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December 8, 2014

Robert H. Stewart
Secretary
Tourism, Arts and Heritage Cabinet
2400 Capital Plaza Tower
500 Mero Street
Frankfort, KY 40601

Re: Ark Encounter Project TDFA Application

Dear Secretary Stewart:

Reference is made to our meeting on November 24, 2014 in response to your letter of September 4, 2014 (the "Letter") regarding the Ark Encounter, LLC TDFA application. My client rejects your demand that it provide an express written assurance that it will not discriminate in any way on the basis of religion in the hiring for Ark Encounter (the "Project"). Such a demand must be rejected because (i) it violates the agreement we reached on this issue at our July 9, 2014, meeting (the "Meeting"); (ii) because it violates state and federal law; and (iii) because, most importantly, the condition entangles the Commonwealth in religion in violation of the 1st and 14th Amendments to the U.S. Constitution.

The Letter substantially misrepresents our discussion at the Meeting when the matter of the 2011 Tourism Development Agreement ("TDA") was discussed, which contained a provision that the Project would not discriminate in hiring on the basis of religion. At the Meeting, we specifically discussed the change in the ownership structure of Ark Encounter, LLC that had occurred since 2011. Presently, while Ark Encounter, LLC is a for-profit entity, it is a wholly-owned subsidiary of Crosswater Canyon, Inc., a non-profit religious organization recognized as a public charity under Section 501(c)(3) of the Internal Revenue Code. Crosswater Canyon is the sole member of Ark Encounter, and was formed for the specific purpose of operating for the

benefit of, and to support the mission and purposes of, Answers in Genesis, a non-profit religious organization also recognized as a public charity under Section 501(c)(3).

It is clear that Crosswater Canyon is wholly-owned and controlled by Answers in Genesis, the parent organization, and that Ark Encounter is now wholly-owned and controlled by Crosswater Canyon. Ark Encounter and Crosswater Canyon were formed for the specific purpose of owning, developing, operating and managing the Project, which your cabinet and all concerned have always known will be a religious-themed attraction centered upon the biblical and historical accounts of Noah and the Ark, the Genesis Flood, and related Judeo-Christian and Christian traditions and themes.

As you know, when the 2011 TDA was executed, Crosswater Canyon, Inc. was the managing member of Ark Encounter, LLC, but there were also private entities and individuals that had an ownership interest. We explained at the Meeting that since Ark Encounter, LLC is now totally owned by a charitable and religious entity, and Ark Encounter, LLC is itself an overtly Christian company, it will be important for Ark Encounter, LLC to abide by and reflect the same employment policies as its parent entity to the full extent allowed by law. That is why we needed to now delete any express provisions in the TDA that would impose any conditions on Ark Encounter, LLC beyond what is already provided by state and federal law.

Fortunately, there is no need to engage in a "he said, she said" debate as to what was discussed and agreed at the Meeting, as following the Meeting, what was agreed to was set forth in a July 11, 2014 letter from William Dexter, attached as Exhibit "A." The pertinent parts of that letter are as follows:

> "After discussions of recent correspondence, we agreed as follows:
>
> 1. Ark Encounter re-affirming the representations in its letter to me from John Pence dated May 5, 2014;
>
> 2. If the project receives final approval, the Tourism Development Agreement with your client will contain the terms and conditions in its previous Agreement, except:
>
> (a) The previous references against discrimination will be replaced by a covenant from your client to comply with all state and federal laws and regulations, like those contained in other Kentucky economic incentive agreements; and which will establish the maximum limit of state incentives under the Act; ..."

As we discussed at the Meeting, and again when we met on November 24, 2014, we do not object to a condition to abide in every way by state and federal laws and regulations that apply to hiring for the Project, but we cannot

agree to conditions that expand the requirements beyond what is legally mandated, which is what your condition on religious hiring does.

Ark Encounter, LLC has not yet employed any persons, nor established any specific employment standards for the Project. However, as we have previously shown and discuss again herein below, Ark Encounter, LLC, as an overtly religious entity owned by another overtly religious and charitable entity, is clearly allowed by state and federal law to include religion as a criteria in its future hiring decisions.

If you impose a condition prohibiting religious preference in hiring here it will be a violation of state law. Nowhere in the provisions of the Tourism Development Act (the "Act") are there requirements that religious entities must agree to any special conditions to receive incentives under the Act. The fact that the Tourism Development Finance Authority granted preliminary approval of the Project's application reflects that the Project and its owner meet the objective requirements of the Act and are entitled to incentives under the Act, subject only to the net positive impact that will be determined by the independent consultant, and which will establish the upper limits for the incentives.

Your proposed condition also directly violates KRS 446.350, which prohibits the government from substantially burdening the freedom of religion without showing a compelling government interest. That statute provides as follows:

> Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. **A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.** [Emphasis added.]

The Kentucky statute mirrors similar protections provided by federal law and applied most recently by the U.S. Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.,* 134 S.Ct. 2751 (June 30, 2014). That landmark case affirmed the rights of persons of faith to "run their businesses as for-profit corporations in the manner required by their religious beliefs." *Id.* The Court based its holding on The Religious Freedom Restoration Act of 1993 ("RFRA"), which prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb1(a),(b). RFRA covers "any exercise of religion, whether or not

compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A).The demand set forth in your Letter that Ark Encounter, LLC surrender its rights under state and federal law in order to receive a tax incentive otherwise made available to all other qualifying parties imposes a substantial burden on my client's freedom of religion and smacks of overt religious discrimination. Kentucky has no legitimate reason or interest to act in such a manner.

My client appreciates the support it has received from the State thus far for the Project. It also understands the State has supported the Project in spite of significant criticism from area media outlets and others. We also understand that your office may be operating under the mistaken belief that imposing these new conditions on the Project will somehow protect the State from claims it is "promoting religion" in violation of the federal or state constitutions. However, as we demonstrated in detail in the May 22, 2014, letter to William Dexter from Freedom Guard, Inc. and Center for Religious Expression, attached hereto as Exhibit "B", imposing such conditions actually *create* a constitutional problem rather than alleviate one.

Your legal counsel should readily acknowledge that it has long been established in federal law and state law that religious entities are *permitted* to give employment preference to members of their own religion. The federal law that prohibits discrimination in hiring practices, Title VII of the Civil Rights Act of 1964, specifically carves out an exception for churches and religious organizations, which *are* permitted to give employment preference to adherents of their own religion.

As noted above, Ark Encounter, LLC is clearly a Christian company with plainly religious attributes and ownership. It thus meets the legal standard for the Title VII exemption on religious preferences. *See, e.g., Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (citing *E.E.O.C. v. Townley Eng'g & Mfg.Co.,* 859 F.2d 610 (9th Cir.1988), *cert. denied,* 489 U.S. 1077 (1989); *E.E.O.C. v. Mississippi College,* 626 F.2d 477 (5th Cir.1980), *cert. denied,* 453 U.S. 912 (1981).

Our corresponding state law, KRS 344.090, *et seq.*, further affirms this position and expressly provides: "[I]t is ***not*** unlawful practice for . . .a religious corporation, association, or society to employ an individual on the basis of his religion to perform work connected with the carrying on by such corporation, association, or society of its religious activity." (Emphasis added.) Every state has such a statute, because the U.S. Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of Presiding Bishops of Church of Jesus Christ of Latter-day Saints v. Amos,* 493 U.S. 327 (1987) (internal citations omitted).

Since the law on point is so clear and unambiguous, we are left to wonder on what basis your office can possibly assume it has the authority to impose your additional condition? The U.S. Court of Appeals for the Sixth Circuit has consistently

followed the U.S. Supreme Court precedent on these issues, and specifically determined that providing facially-neutral economic development incentives to religious entities does not violate the Establishment Clause. *See, e.g., American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.,* 567 F.3d 278 (6th Cir. 2009); *Johnson v. Economic Dev. Corp. of the County of Oakland,* 241 F.3d 501 (6th Cir. 2001). So long as the government benefits program "allocates benefits in an evenhanded manner to a broad and diverse spectrum of beneficiaries," a religious group may be a qualified recipient "in spite of, rather than because of, its religious character." *American Atheists,* 567 F.3d at 289 (citations omitted); *accord Johnson,* 241 F.3d at 512.

That is certainly the case here. Merely allowing Ark Encounter, LLC to participate equally in the neutral tax incentive program of Kentucky and to exercise all its rights allowed under existing state and federal law cannot be construed in any way as a diversion of state funds to further any religious mission or endorse any religious viewpoint of Ark Encounter, LLC. As the Sixth Circuit made clear in *American Atheists,* the government *avoids* any "excessive entanglement in religion" when a neutral tax incentive program does not require state officials to "make judgments about the religious content of particular projects" or require comprehensive and ongoing government monitoring of the project's affairs. *Id.* at 294. *See also, Johnson,* 241 F.3d at 516 (once tax-exempt revenue bonds were issued, the County had no ongoing involvement with the religious school in that context).

Given all these factors, it is quite clear that TDFA can and should provide its approval to Ark Encounter, LLC, without approaching near the line of "government-sponsored faith-based activities" in violation of the Establishment Clause. *American Atheists, supra,* at 295. Indeed, as the Supreme Court has affirmed, "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression" or the religious nature of their identity. *Rosenberger v. Rector and Visitors of Univ. of Virginia,* 515 U.S. 819, 828 (1995) (all internal citations omitted).

For all these reasons, if you insist on the newly imposed condition in your Letter, it will amount to unconstitutional viewpoint discrimination and my client will have no choice but seek redress in federal court.

Please let me know within five (5) days from the receipt of this letter whether you will withdraw your unlawful condition on Ark Encounter's participation in the tax incentive program.

Sincerely yours,

James E. Parsons

JEP:slk
Enclosure

cc: William Dexter
John Pence
J. Michael Johnson
Nate Kellum

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July 11, 2014

Email and First Class Mail

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RE: Ark Encounter, LLC TDFA Application

Dear Jim:

This letter will summarize the meeting at our offices on July 9, 2014 with you and your client, Ark Encounter, LLC, concerning its March 28, 2014 application for incentives under the Tourism Development Act.

After discussion of recent correspondence, we agreed as follows:

1. Ark Encounter re-affirms the representations in its letter to me from John Pence dated May 5, 2014;
2. If the Ark project receives final approval, The Tourism Development Agreement with your client will contain the terms and conditions in its previous Agreement, except:
   (a) the previous references against discrimination will be replaced by a covenant from your client to comply with all state and Federal laws and regulations, like those contained in other Kentucky economic incentive agreements; and
   (b) the provision regarding legal fees and indemnification will be modified to clarify that both Ark Encounter, LLC and the COK may each select their own counsel to represent their interests in any litigation relating to the project's incentives; as before, Ark Encounter LLC will indemnify the Commonwealth and its agencies for all losses, liability or judgments, including reasonable attorney fees for the Commonwealth's lawyers in any challenge relating to this project's incentives.

As you know, the amount of any economic incentives included in any agreement will be a function of the net fiscal impact of the project and the approved qualified expenditures.

If this accurately reflects our agreement with your client, please confirm by signing and returning a copy of this letter to me. We will then proceed with scheduling a meeting of the Tourism Development Finance Authority to consider Ark Encounter, LLC's application for preliminary approval of the incentives it seeks.

Very Truly Yours,

William R. Dexter

James E. Parsons, Esq.
On behalf of Ark Encounter, LLC

PENGAD 800-631-6989

EXHIBIT

A

CENTER FOR RELIGIOUS EXPRESSION
Clearing the Path for Truth

FREEDOM Guard
Defend the foundations. Contend for the faith.

May 22, 2014

Mr. William R. Dexter
General Counsel
Tourism, Arts and Heritage Cabinet
2400 Capitol Plaza Tower
500 Mero Street
Frankfort, KY 40601

Re: TDFA Approval of the Ark Encounter Project

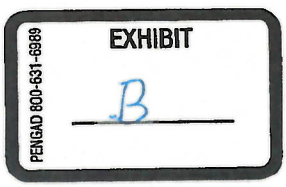
Dear Mr. Dexter:

This letter is being submitted to you by the Center for Religious Expression, Inc. ("CRE") and Freedom Guard, Inc. ("Freedom Guard") on behalf of our client, Ark Encounter, LLC. We write to specifically address the concerns you have articulated in your recent correspondence about the approval of state tax incentives for our client's Ark Encounter Project (the "Project"). It is our hope that this legal information letter will assist you in confirming that the Kentucky Tourism Development Finance Authority ("TDFA") can and should provide its preliminary approval for the Project at its earliest opportunity.

By way of introduction, CRE and Freedom Guard are both not-for-profit public interest law firms dedicated to the defense of religious liberty in the courts and in the court of public opinion. Our organizations exist to educate citizens and the government about important constitutional rights, particularly the freedom of religious expression. Over the past two decades, our attorneys have successfully litigated these issues on behalf of religious persons and organizations in federal and state courts nationwide, and have also been called upon to assist and successfully defend many governmental bodies and public officials on a variety of related matters.

PROJECT SUMMARY

As you know, Ark Encounter, LLC chose to develop the Project in Kentucky for a variety of reasons, including the availability of the Kentucky Tourism Tax Credit Program incentives set forth in KRS Chapter 147 and local tax increment incentives available under KRS Chapter 65. The Project will include a large theme park with numerous attractions marketed to tourists and visitors across the country. The theme park will be based on biblical events and times, and its first phase features a full-scale replica of Noah's Ark, with numerous educational and interactive elements for guests of all ages. Later phases of the Project will add additional



attractions such as a replica of the Tower of Babel, a Performing Arts Theatre, a First Century Village, and similar developments.

As has been previously detailed in Ark Encounter, LLC's 2013 Feasibility Report and its pending application for the available tax incentives, the Project will bring millions of dollars in new capital investment, create hundreds of jobs, and be a tremendous asset to the Commonwealth of Kentucky and the surrounding community and businesses of the region. The Project will attract millions of people from all points of view, who will visit for a countless variety of reasons. Some will be interested in the educational and historic perspectives of the theme park, and some will be more interested in its religious perspectives. As with any historical, scientific, religious or philosophical work or museum display, some guests of the Ark Encounter Project will surely agree with the perspectives presented, and many will surely disagree. Regardless, the park will enthusiastically welcome them all, without regard to race, color, religion, creed or other status protected by federal and state laws. Indeed, one of the *intended purposes* of the Project is to encourage critical thought, civic discourse and respectful public debate about the various attractions and ideas presented at the theme park. This is the beauty and essence of free speech.

LEGAL ANALYSIS

In your recent letter to our client dated April 24, 2014, you explained that TDFA is suddenly reluctant to grant the requested tax incentives to Ark Encounter, LLC, because certain statements made in a February 27, 2014, press conference have caused TDFA concern. You wrote that because two individual leaders of Ark Encounter, LLC's parent corporation, Answers in Genesis, Inc., "made very direct statements about the evangelical mission of Answers in Genesis" and commented that certain aspects of the Noah's Ark replica were, in your words, "designed to further that evangelical ministry," a question has now been raised about whether allowing tax incentives for the Project would "amount[ ] to impermissible state funding of religious indoctrination" and/or "constitute a diversion of secular assistance to further a religious mission."

While we understand your caution and thoughtful counsel, we write to assure you that the approval of state and local tax incentives for this Project is both lawful and appropriate. TDFA's objective and neutral application of the available economic incentive programs here should create no conflict with the United States Constitution, the Kentucky Constitution, or any other provisions of law including the Kentucky Tourism Development Act (the "Act"). To the contrary, we respectfully submit that it would be a violation of those constitutional provisions if TDFA did *not* provide its approval at this point.

I. COMPLIANCE WITH THE UNITED STATES CONSTITUTION

A. Approving tax incentives here will not violate the Establishment Clause.

There is no question that the Commonwealth's allowance of tax incentives in exchange for the Project's substantial economic impact to the area will fully comply with the safeguards of the Establishment Clause of the First Amendment. The United States Supreme Court has long acknowledged that when a government's financial benefits program is facially neutral toward religion (as you have acknowledged the Act itself is), provision of funding to an applicant who may happen to have a particular religious identity or viewpoint is not a violation of the Constitution. This has been a consistent principle in First Amendment jurisprudence.

You explained in your letter of April 24, 2014, that a handful of comments made at a February press conference have created a question for TDFA regarding whether application of the Act to this Project "might improperly advance religion." But that question has already been answered decisively by the Supreme Court. "We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Rector and Visitors of Univ. of Virginia,* 515 U.S. 819, 839-840 (1995) (citing *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 704 (1994) (Souter, J.) ("[T]he principle is well grounded in our case law [and] we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges."); *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 487–488 (1986); *Mueller v. Allen,* 463 U.S. 388, 398–399 (1983); *Widmar v. Vincent,* 454 U.S. 263, 274–275 (1981)).

According to the Supreme Court, this is not even a close call. "More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger,* 519 U.S. at 840 (citing *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 393-394 (1993); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 248, 252 (1990); and *Widmar,* at 274–275).

As in those previous cases cited above, the generally-available, broad-reaching governmental program here is neutral toward religion. Indeed, Secretary Bob Stewart's January 2014 annual report of incentives provided under the Act shows the program has so far been applied to extend nearly $100 million in tax incentives to a diverse array of recipients—from the developers of entertainment facilities and hotel venues, to other amusement parks, water parks and an aquarium, to a visitors' experience at a beer distillery, to the expansion of the Kentucky Speedway. There is no evidence whatsoever to suggest the Commonwealth created the Act to advance any religion or aid any religious cause.

Indeed, the Kentucky Tourism Development Act provides a quintessential example of a "broad-reaching government program that is neutral in design," because its sole and undisputed purposes have been simply to enhance economic development and increase tourism in the Commonwealth. The legislative findings and the language of the relevant statutes articulate these purposes clearly, and the Act includes on its face no preferences for or against any religious entity or viewpoint.

Given the language and history of the Act, "[t]his is a far cry from a general public assessment designed and effected to provide financial support for a church." *Rosenberger*, 519 U.S. at 841. "Government neutrality is apparent in the State's overall scheme in a further meaningful respect. The program respects the critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Id.* (*citing Mergens, supra,* at 250 (opinion of O'CONNOR, J.)). In this case, "the government has not fostered or encouraged" any mistaken impression that Ark Encounter, LLC, or any other beneficiary of the available tax credit program speaks *for the Commonwealth itself. See Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 766 (1995).

Just as there can be no valid argument that the Commonwealth of Kentucky has somehow endorsed the consumption of alcohol by approving tax incentives for the beer distillery project in 2012, or endorsed the speech or viewpoint of every stand-up comedian or adult-themed entertainer who may fill the stage at one of the several entertainment venues developed with tax credits under the Act, there can be no valid argument that the Commonwealth will somehow endorse the private religious speech or various ideas that may be expressed at the Ark Encounter Project, simply because the Project's developers made use of a tax incentive/economic development program that is equally available to all.

The U.S. Court of Appeals for the Sixth Circuit has consistently followed the U.S. Supreme Court precedent on this point, and specifically determined that providing facially-neutral economic development incentives to religious organizations—and even directly to churches—does not violate the Establishment Clause. *See, e.g., American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.,* 567 F.3d 278 (6th Cir. 2009); *Johnson v. Economic Dev. Corp. of the County of Oakland,* 241 F.3d 501 (6th Cir. 2001). So long as the government benefits program "allocates benefits in an evenhanded manner to a broad and diverse spectrum of beneficiaries," a religious group may be a qualified recipient "in spite of, rather than because of, its religious character." *American Atheists,* 567 F.3d at 289 (citations ommitted); *accord Johnson,* 241 F.3d at 512.

In *American Atheists*, the City of Detroit created a financial incentive program to encourage downtown revitalization, and allowed up to a 50% cost reimbursement for downtown property owners who completed exterior building renovations. When the applications of three churches were approved for the reimbursement grants, an atheist group brought suit to claim a violation of the Establishment Clause. The Sixth Circuit concluded that Detroit's facially-neutral, generally-applicable program was constitutional because it utilized "neutral, secular

criteria to determine an applicant's eligibility, what projects may be reimbursed, and how much each grantee receives." *American Atheists,* 567 F.3d at 290. The court also determined that the Detroit program did not have the "primary effect of advancing religion," even though three *churches* were approved as grant recipients to improve their *church* property. 567 F.3d at 291 (citing *Agostini v. Felton,* 521 U.S. 203, 234-35 (1997); *Bowen v. Kendrick,* 487 U.S. 589, 609 (1988)). *See also, Johnson, supra,* (Sixth Circuit held that grant of tax-exempt county revenue bonds for the construction of a Catholic school building involved no Establishment Clause violation because it was a facially neutral public program with the secular purpose of encouraging economic development).

Here, the analysis of the Ark Encounter situation is much simpler, because the applicant is clearly not a church, and its theme park project is clearly not a church property. Moreover, as in the Oakland County program and the Detroit program, there is obviously no "inherently religious content" in the government benefit itself. *American Atheists,* 567 F.3d at 292. Merely allowing Ark Encounter, LLC to participate equally in the neutral tax incentive program of Kentucky cannot be construed as a diversion of state funds to further a religious mission.

As has been previously explained by counsel for the Project, although one of the owners in the Project itself has a religious mission, the money is not going directly to that owner to further its mission in a way that would "prompt a reasonable observer to impute to [Kentucky] the religious mission that [the one owner] undertake[s]." *Id.* at 293. The Project at issue is a multi-facted theme park, and not a sanctuary or synagogue. Like the beneficiaries of the Act, this Project itself will be operated as a private, for-profit business, and the Project owners will have to comply with the applicable statutory requirements and incentive agreements to receive any available tax rebates. Once the incentives are paid, there will be no other state or local involvement except for the same regulatory compliance that applies to all other businesses and operations in Kentucky.

Although the plaintiffs in *American Atheists* claimed the most egregious constitutional violation was the fact that the City of Detroit offered public grant money to pay for the repair of church signage that would relay explicit religious messages, the Sixth Circuit rejected the plaintiffs' argument because "no reasonable observer could attribute a religious message to the City any more than he could attribute messages conveyed by other downtown signs to the City." *Id.* at 293-94. In addition, the money attributable to the signage and any religious messaging in *American Atheists* represented a very small percentage of the reimbursement program as a whole. Here, the amount of the incentives that could conceivably be linked to religious messaging (if any) would similarly represent a very small portion of the tens of millions of dollars being rebated statewide by way of the Act.

Importantly, the Sixth Circuit also made clear in *American Atheists* that the government avoids any "excessive entanglement in religion" when a neutral tax incentive program—like the Act in Kentucky—does not require state officials to "make judgments about the religious content of particular projects" or require comprehensive and ongoing government monitoring of the project's affairs. *Id.* at 294. *See also, Johnson,* 241 F.3d at 516 (once the tax-exempt revenue

bonds were issued, the County had no ongoing involvement with the religious school in that context). Given all these factors, it is quite clear that TDFA can and should provide its approval to Ark Encounter, LLC, without coming anywhere near the line of "government-sponsored faith-based activities" in violation of the Establishment Clause. *American Atheists, supra,* at 295.

B. Denying these tax incentives would amount to unconstitutional viewpoint discrimination.

Ironically, if TDFA were to *deny* the application of Ark Encounter, LLC for the reasons you have articulated in your recent correspondence, such a denial would clearly violate the Free Speech and Free Exercise Clauses of the First Amendment. As you frankly stated in your letter of April 24, 2014, TDFA had no concern these past four years about the obvious religious theme of the Project until two of its leaders mentioned at a press conference on February 27, 2014, that certain exhibits at the theme park might involve an evangelical Christian message. You wrote that this suggests the Project "has changed from a tourism attraction" to "an extension of [Christian] ministry," and "[w]hile AIG has every right to make that change, such a change will affect whether the Tourism Development Finance Authority can offer tourism incentives to such a project."

As described herein above, TDFA must be neutral in its administration of the state tax incentives law so that it does not wrongfully deny the applications of otherwise qualified projects just because some of a project's participants may be too "religious" in nature. But the constitutional obligations of TDFA in this context go even further. To fully comply with the safeguards of the First Amendment, when reviewing such an application, TDFA must also avoid dictating to any such party *what* they can say, and/or playing the role of supervisor or religious censor over the private speech of the project's participants and the religious and/or non-religious viewpoints they express.

As the U.S. Supreme Court has repeatedly affirmed:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.

Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 828 (1995) (all internal citations omitted).

Earlier this month, in a landmark case in which the undersigned attorneys participated on behalf of the prevailing party government defendant, the U.S. Supreme Court reiterated the age-old principle that "[t]he First Amendment is not a majority rule, and government may not seek to

define permissible categories of religious speech." *Town of Greece, NY v. Galloway*, No. 12–696, 2014 WL 1757828, *11 (May 5, 2014) (holding that prayer opening town board meetings and delivered by guest clergy does not compel citizens to engage in a religious observance, and the prayers do not have to be nonsectarian to comply with the Establishment Clause). While *Town of Greece* specifically concerned the constitutionality of legislative prayer, the broader principle articulated by the Court is instructive here:

> To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. Cf. *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. —, —, 132 S.Ct. 694, 705–706, 181 L.Ed.2d 650 (2012). Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior. *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. **Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.** See *Lee v. Weisman*, 505 U.S. 577, 590, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted"); *Abington v. Schempp*, 374 U.S., at 306, 83 S.Ct. 1560 (Goldberg, J., concurring) (arguing that "untutored devotion to the concept of neutrality" must not lead to "a brooding and pervasive devotion to the secular").

Town of Greece, 2014 WL 1757828, *11-12 (emphasis added).

It is well understood that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829 (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)). Such viewpoint discrimination by the government is *presumed* impermissible, and, as in this case, it is often easy to identify, especially when the government has opened a forum for private speech.

"Once it has opened a limited forum, [ ] the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" *Rosenberger*, 515 U.S. at 829 (citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 804-806 (1985), and *Perry Ed. Assn., Assn., supra*, at 46, 49. The government may not "discriminate against speech on the basis of its

viewpoint." *Rosenberger, supra,* at 829 (citing *Lamb's Chapel, supra,* at 392–393; *Perry Ed. Assn., supra,* at 46; *R.A.V. v. St. Paul,* 505 U.S. 377, 386-388, 391-393 (1992); *Texas v. Johnson,* 491 U.S. 397, 414–415 (1989). "Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger, supra,* at 829-830 (citing *Perry Ed. Assn., supra,* at 46).

A specific prohibition against "evangelical speech" in a limited public forum simply cannot withstand constitutional muster. "Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. ...Accordingly, we have not excluded from free-speech protections religious proselytizing or even acts of worship." *Capitol Square Review and Advisory Bd.,* 515 U.S. at 760 (citing *Lamb's Chapel; Mergens; Widmar, Widmar, supra,* at 269, n. 6; and *Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 647 (1981)). Notably, in *Capitol Square Review and Advisory Bd.,* the U.S. Supreme affirmed the decision of the U.S. Court of Appeals for the Sixth Circuit and held that the government must grant the application of a private party who sought a permit to erect a cross display on the grounds of the statehouse plaza in Columbus, Ohio. The state officials there did not dispute that the applicants, in displaying their cross, were engaging in constitutionally protected expression, but the officials argued that the constitutional protection did not extend so far as to allow such expression on the plaza of Capitol Square. *Id.,* 515 U.S. at 761. The Supreme Court and the Sixth Circuit plainly disagreed.

A tax incentives program like the one at issue here is tantamount to a government-created limited public forum. A financial benefits or grant program by a state "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Rosenberger, supra,* at 830 (forum analysis of a state university's student activities fund) (citing as examples *Perry Ed. Assn., supra,* at 46–47 (forum analysis of a school mail system); *Cornelius, supra,* at 801, (forum analysis of charitable contribution program)). *See also, Legal Services Corp. v. Velazquez,* 531 U.S. 533, 544 (2001) (forum analysis of a government subsidy program); *Rust v. Sullivan,* 500 U.S. 173 (1991) (forum analysis of a government subsidy program).

The government's approach in the *Rosenberger* case in handling a student activities fund was very similar to the current approach of TDFA here—and it was held to be unconstitutional. In *Rosenberger,* a student organization which published a Christian newspaper was denied participation in the state university's fund that was created to make payments to outside contractors for printing costs of publications of student groups. *Rosenberger, supra,* at 819. The Christian student organization filed suit claiming the university's refusal to authorize payment violated the First Amendment right to freedom of speech. The Supreme Court held, in relevant part, that because the program was neutral toward religion, provision of the requested funding

would not violate Establishment Clause, and that the denial of funding amounted to unconstitutional viewpoint discrimination. *Id.* The Court explained why the state's rationalization for its actions was improper:

> The University does acknowledge (as it must in light of our precedents) that 'ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts,' but insists that this case does not present that issue because the Guidelines draw lines based on content, not viewpoint. As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. See, *e.g., R.A.V., supra,* at 391, 112 S.Ct., at 2146. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. **The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history.** We conclude, nonetheless, that here, as in *Lamb's Chapel,* viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake [the Christian student group publication]. By the very terms of the SAF [student activities fund] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

Rosenberger, supra, at 830-831 (emphasis added).

In Kentucky, the Act does not (and certainly should not) exclude religion as a subject matter. In the case at hand, all parties have clearly understood from the beginning that by its very name and description, the Ark Encounter would be a tourist attraction based upon the account of the great flood in the book of Genesis—a story central to the beliefs and theology of many Christians and Jews (and also an account vehemently rejected by many others). The seminal importance of the Ark story, and the high interest and passionate discussion that it evokes (pro and con), will make the Ark Encounter an ideal and popular tourist attraction—and thus a superbly qualified recipient of the available state and local tax incentives programs. However, by your own explanation, something suddenly "changed" in the eyes of TDFA when an individual suggested at a February press conference that some discussions at the theme park may veer from the Old Testament's account of Noah's flood, to the New Testament's account of Jesus. **If TDFA were to deny the Project on this basis, it would frankly be difficult to imagine a more blatant example of viewpoint discrimination.**

Denying the tax rebates here simply because one aspect of the theme park may include a discussion about belief in Jesus would be egregiously unconstitutional and an act of open hostility toward religion. As the *Rosenberger* Court concluded: "The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause." *Rosenberger, supra,* at 845-846.

We note here that for TDFA to honor its constitutional duties and avoid viewpoint discrimination, it must withdraw the errant instruction provided in your most recent email to Mr. James Parsons, counsel for the Project. In that email, you wrote: "The issue is whether we can reach an understanding that there can be no religious indoctrination as a part of the project. . . those details will be included as covenants in the Tourism Development Agreement that follows final approval." Of course, for all the reasons explained hereinabove, the government can issue no such vague restriction or condition, and TDFA must avoid any attempt to supervise or censor the private speech of the Project's participants and guests.

In her concurring opinion in *Rosenberger,* Justice O'Connor noted that some cases are difficult to resolve because they may "lie[ ] at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities." *Id.* at 846. When this occurs, "[r]eliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause." *Id.*

But the case at issue here is ***not*** at all a difficult one to judge. As we have discussed above, the details of the broad, neutral scope of the Kentucky Tourism Development Act show that it clearly passes muster under the Establishment Clause. As with the provision of state funds to a wide spectrum of student newspapers in *Rosenberger*, Kentucky's provision of tax rebates to a wide spectrum of tourist attractions has a purely secular purpose of supporting economic development and "[a]ny benefit to religion is *incidental* to the government's provision of secular services for secular purposes on a religion-neutral basis." *Id.* at 843 (emphasis added).

For all of these reasons, it is quite clear that compliance with the First Amendment requires TDFA to proceed with its approval of the Ark Encounter Project, on the same neutral and objective basis that it has approved all of the previous amusement parks and other tourist attractions. Ironically, to deny the tax incentives now would run afoul of the very bedrock principle of neutrality that you have identified as TDFA's concern.

II. COMPLIANCE WITH THE KENTUCKY CONSTITUTION

TDFA can rest assured that its neutral review and approval of the Ark Encounter Project will fully comply not only with the safeguards of the Establishment Clause of the U.S. Constitution, but also with the corresponding provisions of the Kentucky Constitution. The Commonwealth's establishment prohibition is included in Section 5 of the Kentucky Constitution, which reads in relevant part:

> No preference shall ever be given by law to any religious sect, society or denomination; . . .and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

A. Interpretation of Section 5 of the Kentucky Constitution parallels the federal Establishment Clause.

Aside from litigation concerning the use of public funds to benefit religious private *schools*—which has always involved a specific analysis of Section 189 of the Kentucky Constitution in conjunction with Section 5—there are very few cases in the jurisprudence interpreting the more general contours and application of Section 5.

As it pertains to the matter at hand, there is no reason to expect that Kentucky courts would analyze and apply Section 5 any differently than the federal Establishment Clause has been applied in this context by the U.S. Supreme Court, the Sixth Circuit, and other federal courts. Indeed, the Kentucky Supreme Court has shown in recent years that its analysis closely mirrors an Establishment Clause analysis. *See, e.g., Neal v. Fiscal Court of Jefferson County*, 986 S.W.2d 907 (Ky. 1999) (relying extensively on federal "establishment" analysis in *Agostini v. Felton,* 521 U.S. 203 (1997), in deciding to uphold a Jefferson County program that provides school bus transportation to children attending private schools); *Kentucky Bldg. Comm'n v. Effron*, 310 Ky. 355, 359 (Ky. 1949) (noting that the "evident purpose" of the framers of the Kentucky Constitution in drafting Section 5 was, "in the language of Thomas Jefferson, to build a 'wall of separation between Church and State' which had been so firmly erected in the Federal Constitution.")

As noted, the legislative history of Section 5 indicates it is likely to be applied by reference to federal Establishment Clause cases. Section 5 dates back to Kentucky's original Constitution of 1792, and its language was taken from provisions of the 1776 Pennsylvania Constitution (currently codified in Section 3 of the Pennsylvania Constitution). *See* Robert M. Ireland, *The Kentucky State Constitution: A Reference Guide*, 29-30, (Greenwood Press 1999); Lowell H. Harrison, *Kentucky's Road to Statehood*, 116 (University of Kentucky Press 1992). Pennsylvania courts have repeatedly adopted the federal Establishment Clause tests when deciding cases involving Section 3 of their state constitution. *See, e.g., In Re 1839 North Eighth Street: In Re A Condemnation Proceeding In Rem by the Redevelopment Authority of the City of*

Philadelphia, 595 Pa. 241, 938 A.2d 341 (2007); *Haller v. Department of Rewenue*, 556 Pa. 289, 728 A.2d 351 (1999); *Springfield School District v. Department of Education*, 483 Pa. 571, 397 A.2d 1154 (1979). It is logical to expect that Kentucky courts would do the same, and refer to the federal Establishment Clause tests if made to decide a case involving a Section 5 challenge to a tax incentive program such as the Act.

B. Approving the pending Ark Encounter application will involve no unconstitutional "religious preference."

TDFA's approval of the Project under the Act will clearly pass constitutional muster because simply allowing tax rebates for this huge economic development project will in *no way* be "giving a preference by law to any religious sect, society or denomination." As shown above, Ark Encounter, LLC, is a private business that does not represent any "sect, society or denomination," and is requesting not a "preference" of any kind, but a generally available rebate of taxes it generates as a result of its large tourist attraction. Indeed, that is the very point: Ark Encounter is pursuing the very *opposite* of a "preference"—it merely wants and deserves to be dealt with on the ***same*** neutral and objective basis as everyone else.

The mere allowance of a generally available financial incentive to a business that has some connection to a religion does not run afoul of Section 5. As the Kentucky Court of Appeals explained long ago:

> Manifestly, the drafters of our Constitution did not intend to go so far as to prevent a public benefit, like a hospital in which the followers of all faiths and creed are admitted, from receiving State aid merely because it was originally founded by a certain denomination whose members now serve on its board of trustees.

Kentucky Bldg. Comm'n v. Effron, 310 Ky. 355, 220 S.W.2d 836, 838 (Ky. 1949) (upholding state funding for non-profit hospitals which were controlled by boards of certain religious faiths). This principle has never changed, and can be contrasted with a case like *Fiscal Court of Jefferson County v. Brady*, 885 S.W.2d 681, 686 (Ky. 1994), where local subsidies for private school bus transportation *were* found to violate Section 5 because *99%* of the challenged payments were made to religious schools. Obviously, no such concern exists here.

C. Denying the pending application would unconstitutionally "diminish" the "rights, privileges or capacities" of the applicant.

It is important to note that Section 5 of the Kentucky Constitution also includes a critical safeguard against government infringement of religious freedom. It ensures that "the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished. . . on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience." If TDFA were to deny the Ark Encounter application on the basis that has been suggested, or attach any restriction

on "religious" speech as a condition of receiving the tax rebate approval, TDFA would be in violation of the plain meaning of the above provisions.

"There is no room for construction of a constitution outside of the words themselves, if they are unambiguous...." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 863 (Ky. 2005). The primary rule of constitutional interpretation in Kentucky is to give the words used their "plain and ordinary meaning." *Freeman v. St. Andrew Orthodox Church, Inc.*, 294 S.W.2d 425, 428 (Ky. 2009); *Court of Justice v. Oney*, 34 S.W.3d 814, 816 (Ky. App. 2000) ("Where the language of the Constitution leaves no doubt of the intended meaning, courts may not employ rules of construction.")

D. Little basis would exist to challenge the Ark Encounter tax rebates.

A legitimate question exists as to whether any opponent of the Project would have sufficient standing to legally challenge the Project's approval. "Before one seeks to strike down a state statute he must show that the alleged unconstitutional feature injures him." *Second St. Properties, Inc. v. Fiscal Court of Jefferson County*, 445 S.W.2d 709, 716 (Ky. 1969). Although taxpayer standing has a lower threshold in Kentucky state court than in federal court, a plaintiff must still show meet this basic "injury" requirement. "Simply because a plaintiff may be a citizen and a taxpayer is not in and of itself sufficient basis to assert standing. There must be a showing of a direct interest resulting from the ordinance." *City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667, 668 (Ky. 1994) (citations omitted).

As you know, under the unique provisions of the Act here, the incentives paid to participants are not withdrawn from any general tax revenue fund, and thus do not add any burden to other taxpayers. Instead, the incentives are in the form of partial *rebates* of sales taxes generated by the program participant itself. In this case, the Project will thus generate the incremental sales taxes used to pay its own incentives. No one is conceivably "harmed" by this arrangement in any way. To the contrary, all Kentucky citizens stand to benefit by the extraordinary economic benefit and increased tourism dollars that the Ark Encounter Project will bring to the Commonwealth. For this reason, TDFA should enthusiastically approve Ark Encounter, LLC's pending application without further delay.

III. CONCLUSION AND OFFER OF SUPPORT

As Justice O'Connor summarized in her concurring opinion in *Rosenberger*, "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. Neutrality, in both form and effect, is one hallmark of the Establishment Clause." *Supra,* at 846 (internal citation omitted). If true neutrality is the aim of TDFA, it has no choice but to grant the requested approval of the Ark Encounter Project's application for the available tax incentives. The Commonwealth's duty in applying its neutral tax rebate statute is to review the *context* of an applicant's economic impact—not the *content* of its particular speech. If beer distilleries, motor speedways, and aquariums have qualified, so must the Project at hand.

Indeed, our First Amendment attorneys are so confident that this approval by TDFA will be lawful and appropriate, if the approval of the Project were to face any legal challenge, one or both of our undersigned organizations would strongly consider offering a *pro bono* legal defense of TDFA and the Commonwealth. Our attorneys have successfully represented and defended many state and local governmental bodies in similar First Amendment cases in federal and state appellate courts nationwide over the past two decades, and we are always honored to defend public officials who abide by constitutional principles.

We trust that this letter has been helpful in your thoughtful deliberations, and we stand ready to assist in this matter further in whatever way we can. If we can answer any questions or concerns in advance of the meeting where you will decide upon the TDFA application, please do not hesitate to contact us through the offices of Freedom Guard (in Louisiana) at (318) 658-9456 or by direct email to our Chief Counsel, J. Michael Johnson (mjohnsonlegal@gmail.com).

We thank you in advance for your attention to this matter and your dedicated public service. As you know, time is of the essence.

Very sincerely yours,

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