COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2008-SC-00285-T

VERNIE MCGAHA, SENATOR, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE KENTUCKY GENERAL ASSEMBLY, ET AL. — APPELLANTS

V.

BRIEF FOR APPELLANTS

UNIVERSITY OF THE CUMBERLANDS, ET AL. — APPELLEES

* * * * *

ON APPEAL FROM THE FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN
CIVIL ACTION NO. 06-CI-00554
[COURT OF APPEALS CASE NO. 2008-CA-000682]

Respectfully submitted,

Bryan H. Beauman

BRYAN H. BEAUMAN
STURGILL, TURNER, BARKER
& MOLONEY, PLLC
333 West Vine Street, Suite 1400
Lexington, Kentucky 40507
ATTORNEYS FOR APPELLANTS

BRIAN W. RAUM
GLEN LAVY
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260

CERTIFICATE OF SERVICE

This is to certify that a copy of this Brief has been served upon the following by U.S. Mail on this the 16th day of March, 2009 to: David Tachau, TACHAU, MADDOX, HOVIOUS & DICKENS, 2700 National City Tower, 101 S. Fifth Street, Louisville, KY 40202; General Counsel, Office of the Governor State Capitol, Room 101, 700 Capitol Ave. Frankfort, KY 40601; Mark R. Overstreet, STITES & HARBISON, 421 West Main Street, P.O. Box 634 Frankfort, Kentucky 40602-0634; James P. Guenther, James D. Jordan, GUENTHER, JORDAN & PRICE, 1150 Vanderbilt Plaza, 2100 West End Avenue, Nashville, TN 37203; Timothy Tracey, Gregory S. Baylor, CENTER FOR LAW & RELIGIOUS FREEDOM, 8001 Braddock Rd., Suite 300, Springfield, VA 22151; Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and the Honorable Roger Crittenden, Franklin County Courthouse, P.O. Box 678, Frankfort, Kentucky, 40602. I further certify that the record on appeal was not withdrawn from the Clerk's office.

Bryan H. Beauman
ATTORNEY FOR APPELLANTS

INTRODUCTION

The Kentucky Constitution does not bar appropriations by the General Assembly for the establishment of a pharmacy school or scholarships for students to attend pharmacy school, even at a private college or university. In this action, Appellees challenged such appropriations to the University of the Cumberlands. The court below 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 of the Cumberlands' campus and by establishing a Pharmacy Scholarship Program.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants request oral argument before the Court given the importance of the constitutional questions raised in this case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This appeal derives from the same original action as another case before this Court, 2008-SC-00253. In the circuit court action, Appellees filed suit against the Governor challenging certain appropriations in the 2006-2008 budget. The University of the Cumberlands (the "University") intervened in the suit. These Appellants, Kentucky State Senator Vernie McGaha, Senator Gary Tapp, Senator Jack Westwood, Senator Carroll Gibson, Senator Damon Thayer, Senator Ernie Harris, Senator Dick Roeding, Representative Danny Ford, Representative Joe Fischer, Representative Mike Harmon, Representative Tom Kerr, Representative Marie Rader and Representative Addia Wuchner, in their official capacities as members of the Kentucky General Assembly, intervened in support of the legislation and the appropriations.

The trial court held that the appropriations of money for the construction of a pharmacy building on the campus of the University of the Cumberlands violated the Kentucky Constitution. That court also found that the General Assembly's establishment of a scholarship fund for pharmacy students further violated Kentucky law.

Separate notices of appeal were filed by the University and the Legislators. The same issues are raised by all Appellants on appeal, and thus these cases (No. 2008-SC-253 and 2008-SC-285) should be consolidated and considered together. These Appellants incorporate the University's Brief in 2008-SC-253 as if fully set forth herein. In particular, these Appellants incorporate the thorough Statement of the Case included in the University's Brief.

The facts concerning this case are straightforward, but the legal issues at the heart of these constitutional questions spirit deep debate. In the 2006-2008 Budget Bill, HB 380, the General Assembly provided for appropriations of $10,000,000.00 for the construction of a pharmacy school building and, elsewhere, $1,000,000.00 for the establishment of a scholarship

fund for pharmacy students. *See, e.g.*, 2006 Ky. Acts ch. 252 (HB 350) (Westlaw cite: KY LEGIS 252 (2006)). The primary Constitutional issue before the Court concerns whether the Kentucky Constitution prohibits appropriations for the construction of a pharmacy school building at the University.

Appellees claim that these appropriations violate a number of state constitutional provisions. (Record on Appeal ("RA") at 1-5, Complaint; RA 11-18, Amended Complaint; and RA 27-36 Second Amended Complaint.). The University was permitted to intervene (RA 42-44) as were these legislators (RA 58-59.) After discovery, cross-motions for summary judgment were filed by the parties (RA 195-197.) These Appellants' memorandum in support of the pending summary judgment motions is included in the record below at RA 253-266. After a hearing on the cross-motions on December 10, 2007, the trial court requested supplemental briefing, which was provided. (RA 269-279, 287-306, 352-353.) The trial court entered its ruling on March 8, 2008 in Appellees' favor (RA 363-373), and the appeals by the University and these Appellants followed (RA 374-378 and Record on cross-appeal 1-13).

These Appellants join with the University and respectfully request that this Court reverse the trial court below and hold that the subject appropriations of monies do not violate constitutional restrictions or KRS 48.310.

ARGUMENT

I. The Appropriations in this Case are not a Preference to a Religious Sect, Society or Denomination and therefore do not Violate Section 5 of the Kentucky Constitution.[1]

Section 5 of the Kentucky Constitution states:

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

While Section 5 clearly prohibits the state from preferring one religious sect, society or denomination over another or compelling adherence to particular religious doctrine, it does not prohibit sectarian institutions to *incidentally* benefit from government funding in the same manner as non-sectarian institutions if the purpose of the government benefit is to further a secular state interest. *Neal v. Fiscal Court,* 986 S.W.2d 907 (Ky. 1999). Here, the state has allocated funding to erect a pharmacy building at the University and to establish a scholarship program for pharmacy students as part of its broad efforts to promote the health of welfare of state citizens. These two objectives are squarely within the province of the state and can be constitutionally accomplished through private (and even sectarian) entities. *See Kentucky Bldg. Comm'n v. Effron*, 310 Ky. 355, 358, 220 S.W.2d 836, 837 (1949) ("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"); *see also Butler v. United Cerebral Palsy of N. Kentucky*, 352 S.W.2d 203, 205-06 (Ky. 1961) ("That the state

[1] This issue was argued below and preserved for review in Defendant Intervenors' Memorandum in Support of the University of the Cumberlands' Motion for Summary Judgment and their Opposition to Plaintiffs' Cross-Motion for Summary Judgment. (RA 253-266).

chooses a private institution as its instrumentality does not despoil the public nature of the appropriation.") (internal quotations omitted).

Section 5 of the Kentucky Constitution parallels the Federal Establishment Clause in that it prohibits the state from compelling its citizens to conform to a particular religious belief or practice.[2] Thus, this Court has repeatedly looked to the United States Supreme Court as persuasive authority when interpreting this section of the State Constitution. *See Fiscal v. Brady,* 885 S.W.2d 681, 686 (Ky. 1994) (citing *Lemon v. Kurtzman,* 403 U.S. 602 (1971); *Wolman v. Walter,* 433 U.S. 229 (1988)); *see also Neal,* 986 S.W.2d at 911 (citing *Agostini v. Felton,* 521 U.S. 203 (1997); *Sch. Dist. of Grand Rapids v. Ball,* 473 U.S. 373 (1985)).

In *Neal v. Fiscal Court, supra*, this Court upheld the Fiscal Court's allocation of funds for the transportation of elementary school children attending parochial schools. The plaintiff contended that the allocation of such funds violated several sections of the Kentucky Constitution including Section 5. Specifically, the plaintiffs claimed the following "benefits" to parochial schools:

> [C]ounty funds [would] make it easier and cheaper to attend a private school than would otherwise be the case, the private and parochial schools' enrollment and tuition receipts will increase, and a larger audience will be exposed to the schools' religious message. Thus, the schools, and not just their students, will benefit from the Fiscal Court's subsidies.

Id. at 910. This Court disagreed, and found that the state had an interest in providing safe transportation to students who attended both public and private schools. In the course of its analysis, the Court relied to a large degree on the United States Supreme Court's decision in *Agostini v. Felton, supra*. The *Neal* Court pointed out that the *Agostini* Court was "swayed in

[2] While this Court has indicated that Section 5 is broader than the federal Establishment Clause and indeed on its face it is, it has at the same time repeatedly relied on Supreme Court Establishment Clause jurisprudence when interpreting Section 5.

large measure by the fact that the funds in question were available 'to both religious and secular beneficiaries on a non-discriminatory basis.'" *Id.* at 911.

Additionally, the *Agostini* Court pointed out that "a distinctive element to [the] program was that no funds designated for the program 'ever reach the coffers of religious schools.'" *Id.* at 911. In this case, the funds at issue have been allocated specifically for a building which will be used to meet a secular need. The funds will not be disseminated directly to the University's general "coffers." Similarly, the scholarship funds will benefit the pharmacy students (not theology students) and those funds are available to any student who attends a pharmacy school in the Appalachian Region. These objectives are well within the constitutional parameters of Section 5. The *Neal* Court held that:

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

Id. at 912. Again the *Neal* Court referred to the *Agostini* decision, stating:

> In *Agostini, supra,* the United States Supreme Court quoted the earlier decision of *School District of Grand Rapids v. Ball,* 473 U.S. 373, 393, 105 S.Ct. 3216, 3228, 87 L.Ed.2d 267 (1985), holding that aid which "resulted in an effect that was 'indirect, remote, or incidental'" would be upheld, and would only be invalidated when "the aid resulted in 'a direct and substantial advancement of the sectarian enterprise.'" *Agostini,* 117 S.Ct. at 2009.

Id.

The principle that emerges is a practical one – the state does not run afoul of Section 5 if the funds directed to a religious entity serve a distinct public purpose. This is especially true when the benefit to the religious organization is *incidental* as part of a broader program which benefits both religious and non-religious recipients.

A. The Funding at Issue is Part of a Broad Public Program.

The record below clearly demonstrates that the state appropriated funds to the University for the express purpose of addressing a secular interest – an acute shortage of pharmacist in Kentucky. (Tracey Aff. Ex. K.)[3] The state did not single out the University for a special preference in this regard, but rather, it included the University in its broad effort to address the need for pharmacists and thereby further "the health, safety, welfare and well-being of the general public." KRS 224A.020 (2008). Not only were funds allocated to the University, but the University of Kentucky also received funds totaling $80,000.000 to erect a pharmacy building as part of the state's comprehensive scheme to address the shortage of pharmacists. (Tracey Aff. Ex. H. at 118).

The funding here is related to approximately 560 other projects, many of which are designed to meet Kentucky's medical and healthcare needs. Other projects included $750,000 for the construction of a Health Education Building, $1,000,000 for the construction of Health Education Centers, and $1,000,000 for the construction of a Wellness Center. (Tracey Aff. Ex. H at 218-226). And $317,900 was appropriated to Campbellsville University for improvements to the school's Tech Center. (Tracey Aff. Ex. H at 284.) Therefore, the funds appropriated to the University are designed to serve a public need completely unrelated to the University's religious affiliation and mission.

The United States Supreme Court has on more than one occasion found that government funding for religiously affiliated buildings does not run afoul of the Federal Establishment Clause. *See Roemer v. Bd. of Public Works*, 426 U.S. 736 (1976) (upholding state grants for capital construction at Roman Catholic colleges and universities); *Hunt v. McNair*, 413 U.S. 734

[3] Although part of the record in this case, the Clerk did not separately paginate this exhibit filed in support of the University's Motion for Summary Judgment. This Affidavit and its accompanying exhibits were attached to the University's primary brief below which begins at RA. 198.

(1973) (permitting revenue bond funding for Baptist college capital improvements, including a dining hall); *Tilton v. Richardson,* 403 U.S. 672 (1971) (plurality) (upholding federal funding for the construction of a library, a performing arts building, a science building, and a language laboratory at four religiously-affiliated colleges and universities). Therefore, for these reasons and for the reasons presented by the University, this Court should not hesitate to uphold the appropriations at issue in this case.

B. The Funding would not Foster Excessive Entanglement with Religion

The Circuit Court relied heavily on *Fiscal v. Brady, supra,* and *Fannin v. Williams,* 655 S.W. 2d 480 (Ky. 1993), to support its finding that the appropriations at issue in this case amounted to an excessive entanglement with religion in violation of Section 5 of the Kentucky Constitution. Specifically, the lower court determined that the funding would result in "exactly the 'entanglement' between government interests and religious institutions that the Kentucky Constitution prohibits." (RA. 366-367.)

Interestingly, for purposes of this entanglement issue, the Circuit Court relied substantially on the dissenting opinion in *Brady*, which in turn relied on this Court's decision in *Fannin v. Williams, supra,* (citing *Wolman v. Walter,* 433 U.S. 229 (1977). This reliance is misplaced. Without a doubt, Supreme Court Establishment Clause jurisprudence has progressed substantially since *Wolman v. Walter*. In fact, *Wolman* has been overruled. *See 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).

The Circuit Court in this case erroneously found that the funding here would result in excessive entanglement with religion because it would require ongoing state monitoring to ensure that the funds were not used for sectarian purposes. (RA. 366.) But the monitoring required for the University is no different than the monitoring required for any of the recipients under the state's program. State funding projects all require monitoring by the Kentucky Infrastructure Authority (KIA) and Department for Local Government (DLG). The DLG requires that recipients submit a Request for Disbursement form, which must certify that work has been done pursuant to the grant agreement. Grantees must also submit invoices and other documentation for the work performed. (Tracey Aff. Ex. F.) Additionally, grant recipients must submit Project Scope and Budget documentation to the DLG, including a detailed explanation of the scope of the work and a cost breakdown as well as Quarterly Progress Reports detailing the status of the work completed. (Tracey Aff. Ex. E, G). Therefore, the monitoring necessary in this case is no different that the monitoring required for any grantee.

This Court has previously upheld state monitoring of private sectarian schools. *See Kentucky State Bd. for Elementary and Secondary Educ. v. Rudasill,* 589 S.W.2d 877 (Ky. 1979). In *Rudasill,* this Court held that that state's monitoring of private religious schools to ensure compliance with accreditation requirements did not violate 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. Therefore, for the reasons stated above and those argued by the University, the appropriation in this case does not violate Section 5 of the Kentucky Constitution.

C. HB 380 does not Violate Section 189 because it is not a Fund or Tax Raised or Levied for Educational Purposes.[4]

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." On its face Section 189 is limited in scope and intended to prevent funds otherwise designated for secular education from being diverted in support of sectarian education. The funds at issue here, however, are derived from the coal severance tax, which is designated not for educational purposes but for the health, safety and welfare of Kentucky citizens. Therefore, because the funds here have been "raised or levied" specifically for "the health, safety, welfare and well-being of the general public," Section 189 is not implicated in the least. KRS 224A.020.

HB 380 provides two bond pools designated for Infrastructure for Economic Development: 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 pools are designated to fund nearly 560 individual public projects of a wide variety. The bond pools are administered by the Kentucky Infrastructure Authority, which assists "the state with respect to the construction and acquisition of infrastructure projects." KRS 224A.035 (2008). All these programs, including the funding of the pharmacy building at the University, support "the health, safety, welfare and well-being of the general public." KRS 224A.020.

In *Neal,* this Court upheld the constitutionality of KRS 158.115, which provided transportation subsidies 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*

[4] This issue was argued below and preserved for review in Defendant Intervenors' Memorandum in Support of the University of the Cumberlands' Motion for Summary Judgment and their Opposition to Plaintiffs' Cross-Motion for Summary Judgment. (RA 253-266).

levied for educational purposes or appropriated in aid of common schools." KRS 158.115 (2008) (emphasis added). The *Neal* court recognized that the source of the funds at issue was of constitutional importance when analyzing Section 189. In upholding the transportation funding in that case, the Court noted that the Fiscal Court could allocate the funds while the Board of Education could not. *Neal,* 986 S.W.2d at 913 (citing *Rawlings v. Butler,* 290 S.W.2d 801, 807 (1956)). Therefore, the source of the funds (and not simply their destination) is of critical importance when considering a Section 189 challenge.

When examined in context, it is even more apparent that Section 189 is limited. Section 189 arises as part of a series of constitutional provisions all relating to the common school fund: Section 183 (providing for a common school system); Section 184 (establishing a common fund for common schools); Section 185 (addressing interest on the common school fund); Section 186 (concerning the distribution and use of the common school fund); Section 187 (prohibiting discrimination based on race in the distribution of the common school fund); Section 188 (requiring federal tax refund to be part of the common school fund); and Section 189 (prohibiting money raised for educational purposes (i.e. commons schools) to be appropriated to sectarian schools).

All the surrounding constitutional sections concern the common school fund, which applies specifically to elementary and secondary schools in the compulsory public school system. The facts presented in this case, however, do not involve the common school fund. None of the money at issue in this case is remotely related to any common school fund as described in Sections 183-189, nor has the money been derived from taxes levied for "education purposes." For these reasons, and those presented by the University, the decision of the Circuit Court should be reversed.

II. The Pharmacy Scholarship Program was Properly Enacted and did not Violate Section 51 of the Constitution or KRS 48.310.[5]

The 2006-2008 Budget Bill met all constitutional and statutory requirements. That legislation provided, in part, as follows:

> PART XXIV
>
> PHARMACY SCHOLARSHIP PROGRAM
>
> Notwithstanding KRS 48.310, the following statute is created to read as follows and shall have permanent effect, subject to future actions by the General Assembly:
>
> SECTION 1. A NEW SECTION OF KRS CHAPTER 164 IS CREATED TO READ AS FOLLOWS...[TEXT OF STATUTE OMITTED].

2006 Ky. Acts ch. 252, Part XXIV. Immediately following the above-quoted language, the legislation sets forth the text of the new statute, now codified as KRS 164.7901, highlighted by underscoring the text. For newly proposed legislation, this approach meets all requirements of Kentucky law. *Fiscal Court of Jefferson County v. City of Anchorage*, 393 S.W.2d 608, 611 (Ky. 1965); *Bd. of Trustees v. City of Paducah*, 333 S.W.2d 515, 521 (Ky. 1960). The lower court, however, construed this language in the legislation that created KRS 164.7901 as also amending KRS 143.090. The lower court reasoned that because the legislation did not restate portions of KRS 143.090 but rather created a new statute, the legislation appropriating the scholarships funds violated Section 51 of the Constitution.

While Section 51 of the Constitution certainly requires that no statute may be repealed or amended without setting forth the full text of the original statute, Section 51 is not implicated here because this legislation did not amend KRS 143.090. Rather, the pharmacy scholarship

[5] This issue was argued below and preserved for review in Defendant Intervenors' Memorandum in Support of the University of the Cumberlands' Motion for Summary Judgment and their Opposition to Plaintiffs' Cross-Motion for Summary Judgment (RA 253-266) and the supplemental filing of the Appellants (RA 352-353).

appropriation meets all requirements of KRS 143.090, which provides that the General Assembly may direct the spending of revenue from the coal severance tax in any budget bill. KRS 143.090(3). The legislation challenged here is the type of budget bill expressly permitted by KRS 143.090(3), and which established a pharmacy scholarship program and for the 2006-2008 biennium funded the program (as noted by the University, the 2008 budget bill did not, 2008 Ky. Acts ch. 127). Accordingly, the specific allowance provided in KRS 143.090 permitting the General Assembly to appropriate coal severance tax revenue in a budget bill deems this subject legislation lawful and not in contradiction to Section 51.

Furthermore, the permanent nature of the scholarship program should not be considered as an attempted amendment of KRS 48.310. Rather, KRS 48.310 permits the General Assembly to exempt measures from statutory restrictions, which is the effect of the above-quoted language from the legislation. Should the Court construe this portion of the Legislature's budget bill as amending KRS 48.310, then it certainly can only be construed as an amendment by implication. *Fiscal Court Comm'rs v. Jefferson County Judge/Executive,* 614 S.W.2d 954, 959 (Ky. App. 1981). If so, and the Court finds the statutes conflict, then the later-enacted legislation, here KRS 164.7901, would control as the more specific, later-enacted legislation. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 819 (Ky. 1992) (recognizing that a specific statute would control over a more general one); *Brown v. Hoblitzell*, 307 S.W.2d 739 (Ky. 1956) (holding that a later enacted statute controls over a prior one). This principle is especially true since the legislature is presumed to be aware of a pre-existing statute, *Shewmaker v. Commonwealth*, 30 S.W.3d 807 (Ky.App. 2000), and, in fact, in this instance even referenced the pre-existing statute in the text of the legislation. 2006 Ky. Acts ch. 252, Part XXIV. Thus, the legislation establishing KRS 164.7901 was constitutionally enacted.

CONCLUSION

For the foregoing reasons, Appellants join the University and request that the trial court Judgment and Order be reversed and that judgment be entered in favor of the original defendants and intervening defendants.

Respectfully submitted,

BRYAN H. BEAUMAN
STURGILL, TURNER, BARKER & MOLONEY, PLLC
333 West Vine Street
Lexington, Kentucky 40507
(859) 255-8581

AND

BRIAN W. RAUM
GLEN LAVY
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
ATTORNEYS FOR APPELLANTS