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

UNIVERSITY OF THE CUMBERLANDS,

APPELLANT

BRIEF FOR APPELLANT  
UNIVERSITY OF THE CUMBERLANDS

v.

REV. ALBERT M. PENNYBACKER, et al.,

APPELLEES

STEVEN L. BESHEAR and

APPELLEE

VERNIE McGAHA, et al.

APPELLEES

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

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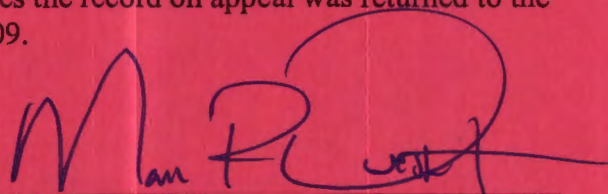
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(Certificate of Service on Reverse)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served on March 16, 2009, by United States Postal Service, First Class Mail, postage prepaid, upon: David Tachau and Jasper Ward, Tachau Meek PLC, 2400 National City Tower, 101 South Fifth Street, Louisville, Kentucky 40202-3115; Ellen M. Heslen, General Counsel, Office of the Governor, 101 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601; 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; and the Honorable Roger Crittenden, Franklin County Courthouse, P.O. Box 678, Frankfort, Kentucky, 40602. The undersigned also certifies the record on appeal was returned to the Franklin Circuit Court Clerk on March 12, 2009.

A handwritten signature in blue ink, appearing to read "Mark R. Overstreet", is written over a horizontal line.

Mark R. Overstreet



## **INTRODUCTION**

This is a Kentucky constitutional case in which the University of the Cumberlands appeals from the Judgment and Order of the Franklin Circuit Court granting summary judgment to a group of taxpayer plaintiffs. In its Judgment and Order, the Court held that the General Assembly violated Sections 5, 51, and 189 of the Kentucky Constitution by funding the construction of a pharmacy school building on the University's campus and establishing a Pharmacy Scholarship Program as part of a comprehensive plan to address the Commonwealth's shortage of trained and licensed pharmacists.

## **STATEMENT CONCERNING ORAL ARGUMENT**

Appellant University of the Cumberlands desires oral argument. This case presents the important question of whether the Kentucky Constitution disqualifies the University from being used by the General Assembly as a means for addressing the Commonwealth's shortage of pharmacists simply because the University is religiously-affiliated and seeks to instill Christian values in its students. Because the case involves significant and unsettled questions of Kentucky constitutional law, the University believes oral argument would be helpful to the Court.

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## STATEMENT OF THE CASE

### A. The Pharmacist Shortage.

The Commonwealth of Kentucky, like many states across the country, suffers from a significant, public healthcare crisis—a shortage of pharmacists. In mid-2007, Kentucky was one of four states (along with Alabama, California, and North Carolina) reported to have a “high demand” for pharmacists, meaning the state had a large number of vacant pharmacist positions that it simply could not fill. (Nelson Aff. ¶ 8.)<sup>1</sup> The National Association of Chain Drug Stores reported in 2006 that Louisville, Lancaster, Leitchfield, and Inez were “specific shortage areas.” (Nelson Aff. Ex. F.) At present, the state has approximately 4,190 licensed pharmacists serving a population of about 4,200,000 people. Thus, for every 1,000 residents of Kentucky, there is only one licensed pharmacist. (Nelson Aff. ¶ 9.)

The pharmacist shortage is particularly acute in the rural areas of Kentucky. (Nelson Aff. ¶ 9.) For instance, the counties in Southeastern Kentucky, such as Whitley County, have only 0.8 pharmacists per 1,000 residents, which is twenty percent fewer pharmacists per 1,000 residents than the overall state ratio. (Nelson Aff. ¶ 9.)

The pharmacist shortage is driven by a number of factors. (Nelson Aff. ¶ 7.) First, the number of prescriptions written by doctors and other healthcare professionals annually out-paces the growth in the pharmacist workforce. (Nelson Aff. ¶ 7.) Second, the percentage of the population over age sixty (the largest group of medication users) is rapidly increasing. (Nelson Aff. ¶ 7.) Third, the large number of “baby boomers” who entered the pharmacist profession in the late 1960s and early 1970s are now retiring.

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<sup>1</sup> Although part of the record on appeal, Dr. Nelson’s affidavit was not separately paginated by the Clerk in preparing the record on appeal.

(Nelson Aff. ¶ 7.) Finally, over the last several years, the scope of practice for pharmacists has expanded to include more direct patient care services, such as making hospital rounds with doctors, suggesting drug therapies, and monitoring patient responses. (Nelson Aff. ¶ 7.)

The pharmacist shortage took national prominence in December 2000, when the United States Department of Health and Human Services (“HHS”) published a report at the direction of Congress. (Nelson Aff. Ex. C.) *See also* Health Research and Quality Act of 1999, *codified at* 42 U.S.C. §201-218a. HHS’ report concluded:

The evidence clearly indicates the emergence of a shortage of pharmacists over the past two years. This shortage is considered a dynamic shortage since it appears to be due to a rapid increase in the demand for pharmacists coupled with a constrained ability to increase the supply of pharmacists. The factors causing the current shortage are of a nature not likely to abate in the near future without fundamental changes in pharmacy practice and education.

(Nelson Aff. Ex. C at i, 4.) The consequences of the shortage, according to HHS, include “service restrictions particularly affecting underserved or otherwise vulnerable sectors of the population such as the elderly” and “residents of rural communities.” (Nelson Aff. Ex. C at ii, 19-20, 31-32, 57-58,)

The pharmacy profession itself has taken note of the shortage. For example, the American Association of Colleges of Pharmacy has stated:

The demand for trained pharmacy professionals has never been greater than in recent years . . . . Currently, a shortfall of as many as 157,000 pharmacists is predicted by 2020. In an article published in the March 2005 issue of *American Journal of Health-System Pharmacy*, Kentucky was ranked as having the sixth highest shortage of pharmacists . . . .

(Nelson Aff. Ex. G.)

B. The General Assembly Addresses the Pharmacist Shortage.

On April 11, 2006, the Kentucky General Assembly enacted the Fiscal Year 2006-2007 general appropriations bill, House Bill 380 ("HB 380"). (Tracey Aff. Ex. H at 1.)<sup>2</sup> The bill included a three part plan for addressing the pharmacist shortage: (1) an almost \$80,000,000 appropriation to the University of Kentucky for the construction of a "Biological/Pharmaceutical Complex" (Tracey Aff. Ex. H at 113); (2) the establishment of a Pharmacy Scholarship Program to encourage students to study pharmaceutical science (Tracey Aff. Ex. H at 357-59.); and (3) a \$10,000,000 appropriation for the construction of a pharmacy school building on the campus of the University of the Cumberlands ("UC") in Whitley County, (Tracey Aff. Ex. H at 231-32). Members of the General Assembly commented to the press that the purpose of these appropriations was "filling a shortage of pharmacists." (Tracey Aff. Ex. J at 2.)

Former Governor Ernie Fletcher signed HB 380 into law on April 24, 2006. Addressing the appropriation for the pharmacy school building at UC, Governor Fletcher noted the Commonwealth's shortage of pharmacists:

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.

(Tracey Aff. Ex. A at 3; Tracey Aff. Ex. B.)

The Kentucky Pharmacists Association applauded the measures taken by the General Assembly. It offered its assistance to UC in establishing a new pharmacy school

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<sup>2</sup> Although part of the record on appeal, Mr. Tracey's affidavit was not separately paginated by the Clerk in preparing the record on appeal.



to “begin addressing the tremendous pharmacist shortage plaguing this state.”

(Colegrove Aff. Ex. I.)<sup>3</sup> The Association also issued a statement explaining:

For many years, the Kentucky Pharmacists Association (KPhA) has strongly supported the expansion of accredited, affordable educational opportunities for pharmacy students in the Commonwealth. In 2006, we have provided guidance and counsel to Sullivan University in Louisville as it plans to introduce a new pharmacy program. Also, we have offered the same support to officials at the University of the Cumberlands in Williamsburg who wish to organize a pharmacy school on their campus. We face a tremendous shortage of licensed pharmacists across the Commonwealth, and therefore KPhA encourages the expansion of pharmacy training slots in Kentucky as long as the need exists.

(Colegrove Aff. Ex. I at 3.)

1. “Biological/Pharmaceutical Complex” at the University of Kentucky.

The General Assembly included in HB 380 an almost \$80,000,000 appropriation from the Capital Construction Fund to the University of Kentucky (“UK”) for the construction of a “Biological/Pharmaceutical Complex.” (Tracey Aff. Ex. H at 118, 120, 121, 130, and 131.) The funds for the appropriation were generated through the sale of General Fund Bonds to private investors. (Tracey Aff. Ex. H at 118, 120, 121, 130, and 131.) The appropriation was in addition to the \$40,000,000 in bond funds already appropriated to UK in the prior budget bill for construction of the same building. (Tracey Aff. Ex. I at 141.)

These appropriations came in response to a call by UK for funding to address “the severe shortage of pharmacists in Kentucky, particularly in rural communities.” (Tracey Aff. Ex. K.) The Dean of the UK College of Pharmacy, Dr. Kenneth Roberts, stated publicly that the response to the shortage “need[ed] to start in education facilities so that

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<sup>3</sup> Although part of the record on appeal, Mr. Colegrove’s affidavit was not separately paginated by the Clerk in preparing the record on appeal.

we have capacity to produce more graduates.” Andrea Braslavsky, *A Bitter Pill to Swallow: Rx for Disaster?*, WebMD, July 16, 2001, <http://www.webmd.com/healthy-aging/features/bitter-pill-to-swallow>.

UK’s construction of the new “Biological/Pharmaceutical Complex” is already underway and is scheduled to be completed in December 2009. (Tracey Aff. Ex. K.) The new building will house the University’s College of Pharmacy, providing three times more space than the University’s existing pharmacy facilities. (Tracey Aff. Ex. K.) The College of Pharmacy currently enrolls about 100 new students a year, and the new building is expected to double that enrollment. (Tracey Aff. Ex. K.)

2. The Pharmacy Scholarship Program.

HB 380 also established a Pharmacy Scholarship Program. (Tracey Aff. Ex. H at 357-59, *codified at* KRS § 164.7901.) The General Assembly created the Program as a special trust fund in the State Treasury to be administered by the Kentucky Higher Education Assistance Authority (“KHEAA”). (Tracey Aff. Ex. H at 359.)

The preamble to the Program provides that its purpose is “to establish a scholarship program to provide eligible Kentucky students the opportunity to attend an accredited school of pharmacy at a private four (4) year institution of higher education with a main campus located in an Appalachian Regional Commission county in the Commonwealth and become certified pharmacists in the Commonwealth.” KRS § 164.7901(1). The specific eligibility criteria enumerated in subsection (3) of the Program place no limitation on the type (private or public) or the location of the school scholarship recipients may attend. KRS § 164.7901(3). Rather to be eligible for aid under the Program, a student must only be (1) a resident of the Commonwealth; (2) enrolled

fulltime in a pharmacy school; and (3) agree to render one year of “qualified service” in the Commonwealth for each year the scholarship is awarded. *Id.* “Qualified service” is defined as “full-time practice in the Commonwealth of Kentucky as a licensed pharmacist for a majority of the calendar year.” *Id.*

In HB 380, the General Assembly appropriated \$1,000,000 from the General Fund for the initial funding of the Program. (Tracey Aff. Ex. H at 11.) All subsequent funding is to come from Coal Severance Tax revenues levied under KRS § 143.020 “in an amount that permits each Kentucky resident eligible under subsection (3) . . . to be awarded a scholarship...,” up to 4% of the Coal Severance Tax revenues. (Tracey Aff. Ex. H at 359.) The trust fund for the Program may also receive state appropriations, gifts, and grants from public and private sources, as well as federal funds. (Tracey Aff. Ex. H at 359.) Any fund balance at the close of the fiscal year does not lapse, but is carried forward to the next fiscal year and continuously appropriated for the purposes of the fund. (Tracey Aff. Ex. H at 359.)

Scholarships are awarded under the Program to individual students. KRS §§ 164.7901(2), 164.7901(3). The KHEAA pays the scholarship funds to the college or university the student chooses to attend. Thus, for example, UK’s College of Pharmacy would only receive scholarship funds under the Program if a student awarded a pharmacy scholarship chooses to attend UK. The scholarship funds are directed to schools by students, not the KHEAA. KRS §§ 164.7901(2), 164.7901(3).

In the Fiscal Year 2009-2010 general appropriations bill, House Bill 406 (“HB 406”), the General Assembly directed that “no funds shall be transferred to the Pharmacy Scholarship Program Fund within the [KHEAA] in fiscal year 2008-2009 and fiscal year

2009-2010.” Exec. Budget 2008 Acts, ch. 127 (HB 406), reprinted in KRS ch. 47 app. A (West 2008).

3. The Pharmacy School Building at UC.

The \$10,000,000 for the capital construction of a pharmacy school building on the UC campus originates from the Infrastructure for Economic Development funds as conduit financing. (Tracey Aff. Ex. H at 215, 231-232.) HB 380 provides two Infrastructure for Economic Development bond pools: a \$150,000,000 bond funded pool for Non-Coal Producing Counties, and a \$100,000,000 bond funded pool for Coal Producing Counties. These two pools finance nearly 560 individual projects, ranging from repair and maintenance of roads and sewers to high school renovations. The bond pools are managed by the Kentucky Infrastructure Authority (“KIA”), which has been tasked by the legislature with the “public purpose” of assisting “the state with respect to the construction and acquisition of infrastructure projects.” KRS § 224A.035. These projects are aimed at “the health, safety, welfare and well-being of the general public.” KRS § 224A.020.

The bonds from these pools are sold by the KIA to private investors and repaid with revenue raised by the Coal Severance Tax. (Tracey Aff. Ex. H at 86-87.) The Coal Severance Tax is “levied on every taxpayer engaged in severing and/or processing coal within th[e] Commonwealth.” KRS § 143.020. The interest on the bonds is repaid from the General Fund to the private purchasers of the bonds. (Tracey Aff. Ex. H at 10.) Before issuing bonds for any project, the KIA is obligated by statute to submit the proposed bond issue to the Capital Projects and Oversight Committee for review and recommendation along with documentation that the proposed use of the funding is in

compliance with regulatory and statutory authority. KRS § 224A.120(1); *see also* KRS § 45.810(1)-(2).

The appropriation to UC for the construction of the pharmacy school building is one of the hundreds of projects paid for from the Infrastructure for Economic Development bond pools. Many of the projects are aimed at meeting the medical and healthcare needs of the citizens of Kentucky, including a \$750,000 appropriation for the construction of a Health Education Building (Tracey Aff. Ex. H at 218), \$1,000,000 for the construction of Health Education Centers (Tracey Aff. Ex. H at 225), \$250,000 for construction of an Ambulance/EMS Building (Tracey Aff. Ex. H at 219), \$1,000,000 for the construction of a Wellness Center (Tracey Aff. Ex. H at 226), and \$220,000 for Capital Construction for Grey Hawk Fire and Rescue (Tracey Aff. Ex. H at 224).

The Infrastructure for Economic Development bond pools also include appropriations for similarly situated private institutions. For example, \$317,900 was appropriated to Campbellsville University for improvements to the school's Tech Center. (Tracey Aff. Ex. H at 284.)

C. Safeguards Imposed to Ensure UC Uses the \$10,000,000 Appropriation for the Construction of a Pharmacy School Building.

The Governor's Department for Local Government ("DLG") works with the KIA to manage and administer projects funded through the Infrastructure for Economic Development bond pools, including the pharmacy school building appropriation. Until June 16, 2008, the DLG was known as the Governor's Office for Local Development, or GOLD. GOLD entered into a Memorandum of Understanding ("MOU") with UC on or about December 10, 2007, to govern the disbursement and use of the \$10,000,000



appropriation for the pharmacy school building. (II R. 283-286.) The MOU is specifically conditioned on the outcome of this litigation. (II R. 283.)

Should this litigation be resolved so as to permit the appropriation, UC agrees in the MOU that “any funding provided will be used for the sole purpose of constructing and furnishing a new pharmacy building on the campus of [UC] in Whitley County, Kentucky,” and that it “will use the pharmacy building and any furnishings and fixtures acquired with the appropriated funds exclusively for purposes which advance the public interest of the Commonwealth of Kentucky.” (II R. 284.) UC is forbidden under the MOU from using the appropriated funds for “any church, sectarian, or denominational purpose.” (*Id.*) UC also agrees to “comply with all applicable federal, state, and local non-discrimination statutes and ordinances with regard to employment and the administration of its educational programs.” (*Id.*) If UC ever ceases to use the building constructed with the appropriated funds “as a school of pharmacy,” the MOU provides that ownership of the building is “immediately vested in the County of Whitley and shall be utilized by the County for purposes consistent with the general health and welfare.” (*Id.*)

The MOU also imposes certain monitoring requirements. UC must allow DLG (formerly GOLD), the Finance and Administration Cabinet, the Auditor of Public Accounts, and the Legislative Research Commission access to its “books, documents, papers, records, or other evidence” for the purpose of “financial audit or program review” to ensure UC is complying with its obligations under the MOU. (II R. 285.)

Once the funds are made available, the DLG (formerly GOLD) will require UC, like all capital grant recipients, to submit a Project Scope and Budget document,

including a detailed scope of work explanation and cost breakdown. (Tracey Aff. Ex. E.)

Before any funds are disbursed to the project, DLG will require a Request for Disbursement form in which UC will have to certify that the work has been done in accordance with the terms and conditions of any grant agreement and submit invoices and other documentation of the work performed. (Tracey Aff. Ex. F.) UC will also have to submit Quarterly Progress Reports detailing the status of the work completed. (Tracey Aff. Ex. G.)

Consistent with these requirements, UC's Board of Trustees adopted a policy governing receipt of the appropriated funds, which provides:

The University shall use any state or federal funds which it receives in a manner entirely consistent with any designated purpose. It shall comply with all terms and conditions which are attached to the receipt of the funds. It shall comply with all statutes and regulations which become applicable to the University because of receipt of the funds. The University shall comply with any discrimination prohibition which is applicable to it because of the receipt of federal or state funds or otherwise.

The University shall not use any facility for religious worship or sectarian activity or for a school or department of divinity if the facility was constructed or renovated by the University in whole or in part with federal or state grants or loans.

The University shall structure and manage its accounting policies and practices so that it may demonstrate that the University's policy is being followed.

(Colegrove Aff. Ex. H.)

D. The University of the Cumberlands.

UC is a private university located in Whitely County in the heart of the Appalachian region in Southeastern Kentucky. (Colegrove Aff. ¶ 3 & Ex. C.) It is accredited by the Commission on Colleges of the Southern Association of Colleges and

Schools and affiliated with the Southern Baptist Convention. (Colegrove Aff. ¶ 6.) It has historically served students primarily, though not exclusively, from the Appalachian mountain regions. (Colegrove Aff. ¶ 3 & Ex. C.) For the 2005-2006 academic year, UC had an enrollment of 1,743 students. (Colegrove Aff. ¶ 5.)

The Appalachian region, where UC is situated, is economically “distressed.” (Colegrove Aff. Ex. A.) The poverty rate is twice the national average and unemployment is one and a half times the national average. (Colegrove Aff. Ex. A.) The region experiences excesses in mortality from many of the major causes of death and illness, such as cancer, heart disease, and stroke, relative to the rest of the United States. (Colegrove Aff. Ex. B.) The Appalachian region is also dramatically underserved by medical professionals, including pharmacists. (Colegrove Aff. Ex. B.)

UC has established several programs to aid economically disadvantaged persons living in the surrounding Appalachian community. For example, through its Mountain Outreach program, UC has assisted thousands of people, building its 121st home in 2005 and assisting over 3,000 persons with clothing and household items. (Colegrove Aff. ¶ 4; Tracey Aff. Ex. B at 41:2- 42:1.)

UC offers students from a broad range of backgrounds, including diverse religious backgrounds, a liberal arts education enriched with Christian values. (Colegrove Aff. Ex. C at 1; Tracey Aff. Ex. C at 26:2-27:18.) It seeks to foster in its students a heightened awareness and sensitivity to the search for truth and a deepened responsibility toward mankind. (Colegrove Aff. Ex. C at 1.) The University complies with all applicable federal, state, and local nondiscrimination laws with regard to its admission and discipline decisions. (Colegrove Aff. ¶ 7.)

E. The Present Lawsuit.

Because of its objection to the manner in which UC disciplined a student, a matter not reached by the Circuit Court, Appellee Kentucky Fairness Alliance urged Governor Ernie L. Fletcher to veto the \$10,000,000 million appropriation approved by the General Assembly for the construction of the pharmacy school building. The day after Governor Fletcher signed HB 380 into law, including the appropriation for the pharmacy school building, April 25, 2006, Appellee Christina Gilgor, the Executive Director of the Kentucky Fairness Alliance, brought suit against the Governor claiming that the \$10,000,000 appropriation for the pharmacy school building and the \$1,000,000 initial appropriation for the Pharmacy Scholarship Program violated Sections 2, 3, 5, and 189 of the Kentucky Constitution. I R. 1.

On May 16, 2006, Appellee Gilgor amended her complaint to add the Kentucky Fairness Alliance as a named plaintiff and to add claims under Sections 171 and 184 of the Kentucky Constitution. I R. 11. On June 1, 2006, the Franklin Circuit Court entered an Agreed Order, filed by the Appellees and the Governor's Office, providing that no funds will be released to UC until thirty (30) days following the entry of a final, appealable judicial ruling on the merits. I R. 19.

On June 14, 2006, the Appellees filed another amended complaint. I R. 27; 25. They added three additional plaintiffs, two taxpayers, Rev. Albert M. Pennybacker and Rev. Dr. Paul D. Simmons, and the Jefferson County Teachers Association. About five days later, on June 19, 2006, UC filed a motion to intervene in the lawsuit, which the Court subsequently granted. I R. 37; 42. On July 3, 2006, a group of Senators and Representatives from the General Assembly also sought intervention. The Court granted

their motion to intervene on July 22, 2006. I R. 58.

UC filed a motion for summary judgment on October 8, 2007. II R. 195-229. The Appellees filed a response and cross-motion for summary judgment on November 26, 2007.<sup>4</sup> The Court held a hearing on the cross-motions on December 10, 2007.

Two days later, on December 12, 2007, the Court entered an order requesting supplemental briefing to address two issues: (1) whether the preamble to the Pharmacy Scholarship Program limits students to attending a pharmacy school located in an Appalachian Regional Commission county, despite the specific eligibility criteria containing no geographic limitation; and (2) the relationship between the Pharmacy Scholarship Program and KRS § 48.310(1), which provides that “[n]o provision of a branch budget bill shall be effective beyond the second fiscal year from the date of its enactment.” II R. 267. On January 10, 2008, the Appellees filed a motion to conform the evidence to the pleadings asserting additional claims under Sections 51 and 59 of the Kentucky Constitution. II R. 287. The parties completed the Court’s requested supplemental briefing on January 22, 2008. II R. 290; III R. 316. The Court entered a Judgment and Order on March 6, 2008, denying UC’s motion for summary judgment and granting the Appellees’ cross-motion for summary judgment. III R. 363. In its Judgment Order, the Court held that the pharmacy building appropriation violated Sections 5 and 189 of the Kentucky Constitution, and that the pharmacy scholarship program was contrary to Section 51 of the Constitution. III R. 364.

UC timely filed a notice of appeal on March 31, 2008. III R. 374. The intervening legislators filed a cross-notice of appeal on April 4, 2008. I Cross Appeal R.

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<sup>4</sup> The Plaintiffs’ motion for summary judgment and supporting memorandum was not paginated by the Clerk.



1. On April 10, 2008, UC filed a motion to transfer the case from the Court of Appeals to this Court. That motion was granted by this Court on December 18, 2008.

## ARGUMENT

### I. The Applicable Standard of Review.

“When considering the constitutionality of a statute, this Court draws all fair and reasonable inferences in favor of the statute’s validity.” *Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006), *citing Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 499 (Ky. 1998). “[T]he violation of the Constitution must be clear, complete and unmistakable in order to find the law unconstitutional.” *Id.*; *see also Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky. 1968) (“It is the rule that all presumptions and intendments are in favor of the constitutionality of statutes and, even in cases of reasonable doubt of their constitutionality, they should be upheld and the doubt resolved in favor of the voice of the people as expressed through their legislative department of government.”)

“States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” *Posey*, 185 S.W.2d at 175-76, *quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). Indeed, “the legislature’s power to pass laws, especially laws in the interest of public safety and welfare, is an essential attribute of government.” *Posey*, 185 S.W.2d at 175, *citing Manning v. Sims*, 308 Ky. 587, 592, 213 S.W.2d 577, 580 (1948). Thus, this Court “must always accord great deference to the legislature’s exercise of these so-called ‘police powers,’ unless to do so would clearly offend the limitations and prohibitions of the constitution.” *Posey*, 185 S.W.2d at 175 (internal quotations omitted).

The standard of review for summary judgments is “whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law.” *Lach v. Man O’War, LLC*, 256 S.W.3d 563, 567 (Ky. 2008); *see also Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Where there are no material disputes of fact, the question is one of law and “may be reviewed *de novo*.” *Lach*, 256 S.W.3d at 567, *quoting Bob Hook Chevrolet Isuzu, Inc. v. Com. Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998); *see also Gainsco Companies v. Gentry*, 191 S.W.3d 633, 638 (Ky. 2006) (“Because summary judgments involve no fact finding, this Court will review the circuit court’s decision *de novo*.”)

“The burden is upon one who questions the validity of an Act to sustain his contentions.” *Manning*, 213 S.W.2d at 580, *quoting Johnson v. Commonwealth ex rel. Meredith*, 291 Ky. 829, 165 S.W.2d 820, 823 (1942). The Circuit Court erred in holding that Appellees carried their burden of establishing that the appropriations at issue in this case clearly offend the limitations and prohibitions of the constitution —Sections 5, 51, and 189. III R. 373.

Contrary to the Circuit Court’s ruling, the General Assembly may consistent with Sections 5 and 189 appropriate funds to UC for the purpose of promoting the health and safety of the citizens of Kentucky. To hold otherwise threatens to single out private religious institutions for discrimination in violation of the First Amendment’s Free Exercise and Free Speech Clauses. Under the ruling below, any private institution may be used by the General Assembly to meet a public healthcare crisis, except religious institutions. Moreover, the Circuit Court erred in holding that the Pharmacy Scholarship

Program violated Section 51 by attempting an impermissible amendment of the statutes governing the disbursement of coal severance tax revenues, when the statutes specifically provide an exception for disbursements made in a budget bill.

II. The Circuit Court Erred in Holding that the General Assembly's Appropriation for the UC Pharmacy School Building Violates Section 189 of the Kentucky Constitution.<sup>5</sup>

Kentucky constitutional law is clear: The General Assembly may use a *private* means to achieve a *public* purpose. "It is well settled that a private agency may be utilized as the pipe-line through which a public expenditure is made, the test being not who receives the money, but the character of the use for which it is expended." *Kentucky Bldg. Comm'n v. Effron*, 310 Ky. 355, 358, 220 S.W.2d 836, 837 (1949); *see also Butler v. United Cerebral Palsy of N. Kentucky*, 352 S.W.2d 203, 205-06 (Ky. 1961) ("That the state chooses a private institution as its instrumentality does not despoil the public nature of the appropriation.") (internal quotations omitted). "[T]he vital point in all such appropriations 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." *Hager v. Kentucky Children's Home Soc.*, 119 Ky. 235, 83 S.W. 605, 608 (1904).

Thus, the General Assembly may, consistent with the Kentucky Constitution, appropriate funding to private, religious hospitals for construction projects, because "the construction of nonprofit hospital facilities is a public purpose" for "the common good of all people throughout the State." *Effron*, 220 S.W.2d at 837. It may provide aid to

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<sup>5</sup> The issue was argued below and preserved for review in UC's Memorandum in Support of Motion for Summary Judgment and UC's Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment. II R. 221-227; II R. 262-256.

private schools to educate mentally and physically disabled children, since “its ultimate purpose is to contribute to the welfare of the people of the whole state.” *Butler*, 352 S.W.2d at 206. And it may bear the expense of transporting children attending private religious schools, because such “legislation [is] for the health and safety of our children, the future citizens of our state.” *Nichols v. Henry*, 301 Ky. 434, 443, 191 S.W.2d 930, 935 (1945); *see also Neal v. Fiscal Court*, 986 S.W.2d 907, 914 (Ky. 1999) (upholding transportation subsidies for students attending private religious schools because “[t]he purpose of Resolution 34 is to provide safety for non-public school children”).

The General Assembly’s appropriations in this case are aimed at training and educating pharmacists to address the Commonwealth’s shortage. (Tracey Aff. Ex. A at 3; Tracey Aff. Ex. B; Tracey Aff. Ex. J at 2.) Meeting the healthcare needs of the people of Kentucky is a public purpose. “Clearly the eradication of disease and the preservation of the public health is a public purpose and a matter of state-wide, as well as local, concern, and a proper subject of legislation.” *Miller v. State Bldg. Comm’n*, 308 Ky. 249, 256, 214 S.W.2d 265, 269 (1948), *quoting Dist. Bd. of Tuberculosis Sanitarium Trustees v. City of Lexington*, 227 Ky. 7, 12 S.W.2d 348, 351 (1928) (internal quotations omitted). Thus, the General Assembly may use appropriations to private institutions as the “pipeline” or “instrumentality” for addressing the pharmacist shortage.

However, the Circuit Court construed Section 189 of the Kentucky Constitution to prohibit the legislature from using a private religious school, like UC, to deal with the shortage. (III R. 366-367.) Section 189 provides, “No 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.”

Under the Circuit Court's construction of this provision, *any* private institution may be the "pipe-line" or "instrumentality," *except* if that institution is, like UC, religiously-affiliated and seeks to instill Christian values. The lower court's interpretation of Section 189 is overly broad and raises serious questions under the First Amendment to the United States Constitution.

The Circuit Court specifically erred in holding that the funds for the pharmacy building were "raised or levied" for "educational purposes" under Section 189. (III R. 367.) The uncontested evidence in the record shows that the purpose of the pharmacy building appropriation was to address the Commonwealth's shortage of pharmacists—a clear health and welfare purpose. The Circuit Court further erred because it ignored the significant safeguards imposed on UC to ensure that funds are not spent for a "church, sectarian, or denominational" purpose and assumed that simply because UC is religiously-affiliated and seeks to instill religious values that the funds will inevitably be "used by or in aid of" religion in violation of Section 189. (III R. 365-367.) Finally, the Circuit Court erred in relying on *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983), when that case specifically distinguished between appropriations for education purposes and those aimed at health and welfare purposes, like the pharmacy building appropriations at issue here.

A. Because the Funds for the Pharmacy Building Were “Raised or Levied” for a Health and Welfare Purpose, Not for “Educational Purposes,” the Circuit Court Erred in Holding That Section 189 Was Violated.<sup>6</sup>

Section 189 applies only to monies “raised or levied for educational purposes.” This Court in *Neal v. Fiscal Court*, 986 S.W.2d 907 (Ky. 1999), considered the constitutionality of providing transportation subsidies under KRS § 158.115 to private religious schools. KRS § 158.115 provides that “[e]ach county may furnish transportation *from its general funds, and not out of any funds or taxes raised or levied for educational purposes or appropriated in aid of common schools.*” *Id.* (emphasis added). The Court held that appropriations made under this statute to private schools were “consistent with the Kentucky Constitution,” including Section 189. *Neal*, 986 S.W.2d at 913.

Here, the funds for the pharmacy school building are “raised or levied” to address the pharmacist shortage, not for “educational purposes.” Members of the General Assembly stated that the purpose of the pharmacy building appropriation was “filling a shortage of pharmacists.” (Tracey Aff. Ex. J at 2.) When Governor Fletcher signed the appropriation into law, he emphasized that “Kentucky has a shortage of pharmacists, particularly in Southeastern Kentucky,” where UC is located. (Tracey Aff. Ex. A at 3; Tracey Aff. Ex. B.) The Kentucky Pharmacists Association understood the appropriation to UC for the pharmacy building the same way and immediately offered its assistance to UC to “begin addressing the tremendous pharmacist shortage plaguing this state.” (Colegrove Aff. Ex. I.)

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<sup>6</sup> The issue was argued below and preserved for review in UC’s Memorandum in Support of Motion for Summary Judgment and UC’s Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Cross-Motion for Summary Judgment. II R. 221-222; II R. 252-253.

The funds themselves come from the Infrastructure for Economic Development bond pools. These bond pools are managed by KIA for the purpose of assisting “the state with respect to the construction and acquisition of infrastructure projects.” KRS § 224A.035. These projects specifically further “the health, safety, welfare and well-being of the general public.” KRS § 224A.020. Thus, the funds for the pharmacy building are raised for a health and welfare purpose, not an educational one.

Moreover, none of the funds come from a source designated for “educational purposes”—such as the Common School Fund. Instead, the KIA sells the bonds from the pools to private investors and repays the investors with revenue raised by the Coal Severance Tax. (Tracey Aff. Ex. H at 86-87.) The Coal Severance Tax is levied on businesses “engaged in severing and/or processing coal within th[e] Commonwealth.” KRS § 143.020. The KIA uses General Funds to pay interest to the private bondholders. (Tracey Aff. Ex. H at 10.) Thus, the funding for the pharmacy school building is either private money generated by the sale of bonds or Coal Severance Tax revenues; it is not money “raised or levied for educational purposes.” Accordingly, the Circuit Court erred in holding that Section 189 is implicated.

B. The Appropriation for the Pharmacy School Building is Not “Used by or in Aid of” Religion, Since the Money is Restricted to the Capital Construction of a Pharmacy Building.<sup>7</sup>

The Circuit Court erred in ignoring the safeguards imposed on UC to ensure that the funds are spent for the intended purpose of constructing a pharmacy school building. (III R. 365-367.) The Circuit Court should *not* have assumed that simply because UC is

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<sup>7</sup> The issue was argued below and preserved for review in UC’s Memorandum in Support of Motion for Summary Judgment and UC’s Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Cross-Motion for Summary Judgment. II R. 222-226; II R. 254-256.

religiously-affiliated and seeks to instill Christian values that funds will inescapably be “used by or in aid of” religion in violation of Section 189.

In *Fiscal Court v. Brady*, 885 S.W.2d 681 (Ky. 1994), and in *Neal v. Fiscal Court*, 986 S.W.2d 907 (Ky. 1999), this Court made no such assumption. The Court did *not* take for granted that because some of the private schools receiving transportation subsidies were religious that money would inevitably be “used by or in aid of” religion in violation of Section 189. Rather, the Court looked to see what safeguards were in place to restrict the use of the money.

In *Brady*, for example, the Court held that Section 189 was violated because “money [was] paid over directly into the general funds of the private or parochial schools receiving payment” and, “[a]fter payment, the manner in which the money [was] expended [was] controlled solely by the recipient school.” 885 S.W.2d at 684. In other words, the schools could divert the money to whatever use they desired, including religious uses.

In contrast, the Court in *Neal*, held the transportation subsidies were consistent with Section 189, in part, because funds were no longer paid “directly . . . into the accounts of non-public schools.” 986 S.W.2d at 911. There were safeguards in place to ensure that the funds were “paid directly to ‘the individual local Board of Education operated transportation system of contracted bus and vehicle companies,’” and not “used by or in aid of” religion. *Id.*

The same is true here. The numerous safeguards imposed on the use of the pharmacy building appropriation make it impossible for the funds to be “used by or in aid of” religion. (II R. 284.) The MOU between UC and DLG mandates that the funds only



be used for a “new pharmacy building on the campus of [UC] in Whitley County, Kentucky.” (*Id.*) UC is expressly forbidden under the MOU from using the appropriated funds for “any church, sectarian, or denominational purpose.” (*Id.*) If UC ever ceases to use the building constructed with the appropriated funds “as a school of pharmacy,” ownership of the building is “immediately vested in the County of Whitley and shall be utilized by the County for purposes consistent with the general health and welfare.” (*Id.*) The MOU also imposes monitoring requirements that allow DLG to ensure that the funds are used only as directed – for the construction of a pharmacy school building. (II R. 285.)

Once the funds are made available, UC must submit to DLG a Project Scope and Budget document, including a detailed scope of work explanation and cost breakdown. (Tracey Aff. Ex. E.) And, before any funds are disbursed to the project, DLG requires UC to submit a Request for Disbursement form in which UC will certify that the work has been done in accordance with the terms and conditions of the MOU along with invoices and other documentation of the work performed. (Tracey Aff. Ex. F.) UC will also have to submit Quarterly Progress Reports detailing the status of the work completed. (Tracey Aff. Ex. G.) Accordingly, UC can only draw down money from the pharmacy school appropriation once it has documented that funds have been spent consistent with the MOU, and, specifically, that funds have not been spent for “any church, sectarian, or denominational purpose.”

UC’s own internal policies also dictate that all state funds be used “consistent with any designated purpose” and not for “religious worship or sectarian activity.” (Colegrove Aff. Ex. H.)

As in *Neal* and in contrast to *Brady*, the funds for the pharmacy school building are not paid “directly into [UC’s] general fund[]” and, “[a]fter payment, the manner in which the money is expended is [not] controlled solely by” UC. *Brady*, 885 S.W.2d at 684. The University is prohibited by the MOU, DLG’s fund disbursement process, and internal policy (Colegrove Aff. Ex. H), from using the funds for anything other than the construction of a pharmacy school building. Because the funds cannot be “used by or in aid of” religion, Section 189 is not violated.

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. This Court in *Brady*, for instance, gave significant consideration to the United States Supreme Court’s Establishment Clause analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Brady*, 885 S.W.2d at 686. The Court also found the reasoning of *Wolman v. Walter*, 433 U.S. 229 (1988), persuasive in considering church-state entanglement under Section 5 of the Kentucky Constitution. *Brady*, 885 S.W.2d at 686. Likewise, in *Neal*, 986 S.W.2d 907, this Court placed great weight on the United States Supreme Court’s discussion in *Agostini v. Felton*, 521 U.S. 203 (1997), about neutrality in funding. *Neal*, 986 S.W.2d at 911. Thus, this Court has repeatedly recognized federal constitutional law’s persuasive authority in interpreting Section 189.

The United States Supreme Court held in *Agostini*, 521 U.S. 203, and in *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality), that it would *not* assume government funds are being diverted to religious uses in violation of the Establishment Clause simply because money is appropriated to a religious institution. *Agostini*, 521 U.S. at 223-224, 226-227;

*Mitchell*, 530 U.S. at 857-58 (O'Connor, J., concurring).<sup>8</sup> Instead, the Court requires plaintiffs "to prove that the aid in question actually is, or has been, used for religious purposes." *Id.* at 857 (O'Connor, J., concurring). This Court should follow the United States Supreme Court's lead and not assume that funds will inevitably be spent for religious uses simply because UC has a religious affiliation and seeks to instill Christian values in its students.

Appellees have offered no proof of the actual diversion of funds to religious uses. Rather the record shows that UC is restricted by the MOU, DLG's fund disbursement process, and internal policy (Colegrove Aff. Ex. H), from using the money for anything other than the construction of a pharmacy school building. The United States Supreme Court has repeatedly held that such funding for capital construction at private, religious schools is consistent with the Establishment Clause. *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1976) (permitting state grants for capital construction at private Roman Catholic colleges and universities); *Hunt v. McNair*, 413 U.S. 734 (1973) (permitting revenue bond funding for capital improvements, such as dining hall, at Baptist college); *Tilton v. Richardson*, 403 U.S. 672 (1971) (plurality) (permitting federal government to directly fund the construction of a library, a performing arts building, a science building, and a language laboratory at four religiously-affiliated colleges and universities). Because the funds for the pharmacy school building cannot be "used by or in aid of" religion, the Circuit Court erred in holding that Section 189 has been violated.

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<sup>8</sup> With a plurality opinion, the narrowest ground for the decision is the controlling opinion. *Tennard v. Dretke*, 542 U.S. 274, 286 n.\* (2004); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004). Justice O'Connor's opinion is the narrowest ground on which the Court held that the aid to private religious schools is constitutionally permissible and, thus, it is the controlling opinion. *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001) (ruling that "Justice O'Connor's opinion . . . is controlling upon this Court").

C. The Circuit Court's Reliance on *Fannin v. Williams* is Misplaced.<sup>9</sup>

The Circuit Court placed great weight on *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983), in its Section 189 analysis. But *Fannin* is inapposite. In *Fannin*, this Court held that a statute providing textbooks to children in private schools violated Section 189. *Id.* at 484. The Court specifically distinguished between expenditures for health and safety, like the pharmacy building appropriation, and expenditures for educational purposes when it said “unlike the statute extending transportation to children in nonpublic schools, it is simply impossible to classify textbooks as anything but educational.” *Id.* at 484. The Court looked back at its decisions in *Nichols, Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956), and others, where it had upheld the appropriation of transportation subsidies to private religious schools, and ruled that what makes textbooks different from transportation subsidies is that the purpose of textbooks “is educational, rather than health and safety.” *Fannin*, 655 S.W.2d at 484.

Indeed, this Court observed in *Neal v. Fiscal Court*, 986 S.W.2d 907, 909 (Ky. 1999) that the constitutional problem in *Fannin* was that the “public money [was] being expended for the benefit of the private institution rather than providing specifically for the health and safety of all children.” Because the appropriation for the pharmacy school building has a definite health and welfare purpose—addressing the pharmacist shortage—*Fannin* is inapplicable, and the Circuit Court erred in relying on the case.

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<sup>9</sup> The issue was argued below and preserved for review in UC's Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment. II R 236-237; II R. 248-250.

D. The Circuit Court's Construction of Section 189 Raises Questions Regarding Its Constitutionality Under the First Amendment to the United States Constitution.<sup>10</sup>

A statute should "not be construed so as to raise a grave and doubtful constitutional question if some other construction is open." *Shannon v. Heringer*, 271 Ky. 248, 111 S.W.2d 603, 604 (1937); *Commonwealth v. Halsell*, 934 S.W.2d 552, 555 (Ky. 1996) ("If there are two ways to reasonably construe a statute, one upholding the validity and the other rendering it unconstitutional, we must adopt the construction which sustains the constitutionality of the statute.") (internal citations and quotations omitted).

The Free Exercise Clause of the First Amendment to the United States Constitution forbids government from "impos[ing] special disabilities on the basis of religious views or religious status." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993).

The Circuit Court's interpretation of Section 189 transgresses this fundamental requirement of neutrality. The Circuit Court assumed that the pharmacy building appropriation was for "the laudatory public purpose of increasing the supply of health professionals in an underserved area." (III R. 365.) Nonetheless, the Court held Section 189 was violated because the General Assembly had chosen UC, described by the Court as a "sectarian or denominational school," as the means for achieving that purpose. (III

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<sup>10</sup> The issue was argued below and preserved for review in UC's Memorandum in Support of Motion for Summary Judgment and UC's Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment. II R. 213-215, 225-226; II R. 246-248. 254.

R. 366.)

As explained above, under the holdings of this Court, “a governmental body may choose a private institution as an instrumentality for the accomplishment of a public purpose.” *Ezelle v. City of Paducah*, 441 S.W.2d 162, 164 (Ky. 1969). However, under the Circuit Court’s construction of Section 189, if the institution happens to be a “religious school,” (III R. 365), like UC, the General Assembly is flatly prohibited from using it as the vehicle for addressing a public purpose. In other words, under the ruling below, private institutions, like UC, are penalized because of the fact they are “religious.”

Because such non-neutral treatment of religion threatens to violate the Free Exercise Clause, this Court should construe Section 189 to permit the General Assembly to utilize UC as a means for accomplishing a public health and welfare purpose—the training of new pharmacists.

Moreover, disfavoring private religious schools because of the religious nature of their speech is viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. Under the Circuit Court’s construction of Section 189, the General Assembly may appropriate funds for a health and welfare purpose to private schools teaching from a secular perspective, *Butler*, 352 S.W.2d at 206 (upholding appropriations to private schools for special education); *Nichols*, 191 S.W.2d at 935 (upholding transportation subsidies to private schools), but not schools offering a “program enriched with Christian values.” (III R. 365.) To penalize UC and other private religious schools because of the religious character of their instruction or their religious affiliation is unconstitutional viewpoint discrimination. *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819, 831-32 (1995) (denying student activity funds to student

newspaper because of the “religious editorial viewpoints” taken by the paper was unconstitutional viewpoint discrimination); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (denying religious group access to school facilities to show film series on child-rearing “because the series dealt with the subject from a religious standpoint” was unconstitutional viewpoint discrimination); *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 109 (2001) (excluding Good News Club from school facilities because it “seeks to address . . . the teaching of morals and character from a religious standpoint” was unconstitutional viewpoint discrimination). Accordingly, the Circuit Court’s construction of Section 189 should be abandoned, and Section 189 should be construed to allow health and welfare appropriations to private religious schools, like UC, to avoid the possibility of religious viewpoint discrimination.

III. Because the Appropriation for the Pharmacy Building Does Not Entangle the Commonwealth with Religion or Constitute a Preference for UC, the Circuit Court Erred in Holding that the Appropriation Violates Section 5 of the Kentucky Constitution.<sup>11</sup>

A. The Pharmacy Building Appropriation Does Not Entangle the Commonwealth with Religion.

The Circuit Court held that the pharmacy building appropriation resulted in “exactly the ‘entanglement’ between government interests and religious institutions that the Kentucky Constitution prohibits” in Section 5. (III R. 366-367.) The language of Section 5 does not specifically forbid entanglement between government and religion. However, Section 5’s prohibition of a “preference . . . to any religious sect, society, or denomination” has been interpreted by this Court to bar excessive church-state entanglement. *See, e.g., Fiscal Court v. Brady*, 885 S.W.2d 681, 686 (Ky. 1994).

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<sup>11</sup> The issue was argued below and preserved for review in UC’s Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Cross-Motion for Summary Judgment. II R. 254-255..

The Circuit Court erred in holding that the bar on entanglement has been violated in this case. *All* grantees of state funding are subject to monitoring by the KIA and the DLG. For instance, before any funds are disbursed for a project, DLG requires a Request for Disbursement form in which grantees must certify that work has been done in accordance with the terms and conditions of the grant agreement and submit invoices and other documentation for the work performed. (Tracey Aff. Ex. F.) Likewise, *all* grant recipients must submit to DLG a Project Scope and Budget document, including a detailed scope of work explanation and cost breakdown, (Tracey Aff. Ex. E), and Quarterly Progress Reports detailing the status of the work completed, (Tracey Aff. Ex. G). There is no evidence that the monitoring necessary in UC's case will be any different than what is typically required of grantees of state funds.

In *Kentucky State Board for Elementary and Secondary Education v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), this Court considered whether the Commonwealth's monitoring of private, religious schools to ensure compliance with accreditation requirements violated Section 5 by impermissibly entangling the state with religion. This Court stated, "If the legislature wishes to monitor the work of private and parochial schools in accomplishing the constitutional purpose of compulsory education, it may do so by an appropriate standardized achievement testing program." *Id.* at 884.

If monitoring the academic programs of private, religious schools through intrusive, standardized testing is consistent with Section 5, then surely the MOU's less intrusive audit of funds used to construct a physical structure—a pharmacy school building—provides no entanglement with religion.<sup>12</sup>

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<sup>12</sup> In holding that the appropriation presents entanglement problems, the Circuit Court states that UC may have suspended a student for "expressions of free speech." (III R. 366-367) This statement is incorrect.



To the extent the Circuit Court relied on *Wolman v. Walter*, 433 U.S. 229 (1988) to support its holding that the pharmacy building appropriation fosters “an excessive government entanglement with religion,” such reliance was misplaced. (III R. 366.) *Wolman* was overruled by the United States Supreme Court in *Mitchell v. Helms*, 530 U.S. 793 (2000). Both the four judge plurality in *Mitchell* and Justice O’Connor’s concurrence held that *Wolman* was no longer good law. *Id.* at 835 (plurality opinion) (“To the extent that *Meek* and *Wolman* conflict with this holding, we overrule them.”); *see also id.* at 837 (O’Connor, J., concurring) (“To the extent our decisions in *Meek v. Pittenger* and *Wolman v. Walter* are inconsistent with the Court’s judgment today, I agree that those decisions should be overruled.”) (internal citations omitted).

B. The Appropriation Is Not an Impermissible Preference Under Section 5 of the Kentucky Constitution.

To the extent the Circuit Court’s ruling on Section 5 rests on the premise that the appropriation for the pharmacy building is a preference to “a religious sect, society, or denomination,” the Circuit Court erred.

1. Because the appropriation provides a statewide benefit, it does not constitute a preference in violation of Section 5.<sup>13</sup>

In *Effron*, this Court upheld the appropriation of funds to certain religious hospitals against a Section 5 challenge. The Court ruled that it “will look at the use to which funds are put rather than the conduits through which they run. *If that use is a*

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The record shows that the student was suspended for engaging in conduct, not speech, in violation of the University’s sexual morality policy, just like seven other previous students. (Tracey Aff. Ex. D at 61:10-63:3; Tracey Aff. Ex. C at 27:19-28:21, 28:16-28:18.)

<sup>13</sup> The issue was argued below and preserved for review in UC’s Memorandum in Support of Motion for Summary Judgment, at 10-14, and UC’s Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Cross-Motion for Summary Judgment. IIR. 214-244.

*public one and is calculated to aid all people in the State, it will not be held in contravention of § 5.*” 220 S.W.2d at 838 (emphasis added). Even though the religious hospitals chosen by the legislature “were controlled and governed by boards of certain religious faiths,” the appropriations did *not* violate Section 5, since the hospitals were merely “channels through which the funds flow” to the benefit of all Kentuckians. *Id.* See also *Abernathy v. City of Irvine*, 355 S.W.2d 159, 161 (Ky. 1962) (holding that lease of hospitals to religious organization did not violate Section 5).

Like the hospitals in *Effron*, UC is merely the conduit through which the healthcare needs of all the people of Kentucky are being addressed. Kentucky courts have repeatedly held that expenditures for “the health of the people [are] a matter of public concern of a state-wide interest.” *Miller*, 214 S.W.2d at 269. For instance, in *Craddock v. University of Louisville*, 303 S.W.2d 548, 549 (Ky. 1957), the Court addressed an analogous situation in which the University of Louisville condemned land for the expansion of its medical school. The Court held that the taking was constitutionally permissible since the training of physicians “is not only serving the public welfare of the City of Louisville but the entire Commonwealth of Kentucky.” *Id.* at 550-51.

Just as expanding a medical school to train additional physicians provided a statewide benefit, the appropriations here for the training of additional pharmacists “serv[e] the public welfare of . . . the entire Commonwealth of Kentucky.” *Id.* The Pharmacy Scholarship Program, KRS § 164.7901, is designed to train students to “become certified pharmacists in the Commonwealth.” KRS § 164.7901(1). The Program mandates that all scholarship recipients provide one year of qualified service in

the Commonwealth for each year the scholarship is awarded. KRS § 164.7901(3). Accordingly, the Program is aimed squarely at addressing the pharmacist shortage and, thus, promotes public health.

Similarly, the appropriation for the pharmacy school building advances the general welfare of Kentuckians. In passing the appropriation, the General Assembly explained that it was seeking to “fill[] a shortage of pharmacists.” (Tracey Aff. Ex. J at 2.) When Governor Fletcher signed the appropriation into law, he emphasized that “Kentucky has a shortage of pharmacists, particularly in Southeastern Kentucky.” (Tracey Aff. Ex. A at 3; Tracey Aff. Ex. B.) The appropriation itself is also part of the Infrastructure for Economic Development bond pools, which are specifically managed by the KIA to promote “the health, safety, welfare and well-being of the general public.” KRS § 224A.020.

UC is *not* the ultimate beneficiary of the appropriations, rather the school is merely the conduit through which the legislature has chosen to meet the healthcare needs of Kentuckians. Because the ultimate beneficiaries of the legislation are the citizens of Kentucky, and no citizens are excluded from this benefit, the appropriations do not run afoul of Section 5.

2. Because the appropriation for the pharmacy school building is part of a broader funding program, it is not a preference for UC.<sup>14</sup>

UC will receive the appropriation for the pharmacy school building as part of a general funding program for infrastructure projects. In *Nichols v. Henry*, 301 Ky. 434, 191 S.W.2d 930, 931-932 (1945), this Court held that a busing program that paid for the

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<sup>14</sup> The issue was argued below and preserved for review in UC’s Memorandum in Support of Motion for Summary Judgment and UC’s Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Cross-Motion for Summary Judgment. II R. 212-215; II R. 245-246.

transportation of “all pupils of elementary grade” did *not* violate Section 5. The busing program included students attending “private, sectarian and parochial schools;” nonetheless it was *not* a “preference” for a “religious sect, society or denomination,” since busing the students to private religious schools was part of a general program that paid for busing *all* students whether they attended a religious or non-religious school. *Id.*

Like the busing of students to private religious schools in *Nichols*, the pharmacy school appropriation is part of a broader funding program. It is one project out of nearly 560 projects funded by the Infrastructure for Economic Development bond pools. These projects are all aimed at “the health, safety, welfare and well-being of the general public.” KRS § 224A.020. Many of the projects are designed to meet medical and healthcare needs, including \$750,000 for the construction of a Health Education Building (Tracey Aff. Ex. H at 218), \$1,000,000 for the construction of Health Education Centers (Tracey Aff. Ex. H at 225), and \$1,000,000 for the construction of a Wellness Center (Tracey Aff. Ex. H at 226).

The bond pools also include appropriations for similarly situated private institutions. For example, \$317,900 was appropriated to Campbellsville University for improvements to the school’s Tech Center. (Tracey Aff. Ex. H at 284.)

Thus, the pharmacy building appropriation is part of a broad funding program that includes similar health and welfare projects and other private institutions. Moreover, the appropriation is only one part of the General Assembly’s comprehensive plan to address the pharmacist shortage. HB 380 also included an almost \$80,000,000 appropriation for a new pharmacy building at UK, (Tracey Aff. Ex. H. at 118), and established the

Pharmacy Scholarship Program. Accordingly, the pharmacy building appropriation cannot fairly be characterized as an impermissible preference under Section 5.

IV. The Circuit Court Erred in Holding that the Pharmacy Scholarship Program is an Impermissible Attempt to Amend Kentucky Statutes in Violation of Section 51.<sup>15</sup>

Section 51 requires that when a law is amended it must be “reenacted and published at length.” Ky. Const. § 51. The Circuit Court wrongly held that the Pharmacy Scholarship Program was an impermissible amendment of the statutes governing the disbursement of Coal Severance Tax revenues, KRS § 143.090, and the statute limiting the life of a budget bill to two years, KRS § 48.310(1). (III R. 367-371.)

A. The Pharmacy Scholarship Program is Not an Amendment of KRS § 143.090.

As the Circuit Court noted, KRS § 143.090, governs the disbursement of Coal Severance Tax revenues levied under KRS § 143.020. III R. 370. The statute dictates that the revenues are, first, credited to the transportation fund and the Office of Energy Policy and, then, any remaining balance is credited to the General Fund. K.R.S §§ 143.090(3), 143.090(4). The statute, however, specifically provides an exception to this disbursement. It says “*unless otherwise provided by the General Assembly in a budget bill . . .*” KRS § 143.090(3) (emphasis added). Thus, the General Assembly can, consistent with K.R.S § 143.090, legislate in a budget bill that some portion of the Coal Severance Tax revenues should be credited to a different account, i.e., that the disbursement of tax revenues deviate from the scheme laid out in the statute.

This is precisely what the General Assembly did with the Pharmacy Scholarship

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<sup>15</sup> The issue was argued below and preserved for review in UC’s Supplemental Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Cross-Motion for Summary Judgment and UC’s Memorandum in Opposition to Plaintiffs’ Supplemental Cross-Motion for Summary Judgment. II R. 269-272; III R. 316-322.

Program. It used a budget bill, HB 380, to legislate that a portion of the Coal Severance Tax revenues collected under KRS § 143.020 should be used to fund the Pharmacy Scholarship Program. KRS § 164.7901(11)(b). Because K.R.S § 143.090 expressly allows the General Assembly to deviate from the disbursement scheme spelled out in the statute, the legislature was not only not attempting to amend the statute, it was wholly unnecessary for the legislature to do so.

B. The General Assembly May Exempt the Pharmacy Scholarship Program from the Typical Two Year Restriction Imposed on Budget Provisions.

“The General Assembly has the basic constitutional power and responsibility to tax and to spend the public’s money. This power . . . is exclusive to the General Assembly and includes the power to use a budget bill to repeal, amend, modify and suspend existing statutes.” *Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 448 (Ky. 1986); *see also Commonwealth v. Gobert*, 979 S.W.2d 922, 927 (Ky. 1998), *citing Legislative Research Comm’n v. Brown*, 664 S.W.2d 907, 927-28 (Ky. 1984) (“a budget is required to be enacted as a bill as opposed to a resolution and, as such, has the power to amend or repeal existing statutes”).

In HB 380, the General Assembly used its inherent, constitutional power to exempt the Pharmacy Scholarship Program from the typical rule that “[n]o provision of a branch budget bill shall be effective beyond the second fiscal year from the date of its enactment,” KRS § 48.310(1), and to give the Program “permanent effect,” (Tracey Aff. Ex. H at 357). Rather than permanently repealing or amending KRS § 48.310(1), the General Assembly exempted the scholarship program from the operation of the statute.

No change was made to the provisions of KRS § 48.310(1) and the statute still remains in full force and effect.

Over twenty times in HB 380, the General Assembly exempts various taxing and spending programs, such as the Omnibus Assistance to Veterans and Military Families, Exec. Budget 2006 Acts, ch. 252 (HB 380), reprinted in KRS ch. 47 app. A (West 2006), from the two year limitation. Likewise, throughout HB 380, the General Assembly mandates that various appropriations “shall not lapse and shall be carried forward to the next fiscal year,” despite the ordinary two year limitation imposed on such appropriations. The Pharmacy Scholarship Program is just one more example of the General Assembly exempting an appropriation from KRS § 48.310(1).

The requirements of Section 51 of the Kentucky Constitution only apply to bills repealing or amending existing statutes. *Armstrong*, 709 S.W.2d at 445; *Gobert*, 979 S.W.2d at 927. This Court in *Armstrong*, held that the re-enactment and publication requirements that typically pertain under Section 51 to amendments and repeals are not applicable when a bill is “merely a suspension or modification” of existing statutes. 709 S.W.2d at 445. Because the General Assembly exempted the Pharmacy Scholarship Program from the operation of KRS § 48.310(1), rather than affecting a permanent amendment or repeal, Section 51 is not implicated.

If the Court is inclined to categorize the Pharmacy Scholarship Program as an attempted amendment of KRS § 48.310(1), rather than just an exemption, it must be treated as an amendment by implication. *Bybee v. Commonwealth*, 904 S.W.2d 244, 246 (Ky. App. 1994), quoting *Fiscal Court Comm’rs v. Jefferson County Judge/Executive*, 614 S.W.2d 954, 959 (Ky. App. 1981).

Under this paradigm, rather than seeing the General Assembly as having simply exempted the Pharmacy Scholarship Program from KRS § 48.310(1), the scholarship program and KRS § 48.310(1) must be viewed as being directly at odds with one another. “In such a situation, the conflicting statutes should be reconciled if possible. If reconciliation is not possible, the later statute controls.” *Fiscal Court Comm’rs*, 614 S.W.2d at 958; *Osborne v. Commonwealth*, 185 S.W.3d 645, 649 (Ky. 2006) (observing that “this Court and the Court of Appeals have held that a later statute generally controls”).

Assuming the more natural reading of the Pharmacy Scholarship Program as an exemption from KRS § 48.310(1) is ignored, then the statutes plainly conflict. KRS § 48.310(1) imposes a two year limitation on the life of budget bill provisions. Yet the Pharmacy Scholarship Program states that it has “permanent effect.” Because of the direct conflict, the Pharmacy Scholarship Program, being the later statute, would control.<sup>16</sup>

Because any amendment of KRS § 48.310 is by implication only, the General Assembly did not run afoul of Section 51 by failing to re-enact and republish KRS § 48.310. “When an act does not purport to be an amendment to an existing law, but a new act, it is not necessary to set out or republish any part of an old law that may be changed or repealed.” *Fiscal Court of Jefferson County v. City of Anchorage*, 393 S.W.2d 608, 611 (Ky. 1965). “Section 51 of the Constitution does not require that statutes which are amended or repealed merely by implication, or by the superseding effect of the later enactment, be republished and set forth at length.” *Bd. of Trustees v. City of Paducah*,

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<sup>16</sup> KRS § 48.310 was passed in 1982 and last amended in 2001. 1982 KY. ACTS Ch. 450. § 21; 2001 KY. ACTS Ch. 58. § 5. The Pharmacy Scholarship Program was passed in 2006. 2006 KY. ACTS Ch. 252, Pt. XXIV, §1.



333 S.W.2d 515, 521 (Ky. 1960).

### CONCLUSION

For the foregoing reasons, UC respectfully requests that this Court reverse the Circuit Court, grant its motion for summary judgment, and deny the Appellees' cross-motion for summary judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark R. Overstreet', written over a horizontal line.

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