SUPREME COURT
OF LOUISIANA

DOCKET NO. 2007-C-2224
(civil case)

PARMA MATTHIS HOWARD and JANE MATTHIS SMITH,
Applicants,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND,
Respondent.

WRIT OF REVIEW TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF ORLEANS
DOCKET NO. 2006-CA-1276

# *AMICUS CURIAE* BRIEF
**on behalf of**

**AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF AMERICAN UNIVERSITIES, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES, AND NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES IN SUPPORT OF THE POSITION OF THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, RESPONDENT**

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MAY IT PLEASE THE COURT:

In accordance with Louisiana Supreme Court Rule VII(12), American Council on Education, Association of American Universities, National Association of Independent Colleges and Universities, American Association of Community Colleges, Association of Jesuit Colleges and Universities, and National Association of State Universities and Land-Grant Colleges (collectively "*Amici*"), conditionally file this brief in conjunction with their motion for leave to appear as *amici curiae* in support of the position of Respondent Administrators of the Tulane Educational Fund.

## I. THIS CASE ENTAILS FUNDAMENTAL INTERESTS OF AMERICAN HIGHER EDUCATION AND IS OF VITAL IMPORTANCE TO THE AMICI.

*Amici* represent a broad and comprehensive spectrum of American higher education.[1] Their unified presence in this case demonstrates the importance of the issues to all institutions of higher education.

*Amici* participate as *amicus curiae* only in cases that, in their estimation, raise issues of widespread importance for their members nationwide. The decision below implicates two such issues: (1) the importance of judicial deference to the reasoned and informed judgment of a college or university in the exercise of its academic expertise; and (2) the role of precatory language in interpreting donor intent.

There is a longstanding tradition of judicial deference to university decisionmaking in academic matters. To ensure academic freedom, courts must preserve a university's ability to determine on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. A university's restructuring of its collegiate structure necessarily requires determinations involving educational expertise, and thus, lies at the very core of the academic freedom to which courts have afforded a degree of deference. Courts should give deference to the reasoned and deliberate judgment of a university on matters requiring academic expertise and should strive to avoid entry of orders that require judicial oversight of such decisions.

Further, consistent with the Louisiana Civil Code, courts have long refused to interpret precatory language in a donation or will as creating a binding obligation on the donee. It is a

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[1] Each of the *Amici Curiae* is described more fully in the Motion for Leave to File Amicus Curiae Brief. Mot. at pp. 2-4.

deeply engrained principle in both Louisiana and in common law jurisdictions that where a donor conveys absolute ownership in unconditional language, courts will not infer conditions from precatory language absent an equally unconditional and absolute statement of the conditions. This principle has special significance for colleges and universities because precatory language often serves the time-honored role of permitting a donor to express his or her motivations or desires for a gift without hindering the recipient's discretion and ability to achieve its mission in a constantly evolving educational environment. Donor intent deserves the utmost respect, and it is the province of this Court to distinguish between conditional bequests and precatory language. Charitable donations substantially advance and are critical to the educational mission of colleges and universities. The notion that a university must account to descendents of a donor in perpetuity, subject to potential revocation, for a condition *inferred* decades or centuries after the gift will have a devastating impact on higher education in Louisiana and throughout the United States.

## II. COURTS SHOULD AVOID SUBSTITUTING THEIR JUDGMENT FOR THE ACADEMIC JUDGMENT OF AN EDUCATIONAL INSTITUTION IN MATTERS RELATED TO THE INSTITUTION'S ORGANIZATION, ACADEMIC PROGRAMS, AND ADMINISTRATIVE STRUCTURE.

The United States Supreme Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). Courts thus should afford universities a degree of deference in decisions affecting academic matters because the judiciary has a "responsibility to safeguard [universities'] academic freedom." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (internal quotations omitted). Justice Frankfurter described the academic freedom of a university as comprised of "'four essential freedoms'" that must be protected:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

*Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

Based upon those venerable freedoms, the United States Supreme Court has acknowledged that universities must make "complex educational judgments in [] area[s] that lie[]

primarily within the university's expertise." *Grutter*, 539 U.S. at 328-29. These educational judgments often require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Ewing*, 474 U.S. at 226 (citation omitted); *cf. Missouri v. Jenkins*, 515 U.S. 70, 131-32 (1995) (Thomas, J., concurring) ("State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricular, and funding choices . . . .").

Lower federal courts and state appellate courts nationwide repeatedly have affirmed this tradition of deference to a university's academic decisions. *See, e.g., Williams v. Texas Tech Univ. Health Sci. Ctr.*, 6 F.3d 290, 293 (5th Cir. 1993) ("A state university has a significant interest in having reasonable discretion to administer its educational programs."); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) ("Federal judges should not be ersatz deans or educators."); *Henderson State Univ. v. Spadoni*, 848 S.W.2d 951, 953 (Ark. Ct. App. 1993) ("There is a general policy against intervention by the courts in matters best left to school authorities."); *Miller v. Loyola Univ. of New Orleans*, 02-0158, p. 6-7 (La. App. 4 Cir. 9/30/02); 829 So. 2d 1057, 1061 ("Universities must be allowed the flexibility to manage themselves. . . . It is not the place of the court system to micro-manage the adequacy of instruction or management at institutions of higher learning, even if it were feasible, which we feel it is not. This is a task best handled by the universities themselves.").[2]

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[2] *See also* (internal citations omitted): *Tigrett v. Rector & Visitors of the Univ. of Virginia,* 290 F.3d 620, 629-630 (4th Cir. 2002) ("In the absence of a constitutional or statutory deprivation, the federal courts should be loathe to interfere with the organization and operation of an institution of higher education."); *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001) (student grading "not a matter that warrants the 'intrusive oversight by the judiciary'"); *Mangla v. Brown Univ.*, 135 F.3d 80, 84 (1st Cir. 1998) ("Courts have long recognized that matters of academic judgment are generally better left to the educational institutions than to the judiciary and have accorded great deference where such matters are at issue."); *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989) ("The administration of the university rests not with the courts, but with the administrators of the institution. . . . [B]ecause the university must remain independent and autonomous to enjoy academic freedom, the federal courts are reluctant to interfere in the internal operations of the academy."); *Anderson v. Univ. of Wisconsin*, 841 F.2d 737, 741 (7th Cir. 1988) ("The Supreme Court has repeatedly admonished courts to respect the academic judgment of university faculties."); *Mustell v. Rose*, 211 So.2d 489, 493 (Ala. 1968) ("It has been said that courts do not interfere with the management of a school's internal affairs unless there has been a manifest abuse of discretion or where (the school officials') action has been arbitrary or unlawful.") (internal quotations omitted); *Bruner v. Petersen*, 944 P.2d 43, 48 (Alaska 1997) ("In matters of academic merit, curriculum, and advancement, courts afford university faculty and administrators substantial discretion."); *Carley v. Arizona Bd. of Regents*, 737 P.2d 1099, 1102 (Ariz. Ct. App. 1987) ("Various courts have expressed their reticence to intervene in academic decision making by a university concerning retention of teaching personnel."); *Paulsen v. Golden Gate Univ.*, 602 P.2d 778, 808 (Cal. 1979) ("There is a widely accepted rule of judicial non-intervention into the academic affairs of schools."); *Neiman v. Yale Univ.*, 851 A.2d

Courts have recognized the necessity of deference in many facets of university decisionmaking that impact the university's educational "atmosphere." Respect for the university's educational expertise in academic matters has led courts to defer to university decisions, among many others, on allocating funds between a university's schools that may lead to the closure of one school, *In re Antioch Univ.*, 418 A.2d 105, 113 (D.C. 1980) ("'[T]he board of trustees has the jurisdiction to make the policy determination of the continued existence of the various departments with the university.'"); creation and modification of college curriculum, *Webb v. Bd. of Trs. of Ball State Univ.*, 167 F.3d 1146 (7th Cir. 1999); changes to educational environment by lifting restrictions on male visitors at a women's college, *Jones v. Vassar Coll.*,

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1165, 1172 (Conn. 2004) ("'A court must be careful not to substitute its judgment improperly for the academic judgment of the school.'"); *Allworth v. Howard Univ.*, 890 A.2d 194, 202 (D.C. 2006) ("[I]n the university context . . . concepts of academic freedom and academic judgment are so important that courts generally give deference to the discretion exercised by university officials."); *Militana v. Univ. of Miami*, 236 So. 2d 162, 164 (Fla. Dist. Ct. App. 1970) ("On the question of determining whether a student has failed to meet the academic requirements of a school, there is a wide discretion permitted by school authorities, and courts will not interfere, unless the school authorities are shown to have acted in bad faith or exercised their discretion arbitrarily."); *Gordon v. Purdue Univ.*, 862 N.E.2d 1244, 1247 (Ind. Ct. App. 2007) ("'[A]bsent a showing of bad faith on the part of the University or a professor, the Court will not interfere'" with university's "academic judgment"); *Lunde v. Iowa Bd. of Regents*, 487 N.W.2d 357, 363 (court "reluctant to override the faculty's academic decision in the absence of significant evidence showing a failure to exercise their professional judgment."); *Lexington Theological Seminary, Inc. v. Vance*, 596 S.W.2d 11, 14 (Ky. Ct. App. 1979) ("The courts will not generally interfere in the operations of colleges and universities . . . since the courts possess minimum expertise in this area."); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000) ("We adhere to the principle that '[c]ourts are chary about interfering with academic and disciplinary decisions made by private colleges and universities.'"); *Gleason v. Univ. of Minnesota*, 116 N.W. 650, 652 (Minn. 1908) ("We are of the opinion that the government of the University as to educational matters is exclusively vested in the Board of Regents, and that the courts of the state have no jurisdiction to control the discretion of the board.") ; *Univ. of Mississippi Med. Ctr. v. Hughes*, 765 So. 2d 528, 532 (Miss. 2000) ("[I]n an academic context . . . judicial intervention in any form should be undertaken only with the greatest reluctance."); *Swidryk v. Saint Michael's Med. Ctr.*, 493 A.2d 641, 644 (N.J. Super. Ct. Law Div. 1985) ("The New Jersey courts should not be required to sit in day to day review of the academic decisions of a graduate medical education program."); *Olsson v. Bd. of Higher Educ.*, 402 N.E.2d 1150, 1152-53 (N.Y. 1980) (because academic decisions "rest in most cases upon the subjective professional judgment of trained educators, the courts have quite properly exercised the utmost restraint in applying traditional legal rules to disputes within the academic community."); *Bleicher v. Univ. of Cincinnati Coll. of Med.*, 604 N.E.2d 783, 788 (Ohio Ct. App. 1992) (trial court "required to defer to academic decisions of the college unless it perceived . . . 'such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.'"); *Clifton-Davis v. Oklahoma*, 930 P.2d 833, 835 (Okla. Civ. App. 1996) ("'On the question of determining whether a student has failed to meet the academic requirements of a school, *there is an absolute discretion permitted the school authorities* and the courts will not interfere unless such authorities are shown to have acted in bad faith or exercised their discretion arbitrarily or capriciously.'"); *Sherman v. Hyman*, 171 S.W.2d 822, 826 (Tenn. 1942) ("We are not unmindful of the fact that the governing authority in both public and private schools should have and does have the widest discretion in the matter of discipline, to the end that the honor and integrity of the school, as well as its scholastic standards, be preserved and maintained."); *D'Aleo v. Vermont State Colls.*, 450 A.2d 1127, 1130 (Vt. 1982) (state administrative board "properly ruled that [decision to deny tenure] is within the broad discretion of the Colleges and is not arbitrary or discriminatory. . . . [W]hatever th[e] Court may think of its underlying wisdom, [the decision] will not be interfered with."); *Maas v. Corp. of Gonzaga Univ.*, 618 P.2d 106, 109 (Wash. Ct. App. 1980) ("As a general rule, the courts will not interfere with purely academic decisions of a university."); *Frank v. Marquette Univ.*, 245 N.W. 125, 127 (Wis. 1932) ("A broad discretion is given to schools, colleges, and universities in" academic matters; "So long as they act in response to sufficient reasons and not arbitrarily or capriciously, their acts may not be interfered with by the courts.").

299 N.Y.S.2d 283 (Sup. Ct. 1969); and shifts in priorities that resulted in disbanding certain varsity sports teams, *Soderbloom v. Yale Univ.*, No. CV-91-0324553, 1992 WL 24448 (Conn. Super. Ct. Feb. 3, 1992) and *Cooper v. Peterson*, 626 N.Y.S.2d 432 (Sup. Ct. 1995). "Academic freedom thrives . . . on [such] autonomous decisionmaking by the academy itself." *Ewing*, 474 U.S. at 226 n.12.

A university's decision to consolidate or reorganize its collegiate structure strikes at the very core of how a university chooses to teach. Restructuring involves complex questions of how to align existing faculty and curricula into educationally sound and coherent academic programs, *see Webb*, 167 F.3d at 1149 (university "ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view"); how to structure the student experience to maximize educational opportunities in extracurricular and other activities, *see Soderbloom*, 1992 WL 24448, at *4 ("[C]ourts have recognized that universities must have the flexibility to make changes [in extracurricular activities] in furtherance of their educational responsibilities."); and how to organize the institution to establish enduring faculty and student recruitment, *see Lovelace v. Se. Massachusetts Univ.*, 793 F.2d 419, 425-26 (1st Cir. 1986) (how "a school sets itself up to attract and serve [students] . . . is a policy decision which, we think, universities must be allowed to set"). There is no single answer to these and many other interrelated issues in structuring a collegiate system. Small private liberal arts colleges necessarily will have different educational missions – and thus different structures – than a large public research university. It is the role of a university to apply its academic expertise and answer these questions for itself. Courts across the country have been reluctant to substitute their judgment or the judgment of a third party for precisely these types of university decisions. S*ee Antioch*, 418 A.2d at 113 (injunction denied; even if challenged action would lead to closure of law school, plaintiffs' remedy cannot be "an interference in the trustees' control of the University"); *see also Parate*, 868 F.2d 821 (injunction denied); *Soderbloom*, 1992 WL 24448 (same); *Cooper*, 626 N.Y.S.2d 432 (same); *Jones*, 299 N.Y.S.2d 283 (same).

Applicants and their supporting *amicus*, however, suggest that this Court do just that in this case – strip Tulane University of academic discretion in structuring its collegiate program. Applicants argue that Tulane must reconstitute Newcomb College by offering admission to all undergraduate women, hiring deans and staff, reallocating endowment funds and real property,

and issuing separate diplomas. *See* Applicants' Br., at 24. *Amicus curiae* The Future of Newcomb College, Inc. goes further to argue that a committee of Newcomb alumnae and others would make academic decisions for Newcomb College, without University input, on choice of dean and associate dean to serve as academic leadership of Newcomb College, use of endowment funds, operation of educational programs, and admission of students. *See Amicus Curiae* Br. of The Future of Newcomb College, Inc., at 2-3. Similarly, the dissent in the Court of Appeal suggested that the court should substitute its judgment for the academic decisions of the university as to matters of curriculum and faculty hiring.[3] These suggested remedies are antithetical to academic freedom and the strong tradition of judicial deference to university decisionmaking.

*Amici* are not aware of any case where a court has mandated such a thorough evisceration of academic discretion as proposed to this Court by Applicants and their supporting *amicus*.

*Amici* respectfully submit that this Court should avoid intrusive judicial oversight of Tulane University's academic restructuring efforts undertaken in response to the crisis it faced after Hurricane Katrina.[4]

## III. DONATIVE CONDITIONS SHOULD NOT BE IMPLIED FROM PRECATORY LANGUAGE WHEN THE TESTATOR MAKES A BEQUEST OF FULL AND ABSOLUTE OWNERSHIP.

It is a universal principle of testamentary interpretation, rooted in Louisiana law and shared by other jurisdictions, that precatory suggestions do not justify imposition of conditions on an absolute bequest. Because it is not uncommon for donors to colleges and universities to express their hopes, expectations, motives or desires in a donative instrument, it is paramount that this Court continue to interpret such expressions as merely precatory. Colleges and universities respect and honor donor intent, and an unconditional bequest is irresistible evidence that the donor vested the college or university with full discretion to apply the gift in furtherance of the institution's educational mission, notwithstanding other precatory statements in the testament. Legatees should not be subjected to onerous conditions that allow for revocation or enforcement decades or centuries after a bequest that does not clearly impose a condition. Any

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[3] *Howard v. Adm'rs of Tulane Educ. Fund*, 06-1276, p. 13 n.17 (La. App. 4 Cir. 10/22/07); 970 So. 2d 21, 36 n.17, dissenting opinion.

[4] This Court has recognized "the inadequacy of words to describe the total devastation of property, community and social structures which are the after-effects of these historic storms." *State v. All Property & Cas. Ins. Carriers*, 06-2030, p. 12 (La. 8/25/06), 937 So.2d 313, 326

change in the law to give precatory statements the status of conditions could cause enormous and unpredictable changes in the use of donated funds, interfering with the mission of universities and colleges nationwide.

Article 1712 of the Louisiana Civil Code of 1870, created almost two decades before the will in this case, mandated that "the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament," a rule carried forward today in current C.C. art. 1611. The requirement that courts take into account the "signification of the terms" has led to the long-standing principle that precatory suggestions in a will are not expressions of testamentary intent and are not binding on a legatee. *E.g.*, *Girven v. Miller*, 219 La. 252, 52 So.2d 843, 845 (La. 1951). The Louisiana courts further have adhered to the principle, consistent with common law jurisdictions, that if a testator has granted absolute ownership of a legacy, other requests or suggestions related to the legacy are merely precatory and do not bind the legatee. *E.g., Girven*, 219 La. at 257, 52 So. 2d at 845 (dismissal warranted where testator made "absolute" bequest to universal legatee "followed by the language 'to be disposed and administered according to my typed instructions'" because such language constituted "precatory suggestions addressed to the conscience of the legatee but which is 'not binding in law and cannot affect the validity of the bequest of the estate'").

This principle held true in Louisiana and other jurisdictions that dealt with absolute bequests prior to the execution of Mrs. Newcomb's 1898 will. *See, e.g., Young v. Egan*, 10 La. Ann. 415 (1855) ("In Louisiana, the trust contained in the legacy of [a slave] to *Charpentier*, would be considered as not written; and the bequest of the [slave] to *Charpentier* 'to hold in his own right,' would alone stand."); *Howard v. Carusi*, 109 U.S. 725, 733 (1884) ("But even if the will had contained an express request that Samuel should convey to the complainant so much of the estate as he did not dispose of by sale or devise, there would be no trust, for the will . . . gives Samuel Carusi the absolute power of disposal."); *Taylor v. Brown*, 33 A. 664, 665 (Me. 1895) ("[T]he testator makes an absolute gift, and then expresses a wish as to how the donee may dispose of a portion of the estate before her death. The title of property once given away cannot be regained by the hand that gave it."); *Hunt v. Hunt*, 11 Nev. 442 (1876) ("Now words of recommendation, and other words precatory in their nature, *imply that very discretion*, as

contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is irresistibly forced upon them by the context.").[5]

This principle also holds true among the other jurisdictions that addressed the issue after 1898. *See, e.g., McClean v. McClean*, 52 P.2d 625, 628 (Kan. 1935) ("[W]here property is given in clear language sufficient to convey an absolute fee, the interest thus given shall not be taken away or diminished by any subsequent ambiguous, vague, or general expressions in the will, and in cases of doubt a fee simple is favored."); *Hawley v. Grand Rapids Trust Co.*, 255 N.W. 196, 197 (Mich. 1934) ("To enforce the trust prayed for would be for the court to supersede or control the discretion vested by the testator in Frances Eby as to the disposition of the property which was devised and bequeathed to her absolutely. This the court ought not to do."); *In re Estate of Lubenow*, 146 N.W.2d 166, 168 (N.D. 1966) ("Where there is an unconditional devise made . . . and precatory words are used which are not imperative and not certain, they do not in any way impair the absolute and unconditional devise."); *Cahill v. Tanner*, 113 A. 289, 289 (R.I. 1921) ("It is well established that the legal effect of the provisions of a will, plainly expressed, must prevail over an implied intention.").[6]

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[5] *See also Ellis v. Ellis's Adm'r*, 15 Ala. 296 (1849); *In re Whitcomb's Estate*, 24 P. 1028 (Cal. 1890); *Gilbert v. Chapin*, 19 Conn. 342 (1848); *Bryan v. Milby*, 24 A. 333 (Del. Ch. 1891); *Lines v. Darden*, 5 Fla. 51 (1853); *Giles v. Anslow*, 21 N.E. 225 (Ill. 1889); *Van Gorder v. Smith*, 99 Ind. 404 (1885); *Bills v. Bills*, 45 N.W. 748, 748 (Iowa 1890) ("When an estate or interest in land is devised, or personalty is bequeathed, in clear and absolute language, without words of limitation, the devise or bequest cannot be defeated or limited by a subsequent doubtful provision inferentially raising a limitation upon the prior devise or bequest."); *Hazelwood v. Webster*, 13 Ky. Op. 482 (1885); *Nunn v. O'Brien*, 34 A. 244, 245 (Md. 1896) ("[W]herever the prior disposition of property imports absolute and uncontrollable ownership, -- in all such cases courts of equity will not create a trust from words of this character."); *Aldrich v. Aldrich*, 51 N.E. 449 (Mass. 1898); *Balliott v. Veal*, 41 S.W. 736 (Mo. 1897); *Hoxsey v. Hoxsey*, 37 N.J. Eq. 21 (N.J. Ch. 1883) ("In other words, he says it is his intention that her estate in the property shall be absolute, and that the expression of his wishes in the will as to her management and disposition of it, is to be regarded as merely advisory."); *In re Gardner*, 35 N.E. 439 (N.Y. 1893) ("The gift to the wife is in the first instance absolute and unlimited . . . . The estate of the wife is not qualified by the precatory words of the concluding paragraph."); *Batchelor v. Macon*, 69 N.C. 545 (1873); *Bowlby v. Thunder*, 105 Pa. 173 (1884) ("Having made an unqualified devise of his property, no precatory words to his devisee can defeat the estate previously devised."); *Lesesne v. Witte*, 5 S.C. 450 (1875); *Clark v. Hill*, 39 S.W. 339, 340-41 (Tenn. 1897) ("[W]henever prior dispositions impart uncontrollable ownership, the courts will not create a trust from precatory words."); *Speairs v. Ligon*, 59 Tex. 233 (1883) ("[B]y the terms of the will, an absolute power of disposal is given to Catherine Speairs, and if it could be said that the testator attempted to create a limitation over in favor of the appellant, then under the rule cited above such limitation would be declared void."); *Van Amee v. Jackson & Ketcham*, 35 Vt. 173 (1862); *Hunt v. Hunt*, 50 P. 578 (Wash. 1897); *Seamonds v. Hodge*, 15 S.E. 156 (W. Va. 1892).

[6] *See also In re Hayward's Estate*, 110 P.2d 956 (Ariz. 1941); *Woolridge v. Gilman*, 279 S.W. 20 (Ark. 1926); *In re Forrester's Estate*, 279 P. 721, 724 (Colo. 1929) ("The rule appears to be well settled that, 'where one estate is given in one part of an instrument in clear and decisive terms, such estate cannot be taken away or cut down by raising a doubt upon the extent or meaning or application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that estate.'"); *In re Little's Estate*, 173 N.W. 659 (Minn. 1919); *Rector v. Alcorn*, 41 So. 370 (Miss. 1906); *In re Estate of Bolinger*, 943 P.2d 981, 986 (Mont. 1997) ("[W]here a

Expressions of "confidence" in particular matters do not vary an absolute bequest. *See, e.g., Poor v. Bradbury*, 81 N.E. 882, 883 (Mass. 1907) ("The words 'in confidence that he will use it for the prosecution of his work' speak the reason for the disposition, and do not establish a trust."); *Lloyd v. Lloyd*, 53 N.E. 148, 149 (Mass. 1899) ("The statement of the testator of his full faith and confidence in his wife and the words that follow state the motive of the gift, and cannot be fairly construed to affect the absolute quality of the gift."); *Hunt*, 11 Nev. 442 ("If the event has failed to justify his confidence . . ., it can only be said that his will is to be interpreted, not by the event but in light of the confidence which he reposed in her at the time it was made.").[7]

In addition, courts will conclude that a donor intended to vest full discretion in a legatee when precatory language is too ambiguous for the court to enforce without exercising its own discretion. *See, e.g., Woolridge v. Gilman*, 279 S.W. 20, 22 (Ark. 1926); *Pratt v. Trs. of Sheppard & Enoch Pratt Hosp.*, 42 A. 51, 57 (Md. 1898) ("[T]he fact that there is no sufficient designation or description of the objects of the trust naturally suggests, not the inference that there was an attempt to create an unenforceable trust, but, on the contrary, leads to the conclusion that no trust at all was intended."); *In re Carleton*, 432 N.Y.S.2d 441, 445 (Sur. Ct. 1980) ("[T]o constitute a bequest the language must be so definite as to amount and subject matter that it could be executed by the court. The language here at best leaves the nature of the gift and the value thereof to the discretion of the executor. To effectuate the gift, the court would have to override that discretion. This is not permitted."); *St. James Parish v. Bagley*, 50 S.E. 841, 843-44 (N.C. 1905) ("If, for example, a gift is bestowed, coupled with a suggestion or recommendation that it be applied by the donee to objects which are vaguely and imperfectly

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donor first makes an absolute gift of property, without restriction or limitation, and later inserts precatory language in a separate sentence or paragraph, the courts are apt to find that there was no intent to have a trust."); *In re Hansen's Estate*, 127 N.W. 879 (Neb. 1910); *Torres v. Abeyta*, 84 P.2d 592 (N.M. 1938) ("Ordinarily where an absolute estate is in terms given, precatory words which follow are treated as expressions of wish rather than of will, so that no trust is created."); *Thomas v. Bd. of Trs. of Ohio State Univ.*, 70 N.E. 896 (Ohio 1904); *Rice v. Young*, 194 P.2d 882 (Okla. 1948); *Hall v. Dolph*, 198 P.2d 272 (Or. 1948); *In re Havsgaard's Estate*, 238 N.W. 130 (S.D. 1931); *Miller v. Walker Bank & Trust Co.*, 404 P.2d 675 (Utah 1965); *Smith v. Trs. of the Baptist Orphanage of Virginia*, 75 S.E.2d 491 (Va. 1953); *In re Mechler's Will*, 16 N.W.2d 373 (Wis. 1944); *cf. Bliss v. Bliss*, 119 P. 451 (Idaho 1911) (rejecting precatory language as imposing trust on named beneficiaries of insurance policy).

[7] *See also Thomas v. Reynolds*, 174 So. 753 (Ala. 1937) ("confidence"); *McClean*, 52 P.2d 625 (same); *Sexton v. W. View Land Co.*, 288 S.W.2d 352 (Ky. 1956) ("explicit confidence"); *Aldrich*, 51 N.E. 449 ("confident"); *Rector*, 41 So. at 372 ("full confidence"); *Bolinger*, 943 P.2d at 987 ("[Confidence] does not impose any sort of clear directive or obligation (other than, perhaps, a moral or ethical one) . . . ."); *In re Steiner's Estate*, 118 N.Y.S. 833 (App. Div. 1909) ("full confidence"); *Hagerott v. Davis*, 17 N.W.2d 15 (N.D. 1944) ("every trust and confidence"); *Rice*, 194 P.2d 882 ("confidence"); *Bowlby*, 105 Pa. 173 ("fullest confidence"); *In re Pennock's Estate*, 20 Pa. 268 (1853) ("full confidence" and "perfect confidence"); *In re Donaldson's Estate*, 1 Pa. D. 235 (Pa. Orph. 1892) ("full confidence"); *Lesesne*, 5 S.C. 450 ("entire confidence").

described, this vagueness will be regarded by the court as tending to show that the application or nonapplication of the gift was to be left to the option of the donee."); *Rowland v. Rowland*, 6 S.E. 902, 905 (S.C. 1888) ("[I]f a court of equity were to undertake to fix the amount, that would be making a new will for the testator, and substituting the opinion of the court for that of the wife, to whose discretion the testator saw fit to leave it."); *Van Amee*, 35 Vt. 173 (although it was testator's "intention" that his children receive equal distribution, no trust could be imposed because testator vested his wife with discretion to determine the timing and amount of the distribution).[8]

Courts also show greater reluctance to infer conditions if the testator received legal advice.[9] *See In re Estate of Newcomb*, 192 N.Y. 238, 247 (1908) (Mrs. Newcomb "took counsel as to what she should do . . . with reference to making her will"). Ultimately, precatory suggestions that merely express the testator's motivation for a gift will be left to the legatee's conscience, not the courts. *See, e.g., Van Gorder*, 99 Ind. 404 ("Where a bequest is given, coupled with precatory words which leave the legatee free to act or not to act, such words are to be treated as an appeal to the conscience and affections of the legatee and nothing more."); *Aldrich*, 51 N.E. at 450 (testator intended "to express his reason for the gift . . . and not to . . . affect the absolute character of the gift"); *Dickson v. United States*, 125 Mass. 311, 313 (1878) ("The introductory clause of this devise and bequest merely expresses the motive of the testator, and in no way defines or limits the purposes to which the property may be applied by the devisee."); *Torres*, 84 P.2d at 595 ("But no trust is implied where the words simply state the motive leading to the gift . . . ."); *St. James Parish*, 50 S.E. at 842 ("[I]f he does not make any

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[8] *See also Mykola v. Skeltinska*, 417 N.E.2d 699, 703 (Ill. App. Ct. 1981); *Chase v. Plummer*, 17 Md. 165 (1861); *Lesesne*, 5 S.C. 450 ("[T]he want of description of the manner in which the trust is to be executed, may well be urged against its existence."); *Hill v. Page*, 36 S.W. 735, 742 (Tenn. Ch. App. 1895) ("[I]t is very clear to our minds that in all respects so much uncertainty here exists that an attempt to enforce a trust in this case would be a mere guess at the wishes of the testator, and would, as we have said, virtually result in the court's making the will which the testator had left unmade."); and *Spicer v. Wright*, 211 S.E.2d 79, 82 (Va. 1975) (words "as already agreed between us" imposed "no legal obligation" because devisee had "discretion as to how their understanding should best be implemented").

[9] *See also In re Estate of Beauchamp*, 256 Cal. App. 2d 563 (Ct. App. 1967); *Pratt*, 42 A. at 55 ("It seems to me very singular that a person . . . should use . . . language so inappropriate and obscure to express what might have been conveyed in the clearest and most usual terms, - terms the most familiar . . . to the professional or other person who might prepare his will."); *In re Stuart's Estate*, 264 N.W. 372, 374 (Mich. 1936) ("If the will had been prepared by a person uninformed in legal terms or it demonstrated a careless use of language, defendants' claim would have much force."); *Gardner*, 35 N.E. at 440; *St. James Parish*, 50 S.E. at 844 (inferring that an attorney who witnessed the deed "either wrote or was consulted in regard to the deed"); *Cahill*, 113 A. at 289 ("A reading of the will . . . shows that it was written by an experienced person."); *Smith*, 75 S.E.2d at 495.

condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive."); *Wilmoth v. Wilmoth*, 12 S.E. 731, 734 (W. Va. 1890) ("There may be a trust in the forum of conscience, but not in the forum of municipal law.").[10]

Colleges and universities annually receive more than $29 billion in charitable donations, according to the most recent data. Press Release, Council for Aid to Education, Contributions to Colleges and Universities Up by 6.3 Percent to $29.75 Billion (Feb. 20, 2008), *available at* http://www.cae.org/content/pdf/VSE%202007%20Survey%20Press%20Release.pdf. Donors to higher education, particularly those acting with advice of counsel, have the opportunity to express their intent in language that all parties will understand as conditional or unconditional, and by so doing, enable the college or university to elect whether to accept or reject the proffered gift.

A bequest and designation as universal legatee with no limiting language is compelling evidence of the donor's intent to leave the remainder of the estate to the universal legatee unconditionally and absolutely. A donor's expression of "confidence" in a college or university is further evidence that the donor intended the institution to exercise its discretion in applying the gift to its educational mission. Thus, to grant Applicants' requested remedy, this Court must reverse more than 150 years of Louisiana jurisprudence on precatory suggestions and expose Louisiana colleges and universities to an ocean of potential claims by distant descendants with no connection to the institution or the donor.

*Amici* respectfully submit that Louisiana civil law accords with common law jurisdictions on this basic principle of interpreting donor intent: if the donor provides an absolute bequest,

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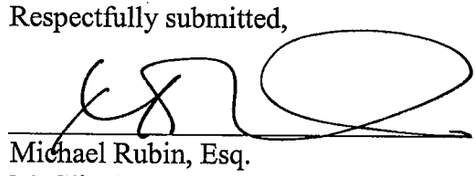
[10] *See also Ellis*, 15 Ala. 296 (testator "*recommends* to her favorable regard his brothers and sisters, to incite her to the performance of a moral duty"); *Beauchamp*, 256 Cal. App. 2d at 567 ("The only question presented for decision is whether . . . the testator intended to impose a legally enforceable duty or a mere moral obligation."); *McClean*, 288 S.W.2d at 353 ("[T]he precatory words create a presumption that only a moral obligation was imposed, and this presumption will be overcome only by clear evidence of an intent to create a binding legal obligation."); *Harmon v. Harmon*, 6 N.W.2d 762, 765 (Mich. 1942) ("Whatever he gave Dorothy Harmon or will give depends alone on his willingness to perform a moral obligation in compliance with his father's desire."); *Balliott*, 41 S.W. at 737 ("That clause simply shows the purpose of the bequest."); *Bolinger*, 943 P.2d at 986 (precatory words "are generally construed not to create a trust but instead to create at most an ethical obligation"); *Stapleton v. DeVries*, 535 P.2d 1267, 1269 (Mont. 1975) ("The reason for [the bequest] . . . does not limit or restrict the testamentary gift."); *First Nat'l Bank of Mansfield v. Galion Cmty. Hosp.*, No. 3-77-8, 1978 WL 215794, at *3 (Ohio Ct. App. May 11, 1978) ("No trust is created if the settlor manifests an intention to impose merely a moral obligation . . . ."); *Miller*, 404 P.2d at 676-77 ("Where there is a clear and unequivocal devise, the statement of reasons for doing so does not limit or restrict the testamentary gift.").

then other suggestions about the use of the legacy are precatory and not binding on the legatee. This Court should reject Applicants' attempt to engraft an onerous obligation on a will executed 110 years ago and to use that obligation to control the academic decisionmaking at a nationally prominent university in Louisiana coping with "the total devastation of property, community and social structures"[11] that occurred after Hurricane Katrina.

Respectfully submitted,



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IN SUPPORT OF THE POSITION OF
THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, RESPONDENT

April 7, 2008

[11] *State v. All Property And Casualty Ins. Carriers*, 06-2030, p. 12 (La. 8/25/06), 937 So.2d 313, 326.