COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

CASE NO.2008-SC-00253-TG

UNIVERSITY OF THE CUMBERLANDS — APPELLANT

v.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-000643-MR
FRANKLIN CIRCUIT COURT NO. 06-CI-00554

REV. ALBERT M. PENNYBACKER, et al. — APPELLEES

AND

CASE NO. 2008-SC-000285-T

VERNIE MCGAHA (SENATOR IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE KENTUCKY GENERAL ASSEMBLY), et al. — APPELLANTS

v.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-000682-MR
FRANKLIN CIRCUIT COURT NO. 06-CI-00554

UNIVERSITY OF THE CUMBERLANDS, et al. — APPELLEES

AMICUS CURIAE BRIEF IN SUPPORT OF JUDGMENT BELOW

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Certificate of Service

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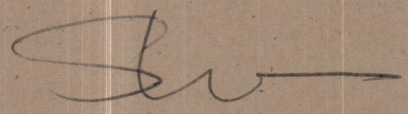

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STATEMENT OF POINTS AND AUTHORITIES

SUMMARY OF ARGUMENT

The governmental appropriations challenged here — a $10 million appropriation for the construction of a pharmacy-school building on the campus of the University of the Cumberlands and the creation of a perpetual scholarship program for pharmacy-school students — contravene the plain language of §§ 5 and 189 of the Kentucky Constitution and the framers' intent in adopting those provisions. They do so by conferring a direct, specific benefit upon a religious institution and by diverting public funds to a private, religious school for educational purposes. When viewed in the historical context of the development of church-state separation generally, and of Kentucky's longstanding commitment to church-state separation specifically, it is evident that the Kentucky General Assembly overstepped its authority by seeking to appropriate funds for the benefit of a private, sectarian university.

ARGUMENT

I. THE SEPARATION OF CHURCH AND STATE AND THE ATTENDANT PROHIBITIONS AGAINST FUNDING FOR RELIGIOUS INSTITUTIONS SERVE AS AN ESSENTIAL BULWARK AGAINST ENCROACHMENTS ON RELIGIOUS FREEDOM.

Since the Republic's founding, the "wall of separation between church and State" has been the chief bulwark against governmental encroachments on religious freedom. 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861), *quoted in Wallace v. Jaffree*, 472 U.S. 38, 92 (1985). As James Madison (the author and principal architect of the Religion Clauses of the First Amendment to the U.S. Constitution) explained, the basic principle underlying this separation is that "religion & Govt. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), *in* JAMES MADISON, WRITINGS 786, 789 (Library of Am.

1999). This principle, which is embodied in both the federal and Kentucky constitutions, reflects "the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society" while quelling the divisiveness and civil strife that religious differences can so easily engender. *McCreary Co., Ky. v. ACLU of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

The Founders were, after all, "aware that they were designing a government for a pluralistic nation — a country in which people of different faiths had to live together." JON MEACHAM, AMERICAN GOSPEL 101 (2006). And they well knew the dangers that this religious diversity posed, both to freedom of conscience and to social stability:

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.

Everson v. Bd. of Educ., 330 U.S. 1, 8-9 (1947).[1]

But the principled rejection of governmental support for religion reflected deep theological commitments as much as it did political realities. Roger Williams (the Baptist minister and theologian who founded Rhode Island) had long since preached that

[1] *See also, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835) ("Religion . . . cannot share the material force of those who govern without being burdened with a part of the hatreds to which they give rise."); James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 11 ("Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions."), *reprinted in Everson*, 330 U.S. at 69 (appendix to dissenting opinion of Rutledge, J.).

for religious belief to be genuine, people must come to it of their own free will: Coerced belief and punishment of dissent are anathema to true faith. ROGER WILLIAMS, *The Bloudy Tennant, Of Persecution for Cause of Conscience* (1644), *reprinted in* 3 COMPLETE WRITINGS OF ROGER WILLIAMS (Samuel L. Caldwell ed., 1963). Williams taught that freedom of conscience flourishes only when churches act without governmental interference, and that official sponsorship degrades religion's purity and integrity.[2]

The Founders took those teachings to heart: Madison cautioned that an established religion would "weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its author; and . . . foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust to its own merits." Madison, *Memorial and Remonstrance*, *supra* n.1, ¶ 6. Thomas Jefferson warned that government-supported religion "tends . . . to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it." THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom* § I, *in* JEFFERSON: WRITINGS 346 (Merrill D. Peterson ed., 1984). And Benjamin Franklin observed: "When a religion is good, I conceive it will support itself; and when it does not support itself, and God does not care to support it, so that its professors are obliged to call for the help of the civil power, 'tis a

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[2] *See, e.g.*, RICHARD P. MCBRIEN, CAESAR'S COIN 248, at n.37 (1987) ("'[T]he Jews of the Old Testament and the Christians of the New Testament 'opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world' . . . if He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world'" (quoting Williams)); WILLIAMS, *The Bloudy Tennant*, *supra* ("[T]rue religion does not need the support of carnal weapons." (quoted in CONRAD H. MOEHLMAN, THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 60 (1951))).

sign, I apprehend, of its being a bad one." Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), *quoted in* THE AMERICAN ENLIGHTENMENT: THE SHAPING OF THE AMERICAN EXPERIMENT IN A FREE SOCIETY 93 (Adrienne Koch ed., 1965). Thus, the separation of church and state was not merely a political compromise between competing sects, but a sacred commitment to ensuring absolute freedom of conscience.

Nothing was more central to achieving that aim than the strict prohibition against public funding of religious institutions. "The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968); *see also, e.g.*, *Locke v. Davey*, 540 U.S. 712, 722 (2004). Jefferson wrote that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern . . . ." JEFFERSON, *Bill for Establishing Religious Freedom*, *supra*, § I. And Madison explained the need for a bright-line rule against public funding for religious institutions, warning that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." Madison, *Memorial and Remonstrance*, *supra*, ¶ 3.

Sensitive to these concerns for freedom of conscience and avoidance of religiously based strife, the several states have enacted their own constitutional prohibitions against public support for religious institutions. *See, e.g.*, GA. CONST. art.

IV, §5 (1789); PA. CONST. art. II (1776); N.J. CONST. art. XVIII (1776); *see also Locke*, 540 U.S. at 723 (citing other state constitutions). Kentucky sought to prevent these evils ever since the adoption of its first Constitution in 1792: "[N]o man can of right be compelled to . . . support any place of worship . . . and . . . no preference shall ever be given by law to any religious societies or modes of worship." KY. CONST. art. XII, §3 (1792).

Sadly, the states have not always live up to these constitutional commitments, instead yielding to the temptation to channel taxpayer funds to religious organizations. But no matter how well-intentioned their aims in doing so may have been, the result has been "popular uprisings" and suppression of religious dissent, just as the Founders of the Republic and of this Commonwealth so feared. *Locke*, 540 U.S. at 722-23.[3]

Thus, as new threats to religious freedom arose, the states enacted ever more strict prohibitions against governmental encroachments. *See generally id.* at 719-25 (explaining that many states have enacted far stricter protections against public support for religion than the federal First Amendment contains, and upholding those restrictions as constitutionally permissible). Sections 5 and 189 of the Kentucky Constitution serve that critical function, "restrict[ing] direct aid from state or local governments to sectarian schools much more specifically and significantly than the . . . 'establishment of religion' clause in the First Amendment." *Fiscal Court v. Brady*, 885 S.W.2d 681, 686 (Ky. 1994) (striking down public funding of transportation expenses for parochial-school students

[3] *See also, e.g.*, JOHN THOMAS NOONAN, THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 74 (2000) (detailing citizens' protests against Virginia bill that would give a portion of state property taxes to churches); F. LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 188 (2003) ("In defending their religious liberty against overreaching clergy, Americans in all regions found that Radical Whig ideas best framed their argument that state-supported clergy undermined liberty of conscience and should be opposed").

under §§ 5 and 189, notwithstanding that aid might be permissible under federal Establishment Clause).

This Commonwealth, its people, and their respective religious denominations and houses of worship have been well served by the Kentucky Constitution's rigorous protections for freedom of conscience. Those essential safeguards should not now be jettisoned as the challenged appropriations here contemplate. No matter how laudatory in the short run the Legislature's objectives might be, they cannot justify the degrading effect upon both faith and civil society that results from having religious institutions compete in the political arena for public dollars and public favor.

II. THE PLAIN LANGUAGE OF SECTIONS 5 AND 189 AND THE HISTORICAL CONTEXT IN WHICH THEY WERE ADOPTED COMPEL THE CONCLUSION THAT THE CAPITAL APPROPRIATION HERE IS UNCONSTITUTIONAL.[4]

A. The historical context in which Sections 5 and 189 were adopted evinces an understanding and intent that public funds should not be used to improve private, sectarian colleges.

The relevant portion of § 5 provides: "No preference shall ever by given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity." KY. CONST., § 5, cl. 1. Similarly, § 189 mandates that "no . . . [public funds] raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any . . . sectarian or denominational school." When the plain language of these provisions is viewed together and in the historical context in which the provisions were adopted, §§ 5 and 189 work in tandem to promote a vision of

[4] In this brief, *Amici* confine their arguments to the capital construction appropriation struck down under §§ 5 and 189. *Amici* maintain, however, that the Pharmacy Scholarship Program is likewise invalid under § 5.

government that preserves church-state separation and freedom of conscience in part by prohibiting public funding of religious schools.

Specifically, the current language of § 5 is an expansion upon a similar clause that appeared in identical form in all three of Kentucky's previous constitutions. *See* KY. CONST. art. XIII, § 5 (1850) ("no preference shall ever be given by law to any religious societies or modes of worship"); KY. CONST. art. X, § 3 (1799) ("no preference shall ever be given by law to any religious societies or modes of worship"); and KY. CONST. art. XII, § 3 (1792) ("no preference shall ever be given by law to any religious societies or modes of worship"). The phrase "was borrowed from the Pennsylvania Constitution of 1790." ROBERT M. IRELAND, *The Kentucky State Constitution: A Reference Guide* 29 (Greenwood Press 1999); *see also* PA. CONST. art. IX, § 3 (1790) ("no preference shall ever be given, by law, to any religious establishments or modes of worship").

Although the Bill of Rights section that evolved into the current § 5 underwent only limited substantive changes over the course of Kentucky's first three constitutions, it received significant textual and structural revisions as a result of the 1890 constitutional convention. These changes included moving the "no preference shall ever be given" clause from the last sentence of the section to its opening phrase. *Compare* KY. CONST. art. XIII, § 5 (1850) *with* KY. CONST. § 5, cl. 1 (1891). Similarly, the prohibition against granting "preference[s]" to "religious societies or modes or worship" was expanded in 1891 to include "any religious sect, society or denomination" as well as "any particular creed, mode of worship or system of ecclesiastical polity." *Compare* KY. CONST. art. XIII, § 5 (1850) *with* KY. CONST. § 5, cl. 1 (1891). Thus, the current § 5 represents a greater restriction upon governmental authority than that of its three predecessors.

There is no direct evidence that the Delegates addressed the question whether public funding of sectarian schools would constitute an impermissible preference[5] under § 5. *See generally* 1 Official Report of the Proceedings and Debates in Convention (Debates) 845-1025 (1890). Historical evidence suggests, however, that at the time the precursor to § 5 was first adopted in 1792, the framers favored an expansive interpretation that avoided any commingling of government with religion. *See e.g.*, IRELAND, *supra*, at 29-30 (noting that Kentucky's early commitment to the principle of separation of church and state "exceeded that of more established states such as Pennsylvania," leading to Kentucky's barring "clergy from serving in the legislature or as governor"); *see also* Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80-1 KY. L.J. 1, 30 (1991-1992) ("Kentucky's sentiment was anti-clerical"). Also, the Delegates' discussions in 1890 regarding public financing of higher education evinced an understanding that funding of private, sectarian colleges remained the province of the colleges' religious sponsors, not government officials.

Specifically, "the principal exponent of [§ 189] expressed deep displeasure at the efforts of religious colleges, both in the legislature and the convention, to undermine public funding" of Kentucky's only public university (A&M College) by advocating that popular votes be required for any future increases in public funding to the university. IRELAND, *supra*, at 167; *see also* 4 Debates 4542-4547 (1890). In opposing the sectarian colleges' effort, Delegate Beckner observed that if adopted, the popular-vote requirement would hamper A&M College's continued growth and financial stability. *See* 4 Debates 4544-4545 (1890). In the context of these discussions, Delegate Beckner's observations

[5] One reason for this may be that the framers considered such a question unnecessary, particularly in light of § 189's prohibition against the use of taxes or public funds for "any church, sectarian or denominational school." KY. CONST. § 189.

reveal his recognition that the financing of private, sectarian universities is a function of the religious institutions to which they are affiliated rather than the government. Specifically, Delegate Beckner stated:

> The denominational colleges have done a great work, and have turned out great men. That will not be denied. They are usually patronized by those who entertain the peculiar views they represent. A Presbyterian prefers to have his boy go to a Presbyterian College. The Methodist prefers to have his go to a Methodist College, and the Catholic prefers to have his boy go to a Catholic College. That is a matter of preference, and the denominational colleges are founded for the benefit of those who hold to these respective views; but there is a large class who prefer not to have their boys educated at a denominational college. Then there are many of those who prefer not to have their children brought up at the particular place where the college may be located, or to subject them to the particular views maintained in other respects by those in charge of that college. They may not hold to something that the college represents, and they do not choose to send their children to it; but whether that be so or not, it is the duty of the State to furnish to its children facilities for higher education. . . . What I have criticized was not the education received at the [sectarian] colleges, *nor the fact that church people maintain these colleges* . . . what I do object to is, that any of these officers should come here and attempt to destroy another seat of learning in the State . . . to destroy competition . . .

Id. at 4544-4545 (emphasis added).

Perhaps more pointedly, Delegate Beckner also observed:

> I am proud to say that I have contributed out of my means more for the support of denominational colleges, not only of my own church, but of other churches, than any other man in the Commonwealth . . . I have spent month after month of my time in securing the location of a denominational college in the community where I live, because I felt that its influence would be for good. That is a matter that concerns me. *The location and endowment of these institutions is a matter that concerns the church.*

Id. at 4543 (emphasis added).

Thus, from this historical context three things seem evident: 1) those who drafted and adopted §§ 5 and 189 acted on the belief that public financing of private, sectarian universities contravened Kentucky's longstanding adherence to the strict separation of

religion and government; 2) they sought to expand the limitation upon government's ability to allocate funds, or otherwise grant preferences to, any religious institutions by means of the changes that were adopted in § 5; and 3) these protections were not born out of animus towards religiously affiliated schools, but rather out of dedication to the notion that publicly funded higher education should be accessible to all Kentuckians regardless of faith. These conclusions are consistent with this Court's observation that:

> The delegates to the Constitutional Convention of 1890 did not casually adopt verbatim the language of the bill of rights as it was found in the previous three Kentucky constitutions. Instead, these delegates examined the guarantees afforded the citizens of sister states by their constitutions along with the traditional protections given to and expected by the citizens of Kentucky. Then guided by their own consciences, they drafted a comprehensive bill of rights for the new constitution. It is generally recognized that the convention of 1890 was comprised of competent and educated delegates who were sincerely concerned with individual liberties. The debate on the bill of rights after it was reported from the Committee on Preamble and Bill of Rights lasted nearly two months and covers almost 950 pages in the published proceedings and debates of the convention.

Ky. State Bd. for Elementary and Secondary Educ. v. Rudasill, 589 S.W.2d 877, 880 (Ky. 1979) (recognizing as "obvious" that § 5 "is more restrictive of the power of the state to regulate private and parochial schools than is the first amendment to the federal constitution"). It is also consistent with the recognition that:

> Most of the delegates to the constitutional convention [of 1890] felt that the real root of Kentucky's governmental problems was the almost unlimited power of the General Assembly. One of them even said that "the principle, if not the sole, purpose of the constitution which we are here to frame, is to restrain its [the Legislature's] will and restrict its authority."

The Constitution of the Commonwealth of Kentucky, Legislative Research Commission, Informational Bulletin No. 59 at 3 (rev. Oct. 2005).

B. Appellants' argument that the capital appropriation is not a "preference" under Section 5 misapprehends the "public benefit"

exception and too narrowly construes Section 5's limitation on governmental authority.

Appellants assert that the $10 million appropriation is not an impermissible "preference" under § 5 because Kentucky's citizens are the ultimate beneficiaries of the pharmacy school and UC is merely the "conduit" through which this benefit is delivered. [Brief for Appellant University of the Cumberlands (UC Brief), at 31; *see also* Brief for Appellants (Legislators' Brief), at 3-5]. This argument improperly construes the "public benefit" exception in *Ky. Bldg. Comm'n v. Effron*, 220 S.W.2d 836 (Ky. 1949), and if adopted, would eviscerate § 5's limitation upon governmental authority.

Specifically, in *Effron*, this Court considered the constitutionality of allocating public funds to private, non-profit hospitals that were "controlled and governed by boards of certain religious faiths." *Id.* at 838. In finding no violation under § 5, the Court specifically noted that the hospitals were "open to the public of all creeds and faiths [or no faith]" and that "religion is not taught in these hospitals nor is any one sect given preference over another." *Id.* Of particular importance was that the *recipient* of the public funds actually served a public benefit. *Id.* The Court stated that "it was never the intention of the framers of § 5 of our Constitution to prevent the State from aiding with money raised by taxes *an institution rendering a public service* merely because the governing body of the institution is composed of one denomination." *Id.* (emphasis added).

Unlike the delivery of healthcare services by the *recipient* of public funds in *Effron*, UC's operation of a pharmacy school is a private, educational function for the benefit of UC and its students. Any healthcare benefit Kentuckians might derive from this appropriation would not be delivered by UC, but rather by third parties (the school's

prospective graduates) who may or may not choose to practice their profession in Kentucky. Thus, if Appellants' construction of the "public benefit" exception were adopted, any incidental benefit (no matter how remote or speculative) would justify direct appropriations to sectarian institutions if an arguably "public benefit" could result. This argument disregards the plain meaning of § 5 and its framers' intent; and its adoption would impose a technical interpretation upon § 5's otherwise clear and unambiguous limitation upon governmental authority. *See Bd. of Penitentiary Com'rs v. Spencer*, 166 S.W. 1017, 1018 (Ky. 1914) ("a construction [of a constitutional provision that is] so loose as to virtually nullify the section, which is mandatory in its terms, should not be adopted").

C. Because the appropriation for the construction of a pharmacy school serves an inherently educational purpose, as opposed to a public-health one, and is directed to a sectarian school, the expenditure violates Section 189.

Section 189 provides that no public funds "raised or levied for educational purposes" shall be "appropriated to, or used by, or in aid of, any church, sectarian or denominational school." In seeking to avoid § 189's application, Appellants maintain that the funds for the pharmacy-school building do not violate § 189 because: 1) the funds were raised for a health and welfare purpose ("to address the pharmacist shortage") as opposed to an educational purpose [UC Brief at 19-20]; 2) the appropriation is not "used by or in aid of religion" [*id.* at 20-24]; and 3) as construed by the trial court, § 189 violates the First Amendment. [*Id.* at 26-28.][6]

[6] In this brief, *amici* will address Appellants' first argument: that the capital appropriation is not derived from "educational" funds and therefore is not subject to § 189. Appellees and other prospective *amici* will address the latter two arguments.

First, Appellants' characterization of the multimillion-dollar appropriation as one for "health and welfare" rather than education subverts § 189, in that Appellants' argument seeks to supplant the objective analysis of whether the public funds are appropriated for an "educational" purpose with a more deferential review of the General Assembly's policy decisions. Such an inquiry is inconsistent with this Court's decisions and would render § 189's prohibition against funding of sectarian schools virtually unenforceable. Specifically, this Court has stated that whether funds under § 189 are raised for an educational purpose, courts must look to "the character of the use for which [the public funds are] expended." [UC Brief, at 16 (quoting *Effron*, 220 S.W.2d at 837)]; *see also Hager v. Ky. Children's Home Soc.*, 83 S.W. 605, 608 (Ky. 1904) (in determining whether governmental appropriation to a private, charitable organization that provided housing to indigent children violated § 177, "the vital point . . . is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means"). In applying this analysis, courts look to the "actual" use of the funds rather than the General Assembly's stated policy goals for appropriating them. *See e.g., Effron*, 220 S.W.2d at 359-60 (receipt of public funds by religiously affiliated hospital did not violate §§ 5 and 171 because hospitals perform public function); *Neal v. Fiscal Court*, 986 S.W.2d 907, 912 (Ky. 1999) (public funds, if not appropriated directly to private schools, can be "used" as transportation subsidies for private-school students because "safe transportation" is a legitimate public purpose and the schoolchildren were "clearly the primary beneficiaries" of the subsidies as opposed to the nonpublic schools).

Here, Appellants' argument, if adopted, diverts this Court's review from the funds' actual use to the General Assembly's stated purpose, regardless of how speculative or attenuated that purpose might be. Specifically, Appellants disregard the educational nature of the appropriation's use (the construction of a school building for the education of students at a private university), and instead ask the Court to accept the General Assembly's policy decision that the appropriation furthers a "health and welfare" purpose. Notwithstanding that some students who attend the pharmacy school might eventually provide a "public benefit," the *recipient* of the public funds (UC) will use those funds for an exclusively private function in violation of § 189. Moreover, Appellants' argument would permit the General Assembly to circumvent § 189 by classifying any private, educational endeavor as furthering a "public purpose" so long as the Legislature could provide some arguable connection between the private function and an arguably public benefit. This result cannot be countenanced in light of § 189's plain language.

Appellants' reliance upon *Neal v. Fiscal Court, Jefferson County*, 986 S.W.2d 907 (1999), is also unpersuasive because there, unlike here, the *recipients* of the public funds — the transportation system operated by the local Board of Education — contracted with various bus and vehicle companies to deliver the public benefit of ensuring safe transportation for the county's school children. *Id.* at 911. UC, by contrast, is receiving a direct, substantial benefit in the form of a capital improvement to its real property so that it might expand its curriculum and attract a greater number of students to its private university. The public benefit, even as articulated by Appellants, is delivered not by UC, but by the students who will attend the proposed pharmacy school, pass their

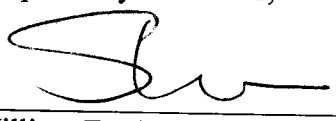
required courses, obtain their licenses, and then choose to remain in Kentucky to work as pharmacists. [*See* UC Brief at 17 ("[m]eeting the healthcare needs of the people of Kentucky is a public purpose.")] As the trial court correctly noted, "there is a fundamental difference between providing scholarships to Kentucky residents to attend the public or private college of their choice and providing direct payments to selected non-public schools to develop and operate educational programs." [R.366.]

CONCLUSION

The plain language of §§ 5 and 189 evince "clear and unambiguous" meanings — government may not give preference to any religious institutions, nor may public funds be appropriated to private religious schools for educational purposes. These provisions, when viewed in context of the "history of the times and the state of existing things" at their adoption, support the judgment below — that the pharmacy school appropriation violates §§ 5 and 189 of the Kentucky Constitution.

Date: March 31, 2009

Respectfully submitted,



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