SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY
CASE NO. 2008-SC-000253-TG

UNIVERSITY OF THE CUMBERLANDS — **APPELLANT**

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

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

Consolidated for hearing with

CASE NO. 2008-SC-000285-TG

VERNIE McGAHA, et al. — **APPELLANTS**

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

UNIVERSITY OF THE CUMBERLANDS, et al. — **APPELLEES**

BRIEF OF APPELLEES

Respectfully submitted,

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CERTIFICATE REQUIRED BY CR 76.12(6)

I certify that a copy of this Brief for Appellees was served by first-class mail on May 15, 2009 upon Ellen Hesen, General Counsel, Office of the Governor, State Capitol, Room 101, 700 Capital Ave., Frankfort, KY 40601; Mark R. Overstreet, STITES & HARBISON PLLC, 421 W. Main St., P.O. Box 634, Frankfort, KY 40602-0634; James P. Guenther, James D. Jordan, GUENTHER, JORDAN & PRICE, PC, 1150 Vanderbilt Plaza, 2100 West End Ave., Nashville, TN 37203; Timothy J. Tracey, Gregory S. Baylor, Isaac Fong, CENTER FOR LAW & RELIGIOUS FREEDOM, 8001 Braddock Rd., Suite 300, Springfield, VA 22151; Bryan H. Beauman, STURGILL TURNER BARKER & MALONEY PLLC, 333 W. Vine St., Suite 1400, Lexington, KY 40507; R. Daniel Beale, Jessica C. Abrahams, MCKENNA LONG & ALDRIDGE LLP, 303 Peachtree St. NE, Atlanta, GA 30308; William E. Sharp, David A. Friedman, ACLU OF KENTUCKY, 315 Guthrie St., Suite 300, Louisville, KY 40202; Ayesha N. Khan, Richard B. Katskee, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, 518 C Street NE, Washington, DC 20002-5810; Daniel Mach, Director of Litigation, ACLU PROGRAM OF FREEDOM OF RELIGION AND BELIEF, 915 15 Street NW, Washington, DC 20005; Mary W. Ruble, KENTUCKY EDUCATION ASSOCIATION, 401 Capital Ave., Frankfort, KY 40601; Mark A. Wohlander, WALLINGFORD LAW PSC, 3141 Beaumont Centre Circle, Suite 302, Lexington, KY 40513; Lori H. Windham, THE BECKET FUND FOR RELIGIOUS LIBERTY, 1350 Connecticut Ave., Suite 605, Washington, DC 20036; Sam Givens, Clerk, KENTUCKY COURT OF APPEALS, 360 Democrat Dr., Frankfort, KY 40601; and Hon. Roger Crittenden, SENIOR JUDGE, FRANKLIN CIRCUIT COURT, Franklin County Courthouse, P.O. Box 678, Frankfort, KY 40602. I further certify that the Record on Appeal withdrawn on April 21, 2009 was returned to the Court on May 14, 2009.

David Tachau

Counsel for Appellees
Rev. Albert M. Pennybacker, et al

SUPREME COURT OF THE
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UNIVERSITY OF THE CUMBERLANDS, et al. — **APPELLEES**

* * * * *

May It Please The Court:

Appellees Rev. Albert M. Pennybacker, Rev. Dr. Paul D. Simmons, the Jefferson County Teachers Association, Ms. Christina Gilgor and the Kentucky Fairness Alliance, plaintiffs in the underlying action, tender this Brief in support of the decision below and for additional reasons as described in the following discussion.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees join with Appellants and respectfully request the opportunity for oral argument. As Appellants argued in successfully seeking to transfer their appeals directly from the Circuit Court, the constitutional issues presented by these appeals involve significant matters of public concern which have come before this Court infrequently. Appellees thus believe oral argument may be helpful for the Court's deliberations.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellees accept certain portions of the Statement of the Case in the Brief for Appellant filed in No. 2008-SC-00253 by the University of the Cumberlands ("UC Brief"), and likewise portions of the shorter Statement of the Case in the Brief for Appellants filed in No. 2008-SC-00285 by Senator Vernie McGaha, et al. However, Appellees disagree with other portions and contend that additional matters are essential to a fair understanding of the issues presented by this appeal. According, Appellees offer the following Counterstatement of the facts and procedural events in this litigation.

A. Background Facts Involving The University Of The Cumberlands

The University of the Cumberlands, Inc. ("UC"), until July 2005 known as Cumberland College, is located in Williamsburg, Ky. It was founded in 1887 by the Mt. Zion Association of Baptists, and has had a relationship with the Kentucky Baptist Convention since 1908. As recently as 1986-87, the parties entered into a "Covenant Agreement between Kentucky Baptist Convention, Inc. and Cumberland College" [1]:

> designed to clarify and make more permanent the relationship between the Kentucky Baptist Convention and Cumberland College. This relationship is built upon many years of faithful commitment and trust by many individuals and many millions of dollars contributed by Kentucky Baptists in support of Cumberland College and by the support of many Cumberland College graduates to the Kentucky Baptist Convention.[2]

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[1] Tendered Appendix Exhibit A (attached as Ex. 2 to Appellees' November 26, 2007 Summary Judgment Memorandum, which was included but not numbered in the Record certified by the Circuit Court); *see also* Appendix Ex. 7 (Excerpt of Wake depo.), at 12.

The copy of the "Baptist Covenant Agreement" actually attached as Exhibit 2 to the Summary Judgment Memorandum was incomplete. A full copy has been tendered to the Franklin Circuit Court as one of several attachments to a Motion to Supplement the Record, and thus is included in the Appendix to this Brief only as "tendered Appendix Exhibit A."

[2] Tendered Appendix Exhibit A (Baptist Covenant Agreement), at 8.

Thus, the Baptist Covenant Agreement specified that "It is the intent of the Kentucky Baptist Convention and of Cumberland College that Cumberland College shall maintain its Baptist character as set forth in its purpose and the support of the Kentucky Baptist Convention is based upon faithful adherence to that purpose."[3] The Agreement further stated: "The primary purpose of the Kentucky Baptist Convention in supporting Cumberland College is to advance the Kingdom of God in the area of Christian higher education. Such purpose should at all times be recognizable within the ministry of Cumberland College."[4] Separately, in its Articles of Incorporation, UC has committed that if it ever dissolves, all of the University's assets – presumably including any Pharmacy School building – will be distributed to the Kentucky Baptist Convention.[5]

The University is located in a state senate district represented since 1987 by David L. Williams. Almost a year before the 2006 legislative session, UC's President James H. Taylor met with Senator Williams to discuss "the possibility of exploring the feasibility of several programs." President Taylor wrote after their meeting, "Since you told me to spell it out, I'm glad to do so, especially since I'm asking for the people of our geographical area. I hope I won't be viewed as a kid in a candy store since, like you, my desire is to help our own people."[6] Taylor then listed several possible projects, ranging

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3 *Id.*, at 3-4.

4 *Id.*, at 3.

5 *See* Tendered Appendix Exhibit B: Art. V, "Restated Articles of Incorporation of University of the Cumberlands, Inc.," at 1 (also attached to Appellees' Summary Judgment Memorandum as Ex. 7). The copy of the Articles actually attached as Exhibit 7 to the Summary Judgment Memorandum was incomplete. A full copy has been tendered to the Franklin Circuit Court with the Motion to Supplement the Record.

6 *See* Tendered Appendix Exhibit C: Letter from James H. Taylor to David L. Williams, February 9, 2005 (Plaintiffs' Ex. 3 during Deposition of Stephen J. Allen, November 17, 2006).

from constructing "at least one golf course," to "explor[ing] the possibility of constructing an Appalachian Museum and Craft Center," to "The construction of a grand boulevard with appropriate lighting from the I-75 Exit 11 interchange to the campus."

Instead of pursuing any of these proposals, President Taylor subsequently became interested in the idea of starting a pharmacy program. In February 2006, Taylor invited the dean of the Texas Tech University pharmacy school, Dr. Arthur Nelson, to visit as a paid consultant. By that time, Senator Williams was engaged in a Republican primary election campaign against a Williamsburg resident and UC professor, Oline Carmichal, Jr. President Taylor wrote Dr. Nelson the next day (and copied Senator Williams):

> As soon as you communicate with Senator David Williams and provide him with the quick and dirty financial estimates, the better. Senator David Williams told me he would like to have the package within ten weeks in order to get the legislation appropriation. He further told me he would work with Congressman Hal Rogers, Senator Bunning and Senator McConnell for an earmark for the capital portion.[7]

Over the next six weeks, Dr. Nelson exchanged a series of emails with UC officials, including Dr. Michael Colegrove and Donald W. Good, UC's Vice President for Academic Affairs, concerning their communications with Senator Williams and his staff, and their efforts to provide him information for the appropriation process.[8] For example, on March 2, 2006, Dr. Nelson wrote UC's Vice President Dr. Good:

A copy has been tendered to the Franklin Circuit Court with the Motion to Supplement the Record.

[7] *See* Appendix Ex. 1 (Letter from James H. Taylor to Arthur A. Nelson, Jr., February 15, 2006; attached to Appellees' Summary Judgment Memorandum as Ex. 12).

[8] *See* Appendix Ex. 2 (Correspondence between Arthur A. Nelson, Jr., Donald W. Good and Michael Colegrove; attached to Appellees' Summary Judgment Memorandum as Ex. 13).

> I just finished speaking with Senator Williams regarding his efforts with the potential pharmacy school at the Cumberlands. You are very fortunate to have him working for you. He gave me a good oversight of his strategy and is potential for providing the tuition subsidy. He is interested in continuing along the feasibility study process in a timely manner (within 6 months at most).[9]

On April 3, 2006, Dr. Good wrote to Dr. Nelson: "President Taylor tells me that the state budgeting for our support is on the fast-track. Therefore, we would like to go ahead and move toward hiring a dean as soon as possible. Please advise us as to how quickly we can go forth and what we might need to be doing in order to do so."[10]

In the University's Brief, UC devotes considerable attention to a discussion of "The Pharmacist Shortage" (*see* UC Brief, at 1-2) and "The General Assembly Addresses the Pharmacist Shortage" (*see id.*, at 3-8), relying on affidavits with supporting materials filed with UC's motion for summary judgment in the Circuit Court. However, none of those materials had been produced in response to broad discovery requests, such as a request "for documents created or published between January 1, 2004 through the date of your production ... related to or concerning the construction or operation of a program of pharmacy studies ... ." Indeed, there was no evidence produced in the Circuit Court of *any* legislative or executive branch consideration of any alleged shortage of pharmacists or pharmacy programs in Kentucky before the disputed appropriations were enacted, despite multiple misstatements in UC's Brief.[11]

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[9] *See id.* (document with bates number UC_00317).

[10] *See* Appendix Ex. 3 (Correspondence between Arthur A. Nelson, Jr. and Donald W. Good; attached to Appellees' Summary Judgment Memorandum as a portion of Ex. 15).

[11] *See* Appendix Ex. 4. Three times, in increasingly misleading terms, UC's Brief states categorically that the legislative purpose for the appropriations was to address "a shortage of pharmacists," citing a single item in the record. *See* UC's Brief, at 3: "Members of the General Assembly commented to the press that the purpose of these appropriations was 'filling a shortage

On the contrary, the only evidence produced by the University during discovery concerning the justification for a pharmacy program at UC was contained in correspondence and a feasibility study prepared two months *after* the legislative appropriations by UC's paid consultant Dr. Arthur L. Nelson. Although Dr. Nelson later executed the Affidavit upon which UC heavily relies in its description of "The Pharmacist Shortage," his contemporaneous correspondence and feasibility study reflect considerable pessimism about the need for an additional pharmacy program, and the ability of any program at UC to compete with other regional programs, and the financial resources at UC that would be necessary to sustain any program.

For example, following his receipt of Dr. Good's April 3, 2006 email stating "we would like to go ahead and move toward hiring a dean as soon as possible. Please advise us as to how quickly we can go forth and what we might need to be doing in order to do so," Dr. Nelson urged restraint:

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of pharmacists.' (Tracey Aff. Ex. J. at 2.)"; UC's Brief, at 19: "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.)"; UC's Brief, at 32: "In passing the appropriation, the General Assembly explained that it was seeking to 'fill[] a shortage of pharmacists.' (Tracey Aff. Ex. J. at 2.)"

Appendix Ex. 4 is the cited attachment to Mr. Tracey's Affidavit. It is a *Lexington Herald-Leader* news story from April 19, 2006, reporting that the previous day Senator Williams had held what was apparently a campaign appearance at UC – five weeks before the upcoming primary election – with 200 constituents using theatrical props and encouraging political calls to the Governor's Office not to veto the disputed appropriations. In the portion being misquoted by UC's Brief, the newspaper reported that Senator Williams "also said that state constitutional law would not forbid the state's giving money to the college because 'it would serve a legitimate public purpose,' filling a shortage of pharmacists."

In other words, only one legislator – not "Members" or "the General Assembly" – made any comment to the press, and that legislator – speaking a week following final legislative action – did not say anything about the actual legislative "purpose of these appropriations," but simply how they might be defended from constitutional challenges. Indeed, even the quoted phrase "filling a shortage of pharmacists" was the reporter's, not Senator Williams's.

> ... [W]e need to answer some critical questions in the feasibility study before we can seriously recruit a quality dean. ... I assume you have SACS [Southern Association of Colleges and Schools] approval, if not this would be very important before trying to recruit a dean. No one any good would be interested without the feasibility and SACS' authorization.[12]

Nonetheless, with no apparent legislative deliberations or fact-finding, on April 11, 2006, the General Assembly gave final approval to its biennial budget, including $10 million in public bond funding for the construction of a "Pharmacy Building" on UC's campus.[13] Separately, in Part XXIV of the budget, the legislature created a Pharmacy Scholarship Program to be administered by the Kentucky Higher Education Assistance Authority that was designed to be permanent and to function as special legislation solely benefiting UC students.[14] In order to make the scholarship funding permanent, the General Assembly expressly suspended KRS 48.310, which prohibits any budget bill from being "effective beyond the second fiscal year from the date of its enactment." KRS 48.310(1). To fund the scholarship program for the 2007-08 fiscal year, the legislature allocated $1 million to be provided from a permanent "special trust fund" generated from coal severance tax revenues levied under KRS 143.020.[15] In creating the

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12 *See* Appendix Ex. 3.

13 Section N(I) of Part I of House Bill 380, at 335, 2006 Ky. Acts 252, at 201.

14 Section 1(1) of Part XXIV of House Bill 380, at 550, 2006 Ky. Acts 252, at 319-320, codified at KRS 164.7901(1), provided:

> It is the intent of the General Assembly 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.

15 Section K(2)(7) of Part I of House Bill 380, at 128, 2006 Ky. Acts 252, at 63.

scholarship program, the legislature effectively amended KRS 143.090(3)–(4), which controls how coal severance tax receipts are actually spent.[16] However, the General Assembly did not identify the Kentucky statute that was being amended, nor did the General Assembly re-enact KRS 143.090 with the new language.[17]

Finally, in directing that the proposed pharmacy scholarship program be administered by the Kentucky Higher Education Assistance Authority, the General Assembly gave no direction that the scholarship funds be paid directly to individual students, as suggested in UC's Brief, at 5-6. On the contrary, Appellees established in discovery that while UC currently receives tuition support and funding from a number of state programs administered by the KHEAA, those programs uniformly pay money not to the students themselves, but directly to the University. The money is deposited into the University's general account, with book entries simply being made to reflect allocations to individual students.[18]

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16 *See* KRS 164.7901(11)(b).

17 *But see* KY. CONST. § 51:

> No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length.

See also KRS 446.145 ("Manner of indicating amended, created, repealed, and repealed and reenacted sections and sections not intended to be codified.").

18 *See* Appendix Ex. 5 (Excerpt from November 17, 2006 Deposition of Stephen Allen attached to Appellees' Summary Judgment Memorandum as a portion of Ex. 3), at 14-16, 40-41; *id.*, at 41 ("Q. The money itself comes from Kentucky Higher Education Assistance Authority ... to Cumberlands and is transferred to the general fund of Cumberlands, but there are book entries made for each student to reflect what payments have come in; is that correct?" "A. Yes.").

UC's Brief also promotes the subterfuge that the scholarship program was not special legislation. *See* UC's Brief, at 5: "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." But no one was fooled. On the contrary, on April 19, 2006, President Taylor himself wrote to the president of the Southern Association of Colleges and Schools that UC intended seek accreditation for the new pharmacy program now that the special legislation had been enacted: "The state of Kentucky has authorized $10,000,000 to be used for the construction of a pharmacy building and development of the program *as well as an additional $2,000,000 over a two year period to subsidize tuition.*"[19]

At the time of Taylor's letter following the legislative appropriations, Dr. Nelson was still more than a month away from preparing even the first draft of his feasibility study. More surprisingly, the University's Board of Trustees had not even been informed about the proposed school, much less had they taken any action to approve this new program.[20] Dr. Nelson himself was becoming increasingly concerned.[21] As he neared

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[19] *See* Appendix Ex. 6 (Correspondence from James H. Taylor to Belle S. Wheelan, April 19, 2006; attached to Appellees' Summary Judgment Memorandum as a portion of Ex. 15).

[20] *See* Appendix Ex. 7 (Excerpt from November 17, 2006 Deposition of Elizabeth Sue Wake; attached to Appellees' Summary Judgment Memorandum as a portion of Ex. 4), at 16.

[21] The significance of the failure to inform the Trustees was highlighted by a candid email Dr. Nelson sent to UC's Dr. Good on May 25, 2006 after completing a draft of his feasibility study. Dr. Nelson noted the financial obstacles if UC actually did develop a pharmacy program:

> ... At this point, I didn't recommend you move forward with a pharmacy school without the $10M of state or other sources of funds. I have not reviewed the University's financials (I probably should do so before I finish my report – are these data available for the last 3 years???), but given the information I gleaned on the last visit, you don't seem to have a lot of available $'s to invest in an expensive new program without significant outside help. Also, I raise the issues of impact on your

completion of his feasibility report in June 2006, he noted that another pharmacy program was being developed in Louisville and "It appears they are interviewing their dean candidates in July and plan to open in Fall 2007."[22] Four days later, on June 17, 2006, after Dr. Nelson had finally analyzed the University's financial condition, he expressed more intense skepticism about the prospects for UC's pharmacy program, particularly because of the costs of paying faculty and funding ongoing operations which the legislature's appropriations would not address, and because of intense competition from other programs being developed nearby:

> I reviewed the University's financials. The reports revieled [sic] what I suspected. ***The University is financially stable now, but really not growing in financial strength and available reserves are minimum.*** A pharmacy program will increase your risks dramatically in proportion relative to the number of students served. You could get a big Institional [sic] boost once the program stabilized, but that will not be for several years out. Once you start a program you have a huge financial risk to deliver a program with quantifiable outcome measure (Board scores), regardless of the financial situation of the Univ. ***I don't see that you have the reserves to back-up taking on debt to finance the startup and operations until stability either*** . . . .
>
> ***I am uncomfortable with the risk from long-term impact from the number of new and expanding programs in your region (actually nation-wide). I don't believe all new programs will survive.*** All health profession programs are cyclical, and pharmacy seems to be reaching a top just as all the new programs and

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> mission; something I don't believe has been widely considered by the University community and Trustees. As you know, it will be a major shift that will impact the entire University community one way or the other. That is not meant to suggest you shouldn't do this, simply the University community and Trustees need to clearly understand the potential long-term impact it would likely have, both good and bad.

See Appendix Ex. 8 (email from Arthur Nelson to Don Good dated May 25, 2006; attached to Appellees' Summary Judgment Memorandum as Ex. 16).

[22] *See* Appendix Ex. 9 (email from Arthur Nelson to Don Good dated June 13, 2006; attached to Appellees' Summary Judgment Memorandum as portion of Ex. 17).

> expansions are coming on-line. As you know, you are in a different situation than Wingate in NC, Samford in AL, and Palm Beach Atlantic in FL. Due to their location, they will always have access to clinical sites and pop base to keep their classes filled. If you wish to continue moving forward, I will be available at your request to help.[23]

B. The Discriminatory Expulsion of Jason Johnson

Meanwhile, during the same period that UC was seeking state taxpayer funding for its proposed pharmacy building and scholarship program, the University expelled a student, Jason Johnson, following the receipt by UC officials of an anonymous email identifying Johnson and several internet webpages where he discussed his life. Testimony during discovery from those UC officials established that Johnson was not expelled because of any identified sexual *conduct*. Instead, Johnson was expelled merely because of his *status* as a homosexual and the conclusion of UC's Vice President for Student Services, Dr. Michael Colegrove, that Johson was "promoting" homosexuality. Colegrove, who testified that homosexual conduct is "illegal," never asked Johnson whether he had engaged in sexual conduct, and Jason never said that he had done so.

The University explained Johnson's expulsion in an April 6, 2006 press statement released by President Taylor: "University of the Cumberlands isn't for everyone. We tell prospective students about our high standards before they come. There are places students with predispositions can go such as San Francisco and the left coast or to many of the state schools."[24]

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[23] Appendix Ex. 10 (email from Arthur Nelson to Don Good dated June 17, 2006; attached to Appellees' Summary Judgment Memorandum as portion of Ex. 17) (emphasis added).

[24] *See* Appendix Ex. 11 (April 6, 2006 press statement "Handed to Lex-TV, Channel 18"; attached to Appellees' Summary Judgment Memorandum as Ex. 10) (emphasis in original):

> At University of the Cumberlands, we hold students to a higher standard than does society in general. ...

C. The Initiation Of This Litigation

On April 24, 2006, Governor Ernie Fletcher announced that he would not veto the appropriations for UC's Pharmacy School or the Pharmacy Scholarship Program. Appellee Christina Gilgor, then Executive Director of the Kentucky Fairness Alliance (an advocacy organization that promotes the legal rights of gay and lesbian Kentuckians), filed this lawsuit the following day. I R. 1. By Agreed Order entered on June 5, 2006, the parties at that time agreed that "no funds will be released by the Executive Branch of Kentucky Government" for the proposed Pharmacy School construction or the Pharmacy Scholarship Program "until thirty (30) days following the entry of a final and appealable judicial ruling on the merits, subject to any motion for relief from this order that may be filed by the parties or entered by a court of competent jurisdiction." I R. 19.

On June 8, 2006, a Second Amended Complaint was tendered, and by agreement, was filed on June 14, 2006. I R. 25, 27. Appellees sought declaratory and injunctive relief that the disputed appropriations violated prohibitions in Kentucky's constitution against the use of public funds for private sectarian schools, as well as prohibitions on governmental discrimination against homosexuals. On June 28, 2006, the Circuit Court entered an Agreed Order permitting the University to intervene and participate in the

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> We've followed our policies and procedures in keeping with our traditional denominational beliefs. ...
>
> University of the Cumberlands isn't for everyone. We tell prospective students about our high standards before they come. There are places students with predispositions can go such as San Francisco and the left coast or to many of the state schools.
>
> We are different by design, and we say so to students before they get on campus.

litigation. I R. 42. On July 3, 2006, a group of thirteen members of the General Assembly also moved to intervene in this action pursuant to CR 24. They asserted:

> As members of the Kentucky General Assembly who are responsible for enacting, and who did enact, the Commonwealth's budget, these Legislator Movants have a compelling interest in the constitutional validity of the budget/appropriations that the General Assembly overwhelmingly enacted. As indicated by the fact that this is currently a lawsuit against the executive branch, the Legislator Movants are entitle[d] to [] join in this action to assure that their interests as legislators, who are responsible for the budget, is protected.

Appellees opposed the intervention. I R. 53. Appellees contended that the legislators were not entitled to intervene as a matter of right under CR 24.01(b), and had cited no authority from Kentucky or any other American jurisdiction supporting their contention that they had a cognizable legal interest in statutes they had supported. *See* Baker v. Webb, 127 S.W.3d 622, 624 (Ky. 2004) ("In order to intervene, the party's interest relating to the transaction must be a 'present substantial interest in the subject matter of the lawsuit,' rather than an expectancy or contingent interest.") (citation omitted). Appellees also contended that the legislators should be denied permissive intervention under CR 24.02(b) because it would be unwise to allow the General Assembly to participate, some legislators as defendants, perhaps others as plaintiffs, and all of them generating political pressures on the judiciary. However, on July 10, 2006, the Circuit Court overruled Appellees' objections and granted the motion to intervene. I R. 58.[25]

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[25] Perhaps a more optimistic way for Appellees to view this situation is that while 13 legislators sought to intervene, 125 legislators did not. Still, it is no small matter that this case involves a direct challenge to actions championed by the Senate President. The next case involving a challenge to legislative action, and presenting a request by members of the General Assembly to intervene, could offer more worrisome potential for political pressure on the judiciary. Accordingly, in their "Response to Motion to Transfer by Cross-Movants/Intervenors Sen. Vernie McGaha, et al." served May 20, 2008 in No. 2008-SC-00253, Appellees renewed

On October 8, 2007, the University moved for summary judgment seeking dismissal of Appellees' claims. On November 26, 2007, Appellees filed their response and a cross-motion for summary judgment. After further filings, the Circuit Court, Hon. Roger L. Crittenden,[26] conducted oral argument on December 10, 2007. Also on December 10, the final day of Governor Fletcher's Administration, UC executed a "Memorandum of Understanding" purporting to memorialize an "agreement" with the Governor's Office "in the event [this] litigation is resolved so as to permit the appropriation."[27] II R. 283. This "agreement" was plainly designed to remedy constitutional problems raised by Appellees during the briefing that had just occurred. In Section II of the "agreement" (II R. 284), UC ostensibly committed that:

> No portion of the appropriated funds shall be used for any church, sectarian, or denominational purpose. ... In the event that the building constructed with the said appropriation shall ever cease to be used by [UC] as a school of pharmacy, ownership of the building shall be immediately vested in the County of Whitley and shall be utilized by the County for purposes consistent with the general health and welfare.

UC's Brief also devotes considerable attention to the purported constitutional protections provided by its "Memorandum of Understanding" with the Governor's Office. *See* UC's Brief, at 8-10 ("Safeguards Imposed to Ensure UC Uses the $10,000,000 Appropriation for the Construction of a Pharmacy School Building."); *id.* at 22. However, no consideration was recited that might make this "agreement"

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their substantial objections to the intervention by these legislators. Appellees respectfully suggest this issue would benefit from guidance by this Court, perhaps establishing criteria by which permissive intervention might be deemed beneficial or presumptively disfavored.

[26] By Order entered October 16, 2007, Circuit Judge Phillip Shepherd had recused himself and pursuant to an Order of this Court entered October 4, 2007, had assigned the matter to Senior Judge Crittenden. Judge Crittenden had previously served as presiding judge in the litigation.

enforceable, much less superior to UC's contractual obligations to the Kentucky Baptist Convention in the Baptist Covenant Agreement. Nor has UC amended its Articles of Incorporation committing that if the University ever dissolves, its assets – including any taxpayer-funded Pharmacy School building – will be distributed to the Kentucky Baptist Convention. Most importantly, Section V(i) of the Memorandum of Understanding expressly allowed UC to "cancel" its alleged commitments altogether simply by giving 30 days' notice, or even immediately with "cause" (which was not defined).[28]

As summarized in UC's Brief, at 12-14, on December 12, 2007, the Circuit Court entered an Order requesting further briefing on issues raised at the hearing. On March 6, 2008, the Circuit Court entered its Judgment and Order granting Appellees' cross-motion for summary judgment, and declaring unconstitutional both the Pharmacy Building and the Pharmacy Scholarship Program appropriations. III R. 363. Concerning the issues involving UC's discrimination on the basis of sexual orientation, the Circuit Court characterized Appellees' claim as an assertion "that the University discriminated against a student based upon free speech while the University maintains its actions were based upon University forbidden conduct." The Circuit Court then noted "The Court does not need to decide this issue to reach a decision in this case but this is exactly the 'entanglement' between government interests and religious institutions that the Kentucky Constitution prohibits."[29] III R. 366-67. UC and the intervening legislators pursued timely appeals to this Court.

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[28] See II R. 285: "Either party may cancel this agreement at any time upon thirty (30) days written notice to the other party or for cause."

[29] UC objects in its Brief, at 29-30 n.12, that the Circuit Court was "incorrect" in stating that "UC may have suspended a student for 'expressions of free speech,'" citing testimony from discovery. In fact, Appellees did not seek relief for a violation of Jason Johnson's free speech

ARGUMENT

This Court has a fearsome number of difficult and thorny cases. This should not be one of them. The Pharmacy School appropriations in this case plainly constituted impermissible legislative preferences and use of public funds for a private sectarian school in violation of §§ 5, 171 and 189 of the Kentucky Constitution. In addition, the provisions of the Pharmacy Scholarship Program represented impermissible special legislation; the authorizing statutes were not properly amended or republished; and the proposed program was made permanent in violation of budgetary restrictions in state law.

The University repeatedly insists that the proposed expenditures were constitutionally acceptable "health and welfare" benefits intended to address an alleged "shortage of pharmacists." These assertions rely on a fictional version of events unsupported by any evidence, as well as on alleged safeguards contained in an unenforceable "Memorandum of Understanding" that might as well have been written with disappearing ink. Moreover, the University's legal arguments invite a wholesale evasion of constitutional provisions that was squarely rejected in Fannin v. Williams, 655 S.W.2d 480, 484 (Ky. 1983):

> [T]he Kentucky Constitution contemplates that public funds shall be expended for public education. The Commonwealth is obliged to furnish every child in this state an education in the public schools, but it is constitutionally proscribed from providing aid to furnish a private education. Pollitt v. Lewis, 269 Ky. 680, 108 S.W.2d 671 (1937). We cannot sell the people of Kentucky a mule and call it a horse, even if we believe the public needs a mule.

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rights, but rather for discrimination based upon his gay *status*. Appellees do not waive or release this claim if this matter is returned to the Circuit Court. However, in view of UC's assertions that Johnson was not expelled but withdrew voluntarily, and UC's insistence that Johnson was required to withdraw because of his "conduct" and neither his speech or status, Appellees' claims based on UC's prohibited discrimination are likely not subject to summary disposition.

Unfortunately, UC's Brief barely mentions the controlling analysis and holding in Fannin v. Williams, just as the Brief fails to address other critical authorities relevant to its arguments, such as Locke v. Davey, 540 U.S. 712 (2004), which dooms the University's "Free Exercise Clause" arguments. But the practical ramifications of the University's arguments cannot be ignored. If the legislature can use public money to create a pharmacy school at a religious school, there will be no legal impediment for any private school in Kentucky to receive public money for any construction project or any tuition supplement or any academic programs.

Finally, the arguments by the University and Amicus Curiae "The Becket Fund for Religious Liberty" concerning the historical antecedents and purposes of the critical provisions of Kentucky's Constitution are completely erroneous. The remarkable record of the debates during the 1890-91 constitutional convention demonstrates a profound wisdom, absence of religious bigotry, and commitment to public education that serves as an inspiring beacon for our journeys today.

I. THE LEGISLATURE CONFERRED PREFERENCES UPON UC IN VIOLATION OF SECTIONS 5, 171 AND 189 OF THE CONSTITUTION.

The appropriation for UC's Pharmacy Building was set out clearly in HB 380. The legislative appropriation to create a Pharmacy Scholarship Program solely for UC was set out almost as transparently. *See* HB 380, Part XXIV Section (1), codified as KRS 164.7901(1):

> It is the intent of the General Assembly 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.

UC itself conceded in the Circuit Court that there are no other pharmacy schools that would qualify for state supported scholarships (*see* II R. 210: "Significantly, no public four-year college or university is situated in Southeastern Kentucky."), and as quoted above, immediately after the legislative appropriation, UC's President wrote an accreditation official stating "The state of Kentucky has authorized $10,000,000 to be used for the construction of a pharmacy building and development of the program *as well as an additional $2,000,000 over a two year period to subsidize tuition.*"[30]

Thus, this case presents the question of whether two direct appropriations to an avowedly sectarian college are permissible under Kentucky's Constitution. Section 5 of the state Constitution contains protections for individual rights by safeguarding both the free exercise of religious faiths, and the right to be free from religious control over personal lives. This section provides (italics added):

> *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.

Similarly, § 171 of the Constitution mandates that "Taxes shall be levied and collected for public purposes only … ." And § 189 of the Constitution provides: "No portion of any fund or tax now existing, or that may hereafter be raised or levied for

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30 *See* Appendix Ex. 7.

educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school."

Pursuant to KRS 418.040, Appellees sought a judicial declaration that the appropriation of public funds to construct a "Pharmacy Building" at UC and create a Pharmacy Scholarship Program to provide tuition aid for students attending UC would violate §§ 5, 171 and 189. First, as to § 5, Appellees alleged that those appropriations would give "preference ... by law to a[] religious sect, society or denomination" and a "particular creed, mode of worship or system of ecclesiastical polity." Additionally, because of those appropriations, Appellees would "be compelled ... to contribute to the erection [and] maintenance of" a "place of worship." Moreover, those appropriations would deny and "diminish[]" "the civil rights, privileges or capacities" of Appellees who "disbelie[ve]" the compulsory discriminatory "religious tenet, dogma [and] teaching" at UC. And finally; through these appropriations and uses of public funds, the General Assembly would "control [and] interfere with the rights of conscience" of Kentucky citizens. I R. 33-34 (Second Amended Complaint, ¶ 23).

Second, at to § 171, Appellees sought a judicial declaration that the appropriation of public funds to construct a "Pharmacy Building" and create a Pharmacy Scholarship Program at UC would violate the restriction on collecting taxes "for public purposes only." Taxes used for those purposes could not be deemed to have been levied and collected for public purposes. *Id.* at 34 (Second Amended Complaint, ¶ 24). Finally, Appellees also sought a declaration that the proposed appropriations would violate § 189. Appellees alleged that those proposed appropriations would constitute tax dollars "raised

or levied for educational purposes" that would impermissibly be "appropriated to, or used by, or in aid of, any church, sectarian or denominational school." *Id.* at 35 (¶ 26).

The Circuit Court granted judgment on Appellees' claims under §§ 5 and 189 (but failed to address the claim under § 171), and that judgment should be affirmed. Although UC erroneously claims that the legislature intended these appropriations as permissible elements of general health and welfare expenditures, both as a factual and legal matter UC's efforts to sidestep these clear constitutional prohibitions should be rejected.

A. UC Cannot Sidestep Sections 5, 171 and 189 By Alleging These Appropriations Were Mere Health And Welfare Expenditures.

Relying on an utterly fictional premise – *see note 11, supra* – that "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" (UC Brief, at 18), UC argues that the contested appropriations should not be classified as "educational" so that it can evade the unambiguous restrictions in Kentucky's Constitution. The University's obvious purpose is to dodge the application of Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983) (invalidating a statute that appropriated funds for the purchase of textbooks for nonpublic schools). But Fannin squarely applies to this situation, or otherwise UC's loophole would completely swallow these constitutional prohibitions. Indeed, UC's argument would shelter any appropriation to a sectarian school, as long as the General Assembly had the forethought – which it actually did not have in the present case – to assert some generalized public health, welfare or safety justification for the expenditures.

In Fannin, this Court struck down an appropriation out of the general funds of the Commonwealth to provide textbooks to children in nonpublic schools. The Court

considered and specifically rejected an argument like UC's contention that such appropriations could be deemed to provide a "public benefit" and thus would be permissible under the authority of Kentucky Building Commission v. Effron, 310 Ky. 355, 220 S.W.2d 836 (1949). *See* 655 S.W.2d at 482, 484 (emphasis in original):

> The only issue for purposes of Section 171 is whether the money is being used for a public purpose. This depends on whether the "use is a public one and is calculated to aid all the people in the state." *Kentucky Building Commission v. Effron,* Ky., 310 Ky. 355, 220 S.W.2d 836 (1949). Nonpublic schools are open to selected people in the state, as contrasted with public schools which are open to "all people in the state." ...
>
> ... One can argue, quite reasonably, that this statute (and any statute) furthering education is of public benefit, whether selective or not. Unfortunately, this approach begs the question, because the Constitution establishes a public school system and limits spending money for education to spending it in public schools.
>
> ... [T]he Kentucky Constitutional provisions that restrict spending money for education to public schools, restrict *where* and *how* public funds can be expended for education, not just *when* and *why*. So we cannot uphold the statute because we could find some public benefit in its purpose. It is constitutionally impermissible because of the manner in which it directs the expenditure of public funds for educational purposes, through nonpublic schools.

Likewise, in the present case, while it is true that "furthering education [at UC] is of public benefit," this Court must still examine "*where* and *how* public funds can be expended for education, not just *when* and *why*." *Id.* at 484. Otherwise, as Fannin indicated, the exception UC is seeking would swallow the rule prohibiting the use of public funds to advance religious education. *See id.*: "The textbooks are to be purchased from money appropriated by the general assembly rather than the common school fund. But it is no less public money from public taxes." As this Court explained, *id.* at 482:

> Our state constitution provides for and regulates this function primarily under the title, "Education," Sections 183-189 inclusive.

> These sections start with the requirement that the General Assembly "provide for an efficient system of common schools throughout the state." They end with the requirement that "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." A fair reading of these seven sections of the constitution compels the conclusion that money spent on education is to be spent exclusively in the public school system, except where the question of taxation for an educational purpose has been submitted to the voters and the majority of the votes cast at the election on the question shall be in favor of such taxation.

As thoroughly described in the Brief by Amici Curiae American Civil Liberties Union of Kentucky, et al., the concern in Fannin with maintaining a constitutional separation of church and state, has deep historical roots in America and this state. Indeed, almost a century ago, in the first significant case brought under §§ 5 and 189, Williams v. Board of Trustees Stanton Common School District, 173 Ky. 708, 191 S.W. 507 (1917), the Court invalidated a school district's use of public funds to obtain instructional services and lease building facilities from a denominational college, stating:

> This school system derives its support from the communicants of all churches, without being subservient to any of them, and its integrity and its safety depend on a strict adherence to the principle of separation of church and school, not only according to the letter, but to the spirit, of the Constitution.[31]

The cautionary warning in Williams about the importance of adhering "not only ... to the letter, but to the spirit, of the Constitution" was reaffirmed in Fannin, 655 S.W.2d at 484, which squarely rejected the kind of semantic evasions UC proposes here:

> As we stated in *Commonwealth v. O'Harrah,* Ky., 262 S.W.2d 385, 389 (1953):
>
> > "Constitutional provisions, whether operating by way of grant or limitation, are to be enforced

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[31] 191 S.W. at 514.

> according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.
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> "In appraising the validity of the statute we must look through the form of the statute to the substance of what it does. The courts may not countenance an evasion or even an unintentional avoidance of our fundamental law."

It is important to recognize the ramifications of the holding that UC urges upon this Court. If UC's attempt to justify the contested appropriations is successful, the restrictions in §§ 5, 171 and 189 will become completely meaningless. In 2006, it was a Pharmacy School at the University. Why stop there? In 2010 – another election year – how about complete medical school in order to address the genuine shortage of doctors in Eastern Kentucky. Or a law school, under the solemn assurance of a need to promote the interests of justice and public safety? And perhaps a veterinary school at Georgetown College or Bellarmine University in Louisville to support Kentucky's equine industry?

Indeed, once funding to postsecondary institutions is permitted, why not allow direct subsidies to the private and parochial schools in districts of influential legislators? The only boundaries would be the limits of the imaginations of the development officers in those schools, and certainly not the archaic prohibitions in §§ 5, 171 and 189.

But that is not the law of this state. Because "*where*" the public funds would be spent here is at a private, sectarian school, and because "*how*" the funds would be spent here is just as much an "educational" expense as the funding of textbooks held unconstitutional in Fannin, the legislature violated §§ 5, 171 and 189 of the Kentucky Constitution by giving public money for private education to UC.

B. UC's Reliance On Selective Kentucky Decisions Is Misplaced.

UC argues that the contested appropriations are analogous to the "public benefit" expenditures upheld in Butler v. United Cerebral Palsy, 352 S.W.2d 203 (Ky. 1961). That decision is plainly distinguishable from the present case, just like Effron, *supra*, which UC also relies upon for this argument.

In Butler, Kentucky's highest court upheld the expenditure of public funds to private schools to educate "exceptional children" against a challenge that the funding violated § 171 of the Kentucky Constitution as well as §§ 3 and 184 and other sections. 352 S.W.2d at 205-07. The Court's analysis under § 171 was somewhat opaque, but appears to have been essentially the same as its analysis of the challenge under § 184. As to both sections, the Court (in unfortunate terms) concluded that the unusual nature of the recipients of these funds makes their education a "public welfare" or "welfare" measure. As to § 171, *see* 352 S.W.2d at 205:

> What the people through their elected representatives choose to do, whether it be in the form of education or some other type of assistance, in order to develop the capabilities of those who probably otherwise will be either a detriment or a dead weight to society, has the public welfare as its central aim. That is the test of a 'public purpose.'

The Court discussed this issue further in rejecting a challenge under § 184, *see id.* at 207:

> ... [W]e regard the act in question as primarily a welfare rather than an educational measure. For example, it would scarcely be argued that the state could not, if it saw fit, provide crutches for the crippled or seeing eye dogs for the blind. That the public assistance takes the particular form of education makes no difference. Otherwise it would be doubtful that such institutions as the Kentucky Industries for the Blind (KRS 163.036), Mayo State Vocational School (KRS 163.090) and Northern Kentucky State Vocational School (KRS 163.100) could be supported or operated

> by the state, because certainly they are not within the common school system. We do not believe it was the intention of the delegates in adopting Const. §§ 184 and 186 to deny forever the possibility of special educational assistance to those who by no choice of their own are unsuited to the standard program and facilities of the common school system.

These circumstances are not comparable to the present case, which involves appropriations that will benefit individuals who have multiple alternatives for their postsecondary education, and cannot be described as being "by no choice of their own ... unsuited to the standard program and facilities of the common school system." Plainly the more relevant authority is the Fannin decision two decades later, rejecting an overly broad use of the "public welfare" argument to justify appropriation of public funds to textbooks for nonpublic students. *See* Fannin, 655 S.W.2d at 484 ("Unlike the statute extending transportation to children in nonpublic schools, it is impossible to classify textbooks as anything but educational. As such the statute must meet the constitutional limitations of those sections of the Constitution covering 'Education.'").

More importantly, the Butler court specifically noted that the expenditures there were permissible precisely because they were assumed to be made not to "schools that give sectarian instruction or have any denominational requirements with respect to their teachers or pupils," which would violate § 189. *Id.* at 209. The Court stated:

> We come lastly to the question of whether the act permits public funds to be used by sectarian or denominational schools in violation of Const. § 189. It so happens that the schools involved in this lawsuit are nonsectarian charities, but the term 'private schools,' of course, admits of no such limitation. Literally it would appear to mean any school outside the common school system. However, we may properly indulge the presumption that the legislature did not intend to include schools to which the payments could not legally be made. It is not unreasonable to presume, for example, that the term was not meant to include schools not within the state, and it is equally reasonable to infer that it does not include schools that give

> sectarian instruction or have any denominational requirements with respect to their teachers or pupils.

Id., at 208-09. Of course, what is occurring here is exactly what was proscribed in Butler: the challenged appropriations *will* go to a "school[] that give[s] sectarian instruction." In other words, Butler actually supports affirmance of the Judgment below.

Likewise, UC's reliance on Kentucky Building Commission v. Effron, *supra*, is also misplaced. UC cites Effron's holding that private, sectarian hospitals can receive state money and argues that the same standard should apply to UC's proposed Pharmacy School. Again, however, the circumstances in Effron were crucially different from the present situation. In Effron, "[r]eligion is not taught in these hospitals nor is any one sect given preference over another." 220 S.W.2d at 838. By contrast, in UC's circumstances, the school has assured the Kentucky Baptist Convention that it "requires courses in Religion," and has contractually committed that "advanc[ing] the Kingdom of God in the area of Christian higher education" will "at all times be recognizable within the ministry of Cumberland College." Tendered Ex. A ("Baptist Covenant Agreement"), at 3.

Nor can UC claim support from Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945). UC cites Nichols and argues that because the legislature "may bear the expense of transporting children attending private religious schools," which are not educational expenses, somehow that also makes the appropriation of $10 million for the creation of a new school at UC not educational. But the more applicable decision – according to Fannin – is actually Sherrard v. Jefferson Co. Board of Education, 294 Ky. 469, 171 S.W.2d 963 (1943), where busing to private schools was found invalid.

Perhaps the more realistic explanation is that Kentucky lawmakers and jurists have struggled mightily with political pressures and safety concerns involving the

transportation of nonpublic schoolchildren, which has led to semantic distinctions that have never been attempted in other contexts. There may or may not be sound principles – as opposed to different jurists voting – which distinguish Sherrard v. Jefferson Co. Board of Education from Nichols v. Henry in the 1940's, or Rawlings v. Butler, 290 S.W.2d 801 (Ky. 1956) (upholding county subsidy to school board sufficient to cover costs of transporting private school children on public school buses), and Board of Education of Jefferson County v. Jefferson County, 333 S.W.2d 746 (Ky. 1960) (permitting county to spend general fund monies for transportation of students attending private schools) in the following decades, or even Brady v. Fiscal Court of Jefferson County, 885 S.W.2d 681 (Ky. 1994) (invalidating county's school transportation subsidies) from Neal v. Fiscal Court, 986 S.W.2d 907 (Ky. 1999) (rejecting challenge under Kentucky Constitution § 171 to county subsidies funding transportation of children to private religious schools) in recent years. Regardless of the doctrinal twists in these decisions, there have been *no* Kentucky appellate decisions upholding *any* direct appropriations of *any* public funds to a private, sectarian college for educational programs. Those are the circumstances of the present case, and UC's proposed appropriations should be declared unconstitutional as the Circuit Court held.

II. THE LEGISLATURE ALSO ENACTED SPECIAL LEGISLATION IN VIOLATION OF SECTION 59 OF THE KENTUCKY CONSTITUTION.

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). In this case, however, the General Assembly actually codified its intent to make the Pharmacy Scholarship Program benefit UC and only UC. *See* HB 380, Part XXIV Section (1), codified as KRS 164.7901(1):

> It is the intent of the General Assembly 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.

The Circuit Court elected to treat this language as advisory only, and thus did not invalidate the pharmacy scholarship program under the same principles that it invalidated the proposed Pharmacy Building under §§ 5 and 189 of the Kentucky Constitution. III R. 367-68. The Court cited no legal authority for this restraint, and neither did UC. On the contrary, in plain language, the General Assembly created a program conferring potential benefits only on UC students, in violation of §§ 5, 171 and 189 of the Constitution.

In addition, the General Assembly's codification of its legislative intent for the Pharmacy Scholarship Program constituted special legislation in favor of UC in violation of § 59 of the Kentucky Constitution. Section 59 prohibits the General Assembly from passing "local or special acts ... ." Legislation is special legislation when it does not "apply equally to all in a class" and there are not "'distinctive and natural reasons inducing and supporting the classification.'" Temperance League of Kentucky v. Perry, 74 S.W.3d 730, 732 (Ky. 2002) (*quoting* Schoo v. Rose, 270 S.W.2d 940 (Ky. 1954)). In striking down other special legislation in Tabler v. Wallace, 704 S.W.2d 179, 185 (Ky. 1985), this Court framed the issue to determine if the challenged legislation is special legislation: "whether the General Assembly had a reasonable basis for this legislation sufficient to justify creating a separate classification for certain persons ... ."

Here, the General Assembly explicitly crafted the legislation specifically for the benefit of UC. The classification of universities and colleges in the Appalachian region with a pharmacy school would have included no possible recipients. However, the

simultaneous creation of a pharmacy school through a $10 million appropriation to one specific school demonstrated the legislative intent to benefit UC and UC alone. The General Assembly had no reasonable or lawful justification for choosing a private, sectarian college as the beneficiary of a pharmacy school. The General Assembly conducted no feasibility study to establish any need for such a school, and in any event, unconstitutionally chose to appropriate public funds to a religious school that proclaimed in a press release that it "isn't for everyone."

Nor is the General Assembly's special legislation salvaged by the subsequent declarations by Governor Fletcher or UC's counsel or its paid consultant that there is an alleged "pharmacist shortage" that justifies the UC appropriations. As the Court held in Tabler, "[t]he creative ability of lawyers suggesting possible reasons after the fact does not suffice to provide the kind of justification that is required for special legislation to be valid under Section 59 of the Kentucky Constitution." *Id.* at 185-86. Accordingly, for the additional reason that the Pharmacy Scholarship Program appropriations constitute unlawful special legislation in violation of Ky. Const. § 59, Appelleess are entitled to judgment declaring the Program unconstitutional.

III. THE LEGISLATURE ALSO VIOLATED MULTIPLE STATUTES IN AUTHORIZING THE PHARMACY APPROPRIATIONS.

A. The Legislature Unlawfully Suspended KRS 48.310 For A Term Longer Than Budgetary Period.

Under KRS 48.310, the General Assembly is permitted to make appropriations that suspend other Kentucky statutes. But the statute clearly specifies that any suspension is only valid for the two years of government operations funded by the budget – which the Pharmacy Scholarship Program ignored. KRS 48.310(2) provides that "A budget bill

may contain language which exempts the budget bill or any appropriation or the use thereof from the operation of a statute for the effective period of the budget bill." (Emphasis added.) But KRS 48.310(1) still limits the duration of any exemption at two years: "No provision of a branch budget bill shall be effective beyond the second fiscal year from the date of its enactment."

In the present matter, the General Assembly violated KRS 48.310(1) by purporting to suspend KRS 48.310 and commit permanent funding for the Pharmacy Scholarship Program, beyond the initial $1 million annual appropriation to the pharmacy scholarship program. *See* HB 380, Part XXIV ("Notwithstanding KRS 48.310, the following statute is created and shall have permanent effect, subject to future actions by the General Assembly ... ."). The budget legislation created a "special trust fund" that is to be funded permanently from the coal severance tax. *See* HB 380, Part XXIV 11(a)–(b). Thus, the General Assembly has attempted to use KRS 48.310(2) to suspend KRS 48.310(1). But KRS 48.310(2) does not give the General Assembly the power to alter KRS 48.310(1) permanently because any suspension is only "effective [during the] period of the budget bill." KRS 48.310(2).

UC's response concerning KRS 48.310 is to note that the General Assembly suspended that statute more than twenty times in HB 380, exempting a number of appropriations from the two-year appropriations limit. UC's Brief, at 36. But the mere formulaic repetition of "notwithstanding 48.310" did not make the action lawful. Accordingly, because the General Assembly cannot permanently fund the Pharmacy Scholarship Program through HB 380, the Circuit Court's Judgment should be affirmed.

B. The Legislature Improperly Amended KRS 143.090 Without Following Constitutional and Statutory Requirements.

Even assuming that the General Assembly could render KRS 48.310(2) meaningless simply by the formulaic repetition of "notwithstanding 48.310," and thus allow an appropriation like the Pharmacy Scholarship Program to be effective "beyond the second fiscal year from the date of its enactment" as otherwise restricted by KRS 48.310(1), Kentucky law specifically describes the procedure the General Assembly must follow to amend statutes. That is what the legislature purported to do in KRS 164.7901(11)(b) by funding the permanent Pharmacy Scholarship Program using coal tax revenue levied under KRS 143.020. However, § 51 of the Kentucky Constitution and KRS 446.145 require the General Assembly to follow certain steps to amend other statutes – none of which the General Assembly followed here. Accordingly, assuming that the General Assembly actually intended to amend the coal severance tax funding statutes to allow permanent funding for the Pharmacy Scholarship Program, the implicit amendment of those statutes to divert four percent to fund scholarships was ineffective.

Section 51 of the Kentucky Constitution mandates that:

> No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length.

"The purpose of the section is said to be to prevent the enactment of 'surreptitious' legislation." Armstrong v. Collins, 709 S.W.2d 437, 443 (Ky. 1985), *citing* Bowman v. Hamlett, 159 Ky. 184, 166 S.W. 1008 (1914). In Armstrong, this Court held that the General Assembly could suspend or modify a statute in the budget bill without complying with § 51. Armstrong, 709 S.W.2d at 445. But the Court made clear

that if the change is actually an "amendment, revision, extension or conferring of" an existing statute, the change must comply with § 51. *Id.*

Here, the General Assembly purported to amend KRS 143.090, the statute that governs the expenditure of coal severance tax receipts. The legislature did so through § 11(b) of the Pharmacy Scholarship Program, which funded the program "from the coal severance tax revenue levied under KRS 143.020" by directly that up to "four percent (4%) of the coal severance tax revenues levied under KRS 143.020 and collected annually shall be transferred to the trust fund." *See* HB 380, Part XXIV 11(b). That provision explicitly would alter and amend KRS 143.090(4), which previously required that all coal severance tax funds in excess of the specific uses proscribed by KRS 143.090(3) "shall be deposited by the Department of Revenue to the credit of the general fund." But contrary to § 51, which requires that any statute the legislature amends "shall be re-enacted and republished at length," the Pharmacy Scholarship Program provisions did not even refer to KRS 143.090, much less republish it at length or re-enact it.

The Armstrong court stated that "temporary, determinable suspensions of the operation of the statutes relating to public funds are within the legislative authority," Armstrong, 709 S.W.2d at 446. But by suspending KRS 48.310 to make the appropriations permanent, the General Assembly has permanently amended a Kentucky statute, in violation of Ky. Const. § 51. The Armstrong court further emphasized that the General Assembly must comply with § 51 in order to ensure that:

> [w]hen any person, lawyer or layman, takes up an act of the Legislature, to read and understand what changes have been made in an old law, he ought to have before him in the act that he is reading the whole of the law as it appears when amended or revised by the new act ....

Id. at 445, *quoting* Bd. of Penitentiary Comm'rs v. Spencer, 159 Ky. 255, 166 S.W. 1017 (1914).

Virtually no Kentucky citizen reading HB 380 would know that KRS 143.090 specifically sets out how coal severance tax money must be spent or that the legislature was taking money from the general fund to create a program of scholarships at a private sectarian college. Accordingly, the Circuit Court's Judgment should be affirmed that the Pharmacy Scholarship Program as enacted violated Ky. Const. § 51.

In addition, expanding on the requirements of § 51, Kentucky law requires that any bill "amending an existing section of the statutes shall indicate the material proposed to be deleted by brackets and by striking through the material." KRS 446.145. The statute further requires that any bill "amending an existing section of the statutes shall indicate new material by underlining." The General Assembly did not comply with either requirement in amending the coal severance tax expenditure framework established in KRS 143.090. The Pharmacy Scholarship Program section of HB 380 did not refer to, strike through, bracket, or underline any part of KRS 143.090, even though taking four percent of coal severance tax revenues effectively amended KRS 143.090(4).

The Court of Appeals struck down a similar effective amendment that failed to follow the requirements of KRS 446.145 in Commonwealth v. Gobert, 979 S.W.2d 922 (Ky. App. 1998). In Gobert, the state Department of Education claimed that a section of the budget gave it the power to disregard the state merit system law in certain hiring situations. *Id.* at 926. The Court held that the General Assembly did not effectively change the hiring system because "the dictates of KRS 446.145 were not followed with regard to this section." *Id.* at 927.

Here, the General Assembly has likewise attempted to disturb the funding system for coal severance tax receipts created by KRS 143.090 without following the requirements of KRS 446.145 – the same action rejected in Gobert. Accordingly, for this additional reason, Appellees are entitled to declaratory relief invalidating the Pharmacy Scholarship Program.

IV. SECTION 189 WAS NOT MOTIVATED BY RELIGIOUS OR ANTI-CATHOLIC BIAS AND DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OR THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

UC and Amicus Curiae "The Becket Fund for Religious Liberty" make two new constitutional arguments designed to defend the disputed appropriations. First, the University contends that "The Circuit Court's interpretation of Section 189 transgresses th[e] fundamental requirement of neutrality" towards religious views or status protected by Free Exercise Clause of the First Amendment (UC Brief, at 26-28). Second, The Becket Fund devotes its entire Brief to the contention that the Blaine Amendments to various state constitutions, allegedly including § 189 of Kentucky's constitution, violate the Equal Protection Clause of the Fourteenth Amendment because they reportedly were motivated by anti-Catholic animus. Neither argument was preserved in the Circuit Court.[32] However, because a possible constitutional infirmity in the Circuit Court's interpretation and application of § 189 might be raised by this Court on its own motion, these new arguments warrant careful response here.

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[32] Although the University asserts that the Free Exercise Clause issue "was argued below and preserved for review" at specified pages in its summary judgment filings, UC Brief, at 26 n.10, this is simply untrue. There is no discussion on those pages of any "viewpoint discrimination" presented by the restrictions in § 189, no reference to the Free Exercise Clause, and no mention of the primary authorities now cited by UC in its Brief to this Court.

The circumstances surrounding the adoption of § 189 make indisputably clear that there was no anti-religious or anti-Catholic animus motivating the author of that provision, former Judge William M. Beckner of Clark County. Nor is there any other evidence suggesting that any of the constitutional delegates held such views or voted to adopt § 189 for those reasons. Instead, the historical context of the constitutional debates establishes that § 189 was drafted solely to protect the financial health and public funding of the fledgling state college now known as the University of Kentucky. Judge Beckner, and apparently the other convention delegates who adopted his proposal, was fiercely determined to prevent competition for public funds from denominational institutions mounting the same pressures they brought 115 years later in the 2006 General Assembly.

A. The Origins Of Section 189 And The Arguments Of Its Author.

The Circuit Court's interpretation of § 189 is strongly confirmed by the circumstances surrounding the adoption of that provision, which Kentucky's highest court has long recognized can provide useful guidance in constitutional adjudication.[33] The author of § 189, Judge Beckner, offered this provision as part of a committee

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[33] Not only has this Court relied on the historical context near that time, and specifically on Judge Beckner's comments in the constitutional debates in construing both § 5 of Kentucky's Constitution, Kentucky State Board for Elementary and Secondary Education v. Rudasill, 589 S.W.2d 877 (1979), and § 183, Rose v. Council for Better Education, Inc., 790 S.W.2d 186, 205-06 (1989), but moreover during the 1890-91 constitutional convention itself, this Court's predecessor explained the relevance of historical events in construing a critical provision involving public education in the previous state constitution. *See* Higgins v. Prater, 91 Ky. 6, 14 S.W. 910, 911 (1890):

> If the words of a statute or a constitution be within themselves perfectly plain as to the purpose of the maker, then they must be followed by the courts. The true intention of the provision is to be ascertained. ... If, however, after considering the language, doubt remains as to the purpose of the law, then courts may resort to extrinsic aids to ascertain it, such as the purpose that was in view, or the mischief to be remedied, and, in case of a constitutional provision, to the proceedings of the convention that framed it. ...

substitute for the report from the Committee on Education.[34] Beckner's authoritative role in education was acknowledged even by his adversaries at the time[35] as well as by scholars from that day to the present.[36] Indeed, Beckner's comments during the constitutional convention provide the foundation for this Court's landmark decision in Rose v. Council for Better Education, Inc., 790 S.W.2d 186, 205-06 (1989).

Section 189 itself was adopted near the end of three days of spirited debate from March 9-11, 1891 about interrelated education provisions that were subsequently codified in §§ 183-89. Because of the statements made by UC and The Becket Fund about the purposes of § 189, and the selective quotations contained in The Becket Fund's Brief, a full copy of these debates is attached as Exhibit 12 in the Appendix to this Brief. The arguments are subtle, scholarly, eloquent, passionate and fascinating.

There was actually no discussion of § 189 when it was considered (other than a statement attributing its authorship to Beckner), and no recorded vote of the supporters and opponents.[37] However, a fair reading of the speeches during those three days leads to the indisputable conclusion that § 189 was motivated solely by Beckner's concern to

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[34] III *Official Report of the Proceedings and Debates in the Convention Assembled at Frankfort, on the Eighth Day of September, 1890, to Adopt, Amend, or Change the Constitution of the State of Kentucky* 4455, 4456 (E. Polk Johnson, printer to the Convention, 1890) ["*1890 Debates*"].

[35] *See id.* 4452 (remarks of R. P. Jacobs, Chairman of the Committee on Education, concerning the impending report of that Committee: "It is a matter in which [Judge Beckner] has taken great interest, probably more than any member in the Convention. He is, perhaps, better acquainted with this subject than any member in the Convention.").

[36] *See, e.g.*, Appendix Ex. 13: 3 E. Polk Johnson, A History of Kentucky and Kentuckians 1419-23 (Chicago, 1912) ["Johnson"]; Appendix Ex. 14: James C. Carper, *William Morgan Beckner: The Horace Mann of Kentucky,* Register of the Kentucky Historical Society 96 (Winter 1998), at 29-60 ["Carper"].

[37] *1890 Debates* 4607.

protect the public institution now known as the University of Kentucky, which was viewed as competition by denominational colleges that charged higher tuitions, and was being subjected to various efforts to deny public funds.[38] Other delegates likewise gave lengthy speeches addressing the same concerns, while making clear they were not motivated by any religious prejudice.[39]

Indeed, Beckner made a series of speeches during the debates intended in multiple ways to protect and increase the funding of public education at the secondary (or "common school") and post-secondary levels. One of his primary goals was to strike a proposal that would require approval by popular vote of any additional tax for the relatively new "Agricultural and Mechanical College" in Lexington (and perhaps other state institutions). That proposal was contained in the report from the Committee on Education headed by R. P. Jacobs of Danville, whom Beckner described as "one of the chief officers" of Centre College,[40] a school controlled by Presbyterians.

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38 *See* Appendix Ex. 15: Robert M. Ireland, The Kentucky State Constitution: A Reference Guide 167 (Greenwood Press, 1999) (addressing the drafting and application of § 189):

> There is no direct evidence in the debates of the constitutional convention on the motives of those who proposed this clear prohibition of the use of public school money for private-religious school purposes, but the principal exponent of the measure expressed deep displeasure at the efforts of religious colleges, both in the legislature and the convention, to undermine public funding of the A&M College (to become the University of Kentucky). He accused Kentucky's sectarian colleges of attempting to gain a monopoly over higher education in the commonwealth and not being able to tolerate competition that left religious training to the home and church.

39 *See, e.g., 1890 Debates* 4493-4502 (remarks of C. J. Bronston); 4511-20 (remarks of H. H. Smith).

40 *1890 Debates* 4542.

Beckner and his supporters accused Jacobs and his supporters of insisting on a tax plebiscite, which Beckner said could not succeed,[41] as a "seductive means"[42] of making it difficult to obtain further appropriations for the A&M College because of competitive desires by the denominational schools to weaken the public institution. This issue was particularly heated because, in December 1890 while the constitutional convention was underway, supporters of the A&M College had defeated an attempt to invalidate a half-cent tax enacted by the legislature in a lawsuit brought under the 1850 Kentucky Constitution and purportedly funded by the denominational colleges.[43]

Three months after that court decision, Beckner attacked Jacobs for seeking to undo the recent ruling in the language of the new constitution. Beckner was a Presbyterian himself and had gone to Centre for five months, before leaving for financial reasons (his father died when he was six)[44] and because he was too proud to request a charitable waiver of tuition from that college.[45] Those experiences plainly inspired his passionate support of public education. As he explained:

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41 Beckner argued that a plebiscite would fail because African Americans would have to be allowed to vote, and yet they were not allowed to attend the college and obtain the "benefits of that institution," and thus "a large element of the population starts out against it." *Id.* at 4473, 4546. Perhaps this was not truly Beckner's greatest concern in view of limited voting by African Americans. But the argument was an ingenious way of countering the awkwardly anti-democratic nature of his position – which his opponents suggested was hypocritical given his ardent support of education to produce an informed citizenry. *Id.* At 4538 (remarks of S. B. Buckner).

42 Id. at 4472.

43 Higgins v. Prater, 91 Ky. 6, 14 S.W. 910 (Ky. 1890); *see 1890 Debates* 4565, 4574-76.

44 Johnson, *supra* note 36, at 1419.

45 *1890 Debates* 4544 (remarks of W. M. Beckner):

> I asked no advantages, although I had no means, beyond what I had worked for, to pay my way. I know they do not turn poor boys away from that college, and the other institutions of the same character do not turn them away; but when they come

I, myself, received what little modicum of collegiate education I have at the denominational college at Danville, which the gentleman from Boyle represents. I am sending my children to denominational colleges. Moreover, I am prepared to say that I have contributed out of my means more for the support of denominational colleges, not only of my own church, but of other churches, than any other man in the Commonwealth of Kentucky, according to my ability, and I do not regret it. I am proud of it. ... But the question of whether the children of the Commonwealth, without reference to their religious belief, shall have the benefit of higher education – that, I say, is a question that concerns the Commonwealth. In this body I am only a citizen; I am not here to represent any church; I am not here to plead the cause of any sectarian school. Neither am I here to attack any denominational or sectarian college, or any other institution ... .

What I have criticised was not the education received at the colleges, nor the fact that church people maintain these colleges. I hold it is noble in them to have done all this; but what I do object to is, that any of these officers should come here and attempt to destroy another seat of learning in the State. They are trying to put out a great intellectual light in the Commonwealth, and for their own benefit selfishly to destroy competition, so that this institution founded by the State, in recognition of its obligation to the Federal Government to maintain an institution of learning of that character in this State, that they should come here and bring all the power of their different churches and of their intelligent and cultivated clergymen for their own aggrandizement, and in order to destroy this institution.

Mr. SPALDING: Will the gentleman be kind enough to specify what churches are doing that?

Mr. BECKNER: For the benefit of the Catholic Church, I will say that I have not seen anybody connected with that church doing any thing of the kind. I have not seen any Methodists. I have not seen any Baptist, nor anybody connected with the Christian Church. I have the privilege of talking about the Presbyterian Church, because I am a member of it, an officer of it in good standing, at home, at least ... . I believe in its doctrines from the bottom of my heart; but I do say that people, who are connected with that church, have been constantly assailing this college, and have brought all the

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there and accept the charity of these institutions, they have "charity scholar" branded on their backs, and no boy of pride or self-respect will submit to that. But when they go to a State institution and receive its benefits, they go there without having the stigma put upon them that they are accepted merely out of charity. They go there as citizens of this Commonwealth, entitled to the privileges furnished by a free and intelligent people, given in recognition of their obligation to furnish a fitting education to the children of the State.

> power of their position, by letter and personal appeals, and in every other way have been trying to break it down.[46]

Beckner actually lost on the issue of whether any additional tax intended to support the A&M College should be submitted to a plebiscite. But he succeeded in easing the original voting requirements in the Education Committee proposal and in protecting the existing tax for the A&M College,[47] and his attacks plainly put the opponents of greater public funding and supporters of the denominational colleges on the defensive.[48] By this time also, the constitutional convention had engaged in several lengthy debates over the adoption of § 5 protecting rights to religious freedom and prohibiting any "preference" to "any religious sect, society or denomination." The obvious result was that when Beckner's proposal was presented to prevent public funding of "any church, sectarian or denominational school" in what became § 189, there was no debate and quick adoption by the delegates.

B. Section 189 Was Neither Anti-Religious Nor Anti-Catholic.

UC raises a new argument in its Brief, asserting that § 189 is flawed by "viewpoint discrimination" in violation of the Free Exercise Clause of the First Amendment. *See* UC's Brief, at 18: "Under the Circuit Court's construction of this

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[46] *1890 Debates*, 4542, 4543, 4545. *See also id.*, at 4520 (remarks by H. H. Smith):

> Mr. President, I have the highest respect for all religious denominations. They have done a vast good for humanity. I believe something in the faith of redemption. I love the Catholics in their great work; I love the Baptists, the Methodists, and all of the Protestants in the great cause of light and liberty; but, sir, when these people come here for the purpose of striking down the only relief, the only beneficiary institution organized and controlled by the hardihood of this State – by the farmers and laborers – I would be the basest coward alive should I not raise my voice against it.

[47] *See* KY. CONST. § 184.

[48] *See, e.g.., 1890 Debates* 4528-30 (remarks of T. J. Nunn); 4532-36 (remarks of Jep. C. Jonson); 4540-42 (remarks of R. P. Jacobs).

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."; *see also id.* at 26-28.

Regrettably, UC fails to mention – much less distinguish – the Supreme Court's most recent and significant decisions concerning alleged "viewpoint discrimination," Pleasant Grove City, Utah v. Summum, __ U.S. __, 129 S. Ct. 1125, 1132 (Feb. 25, 2009), and Locke v. Davey, 540 U.S. 712 (2004). Pleasant Grove made clear that UC's "viewpoint discrimination" doctrine only applies where the government purports to regulate speech in a traditional or limited public forum, and Locke demonstrated that UC's overall effort to challenge government funding decisions under the Free Exercise Clause is infirm.

In Locke, a 7-2 majority of the Court firmly rejected a claim that a Washington State scholarship program violated the Free Exercise Clause by prohibiting state aid to any students pursuing a theology degree. In the Court's most significant discussion related to the present case, Chief Justice Rehnquist expressly recognized and validated the special emphasis existing in many state constitutional provisions which seek to prevent the establishment of religion through prohibitions on educational funding, particularly when there is no demonstration of hostility toward religion. *Id.* at 721-23.

Locke also specifically distinguished the primary authority relied upon in UC's Brief, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), noting that the Court had acted there because of a substantially greater threat to religious freedom than any concerns presented in Locke. *See* 540 U.S. at 720: "In the present case,

the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite." Likewise, there are no "criminal or civil sanctions" implicated by the application of §§ 5, 171 and 189 of the Kentucky Constitution, and UC cannot claim any cognizable violation of the Free Exercise Clause in this situation.

Otherwise, Locke explicitly rejected application of Rosenberger v. Rector of the Univ. of Virginia, 515 U.S. 819 (1995), *see* 540 U.S. at 721 n.3 ("Our cases dealing with speech forums are simply inapplicable"), and UC's argument is actually undermined by Employment Div., Oregon Dep't of Human Resources v. Smith, 494 U.S. 872, 877 (1990). In that case, the Court held that the Free Exercise Clause permits the State to prohibit sacramental peyote use, and to deny unemployment benefits to people discharged for such use. In doing so, the Court altered a longstanding interpretation of the Free Exercise Clause by which any government act that infringed on religious practices of citizens had been required to serve a compelling state interest. Instead, the Court held that the Free Exercise Clause never "relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability" which may incidentally implicate his or her religious beliefs. 494 U.S. at 879. In the present case, UC is not being prevented from any exercise of its religious beliefs or practices, but simply is precluded from seeking public funds by "valid and neutral" constitutional principles "of general applicability" designed to protect and promote public education.

In sum, UC's claim of impermissible discrimination is clearly unjustified because the purpose of § 189 was not to deny religious liberty, but rather to promote a system of public education in which no dogma would be insisted upon, and all citizens would be

willing to participate. This purpose of protecting religious freedom was recognized in the first significant case brought under §§ 5 and 189, Williams v. Board of Trustees Stanton Common School District, 173 Ky. 708, 191 S.W. 507 (1917). In discussing why the defendant school district had violated the constitutional prohibitions in §§ 5 and 189 by using public funds to conduct classes at a denominational college and use teachers from that college to teach classes, the Court explained, 191 S.W. at 514:

> [T]here are thousands of good men and women who will not send their children to any school that is controlled by or under the influence of a denominational institution or church that teaches doctrines or indulges in forms of worship that do not meet their approval. To compose this uneasy spirit that was abroad in the land, to quiet the conscientious scruples of those justly opposed to forced contributions in aid of sectarian institutions, and save the common school from denominational criticism and attack, the prohibition against the union of church and school found voice in the organic law, and its pronouncement must be scrupulously adhered to so that no parent anywhere in the state may have it to say, as did one of the plaintiffs in this case, that he would not patronize the common school in his neighborhood because it was under the control of religious body whose tents or practices he could not accept.

Indeed, the obvious irony of UC's argument is that the University is actually the party which has chosen to engage in invidious discrimination, and to proclaim unabashedly – in defending the expulsion of Jason Johnson – that it "isn't for everyone. We tell prospective students about our high standards before they come. There are places students with predispositions can go such as San Francisco and the left coast or to many of the state schools." President Taylor's derisive comments highlight again Judge Beckner's remarkable wisdom more than a century ago, when he warned other convention delegates:

> The State cannot wisely leave the training of those who are to be its masters to the variable qualities of private agencies. *Even knowledge may be viciously directed. It may be used to oppress,*

> *and not to bless.* It has invented the thumbscrew, the rack and other instruments of torture. ... [A]n education of all classes in the same schools ... blends diverse elements into a harmonious citizenship, and makes impossible the catastrophes that have destroyed governments, and caused oceans of blood to flow in the old world. *Through the influence of the public school bigotry is assuaged, sectarian bitterness is modified, and political rage is calmed.* Children that have been friends in the school-room will not be enemies when grown ... .[49]

Finally, as the historical analysis of § 189 amply demonstrates, this Court should summarily reject the argument by The Becket Fund that § 189 was motivated by unconstitutional anti-Catholic animus, and thus should not be enforced. Whatever may be true of the origins or purposes of similar provisions in other states, it is contrary to the clear record in the Debates to argue that § 189 had any "anti-Catholic pedigree" or was "an outgrowth of pervasive anti-Catholic discrimination." (Becket Brief, at 1, 5.)

One does not need to know anything about the author of § 189 – although that is quite helpful, as demonstrated above.[50] Nor does one need to guess at the "code" meaning of "sectarian" (*id.* at 5),[51] or look to "dictionaries from the time that Kentucky

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[49] *1890 Debates* 4462-63 (emphasis added).

[50] In addition to the absence of any anti-Catholic animus in his statements, Judge Beckner was remarkably progressive for his era, perhaps because of his mother, a Quaker, who was described as "the strongest influence he knew as a young man." Johnson, *supra* note 36, at 1422. Beckner has been credited as "the author and champion of the married woman's property rights law" enacted in 1894, *id.*, at 1421. He was likewise a strong advocate for full educational opportunities for African Americans, and during the same constitutional convention debates, was the author of careful language inserted in KY. CONST. § 187 which not simply required that schools for African Americans students be maintained, but that they be funded on the same basis as schools for white students because of problems with chronic underfunding. *1890 Debates* 4456, 4470-71, 4595; Ireland, *supra* note 38, at 164-65; *see also* Carper, *supra* note 36, at 34.

[51] The Becket Fund is plainly mistaken in asserting that Beckner and others used "sectarian" as a term meaning only Catholics. On the contrary, Beckner expressly used "non-sectarian" in its contemporary sense of having no identifiable religious creed, and he and the other quoted speakers uniformly appear to have used "sectarian" to mean religious creeds of all kinds. *See, e.g., 1890 Debates* 4473; *see also id.* at 4498 (remarks of C. J. Bronston); at 4531 (remarks of L. T. Moore); at 4537 (remarks of J. G. Forrester).

adopted its current constitution" (*id.* at 6), or analyze "Kentucky precedent from this time period" by different authors than the delegates to the 1890-91 constitutional convention (*id.*). Certainly one does not need to make strained arguments about whether "common schools were *intended* to include religious teaching" and thus limitations on funding of sectarian schools necessarily must have reflected anti-Catholic bias (*id.* at 7-8). Instead, one only has to read the actual language of § 189, which encompasses "any church, sectarian or denominational school," and then review the actual Debates not simply for the purpose of extracting selective quotations, to recognize how completely unfounded The Becket Fund's argument is.

Indeed, the attack of "The Becket Fund for Religious Liberty" upon the author of § 189 (*see* Becket Brief, at 10) is extraordinarily imprudent. Judge Beckner was also the author of the vigorously-debated language that eventually appeared in § 5 of the Kentucky Constitution – and which "has no counterpart in any other state or federal constitutional document"[52] – providing "nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed." Beckner's purpose was expressly to protect Catholics who were "opposed to the American system of public schools" from having to send their children to public schools.[53] As summarized by one scholar, "Beckner, the staunch defender of public education and an evangelical Protestant, nevertheless held a deep commitment to protecting the rights of Roman

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[52] Carper, *supra* note 36, at 29.

[53] *Quoted in* Kentucky State Board for Elementary and Secondary Education v. Rudasill, 589 S.W.2d 877, 881 (Ky. 1979).

Catholics and others who dissented from the common-school ideal."[54] Beckner's freedom-of-conscience provision in § 5 eventually provided the basis for this Court's decision in Kentucky State Board for Elementary and Secondary Education v. Rudasill, 589 S.W.2d 877 (1979), which invalidated state regulations concerning teacher qualifications, textbooks and curricula governing fundamentalist Christian schools. *See* 589 S.W.2d at 881: "The Beckner amendment represented the position that while the state has an interest in the education of its citizens which could be furthered through compulsory education, the rights of conscience of those who desired education of their children in private and parochial schools should be protected."

CONCLUSION

The Judgment of the Circuit Court should be affirmed, both for the reasons stated in the decision below, and because of additional constitutional infirmities argued in the Circuit Court and described above. The General Assembly's proposed Pharmacy School Building and Pharmacy Scholarship Program appropriations are prohibited under §§ 5, 171 and 189 of Kentucky's Constitution, and the method by which the scholarship program was enacted further violated Kentucky constitutional and statutory law.

Respectfully submitted,

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54 Carper, *supra* note 36, at 52.