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

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SUPREME COURT

UNIVERSITY OF THE CUMBERLANDS, APPELLANT

REPLY BRIEF FOR APPELLANT, UNIVERSITY OF THE CUMBERLANDS

v.

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

STEVEN L. BESHEAR APPELLEE

VERNIE McGAHA, et al. CROSS-APPELLANTS

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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(Certificate of Service on Reverse)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served on June 15, 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. Hesen, 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.

by R. Benjamin Crittenden

Counsel for University of the Cumberlands

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. The Appropriations For The Construction Of Pharmacy Buildings And Creation Of A Pharmacy Scholarship Comply With The Kentucky Constitution Because They Serve A Clear Health And Welfare Purpose And The Funds Are Derived From Non-Educational Funds That Cannot Be Diverted For Any Religious Purpose.

In its 2006-2007 budget, the General Assembly addressed the state's undisputed pharmacist shortage by committing funds for the construction of buildings to train pharmacists and to support scholarships to encourage enrollment in the state's pharmacy schools. Appellees allege that these appropriations do not serve a public health and welfare purpose and instead violate §§ 5, 59, 171, and 189 of the Kentucky Constitution.[1] For each provision, the critical question is whether the appropriation serves only a parochial or other narrow interest or some broader public purpose. *Kentucky Bldg. Comm'n v. Effron*, 310 Ky. 355, 220 S.W.2d 836, 838 (Ky. 1949) (if the "use [of public funds] is a public one and is calculated to aid all people in the State, it will not be held in contravention of § 5"); *Hayes v. State Property & Buildings Comm'n*, 731 S.W.2D 797, 804 (Ky. 1987) (statute financing certain types of development projects not a preference for Toyota under § 59, although Toyota was only business receiving benefits of program, because it was "available for use in connection with any valid industrial development project now or in the future"); *Neal v. Fiscal Court*, 986 S.W.2d 907, 909, 913 (Ky. 1999) (transportation subsidies for private schools did not violate § 171 or § 189 because purpose and effect was "greater protection for the safety and welfare of the children that attend the schools"). The appropriations at issue here address the undisputed shortage of pharmacists, an urgent health and welfare need, particularly acute in southeastern Kentucky.

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[1] Appellees do not argue in this Court that the appropriations violate § 184.

A. Appellees Do Not Dispute That Kentucky Suffers From A Shortage Of Pharmacists And Fail To Satisfy Their Burden To Show That The General Assembly Acted Unconstitutionally.

Appellees do not dispute that Kentucky indeed suffers from a shortage of pharmacists. Appellees also do not suggest that building a pharmacy school in the most underserved area of the state and providing scholarships to encourage more Kentuckians to pursue pharmacy as a career and to remain in Kentucky once they graduate is a poor means of addressing this problem. Nor could they do so. The shortage is well documented and undisputed among federal and public health agencies and national and state associations of pharmacists and was publicly known when HB380 was enacted. Nelson Aff. ¶¶ 7-9 and Ex. C, F, G; Tracey Aff. Ex. J at 2, Ex. A at 3, Ex. B; Colegrove Aff. Ex. I. (affidavits were not paginated by Clerk in preparing record on appeal). The means chosen to address the shortage had wide approval among the pharmacy profession in the state, Colegrove Aff. Ex. I (Kentucky Pharmacists Association applauding appropriations); Andrea Braslavsky, *A Bitter Pill to Swallow: Rx for Disaster?*, WebMD, July 16, 2001, http://www.webmd.com/healthyaging/features/-bitter-pill-to-swallow. (Dean of the University of Kentucky College of Pharmacy calling for addressing pharmacy shortage by increasing state's capacity to produce more pharmacy graduates.)

That being the case, the Court need look no further. This Court has repeatedly held that the General Assembly's motives in enacting legislation are not at issue and that rather the question is whether the legislation is capable of carrying out a constitutionally permissible purpose. *Moore v. Ward*, 377 S.W.2d 881, 883 (Ky. 1964) ("The question is not what influenced the legislation, but whether the emergent law is reasonably within the scope of a legitimate public purpose."). Moreover, the General

Assembly is granted broad latitude in determining the best means of providing for societal welfare. *Id.* at 884.

B. The Challenged Appropriations Will Serve The Health And Welfare Needs Of All Kentuckians, Not Religious Or Generalized Educational Purposes.

1. The Court Should Not Presume Improper Diversion of State Funds.

The University of the Cumberlands Pharmacy School does not exist. It will not exist unless and until judgment is entered for the Appellants. (II R. 283) (Memorandum of Understanding conditioning release of funds on outcome of this litigation). Thus, there is no history of operation of the UC Pharmacy School to assess whether the appropriations were used congruent with state and federal law. Nevertheless, state laws and accounting requirements, UC's own policies, and a Memorandum of Understanding (MoU) between UC and the Governor's Office for Local Development provide assurances that the appropriated funds will serve the health and welfare needs of Kentucky residents and not be diverted for any improper purpose. See Appellant's Brief, 8-11. In the absence of any actual diversion of funds for an improper purpose, the Court should not assume that the Appellants will divert state funds in violation of their legal and contractual obligations. *Mitchell v. Helms*, 530 U.S. 793, 857-58 (2000) (controlling opinion of Justice O'Connor stating that Court requires plaintiffs "to prove that the aid in question actually is, or has been, used for religious purposes.")

2. The Pharmacy Scholarship Is Open To Students Who Attend Any Pharmacy School In The Commonwealth.

The Appellees misapprehend a factual observation by UC that there are no public four year colleges or universities in Southeastern Kentucky – hence making UC a logical location for the pharmacy school in this high need area – as a concession by UC

that it was the only eligible school under the scholarship program. Appellees' Brief, 17. As Appellants have consistently argued, and as the actual eligibility criteria for the pharmacy scholarship as enacted by the General Assembly confirms, the scholarships are not limited to students attending the University of the Cumberlands. KRS § 164.7901(3). Appellees first acknowledge that the preamble to a statute generally doesn't have any legal effect if it is at odds with the text of the statute. Appellees' Brief, 26 ("Preambles to legislation are generally not law and therefore not binding on the courts, *see e.g., Jasper v. Commonwealth*, 375 S.W.2d 709, 710 (Ky. 1964)"). Yet after then noting that the Circuit Court also "elected to treat this language as advisory only" the Appellees fault the Circuit Court for citing "no legal authority for this restraint." Appellees' Brief, 27. As Appellees had just observed, a statute's preamble is not binding. Nevertheless, Appellees rely upon this concededly non-binding preamble as authoritative despite its conflict with the eligibility requirements set out in the statute itself. Appellees provide no evidence that the State is poised to give scholarships only to UC students despite the clear language of the eligibility requirements to the contrary.

3. The Public At Large Benefits From The General Assembly's Effort To Address The Pharmacy Shortage.

Further, the mere fact that not every citizen of the Commonwealth will attend UC's Pharmacy School (or any other pharmacy school in the state benefiting from HB380) or receive a pharmacy scholarship does not diminish the public benefit of reducing the Commonwealth's shortage of pharmacists.[2] Just as public road projects are not mere benefits to the construction companies and employees who contract to do the

[2] Appellees do not press their claims under §§ 2 or 3 here even though the alleged "invidious discrimination" against Jason Johnson — not a party here — was the original catalyst for this lawsuit. Yet they nevertheless state that he was disciplined because of his sexual orientation. Appellees' Brief, 42. Appellants' addressed this on page 31, footnote 13 of their opening brief.

work but rather serve the public welfare by building infrastructure, the funding for construction of a pharmacy school in the area of the state with the greatest need for pharmacists and scholarships for pharmacy students throughout the state serves an undisputable public health and welfare need. *See Butler v. United Cerebral Palsy of N. Kentucky*, 352 S.W.2d 203, 206 (1961) (aid to private schools educating disabled children contributes to welfare of whole state); *Neal v. Fiscal Court, Ky.*, 986 S.W.2d 907, 914 (1999) (transportation subsidies for children attending private religious schools served public interest in safety of non-public school children).

Appellees rely heavily on *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983) where this Court held that state funding of general textbooks for private elementary and secondary school children violated § 189. As *Fannin* itself explains, the provision of textbooks to private school children cannot be understood as anything other than a generalized educational expense. *Id.* at 484. Further, this Court has more recently explained that the problem with the expenditures in Fannin were that they simply subsidized the school's educational function and were not calculated to address any broader health and safety concern. *Neal*, 986 S.W.2d at 909. Here, by contrast, the General Assembly has chosen a number of initiatives to address a well documented health problem facing the state, the shortage of trained pharmacists.

Despite Appellees' claims, allowing the General Assembly to involve private – including religiously affiliated – educational institutions in addressing the state's pressing health and welfare needs would not lead to direct subsidies for parochial schools. Appellees' Brief, 22. Instead, consistent with prior decisions of this Court, the General Assembly may partner with these institutions where appropriate to serve a bona fide health or welfare interest. Appellees' construction, on the other hand, would

simply exclude religious institutions from working with the State as part of any public program. Such a construction would not only conflict with this Court's decisions in *Neal, Butler, Effron*, etc., but would also threaten to violate the Federal Constitution. See Part II below and Appellants' Brief, 25-27.

C. Section 189 Is Not Implicated Because None Of The Appropriated Funds Were Raised Or Levied For Educational Purposes.

Section 189 provides, "No portion of any fund or tax ... 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." The funds for the pharmacy building come from bonds sold to private investors and supported by proceeds from the Coal Severance Tax and the General Fund and funds for the pharmacy scholarships come from the Coal Severance Tax. It is undisputed that the funds here do not come from the Common School Fund or any source set aside for education. Thus, in addition to the reasons above, the Circuit Court erred in holding that the General Assembly violated §189 by setting aside non-educational funds to address the state's pharmacy shortage.

The challenged appropriations are aimed at addressing the state's shortage of pharmacists, not any special privilege for UC nor any religious or generalized educational purpose. Further, the funds used were not raised for the public schools, and adequate procedures are in place to ensure that the funds are not improperly diverted. Thus the appropriations comply with §§ 5, 59, 171, and 189 of the Kentucky Constitution.

II. The Circuit Court's Interpretation Of § 189 Of The Kentucky Constitution To Prohibit Religiously Affiliated Institutions From Participating In Otherwise Available Public Programs Raises Substantial Federal Constitutional Problems.

A. This Court Must Consider The Federal Constitutional Implications Of Adopting The Circuit Court's Interpretation Of § 189.

Appellees acknowledge that this Court may, even on its own initiative, examine the Federal Constitutional implications of the Circuit Court's interpretation and application of § 189. Appellees' Brief, 33. Further, as Appellants discussed in their opening brief, Appellants' Brief, 25-27, the Federal Constitutional arguments Appellants raise are not an affirmative defense but a canon of construction made relevant by the Circuit Court's construction of § 189. *Shannon v. Heringer*, 271 Ky. 248, 111 S.W.2d 603, 604 (Ky. 1937) (Statutes should "not be construed so as to raise a grave and doubtful constitutional question if some other construction is open."). Thus, this Court must carefully consider the constraints of the Federal Constitution in assessing the proper interpretation of the Kentucky Constitution.

B. *Locke v. Davey* Did Not Alter The Well-Established Principle That Government May Not Penalize Religious Persons And Institutions By Excluding Them From Publicly Available Programs On The Basis That They Are Religious.

Appellees' claim that the Supreme Court's 2004 decision in *Locke v. Davey*, 540 U.S. 712 (2004), "demonstrate[s] that UC's overall effort to challenge government funding decisions under the Free Exercise Clause is infirm." Appellees' Brief, at 40. This reading of *Locke*, authorizing discrimination against religious persons and institutions by government whenever money is involved, is directly refuted by *Locke* itself. In *Locke* the State of Washington refused to permit the use of a state scholarship for vocational training in pursuit of a devotional theology degree and training for the clergy at a Christian college. *Locke*, 540 U.S. at 725. Washington permitted its vocational training scholarships to be used for other degree programs at Joshua Davey's avowedly Christian college despite that school's religious character. *Id.*, at 724-25. The

Supreme Court upheld the denial of Joshua Davey's scholarship, carefully and expressly limiting its decision to "the State's interest in not funding the religious training of clergy." 540 U.S. at 722 n.5. Emphasizing the historical concern about the use of state funds to pay for training of the clergy, the Court limited its holding to permit the state to exclude from its scholarships a "distinct category of instruction," clergy training programs, distinguishing its previous decisions holding that the denial of financial benefits to individuals violated the Free Exercise Clause. *Id.* at 720-21 (collecting cases).

In *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008), the Tenth Circuit held that Colorado's refusal to permit students to use state scholarships to pursue non-devotional degrees at CCU on the basis that the school was "pervasively sectarian" violated the First Amendment. Colorado excluded CCU from the list of schools at which students could use their state scholarships. The Tenth Circuit held, "This is discrimination 'on the basis of religious views or religious status,' and is subject to heightened constitutional scrutiny." *Id., quoting Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). The Court rejected the same interpretation of *Locke* that Appellees advance here. *Colorado Christian University*, 534 F.3d at 1256 (*Locke* "does not imply that states are free to discriminate in funding against religious institutions however they wish, subject only to a rational basis test.")

Appellees ask this Court to interpret the Kentucky Constitution to prohibit an appropriation to build a pharmacy building on the UC campus and to require UC students' exclusion from a statewide pharmacy scholarship program because UC is a Christian university. Such an interpretation of the Kentucky Constitution to require discriminatory treatment of religious higher educational institutions would go well

beyond what the Supreme Court permitted in *Locke*. The denial of equal treatment to UC and the students who choose to attend that school is thus subject to the general rule that categorical discrimination against religious persons and institutions is presumptively unconstitutional. *Smith*, 494 U.S. at 877 (law is presumptively unconstitutional where it "impos[es] special disabilities on the basis of religious views or religious status."); See Appellants' Brief, 25-27. This Court should reject the construction of § 189 advocated by Appellees and adopted by the Circuit Court so as to avoid bringing the Kentucky Constitution into conflict with the Federal Constitution.

C. Appellees' Reliance On *Pleasant Grove v. Summum* Is Misplaced.

Appellees also assert that the Supreme Court's recent decision in *Pleasant Grove v. Summum*, ___ U.S. ___, 129 S.Ct. 1125 (2009) "made clear that UC's 'viewpoint discrimination' doctrine only applies where the government purports to regulate speech in a traditional or limited public forum." Appellees' Brief, 40. This is erroneous. *Pleasant Grove* involved a free speech challenge by a religious group seeking to have a monument bearing its tenets erected alongside a donated 10 Commandments monument and other displays in a municipal park in Utah. The Court held simply that the monument displays in the park were the government's own speech. *Pleasant Grove*, 129 S.Ct. at 1138. *Pleasant Grove* certainly stands for no broad principle that government may engage in religious viewpoint discrimination whenever it appropriates funds.

III. HB380 Did Not Violate § 51 Or KRS § 48.310(1).

The Pharmacy Scholarship Program did not need to amend KRS § 143.090 because that statute already anticipates that budget bills may direct portions of the Coal Severance Tax revenues to other expenditures. K.R.S. § 143.090(3) (allocating Coal

Severance Tax funds "unless otherwise provided by the General Assembly in a budget bill...."). Hence, as to the period funded in HB380, the General Assembly did not violate either KRS § 48.310(1) or § 51.

As explained in Appellant's Brief, 35-37, to the extent that the General Assembly created a permanent scholarship program and this conflicts with KRS § 48.310(1), HB 380 is either an exemption from or an amendment by implication of KRS § 48.310(1). As Appellants note, the General Assembly has routinely done this, Appellants' Brief, 36. Appellees' only response to this fact is to call into question the legality of all these other appropriations on the basis that the "formulaic repetition of 'notwithstanding 48.310' did not make the action[s] lawful." Appellees' Brief, 29.

Even if this Court believes that the language making the Pharmacy Scholarship Program permanent impermissibly conflicts with KRS § 48.310(1), the Court may sever the "permanent effect" language of the Pharmacy Scholarship Program. The program would then be funded as appropriated in HB380 and the General Assembly could renew the program or establish it independently if it chose to do so.

CONCLUSION

For the foregoing reasons, UC respectfully requests that this Court reverse the Franklin Circuit Court, and remand this case to the circuit with directions to enter summary judgment for UC.

Respectfully submitted,

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