

IN THE SUPREME COURT OF OHIO

CHURCH OF GOD IN  
NORTHERN OHIO, INC.,

Appellant,

vs.

WILLIAM W. WILKINS, TAX  
COMMISSIONER OF OHIO

Appellee.

CASE NO.: 2008-2462

Appeal from the Ohio Board  
of Tax Appeals

Board of Tax Appeals  
Case No. 2007-R-102

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MOTION FOR RECONSIDERATION  
OF APPELLANT  
CHURCH OF GOD IN NORTHERN OHIO, INC

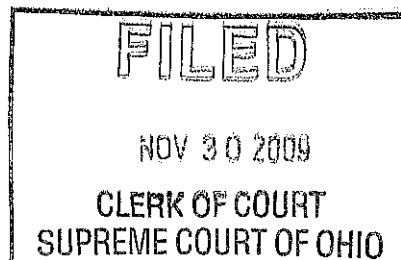
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Now comes Appellant, by and through counsel, and hereby moves this Honorable Court to reconsider its judgment on the merits pursuant to Rule XI §2 of the Rules of Practice of the Supreme Court, on the grounds that the decision of the Court: 1.) erroneously decided the issue based on law that was not properly before the court; 2.) neglected to split-list the property between exempt and non-exempt uses as permitted by RC 5713.04; and 3.) created a public policy that disfavors religious institutions. Appellant's reasons for said motion are more fully set forth in the attached Brief.

Respectfully submitted,

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## BRIEF

### PRELIMINARY STATEMENT

The Appellant Church of God in Northern Ohio Inc, (COGNO) is a religious institution that applied for exemption *solely under RC 5709.12* as a charitable institution using its property exclusively in furtherance of its charitable purposes and without a view toward profit. *Church of God in N. Ohio, Inc., v Levin*, Slip Opinion No. 2009-Ohio-5939, at Par. 3. Its authority for applying under this statute came directly from this Court in the *True Christianity* case, where it recognized that "*religious institutions are not excluded from application of RC 5709.12*". *True Christianity Evangelism v. Zano* (2001), 91 Ohio St. 3d 117 at 120.

Ohio courts have long held that it is the *use* of the property, not the ownership, that determines whether a property is entitled to exemption. *Gerke v. Purcell* (1874), 25 Ohio St. 229. The exemption of real property does not depend on the ownership of the property. "The use that such property subserves, constitute the grounds for its exemption." *Faith Fellowship Ministries, Inc. v. Limbach*, (1987), 32 Ohio St. 3d 432, 434; quoting from *Gerke, supra*. Consequently, since COGNO's building was not *used* as a house of public worship, it appropriately sought exemption pursuant to RC 5709.12(B) *not* RC 5709.07. See Statutory Transcript, p. 4.

By entry dated December 8, 2006, the Tax Commissioner denied the application, relying on *Christian Church of Ohio v. Limbach* (1990), 53 Ohio St. 3d 270. The commissioner found that the property was being used "for purposes that are merely supportive of public worship" and therefore did not qualify for exemption under *RC 5709.07(A)(2)*. *Church of God in N. Ohio, supra* at Par. 4. This ruling applying the wrong statute formed the primary basis of COGNO's appeal to the BTA. See Notice of Appeal to the BTA, p. 1 (a copy of which is attached hereto as Exhibit A); Merit Brief of Appellant, p. 7. The BTA subsequently affirmed the determination of

the Tax Commissioner on November 26, 2008, concluding that COGNO "is not making *exclusive* charitable use of the property, as it uses the subject property to conduct administrative and corporate functions (emphasis by the BTA)". See BTA Decision and Order at p. 11; Merit Brief of Appellant, Appendix at App. 015.

On November 18, 2009, the Court, in a 4-3 decision, affirmed the decision of the Board of Tax Appeals ("BTA"), on the grounds that the primary use of the property was "in administrative and corporate activities in support of public worship". *Id.* at Par. 30. In doing so, the Court reasoned that "the proper analysis of the issue in this case requires us to recognize the scope and limitation of the public-worship exemption at RC 5709.07 (A)(2)". *Id.* at Par. 35.

#### **ARGUMENT:**

**A. The Court lacked jurisdiction to apply the more restrictive "public worship" standard of RC 5709.07 since the Tax Commissioner did not raise the applicability of RC 5709.07 by way of cross-appeal.**

The sole basis of COGNO's application for exemption was the provision set forth specifically in Ohio Revised Code 5709.12(B), which provides that "*real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.*" Yet the majority decision relied exclusively on the application of the more restrictive "public worship" standard of RC 5709.07.

In the case of *Christian Church of Ohio v. Limbach* (1990), *supra*, the appellee had applied for exemption solely as a "house of public worship" under RC 5709.07. Later in the appellate process, it argued that it should also qualify for exemption under RC 5709.12. The court noted in Footnote #1, "Although appellee contended before the BTA that it was entitled to exemption under RC 5709.12, *no cross-appeal has been filed and that issue is not presented in this appeal. Accordingly, we lack jurisdiction to decide that issue.*" *Id.* at 271 (emphasis added).

The court applied the same restriction in the *Moraine Hts.* case, where a 49 acre church

camp sought exemption solely as a house of public worship under RC 5709.07. Since the camp did not properly raise RC 5709.12 on appeal, *the court lacked jurisdiction* to determine the applicability of this section of the Code. *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St. 3d 134, 137-139.

Using the same reasoning, had the Tax Commissioner wished to have this case evaluated under the standards of RC 5709.07, it should have filed a cross-appeal to properly bring that statute under consideration by this Court. Since it did not do so, the Court lacked jurisdiction to decide this case under RC 5709.07. *The Tax Commissioner is not exempt from the jurisdictional requirements of the Supreme Court.*<sup>1</sup>

This Court held in *Moraine Hts.* that "unlike the exemption under R.C. 5709.12, \* \* \* the exemption contained under RC 5709.07 \* \* \* is *more restrictive*, exempting only "houses used exclusively for public worship \* \* \* and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof \* \* \*" *Id.* at 137, (emphasis added). On the other hand, when evaluated under the standards of RC 5709.12, if the primary purpose of the property is "an evangelistic one" and "for the preparation and dissemination of a religious message", the property is exempt from taxation. *True Christianity, supra* at 119. "A good-faith attempt to disseminate information to spiritually advance and benefit mankind in general" constitutes a charitable purpose "under the definition of charity followed by this court," *Id.* at 120. As the record clearly indicates, these are the primary purposes of COGNO and the primary manner in which the subject real estate is being used.

The decision of the BTA below conceded this point, at least in part, when it concluded that COGNO's "purposes constitute both *the spread of religion* and the necessary business

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<sup>1</sup> The BTA was apparently cognizant of this fact, as it did not attempt to rely on RC 5709.07 to justify its decision. (see BTA Decision and Order, Merit Brief of Appellant, Appendix at App. 005-016).

functions of operating a corporation...(emphasis added)". (See BTA Decision and Order pp. 10-11; Merit Brief of Appellant, Appendix at App. 014-015).

Since the application of RC 5709.07 was not properly raised on appeal, the Court lacked jurisdiction to apply those standards to the facts of this case. Consequently, the majority erred in denying COGNO exemption under the more restrictive standards of RC 5709.07.

**B. If this case is to be decided under the more restrictive RC 5709.07 "public worship" standard, then the Court should have "split-listed" the property between exempt and taxable parts in accordance with RC 5713.04.**

While the majority correctly cites *Faith Fellowship Ministries, Inc. v. Limbaugh* (1987), 32 Ohio St. 3d. 432 for its definition of "public worship", (*Church of God in N. Ohio, Inc., supra, at Par. 32*), it neglected to follow that Court's holding by "split-listing" the property in accordance with RC 5713.04.<sup>2</sup> While the majority concluded that it was not the "primary" use, it conceded that a portion of the COGNO building is being used for legitimate exempt purposes. *Id.* at Par. 27 and 28. The dissent also acknowledged this fact. *Id.* at Par. 49. Therefore, COGNO should have been treated in the same manner as other applicants under RC 5709.07 (i.e., *Faith Fellowship, Moraine Heights*) and should have had the record reviewed to determine how the property could be split-listed between exempt and non-exempt uses. The language of RC 5713.04 is mandatory; i.e. "... the listing thereof *shall* be split . . ."

In *Faith Fellowship*, the applicant was the owner of a church complex that included seven buildings. It applied for exemption solely as a house of public worship under RC 5709.07.

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<sup>2</sup> RC 5713.04 provides in pertinent part:

"If a separate parcel of improved or unimproved real property has a single ownership and is so used so that part thereof, if a separate entity, would be exempt from taxation, and the balance thereof would not be exempt from taxation, *the listing thereof shall be split*, and the part thereof used exclusively for an exempt purpose shall be regarded as a separate entity and be listed as exempt, and the balance thereof used for a purpose not exempt shall, with the approaches thereto, be listed at its taxable value and taxed accordingly." (Emphasis added.)

Building A included a sanctuary, *classrooms, church offices, and a counseling room*, which were exempted by the Tax Commissioner, but the remaining 6 buildings were denied exemption. On appeal, the BTA exempted Building B, which included more *classrooms, nurseries, restrooms, a storage room*, a chapel and quarters for guest speakers. On further appeal to the Supreme Court, the court affirmed the exemption of Buildings A & B, but reversed the denial of the "boiler building" and portions of Building C that included another chapel that was used for seasonal worship services, as well as the *pastor's offices and secretarial office*. The remaining buildings that were denied exemption included a cafeteria, sleeping rooms for retreats, a garage, a storage building, and a vacant residential building.<sup>3</sup>

RC 5713.04 requires real property to be split into exempt and taxable parts if the part which is used in the exempt manner can be precisely delineated, and this delineation is not the product of a calculation of a ratio of the part to be exempted to the whole of the property. A building may be divided perpendicularly as well as horizontally. *Faith Fellowship, supra* at 436, *New Haven Church of Missionary Baptist v. Bd. of Tax Appeals* (1967), 9 Ohio St.2d 53; *Bishop v. Kinney* (1982), 2 Ohio St. 3d 52.

Since the majority decision evaluated COGNO's property under the RC 5709.07 "public worship" standard, it should have taken the further step to delineate which portions of the property are used for exempt purposes and which are not. Since it did not do so, the Court should reconsider its decision in light of RC 5713.04. The "all or nothing" decision by the majority leads to an unjust result, as the legitimate charitable uses of the property have been denied exemption. Under the Court's strained analysis, a more balanced and just approach should be to exempt those portions of the building that are being used in furtherance of lawful

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<sup>3</sup> It is noteworthy that the *use* of the rooms that were ultimately granted exemption in *Faith Fellowship* under RC 5709.07 are nearly identical to the *use* of the rooms COGNO seeks to exempt under RC 5709.12. Moreover, the COGNO property does not include any rooms used for non-exempt purposes such as a cafeteria, sleeping rooms for retreats, a garage, storage buildings, or a residential building.

charitable purposes (including, among other things, "the lawful advancement of religion"), and to deny exemption for those portions of the building that are being used purely for "administrative and corporate activities in support of public worship."<sup>4</sup>

**C. The Court's standard creates public policy disfavoring religious institutions that perform the same charitable activities as other non-religious charitable institutions.**

The majority decision has advanced a double standard that penalizes religious institutions engaging in charitable activities which, if done by non-religious entities, would otherwise satisfy the requirements of RC 5709.12. Religious institutions now suffer from a peculiar infirmity, even when they engage in activities that would be considered charitable activities when done by other organizations. This disfavored treatment occurs because, as the Court opines, part of what they do is "worship" or, worse, that because the charitable activities are connected with "worship" they somehow lose their charitable characteristics. In the case of religious institutions, and religious institutions alone, the Court has applied a rule that would force religious institutions to distinctly bifurcate their "public worship" activities from their "charitable" activities in order to obtain the benefits of RC 5709.12.

The Court's ruling creates a two-tiered analysis for what constitutes "charitable activity" which first inquires whether the activity is being done by a "house of worship", and if so, sets a higher standard of what activities can qualify. This disparate treatment of religious institutions is against public policy because it exhibits a hostile posture toward such institutions not supported in the applicable statutes. To conclude that charitable activities, if performed by a religious institution, do not carry the same benefit to society as equivalent charitable activities done by

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<sup>4</sup> This analysis is significantly more restrictive than the analysis this Court applied in the *Girl Scout* case, which had applied for exemption under the *same statute* for the *same size building* and used for the *same purposes* of "administration and training". The Court in that case appropriately applied the *Highland Park* test: *Is the property owned by the institution and is it used primarily in furtherance of its charitable purposes and without a view toward profit?* *Girl Scouts-Great Trail Council v. Levin* (2007), 113 Ohio St.3d 24. There is no just reason why COGNO should be evaluated any differently.

non-religious entities relegates religious institutions to an inferior status, one not evidenced anywhere in the Ohio Constitution, the legislative framework or the First Amendment to the U.S. Constitution. Such a scheme may even create an entanglement issue, since it excessively entangles the church and state in a review of church activities.<sup>5</sup>

An integral part of the Court's reasoning in reaching its conclusion is that religious institutions do not generally benefit society, which the Court expressed in terms of religious institutions looking *inwardly* toward its members as opposed to *outwardly* "toward a general and indefinite public".<sup>6</sup> *Church of God in N. Ohio, Inc., supra* at Par. 32. This formulation is inaccurate and a potential source of much mischief. First, it ignores the many good works done by religious institutions such as helping the poor and supporting families outside their membership. Second, it ignores the value of religious institutions in establishing spiritual, moral and social values in the communities in which they exist. These values were sufficiently important to the Ohio Legislature to warrant the creation of a separate exemption for "houses of public worship". Third, it ignores that virtually all charitable exemptions serve a specified and not universal interest. For example, the Girl Scouts do not serve an indefinite public, but rather girls and only those girls who agree to abide by their practices and rules. The Herb Society provides knowledge about the benefits of herbs to that subset of society interested in natural alternatives to traditional health care. Other non-profits may opt to pursue their missions through education, practice, or even influencing legislation. They may advocate for themes like animal rights, environmental issues, or cancer patients – in each case there is not an "indefinite" public,

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<sup>5</sup> The "entanglement" test is the third prong of the tripartite test enacted by the U.S. Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), which is the principal (though not the only) test used by the Court to determine Establishment Clause violations.

<sup>6</sup> The Court appears to reach its conclusion about COGNO's "worship" based on the Court's general understanding of what its member churches do but without any support in the record of what the specific activities of COGNO's member churches are. At the very least, the Court should remand this matter to the BTA to make a specific finding regarding whether the activities of its member churches can be considered charitable activities.

but still a benefit to society. There is simply no sound reason to divorce religious institutions from the presumed benefit to society that obviously motivated the legislature to give these tax exemptions in the first instance.

In support of its conclusion, the Court relied upon the holding of *Watterson v. Halliday* (1907), 77 Ohio St. 140. *Church of God in N. Ohio, Inc., supra* at Par. 37. Yet this case was decided *before* the 1912 amendment of Section 2 of Article XII of the Constitution which substituted the words, "institutions used exclusively for charitable purposes," for the words, "institutions of purely public charity," and before the similar changes were made in Section 5353, General Code [now RC 5709.12] in 1923.

As recognized by this Court in *Cleveland Bible College v. Bd. Of Tax Appeals* (1949), 151 Ohio St. 258, "there do not appear to be any reasons of public policy in this state which would require *an unreasonable or strained construction* of the words, 'charitable purposes', in cases involving tax exemption for \*\*\* religious institutions":

Since 1851, Section 7 of Article I of the Constitution, being a part of the so-called Bill of Rights, has provided in part:

"Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to *pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship*, and to encourage schools and the means of instruction. \*\*\*

The wisdom of extending tax exemption to institutions used exclusively for charitable purposes may well be questioned in view of the broad scope of the words "charitable purposes." However, that is a question for the Legislature to decide. The people authorized the Legislature to give such tax exemption by the language which they used in the Constitution; and the Legislature then used language in Section 5353 General Code [now 5709.12], which provided for such tax exemption. *This court should not disregard a decision which the Constitution specifically authorized the General Assembly to make and which the General Assembly has made.*

My conclusions therefore are that:

1. The words, "charitable purposes," as used in Section 2 of Article XII of the Constitution and in Section 5353, General Code [now RC 5709.12], include, among other things, *the lawful advancement of both education and religion.*

2. If operated without any view to profit, *an institution used exclusively for the lawful advancement of education or of religion or of both* is an institution *used exclusively for charitable purposes*, within the meaning of Section 2 of Article XII of the Constitution and of Section 5353, General Code [now RC 5709.12].

3. By reason of the amendment of Section 2 of Article XII of the Constitution in 1912 and the subsequent change made in Section 5353, General Code, [now RC 5709.12] in 1923, *it is no longer necessary that such an institution be open generally to the public in order to have tax exemption of property owned and used by it exclusively for lawful educational or religious purposes.*

4. The fact, that such institution restricts admission to followers of the Christian or any other lawful religion, *will not prevent it from having tax exemption of its property used exclusively for lawful educational or religious purposes. Cleveland Bible College, Id. at 270-272 (emphasis added).*

In effect, the majority's decision makes houses of worship a *less* favored type of charitable activity, whereas the history of tax exemption for churches recognizes precisely the opposite to be true. Churches, for example, enjoy automatic federal tax-exempt status – a benefit not accorded to any other non-profit entity – precisely because of the good they do for society. This general benefit to society, and not a favored few adherents, has been recognized by other jurisdictions. For example, the New York Court of Appeals has noted on several occasions:

“While generally tax exemption statutes must be construed against the taxpayer, they should not be so narrowly interpreted as to defeat their settled purpose to encourage, foster and protect religious institutions *as a public benefit* (emphasis added) (citations omitted).<sup>7</sup>

It is therefore respectfully submitted that this Court should follow the well settled public policy as set forth in *Cleveland Bible College, supra*, (as well as states like New York), which

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<sup>7</sup> *Matter of Yeshivath Shearith Hapletah v. Assessor of Town of Fallsburg*, 79 N.Y.2d 244, 249, 582 N.Y.S.2d 54, 590 N.E.2d 1182 [1992]; see also *People ex rel. Watchtower Bible & Tract Socy. v. Haring*, 8 N.Y.2d 350, 358, 207 N.Y.S.2d 673, 170 N.E.2d 677 [1960]).

recognize expressly that religious institutions benefit society, and that they have done so for virtually our entire nation's history. The Court's decision in the instant case subtly devalues traditional assumptions about the importance of the spiritual, moral and social welfare of society. Religious institutions operate in innumerable ways and express their "worship" in countless types of activities -- including charitable activities such as "spiritually, physically, intellectually, socially, and economically . . . advance[ing] and benefit[ing] mankind in general." There are religious institutions operating through religious orders, for example, which take a vow of poverty and fulfill their religious mission by living among and serving the poor. Others provide training and counseling. The distinction the Court has drawn between the activities of religious institutions and other "charitable" activities fails to materialize in actual practice.

#### CONCLUSION

This Court lacked jurisdiction to decide this case using the more restrictive standard of RC 5709.07. As such, it reached an improper conclusion, and should reconsider its decision applying the appropriate standard as set forth in RC 5709.12 and the cases interpreting it. The appropriate analysis is the *Highland Park* test: *Is the property owned by the institution and is it used primarily in furtherance of its charitable purposes and without a view toward profit?*

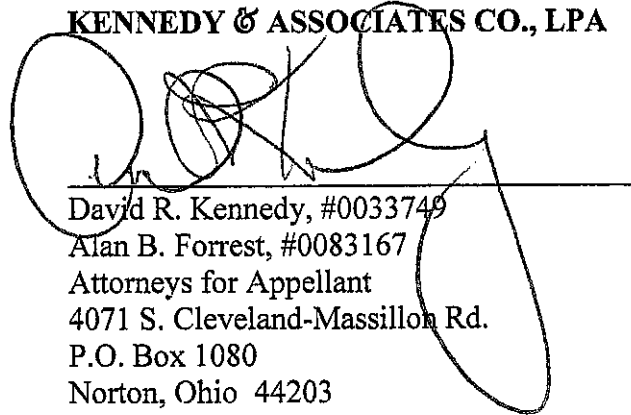
In the alternative, should the Court insist on applying RC 5709.07, the record should be re-considered in order to split-list the property between its exempt and non-exempt purposes. Those portions of the building that are being used in furtherance of legitimate charitable purposes should be granted exemption, while those portions of the building that are being used solely for "administrative and corporate activities in support of public worship" should be denied exemption.

As a matter of public policy, this Court has an opportunity to prevent further confusion and disparate treatment between religious and other charitable institutions by recognizing that the

charitable activities performed by religious institutions *are of equal value and deserve the same tax exempt treatment* as those afforded to other non-religious charitable institutions. There is no just or sound reason why activities motivated by religious worship should receive such disparate treatment.

Respectfully submitted,

**KENNEDY & ASSOCIATES CO., LPA**

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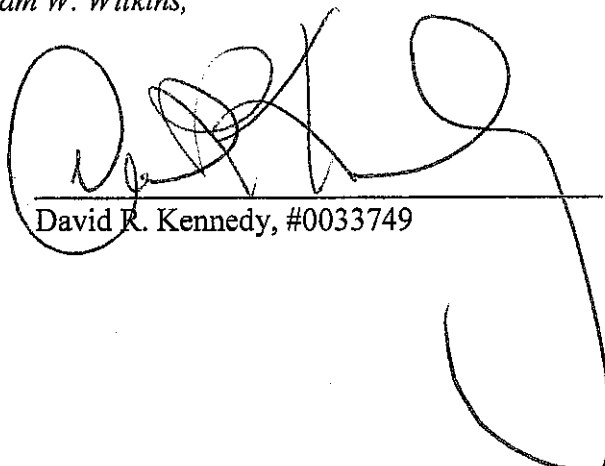
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion for Reconsideration was served via regular U.S. Mail this 30<sup>th</sup> day of November, 2009 to:

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David R. Kennedy, #0033749



The Ohio Supreme Court has held that whether the institution is religious or charitable is not a relevant factor; the relevant factor for determining exemption is *whether the institution is using the property exclusively for charitable purposes*. *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St. 3d 117 at 118 (*emphasis added*). The Commissioner correctly cites *Planned Parenthood Assn of Columbus, Inc. v. Tax Commissioner* (1966), 5 Ohio St. 2d 117, paragraph one of the syllabus, for the proposition that “[I]n the absence of a legislative definition, ‘charity’, in a legal sense is the attempt in good faith, *spiritually*, physically, intellectually, socially, and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular”. Cited in *True Christianity, Supra*, at 119 (*emphasis by the court*).

If operated without any view to profit, an institution used exclusively for the lawful advancement of education *and of religion* is an institution used exclusively for charitable purposes, within the meaning of [now R.C. 5709.12]. *Cleveland Bible College v. Bd. Of Tax Appeals* (1949), 151 Ohio St. 258, paragraph one of the syllabus (*emphasis added*). When the primary purpose of the property is “an evangelistic one” and “for the preparation and dissemination of a religious message”, the property is exempt from taxation under R.C. 5709.12. *True Christianity, Supra*. at 119. When the real property is used primarily “to encourage people to read the Bible and live up to its moral standards”, these efforts are “a good-faith attempt to disseminate information to spiritually advance and benefit mankind in general”, and “under the definition of charity followed by this court, applicant’s activities constitute charitable purposes.” *Id.* at 120 (*emphasis added*).

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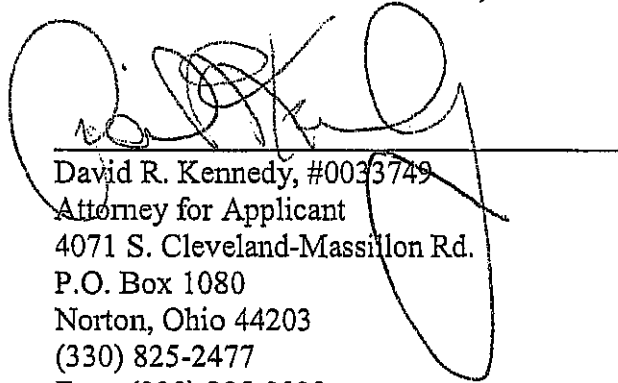
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The Ohio Supreme Court has clearly and concisely stated a simple two-prong test for determining exemption under R.C. 5709.12. The Commissioner has chosen not to apply that test. Thus, his unsupported conclusion that "the administrative headquarters for a church or congregation is taxable", regardless of the charitable use of the property, is inconsistent with Ohio law and is clearly in error.

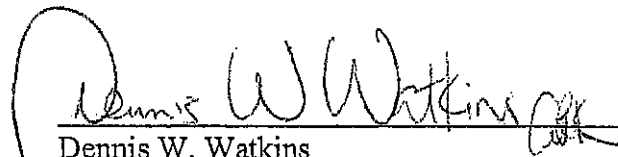
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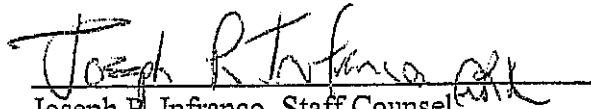
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**ALLIANCE DEFENSE FUND**



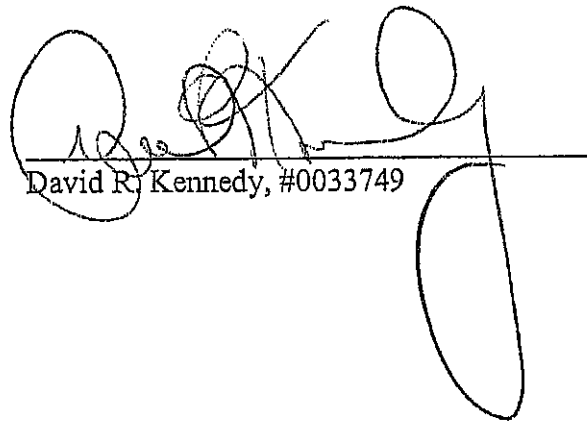
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal was served via Federal Express Delivery this 5<sup>th</sup> day of February 2007 to:

Ohio Board of Tax Appeals  
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