

The Supreme Court
of the State of Louisiana

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

PARMA MATTHIS HOWARD and JANE MATTHIS SMITH,
Plaintiffs-Applicants,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND,
Defendant-Respondent.

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

ORIGINAL BRIEF

on behalf of

**THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND
d/b/a TULANE UNIVERSITY**

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INTRODUCTION

Josephine Louise Newcomb named the Administrators of the Tulane Educational Fund as the universal legatee of her estate. The language of her bequest is clear, simple and unconditional. The donative language, in full, reads as follows:

Third, I hereby give and bequeath to the "Administrators of the Tulane Educational Fund" of New Orleans, the whole of the property real, personal, and mixed, of which I am now possessed or which I may leave at the time of my death, and to that end and purpose I do hereby name and constitute the said "Administrators of the Tulane Educational Fund" to be my universal legatee. [S.Ct. R. 19].

Mrs. Newcomb made clear by the unconditional nature of the bequest and in prior letters to Tulane that her gifts were committed to the full discretion of the Tulane Board. Her letters and an introductory paragraph to her will also expressed her desire and motivation to promote the education of women and to preserve the memory of her late daughter, H. Sophie Newcomb.

For over 120 years and continuing today, Tulane's Board has respected the wishes of Mrs. Newcomb despite the fact that there was no condition to do so in Mrs. Newcomb's will and that Mrs. Newcomb did not endow her gift. Tulane established the H. Sophie Newcomb Memorial College, as well as a women's preparatory high school, to promote women's education and programs. As educational and societal needs have changed, Tulane's Board has exercised its

discretion to adapt and change the university as it deemed appropriate for the future of the institution. Among these changes have been ones germane to Newcomb College. For example, Tulane renounced Mrs. Newcomb's wish to limit attendance to white women; combined the curriculum and faculty of Newcomb College with that of Tulane; and made classes and dormitories co-educational.

In the aftermath of Hurricane Katrina, Tulane was forced to make hard choices to recover from the physical and economic devastation it suffered. Critical to the educational and economic health of the University, and central to its Renewal Plan, was the merger of its seven undergraduate colleges into a single college. In doing so, Tulane continued to respect the wishes of Mrs. Newcomb, naming the newly combined college "The Newcomb-Tulane College" in memory of H. Sophie Newcomb. It established the "H. Sophie Newcomb Memorial College Institute" and preserved all of the programs offered before the Renewal Plan, while at the same time expanding the reach of those programs to all women undergraduates at Tulane whereas they were previously limited only to undergraduate women in the arts and sciences. As it has for more than a century, the Tulane Board was guided by its educational mission, its fiduciary duty to the University, and its desire to respect the wishes of Mrs. Newcomb—not by any condition in Mrs. Newcomb's will.

Applicants Parma Matthis Howard and Jane Matthis Smith are residents of North and South Carolina, respectively, who claim that they are several generations descended from the sister of Josephine Louise Newcomb. Applicants brought suit against Tulane, contending that Mrs. Newcomb's will imposes a "condition" upon Tulane to maintain a "separate degree-granting institution" in perpetuity. Mrs. Newcomb's will contains no such condition, much less one requiring a "separate degree-granting institution" in perpetuity. Based on Louisiana's indisputable principles for interpretation of wills, the language on which Howard and Smith rely is plainly precatory, and therefore has no binding effect. This Court should reject applicants' efforts to overturn longstanding and well-accepted legal principles distinguishing between precatory and conditional language. While Howard and Smith also come to this Court claiming the mantle of "donor intent," Mrs. Newcomb made her intent clear: to leave the use of the funds "fully and solely to [the Board's] care and discretion" and to impose on the Board no

“restrictions which will allow the intervention of any person or persons to control, regulate, or interfere with” that discretion. S.Ct. R. 10.

The Civil District Court for Orleans Parish denied applicants’ motion for a preliminary injunction, concluding that Howard and Smith neither demonstrated that they would prevail on the merits nor that they would be irreparably harmed absent the issuance of an injunction. Finding that Mrs. Newcomb placed no conditions on her gifts to Tulane, the Court of Appeal for the Fourth Circuit affirmed and ordered that the action be dismissed. The Court of Appeal’s decision should be affirmed.

STATEMENT OF THE CASE

The Founding and Evolution of Newcomb College. In October 1886, Josephine Louise Newcomb donated \$100,000 to Tulane University, in memory of her daughter H. Sophie Newcomb, “to be used in establishing the H. Sophie Newcomb Memorial College, in the Tulane University of Louisiana, for the higher Education of white girls and young women.” S.Ct. R. 10. In a letter to the Tulane Board of Administrators accompanying her donation, Mrs. Newcomb expressly disclaimed her intent to impose conditions or restrictions on her gift: “I do not mean in this my act of donation to impose upon you restrictions which will allow the intervention of any person or persons to control, regulate, or interfere with your disposition of this fund, which is committed fully and solely to your care and discretion with entire confidence in your fidelity and wisdom.” *Id.*

Mrs. Newcomb continued in subsequent years to fund specific Newcomb College projects. *See, e.g.,* Pls.’ Ex. 15 (excerpts from Brandt V.B. Dixon, A Brief History of H. Sophie Newcomb Memorial College: 1887-1919 (1928)); *see also* John P. Dyer, Tulane: A Biography of a University: 1834-1965 (1966). The University also used the funds donated by Mrs. Newcomb to build and maintain a separate preparatory high school for women in addition to Newcomb College. Dyer, *supra*, at 99-100. Mrs. Newcomb did not object to the use of the funds for this and any other purposes deemed appropriate by the Tulane Board of Administrators.

Mrs. Newcomb died in 1901. In her will, and after making certain special legacies, Mrs. Newcomb bequeathed her entire estate to Tulane, naming the University as her “universal legatee.” The will provided in relevant part:

I hereby give and bequeath to the "Administrators of the Tulane Educational Fund" of New Orleans, the whole of the property real, personal, and mixed, of which I am now possessed or which I may leave at the time of my death, and to that end and purpose I do hereby name and constitute the said "Administrators of the Tulane Educational Fund" to be my universal legatee. [S.Ct. R. 19.]¹

Newcomb College continued to evolve over the subsequent decades in ways large and small. In 1911, men were permitted to take courses at Newcomb College School of Music. Tulane Ex. 19; Jun. 12, 2006 Hearing 79-80. The Newcomb preparatory school was closed in 1920, S.Ct. R. 246, and in that same year Newcomb College was further integrated into Tulane, replacing the Newcomb College president with a dean. Dixon, *supra*, at 44-45, 192; Dyer, *supra*, at 322. Newcomb students began to enroll in coeducational classes with undergraduate men in the 1960s. S.Ct. R. 246. And Newcomb College admitted its first African-American student in 1963, when changing times mandated a departure from Mrs. Newcomb's original desire. *Id.*

Newcomb and Tulane Colleges unified their academic departments by 1969; by 1979 they shared a single curriculum. In 1983, the colleges merged their respective admissions offices. S.Ct. R. 246. In 1987 Newcomb and Tulane integrated their faculty into a single structure for liberal arts and sciences. *Id.* Many of the Newcomb and Tulane dorms became co-educational during the same timeframe.

Thus, by the late 1980s, Newcomb College no longer had its own classes, its own faculty, or its own academic programs; all classes, faculty, and programs had been integrated into Tulane. Newcomb College retained a separate administration and alumnae association and issued its own diplomas. In addition, the Newcomb name resided on a number of physical facilities and spaces just as it does today.

When the Newcomb faculty was integrated into the University's arts and sciences faculty two decades ago, the Tulane Board created the Newcomb Foundation and designated \$2 million to support the programs in Newcomb College and Mrs. Newcomb's legacy. The Board designated another approximately \$12 million in 1996 to be applied to Newcomb College's operating budget. The income from the Newcomb dedicated funds was used primarily to support

¹ Mrs. Newcomb's heirs, including Plaintiffs' ancestors, attacked Mrs. Newcomb's will. See In re Application for Revocation of Ancillary Letters Testamentary of Estate of Josephine Louise Newcomb, 84 N.E. 950 (N.Y. 1908). The trial court, the intermediate appellate court, and the New York Court of Appeals all rejected the purported heirs' challenge to Mrs. Newcomb's final bequests.

the Newcomb Fellows program, which provided scholarships to women undergraduates and grants to faculty in support of projects for the higher education of women; the Newcomb College Center for Research on Women; and mentoring and leadership programs administered by Newcomb College. See S.Ct. R. 247.

Hurricane Katrina and the Renewal Plan. On August 29, 2005, Hurricane Katrina hit the Gulf Coast. Virtually all of Tulane's 13,000 students and 6,000 employees were displaced for an entire academic semester. In Katrina's wake, the University suffered hundreds of millions of dollars in property damage and lost revenue, and even after reducing expenses and increasing debt to maximum levels, the University continued to project conservative budget deficits in excess of \$50 million a year.

To address the crisis, Tulane developed a plan the University described as "the most serious undertaking in the history of the university"—one that would "ensure the continuing academic ascendancy and financial health" of the University. S.Ct. R. 94. The resulting plan of action was named the "Renewal Plan." See S.Ct. R. 253. One of the most fundamental components of the Renewal Plan was the unification of Tulane's undergraduate collegiate structure. Before the Plan, the University maintained seven undergraduate schools and colleges, some with overlapping constituencies: Tulane College, Newcomb College, the School of Engineering, the School of Architecture, the School of Business, the School of Public Health and Tropical Medicine, and University College (a school of continuing studies). S.Ct. R. 245. Thus under Tulane's previous sprawling structure, undergraduate women who entered the engineering school attended the School of Engineering—not Newcomb. Undergraduate women who entered architecture school attended that college—not Newcomb. Each separate school and college had its own administrative and advisory structure, dean, and diploma. Id.

The Renewal Plan consolidated each of these seven separate schools and colleges into a single undergraduate college, Newcomb-Tulane College. All prospective undergraduate students are admitted to Newcomb-Tulane. The Renewal Plan also reorganized the faculty and academic departments of the entire University. S.Ct. R. 244-45. Under the Plan, the seven overlapping schools and colleges become five schools—Liberal Arts, Science & Engineering, Architecture, Business, and Public Health & Tropical Medicine. S.Ct. R. 255. Once a student declares a

major, he or she will be considered a student of both Newcomb-Tulane College and the relevant school. Id.

In December 2005, the Tulane Board voted unanimously to approve the Renewal Plan. S.Ct. R. 246. At that time, the Board authorized President Cowen to create Newcomb-Tulane College to simplify and consolidate Tulane's undergraduate academic and administrative structure; suspended separate admissions to Newcomb and Tulane Colleges for Fall 2006; and established a Task Force "to specify how the Newcomb and Tulane College names, and their endowments, would be used to support the new collegiate structure." S.Ct. R. 248; see also S.Ct. R. 224 (noting role of Task Force to "[e]nsure substantive roles for the generosity and vision of Josephine Newcomb and Paul Tulane").

In early 2006, pursuant to the Board's instructions, the Task Force met with key constituencies of Newcomb College, conducted outreach to keep alumnae informed of the Task Force's mission, and held public meetings about the Renewal Plan. S.Ct. R. 179-80. Three months later, on March 9, 2006, the Task Force presented its recommendations to the Board regarding the Plan's implementation. S.Ct. R. 180. The Board voted to adopt the Task Force's recommendations and its proposed revision of the Charter, with minor modifications, on March 16, 2006. Id.

In approving the Task Force Recommendations, the Board established the H. Sophie Newcomb Memorial College Institute as an academic center designed to enhance higher education for women at Tulane. S.Ct. R. 186. The executive director of the Newcomb College Institute, the holder of the "Newcomb College Endowed Chair," allocates the income from the Newcomb endowments and funds functioning as endowments to continue support for the same programs that they supported before Katrina: the Newcomb Fellows program, the Newcomb College Center for Research on Women, and all of the mentoring and leadership programs administered by Newcomb College. S.Ct. R. 186, 187.

The Board also agreed that the Newcomb College endowments and funds functioning as endowments would "continue to support those programs and purposes for which they were originally established." S.Ct. R. 187. It also agreed to create "a single-gender residential college established in the Josephine Louise House, reinforcing [Tulane's] commitment to women's education through special programming coordinated by the Newcomb-Tulane College and the

Newcomb College Institute.” S.Ct. R. 190. The Board also approved a new program, the Newcomb Scholars, for undergraduates who wish to complete a special course of study designed by the Newcomb College Institute. S.Ct. R. 186-87. Additionally, all Newcomb-Tulane graduates’ diplomas would indicate that the diploma was certified by “The Newcomb-Tulane College and in honor of H. Sophie Newcomb and Paul Tulane.” See S.Ct. R. 208. The Board further concluded that the designation of the Newcomb Campus and use of the Newcomb name on buildings would continue. S.Ct. R. 206, 216.

The merger of Newcomb, Tulane, and the other undergraduate colleges into Newcomb-Tulane College had minimal impact on the daily life of women at Tulane. Women undergraduate students of the Newcomb-Tulane College have access to the same classes, the same academic programs, the same curricula, and the same professors as before. S.Ct. R. 249. Through the H. Sophie Newcomb Memorial College Institute, women students have access to the same mentoring, leadership, academic, and support programs as before. Id. The Newcomb funds “continue to be used to support those programs and purposes for which they were originally established.” S.Ct. R. 181; see also id. at 233; Jun. 12, 2006 Hearing 17 (plaintiffs’ counsel acknowledging that “[a]ll endowments and funds of Newcomb College will continue to support those programs and purposes”).

Indeed, consolidating the seven colleges into Newcomb-Tulane College actually had the salutary effect of allowing more undergraduate women than before to enjoy the many benefits of Newcomb College’s special programs. Newcomb College’s programs were previously limited to the liberal arts and sciences students at Newcomb College, but are now open to all women undergraduates, including those concentrating, for example, on architecture, business and engineering. S.Ct. R. 186, 250.

Newcomb College has ceased to exist as a separate college. At this point, Newcomb-Tulane College is in its second full academic year and has selected the students who will matriculate in the third.

The District Court Proceedings. The Tulane Board approved the Renewal Plan and ceased admission to Newcomb College in December 2005. The Task Force carried out its charge by March 2006, and the Board approved those recommendations with a few

modifications that same month. Admission decisions for the next generation of undergraduates in the new Newcomb-Tulane College were announced in early April 2006.

It was not until May 2006—six months after the Board’s unanimous approval of the Renewal Plan, two months after the Task Force voted to adopt the recommendations of the Task Force, and one month after the announcement of admissions decisions for the newest entering class of Newcomb-Tulane College—that applicants Howard and Smith filed this lawsuit against the Tulane Board in the Civil District Court for Orleans Parish. Even though all of the relevant actions had already occurred, applicants sought a preliminary and permanent injunction “enjoining and prohibiting the Tulane Board from abolishing H. Sophie Newcomb Memorial College.”² S.Ct. R. 6. By that time, of course, Newcomb College had ceased to exist as a separate administrative entity. The “injunction” therefore was not to maintain the status quo, as is far more commonly the case; the relief they sought would have forced Tulane to reopen Newcomb College as a separate administrative entity. See Tr. 17 (plaintiffs’ counsel acknowledging that plaintiffs were seeking a “ruling to get Newcomb College reopened”).

Howard and Smith claimed that they had the requisite legal standing to sue to enforce Mrs. Newcomb’s will due to their purported status as her “collateral heirs”—albeit several generations removed. Ms. Howard, for example, averred that:

She is a direct descendant of Eleanor Ann LeMonnier Henderson who was the sister of Josephine Louise LeMonnier Newcomb, the founder of Newcomb College. Her lineage is as follows:

Eleanor Ann LeMonnier was the wife of William Henderson. Of that marriage four children were born, one of whom was Warren Newcomb Henderson. Warren Newcomb Henderson married Elizabeth “Lillie” Bell Miller in Louisville, Kentucky. Of that marriage, three children were born, including a daughter named Marguerite Miller Henderson. Marguerite Miller Henderson married Elliott Kaye Pennebaker. Of that marriage two children were born, one of whom was Jane Grainger Pennebaker. Jane Grainger Pennebaker married Joseph Wilgus Naugher from whom she was later divorced. Of that marriage, two children were born, namely Jane Wilgus Naugher and Susan Parma Naugher. Jane Grainger Pennebaker later married George Matthis who raised, but did not adopt her children. They did take his last name and have continued to use it as their maiden name. All of the above listed persons are now deceased with the exception of Jane Wilgus (Naugher) Matthis and Susan Parma (Naugher) Matthis who is the affiant herein. Jane Matthis is now Jane Matthis Smith.

² Several other plaintiffs, current and former students of Newcomb College, filed a separate action in federal district court seeking similar relief, including a preliminary injunction. See Leslie v. Adm’rs of the Tulane Educ. Fund, Civ. No. 06-1331 (E.D. La.). The district court denied the preliminary injunction motion, and the plaintiffs dismissed their claims with prejudice.

Susan Parma Matthis, affiant, now uses the name Parma Matthis Howard.
[S.Ct. R. 380.]

Ms. Smith, Howard's sister, made a nearly identical submission. S.Ct. R. 382. It was through this line of purported succession (not one link of which was authenticated outside of the plaintiffs' affidavits) that plaintiffs claimed to be "collateral" heirs of Josephine Newcomb, and therefore in a position to enforce the will she had executed 108 years earlier.

Tulane opposed the plaintiffs' motion and filed exceptions seeking dismissal of their action. See S.Ct. R. 36-63. As the University explained in detail, Howard and Smith were not entitled to the relief they sought for multiple reasons. To begin with, they both lacked standing to sue; for aside from a statement to the effect that they were descended from Mrs. Newcomb's sister, they had failed to present any evidence that they had succeeded through many subsequent generations to any right under Mrs. Newcomb's 1898 will. Tulane also explained why the plaintiffs' claims were meritless even if they did have standing to bring them in the first place. Mrs. Newcomb's donative letters and her will simply did not impose on Tulane the condition these plaintiffs sought to enforce—that Newcomb College be maintained in perpetuity as a "separate degree-granting college."³ S.Ct. R. 1. Smith and Howard filed an opposition to Tulane's exceptions. S.Ct. R. 333.

The trial court held a hearing on June 12, 2006, on the motion for injunctive relief and Tulane's opposition and exceptions. During the hearing, the court observed that the injunction plaintiffs sought was "an extraordinary remedy." Tr. 128; id. at 132 (same). The court also expressed skepticism about the plaintiffs' purported "irreparable harm," as well as the merits of their claim for preliminary and permanent injunctive relief. See Tr. 87 (asking "What interest do the Plaintiffs have presently in the existence of Newcomb College?"); id. at 100 (asking "Wasn't the academic curriculum[,] the structure, the endowment all set up by Tulane and not specifically—a specific request by [Josephine] Newcomb that there be . . . something that would survive in perpetuity . . .?"); id. ("I don't see anything in [the will] that seems to establish perpetual existence of Newcomb College.")

³ Because Newcomb College was never separately accredited to grant degrees, the University understood plaintiffs' demand as requiring separate diplomas issued in the name of H. Sophie Newcomb Memorial College.

The District Court subsequently denied Smith and Howard's motion for preliminary injunction. In its opinion, the court found that Mrs. Newcomb's will "named Tulane as her universal legatee and expressed a desire that Tulane use her bequest for the present and future development of Newcomb College as a 'Department of the University.'" S.Ct. R. 399. Mrs. Newcomb thus wished "for Tulane, as universal legatee, to use the balance of her estate to maintain a women's higher education college." Id. But, the court concluded, that the will "did not create an enforceable conditional obligation that would support the granting of a preliminary injunction prohibiting Tulane from abolishing Newcomb College as a separate college within Tulane University." Id.

The court further concluded that Smith and Howard had not shown that they would suffer "irreparable injury" if the Renewal Plan were to be implemented and Newcomb and Tulane colleges consolidated. Id. And since the plaintiffs similarly had not shown "that they will prevail on the merits that abolishing Newcomb as an independent college violates the express terms of Mrs. Newcomb's will," the court denied the request for a preliminary injunction. S.Ct. R. 399-400.

Smith and Howard appealed. They did not, however, seek expedited treatment of their appeal; briefing proceeded in the ordinary course, and argument was held in the spring of 2007.

Appeal Proceedings. The Fourth Circuit Court of Appeal affirmed the District Court's denial of applicants' request for a preliminary injunction. S.Ct. R. Supp. 16. It concluded that Mrs. Newcomb's inter vivos donations to the University were unconditional. Id. at 12. As the court explained, "Mrs. Newcomb's words lucidly convey that she did not want anyone to tamper with Tulane's administration of her donation. She expresses her unconditional trust in Tulane's ability to manage her donation. Her language is clear and unambiguous." Id. The Court of Appeal accordingly concluded that the plain terms of Mrs. Newcomb's inter vivos gifts "bar[red]" Howard and Smith from "interfering in Tulane's administration of Mrs. Newcomb's donations inter vivos" and held that applicants thus had "no right to assert a claim for injunctive relief" stemming from those donations. Id.

The Fourth Circuit next concluded that Mrs. Newcomb's testamentary gift (her donation "mortis causa") to the University also was unconditional. Id. at 14. The court stated that it "agree[d] with the district court's finding that Mrs. Newcomb did not impose a conditional

obligation on her bequest.” Id. As the Court of Appeal saw it, “Mrs. Newcomb’s wording conveys that while she entrusted Tulane with . . . overseeing the development of Newcomb College, she did not impose any real conditions upon the institution to carry out her wishes.” Id. Thus the court concluded that Howard and Smith had no “right of action against Tulane relating to Mrs. Newcomb’s donation mortis causa nor do we find that Mrs. Newcomb made a conditional bequest to Tulane in her testament.” Id.

Having concluded that Howard and Smith could not succeed on the merits, because Mrs. Newcomb had placed no conditions on her gifts to Tulane, the Court of Appeal held that they had no right of action. Id. The Court did not determine whether the applicants—as claimed “would-be heirs”—had standing to seek to enforce conditions in Mrs. Newcomb’s will as Howard and Smith had contended. The Court did not need to reach that issue, because it had conclusively found that Mrs. Newcomb placed no conditions on her bequest to Tulane and that there accordingly was nothing to enforce. The Fourth Circuit did, however, observe in dicta that even assuming Louisiana law recognized such a right of “would-be heirs,” it did not recognize any right of such persons to seek injunctive relief. Id. at 11. The most that any heir or “would-be heir” could seek was revocation of the gift. Id.

The Court of Appeal accordingly affirmed the District Court’s denial of the applicants’ request for preliminary injunctive relief and remanded to the District Court with instructions for the court to grant Tulane’s exception (on which the trial court had not acted, given the case’s preliminary posture) of no right of action and dismiss the petition. Judge Tobias dissented.

On November 15, 2007, applicants requested that this Court review the Fourth Circuit’s ruling. The Court granted the writ on February 22, 2008.

SUMMARY OF ARGUMENT

This is a significant case for Tulane University, its students and faculty, the City of New Orleans, and the higher education community. At issue is the ability of the University to continue as a strong and vibrant institution in New Orleans following the devastation wrought by Hurricane Katrina. The University’s complex Renewal Plan, which was painstakingly developed after Katrina, overwhelmingly approved by Tulane’s Board, and implemented with great care, has been in place for over two years, and Tulane is thriving. But these distant relatives of Newcomb College’s benefactrix Josephine Newcomb—who have no connection whatsoever to

Newcomb, to Tulane, or to the State of Louisiana—sued many months after Tulane’s Board approved the Renewal Plan, claiming that Mrs. Newcomb had conditioned her gifts to Tulane on Newcomb remaining a “separate degree-granting institution.” The District Court and Court of Appeal both correctly concluded that no such condition existed in Mrs. Newcomb’s inter vivos or testamentary gifts.

Mrs. Newcomb expressed a desire that Tulane use her testamentary bequest for the “future development” of a “Department” of Tulane University known as H. Sophie Newcomb Memorial College, to be sure. But as both lower courts found, that expression was precatory in nature; it was not binding on Tulane. It is well accepted that such precatory language should be considered as if it were not included in the will. It is equally clear that Mrs. Newcomb never expressed any desire—precatory or otherwise—that Newcomb College be operated as a “separate degree-granting institution,” much less in perpetuity, as applicants suggest. The absence of any such intent on the part of Mrs. Newcomb is amply evidenced by Howard and Smith’s inability to cite to any document wherein she expressed it. There is simply no condition for applicants to enforce.

The Court need go no further to affirm the lower courts’ rulings. But other grounds exist on which the Court also can affirm the Fourth Circuit. Although the Fourth Circuit did not need to reach this question, Howard and Smith have no standing to bring this suit. Louisiana law does not recognize the right of “would-be heirs”—as applicants claim to be of Mrs. Newcomb—to enforce conditions placed on testamentary bequests. The Code only recognizes a right to seek revocation of the gift—relief Howard and Smith have not sought.

The District Court’s denial of a preliminary injunction can be affirmed on the alternate ground that applicants have not established that they will suffer irreparable harm, much less that any such harm would outweigh the injury that will be suffered by Tulane, its students, faculty and staff, not to mention the New Orleans community and the higher education communities in general if a preliminary injunction were issued

The Court of Appeal’s ruling should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the Fourth Circuit's grant of the exception of no right of action de novo. See Badeaux v. Sw. Computer Bureau, Inc., 05-0612, p.7 (La. 3/17/06); 929 So.2d 1211, 1217. The Court reviews the trial court's denial of a preliminary injunction for abuse of discretion. See Smith v. W. Virginia Oil & Gas Co., 373 So. 2d 488, 493 (La. 1979) ("The issuance of a preliminary injunction addresses itself to the sound discretion of the trial court."); FQCPRQ v. Brandon Investments, L.L.C., 05-0793, p. 3 (La. App. 4 Cir. 3/29/06); 930 So. 2d 107, 109 ("the denial . . . of a preliminary injunction should not be overturned on appeal absent a clear abuse of the trial court's great discretion").

II. THE COURT OF APPEAL CORRECTLY HELD THAT MRS. NEWCOMB PLACED NO CONDITIONS ON HER GIFTS TO TULANE.

The Fourth Circuit correctly held that Mrs. Newcomb placed no conditions on her inter vivos and testamentary gifts to Tulane. S.Ct. R. Supp. 14.

"The intent of the testator controls the interpretation of [her] testament. If the language of the testament is clear, its letter is not to be disregarded under the pretext of pursuing its spirit." La. Civ. Code art. 1611. "A disposition should be interpreted in a sense in which it can have effect, rather than one in which it can have none." La. Civ. Code art. 1612. Thus, "courts will not search for the testator's intent beyond the four corners of [her] will when the language of that document is sufficiently clear and unambiguous so as to lead the court to believe it can with reasonable certainty effect a distribution in accordance with the testator's desires." Hendry v. Succession of Helms, 557 So. 2d 427, 431 (La. App. 3 Cir 1990).

In determining the testator's intent, Louisiana courts are mindful not to give legal effect to mere precatory language—language that may express certain wishes of the testator, but that does not place conditions on that person's donative gifts. See Succession of Maguire, 228 La. 1096, 1102, 85 So. 2d 4, 5-6 (1955) ("It is well settled in the jurisprudence of this state that precatory suggestions are not binding in law and are considered as not written."); Succession of Hall, 141 La. 860, 865, 75 So. 802, 803 (1917) (a "mere request to the donee or legatee . . . [is] regarded as not written [and] does not destroy the title conveyed to the original donee or legatee"); Succession of Diaz, 617 So. 2d 34, 36 (La. App. 4 Cir. 1993) ("The law is clear that a

testator's mere wishes and requests are viewed as precatory suggestions which are not binding in law."). This settled principle—that the mere expression of a wish in a will does not rise to the level of a testamentary condition—is carried out even in circumstances where the precatory language is quite specific and clear. See Maguire, 85 So. 2d at 5 (testamentary language stating that "I would like the trustees to give [to my cousin] every month the rent of one of the tenant houses" was precatory and not binding); Lelong v. Succession of Lelong, 164 So.2d 671, 675 (La. App. 3 Cir. 1964) (a "recommendation that the trustees use the income to develop the estate" was precatory, not binding).

This Court's decision in Girvin v. Miller, 219 La. 252, 52 So.2d 843 (1951), is particularly instructive. The Court held there that "when [a] disposition clearly confers title upon the legatee, all other wishes or requests by the testator as to the legatee's disposal of the legacy will be regarded as precatory suggestion." Id. at 846. The testator in that case, Reverend Joseph A. Girvin, bequeathed to Reverend William A. Miller "all I die possessed of . . . to be disposed and administered by my typed instructions." Id. at 844. First noting that the bequest to Rev. Miller was "absolute and institutes him as universal legatee of the estate," this Court concluded that Rev. Girvin's "typed instructions" were "not limitations upon the title of Father Miller." Id. at 845. Rather, they were merely "expressions of the testator's wish or request which, under familiar rules of interpretation of testaments, are to be viewed as a precatory suggestion 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 to him." Id. (internal quotations omitted). Thus, even where the testator had left "typed instructions" to his universal legatee, the Court had "no difficulty in resolving that the bequest to Father Miller is unencumbered by conditions." Id.

This Court reached a similar result in Hutchinson v. Tulane University of Louisiana, 117 La. 653, 131 So. 838 (1930). In that case, the deceased left Tulane Medical School a significant testamentary bequest, and declared in his will that "[i]n the furtherance of the purpose of this bequest, the fund thus created is to be used . . . for the purchase of ground and erection of suitable buildings." Id. at 838. Finding that these "directions" were "merely advisory in character and not conditions imposed by the testator on the legatee," this Court held that "the legacy to the defendant university was an unconditional one, coupled only with an announcement

of the object of the gift and containing certain advisory directions regarding the use of the property.” Id. at 839.

The four corners of Mrs. Newcomb’s will make her testamentary intent quite clear: to “give and bequeath to the ‘Administrators of the Tulane Educational Fund’ of New Orleans, the whole of the property real, personal, and mixed, of which I am now possessed or which I may leave at the time of my death.” S.Ct. R. 19. Howard and Smith can point to no language in Mrs. Newcomb’s will that conditions (expressly or otherwise) the devisement of her estate to Tulane on the fulfillment of any requirement. Cf. Hampton v. Hampton, Inc., 97-1779, p. 8 (La. App. 1 Cir. 6/29/98); 713 So. 2d 1185, 1190 (“Courts do not construe stipulations in a contract as suspensive conditions unless the express contract language compels such construction.”); Tilley v. Lowery, 511 So. 2d 1245, 1247 (La. App. 2 Cir. 1987). Nor do they try. In the single paragraph supporting their contention that Mrs. Newcomb conditioned her testamentary bequest to Tulane, applicants do not cite to any language in Mrs. Newcomb’s will placing any conditions on her bequest to Tulane. See App. Br. 17. That is because Mrs. Newcomb’s will unambiguously bequeathed her entire estate to Tulane as her “universal legatee” without condition. S.Ct. R. 19; S.Ct. R. Supp. 7.

The unconditional nature of Mrs. Newcomb’s inter vivos gifts to Tulane is equally clear. When making her original gift to Tulane in 1886, Mrs. Newcomb expressed her “desire” that the funds be used “to advance the cause of female education in Louisiana,” but provided unambiguously that Tulane’s “disposition of this fund . . . [was] committed fully and solely to [the Board’s] care and discretion with entire confidence in [its] fidelity and wisdom.” S.Ct. R. 10. She reiterated on the same page, “I do not mean in this my act of donation to impose upon you restrictions.” Id. (emphasis added). As with her will, Mrs. Newcomb’s intent was manifestly clear: she granted Tulane funds without restriction. See Bd. of Dirs. of Indus. Dev. Bd. of City of Gonzales v. All Taxpayers, Property Owners, Citizens of City of Gonzales, 05-2298, p. 17 (La. 9/6/06); 938 So. 2d 11, 21 (“[i]f gratitude and love, instead of an intent to impose or a desire to remunerate, motivated the donor, the donation is gratuitous” and is made without condition).

Both the District Court and the Fourth Circuit thus easily concluded that Mrs. Newcomb’s gifts were unconditional. In refusing to grant Smith and Howard a preliminary

injunction, the District Court held “that the provisions of Mrs. Newcomb’s will did not create an enforceable conditional obligation.” S.Ct. R. 399. The Court of Appeal similarly found that Mrs. Newcomb’s will “did not impose a conditional obligation on her bequest” to Tulane. S.Ct. R. Supp. 14. Rather, the court explained, “Mrs. Newcomb’s wording conveys that . . . she entrusted Tulane with overseeing the development of Newcomb College.” Id. And with respect to Mrs. Newcomb’s gifts inter vivos, after noting that “[h]er language is clear and unambiguous,” the court concluded that Mrs. Newcomb “expresses her unconditional trust in Tulane’s ability to manage her donation.” Id. at 12.

To be sure, the District Court recognized that Mrs. Newcomb “expressed a desire that Tulane use her bequest for the present and future development of Newcomb College as a ‘Department of the University.’ ” S.Ct. R. 399 (emphasis added). But the District Court understood that Mrs. Newcomb’s general expression of desire did not amount to a condition on her gift to Tulane: as it further explained, nothing in the will gives rise to “an enforceable conditional obligation that would support the granting of a preliminary injunction prohibiting Tulane from abolishing Newcomb College as a separate college within Tulane University.” Id. The Fourth Circuit agreed, concluding that the “Department of the University” language was “more precatory in nature than . . . binding.” S.Ct. R. Supp. 14.

Just as in Girvin and Hutchinson, Mrs. Newcomb’s expressed desire was merely precatory. There can be no dispute that, as in Girvin and Hutchinson, Mrs. Newcomb’s will “clearly confers title [of her entire estate] upon” Tulane as her “universal legatee.” S.Ct. R. 19; see Girvin, 52 So. 2d at 846; Hutchinson, 131 So. at 838. She bequeathed “the whole of [her] property real, personal, and mixed” to Tulane. S.Ct. R. 19. And, although Mrs. Newcomb expressed her desire that the University would “continue to use and apply [her] benefactions and property” to the “future development” of Newcomb College, her will included no specific direction to Tulane as to how the University should expend those sums (to this end or any other), much less anything resembling the “typed instructions” Rev. Girvin left as a guide to his universal legatee expressing his wishes as to how his estate would be “disposed [of] and administered,” Girvin, 52 So.2d at 844, or the “directions” Mr. Hutchinson left as to how his bequest Tulane Medical School was to “be used,” Hutchinson, 131 So. at 838, 839. The “instructions” from the decedents in those cases were nothing more than “words expressing the

desire of the testator,” Girvin, 52 So. 2d at 846, and nonbinding “advisory directions,” Hutchinson, 131 So. at 839.

Mrs. Newcomb’s will did not even contain such detailed “advisory directions” or “instructions.” She gave full and complete title to her residual estate to Tulane, with no conditions whatsoever. To be sure, in a paragraph of her will wholly separate from her bequest, Mrs. Newcomb expressed “confidence” that her estate would be used for the “development” of a Department of the University. But that language plainly was designed to express a “desire,” not to place any binding conditions on her testamentary gift to Tulane.⁴ See S.Ct. R. 19.

Mrs. Newcomb’s precatory suggestion that her universal legatee apply her estate for the “development” of a “Department” of the University also cannot be read to require Tulane to operate Newcomb College as a “separate degree-granting institution” in perpetuity, as applicants maintain. App. Br. 1, 17. Applicants have not pointed the Court to any document wherein Mrs. Newcomb expressed any condition—or, indeed, even the precatory suggestion—that Newcomb College operate as a separate degree-granting institution, much less that the institution be maintained as such in perpetuity. The term “Department” surely cannot be read to require a “separate degree-granting institution,” as the definition of that term would plainly include a wide variety of divisions within the university, such as the “English Department” or an Institute within the University.⁵ Thus, Mrs. Newcomb’s will cannot be read to reflect any intent of Mrs. Newcomb to limit Tulane’s discretion to use the funds—much less to require Tulane to maintain a college with funds obtained wholly from other sources.⁶

⁴ Mrs. Newcomb’s precatory expression also could not be read as a condition because it is too vague to enforce. Cf. Coen v. Toups, 168 So.2d 893, 897 (La. App. 2 Cir. 1964) (refusing to enforce “vague, indefinite, [or] uncertain” contractual terms); Woolridge v. Gilman, 279 S.W. 20, 22 (Ark. 1926) (bequest language calling for funds to be used “to educate” could not be subject of enforcement proceeding because character of the education was “wholly” discretionary). Mrs. Newcomb’s “confidence” that her estate would be directed toward the “development” of Newcomb is a statement too vague to be enforceable.

⁵ The term “department” is defined by the Oxford English Dictionary as a “‘Separate allotment; province or business assigned to a particular person’ (J.); hence in wider application: A separate division or part of a combined whole or organized system, *esp.* of activities or studies; a branch, province.” (2d ed. 1989).

⁶ As applicants recognize, as of June 2005, Newcomb’s Endowment totaled over \$41 million. App. Br. 4. These funds were predominantly, if not completely, raised from sources other than Mrs. Newcomb. In fact, Mrs. Newcomb did not leave an endowment for Newcomb College.

Although her expressed desires are not binding, Tulane has, for over 100 years, diligently followed Mrs. Newcomb's expressed desires, and Tulane continues to do so today. The University's Renewal Plan is entirely consistent with Mrs. Newcomb's expressed desire to provide for the "higher education of . . . young women" at Tulane. App. Br. 2; S.Ct. R. 10.⁷ Under the Renewal Plan, the Newcomb College Institute carries on all of the same programs that were previously available at Newcomb College. The Newcomb endowments—created by Tulane and not Mrs. Newcomb—continue to fund those programs. Female undergraduate students continue to have access to the Newcomb Fellows program, the Newcomb College Center for Research on Women, and the same mentoring, leadership and academic programs as before. What is different now is that all undergraduate women—not just those enrolled in Newcomb College—have access to those special programs, and all undergraduate students (women and men) receive at graduation a diploma that pays homage to Mrs. Newcomb's family legacy. Tulane thus continues to invest in the development of Newcomb as a valued "Department of the University." S.Ct. R. 399.

Judge Tobias in dissent below contended that by continuously operating "Newcomb College as a separate entity and coordinate women's college," Tulane had implicitly recognized that Mrs. Newcomb placed conditions on her gifts to the University. S.Ct. R. Supp. 27-28 (emphasis omitted). That is not so. There is no evidence in the record that Tulane believed it was compelled by the will to maintain a separate, degree-granting, coordinate women's college.⁸ And there is no canon—in probate law or otherwise—that suggests that a court should look to the subsequent action of the donee to determine the intent of the donor. The language of the donative document is what matters—not the actions of the universal legatee. See Hendry, 557

⁷ Judge Tobias in dissent contended that Mrs. Newcomb "expressly and unequivocally made a donation to and for a college"—not a "women's institute." S.Ct. R. Supp. 24 & n.11 (emphasis omitted). Not so. Mrs. Newcomb made her bequest to the University, and for the benefit of " 'H. Sophie Newcomb Memorial College,' a Department of Tulane University." See App. Br. 3 (quoting will). Nothing in Mrs. Newcomb's will suggests that she expected Newcomb to operate exclusively as a college; other than to state Newcomb's name at the time, she does not even use the term. See S.Ct. R. 18-20. And, in any event, Newcomb continues to operate as a college: Newcomb-Tulane College.

⁸ President Walmsley's 1910 letter, quoted by Judge Tobias, does not "acknowledge[] Mrs. Newcomb's sole object and intent" so much as note that certain University constituents had suggested Tulane's use of funds violated Mrs. Newcomb's intent. President Walmsley did not endorse that view, but asked the Board to adopt a policy concerning use of Newcomb funds. S.Ct. R. 412.

So. 2d at 431 (“Courts will not search for the testator’s intent beyond ‘the four corners of his will’ ”); Succession of Williams, 608 So. 2d 973, 975 (La. 1992) (“When a will is free from ambiguity, the will must be carried out according to its written terms, without reference to information outside the will.”).

Mrs. Newcomb placed no conditions on her gifts to Tulane. The District Court accordingly did not abuse its discretion by denying the applicants’ request for a preliminary injunction, and the Court of Appeals correctly held that they have no right of action.

III. APPLICANTS LACKED STANDING TO SUE TO ENFORCE ANY PURPORTED CONDITIONS IN MRS. NEWCOMB’S WILL AND GIFTS.

The Fourth Circuit’s conclusion that Mrs. Newcomb did not place any conditions on her gifts to Tulane was correct. But there were still more deficiencies in applicants’ presentation below, because Howard and Smith, as “would-be heirs,” lacked standing to enforce any conditions Mrs. Newcomb may have placed on her gifts to Tulane. The Fourth Circuit did not need to reach this issue after finding that there were no conditions to enforce—but it did point out that even if applicants had standing, Louisiana law directed that they only could have sought revocation of Mrs. Newcomb’s gifts, not mandatory injunctive relief.

A. “Would-Be” Heirs Lack Standing To Sue To Enforce Conditions In A Will Or Gift.

Article 426 of the Louisiana Code of Civil Procedure dictates who has standing to enforce conditions a deceased person placed on testamentary or inter vivos gifts. The right to enforce such conditions is “transmitted with [the] estate to [the deceased’s] heirs, universal legatees, or legatees under a universal title.” La. Civ. Proc. Code art. 426. Thus, to have standing in this action Howard and Smith had to show that they are either Mrs. Newcomb’s heirs or her universal legatees. They are neither. As Mrs. Newcomb’s universal legatee, the University inherited all of Mrs. Newcomb’s property and rights including any “action to enforce an obligation” to the estate or to Mrs. Newcomb while she was alive. La. Civil Code art. 1585; La. Code Civ. Proc. art. 426. Any right to enforce obligations arising from Mrs. Newcomb’s inter vivos donations therefore passed to Tulane on Mrs. Newcomb’s death, and was “extinguished by confusion” because Tulane was then simultaneously in the positions of obligor and obligee. La. Civ. Code art. 1903. Nor are Howard and Smith Mrs. Newcomb’s heirs; “heirs” are successors in intestate successions. La. Civ. Code art. 876.

Applicants claim in the face of these irrefutable legal truths that they are "would-be heirs."⁹ Even if Howard and Smith could qualify as "would-be heirs" who would inherit funds that were returned to the estate for failure of a condition, the Fourth Circuit correctly observed that Louisiana law does not recognize the right of "would-be heirs" to enforce obligations owed to a deceased or her estate. See S.Ct. R. Supp. 11 (finding that applicants' cited cases "do not provide a precedent for non-legatee/would-be heirs to sue for injunctive relief on behalf of a donor, who died testate").

Applicants cite to a solitary case from 1836, Poydras v. Taylor, 9 La. 488, 1836 WL 868 (La. 1836), to support their contention that Louisiana law supports the right of a "would-be heir" to bring an action like this one. App. Br. 7-8. But the plaintiff in Poydras was "one of the heirs of the late Julien Poydras"—not his "would-be heir." 1836 WL 868, at *1 (emphasis added). Howard and Smith recognize as much in their brief. See App. Br. 7 (Poydras "was a legatee under the decedent's will"). Poydras thus plainly does not stand for the proposition that a "would-be heir" can bring a suit to enforce a condition on a testamentary gift. And as best the University can discern, Poydras has not been cited for over a century for that (or any other) proposition. There is simply no right of "would-be heirs" to bring a suit to enforce a deceased's testamentary intent recognized in Louisiana law.¹⁰

Finding no support for its cause of action in either the Code or Louisiana case law, Howard and Smith rely on commentaries interpreting the *Code Napoléon* art. 1046 (1804), to claim that under current Civil Code Article 1610.1 they have an implied cause of action to enforce the "conditions" they claim Mrs. Newcomb placed on her gifts. Article 1610.1, however, merely "authorize[s] an action for revocation of a donation inter vivos." La. Civ. Code art.

⁹ In Louisiana, "[t]he sources of law are legislation and custom." La. Civ. Code art. 1; accord Doerr v. Mobil Oil Corp., 00-0947, p. 13 (La. 12/19/00), 774 So.2d 119, 128. The Code does not as much as mention the term "would-be heirs," much less does it recognize the right of such persons to bring actions to enforce obligations owed to an estate in which they have no formal rights. The Code exclusively endows actual heirs and legatees with such rights. La. Code Civ. Proc. art. 426.

¹⁰ Applicants suggest that "would-be heirs" are granted rights under Louisiana's *cy pres* statute. App. Br. 12; see La. R.S. 9:2331. That is not correct. The *cy pres* statute grants certain rights to "any heir, legatee or donee." La. R.S. 9:2331. The statute does not mention "would-be heirs," much less grant them any rights or privileges.

1610.1 (emphasis added).¹¹ On its face, the Article cannot reasonably be read to create an action sounding in an injunction for enforcement of conditions placed on gifts inter vivos. Article 1610.1 can and should be given its plain meaning. La. Civ. Code art. 9 (“When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written”); see Leblanc v. Perroux, 21 La. Ann. 26, 1869 WL 4284, *2 (1869) (rejecting instruction from “French commentaries and decisions on . . . the *Code Napoléon*” because “the law of Louisiana [is] settled adverse[] to the view urged” by those commentaries). And as we next explain, applicants have not sought revocation—only a mandatory injunction.

B. Even If Applicants Had Standing To Sue To Enforce Against A Universal Legatee Purported Conditions In Mrs. Newcomb’s Will And Gifts, Their Only Relief Would Be Revocation—Not An Injunction.

The Louisiana Code only recognizes the right of a donor to revoke or dissolve a gift on the grounds of non-performance of a condition. See La. Civ. Code arts. 1559 (“[d]onation[s] inter vivos are liable to be revoked or dissolved”) (emphasis added); 1610.1 (authorizing “action for revocation of testamentary dispositions”) (emphasis added); see also Glass v. Wiltz, 551 So. 2d 32, 33 (La. App. 4 Cir. 1989) (recognizing that “failure of [an] essential condition . . . makes the gift nullable”). It does not recognize actions seeking injunctive relief. A donor’s sole remedy for a donee’s failure to satisfy a condition on the receipt of a gift is the return of the gift.

Applicants again cite to a case involving Mr. Poydras, also from 1836, as purported controlling authority: Poydras v. Mourain, 9 La. 492, 1836 WL 869 (1836).¹² Mourain is not instructive here. Howard and Smith contend that Mourain holds that an heir has the right to seek injunctive relief enforcing directives in a deceased’s will. App. Br. 8-9. But Mourain holds no such thing. Rather, it holds that an heir (but not a “would-be heir”) can enforce conditions placed on the sale of property from the decedent’s estate. Mourain, 1836 WL 869, at * 8.

In Mourain, the deceased “direct[ed] that all his slaves at his death, are to be considered as attached to his several plantations . . . and that his executors be required to sell them with, and as attached to the plantations on which they were situated.” Id. at * 7. The defendant

¹¹ In full, Article 1610.1 provides: “The same causes that authorize an action for the revocation of a donation inter vivos are sufficient to authorize an action for revocation of testamentary dispositions.”

¹² The Mourain case was brought by the same heir of Julien Poydras who was the plaintiff in Poydras v. Taylor, supra.

“purchased . . . one of the plantations from the deceased, with a large number of slaves attached thereto, and by the terms expressed in the act of sale, subscribed to the conditions imposed by the will.” *Id.* at *7 (emphasis added). An heir of the deceased sought to have the conditions in the deceased’s will and the contract of sale enforced against the defendant. *Id.* Specifically, he sought “strict performance of the contract and sale made under it.” *Id.* The Court allowed the action and held that “the heir ha[d] an undoubted right, as having succeeded to all the rights and actions of the ancestor, to require the specific performance of the terms and conditions of a sale of part of the estate.” *Id.* at *8 (emphasis added). See also *Poydras*, 1836 WL 868, at *3 (“[t]he heir can compel . . . the rescission of the sale for a breach of the conditions under which it was made”).

The *Mourain* Court thus did not recognize the ability of “would-be heirs” to enforce through injunction conditions a deceased placed on gifts inter vivos or testamentary bequests (much less that “would-be heirs” can sue to enforce unconditional donations, as here). Rather, the Court in *Mourain* merely recognized that an heir, having inherited all the rights of the deceased, can enforce conditions that the decedent placed on the sale of property from his estate. See *Mourain*, 1836 WL 869, at * 8 (“the exercise of the plaintiff’s right to have the condition of the sale specifically performed or executed, remains unimpaired”). This result—unlike the one applicants seek here—was in keeping with the Civil Code, which recognizes the right of a seller to enforce a specific condition in a contract of sale, La. Civ. Code art. 2623 (“[a]n agreement whereby one party promises to sell and the other promises to buy . . . gives either party the right to demand specific performance”), and that an “heir” succeeds to such rights when the seller passes, La. Code Civ. Proc. art. 426 (“[a]n action to enforce an obligation is the property of the obligee which on his death is transmitted with his estate to his heirs”).¹³

Thus, rather than creating an otherwise-unrecognized right of “would-be heirs” to seek injunctive relief to enforce an obligation created by a testamentary gift, *Mourain* merely stands for the unremarkable proposition under the Civil Code that an actual heir has the right to seek

¹³ The *Mourain* Court recognized the limits of its holding by noting that the plaintiff would have no right to enforce the conditions in *Poydras*’s will against a subsequent purchaser of the land and attached slaves because “[t]he vendees . . . will be under no obligation to comply with the terms and conditions of the sale under which their vendor acquired [the land and slaves].” *Mourain* 1836 WL 869, at *9. That person would not be in privity of contract with the estate.

specific performance to enforce conditions on property sold from an estate. There is no such contract of sale at issue in this action, and there was no testamentary bequest at issue in Mourain. The case is thus inapposite.

The two other cases applicants cite serve them no better. Howard and Smith cite to the Fourth Circuit's opinion in Braquet v. Administrators of the Tulane Educational Fund, 304 So. 2d 720 (La. App. 4 Cir. 1974), to suggest that a court can grant injunctive relief to enforce a condition on a gift. App. Br. 11, 18, 19. But as the Court of Appeal explained in its opinion here, Braquet did not recognize the right of "would-be heirs" to bring suits for injunctive relief to enforce purported conditions on testamentary gifts. S.Ct. R. Supp. 13. The plaintiffs in Braquet brought an action to "declare [a] legacy revoked"—they did not request an injunction. 304 So. 2d at 723. The Court dismissed that revocation action in favor of affording the defendant the opportunity to satisfy the conditions of the bequest—conditions that are conspicuously absent from this case. See id. at 721, 723. No injunction was issued by the Court. See id. at 723-724.

Applicants' reliance on Congregation of Sisters of St. Joseph v. Glassell, 207 La. 213, 20 So. 2d 923 (La. 1945), is similarly unavailing. See App. Br. 18-19. The Court in Glassell did not, as applicants suggest, recognize that revocation of a gift subject to a condition is an inadequate remedy when the condition has been violated. Id. Rather the Court held that there was no right of revocation in that case because the donee was in "substantial compliance with the terms of the donation." Id. at 927. Moreover, the Glassell Court did not even broach the question of whether a donor has a right of action to seek an injunction to enforce a condition on a gift, much less recognize it. Glassell, like Braquet, does not support applicants' claim for injunctive relief.¹⁴

¹⁴ Applicants' contention that denying them the right to seek an injunction here is against public policy and would "discourage future donations to all charitable entities" is meritless. App. Br. 22-23. As both lower courts found, Mrs. Newcomb placed no conditions on her gifts to Tulane. Thus, dismissing the applicants' action does nothing to discourage future donors from giving unconditional donations to charitable organizations. And those donors who seek to condition their gifts to such organizations continue to have the right under the Code to seek revocation of those gifts if their conditions are not satisfied. See La. Civ. Code arts. 1559, 1610.1. As this Court made clear in Hutchinson, a donor can easily condition a gift by using the appropriate conditional language. See Hutchinson, 131 So. at 839 ("He does not say, for instance, that this clinic and this hospital are the sole aim and object of his gift, and that the fund must and shall be expended only in that way."). Such language was absent from Mrs. Newcomb's will.

IV. THE DISTRICT COURT'S DENIAL OF A PRELIMINARY INJUNCTION SHOULD BE AFFIRMED ON THE ALTERNATE GROUND THAT HOWARD AND SMITH FAILED TO DEMONSTRATE THAT THEY WILL SUFFER IRREPARABLE HARM.

This case came up to the Court of Appeal, and further arrives here, still in a quasi-interlocutory posture: Howard and Smith took an appeal after the District Court denied their request for preliminary injunctive relief. They pursued a leisurely tack on appeal, never seeking expedited briefing or argument, but the posture of this case nonetheless remains as it was when it left the District Court: as an appeal from a denial of injunctive relief. The District Court's denial of a preliminary injunction thus can and should be affirmed for an alternate reason the Court of Appeal did not even need to reach: that applicants have not established and cannot establish irreparable harm. Howard and Smith have failed to identify any concrete injury they have suffered or will suffer now that Newcomb-Tulane College and the H. Sophie Newcomb Memorial College Institute have been operational for two years; and in any event, donors and proven successors in interest have a remedy at law—they can seek revocation of the gift.

Howard and Smith cannot legitimately claim that they have been or will be injured now that Newcomb College has long since ceased operations as a separate college. Neither Howard or Smith has any connection to Newcomb or the University. They are not Newcomb College students. They are not Newcomb alumnae. They do not even live in Louisiana; they reside in North and South Carolina respectively. And even assuming their claimed harm to “their family history and heritage” and “Mrs. Newcomb's testamentary intent,” App. Br. 20, are sufficiently tangible and concrete to support an injunction in this case, Howard and Smith, if entitled to relief, have a remedy at law: they can seek revocation of Mrs. Newcomb's gift. See Wiltz, 551 So. 2d at 33. This further negates any contention that they will suffer harm in the absence of the relief they seek. See Pumpelly Oil, Inc. v. Ribbeck Constr. Corp., 02-868, p. 7 (La. App. 3 Cir. 2/5/03), 838 So. 2d 88, 93 (“irreparable injury means that there is no adequate remedy at law”).

Any theoretical harm to applicants' “family heritage,” moreover, pales in comparison to the very tangible harms that Tulane, its students, faculty and staff, and the City of New Orleans would suffer if an injunction were to issue forcing Tulane to turn back the clock over two years and roll back critical aspects of its Renewal Plan. Applicants themselves acknowledge that “there are logistical and administrative difficulties in reopening Newcomb College” that would

require several “fundamental actions” on the University’s part, including, among others, 1) reconstituting the student body, 2) recreating the administration, 3) restoring the Newcomb endowments, and 4) reestablishing programs that were eliminated in 2005. App. Br. at 24. Needless to say, such efforts would come at considerable cost to Tulane—financially and otherwise—and would disrupt the day-to-day operations of the University and the lives of many of those who (unlike applicants) live and work on the Tulane campus. And such efforts also would require ongoing supervision by this Court. See Sizeler Property Investors, Inc. v. Gordon Jewelry Corp., 544 So.2d 53, 54 (La. App. 4 Cir. 1989) (refusing to grant preliminary injunction to reopen business because “implementing specific performance clearly requires not only the reorganization of a no longer existing business, but supervision by the court of the reopening and running of the business as well”). Howard and Smith properly were denied the preliminary mandatory injunction they sought.

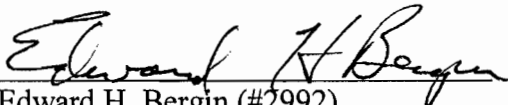
CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeal should be affirmed.

Respectfully submitted,

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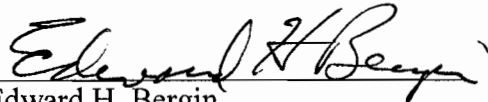

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April 7, 2008

CERTIFICATE OF SERVICE

I, Edward H. Bergin, hereby certify that a copy of the foregoing Original Brief filed on behalf of Defendant-Respondent was served by hand delivery to counsel of record this 7th day of April, 2008.


Edward H. Bergin