

CASE NO. 07-1247

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO CHRISTIAN)
UNIVERSITY,)
)
Plaintiff-Appellant)
)
v.)
)
RAYMOND T. BAKER, et al.,)
)
Defendants-Appellees)

On Appeal from the United States District Court
for the District of Colorado
The Honorable Judge Marcia S. Krieger
D.C. No. 1:04-cv-02512-MSK-BNB

BRIEF OF AMICI CURIAE
THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES
AND THE AMERICAN ASSOCIATION OF PRESIDENTS OF
INDEPENDENT COLLEGES AND UNIVERSITIES
IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL
OF THE DISTRICT COURT'S DECISION

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September 21, 2007
Attachment A is included as a scanned PDF

DISCLOSURE STATEMENT

I, Stuart J. Lark, counsel of record for The Council for Christian Colleges & Universities and the American Association of Presidents of Independent Colleges and Universities (collectively, “*amici*”), hereby make the following disclosure pursuant to Federal Rule of Appellate Procedure 26.1:

Amici state that they are incorporated as nonprofit corporations, they have no parent corporations, they have issued no publicly held stock and they are not trade associations.

Dated: September 21, 2007

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Statement of Interest of *Amici Curiae*

All parties have consented to the filing of this brief. *See* Attachment A attached hereto.

The **Council for Christian Colleges & Universities** (“CCCU” or the “Council”) is an international higher education association of intentionally Christian colleges and universities. Founded in 1976 with 38 members, the Council has grown to 105 members in North America, including Colorado Christian University (“CCU”), which together comprise over 300,000 students, 18,000 faculty and 1,550,000 alumni. In addition, the Council has 77 affiliate institutions in 24 countries.

The Council’s mission is: “[t]o advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth.” If the decision of the district court in this case is upheld, it would establish a precedent that could marginalize the Christ-centered educational programs of the Council and many of its member institutions.

The **American Association of Presidents of Independent Colleges and Universities** (“AAPICU”) is an association of over 200 college and university presidents (including the CCU president) representing both religious and nonreligious institutions. One primary purpose of AAPICU is to further and protect the independence of its member institutions from political control and to

preserve an environment in which each institution may offer its own distinctive perspectives on higher education. Since its founding in 1968, AAPICU has been committed to preserving the private sector of higher education.

Summary of Argument

Amici adopt the Statement of the Facts set forth in Appellant’s Opening Brief. This case asks whether the State of Colorado can exclude Colorado Christian University (“CCU”) and its students from a student aid program for which they otherwise qualify solely because of the religious character of CCU and its educational program.

1. The nature of CCU’s educational program.

CCU provides a fully accredited educational program offering degrees in a wide range of “secular” subjects. In addition, CCU integrates Christian core principles into its educational programs (CCU refers to its integrated educational programs as “Christ-centered” programs).

The Christian viewpoints integrated into CCU’s programs do not alter the secular or social value of the programs. Indeed, graduates from CCU are fully qualified for occupations ranging from business to teaching to computer related occupations. In addition, such graduates often pursue post-graduate degrees in engineering, law, medicine and other fields. Although CCU teaches “secular” subjects from a particular Christian viewpoint, its programs are not any more ideological than the educational programs offered by other institutions.

2. The district court's interpretation of the Colorado Constitution.

The district court interprets the Colorado Constitution to mandate religious discrimination against CCU's Christ-centered educational program. The court reaches this result by interpreting Colo. Const. Art. IX, § 7 ("Art. IX, § 7") to prohibit the funding of "religious education." The court broadly defines "religious education" to include not only "exclusively religious" education such as religious vocational training, but also educational programs which integrate religious viewpoints into the teaching of "secular" subjects. The district court's interpretation permits the state to establish a student aid program which may be applied at any accredited higher educational institution providing a program from a secular viewpoint, but not at any institution providing a program from a particular religious viewpoint.

The district court concedes that the "pervasively sectarian" exclusion in the student aid program is presumptively unconstitutional because it discriminates on the basis of religious character. But the court errs in holding that this discrimination is nevertheless justified because it complies with the district court's interpretation of Art. IX, § 7. The problem is that the district court's interpretation of Art. IX, § 7 does not itself survive First Amendment scrutiny. The interpretation is presumptively unconstitutional under the Free Exercise Clause because it discriminates on the basis of religion, and this discrimination is not

required to comply with the Establishment Clause. Specifically, nothing in the Establishment Clause prohibits the government from including a Christ-centered educational institution and program in a student aid program that defines the qualifying institutions without reference to religion.

Finally, in the absence of the district court's unconstitutional interpretation of Art. IX, § 7, there is no governmental interest that justifies the pervasively sectarian exclusion in the student aid program.

Argument

I. CCU's "Christ-centered" educational program is no less qualifying nor any more ideological than the educational program of any other qualifying institution.

CCU is a fully accredited higher educational institution which offers a comprehensive, Christ-centered undergraduate and graduate program rooted in the arts and sciences.¹ CCU's Christ-centered education is grounded in a distinctly Christian understanding of the nature of knowledge and learning; it is an educational program provided from a distinctly Christian viewpoint.

The Christian viewpoints integrated into the educational programs offered by CCU expand upon the "secular" aspects of these programs. CCU aims to

¹ CCU currently offers over 20 majors, which include accounting, biology, computer information systems, education, English and mathematics. CCU Profile, *available at* <http://www.ccu.edu/friends/press.pdf>. More generally, the Council member institutions offer in aggregate over 350 undergraduate majors and over 140 graduate majors. Council for Christian Colleges & Universities Profile, *available at* <http://www.cccu.org>.

produce graduates who are not only competent in their fields of study but who also are equipped to analyze the knowledge they have gained from a Christian perspective. In this regard, “Christ-centered” educational programs are both “secular,” in the sense that they produce graduates with the requisite knowledge and skills to contribute to society, and “religious,” in the sense that they equip graduates to analyze knowledge and make life choices based on core Christian principles.

A. CCU’s “Christ-centered” educational program integrates Christian viewpoints into the teaching of the “secular” subjects offered by the program.

CCU provides its educational program within a distinctly Christian environment which nurtures Christian spiritual maturity – the ability to live in accordance with what students understand to be reality. But the concept of a Christ-centered education extends beyond a nurturing environment; it reaches to the core philosophical underpinnings of the program.

The Christ-centered educational program at CCU is reflected in CCU’s stated purposes, the first of which is to integrate biblical concepts with the arts, sciences and professional fields.² *See* Appellant’s Opening Brief at 18-19 (Citing

² Similarly, each Council member institution must provide curricular and extra-curricular programs that reflect the integration of scholarship, biblical faith and service. *Criteria & Application for Membership, available at* <http://www.ccu.org/about/about.asp?contentID=7>.

Joint Appendix [hereinafter “J.A.”] 87). One such core biblical concept is the relationship set forth in the Bible between God and the material world.³

Applying this relationship, the teacher of a “Christ-centered” chemistry course might have the following objective for the course:

Chemicals . . . obviously behave the same for Christians as they do for non-Christians. At that level . . . there should be no difference at all [between a “Christ-centered” course and a nonreligious course]. But I want more for our students. . . . I want them not only to be fascinated and delighted by the intricacies of chemical behavior, but also to realize that what they’re exploring is the handiwork of the Lord Jesus Christ. . . . I want them to delight in what they’re learning about chemistry, but as Christians I also want them to see at every moment what these things are telling them about the One they know as their Savior, so that in the end they are lifted up to him, even in a chemistry course.

Duane Litfin, *Conceiving the Christian College* 76-77 (Wm. B. Eerdmans Publg. Co. 2004).

³ Although there are obviously many different views of this relationship, one description is as follows:

Only God is truly independent; all created things, including the chemical elements chemists study, are utterly contingent upon him. They depend for their existence and their properties upon him in every instance, at all points and at every moment. Thus the very chemicals we study are Christ’s handiwork and, if we allow them, they will declare to us his glory (Psalm 19:1).

Duane Litfin, *Conceiving the Christian College* 160 (Wm. B. Eerdmans Publg. Co. 2004).

As this example demonstrates, a Christ-centered education “. . . is marked by courses and curricula which are rooted in and are permeated by a Christian worldview, rather than a secular worldview (often disguised as a supposedly neutral worldview).” *Id.* at 83 (quoting Stephen V. Monsma, “Christian Worldview in Academia,” *Faculty Dialogue* 21 (Spring-Summer 1994): 146). Put another way, a Christ-centered education provides a distinctly Christian viewpoint on all of the “secular” subjects in the curriculum.

B. CCU’s graduates are fully-qualified in their chosen fields and CCU satisfies all of the nonreligious requirements of the student aid programs.

Both with respect to the curriculum and with respect to the faculty and staff, CCU provides no less “secular” or social value merely because it is also “Christ-centered.”⁴ Students in a Christ-centered, higher educational program still learn the laws of science,⁵ the techniques of educating, the theorems of mathematics and the algorithms of computer science, for instance. Indeed, one of CCU’s purposes

⁴ Indeed, the Council member institutions strive to “provide students with the necessary educational certification for entering the major vocations and the leading professional schools.” In addition, these institutions “are home to many scholars who regularly read papers at academic conferences, review books for professional journals and engage in some kind of continuing research.” William C. Ringenberg, *The Christian College A History of Protestant Higher Education in America* 33 (Baker Academic 2nd ed. 2006)

⁵ For example, CCU’s general chemistry class covers atomic structure, stoichiometry, chemical bonding, and gas and solution chemistry. Academic Catalog 2007-2008, *available at* <http://www.ccu.edu/catalog/2007-08/courses/chm.asp>.

is to prepare students for leadership and service within their selected careers and communities. (J.A. 87) Upon graduation, these students hold degrees from an accredited institution and are fully qualified to begin their careers in their chosen professions.⁶ Nothing about the integrated religious viewpoints in the program changes this result.⁷

The Colorado Commission on Higher Education (“CCHE”) has expressly acknowledged that CCU qualifies to participate in the student aid programs in every respect except for the restriction on “pervasively sectarian” institutions. (J.A. 97). CCU’s Christ-centered approach to higher education undermines neither

⁶ Prominent alumni of the Council member institutions include U.S. Representative Dennis Hastert, a Wheaton College alumnus, and U.S. Senator John Thune, a graduate of Biola University. In addition, U.S. Representative Roy Blunt formerly served as president of Southwest Baptist University. James A. Patterson, *Shining Lights and Widening Horizons A history of the Council for Christian Colleges & Universities 2001-2006* 22 (Council for Christian Colleges & Universities 2006). In addition, former U.S. Senator William Armstrong currently serves as the president of CCU.

⁷ Similarly, like all other institutions, CCU strives to sustain a community of faculty, administrators and staff who exemplify excellence in their professional fields. (J.A. 87). More than three-fourths of CCU’s faculty has earned post-graduate degrees. CCU Profile, *available at* <http://www.ccu.edu/friends/press.pdf>. CCU’s faculty includes professors holding doctorate degrees from the following institutions: the University of California-Berkeley, Harvard University, the University of Wisconsin-Madison, the University of Colorado, the University of Denver, Colorado State University and Oxford University (among others). Academic Catalog, *available at* <http://www.ccu.edu/catalog/2007-08/faculty/faculty.asp>.

CCU's accreditation status nor its eligibility with respect to the nonreligious requirements of the student aid programs.

C. CCU's "Christ-centered" educational program is no more "ideological" than any other educational program.

Most colleges and universities have some kind of mission or institutional values statement. For instance, Regis University describes its mission to "provide value-centered undergraduate and graduate education." Our Mission, *available at* <http://www.regis.edu/regis.asp?sctn=abt>. As part of this education, Regis students "examine and attempt to answer the question: 'How ought we to live?'" *Id.* Similarly, Colorado College identifies as its core values a shared commitment to: value all persons, live with integrity, nurture an ethic of environmental sustainability and encourage social responsibility. CC Mission and Core Values, *available at* <http://www.coloradocollege.edu/welcom/mission>.

This country's earliest institutions of higher education were founded to teach from expressly Christian viewpoints.⁸ However, the predominant defining values today are more likely to be ". . . egalitarianism, environmentalism, self-esteem, and

⁸ See *The Christian College A History of Protestant Higher Education in America* 40 (Baker Academic 2nd ed. 2006) (describing the religious affiliations of the initial higher educational institutions in this country, including Harvard, Yale and Princeton). See generally, Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.G. 43 (1997) (discussing the history of Protestant values in public education).

other products of modern secular liberal thought.” Michael W. McConnell, *Why is Religious Liberty the “First Freedom?”* 21 *Cardozo L. Rev.* 1243, 1264 (2000).⁹

The important point about these differences in predominant defining values is that there is no “neutral” reference point from which to evaluate them. With respect to the change in the predominant value system in education from Christianity to secularism, Professor (now Judge) McConnell has noted:

It is not evident, however, that education has become any less one-sided – any less sectarian[] – than it used to be. The dominant ideology has changed, but the use of the schools to inculcate that dominant ideology is essentially the same.

It is essential to recognize that secularism is not a neutral stance. It is a partisan stance, no less “sectarian,” in its way, than religion. In a country of many diverse traditions and perspectives – some religious, some secular – neutrality cannot be achieved by assuming that one set of beliefs is more publicly acceptable than another.

Id. at 1264.

The view or presupposition that chemicals are created by God is, of course, a religious and philosophical viewpoint. Indeed, it is a viewpoint that stands in sharp contrast to the presupposition that chemicals are derived from purely natural

⁹ Given that Regis states that its mission is consistent with Judeo-Christian principles, it appears that the values around which its educational programs are centered (and which presumably are used to answer the question of how one ought to live) reflect Regis’ understanding of Christian values. By way of contrast, the values articulated by Colorado College (*e.g.*, value all persons, nurture an ethic of environmental sustainability) appear to track those of modern secularism.

causes. However, the difference in presuppositions is simply that – a philosophical difference about the nature of reality. The state is not neutral when it chooses to fund the secular viewpoint and not fund the religious viewpoint.

The presence of many diverse institutions providing qualifying educational programs from different ideological perspectives reflects, among other things, the pluralism underlying the First Amendment. This country’s heritage and strength lies in a rich diversity of educational institutions offering different perspectives in the marketplace of ideas.¹⁰ To ensure the continued vitality of this marketplace, and to promote the pluralism embodied in the First Amendment, no institution should be excluded from benefits offered to all solely because the presuppositions underlying its program are derived from religious conviction.

II. The District Court’s interpretation of Art. IX, § 7 mandates religious discrimination against CCU’s Christ-centered educational program in violation of the First Amendment.

The district court correctly recognized that the “pervasively sectarian” exclusion is presumptively unconstitutional because it discriminates on the basis of

¹⁰ In recognition of the principle that academic freedom should apply to institutions as well as professors, the American Association of University Professors has provided in its statement on academic freedom that “limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.” Michael McConnell, “*Academic Freedom in Religious Colleges and Universities*,” 53 *Law of Contemporary Problems* 303, 307 (1990) (describing both the institutional and individual aspects of academic freedom).

religion. *Colo. Christian Univ v. Baker*, No. 04-cv-02512-MSK-BNB, *slip op* at 28-29 (D. Colo. May 18, 2007). However, the court incorrectly justified this discrimination by relying on an unconstitutional interpretation of Art. IX, § 7 of the Colorado state constitution. The district court’s broad interpretation of Art. IX **discriminates in the very same way that the “pervasively sectarian” exclusion discriminates**. According to the district court, Art. IX, § 7 requires exclusion of the “Christ-centered” educational program offered by CCU solely because of its Christian character. The exclusion turns not on whether CCU’s educational program provides sufficient “secular” educational value - indeed the Commission has acknowledged that it does - but rather on whether it is otherwise too religious. Put differently, the discrimination the district court interpreted into Art. IX, § 7 is presumptively unconstitutional and cannot be justified by reference to itself or to any federal constitutional interest.

A. The District Court interprets Art. IX, § 7 to prohibit state funding of “religious education,” which it broadly defines to include educational programs that teach secular subjects from a religious perspective.

Without explanation, the district court interprets Art. IX, § 7 to prohibit the use of public funds for “religious education” or “religious instruction.” *Slip op* at 2, 29. As an initial matter, this interpretation is certainly not obvious from the

wording of Art. IX, § 7.¹¹ The Art. IX, § 7 language, on its face, speaks to sectarian institutions or, generally, who the institution is. The court leaps to construe the language much differently as speaking to religious activity, or what an institution does. This leap is not required by the plain language of Art. IX, § 7.

The district court may have been informed by the Colorado Supreme Court's analysis in *Americans United for Separation of Church and State v. Colorado*, 648 P.2d 1072 (Colo. 1982). In that case, the court upheld the participation of Regis College, an admittedly *sectarian institution*, in student aid programs. In the course of the opinion, the court claims (without explanation) that Art. IX, § 7 allows aid to sectarian institutions where there is limited "risk of religion intruding into the secular educational function of the institution" or where there is not "the type of ideological control over the secular educational function which Art. IX, § 7, at least in part, addresses." *Americans United*, 648 P.2d at 1084. Unfortunately, the court cites no authority for either of these statements. In addition, it is important to note that the result in *Americans United* would have been the same if the court had

¹¹ The district court quotes the relevant portions as follows:

Neither the general assembly, nor [other governmental bodies] shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any . . . college [or] university . . . controlled by any church or sectarian denomination whatsoever.

Slip op at 17.

interpreted Art. IX, § 7 narrowly to apply only to exclusively religious education (*i.e.*, religious vocational training for clergy).

The district court next expands the reach of its unexplained interpretation of Art. IX, § 7 by broadly interpreting “religious education” to include not only exclusively religious content, such as religious vocational training, but also secular topics taught from a distinctly religious perspective. *Slip op* at 30. In developing its broad exclusion of religious education, the district court also relied heavily upon *Locke v. Davey*, 540 U.S. 712 (2004). *Slip op* at 17. However, its reliance upon *Locke* is misplaced. First, the district court incorrectly asserts that Art. IX, § 7 is essentially identical to the Washington constitutional provision at issue in *Locke*. In fact, the Washington provision, which prohibits the use of government funds for “religious worship, exercise or instruction,” addresses religious activity, not sectarian institutions. *Slip op* at 17. Second, the Court in *Locke* narrowly interpreted the Washington constitutional provision to apply only to the narrow state interest asserted in not funding the religious training of clergy. *Locke*, 540 U.S. at 723 n.5. The district court’s interpretation of Art. IX, § 7 extends much further to include not only exclusively religious content, such as religious vocational training, but also secular topics taught from a religious perspective. *Slip op* at 30.

B. A broad construction of “religious education” is presumptively unconstitutional.

The district court’s interpretation of “religious education” examines not whether a program provides sufficient “secular” educational content, but only whether it is too religious. As applied in the student aid program, the court’s interpretation prohibits the state from funding an otherwise qualifying educational program solely based on the religious viewpoints integrated into the program, even when the state is funding other educational programs in which nonreligious viewpoints are integrated. This viewpoint discrimination is presumptively unconstitutional.

1. A broad construction of religious education constitutes religious viewpoint discrimination.

In those cases where the Court has specifically examined governmental restrictions on private religious expressive activity, it has held that such restrictions constitute viewpoint discrimination. In *Good News Club v. Milford Central School*, 533 U.S. 98, 103 (2001), the Court struck down a provision in an elementary school’s community use policy that prohibited use “by any individual or organization for religious purposes.” The Court noted that the policy permitted use for “a variety of purposes, including events pertaining to the welfare of the community.” *Id.* at 108 (internal quotation omitted). Pursuant to the policy, “any

group that promotes the moral and character development of children was eligible to use the school building.” *Id.* (internal quotation omitted).

The school argued that the activities of a Bible club, which consisted of singing religious songs, praying, memorizing Bible verses and discussing a Bible lesson and its life application, were “religious in nature” and “different in kind” from other activities permitted by the school. *Id.* at 110-111. Further, the school argued that the club engaged in an “additional layer” of “quintessentially religious” activities that are “focused on teaching children how to cultivate their relationship with God through Jesus Christ.” *Id.* The school sought to distinguish these activities from “pure moral and character development.” *Id.*

The Court rejected these arguments. Concluding that “the [club] seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint,” the Court held that the exclusion of the club based on its religious nature “constitutes unconstitutional viewpoint discrimination.” *Id.* at 109. The Court expressly disagreed with the proposition “that something that is ‘quintessentially religious’ or ‘decidedly religious in nature’ cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.” *Id.* at 111. The Court noted that there is “no logical difference in kind between the invocation of Christianity by the

[club] and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.” *Id.*

Similarly, in *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 387 (1993), the Court held that a policy permitting community use of school facilities for “social, civic, or recreational uses,” but not for “religious purposes,” constitutes viewpoint discrimination as applied to “a film series dealing with family and child-rearing issues faced by parents today.” The Court concluded that “it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.” *Id.* at 393.

In *Rosenberger v. Rectors of the Univ. of Virginia*, 515 U.S. 819 (1995), the Court struck down a restriction in a public university student club funding policy pursuant to which the university denied funding to a religious student publication. The restriction excluded activities that “primarily promote[] or manifest[] a particular belie[f] in or about a deity or an ultimate reality.” *Id.* at 825. The Court noted that the policy:

Does not exclude religion as a subject matter, but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make . . .

payments, for the subjects discussed were otherwise within the approved category of publications.

Id. at 831.

Taken together, these cases establish that when the government excludes private religious expression that is otherwise within the scope of a government program (*e.g.*, by denying government resources for such expression), it engages in viewpoint discrimination. This is precisely what occurs when the district court's broad construction of religious education is applied to the student aid program. Even if CCU's "Christ-centered" education program is an "essentially religious endeavor" as the district court asserts, *slip op* at 15, it is still the teaching of secular subjects from a particular viewpoint (just as the "quintessentially religious" Bible club activities in *Good News Club* were characterized by the Court "as the teaching of morals and character development from a particular viewpoint." *Good News Club*, 533 U.S. at 111.) Just as Colorado College extends its viewpoints regarding the value of all people and environmental sustainability into its educational programs, CCU extends its viewpoints regarding God's role in nature into its educational programs. Denying funding to a "Christ-centered" education in this context, as required under the district court's broad construction, constitutes viewpoint discrimination.

2. Religious viewpoint discrimination is presumptively unconstitutional under the Free Exercise Clause.

The Free Exercise Clause requires government action to be neutral with respect to religion and of general applicability. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990)). However, a law that is not neutral is subject to strict scrutiny and must be narrowly tailored to advance a compelling governmental interest. *Id.* at 531–32.

As discussed below the case law identifies several different ways to evaluate religious neutrality. Because the district court’s broad construction of religious education fails to comply with each of these forms of neutrality, it is presumptively unconstitutional under the Free Exercise Clause.

The district court’s broad definition of religious education is not facially neutral with respect to religion because it necessarily uses religious criteria to determine whether or not a particular educational activity may be funded. The Court in *Lukumi* stated that “the minimum requirement of neutrality is that a law not discriminate on its face.” 508 U.S. at 533. The Court noted that “[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.” *Id.* In this case, the district court’s broad interpretation of religious education requires the exclusion of religious viewpoints in secular education programs. Because the religious character of the

program is the basis upon which the exclusion turns, there is no secular meaning for the exclusionary criteria. Therefore, a broad construction of religious education does not satisfy the minimum requirement of facial neutrality.¹²

The lack of neutrality is also evident in the fact that excluding religious viewpoints from an otherwise qualifying educational program is unrelated to the interests furthered by the student aid program. In other words, such exclusion does not serve to protect or promote the interests of the student aid program, but rather merely to distinguish between favored and unfavored expression. In *Lukumi*, Court held that several city ordinances banning the ritual sacrifices of animals were not neutral in part because they were drafted to suppress religious conduct without reference to the legitimate ends asserted in their defense. *See Id.* at 535-40. The Court acknowledged that the ordinances address concerns “unrelated to religious animosity” such as public health and prevention of cruelty to animals. *Id.* at 535. However, in reading the ordinances together, the Court concluded that they “disclose an object remote from these legitimate concerns.” *Id.* Specifically, “although [religious] sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.” *Id.* at 536.

¹² By way of contrast, a narrow construction of religious education (*i.e.*, one that is limited to exclusively religious content such as theology at a seminary) could be excluded on secular criteria from a program that only funds “secular” educational activities.

The same “remote object” appears with respect to a broad construction of religious education because the exclusion of religious viewpoints is unrelated to ensuring that government funds only go to activities that further the government’s objectives. Indeed, “a law which visits gratuitous restrictions on religious conduct . . . seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.” *Lukumi*, 508 U.S. at 538.

A law also lacks neutrality if it intentionally favors certain types of religious organizations over others. In *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quotation omitted), the Court stated that “the fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief.”¹³ The state law at issue in *Larson* contained an exemption for religious organizations, but only if they received more than half of their total contributions from members or affiliated organizations. *Id.* at 231–32.

In striking down the exemption, the Court held that the criteria “effectively distinguish[ed] between well-established churches that have achieved strong but

¹³ Even though *Larson* was decided under the Establishment Clause, the Court applied the same strict scrutiny test once it determined that the law at issue did not treat all religious denomination equally. *Id.* at 247. Further, the Court in *Larson* expressly noted that the “constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause.” *Id.* at 245.

not total financial support from their members . . . and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members. . . .” *Id.* at 245 n.23 (internal citation and quotation omitted).

The favoritism prohibited in *Larson* applies with even greater force when the distinctions turn upon expressly religious criteria. In *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the court struck down a “substantial religious character” test used by the NLRB to determine whether a religious employer is exempt from NLRB jurisdiction. The court in *Great Falls* concluded that failing to exempt religious institutions that take a less religious approach to the delivery of educational services creates an unconstitutional preference. The same unconstitutional preference results when a government-funded program excludes religious organizations that take a more religious approach to the delivery of education. In this regard, the district court’s conclusion with respect to the pervasively sectarian exclusion in the student aid program applies with equal force to a broad construction of religious education in Art. IX, § 7. *Slip op* at 28-29. Those institutions such as CCU that provide education from a distinctly religious perspective are excluded, while those institutions such as Regis whose approach is more objectively secular (but in some sense covertly religious) are included.

Finally, to the extent that *Locke* modifies the free exercise neutrality requirement as applied to government funds, a broad construction of religious education fails to satisfy these modifications. Specifically, a broad construction does not apply merely to a distinct category of instruction such as religious vocational training, *Locke*, 540 U.S. at 713, but rather to all categories of instruction when presented from a particular religious viewpoint. The broad construction excludes a “prohibited perspective, not the general subject matter.” *Rosenberger*, 515 U.S. at 831.¹⁴

In applying the neutrality requirement of the Free Exercise Clause, the Court has stated that it must “survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.” *Lukumi*, 508 U.S. at 534 (internal quotation marks and citation omitted). With respect to a broad construction of religious education, the survey is not difficult. By its express terms, its relationship to the student aid program objectives, and its intentional favoritism, a broad construction fails to comply with the neutrality principles worked out in *Lukumi*, *Larson*, and *Locke*.

C. Applying a broad construction of “religious education” to the student aid program is not required by the Establishment Clause.

¹⁴ There is also a well documented history of religious hostility behind the adoption of state constitutional amendments such as Art. IX, § 7. *See generally*, Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43 (1997).

Because the district court’s construction of religious education is presumptively unconstitutional, it must be narrowly tailored to further a compelling governmental interest. *Lukumi*, 508 U.S. at 531-32. As an initial matter, applying a broad construction of religious education to the student aid programs in this case is not narrowly tailored to any Establishment Clause interest because the aid goes to the students and not the school. The U.S. Supreme Court has consistently held that this type of indirect aid does not implicate the Establishment Clause. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Witters v. Wash. Dept. of Servs.*, 474 U.S. 481 (1986).

Further, a broad construction of religious education is not narrowly tailored to any state interest in not funding the religious training of clergy, which was the only interest upheld in *Locke*. See *Locke*, 540 U.S. at 723 n5. The broad construction excludes not only such “exclusively religious” instruction, but also instruction on many “secular” subjects when presented from a religious viewpoint.

Even if the student aid is treated as direct aid, the Establishment Clause does not require the exclusion of religious viewpoints on “secular” subjects from a state program that funds all other viewpoints on these same subjects. In this context, a broad construction of religious education is not consistent with the Establishment Clause’s neutrality requirement. Further, to the extent the Court has inquired beyond neutrality in analyzing government funding, it has never expressly held

that there can be no funding in a religiously neutral program of religious viewpoints on the program's subject matter. To the contrary, the Court has held that excluding such viewpoints may violate the Establishment Clause.

The Establishment Clause analysis in this context turns on whether the student aid results in governmental indoctrination. *Agostini v. Felton*, 521 U.S. 203, 234 (1997). In its most recent case involving direct aid to religious schools, a four-justice plurality of the Court held that:

the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.

Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality). The plurality further stated that “[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion.” *Id.*; *see also id.* at 838 (O’Connor, J., concurring) (“[N]eutrality is an important reason for upholding government-aid programs against Establishment Clause challenges).

In applying the neutrality principle to the question of attribution, the plurality explained that:

If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been

done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.

Id. at 809-810. On this basis, the plurality concluded that if “eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.” *Id.* at 820 (plurality).

The court has required neutrality to avoid attribution in other cases involving aid to private organizations. For instance, in *University of Wisconsin v. Southworth*, 529 U.S. 217 (2000), the Court held that viewpoint neutrality is required in the allocation of funding support to recognized student organizations at a public university. *Id.* at 233. The Court noted that this requirement is consistent with its holding in *Rosenberger* that a public university’s “adherence to a rule of viewpoint neutrality in administering its student fee program would prevent ‘any mistaken impression that the student newspapers speak for the University.’” *Id.* (citing *Rosenberger*, 515 U.S. at 841). *See also Agostini*, 521 U.S. at 230 (“the criteria by which an aid program identifies its beneficiaries [is relevant to assessing] whether any use of that aid to indoctrinate religion could be attributed to the State”). Because a broad construction requires using religious criteria to

distinguish among permitted and prohibited activities, it undermines the neutrality that the Court has held is necessary to avoid attribution.

In contrast with the *Mitchell* plurality, Justice O'Connor held that in addition to neutrality, the Establishment Clause prohibits actual diversion of government aid to religious indoctrination. *Mitchell*, 530 U.S. at 840-42 (O'Connor, J., concurring). However, Justice O'Connor did not identify precisely what activities would constitute impermissible religious indoctrination in a neutral aid program. Noting that the school aid program challenged in the case prohibited the use of the aid for "religious worship or instruction," Justice O'Connor simply held that this restriction was *sufficient* to avoid Establishment Clause violations. *Id.* at 849.

More generally, the Court has never been required to describe precisely the religious character and context of activities that are not permitted in a government aid program. Instead of identifying any particular religious activities that constitute impermissible religious indoctrination, the Court has merely held in each case that the structure of the aid and the conditions prohibiting use of funds for certain generically defined religious activities provided *sufficient* separation between the expression and the government. As a result, the Court has never held that prohibited religious activities include the expression of religious viewpoints in

an educational program that qualifies for funding without regard to its religious character.¹⁵

The case that addressed this issue most closely is *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988). In *Bowen*, the Court held that a government aid program may violate the Establishment Clause if the funds are expended on “specifically religious activities” or for “materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith.” *Id.* at 621. But the Court provided no definition of what constitutes a “specifically religious” (or “inherently religious”) activity, “explicitly religious content,” or the “views of a particular religious faith.”

Nothing in the analysis or holding of *Bowen* prohibits interpreting these terms narrowly to apply only to “exclusively” religious activities. Indeed, the logic of the opinion points to this interpretation. In response to the assertion that the challenged statutory program did not contain any “express provision preventing the use of federal funds for religious purposes,” the Court observed that it has “never stated that a statutory restriction is constitutionally required.” *Id.* at 614. Instead, the Court suggested that the limited purposes for the use of funds set forth in the statute were sufficient to ensure that funds were not used for impermissible

¹⁵ See generally, Stuart J. Lark, *Religious Expression, Government Funds and the First Amendment*, 105 W. Va. L. Rev. 317 (2003).

religious activities. *Id.* at 614 n.13. Since religious expression that furthers these purposes would not have been excluded by any statutory limitation, the Court’s analysis implies that only religious expression unrelated to the government’s purposes, *i.e.*, exclusively religious expression, is forbidden by the Establishment Clause.

In addition, the Court stated that “evidence that the views espoused on questions such as premarital sex, abortion, and the like happen to coincide with the religious views of the program grantees would not be sufficient to show that the grant funds are being used in such a way as to have a primary effect of advancing religion.” *Id.* at 621. On this basis, the “views of a particular faith,” which the Court held could not be funded, do not include religious views on the subject matter of the program. Put differently, the phrase “views of a particular faith” is defined narrowly to apply to views on exclusively religious subjects outside the scope of the program.

To summarize, private religious expression, even if it in some sense constitutes religious indoctrination, is not attributable to the government if it is conducted in furtherance of the objectives of a religiously neutral program. A narrow construction of religious education, one which applies only to exclusively religious activity, can be applied in a religiously-neutral manner. Therefore, a narrow construction is sufficient to satisfy Establishment Clause requirements.

Beyond this, because a broad construction excludes religious viewpoints on otherwise qualifying subject matter, it may actually violate the Establishment Clause. In *Good News Club*, 533 U.S. at 118, the Court discussed the danger that school students would perceive governmental hostility toward the religious viewpoints of a Bible club if it were excluded from using the school building after school hours. In addition, the Court noted that “[a]ny bystander could conceivably be aware of the school’s use policy and its exclusion of the [club], and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement.” *Id.*

Because a broad construction of religious education that encompasses religious viewpoints on subject matter within the scope of a government aid program is not required by the Establishment Clause (or any other governmental interest), it violates the Free Exercise Clause.

CONCLUSION

The district court upheld the pervasively sectarian exclusion in the student aid program on the basis of its interpretation of Art. IX, § 7. Because this interpretation is unconstitutional, it cannot provide the requisite governmental interest to satisfy strict scrutiny. The district court did not identify any other governmental interest to justify the pervasively sectarian exclusion and, indeed,

there is no other interest. As a result, the pervasively sectarian exclusion must be struck down and CCU must be permitted to participate in the student aid program.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Section 1. Word Count

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this amicus brief is proportionally spaced and contains 6,984 words.

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Dated: September 21, 2007

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing **BRIEF *AMICI CURIAE* OF THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES AND THE AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES IN SUPPORT OF PLAINTIFF-APPELLANT**, as submitted in Digital Form is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the TrendMicro Office Scan for Windows 2003/XP/2000/NT, Version 7.3, engine version 8.500.1002, virus pattern file number 4.731.00, virus pattern release date 9/19/07, and, according to the program, is free of viruses.

By: _____
Dee Kerkow

By: /s/ Dee Kerkow
Legal Secretary (Digital)

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I hereby certify that a true and correct copy of the foregoing **BRIEF AMICI CURIAE OF THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES AND THE AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES IN SUPPORT OF PLAINTIFF-APPELLANT** was served via email on the 21st day of September, 2007, and will be sent by U.S. mail, postage prepaid, on the 24th day of September, 2007, to the following:

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ATTACHMENT A