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 CIRCUIT COURT
HON. THOMAS DAWSON WINGATE JUDGE
ACTION NO. 08-CI-1950

BRIEF OF AMICUS CURIAE THIRTY-FIVE KENTUCKY STATE SENATORS

___S//_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing 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 8th day of May, 2010. I further certify that the record on appeal has not been withdrawn by the party filing the brief.

__S//_____
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STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

ARGUMENT

> *This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges and return to the original meaning of the Clauses.*

Van Orden v. Perry, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF THE CHALLENGED KENTUCKY STATUTES SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The Franklin Circuit Court below began its analysis of the Establishment Clause issue by quoting from the text of the First Amendment: "Congress shall make no law respecting an establishment of religion." (Opinion and Order, ¶2, p. 8) (quoting U.S. Const. amend. I.). Unfortunately, the court never looked back, neither defining or even discussing the meaning of the text that it held was violated by the recognitions of God in KRS 39G.010 and KRS 39A.285. Instead, the court below noted that while the text of the Establishment Clause "seems facially clear, understanding of exactly what it requires in a given situation has been notoriously difficult to determine." (Opinion and Order, ¶2, p. 8-9.) The court's fundamental error was in turning from the clear language of the First Amendment to apply instead the extra-constitutional *Lemon* Test[1] and the *Van Orden* Test.

A. The Constitution is the "supreme Law of the Land."

The United States Constitution dictates that the Constitution and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. Art. VI. All Kentucky judges are sworn to "support the Constitution of the United States and the Constitution of this Commonwealth," not a person, office, government body, or judicial opinion. Ky. Const. §

[1] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

228. These constitutions and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of this court.

As Chief Justice John Marshall observed, the very purpose of a written constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted

> it, must be understood to have employed words in their natural sense, and to have intended what they have said.[2]

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). The words of the Constitution are neither suggestive nor superfluous: "In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

The U.S. supreme Court recently reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague,* 282 U.S. 716, 731 (1931); see also *Gibbons v. Ogden,* 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821. Justice Joseph Story, an "important founding-era legal scholar[]," *id.* at 2805, 2806, succinctly summarized the principles of constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

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[2] *Accord Children's Psychiatric Hosp. of Northern Kentucky, Inc. v. Revenue Cabinet, Com. of Ky.*, 989 S.W.2d 583, 585 (Ky.,1999) ("When interpreting the Constitution, the words employed therein should be given the meaning and significance that they possessed at the time they were employed.")

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

C. The *Van Orden/McCreary* compare-and-contrast test, the *Lemon* test, and other case-made tests form a confusing labyrinth that contradicts the text of the "supreme Law of the Land."

The current jurisprudential attitude confuses complexity with intelligence and sensitivity with difficulty. Just because an area of the law deals with a sensitive subject (such as a person's religion) does not mean that the answer to the conflict must be difficult to achieve, and interweaving various factors and levels of analysis into an area of the law does not automatically make the law more intelligent. Yet this is exactly what the supreme Court has done with its proliferation of tests: the *Lemon* test, the *Agostini*-modified *Lemon* test, the endorsement test, the coercion test, the neutrality test, and so on. These tests have created more problems than they have solved, producing a continuum of disparate results. *See, e.g., Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas J., concurring in judgment) (collecting cases). "[T]he very 'flexibility' of [the supreme] Court's Establishment Clause precedent leaves it incapable of consistent application."[3] *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring). Such impracticability is hardly surprising because attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible.

The courts' abandonment of fixed, *per se* rules results in the application of judges' complicated substitutes for the law. The "law" in Establishment Clause cases changes so often and is so incoherent that few can discern what it is today nor can guess what it will be

[3] The 6th Circuit has noted the "oft-aired criticism and debate" in Establishment Clause jurisprudence, *ACLU of Ohio Found. v. Ashbrook*, 375 F.3d 484, 490, n.5 (6th Cir. 2004), and even once labeled it "purgatory." *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005).

tomorrow, "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ." *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting).

By adhering to judicial tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. Reliance upon precedents such as *Lemon* is a poor substitute for the concise language of the Establishment Clause and raises the rule of man above the rule of law.

II. THE CHALLENGED KENTUCKY STATUTES ARE NOT LAWS "RESPECTING AN ESTABLISHMENT OF RELIGION" UNDER THE FIRST AMENDMENT.

Applying the Constitution as it was understood at the time of its ratification, rather than judicial "tests," would not only render a decision that is more faithful to the "supreme Law of the Land," but it would also prevent such cases from being the "difficult task" that the trial court thought this was. (Opinion and Order, ¶1, p. 9.) The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. No matter how non-passive, recent, or official the challenged Kentucky statutes may be—all attributes of the laws that troubled the court below—they are not laws "respecting an establishment of religion," as those words were understood during the ratification of the First Amendment.

B. The definition of "establishment"

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). The "establishment of religion" with which the Founders were most familiar was that of England, in which the Church of England was the official church, received tax support, the King or Queen was the official head, and dissenters suffered substantial disabilities or worse. And in the Virginia colony, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Newdow*, 542 U.S. at 52 (Thomas, J., concurring in the judgment). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong*. 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these*.

H.R. Rep. No. 33-124 (1854) (emphasis added). Therefore, an "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states' policies on religion and to prevent fighting among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church "establishment."[4]

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[4] *See, e.g.*, Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 441 (1840):

> We do not attribute this prohibition of a national religious establishment to an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution,) but to a dread by the people of the influence of ecclesiastical power in matters of government; a dread, which their ancestors brought with them from the parent country, and which, unhappily for human infirmity, their own conduct, after

In the present case, shortly after the attacks of September 11, 2001, the Kentucky General Assembly, through KRS 39G.010, directed the executive director of the Office of Homeland Security to "[p]ublicize the findings of the General Assembly stressing the dependence on Almighty God as being vital to the security of the Commonwealth by including the provisions of KRS 39A.285 in its agency training and educational materials" and to prominently display a plaque at the Emergency Operations Center stating the text of KRS 39A.285(3):

> (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.'"

As to the first statute, the trial court noted that it "pronounces very plainly that current citizens of the Commonwealth cannot be safe, neither now, nor in the future, without the aid of Almighty God." (Opinion and Order, ¶2, p. 10.) Somehow, the trial court concluded that, therefore, the General Assembly "requires present dependence on an Almighty God" and was "demand[ing] that its citizens depend on Almighty God." (Opinion and Order, ¶1, p. 11.) Nothing could be further from the truth. The only requirement in KRS 39G.010 is directed at

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> their emigration, had not in any just degree, tended to diminish. It was also obvious, from the numerous and powerful sects existing in the United States, that there would be perpetual temptations to struggle for ascendancy in the National councils, if any one might thereby hope to found a permanent and exclusive national establishment of its own, and religious persecutions might thus be introduced, to an extent utterly subversive of the true interests and good order of the Republic. The most effectual mode of suppressing this evil, in the view of the people, was, to strike down the temptations to its introduction.

the Homeland Security executive director to include the legislative findings and display them at one state office. No citizens—plaintiffs included—-are required to do, see, or believe anything at all; nor does the trial court ever identify how anything is demanded of Kentucky's citizens.

As to KRS 39A.285, the trial court declared that the statute's purpose reflects "the official position of the Commonwealth of Kentucky . . . that an Almighty God exists," which the court considered "an official government position on God" and an endorsement of "religious belief over the lack of such belief." (Opinion and Order, ¶1, p. 12 and ¶1, p. 15.) But an official state's pronouncement, or "endorsement," of a belief in a real God does not an establishment make. "'Endorsement' differs from 'establishment.' A government does not 'establish' milk as the national beverage when it endorses milk as part of a sound diet." *Books v. Elkhart County, Indiana*, 401 F.3d 857, 869 (7th Cir. 2005) (Easterbrook, J., dissenting). Ultimately, the trial court below conceded that "the General Assembly's action falls short of adopting an official state religion or church," but nevertheless held it was improper under the First Amendment. (Opinion and Order, ¶1, p. 15.)

Neither Kentucky statute is an establishment of religion because, just like the Ohio State Motto, "With God All Things Are Possible," it

> involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (6th Cir. 2001) (*en banc*). The challenged statutes in this case do not in any fashion represent the setting up of a state-sponsored church or denomination; they do not involve the government's power of

coercion to force anyone to believe in any particular religion's beliefs or to join any particular religion; and it does not in any way lend government aid to one religion over another. In short, Kentucky's recognition of its dependence upon God is not an "*establishment* of religion."

B. The definition of "religion"

Additionally, the challenged Kentucky statutes do not fall within the definition of "religion" as used in the First Amendment. The original definition of "religion" was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions' proposed amendments to the Constitution, and was echoed by the United States supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[5] In all these instances, "religion" was defined as:

The duty which we owe to our Creator, and the manner of discharging it.

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *Founders' Constitution* at 82; *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J.,

[5] Later in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the U.S. supreme Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. *See Torcaso*, 367 U.S. at 492 n.7.

dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. The Court thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, was "within the legitimate scope of the power of . . . civil government." *Id.* In *Beason*, the supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.").

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H. Rep. No. 83-1693 (1954). For example, from its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from

the public square. The supreme Court in *Van Orden* stated that such conflation is erroneous: "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 678 (emphasis added).

The Kentucky statutes cannot be considered laws concerning "religion" because, while they communicate a reliance upon God and a limited publication of that sentiment, they do not address the *manner* of discharging any duties to that God. That which constitutes a "religion" under the Establishment Clause must inform the follower not only *what* to do (or not do) but also *how* those commands and prohibitions are to be carried out. Again, the only person duty-bound by the Kentucky statutes is the Homeland Security director, and what the director is ordered to do is not to embrace a belief but to publish legislative findings that reflect the findings of the General Assembly. Even for the Homeland Security director, this action is woefully short of anything close to a "religion."

Examples of such acknowledgments by government officials and bodies are replete throughout our history. On November 1, 1777, Henry Laurens, President of the Continental Congress, signed the First National Thanksgiving Proclamation, stating:

> . . . it is the indispensable duty of all men to adore the superintending Providence of Almighty God; to acknowledge with gratitude to Him for the benefits received, and to implore such farther blessings as they stand in need of . . . .

In September 1789, Congress asked President George Washington to "recommend to the people of the United States a day of public thanksgiving and prayer to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by

affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness." President Washington's Thanksgiving Proclamation began,

> Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor. . . .

See 4 *The Papers of George Washington, Presidential Series* 131-32 (W. W. Abbot et al. eds. 1987). And President Abraham Lincoln's Thanksgiving Proclamation of October 3, 1863, recognized the "duty of nations as well as of men" to acknowledge God:

> It is the duty of nations as well as of men to own their dependence upon the overruling power of God; to confess their sins and transgressions in humble sorrow, yet with assured hope that genuine repentance will lead to mercy and pardon; and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history that those nations are blessed whose God is the Lord.

Not surprising, then, that the supreme Court would state, "We are a religious people whose *institutions presuppose* a divine being." *Zorach v. Clauson,* 343 U.S. 306, 314 (1952) (Emphasis added).[6] Since the passage of the Judiciary Act of 1789, all federal judicial officers take an oath of office swearing to support the United States Constitution that concludes with the phrase, "So help me God." *See* 28 U.S.C. § 453. "In God We Trust" has been emblazoned on our nation's coins and currency for decades and the phrase "under God" was added to the nation's Pledge of Allegiance over 50 years ago. *See* 36 U.S.C. § 302; 4 U.S.C. § 4.

[6] If "express[ing] a preference for the Judeo-Christian faith" without forcing others to ascribe to it were an establishment of religion, then the proclamations of Washington and Lincoln, as well as the Declaration of Independence itself, would be unconstitutional. See, Robert J. Barth, *Philosophy of Government vs. Religion and the First Amendment,* Oak Brook Journal of Law and Public Policy, Vol. 5, 2006, 71-88.

The National Motto and "under God" in the Pledge were recently upheld as constitutional by the U.S. Court of Appeals for the 9th Circuit. In *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, Nos. 05-17257, 05-17344, 06-15093 (9th Cir., March 11, 2010), the court held that, rather than establish a religion, the Pledge of Allegiance

> serves to unite our vast nation through the proud recitation of some of the ideals upon which our Republic was founded and for which we continue to strive: *one Nation under God*-the Founding Fathers' belief that the people of this nation are endowed by their Creator with certain inalienable rights . . . .

Id., Slip op. at 3873.[7] The same court also upheld "In God We Trust" as the National Motto. *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. March 11, 2010). Indeed, the National Motto has been consistently referred to, in case after case, as a model, constitutional example of a governmental acknowledgment of God; it has never been held otherwise. *See Freethought Soc. of Greater Philadelphia v. Chester* County, 334 F.3d 247, 264 (3rd Cir. 2003); *ACLU of Ohio v. Governor of Ohio, et al.*, 2000 FED App. 0148P (6th Cir. 2000); *Gaylor v. United States*, 74 F.3d 214 (10th Cir.), cert. Denied, 517 U.S. 1211 (1996); *Americans United For Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992); *O'Hair v. Murray*, 588 F. 2d 1144 (5th Cir.), cert. Denied, 442 U.S. 930 (1979); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970).

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[7] The 9th Circuit court in *Newdow* concluded that, in reaffirming the Pledge of Allegiance,

> Congress in 2002 was not trying to impress a religious doctrine upon anyone. Rather, they had two main purposes for keeping the phrase "one Nation under God" in the Pledge: (1) to underscore the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away; and (2) to add the note of importance which a Pledge to our Nation ought to have and which in our culture ceremonial references to God arouse.

Id. at 3902. "Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring in part and concurring in the judgment).

The Kentucky statutes at issue here are simply a more specific rewording of "In God We Trust," as reflected through the reaction the country felt by the terrorist attacks of September 11, 2001; it is a specific state's affirmation that it trusts God for its safety. Just because Kentucky's General Assembly expresses the same trust in God that Congress still requires to be expressed on our currency and our motto does not make it unconstitutional. Whether of 1776 or 2001 vintage, acknowledgments of God that do not establish a religion are not only constitutional, they dovetail perfectly with the American tradition of recognizing that we are "one nation under God" and we trust Him. There is no expiration date on the meaning of the First Amendment; until it is amended it has the same words and meaning in 2010 that it had when it was ratified "in the year of our Lord" 1791.

CONCLUSION

"When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn*., 545 U.S. 469, 523 (2005) (Thomas, J., dissenting). Such a clash exists in this case between the shifting sands of Establishment Clause jurisprudence and the fixed, original words of the Establishment Clause. The proper solution is to fall back to the foundation, the "Constitution's original meaning." For the foregoing reasons, *Amicus* respectfully urges that the trial court's decision below be reversed.

Respectfully Submitted,

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