In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

Columbia Union College,

Petitioner,

v.

Edward O. Clark, Jr., et al.

Respondents.

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QUESTIONS PRESENTED

1. Whether a private church-affiliated college may be compelled to undergo an intrusive investigation of religious speech and practice on its campus, on pain of exclusion from a neutrally available state funding program in which other religious and non-religious colleges participate.

2. Whether, in reviewing government aid to church-affiliated higher education, lower courts should follow Roemer and similar older cases focusing upon each recipient's religiosity, or should instead follow recent cases such as Rosenberger, Witters, and Agostini, focusing upon the neutrality of an aid program as whole and its safeguards to ensure that government funds are spent only for secular program purposes.

LIST OF PARTIES

The parties to this case are petitioner Columbia Union College and respondents are Edward O. Clark, Jr., Edward O. Clark, Jr., the Honorable J. Glenn Beall, Jr., Dorothy Dixon Chaney, Donna H. Cunninghame, John L. Green, Jamie Kendrick, Terry L. Lierman, Osborne A. Payne, Jr., Kathleen Perini, Charles B. Saunders, Jr., Richard P. Street, Jr. and Albert Nathaniel Whiting, in their official capacities as members of the Maryland Commission of Higher Education. Pursuant to Supreme Court Rule 29.6, the Court is advised that petitioner Columbia Union College has no parent companies or subsidiaries that are not wholly owned.

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Columbia Union College respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Fourth Circuit is reported at 159 F.3d 151 (4th Cir. 1998) and is reprinted at pages 1a-55a of the appendix to this petition ("Pet. App."). The opinion of the United States District Court for the District of Maryland is reported at 988 F. Supp. 897 (D. Md. 1998) and is reprinted at Pet. App. 56a-73a.

JURISDICTION

The United State Court of Appeals for the Fourth Circuit issued the opinion below on October 26, 1998. The court of appeals denied a timely request for rehearing and rehearing in banc on December 22, 1998. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the First Amendment of the Constitution of the United States, this case involves Maryland Code § 17-102 through 17-202, and applicable regulations, which are set forth at Pet. App. 81a-102a.

STATEMENT OF THE CASE

This petition seeks review of a court of appeals decision ordering an investigation of religious speech and practice on a college campus. The majority below held that, unless it could be demonstrated by a thorough

on-campus investigation that the college was not "pervasively sectarian," the plurality decision in Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976) compelled exclusion of the college from a neutral program of private college aid made available to every other qualified college in the state, including other church-affiliated colleges. The majority reached this result based upon a view of the First Amendment that conflicts with decisions of this Court, other courts of appeals, and a state supreme court. It did so notwithstanding the fact that it had earlier held that exclusion of the college from the program violated the Free Speech and Free Exercise Clauses. This case calls upon the Court to correct a conflict among the circuits upon the propriety of the religious "inquisition" (as described by the dissenting judge) ordered below. More importantly, it affords an opportunity for this Court to address the confusion generated by the conflict between older cases like Roemer and this Court's more recent Establishment Clause jurisprudence.

The Sellinger Program. In 1971, the Maryland General Assembly created a program of aid to nonpublic institutions of higher education, known since 1993 as the Joseph A. Sellinger Program ("Sellinger Program"). See Md. Code Ann., Educ. § 17-101 et seq. Pet. App. 81a. The Program (named for Father Joseph Sellinger, a Roman Catholic priest) provides state financial aid to a wide range of private colleges. Qualifying institutions receive aid under the Program based upon an automatic formula under which a specified amount of aid is provided to a college for each full-time equivalent student who chooses to attend the college.

Authority to administer the Sellinger Program has been delegated to the Maryland Higher Education Commission ("the Commission"). Md. Code Ann., Educ. § 17-102. Pet. App. 81a-82a. To qualify for funds, an institution must: (1) be a nonprofit private college or university that was established in Maryland before July 1, 1970; (2) be approved by the Commission; (3) be accredited; (4) have awarded the associate of arts or baccalaureate degrees to at least one graduating class; (5) maintain one or more programs leading to such degrees, other than seminarian or theological programs; and (6) submit each new program or major modification of an existing program to the Commission for its approval. Md. Code Ann., Educ. § 17-103. Pet. App. 82a-83a.

The statute commands that no Sellinger funds may be used for sectarian purposes. Md. Code Ann., Educ. § 17-107. Pet. App. 86a. Colleges receiving aid must specify the activities for which Sellinger funds will be used and must certify that no Sellinger money will be used for sectarian purposes. Participating colleges are required to keep Sellinger funds separate from their general funds in a "special revenue account" and to certify their use only for non-sectarian purposes. Md. Regs. Code tit. 13B.01.02.05(G)(2). Pet. App. 98a. The Program includes an audit procedure to ensure that funds are expended only as authorized for non-sectarian purposes.

The funding formula of the Sellinger Program gives no incentive toward attending a church-affiliated college, but instead is intended to aid private higher education neutrally. Of the fifteen institutions which received Sellinger funds for fiscal year 1997, twelve have no religious affiliation and three are affiliated with the Roman Catholic Church. Students enrolled in seminary or theology programs are excluded from the funding calculation for Sellinger recipients. Pet. App. 84a.

Twenty-three years ago in Roemer, this Court upheld the participation of four Catholic colleges in the Sellinger Program against an Establishment Clause challenge. Justice Blackmun's plurality opinion examined a broad range of factors in reaching the conclusion that aid to the Catholic colleges was permissible because they were not "pervasively sectarian." The plurality reviewed, for example, the degree of institutional autonomy from the affiliated church, sources of funding, faculty hiring and student

admissions criteria, requirements of mandatory worship or theology classes, and the presence of classroom prayer. See 426 U.S. at 755-58. While various of the factors pointed in opposing directions, the plurality found that the "general picture" of the institutions supported the district court's finding that the colleges were not pervasively sectarian.

Columbia Union College. Columbia Union College is a private four-year college affiliated with the Seventh-day Adventist Church and located in Takoma Park, Maryland. Columbia Union serves a broad range of students, with 16 majors leading to a bachelor of arts and 17 leading to a bachelor of science degree. The College has been accredited since 1942 as a four year, degree-granting institution by the Middle States Association of Colleges and Secondary Schools.

The secular accrediting agency and the State of Maryland have repeatedly recognized the high quality of Columbia Union's educational programs, particularly in the field of health sciences. In addition to providing quality education, the College presents a distinct viewpoint among the wide variety of Maryland colleges and universities. As stated in the College's Bulletin: "The heart of Columbia Union College is a Christocentric vision that affirms the goodness of life, the value of earth, and the dignity of all peoples and cultures."

Proceedings Below. In January 1990, Columbia Union applied for funds under the Sellinger Program. It was (and is) undisputed that Columbia Union satisfied each of the six neutral secular statutory requirements for participation in the program. In conformance with the statute and regulations, Columbia Union pledged that "none of the state aid received under the State's Program of Aid to Non Public Institutions of Higher Education (Education Article SEC.17-101 et seq.) will be used for sectarian purposes." The College likewise agreed to set up segregated "special revenue accounts" for Sellinger funds and to cooperate with the prescribed auditing procedures.

On April 14, 1992, however, the Commission ruled that Columbia Union was "pervasively sectarian" and concluded that the Establishment Clause required denial of the application based upon the factors considered in Roemer. The Commission adopted a lengthy report prepared by the Secretary of Education, comparing Columbia Union with the Catholic colleges already participating in the program and essentially concluding that Columbia Union was impermissibly "more religious."

On December 27, 1995, Columbia Union requested reconsideration of its application. Columbia Union believed that the Commission's refusal to treat it equally by reason of religious expression and practice on campus had become indefensible in light of this Court's then-recent decision in Rosenberger v. Rector and Bd. of Visitors of the Univ. of Va., 515 U.S. 819 (1995). On January 22, 1996, however, the Commission notified Columbia Union that unless the nature and practices of Columbia Union had changed very substantially since 1992, there would not be any point in reapplying for aid. Pet. App. 57a.

In June 1996, Columbia Union filed this suit against the members of the Commission in their official capacities, seeking declaratory and injunctive relief for constitutional and statutory violations. As part of preliminary proceedings before the district court, Columbia Union submitted a new application for Sellinger funds on November 12, 1996, requesting $806,079 for programs in mathematics, computer science, clinical laboratory science, respiratory care, and nursing. The College provided voluminous documentation concerning its course offerings and other aspects of its campus life. Commission officials agreed that the College had provided sufficient information fully to evaluate its application. They disclaimed any desire for direct inspections or interviews at the College, based on their concern that such measures might lead to problems of "entanglement" under the Establishment Clause. Pet. App. 105a.

On December 10, 1996, the Commission circulated a report prepared by the Secretary of Education recommending denial of funding. Pet. App. 103a-131a. The next day, the Commission convened a meeting. Following brief presentations by the Secretary's office and the College, the Commission voted with one dissent to deny funding and adopt the Secretary's Report, again finding that Columbia Union was "pervasively sectarian." Pet. App. 129a. In adopting the same Report, the Commission reaffirmed Sellinger grants to other church-affiliated colleges: Loyola College, Mount St. Mary's College, and the College of Notre Dame, three of the colleges whose funding was upheld in Roemer. Pet. App. 131a.

On December 24, 1996, Plaintiff filed an Amended Complaint, again alleging that the Commission's discriminatory denial of funding violated Columbia Union's rights of Free Speech, Free Exercise of Religion, and Equal Protection. Both parties filed cross-motions for summary judgment, agreeing that no material facts were in dispute. The district court entered summary judgment in favor of the Commission and against Columbia Union.

The district court held that the Establishment Clause prohibited funding on grounds that the College is pervasively sectarian. The court found that religion was so pervasive at Columbia Union that its secular and religious aspects were "inextricably intertwined," so that its secular functions could not be separated from its religious ones. Applying Roemer, Hunt v. McNair, 413 U.S. 734 (1973) and Bowen v. Kendrick, 487 U.S. 589 (1988), the court held that to allow Columbia Union to participate in the Sellinger Program would violate the Establishment Clause. Pet. App. 61a.

The district court reviewed in detail its assessment of Columbia Union under the numerous factors mentioned in the Roemer plurality opinion, which had upheld aid to the Catholic colleges. The court held that Columbia Union was not "characterized by a high degree of institutional autonomy" because it received financial aid from the Seventh-day Adventist Church, and had a high proportion of Church members on its board of trustees. The court admitted that, in this regard, the College was less sectarian than colleges allowed to receive aid in Hunt and Tilton v. Richardson, 403 U.S. 672 (1971), but nonetheless found that this factor cut against funding. Pet. App. 62a-63a.

The district court found fault with Columbia Union's requirement that "traditional" (18-24 year old) students attend weekly worship services. The district court also expressed its concern that mandatory theology courses might "be devoted to deepening students' religious experiences in the Seventh-day Adventist faith, rather than to teaching theology as an academic discipline." Pet. App. 64a-65a. The district court acknowledged that this had also been the case in Roemer itself, but inexplicably counted this factor against Columbia Union. Id. 64a-65a.

The district court likewise supported its finding that the College was pervasively sectarian by finding that descriptions of academic departments in the College bulletin were "replete with references to religion." The district court found that Columbia Union must be denied funding because "the business department's goal, in addition to graduating students with the requisite technical competence in preparedness, is to instill students with 'an approach to people, work, and life that demonstrates outstanding Christian values and ethics.'" Pet. App. 65a-66a.

Finally, the district court concluded that faculty hiring and admission decisions do not appear to be made "without regard to religion." Pet. App. 66a. Similarly, the district court found fault with the fact that 80% of Columbia Union's traditional students and 20% of its evening students were Seventh-day Adventists. (Interestingly, the district court ignored the fact the fewer than half of Columbia Union's total graduates are Church members.) Id. Again, the district court counted this factor against Columbia Union

notwithstanding the fact that the Catholic colleges granted funding admittedly had even higher percentages of Catholic students.

Having found that Columbia Union was "pervasively sectarian" under the Roemer factors, the district court rejected Columbia Union's contention that it could nonetheless be treated equally in light of this Court's more recent cases such as Rosenberger, Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986), and Agostini v. Felton, 117 S. Ct. 1997 (1997). The district court assumed, without deciding, that the Commission's discriminatory treatment of Columbia Union violated the Free Speech and Free Exercise Clauses, but held that complying with the Establishment Clause was a compelling interest that would justify violation of the Free Speech and Free Exercise Clauses.

On appeal, the Fourth Circuit held that it must first determine whether the exclusion of Columbia Union from the Sellinger Program violated its Free Speech, Free Exercise, and Equal Protection rights.[(1)]

The court of appeals held that Rosenberger governed this question and that Columbia Union had a First Amendment right to participate in the Sellinger Program:

> The Sellinger Program similarly infringed on Columbia Union's Free Speech rights by establishing a broad grant program to provide financial support for private colleges that meet basic eligibility criteria but denying funding to Columbia Union solely because of its alleged pervasively partisan religious viewpoint.

Pet. App. 8a.

The court of appeals concluded, however, that in light of "the direct applicability of Roemer," allowing a pervasively sectarian college to participate in the Sellinger Program would violate the Establishment Clause. Citing dicta from this Court's cases, the court below held that avoiding this Establishment Clause violation was a compelling governmental interest that was sufficient to "justify an infringement on Columbia Union's free speech rights." Pet. App. 9a-10a. In so holding, the Fourth Circuit adopted precisely the mode of analysis that led to this Court's reversal of that court's decision in Rosenberger itself.

The court of appeals rejected Columbia Union's arguments that this Court's more recent precedents indicated that Columbia Union's participation in the Sellinger Program was permissible even if the college were found to be pervasively sectarian. App. 10a-22a. The court noted that, absent direct overruling by this Court, it is not proper for a court of appeals to conclude that more recent Supreme Court cases have "by implication," overruled earlier precedent. Pet. App. 12a-13a, citing Agostini, 117 S. Ct. at 2017; Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

The panel found that these cases could be distinguished based upon the fact that in those cases aid had passed through the fingers of a student or independent agency prior to flowing to a pervasively sectarian institution, while the Sellinger Program pays funding directly to institutions, albeit under a mathematical formula based upon the number of students choosing to attend the institution. Pet. App. 13a-15a (distinguishing Witters). The panel acknowledged that Agostini directly contradicted the Roemer dicta that "no state aid at all" may go to pervasively sectarian institutions. Pet. App. 15a. It nonetheless distinguished Agostini on grounds that there aid did not flow "directly to the coffers of religious schools." Pet. App. 16a. Similarly, the court found Rosenberger distinguishable on the ground that public funds were paid to a printer to offset the religious organization's costs, rather than being paid directly to the organization. Pet. App. 18a.

The court of appeals next turned to the application of Roemer's "pervasively sectarian" analysis to Columbia Union. Notwithstanding the fact that neither the Commission nor Columbia Union believed there were any facts in dispute or that any further discovery was appropriate, the panel found that the record examined in detail by the district court was insufficient to resolve the case. On each of the relevant factors, the panel found that there was not sufficient evidence to make a determination without further factual investigation. Pet. App. 25a-33a.

The majority emphasized that evaluation of whether Columbia Union was pervasively sectarian must be an "intensely factual" determination requiring "a full and complete factual record." Pet. App. 34a. Taking note of procedures that had been followed below in a number of this Court's cases in the 1970's, the panel indicated the necessity of "holding lengthy evidentiary hearings and making numerous factual findings," reviewing "massive testimony and exhibits," "a record of thousands of pages, compiled during several weeks of trial," and other similar procedures. The panel held that while the district court had considered the written record, "it did not begin to explore the college's practices pursuant to those policies." Pet. App. 34- 36a (emphasis added).

The majority stated that the necessary inquiries were "complex, elusive, and heavily fact intensive," and required direct evidence of the college's practices to "determine whether religious indoctrination pervades the institution." For example, the panel indicated the need for "faculty testimony" to determine whether the faculty "taught without fear of religious pressures in classroom presentations." Pet. App. 36a-37a. The panel demanded evidence on whether religious motivations had been considered during faculty hiring and student admissions. Pet. App. 30a-31a. Over the objection of both Columbia Union and the State, the panel demanded investigation and factfinding on whether the "school crafts its teachings based on religious principles of the Seventh Day Adventist Church" and whether "the college's religious mission impinged too greatly on its academic freedom." Pet. App. 28a-29a, 37a.

Chief Judge Wilkinson dissented. At the outset, he noted his conclusion that the neutrality principle reflected in this court's decisions such as Witters, Rosenberger, and Agostini would allow participation by Columbia Union in the Sellinger Program. Judge Wilkinson acknowledged, however, that he did not "write on so clean a slate," since this Court in Agostini and elsewhere has admonished courts of appeals not to find that prior precedents have been "implicitly" overruled. Given the fact that Roemer involved the exact same funding program at issue here, Judge Wilkinson concluded that application of Roemer's pervasively sectarian analysis was compelled absent further direction from this Court. Pet. App. 47a.

As for the investigation ordered by the panel, however, Judge Wilkinson argued that the result did not serve Establishment Clause values, but in fact threatened them:

The majority sets the stage for what should prove to be a relentless inquisition into the religious practices of Columbia Union, its teachers, and its students. To obtain funding, Columbia Union will have little choice but to mold itself to an exhaustive template of "nonsectarianness," jettisoning in the process many of the beliefs and practices that it holds most dear. For these reasons, I believe the result reached by the majority is not only unnecessary, but also threatening to important values inherent in the First Amendment's Speech and Religion Clauses.

Pet. App. 38a. The dissent also noted that the holding was certain to "increase the administrative costs associated with educational programs like Maryland's." Pet. App. 50a. Moreover, the inquiry mandated by the majority would encourage religiously affiliated colleges to "disown their own religious character in order to gain funding," contrary to this Court's instructions in other Establishment Clause cases:

> The scrutiny the majority now demands will encourage them to disown their own religious character in order to gain funding. The result is an Establishment Clause jurisprudence that, far from maintaining government neutrality toward religion, is a ballista, affirmatively attacking an institution's religious foundation.

Pet. App. 51a.

In a petition for rehearing and suggestion for rehearing in banc, Columbia Union objected to the unexpected and intrusive remand ordered by the panel majority, contending that such an investigation itself violated the Establishment Clause. The court of appeals denied rehearing and denied rehearing in banc. Pet. App. 77a-79a. The district court stayed any conduct of further discovery so that Columbia Union could file this Petition. Pet. App.75-76a.

REASONS FOR GRANTING THE PETITION

Arguments can be made for both neutrality and separationism as approaches to the Religion Clauses, but the result below offers the worst of all worlds. A command -- over the objections of both parties -- that every private college funding program must involve intrusive investigations into an institution's "religiosity" can only create uncertainty and expense for colleges and state officials. The result below violates several commands of the First Amendment: it mandates discrimination and hostility toward religion in general; it involves forbidden intrusion by courts into matters of religion; it fosters discrimination among different religions; and it puts the force of government funding behind an incentive to disavow religious belief.

The Court should grant certiorari in order to clarify its First Amendment jurisprudence, and make clear that where a funding program is neutral toward religion, provides funding on the basis of student attendance decisions rather than governmental discretion, and contains safeguards to ensure that program funds are used for secular program purposes, the "pervasively sectarian" inquiry pursued below is simply unnecessary. Rather than focus upon technicalities that are unrelated to the nature and purposes of the program at issue, the Court should return the focus of the analysis to the substantive First Amendment values at stake. None of those values require the discrimination against Columbia Union called for by the court of appeals.

I. THE COURT OF APPEALS' REQUIREMENT OF INTRUSIVE FACTFINDING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND VIOLATES THE ESTABLISHMENT CLAUSE

The extensive investigation into religious practice at Columbia Union ordered by the panel majority below is prohibited by the Free Speech, Free Exercise, and Establishment Clauses. The opinion below reflects confusion and conflict among the courts of appeals that only this Court can correct.

A. The Opinion Below Mandates an Impermissible Judicial Intrusion Into Matters of Religion

This Court has held that "[i]t is not only the conclusions that may be reached by [a government inquiry] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979). The religious investigation ordered below cannot be reconciled with the Court's decisions. Warnings

against formulating legal "tests" that entangle church and state appear in numerous Establishment Clause cases.(2)

Indeed, the inquiry ordered below is precisely what this Court has held in earlier cases that the Establishment Clause prohibits due to excessive entanglement. For example, in New York v. Cathedral Academy, 434 U.S. 125, 132-33 (1977) the Court said in the context of discussing an aid program's auditing procedures:

But even if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute.

> The 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, and it cannot be dismissed by saying it will happen only once.

Id. at 132-33.

The cases discussed above cannot be squared with the Fourth Circuit's application of the "pervasively sectarian" test. The district court will have no choice but to delve into questions of whether teachers' and students' thoughts, words, and deeds are motivated by religious thoughts or principles, or by secular principles that happen to coincide with religious ones. Cf. Pet. App. 32a. If a faculty member exhorts his students to strive for honesty and tolerance of diverse cultures, does this count toward "pervasive sectarianism" because it is consistent with church teaching? Does it matter whether the teacher's motivation for promoting these values was religious? Is he to be cross-examined to find out?

These are matters over which federal courts are not qualified to make a judgment. Given the amorphous nature of the inquiry, it is impossible for anyone involved to have confidence in an "objective" outcome. It is one thing for state authorities to investigate the quality of education as accreditation standards demand, but it is quite another for a civil authority to undertake an investigation and draw conclusions about an institution's religiosity.

Given the confusion in the precedents, it is not surprising that the decision below conflicts with those of other courts of appeals. Compare with the decision below the Sixth Circuit's opinion in Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995), analyzing the Army's exclusion from a "preferred" day-care provider program of day-care facilities allowing grace before meals, Bible stories, and similar activities. Notwithstanding the fact that approval under the program qualified a facility for receipt of cash meal reimbursements from the U.S. Department of Agriculture, the Sixth Circuit held that the Army's regulations violated the Free Exercise clause, and were not justified by any Establishment Clause need to secularize Army-approved day-care facilities. The court thus invalidated regulations that "require the Army to determine exactly how much religion is too much, what is substantive about particular religions and what is merely educational, and when a Provider is using a religious symbol in a 'proselytizing manner.'"

Similarly, other courts of appeals have held that civil courts are without jurisdiction to undertake intrusive

inquiries into matters of religion. In EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996), the court addressed an employment discrimination claim brought over the denial of tenure to a professor of canon law at a university affiliated with the Roman Catholic church. Although the university's denial of tenure was explicitly based upon non-ecclesiastical grounds of scholarship quality, the court of appeals nonetheless held that the inquiry into hiring decisions required by the case was beyond the jurisdiction of a federal court under the Establishment and Free Exercise Clauses.

The D.C. Circuit reached this conclusion despite the fact that it found the eradication of discrimination to be a compelling governmental interest of "the highest order." Id. at 460. The court stated:

> In this case, the EEOC's two-year investigation of Sister McDonough's claim, together with the extensive pre-trial inquiries and the trial itself, constituted an impermissible entanglement with judgments that fell within the exclusive province of the Department of Canon Law as a pontifical institution. See Rayburn, 772 F.2d at 1171 (noting that a Title VII action is a "potentially ... lengthy proceeding" that could subject church personnel and records to subpoena, discovery, and cross-examination). This suit and the extended investigation that preceded it has caused a significant diversion of the Department's time and resources. Moreover, we think it fair to say that the prospect of future investigations and litigation would inevitably affect to some degree the criteria by which future vacancies in the ecclesiastical faculties would be filled. Having once been deposed, interrogated, and haled into court, members of the Department of Canon Law and of the faculty review committees who are responsible for recommending candidates for tenure would do so "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the ... needs of the Department. Id.
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> These conclusions are a sufficient basis for affirming the district court's dismissal of this case under the Establishment Clause.

83 F.3d at 467. It is difficult to imagine analysis more at odds with the panel majority below. The Court should grant certiorari to resolve the conflict.

B. The Result Below Discriminates Among Religions

One of the starkest facts in this case is that Maryland's Catholic colleges have for twenty-three years received Sellinger funding without any investigation or controversy, while an application by a Seventh-day Adventist college was immediately greeted with inquest and rejection. By allowing funding only to colleges which, while religiously affiliated, are in accord with notions of the "permissibly religious" as set forth in the twenty-three year old Roemer plurality opinion, pervasively sectarian analysis mandates discrimination among religions. This Court has said that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982); see also Everson v. Board of Education, 330 U.S. 1, 15 (1947) (no state can pass laws that "prefer one religion over another").

Under the pervasively sectarian analysis -- certainly as applied below -- religions whose demands upon their adherents are sufficiently "loose," "progressive," or "flexible" to meet the Roemer test may obtain funding. Religions whose practices seem less familiar to commission members or judges -- such as the practices of a minority religion like Seventh-day Adventism with its strong belief in community-based reinforcement of spiritual activity -- risk appearing out of step with prevailing norms, and so being denied

the rights afforded citizens of other religious persuasions. See James Davidson Hunter, Culture Wars: The Struggle to Define America 42-46 (1991) (discussing division of American religion between fervent "orthodox" and acculturated "progressive" groups).

Depending upon the decisionmakers' biases and predilections, some religious colleges will look "educational" while others will look "pervasively sectarian." As in this case, decisions of this sort are likely to be arbitrary, lacking in any coherent principle in which citizens can be confident. See Lamb's Chapel, 508 U.S. at 391 (invalidating "religious use" exclusion that allowed for the Salvation Army Youth Band and the Hampton Council of Churches while excluding other religious groups); Rosenberger, 515 U.S. at 850 (Opinion of O'Connor, J.) (invalidating university funding regulations that funded Islamic "cultural" magazine Al-Salam while denying funds to Christian "religious" magazine Wide Awake).

Such discrimination is particularly egregious where, as here, a majority, mainstream religion is preferred over a minority, less traditional religion. See Larson, 456 U.S. at 245. When the government prohibits a minority religion from engaging in activity enjoyed by "Baptists, Methodists, Presbyterian, or Episcopal Ministers, [and] Catholic priests," it engages in impermissible discrimination among religions. See Fowler v. Rhode Island, 345 U.S. 67, 70 (1953). Particular scrutiny is surely appropriate where all applicants from a mainstream religion gain admittance, but the door is barred to a less prominent denomination. Columbia Union hopes its sister institutions affiliated with the Roman Catholic faith will continue to enjoy the benefits of the Sellinger Program, and seeks nothing more than equal treatment.

To include Columbia Union among the other twelve non-church affiliated colleges and three Catholic colleges that receive funding obviously would not involve "endorsement" of Seventh-day Adventism. See Rosenberger, 515 U.S. at 841. Yet citizens affiliated with Columbia Union and the Seventh-day Adventist Church cannot but reasonably conclude from their exclusion that they are "outsiders, not full members of the political community." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (Opinion of O'Connor, J.). This result violates the First Amendment.

C. The Opinion Below Imposes Unlawful Governmental Pressure to Disavow Religious Belief and Practice

At the Commission's meeting to vote on Columbia Union's application, the College president asked this question: "If we recant, would we qualify?" As Judge Wilkinson noted in dissent, that question sums up what this case is all about. Pet. App. 55a. Application of the pervasively sectarian analysis to a college "raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy." Rosenberger, 515 U.S. at 844.

Perhaps even more troubling, the panel majority's analysis creates a powerful incentive to disavow religious belief. The State has no business tempting faculty and administrators with precious educational funding, if only they will soft-pedal their religious convictions. See, e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972) (unlawful to condition receipt of a government benefit on surrender of a constitutional right). Given the close and contradictory analysis of the Roemer "factors" below, even the Catholic colleges must now worry about whether to trim and tweak their policies so as to hang on to Sellinger funding. The potential for waste, confusion, and needless government interference with the free evolution of religious doctrine can only grow. See Karen W. Arenson, Catholic Campuses Face a Showdown on Ties to Church, The New York Times, February 5, 1999 at A1 (discussing proposal to shift control of Catholic colleges to local bishops, require college presidents to take an oath of fidelity to the Church, and restrict faculty recruitment to "faithful Catholics").

The Court has explained that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 226 n.12 (1984). Columbia Union offers one valuable viewpoint among the many presented by private colleges in Maryland. Yet the analysis below distorts a neutral program funding a variety of educational choices into an engine of secular conformity.[(3)]

II. "PERVASIVELY SECTARIAN" ANALYSIS CONFLICTS WITH THIS COURT'S MORE RECENT ESTABLISHMENT CLAUSE JURISPRUDENCE, CAUSING CONFUSION ONLY THIS COURT CAN CORRECT

This case affords the Court an ideal opportunity to clarify aspects of Establishment Clause jurisprudence that have already confused lower courts, and are certain to impose cost and uncertainty on educational institutions throughout the United States. As Judge Wilkinson recognized in dissent, under the Court's "neutrality" analysis in Rosenberger, Witters, and Agostini, Columbia Union can participate equally in the Sellinger Program without violating any Establishment Clause principle. Under the panel majority's approach, colleges and state administrators are guaranteed a future of wasteful and unpredictable litigation. Indeed, it might be argued that any clear rule of decision is preferable to the arbitrary and open-ended proceedings pervasively sectarian analysis demands.

Two Justices have already questioned whether a "pervasively sectarian" analysis should remain part of Establishment Clause jurisprudence given the degree to which it requires close evaluation of whether "too much" religion is being practiced at an institution. See Bowen, 487 U.S. at 624-25 (Opinion of Kennedy, J., joined by Scalia, J.) (questioning whether pervasively sectarian is a "well-founded juridical category" and noting that the proper inquiry "in an as-applied challenge is not whether the entity is of religious character, but how it spends its grant.") The Court should grant certiorari to harmonize its Establishment Clause jurisprudence.

Specifically, the Court should make clear that religiously- affiliated colleges that fully meet the secular standards of a state program can receive equal treatment. Where aid is distributed according to a neutral formula that does not involve religious considerations and state decisionmkers do not make discretionary decisions about the amount of funding given to participants, and where funds are segregated into special accounts for purely secular purposes, the intrusive and constitutionally suspect "pervasively sectarian" analysis need not be undertaken at all.

The Sellinger Program's provisions conform with the substantive rationale of this Court's modern Establishment Clause cases. In Witters, the Court upheld extension of neutrally available vocational assistance to a blind person studying at a private Christian college to become a pastor, missionary, or youth director. The Court emphasized the neutral criteria of the program, under which aid went to religious institutions "only as a result of the genuinely independent and private choices of aid recipients" 474 U.S. at 487, under a funding mechanism that creates "no financial incentive for students to undertake sectarian education." Id. at 488. All this would be true if Columbia Union were given nondiscriminatory access to the Sellinger Program, where eligibility is based on neutral secular criteria and funding is based not upon subjective funding decisions, but upon a mathematical student attendance formula.

The panel majority's only response was to say that Witters is distinguishable because there funds were paid directly to the student, who then transmitted them to the sectarian school. Pet. App.13a-15a. Similarly, the panel distinguished Rosenberger by emphasizing that in that case "no public funds flow directly to [the

religious publication's] coffers" because the funds were paid to a printer. Pet. App. 18a. In light of these distinctions, the court below concluded that these later opinions could not be construed as overruling Roemer.

Perhaps understandably, in view of this Court's admonitions about the proper role of courts of appeals, the panel never undertook any principled analysis of why these distinctions might matter, or whether the substantive Establishment Clause values they serve were already met by other aspects of the Sellinger Program. Only this Court can perform that task. The Court should do so in order to clarify the law, and to relieve colleges like Columbia Union from the prospect of repeated and unpredictable theological audits.

The distinction emphasized by the panel majority -- that Sellinger aid is paid directly -- cannot alone provide a principled basis of decision. In Committee for Public Education v. Regan, 444 U.S. 646 (1980), the Court rejected this formalistic approach: "we decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or the realities of school finance." As the Court explained, "none of our cases requires us to invalidate these reimbursements simply because they involve payments in cash." *Id.* at 658.[(4)]

It cannot be that what mattered in Witters was the formality of a check passing through the student's hands. Rather, it was critical that "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients," that the program was "in no way skewed towards religion," and that the program created no "financial incentive for students to undertake sectarian education." Id. at 487-488.[(5)]

The Sellinger Program fully complies with these substantive principles. Had Maryland set up an aid program that placed the State in the position of making discretionary grants to religiously affiliated schools on a continuing, subjective, ad hoc basis, an Establishment Clause concern might be presented. Providing aid to religious schools in this way could run the risk that the State might tilt the playing field in favor of -- or against -- church affiliated institutions, or might be seen as endorsing religion. No such danger exists with the Sellinger Program, under which all private colleges that meet the neutral criteria of the program receive funding through an objective mathematical formula based upon the number of student credit hours provided at the institution (excluding theological or seminarian students). Md. Code Ann., Educ. § § 17-103. Pet. App. 82a-83a; 17-104. Pet. App. 83a-84a.; Md. Regs. Code tit. 13B.01.02.04. Pet. App. 91a.

On this point, too, the decision below creates a conflict that this Court should address. In Jackson v. Benson, 578 N.W.2d 602 (1998), the Supreme Court of Wisconsin rejected the notion that the path taken by an aid check is more important than the substantive neutrality of the aid program as a whole. Emphasizing the neutral criteria of the school aid program at issue and the fact that the amount of funding (as here) depends upon student attendance choices, the court rejected the notion that the program was unconstitutional because "the State sends the checks directly to the participating private school and the parents must restrictively endorse the checks to the private schools." 57 N.W.2d at 618. Contrary to the court of appeals here, the court held that "the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path." Id. The Court should grant certiorari to resolve the conflict.

Direct payments into the general "coffers" of a religious institution raise the risk that state funds may flow toward worship or other religious practices that serve no secular purpose. This point was recognized in Witters, where the court noted that "aid to a religious institution unrestricted in its potential uses, if

properly attributable to the state, is `clearly prohibited under the Establishment Clause.'" 474 U.S. at 489 (emphasis added). In Rosenberger any such concern was dealt with because state funds were paid directly to a printer for printing services as opposed to being given to the publication as a direct money payment "unrestricted in its potential uses." Justice O'Connor emphasized this point. See 515 U.S. at 850 ("financial assistance is distributed in a manner that ensures its use only for permissible purposes").

Again, under the Sellinger Program, the substantive concern served by the emphasis on the absence of a direct money payment is fully addressed. Funds never flow directly to the "coffers" of any institution. They must instead be placed in a special revenue account to be used for specified secular purposes. Md. Regs. Code tit. 13B.01.02.05 (G)(2). Pet. App. 98a. An application process, pre and post-expenditure affidavits, and post-expenditure audit procedures are in place under the Sellinger Program to ensure that no state monies are used for any religious activity. *Id.* § 13B.01.02.05.

Prior to Agostini, one response to all this might have been to say that the very purpose of the pervasively sectarian analysis was to determine whether an institution was one that could be "trusted" to keep aid money separated for secular uses in this way. See Roemer, 426 U.S. at 755 (purpose is to determine whether "secular activities cannot be separated from sectarian ones"). But Agostini flatly contradicted Roemer's statement that "no state aid at all" may go to a pervasively sectarian institution see 117 S. Ct. at 2010-11, and conclusively rejected the Roemer notion that secular and sectarian activities can never be separated within a pervasively sectarian institution, id. at 2012; see also Regan, 444 U.S. at 660 (Court not willing to assume "bad faith" in the direction of funds by parochial schools).(6) After Agostini, the time has come to clarify this area of the law.

The court of appeals' analysis, in which two clauses of the First Amendment are at war with one another, cannot provide a unified and coherent theory of the Establishment Clause. Scholars may debate whether there should be a range of discretionary governmental action toward religion, between the floor of the Free Exercise Clause and the ceiling of the Establishment Clause. But it cannot make sense to adopt an analysis in which the floor is above the ceiling -- where discrimination against a religious institution violates part of the First Amendment yet another part forbids equal treatment.

A "battle of the clauses" analysis based upon the form of aid risks creation of a Free Speech and Free Exercise right to funding that, ironically, will prove hollow only for religious groups. Should a school administrator who is hostile to a Bible Club, for example,(7) be able to avoid the Club's right to equal access by requiring $100 "rent" for each meeting, then announcing that the only school group that cannot qualify for $100 in aid to pay the rent is the Bible Club because "cash" grants are prohibited? Cf. Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997) (groups advocating lifestyles and actions prohibited by sodomy and sexual misconduct laws must have equal access to government funds). At the end of this path is a First Amendment uniquely hostile to religion.

The law need not take this direction. Application of the principles of nondiscrimination and equal treatment can bring the clauses of the First Amendment into harmony. Perhaps the principle of neutrality cannot solve every Establishment Clause problem in every context. See e.g., Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 771 (1994) (Opinion of O'Connor, J.) (discussing limits of neutrality as a rule of decision in special context of symbolic displays that risk conveying message of government endorsement). But it can solve this one. The Court should address the matter before scarce administrative and educational resources are wasted in trying to comply with unsettled law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Footnotes

1. The Court of Appeals noted that these claims are to be considered as a single constitutional inquiry. Pet. App. 6a n.1, citing Rosenberger, 515 U.S. at 827; Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 389 (1993); Widmar v. Vincent, 454 U.S. 263, 266 (1981).

2. See Rosenberger, 515 U.S. at 844-45 (1995) (cautioning a state university to avoid a policy that required officials to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); Jimmy Swaggart Ministries v. California Board of Equalization, 493 U.S. 378, 396-98 (1990) (cautioning against making distinctions between "core" religious practices and those "peripheral" to the faith); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987) and id. at 344-45 (Brennan, J., concurring)(government should not attempt to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (tax officials should avoid potential entangling inquiry into religious practice); Widmar v. Vincent, 454 U.S. 263, 269-70, 272 n.11 (1981) (rejecting suggestion that Court was required to distinguish between religious "speech" and religious "worship" and exclude the latter from public fora because it would embroil university authorities, and eventually courts, in parsing the meaning of religious words and events).

3. One recent court of appeals decision has affirmed a First Amendment right of academic freedom on the part of a public university to command that one of its professors cease expounding religious ideas on university time. See Edwards v. California University of Pennsylvania, 156 F.3d 488 (3d Cir. 1998), cert. denied, 1999 U.S. Lexus 1094 (U.S. 1999). It is ironic that at the same time the court below has held that Columbia Union has no academic freedom to pursue its own vision without the coercive prospect of losing

funding given to every other qualified Maryland college.

4. Consider how strange the formalistic jurisprudence of the court of appeals looks in terms of results. Because the checks passed though the hands of students in Witters, funding was allowed for Bible college study leading to a career as a pastor. This activity would not even be eligible for funding under the Sellinger Program. Yet funding for mathematics, computer science, and nursing programs is denied to Columbia Union because it would receive funding directly based upon a count of the students who choose to go there rather than having the same funds passed through the possession of the students. This makes no sense.

5. The court below inexplicably rejected Columbia Union's contention that, even under the formalistic view that Witters turned on passing checks through the fingers of students, that case demonstrated that the Commission's exclusion of the College from the Sellinger Program was not "narrowly tailored" to avoid constitutional difficulty where the State could achieve the same funding results by changing its program to channel aid through the students. Pet. App. 9a. The Commission did not even advance evidence of administrative costs in making such a change, much less show a compelling interest in structuring the program in a way that needlessly excludes Columbia Union. With an inclusive alternative readily available, it cannot be correct that the most narrowly tailored approach is the only one that requires violating independent Free Speech and Free Exercise rights.

6. In the same sentence in which it observed in Agostini that the funds at issue did not "reach the coffers of religious schools" because the program was administered by a "local educational authority," this Court approvingly cited Regan, in which direct money payments to pervasively sectarian schools were permitted where (as here) separate special revenue accounts were maintained. *Id.* at 2013.

7. See, e.g., Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839, 848 (2d Cir.) cert. denied, 519 U.S. 1040 (1996). (recounting school board member's effort to persuade district to reject all federal funds so it could avoid mandate of Equal Access Act and bar Bible Clubs).