COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2008-SC-00253-TG

UNIVERSITY OF THE CUMBERLANDS,	APPELLANT
v.	
REV. ALBERT M. PENNYBACKER, et al.,	APPELLEES
STEVEN L. BESHEAR, and	APPELLEE
VERNIE McGAHA, et al.	APPELLEES

BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF APPELLEES

Respectfully submitted,

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CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. mail, postage pre-paid, on this 30th day of March 2009: David Tachau, Jasper Ward, Tachau Meek PLC, 2400 National City Tower, 101 S. Fifth Street, Louisville, KY 40202; Ellen M. Hesen, General Counsel, Office of the Governor, 101 Capitol Building, 700 Capitol Avenue, Frankfort, KY 40601; Bryan H. Beauman, Sturgill, Turner, Barker & Maloney, PLLC, 333 W. Vine St., Suite 1400, Lexington, KY 40507; Brian W. Raum, Glen Lavy, Alliance Defense Fund, 15100 N. 90th St., Scottsdale, AZ 85260; Mark R. Overstreet, Stites & Harbison, 421 W. Main St., P.O. Box 634, Frankfort, KY 40602; James D. Jordan, Guenther, Jordan & Price, PC, 1150 Vanderbilt Plaza, 2100 West End Avenue, Nashville, TN 37203; Timothy J. Tracey, Gregory S. Baylor, Center for Law & Religious Freedom, 8001 Braddock Road, Suite 300, Springfield, VA 22151. I also further certify that the record on appeal was not withdrawn from the Clerk's office.

R. Daniel Beale

STATEMENT OF POINTS AND AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*

The American Jewish Congress is a membership organization founded in 1918 to protect the civil, political, economic and religious rights of American Jews. An important part of the American Jewish Congress's mission is to preserve the religious freedom guaranteed in the First Amendment of the U.S. Constitution. Consistent with its interest in the separation of church and state, the American Jewish Congress has participated in many cases involving government funding to religious institutions to ensure that these funds do not run afoul of the protections afforded by the Free Exercise Clause and Establishment Clause. The American Jewish Congress's longstanding involvement with First Amendment jurisprudence places it in a unique position to provide valuable insight into this important constitutional question.

STATEMENT OF THE CASE

In April 2006, the Kentucky General Assembly appropriated $10 million to Appellant University of the Cumberlands ("Appellant"), to finance construction of a new pharmacy school building on the University's campus. 2006 Ky. Acts 252 ("H.B. 380"). In subsequent litigation brought by Appellees, the Franklin County Circuit Court held that the appropriation violated Section 189 of the Kentucky Constitution, which prohibits the Commonwealth from appropriating educational funds to any church, sectarian or denominational school. Ky. Const. § 189.

Section 189 is one of many similar provisions found in state constitutions, commonly referred to as "Blaine Amendments," which restrict state funding of religious education. Appellant's assertion that Section 189 is unconstitutional as applied by the circuit court below thus has potential ramifications for the laws and policies of Kentucky and numerous other states. Because Section 189 and other state "Blaine Amendments"

serve an important function in preserving the separation of church and state and promoting government neutrality among religions, the Court should uphold the circuit court's interpretation of Section 189.

SUMMARY OF ARGUMENT

Appellant asserts that "the circuit court's construction of Section 189 raises questions regarding its constitutionality under the First Amendment to the United States Constitution." App. Br. at 26. Appellant's argument is erroneous. First, states do not violate the Free Exercise Clause by placing stricter limits on the provision of public funds to religious institutions than are required by the Establishment Clause, and differential treatment of religious organizations in state funding schemes has been upheld by the U.S. Supreme Court. *See Locke v. Davey*, 540 U.S. 712 (2004). Second, Section 189 does not limit the free speech of religious educational institutions on the basis of viewpoint, because the provision creates at most a neutral subject-matter classification. *See Virginia v. Black*, 538 U.S. 343 (2003). Because H.B. 380 plainly violates Section 189's bright line prohibition against state funding of religious education, *see Fiscal Court v. Brady*, 885 S.W.2d 681 (Ky. 1994), this Court should affirm the judgment of the circuit court.

ARGUMENT

I. SECTION 189 IS A CONSTITUTIONAL FUNDING RESTRICTION UNDER THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE

Appellant claims that the circuit court's construction of Section 189 "raises questions regarding its constitutionality under the First Amendment" because it imposes special disabilities on the basis of religious views or religious status. App. Br. at 26. Under the Free Exercise Clause, however, states may enforce stricter policies of church and state separation than are required by the Establishment Clause. *See Arizona v. Evans*,

514 U.S. 1, 8 (1995). Because Section 189 is neutral among religions and does not engage in intrusive religious inquiry, it satisfies all requirements of the Free Exercise Clause.

A. States Do Not Violate the Free Exercise Clause by Placing Stricter Limitations on the Provision of Public Funds to Religious Institutions Than Are Required by the Establishment Clause

The Commonwealth of Kentucky, like at least twenty-six other states,[1] has chosen to protect the religious freedom of its citizenry by guaranteeing stricter separation of church and state than the Establishment Clause requires. Ky. Const. § 189. Although Section 189 imposes greater restrictions on the Commonwealth's ability to fund non-secular institutions with public funds than does the First Amendment to the United States Constitution, this does not mean that Section 189 is unconstitutional. Absent a conflict with federal constitutional guarantees, Kentucky may provide a stricter separation of church and state. *See Widmar v. Vincent*, 454 U.S. 263, 277-78 (1981). "The fact that [a state] has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question." *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 386 (W.D. Mo. 1973). This is especially so considering that "[w]ithin our federal system the substantive

[1] *See, e.g.*, Ariz. Const. art. II, § 12; Cal. Const. art. XVI, § 5; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 2, ¶ VII; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 5; Mass. Const. art. XLVI, Amendments, art. XVIII, § 2; Mich. Const. art. XIII, § 2; Minn. Const. art. XIII, § 2; Mo. Const. art. IX, § 8; Mont. Const. art. X, § 6; Nev. Const. art. XI, § 10; N.M. Const. art. XII, § 3; N.Y. Const. art. XI, § 3; N.D. Const. art. VIII, § 5; Okla. Const. art. II, § 5; Or. Const. art. I, § 5; Pa. Const. art. III, § 15; S.D. Const. art. VI, § 3, art. VIII, § 16; Tex. Const. art. I, § 7; Utah Const. art. I, § 4; Vt. Const. ch. 1, art. III; Va. Const. art. VIII, § 11; Wash. Const. art. I, § 11; Wyo. Const. art. I, § 19.

rights provided by the Federal Constitution define only a minimum." *Mills v. Rogers*, 457 U.S. 291, 300 (1982).

The Free Exercise clause requires that laws imposing a burden on freedom of religion be both neutral and generally applicable. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990). Even if this Court finds that Section 189 is neither neutral nor generally applicable, the Commonwealth has identified a compelling interest in maintaining the separation between church and state and has narrowly tailored Section 189 to that effect. Even under the more stringent analysis applied by the Supreme Court pre-*Smith*, Section 189 neither coerces Appellant to act contrary to its religion, nor compels Appellant to refrain from action required by its faith. *See Lyng v. Nw. Indian Cemetery*, 485 U.S. 439, 451 (1988). Therefore Section 189 does not violate the Free Exercise Clause.

Courts have routinely refused to find free exercise violations when programs funding non-secular institutions or activities are struck down subject to the Establishment Clause. *See, e.g., Norwood v. Harrison*, 413 U.S. 455, 469 (1973) (holding that a state is not "constitutionally obligated to provide even 'neutral' services to sectarian schools"); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963) (finding that public reading of the Bible in school violated the Establishment Clause, regardless of Christian students' free exercise concerns); *Mozert v. Hawkins Co. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (requiring students to read and study from textbooks they found offensive to their religious beliefs did not violate their free exercise rights).

In the Supreme Court's most recent foray in the subject of free exercise and educational institutions, the Court found that a state's refusal to fund a student's

education in theology from a generally applicable scholarship fund was not a denial of the student's free exercise. *Locke*, 540 U.S. at 712. The *Locke* Court recognized that although the state of Washington's Constitution "draws a more stringent line [regarding funding of religious institutions] than that drawn by the United States Constitution" (as does the Kentucky Constitution), this did not violate any student's right to free exercise. *Id.* at 722.

Where a state provides funding to a non-secular institution for the benefit of a public interest, the funding may be impermissible despite a potential impact on the institution's free exercise interests. In *Teen Ranch, Inc. v. Udow*, for example, the Sixth Circuit considered a state statute that restricted funding of a provider of youth residential care, where the provider incorporated religious elements and attitudes in its organization. 479 F.3d 403 (6th Cir. 2007). Although the youth services certainly benefited the community, the court recognized that funding the group violated the statute, and discounted the effect on the free exercise rights of the provider. *Id.* at 409-10.

Appellant fails to recognize that "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Mozert*, 827 F.2d at 1070 (*quoting Sherbert v. Verner*, 374 U.S. 398, 412 (1963)). Accordingly, Section 189, which prohibits non-secular institutions like the University of the Cumberlands from acquiring state funding but does not otherwise limit Appellant's private rights, does not violate the Free Exercise Clause.

B. Section 189 Does Not Discriminate Among Religions and Does Not Require Intrusive Religious Inquiry by the State

Even under the narrowest interpretation of *Locke* and other precedents upholding the differential treatment of religious institutions in public funding schemes, Section 189

passes constitutional muster because it neither discriminates among religions nor requires intrusive religious inquiry by the Commonwealth.

The principle of denominational neutrality prohibits the government from passing laws that favor one religion over another. *Larson v. Valente*, 456 U.S. 228, 246 (1982) ("The government must be neutral when it comes to competition between sects." (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952))). The Tenth Circuit recently cited *Larson* in holding that certain state-subsidized scholarship programs in Colorado, which denied eligibility for students attending "pervasively sectarian" colleges or universities, were unconstitutional under the neutrality principle of the Free Exercise Clause. *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). The *Colorado Christian* court distinguished *Locke* on the grounds that the scholarship program at issue in that case "excluded all devotional theology majors equally . . . and therefore did not discriminate among or within religions." *Id.* at 1256.

Section 189 is comparable to the program at issue in *Locke* (and not at all similar to the program at issue in *Colorado Christian*). Section 189 prohibits the Commonwealth from providing educational funding to "*any* church, sectarian or denominational school." Ky. Const. § 189 (emphasis added). Rather than expressing a preference for one religious tradition or denomination over another, or denying benefits only to those institutions that are *pervasively* sectarian, the Kentucky Constitution creates a wholesale exclusion of religious educational funding under Section 189, and thus fully comports with the denominational neutrality principle of the Free Exercise Clause. *See Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004) (upholding a state program providing tuition to private secular secondary schools but categorically excluding religious ones).

The *Colorado Christian* court also distinguished *Locke* on the grounds that, under the *Locke* scholarship program, the institution, rather than the state, determined whether the student's major was devotional, and the state therefore did not engage in intrusive religious inquiry. 534 F.3d at 1256 (quoting *Locke*, 540 U.S. at 717). As discussed in the context of "excessive entanglement" concerns, *infra*, federal and state courts disfavor inquiry into the religious views of public funding recipients. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("[C]ourts should refrain from trolling through a person's or institution's religious beliefs."); *New York v. Cathedral Acad.*, 434 U.S. 125, 132 (1977) (holding the practice of examining the schools' teaching practices for religious content unconstitutional).

Once again, the concern with "intrusive religious inquiry" is simply not implicated by Section 189, because its prohibition against public educational funding for *any* religious institution makes classification easy. In this case, for example, the circuit court readily determined the University's status as a religious institution: "[t]here is no question that the appropriation . . . is a direct payment to a non-public religious school for educational purposes." *Pennybacker v. Beshear*, No. 06-CI-00554 (Mar. 6, 2008). No further examination was necessary to apply the prohibition against funding set forth in Section 189. Because Section 189 affords neutral treatment to all religions and avoids the problem of intrusive religious inquiry, the provision withstands constitutional muster even under the narrowest reading of *Locke*.

II. SECTION 189 DOES NOT RESTRICT FREE SPEECH UNDER THE FIRST AMENDMENT BECAUSE IT DOES NOT ENGAGE IN VIEWPOINT DISCRIMINATION

Appellant argues that the circuit court's construction of Section 189 "raises questions regarding its constitutionality under the First Amendment," because a rule

excluding religious schools from eligibility for public funding constitutes viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. App. Br. at 26-27. Appellant, however, misconstrues the doctrine of viewpoint discrimination. Section 189 creates merely a categorical, *subject matter* distinction, which does not favor or oppose any particular viewpoint, religious or otherwise. Moreover, the doctrine of viewpoint discrimination does not apply in this case, because the Commonwealth has not created a public forum for the purpose of facilitating private speech.

A. Section 189 Creates a Neutral Subject Matter Distinction That Does Not Favor or Oppose Any Particular "Viewpoint"

A regulation purporting to limit speech or expression is unconstitutional as "viewpoint discrimination" when "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995). The exclusion of a class of speech based on subject matter or content is permissible, however, if it is neutral and designed to preserve the limits of the forum that the State has created. *See id.*; *see also Black*, 538 U.S. at 361-62 (stating that content discrimination proscribing an entire class of speech poses no significant danger of idea or viewpoint discrimination). Section 189 is constitutional because it does not discriminate against any particular ideology, opinion or perspective of the affected religious institutions. It is viewpoint-neutral legislation that seeks only to preserve the Commonwealth's policy of strict separation of church and state.

Differential treatment of religion may sometimes distinguish based on subject matter and sometimes distinguish based on viewpoint. *See, e.g.*, *Rosenberger*, 515 U.S. at 831 ("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."); *Pfeifer v. City of West Allis*, 91 F. Supp. 2d 1253, 1267 n.6 (E.D. Wis. 2000) ("Religion may either be a perspective . . . or may be a substantive activity in itself. In the latter case, the government's exclusion of the activity is discrimination based on content, not viewpoint.") (citation omitted). In support of its argument, Appellant cites several cases that plainly involved viewpoint discrimination.

In *Rosenberger*, the defendant University "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831. Likewise, the films in *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), discussed child-rearing from a religious perspective, and the organization in *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 110 (2001), taught moral lessons from a Christian perspective through live storytelling and prayer. Not one of those cases is relevant here.

Section 189 creates a distinction based on religion as a broad subject matter -- it does not target religious viewpoints on a given topic. The Kentucky Constitution expresses its policy of separation of church and state by creating a bright-line rule that prohibits public educational funding to religious institutions *as a class*. As such, the Commonwealth's policy is motivated by respect for the ideal of religious freedom, and avoids the fundamental problem of government discrimination among religions. *See Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

For the reasons stated above, Section 189 does not constitute viewpoint discrimination under the Free Speech Clause of the First Amendment.

B. The Doctrine of Viewpoint Discrimination Does Not Apply in this Case, Because H.B. 380 Does Not Create a Public Forum Designed to Facilitate Private Speech

Even if the circuit court's construction of Section 189 implicates viewpoint discrimination rather than mere subject matter classification, Appellant's argument under the Free Speech Clause nevertheless fails. The doctrine of viewpoint discrimination applies only where government purports to regulate speech occurring in a traditional, designated or limited public forum. *See Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009). Because H.B. 380 does not create a public forum of *any* type, there can be no viewpoint discrimination on the facts of this case, and the General Assembly's appropriation does not implicate free speech concerns.

To create a designated public forum, "the government must make an affirmative choice to open up its property for use as a public forum." *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003). "The government does not create a public forum by inaction or by permitting limited disclosure, but only by intentionally opening a non-traditional forum for public discourse." *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)). Where the government establishes subsidies designed for the achievement of specified ends, it creates a limited public forum only if the subsidy is specifically "designed to facilitate private speech." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542-44 (2001).

In appropriating public funds to the University of the Cumberlands for the construction of a pharmacy building, the General Assembly did not purposefully establish a forum "designed to facilitate private speech." Rather, H.B. 380 was intended to

facilitate research and learning by providing appropriate facilities. *See, e.g., Am. Library Ass'n*, 539 U.S. at 206 (holding that a public library's acquisition of Internet terminals did not "create a public forum for Web publishers to express themselves," but rather to "facilitate research, learning, and recreational pursuits"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (upholding federal subsidies for art projects in part because the programs were not designed to "indiscriminately encourage a diversity of views from private speakers") (citation omitted).

In public funding cases, the Supreme Court finds a public forum only where the government directs money specifically for the purpose of promoting private speech. In *Rosenberger*, for example, the Court held that the University established a limited public forum because the student activity funding at issue was expressly designed to "open a forum for speech . . . including the publication of newspapers." 515 U.S. at 840. Likewise, in *Velazquez*, the Court found a limited public forum where federal legal services grants were used to provide attorneys to speak "on the behalf of his or her private, indigent client." 531 U.S. at 542-43. Because H.B. 380 was intended to facilitate learning and research, rather than private speech, *Rosenberger* and *Velazquez* are inapposite, and the doctrine of viewpoint discrimination is inapplicable.

III. H.B. 380 VIOLATES SECTION 189 OF THE KENTUCKY CONSTITUTION

H.B. 380 violates Section 189, which declares that "[n]o portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school," Ky. Const. § 189, because it appropriates government funds raised for construction at a religiously-affiliated school. In claiming that H.B. 380 does not violate

Section 189, Appellant makes two erroneous arguments: (1) Appellant claims that the fact that the funds were raised via a government-issued bond for "public purposes," rather than via another type of tax, is dispositive; and (2) Appellant claims that the Commonwealth can monitor the University of Cumberlands' use of public funds to ensure that they are not used for any religious purpose. App. Br. at 3, 4, 7, 8-10, 19-20, 21-22. These facts do not cure the Section 189 violation.

First, Appellant argues that because the funding for the pharmacy building comes from the sale of bonds (rather than from a fund earmarked for "educational purposes"), financial support of this non-secular institution is constitutionally sound. App. Br. at 20. However, the funds are clearly being *used* for educational purposes. Appellant admits that H.B. 380 was passed to address a shortage of pharmacists by directly appropriating $10 million to the University of the Cumberlands for a new school building. App. Br. at 3. Despite this transparency, the Commonwealth hopes to save its program by labeling this money, directed to the benefit of a non-secular university, as being from a "public purpose" fund, rather than for any educational purpose. This distinction is irrelevant. This Court should not be swayed by the re-naming of funds clearly used to the aid of a religious institution.

This Court has said that it finds federal law "helpful in deciding how to apply our own constitutional provisions." *Brady*, 885 S.W.2d at 686. Accordingly, the Supreme Court's handling of federal First Amendment law is instructive on the scope of the appellant's violation of Section 189, a provision designed to enforce the separation of church and state by eliminating state funding of non-secular schools. In considering whether government funding should be considered an endorsement of religion, courts ask

what an "objective observer" would think of the government's action and whether that objective observer would think that the government was funding, and thereby tacitly endorsing, the recipient of the funds. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). *See also Lee v. Weisman*, 505 U.S. 577, 590 (1992) (striking down a program where a school's "effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject"). At issue here is whether "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Wallace*, 472 U.S. at 56 n.42 (*citing Lynch v. Donnelly*, 465 U.S. 668, 690 (1984)).

In this instance, an objective observer would see that a non-secular university was exclusively singled out by legislative order and funded with bonds sold by a government agency (the Kentucky Infrastructure Authority) and repaid with revenue raised by a government tax. App. Br. at 7. A reasonable observer would see the Commonwealth as the source of the funding of the University of the Cumberlands' new school building and would identify this financial support as government endorsement.

Second, Appellant argues that Kentucky's support of a non-secular institution is permissible because the government has "impose[d] certain monitoring requirements" on Appellant. App. Br. at 9. This too is a flawed argument that misconstrues the relevant doctrine.

The Kentucky Constitution prohibits excessive entanglement between church and state. *See, e.g.*, Ky. Const. §§ 5, 189; *Brady*, 885 S.W.2d at 686. Government monitoring of a religious institution, like the monitoring program relied upon by the Appellant, is excessive entanglement that is repugnant to the Kentucky Constitution. *See*

Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). In *Lemon v. Kurtzman*, the Supreme Court struck down a program that paid teachers in nonpublic elementary schools a supplement of their annual salary. *Id.* at 611. The Court objected to the program's requirement that the government monitor the school's records in order to determine how much of the school's expenditures went to secular education, and how much went to religious activity. *Id.* at 620. Under H.B. 380, the University of the Cumberlands is required to give the government "access to its books, documents, papers, records, or other evidence for the purpose of financial audit or program review" to ensure that the University is not using the money for any religious purpose. App. Br. at 9 (internal citations omitted). The monitoring system in *Lemon*, remarkably similar to the system Appellant relies on support of its appeal, was a "kind of state inspection and evaluation of the religious content of a religious organization [that] is fraught with the sort of entanglement that the Constitution forbids." *Id.*

As a matter of law, therefore, the Commonwealth's funding of the University of the Cumberlands violates Section 189.

CONCLUSION

For the foregoing reasons, the American Jewish Congress respectfully requests that this Court uphold the circuit court's construction of Section 189, and affirm the judgment that the appropriation of public funds to the University of the Cumberlands for the construction of a pharmacy building violates the Kentucky Constitution.

Dated: March 30, 2009

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