

**COMMONWEALTH OF KENTUCKY  
COURT OF APPEALS**

**CASE NO. 2009-CA-001676**

**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

**v.**

**AMERICAN ATHEISTS, INC.**

**APPELLEES**

**CASE NO. 2009-CA-1650**

**KENTUCKY OFFICE OF HOMELAND SECURITY**

**APPELLANT**

**v.**

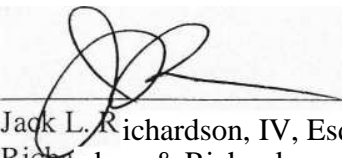
**MICHAEL G. CHRISTERSON**

**APPELLEE**

**APPEAL FROM FRANKLIN CITCUIT COURT  
DIVISION II  
HON. THOMAS DAWSON WINGATE, JUDGE**

**BRIEF OF AMICUS CURIAE NINETY-SIX  
KENTUCKY STATE REPRESENTATIVES**

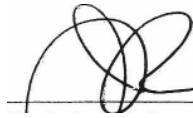
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Brief of Amicus Curiae was served, via first class United States mail, postage prepaid, upon Hon. Thomas Dawson Wingate, Judge, Franklin Circuit Court, 666 Chamberlin Avenue, Frankfort, Kentucky 40601; Jack Conway, Esq., Tad Thomas, Esq., Craig F. Newbern, Jr., Esq., Kentucky State Capitol, Office of the Attorney General, Capitol Suite 118, 700 Capitol Avenue, Frankfort, KY 40601-3449, counsel for Appellant, and upon Edwin F. Kagin, Esq., 10742 Sedco Drive, PO Box 666, Union, KY 41901, counsel for Appellee American Atheists, Inc., this S day of May, 2010. I further certify that the record on appeal file has not been withdrawn by the party filing this brief.

A handwritten signature in black ink, appearing to read 'Jack L. Richardson, IV', is written over a horizontal line.

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## **ARGUMENT**

### **1. KRS 39A.285 is not subject to constitutional challenge.**

While the power of a court to determine the constitutionality of statutes is clear, *Marbury v. Madison*, 5 U.S. 137 (1803), the court below has evidently failed to note that KRS 39A.285 is not a statute, but a resolution. "A resolution is not a law but merely the form in which the legislature expresses an opinion." *Wright v. Childree*, 972 So.2d 771, 780 (Ala. 2006); Black's Law Dictionary, 1337 (8<sup>th</sup> ed. 2004)(a resolution "formally expresses the sense, will, or action of a legislative body"); 54 C.J. 721 at n. 86 (1931)(a resolution is "merely the form in which the legislative body expresses an opinion.")

Indeed, the United States Supreme Court has recognized this distinction, stating that such resolutions "do not constitute an exertion of the will of Congress which is legislation, but a recital of considerations which in the opinion of that body existed." *Carter v. Carter Coal Co.*, 298 U.S. 238, 290 (1936)

Since such resolutions are non-binding, *Little Traverse Bay Bands v. Great Springs Waters*, 203 Fed. Supp.2d 853, 856 n. 3 (W.D. Mich. 2002), and do not create either individual rights or enforceable law, *Orkin v. Taylor*, 487 F.3d 734, 739 (9<sup>th</sup> Cir. 2007), it is difficult to see how Plaintiffs could have been damaged by the enactment of KRS 39A.285.

Moreover, the United States Supreme Court has held that state legislators, like all other citizens, enjoy the Protection of the First Amendment. *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966). If the First Amendment "requires that legislators be given the widest latitude to express their views on issues of policy, 385 U.S. at 136, *citing*, The Federalist, No. 60, it would appear that they may do so collectively as well as in their individual capacities.



Extensive research has disclosed no case in which a court has held that any legislative resolution was unconstitutional. This case, therefore, appears to present an issue of genuine first impression. KRS G.010 does require the KY Office of Homeland Security to post the legislative findings at its headquarters. Plaintiffs do not allege that they have ever visited the Homeland Security Office or viewed the plaque in question, which is under guard inside the Boone National Guard Center because it is a national security site, accessible only to authorized personnel.

## **2. Portions of Plaintiffs' Brief below should be stricken.**

The Court notes, at page 8 of its Opinion,

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*."

Opinion, at 8 (emphasis added), *citing*, Memorandum in Support of Plaintiff's Response to Defendants' Motion to Dismiss and for Summary Judgment and Plaintiff's Motion for Summary Judgment.

Were this language not contained in a legal pleading, it would clearly be actionable, as suggesting that Amici are guilty of the crime of treason. Amici recognize that statements made in a court document are absolutely privileged; but they respectfully insist that they are neither "fanatics, traitors or fools." Amici suggest that the Court strike this language from the Plaintiffs' Brief below as violative of CR 12.06.

## **3. Kentucky courts should defer to the findings of the General Assembly.**

The court below has also failed to note that the courts of this Commonwealth are required to defer to the judgment of the Kentucky General Assembly, as being a co-equal branch of the state government. At the federal level, the United States Supreme Court has

held that respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality. *U.S. v. Morrisio*, 529 U.S. 598, 607 (2000); *El Paso & Northeastern R. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909).

Specifically, the court below held:

It is clear that the purpose 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 tenor 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.

Opinion, at 12.

At the federal level, Justice Stevens has stated that a court, even the United States Supreme Court, should not be "so dismissive of Congress" as to assume an illicit purpose." *Citizens United v. Federal Election Commission*, 558 U.S. —, 130 S. Ct. 876, 968 (2010)(Stevens, J., concurring in part and dissenting in part).

More recently, in *Salazar v. Buono*, 2010 Lexis 3674 (decided April 28, 2010)(slip opinion at 31-32), decided only last month, Justice Alito stated that a court "should not jump to the conclusion that Congress's aim in enacting the [measure] was to embrace the religious message of the symbol," *Salazar v. Buono*, slip opinion at 49 (Alito, J., concurring in part and concurring in judgment).

Later in the same Opinion, Justice Alito added:

Adhering to Article III's limits on a court's jurisdiction respects the authority of those whom the people have chosen to make and carry out the laws. In this case, Congress had determined that [the statute] serves the public interest and complies with the Constitution, and the Executive defends that decision and seeks to carry it out. Federal courts have no warrant to revisit that decision - and to risk replacing the people's judgment with their own - unless and until a proper case has been brought before them.

*Salazar v. Buono*, slip opinion at 60 (Alito, J., concurring in part and concurring in judgment).

A similar rule should apply in the case at bar. The court below should not have been so dismissive of the Kentucky General Assembly as to assume that it was motivated by an illicit purpose. Nor should the court below have jumped to the conclusion that the Kentucky General Assembly's aim in enacting K.R.S. 39A.285 and K.R.S. 39G.010 was to embrace the religious message of the plaque.

Moreover, 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.

4. *Salazar v. Buono* controls this case.

As noted above, on April 28, 2010, and after the Commonwealth had filed its Brief, the United States Supreme Court issued its Opinion in the case *Salazar v. Buono*, 2010 Lexis 3674 (decided April 28, 2010). In its Brief the Commonwealth argued that the court below had misapplied the holding of *Lemon*, Brief of Commonwealth at 2. As neither the court below nor the Commonwealth had the benefit of the *Salazar* opinion, Court should consider whether this most recent holding of the United States Supreme Court controls the instant action.

In 1934 members of the Veterans of Foreign Wars placed a Latin cross on federal land in the Mojave Preserve to honor American soldiers who died in World War I. Claiming to be offended by the presence of a religious symbol on federal land, Buono filed suit

alleging a violation of the First Amendment's Establishment Clause and seeking an injunction requiring the Government to remove the cross.

The district court applied the "endorsement test" set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), and issued the requested injunction. *Buono v. Norton*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002). After eight years of litigation, the procedural details of which are not pertinent to this discussion, *Buono* reached the United States Supreme Court for the second time in 2009, and the Court issued its Opinion on April 28, 2010.

Of particular relevance to the instant case is the following language set out in the plurality Opinion:

The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. . . . The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society. See *Lee v. Weisman*, 505 U. S. 577, 598 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution")

*Salazar v. Buono*, slip opinion at 31-32.

This Court should reevaluate the holding of the trial court, in light of this new authority. As shown below, Amici believe that compliance with this recent mandate of the High Court, requires reversal and remand of the instant action.

#### **5. The court below misapprehended the endorsement test.**

In its Opinion, the court below, citing *Lemon v. Kurtzman*, applied the "endorsement test" to the instant case. Wrote the court:

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, at 15, *citing. Lemon v. Kurtzman*, 403 U.S. 602 (1971)(emphasis added).

In its brief, the Commonwealth has applied the "endorsement test" to the case at bar, Brief of Commonwealth, at 2-3. However, as noted above, the Commonwealth did not have the benefit of the *Salazar* opinion when it filed its brief.

In his dissenting Opinion, Justice Stevens explained the "endorsement test" as follows:

A government practice violates the Establishment Clause if it "either has the purpose or effect of 'endorsing' religion." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 592 (1989). "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.*, at 593-594 (quoting *Lynch v. Donnelly*, 465 U. S. 668, 687 (1984) (O'Connor, J., concurring)).

*Salazar v. Buono*, slip opinion at 8 (Stevens, J., dissenting)

The endorsement test, in turn, asks whether a "reasonable observer" would understand the challenged structure or writing as conveying a message that the Government endorses a particular religion, or belief over nonbelief. This second test, which the *Salazar* Court referred to as the "reasonable observer" test, was explained as follows:

That test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement. *See, [Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 801 (1995)] at 780 (O'Connor, J., concurring in part and concurring in judgment).

*Salazar v. Buono*, slip opinion at 35 (Alito, J., concurring).

In his dissent, Justice Stevens further clarified the "reasonable observer" test:

The so-called "endorsement test" views a challenged religious display through the eyes of a hypothetical reasonable observer aware of the history and all other pertinent facts relating to the display.

*Salazar v. Buono*, slip opinion at 9 (Stevens, J. dissenting).

Justice Alito stated that the hypothetical individual would be a "well-informed reasonable observer." *Salazar v. Buono*, slip opinion at 6 (Alito, J., concurring).

Applying this test to the instant case, Amici submit that a well-informed reasonable observer would be aware that KRS 39A.285 and KRS 39G.010 were enacted by the Kentucky General Assembly in response to the greatest breach of national security in our nation's history, and that it was intended, not to endorse any particular religion or to prefer belief over nonbelief, but to acknowledge the admitted fact that our Republic has always, in times of crisis, sought the protection of a Higher Power.

#### **6. The individual Plaintiffs lacked standing to bring this action.**

The trial court devoted considerable space to the question of whether the Association and the individual Plaintiffs had standing to bring the action. It ultimately held that the Association lacked standing, but that the individual Plaintiffs had the requisite standing; *see*, Opinion, at 5-8. In order to reach this result, the court found that the standing of the Association must be determined by federal law, while the standing of the individual Plaintiffs was to be determined by state law. Opinion, at 7, note 10.

As its sole authority for this holding, the court relied on a recent holding of the United States District Court for the Western District of Kentucky, *Pedreira v. Kentucky Baptist Homes for Children*. 553 F. Supp.2d 853 (W.D. Ky. 2008). Wrote the court:

State 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.

Opinion, at 7, Note 10, *citing*, *Pedreira*.

The Opinion of the court below was issued on August 26, 2009. Five days later, on August 31, 2009, the United States Court of Appeals for the Sixth Circuit reversed the holding of the district court. *Pedreira v. Kentucky Baptist Homes for Children*, 579 F.3d 722 (6th Cir. 2009). In regard to the question of standing, the Sixth Circuit cited the holding of the United States Supreme Court in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), in which the High Court had stated:

We then reiterated what we had said in rejecting a federal challenge to a federal statute as equally true when a state Act is assailed: *The taxpayer must be able to show that he has sustained some direct injury and not that he merely suffers in some indefinite way in common with people generally.*

547 U.S. at 345 (emphasis added).

Respectfully, Amici submit that the trial court's holding with regard to standing must be reexamined in light of the Sixth Circuit's subsequent holding in *Pedreira*.

#### **7. The General Assembly's finding is not unconstitutional.**

As noted above, Amici do not concede that their findings, being a resolution rather than a statute, are subject to constitutional challenge. However, assuming *arguendo* that their resolution were subject to such a challenge, the court would be required to find that the resolution is not unconstitutional.

The finding of the Kentucky General Assembly in KRS 39G.010 stressing the dependence on "Almighty God" as being vital to the security of the Commonwealth is a specific application of America's Official National Motto of the United States, "**In God We Trust**," to the terrible and tragic circumstances of the greatest national security failure in the history of the Republic on September 11, 2001 at the World Trade Center and the Pentagon.

In a similar moment of national crisis, Gen. George Washington wrote:

The blessing and protection of heaven are at all times necessary, but especially so in times of public distress and danger.

Gen. Washington, General Orders issued July 9, 1776.

The foundations of American law and civil government, beginning with the Organic Laws, adopted during the founding of the Republic, including the Charter of American Liberties contained in the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance, the U.S. Constitution, and the Bill of Rights and Amendments thereto, are all consistent in their recognition of the Providence of Almighty God. The founders stated in the Declaration:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. \_\_\_\_ That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The unanimous Declaration of the thirteen United States of America, Action of  
Second Continental Congress, July 4, 1776

The Declaration, in its Preamble, further declares the foundation of the civil government of America to be **"the laws of nature and of nature's God."** These founders, whom the King of England and its authorities held to be traitors for having declared such independence, unanimously stated:

And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.



Every single challenge brought by the American Civil Liberties Union, or other groups, to America's Official National Motto, "In God we trust," has been rejected by the United States Court of Appeals to which it was addressed; *see, 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 (1979); *Gaylor v. United States*, 74 F.3d 214 (10th Cir.), *cert. denied*, 517 U.S. 1211 (1996); *ACLU of Ohio v. Governor of Ohio, et al.*, Electronic Citation: 2000 FED App. 0148P (6th Cir.).

*Newdow v. Rio Linda School District*, Nos. 05-17257, 05-17344, and 06-15093 (9th Cir. 2010), essentially reaffirmed *Aronow's* upholding of the National Motto. The *Newdow* case also set out a list of other circuits that have upheld the Motto. The Ninth Circuit panel relied upon supreme Court dicta that the "National Motto does not violate the Establishment Clause," citing *County of Allegheny v. ACLU* and *Lynch v. Donnell*; *see, Newdow*, slip onio. at 7.

In *Americans United For Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992), the Sixth Circuit upheld the erection of a public menorah, and noted in its analysis Justice O'Connor's example in *Lynch* of "**In God We Trust**" on coins. Moreover, in *Freethought Soc. of Greater Philadelphia v. Chester County*, 334 F.3d 247, 264 (3rd Cir. 2003), a case concerning a Ten Commandments plaque, the court stated that it concurred with Justice O'Connor's statement in *Allegheny* that "**In God We Trust**" does not violate the Establishment Clause.

**"A page of history is worth a volume of logic."** (Justice Oliver Wendell Holmes, Jr., *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).) America's "Organic Utterances," that is, the official declarations of national and state governments and their

institutions, through their Constitutionally mandated officials, have routinely supported the notion found in America's official national motto, **"In God We Trust."** Such language is inscribed above the speaker's dias of the House of Representatives in Washington. There are thousands of physical and official documents of civil government confirming such "Official Utterances," including the Preamble to the Kentucky Constitution, which states as follows:

**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.**

There is a foundation of American law and civil government; an official Canon, which includes at least four separate decisions of the United States supreme Court. Each of these holdings confirms that the United States is in law, fact, and history and should thus properly be termed officially, a **"Christian Nation"** since the foundation of our laws upon principles of the Ten Commandments and the Old and New Testaments.

Those Court decisions include *Vidal v. Garard's Executors*, 2 How. 127, 197-199 (1844) [cited in *Marsh v. Chambers* and *Abington v. Schempp*]; *Mormon Church v. United States*, 136 U.S. 1 (1889), [also cited in *Abington v. Schempp*]; *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); and *U.S. v. Macintosh* 283 U.S. 605 (1931).

*Church of The Holy Trinity v. United States* is the most significant of these cases. It was rendered by a unanimous Court, and has never been reversed or limited by the High Court. In its Opinion, the Court reviewed "organic utterances" from the discovery of the continent in 1492 through the colonial period, and the founding of the Republic. After reviewing and analyzing these four hundred years of history, the supreme Court declared:

Even the Constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the First Amendment

a declaration common to the constitutions of all the States, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," etc. And also provides in Article 1, section 7, (a provision common to many constitutions,) that the Executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill.

There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. The Commonwealth*, 11 S. & R. 394, 400, it was decided that, "Christianity, general Christianity, is, and always had been, a part of the common law of Pennsylvania;...not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men." And in *The People v. Ruggles*, 8 Johns. 290, 294, 295, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: "The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order... The free, equal and undisturbed enjoyment of religious opinion, whatever I may be, and free and decent discussions on any religious subject, is granted and recurred; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community; is an abuse of that right. Nor are we bound, by any expressions in the Constitution as some have strangely supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of Mahomet of the Grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply engrafted upon Christianity, and not upon the doctrines or worship of those imposters." And in the famous case of *Vidal v. Girard's Executors*, 2 How. 127, 198, this court, while sustaining the will of Mr. Girard, with its provision for the creation of a college into which no minister should be permitted to enter, observed: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."

If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of the Sabbath, with the general

cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day, the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing every where under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."

### **CONCLUSION**

As shown above, the findings of the Kentucky General Assembly are not unconstitutional. This is true for a number of reasons. The Court, therefore, should reverse the holding of Franklin Circuit Court, and remand the case for further proceedings consistent with this opinion. Amici pray for an Order of the Court so holding.

Respectfully submitted,

**fra**

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