

COUNTERSTATEMENT OF THE CASE

Plaintiff American Atheists, Inc., a non-profit corporation registered to do business in Kentucky, and eleven (11) named individual plaintiffs, who, at the time of filing, were citizens or residents of Kentucky, and taxpayers in Kentucky, filed this action in the Franklin County Circuit Court alleging that KRS 39A.285 and KRS 39G.010 (hereinafter “the challenged statutes”) are repugnant to the First Amendment to the Constitution of the United States, and to Section 5 of the Constitution of Kentucky.

The gravamen of the Constitutional challenge was, and is, that the challenged statutes constitute an impermissible establishment of religion in Kentucky by the Kentucky Legislature, and that the challenged statutes evidence a clear, and unlawful, preference for religion over nonreligion by Kentucky lawmakers.

Defendants moved for Summary Judgment. Plaintiffs also moved for Summary Judgment. The response and motion of plaintiffs can be found at Tab 2 of the Appendix. Appellees/Cross-Appellant thus supplement Appellants’ Statement of the Case.

After hearing oral arguments on both motions, the trial judge dismissed plaintiff American Atheists, Inc. for lack of standing. The trial judge granted the Motion for Summary Judgment of the remaining plaintiffs. The Opinion and Order of the trial court can be found at Tab 1 of the Appendix.

The defendants below filed a Notice of Appeal from the Order finding the challenged statutes unconstitutional. American Atheists, Inc. filed a Notice of Cross-Appeal from the order dismissing it as a plaintiff.

This Appeal and Cross-Appeal followed.

ARGUMENT

May it Please the Court:

1. American Atheists Has Standing to Bring this Action

Your Appellees/Cross-Appellant agree with, and are most grateful for, the ruling of the trial court finding the challenged statues to be unconstitutional.

However, they disagree with the ruling of the trial court finding that American Atheists, Inc. (hereinafter “American Atheists”) does not have standing as an organization to bring this action. (Opinion and Order, pp, 8-9, at Tab 1 of Appendix). American Atheists respectfully cross-appeals from this ruling.

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

Then it was later held that the organization must stay outside of the court system unless it proffers as a plaintiff a member of the organization who has a claim for actual damages suffered in consequence of the conduct complained of. *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007). Thus your cross-appellant, American Atheists,

took care to assure that, in addition to the organization, real living damaged plaintiffs were introduced into the complaint to set forth their causes of action. American Atheists, in its view, properly alleged how the organization, as well as its members, were suffering, and would continue to suffer, damages, and the arguments regarding the relief sought in a request for a finding of the unconstitutionality of the challenged statutes was not a claim or a request for relief that required the participation of individual members in the lawsuit.

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

The result of such analysis is that American Atheists is effectively barred from use of the Courts. American Atheists cannot be a plaintiff unless they have injured members

as plaintiffs, and, if American Atheists has injured members as plaintiffs, then American Atheists cannot be a plaintiff. American Atheists has thus been denied due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

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

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

Appellee Helen Kagin died on February 17, 2010, while this appeal and cross-appeal were pending. Had she lived, she would have wanted to remain a part of this historic action. If her organization, American Atheists, can remain a party plaintiff, this can be accomplished. Further, the rights of persons throughout Kentucky who do not want to be told that they cannot be safe in Kentucky without reliance on one “Almighty God,” can be protected in a manner that cannot be achieved if American Atheists, a non-profit corporation registered to do business in Kentucky, is not permitted to assert their rights. Indeed, there are many people who agree with the positions herein articulated who, for fear of public obloquy, do not wish their names to be made known. American Atheists can, as an organization, protect their rights as well as their anonymity.

The organization, if a plaintiff, can also monitor any favorable rulings by this and other courts into the future, and the degree to which such rulings are obeyed or followed, in a manner that is far beyond the ability of individual plaintiffs to achieve; plaintiffs, who, like Helen Kagin, may, and eventually will, one day die. Indeed, it could happen that all individual plaintiffs might die before this case is resolved, and, absent substitution of parties, only the organization would remain to assert, on behalf of its members, the rights won in the trial court and now sought to be upheld on this appeal.

On August 18, 2010, the United States Court of Appeals for the Tenth Circuit issued its ruling in *American Atheists, Inc., et al. v. Scott T. Duncan, et al.*, No. 08-4061. In this case, as in the case *sub judice*, American Atheists, Inc. was a plaintiff, as were certain named individuals who alleged damages. The court held, on the issue of standing of American Atheists:

Because the individual named plaintiffs here have standing, this court does not need to determine whether American Atheists

would also have standing in its own right. See Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981) (determining that because one of the plaintiffs “has standing, we do not consider the standing of the other plaintiffs”); see also Green, 568 F.3d at 793 n.5 (“Because we conclude that [Plaintiff-Appellant] Mr. Green has standing, . . . it is unnecessary to address the ACLU of Oklahoma’s standing.”).
(Slip Opinion, p. 11. <http://www.ca10.uscourts.gov/opinions/08/08-4061.pdf>)

It is respectfully suggested that this is the correct rule for this court to follow. It is also respectfully suggested that this opinion speaks to other issues quite similar to those raised herein by American Atheists and the individual named plaintiffs.

The ruling that denied American Atheists standing in this action should be reversed and the rulings finding the challenged statutes to be unconstitutional should be affirmed.

2. The Trial Court Correctly Ruled that KRS 39G.010 and KRS 39A.285 Violate Section 5 of the Kentucky Constitution and the First Amendment to the Constitution of the United States.

“...[T]he government of the United States of America is not, in any sense, founded on the Christian Religion...” This declaration is memorialized in the “Treaty of Peace and Friendship between the United States and the Bey and Subjects of Tripoli of Barbary,” 1796-1797. The treaty, which the Senate of the United States passed/ratified with a unanimous, recorded, roll-call vote, was started under our first President, George Washington, and was concluded and signed, on June 10, 1797, by President John Adams, who also issued the following statement:

Now be it known, That I John Adams, President of the United States of America, having seen and considered the said Treaty do, by and with the advice and consent

of the Senate, accept, ratify, and confirm the same, and every clause and article thereof. And to the End that the said Treaty may be observed and performed with good Faith on the part of the United States, I have ordered the premises to be made public; And I do hereby enjoin and require all persons bearing office civil or military within the United States, and all other citizens or inhabitants thereof, faithfully to observe and fulfill the said Treaty and every clause and article thereof. *Treaties and Other International Acts of the United States of America. Edited by Hunter Miller. Vol. 2. 1776-1818. U.S. Government Printing Office, Washington, D.C., 1931, p. 383.*

It is laughable to even attempt to argue that the Senators who so stated, and the two Presidents—being Founders themselves—who so approved this treaty, knew less of the basis for the founding of our nation than the appellants who, in their endeavor to proclaim that we are a Christian nation, have unsuccessfully attempted to impose this view upon our citizens through patently unconstitutional legislation, and who now continue this attempt in their appeal with patently false descriptions of the lower court’s opinion.

The appellants claim, at pages 2-3 of their brief, that the “challenged statutes are no different from the national motto, ‘In God We Trust’ which is statutorily prescribed...Under the lower court’s reasoning, the motto ‘pronounces very plainly’ a trust in God shared by all current citizens of the United States.” Nothing could be further from the truth, for two reasons. The lower court *does* acknowledge that plaintiffs, who are current citizens of the United States, do not trust in God. Further, the lower court’s use of the phrase “pronounces very plainly” is falsely quoted by the appellants, who claim it refers to the national motto, when in reality it refers to KRS 39A.285, which is most definitely not the national motto. The lower court in fact said:

KRS 39A.285 is more than an ephemeral general reference to God. The statute places an affirmative duty to rely on Almighty God for the protection of the Commonwealth. This makes the statute exceptional among thousands of others, and therefore, unconstitutional." The nature of this statute is much more than an

acknowledgement that people have historically looked to God for protection. The statute pronounces very plainly that current citizens of the Commonwealth cannot be safe, neither now, nor in the future, without the aid of Almighty God. 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. (Opinion and Order, appended hereto at Tab A, pp.10-11)

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

It should be here noted, and it is here argued, that the members of the Kentucky Legislature really have no business attempting to influence a ruling of this Court on legislation passed by the Legislature. The doctrine of "separation of powers" is still alive and well.

The Kentucky Constitution states:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. *Kentucky Constitution, Section 27.*

and:

No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted. *Kentucky Constitution, Section 28.*

It is the appropriate role of the Attorney General of Kentucky to argue for the constitutionality of challenged laws. And he may do so with vigor. It is up to the Judicial

Branch of government to make the call. The Representatives and Senators, whose actions are called to scrutiny, should more appropriately stay in their own chambers, let the Executive Branch argue their case, and live with the ruling of the Judiciary, whatever those rulings might be.

Although the propriety of the members of the Legislature filing briefs attempting to influence the decision of this Court may certainly be validly questioned, and indeed perhaps even denounced as improper, Appellees/Cross-Appellant did not object, because the filings themselves, and the arguments therein made, serve to prove the contentions of Appellees/Cross-Appellant that the legislature, in passing the challenged legislation, did in fact wish to unconstitutionally put forward a religious doctrine and to create an establishment of religion in Kentucky.

In their haste to transform our nation and our state into a theocracy, those who reject, or do not understand, the reasons for separation of Church and State have made certain hubristic errors. Organizing a majority of both houses of our Legislature to stump for their religious views is one of them. If those wishing to advance a religious cause have managed to harness the power of the Legislature to accomplish this end, and if those responsible for passing unconstitutional laws can have standing to argue the Constitution, or the constitutionality of a law they passed, in a court of law, American Atheists must have that same right, or the concept of “equal protection of the laws” is without meaning and democracy might as well call it a day.

President James Madison saw this coming:

Notwithstanding the general progress made within the two last centuries in favour of this branch of liberty, & the full establishment of it, in some parts of our Country, there remains in others a strong bias towards the old error, that without some sort of alliance or coalition between Gov' & Religion neither can be duly

supported: Such indeed is the tendency to such a coalition, and such its corrupting influence on both the parties, that the danger cannot be too carefully guarded agst.. And in a Gov' of opinion, like ours, the only effectual guard must be found in the soundness and stability of the general opinion on the subject. Every new & successful example therefore of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that religion & Gov will both exist in greater purity, the less they are mixed together; [James Madison, Letter to Edward Livingston, July 10, 1822, *The Writings of James Madison*, Gaillard Hunt]

http://atheism.about.com/library/quotes/bl_q_JMadison.htm

And, prophetically, President Madison observed and foretold:

Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. **The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.** We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever? (Emphasis supplied)

James Madison (1785). "*Memorial and Remonstrance Against Religious Assessments.*"

And in little assaults, just as President Madison foretold, the forces who would establish a theocracy over us have built a body of precedent to rely upon, in an attempt to weaken and to break down the safeguard between our freedoms and their certainties. In this process, they would make our history other than it is and they would make our Constitution something other than it was meant to be.

This Court is respectfully reminded of a too recent national phenomenon called "Justice Sunday," that had its epicenter in Kentucky. The purpose of this treasonous activity of the Religious Right was, *inter alia*, for the legislature to "take back" the

judiciary. They did not like the fact that the courts were actually following the Constitution of the United States in matters of church/state separation and they wanted to fix that perceived problem. They do not like the holdings of our Courts, such as the Court from which this Appeal is taken. The “Brief of Amicus Curiae, Thirty-Five Kentucky State Senators,” in breathtaking violation, or ignorance of, the doctrine of Separation of Powers, calls these Constitutional holdings “Judicially-Fabricated Tests,” p. 1 *et seq.*, and argues that the First Amendment does not mean what it says. They ignore Section 5 of the Kentucky Constitution. The argument here appears to be that if they don’t like what Section 5 plainly states, they will argue that the Constitution of the United States, which they seem to imperfectly understand, supports their views and that the Kentucky Constitution can be ignored.

The thirty-five Senators jejunely proclaim, and argue, that “The Constitution is the 'supreme Law of the Land.’” Yes, it is. And just what part, one might ask, of “no” don't they, or the ninety-six Kentucky State Representatives, who filed an equally offensive brief, understand when the First Amendment to that Constitution states “Congress shall make **no law respecting an establishment of religion**” (emphasis added)? This Constitution builds a wall between government and religion, it prohibits any “religious test” for any public office, it prohibits the state from passing any laws “respecting the establishment of religion,” and it gives judges the right and duty to strike down laws that violate these prime directives. “God” is not mentioned in our Constitution. The attempts of those desperate to find a god where there is none try to persuade that the notation, “Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven

hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In Witness whereof We have hereunto subscribed our Names” makes a lie of the assertion that our Constitution is a godless document. “In the Year of our Lord” is, of course, merely an English translation of the centuries-old convention in western civilization of following a recorded date with the Latin “Anno Domini” or “A.D.” It is now the year 2010 A.D. or 2010 Anno Domini, or, as the secular would prefer, 2010 CE or 2010, Common Era.

The truth is that our country was founded as a secular nation. It was not founded on religion of any kind. It was not founded on the Bible or on Christianity. The very concept of democracy, or of a republic, is foreign to the entirety of the Bible. Neither is mentioned at all in the Bible, and laws contained in the Bible were in the form of commandments, edicts, or proclamations made by Judges or by Kings. There was no concept of due process of law. Indeed, the appropriate biblical response to King George III, for those who believe they should follow biblical law, would plainly have been obedience, not revolution.

Romans 13:1-2 clearly forbids rebellion against the established authorities and was, moreover, written about the pagan government of the Roman Empire, which actively persecuted Christians: "Every person must submit to the supreme authorities. There is no authority but by act of God, and the existing authorities are instituted by him; consequently, anyone who rebels against authority is resisting a divine institution, and those who so resist have themselves to thank for the punishment they will receive." George III, it should be noted, was a Christian monarch. If the Apostle Paul commanded obedience by Christians to the pagan and tyrannical Roman emperors, surely he would

have demanded equal obedience by Christians to the avowedly Christian (and far less cruel or oppressive) British king and parliament, the “supreme authorities” at the time of our founders’ rebellion against that authority; the rebellion that made us a nation.

The New Testament does, of course, present a major shift in viewpoint from the Old; now, obedience to secular authorities is commanded not so much because they rule over a divinely ordained theocracy as it is because secular authorities, along with everything else in the world, will soon be swept away by the Second Coming. Christians should act morally—which to Paul included obedience to a corrupt and tyrannical state—in preparation for Judgement Day, which he preached was quite near at hand in the first century C.E. (Romans 13:7-14). Michael E. Buckner, “The Unchristian Roots of the Fourth of July” (<http://www.infidels.org/library/modern/features/2000/buckner1.html>)

Our first President started the Treaty that said we were in no sense founded as a Christian nation; our second President signed the Treaty and stated it should be followed; our third President wrote that the First Amendment creates “a wall of separation between church and state;” (for a detailed presentation of this point, please see plaintiff’s motion for summary judgment at Tab 2 of the Appendix) our fourth President warned us that persons of narrow minded and bigoted understanding of just what we are should not be permitted to build a structure of legal precedent that could later overwhelm us with false proofs leading to the incorrect conclusion that our secular nation was created as a religious nation. “Intent of our founders,” indeed! Court cases, however, as will be hereinafter developed, have determined that courts must take mandatory judicial notice of federal public laws and treaties, state public laws, and official regulations of both federal and local government agencies.

The details of First Amendment litigation fill law libraries. Decisions that seem, Janus-like, to look in two directions at once overwhelm us. If only the minutia of specific, and very narrow, fact situations are considered, and these are subjected to hair-splitting analysis, legal opinions can issue that appear contradictory, or even absurd, to the parties against whom a given case is resolved. We murder to dissect.

This tendency of the law to say more and more about less and less, and to cast highly specific conclusions from non-specific principles, was recently, and brilliantly, analyzed by Mr. Justice David Souter, retiring Justice of the United States Supreme Court, at the 2010 Harvard commencement. Mr. Justice Souter said:

The charges of lawmaking and constitutional novelty seem to be based on an impression of the Constitution, and on a template for deciding constitutional claims, that go together something like this. A claim is made in court that the government is entitled to exercise a power, or an individual is entitled to claim the benefit of a right, that is set out in the terms of some particular provision of the Constitution. The claimant quotes the provision and provides evidence of facts that are said to prove the entitlement that is claimed. Once they have been determined, the facts on their face either do or do not support the claim. If they do, the court gives judgment for the claimant; if they don't, judgment goes to the party contesting the claim. On this view, deciding constitutional cases should be a straightforward exercise of reading fairly and viewing facts objectively....

The fair reading model fails to account for what the Constitution actually says, and it fails just as badly to understand what judges have no choice but to do. The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another. Not even its most uncompromising and unconditional language can resolve every potential tension of one provision with another, tension the Constitution's Framers left to be resolved another day; and another day after that, for our cases can give no answers that fit all conflicts, and no resolutions immune to rethinking when the significance of old facts may have changed in the changing world. These are reasons enough to show how egregiously it misses the point to think of judges in constitutional cases as just sitting there reading constitutional phrases fairly and looking at reported facts objectively to produce their judgments. Judges have to choose between the good things that the Constitution approves, and when they do, they have to choose, not on the basis of measurement, but of meaning.

<http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>

President Madison would have surely agreed.

Of like import is the famous observation of Mr. Justice Oliver Wendell Holmes, Jr. that “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.”

Southern Pacific Company v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting; opinion published (21 May 1917)

This Honorable Court is respectfully asked to respect the Constitutions of our Commonwealth and of our Nation and to affirm the findings of Judge Wingate that the challenged statutes are in fact violative of those Constitutions. This Court may not like it. This Court may not want to do it. Doing so may go against deeply held views of some or all of the members of this Court. But this Court must affirm the lower Court's ruling that the statutes in question are unconstitutional. This is because both our Federal and State Constitutions require this Court to do so.

If the supporters of the challenged legislative acts wish to only provide a clear view of our history, let them quote, which they do not now do, from the address of September 12, 1960, by President Kennedy to the Greater Houston Ministerial Association:

I believe in an America where the separation of church and state is absolute... where no church or church school is granted any public funds or political preference...where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials;...

For while this year it may be a Catholic against whom the finger of suspicion is pointed, in other years it has been, and may someday be again, a Jew— or a

Quaker or a Unitarian or a Baptist. It was Virginia's harassment of Baptist preachers, for example, that helped lead to Jefferson's statute of religious freedom. Today I may be the victim, but tomorrow it may be you — until the whole fabric of our harmonious society is ripped at a time of great national peril. ...

where every man has the same right to attend or not attend the church of his choice...where Catholics, Protestants and Jews, at both the lay and pastoral level, will refrain from those attitudes of disdain and division which have so often marred their works in the past, and promote instead the American ideal of brotherhood....

I believe in a president whose religious views are his own private affair, neither imposed by him upon the nation, or imposed by the nation upon him as a condition to holding that office. ...

I would not look with favor upon a president working to subvert the First Amendment's guarantees of religious liberty. Nor would our system of checks and balances permit him to do so. And neither do I look with favor upon those who would work to subvert Article VI of the Constitution by requiring a religious test — even by indirection — for it. If they disagree with that safeguard, they should be out openly working to repeal it. ...

And in fact, this is the kind of America for which our forefathers died, when they fled here to escape religious test oaths that denied office to members of less favored churches; when they fought for the Constitution, the Bill of Rights and the Virginia Statute of Religious Freedom; and when they fought at the shrine I visited today, the Alamo. For side by side with Bowie and Crockett died McCafferty and Bailey and Carey. But no one knows whether they were Catholic or not, for there was no religious test at the Alamo.

I do not consider these other quotations binding upon my public acts. Why should you? ...

But if the time should ever come — and I do not concede any conflict to be even remotely possible — when my office would require me to either violate my conscience or violate the national interest, then I would resign the office; and I hope any conscientious public servant would do the same.

But if this election is decided on the basis that 40 million Americans lost their chance of being president on the day they were baptized, then it is the whole nation that will be the loser — in the eyes of Catholics and non-Catholics around the world, in the eyes of history, and in the eyes of our own people. ...

<http://www.beliefnet.com/News/Politics/2000/09/I-Believe-In-An-America-Where-The-Separation-Of-Church-And-State-Is-Absolute.aspx>

The lower court undertook a detailed analysis of the factual situation presented by the statutes in question, and rigorously tested them under appropriate law. Judge Wingate,

of the Franklin County, Kentucky Circuit Court correctly held:

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 purpose¹⁸ 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 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 city's display of a creche, 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 creche'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. (Opinion and Order, p-p 11-12)

Appellee/Cross Appellants are unable to state the law with greater precision or accuracy. Judge Wingate also correctly disposed of other arguments advanced for why clearly unconstitutional legislation should be found acceptable. The Appellants argue, as President Madison warned us they one day would, that recent unfortunate precedents of the law compel a finding in their favor. However, the trial court correctly found:

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." (Opinion and Order, p.14)

On June 10, 2010, the United States Court of Appeals for the Sixth Circuit decided the case of *ACLU, et al. v. McCreary County, Kentucky, et al.* No. 08-6069. The slip opinion is quoted because of its remarkable relevance to the issues *sub judice*.

As was true the last time we heard this matter, the governing standard for determining whether a particular government action violates the Establishment Clause remains *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Despite Defendants' attempts to persuade the Supreme Court to abandon the inquiry into legislative purpose, the Supreme Court confirmed that the *Lemon* test remains the appropriate inquiry. See *McCreary IV*, 545 U.S. at 861-64. Under the *Lemon* test, as originally formulated, reviewing courts must consider whether (1) the government activity in question has a secular purpose, (2) the activity's primary effect advances or inhibits religion, and (3) the governmental activity fosters an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13.

The touchstone of a reviewing court's analysis under the Establishment Clause requires "government neutrality between religion and religion, and between religion and nonreligion." *McCreary IV*, 545 U.S. at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

In analyzing purpose under the first prong of the Lemon test, “[t]he 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 (quoting *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985))). See also *Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987). “[A]lthough a legislature’s stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” *McCreary IV*, 545 U.S. at 864. Thus, the government violates the Establishment Clause when it acts with the “predominant purpose of advancing religion.” Id. at 860.

Furthermore, the objective observer is considered to have “reasonable memories,” and Supreme Court precedents “sensibly forbid an observer ‘to turn a blind eye to the context in which [the] policy arose.’” Id. at 866 (quoting *Santa Fe*, 530 U.S. at 315). Thus, reviewing courts must look with the eye of an observer “familiar with the history of the government’s actions and competent to learn what history has to show.” Id. (citing *Santa Fe*, 530 U.S. at 308). As a consequence, “the same governmental action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage.” Id. at 866 n.14 (“where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of religious believers as against another). (slip opinion)

The court was not unmindful of the fact that this was not the first time Kentucky lawmakers had tried to substitute their religious views, priorities, and mandates for the Constitutions they had sworn to protect and defend. If they simply do not understand the law, the only remedy is to stop them. We may not be able to change their opinions, but we must change their behavior.

The *amicus curiae* brief of the Kentucky State Senators and that of the Kentucky State Representatives filed with this Court demonstrate, beyond any possibility of misinterpretation, the desire of these lawmakers to establish a religion in Kentucky. They are proud of their mission and of their accomplishments in doing good works for the faith. They make clear that the challenged statutes are a statement of religious

propitiation to their idea of the god they believe guides the destiny of our Commonwealth. The Kentucky Legislature, in its Amicus Briefs, has thoughtfully absolved Appellees/Cross-Appellant from any need to further, or to more closely, examine the motives of the Kentucky Legislature in passing the challenged legislation. A majority of both houses of the Kentucky General Assembly has admitted to this Court that their intent was to establish religion and to prefer religion over nonreligion, and this Court is respectfully asked to take Judicial Notice of that fact.

Your Appellees and Cross-Appellant are all Atheists. They do not want their government to favor religion over nonreligion. This is because, like President Kennedy, they believe our Constitution prohibits Kentucky from favoring religion over nonreligion.

Judge Wingate found:

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. (Opinion And Order, p. 15)

The lower Court also held:

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

"No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister 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); *Steelevest, 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. (Opinion and Order, pp. 16-17)

Judge Wingate concluded:

"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." (Opinion and Order, p. 17)

Appellant, and their amicus supporters, make much over the wording in the preamble to the Kentucky Constitution that states:

Constitution of 1891: "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.” (Preamble to Kentucky Constitution)

The argument, Orthrus-like, is a two-headed attack on the separation of government and religion guaranteed in Section 5 of the Kentucky Constitution. How, it is first argued, can a reference to “Almighty God” be unconstitutional in Kentucky when such is mentioned in the preamble to the Kentucky Constitution. And, it is further argued, the existence of such language proves that this “Almighty God” has been part of our heritage since the creation of our Commonwealth.

But facts intervene to the detriment of appellants' certainties. Kentucky has had four constitutions. The reference to a deity, together with the term “Commonwealth of Kentucky,” first appears in our fourth and latest Constitution, the Constitution of 1891.

The preambles of our prior Constitutions read as follows:

Constitution of 1792: “We, the representatives of the people of the State of Kentucky, in Convention assembled, do ordain and establish this Constitution for its government.”

Constitution of 1799: “We, the representatives of the people of the State of Kentucky, in convention assembled, to secure to all the citizens thereof the enjoyment of the right of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government.”

Constitution of 1850: “We, the representatives of the people of the State of Kentucky, in convention assembled, to secure to all the citizens thereof the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government.”

“PREAMBLE OF THE CONSTITUTION,” Mary Helen Miller, *A CITIZENS’ GUIDE TO THE KENTUCKY CONSTITUTION*, Compiled by, Laura Hromyak Hendrix, Edited by Tom Lewis, Research, Report No. 137, Legislative Research Commission, Frankfort, Kentucky, Revised October 2005.

Further, it is basic to constitutional interpretation to understand that the preamble is not a part of the law represented by the words of the Constitution itself. *Jacobson v.*

Massachusetts, 197 U.S. 11, 22 (1905). This argument is unresearched and unsound, and it must fail.

The Kentucky Rules of Evidence require this Honorable Court to take mandatory notice of certain adjudicative facts “...if requested by a party and supplied with the necessary information.” KRE 201 (d). Quoting the drafters of the Federal Rules of Evidence, Professor Robert G. Lawson defines “adjudicative fact” as a fact to which the law is applied in the adjudicative process that would normally go to a jury and relates to the parties, their activities, their properties, or their businesses. ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 1.00[2][c] (4th ed. 2003).

Unpublished, but relevant, opinion of the Court of Appeals of Kentucky, *Beavers v. Beavers*, NO. 2007-CA-001772-MR, rendered January 16, 2009, page 7.

This Honorable Court is asked to take mandatory notice of the following adjudicative facts in the case *sub judice*, for which it is believed that the Court has been supplied with the necessary information:

- 1) The Constitution of the United States is the highest law of the United States.
- 2) The Constitution of Kentucky is the highest law of the Commonwealth of Kentucky.
- 3) The Constitution of Kentucky may confer greater rights upon the citizens of Kentucky than the Constitution of the United States, but it may not diminish the rights therein protected.
- 4) Both Constitutions prohibit their respective legislatures from establishing a religion.
- 5) The Constitution of the United States makes no reference to a deity, and the term “in the year of our Lord,” used in reference to the date of signing is merely a dating convention, often abbreviated as “A.D.”
- 6) The first three (3) Constitutions of Kentucky did not mention “Almighty

God” in their preambles.

- 7) The preamble of the Constitution of Kentucky is not part of the laws set out in the Constitution of Kentucky.
- 8) The language of the challenged statutes, together with the *amicus* briefs filed in this appeal by a majority of the Senators, and by a majority of the Representatives of Kentucky, manifests a desire on the part of the Kentucky Legislature to promote a belief in a deity, “Almighty God,” and to prefer religion over nonreligion in the Commonwealth of Kentucky.

Given the correctness of these facts, which it is submitted can be taken to be established as true by judicial notice alone, the conclusion is inescapable that Judge Wingate of the Franklin Circuit Court was correct in his findings and that the Judgment holding the challenged statutes to be unconstitutional should be affirmed.

As that great Republican Robert Ingersoll said:

We have taken the ground that the people can govern themselves without the assistance of any supernatural power. We have taken the position that the people are the real and only rightful source of authority. We have solemnly declared that the people must determine what is politically right and what is wrong, and that their legally expressed will is the supreme law. This leaves no room for national superstition - no room for patriotic gods or supernatural beings - and this does away with the necessity for political prayers.

...When the theologian governed the world, it was covered with huts and hovels for the many, palaces and cathedrals for the few. To nearly all the children of men, reading and writing were unknown arts. The poor were clad in rags and skins - they devoured crusts, and gnawed bones. The day of Science dawned, and the luxuries of a century ago are the necessities of today. Men in the middle ranks of life have more of the conveniences and elegancies than the princes and kings of the theological times. But above and over all this, is the development of mind. There is more of value in the brain of an average man today - of a master-mechanic, of a chemist, of a naturalist, of an inventor, than there was in the brain of the world four hundred years ago.

These blessings did not fall from the skies. These benefits did not drop from the

outstretched hands of priests. They were not found in cathedrals or behind altars - neither were they searched for with holy candles. they were not discovered by the closed eyes of prayer, nor did they come in answer to superstitious supplication. They are the children of freedom, the gifts of reason, observation and experience - and for them all, man is indebted to man.

Let us hold fast to the sublime declaration of Lincoln. Let us insist that this, the Republic, is "A government of the people, by the people, and for the people."

Robert G. Ingersoll *God in the Constitution (1890)*.

The judgment below, save for the dismissal of American Atheists, Inc., must be Affirmed.

For the security of our homeland. For our own safety's sake.

CONCLUSION

For all of the reasons hereinabove stated, the judgment of the trial court holding that American Atheists does not have standing to bring this action should be Reversed, and the judgment of the trial court holding the challenged statutes of the Commonwealth of Kentucky to be unconstitutional should be Affirmed.

Respectfully submitted:

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