

No. 08-1371

In The
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER
OF UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

**BRIEF OF AMICI CURIAE ASSOCIATION OF
CHRISTIAN SCHOOLS INTERNATIONAL, AZUSA
PACIFIC UNIVERSITY, BETHESDA MINISTRIES,
CHERRY HILLS COMMUNITY CHURCH,
CHRISTIAN CAMP AND CONFERENCE
ASSOCIATION, COLORADO CHRISTIAN
UNIVERSITY, COMPASSION INTERNATIONAL,
COUNCIL FOR CHRISTIAN COLLEGES &
UNIVERSITIES, CRISTA MINISTRIES, CROSSWAY
BOOKS & BIBLES, CROSSWORLD, DENVER
RESCUE MISSION, MOODY BIBLE INSTITUTE,
MOPS INTERNATIONAL, PRISON FELLOWSHIP,
REGENT UNIVERSITY, SAMARITAN'S PURSE, SIM
USA, INC., THE ALLIANCE DEVELOPMENT FUND,
THE BIBLE LEAGUE, THE CHRISTIAN AND
MISSIONARY ALLIANCE, THE EVANGELICAL
ALLIANCE MISSION, THE ORCHARD
FOUNDATION AND WORLD VISION, INC.
IN SUPPORT OF PETITIONER**

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**STATEMENT OF INTEREST
OF *AMICI CURIAE*¹**

Amici constitute a diverse group of religious organizations and collectively they conduct many different types of activities including humanitarian relief, care for seniors, education at all levels and training in religious texts and religious living. Their programs include both distinctly religious activities such as the study of sacred texts, prayer and sacramental services, and a wide range of other activities that serve social needs as an exercise of religious conviction. These institutions conduct all of their activities out of a Christian motivation and in furtherance of their respective Christian missions.

Like Christian Legal Society (“CLS”) and many other religious organizations, *amici* are guided by their beliefs to carry out their activities as associations of like-minded believers, and doing so is an expression of those beliefs. Further, the experience of community within such religious associations often inspires and energizes their service to others. Shared religious belief among those carrying out *amici’s* activities also ensures that these activities are

¹ The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

conducted in a manner that distinctly expresses and exercises their religious convictions. In short, *amici* cultivate, preserve and express their distinctive religious character and mission through their religious associational policies.

Although this case does not address the rights of *amici* and other religious organizations to employ like-minded believers, the decision of this Court could have significant implications for religious hiring rights. As an initial matter, if this Court determines that CLS does not have any constitutional right to religious association in the context of this case, then there will be little constitutional protection for religious employers, particularly if they receive any kind of government benefit, use government buildings such as schools and convention centers and/or participate in government-funded programs. Perhaps even more importantly, how this Court characterizes the religious associational policies and rights of religious organizations in this case will likely establish the framework for future deliberations within all branches of government on questions of religious hiring.

The religious character and mission of the *amici* are as follows.

Association of Christian Schools International (“ACSI”) is the largest association of Protestant schools in the world, having more than 5,000 member Christian schools in more than 100 nations. ACSI is based in Colorado Springs. Its mission is to

enable Christian educators and schools worldwide to effectively prepare students for life.

Azusa Pacific University (“APU”) is a comprehensive, evangelical, Christian university located near Los Angeles. A leader in the Council for Christian Colleges & Universities, APU is committed to God First and excellence in higher education. APU serves more than 8,500 students on campus, online and at 7 regional centers, offering more than 60 areas of undergraduate study, 26 master’s degree programs, and 7 doctorates.

Bethesda Ministries is a nonprofit Christian ministry organization headquartered in Colorado Springs whose mission is to provide child care, education and health care to over 40,000 impoverished children in 19 countries through *Mission of Mercy*. Bethesda Ministries also has a nonprofit subsidiary, whose mission is to care for seniors with dignity, including those whose financial status qualifies them for Medicaid. The subsidiary operates 15 residential senior living communities in 6 states with over 600 employees.

Cherry Hills Community Church, located in Highlands Ranch, CO, was established in 1982. The church is a large, vibrant congregation of everyday people who come together in many ways – in learning and faith, in raising children and strengthening marriages, and in discovering the kind of life God desires. The church supports a variety of outreach ministries including, among many others, programs serving the

urban poor, addressing AIDS issues and providing medical services in India.

Christian Camp and Conference Association (“CCCA”) provides resources for leaders and participants in camping and conference organizations. There are more than 900 Christian camps and conference centers who are CCCA members and every year nearly eight million people participate in their programs.

Colorado Christian University (“CCU”) is an evangelical Christian university with a main campus located near Denver and several satellite campuses throughout Colorado. CCU has over 2,000 students in more than 35 undergraduate and graduate programs. CCU cultivates knowledge and love of God in a Christ-centered community of learners and scholars, with an enduring commitment to the integration of exemplary academics, spiritual formation and engagement with the world.

Compassion International (“Compassion”) is a Christian child advocacy ministry that, in response to Christ’s instructions to his followers (the “Great Commission”), releases children from their spiritual, economic, social and physical poverty and enables them to become responsible and fulfilled Christian adults. Based in Colorado Springs, Compassion provides regular support to more than one million children in 24 countries.

Council for Christian Colleges & Universities (“CCCU”) is an international association of

intentionally Christian colleges and universities. Founded in 1976 with 38 members, CCCU has grown to 111 members in North America and 70 affiliate institutions in 24 countries. CCCU's mission is to advance the cause of Christ-centered higher education and to help its institutions transform lives by faithfully relating scholarship and service to biblical truth.

CRISTA Ministries ("CRISTA") was founded in 1948 and its corporate offices are in Seattle. CRISTA's mission is to love God by serving people – meeting practical and spiritual needs – so that those it serves will be built up in love, united in faith and maturing in Christ. CRISTA has 2 senior living facilities (over 600 residents), 3 broadcasting stations, 2 K-12 Christian schools, a school for at-risk-teens, 2 camps, a veterinary mission and an international relief organization operating as World Concern. World Concern works with communities in some of the most neglected areas of the world, including Myanmar and Chad.

Crossway Books & Bibles ("Crossway") is owned by Good News Publishers. Good News Publishers is a nonprofit Christian ministry founded in 1938 which exists solely for the purpose of proclaiming the Gospel through publishing and all other means, by God's grace. Crossway publishes and distributes the English Standard Version of the Bible. Good News Publishers' principal office is in Wheaton, IL.

CrossWorld was founded as Unevangelized Fields Mission in 1931 with 36 missionaries serving in the Congo and Brazil. Today nearly 400 missionaries serve on 80 teams in 25 ministry areas of the world. CrossWorld serves the church around the world by mobilizing teams to make disciples and train leaders.

Denver Rescue Mission is a Christian organization in Denver that provides shelter, food, clothing, education, Christian teaching and work discipline to meet individuals at their physical and spiritual points of need. Founded in 1892, the organization serves thousands of needy individuals through a range of programs.

Moody Bible Institute of Chicago (“Institute”) was established in 1886 by D.L. Moody. The Institute is a nonprofit organization with broadcasting, publishing, and education branches. Approximately 4,000 students representing over 38 countries study each year in the undergraduate and graduate programs. The Institute has 83 full-time faculty members and approximately 600 employees.

MOPS International, Inc. (“MOPS”) exists to encourage, equip and develop every mother of preschoolers to realize her potential as a woman, mother and leader in the name of Jesus Christ. There are currently over 3,700 MOPS programs at churches around the world, with over 95,000 members. MOPS is a nonprofit organization, and its principal office is in Denver.

Prison Fellowship is a national nonprofit ministry that for over 30 years has focused on transforming prisoners through Jesus Christ. Prison Fellowship helps reduce recidivism by partnering with churches to provide in-prison programs and values-based reentry services and to serve prisoners' children. Prison Fellowship also advocates for needed reforms in the criminal justice system and promotes biblical thinking as it applies to all of life. From its principal office in Lansdowne, VA, Prison Fellowship serves inmates in 1,423 prisons in all 50 states in the U.S. and through Prison Fellowship International, serves prisoners in 110 nations.

Regent University ("Regent") is a higher educational, nonprofit institution based in Virginia Beach, VA. Regent offers rigorous academics within a faith-based context including a multitude of on-campus and online programs available worldwide with over 70 graduate and undergraduate degrees. Regent currently has over 2,100 full-time students and over 2,700 part-time students.

Samaritan's Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ.

SIM USA, Inc. has ministered globally since 1893. The organization's purpose is to glorify God by planting, strengthening, and partnering with churches around the world as it evangelizes the unreached, ministers to human need, disciples believers into churches, and equips churches to fulfill Christ's Commission. The organization is based in Charlotte, NC.

The Alliance Development Fund is a corporate subsidiary of The Christian and Missionary Alliance formed to provide construction loans and other financial services for member churches of the denomination. In so doing, the organization advances the mission of transforming peoples' lives through local Alliance churches.

The Bible League was founded in 1936 by William Chapman, a Chicago area businessman, and its international ministry center is now located in Crete, IL. The Bible League provides scriptures and bible study materials world wide while at the same time training local Christians who use them to lead people to Christ. The Bible League views itself as being called by God to conduct these activities.

The Christian and Missionary Alliance is a church denomination and missionary organization with about 429,000 members in over 2,000 churches in all 50 states. In addition, there are over 800 missionaries in 58 nations supported by the organization. Based in Colorado Springs, the organization

also sponsors a number of educational institutions and retirement centers around the country.

The Evangelical Alliance Mission (“TEAM”) was founded in 1890 as a missions organization. The organization, which is based in Carol Stream, IL, helps churches and missionaries around the globe fulfill their ministries. TEAM characterizes itself as a body of people that are being and building the Body of Christ around the world through missionaries, representatives, and leaders.

The Orchard Foundation is a corporate subsidiary of The Christian and Missionary Alliance formed to provide trust and planned giving services for those who wish to support the ministries of the Alliance.

World Vision, Inc. is the U.S. affiliate of an international Christian relief, development and advocacy organization based in the Seattle area that serves over 100 million people in nearly 100 countries. The organization is dedicated to working with children, families and their communities world wide to overcome poverty and injustice. Motivated by their faith in Jesus Christ, World Vision personnel serve alongside the poor and oppressed as a demonstration of God’s unconditional love for all people.



SUMMARY OF ARGUMENT

This case asks whether a public law school can deny certain benefits to an otherwise qualifying religious student group merely because the group requires its voting members and leaders to subscribe to its religious beliefs. Accordingly, this brief sets forth three foundational points that apply both to the voting member and leadership requirements of religious student groups, and to the religious hiring practices of *amici* and other religious organizations.

1. *Religious association by religious organizations is both an expression and an exercise of their religious beliefs.*

Many churches and other religious organizations are defined by the common religious commitment of their members and employees. As Justice Brennan wrote in this Court's leading case upholding religious hiring rights: "determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). The mere existence of an association defined by the shared religious beliefs of its members can be an expression of those beliefs to others. In addition, many religious associations are grounded in the shared view of their individual members that they have a religious duty to associate with fellow believers. Hence, the association is not only an

expression of religious beliefs to others, but it is also separately and independently an exercise of those beliefs.

2. *The religiously selective policies of religious organizations fundamentally differ from invidious religious discrimination by secular organizations.*

Religious beliefs constitute a core *institutional value* of many religious organizations, and they operate to define such organizations in a manner similar to how nonreligious organizations are defined by their institutional values. Accordingly, hiring based on religion is to many religious organizations what hiring based on academic excellence is to Harvard, or what hiring based on software proficiency is to Microsoft, or what hiring based on commitment to the environment is to the Sierra Club. It is not inherently invidious for employers, whether religious or secular, to require their employees to adhere to their institutional values. Indeed, religious exemptions from religious nondiscrimination laws such as Title VII generally recognize the following key distinction: for many religious organizations, association with fellow believers is essential to the definition, expression and exercise of their religious beliefs; for other organizations, excluding individuals of certain religions reflects nothing but animus and is neither an exercise nor expression of religion by such organizations.

3. *Religious liberty principles of neutrality and deference support a broad exemption from religious nondiscrimination rules for religious organizations.*

Because only religious organizations rely upon religious associational policies to express and exercise their core institutional values, religious nondiscrimination laws impose a unique impact on such organizations. A religious nondiscrimination rule has no impact on the character or mission of Microsoft, for example, or any other nonreligious organization. But that same rule uses religious criteria to undermine the institutional character and mission of religious organizations. Exemptions from such rules for religious organizations, therefore, promote religious neutrality and deference.

These same principles apply to rules imposed as a condition on access to government benefits. Like other organizations, religious organizations may interact with government agencies in a variety of ways, such as from time to time using facilities owned by governmental entities or requesting government funds for a portion of their activities serving specific social needs. However, access to particular government benefits or facilities may be conditioned on the organization's agreement not to discriminate on the basis of religion in its employment (and perhaps leadership), with no exception for religious organizations. This condition effectively requires religious organizations (and only such organizations) to sacrifice their institutional character (*i.e.*, to forego the

religious expression and exercise reflected in their associational practices) in order to receive government benefits for which they otherwise qualify. This religious discrimination results in the “secularization” of the many areas of society in which government is involved. Further, applying the condition to religious organizations does nothing to protect the government’s interest in not conferring benefits on groups engaging in invidious discrimination.

Religious liberty principles also preclude narrow exemptions that purport to exempt only those religious organizations or activities which are determined to be sufficiently religious. The criteria used to distinguish among exempt and nonexempt religious organizations or activities inevitably require government officials to make intrusive religious determinations and/or result in religious favoritism. In addition, exemptions that exclude religious organizations engaged in social services, for instance, may require such organizations to sacrifice their religious character in order to fulfill their religious duties.

Because religious nondiscrimination rules uniquely impair the ability of religious organizations to express and exercise their distinct religious beliefs, *amici* respectfully request this Court to affirm the right of the Christian Legal Society (“CLS”) student group to an exemption from the religious nondiscrimination rules imposed on recognized student groups at Hastings Law School.



ARGUMENT

I. Religious associational policies constitute both an expression and an exercise of religion for many religious organizations and individuals serving diverse roles in society.

The short descriptions of *amici* in the Statement of Interests section of this brief reveal that *amici*, like many other religious organizations, engage in a wide variety of activities serving the physical, emotional and spiritual needs of people. A number of organizations, such as Compassion International, Samaritan's Purse, World Vision, CRISTA and Bethesda Ministries focus on delivering humanitarian relief and basic life sustenance resources and services to the desperately needy. These organizations and others have been on the front lines responding to catastrophic events such as the recent earthquake in Haiti.² In addition, on a daily basis Compassion International, to take just one example, provides food and support for over 1 million needy children in 25 developing countries around the world.

² The Evangelical Council for Financial Accountability, an organization which accredits Christian ministries complying with rigorous financial and governance standards, has posted on its website a list of member organizations responding to the Haiti earthquake. Of the 100 organizations listed, seven are *co-amici* on this brief (including those named above plus CrossWorld and The Christian and Missionary Alliance). See ECFA Servant Match, *available at* <http://www.ecfa.org/ServantMatch.aspx?Type=Haiti> (last visited Jan. 27, 2010).

Other organizations such as Denver Rescue Mission reach out to the homeless and others on the margins of society, providing homeless shelters, meals, and job and life skills training to help these persons work back into society. As another example, Prison Fellowship provides extensive programs to help inmates and their families during incarceration and following release.

While some organizations serve a range of human needs, others focus on the specific needs of certain social segments. For instance, MOPS provides emotional and spiritual support for mothers of preschool children, and Bethesda Ministries and CRISTA each operate senior living centers to serve the elderly. The Association of Christian Schools International has over 5,000 member institutions providing accredited educational programs. The Council for Christian Colleges & Universities likewise has over 100 member institutions, each providing fully-accredited higher educational programs.

Amici and other religious organizations view their respective activities, whether serving the poor or elderly or marginalized, or providing education, or offering distinctly spiritual worship or counseling, both as service to God and as an expression of religious faith. As explained by Justice Brennan in *Amos*: “Churches often regard the provision of [community] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster. . . .” 483 U.S. at 344 (Brennan, J., concurring). But the full expression and, separately,

exercise of religion comes not from conducting such activities, but from conducting them as an association of like-minded believers. This associational expression and exercise applies regardless of the nature of the activities a religious organization may conduct, because it is the associating itself which is the expression and exercise.

A. Association as Expression

Religious organizations adopt religious associational policies to define, nurture and express their religious character and mission. For example, in its mission statement, World Vision describes itself as a “*partnership of Christians* whose mission is to follow our Lord and Savior Jesus Christ in working with the poor and oppressed to promote human transformation, seek justice and *bear witness* to the good news of the Kingdom of God.” Our Mission, *available at* http://www.worldvision.org/content.nsf/about/our-mission?Open&1pos=lft_txt_Our-Mission (last visited Jan. 25, 2010) (emphasis added). Similarly, Samaritan’s Purse affirms that its activities are done “with the purpose of sharing God’s love through His Son, Jesus Christ.” About Us, *available at* http://www.samaritanpurse.org/index.php/Who_We_Are/About_Us (last visited Jan. 27, 2010).

The activities of such organizations are an expression of their religious beliefs, and that is what distinguishes such activities from similar activities of secular organizations. Religious associational policies

help these organizations ensure that their activities maintain their distinctive religious expression. The point is not just that services are being provided, but that services are being provided by religious followers as an expression of their religious beliefs.

Not only does religious association express the religious aspect of an organization's activities, but perhaps even more importantly it also directly expresses religious views. The mere act of associating based on shared religious beliefs is an expression of those beliefs (just as many other organizations consist of like-minded individuals associating to express their commonly held views).

That associations may have an expressive component has long been recognized by this Court. Indeed, this Court has held that such expressive associations are entitled to protection. In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), this Court explained that protecting:

. . . collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, . . . implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

This Court has applied the right of expressive association in a variety of contexts, each time

affirming the right of a group to include only persons who share its message. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640, 649, 655 (2000) (the Boy Scouts); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (parade organizer). As recognized in these cases, religious organizations engage in distinctive expression through their religious associational policies.

B. Association as Religious Exercise

Religious organizations rely upon religious associational policies not only to *express* but also separately to *exercise* their religious convictions. For example, Compassion International performs humanitarian work in response to the “Great Commission” (Jesus’ command to his followers to make disciples). Mission Statement, *available at* <http://www.compassion.com/about/missionstatement.htm> (last visited Jan. 26, 2010). Further, just as with the expressive component of religious associations, an organization’s religious exercise may consist of both its activities and its religious association. The carrying out of certain activities in service to society and the associating with fellow believers are intertwined, and often the latter energizes the former. For instance, TEAM identifies itself as “a body of people that are being and building the Body of Christ around the world.” Who Is Team, *available at* <http://www.teamworld.org/LEARN/Default.aspx> (last visited Jan. 26, 2010).

This Court has repeatedly observed that religious association can be a form of religious exercise. In *Wisconsin v. Yoder*, this Court observed that “Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.” 406 U.S. 205, 210 (1972). This Court further noted that the Amish base this concept on “their literal interpretation of the Biblical injunction from the Epistle Of Paul to the Romans, ‘be not conformed to this world. . . .’” *Id.* at 216.

Subsequently, Justice Brennan in *Amos* observed that:

religious organizations have an interest in autonomy in ordering their internal affairs so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations. . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.

Amos, 483 U.S. at 341-43 (1987) (Brennan, J., concurring) (internal quotation omitted).

Clearly different religious organizations, even those of the same general faith, will reach different conclusions regarding the extent of associational requirements of their faith. Perhaps not many religious organizations believe the requirements apply as broadly as do the Amish. But the important point is that in each case this determination is based on religious beliefs as interpreted and applied by the religious organization, and is therefore religious exercise.

II. The religiously selective policies of religious organizations fundamentally differ from invidious religious discrimination by secular organizations.

Many organizations of all kinds, both religious and nonreligious, adopt forms of mission and/or values statements to which they aspire. For instance, Microsoft affirms that “[a]s a company, and as individuals, we value integrity, honesty, openness, personal excellence, constructive self-criticism, continual self-improvement, and mutual respect.” About Microsoft, *available at* <http://www.microsoft.com/about/default.aspx> (last visited Jan. 29, 2010). Similarly, Harvard College “encourages students to respect ideas and their free expression, and to rejoice in discovery and in critical thought; to pursue excellence in a spirit of productive cooperation; and to assume responsibility for the consequences of personal actions.” The Mission of Harvard College, *available at* <http://www.harvard.edu/siteguide/faqs/faq110.php>

(last visited Jan. 29, 2010). As another example, the Fundamental Principles of the American Red Cross include “promoting mutual understanding, friendship, cooperation and lasting peace among all peoples” and “not tak[ing] sides in hostilities or engag[ing] at any time in controversies of a political, racial, religious or ideological nature.” The Fundamental Principles of the Red Cross, *available at* <http://www.ifrc.org/what/values/principles/index.asp> (last visited Jan. 29, 2010).

Based on their respective institutional values, Harvard may choose not to employ someone who thinks students are not responsible for the consequences of their actions, and the Red Cross may choose not to employ someone who thinks it is important to take sides in political, racial or religious hostilities. In this same way, religious organizations may employ only those individuals who subscribe to their religious values. Put differently, for many religious organizations, religious beliefs are core institutional values. Assuming these institutional values are not inherently invidious, then employment practices based on such values are also not invidious. Accordingly, the religiously selective policies of religious organizations are inherently invidious only if religious associations are by their nature invidious.

This has never been the case. From a moral standpoint, religious selectivity by religious organizations fundamentally differs from invidious discrimination by nonreligious organizations seeking to exclude a particular disfavored religion. This is in part why Congress exempted religious employers

from the religious nondiscrimination requirements under Title VII. *See* 42 U.S.C. § 2000e-1(a) (exempting any “religious corporation, association, educational institution, or society”) (“Section 702”).

At the time Title VII was adopted, the House of Representatives debated an additional exemption specifically for religious schools (which is now codified at 42 U.S.C. § 2000e-2(e)(2)). Proponents of this particular amendment were concerned that the general exemption for religious corporations might be construed narrowly to exclude religious schools. They also argued that the exemption should apply to all positions at religious schools, and that a separate exemption for bona fide occupational qualifications was not sufficient in this regard. Opponents of the amendment did not dispute the principle that religious schools should be exempt, but they thought the exemption should be limited to administrative and faculty positions.

Congressman Purcell, the amendment sponsor, argued for an express exemption on religious liberty grounds:

There may be some who feel that it would be an unwise policy for a church-affiliated school to restrict itself only to members of its own church for its employees, *but certainly it should be their right to do so . . .* The church-related school should never be called upon to defend itself for failure to hire an atheist or a member of a different faith. Also the school should not be called upon to prove in a legal

action that it is protected by a provision of this bill. It should be so spelled out that there is no question of their right to hire employees on the basis of religion.

110 Cong. Rec. 2585 (1964) (emphasis added).

Building on this argument, Congressman Harris emphasized the difficulty for government officials to categorize types of positions within religious organizations:

As an example, let us suppose that Ouachita Baptist College in my district received an application from a person who happened to be an atheist for a position of janitor. Suppose that the college determined it would not be a proper employee. Suppose he made a complaint. Would the Commission then have authority to investigate and take action?

110 Cong. Rec. 2586. In response to this inquiry, and in opposition to the amendment, Congressman Celler expressed his view that “[r]eligion is not, and should not, be a qualification for the job of janitor.” *Id.* Congressman Harris replied with another question: “Suppose a man applied as coach of the football team. Would that be included?” *Id.* This led to the following dialogue:

Mr. Celler: That might be in the nature of an administrative qualification for a football coach.

Mr. Harris: It might be?

Mr. Celler: It might be.

Mr. Harris: But it might not be?

Mr. Celler: I believe it likely would be. I believe it would be administrative.

Mr. Harris: We are getting into very dangerous territory, Mr. Chairman.

Id.

In addition to these religious liberty arguments, a number of representatives noted the valuable contributions religious organizations make to society, and they expressed concern that the religious non-discrimination rules would be imposed on religious schools which were in their districts, or from which they graduated, or on whose governing boards they served. They clearly did not consider these organizations, or their religious hiring policies, to be invidious.

For example, Congressman Roush stated:

I attended a denominational college. I serve on the board of trustees of a denominational college. I lived on the campus of a denominational college. That college insists not only that its administrators, not only its teachers and professors adhere to its religious beliefs, but insists that the janitors and everyone else who is employed by that school adhere to those beliefs.

110 Cong. Rec. 2587. Congressman Chelf added similar sentiments:

I have many splendid Catholic colleges, schools and orders. Why I have the famous and God-fearing order of the Trappist Monks, Baptist colleges, Presbyterian colleges, even some fine Mormons. All of these good people have the right under the first amendment to follow the religion of their own choice.

Id. And Congressman Bennett expressed the key point as a question:

I am on the board of trustees of Lynchburg College, which is a Disciples of Christ Church school. I am happy to be there. I am happy to serve in connection with the old people's home in Jacksonville, Fla., where retired Disciples of Christ people go. They do hire janitors of my faith. They hire charwomen of my faith. *Is there something bad about that?*

Id. at 2592 (emphasis added). *See also*, comments of Congressmen Roberts, Quie, Poage, Gary and Kornegay. *Id.* at 2587-2593. The prevailing view at that time was "no, it's not bad," and the opponents eventually dropped their objections and agreed to the amendment. *Id.* at 2593.

Consistent with this history, the U.S. Department of Health and Human Services has asserted that the Section 702 exemption

reflects Congress's judgment that employment decisions are an important component

of a religious organization's autonomy, and that the government has a much stronger interest in applying a religious nondiscrimination requirement to secular organizations than to religious organizations[,] many of whose existence depends upon their ability to define themselves on a religious basis.

68 Fed. Reg. 56430, 56435 (Sept. 30, 2003). In addition, other courts have recognized the distinction between invidious religious discrimination by secular organizations and the religiously selective policies of religious organizations. *See, e.g., Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 870 (2d Cir. 1996); *see also* Paul Taylor, *The Costs of Denying Religious Organizations the Right to Staff on a Religious Basis When They Join Federal Social Service Efforts*, 12 Geo. Mason U. Civ. Rts. L.J. 158, 181 (2002) ("When a religious group seeks to staff its church outreach program on a religious basis, it is not engaging in the sort of invidious discrimination that is viewed as immoral and thus rightly forbidden by law.").

In short, when religious organizations choose as their employees and leaders only those who agree with their religious beliefs, they are in part doing just what Microsoft, Harvard, the Red Cross and most other organizations do: hiring people who agree with their mission. In addition, they are also engaging in religious exercise. By way of contrast, when a non-religious organization excludes an individual because of his or her religion, it is doing so out of animosity and not as an exercise or expression of religion. The difference is crucial.

III. Religious liberty principles of neutrality and deference support a broad exemption from religious nondiscrimination rules for religious organizations.

Religious liberty as conceived by this country's Founders started with the twin propositions that duty to God transcends duty to society and that true religious faith cannot be coerced. James Madison captured these propositions in his *Memorial and Remonstrance Against Religious Assessments*:

It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Id., reprinted in *Everson v. Board of Education of Ewing*, 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.). Thomas Jefferson incorporated the same propositions into the Virginia Act for Religious Freedom, which in its preamble asserts that any attempt by the government to influence the mind through coercion is “a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do. . . .” Va. Code Ann. § 57-1 (West 2003). Put differently, because individuals possess an inalienable

right and duty to worship God as they deem best, government can have no authority over religious exercise as such.

This Court in 1871 expanded upon and applied these principles in a landmark church property dispute case, stating:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned. All who unite themselves to such a body do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Watson v. Jones, 80 U.S. 679, 728-29 (1871).

Accordingly, religious liberty in our constitutional system protects religious organizations from discriminatory or intrusive governmental action that impairs the religious character of such organizations. As this Court observed in *Yoder*, “. . . in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today’s majority is ‘right’ and the Amish and others like them are ‘wrong.’” *Yoder*, 406 U.S. at 223-24. This Court further noted that “[e]ven their idiosyncratic separateness exemplifies the diversity we

profess to admire and encourage.” *Id.* at 226. Rules of religious neutrality and deference based on these fundamental principles support a broad exemption for religious organizations from religious nondiscrimination rules.

A. Exemptions recognize that religious nondiscrimination rules uniquely burden religious organizations.

Religious neutrality and deference rules fully support exemptions such as Section 702 because such exemptions avoid imposing unique burdens on religious organizations. As an initial matter, this Court in *Amos* recognized that a religious nondiscrimination requirement creates “significant governmental interference with the ability of religious organizations to define and carry out their mission.” *Amos*, 483 U.S. at 335; *see also id.* at 338 (the exemption “lift[s] a regulation that burdens the exercise of religion”).

In addition, the burden imposed on religious organizations is unique to such organizations. It is no burden on Microsoft or Harvard or the Red Cross to comply with a religious nondiscrimination requirement, as religion is simply not part of their defining characteristics. The burden falls solely and squarely on religious organizations.

This Court has held that “the minimum requirement of neutrality is that a law not discriminate on its face[.]” and that “[a] law lacks facial neutrality if

it refers to a religious practice without a secular meaning discernible from the language or context.” *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). Because religious criteria is the basis upon which religious nondiscrimination turns, there is no secular meaning for the prohibited action. Accordingly, religious nondiscrimination rules are not facially neutral with respect to religion.

Also, prohibiting religious discrimination by religious organizations is unrelated to the civil rights law interest in prohibiting invidious discrimination. As this Court noted in *Lukumi*, “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. For these reasons, exemptions for religious organizations help ensure that religious nondiscrimination laws comply with fundamental religious liberty principles of neutrality and deference.

B. This unique impact also applies when religious nondiscrimination is imposed as a condition on access to government benefits.

Some laws and regulations limit the religious exemption by imposing a religious nondiscrimination requirement as a condition on access to certain government benefits (such as the use of a government facility or the participation in a government-funded

program). *See, e.g.*, 42 U.S.C. § 3789d(c)(1) (federally funded program); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (state employee charitable campaign). The issue in these situations is not whether religious organizations should be granted a right that they do not already have, but whether they must forfeit that right when engaged in certain interactions with the government. In the context in which such benefits are made available, the religious nondiscrimination rule imposes the same unique burden on religious organizations as described above under general civil rights laws.

As an initial matter, this Court has repeatedly held that “the liberties of religion and expression may be infringed by the denial of or placing of conditions on a benefit or privilege.” *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). In *Sherbert*, this Court held that government burdens the free exercise of religion when it imposes a condition on the availability of a government benefit that forces someone to choose between the benefit and following a precept of that person’s faith. *Id.*

In addition, a government benefit open to associations formed around virtually any ideology except religion discriminates against religion. Imposing a religious nondiscrimination requirement on religious organizations essentially says that such organizations (and only such organizations) cannot be who they are and participate in government programs. Because the rule results in government benefits being open to associations formed around virtually any

ideology except religion, it effectively “gerrymanders” the marketplace of ideas against a religious presence or voice in any area where the government gets involved. *See Lukumi*, 508 U.S. at 534. Such a rule not only marginalizes religious organizations, but it also harms potential recipients who would prefer but are unable to obtain services from faith-based providers.

The discriminatory impact on religious organizations is compounded by the fact that no policy justifies such discrimination. The nondiscrimination conditions attached to government benefits are intended to ensure that such benefits are not extended to groups engaging in invidious discriminatory practices. But, as noted above, religious associational practices of religious organizations are not invidious. And they do not become invidious merely by virtue of the organization participating in a government program.

Further, providing a benefit to a religious organization under such circumstances does not promote or endorse or fund its hiring practices anymore than it does the hiring practices or criteria of any other participating organization. The government is only funding (and perhaps endorsing) the delivery of the social services or other government benefit for which the organization qualifies on nonreligious criteria. This is why this Court has never prohibited the extension of government benefits to a religious organization solely because of its religiously selective employment policies. Indeed, over 100 years ago, this

Court sustained a contract between the District of Columbia and a private hospital corporation controlled and managed exclusively by members of a sisterhood of the Catholic Church. *Bradfield v. Roberts*, 175 U.S. 291 (1899). In holding that the contract complied with the Establishment Clause, this Court stated: “[w]hether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarian, or members of any other religious organization, or of no organization at all, is of not the slightest consequence . . . ” *Id.* at 298. *See also Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (applying *Bradfield*).

Finally, because an exemption avoids imposing a unique burden on religious organizations, it does not constitute special treatment for such organizations. To the contrary, providing an exemption in a context where the law has no moral relevance is simply good lawmaking. It also advances religious liberty.

C. Attempts to exempt only sufficiently religious organizations or activities lead to unconstitutional religious terminations and favoritism.

Faced with the rationale for religious exemptions discussed above, some governmental entities have agreed to provide an exemption but have limited it to those *activities* or *organizations* which are deemed to be sufficiently religious. These efforts continue to

misconceive the distinction between benign religious selection policies and invidious discrimination. And they also draw government officials into making unconstitutional religious determinations and favoring certain types of religious organizations over others.

In 1972, Congress extended the Section 702 exemption to include all activities of a religious organization, not just its *religious activities* (as the exemption initially provided). In upholding this extension against an Establishment Clause challenge, this Court held that “Congress’ purpose in extending the exemption was to minimize governmental ‘interfer[ence] with the decision-making process in religions.’” *Amos*, 483 U.S. at 336. This 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, this 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.*

More generally, this Court has repeatedly held that government officials have no competence or constitutional authority to interpret or apply religious beliefs, or to determine the religious significance of various activities. *See, e.g., Watson v. Jones*, 80 U.S. 679 (1871); *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).

In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), this Court struck down a statute which 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. This Court noted that the requirement 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). This 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 133.³

³ See also *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981) (“[m]erely to draw the distinction [between religious worship and other religious expression] 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”); *Hernandez v. Commissioner*, 490 U.S.

(Continued on following page)

These cases all recognize that in practice discerning the religious significance of an activity or policy requires doctrinal interpretation. Further, 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 religious activity if performed out of a desire to know and obey God, but it is not 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. Ingesting 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).

These same constraints apply to governmental determinations regarding the religious character of an *organization*. In this regard, 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 Court concluded that the test, which

680, 694 (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).

required the NLRB to consider “all aspects of a religious school’s organization and function,” *id.* at 1339 (quotation omitted), was flawed because it “boils down to ‘is [an institution] sufficiently religious?’” *Id.* at 1343. The court further held that “very process of inquiry” into the “‘religious mission’ of the University,” as well as “the Board’s conclusions have implicated [] First Amendment concerns. . . .” *Id.* 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.”).

A narrow exemption not only creates excessive intrusion, but it may also improperly prefer some types of religious organizations over others based on expressly religious considerations (*i.e.*, how religious each organization is). The Tenth Circuit Court of Appeals recently 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 Tenth Circuit relied in part on this 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 the law nominally applied secular criteria, this Court held that the criteria created an unconstitutional religious preference because it “effectively distinguish[ed] 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 short, a narrow exemption which requires government officials to weigh all significant religious and secular characteristics to determine whether an activity or organization is sufficiently religious sets government officials adrift in a sea of subjective religious determinations which they have no competence or authority to navigate. Such an exemption will inevitably produce arbitrary and discriminatory results.

D. Exemptions should apply to any organization operated primarily for bona fide religious purposes, even if such purposes are similar to secular purposes.

The question for religious exemption purposes should not be whether an organization is “sufficiently religious” as measured by the religious significance of the organization’s activities, policies and affiliation. The question instead should be whether the organization is operated primarily for bona fide religious purposes. In this regard, the Third Circuit Court of Appeals recently determined that an organization qualified for the Section 702 exemption because its “primary purpose was religious.” *Leboon v. Lancaster Jewish Community Center Ass’n*, 503 F.3d 217, 231 (3rd Cir. 2007).

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, the Internal Revenue Code exempts from income tax organizations which are organized and operated exclusively for religious purposes. 26 U.S.C. § 501(c)(3); *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).

To determine whether an organization embraces its primary purpose(s) for religious reasons, government officials cannot (and need not) weigh the religious significance of various characteristics of the organization. But they can determine whether an organization's asserted religious beliefs and mission are merely a sham, or whether there is at least a plausible connection between the organization's activities and its stated primary purposes. For instance, the court in *University of Great Falls* held that the religious character of an organization may be determined by confirming that the organization holds itself out to the public as a religious organization. 278 F.3d at 1344. Similarly, government officials could inquire into whether an organization has consistently asserted a bona fide religious basis for its purposes or whether it is opportunistically asserting such a basis merely to claim an exemption.

Finally, an organization's primary purpose is no less religious merely because it might be embraced by other organizations for secular reasons. 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.

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).

These cases affirm that 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. Put differently, *religious purposes* cannot be limited to *exclusively religious purposes* (*i.e.*, only those purposes that could not be embraced for nonreligious reasons). To hold otherwise would mean that those religious organizations whose religious duty requires them to serve tangible human needs would be required to sacrifice their religious character in order to do so. Such a result trivializes religious liberty.



CONCLUSION

This country has a long tradition of deference for churches and other associations formed around shared religious life and conviction. Our constitutional commitment to religious pluralism respects their duty to their religion, prohibits religious favoritism, and welcomes their distinct contributions to society. For these reasons, *amici* respectfully request this Court to affirm the right of CLS to receive the benefits offered to other student groups while requiring its voting members and leaders to subscribe to its statement of faith.

Respectfully submitted,

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