IN THE SUPREME COURT OF MISSOURI

No. SC90912

CRAIG DYDELL

Appellant

v.

BERNARD TAYLOR, JR.

Respondent

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit, Division 11
The Honorable W. Brent Powell, Circuit Judge

APPELLANT'S REPLY BRIEF

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STATEMENT OF FACTS

In his Brief, Taylor engages in abundant argument in violation of Rule 84.04(c) of the Missouri Rules of Civil Procedure. At numerous points, Taylor engages in improper argument by contending that a statement of fact that was set forth in Dydell's Opening Brief is supposedly not supported by the Legal File. In nearly every such instance, Taylor does not explain why and in what respect the Legal File supposedly does not support any factual statement presented by Dydell. In order to demonstrate the misleading nature of Taylor's argument about the alleged inaccuracy of some of the statements of fact set forth in Dydell's Opening Brief, a few pertinent examples of Taylor's misrepresentations will be shown.

At page 2 of Taylor's Brief, he argues that the Legal File cited by Dydell does not support his statement of fact that "the School District reported Whitehead's criminal record to Taylor." One of the documents cited by Dydell to support this statement is contained at page 349 of the Legal File. That District document dated June 17, 2004, states that Whitehead "is currently under the jurisdiction of Family Court," and that his criminal offense "is reportable to the Superintendent under the Safe Schools Act." (L349).

At page 9 of his Brief, Taylor argues that the Legal File cited by Dydell purportedly does not support his factual statement that Whitehead's "file contained Whitehead's psychiatric and criminal records." One of the documents cited by Dydell

in support of that statement was a District index of Whitehead's student file. (L355-356). That index shows that Whitehead's file contained both his criminal record and his psychiatric records. In addition, the record before the Trial Court and this Court establishes that Whitehead's mother completed a District enrollment form on June 16, 2004, wherein she acknowledged that her son had been convicted of a felony for bringing a knife to Westport Charter School. (L315). Furthermore, Taylor's misrepresentation about the accuracy of the foregoing factual statement is made *more* egregious when one considers that the record before the Trial Court and this Court includes a judicial admission by Taylor's *own* attorneys that "[a]s of July, 2004, the School District had in its possession, as part of Whitehead's permanent file: (1) the three Two Rivers Psychiatric Hospital reports; (2) the Truman Medical Center record on his treatment for aggression; and (3) information about his expulsion and criminal conduct while at Westport Charter Academy." (L445).

At page 10 of Taylor's Brief, he engages in additional misrepresentations of the Legal File and the facts set forth in Dydell's Opening Brief. There, Taylor argues that the Legal File cited by Dydell supposedly does not support Dydell's statement of fact that District teachers and case managers were not provided information about Whitehead's criminal record. In point of fact, the Legal File referenced by Dydell included a reference to the deposition testimony of James Franson, Whitehead's case manager. Mr. Franson was asked the following question: "Now, with regard to… Mr.

Whitehead, were you aware that he had been criminally charged at Westport High School …." (L269). His answer was: "I was not." (*Id.*).

At the same page of his Brief, Taylor goes on to argue that the Legal File cited by Dydell supposedly does not contain any support for Dydell's statement that Taylor "never sent or caused to be sent to School District employees any guidelines or directives recommending that case managers review the files of special education students under their supervision so that they would be aware of any criminal or psychiatric records on dangerous students." (Respondent's Brief, at pp. 10-11). Contrary to Taylor's misrepresentation of the record, the Legal File cited by Dydell (Franson deposition testimony) establishes that Whitehead's case manager had never been made aware of Whitehead's criminal record; that this same case manager "never received any guidelines or directives from Mr. McClendon or Dr. Taylor telling people like yourself or recommending to people like yourself to go downtown and review the files of the students that are under your case load"; that "the District never had any protocol in place in 2004 and 2005, whereby they would notify case managers and teachers of any students that had psychiatric records like the record of Mr. Whitehead"; and that Whitehead's case manager had never seen "any guidelines, written guidelines from Mr. McClendon or Dr. Taylor about the handling of mentally disturbed students at Central High School." (L269-274).

At page 10 of his Brief, Taylor *argues* that he was not "responsible" for handling the dissemination of criminal information on students to District teachers and case managers with a need to know. Then in the argument portion of his Brief, at page 52, Taylor expands this misrepresentation by alleging that "[i]t is uncontroverted that Dr. Taylor delegated this duty [to comply with the Missouri Safe Schools Act] to the Student Hearing Office and School District Legal Counsel." (Respondent's Brief, at p. 52).[1] This is a gross misrepresentation of the record before the Trial Court and this Court. In his deposition, Taylor was asked "who had you delegated the task of complying with the Safe Schools Act, if anybody?" (L304). In response, Taylor testified as follows: "Well, I mean, I think we are all responsible for that." (*Id*.). And when asked whether he had *ever* read any portion of the Missouri Safe Schools Act, Taylor testified: "No." (*Id*.).

[1] It is highly questionable whether that duty could even be delegated by Taylor since it is an undisputed fact that Taylor, and Taylor alone, was obligated to enforce and execute *all* policies and regulations officially adopted by the School District's Board of Directors. (L193, 220). The Dangerous Student Regulation, which implements the Missouri Safe Schools Act, was adopted by the District's Board of Directors in 2000. (Respondent's Brief, at p. 54; A14).

ARGUMENT

I. REPLY TO TAYLOR'S FIRST ARGUMENT: DYDELL'S POINT I IS IGNORED BY TAYLOR'S ARGUMENT, AND HIS RELIANCE UPON RAILROAD CASES AND OTHER SUPREMACY CLAUSE CASES ARE IRRELEVANT TO POINT I.

A. Additional Overview of the Coverdell Act.

Without stating so, Taylor necessarily concedes that the Coverdell Act contains *no* funding provisions. Thus, there remains a question whether the Act even qualifies for Spending Clause analysis.

In *School District of the City of Pontiac v. Secretary of the Dept. of Education*, 584 F.3d 253 (6th Cir. 2009), the appeals court set forth the background, basic purposes and structure of the No Child Left Behind Act (NCLBA), which became law on January 8, 2002. According to the Sixth Circuit, the Act focused narrowly on the poorest students and demanded accountability from schools, with serious consequences for schools that fail to meet the heightened academic-achievement requirements. Moreover, the Act provides that the States can use federal funds "only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds." 20 U.S.C. § 6321(b)(1). In other words, "States and school districts remain responsible for the

majority of the funding for public education, and the funds distributed under Title I [of the Act] are to be used only to implement Title I programming, not to replace funds already being used for general programming." *School District of the City of Pontiac v. Secretary of the Dept. of Education*, supra at 258-259.

At *no* point in the Coverdell Act is there any reference made to *any* provision of the NCLBA. There is not one provision in the Coverdell Act which ties performance under the NCLBA to *any* provision in the Coverdell Act. Stated simply, the Coverdell Act was introduced as an independent piece of tort-reform legislation that is unconnected to the narrow focus of the NCLBA. While the NCLBA narrowly focuses its funds and its mandates on the poorest students, the Coverdell Act applies to all schools, whether they be public, parochial or private. The Act makes no distinction between poor students and rich students, nor does it distinguish between teachers and administrators at poor public schools from teachers and administrators at private or parochial schools.

B. **Dydell's Spending Clause Argument Does Not Directly Implicate the Dole Decision.**

Taylor devotes pages 20 through 24 of his Brief to an analysis and argument about whether the Coverdell Act is in compliance with *South Dakota v. Dole*, 483 U.S. 203 (1987). Taylor's analysis of the majority opinion in *Dole* is misplaced. Point I of Dydell's argument does not directly implicate the foregoing majority decision.

The reason Point I does not directly implicate *Dole* is because *Dole* did *not* involve federal spending legislation that sought to directly regulate individuals or institutions who were non-recipients of federal funds. *See United States v. American Library Ass'n*, 539 U.S. 194, 203 fn. 2 (2003) (The Act "does not directly regulate private conduct; rather, Congress has exercised its Spending Power by specifying conditions on the receipt of federal funds. Therefore, *Dole* provides the appropriate framework for assessing CIPA's constitutionally."). Thus, the four limitations discussed by the Supreme Court in *Dole* are not directly implicated.

What is implicated is the dissenting opinion by Justice O'Connor. There she discussed the Constitutional difference between Congress' spending power and its regulatory power. Justice O'Connor also emphasized that "Congress may only condition grants in ways that can fairly be said to be related to the expenditure of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 217 (1987). With that said, it cannot be disputed that the Coverdell Act is in *no* way connected to the expenditure of federal education funds under the NCLBA. Such a relationship requirement between federal funding and the conditions upon which that funding are offered remains a critical requirement for any federal spending legislation to pass Constitutional muster under the Spending Clause. *New York v. United States*, 505 U.S. 144, 167 (1992).

C. **Taylor's Railroad Cases and Supremacy Clause Argument Are Irrelevant to Point I.**

Instead of addressing the single issue posed in Point I (whether Congress can directly regulate non-recipients of federal funds under the Spending Clause), Taylor poses a false issue; it is "whether state common law has been preempted through Missouri's acceptance of funds under the Coverdell Act." (Respondent's Brief, at p. 33). This false issue has *nothing* to do with Point I. Taylor's issue makes no mention of, nor does it have anything to do with, the question whether a non-recipient of federal funds can be directly regulated by Congress under the Spending Clause.

Taylor relies primarily upon two railroad cases to support his false issue argument. He contends that *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993) and *Norfolk Railway Co. v. Shanklin*, 529 U.S. 344 (2000) are "controlling" on Point I. (Respondent's Brief at p. 32). As hereinafter shown, these two railroad cases have nothing to do with the Spending Clause or Point I.

The *Easterwood* case arose from a wrongful death suit that was filed by the widow of a truck driver who was killed when his vehicle was struck by a train. The widow alleged that CSX was negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed. The trial court granted summary judgment to the railroad on the ground that both claims were preempted under the Federal Railway Safety Act of 1970, which Act

was authorized by Congress under the Commerce Clause. The court of appeals affirmed in part and reversed in part. It held that the negligence claim based on the speed of the train was preempted by federal law, but that the claim based on the absence of proper warning devises at the crossing was not. The Supreme Court affirmed.

The only two issues before the Supreme Court in *Easterwood* were (1) whether the warning device claim was preempted by federal law, and (2) whether the speed claim was preempted by federal law. *No* Constitutional issue was raised, nor was there *any* mention of the Spending Clause. Instead, the Supreme Court merely engaged in a traditional federal preemption analysis. In the course of that analysis, the Supreme Court held that the warning device claim was not preempted, regardless of the fact that states receive federal aid to establish highway safety improvement programs. The Court did, however, hold that the speed claim was preempted under federal law by virtue of the federal dominance of the subject as a result of the regulations issued by the Secretary of Transportation.

The *Shanklin* decision also arose from a wrongful death action by a widow in connection with the death of her husband in a railroad crossing accident. The widow alleged that the railroad had failed to maintain adequate warning devices at the crossing. The widow claimed that the warning signs posted at the crossing were insufficient to warn a motorist of the danger posed by passing trains. A jury verdict

was entered in favor of the widow and the railroad appealed. After the appeal was affirmed, the Supreme Court took the case and reversed. It held that the widow's action was preempted by federal law. Like the *Easterwood* case, *Shanklin* did *not* involve any Constitutional issue, nor did it involve any issue under the Spending Clause. All of the railroad/transportation statutes at issue in *Shanklin* were passed under the Commerce Clause. And like *Easterwood*, *Shanklin* involved traditional federal preemption analysis to determine whether certain federal transportation regulations had preempted conflicting state law. In reaching its conclusion, the High Court concluded that once federal railroad/transportation funds are requested and used to install warning devices at a gate crossing, the resulting federal *regulation* of those warning devices at that crossing preempted state law with respect to the adequacy of such warning devices.

The *Easterwood* and *Shanklin* cases both involved transportation and railroad legislation that was enacted under the Commerce Clause. "[W]here Congress has the authority to regulate private activity *under the Commerce Clause*, [the Supreme Court has] recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992). Commerce Clause legislation often involves some federal funding, but the underlying legislative power for enacting such statutes and the resulting regulations is the Commerce Clause, *not* the Spending

Clause. Because the regulatory reach of private activity is quite broad under the Commerce Clause, legislation and cases under that clause can have no relevance to determining whether direct regulation of private activity can similarly be affected under the Spending Clause, particularly when the persons affected are not the recipients of any federal funding.

D. **The O'Brian and Cross Decisions Are Also Irrelevant to the Spending Clause and Point I.**

The other decisions relied upon by Taylor to support his response to Point I are two federal appellate decisions. They are *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034 (8th Cir. 2002) and *O'Brien v. Massachusetts Bay Transportation Authority*, 162 F.3d 40 (1st Cir. 1998). Neither of these cases helps Taylor.

The *Cross* decision involved an action under 42 U.S.C. § 1983 against the Director of the Missouri Division of Family Services and the Director of the Missouri Department of Social Services. The action sought declaratory and injunctive relieve to enforce the foster-care provider reimbursement provisions of the Adoption Assistance and Child Welfare Act of 1980. The subject Act created a joint federal-state program that provided federal funds to participating states to pay for certain foster-care and adoption expenses. The plaintiff trade association sued the directors, alleging that their state agencies had failed to comply with the reimbursement requirements applicable to institutional providers under the Act. The directors argued

that they could not be sued under Section 1983 because the subject Act was not a part of the supreme law of the land under the Supremacy Clause. The Eighth Circuit disagreed, holding that the Act was part of the supreme law of the land. Taylor contends that this case stands for the proposition that "the spending program at issue applied to the State of Missouri, and *thus to the individual litigates themselves*, through the Supremacy Clause." (Respondent's Brief, at p. 32) (emphasis in original). That is a misstatement of the holding. The two department directors that were named in the suit were there because the only relief sought was declaratory and injunctive relief, and that relief could *only* be achieved by naming the heads of the two state agencies.[2] The appeals court properly held that the Missouri Division of Family Services and the Missouri Department of Social Services, both being recipients of federal funding, were subject to the requirements and conditions under which their federal funds were accepted. At *no* point did the Eight Circuit ever hold that Congress could regulate the rights of individuals or institutions that were not the recipients of federal funding under the Spending Clause.

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[2] In *Smith v. Allen*, 502 F. 3d 1255, 1272-73 (11th Cir. 2007), the Eleventh Circuit emphasized that federal courts have "repeatedly held that Congress cannot use its Spending Power to subject a non-recipient of federal funds, including a state official acting in his or her individual capacity, to private liability for monetary damages."

The *O'Brien* case was an action by a police association against the Massachusetts Bay Transportation Authority (MBTA). The association sought to prevent the implementation of the Omnibus Transportation Employee Testing Act. That Act required MBTA police officers to submit to random drug and alcohol screens. In particular, the federal subsidy under the Urban Mass Transportation Act directed the recipients of the federal government largesse to conduct random drug and alcohol testing of MBTA employees responsible for safety-sensitive functions. The First Circuit concluded that the express preemption provisions in the subject federal legislation prevented the association from precluding enforcement of the federal drug testing policy. According to Taylor, this decision stands for the proposition "that a state's receipt of federal funds can even result in the preemption of its citizens' rights under a state constitution."[3] (Respondent's Brief, at p. 31). Again, Taylor misrepresents the holding of the case. What the First Circuit actually held was that the arrangement and *agreement* between the federal government and the MBTA came with a drug testing condition. Acceptance of the subject federal funds obligated the MBTA to comply with the federal funding condition. Again, the subject federal

[3] The First Circuit cited *no* case authority in support of that dubious proposition. In *United States v. Butler*, 297 U.S. 1, 73 (1936), the Supreme Court made clear that "[a]n appropriation to be expended by the United States under contracts calling for violations of a state law clearly would offend the Constitution."

legislation *did not* seek to directly regulate individuals or institutions who were *not* the recipients of federal funding. While some of the employees of the MBTA were incidentally affected by their employer's acceptance of the federal transportation funding, the federal legislation did *not* directly regulate any institutions or individuals who were not the recipients of federal funding.

E. **Taylor's Misunderstanding of the Pennhurst and Davis Decisions.**

In his discussion of the *Cross* case, Taylor appears to cast doubt on the continued validity of the contract theory espoused by the Supreme Court in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). In that decision, the Supreme Court concluded that Congressional power under the Spending Clause is similar to the power that exists between parties to a contract. In other words, "legislation enacted pursuant to spending power is much in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions." *Id*. at 17. The contractual theory underlying Congressional power under the Spending Clause has remained a vital component of Constitutional analysis under Article I. As recently as 2006, the Supreme Court reiterated that '[l]egislation enacted pursuant to the spending power is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' *recipients* of federal funds must accept them 'voluntarily and knowingly.'" *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006) (emphasis added).

In his Opening Brief, Dydell noted that the important Constitutional point made implicit in *United States Dept. of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), was made explicit in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1900). (Dydell's Opening Brief, at p. 22). In the latter case, the Supreme Court held that individuals and institutions who are not the recipients of federal funding cannot be subject to private damage actions under Title IX because "Government enforcement power may only be exercised against the funding recipient" *Id*. at 641.

In his Brief, Taylor argues that *Davis* "proves that Congressional action under the Spending Clause may have collateral effects on the rights of individual litigants; individual students are not direct recipients of federal funds, yet the Court expressly held that Title IX *grants* them a private cause of action." (Respondent's Brief, at p. 13, fn.11) (emphasis in original). Again, Taylor misrepresents the Supreme Court's holding. In *Davis*, the Supreme Court did *not* hold that non-recipients of federal funds can be directly regulated by Congress under the Spending Clause. Rather, the Supreme Court merely concluded that individuals have a federal cause of action under Title IX to enforce the subject federal legislation. Persons suing under Title IX are not being regulated by Congress under the Spending Clause; rather, they are beneficiaries of Congress' lawful desire to *enforce* federal legislation by granting individuals rights of action thereunder. Granting an individual a federal cause of

action or providing for federal criminal liability in connection with the expenditure of federal funds serves the legitimate purpose of facilitating the enforcement and execution of federal laws. *See, e.g., Sabri v. United States*, 541 U.S. 600, 605 (2004). The Coverdell Act provides no federal cause of action for enforcement of the Act or the NCLBA.

F. **The Supreme Court's Decision In Sabri Is Not Applicable to Point I, But the Eighth Circuit's Underlying Decision In Sabri Is Directly On Point I.**

In its Brief, *amicus curiae* United States cites the Supreme Court's recent decision in *Sabri v. United States*, 541 U.S. 600 (2004), stating that "the Supreme Court rejected a constitutional challenge to a spending clause statute that made it a federal crime for a person to attempt to bribe a state or local official in a state that receives more than $10,000 in annual federal grants." (Brief of United States, at p. 11). The United States goes on to state that this decision stands for the proposition that "federal regulation of private conduct was an appropriate means to protect the integrity of federal grant programs." (*Id*.)

The decision by the Supreme Court in *Sabri* does not provide support for either the United States or Taylor under Point I for one simple reason; the High Court's holding was based exclusively on the Necessary and Proper Clause. That Clause is set forth at Article I, section 8, clause 18 of the Constitution. Justice Souter concluded that the Necessary and Proper Clause authorized the subject federal bribery

statute in order "that taxpayer dollars appropriated under [the Spending Clause] are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officials are derelict about demanding value for dollars." *Id*. at 605. There can be little dispute that there is *nothing* in the Coverdell Act which is necessary or proper for carrying into execution the spending provisions of the NCLBA. As stated earlier, there is not one provision in the Coverdell Act which ties performance under the NCLBA to any provision in the Coverdell Act. The Necessary and Proper Clause has no relevance to the Coverdell Act or Point I.

While the Supreme Court's decision in *Sabri* does not help Taylor or the United States, the Eighth Circuit's underlying decision in that *same* case *directly and squarely* supports Dydell's argument under Point I. *Sabri v. United States*, 326 F.3d 937 (8th Cir. 2003), *aff'd*, 541 U.S. 600 (2004). In his analysis of the Spending Clause, Appellate Judge Hansen made these *highly* relevant observations and conclusions.

> We could find no persuasive or authoritative case law supporting the proposition that Congress, acting pursuant to its power to attach conditions to the receipt of federal funds, has the authority to directly regulate the conduct of third parties who are not actually the recipients of the federal funds. Instead, the case law demonstrates

> that *funding condition statutes may only directly regulate the recipients of the federal funds* who then may or may not undertake action vis-à-vis third parties.

Id. at 947 (emphasis added).

G. **Point I Has Nothing To Do With the Supremacy Clause.**

Every case cited and relied upon by Taylor, with the exception of the *Dole* case, involved preemption under the Supremacy Clause. There is *no* issue in this case involving the Supremacy Clause. *If* the Coverdell Act was lawfully authorized under the Spending Clause, then Missouri substantive and procedural law *is* necessarily preempted. The Supremacy Clause, however, has nothing to do with Article I or whether Congress had any Constitutional power to enact the Coverdell Act.

As stated in Dydell's Opening Brief, the issue for this Court in Point I is *not* whether the Coverdell Act conflicts with Missouri substantive and procedural law (which it clearly does), but whether Congress had *any authority* under the Article I of the Constitution to enact the Coverdell Act. Neither Taylor nor the United States have cited a *single* case where Congress ever sought (other than the Coverdell Act) to directly regulate non-recipients of federal funding under the Spending Clause. The Eighth Circuit's underlying decision in *Sabri* may explain why no such cases were located by Taylor and the United States.

II. REPLY TO TAYLOR'S SECOND ARGUMENT: TAYLOR FAILS TO CITE ANY CASE WHICH COMES CLOSE TO SUPPORTING HIS EXTREME COMMERCE CLAUSE ARGUMENT.

Taylor argues that "Congress can regulate activities that directly or indirectly affect interstate commerce, as long as Congress has a *rational basis* to believe the activities affect interstate commerce in a substantial way." (Respondent's Brief, at p. 37) (emphasis in original). In support of that statement, Taylor cites *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). Taylor goes on to argue that the Supreme Court has "*routinely* upheld statutes that regulate purely *intrastate* activities because those intrastate activities have an indirect effect on interstate commerce that is substantial." (Respondent's Brief, at p. 37) (emphasis in original). What Taylor fails to mention is that in *every* case where the Supreme Court has found that intrastate activities had a substantial effect on interstate commerce, the subject activities were *always economic* in nature. The Coverdell Act involves *nothing* that is economic in nature.

The *Gonzales* case is of no help to Taylor. *Gonzales* was an action by users and growers of marijuana for medical purposes. They sought to uphold California's Compassionate Use Act and to declare as unconstitutional the federal Controlled Substances Act (under which marijuana is classified as a class one substance), as applied to them. The Supreme Court held that the federal criminalization of the distribution or possession of marijuana to interstate growers and users of marijuana

for medical purposes did not violate the Commerce Clause. In its analysis, the Court recognized "Congress' power to regulate purely local activities that are part of an *economic* 'class of activities' that have a substantial affect on interstate commerce." *Id*. at 17 (emphasis added). The Court went on to conclude that "[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. 'Economics' refers to 'the production, distribution, and consumption of commodities.' The CSA is a statute that regulates the production, distribution and consumption of commodities for which there is an established, and lucrative, interstate market." *Id*. at 25-26.

Taylor makes the outrageous factual representation to this Court that "the Coverdell Act regulates activities that *Congress recently concluded* have a 'substantial affect' on interstate commerce." (Respondent's Brief, at p. 38) (emphasis added). Taylor cites *nothing* to support this misrepresentation. The legislative history of the Coverdell Act provides absolutely *no* such conclusion. Congress made absolutely *no* findings as to the affect of the Coverdell Act on interstate commerce or on any other commerce. For Taylor to make such an outrageous false statement is beyond the realm of ethical argument.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that a federal statute that was designed to protect schools and school children from firearms could not pass Constitutional muster under the Commerce Clause. In his decision,

Justice Rehnquist aptly noted that "if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it can also regulate the educational process directly." *Id*. at 565. He went on to note that while Commerce Clause authority is broad, it "does not include the authority to regulate each and every aspect of local schools." *Id*.

III. REPLY TO TAYLOR'S THIRD ARGUMENT: TAYLOR'S RELIANCE UPON THE HOWLETT DECISION IS MISPLACED.

Taylor argues that the Tenth Amendment is not an independent bar to Congress' spending power. Taylor does not cite a case to support this proposition. Instead, Taylor again relies on Supremacy Clause cases, as well as the Supreme Court's decision in *Howlett v. Rose*, 496 U.S. 356 (1990). Taylor's reliance on this case is of no assistance to his Tenth Amendment argument.

Howlett was an action by former high school students against a school board and three school officials, contending that their search of a car and subsequent suspension of the students violated their rights under the Fourth and Fourteenth Amendments of the Constitution. The action was brought under 42 U.S.C. § 1983, which creates a federal remedy for violations of federal rights committed by persons acting under color of state law. The Supreme Court held that the refusal by Florida state courts to entertain the Section 1983 claim, when Florida state courts entertained similar state-law actions against state defendants, violated the Supremacy Clause.

Taylor argues that "*Howlett* stands for the clear proposition that federal law may affect the defenses and claims available to private litigants and state courts, and state courts are required to take cognizance of that federal law and apply it *as if it were simply the law of the state itself*." (Respondent's Brief, at p. 43) (emphasis in original). Taylor does not explain what relevance the holding in *Howlett* has to Dydell's Tenth Amendment argument. In fact, the Tenth Amendment is *never* even cited at any point in the *Howlett* decision. The *Howlett* decision simply stands for the proposition that when a party seeks to enforce a federal cause of action under 42 U.S.C. § 1983, the federal courts will protect the enforcement of those rights even if that federal cause of action is asserted in a state court.[4] The Coverdell Act does not provide for any federal cause of action in *any* court.

[4] The Supreme Court did, however, aptly observe in *Howlett* that up to the time of that decision in 1990, "Congress had not attempted 'to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure…"' *Id*. at 373. Since the passage of the Coverdell Act, such a statement can no longer be made.

IV. REPLY TO TAYLOR'S FOURTH ARGUMENT: THE DANGEROUS STUDENT REGULATION IMPLEMENTS THE MISSOURI SAFE SCHOOLS ACT, WHICH ACT TAYLOR FAILED TO COMPLY WITH AND, THEREFORE, HE FAILED TO COMPLY WITH THE SECOND PREREQUISITE OF THE COVERDELL ACT.

A. **The Dangerous Student Regulation Implements the Missouri Safe Schools Act.**

Taylor argues that the Coverdell Act's second requirement does not apply to the Dangerous Student Regulation because that regulation supposedly does not constitute "local laws (including rules and regulations)," as that phrase is used in the second prerequisite of the Coverdell Act. 20 U.S. C. § 6736(a)(2). Taylor's argument is irrelevant because it is *undisputed* that the Dangerous Student Regulation *implements* and restates the reporting requirements mandated by Missouri law under the Missouri Safe Schools Act. Moreover, at page 54 of his Brief, Taylor actually *admits* that the Dangerous Student Regulation "implements reporting requirements under the [Missouri] Safe Schools Act." (Respondent's Brief, at p. 54). Therefore, the Dangerous Student Regulation is part of the second prerequisite of the Coverdell Act which Taylor had to satisfy.

The Missouri Safe Schools Act is set forth at Sections 160.261 and 167.161 of the Revised Statutes of Missouri. Section 160.261.2 provides that the written policy

of discipline and reporting *mandated* by the Missouri Safe Schools Act "shall require that any portion of a student's individualized education program that is related to demonstrated or potentially violent behavior shall be provided to any teacher or other school district employees who are directly responsible for the student's education or who otherwise interact with the student on an educational basis while acting in the scope of their assigned duties." This Missouri statutory requirement is repeated and implemented in the Dangerous Student Regulation as follows: "In addition, any portion of a student's Individualized Education Program (IEP) that is related to demonstrated or potentially violent behavior shall be provided to any teacher and other district employees with a need to know the information." (A13).

Section 167.115.3 of the Revised Statutes of Missouri provides that juvenile officers, sheriffs, chiefs of police and other law enforcement authorities shall notify the superintendent or the superintendent's designee of any instance where a student has committed one of 22 criminal offenses, including possession of a weapon under Chapter 571 of the Revised Statutes of Missouri. Numbered paragraph 3 of that same statutory section goes on to mandate that "the superintendent or the designee of the superintendent shall report such *information* to teachers and other school district employees with a need to know while acting within the scope of their assigned duties." (Emphasis added). The foregoing statutory provisions are repeated and carried forth in the Dangerous Student Regulation. This District regulation provides

as follows: “Teachers and other school district employees who have a need to know will also be informed by the superintendent or designee of any *act* committed or allegedly committed by a student in the district that is reported to the district by a juvenile officer or an employee of the Children’s Division (CD) of the Department of Social Services, sheriff, chief of police or other appropriate law enforcement authority in accordance with state law.” (A13) (emphasis added).

B. **Taylor Completely Failed to Prove His Compliance With the Missouri Safe Schools Act, the Dangerous Student Regulation and the Second Prerequisite of the Coverdell Act**

The first provision of the Missouri Safe Schools Act and the Dangerous Student Regulation, which Taylor wholly failed to implement or execute, required District employees and teachers to be informed of dangerous special education students (like Whitehead) with “demonstrated or potentially violent behavior” tendencies. Taylor argues that he had no obligation to disclose to Whitehead’s case workers and teachers Whitehead’s *demonstrated* violent past behavior because this information had not been placed in Whitehead’s Individualized Education Program (IEP). While it is true that such information was not set forth in Whitehead’s IEP by the District’s Special Education Department, it is *not* true that Taylor is thereby absolved of any duty.

It cannot be disputed that both the Missouri Safe Schools Act and the Dangerous Student Regulation *both* contained a clear *purpose and intent* that District employees and teachers be notified of dangerous special education students. It is undisputed that Taylor provided no supervision, guidance or direction to the Special Education Department to see that information about dangerous special education students was placed in their IEPs. Without such guidance or direction by Taylor, there was *little* likelihood that the foregoing purpose and intent would be achieved. Thus, the foregoing provisions of the Missouri Safe Schools Act and the Dangerous Student Regulation were never effectively implemented by Taylor. Taylor's attempt to rely on legal niceties to avoid his legal responsibility to protect teachers, students and case workers from dangerous special education students, such as Whitehead, cannot be allowed.

The second requirement of the Missouri Safe Schools Act and the Dangerous Student Regulation, which Taylor also failed to implement or execute, related to the reporting (to case workers and teachers) of information about student criminal offenses as reported to the School District by law enforcement authorities. Taylor seeks to avoid responsibility for this second requirement by misrepresenting the Missouri Safe Schools Act and the Dangerous Student Regulation. The foregoing Act required Taylor to "report such [criminal] information to teachers and other school district employees with a need to know acting within the scope of their assigned

duties." § 167.115.3, R.S.Mo. The Dangerous Student Regulation required Taylor to notify teachers and other District employees with a need to know "of any act committed or allegedly committed by a student" that is reported to the District by law enforcement authorities. (A13). In his Brief, Taylor misrepresents *both* the Act and the Regulation by arguing that the terms "act" and "information" only refer to an "act of school violence". *Nothing* in the foregoing Act or Regulation supports Taylor's argument. Moreover, the phrase "act of school violence" is not even contained in Section 167.115. There can be no dispute that the terms "act" or "information" refer to a record that a student has committed one of the 22 listed criminal offences identified in Section 167.115.1 and the Dangerous Student Regulation.

Taylor continues his misrepresentation of the Dangerous Student Regulation and the Missouri Safe Schools Act by alleging that the crime which Whitehead committed at Westport Charter School in 2004 was supposedly *not* covered under Section 167.115.1. In particular, Taylor argues that crime number 18 (possession of a weapon under Chapter 571.R.S.Mo.) "only criminalizes the possession of a 'switch blade knife.'" (Respondent's Brief, at p. 53). Taylor goes on to argue that because Whitehead was not convicted of possessing a "switch blade knife," his admitted criminal offense did not come within the Missouri Safe Schools Act or the Dangerous Student Regulation. A cursory review of Chapter 571 of the Revised Statutes of Missouri shows that a person commits a crime under that Chapter if he or she

"[c]arries concealed upon or about his or her person a knife…" § 571.030.1(1), R.S.Mo. The term "knife" is defined in Section 571.010(12) as "any…. bladed hand instrument that is readily capable of inflicting personal physical injury or death by cutting or stabbing a person." The record is undisputed that Whitehead attempted to bring a 7 ½ inch butcher knife, concealed upon his person, into Westport Charter School in 2004. (L315, 317, 321, 442, 443). Thus, it is undisputed that the Missouri Safe Schools Act and the Dangerous Student Regulation required Taylor to report Whitehead's criminal record to Whitehead's teachers and case workers. (L467).

In a final attempt to avoid his obligations under the Missouri Safe Schools Act and the Dangerous Student Regulation, Taylor argues that he "delegated this duty to the Student Hearing Office and School District legal counsel." (Respondent's Brief, at p. 52). [5] This allegation is not supported by Taylor's deposition testimony. During his deposition, Taylor was asked the following question: "Who was in charge of.. who had you delegated the task of complying with the Safe Schools Act, if anybody?" (L304). In response, Taylor answered as follows: "Well, I mean, I think we were all responsible for that." (*Id*.). To the extent that Taylor may attempt to argue that he was never notified of Whitehead's criminal record in accordance with the Missouri Safe Schools Act, this is also refuted by a District document dated June 17, 2004. (L467). There, the School District acknowledged that Whitehead's "criminal offense is

[5] See footnote 1 herein.

reportable to [Taylor] under the Safe Schools Act." (*Id.*). There is no record evidence that such reporting to Taylor was never carried out by the District.

C. **There is No Evidence in the Legal File That Taylor Complied With the Missouri Safe Schools Act, the Dangerous Student Regulation and the Second Prerequisite of the Coverdell Act**

The record before this Court clearly demonstrate that Taylor did absolutely *nothing* to implement or execute the foregoing provisions of the Missouri Safe Schools Act and the Dangerous Student Regulation. In his Brief, Taylor fails to cite *any* record evidence to the contrary. In fact, Taylor contends that the substantial record of his complete failure to implement and execute the provisions of the Act and the Dangerous Student Regulation is somehow "irrelevant." (Respondent's Brief, at p. 55).

Taylor had the burden before the Trial Court to prove that his conduct or lack thereof complied with the second prerequisite of the Coverdell Act. As shown above, Taylor completely failed to satisfy that burden. Accordingly, Taylor had no protection under the Coverdell Act. Therefore, summary judgment based thereon in favor of Taylor was wholly unwarranted.

V. REPLY TO TAYLOR'S FIFTH ARGUMENT: APPELLATE REVIEW OF THE TRIAL COURT'S DENIAL OF TAYLOR'S MOTIONS FOR SUMMARY JUDGMENT BASED ON OFFICIAL IMMUNITY IS NOT AVAILABLE.

Taylor filed at least two motions for summary judgment with the Trial Court based exclusively on the Missouri doctrine of official immunity. All of those motions were denied. Taylor's final motion for summary judgment in the Trial Court was based on the Coverdell Act. That motion was granted and final judgment based thereon was entered in Taylor's favor. (A1). The order granting that motion clearly states that it is based exclusively on the Coverdell argument set forth in Taylor's final motion for summary judgment. (*Id*.).

In Point V of his argument, Taylor seeks appellate review of the Trial Court orders denying his motions for summary judgment. Those motions were based on Missouri's official immunity doctrine. Taylor devotes 27 pages of his 85-page Brief to this improper argument. Appellate review of Point V is improper and unavailable.

It is established in Missouri that "denial of a motion for summary judgment is not subject to appellate review, even when an appeal is taken from a final judgment and not the denial of a motion for summary judgment." *Hihn v. Hihn*, 235 S.W. 3d 64, 67 (Mo. App. 2007), *citing Gilmore v. Erb*, 900 S.W. 2d 669, 667 (Mo.App. 1995); *see also State v. Sure-Way Transportation, Inc.*, 884 S.W. 2d 349, 351

(Mo.App. 1994). The only exception to the foregoing rule is when "the merits of the [denied] motion for summary judgment are 'intertwined with the propriety of an appealable order granting summary judgment to another party.'" *Schroeder v. Duenke*, 265 S.W. 3d 843, 850 (Mo.App. 2008), *citing Hussmann Corp. v. UQM Electronics, Inc.*, 172 S.W. 3d 918, 922 (Mo.App. 2005). Taylor's final motion for summary judgment based on the Coverdell Act has absolutely *no* relationship to his prior motions for summary judgment based on the official immunity doctrine. Thus, the foregoing exception has no application.

Taylor's Point V is wholly improper and is not subject to appellate review.

CONCLUSION

For these additional reasons, the Trial Court erred in granting Taylor summary judgment under the Coverdell Act. The Act should be declared unconstitutional or otherwise not applicable to Dydell, the judgment of the Trial Court should be reversed and this case should be remanded to the Trial Court for the jury trial that Dydell has been wrongfully denied for too many years.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Reply Brief complies with the provisions of Rule 55.03 of the Missouri Rules of Civil Procedure; that it contains 7, 744 words/ 730 lines and therefore complies with the word/line limitations contained in Rule 84.06(b); that the CD-ROM was scanned for viruses and found to be free of viruses; and that one copy of the CD-ROM and two copies of Appellant's Reply Brief were mailed this 4th day of October, 2010, to:

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