#### B. Lemon and KRS 39G.010

KRS 39G.010 is more appropriately examined under the infamous *Lemon* test. According to *Lemon*, for a statute to be permissible under the Establishment Clause, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-613 (internal citations omitted).

#### i. Secular legislative purpose

The Defendants assert the purpose of the KRS 39G.010 was to recognize historical reliance upon the

Almighty in securing the nation's defense and wellbeing, and to provide a sense of unity among Kentuckians. The Plaintiffs condemn the plaque and its inclusion in training materials as clearly establishing an official religious belief and perhaps constituting a test of faith for government officials. To determine the purpose of the statutes in question, the Court must look to readily discernible facts. *McCreary County*, 545 U.S. 844, 862. Also, while courts will generally defer to a legislature's stated purposes, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *Id* at 864.

It is clear that the purpose<sup>18</sup> underlying the display of the plaque and the contents of Office of Homeland Security training materials is not to celebrate the historical reasons for our great nation's

<sup>&</sup>lt;sup>18</sup> The Commonwealth argues that this Court must determine the "objective purpose" from "openly available data." Defendants' Memorandum at 11 citing McCreary County, Ky. v. ACLU, 545 U.S. 844, (2005). In some detail the Commonwealth instructs this Court not to examine any secret motives of the legislature because secret motives are hidden from an objective observer, and thus, are "no reason for great constitutional concern. Id. at 11-12 citing McCreary, 545 U.S. at 934. At the same time the Commonwealth concedes that an "objective observer is one presumed to be familiar with the history of the government's actions and competent to learn what history has to show. . . . " Id. at 12 citing 545 U.S. at 863 (internal citations and quotations omitted). Consequently, the Commonwealth's reliance on McCreary weakens rather than strengthens its case due to Kentucky's history of dubious statutes. See Plaintiffs' Response at 5-9.

survival in the face of terror and war. Its purpose is to declare publicly that the official position of the Commonwealth of Kentucky is that an Almighty God exists and that the function of that God is to protect us from our enemies. Consequently, a reading of the statute's plain language makes that clear. Effectively, the General Assembly has created an official government position on God. The recitation of the beliefs of past Presidents does not mask the clear purpose of the statutes.

The instant case is also distinguishable from Lynch v. Donnelly, 465 U.S. 668 (1984), in which a city's display of a crèche, among secular holiday decorations, was upheld. In Lynch, the court found "insufficient evidence to establish that the inclusion of the crèche [was] a purposeful or surreptitious effort to express some kind of subtle government advocacy of a particular religious message." Id. at 680. Furthermore, the court in Lynch quoted McGowan v. Maryland, 366 U.S. 420, 442 (1961) in finding the reason for the crèche's placement in the holiday display "merely happens to coincide or harmonize with the tenets of some religions." Here, in contrast. the plain language of the statute in question leaves no doubt that the plaque and inclusion of its language in training manuals is indeed a purposeful effort to express "government advocacy" of what is clearly a religious message.

In defending the statutes, the Defendants cite the U.S. Supreme Court's declaration of the constitutionality of presidents' and legislators' various public

expressions of faith. It is true that allowing legislators to open sessions with prayer and continuing the longstanding practice of taking oaths of office or testifying under oath does not constitute the establishment of religion. See Murray v. Buchanan, 720 F.2d 689, 695 (1983). Similarly, if the disputed statutes contained merely a provision allowing Homeland Security officials to request God's assistance in protecting the Commonwealth from terrorist attacks, the statute would likely be permissible. However, passing a law that requires statements about God and the nature of God to be included in training and educational materials, and mandates memorializing legislators' belief in God on government buildings does not allow mature adults who disagree with this position to excuse themselves from participating in the religious aspects of this legislation.

Additionally, the practice of opening state and federal legislative sessions with prayer and using public funds to hire chaplains has been deemed permissible because the practice's origination was substantially simultaneous to the creation of the Establishment Cause. *Murray v. Buchanan*, 720 F.2d 689, 695-697 (D.C. Cir. 1983). Because of this, employing legislative chaplains to conduct daily prayer could not have been contrary to the founders' intent in prohibiting the establishment of religion. *Id.* This fact, coupled with the fact that members of Congress may excuse themselves from prayer without consequence, protects this ritual from violation of the Establishment Clause. *See School Dist. of Abington* 

Tp., Pa. v. Schempp, 374 U.S. 203, 299 (1963). The Kentucky statute at issue here, however, has neither historical approval nor the option for dissenters to excuse themselves from participation.

Furthermore, reliance on the permissibility of Presidents' invocations of God in speeches and other public declarations does not save this statute from unconstitutionality. While Presidents, as individuals, may declare tenets of their faith even while acting in their official capacity, a state may not adopt a legislative policy of belief in God for any purpose. It is abundantly clear that including the Commonwealth's reliance upon "Almighty God" in Homeland Security educational materials constitutes state-sponsored religious belief, which is impermissible and violates the Establishment Clause.

The Defendants also claim the use of "In God We Trust" on American currency justifies KRS 39G's reliance upon Almighty God in its Homeland Security statute. However, it has been held the motto, as presented on U.S. currency, "has no theological or ritualistic impact." *Aronow v. U.S.*, 432 F.2d 242 at 243 (9th Cir. 1970). Instead, the phrase was valuable in its inspirational quality. The expression's fleeting and broad reference to God could not constitute establishment of religion. Here, while the ritualistic impact of the plaque is nonexistent, its theological impact is clear from the very language of the challenged statutes. The legislative finding that the Commonwealth is unsafe without the protection of "Almighty God" takes a clear stance on the nature of

God, which constitutes an impermissible purpose not comparable to In God We Trust."

#### ii. Principal effect

Under this prong of the *Lemon* test, the main purpose or effect of the statute in question may not advance or inhibit religion. *Lemon*, 403 U.S. 602, 612-613. The law does not appear to inhibit religion, and there has been no allegation that it does. With respect to the advancement of religion, the Kentucky statute does not promote the doctrine of a particular faith, though it does adopt language of monotheism, God's omnipotence, and divine intervention, beliefs which are not present in all world religions.

Additionally, the *McCreary County* decision admonishes governments not to take a side between "religion and nonreligion." McCreary County 545 U.S. 844 at 860. Even when a statute does not adopt views identical to those of a single organized religion, it can violate the Establishment Clause. In proclaiming the existence and interventional and protective power of God, the General Assembly has clearly taken a side, namely that of religion. Furthermore, the U.S. Supreme Court has found a statute may violate the First Amendment's admonition that "there should be no law respecting an establishment of religion," even when it "[falls] short of its total realization." Lemon at 403 U.S. at 612. Here, although the General Assembly's action falls short of adopting an official state religion or church, it strongly endorses religious belief over the lack of such belief and adopts this belief as the official position of the Commonwealth. This is improper.

#### ii. [sic] Government entanglement

The government entanglement with religion does not appear high in this instance. Although initially the state was presumably required to finance the plaque, 19 there has been no evidence presented as to its actual cost, and there is no reason to assume its production required the expenditure of significant public funds, if any. Also, although the statute requires the Office of Homeland Security to include the legislative finding in its training materials, there is no evidence this requires significant expenditure, if any, either. It is difficult to imagine a situation in which placing such a brief statement among other training materials could incur more than negligible costs.

As for administrative entanglement, KRS 39G.010 does not require the Commonwealth to become involved with any religious organization or to conduct religious events of any kind. It does require officials to assemble training manuals which include the language of KRS 39A.285; though, there is no evidence this requires substantial time or effort. It is

<sup>&</sup>lt;sup>19</sup> Although this is questionable since Kentucky's Homeland Security programs, and administration and staffing are financed almost entirely thought [sic] federal dollars. *See* note 4.

safe to assume conformity with this statute requires merely photocopying the statement and placing copies in training manuals. This does not constitute excessive entanglement.

KRS 39G.010 does not require excessive government entanglement with religion; it does, however, lack a sincere legislative purpose, and it does promote religion. Therefore, KRS 39G.010 constitutes government action in contravention of the Fourteenth Amendment of the United States Constitution. It is therefore impermissible.

# V. Kentucky Constitution

This Court also finds that KRS 39G.010 and KRS 39A.285 violates § 5 of Kentucky's Constitution. The Kentucky Constitution § 5 provides,

"[n]o 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 of religion; nor shall any man be compelled to send his child to any 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."

KY. Const. § 5 (emphasis added). The Kentucky Constitution is far more detailed and provides greater protection against the Commonwealth's infringement on religious freedom than its federal counterpart, and there is no question that it is proper for the Kentucky Constitution to do so. Commonwealth v. Brandenburg, 114 S.W.3d 830, 835 (Ky. 2003); Commonwealth v. Wasson, S.W.2d 487, 492 (Ky. 1992); Steelvest, Inc. v. Scansteel Service Center, Inc., 908 S.W.2d 104, 107 (Ky. 1995). The Kentucky Supreme Court has recently affirmed that § 5 of the Kentucky Constitution "mandate[s] a much stricter interpretation than the Federal counterpart found in the First Amendment's 'establishment of religion clause'" Neal v. Fiscal Court, Jefferson County, 986 S.W.2d 907, 910 (Ky.1999). Because this Court has concluded that KRS 39A.285 and KRS 39G.010 violate the Fourteenth Amendment of the U.S. constitution: which extends the protections in the First Amendment to state action; and because § 5 of the Kentucky Constitution provides for greater religious freedom than its federal counterpart, it follows that KRS 39G.010 and KRS 39A.285 violate the Kentucky Constitution.

#### VI. Conclusion

KRS 39G.010 and KRS 39A.285 constitute government action in contravention of the Fourteenth Amendment of the United States Constitution and § 5

of the Kentucky Constitution. These provisions are therefore impermissible.

ACCORDINGLY, the Defendants' Motion to Dismiss is hereby granted with respect to American Atheist, Inc. and hereby DENIED with respect to all other plaintiffs; the Defendants' Motion for Summary Judgment is hereby DENIED, and the Plaintiffs' Motion for Summary Judgment is hereby GRANTED with respect to the remaining plaintiffs.

There being no just cause for delay, this is a final and appealable order.

SO ORDERED this 26 day of August, 2009.

/s/ [Illegible]
Thomas D. Wingate
Judge, Franklin Circuit Court

[Certificate Of Service Omitted In Printing]

# **Supreme Court of Kentucky**

2011-SC-000719-D (2009-CA-001650 & 2009-CA-001676)

AMERICAN ATHEISTS, INC., ET AL. MOVANTS

V. FRANKLIN CIRCUIT COURT 2008-CI-01950

KENTUCKY OFFICE OF HOMELAND SECURITY, ET AL. RESPONDENTS

# **ORDER DENYING DISCRETIONARY REVIEW**

The motion for review of the decision of the Court of Appeals is denied.

Venters, J., would grant discretionary review.

ENTERED: August 15, 2012.

/s/ John [Illegible]
CHIEF JUSTICE

# Kentucky Office of Homeland Security 2010 Annual Report

Steven L. Beshear Governor

Thomas L. Preston Executive Director



# Kentucky Office of Homeland Security 2010 Annual Report

Per KRS 39G.030, the Kentucky Office of Homeland Security (KOHS) is charged with publishing information gathered from various recipients. This supplemental report is a record of grant information submitted to KOHS by October 22, 2010. Incomplete and/or missing data is a result of late or partial submissions from other agencies. KOHS has educated

entities of this reporting requirement and sends reminders during the month of September.

KRS 39G.030 Reports by office – Contents of reports.

Each year by November 1, the executive director of the Kentucky Office of Homeland Security shall submit a written report to the Governor, the Auditor of Public Accounts, the Legislative Research Commission and the Interim Joint Committee on Seniors, Veterans, Military Affairs, and Public Protection. The written report shall:

Provide a record of all federal homeland security funding, including grants, gathered under KRS 39G.020 since the last annual report, as well as any other relevant homeland security funding information gathered by the Kentucky Office of Homeland Security. The report shall identify, at a minimum, the specific federal source, the amount, the specific recipient, the intended use of the funding, the actual use of the funding and any unspent amount.

#### **Protection Statement**

KRS 39A,285 [sic] Legislative findings.

The General Assembly hereby finds that:

 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.
- The safety and security of the Common-3. wealth 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."