

IN THE SUPREME COURT OF MISSISSIPPI

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CASE NO. 2007-TS-01926

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DR. CLAUDIA A. LIMBERT, individually and in  
her official capacity as President; MISSISSIPPI  
UNIVERSITY FOR WOMEN; and MISSISSIPPI  
BOARD OF TRUSTEES OF STATE  
INSTITUTIONS OF HIGHER LEARNING                      DEFENDANTS/APPELLANTS

V.

MISSISSIPPI UNIVERSITY FOR WOMEN                      PLAINTIFF/APPELLEE  
ALUMNAE ASSOCIATION, INC.

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ON APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

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**BRIEF IN SUPPORT OF APPELLANTS' MOTION  
FOR EXPEDITED CONSIDERATION OF APPEAL**

In its Opinion and Final Judgment, the Lowndes County Chancery Court determined that Mississippi University for Women Alumnae Association, Inc. (the "Alumnae Association"), and its representatives were trying to control the management and leadership of Mississippi University for Women and to remove Dr. Claudia Limbert as President.<sup>1</sup> The Chancery Court further found that these leaders' criticisms of Dr. Limbert and her administration were "unmerited" and that Dr. Limbert had "well-grounded" fears that these Alumnae Association leaders were "interfering with the administration of university business".<sup>2</sup> Finally, the Chancery Court determined that Dr. Limbert

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<sup>1</sup> See Opinion and Final Judgment, p. 8 (Appendix "A" to Motion).

<sup>2</sup> *Id.* at pp. 4 n.2, 5, 12 and 13.

had the right to exercise her judgment in terminating the written affiliation agreement between the Alumnae Association and the University.<sup>3</sup>

Despite these findings, the Chancery Court then concluded that Dr. Limbert acted in “bad faith” when she exercised the 60-day termination provision in the affiliation agreement with the Alumnae Association because (i) her refusal to approve by-laws submitted by the Alumnae Association conflicted with IHL Board policy that affiliated entities be “independent”, and (ii) her termination of the affiliation agreement in the face of criticism from the Alumnae Association violated First Amendment “Free Speech” rights.<sup>4</sup> Based on these conclusions, the Chancery Court mandated that the University re-affiliate with the Alumnae Association.<sup>5</sup> Second, the Chancery Court mandated that the University and the IHL Board disaffiliate with the new Mississippi University for Women Alumni Association, as the Chancery Court concluded that the formation of the Alumni Association and entry into an affiliation agreement with that entity were also done in “bad faith”.<sup>6</sup> The Chancery Court refused to prohibit the Alumnae Association from using the University’s name, marks and symbols.<sup>7</sup>

To preserve and protect the powers and authorities granted to them by the Mississippi Constitution and the Mississippi legislature and to correct erroneous legal conclusions, Appellants Dr. Claudia Limbert, Mississippi University for Women and Mississippi Board of Trustees of State

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<sup>3</sup> *Id.* at p. 9.

<sup>4</sup> *Id.* at pp. 9-13.

<sup>5</sup> *Id.* at p. 13.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

Institutions of Higher Learning have appealed to this Court from the Chancery Court's Opinion and Final Judgment. Because this matter concerns a mandate involving a matter of public interest, Appellants ask this Court to give expedited consideration to this appeal, including the adoption of an expedited briefing schedule and setting for oral argument.

#### DISCUSSION

This Court and the Mississippi legislature have provided for the early consideration and resolution of certain appeals. Rule 23 of the Mississippi Rules of Appellate Procedure and Miss. Code Ann § 11-3-3 (1972) permit this Court to expedite consideration of an appeal that (i) concerns a mandate (ii) involving a matter of public interest. Moreover, this Court has "inherent power to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants, especially in cases of extraordinary public moment."<sup>8</sup>

Here, the Chancery Court has improperly mandated that Mississippi University for Women re-affiliate with the Alumnae Association (whose leaders the Chancery Court concluded were attempting to undermine the University's administration) and terminate its affiliation with an alumni association (which Dr. Limbert, the University and the IHL Board concluded was supportive of the University's mission and administration). Thus, this matter certainly satisfies the first factor for expedited consideration - - - a mandate.

In addition, this appeal clearly involves a matter of public interest on several fronts. First, the Chancery Court has over-stepped its bounds in violation of the separation of powers doctrine that forms the basis of our three-branch government by mandating that an executive branch official undertake specific actions for which that official has discretionary authority. Second, the Chancery

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<sup>8</sup> *Vail v. City of Jackson*, 206 Miss. 299, 320, 1949 Miss. LEXIS 263, 33-34 (1949).

Court has interfered with the constitutional and statutory authority of the IHL Board to manage and control Mississippi's public universities. Third, the Chancery Court has substituted its own judgment and disregarded the deference due the IHL Board, as a state agency, to adopt and enforce its regulations in a manner consistent with its powers. Finally, the Chancery Court has afforded the Alumnae Association First Amendment "free speech" rights (rights non-existent under the United States Constitution or the Mississippi Constitution) that permit the Alumnae Association to force its speech on the University and the IHL Board. The citizens of Mississippi have a direct and compelling interest in having these errors corrected as expeditiously as possible and for this matter to take preference over other cases.

### Separation of Powers

It is a fundamental principle of government in this State that neither of the three branches "shall exercise any power properly belonging to either of the others."<sup>9</sup> Thus, while Mississippi courts "have the power to hear claims that public officials have violated their mandatory, non-discretionary duties of office",<sup>10</sup> they *may not* force executive branch officials to exercise their discretion to bring about a particular result.<sup>11</sup> The most important factor involved in determining whether a particular duty is discretionary or ministerial is whether the duty is "one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions

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<sup>9</sup> MISS. CONST., Art. I, § 2.

<sup>10</sup> *Fordice v. Thomas*, 649 So.2d 835, 840 (Miss. 1995) (citing *Poyner v. Gilmore*, 158 So. 922, 923 (Miss. 1935)).

<sup>11</sup> *USPCI of Miss., Inc. v. State of Miss. ex rel McGowan*, 688 So.2d 783, 789 (Miss. 1997) (holding that no action would lie against the Governor for his exercise of "mere discretionary functions").

which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion."<sup>12</sup>

The Chancery Court issued a writ of mandamus compelling Dr. Limbert to re-affiliate the University with the Alumnae Association despite also concluding that Dr. Limbert had the right to exercise her judgment in making a decision to terminate the affiliation agreement. The law is clear that a writ of mandamus may not issue in the absence of "the existence of a legal duty on the part of the defendant to do the thing which the petitioner seeks to compel."<sup>13</sup> The courts, when considering mandamus petitions, must follow a "doctrine of non-judicial interference":

[Courts] "can direct an official or commission to perform its official duty or to perform a ministerial act, but it *cannot project itself into the discretionary function of the official or the commission*. Stated differently, it can direct action to be taken, but it cannot direct the outcome of the mandated function." Thus, a court could, if necessary, compel by mandamus an [official] to perform its statutory duty upon its failure to do so, or prohibit it by way of injunction from exceeding its statutory authority in some respect; use of an extraordinary writ, however, *cannot be extended to actually telling the [official] what action to take*.<sup>14</sup>

The public has an interest in the checks and balances provided by our three-branch system of government. Separation of powers issues are implicated by the Chancery Court's Opinion.

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<sup>12</sup> *Fordice* 649 So.2d at 840 (Miss. 1995) (citing *Poyner*, 158 So. at 923).

<sup>13</sup> *USPCI of Miss., Inc.*, 688 So.2d at 789 (quoting *Bd. of Supervisors of Prentiss County v. Miss. State Highway Comm'n*, 42 So. 2d 802, 805 (Miss. 1949)).

<sup>14</sup> *In re Wilbourn*, 590 So. 2d 1381, 1385 (Miss. 1991) (quoting *Hinds County Democratic Committee v. Muirhead*, 259 So. 2d 692, 695 (Miss. 1972)) (emphasis added).

### Power and Authority of IHL Board

The Mississippi Constitution vests the IHL Board with sole authority for administration of Mississippi's public institutions of higher learning.<sup>15</sup> While the IHL Board is, strictly speaking, a part of the executive branch of government, this Court has held that its status as a "constitutionally-created state agency" entitles it to "operate with a considerable amount of independence and security of position."<sup>16</sup> Thus, the IHL Board's constitutional charter ensures that, while it is "not an island, . . . it is a pretty good sized peninsula." *Id.*

The IHL Board has delegated to the various chief executive officers at each university the primary responsibility for ongoing management of their respective institutions.<sup>17</sup> In addition, the IHL Board has specifically delegated to the chief executives of the various universities the responsibility to execute affiliation agreements with any affiliated entities.<sup>18</sup> The University and the Alumnae Association entered an affiliation agreement in October 2006.<sup>19</sup> Among other things, the affiliation agreement provided for either party to have the right to terminate the agreement with a 60-day termination period.<sup>20</sup>

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<sup>15</sup> See MISS. CONST. Art. VIII, § 213-A.

<sup>16</sup> *Van Slyke v. Bd. of Trustees of Institutions of Higher Learning*, 613 So. 2d 872, 877 (Miss. 1993).

<sup>17</sup> See IHL Policy § 301.0801 (Appendix "B" to Motion).

<sup>18</sup> See IHL Policy § 301.0806 (Appendix "C" to Motion).

<sup>19</sup> See Opinion, p. 7 (Appendix "A" to Motion).

<sup>20</sup> *Id.* at p. 1.

In this case, the University, *in its discretion*, exercised its contractual right to dissolve the affiliation agreement with the Alumnae Association. The Chancery Court, substituting its judgment for that of Dr. Limbert, mandated that the University re-affiliate with the Alumnae Association and terminate the relationship with the new Alumni Association, the entity with whom the University and the IHL Board have determined an affiliation best serves the University. The Chancery Court Opinion has brought into question the constitutional and legislative scheme of higher education administration - - - a matter of public concern.

### **Right of State Agency to Adopt and Enforce Regulations**

The Chancery Court concluded that Dr. Limbert and the University violated the IHL Policy requiring that affiliated entities maintain their “independent” status *vis-a-vis* the institution. Specifically, the Chancery Court concluded that Dr. Limbert acted in “bad faith” by terminating the affiliation agreement because she disapproved of certain by-law provisions proposed by the Alumnae Association, all, according to the Chancery Court, in violation of the “independent” status required under the IHL Board Policy.

The Chancery Court’s interpretation of “independent” differed from the IHL Board’s view of that term, as testified by Dr. Tom Meredith, IHL Commissioner.<sup>21</sup> The IHL Board, which adopted the standard, was particularly well-suited to interpret the language, and the Chancery Court should have deferred to the IHL Board’s interpretation of its own policy provision.<sup>22</sup> The policy itself provides guidance on the meaning intended by the IHL Board, as it limits the ability of IHL

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<sup>21</sup> *Id.* at p. 10.

<sup>22</sup> See *Mississippi Gaming Comm’n v. Board of Education*, 691 So.2d 452, 455 (Miss. 1997) (“This Court affords great deference to an administrative agency in interpreting its own regulations.”).

employees to serve on the board of directors of an affiliated entity.<sup>23</sup> The IHL Board looks to each of the institutional chief executive officers to employ the appropriate amount of control over the respective affiliated entities.<sup>24</sup> Because it must approve all affiliation agreements, the IHL Board retains ultimate control in determining if an affiliated entity has sufficient independence from a particular university consistent with the IHL Policy.

The Chancery Court has ignored the IHL Board's interpretation of its own policy in favor of the Chancery Court's subjective interpretation. The public has an interest in this appeal, as such judicial conduct certainly impacts the IHL Board and its policy-making powers but could also affect other state agencies in their adoption and enforcement of regulations.

#### **Permitting Alumnae Association to Force Speech on University**

The Chancery Court shielded the Alumnae Association's speech (which was inconsistent with the legitimate pedagogical and administrative messages the University sought to convey) as constitutionally protected. Yet, at the same time, the Chancery Court found, as a matter of fact, that "Dr. Limbert was motivated by a well-grounded fear . . . that an independent group of alumnae were trying to undermine her administration."<sup>25</sup> Because it is clear that the Alumnae Association's officers and members were undermining the mission and priorities of the University on behalf of an officially-sanctioned affiliated entity, Dr. Limbert's actions were not constitutionally suspect.

Governmental entities, while they do not possess constitutional rights, have the inherent power to control the content of their expression, as well as the message that is conveyed by their

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<sup>23</sup> IHL Policy § 301.0806 (Appendix "C" to this Motion).

<sup>24</sup> Opinion, p. 10 (Appendix "A" to Motion).

<sup>25</sup> *Id.* at 12.

agents and affiliates. The United States Supreme Court has held that, “when the State is the speaker, it may make content-based choices” about the messages disseminated by its agencies and its agents.<sup>26</sup> Furthermore, when an arm of the State designates “private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”<sup>27</sup> As one court has put it, “[s]imply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.”<sup>28</sup> The Alumnae Association’s leaders and members certainly have a constitutionally-protected right to voice their opinion about perceived shortcomings on the part of the University’s administration. However, the University has a parallel right to withdraw its *seal of approval* from such statements by, among other things, terminating an affiliation with the Alumnae Association.<sup>29</sup>

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<sup>26</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (U.S. 1995) (“When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”).

<sup>27</sup> *Id.* See also *Columbia Broadcasting System, Inc. v. Democratic Nat’l Committee*, 412 U.S. 94, 140 n.7 (U.S. 1973) (Stewart, J., concurring) (“The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.”) (quoting THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 700 (1970)); *Muir v. Ala. Educ. Television Comm’n*, 688 F.2d 1033, 1038 (5th Cir. 1982) (“To find that the government is without First Amendment protection is not to find that the government is prohibited from speaking or that private individuals have the right to limit or control the expression of government.”) (internal citations omitted).

<sup>28</sup> *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) (“We conclude that when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual’s choice of how to convey oneself: among other things, content, timing, and purpose.”)

<sup>29</sup> Under the Affiliation Agreement, the Alumnae Association may use the University’s name, symbols, trademarks, trade names, logos, and service marks.

The Chancery Court confused the First Amendment right to freedom of speech with the privilege of being an officially-sanctioned affiliated entity. The Chancery Court cited no legal authority for the proposition that the Alumnae Association has a constitutionally-protected right to remain affiliated with the University. One federal court considering similar issues has held just the opposite: “[T]he First Amendment does not require colleges to fund or recognize alumni groups. Moreover, a college does not unlawfully impede the associational rights of its alumni when it declines to recognize an alumni group.”<sup>30</sup>

By suggesting that the Alumnae Association has a constitutionally-protected right to affiliation despite the conduct of its leaders and members in direct conflict with the University administration, the decision of the Chancery Court has raised issues of public concern.

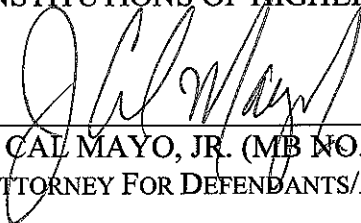
#### CONCLUSION

For these reasons, this Court should expedite consideration of this appeal and provide any other general relief to which Appellants are entitled under the circumstances.

THIS, the 9<sup>th</sup> day of November, 2007.

Respectfully submitted,

DR. CLAUDIA A. LIMBERT, individually and in her official capacity as President; MISSISSIPPI UNIVERSITY FOR WOMEN; and MISSISSIPPI BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING

  
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J. CAL MAYO, JR. (MB NO. 8492)  
ATTORNEY FOR DEFENDANTS/APPELLANTS

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<sup>30</sup> *Ad Hoc Comm. of Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 726 F. Supp. 522, 523 (S.D.N.Y. 1989).

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**CERTIFICATE OF SERVICE**

I, J. CAL MAYO, JR., one of the attorneys for Appellants, do certify that I have this date delivered, by United States mail, postage fully pre-paid, and by electronic means, a true and correct copy of this document to the following attorneys at these addresses:

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THIS, the 9<sup>th</sup> day of November, 2007.

  
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