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COMMONWEALTH OF KENTUCKY
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CASE NO. 2008-SC-00253-TG AND
CASE NO. 2008-SC-00285-T

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UNIVERSITY OF THE CUMBERLANDS — APPELLANT

vs.

REV. ALBERT M. PENNYBACKER, ET. AL. — APPELLEES

ON APPEAL FROM THE FRANKLIN CIRCUIT COURT
HONORABLE JUDGE ROGER L. CRITTENDEN
CIVIL ACTION NO. 06-CI-00554
[COURT OF APPEALS CASE NO. 2008-CA-000643-MR]

AMICUS CURIAE BRIEF OF THE KENTUCKY EDUCATION ASSOCIATION

The undersigned hereby certifies pursuant to CR 76.12(5) that a true and complete copy of the following Amicus Curiae Brief of the Kentucky Education Association was served by mailing same, postage prepaid, to the following this the 31st day of March 2009: David Tachau, Tachau, Maddox, Hovious & Dickens, 2700 National City Tower, 101 South Fifth Street, Louisville, Kentucky 40202; Ellen Hesen, General Counsel, Office of the Governor, Kentucky State Capitol, Room 101, 700 Capital Avenue, Frankfort, Kentucky 40601; Mark R. Overstreet, Stites & Harbison, 421 West Main Street, P.O. Box 634, Frankfort, Kentucky 40602-0634; James P. Guenther and James D. Jordan, Guenther, Jordan & Price, 1150 Vanderbilt Plaza, 2100 West End Avenue, Nashville, Tennessee 37203; Timothy Tracey and Gregory S. Baylor, Center for Law and Religious Freedom, 8001 Braddock Road, Suite 300, Springfield, Virginia 22151; Bryan H. Beauman, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1400 Lexington, Kentucky 40507; Brian W. Raum and Glen Lavy, Alliance Defense Fund, 15100 North 90th Street, Scottsdale, Arizona 85260; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Judge Roger Crittenden, Franklin County Courthouse, P.O. Box 678, Frankfort, Kentucky 40602. The undersigned certifies that the record on appeal was not withdrawn from the Clerk's office.

Respectfully submitted,
KENTUCKY EDUCATION ASSOCIATION

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PURPOSE OF THE BRIEF

This Brief is submitted by the Kentucky Education Association ("KEA") as amicus curiae in support of Hon. Judge Roger Crittenden's decision rendered on March 6, 2008 finding two separate state appropriations to the University of the Cumberlands unconstitutional under various provisions of the Kentucky Constitution.

PARTICULAR ISSUES TO WHICH THIS BRIEF IS ADDRESSED

1. Whether the proposed appropriations to the University of the Cumberlands violate the General Assembly's constitutional duty to financially support public education in the Commonwealth.
2. Whether the Kentucky Constitution prohibits the expenditure of public funds for a private educational purpose.
3. Whether the proposed appropriations provide more than an "incidental" benefit to the University of the Cumberlands.

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I. THE LEGISLATURE HAS A LEGAL DUTY TO ENACT LAWS THAT ARE IN COMPLIANCE WITH THE KENTUCKY CONSTITUTION; WHERE IT FAILS IN THAT REGARD, IT IS THE SOLEMN DUTY OF THE COURTS TO CORRECT THE ERROR.

The case of Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989) is arguably the most profound decision wrought by this Court in the history of Kentucky, not just because of its impact on public education, but also because it required the Court to plainly articulate and fully exercise its power to review legislative actions. In that decision, this Court stood firm against the significant political pressures of the day and unapologetically executed its obligation to hold the General Assembly to the rules of law articulated in the Kentucky Constitution. In doing so, the Court acknowledged the separation of powers doctrine requires that "enactments of the General Assembly have a strong presumption of constitutionality." Rose at 209, citing Jefferson County Police Merit Board v. Bilyeu, 634 S.W.2d 414 (Ky. 1982). While acknowledging the right and duty of the General Assembly to legislate, the Court also acknowledged its own right and duty to review legislative acts for compliance with the rule of law:

> It is our sworn duty, to decide such questions when they are before us by applying the constitution. The duty of the judiciary in Kentucky was so determined when the citizens of Kentucky enacted the social compact called the Constitution and in it provided for the existence of a third equal branch of government, the judiciary.... To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the

Executive) to decide whether its actions are constitutional is literally unthinkable.

Id. (Emphasis added).

And so we find ourselves here again. In plain violation of multiple provisions of the Kentucky Constitution, in 2006 the General Assembly approved the appropriation of $11 million in public funds for the sole and direct benefit of a private educational institution. That institution, the University of the Cumberlands (hereafter "UC" or "the University") and a small group of intervening legislators are now before the Court arguing the validity of that action, despite clear evidence and the plain language of the Kentucky Constitution to the contrary. KEA understands the powerful political forces at play here. But an independent judiciary is the last bastion of the people against illegal overreaching by its elected officials. Where, as here, the General Assembly has considerably overstepped its constitutional authority, the people have a right to ask the Courts to rein in the overt abuse of power. All legislators, even those in powerful leadership positions, must abide by the rules of law. When that does not occur, the people necessarily look to the judiciary to restore the balance of power that is so vital to a truly democratic government.

II. THE SUPREME COURT SHOULD AFFIRM ALL ASPECTS OF JUDGE CRITTENDEN'S RULING ENTERED MARCH 6, 2008.

KEA fully supports Judge Crittenden's ruling in this matter. The Court's decision was well reasoned and was based on the rules of law articulated in published decisions from Kentucky Courts, all of which interpreted relevant

provisions of the Kentucky Constitution. The arguments of the Appellants notwithstanding, this case does not arise under the United States Constitution and is not controlled by any of the federal cases cited in their Briefs.

KEA adopts and relies upon the "Statement of Facts" and supporting arguments regarding the violations of Sections 171, 184 and 189 of the Kentucky Constitution set forth in Plaintiff's Memorandum in Support of Summary Judgment filed in the Franklin Circuit Court. (Included separately in Record, Motion filed 11/26/2007, pp. 6-8; 14-24; 38-51). To the extent those same facts and state constitutional arguments will be made by Appellees in their Brief to this Court, KEA adopts and relies upon them as if fully set forth herein.

III. THE GENERAL ASSEMBLY HAS AN AFFIRMATIVE DUTY TO FINANCIALLY SUPPORT PUBLIC EDUCATION AND CONVERSELY, IS CONSTITUTIONALLY PROHIBITED FROM SPENDING PUBLIC FUNDS FOR PRIVATE EDUCATIONAL PURPOSES.

There can be no doubt that Section 183 of the Kentucky Constitution imposes an affirmative duty on the General Assembly to provide an efficient system of common schools throughout the Commonwealth. The primary hallmark of that legislative duty is the obligation to insure adequate funding for public education. See Ky. Const. §§ 183-189. The landmark decision of this Court in Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989) put any question on those points permanently to rest. "Uniform testimony of the expert witnesses at trial, corroborated by data, showed a definite correlation between the money spent per child on education and the quality of the education received." Id. at 198. "No tax proceeds have a more

important position or purpose than those for education in the grand scheme of our government. The importance of common schools and the education they provide Kentucky's children cannot be overemphasized or overstated." Id. at 211.

The corollary to this point is that public funds cannot be spent by the General Assembly on private education. In fact, this Court previously found that a "fair reading" of Sections 183-189 of the Kentucky Constitution "compels the conclusion that money spent on education is to be spent exclusively in the public school system," except where the question has been put to the voters for approval. Fannin v. Williams, 655 S.W.2d 480, 482 (Ky. 1983)(emphasis added). Simply put, the General Assembly has no legal authority to appropriate public funds for the benefit of UC because it is a private school and the proposed appropriation was never put to the voters for approval.

It is no secret that funds for public education in Kentucky and elsewhere are already significantly strained. Allowing legislators to divert already limited funds to unconstitutional private educational purposes will simply put more financial pressure on Kentucky's public school systems. Projected state budget deficits during the 2008 legislative session were so dire that there was initially talk of reducing the per capita base amount of the "Fund to Support Education Excellence in Kentucky" (hereafter "SEEK") to the common schools. See KRS 157.320 et. seq. Although that did not actually come to pass, neither was SEEK significantly increased for the 2008-09 school year.

See Ky. Acts 2006, Vol. II, p. 1171 (2007-08 SEEK base guarantee $3822 per student); Ky. Acts 2008, Vol. I, Ch. 127, pp. 504-505 (2008-09 SEEK base guarantee $3866 per student). According to the US Census Bureau, for fiscal year 2005-06, Kentucky ranked 43rd of the states in per pupil spending on public education.[1] That ranking is not likely to significantly increase, given the stagnation in SEEK funding for the last three fiscal years, particularly when those per capita amounts are adjusted for inflation.

KEA asks the Court to zealously guard against any outcome in this case that would give the General Assembly any basis to believe it may directly appropriate public tax dollars to the benefit of private education for any reason. Such a decision would open the state coffers to claims for capital expenditures and direct payment of tuition and fees by every private school in the state, whether religious or secular. Every tax dollar spent on private schools has the direct and immediate effect of significantly reducing the funds available to support public education. Should these appropriations to UC be upheld, the long term cost to the taxpayers of the Commonwealth and more importantly, to the students of Kentucky public schools will be exponentially greater than the $11 million at issue in this case.

IV. THE APPROPRIATIONS MADE TO UC ARE CONSTITUTIONALLY PROHIBITED BECAUSE THEY ARE IN SUPPORT OF A PRIVATE EDUCATIONAL PURPOSE.

Section 171 of the Kentucky Constitution prohibits the use of any tax except for public purposes. "Taxes shall be levied and collected for public

[1] Source: US Census Bureau Annual Survey of Local Government Finances, 2005-06, Table 11. Available at: http://ftp2.census.gov/govs/school/06f33pub.pdf.

purposes only . . ." Ky. Const. §171 (emphasis added). Furthermore, Section 189 of the Kentucky Constitution prohibits the appropriation of public funds to any "church, sectarian or denominational school." Ky. Const. §189. Taken together, these constitutional provisions plainly prohibit UC from receiving any state appropriations. See also Fannin v. Williams, 655 S.W.2d 480, 482 (Ky. 1983). In response, the University disingenuously argues that the purpose of the disputed appropriations is not "educational," but rather, that the expenditure of state funds for the benefit of UC will serve a "public purpose." In making this argument, UC relies primarily upon Ky. Building Commission v. Effron, 310 Ky. 355, 220 S.W.2d 836 (1949), which allowed the use of matching public funds to subsidize the construction of both public and private hospitals across the state. In holding that the appropriation of public funds for that purpose was allowed, the former Court of Appeals relied solely on the fact that the construction of nonprofit hospitals is a public purpose, clearly intended for the common good of all the people throughout the state. Id., 220 S.W.2d at 837-838.

However, the holding of Effron has no application here. Unlike a hospital, the University itself does not directly serve the public "health and welfare." Rather, it is a private entity that provides higher education services to the few select students it approves for admission. Any benefit that might accrue to the "common good of all the people throughout the state" from the establishment of a Pharmacy School at UC is attenuated at best and is wholly dependent upon the educational activities that must necessarily first occur.

The former Executive who approved the provision acknowledged as much. In their Brief, Appellants cite to an exhibit attached to Mr. Tracy's deposition, which purports to offer former Governor Fletcher's explanation of the purpose of this appropriation:

> Let me address one project that has recently captured the attention of many, the grant for a pharmacy school at University of the Cumberlands.
>
> The fact remains: Kentucky has a shortage of pharmacists, particularly in Southeastern Kentucky. Also the tax dollars to build this school come from coal severance tax and not directly from the taxes you pay.

(Brief for Appellants, p. 3, citing Tracey Aff. Ex. A at 3)(emphasis added). In this brief quote, former Governor Fletcher twice acknowledged that the primary purpose of the appropriation is to build a "school" at UC. Building schools anywhere in the state is an "educational" use of state funds. To call it otherwise is simply absurd.

Any benefit that might possibly, eventually accrue to the public health and welfare from this scheme could not begin to take shape unless all of the following occur: 1) an entirely new educational course of study is established at UC; 2) a new classroom building wherein university students will be educated is constructed at UC, subsidized by public funds; 3) the students accepted into the program are properly educated and eventually graduate; 4) graduates from the new school, some of whom may benefit from the public funds appropriated for scholarships at UC, elect to stay and practice in Kentucky, and; 5) those graduates who elect to stay become approved for

licensure under the state laws and regulations of the Commonwealth. Completely unknown is whether this plan will alleviate the alleged shortage of pharmacists in Southeastern Kentucky, since there is nothing in any of the provisions of the "Pharmacy Scholarship" statute that requires practice in any particular area of the state as a condition of receiving funds. KRS 164.7901.[2] Only after all of these conditions precedent are met could any benefit to the "general health and welfare" of the Commonwealth reasonably be calculated to occur.

The proposed expenditures are plainly educational and Appellants' entire argument to the contrary is wholly without merit. Judge Crittenden correctly rejected this contention in his Order, and KEA urges the Court to do the same.

V. THE PROPOSED APPROPRIATIONS CONFER MUCH MORE THAN AN "INCIDENTAL" BENEFIT TO UC.

The intervening legislators take the interesting position that the $11 million in appropriations to UC and its students confer only an "incidental" benefit to that private institution and therefore, are not unconstitutional. (Brief for Appellants, Case no. 2008-SC-00285-T, p. 3). In support of that astounding assertion, they rely upon Neal v. Fiscal Court, 986 S.W.2d 907 (Ky. 1999). That reliance is misplaced. In Neal, the Court upheld the constitutionality of an ordinance that allowed the Jefferson County Fiscal Court to subsidize the cost of transporting private school students by making payments directly from its general fund to the transportation providers. The

[2] The only benefits sure to be conferred by the appropriations are to the University itself: UC will get a new building at public expense, pharmacists will be educated at a new building at UC, and those new UC students will have their tuition paid by public funds. However, there is absolutely no guarantee that this scheme will actually increase the number of pharmacists practicing in the area.

Court had previously held that payments made directly to the private schools were unconstitutional. See Fiscal Court of Jefferson County v. Brady, 885 S.W.2d 681 (Ky. 1994). In response to the opposing argument that subsidizing the cost of transporting private school students benefitted the private schools, the Court determined that the benefit was to the individual students, not to the schools that they attended:

> Any incidental benefit to private institutions educating the recipients of the transportation subsidy does not make the ordinance illegal. "The fact that in a strained and technical sense the school might derive an indirect benefit from the enactment, is not sufficient to defeat the declared purpose and the practical and wholesome effect of the law."

Id. At 19, citing Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930, 935 (1945). It must be pointed out that whether transporting students to a private school confers a direct or indirect benefit on the school itself is obviously a matter of debate; the prior incarnations of this Court have decided the issue both ways, depending upon the specific facts of the case presented. See, i.e., Sherrard v. Jefferson County Board of Education, 294 Ky. 469, 171 S.W.2d 963 (1942)(holding unconstitutional a law requiring local boards of education to provide transportation to private school students on the same basis as public school students in the district); Nichols v. Henry, supra, (specifically reaffirming the holding of Sherrard, but also upholding the constitutionality of KRS 158.115, which permitted, but did not mandate, county fiscal courts to use general funds to supplement the existing bus transportation system to transport both public and non-public elementary school students); Fiscal Court

of Jefferson County v. Brady, supra, (holding unconstitutional payments from the fiscal court directly to non-public schools to subsidize the cost of transporting students). But of course, the case at bar does not address student transportation at all, and KEA asserts that the conflicting line of cases referenced above, including Neal, are not at all relevant to the questions before the Court.

In the instant case, Appellants ask this Court to accept their contention that a capital construction project on the UC campus worth at least $10 million and payment of another $1 million to offset tuition and fees for future pharmacy students to attend UC is merely an "incidental" benefit to the University. The absurdity of that statement is overshadowed only by the audacity it takes to make it at all. These appropriations are not "incidental" under any commonly understood definition of that word. First, the construction of a new $10 million classroom building and payout of $1 million in scholarship funds to UC will not "occur by chance or without intention or calculation."[3] UC is entirely a private institution. The proposed appropriations are plainly targeted at UC and are specifically intended to confer an entirely new specific benefit to that institution; they will not occur as a side effect or unintended consequence of an already existing program. Therefore, the holding of Neal does not apply.

Furthermore, although $11 million dollars might be a "minor item of expense"[4] to some, it most assuredly is not incidental to the taxpayers who

[3] Webster's New Collegiate Dictionary, 1977, p. 580.
[4] Id.

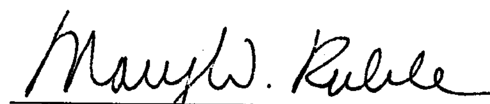
entrusted it to the General Assembly in the first place. Nor can such an amount really be of minor consequence to UC, considering the financial benefits that could accrue to the institution if the money is ever paid out. Every public tax dollar that may be paid to UC frees up a corresponding amount from its own coffers to spend in any way it sees fit. Appropriating $11 million in public funds to UC will result in an immediate, direct, significant fiscal benefit directly to UC. That cannot be "incidental" in any sense of the word.

CONCLUSION

For the reasons set forth above, KEA respectfully requests that the Supreme Court find the proposed appropriations to the University of Cumberlands unconstitutional and affirm Judge Crittenden's ruling entered on March 6, 2008.

Respectfully submitted,

KENTUCKY EDUCATION ASSOCIATION

BY: 

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