**No. 08-35532**

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**SYLVIA SPENCER, VICKI HULSE, and TED YOUNGBERG**

**Plaintiffs-Appellants,**

**v.**

**WORLD VISION, INC.,**

**Defendant-Appellee.**

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**APPEAL FROM UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**The Honorable Ricardo S. Martinez**

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# BRIEF OF *AMICI CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL and COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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## DISCLOSURE STATEMENT

I, Eric Bentley, counsel of record for Association of Christian Schools International and Council for Christian 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: November 25, 2008

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The **Council for Christian Colleges & Universities** ("CCCU") is an international higher education association of intentionally Christian colleges and universities. Founded in 1976 with 38 members, CCCU has grown to 110 members in North America, including 20 institutions in the states within the jurisdiction of this Court, which together comprise over 300,000 students, 18,000 faculty and 1,550,000 alumni. In addition, CCCU has 70 affiliate institutions in 23 countries.

CCCU'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." Among its many programs, CCCU provides specialized semester long educational courses for students of its member institutions, including eight year round study abroad programs in 7 different countries along with four specialized studies programs in the United States.

The **Association of Christian Schools International** ("ACSI") is a nonprofit, non-denominational, religious association providing support services to more than 3,900 Christian preschools, elementary and secondary schools in the

United States. One hundred forty-five post-secondary institutions are also members of ACSI.

ACSI is organized as a California religious nonprofit corporation with its national/international office located in Colorado Springs, Colorado. ACSI also has regional offices throughout the United States, including three offices in California and Washington.

***Religious Character and Faith-Based Employment***

*Amici* and their member institutions provide "arts and sciences" educational programs which, even though offered from a Christian perspective, are similar in terms of subject matter to educational programs offered by "secular" institutions. In addition, *amici* and many of their member institutions are not legally controlled by any particular church or denomination. Neither of these factors, however, diminish the religious character of *amici* and their members.

Indeed, to promote and preserve their institutional values and distinctively Christian mission, CCCU and its member institutions employ only professing Christians as full-time faculty members and administrators. Similarly, all full- and part-time personnel, and board members, of ACSI and its member institutions must be professing Christians. Accordingly, *amici* and their respective member institutions all rely upon the section 702 exemption from Title VII to protect the

faith-based employment practices which are an essential component of their Christian character and mission.

*Amici* are concerned that both this Court's previous interpretation of section 702, as well as Plaintiffs' proposed interpretation, would eliminate the protection provided by this section for *amici* and many of their member institutions. Therefore, *amici* are respectfully submitting this brief to set forth the legal principles that prohibit government officials from applying section 702 in a manner that excludes certain religious institutions because they do not appear to be sufficiently religious or their activities are too secular.

## SUMMARY OF ARGUMENT

*Amici* represent a diverse group of religious educational institutions which collectively provide accredited educational programs at all levels from a Christian perspective. Just like World Vision, these institutions conduct all of their activities out of a Christian motivation and in furtherance of their respective Christian missions. Their programs include some distinctly religious activities such as the study of sacred texts, prayer, meditation and sacramental services such as communion. But they also include educational or other activities which may not contain distinctly or identifiably religious content and which may appear to some to be secular in nature.

This case asks two related questions: (1) are organizations such as these religious organizations under Title VII, and (2) how can government officials make such a determination. As discussed below, the answer to the first question is "yes," and the answer to the second question is determined by applying the following three principles.

### 1. *Government officials cannot favor certain religious organizations over others based on how religious they are.*

Section 702 of Title VII exempts from the religious nondiscrimination requirement any "religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1. This Court has held that a corporation only

qualifies for exemption under section 702 if its "purpose and character are primarily religious." *EEOC v. Townley Engineering and Manufacturing Company*, 859 F.2d 610, 618 (9th Cir. 1988). To apply this standard, government officials must "determine whether the 'general picture' of the institution is primarily religious or secular." *Id.* at 618 n.14; *see also EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993).

According to this Court, limiting the section 702 exemption to "primarily religious" organizations implements what this Court believes was the Congressional intent to provide a narrow exemption. *Townley*, 859 F.2d at 618. However, this Court's test improperly prefers "primarily religious" organizations over other religious organizations based on expressly religious considerations (i.e., how religious each organization is). This type of religious favoritism violates the First Amendment.

### 2. *Government officials cannot search for religious meaning or significance in an organization's activities, policies or affiliations.*

To implement this Court's interpretation of section 702, government officials must determine the "general picture" of an organization by analyzing the religious meaning or significance of a variety of characteristics of the organization, including its activities, policies and affiliations. *Kamehameha*, 990 F.2d at 460-61. Such an analysis effectively requires government officials either to interpret an

organization's religious doctrine or to impose their own doctrinal standards as applied to these characteristics. This analysis is certain to produce arbitrary and discriminatory results. More importantly, the U.S. Supreme Court has consistently held that not only do governmental officials lack any institutional competence to interpret doctrine, they are also prohibited from doing so under the First Amendment. Accordingly, the multi-factor analysis used by this Court to determine whether an organization is "primarily religious" is unconstitutional.

**3.** ***An organization is religious if it is operated primarily for bona fide religious purposes, even if such purposes are similar to secular purposes.***

The question in this case should not be whether the "general picture" of World Vision, as measured by the religious significance of the organization's activities, policies and affiliations, is "primarily religious." Instead, the question should be whether World Vision is operated primarily for *bona fide* religious purposes. To answer this question, government officials cannot (and need not) weigh the religious significance of various characteristics of World Vision, but they can analyze these characteristics to confirm that World Vision has not made false or materially inconsistent representations regarding the religious nature of its purposes.

Appellants argue that World Vision is not religious because serving humanitarian needs is a secular purpose. *App. Br.* at 23. But this argument trivializes the religious convictions which underlie the commitment of many religious citizens to provide social and/or educational services. For instance, the Bible teaches that true religion consists of taking care of widows and orphans. That a secular organization might embrace a similar mission for nonreligious reasons does not diminish the religious significance of this Biblical mandate to World Vision.

***Application***

*Amici* clearly agree with the district court's conclusion that World Vision is a religious organization. *Spencer v. World Vision, Inc.*, 2008 U.S. Dist. LEXIS 40938 at *26-27 (May 21, 2008). Therefore, *amici* respectfully request this Court to (i) refine its definition of a religious organization under section 702 by incorporating the principles described above and (ii) affirm that World Vision is a religious organization because it is operated primarily for *bona fide* religious purposes.

## ARGUMENT

### I. The "primarily religious" test is unconstitutional to the extent it favors certain religious organizations over others based on how religious they are.

Sister courts in other circuits have invalidated tests similar to this Court's "primarily religious" test on the ground that they unconstitutionally discriminate among religious organizations based on religious criteria. Most recently, the Tenth Circuit Court of Appeals struck down a multi-factor test intended to separate *pervasively sectarian* educational institutions from other religious educational institutions, allowing the latter but not the former to participate in a state student aid program. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). The court concluded that the *pervasively sectarian* test violated the First Amendment because it "necessarily and explicitly discriminate[d] among religious institutions . . .," *id.* at 1258, and "the discrimination is expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum and the religious composition of its governing board." *Id.* at 1259.

The court rejected an argument that the discrimination was based not on religion but rather on the type of institution (*e.g.*, between "moderately religious" and "primarily religious" institutions). The court observed that there is "no reason

to think that the government may discriminate between 'types of institutions' on the basis of the nature of the religious practice these institutions are moved to engage in." *Id.*

The court also noted that this argument is inconsistent with the U.S. Supreme Court's holding in *Larson v. Valente*, 456 U.S. 228 (1982). 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. Although this distinction was based on secular criteria, the Court recognized that its intent was not merely to distinguish among types of institutions. Instead, the Court held that the criteria created an unconstitutional preference because it "effectively distinguishe[d] between well-established churches that have achieved strong but 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).

In another case, the Court of Appeals for the D.C. Circuit struck down a *substantial religious character* test used by the National Labor Relations Board to determine whether it could exercise jurisdiction over a religious organization.

*University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). The test evaluated "the purpose of the employer's operations, the role of unit employees in effectuating that purpose and the potential effects if the Board exercised jurisdiction." *Id*. at 1339 (quotation omitted). In evaluating a religious school, for instance, the test required the NLRB to consider "all aspects of a religious school's organization and function," including "such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." *Id*. (quotation omitted).

The court concluded that the *substantial religious character* test was flawed because when used to evaluate an institution the test "boils down to 'is it sufficiently religious?'" *Id.* at 1343. Indeed, in the instant case, the NLRB noted that the university, although affiliated with the Catholic Church, maintained a campus open to people of all faiths or no faith and did not emphasize the Catholic faith in its curriculum. In addition, neither the president nor any of the faculty were required to be of the Catholic faith, and the one required religion course need not be one involving Catholicism. *Id.* at 1340. Based on these seemingly secular characteristics, the NLRB effectively concluded that the "general picture" of the university was not "primarily religious."

But the court rejected both the analysis and the conclusion. The court stated that:

> If the University is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty. To limit the . . . exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom, as essentially proposed by the Board in its brief, is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause – not to prefer some religions (and thereby some approaches to indoctrinating religion) to others.

*Id*. at 1346.

As these cases indicate, to the extent that the *primarily religious* construction of the section 702 exemption distinguishes among religious organizations based on how religious they are, it violates the First Amendment. Faced with a similar test, the *Colorado Christian* court determined that the state had offered no compelling interest to justify the discrimination in the "pervasively sectarian" test. *Colorado Christian*, 534 F.3d at 1269. Similarly, there is no compelling interest to exempt under section 702 some religious organizations but not others "on the basis of the pervasiveness or intensity of their belief." *Id.* at 1259.

## II. The "primarily religious" test is unconstitutional to the extent it requires government officials to weigh the religious meaning or significance of an organization's activities, policies and other characteristics.

In both *Townley* and *Kamehameha*, this Court weighed the religious significance or meaning of a number of characteristics of the organizations in question to determine whether the "general picture" of these organizations was "primarily religious." *Townley,* 859 F.2d at 619; *Kamehameha,* 990 F.2d at 461-64. The district court in this case followed essentially the same approach. *Spencer,* 2008 LEXIS 40938 at *17. The court noted that "not all factors will be relevant in all cases, and the weight given each factor may vary from case to case." *Id.* at *16 (quoting *Leboon v. Lancaster Jewish Community Center Ass'n,* 503 F.3d 217, 227 (3rd Cir. 2007)).

Appellants argue that the district court weighed the relevant factors inappropriately. But in fact the district court should not have weighed the religious significance of these factors at all. The First Amendment prohibits government officials from measuring the religious character of an organization based on some litmus test of the perceived religious meaning in or significance of, for instance, the organization's activities, policies and governance. Government officials have no competence or authority to engage in such an exercise, and doing so inevitably

entangles government officials in religious doctrine and results in subjective, arbitrary and discriminatory classifications.

### *A. Government officials have no competence or authority to search for religious meaning in an organization's policies, activities or other characteristics.*

In a long and unbroken line of cases, beginning with *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), the U.S. Supreme Court has consistently held that government officials have no authority to interpret or apply religious doctrine. In announcing a rule of judicial deference regarding church property disputes, the *Watson* Court explained that:

> The law knows no heresy and is committed to the support of no dogma, the establishment of no sect. . . . It is not to be supposed that the judges of the civil courts can be as *competent* in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to the one which is less so.

*Id*. at 728-29 (emphasis added).

The Court subsequently held that not only do government officials lack competence to interpret religious doctrine, they also lack the constitutional authority to do so. In addition, cases following *Watson* have held that the rule of deference applies not just to courts and property disputes, but to all government officials and to policies, activities and other characteristics that turn upon religious

doctrine. For example, government officials have no authority to inquire into or interpret the procedural or substantive policies derived from religious doctrine. *See, e.g.*, *Serbian Eastern Orthodox Diocese v. Milijovech*, 426 U.S. 696, 713 (1976) (holding that courts cannot review whether actions of religious organizations "involving matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law" comply with church laws and regulations); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952).

Government officials also lack authority to determine the doctrinal significance of various activities. In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), the Court struck down a statute which allowed religious schools to obtain reimbursements for costs incurred with respect to certain examinations, provided the examinations were not too religious. The statute required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities." *Id*. at 132. The Court rejected this audit, noting that it would place religious schools "in the position of trying to disprove any religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim." *Id*. at 132-33 (emphasis added). The Court

concluded that "[t]he prospect of church and state litigating in Court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id*. at 133.

Based on this principle, the Court has consistently rejected efforts to distinguish among activities or other characteristics based on how religious they are. In *Widmar v. Vincent*, for example, the Court rejected a proposal to permit students to use buildings at a public university for all religious expressive activities except those constituting "religious worship." 454 U.S. 263, 269 n.6 (1981). The Court observed that the distinction between "religious worship" and other forms of religious expression "[lacked] intelligible content," and that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer." *Id.* The Court noted that "[m]erely to draw the distinction would require the [State] - and ultimately the Courts - to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*; *see also id. at* 272 n.l1 (noting the difficulty of

determining which words and activities constitute religious worship due to the many and various beliefs that constitute religion).[1]

These cases all recognize that in practice discerning the religious significance of an activity or policy (for instance, whether it constitutes religious worship or religious instruction) requires doctrinal interpretation. Government officials making such a determination may, on the one hand, analyze the activity by interpreting the organization's religious doctrine, a task which is clearly outside of their competence. Such discernment requires precisely the inquiry into the religious significance of words and practices expressly rejected in *Cathedral Academy* and *Widmar* (among others). Alternatively, government officials may compare the activity with activity they implicitly perceive to be "religious." But this approach not only fails for the reasons described above, it also creates an

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[1] *See also Hernandez v. Commissioner*, 490 U.S. 680, (1989) (in income tax exemption context, pervasive governmental inquiry into "the subtle or overt presence of religious matter" is proscribed by the first amendment establishment clause); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 109 (1989) (plurality opinion) ("The prospect of inconsistent treatment and government embroilment in controversies over religious doctrine seems especially baleful where . . . a statute requires that public official determine whether some message or activity is consistent with 'the teaching of the faith.'"); *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) ("The risk that governmental approval of some [claims for religious tax exemptions] and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.").

implicit state defined orthodoxy regarding religious activities and interferes with the right of religious institutions to determine and apply their own doctrine.

### *B. A governmental search for religious meaning inevitably creates unconstitutional religious preferences and incentives.*

The Court has noted that making distinctions based on the relative religious significance of various activities inevitably favors expressly religious or conventional methods of accomplishing a religious mission over other more ecumenical or unorthodox methods. In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the Court struck down a city ordinance that in critical respects was the opposite of the proposed policy rejected in *Widmar*. Specifically, the ordinance permitted churches and similar religious bodies to conduct *worship services* in its parks, but it prohibited *religious meetings*. The ordinance resulted in the arrest of a Jehovah's Witness as he addressed a peaceful religious meeting. The Court held that the distinction required by the ordinance between *worship* and an *address on religion* was inherently a religious question and invited discrimination:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. . . . [It is not] in the competence of Courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another

> minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

*Id*. at 69-70.

Because of the many different expressions of religious faith, it is not difficult to see how classifying activities or organizations based on religious characteristics leads to favoritism. For instance, suppose a religious institution expresses its religious value of caring for the needy by providing meals and shelter, and that the theological tradition of this institution emphasizes "teaching by example" over preaching. In this case, providing meals and shelter furthers two purposes related to the organization's religious values: to serve and to teach. However, because local officials are not competent to interpret the institution's doctrine, they cannot conclude based on this doctrine that the activities reflect religious values. So instead, they may conclude based on their own conceptions of orthodoxy that the activities are not religious. But this conclusion favors one religious tradition regarding how to serve and teach over another. Indeed, a more discriminatory rule could hardly be devised. [2]

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[2] In contemporary culture, theologically "liberal" organizations will often appear to local officials as "secular" whereas theologically "conservative" or orthodox organizations will more likely be regarded as "religious." With respect to religion and public life, the significant distinction among believers is often not the traditional denominational lines separating Protestants, Catholics, Jews and Muslims, but rather the line between "orthodox" (whether Protestant, Catholic,

To avoid such favoritism, Congress extended the section 702 exemption to include all activities of a religious organization. In *Corporation of the Presiding Bishop v.* Amos, 483 U.S. 327 (1987), the Supreme Court upheld the section 702 exemption as applied to all employment positions of a religious employer (even those positions performing activities without expressly religious content). The Court observed that "[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Id.* at 336. Accordingly, the Court warned that requiring a religious organization "to predict which of its activities a secular court will consider religious" imposes a significant burden and that "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Id.*

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Jewish, or Muslim) and theologically liberal or "progressive" (whether Protestant, Catholic, Jewish, or Muslim). *See* James Davison Hunter, *Culture Wars: The Struggle to Define America* 42-46 (1991). Professor Hunter explains that orthodox believers are devoted "to an essential, definable, and transcendent authority," whereas progressives "resymbolize historic faiths according to the prevailing assumptions of contemporary life." The latter type of religious organizations, those most likely to align with contemporary culture, will, unsurprisingly, appear less "religious" or sectarian to government officials, while many orthodox groups who ignore cultural assumptions will appear more sectarian. Of course, even orthodox groups may choose to align some of their activities with contemporary culture for greater outreach or impact. The important point is that all such organizations are equally religious.

As the Court correctly noted, an exemption limited to sufficiently religious activities creates incentives for organizations to include more distinctly religious content in their activities. Suppose a religious organization creates a children's story promoting the values of honesty and respect for parents (which are two of the Ten Commandments found in the Bible). To reach a broader audience, the organization might decide that it would be more effective not to reference the Bible in the story. However, under a sufficiently religious rule, there would be an incentive for the organization to include such a reference to preserve the activity as a religious activity. Put differently, this rule would require religious organizations to take into account the absurd result that a story presented by a religious organization with the message of "be honest and respect your parents" would have a different legal status than one with the message that "the Bible says to be honest and respect your parents."

### *C. This Court's multi-factor "primarily religious" test requires an unconstitutional search for religious meaning.*

This Court has held that the "general picture" of an organization must be determined by weighing factors such as the organization's activities (including curriculum or products, as applicable), policies and affiliations with supporters. This search for religious meaning must necessarily involve an assessment of both

the religious significance or meaning of each such factor and the relative significance of each factor to the overall "general picture" of the organization.

In both *Townley* and *Kamehameha*, this Court effectively concluded that the factors with religious significance were outweighed by the factors lacking such significance. For instance, in *Townley*, this Court evaluated a commercial company which had been dedicated to God by its owners and which enclosed gospel tracts in its mailings, printed Bible verses on its commercial documents, conducted a weekly devotional service and financially supported various churches and missionary activities. *Townley*, 859 F.2d at 619. Notwithstanding these factors, this Court held that the "general picture" of the company was not "primarily religious" because the company was for profit, it produced mining equipment, it was not affiliated with a church, and its articles of incorporation did not mention any religious purpose. *Id.*

Similarly, in *Kamehameha*, this Court held that a school did not qualify as a religious corporation even though (i) the school was established as a Protestant school with the requirement that all teachers be Protestant, (ii) the school's curriculum included a required religious education component which at the kindergarten through sixth grade level taught basic Christian doctrine, and (iii) various regular school activities included distinctly religious activities such as

prayer. *Kamehameha,* 990 F.2d at 461-64. This Court concluded that the school was "essentially secular" because (i) it was not owned by, affiliated with, or supported by any religious organization, (ii) the focus of the school had shifted away from religion, (iii) there was no requirement that students subscribe to a religion, and (iv) the curriculum consisted of general liberal arts courses taught from a secular perspective. *Id.* at 461-63.

The Tenth Circuit in *Colorado Christian* provided several examples of how such weighing of religious content in various characteristics results in unconstitutional religious determinations. One of the factors in the *pervasively sectarian* test at issue in that case was whether an institution's curriculum required religion courses that tended to indoctrinate or proselytize. *Colorado Christian University,* 534 F.3d at 1262. The court observed that this factor required government officials to decide how religious beliefs are derived and to discern the boundary between religious faith and academic theological beliefs. *Id.* The court further noted that the line "between 'indoctrination' and mere education is highly subjective and susceptible to abuse." *Id.* Accordingly, the court concluded that "[t]he First Amendment does not permit government officials to sit as judges of the '*indoctrination' quotient* of theology classes." *Id.* at 1263 (emphasis added).

Another factor considered in the *pervasively sectarian* test was whether any policy of an institution's governing board has the image or likeness of a particular religion. *Id.* The court held that government officials could not evaluate this factor because "[i]t is not for the state to decide what Catholic – or evangelical, or Jewish - 'policy' is on education issues." *Id.*[3]

Several of the factors in this Court's *primarily religious* test mirror factors in the *pervasively sectarian* analysis. For example, the analysis of an organization's activities effectively requires government officials to measure their *indoctrination quotient*. Indeed, in *Townley* and *Kamehameha*, this Court determined that, notwithstanding some distinctly religious content, the organizations' activities overall were "essentially secular" and therefore not sufficiently religious. Put differently, this Court placed these activities on the secular side of the line between "indoctrination" and "mere education" (or a merely secular product), a line which the Tenth Circuit characterized as highly subjective and susceptible to abuse.

This Court also determined that the policies of the school in *Kamehameha*, as well as its curriculum, had shifted too far away from religion and no longer

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[3] A third factor was whether the students, faculty, trustees or funding sources of an institution are "primarily" of a "particular religion." *Id.* at 1264. The court noted that identifying a "particular religion" required a definition of ecclesiology and that "the government is not permitted to have an ecclesiology, or to second-guess the ecclesiology espoused by our citizens." *Id.* at 1265.

sufficiently reflected Protestant theology. But this conclusion must rest upon some determination as to what a Protestant educational policy or curriculum looks like. Finally, this Court assigned some level of religious significance to the lack of affiliation with another church or religious organization, thereby effectively imposing a particular "ecclesiology" on the organizations.

More generally, this Court's search for religious meaning requires not only a weighing of each factor but also a weighing of these factors against each other. A government official may be required to determine, for instance, whether an institution is primarily religious if its activities are distinctly religious but its policies and affiliations are not (or *vice versa*). Similarly, would an organization such as the one in *Townley* be primarily religious if it was organized as a nonprofit corporation and/or owned by a church, or if it was a for profit company but it produced Bibles instead of mining equipment? Or would a school similar to the one in *Kamehameha* be treated as primarily religious if, for example, the courses were taught from a distinctly religious perspective, or the school was affiliated with or supported by a religious organization?

In short, this Court's "primarily religious" test in general, and its admonishment to weigh all significant religious and secular characteristics in particular, sets government officials adrift in a sea of subjective religious

determinations which they have no competence or authority to navigate. This test will inevitably produce arbitrary and discriminatory results and it is, in any event, unconstitutional.

## III. An organization qualifies for the section 702 exemption if it is operated primarily for bona fide religious purposes, even if such purposes are similar to secular purposes.

### *A. A religious organization is an organization which embraces its primary purpose(s) for religious reasons.*

The Third Circuit in *Leboon* applied the "primarily religious" multi-factor test and determined that the organization at issue in the case qualified for the section 702 exemption because its "primary purpose was religious." *Leboon*, 503 F.3d at 231; *see also id.* at 229 (concluding that the organization was "primarily a religious organization").

This definition of a religious organization, based on the religious character of its primary purpose(s), is consistent with other statutory definitions. For instance, federal law provides an exemption from unemployment insurance obligations for employers which are "operated primarily for religious purposes." 26 U.S.C. § 3309(b). Similarly, Internal Revenue Code § 501(c)(3) exempts from income tax organizations which are organized and operated exclusively for religious purposes. *See also Widmar v. Vincent*, 454 U.S. at 271 n.9 (explaining

that the distinction between religious and nonreligious speech is based on the purpose of such speech).[4]

The critical point about the *Leboon* definition is that although it requires an organization to be operated primarily for a purpose that is religious, it does not require that such purpose be "exclusively religious." The court in *Leboon* rejected an argument that a Jewish Community Center was not a religious organization because it promoted principles, such as tolerance and healing the world, which are shared by nonreligious persons. The court held that "[a]lthough the [community center] itself acknowledges that some of these principles exist outside Judaism, to the extent that [the community center] followed them as Jewish principles this does not make them any less significant." *Leboon*, 503 F.3d at 230.

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[4] As another instructive example, the state constitutional basis in Colorado for exemption from property tax for religious uses is as follows: "Property, real and personal, that is used solely and exclusively for *religious worship* . . . shall be exempt from taxation. . . ." Colo. Const. Art. X, Sect. 5 (emphasis added). Recognizing the difficulty of defining religious worship, the Colorado statutes provide that "[p]roperty, real and personal, which is owned and used solely and exclusively *for religious purposes* and not for private gain or corporate profit shall be exempt. . . ." C.R.S. 39-3-103(1) (emphasis added). When enacting this statutory language, the general assembly made the following finding:

> The general assembly hereby finds and declares that religious worship has different meanings to different religious organizations; . . . and that *activities of religious organizations which are in furtherance of their religious purposes constitute religious worship* for purposes of . . . the Colorado constitution. C.R.S. 31-3-106(2) (emphasis added).

This precise point was also made by the court in *University of Great Falls* in response to an argument that the university was not sufficiently religious because it promoted values similar to those taught at secular institutions (*e.g.*, character, competence and community). The court observed that this fact:

> . . . says nothing about the religious nature of the University. Neither does the University's employment of non-Catholic faculty and admission of non-Catholic students disqualify it from its claimed religious character. *Religion may have as much to do with why one takes an action as it does with what action one takes*. That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious.

278 F.3d at 1346 (emphasis added).[5]

Like the university in *Great Falls* and the community center in *Leboon*, World Vision furthers purposes that are both religious and secular. As the district court in the instant case observed, "while providing humanitarian services may be a secular activity, for Christians this type of activity is so motivated by their faith and part of their Christian identity that it must be considered a religious activity."

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[5] Regarding the religious foundation for the University's values, the court noted that: "The University of Great Falls in its mission statement defines its mission "as an expression of the teaching mission of Jesus Christ." In its expression of its philosophy and purpose, it calls upon its faculty and staff to join with the students in developing "character . . . competence . . . [and] commitment." But it goes further than that. It defines character in terms of recognition and acceptance of personal accountability by the students "to themselves, to society, and to God." *Id*.

*Spencer*, 2008 LEXIS 40938 at *18. In short, the purposes and activities of a religious organization are no less religious merely because others may embrace similar purposes or conduct similar activities for nonreligious reasons. Accordingly, *religious purposes* cannot be limited to *exclusively religious purposes* (*i.e.*, only those purposes that could not be embraced for nonreligious reasons).

By way of contrast, Appellants argue that section 702 does not apply to organizations whose "primary purpose is one that, like education, is not the exclusive province of religion." App. Br. at 12. Put differently, an organization only qualifies if its activities constitute a "principally religious endeavor," and its purpose is "uniquely religious." *Id.* at 12-13. Accordingly, based on a review of World Vision's humanitarian purposes and activities, Appellants argue that World Vision does not qualify as a religious corporation because its activities are not "expressly religious in nature" and it is not owned or controlled by a specific church or denomination. *Id.* at 30.[6]

[6] Appellants concede that an organization controlled by a church qualifies as a section 702 religious organization even if it conducts activities which are not expressly (or exclusively or uniquely or principally) religious. Accordingly, Appellants' position appears to be that Congress intended to exempt an organization serving humanitarian needs in furtherance of a religious mission if it is controlled by a church, but not to exempt an identical organization serving an identical religious humanitarian mission if it is not church controlled.

Appellants' position that religious purposes are not religious if they are embraced for nonreligious reasons is not only inconsistent with the case law described above, but it also effectively secularizes a vast array of religious activity. It would essentially mean, for instance, that six of the Ten Commandments (honor your parents and do not murder, steal, lie, covet or commit adultery – Exodus 20: 2-17) are no longer religious because they have been widely embraced by society. Religious organizations formed to fulfill these particular Commandments would not be religious, nor would religious humanitarian organizations, soup kitchens, hospitals, and educational institutions. Indeed, applying this position, Mother Theresa's activities to serve the poor out of obedience to God would not qualify as serving a religious purpose.

In addition, this narrow interpretation provides no consistent rule for identifying activities which are "expressly religious." In this regard, the extent of distinctly religious content in a particular activity is not a reliable indicator of the activity's religious character. Bible reading is a "principally religious endeavor" if performed out of a desire to know and obey God, but it is an "essentially secular activity" if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Smoking peyote and

killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993).

### *B. Government officials may inquire into whether an organization's representations regarding its religious purposes are bona fide.*

As discussed in Section II above, federal constitutional principles limit the scope of inquiry government officials may conduct into the religious character and mission of an organization. In this regard, the *Great Falls* court cautioned that the "very process of inquiry" into the "'religious mission' of the University," as well as "the Board's conclusions have implicated [] First Amendment concerns. . . ." *Great Falls*, 278 F.3d at 1341 (citing *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979)); *see also Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality) ("It is well established, in numerous other contexts, that Courts should refrain from trolling through a person's or institution's religious beliefs.").

In *Unification Church v. Immigration and Naturalization Service*, 547 F.Supp. 623 (D.D.C. 1982), the court remarked that while the Immigration and Naturalization Service ("INS") exercises "delegated power" from Congress with respect to admission of aliens, it is unlikely that Congress granted the INS "authority . . . to establish 'criteria' by which religions may be qualitatively

appraised, particularly in light of the deference the Establishment and Free Exercise Clauses must be accorded when no issue of alienage is involved." *Id*. at 628 (citing *Larson v. Valente*, 456 U.S. 228 (1982)). As a result, the court concluded "that when Congress permitted an alien's status to turn upon religious considerations[,] it intended that the INS do no more than to determine if the religion in question is *bona fide*. A more invidious use of the government's power over aliens should require more explicit legislative direction." *Id*.

As this case suggests, although the First Amendment limits governmental inquiry regarding religious matters, it does not preclude government officials determining whether an organization is making false statements regarding its religious beliefs. Although the court in *University of Great Falls*, held that the NLRB's "substantial religious character" test violated the First Amendment, it nevertheless held that the religious character of an organization may be determined by confirming that the organization's religious representations are bona fide (*e.g.*, that it holds itself out to the public as a religious organization). *Id*. at 1344.

In this regard, government officials may confirm that the asserted religious beliefs and mission are not merely a sham and that there is at least a plausible connection between the organization's activities and its stated purposes. For example, government officials could inquire into whether an organization has

consistently asserted a religious basis for its purposes or whether it is opportunistically asserting such a basis merely to claim an exemption. Similarly, they could challenge the declaration of an organization which claims to be engaged in providing food and shelter for the poor but is actually running a software business.[7] As these examples indicate, governmental officials can examine an organization's activities, but only for the limited purpose of verifying that its representations are bona fide and sincerely held.

## CONCLUSION

*Amici* obviously agree with the district court in this case that World Vision is a religious organization under section 702. However, the description of the applicable law provided by the district court in its decision fails to articulate clearly the limiting principles set forth in this brief. Therefore, *amici* respectfully request this Court to refine its definition of the "primarily religious" test by adopting these principles. Specifically, any organization which is operated primarily for a religious purpose is a religious organization, a religious purpose need not be exclusively religious, and government officials may only inquire into whether an organization's representations regarding religious matters are bona fide. Based on

[7] Of course, as discussed above, government officials cannot require that such corroborating evidence include distinctly religious content.

this refined test, World Vision is clearly a religious organization under section 702 of Title VII.

Respectfully submitted this 25th day of November, 2008.

HOLME ROBERTS & OWEN LLP

s/ Eric Bentley
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## CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that the foregoing **BRIEF OF *AMICI CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL and COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION** is proportionately spaced, has a typeface of 14 points or more and contains 6,995 words.

By: s/ Eric Bentley
Eric Bentley
Attorney for *Amici*
Counsel of Record

Dated: November 25, 2008

## CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2008, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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