No. 12-613

Supreme Court of the United States

AMERICAN ATHEISTS, INC., MICHAEL G. CHRISTERSON, JAMES F. COFFMAN, LUCINDA HEDDEN COFFMAN, JAN EWING, EMMETT F. FIELDS, ALEX GRIGG, EDWIN HENSLEY, HELEN KAGIN, GARY MARYMAN, DAVID RYAN, AND JAMES K. WILLMOT,

Petitioners,

v.

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

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

BRIEF IN OPPOSITION

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY

Sean J. Riley
Deputy Attorney General
(*Counsel of Record)*
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
Counsel for Respondents

QUESTIONS PRESENTED

1. Does American Atheists, Inc., have associational standing on behalf of its members, given that it sought damages for its individual members in its complaint?

2. Is the Commonwealth's statutory requirement for the executive director of the Kentucky Office of Homeland Security to publicize that "[t]he safety and security of the Commonwealth cannot be achieved apart from reliance upon Almighty God" on a plaque and in its training materials a permissible passive display of the historical role of religion consistent with the Establishment Clause?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE................................1

REASONS FOR DENYING THE WRIT..................3

CONCLUSION..12

TABLE OF AUTHORITES

Cases **Page**

American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd., 243 F.3d 289 (6th Cir. 2001)......................2, 9-10

Corporation of Presiding Bishops of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987)..10

Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004)....................................2, 8, 10

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979)..6

Hunt v. Washington State Advertising Com'n, 432 U.S. 333 (1977)...3

Kentucky Office of Homeland Security v. Christerson, 371 S.W.3d 754 (Ky. App. 2012)......................2,6

International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Brock, 477 U.S. 274 (1986)...5

Larson v. Valente, 456 U.S. 228 (1982)...................10

Lemon v. Kurtzmann, 403 U.S. 602 (1971)...2, 7, 9, 11

Lynch v. Donnelly, 465 U.S. 668 (1984)...................8

Cases **Page**

United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544 (1996)....................5

Van Orden v. Perry 545 U.S. 677 (2005)..........2, 7-10

Warth v. Seldin, 432 U.S. 343 (1975)..................4, 6

Constitutional Provisions

U.S. CONST. amend. I..2

KY. CONST. § 5..2

Statutes

KY. REV. STAT. ANN. § 39A.235 (West 2012) 1-2, 8-9, 11

KY. REV. STAT. ANN § 39G.010 (West 2012) 1-2, 8-9, 11

STATEMENT OF THE CASE

On July 12, 2006, the Kentucky General Assembly enacted KY. REV. STAT. ANN. § 39G.010 (West 2012), which provides in relevant part:

> (2) The executive director shall:
>
> > (a) Publicize the findings of the General Assembly stressing the dependence on Almighty God as being vital to the security of the Commonwealth by including the provisions of KRS 39A.285(3) in its agency training and educational materials. The executive director shall also be responsible for prominently displaying a permanent plaque at the entrance to the state's Emergency Operations Center stating the text of KRS 39A.285(3).

KY. REV. STAT. ANN. § 39A.235(3) (West 2012) provides:

> 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.' "

KY. REV. STAT. ANN. § 39A.235 was enacted in 2002. KY. REV. STAT. ANN. § 39A.990 provides that any person who violates any provision of Chapter 39 of the Kentucky Revised Statutes is guilty of a Class A misdemeanor.

In 2008, Petitioners American Atheists, Inc. and eleven others filed suit in Franklin Circuit Court in Frankfort, Kentucky challenging KY. REV. STAT. ANN. §§ 39G.010 and 39A.235 as violating the Establishment Clause of U.S. CONST. amend. I and KY. CONST. § 5. The Franklin Circuit Court declined to use the test for Establishment Clause violations in *Van Orden v. Perry*, 545 U.S. 677 (2005), and instead applied the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Circuit Court Opinion 8-11, App. 35-39. The court found that the statutes failed the *Lemon* test, Circuit Court Opinion 11-16, App. 39-46, but held that American Atheists lacked associational standing because its complaint sought damages for individual members. Circuit Court Opinion 7-8, App. 34-35.

On appeal, the Kentucky Court of Appeals upheld the Circuit Court's finding that American Atheists lacked standing, but reversed the Circuit Court's finding that the statutes violated the Establishment Clause. *Kentucky Office of Homeland Security v. Christerson*, 371 S.W.3d 754, 760 (2012), App. 14. The Court of Appeals followed *ACLU of Ohio v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001) and *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) in finding the statutes to be a permissible reference to a generic "God" that acknowledges the historical role of religion in a general way. *Id.* at 758, App. 8-11. Petitioners appealed to the Kentucky Supreme Court, which denied discretionary review on August 15, 2012.

REASONS FOR DENYING THE WRIT

I.

AMERICAN ATHEISTS, INC. LACKS ASSOCIATIONAL STANDING BECAUSE IT SEEKS DAMAGES FOR INDIVIDUAL MEMBERS IN ITS COMPLAINT

In its complaint, Petitioner American Atheists, Inc. asserts that its members, which are unnamed plaintiffs, suffer physical and emotional pain, and seeks damages on behalf of its members. Under this Court's jurisprudence, an organization has associational standing on behalf of its members only if the relief requested does not require the participation of individual members. Since the relief sought by American Atheists requires the participation of individual members in order to determine their individual damages, American Atheists does not have associational standing to bring this case.

In *Hunt v. Washington State Apple Advertising Com'n,* 432 U.S. 333 (1977), this Court clearly laid out the rule for when an association has standing to bring suit on behalf of its members:

> [A]n 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.

Id. at 343.

In *Warth v. Seldin*, 432 U.S. 343 (1975), this Court explained that an association may seek injunctive relief on behalf of its members, but if a complaint seeks damages for its members, then it requires their individual participation, and an association lacks standing.

> (W)hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.
>
> The present case, however, differs significantly as here an association seeks relief in damages for alleged injuries to its members. Home Builders alleges no monetary injury to itself, nor any assignment of the damages claims of its members. No award therefore can be made to the association as such. Moreover, in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and

> extent of injury would require individualized proof. Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf.

Id. at 515-16; *see also International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Brock,* 477 U.S. 274, 287 (1986); *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996).

In their Complaint, American Atheists alleges that "[t]he plaintiffs, and each of them, have suffered, are suffering, and will continue to suffer damages, both physical and emotional . . . [including] somatic discomforts, and mental pain and anguish." Circuit Court Opinion 8, App. 35. They also assert that they suffer "anxiety from the belief that the existence of these unconstitutional laws suggest that their very safety as residents of Kentucky may be in the hands of fanatics, traitors, or fools . . . [And] demand . . . damages as may appear to be appropriate, within the jurisdictional limits of the Court." *Id.* American Atheists clearly allege damages on behalf of individual members.

Since American Atheists' Complaint seeks individual damages for its members, it fails the third part of the *Hunt* test that neither the claim asserted nor the relief requested requires the participation of individual members, as both the Circuit Court and the Court of Appeals noted. "Without the participation of the members who allegedly suffered such damages, a court would have no way to determine the appropriateness of any such award."

Christerson, 371 S.W.3d at 760, App. 14, Circuit Court Opinion 8, App. 35.

In their Petition for a Writ of Certiorari, American Atheists allege two grounds for reversing the finding of the lower courts that they lack associational standing: (1) that atheists are the most hated and politically ostracized group in America, and (2) that the courts below improperly applied the *Hunt* analysis. Petition 22-28. While there is credible evidence that they are consistently regarded as less trustworthy than other groups, their claims that they are the most hated and politically ostracized group in America are greatly exaggerated and unsupported by any evidence of actual persecution. Even assuming that atheists are as hated and ostracized as American Atheists claim they are, it has no bearing on whether they meet the elements of standing.

Regarding American Atheists' claims that the courts below improperly applied the *Hunt* analysis, while it is undisputed that American Atheists would have taxpayer standing if they had just sought injunctive relief and attorney's fees, the inclusion of damages for individual members deprives them of associational standing, as argued above. "Standing is generally matter dealt with at earliest stages of litigation, usually on pleadings." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n. 31 (1979). An examination of American Atheists' pleadings demonstrates a request for damages for individual members, and as such, American Atheists lacks associational standing on behalf of its members under *Hunt* and *Warth*.

II.

THE STATUTORY REQUIREMENTS ARE A PERMISSIBLE PASSIVE DISPLAY OF THE HISTORICAL ROLE OF RELIGION

This Court has established two tests for determining whether a reference to religion violates the Establishment Clause. In *Van Orden v. Perry,* 545 U.S. 677 (2005), this Court analyzed a passive reference to religion in terms of its nature and our nation's history. *Id.* at 686. In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), this Court established a general three-part test for violations of the Establishment Clause. The statutes at issue are constitutional under either analysis.

A. The Statutory Requirements are a Permissible Passive Display of the Historical Role of Religion Under the *Van Orden* Test.

In *Van Orden*, 546 U.S. 677 (plurality opinion), this Court found that a monument displaying the Ten Commandments on the grounds of the Texas State Capitol was a permissible passive acknowledgment of the historical role of religion in our government institutions. This Court analyzed the monument in terms of the two factors of "the nature of the monument and . . . our Nation's history." *Id.* at 686. Regarding the nature of the monument, this Court found it to be an acceptable passive display, compared to posting of the Ten Commandments in all elementary schoolrooms or mandatory school prayer. *Id.* at 691.

Regarding our nation's history, this Court surveyed its many prior decisions acknowledging that "religion has been closely identified with our history and government." *Id.* at 686-88. It also noted the many instances of monuments throughout the nations' capital that have religious significance, including the Library of Congress, National Archives, Department of Justice, federal courthouse, and the Washington, Lincoln, and Jefferson Memorials. *Id.* at 688-89. The history of our nation is also replete with public invocations for the protection of a generic God, such as those by George Washington, Abraham Lincoln, Woodrow Wilson, Franklin Roosevelt, and Dwight Eisenhower. This Court's own opening proclamation begins with an invocation to God's protection, requesting that "God save the United States and this honorable court." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 26-28 (2004) (Rehnquist, J., concurring); *see also Lynch v. Donnelly*, 465 U.S. 668, 74-78 (1984). It is the established precedent of this Court that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 546 U.S. at 690.

The conduct required by the statutes at issue is the same kind of conduct permitted under the *Van Orden* analysis. The text of KY. REV. STAT. ANN. § 39A.235 is an invocation for the protection of a generic God that has been an integral part of this nation's history, and has been repeatedly upheld under this Court's jurisprudence. The display of the text of KY. REV. STAT. ANN. § 39A.235 on a plaque is no different than the acknowledgements of God or religion that appear on many national monuments and buildings. KY. REV. STAT. ANN. § 39G.010 does

not require anyone to recite, affirm, or swear to the text of KY. REV. STAT. ANN. § 39A.235; it merely requires the text to be passively displayed. Accordingly, these statutes are permissible passive displays of the historical role of religion in accordance with the *Van Orden* test.

B. The Statutes are a Permissible General Acknowledgment of Religion Under the *Lemon* Test.

KY. REV. STAT. ANN. § 39A.235 and KY. REV. STAT. ANN. § 39G.010 are also permissible under the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Lemon* provides a three-part test for violations of the Establishment Cause:

> First, 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.'

Id. at 613 (citations omitted).

The statutes are a small part of the permissible legislative purpose of protecting the Commonwealth. In *American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001), the Sixth Circuit analyzed the Ohio motto "With God, All Things Are Possible" under the *Lemon* test. The court found that the statute adopting the motto had "a general purpose roughly comparable to the purposes of the sections that surround it." *Id.* at 306. The court further found that "[s]uch symbols unquestionably serve an important secular purpose-reenforcing the citizen's

sense of membership in an identifiable state or nation-and the fact that this and the other purposes mentioned are not exclusively secular hardly means that the motto fails the test," *id.* at 307-08, relying on *Lynch,* 465 U.S. 668. Similar to *Capitol Square*, the statutes are a part of the legislature's valid secular purpose, established in KY. REV. STAT. ANN. § 39A.010, of protecting the Commonwealth from all major hazards.

The principal or primary effect of the statutes is not to advance or inhibit religion. "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987). The statutes here are merely a passive acknowledgement of reliance on God, as argued above, and the Commonwealth has not advanced religion through such acknowledgements. "We have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion." *Van Orden*, 545 U.S. at 684 n. 3. Rather, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The statutes simply acknowledge "religion in a general way: a simple reference to a generic 'God.'" *Elk Grove*, 542 U.S. at 42 (O'Connor, J., concurring). The generic acknowledgement of God in the statutes does not promote one religion over another, and thus does not impermissibly advance religion.

Neither do the statutes promote an excessive entanglement with religion:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.

Lemon, 403 U.S. at 615. In this case, no religious institutions are benefited, the state provides no aid to any religion or religious organization, and no relationship is created between the government and the religious authority.

KY. REV. STAT. ANN. § 39A.235 and KY. REV. STAT. ANN. § 39G.010 are part of the Commonwealth's permissible secular purpose of protecting its citizens, do not advance religion, and do not promote excessive entanglement with religion. Accordingly, these statutes are permissible under the *Lemon* test.

C. Petitioners' Allegations of an Organized Assault to Mix Religion and Government are Irrelevant to the Legal Analysis.

In their Petition, American Atheists argue that (1) a particular legislator-minister has led the Kentucky General Assembly to pass unconstitutional religious bills and ignore this court's jurisprudence, and (2) events in Kentucky are part of a large movement to mix religion and government and defy this Court's jurisprudence. Petition 29-37. American Atheists accuse Kentucky Rep. Tom Riner of leading the Kentucky General Assembly to pass wildly unconstitutional religious bills. Petition 30. Petitioners seem to be implying that Rep. Riner is

somehow coercing the General Assembly into passing the bills of his choice. However, thirty-five of thirty-eight Kentucky Senators and ninety-six of one hundred Kentucky Representatives filed amicus briefs in support of the statutes in *Christerson*. Rather than Rep. Riner somehow coercing the General Assembly, the General Assembly near-unanimously supports the statutes. The statutes are overwhelmingly the will of the people of Kentucky as established through their representatives. Even assuming that the General Assembly was somehow at the mercy of Rep. Riner as Petitioners suggest, it is completely irrelevant to the legal analysis of whether the statutes are permissible under the Establishment clause.

Petitioners also allege that there is a widespread movement to mix religion and government and defy this Court's jurisprudence. While a movement to mix religion and government may exist, again it is completely irrelevant to the legal analysis of the statutes. The interaction of religion and government is a constant element of the legislative and democratic processes, and petitioners allege no new or special danger that merits this Court's attention.

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky prays this court to deny a writ of *certiorari*.

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY

Sean J. Riley
Deputy Attorney General
(counsel of record)
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300