IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Record No. 00-2193

COLUMBIA UNION COLLEGE,

Plaintiff-Appellee,

v.

JOHN J. OLIVER, JR., ET AL.,

Defendants-Appellants.

BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

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STATEMENT OF JURISDICTION

Jurisdiction in the district court was predicated upon the presence of a federal question. 28 U.S.C. § 1331. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED

Whether the district court properly determined that the Maryland Higher Education Commission failed to meet its substantial burden to justify unconstitutional discrimination against Columbia Union College, a religiously-

affiliated institution of higher education, in denying equal access to state assistance under the Sellinger Program.

STATEMENT OF APPLICABLE STANDARD OF REVIEW

The district court's decision should be affirmed unless the Maryland Higher Education Commission can show that it was clearly erroneous. In its previous opinion, this Court made clear that a pervasively sectarian institution of higher education is not only rare, but it cannot be identified without a searching factual inquiry. Now that the district court has engaged in the excruciating factual examination called for by this Court, the Commission asserts that this Court need not show any deference to the district court's findings. Under the clear law of this Circuit, the Commission is wrong. Worse, the Commission's argument is precisely opposite to its position the last time this case appeared before this Court.

Relying on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), the Commission asserts that "the *de novo* review standard applies to the court's determination that the State's refusal to directly fund Columbia Union violated the First Amendment." Comm. Br. at 7. Previously, the Commission maintained that "[t]he clearly erroneous standard applies to the district court's finding that Columbia Union College is a pervasively sectarian institution." Mar. 13,

1998, Comm. Br. at 12.[1] These two positions share little common ground, and one might expect the Commission to get at least one of them right.

It did not. The Commission rightly acknowledges that in cases involving threats to free speech, appellate courts often must make an "independent examination" of "constitutional facts" — facts central to the constitutional issue at hand. *Bose*, 466 U.S. at 514 n.31. The independent review discussed in *Bose*, however, is designed to "preserve the precious liberties established and ordained by the Constitution." *Id.* at 511. Indeed, *Bose* recognized that in appropriate circumstances, appellate courts must "make an 'independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" 466 U.S. at 499 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

This Court has declined to apply *Bose* when the trial court rules *in favor* of expressive activity. In *Multimedia Publishing Co. of S.C., Inc. v. Greenville-Spartanburg Airport District*, 991 F.2d 154, 160 (4th Cir. 1993), this Court held that "[t]he Bose requirement of independent review doesn't apply to the

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[1] This time around, the Commission does not mention that the *Roemer* plurality applied the clearly erroneous standard of review to the district court's findings that the colleges in that case were not pervasively sectarian. *Roemer v. Board of Public Works*, 426 U.S. 736, 758 (1976) ("We cannot say that the foregoing findings as to the role of religion in particular aspects of the colleges are clearly erroneous. . . . It is not our place . . . to reappraise the evidence, unless it plainly fails to support the findings of the trier of facts.").

Commission's claim that it has been wrongly prevented from restricting speech." *See also Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988) ("When a district court holds a restriction on speech constitutional, we conduct an independent, de novo examination of the facts. . . . When the government challenges the district court's holding that the government has unconstitutionally restricted speech, on the other hand, we review the district court findings of fact for clear error.") (citations omitted); *Planned Parenthood Assoc. v. Chicago Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir. 1985) ("The doctrine of independent review has never been thought to afford special protection for the government's claim that it has been wrongly prevented from restricting speech.").[2] Consequently, the *Multimedia* court applied the ordinary standard of review imposed by Federal Rule of Civil Procedure 52(a) to the district court's factual determinations, notwithstanding the First Amendment issues involved.

This Court already has concluded that the Commission's denial of Sellinger funds violates Columbia Union's free speech rights under the First Amendment. *Columbia Union College v. Clarke*, 159 F.3d 151, 156 (4th Cir. 1998) ("The

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[2] The Courts of Appeals for the Fifth, Tenth, and Eleventh Circuits, however, conclude that the independent review standard applies even when the trial court rules against the government. *Brown v. Palmer*, 915 F.2d 1435, 1441 (10th Cir. 1990), *aff'd on reh'g en banc*, 944 F.2d 732 (10th Cir. 1991); *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1107-08 (5th Cir. 1987). Of course, these cases are not controlling in this Circuit.

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."). By ruling in favor of Columbia Union, the trial court's judgment in this case protects rather than threatens free speech. Accordingly, this Court should apply the clearly erroneous standard to the district court's findings of fact, constitutional and otherwise.

The Commission also argues that Rule 52's "presumption of correctness" has lesser weight in this case because the district court relied solely upon documentary evidence instead of live witnesses. Comm. Br. at 7 (citing *Bose*, 466 U.S. at 500). But Rule 52 was amended shortly after *Bose* to provide that findings of fact shall not be set aside unless clearly erroneous "whether based on oral *or documentary* evidence." Fed. R. Civ. P. 52(a) (emphasis added); *see also* Fed. R. Civ. P. 52(a) advisory committee's note to 1985 Amendment. The Rule now makes clear that appellate courts must apply the clearly erroneous standard "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

For these reasons, the district court's findings of fact are presumptively correct. *Crowe v. Cherokee Wonderland, Inc.*, 379 F.2d 51, 53 (4th Cir. 1967). This Court may reverse the district court's findings only if it concludes that the trial

court's ultimate determinations were induced by an erroneous view of the controlling legal standard, are not supported by substantial evidence, were made without properly taking into account substantial evidence to the contrary, or are against the clear weight of the evidence as a whole. *Dwyer v. Smith*, 867 F.2d 184, 187 (4th Cir. 1989). The clearly erroneous standard applies even when the finding resolves the ultimate issue of the case. *Id*. Finally, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574; *accord Zfass v. Commissioner*, 118 F.3d 184, 188 (4th Cir. 1997).

STATEMENT OF THE CASE

In January 1990, Columbia Union applied for funds under a Maryland state program known as the Sellinger Program ("the Program"). Columbia Union satisfied each of the statutory requirements for participation in the Program. On April 24, 1992, however, the Commission denied Columbia Union's request for funds solely because the Commission believed that the college was a "pervasively sectarian" institution, and claimed that the Establishment Clause of the First Amendment required that Plaintiff's application be denied. J.A. 44. The Commission based its action upon a review of Columbia Union's publications and program descriptions for religious content, evaluation of the religious beliefs of the faculty and student body, examination of worship practices on campus, and similar considerations. J.A. 2155-78.

On December 27, 1995, Columbia Union requested reconsideration of its application. Columbia Union believed that the Commission's discriminatory action had become indefensible in light of the Supreme Court's decision in *Rosenberger v. Rector & Bd. of Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). J.A. 44. On January 22, 1996, however, the Commission notified Columbia Union that "unless the nature and practices of Columbia Union have changed very substantially since 1992, . . . there would [not] be any point in pursuing a new application for private aid." *Id.*

In June 1996, Columbia Union filed this lawsuit against the Commission, seeking declaratory and injunctive relief for constitutional and statutory violations. The Commission moved to dismiss on the ground that Columbia Union's claim was not ripe because it did not have a current application pending, notwithstanding the Commission's earlier pronouncement that there would be no point in filing a new application. *See id*. On October 24, 1996, Judge Kaufman obtained agreement from all parties that Columbia Union would reapply for funds and that the Commission would reconsider that application on an expedited basis. The parties agreed that the application would be considered without an administrative hearing. J.A. 44.

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. See J.A. 34-42.

The Commission held a meeting to evaluate Columbia Union's application on December 11, 1996. J.A. 66-73. Shortly before the meeting, the Commission circulated a report prepared by the Secretary of Education, recommending denial of funding. J.A. 43-62. Following brief presentations, the Commission voted with one dissent to adopt the Secretary's Report, finding that Columbia Union was "pervasively sectarian," and denied its application. J.A. 72. In adopting the same Report, the Commission reaffirmed Sellinger grants to three other church-affiliated colleges: Loyola College, Mount St. Mary's College, and the College of Notre Dame, the same colleges whose funding was upheld in *Roemer*. *See* J.A. 62.

On December 24, 1996, Plaintiff filed an Amended Complaint against Defendant Edward O. Clarke, Jr.,[3] and the other members of the Maryland Higher Education Commission, in their official capacities, seeking declaratory and injunctive relief for constitutional and statutory violations. J.A. 1-14. Columbia Union alleged that the Commission's discriminatory denial of funding violated Columbia Union's rights of Free Speech and Free Association, its rights under the Free Exercise Clause, and its right to Equal Protection. *Id*.

On January 15, 1997, Defendants filed a motion for summary judgment. J.A. 15. On February 14, 1997, Columbia Union filed its cross-motion for summary

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[3] Mr. Clarke has since been replaced by Defendant John J. Oliver, Jr. as the Chairman of the Commission.

judgment. On October 28, 1997, the district court entered an Order granting Defendants' motion for summary judgment and denying Columbia Union's cross-motion. J.A. 167. Columbia Union timely filed a notice of appeal, and on October 26, 1998, this Court vacated and remanded the district court's Order.

This Court held that the Commission had not met its burden to justify entry of summary judgment against Columbia Union. *Columbia Union College v. Clarke*, 159 F.3d 151, 167-69 (4th Cir. 1998). In particular, this Court held that the district court had erred by drawing inferences in the light most favorable to the Commission, and that the available record could not justify a finding on summary judgment that Columbia Union was pervasively sectarian. Over the objection of both parties, this Court remanded for further discovery. This Court also denied Columbia Union's petition for rehearing and petition for rehearing *en banc*. J.A. 194. The Supreme Court, with Justice Thomas dissenting, denied Columbia Union's petition for certiorari. J.A. 200.

On remand, the district court entered an order requiring further discovery and factual development notwithstanding Columbia Union's constitutional objections. The Commission propounded numerous document requests and interrogatories, and took depositions of Columbia Union personnel. Columbia Union likewise obtained document and deposition discovery from the Commission.

On August 17, 2000, the district court found that the evidence failed to show that Columbia Union was "pervasively sectarian," and entered judgment in favor of

Columbia Union. *Columbia Union College v. Oliver*, No. MJG-96-1831, 2000 U.S. Dist. LEXIS 13644, at *44-46 (D. Md. Aug. 17, 2000). J.A. 2883. This appeal followed.

STATEMENT OF FACTS

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" or "Program"). *See* Md. Code Ann. Educ. § 17-101 *et seq.* Named (ironically) for Father Joseph Sellinger, a Roman Catholic priest, the Program provides aid to a wide range of private colleges. Qualifying institutions receive aid under the Program based upon a 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. *Id*.

The Sellinger Program determines fund recipients on a neutral basis, and provides no incentive to attend a church-affiliated college. 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. *See* J.A. 74. Students enrolled in seminary or theology programs are excluded from the funding calculation for Sellinger recipients. Colleges that receive aid must specify the programs for which Sellinger funds will be used, and must certify that no Sellinger money will be used for sectarian purposes. J.A. 28-29. The Supreme Court upheld Sellinger funding of Maryland colleges affiliated with the Roman Catholic Church

against an Establishment Clause challenge in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

Authority to administer the Sellinger Program has been delegated to the Commission. Md. Code Ann. Educ. § 17-102. To qualify for funds, an institution must:

(1) be a non-profit 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. In addition, as noted above, the statute commands that no Sellinger funds may be used for sectarian purposes. Md. Code Ann. Educ. § 17-107.

Columbia Union College. Columbia Union College is a private, accredited, four-year college affiliated with the Seventh-day Adventist Church and located in Takoma Park, Maryland. Columbia Union meets all the statutory criteria for participation in the Sellinger Program. It is undisputed that Columbia Union:

(1) is “a non-profit private college or university that was established in Maryland before July 1, 1970;”

(2) is "approved by the Maryland Higher Education Commission;"

(3) is "accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools;"

(4) has "awarded the associate of arts or baccalaureate degrees to at least one graduating class;"

(5) maintains "one or more earned degree programs, other than seminarian or theological programs, leading to an associate of arts or baccalaureate degree;" and

(6) has "submit[ted] each new program and each major modification of an existing program to the Maryland Higher Education Commission for its review and recommendation as to the initiation of new or modified program."

See J.A. 34-42. As required in the application process, Charles Scriven, then-President of Columbia Union College, pledged by sworn affidavit 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." J.A. 40. Thus, there is no dispute that Columbia Union has met all of the applicable criteria to receive funds under the Sellinger Program.

Columbia Union serves a broad range of students, with 16 majors leading to a bachelor of arts degree and 17 leading to a bachelor of science degree, including biochemistry, business administration, clinical laboratory science, engineering, and mathematics. *See* J.A. 2553 at p. 65-72 (listing majors). A list compiled of all persons who have given guest speeches on campus is another good example of the

breadth of campus offerings.[4] Less than half of the College's graduates in the past five years have been members of the Seventh-day Adventist Church. *See* J.A. 68; 82. The College promotes an atmosphere of inquiry, open mindedness, and appreciation for the value of all people and cultures. No student at Columbia Union is compelled to accept any belief, religious or otherwise. *Id*.

SUMMARY OF ARGUMENT

The State of Maryland has crafted a carefully-drawn program that promotes the State's secular interest in supporting Maryland's institutions of higher education, and also avoids trespassing upon the Establishment Clause. The Sellinger Program not only employs neutral eligibility criteria, but also excludes religion students from its funding determination, prohibits use of aid funds for sectarian purposes, requires special revenue accounts, and implements auditing procedures. These significant safeguards distinguish the Sellinger Program as the paradigm of a responsible and well-constructed program under governing Supreme Court precedent. Rather than defend the legislature's thoughtful structure, the Commission remains committed to a misconstruction of both the Establishment Clause and the record in this case at

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[4] Guest speakers on campus have included, among many, many others, presidential candidate and consumer advocate Ralph Nader, Congresswoman Sheila Jackson Lee of Texas, Hill & Knowlton CEO Tom Budemaster, National Public Radio Senior Religion Correspondent Lynn Neary, *George* magazine writer Peter Maas, *Washington Post* columnist Bob Levey, World Wildlife Fund official Penelope Wiakler, D.C. Mayor Anthony Williams, and the comedy/music group, *The Capitol Steps. See* J.A. 1399-1405.

the price of the continued violation of Columbia Union's First Amendment rights.

Columbia Union did not ask for the remand to the district court. In fact, Columbia Union opposed it at every step, even petitioning the Supreme Court for certiorari to stop what Columbia Union continues to believe was an unconstitutionally intrusive examination of religious faith and practice on its campus. Nonetheless, the remand has now occurred and the district court has found in favor of Columbia Union on grounds that the college is not "pervasively sectarian." Although this Court need only review that conclusion for clear error, the district court's careful opinion on this point is worthy of affirmance under any standard of review.

The law of the Establishment Clause, however, has changed since this Court remanded this case to the district court. Under new and more directly applicable Supreme Court precedent, this Court need not "troll through" Columbia Union's religious beliefs in order to calibrate the Sellinger Program with the Constitution. *Mitchell v. Helms*, 120 S. Ct. 2530, 2551 (2000). In *Mitchell*, six Justices of the Supreme Court not only upheld state assistance to pervasively sectarian schools, but also discarded any presumption that pervasively sectarian primary schools, much less colleges, would necessarily use state assistance for sectarian purposes. In other words, a majority of the Supreme Court has now rejected the presumption that pervasively sectarian schools cannot distinguish between their religious and secular functions. Plainly, answering whether Columbia Union is "pervasively

sectarian" no longer determines the legitimacy of government assistance under the Establishment Clause.

While this Court previously determined that the "pervasively sectarian" inquiry described in *Roemer v. Board of Public Works* defined the constitutional question, that premise has not survived *Mitchell*. Even if *Roemer* — which itself was only a plurality opinion — remains relevant in other contexts, *Mitchell* establishes that courts must now look beyond the "pervasively sectarian" inquiry to determine whether a particular aid program violates the Establishment Clause. After *Mitchell*, the constitutionality of state funding to religious schools depends upon the existence of safeguards designed to prevent government aid from resulting in religious indoctrination and whether recipients receive state assistance pursuant to neutral criteria. Regardless of the religious affiliation of the recipient, state assistance does not offend the Establishment Clause unless there is proof of *actual diversion* of state aid to religious uses.

The record contains no evidence whatsoever that Columbia Union has diverted government funds for sectarian purposes or even that it is likely to do so in violation of Sellinger Program requirements. In light of the Sellinger Program's significant safeguards and neutral criteria, this Court need not engage in the fact-intensive and constitutionally suspect pervasively sectarian inquiry in order to affirm under *Mitchell*. Providing state assistance to Columbia Union College under the Sellinger Program does not threaten the Establishment Clause. This is so not

because of the character of Columbia Union, but because the Program itself meets the standards that the Supreme Court has found sufficient to authorize state funding even to pervasively sectarian schools.

To the extent that this Court continues to believe that the "pervasively sectarian" inquiry maintains some currency, the Court should decline the Commission's invitation to independently reassess the fact-finder's evaluation of the evidence. This is the second time that this case has visited the Court of Appeals. Notwithstanding Columbia Union's opposition, the district court has duly evaluated additional evidence in accordance with the law articulated by this Court, made findings of fact and conclusions of law, and entered a judgment in favor of Columbia Union College. The evidence failed to sustain the Commission's burden to show that Columbia Union's great emphasis on religious faith and practice was maintained "at the expense" of its educational mission. To the contrary, to deny Columbia Union Sellinger funds would violate its free speech rights under the First Amendment.

While the district court's evaluation of the evidence was correct — Columbia Union is not a "pervasively sectarian" institution — this Court need not rely upon this bankrupt doctrine to affirm the trial court. Columbia Union respectfully submits that this Court should "acknowledge what has long been evident," *Mitchell*, 120 S. Ct. at 2556: the Sellinger Program is consonant with the Establishment

Clause not because of the identity of its recipients but because of the carefully crafted provisions of this neutral educational aid program.

ARGUMENT

I. THE SUPREME COURT'S RECENT DECISION IN *MITCHELL v. HELMS* SUPPORTS AFFIRMANCE WITHOUT REGARD TO THE PERVASIVELY SECTARIAN DOCTRINE

Under the Supreme Court's Establishment Clause jurisprudence, both the Sellinger Program and funding under that program to Columbia Union College unmistakably pass constitutional muster. Notwithstanding the district court's factual findings below, Columbia Union believes that state assistance under the Sellinger Program would be constitutional even if Columbia Union rigorously enforced a mandatory worship policy upon its entire student body, studiously exercised a preference for Seventh-day Adventist students and faculty, and was subject to control by the General Conference of the Seventh-day Adventist Church. In other words, the constitutionality of state assistance does not and should not depend upon the importance of religion at Columbia Union. Columbia Union has never retreated from the idea that religious belief, expression, and practice are a critical component of its mission. Prevailing law does not require religiously-affiliated institutions to "recant" in order to participate in a government assistance program on an equal footing with all other qualifying institutions.

Since this Court's previous review of this case, new precedent from the Supreme Court has made clear that the "pervasively sectarian" inquiry is

inconsistent with a modern legal scheme that focuses upon the type of government assistance at issue, how it is used, and the statutory structure in place to husband its distribution. In *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), the opinions of six Justices make clear that the "pervasively sectarian" doctrine is not needed to resolve this case. Unlike the situation 24 years ago when *Roemer* was decided, the identity of a government aid recipient is no longer a viable shorthand for the constitutional inquiry required by the Establishment Clause. Columbia Union therefore urges this Court to affirm the trial court on the ground that the structure and safeguards of the Sellinger Program demonstrate that participation by Columbia Union does not violate the Establishment Clause. *See Jackson v. Kimel*, 992 F.2d 1318, 1322 (4th Cir. 1993) (noting that the Court of Appeals is not constrained by the grounds upon which the district court relied but may affirm the decision below on any legal ground supported in the record).

A. *Roemer* Does Not Determine Whether State Assistance Contravenes The Establishment Clause

Once again, the "issue presented in this case is whether directly granting state funds to Columbia Union would have the impermissible effect of advancing religion." *Columbia Union*, 159 F.3d at 157. To determine whether the Sellinger Program contravenes the Establishment Clause, the Court must examine whether the Program has a secular purpose, or whether its primary effect is to advance or inhibit religion. *See Agostini v. Felton*, 521 U.S. 203, 232-34 (1997). A government aid

program impermissibly advances religion if it: (1) results in governmental indoctrination; (2) defines its recipients by reference to their religion; or (3) creates an excessive entanglement between government and religion. *Agostini*, 521 U.S. at 234. Important to this inquiry is whether the statute employs evenhanded or neutral criteria, and whether it contains safeguards to prevent government funds from sponsoring religious indoctrination. *See Mitchell*, 120 S. Ct. at 2562 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 225-26.

Equally important is the Supreme Court's unequivocal rejection of the rule "that all government aid that directly aids the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225; *accord Mitchell*, 120 S. Ct. at 2559, 2562, 2567 (O'Connor, J., concurring) (quoting this language three separate times).[5] The Court's rejection of such a rule cannot be squared with a presumption or *per se* rule that government assistance to religious schools will be used for religious

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[5] In their *amicus* brief to this Court, the ACLU Foundation of Maryland and the ACLU of the National Capital Area argue that *any* aid to a religious institution, even if the institution is not "pervasively sectarian," contravenes the Establishment Clause if the aid "supplants" rather than "supplements" non-government sources of funding. ACLU *amicus* Br. at 10.

In *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 661-62 (1980), the Supreme Court upheld aid which "supplanted" expenses otherwise borne by parochial schools for state-required testing. Even the dissent in *Mitchell* concedes that a reconciliation between *Regan* and an absolute prohibition on aid that supplants rather than supplements "is not easily explained." 120 S. Ct. at 2588 n.17 (Souter, J., dissenting). At the very least, *Regan* suggests that no "blanket rule" exists. *Id.* at 2544 n.7 (plurality).

indoctrination. Justice O'Connor makes this very point in her concurrence in *Mitchell*:

> [P]resumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause. In *Agostini*, we repeatedly emphasized that it would be inappropriate to presume inculcation of religion; rather, plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination. See *521 U.S. at 223-224, 226-227*. We specifically relied on our statement in *Zobrest* [*v. Catalina Foothills School District*, 509 U.S. 1 (1993)] that a presumption of indoctrination, because it constitutes an absolute bar to the aid in question regardless of the religious school's ability to separate that aid from its religious mission, constitutes a "flat rule, smacking of antiquated notions of 'taint,' [that] would indeed exalt form over substance." 509 U.S. at 13. That reasoning applies with equal force to the presumption in *Meek* [*v. Pittenger*, 421 U.S. 349 (1975)] and [*School District of Grand Rapids v.*] *Ball* [473 U.S. 373 (1985)] concerning instructional materials and equipment. As we explained in *Agostini*, "we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid." 521 U.S. at 225.

120 S. Ct. at 2567.

The "pervasively sectarian" inquiry discussed in *Roemer* represents the presumption that certain religiously-affiliated institutions cannot be trusted, "regardless of the religious school's ability to separate [government] aid from its religious mission," no matter how carefully drafted the statutory scheme, or how secure the safeguards against use of government assistance for religious indoctrination. 426 U.S. at 750. Under *Roemer*, the character of the recipient is the sole dispositive question, and serves as a one-stop-shopping approach to constitutional illegitimacy under the Establishment Clause. The Supreme Court's

repeated approval of state and federal laws that authorize funding to institutions otherwise identified as "pervasively sectarian," however, demonstrates that the character of the institution receiving government assistance is not and cannot be the focus of the constitutional question. *See, e.g.*, *Agostini*, 521 U.S. at 231 (collecting cases); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 10 (1993); *Witters* v. *Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *cf. Rosenberger*, 515 U.S. at 840-41 (finding no Establishment Clause barrier to funding wide variety of religious and non-religious college student organizations); *Virginia College Bldg. Auth. v. Lynn*, No. 992099, 2000 Va. LEXIS 147, at *51-55 (Va. Nov. 3, 2000) (upholding participation by pervasively sectarian university in bond program).

After the Supreme Court's opinions in *Mitchell*, the 24-year old *Roemer* opinion no longer accurately defines the applicable legal standard. Prior to *Mitchell*, *Roemer* was simply inconsistent with the logic and reasoning of the Supreme Court's precedents. Now, a plurality opinion for the Court has declared the "pervasively sectarian" analysis a doctrine "born of bigotry" that should be discarded. 120 S. Ct. at 2552. Despite noting several points of disagreement with the plurality in her separate opinion, Justice O'Connor did not take issue with this point, and in fact explicitly joined in overruling the specific portions of *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Hunt v. McNair*, 413 U.S. 734 (1973), that set forth the operative core of the pervasively sectarian concept.

While Justice O'Connor and Justice Breyer did not join in the plurality's denunciation of the pervasively sectarian doctrine as bigoted, their opinion made plain that the doctrine has now lost all relevance to this case. The Commission has argued, and the district court agreed, that if Columbia Union is "pervasively sectarian," then it cannot receive Sellinger aid because its secular components cannot be separated from its religious components. Justice O'Connor, however, quotes directly from the passages in *Meek* and *Hunt* that once stood for that proposition. *See* 120 S. Ct. at 2563 ("Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion."). *This quoted holding of Meek and Hunt has now been explicitly overruled by a 6-3 vote of the Supreme Court*. The "pervasively sectarian" inquiry of *Roemer* is therefore unnecessary to resolve this case.

The district court below noted correctly that *Mitchell* "did not involve direct funding to an educational institution," and that direct monetary aid raises "special" concerns. 2000 U.S. Dist. LEXIS at *17. Such concerns, however, have not prevented the Supreme Court from authorizing direct monetary payments to sectarian schools. *Regan*, 444 U.S. at 658 ("We decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or to the realities of school finance. None of our cases requires us to invalidate these

reimbursements simply because they involve payments in cash."). In fact, "ample safeguards" provide a sufficient guarantee that monetary assistance will not be used for sectarian purposes. *Id*. at 659; *see also Mitchell*, 120 S. Ct. at 2546 n.8 (noting that monetary assistance is not "*per se* bad"). Furthermore, at least six Justices in *Mitchell* specifically disavowed any presumption that a religiously-affiliated school would necessarily use government aid for religious indoctrination. Without this presumption, the "pervasively sectarian" inquiry cannot answer whether a particular statute violates the Establishment Clause.

The question, then, is whether this Court's obligation to follow ostensibly applicable Supreme Court precedent conflicts with the conclusion that *Roemer* no longer describes the applicable legal standard. *See Agostini*, 521 U.S. at 237. Columbia Union submits that it does not. First, this is not a case in which a prior Supreme Court opinion prohibits the exact type of funding at issue in this case. *Cf. id*. at 208-09 (discussing *Aguilar v. Felton*, 473 U.S. 402 (1985), which disallowed the aid at issue in *Agostini*). The actual holding of *Roemer*, of course, was to *uphold* aid, not to disallow it. Second, this is not a case in which Columbia Union has parsed through the U.S. Reports for hints that the Supreme Court is unhappy with *Roemer*'s underlying assumptions. A plurality of the Supreme Court in its most recent discussion of the Establishment Clause announced that the "pervasively sectarian" inquiry "should be buried now." 120 S. Ct. at 2552. Two further Justices have discarded the presumption that animates the doctrine.

In these circumstances, subjecting institutions like Columbia Union to the intrusive, expensive inquisition required by the pervasively sectarian inquiry is unwarranted. *See Columbia Union*, 153 F.3d at 175-76 (Wilkinson, J., dissenting). Instead, this Court should resolve the case by examining the Sellinger Program's neutral criteria and ample safeguards.

B. The Sellinger Program Meets the Requirements For A Valid Aid Program Outlined in *Mitchell*

What can and does resolve the case — in Columbia Union's favor — is Justice O'Connor's analysis in *Mitchell*. That analysis focuses upon the neutrality and safeguards of the aid program in question. It rejects the notion of "divertibility." It emphasizes a strong presumption that aid will be used in compliance with statutory requirements. And it approves and endorses the adequacy of the very types of safeguards employed by the Sellinger program.

The Sellinger program, like the Chapter 2 program at issue in *Mitchell*, requires as a safeguard that services provided with the aid must be secular in nature. Justice O'Connor expanded upon her holding in *Agostini* to make clear the strong presumption that teachers and administrators can be trusted to comply with those limits. Importantly, that presumption now applies not only to public school teachers as in *Agostini*, but also to teachers in a "*pervasively sectarian*" private school. 120 S. Ct. at 2568. While Justice O'Connor observed that monetary aid raises special concerns under the Establishment Clause, her opinion *rejects* a rule

prohibiting monetary aid outright, and rejects even the "divertibility" analysis proposed by Justice Souter. *Id.* at 2566-67. Indeed, Justice O'Connor described the constitutionality of most respects of the aid program upheld in *Tilton* as turning on the program's *secular content restriction and its prohibition against diverting aid to sectarian uses*. *Id.* at 2567. These features are, of course, present in the Sellinger program, and the same analysis applies here. The Sellinger Program's safeguards — exclusion of religion students from its headcount formula, the prohibition on use of aid funds for sectarian purposes, the requirement of special revenue accounts, and auditing procedures — make it the paradigm of a neutral, responsible, and well-constructed aid program.

The law is now clear that to establish an Establishment Clause violation, "plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes." 120 S. Ct. at 2567 (O'Connor, J., concurring). The Commission has not made such a showing here. Indeed, no Sellinger aid has reached Columbia Union at all. Instead, the Commission has withheld it based upon the presumption of potential misuse that *Mitchell* squarely rejects. Moreover, the Commission has fallen woefully short of proving even the risk of diversion. Justice O'Connor's review of the safeguards of the Chapter 2 program at issue in *Mitchell* emphasizes the requirement of a signed statement from school officials that aid will not be diverted, the requirement that secular uses for the aid be designated, and monitoring provisions. *Id.* at 2569-70. These are indistinguishable

from the specification of uses, affidavit stating that funds will be used only for program purposes, and auditing procedures of the Sellinger program. *See* Md. Code Ann. Educ. § 17-703. Indeed, Sellinger's requirement of "special revenue accounts" where Sellinger funds must be segregated so their use may be audited, *id.*, prevents Sellinger funds from "reaching the coffers" of the college, another factor emphasized by Justice O'Connor as indicating a finding of adequate safeguards under the Establishment Clause.

It is a shame the Commission has chosen to attack equal participation in the program rather than defend the legislature's thoughtful structure — one perfectly consistent with prevailing law. It is particularly unfortunate that the Commission insists upon this course when the price is continued violation of Columbia Union's First Amendment rights. Columbia Union is pleased that the district court found in its favor. But the College should never have needed to undergo years of intrusive and objectionable "pervasively sectarian" litigation in order to receive fair and constitutional treatment. This Court should affirm the district court under *Mitchell* without regard to a "pervasively sectarian" inquiry that denigrates First Amendment rights instead of protecting them.

II. THE ESTABLISHMENT CLAUSE DOES NOT SANCTION DISCRIMINATION AGAINST COLUMBIA UNION COLLEGE

A. The District Court Properly Placed The Burden On The Commission To Demonstrate That Columbia Union is "Pervasively Sectarian"

In accordance with this Court's October 26, 1998, opinion, the district court has examined Columbia Union's statements, policies, and practices, as well as expert testimony in order to evaluate whether Columbia Union exhibited the factual markings of a pervasively sectarian institution. The Commission favored this exercise. Comm. Br. Opp'n Pet. Cert. at 10 ("Review is also premature because the petition raises many disputed issues of fact to be determined by the trial court on remand."). Having defended and advocated this factual inquiry, the Commission now simply disagrees with the district court's evaluation of the record. The district court's conclusions, however, are consistent both with the law articulated by this Court and with the factual record in this case.[6]

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[6] Columbia Union wishes to preserve all additional arguments it has previously advanced in this case. For example, Columbia Union continues to contend, without limitation, that: (1) the constitutionality of the Commission's actions must be judged against the record upon which the Commission actually took those actions in December 1996, and the expansion of the record to consider additional material violates rules against justification of unconstitutional discrimination with after-acquired evidence; (2) the admitted violation of Columbia Union's First Amendment rights to free speech cannot be justified by reference to the Establishment Clause; and (3) whatever the result on other issues, a Sellinger Program administered to exclude Columbia Union cannot pass constitutional muster because it is not narrowly tailored to prevent a constitutional violation.

1. The Commission's Burden to Show that Religious Indoctrination "Thoroughly Dominates" Secular Instruction is Exceedingly High

The Commission does not quarrel with this Court's conclusion that the Supreme Court has "set the bar to finding an institution of higher learning pervasively sectarian quite high." Comm. Br. at 12 (quoting *Columbia Union College*, 159 F.3d at 163). Instead, the Commission argues that the bar is not insurmountable, and that no presumption against such a finding exists. Comm. Br. at 12. The relevant case law, however, favors Columbia Union.

The Supreme Court has never held an institution of higher learning to be "pervasively sectarian." *Columbia Union College*, 159 F.3d at 163 n.4. In fact, the Supreme Court has quite reasonably distinguished colleges and universities from primary and secondary schools for purposes of this inquiry. *Id. (citing Lemon*, 403 U.S. at 616; *Tilton*, 403 U.S. at 686). As a result, "church-affiliated colleges that receive state-funded grants on a neutral basis are presumed not to be pervasively sectarian." *Columbia Union College*, 2000 U.S. Dist. LEXIS at *21 (citing *Minnesota Fed'n of Teachers v. Nelson*, 740 F. Supp. 694, 705 (D. Minn. 1990)). The Commission has cited no authority to the contrary. Furthermore, the district court's conclusion is consistent both with the Supreme Court's distinction between primary schools and higher education, and *Mitchell*'s categorical rejection of a presumption that even a religious primary school cannot distinguish its

educational function from its religious mission. 120 S. Ct. at 2567 (O'Connor, J., concurring).

In a straw-grasping effort to lower the standard for finding a college or university "pervasively sectarian," the Commission cites a trio of Title VII cases that have little to do with the issues before the Court. Comm. Br. at 9-12 (citing *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000); *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997); *EEOC v. Mississippi College,* 626 F.2d 477 (5th Cir. 1980)). The "pervasively sectarian" question is not fairly raised in any of these cases, and is mentioned in dicta in only one — *EEOC v. Mississippi College.* Indeed, these cases address whether federal employment law impermissibly intrudes upon the freedom of religiously-affiliated colleges to carry out their religious mission; they have nothing to do with government assistance to religiously-affiliated schools. *Cf. Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398-99 (4th Cir. 1990) (application of FLSA to church-operated primary and secondary school did not violate First Amendment); *Rayburn v. General Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1169-71 (4th Cir. 1985) (refusing to apply Title VII to decision to deny pastoral position).

In *EEOC v. Mississippi College,* the Court of Appeals for the Fifth Circuit addressed the enforcement of a subpoena in an employment discrimination case levied against a college owned and operated by the Mississippi Baptist Convention. 626 F.2d at 478. Concluding that enforcement of the subpoena would not

implicate the First Amendment, the Fifth Circuit rejected the college's argument that its religious affiliation necessarily precluded application of federal employment law. *Id.* at 487-88. The court's analysis of whether the college was "pervasively sectarian" is neither important to its holding nor required by the subsequent case law. *See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985); *Shenandoah Baptist Church*, 899 F.2d at 1398-99. Indeed, its brief discussion of the issue is inconsistent with the extensive factual inquiry this Court deems necessary before concluding that a college or university is pervasively sectarian. *See Columbia Union*, 159 F.3d at 164 ("the Supreme Court regards a 'pervasively sectarian' college as a rarity, to be so designated only after a thorough and searching inquiry").

The other two employment cases likewise provide no support for the Commission's position. They address solely Title VII's statutory language, not the scope of the Establishment Clause. *Hall*, 215 F.3d at 623-24 (discussing whether college falls with Title VII's statutory exemption for religious educational institutions); *Killinger*, 113 F.3d at 198-200 (same). In fact, the *Hall* court emphasized the distinction between the Title VII exemptions and the definition of a "pervasively sectarian" college by concluding that the college at issue not only qualified for exemption under Title VII, but also received federal funds. 215 F.3d at 625. The *Hall* court even stated that "government funds are most likely available to all institutions of higher learning whether or not they have a religious affiliation."

215 F.3d at 625 (citing and paraphrasing *Siegel v. Truett-McConnell College, Inc.*, 13 F. Supp.2d 1335, 1344 (N.D. Ga. 1994)). Columbia Union fully agrees.

The Commission also cites a recent opinion issued by a federal district court, *Steele v. Industrial Development Board*, 117 F. Supp.2d 693, 2000 U.S. Dist. LEXIS 15816 (M.D. Tenn. Oct. 24, 2000). In *Steele*, the court concluded that use of municipal bonds to finance a construction project for a private religiously-affiliated university would violate the Establishment Clause. *Id.* at *133. As an initial matter, *Steele* involves a bond measure designed to fund a single religious college; it does not address a neutral program, like the Sellinger Program, which distributes funds to all types of private colleges and universities. The *Steele* court also specifically distinguished its facts from those at issue here, noting that "evidence of the pervasively sectarian nature of [the university] is much stronger than that presented in *Hunt*, *Tilton*, *Roemer* or even *Columbia Union College*." *Id.* at *55. Indeed, the court noted that "[e]very [university] student unofficially majors in Bible and all students are required to take one class in the Bible every day of every semester," "[t]he school does not follow the Statement of Principles on Academic Freedom of the AAUP," the factors governing the city's decision to issue the bonds were unclear, and no procedural mechanisms prevented use of the funds for religious indoctrination. *Id.* at *65, *72, *99-100, *111. Finally, the court concluded that in its decision to issue the bonds, including its public announcement of the decision, the municipality provided "nothing to indicate to the reasonable

observer that the government is not entirely endorsing the religious views espoused" by the university. *Id*. at *128-29. In sum, *Steele* bears little resemblance to the case before this Court.

2. The District Court Properly Examined The College As A Whole Without Losing Sight Of The Defects In The Commission's Evidence

The Commission criticizes the district court for failing to "paint a general picture of the institution," and instead employing a "drawing-by-numbers approach" that missed the "cumulative impact" of the evidence. Comm. Br. at 14, 16-17. Specifically, the Commission states that the district court "should have considered the factors [outlined by the Court of Appeals] not solely in connection with the ultimate question of whether Columbia Union is a pervasively sectarian institution, but rather as part of the college's overall composite and also in conjunction with each other." Comm. Br. at 13.

The Commission's argument provides no reasoned basis upon which to vacate the district court's judgment. The Commission not only mischaracterizes what the district court did in this case, but it casts the constitutional inquiry in superficial and virtually unintelligible terms. The significance of the evidence turns solely on its relation to the constitutional question, and the district court deserves praise to the extent it remained mindful of this point. The Commission, on the other hand, would prefer that this Court ignore the defects in its evidence. One way to do that is to emphasize the "general picture" at the expense of the truth.

This Court has rightly acknowledged that no analytical "template" accurately defines an institution as "pervasively sectarian." 159 F.3d at 164. Rather, a "pervasively sectarian" school must bear in some meaningful degree hallmarks such "as mandatory student worship services; an express preference in hiring and admissions for members of the affiliated church for the purpose of deepening the religious experience or furthering religious indoctrination; academic courses implemented with the primary goal of religious indoctrination; and church dominance over college affairs as illustrated by its control over the board of trustees and financial expenditures." *Id.* at 163.

The district court took pains to evaluate the factual record in light of this Court's articulation of the characteristics of a "pervasively sectarian" institution. 2000 U.S. Dist. LEXIS 13644, at *18, J.A. 2897-98. Indeed, the district court recognized that this Court's description of the characteristics of a pervasively sectarian institution "convey[ed] more than a mathematical formula." *Id.* at *20, J.A. 2898. Moreover, the district court evaluated the evidence in light of this Court's observation that the relevant characteristics "fall into four general areas of inquiry: (1) does the college mandate religious worship, (2) to what extent do religious influences dominate the academic curriculum, (3) how much do religious preferences shape the college's faculty hiring and student admission processes, and (4) to what degree does the college enjoy 'institutional autonomy' apart from the church with which it is affiliated." 159 F.3d at 163. Finally, the district court

examined its factual findings and all of the characteristics discussed by this Court, and found that Columbia Union did not "possess 'a great many' of the characteristics necessary, according to the panel majority, to conclude that the college is pervasively sectarian." *Id.* at *45, J.A. 2920.

The Commission objects to the district court's evaluation of the evidence in light of the four general categories identified by this Court. In particular, the Commission takes issue with the conclusion that because Columbia Union's "mandatory worship policy reaches only a minority of students," it is not "being implemented at the expense of secular education." 2000 U.S. Dist. LEXIS 13644 *24, J.A. 2902-03. The district court's finding, however, simply reflects this Court's statement in its opinion that the "reach" of a mandatory worship policy is relevant in evaluating the primary mission of a religiously-affiliated school. 159 F.3d at 165. In contrast, the Commission contends that "the mere fact that the college had *any* mandatory worship policy at all for any students is a relevant part of the overall picture . . . ." Comm. Br. at 14 (emphasis in original). But the district court did not "dismiss" this evidence as the Commission suggests. *Id.* Instead, the district court attempted to evaluate the degree to which Columbia Union's mandatory worship policy might affect its ability to carry out its secular function, and considered this evidence in conjunction with the other characteristics identified by the Court. *See* 2000 U.S. Dist. LEXIS 13644, at *45, J.A. 2920.

The Commission also maintains that the district court should have given stronger weight to the percentage of Adventist faculty at Columbia Union because such evidence is "directly related" to "the degree of religious indoctrination in the courses taught by these individuals." Comm. Br. at 15. The Commission then quotes the following paragraph from *Lemon v. Kurtzman*: "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Id.* (quoting 403 U.S. at 618).

The Supreme Court, however, has rejected the idea that a teacher in a religiously-affiliated school is presumptively likely to inculcate religion. As Justice O'Connor explained in her concurrence in *Mitchell*:

> *Agostini* only addressed the specific presumption that public-school employees teaching on the premises of religious schools would inevitably inculcate religion. Nevertheless, I believe that our definitive rejection of that presumption also stood for — or at least strongly pointed to — the broader proposition that such presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause.

120 S. Ct. at 2567.

The Commission also complains that the district court failed to properly weigh "the large percentage of traditional students who are Seventh-day Adventists." Comm. Br. at 16. The Commission is wrong. The district court considered this evidence, but "considered [it] along with the other characteristics of [Columbia Union]." 2000 U.S. Dist. LEXIS 13644, at *40-41, J.A. 2917.

The Commission implies that the relevant constitutional analysis is like finger-painting, in which the images are unfocused and bleed together. In fact, the Commission wants this Court to look at the surface rather than the substance of the record before it. Whatever the case, the district court's opinion faithfully follows this Court's direction. There is no reason to vacate the judgment below.

B. The Record Supports The District Court's Conclusion That Religious Indoctrination Does Not "Thoroughly Dominate" Secular Instruction At Columbia Union

Throughout its brief, the Commission assumes that the correct analysis in this case is to compare Columbia Union with the average secular college, and that every difference supports a finding against Columbia Union. Every religious reference and every indication that Columbia Union does not provide a permissive and unstructured environment for faculty and students to do whatever they please is a strike against the College. Columbia Union respectfully submits that the question here is not whether Columbia Union is different from the University of Maryland. It is. The question is whether Columbia Union's religious educational mission creates an environment in which religious indoctrination thoroughly dominates secular instruction. Reviewing the entire record with respect to the four factors specified by this Court – (1) mandatory worship, (2) the role of religion in academic courses, (3) faculty hiring and student admissions, and (4) institutional autonomy – the district court's conclusion was not clearly erroneous.

1. Columbia Union's Religious Worship Policy Does Not Overshadow Its Educational Mission

The Commission urges this Court to not look too deeply into the evidence related to Columbia Union's worship policy. Instead, the Commission argues that Columbia Union's mandatory worship policy is significant "regardless of how many students the policy actually requires to attend religious services," that the district court should have ignored evidence related to the Adult Evening Program, and that the Court should consider a mixed bag of other evidence rather than focus on the issue at hand. Comm. Br. at 25-33.

As this Court stated in its previous opinion, the importance of a mandatory worship policy hinges upon the extent to which it suggests that a religiously-affiliated college elevates its religious mission "at the expense" of fulfilling its educational function. 159 F.3d at 164. The district court properly concluded that the limited reach of Columbia Union's policy supports the inference that it is not "being implemented at the expense of secular education." 2000 U.S. Dist. LEXIS 13644, at *24, J.A. 2902-03. Indeed, nothing in the record suggests that the mandatory worship policy is carried out at the expense of educational activities, or that it overwhelms the College's educational functions.

In an effort to prune the record of evidence that does not suit its conclusion, the Commission contends that this Court should ignore evidence concerning Columbia Union's Adult Evening Program ("AEP"). Comm. Br. at 26. The

Commission offers no legal justification for this suggestion. The Commission apparently believes that this Court should ignore the AEP because the AEP produces income that supports Columbia Union's general activities, including the "traditional" program. As an initial matter, the Commission's citation of the record on this point is inaccurate. The actual testimony during discovery, even by the Commission's witness, was that while the AEP generates income for the College, it also furthers Columbia Union's mission by serving the educational needs of the community in which Columbia Union is located. Bartlett Dep., J.A. 1562. In any event, there is no warrant for the suggestion that, in evaluating the "general picture" of a college under the pervasively sectarian test, the Court must exclude any operation that generates income. As usual, this is not a criterion that the Commission has ever applied to any other college, such as the "mainstream" Catholic colleges the Commission funds without question or hesitation.

Furthermore, this Court's analysis in its prior opinion plainly *included* the AEP, adjunct faculty members, and other aspects of Columbia Union that the Commission would like to ignore. *See e.g.*, 159 F.3d at 164 ("[t]his limitation, combined with Columbia Union's liberal excuse policy, results in only about 350 to 400 of Columbia Union's 1172 students being required to attend services. Well over half of the student body, therefore, is *not* so compelled."); *id*. at 166 ("however, when part-time instructors are included, only 57 percent of the faculty are Adventists"). The Commission repeatedly criticizes the district court for failing

to look at the *entire* picture. This Court should take the Commission at its word, and reject its invitation to ignore the parts of Columbia Union that the Commission finds inconvenient.

The Commission also criticizes the district court for discounting other evidence designed to establish "the religious overtones" at the College. The Commission spends pages denigrating the "lifestyle" policies of Columbia Union, pretending that they are relevant to the issue of mandatory worship. For example, the Commission takes issue with the fact that "meals in the cafeteria are vegetarian," that "partaking of tobacco, alcohol, and drugs is prohibited," that students are asked to "attire and adorn themselves appropriately," that "premarital and extramarital sexual relationships" are contrary to College policy, and the like. Comm. Br. at 29-31. Even if many of these and similar policies are consistent with religious practice, surely the *voluntary* decision of the College and its students to associate with one another in a community committed to these norms of behavior does not provide a legitimate basis for denying the College equal treatment. *Cf. Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2455 (2000) (discussing Boy Scouts' right to freedom of expression).

Lastly, the Commission argues that "Columbia Union's substantial religious character is perhaps best documented by the fact that students *are* expected to attend religious services." Comm. Br. at 32. In particular, the Commission relates that "[d]uring the Fall 1999 semester, at least 15 students were counseled by the

administration for failure to attend chapel." *Id.* These "enforcement" figures cited by the Commission indicate that 10 or 15 students out of 1,055 enrolled students were "approached" by the Associate Vice President for Student Services for failure to attend workshop services or chapel. In other words, fewer than 1% of the student body was involved in this enforcement process.

The district court properly rejected the Commission's effort to misdirect the constitutional inquiry to focus on the principles held by a community of believers. Even if "some of the[] [lifestyle policy] requirements are not found at secular institutions," Comm. Br. at 32, the question is not whether Columbia Union is a secular institution. More important, the evidence presented by the Commission "does not change the basic fact that the mandatory worship policy (the subject of this inquiry), as opposed to the college's general code of conduct, applies only to a minority of [Columbia Union] students." 2000 U.S. Dist LEXIS 13644, at *23 (footnote omitted), J.A. 2901-02. The Commission therefore failed to demonstrate "that the [mandatory worship] policy is being implemented at the expense of secular education." *Id.* at *24, J.A. 2903. In sum, the district court's conclusions are not clearly erroneous.

2. The Commission's Arguments Concerning The Role Of Religion In Academic Courses And "Academic Freedom" Are Factually Misleading, Legally Erroneous, And A Danger To The Public

The Commission's approach to the role of religion in Columbia Union's academic curriculum not only misrepresents the record, but also presumes that Columbia Union's commitment to religious belief is inconsistent with academic freedom. As noted earlier, the Commission trumpets the differences between Columbia Union and secular institutions to suggest that such differences answer the question before the Court. They do not. Moreover, none of the evidence adduced

by the Commission obscures the fact that Columbia Union's religious educational mission in no way conflicts with its status as a serious academic institution.

a. The Commission's Review Of College Policies Is Incomplete And Misleading, And The True Facts On This Point Support Columbia Union

In its previous opinion, this Court made clear that the presence of statements advocating the teaching of Christian principles in the Columbia Union *Bulletin* and in various class descriptions cited in the summary judgment record did not support a finding of "pervasive sectarianism." The Commission does not take issue with this point, conceding that "written materials may not by themselves be dispositive of whether religion permeates the secular courses offered at Columbia Union." Comm. Br. at 48. This Court also acknowledged the broad variety of courses at Columbia Union, and the fact that much of the descriptive material concerning those courses did not contain religious references. 159 F.3d at 165. This Court stated that in order to meet its high burden, the Commission would be required to show that "the courses at Columbia Union *predominantly focus* on 'deepening students' religious experiences.'" *Id*. (emphasis added).

Notwithstanding its agreement that mission statements are insufficient to demonstrate a "predominant focus" on religious indoctrination, the Commission argues that it has met its burden by highlighting selective excerpts from Adventist and Columbia Union mission and policy statements that stress the importance of religious faith to its educational goals. Comm. Br. at 43-44. In other words, the

Commission quotes the very same type of excerpts from College and Adventist publications that this Court has already concluded are "not enough, in number or in nature" to demonstrate that Columbia Union is pervasively sectarian. *See Minnesota Fed'n*, 740 F. Supp. at 715-20 (granting summary judgment, finding that college with catalog stating that "[c]onsidering education in the light of Christ, there can be no division between sacred and secular subjects" was not pervasively sectarian).

The Commission once again neglects to acknowledge how the statements it emphasizes compare to those found in the documents of the Catholic colleges the Commission funds. *See* Comm. Br. at 50. For example:

- **Mount St. Mary's:** In the classroom, you'll find our Catholic tradition reflected when you explore the contributions made by religious thinkers to our notions of freedom, political liberty and education. You will read traditional authors such as St. Augustine or Thomas Aquinas and contrast them with non-Catholics like Martin Luther, and also with contemporary works of all kinds, applying historical, literary and philosophical methods of inquiry to better understand yourself and others. In other words, when we combine "Catholic" with "liberal arts," the result can be most positive. It's all designed to challenge and strengthen your beliefs, to help you apply them in life.

Mount St. Mary's Prospectus, J.A. 107.

- **Loyola:** As an institution that is both Catholic and Jesuit, Loyola College proudly shares in the educational mission of the Universal Church. That mission of education "concerned with the whole of man's life" was confirmed by the Second Vatican Council as a way of helping "young people . . . in the harmonious development of the physical, moral and intellectual endowments . . . to acquire gradually a more mature sense of responsibility toward enabling their own lives through constant effort and toward pursuing authentic freedom" (Gravissimum Educationia, #1, pg. 639). As an

> apostolate of the Society of Jesus, the Mission of Education has been affirmed by both the 31st and 32nd General Congregations.

Loyola Handbook 5, J.A. 92. Such evidence illustrates that the Commission's nine-year opposition to Columbia Union's effort to obtain Sellinger funds does not depend upon a few statements in its 1998 Institutional Self-Study.

The Commission also criticizes the district court for emphasizing that only a relatively small percentage of course syllabi make reference to religious belief. Comm. Br. at 47-48. In fact, the district court opinion reflects the fact that before the lower court, the Commission made the syllabi a centerpiece of its case. It falsely argued, through the testimony of its expert, Professor Finkin, that the evidence with respect to the syllabi was that *33* out of *40* syllabi contained religious references. Columbia Union then exposed the fact that the actual record evidence indicated the correct number to be 90 syllabi out of 575.[7] Now that the district court has made findings that are not to its liking, the Commission suddenly believes that the syllabi are insignificant. But there is no substance to the Commission's vague assertion that the district court "ignored" the really important evidence, whatever that might be.

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[7] Columbia Union made available to the Commission syllabi for 575 courses. *See* Short Declaration, J.A. 2555 (535 total courses excluding religion department courses). Of those syllabi, 90 contain some reference to religious content or creationism. See *id*. Thus syllabi for *seventeen percent* of Columbia Union's courses contain religious references. Of course, these references constitute only a portion of the relevant syllabi. This evidence supports the district court's findings.

Furthermore, the Commission makes no mention of the district court's emphasis on the "affirmative evidence indicating that secular education is the primary goal of CUC." 2000 U.S. Dist. LEXIS 13644, at *35, J.A. 2912. This evidence, the district court found, establishes that the computer science, biology, chemistry, and engineering curricula at Columbia Union focus on teaching real-world technical skills rather than a religious message. *Id.* at *36, J.A. 2913. The district court also found that religious references drawn from documents related to the business, education, liberal studies, nursing, and psychology departments did not "in context, show that religious inculcation is the primary goal of the courses or is being promoted at the expense of secular education." *Id.* at 34, J.A. 2911.

The Commission's oblique response to the district court's findings is that "[t]he fact that the College trains its students to be nurses and other health care professionals does not transform the institution into one that is secular." Comm. Br. at 47 (quoting *Hall*, 215 F.3d at 625). This argument misses the mark — Columbia Union does not pretend to be a secular institution. It only argues, and the district court found, that religion does not "thoroughly dominate" secular instruction at the school. At most, the Commission presents an alternative view of the evidence, a position that does not support reversing the district court's judgment.

See Anderson, 470 U.S. at 574 (factfinder's choice between two permissible views not clearly erroneous).

b. Columbia Union Complies With The 1940 AAUP Statement On Principles Of Academic Freedom

The district court found no "denial of academic freedom determinatively characteristic of a pervasively sectarian institution" at Columbia Union College. 2000 U.S. Dist. LEXIS 13644, at *30; J.A. 2908. The Commission takes issue with this conclusion because it mistakenly believes that *any* limitation on academic freedom constitutes indicia of a "pervasively sectarian" institution. Unless this Court radically shifts the accepted baseline for academic freedom, the Commission is wrong.[8]

This Court previously noted that Columbia Union's policies in furtherance of its "religious mission" do not support a finding that the College is pervasively sectarian if they are consistent with the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors. This is so because Supreme Court precedent "has expressly credited" the position that practices

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[8] Since *amicus* AAUP concedes that it has no "first-hand knowledge" of the state of academic freedom at Columbia Union, its suggestion that Columbia Union's policy toward academic freedom is inconsistent with the 1940 Statement (or with the AAUP's current revisionist view of the Statement) is beside the point. *See* AAUP *amicus* Br. at 9.

consistent with the 1940 Statement adequately afford "intellectual freedom" in the context of a religious education institution. 159 F.3d at 165. Columbia Union's educational practices (which are no more restrictive than those at some of the Catholic colleges the Commission funds, *supra* at p. 45) are compatible with the 1940 Statement, and thus are consistent with the Constitution. Columbia Union's compliance with the 1940 Statement is a question of fact that the district court resolved in Columbia Union's favor. Based on the evidence in the record, including the expert opinion testimony proffered by Columbia Union, the district court's conclusion is well supported. *See* Prof. Laycock's Report, J.A. 1511-21.

Columbia Union's statement of academic freedom grants faculty members "complete freedom so long as their speech and actions are in harmony with the philosophies and principles of the college — a Seventh-day Adventist institution of higher education." 159 F.3d at 151. The 1940 Statement explicitly recognizes that academic freedom is not incompatible with the legitimate efforts of a religious institution to encourage instructors to promote its mission. The requirement placed upon religious institutions that wish to *comply* with the AAUP Statement is that "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment." 1940 AAUP Statement, Ex. 40.[9] This is known as the "Limitations Clause" of the 1940

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[9] The College of Notre Dame makes explicit reference to this aspect of the

Statement. As Columbia Union's expert witness, Professor Douglas Laycock, explained: "The 1940 Statement requires disclosure of any religious limitations on academic freedom, and Columbia Union College has complied with that requirement." Laycock Rep., J.A. 1521.

In his Report, Professor Laycock examined the policies of Columbia Union, and concluded that the limitations on academic freedom at Columbia Union were compatible with the 1940 Statement. He observed that there were no reported instances of faculty members being disciplined or limited in their teaching by administrative enforcement of any limitation on academic freedom. *See also* Conway Dep., J.A. 1676-77. He observed that Columbia Union afforded to scholars who chose to teach there an environment providing greater academic freedom than would be available at many secular institutions, particularly because secular institutions may *forbid* teachers from exercising their academic freedom to add religious expression to their teaching. *See Bishop v. Aronov*, 926 F.2d 1066, 1078 (11th Cir. 1991) (holding that university restriction on faculty speech concerning religious belief did not violate Religion clauses of First Amendment). The limitations on academic freedom set forth in Columbia Union policies in order

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1940 AAUP statement in its Handbook, which provides that it "accepts these principles of academic freedom *as stated below*." The Handbook then goes on to state that "[l]imitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment." Faculty Handbook 45, J.A. 127.

to further its mission as a Seventh-day Adventist institution are clearly disclosed in advance, and do not limit intellectual freedom in a way that is incompatible with the 1940 Statement. *See* J.A. 1501-21.

The Commission, through its expert Professor Finkin, attempted to proffer a view of academic freedom that is *not* a part of the 1940 Statement. In other words, the Commission seeks to measure Columbia Union against an irrelevant standard. Indeed, Professor Finkin *nowhere* directly stated that Columbia Union is in violation of the 1940 Statement. Rather, he quoted from and discussed a variety of secondary documents that he contended provide the "real" meaning of the 1940 Statement. Specifically, it is Professor Finkin's view that *any* limitation on what a faculty member may teach or say is a violation of academic freedom except a limitation based upon professional competence or ethics. J.A. 1433. As Professor Finkin puts it, "a limit is no less a limit – an infringement – of academic freedom whether generated out of religious or any 'other' proprietary aim." *Id*. at 1435.

Professor Finkin's view advanced here by the Commission — that a church-related college may not place *any* limit on what faculty may teach with respect to matters of religion or otherwise — is *not* what the 1940 Statement provides. Even Professor Finkin finally admitted this under questioning in his deposition. Finkin Dep., J.A. 2692-93. The bottom line is that the Commission has produced no evidence supporting the conclusion that Columbia Union is in violation of the 1940

Statement, much less evidence justifying reversal of the district court's findings.[10] Moreover, the yardstick of academic freedom that the Commission seeks to apply to Columbia Union is not congruent with case law, the Constitution, or common sense.

c. The Court Should Reject The Misguided View Of Educational Policy Advanced By The Commission

Columbia Union respectfully urges the Court to review the deposition of Professor Finkin so that it can understand the definition of a "genuine institution of higher learning," Finkin Dep., J.A. 2692, against which the Commission is asking this Court to judge Columbia Union. It is a definition that would forbid any institution to promote *any* viewpoint in its educational offerings, contrary to

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[10] At least one of the Catholic institutions funded by the Commission employs statements of academic freedom essentially identical to Columbia Union's. They too are compatible with the 1940 Statement. For example, Mount Saint Mary's statement on academic freedom provides that

> [t]he faculty member at Mount Saint Mary's is entitled to freedom in research and scholarly publication, and to freedom in the classroom in discussing subject matter. The faculty member is expected to follow the normal canons of scholarship, the accepted standards of the discipline, and *the Mission of Mount Saint Mary's College, Incorporated*, in dealing with all matters.

Faculty Handbook J.A. 120 (emphasis added). The "Mission of Mount Saint Mary's" provides that the College "mindful of its role in the *Church's mission to the world* and respectful of the religious liberty of all, *affirms the values and beliefs central to the Catholic vision of the person and society*, and seeks to deepen understanding of our faith and its practice in just and compassionate engagement with the world." Mount Saint Mary's Bylaws, J.A. 103 (emphasis added).

Supreme Court precedent recognizing the right of an *institution* under the First Amendment to shape its educational mission.[11] It is a definition so radical that the Assistant Secretary for Planning and Academic Affairs at the Commission said in an unguarded moment of his deposition that it would probably violate Maryland law. *See* Sabatini Dep., J.A. 2874. It is a definition uniquely hostile to religion. It is a definition this Court should unequivocally reject.

To summarize, Professor Finkin takes the view that a "genuine institution of higher learning" is not entitled to place *any limit whatsoever* on the expression of a viewpoint by a teacher if that viewpoint is within the range of expression considered legitimate by that teacher's academic "discipline":

> Q. Is there any situation, in your judgment, in which a university may impose limitations on an expression of a point of view by a teacher if the point of view that the teacher wants to express is within the range accepted by the discipline?
>
> * * *
>
> A. If the question is whether, in my opinion, the institution in such a circumstance would be permitted to limit what the teacher said, the answer is no.

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[11] *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself."); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (opinion of Frankfurter, J.) (discussing importance of university's ability to define its own mission, including "four essential freedoms" to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted to study").

Q. Any qualification to that answer, or is it just a flat no?

A. It's a flat no.

Finkin Dep., J.A. 2727-28.[12]

With one exception (expression *favorable* to religious belief), when Professor Finkin says that his answer is a flat "no," he really means it. According to Professor Finkin, in order to meet his standard, a Catholic college would have to allow a faculty member to "continue teaching who is expressing the view that the [Catholic Church] has no grasp of religious truth and is a force for evil in the world." J.A. 2807. Asked whether his view required a college to allow the advocacy of practices such as sexual abuse, incest, and even bestiality, Professor Finkin testified as follows:

Q. Would that include then the advocacy of that behavior if that was the conclusion the faculty member reached?

A. Yes, that's right.

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[12] Moreover, Professor Finkin made plain that, in his view, institutions that do not respect the absolute view of academic freedom he advocates should in fact *lose their accreditation*. Finkin Dep., J.A. 2752. He specifically stated that, in his opinion, Columbia Union should lose its accreditation. *Id*. at J.A. 2754. It does not take any great familiarity with higher education to know what the consequence of loss of accreditation would be to a college. *See also* Finkin Dep., J.A. 2756 (comparing religious references in Columbia Union mathematics classes to anti-Semitic teaching in Nazi texts); Finkin Dep., J.A. 2762 (comparing teachers who are happy at Columbia Union despite limits on academic freedom with acceptance of contractual indentured service by former slaves in South Carolina notwithstanding the fact their servitude violated the Thirteenth Amendment).

> Q. Even if they included advocacy of all the behaviors listed in the first sentence of that paragraph?
>
> MR. DAVIS: You mean in the classroom or outside the classroom?
>
> A. Oh, even in the classroom, let's take bestiality. It's certainly possible for a professor to examine that question, let's say a professor of philosophy, and conclude, come to think of it, this is an expression of affection to animals. And how do we know the animals don't like it?
>
> You know, if that's the result of the investigation, if you're using acceptable methods, the fact that it offends the church should be irrelevant.
>
> Yeah, I think expressions of approval or indeed advocacy of this conduct would be protected by academic freedom.

J.A. 2819-20.[13]

With respect to expression favoring or advocating religious belief, however, Professor Finkin took the extreme opposite position, testifying that he does not believe advocacy of religious truths is protected by academic freedom *at all*. Even a biology professor who concluded based upon years of research that life was sparked by a divine creator would enjoy *no* protection of academic freedom to

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[13] While the Commission has presented Professor Finkin without reservation as its authoritative interpreter of academic freedom, Columbia Union feels constrained to acknowledge that Assistant Secretary Sabatini stated in his deposition (over the objection of the Commission's attorney) that allowing advocacy of sex with animals might well *disqualify* an institution from funding as an objectionable practice "inconsistent with the state's expectation of a college or university." Sabatini Dep., J.A. 2874-75.

express this conclusion. Finkin Dep., J.A. 2822. Apparently, religion is the only form of belief that academic freedom does not give a teacher complete freedom to advocate:

> Q. Okay. Again, though, just to make sure I've got your correct – or your answer to both of these questions, the biologist who exhorts the students to believe in a divine creator because of her conclusions drawn from the complexity of biological life and the economist — or, excuse me, the historian who, based on his long study of history, exhorts the students to accept the Marxist interpretation as the correct one, both of them are operating within or outside the scope of action that academic freedom protects?
>
> A. I think the former is not and the latter is. The reason is, the proposition that's being offered in that case is not a proposition about biology. It's a proposition about religion.
>
> The second one is a proposition about history or economics. I know of no atheist by definition who says, I've studied biology and I believe there is a God.
>
> There are always justifications for predetermined religious truths, which it then seeks to impose itself on a certain body of knowledge with increasing awkwardness. That is indeed the history of the rise of secular discipline….

Finkin Dep., J.A. 2827-28. This Court cannot and should not accept the view advanced by the Commission and Professor Finkin. *See* Comm. Br. at 51. It is hostile to religion in a way the Establishment Clause forbids. In the name of academic freedom, it would eliminate true academic diversity. At a minimum, it is inconsistent with the Supreme Court's clear holding that religious viewpoints are entitled to First Amendment protections equivalent to secular viewpoints. *See*, e.g. *Rosenberger*, 515 U.S. at 836-37.

3. Faculty Hiring And Student Admissions At Columbia Union Reflect The Broad Educational Mission Of The College

The district court examined Columbia Union's student admissions and faculty recruiting criteria to determine whether it exercised a "preference" for Seventh-day Adventists. It makes the point that Columbia Union recruits the majority of both its faculty members and its students from the Seventh-day Adventist community, a fact that Columbia Union does not attempt to hide. In fact, the percentage of students of the affiliated faith at Columbia Union is in line with that at the Catholic colleges the Commission funds, but will not discuss.[14] Likewise, Columbia Union's written policies reserving the right to prefer Seventh-day Adventists for teaching positions are in line with the Catholic college policies.[15]

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[14] Of the approximately 1,400 students enrolled at Mount Saint Mary's at the time the Commission denied funding to Columbia Union, "more than 80%" were Catholic. Mount Saint Mary's College, Internet Page, J.A. 117.

[15] The Faculty Handbook from the College of Notre Dame states as follows:

> It is the responsibility of the President and the Academic Dean to attract academically qualified Sisters to the College when faculty positions are available to assure the continuation of a strong presence (about one-third of the faculty) of the School Sisters of Notre Dame. To this end, faculty positions are announced to qualified SSND's before an open search is conducted. If SSND applicants receive departmental approval, no further announcement of the position is made.

College of Notre Dame Faculty Handbook 29, J.A. 126.

In addition, as many as one in five of the students in the traditional program are not Seventh-day Adventists. Moreover, "if a non-church member applies and a church member applies and all other factors are equal, . . . the college does not give preference to church members." Scriven Dep., J.A. 2041. Less than 20% of the students in the Columbia Union evening program are affiliated with the Seventh-day Adventist Church. Overall, as pointed out by Columbia Union's former President, Charles Scriven, more than 56% of the total graduates of Columbia Union over the past five years are *not* Seventh-day Adventist. *See* J.A. 69; J.A. 82. From 1994 to 1999, within the traditional program, 80.54% of the students were members of the Seventh-day Adventist Church. Yet, for the same time period, only 44.83% of the entire student body were members of the Seventh-day Adventist Church. *See* J.A. 894-97 (Facts and Figures Fall 1998).

These figures are comparable to the private religiously-affiliated institutions that the Commission sees fit to fund. *See* J.A. 117. The district court suggests that this point is irrelevant. 2000 U.S. Dist. LEXIS 13644, at *41 n.19, J.A. 2917. But if this case is really about the Establishment Clause, the Court should not ignore the Commission's treatment of schools affiliated with "established" religious denominations. *See Larson v. Valente*, 456 U.S. 228, 244-46 (1982) (explaining that Constitution prohibits "denominational preferences").

4. Columbia Union's Institutional Autonomy Remains No Different From That Of The Colleges In *Tilton* And *Hunt*

While the Supreme Court has never commented on the relative importance of the factors central to whether an institution is dubbed "pervasively sectarian," institutional autonomy obviously is not the *sine qua non* of the issue. As this Court noted in its prior opinion: "the Supreme Court held that the colleges at issue in *Tilton* and *Hunt* were not pervasively sectarian even though they were 'arguably under more control by their affiliated church than' Columbia Union." 159 F.3d at 167. The only significant information developed by the Commission on remand is that the North American Division of the Seventh-day Adventist Church has pressured Columbia Union to drop this litigation against the Commission. *See Aug. 22, 1996 Letter from A.C. McClure*, President of NAD of General Conference. J.A. 1245 ("While we recognize that the matter has already been initiated in the courts, it is to be clear that we do not support that action and are requesting that it be withdrawn."). The fact that the College has decided to continue seeking constitutional redress for the Commission's religious discrimination casts doubt on the iron-fisted Church control over college affairs posited by the Commission.

In any event, nothing in the record changes the legal conclusion that this factor cannot justify a finding that Columbia Union is "pervasively sectarian." As this Court previously pointed out, the Supreme Court has on two occasions upheld public funding to institutions under more direct control by their affiliated church than Columbia Union. The Commission — which purports to place so much

weight on *Roemer* — ignores statements on this point in both the district court's and the Supreme Court's opinions in *Roemer*. *See* 426 U.S at 758, n.21; *Roemer v. Board of Public Works*, 387 F. Supp. 1282, 1287 n.7 (D. Md. 1974). Columbia Union's institutional structure does not support the Commission's conclusion that the College is pervasively sectarian.

CONCLUSION

For the foregoing reasons, the district court's entry of judgment in favor of Columbia Union College should be affirmed.

Respectfully submitted,

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