CASE NO. 13-5957

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVE B. SMITH, DAVID KUCERA, and VICKIE F. FORGETY,
Plaintiffs/Appellees

v.

JEFFERSON COUNTY COARD OF SCHOOL COMMISSIONERS,
Defendant/Appellant

On Appeal from the United States District Court
For the Eastern District of Tennessee at Knoxville

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE IN SUPPORT OF PLAINTIFFS/APPELLEES AND AFFIRMANCE

Thomas H. Castelli

American Civil Liberties Union Foundation
of Tennessee
P.O. Box 120160
Nashville, Tennessee 37212
[redacted]

Attorney for Amicus Curiae
American Civil Liberties Union of
Tennessee

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-5957 Case Name: Smith et al. v. Jefferson Cnty. Bd. of Co

Name of counsel: Thomas H. Castelli

Pursuant to 6th Cir. R. 26.1, American Civil Liberties Union of Tennessee
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on November 26, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Thomas H. Castelli
ACLU Foundation of Tennessee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONS

CASES

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Tennessee (ACLU-TN) is the Tennessee Affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU-TN is the local affiliate of the ACLU with over three thousand members and supporters throughout Tennessee. Since its founding in 1920, the ACLU has been deeply committed to defending the religious clauses contained in the First Amendment to the United States Constitution. ACLU-TN is dedicated to the principles of liberty and equality embodied in the United States Constitution and the Tennessee Constitution. The above styled case and controversy squarely implicates the ACLU-TN's concerns with unconstitutional establishment of religion by a local governmental body and the threat that coercive conduct or government endorsement of one religion over another or over no religion has on the free exercise of religion by Tennessee residents guaranteed by the First Amendment to the United States Constitution. ACLU-TN regularly participates in cases in state and federal court involving the First Amendment, as counsel and amicus curiae.

I. STATEMENT OF THE CASE

In 2003, Defendant Jefferson County Board of School Commissioners contracted with Kingswood School, Inc. ("Kingswood") to operate Defendant's alternative School. (FFCL, RE 182 PageID# 1586). Defendant previously contracted with Kingswood for the same purpose in the 1990s. (Test. of D. Moody, Trial Tr. May 14, 2013 Vol II, RE201, PageID#2287-88). Kingswood operated a residential religious school on its campus. (FFCL, RE 182 PageID# 1587). It held itself out as a "Christian environment." (*Id.*). Kingswood's website stated "Kingswood has survived independently by remaining true in faith to the principals of a Christian education without being bound to the doctrine of a particular denomination or sect's control." (*Id.* at PageID# 1588). Kingswood also maintained a chapel on its campus. (*Id.* at PageID# 1589). The Chapel was adorned with religious iconography, including a large stained glass window showcasing an image of Jesus. (Trial Ex. 51, Ap. 0382; Trial Ex. 41, Ap. 0248).

Kingswood operated the alternative school from 2003 through 2010. (FFCL, RE 182 PageID#1586). The alternate school's purpose was to educate public school students who had been suspended or expelled from the regular public schools. (*Id.*). Kingswood was empowered to communicate with parents, furnish report cards, determine the term of some student's suspension. . (*Id.*). Kingswood also hired, supervised and made termination decisions for the staff of the

alternative school. (*Id.*). For this service, Defendant paid Kingswood $1,702,368.00 in tax payer funds over the seven school years. (Trial Ex. 35, Ap. 0211-0213).

Kingswood implemented a program where public school students were required to submit a Family Feedback form weekly. (FFCL, RE 182 PageID# 1588). Failure to remit a form signed by a parent would prevent a student from advancing through Kingswood's system and return to the regular school system. (*Id.*). The forms contained biblical scriptures. (*Id.*).

Kingswood also sent home periodic report cards. (*Id.*). The Students were also required to return the report cards with a parent's signature. (*Id.*). The report cards contained biblical scripture quoting a proselytizing passage from the Gospel of Luke. (*Id.* at PageID# 1588-89).

Public school students attended assemblies inside Kingswood's chapel. (*Id.* at PageID# 1589). Sometimes they attended joint assemblies with the students in Kingswood's religious residential program. (*Id.*).

After hearing the evidence, the trial court determined that Defendant's decision to contract with Kingswood served a secular purpose – to save money. (*Id.* at PageID# 1591). However, the court found that, when considering the facts as a whole, the "appearance of governmental endorsement of the Christian faith is

too pronounced." (*Id.* at PageID# 1602). The court summed up its finding of a pronounced religious environment:

> The average student that attended Kingswood would arrive on campus and see a church within the grounds. She would then see an intake staff member who was also an ordained minister. After intake, the student would attend secular classes, but would take home report cards branded with Christian language and symbols. In order to progress through the level system, she would need to have her parents routinely sign and return Family Feedback Forms that also contained bible verses. If she visited Kingswood's website, she would be greeted by the phrases "Christian environment" and "Christian education" among other. Benefactors would receive fundraising correspondence that contained Christian references and iconography, and assemblies would be held in the campus church.

(*Id.* at PageID# 1601-02).

II. ARGUMENT

The very first right illuminated in the Bill of Rights prohibits the state from creating any "law respecting an establishment of religion." U.S. Const. Amend. I. The Establishment Clause not only forbids overt establishment of religion, but also forbids governments from publicly supporting or aiding religion. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 217 (1963).

A. Introduction to the Establishment Clause

The Court has declared that "[t]he establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government ... can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (continuing with an

extensive list of restricted activities including setting up churches, influencing a person to attend or bar their access to a desired church, and punishment for beliefs or disbeliefs). In *Everson*, the Court explicitly incorporated the Establishment Clause as binding on the states via the Fourteenth Amendment. *Id.* Relying on Thomas Jefferson's famous words regarding the separation of church and state, the Court said, "No tax in any amount, large or small can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 16. One of the guiding principles used by the Court is that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion." *McCreary Cnty v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

1. The Effect Test and the Coercion Test

While continuing to adhere to these basic principles, the Court has muddied the waters for lower courts in determining whether a law violates the Establishment Clause. The Court has analyzed potential Establishment Clause violations under the *Lemon* test, which includes three prongs: purpose, primary effect, and entanglement. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) ("[T]he 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." (citation omitted) (internal quotation marks omitted)).

Justice O'Connor advanced an alternate test, known as the endorsement test, which considers whether a law "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The endorsement test is viewed from the perspective of a "reasonable observer . . . [who] must be deemed aware of the history and context of the community and forum in which the religious display appears." *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

2. Neutrality Doctrine

Whether following Lemon's "primary effect" test or Lynch's endorsement test, neutrality is paramount and even "relatively minor encroachments" must be considered violations of the Establishment Clause. *Schempp*, 374 U.S at 225. "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *Id.* The central tenet is always government neutrality with regard to religion. *See McCreary Cnty.*, 545 U.S.at 860.

For more than six decades, the Supreme Court's Establishment Clause jurisprudence has been guided by this fundamental concept that "the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause." *Id.* at 875-86. The neutrality principal speaks to the very harms that the First Amendment was intended to prevent. When the government engages in the endorsement of religious activity, it usurps the right of the individual's conscience, renders religion dependent on the state for its propagation, and incites religiously based divisiveness.

Under the *Lemon Test,* to survive an Establishment Clause challenge, a governmental entity must demonstrate that: 1). the purpose of its policy is secular; 2). the primary effect of this policy "neither advances nor inhibits religion;" and 3). the policy does not create "excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13. If any one of these requirements is not met, then an Establishment Clause violation must be found. *See, e.g., Stone v. Graham*, 449 U.S. 39, 42-43 (1980) (holding that a state statute that violates purpose prong of *Lemon* test violates Establishment Clause). Since establishing the Lemon Test, the Supreme Court has created two glosses on its second prong: the coercion test and the endorsement test. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (explaining coercion test for demonstrating primary effect of

advancing religion); *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (describing endorsement test for demonstrating primary effect of advancing religion); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592-94 (1989) (describing Court's use of *Lemon* and endorsement tests).

3. Special Consideration of Religion and the Public Schools

Public school children have always presented a special consideration in establishment clause jurisprudence. While local school boards are generally afforded considerable discretion in operating public schools, see *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969), because of the compulsory nature of public education, a student's perception of teachers as role models and a child's susceptibility to peer pressure, the courts must be ever vigilant of even unintended endorsement or coercion. *See Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982); *Bethel School Dist,* 478 U.S. at 683. Families entrust public schools with the education of their children. Their trust is conditioned on an understanding that the classroom will not purposely be used to advance religious views that may conflict with the private religious beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. *See, e.g., Grand Rapids School Dist. v. Ball*, 473

U.S. 373, 383 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 60, n. 51 (1985); *Meek v. Pittenger*, 421 U.S. 349, 369 (1975). Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools...." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.).

For example, prayer in elementary and secondary schools carry a particular risk of indirect coercion. *Lee v. Weisman,* 505 U.S. 577, 578 (1992); *see also Engel v. Vitale,* 370 U.S. 421; *Schempp,* 374 U.S. at 217. In *Lee,* the school district's control of a high school graduation ceremony placed subtle and indirect public and peer pressure on attending students to maintain a respectful silence during the invocation and benediction. The Court found that a

> reasonable dissenter of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it. And the State may not place the student dissenter in the dilemma of participating or protesting. Since adolescents are often susceptible to peer pressure, especially in matters of social convention, the State may no more use social pressure to enforce orthodoxy than it may use direct means. The embarrassment and intrusion of the religious exercise cannot be refuted by arguing that the prayers are of a *de minimis* character, since that is an affront to the rabbi and those for whom the prayers have meaning, and since any intrusion was both real and a violation of the objectors' rights.

Lee, 505 U.S. at 578 (1992).

Consequently, courts often invalidate statutes that advance religion in public elementary and secondary schools. *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Alabama statute authorizing moment of silence for school prayer); *Stone v. Graham*, 449 U.S. 39, (1980) (posting copy of Ten Commandments on public classroom wall); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (statute forbidding teaching of evolution); *Schempp*, 374 U.S. at 217 (daily reading of Bible); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (recitation of "denominationally neutral" prayer).

B. The District Court Correctly Found That the Board of Commissioners Violated the Establishment Clause

1. The County's direct disbursement of tax payer funds to a religious group to perform the governmental function of running an alternative school violates the Establishment Clause

"[S]tates may not make unrestricted cash payments directly to religious institutions." *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606, 612 (7th Cir.2001) (citing *Tilton v. Richardson*, 403 U.S. 672, 680–83 (1971)). Such direct subsidies are governmental advancement or indoctrination of religion. *See Rosenberger v. Rector & Visitors of the Univ.y of Va.*, 515 U.S. 819, 842 (1995) ("[W]e have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions."). *Lemon* itself stood for this proposition and found unconstitutional the practice of reimbursing parochial schools for the salaries associated with teachers who taught secular

material and the costs of secular textbooks and instructional materials. *Lemon,* 403 U.S. at 613.

The lower court's decision rested in some part of the direct financial support provided to the objectively religious Kingswood. (FFCL, RE 182 PageID# 1595). However, ultimately the Court relied on the totality of the religious conduct streaming from Kingswood into the students' homes and the religious nature of the campus and iconography present during student assemblies in making its decision. However, the direct payments alone are enough to implicate the Establishment Clause because Defendant failed to provide any restrictions of directions in the sue of the funds and there was no genuine exercise of individual choice directing the funds to the religious institution.

Several cases have followed *Lemon*'s prohibition on direct payments to religious schools. In *Committee for Public Education v. Nyquist*, a New York statute authorized direct money grants from the state to qualifying nonprofit parochial schools. 413 U.S. 756, 768 (1973). The funds were to be used for maintenance and repair of school facilities and equipment to ensure the health, welfare, and safety of enrolled pupils. *Id.* at 762. Each school was required to submit an audited statement of its expenditures during the preceding year. *Id.* at 764. Although the Court found that the grant program passed the purpose prong of the *Lemon* test, it held that direct monetary payments to the schools, particularly

where no restrictions are made requiring the money to be used for secular purposes only, failed the second prong of the *Lemon* test. Id. at 773.

When public funding flows to faith-based organizations solely as a result of the "genuinely independent and private choices of individuals," the funding is considered indirect. *Agostini*, 521 U.S. at 226; *Zelman v. Simmons-Harris*, 536 U.S. 639, 646 (2002). For Example, the Courts have found that the simple placement of a public employee in the parochial school environment, does not inevitably result in an impermissible effect of state-sponsored indoctrination. Agostini v. Felton 521 U.S. 203, 223 (1997) However, these holdings should not be confused with the case before this court.

In *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), the Court held that a deaf student could bring his state-employed sign-language interpreter with him to his Roman Catholic high school. *Id.*at 13. The Court refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by "add[ing] to [or] subtract[ing] from" the lectures translated. *Id.*

Defendant's relationship with Kingwood is not a case of funding individual public employees, who venture into a parochial school to provide necessary services to a student. Instead, there are no public employees, only employees of Kingwood. They are, however, compensated by tax payer funds. This removes

the presumption that the employees will not be pressured by the "pervasively sectarian surroundings to inculcate religion" as their employer is the religious organization.

There is no evidence of any direction from Defendant restraint placed on how the tax payer funding must be used by Kingwood. Kingwood was merely given a blank check and told to create an alternative school to serve the public school students of Jefferson County. Defendant performed no audits or required accountings detailing how and when public funds were used to educate public school students, maintain the religious groups' facilities or benefit the parochial students also attending Kingwood. Certainly the money paid could have been used for the maintenance of the chapel or other religious facilities and the payment of teachers of exclusively religious classes.

Most remarkable about this case is that the county is making unrestricted payments to a religious organization to run an alternative school. The school, by its very nature, is a punishment for disruptive behavior. The students are given less liberties and required to abide by a set of rules to earn the relative freedom of a normal public education.

Because this is an alternative school, no serious argument may be made that any parent or children are exercising an independent choice in attending or funding Kingwood. Attendance is forced by the county dictate and the compulsory

attendance laws of the state. By abdicating its responsibility to educate the alternate school students and directly funding a religious organization to perform this task, Defendant is forcing students to attend school on a religious campus, surrounded by religious iconography and to take home religious messages. Such absence of individual choice in combination with direct payments to sectarian schools is the very definition of the harms against which the Establishment Clause intended to protect.

2. The Defendant violated the Establishment Clause by requiring students at the alternative school to attend assemblies in a chapel and by sending home report cards and other communications containing religious messages.

Where public school students are exposed to religion through school-sponsored or school-related activities, courts have been especially concerned with "keep[ing] out divisive forces" to maintain the separation envisaged in the First Amendment. *Illinois* ex rel. *McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 231 (1948). To maintain this separation, the Supreme Court held that the required reading of Bible verses and the recitation of the Lord's Prayer at the beginning of the school day violate the Establishment Clause. *Schempp*, 374 U.S. at 224-25. In *Schempp*, the religious activities were part of the school's curriculum, were held in the school building and were supervised by teachers. *Id.* at 223. Additionally, the Court has struck down a statute requiring the posting of the Ten Commandments in Kentucky public school classrooms. *See Stone*, 449

U.S. at 42-43. In its reasoning, the Court explained that students could feel pressured to follow these religious teachings. *Id.* at 42.

This pressure is concerning because religious displays in public school environments can make students feel like they have to adopt the religious beliefs being promoted by the displays. *See, e.g., Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 851 (7th Cir. 2012). In *Elmbrook*, the Seventh Circuit held that a high school violated the Establishment Clause when it held its graduation in an Evangelical Church. *Id.* at 856. As the Seventh Circuit noted, while a reasonable observer would understand that the school did not decorate the church with "proselytizing materials":

> that same observer could reasonably conclude that the District would only choose such a proselytizing environment aimed at spreading religious faith . . . if the District approved of the Church's message.

Id. at 853-54.

The school assemblies held in the chapel alone violate the Establishment Clause. Similar to the high school graduation ceremony held in an Evangelical church in *Elmbrook*, the alternative school students are required to attend assemblies in the chapel of Kingswood. The same type of religious pressure that is exerted on high school students graduating in a church is exerted upon the alternative school students when attending assemblies at Kingswood. Even with no proselytizing messages during the assemblies, the reasonable observer could

easily assume that the school district intended to endorse the religious message of the church approving of holding the school assemblies in the chapel.

The violation found in *Elmbrook* is but the "trickling stream" to the "raging torrent" found here. While a high school graduation ceremony occurs on one day out of the year, the alternative school students were subjected to multiple assemblies throughout the years in the chapel. Additionally, the school sent home report cards and other communications containing Bible verses and religious messages. Every week, students were required to carry home a weekly Family Feedback Form, which included a bible verse. If they failed to return the form signed, they would not earn their way out of the alternative school. While these religious messages were not posted on school walls, like the Ten Commandments were in *Stone* the students and their parents were forced to read and acknowledge the religious material on a weekly basis. These are not the "*de minimis*" influences or "passive exposure to religious iconography" as argued in the other briefs. The reasonable student, and parent, in this situation would feel even more pressure than the children in *Stone* and *Schempp* to conform to the school's religious message. As such, these communications would certainly violate the Establishment Clause.

B. The Court Properly Granted a Permanent Injunction and the Defendant's Unilateral Decision to End its Arrangement with Kingwood Does not Moot the Injunctive Relief.

Injunctive relief is an important tool in the enforcement of establishment clause on local governmental bodies. Unlike larger representative bodies like the state and federal legislature, local boards and commissioners are subjected to a greater degree to the whims of the masses. The tyranny of the majority poses a much greater threat when dealing with local politics, where the constituency may be more homogenous and apt to impose its views of those who disagree. This imposition of will is precisely what the Establishment Clause was meant to combat. Without the injunctive remedy, Plaintiffs as county tax payers may be subjected to the same attempts at the establishment of the majority religion. The courts have seen fit to guard against reoccurring violations of the constitution, even when the most current action has been voluntarily ceased by the county board.

It is well settled that the voluntary cessation of unlawful conduct does not moot a case in which the legality of that conduct is challenged. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *see also Allee v. Medrano*, 416 U.S. 802 (1974); *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (per curiam). If it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.' *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). The injunction may be dismissed as moot only if the Defendant meets the burden of showing that there is no reasonable expectation that the unlawful conduct will be repeated. *Id.* at 633. "The burden is a heavy one." *Id.*

Beyond an ultimately self-serving statement, Defendant offers no proof of its future plans to contract with Kingwood or another religious organization to run part of its education system. Instead the Defendant discusses the reasons it ended its most recent nine year contract with Kingwood. Defendants contracted on two separate periods of time beginning in the 1990s. Defendant established a pattern of starting and stopping its unlawful relationship with Kingwood. It has failed to adduce any evidence that it cannot or will not make the same decision again in the absence of an injunction.

C. The Court Should Not Stay its Decision in this Case in Activation of the Town of Greece Opinion Because this Case involves the Issue of Endorsement or Effect on Public School Children and Not Legislative Prayer

Defendant has asked the Court to stay its decision on this matter pending the outcome of the Supreme Court's opinion in *Galloway v. Town of Greece*, 681 F.3d 20, 22 (2d Cir. 2012) *cert. granted* 133 S. Ct. 2388, 185 L.Ed. 2d 1103 (2013). The *amicus curiae* urges the Court to make its decision without delay. The issue before the Supreme Court in *Galloway* is very different from the case at hand. The case concerns the constitutionality of sectarian prayer before a county commission meeting. The town's prayer practice was viewed as an endorsement of a particular religious viewpoint by the Second Circuit Court of Appeals. *Id.* at 30. The court based its conclusions on the prayer-giver selection process, the content of the prayers, and the actions of the prayer-givers and town officials. *Id.*

This case concerns the whole scale endorsement and funding of a religious institution. More specifically, this case involves the special conern of endorsement of religion and its coercive effect as it relates to public school children. The diffrences in the facts of the case warrant a decision in this case without a stay in the hopes of receiving some additional direction from a future decision.

III. Conclusion

For the foregoing reasons, ACLU-TN as amicus curiae urges the Court to affirm the decision of the lower court and hold that, given the totality of the circumstances, the actions of the Defendant in directly funding a religious institution's instruction of public school students and the religious and proselytizing conduct of Kingwood created a coercive environment and an unconstitutional endorsement of religion in violation of the Establishment Clause.

Respectfully Submitted,

/s Thomas H. Castelli
American Civil Liberties Union Foundation
of Tennessee
P.O. Box 120160
Nashville, Tennessee 37212
[redacted]
Attorney for Amicus Curiae
American Civil Liberties Union of
Tennessee

CERTIFICATE OF COMPLIANCE

This *amicus* brief complies with the type-volume limitations of Fed. R. App. P. 29(d) & 32(a)(7)(B), because this brief contains 5,336 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: November 26, 2013

/s/ Thomas H. Castelli
Thomas H. Castelli
American Civil Liberties Union Foundation
of Tennessee
P.O. Box 120160
[redacted]

Attorney for Amicus Curiae
American Civil Liberties Union of
Tennessee

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2013, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

ERIC J. MORRISON
STONE & HINDS
[redacted]

GEORGE F. LEGG
STONE & HINDS
[redacted]

MATTHEW TODD RIDLEY
STONE & HINDS
[redacted]

ARTHUR F. KNIGHT, III
TAYLOR & KNIGHT
[redacted]

JONATHAN SWANN TAYLOR
TAYLOR & KNIGHT
[redacted]

[redacted]

JAY A. SEKULOW
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

/s/ Thomas H. Castelli
Thomas H. Castelli
American Civil Liberties Union Foundation
of Tennessee
P.O. Box 120160
Nashville, Tennessee 37212
[redacted]

Attorney for Amicus Curiae
American Civil Liberties Union of
Tennessee

DESIGNATION OF RELEVANTR DISTRICT COURT DOCUMENTS

RECORD ENTRY #	DESCRIPTION	PAGE ID#
182	Findings of Fact and Conclusions of Law	1586-89;1591;1602
201	Testimony of D. Moody, May 14 2013 Trial Transcript	2287-88