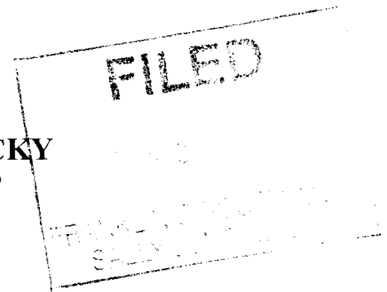

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CASE NUMBER 08-CI-1950

AMERICAN ATHEISTS, INC., *ET AL.* **PLAINTIFFS**

v.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

COMMONWEALTH OF KENTUCKY, *ET AL.* **DEFENDANTS**

****

Come the Defendants, the Commonwealth of Kentucky, the Kentucky Office of Homeland Security, and Thomas L. Preston, in his official capacity as Executive Director of the Kentucky Office of Homeland Security (hereinafter referred to collectively as "Commonwealth"), by counsel, and in support of their Motion to Dismiss pursuant to CR 12.02 for failure to state a claim upon which relief may be granted or in the alternative for Summary Judgment pursuant to CR 56, and state the following:

BACKGROUND

For more than 200 years all three branches of the United States government have acknowledged the role of religion in the American way of life. From George Washington to Barack Obama, *every* American president in his inaugural address has acknowledged God or in some fashion has called upon "Almighty God" for His protection and blessing of our nation.[1] There are countless references in American history to elected officials and other national leaders

[1] Of 44 American Presidents, only 4 – Presidents John Tyler, Millard Filmore, Andrew Johnson, and Chester A. Arthur – were not inaugurated. In each of these cases, the incoming president was succeeding a president who died in office, and was not elected as president in the next election.

proclaiming their belief that the defense of this nation, from enemies both foreign and domestic, not only includes vigilance, strength and temerity, but also the favor of an almighty being. Even President Franklin Pierce stated in his inaugural address, "There is no national security but in the nation's humble, acknowledged dependence upon God and his overruling providence."

September 11, 2001 was a dark day in American history. The inability of the nation's security network to prevent the attacks on New York and Washington, D.C. lead to the deaths of some 3500 citizens. As a result, the federal government, every state government and many local governments began taking steps to ensure the safety and welfare of their citizens. The Kentucky General Assembly participated in these efforts by enacting statutes establishing the Kentucky Office of Homeland Security. KRS 39G *et. seq.*

The Plaintiffs have filed this action challenging the constitutionality of KRS 39G.010 and KRS 39A.285. Specifically, Plaintiffs contend that the aforementioned statutes are in violation of Section 5 of the Kentucky Constitution and of the Establishment Clause embedded in the First Amendment to the United States Constitution.

KRS 39G.010 outlines the duties of the executive director of the Kentucky Office of Homeland Security and, in relevant part, states that the director shall:

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

The challenged text of KRS 39A.285 states:

> The General Assembly hereby finds that:
>
> (1) No government by itself can guarantee perfect security from acts of war or terrorism.

> (2) The security and well-being of the public depend not just on government, but rest in large measure upon individual citizens of the Commonwealth and their level of understanding, preparation and vigilance.
>
> (3) The safety and security of the Commonwealth cannot be achieved apart from reliance upon Almighty God as set forth in the public speeches and proclamations of American Presidents, including Abraham Lincoln's historic March 30, 1863, Presidential Proclamation urging Americans to pray and fast during one of the most dangerous hours in American history and the text of President John F. Kennedy's November 22, 1963, national security speech which concluded: "For as was written long ago: 'Except the Lord keep the city, the watchman waketh but in vain.'"

Plaintiffs allege that the challenged statutes establish religion by endorsing belief in God over non belief and by attempting to "indoctrinate Kentucky citizens and state employees in theistic religious beliefs." (Complaint, ¶ 16, p. 7). Furthermore, Plaintiffs have alleged that the mere existence of the challenged statutes have caused them to suffer both physically and emotionally from the belief that "their very safety as Kentucky residents may be in the hands of fanatics, traitors or fools." (Complaint, ¶ 17, p. 8).

Defendants submit the challenged statutes comply with both the Kentucky and United States' Constitutions and strenuously deny any allegation that the very existence of these statutes has caused any harm to the Plaintiffs, emotional or otherwise. Since the issue of damages is irrelevant to this Court's determination of the constitutionality of the questioned statutes, the Defendants submit this Motion to Dismiss or in the alternative for Summary Judgment. A finding by this Court upholding the constitutionality of the statutes, which would be in keeping with the clear weight of authority submitted here, would resolve this litigation in its entirety.

ARGUMENT

1. Defendants are entitled to dismissal or summary judgment as there are no genuine issues of material fact and the Plaintiffs' claims fail as a matter of law.

A Motion to Dismiss should be granted where it appears the pleading party would be unable to prevail under any set of facts. *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 541 S.W.2d 801, 803 (Ky. 1977). The Rules permit matters outside the pleadings to be considered by the Court when presented by affidavit or otherwise. Where matters outside the pleadings are considered the Court should treat the motion as one for summary judgment pursuant to CR 56. The Defendants submit that factual discovery is not required for this Court to rule on the Constitutional issues and that matters outside the pleadings may be presented by the parties without the need for the taking of formal discovery. In *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005), the United States Supreme Court directed lower courts to examine "openly available data" in determining constitutionality. The Supreme Court also provided some guidance as to what "openly available data" an objective observer may consider in deducing legislative purpose including: the plain language of the statute; traditional external signs in the text; legislative history; comparable official acts; public comments of the sponsor of the enactment; the specific sequence of events leading to the passage of the enactment; and historical context of the enactment.

CR 56.02 provides, "A party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in his favor . . ." Summary judgment is appropriate where, as here, "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; Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 729-30 (Ky. 1999). This Court is charged with determining whether, from the evidence of record, facts exist that would make it possible for the non-moving party to prevail. Welch, 3 S.W.3d at 729-30. Defendants submit that no discovery is necessary on the core issues presented in this case, namely, the facial challenge to KRS 39G.010 and KRS 39A.285 as violating the Kentucky and/or United States Constitutions. Because there are no genuine issues as to any material fact, and the analysis is one which is a legal determination resting solely in the discretion of the Court, Defendants state they are entitled to Summary Judgment.

2. The Constitution Does Not Require the Absolute Separation of Church and State.

Defendants submit that the statutes in question comply with the federal and state constitutions and that a long history of jurisprudence supports Defendants' claims. The Establishment Clause states in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." The United States Supreme Court has long held that the purpose of the Establishment Clause of the First Amendment is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745 (1971). This tenet has been balanced, however, by the Court's rationale that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id.*

In *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, Chief Justice Burger opined:

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less the government. It has never been thought either possible or desirable to enforce a regime of total

> separation... Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. *Id.* at 673, 1359 (citing *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760, 93 S.Ct. 2955, 2958, 37 L.Ed.2d 948 (1973); *Zorach v. Clauson*, 343 U.S. 306, 314-15, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952); *McCollum v. Bd. of Education*, 333 U.S. 203, 211-212, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948).

Lynch, 465 U.S. at 673, 104 S.Ct. at 1359.

The concept of a "wall" of separation between church and state, is, as contemplated by the *Lynch* Court, a useful metaphor but an inaccurate description of the relationship that actually exists. The Constitution does not require the complete separation of church and state, mandating rather, the accommodation of all religions while forbidding hostility toward any. The Supreme Court has not, and presumably will not, mechanically invalidate all governmental conduct or statutes that confer benefits or give special recognition to religion in general. The Court has, and will continue to very carefully scrutinize challenged conduct or legislation in order to determine whether it establishes a religion or religious faith or tends to do so.

3. **Historical Evidence Provides Valuable Insight as to the Intent Behind the Establishment Clause and its Application.**

The Court has consistently interpreted the Establishment Clause within the context of the course of American history and that interpretation has "comported with what history reveals was the contemporaneous understanding of its [the clause's] guarantees. *Lynch*, 465 U.S. at 673. In 2005, the Supreme Court concluded that the Establishment Clause allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol Grounds. *Van*

Orden v. Perry, 545 U.S. 677, 125 S.Ct. 2854. In reaching this conclusion, the Court focused on the strong role played by religion and religious traditions throughout the history of the Nation, noting from 1789 an "unbroken history of official acknowledgement by all three branches of government of religion's role in American life." *Id.* at 677-78, 2856. The obvious religious nature of the Commandments was counterbalanced by their "undeniable historical meaning. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 678, 2856. See, e.g., *Lynch*, 465 U.S. at 680.

The importance that the Supreme Court has placed on historical background in this type of analysis cannot be overstated. In *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330 (1983), the Court held that the challenged practice of the Nebraska legislature opening up each session with prayer from a chaplain paid with public funds, *did not* violate the Establishment Clause. This decision was reached notwithstanding the fact that a chaplain of only one denomination had been selected for the previous *sixteen years* and that the prayers were in the Christian tradition. Weighed against historical background, these facts did not serve to invalidate the practice.

In reaching this decision the Court reasoned that the opening sessions of legislative and "other deliberative bodies" with prayer is "deeply embedded in the history and tradition of this country" and "has coexisted with the principles of disestablisment (sic) and religious freedom." *Id.* at 786, 3333. The Court further reasoned that in all of the courtrooms involved with the litigation of the *Marsh* case, "the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.'" *Id.* This same invocation, incidentally, occurs at all sessions of the Supreme Court.

The *Marsh* Court held that the practice of opening legislative sessions with prayer, in light of the "unambiguous and unbroken history of more than 200 years," leaves no doubt that it has "become part of the fabric of our society." *Id.* at 792, 3336. Moreover:

> To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country.

Id.

The Supreme Court has pointed repeatedly to other examples of the religious heritage of this nation. The national motto, "In God We Trust" is statutorily prescribed by 36 U.S.C. § 302, and, pursuant to 31 U.S.C. § 324, its inscription is mandated on our currency. This history explains why the Court has consistently, and uniformly, rejected any kind of absolutist view of the Establishment Clause. It has been opined that this type of literal viewing of the clause is overly simplistic and "would undermine the ultimate constitutional objective *as illuminated by history.*" *Walz v. Tax Commission*, 397 U.S. 664, 671, 90 S.Ct. 1409, 1412, 25 L.Ed.2d 697 (1970).

Pursuant to Article 11, Section 1, Clause 8 of the United States Constitution, before entering the execution of his office, a president must make the following oath or affirmation:

> I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.

Incidentally, every president since Franklin Roosevelt has added the words, "So help me, God" to the oath. In addition, 28 U.S.C. § 453 mandates:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I do

> solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me... under the Constitution and laws of the United States. So help me God."

The challenged statutes at the center of this action and the ideals behind them comport completely with the historical background of both the nation and the Commonwealth. The 19th Century is replete with examples of political leaders, acting in their official capacities, thanking God for the blessings bestowed upon the Nation, and praying that the nation may continue to enjoy His favor. President Abraham Lincoln repeatedly acknowledged the nation's need for divine assistance. During a speech before his first inaugural he was quoted as saying:

> I must trust in that Supreme Being who has never forsaken this favored land, through the instrumentality of this great and intelligent people. Without that assistance, I shall surely fail; with it, I cannot fail.

Capitol Square, 243 F.3d at 299 (citing 5 *The Works of Abraham Lincoln* 222 (1906)).

KRS 39A.285(3) points specifically to the example of President Lincoln urging Americans to fast and pray during his proclamation on March 30, 1863. This occurred *after* the United States Senate passed a resolution calling for a day of prayer.[2] At the time, this nation was in the throes of the Civil War. Similarly, these statutes were enacted after another dark period in American history -- the devastating and demoralizing attacks of September 11, 2001. The statutes simply express an acknowledgement of the role of religion in the very fabric of this nation.

The challenged Kentucky statutes – like the statutes and governmental actions presented in the other cases demonstrate that the Establishment Clause was *never* intended or understood

[2] 6 Collected Works of Abraham Lincoln 155. Recognizing "the duty of nations as well as of men to their own dependence upon the overruling power of God," the United States Senate passed a resolution on March 3, 1863 requesting President Lincoln to issue a proclamation to set aside a day for national prayer.

by its Framers to be a prohibition against fostering or protecting religion. Similarly, it was not intended or understood to be a prohibition against employing religious language in official discourse. Most 19th and 20th Century judges would have found absurd the very notion that the First Amendment was intended to impose a completely secular political culture on the nation. Indeed, all of the events previously mentioned strongly suggest that our national culture allows public recognition of our Nation's religious history and character.

4. **The Challenged Statutes Survive Scrutiny Under the *Lemon* Analysis.**

Historical evidence alone cannot justify violations of constitutional guarantees. As such, Courts will carefully examine – scrutinize even – challenged legislation or official action to determine whether it establishes a religion or religious faith, or tends to do so. *Lynch*, 465 U.S. at 678, 104 S.Ct. at 1361-62. The Court has used no fixed rules in its inquiries, often deferring to the test established by the *Lemon v. Kurtzman* decision of 1971. The *Lemon* test is hardly unassailable, however, as the line between permissible actions and those barred by the Clause is often a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614, 91 S.Ct. at 2112.

The Court will consider 1) whether the challenged law or conduct has a secular purpose; 2) whether the principal or primary effect of the law or conduct is to advance or inhibit religion; and 3) whether it creates an excessive entanglement of government with religion. The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only after concluding that there was "*no question* that the statute or action was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680, 104 S.Ct. at 1362 (citing *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 193, 66 L.Ed.2d 199 (1980)). The purpose prong of the *Lemon* "test" is not satisfied by the mere existence of some secular purpose. In her concurring

opinion, Justice O'Connor suggests that proper inquiry under this purpose prong is "whether the government intends to convey a message of endorsement or disapproval of religion." *Lynch*, 465 U.S. at 691, 104 S.Ct. at 1368.

Kentucky has taken somewhat of a prominent role in these Establishment Clause inquiries in the context of displays of the Ten Commandments. In *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005), County officials attempted to post the Ten Commandments in a very high traffic area of the McCreary County Courthouse. The first attempt was a stand-alone copy, the second was identical to the first but included other religious elements, and the third incorporated the copy into a grouping of other historical and religious documents. The Court narrowly affirmed the trial court's finding that the county's clear purpose was to post the Commandments, not to educate its citizens. *Id.* at 857. The Court noted that while deference will be afforded to the stated purpose of legislature, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 864. In determining purpose, the Court provides the following guidance:

> [A]n understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts.... The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act....

Id. at 862. Further, the Court suggests that lower courts must look to "openly available data" [4]of a legislature's purpose and cannot "look to the veiled psyche of government officers." *Id.* at 863. Any personal religious intent that is disguised so cleverly that an objective observer cannot

[4] The Supreme Court has provided some guidance as to what "openly available data" the "objective observer" may consider in deducing legislative purpose including: the plain language of the statute; traditional external signs in the text; legislative history; comparable official acts; public comments of the sponsor of the enactment; the specific sequence of events leading to the passage of the enactment; and historical context of the enactment.

discern it "is no reason for great constitutional concern." *ACLU v. Garrard County, Ky.*, 517 F.Supp.2d 925, 934 (citing *McCreary County*, 545 U.S. at 863). The "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" and "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* (citing *McCreary County*, 545 U.S. at 863).

The United States Court of Appeals for the Sixth Circuit weighed in on this matter in *ACLU v. Capitol Square Review and Advisory Board*, 243 F.3d 289 (6th Cir., 2001), in which the ACLU and, ironically, a minister, brought an action challenging the constitutionality of Ohio's official state motto, "With God, All Things are Possible." In ruling that the motto did not violate the Establishment Clause, the Court of Appeals found that the motto in question involved no coercion, nor did it purport to compel belief or acquiescence or command participation in any form of religious exercise. Further:

> Neither does it impose any religious test as a qualification for holding political office, voting in elections, teaching at a university, or exercising any other right or privilege. And, as far as we can see, its adoption by the General Assembly does not represent a step calculated to lead to any of these prohibited ends.

Id. at 299.

The Court of Appeals analogized the Ohio state motto to the National Motto of "In God We Trust", noting that no fewer than three other circuits had upheld its constitutionality[5] and reasoning that:

[5] *Aronow v. United States*, 432 F.2d 242 (9th Cir., 1970); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir.), *cert. denied*, 442 U.S. 930, 99 S.Ct. 2862 (1979); *Gaylor v. United States*, 74 F.3d 214 (10th Cir.), *cert. denied*, 517 U.S. 1211, 116 S.Ct. 1830 (1996).

> [T]he Supreme Court has never questioned the proposition that the national motto can survive scrutiny under the Establishment Clause, and we should be utterly amazed if the Court were to question the motto's constitutionality now. The national motto happens to be inscribed directly above and behind the Speaker's Chair in the United States House of Representatives Chamber, and the idea of any federal court having the temerity to order the inscription stricken from the nation's Capitol strikes us as ludicrous.

Id. at 301.

The Court of Appeals further found that the Ohio motto, much like the National motto, the pledge of allegiance and the national anthem, has the secular purpose of "inculcat[ing] hope" and serving as a symbol of a common identity.[6] *Id.* at 307. Moreover:

> Such symbols unquestionably serve an important secular purpose reinforcing the citizen's sense of membership in an identifiable state or nation, and the fact that this and the other purposes mentioned are not exclusively secular hardly means that the motto fails the test.

Id. at 307-08. The Court of Appeals concluded this point by noting that had the test been that the government must have exclusively secular objectives, then much of the past conduct and legislation approved by the Supreme Court would have been invalidated. *Id.*

It is clear when comparing KRS 39G.010 and KRS 39A.285 to the previously cited cases that they survive any scrutiny under the *Lemon* analysis. First, far from alienating or excluding the plaintiffs, the purpose of this legislation is similar to that of the Ohio and national mottos. That purpose being the creation of hope and reinforcing the sense of membership. The language

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[6] Note also, for example, the following state mottoes: Arizona ("God Enriches"); Colorado ("Nothing without Providence"); Connecticut ("He Who Transplanted Still Sustains"); Florida ("In God We Trust"); Ohio ("With God All Things Are Possible"); and South Dakota ("Under God the People Rule"). Arizona, Colorado, and Florida have placed their mottoes on their state seals, and the mottoes of Connecticut and South Dakota appear on the flags of those States as well. Georgia's newly redesigned flag includes the motto "In God We Trust." The oaths of judicial office (28 U.S.C § 453), citizenship (8 CFR § 337.1), military (10 U.S.C. § 502) and civil service (5 U.S.C. § 3331) all end with the phrase "So help me God."

is not exclusively secular, but that does not, in and of itself, invalidate the statutes. The statutes are not coercive, nor do they compel belief or command participation in any form of religious exercise. Contrary to the assertion of the plaintiffs, these statutes in no way impose any religious test as a qualification for holding political office. In short, there is nothing to suggest that the actions of the General Assembly represent a step calculated to lead to any prohibited ends.

Second, there is no evidence that the primary purpose of these statutes is to either advance or inhibit religion. There are comparable acts, in Kentucky law, which establish that the intent is not to advance religion. The preamble to the Kentucky Constitution acknowledges the gratefulness of the citizens of the Commonwealth to Almighty God for the civil, political and religious liberties that we *all* enjoy.[7] The preamble further seeks to invoke the continuance of those blessings. There is nothing that can even remotely be construed as an abridgment of the rights of non believers or an advancement of those who believe. Further, the preamble is in the same vein as other historical documents and acts as previously discussed.

The phrase "Almighty God" embedded in KRS 39G.010 and KRS 39A.285 is not somehow by its mere recital transformed into a religious exercise. The phrase is not a prayer or an endorsement of any religion, but a simple recognition of the fact that from the time of our earliest history our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. The phrase is much like the phase, "One nation, Under God" from the Pledge of Allegiance, codified in 4 U.S.C § 4[8]. Rather than being an endorsement of

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[7] The preambles to the constitutions of 43 other states refer in one way or another to God or some Supreme Being. Of the six state constitutions that do not make reference to God, three – New Hampshire, Vermont and Virginia – have establishment clauses that refer explicitly to God or speak approvingly of religion.

[8] 4 U.S.C § 4 states in relevant part : "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all." In 1942, in the midst of World War II, Congress adopted, and the President signed, a Joint Resolution codifying a detailed set of "rules and customs pertaining to the display and use of the flag of the United States of America."The phrase "under

religion, the Pledge is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; one through which participants pledge loyalty and fidelity to our flag and our Nation, rather than to any particular God, faith, or church.

Third, Government is not being entangled excessively with religion. As contemplated by the *Marsh* Court, this is nothing more than a tolerable acknowledgement of beliefs widely held among the people of the Commonwealth. In 1963, the U.S. Supreme Court, in *Abington School District v. Schempp*, 374 U.S. 203, held unconstitutional compulsory school prayer. Justices Goldberg and Harlan concurred in the decision but offered:

> [U]ntutored (sic) devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religion which the Constitution demands, but of a brooding and pervasive devotion to the secular and a passive, or even active hostility to the religious. Such results are not only *not* compelled by the Constitution, but ... are *prohibited* by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment *may require that it do so*. (emphases added).

American courts have long held that the total, absolute separation of church and state is not possible, nor is it constitutionally required or even desired. Some relationship between government and religious organizations is inevitable. The dictates of history and common sense illustrate this point. Any attempt by this Court to adopt the position of Plaintiffs and seek to erect

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God" was added by Congressional action on June 14, 1954. The House Report that accompanied the legislation observed that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R.Rep. No. 1693, 83d Cong., 2d Sess., 2 (1954). The resulting text is the Pledge as we know it today.

an absolute barrier between church and state would be contrary to the clear weight of the previously cited authority.

In fact, erecting such as barrier would be detrimental to American society. In the *Zorach* decision, Justice Douglas postulated that churches could not be required to pay property taxes. Cities could not render police or fire protection to religious groups or organizations. Under this strict, unyielding and absolute analysis, the state and the church would be "aliens to each other – hostile, suspicious and even unfriendly." *Zorach v. Clauson*, 343 U.S. at 313, 72 S.Ct. 679. This is not the analysis that the Courts have historically adopted. If that were case, then prayers in legislative halls; Presidential appeals to God in addresses and proclamations; all references to God that permeate our laws, oaths, public rituals and ceremonies would infringe upon the First Amendment. The courts have never held these actions or statutes to involve the excessive entanglement of church and state – actions and statutes which in no way differ from the challenged Kentucky Statutes. These statutes create none of the dangers the First Amendment is designed to prevent, and they do not directly or substantially involve or entangle this Commonwealth in religious exercises or the favoring of religion.

CONCLUSION

There are a multitude of official documents of American law and civil government that affirm the self evident truths contained in the second sentence of the Declaration of Independence. Jefferson and the signers of the Declaration believed that they, and all men, are "endowed by their Creator with certain unalienable rights..." The last sentence concluded with an affirmation that the Declaration itself was supported "with a firm reliance on the protection of divine Providence".

In his concurring opinion in the *Van Orden* decision, Justice Breyer noted that "where the Establishment Clause is at issue, we must distinguish between real threat and mere shadow." *Van Orden*, 545 U.S. at 704, 125 S.Ct. 2854. Here, we have nothing more than shadow, and not much of one at that. The obvious sectarian purpose to the wording of KRS 39G.010 and KRS 39A.285 is the protection of the Commonwealth and its citizens. This wording overcomes scrutiny by the *Lemon* analysis and weighed against the historical background of both the Commonwealth and the nation, the sectarian elements do not violate the Establishment Clause. Plaintiffs have made it abundantly clear in their Complaint that they seek the absolute separation of church and state. More than 200 years of history conclusively establishes that this was not, is not, and ostensibly *never will be* the purpose of the Establishment Clause.

Respectfully submitted,

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