IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Record No. 97-2656

COLUMBIA UNION COLLEGE,

Plaintiff-Appellant,

v.

EDWARD O. CLARK, JR., ET AL.,

Defendants-Appellees.

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

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Dated: February 12, 1998

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

COLUMBIA UNION COLLEGE,

Appellant,

v.

EDWARD O. CLARKE, et al,

Appellees.

Docket No. 97-2656

COLUMBIA UNION COLLEGE'S DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION.

Pursuant to FRAP 26.1 and Local Rule 26.1, Appellant Columbia Union College,

makes the following disclosure:

I. Is the party of a publicly held corporation or other publicly held entity?

(check one) ( ) YES (x) NO

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly

held corporation, or other publicly held entity (see Local Rule 26.1 (b))?

(check one) ( ) YES (x) NO

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation. (See Local Rule 26.1 (b))?

(check one) ( ) YES (x) NO

If the answer is YES, state the name of the entity and the nature of its financial interest:

Respectfully submitted,

COLUMBIA UNION COLLEGE

By

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Dated: December 12, 1997

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BRIEF OF APPELLANT

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

because the district court entered a final judgment dismissing the case on October 30, 1997 and

Columbia Union timely filed a notice of appeal on November 21, 1997.

Questions Presented

1.Whether the district court erred in holding that the Commission's denial of funding toColumbia Union is compatible with the Free Speech Clause and Free Exercise Clause ofthe First Amendment, and with the Equal Protection requirement of the FourteenthAmendment.

2. Whether the district court erred in holding that the Establishment Clause forbade Columbia Union's equal participation in the Sellinger Program notwithstanding the fact that funding under the Sellinger Program flows to participating colleges only as a result of the voluntary and independent choices of students, without any favoritism or incentive toward religious education.

3.Whether the district court erred in holding that the Maryland Higher Education Commission met its burden of showing that Columbia Union College was properly denied the opportunity to participate equally in educational funding made available to other qualifying private colleges on the ground that Columbia Union is "pervasively sectarian. "

4. Whether, even if its Establishment Clause analysis were correct, the district court nonetheless erred by holding that discriminatory denial of funding to Columbia Union is "necessary" and "narrowly tailored" to meet the alleged compelling interest of avoiding conflict with the Establishment Clause notwithstanding the presence of a readily available and concededly constitutional alternative funding mechanism that allows equal treatment of Columbia Union.

Statement of Applicable Standard of Review

This Court reviews the district court's holdings on issues of constitutional law de novo. *E.g.,*

Johnson v. Hugo's Skateway 949 F.2d 1338, 1349 (4th Cir. 1991).

Statement of the Case

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.* The Program (named for Father Joseph Sellinger, a Roman Catholic priest) 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 gives no incentive toward attending a church-affiliated college, but instead purports to aid private higher education neutrally Of the fifteen institutions which received Sellinger funds for fiscal year 1997, twelve have no religious affiliation and three are affiliated with the Roman Catholic Church. Students enrolled in seminary or theology programs

are excluded from the funding calculation for Sellinger recipients. Colleges receiving the 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. *Id.* The Supreme Court upheld Sellinger funding of Maryland colleges affiliated with the Roman Catholic Church against an Establishment Clause challenge in *Roemer v. Public Works Bd.,* 426 U.S. 736 (1976).

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

1. be a nonprofit private college or university that was established in Maryland before July 1, 1970;
2. be approved by the Commission;

3. be accredited;
4. have awarded the associate of arts or baccalaureate degrees to at least one graduating class;
5. maintain one or more programs leading to such degrees' other than seminarian or theological programs; and
6. submit each new program or major modification of an existing program to the Commission for its approval. Md. Code Ann. Educ § 17-103. 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:

(1) that Columbia Union is a non-profit college or university that was established in

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Maryland before July, 1, 1970;

(2) that Columbia Union College is "approve by the Maryland Higher Education Commission";

(3) that Columbia Union is "accredited by the Commission on Higher Education of the Middle State's Association of Colleges and Schools";

(4) that Columbia Union College has "awarded the Associate of Arts or baccalaureate degrees to at least one graduating class";

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

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(6) that Columbia Union 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. 71-79.

It is also undisputed that Charles Scriven, the President of Columbia Union College, has by sworn affidavit pledged that "none of the state aid received under the State's Program of Aid to Non Public Institutions of Higher Education (Education Article SEC. 17-101 *et seq.)* will be used for sectarian purposes." J.A. 77. 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 and 17 leading to a bachelor of science degree, including biochemistry, business administration, clinical laboratory science, engineering, and mathematics. *See* J.A. 323-24 (listing majors). 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. 188; 488. 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.*

Proceedings Below. In January l99O, Columbia Union applied for funds under the Sellinger Program. It was (and is) undisputed that Columbia Union satisfied each of the statutory requirements for participation in the Program. On March 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. 559. It is undisputed that 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. 164-81.

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 then-recent decision in *Rosenberger v. Rector and Bd. of Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). *Id.* 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 reapplying for 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. *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. *Id.*

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. 71-79. The Commission held a meeting to evaluate Columbia Union's application on December 11, 1996. J.A. 185-192. Shortly before the meeting, the Commission circulated a report prepared by the Secretary of Education, recommending denial of funding. J.A. 162-181. Following brief presentations, J.A. 182, the Commission voted with one dissent to adopt the Secretary's Report, finding that Columbia Union was "pervasively sectarian," and denied its application. *Id.* 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*. J.A. 193.

On December 24, 1996, Plaintiff filed an Amended Complaint ("Complaint") against Defendant Edward O. Clarke, Jr., 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. 1-14i' 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.*

Both parties filed cross-motions for summary judgment, agreeing that no material facts were in dispute.2' Without oral argument, the district court entered summary judgment in favor of the Commission and against Columbia Union.

Summary of Argument

The question presented in this case is whether the State of Maryland can exclude Columbia Union College from an educational funding program neutrally available to other private colleges solely on grounds that the College is "too religious" by virtue of certain college activities for which no public funding has been sought. The State concedes, as it must, that Columbia Union meets all of the neutral statutory criteria for participation in the Sellinger Program. Religious expression, beliefs, and practices were the sole basis for denial. Other similarly situated private colleges were provided with Sellinger aid.

This discriminatory action by the Commission, explicitly based upon religious expression

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-1 As did the district court, for purposes of convenience Columbia Union will refer to the defendants as the "Commission," notwithstanding the fact that the Commission members are the actual defendants, and that the Commission's vote was not unanimous.

-2 Columbia Union has made clear throughout that, while there is no dispute about the contents of the written record, Columbia Union objects to the *characterizations* of those facts which Columbia Union contends are contrary to the undisputed facts of record. *See* J.A. 287290 (letter from counsel for Columbia Union in response to request from Commission for identification of any disputed facts).

and practice at Columbia Union, violates First Amendment guarantees of Free Speech and Free Exercise of religion, and violates the Equal Protection Clause of the Fourteenth Amendment. The two important and elementary principles of constitutional law that govern this case were reaffirmed on very similar facts in *Rosenberger, 515 U.S.* 819 (1995). First, discrimination based upon the content and viewpoint of speech is presumptively unconstitutional and can be justified only on the basis of a narrowly tailored efforts to achieve a compelling government interest. *See also R.A. V. v. City of St. Paul*, 505 U.S. 377 (1992). Second, it is permissible for religious organizations to participate in the neutral receipt of benefits to which all citizens are entitled, and impermissible for a State to deny a neutral and generally available benefit for which an entity would otherwise qualify upon the basis of the religious expression or practices of the potential recipient. *See, e.g., Texas Monthly, Inc. v. Bullock,* 489 U.S. 1 (1989); *Widmar v. Vincent,* 454 U.S. 263 (1981); *Bd. of Educ. v. Mergens,* 496 U.S. 226 (1990); *Witters v. Washington Department of Services,* 474 U.S. 481 (1986).

Under the Commission's and the district court's analysis, the violation of Columbia Union's rights of Free Speech, Free Exercise, and Equal Protection is compelled because of dicta from the twenty-two year old three-judge plurality decision in *Roemer.* If this interpretation of *Roemer is* correct, then *Roemer* cannot

be good law in light of recent precedents. This question need not be reached, however, for even *Roemer* allows ample room for Columbia Union to join its sister colleges in enjoying fair and equal access to the Sellinger Program. The fact that the district court's analysis posits a collision between rights of Free Speech, Free Exercise, and Equal Protection on the one hand, and compliance with the Establishment Clause on the other, is conclusive proof that its analysis was flawed, and requires correction by this Court.

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Columbia Union's participation in the Sellinger Program is permissible under the Establishment Clause. The district court ignored the fact that Columbia Union is a college at which attendance is purely voluntary and ignored the fact that Columbia Union has agreed to keep Sellinger funds separate from any sectarian activity, despite the importance of these considerations in precedents far more recent than *Roemer.* Indeed, the whole inquiry undertaken by the Commission and district court was unnecessary. Under *Witters,* Sellinger aid to Columbia Union is permissible because the funding flows to Columbia Union only as result of the independent choices of students, pursuant to a system that gives no incentive to favor religious education.

By focusing on and denigrating certain aspects of religious faith and practice at Columbia Union, the Commission's action discriminates *among* religions, in violation of the Establishment Clause itself. Asking bureaucrats to sit in judgment upon religious practices necessarily entangles them in matters of religion. By undertaking a biased, unsupported, and discriminatory review of Columbia Union, the Commission illustrated why the evaluation of religious activity by government administrators pursuant to vague and overbroad standards simply cannot be a requirement of the First Amendment.

Even if the district court's Establishment Clause analysis were correct, its decision still must be reversed. The district court rejected Columbia Union's argument that *Witters* allows Sellinger aid to Columbia Union on the ground that, in *Witters,* aid was paid to students, not to the institution directly. Even if this were true, *Witters* provides a ready illustration of a funding mechanism that would allocate funds on exactly the same basis as before, allow equal

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participation by Columbia Union, yet indisputably avoid any Establishment Clause problem. Discriminatory exclusion of Columbia Union thus cannot be found "necessary" or "narrowly tailored" for purposes of Free Speech, Free Exercise or Equal Protection analysis.

Under the Commission's approach, religious colleges are entitled to equal treatment only if they conform their religious beliefs and practices to a state-approved model. This is not what the First Amendment requires; it is what the First Amendment forbids. As illustrated by the question Columbia Union's President posed to the Commission ("If we recant, would we qualify?"), J.A. 182, the denial of funding to Columbia Union puts the force of law behind a,. incentive to disavow religious belief. Given the scarcity of higher education funding and the market choices facing students and parents, it is plain that the incentive created by the State's proposed test places a substantial burden upon the religious faith and practice of Columbia Union's faculty and students. This violates the Constitution.

Argument

I. THE FIRST AND FOURTEENTH AMENDMENTS FORBID THE COMMISSION'S

DISCRIMINATORY EXCLUSION OF COLUMBIA UNIONFROM THE SELLINGER PROGRAM

It is undisputed that the State of Maryland, through the Commission, denied Columbia Union the right to participate in an aid program for which it meets all neutral statutory criteria. It is undisputed that the Commission based its denial upon the religious content of speech found in Columbia Union publications. J.A. 169-180. It is undisputed that the Commission based its denial in part upon religious worship and practice occurring upon the grounds of Columbia Union. J.A. 170-172. It is undisputed that the Commission granted aid to all other private colleges meeting the statutory criteria, including private colleges affiliated with other religious

denominations. *See* J.A. 193. A starker violation of rights to Free Speech, Free Exercise of religion, and Equal Protection is difficult to imagine.

A. **The Constitution Forbids Discrimination Upon the Basis of Religious Speech and Practice.**

Few propositions in American constitutional law are more central or better established than this: absent a compelling justification, the government must not discriminate against or deny a benefit to a person because of the content of his speech. *R.A. V. v. City of St. Paul*, 505 U.S. 377 (1992). Government action is "presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon and Shuster v. New York Crime Victims Bd.*, 502 U.S. 106, 116 (1991); *Leathers v. Medlock*, 499 U.S. 439, 497 (1991).

Where, as here, the government attempts to regulate speech on a private college campus as a condition for neutral treatment, it strikes at the heart of the First Amendment. Academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Academic freedom in the "community of American universities" is of critical importance. *Sweez v. New Hampshire*, 534 U.S. 234, 250 (1957). Academic freedom encompasses a college's freedom to decide for itself "who may teach, what may be taught, how it will be taught, and who may be admitted to study." *Id.* at 263 (Opinion of Frankfurter, J.). The Commission explicitly based its exclusion of Columbia Union upon the exercise of these freedoms. Discriminatory denial of a benefit on this basis is no less

unconstitutional than direct interference in the classroom, for "it matters little whether such intervention occurs avowedly or through action that inevitably tends to cloak the ardor and fearlessness of scholars, qualities

at once so fragile and so indispensable for fruitful academic labor. " *Id.* at 262.

The Supreme Court has squarely rejected the notion that public officials may constitutionally scan and interpret speech for religious content in order to justify discrimination against the speaker. In *Rosenberger v. Rector and Bd. of Visitors*, 515 U.S. 819 (1995), the Court held:

> and interpret student publications to discern their underlying philosophic assumptions respecting The viewpoint discrimination inherent in the University's regulation required public officials to scan religious theory and belief. That course of action was a denial of the

> right of free speech and would risk fostering a pervasive bias or hostility to religion, which would undermine the very neutrality the Establishment Clause requires.

515 U.S. at 84546. The Commission undertook exactly this sort of constitutionally prohibited activity in denying Columbia Union College equal access to Sellinger funds.

Similarly, government action that punishes the free exercise of religion is suspect and subject to strict scrutiny:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. . . . A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (internal citations omitted); *see also Jimmy Swaggart Ministries v. Board of Equalization,* 493 U.S. 378, 389 (1990) (to "single out" religious activity "for special or burdensome treatment" would violate the Free Exercise Clause); *Widmar v. Vincent,* 454 U.S. 263, 269-70 (1981) (religious speech and activities is protected by the First Amendment, and exclusion on that basis is subject to strict scrutiny). Discrimination on the basis of viewpoint implicates the Equal Protection

Clause as well, as does the denial of aid to Columbia Union while awarding it to similarly situated private church-affiliated colleges. *See, e.g., Carey v. Brown, 447 U.S. 455, 561-62* (1980).

Here the Commission's action was not based upon a neutral law that merely happens to have disparate *effects* on different denominations. For example, a government grant program to private institutions providing Saturday programs for children might have disparate effects for Seventh-day Adventists, who observe the Sabbath on Saturday. To the contrary, the Commission's decision was based upon a direct examination of religious practices, and an exclusion of a religious group whose practices did not conform to the amorphous standards applied by the Commission. This is direct discrimination on the basis of religious speech and practice.

The Sellinger Program confers benefits upon a wide array of nonsectarian groups in pursuit of a legitimate secular end. Maryland was under no obligation to create the Sellinger Program, but having done so, a decision to exclude Columbia Union on the basis of protected religious speech, beliefs, and practices is subject to the highest scrutiny. As discussed below, the Commission cannot justify its actions. By denying Columbia Union College the right to participate equally in the Program, the Commission violates the First and Fourteenth Amendments.

B. **This Case is Governed by *Rosenberger.***

In *Rosenberger,* the Supreme Court held that the University of Virginia violated the First Amendment when it excluded *Wide Awake,* a religious student magazine, from participation in a university-wide funding system based solely upon the magazine's religious content and

viewpoint. *Rosenberger* governs this case. In fact, it is exceedingly difficult to think of a case that could be closer to the facts and legal issues of *Rosenberger*.

There, as here, a group with a religious viewpoint maintains that its viewpoint provides no basis for the discriminatory denial of benefits made available to others. The Supreme Court in *Rosenberger* explicitly agreed. There, as here, the benefit program at issue serves clearly secular purposes. The University's student activities program supported a diverse campus debate, and *Wide Awake's* inclusion fostered that diversity. Here, Maryland admits that the educational programs at Columbia Union serve all of the secular purposes of the Sellinger Program. J.A. 186. The diversity of Maryland higher education is enhanced by Columbia Union, and Columbia Union's participation does not change the neutral, educational focus of the program.

In *Rosenberger*, the University funded fifteen student magazines and *Wide Awake* sought to be the sixteenth. Likewise here Maryland affords aid to fifteen private colleges and Columbia Union seeks to become the sixteenth. There, the University provided funds to Muslim and Jewish groups on grounds that they were more "cultural" than "religious." Here, Maryland funds three Catholic colleges, yet determines that Columbia Union is "too religious" to be included. Depending upon the decisionmakers' biases and predilections, some religious colleges will look "educational" while others will look "pervasively sectarian. " As in this case, decisions of this sort are likely to be arbitrary, lacking in any coherent principle in which citizens can be confident. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 509 U.S. 384, 391 (1993) (invalidating "religious use" exclusion that allowed for the Salvation Army Youth Band and the Hampton Council of Churches while excluding other religious groups).

The central and insurmountable problem in all this is that the government has no business drawing such content and viewpoint based lines in the first place. In *Rosenberger*, as here, the state defendants appear to suggest that religious applicants might well be eligible for funding if they kindly toned down their religious witness. But doing so could not possibly further any legitimate purpose of the program at issue. Taking the Cross off *Wide Awake's* masthead might have made it appear more genteel, but would hardly have contributed to the diversity of student opinions. "Toning down" various religious practices at Columbia Union would likewise do nothing to further education—unless we are to believe that adherence to Columbia Union's conviction that "true freedom consists of openness to God" rather than "endless choice in the service of endless desire," J.A. 182—contributes

nothing to education, or is inimical to it. The First Amendment forbids the government from making any such judgment.

II. THE ESTABLISHMENT CLAUSE DOES NOT COMPEL DISCRIMINATION AGAINST COLUMBIA UNION

The district court's sole justification for its dismissal of Columbia Union's Free Speech, Free Exercise, and Equal Protection claims was the contention that providing funding to Columbia Union would violate the Establishment Clause, and that avoiding such a violation constituted a compelling interest. J.A. 564. The district court's Establishment Clause analysis was incorrect, and cannot provide a valid basis for the dismissal of Colombia Union's other claims.

A. **The Commission's Actions Violate the Establishment Clause Requirement of Neutrality Toward Religion.**

The First Amendment is not hostile toward religion. Government is forbidden by the Establishment Clause to favor religion; it is forbidden by that Clause and by the Free Exercise

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Clause to disfavor religion. The Clauses work in harmony, not—as Maryland would have it —in opposition. As the plurality in *Roemer* itself stated, "Neutrally is what is required. The State must confine itself to secular objectives and neither advance nor impede religious activity. " *Roemer,* 426 U.S. at 747; *see also Rosenberger,* 515 U.S. at 846 ("There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."); *Grand Rapids School Dist. v. Ball,* 473 U.S. 373, 382 (1985) ("the government [must] maintain a course of neutrality among religions, and between religion and nonreligion"); *Everson v. Board of Education,* 330 U.S. 1, 18 (1947) (the First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the State to be their adversary"); Laycock, *Formal, Substantive, and Desegregated Neutrality Toward Religion,* 39 DePaul L. Rev. 993 (1990). The notion that the Establishment Clause requires discrimination *against* religion is a dangerous misconception. "[W]e must be careful, in protecting the citizens . . . against state-established churches, to be sure that we do not inadvertently prohibit [the State] from extending its general state law benefits to all of its citizens without regard to their religious belief." *Everson,* 330 U.S. at 16.

In *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1 (1989), the Court made clear that the *nondiscriminatory* extension of a public subsidy to religious along with secular organizations is permissible: "insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." *Id.* at 14-15. As the Supreme Court stated more recently:

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> We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broadand diverse.

Rosenberger, 515 U.S. at 839. This principle demands equal treatment for Columbia Union.

B. **Columbia Union's Participation in the Sellinger Program is Permissible Under the Supreme Court's Decision in *Witters.***

The Supreme Court has made clear on several occasions that, where a State provides a general program of aid to its citizens, the Establishment Clause is not offended if some of this aid flows to religious institutions as a result of the independent choices of the State's citizens. In *Witters v. Washington Dept. of Services for the Blind,* 474 U.S. 481 (1986), the Court upheld against an Establishment Clause challenge the State of Washington's extension of neutrally available vocational assistance to a blind person studying at a private Christian college to become a pastor, missionary, or youth director. The Court found no Establishment Clause violation despite the explicitly religious nature of both the school and the course of study, holding that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. " *Id.* at 487. No Establishment Clause violation results where the funding mechanism creates "no financial incentive for students to undertake sectarian education." *Id.* at 488.

This principle applies squarely to the Sellinger Program, under which the aid received by a participating college is calculated upon the basis of the number of students who make the "independent and private choice" to attend an eligible college. As in *Witters,* the program "creates no financial incentive for students to undertake sectarian education," *id.* at 488, for aid is provided to colleges both with and without any religious affiliation. Whatever might be said

of a state program that granted a fixed sum on an institution-by-institution basis, the funding formula based upon private student choice at issue here brings this case within the principle of *Witters. Witters* shows that where such a funding scheme is used, no analysis of whether the institution is "pervasively sectarian" need be undertaken. Indeed, the case for allowing the grant of aid here is far stronger than in *Witters* itself. In that case, the aid was available even for the pursuit of studies "at a private Christian college to become a pastor, missionary, or youth director." *See Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 179 (1993) (discussing *Witters).* Here, religious studies are explicitly *excluded* from the Sellinger grant formula, and Columbia Union has promised no Sellinger funds will be used for sectarian purposes. Indeed, the Commission must receive a full accounting of the use of funds and is able to assure itself that all funds went for the use of non-religious educational purposes. J.A. 33-34.

The district court's only effort at dealing with the Supreme Court's holding in *Witters* was to reference a comment in Justice O'Connor's concurring opinion in *Rosenberger* to the effect that the aid at issue in *Witters* had been paid to the student instead of the educational institution, 515 U.S. at 848, and a similar statement to this effect in Agostini v. *Felton,* 117 S. Ct. 1997, 2011 (1997).3' On this basis, the district court posits that the funding scheme at issue in *Witters* differs materially from the one at issue here. Whether the aid check passes through the fingers of the student or is mailed directly to the institution is a distinction without a difference. The controlling principle of *Witters is* that any aid that "flows to religious

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-3 In actual fact, the Court upheld the aid program in *Witters* notwithstanding the fact that (just as with the Sellinger program aid payments were made directly to the educational institution the student chose to attend, and not to the student directly. See *Brief Amicus Curiae of the AntiDefamation League of B'nai B'rith,* No. 84-1070 (noting confirmation by Washington Attorney General that state's policy was "to provide money directly to the institution").

institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487. Under *Witters,* Sellinger aid to Columbia Union College would not violate the Establishment Clause.

C. The District Court's Misapplication of *Roemer* Cannot be Squared with More Recent Establishment Clause Precedent.

Two Justices of the Supreme Court have already questioned whether a "pervasively sectarian" analysis should remain part of Establishment Clause jurisprudence given the degree to which it requires close evaluation of whether "too much" religion is being practiced at an institution. See *Bowen v. Kendrick,* 487 U.S. 589, 621 (1988) ("The question in an as applied challenge is not whether the entity is of

religious character, but how it spends its grant. ") If this Court were to conclude that the "pervasively sectarian" line of cases required denial of funding to Columbia Union, then Columbia Union respectfully submits that such a result cannot be reconciled with more recent Establishment Clause precedent such as *Rosenberger*. The court need not reach this question, however, because properly informed application of *Roemer* leaves ample room for Columbia Union to participate in the Sellinger program.

The Supreme Court in *Hunt v. McNair,* 413 U.S. 734 (1973), made clear that the burden rests upon the State when it seeks to deny otherwise available funding to a college on grounds that it is "pervasively sectarian. " The Court explicitly held that "the burden rests on appellant to show the extent to which the College is church related." *Id.* at 746 n.8. "Outside of primary and secondary schools, religious institutions that receive public funds on a neutral basis are *presumed not to be* pervasively sectarian." *Minnesota Federation of Teachers v. Nelson,* 740 F. Supp. 694, 704 (D. Minn. 1990) (emphasis added), *citing Bowen v. Kendrick,* 487 U.S. 589, 621 (1988). These standards are not reflected in the district court's opinion.

The Commission and the district court both based their decisions primarily upon comparing Columbia Union against attributes of the Catholic colleges mentioned in the *Roemer* plurality opinion upholding the inclusion of those colleges in the Sellinger Program. This focus upon *Roemer* is not surprising, given that it is a Supreme Court case decided in the context of the Sellinger Program itself. But an apparent fascination with the plurality opinion joined by three Justices in *Roemer* appears to have led both the Commission and the district court into a mode of analysis that is flawed in several respects.

The district court ignored the fact that *Roemer* was a decision *upholding* funding for the Colleges under review in that case. *Roemer* did not set forth a list of criteria that mandate denial of funding. Rather, the *Roemer* court simply reviewed -- in the same order that the district court had listed them -- "a number of subsidiary findings" that the district court had offerred in support of its conclusion. 426 U.S. at 755. Turning the facts that happened to be present when participation in the Sellinger Program was upheld in *Roemer* into a laundry list of criteria that must be met by any church-affiliated college that seeks equal treatment was erroneous.

The district court grudgingly acknowledged that *no* decision of the Supreme Court has ever held a college or university to be pervasively sectarian. J.A. 564 n.7. *See Minnesota Federation of Teachers,* 740 F. Supp at 709 (extensively reviewing and discussing the relevant precedents). But the district court never addressed the significance of this fact, instead dismissively saying "this does not lead this Court to anything beyond the unremarkable conclusion that a case involving such an institution has not yet made its way onto the high Court's docket." *Id.* To the contrary, the distinction is a significant one.

On numerous occasions, the Supreme Court has stated that the "pervasively sectarian"

standard is applied differently in the case of church affiliated elementary or secondary schools as opposed to church affiliated colleges. In *Tilton v. Richardson,* 403 U.S. 672 (1971), the Court upheld a grant of federal money to church affiliated universities, stating that "there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.* at 403. The Court stated in *Widmar v. Vincent,* 454 U.S. 263 (1981), that "university students are less impressionable than younger students and should be able to

appreciate the university's policy. " *Id.* at 1055. Lower courts have consistently recognized this distinction. *Universidad Central de Bayamon v. National Labor Relations Board,* 793 F.2d 383, 404-405 (1st Cir. 1986); *Decker v. O'Donnell,* 661 F.2d 598 (7th Cir. 1980); *EEOC v. Tree of Life Christian Schools,* 751 F. Supp. 700, 715 (S.D. Ohio *1990);Americans United for Separation of Church and State v. Grand Rapids,* 546 F. Supp. 1071 (W.D. Mich. 1982). The district court failed to take this distinction into account.

The Supreme Court in *Roemer* noted the Sellinger program's provisions for assuring that no funds are used for sectarian purposes. *See* 426 U.S. at 742-43. Included are a requirement that the college specify the use to which it will put the funds, an affidavit from the College's chief executive officer that it will not use Sellinger funds for sectarian purposes, and confirmatory audit procedures. Columbia Union has complied with these requirements. The *Roemer* plurality opinion noted: "We must assume that the colleges, and the Council, will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate." *Id.* at 760. Columbia Union fails to understand why the Commission trusts the Catholic colleges with respect to use of funds, yet concludes in the

case of Columbia Union that its trust would be misplaced and its review procedures inadequate.

In the district court, the Commission stated that it "rejected Columbia Union's proposal to fund programs in mathematics, computer sciences, clinical laboratory science and nursing because the college is inherently incapable of separating these programs from religious activity." Comm. Br. 24-25. The district court was dismissive of Columbia Union's argument that this approach was improper because it was based upon the unproven assumption that Columbia Union could not be trusted to keep funding received for secular purposes separate from religious activities. J.A. 563 at n.5 (calling this issue "immaterial"). Under the Supreme Court's recent holding in *Agostini v. Felton,* 117 S. Ct. 1997 (1997), however, this consideration is now of critical importance.

Prior to *Agostini,* earlier decisions of the Court had indicated that one reason government aid programs could not provide teachers or resources to parochial schools was because teachers present in such a "pervasively sectarian" environment could be presumed to either consciously or unconsciously engage in religious indoctrination. *See Agostini,* 117 S. Ct. at 2011-2013 (discussing *Aguilar v. Felton,* 473 U.S. 402 (1985), which *Agostini* overruled). In *Agostini,* the Court concluded that this premise "is no longer valid" and that, in the absence of evidence to the contrary, there is no reason a teacher will "depart from her assigned duties and responsibilities and embark upon religious indoctrination." *Id.* at 2012. Under *Agostini,* even a pervasively sectarian *primary* school can be

presumed to honor its obligation not to use government assistance for religious indoctrination. The district court's failure to address this critical aspect of the Sellinger Program in the context of college funding is indefensible.

Columbia Union did not select the programs for which it sought Sellinger support at

random. Rather, it was Columbia Union's intention that—in addition to trust in the good faith and integrity of Columbia Union personnel—specifying mathematics, computer sciences, clinical laboratory science and nursing would give the Commission an additional measure of comfort that sectarian use of

funds would not be a concern. Indeed, the Commission had—in the period *subsequent* to the initial 1992 denial of Sellinger funding—granted state funds to Columbia Union under a "Health Manpower Shortage Incentive Grant Program" for the support of medical technology and nursing programs. *See J.A.* 551. The State appears pleased to let Columbia Union serve its purposes when a "manpower shortage" arises, but turns aside when Columbia Union has the temerity to seek equal treatment as a full member of the educational community.

D. **The Commission's Arbitrary and Discriminatory Evaluation of Religious Speech and Practice at Columbia Union Violates the First Amendment.**

The danger of arbitrary and discriminatory action by government agencies posed by the Commission's extreme construction of *Roemer is* illustrated by examining the Commission's decision denying aid to Columbia Union. Under the view of *Roemer* advanced by the Commission and the district court, the appropriate analysis involved comparing Columbia Union against the attributes of the Catholic colleges whose participation in the Sellinger Program was upheld in *Roemer.* The Commission's Report focused upon seven criteria under which it purported to "compare" Columbia Union to current practices of the three Catholic colleges. See *J.A.* 166-180. This exercise not only impermissibly entangled state officials in religious matters, *see Rosenberger,* 515 U.S. at 845, but demonstrated that the standards applied by the Commission are vague, arbitrary, and overbroad. "When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone. '"

Keyishian, 385 U.S. at 604. Columbia Union detailed the flaws in the Commission's application of its standards before the district court, but the court below refused to address them.

1. Columbia Union's Institutional Autonomy is No Different From That of the Colleges in ***Tilton*** **and** *Hunt.*

The district court focused upon the fact that Columbia Union receives 21.4% of its unrestricted funding from the Seventh-day Adventist Church and that 34 of its 38 Trustees are required by its Bylaws to be members of the Seventh-day Adventist Church. By comparison, the Commission stated without any citation of support that none of the three Catholic colleges received funding from the Catholic church. J.A. 167. The Commission also reviewed the Bylaws of the Catholic Institutions which confine various officer appointments and board positions to members of religious orders.4' The Commission concluded that this factor indicated Columbia Union was "pervasively sectarian." J.A. 167.

The Supreme Court, however, has on two occasions upheld public funding to institutions under far more direct control by their affiliated church than Columbia Union. The Court summed this up in *Hunt v. McNair,* 413 U.S. at 743:

It is true that the members of the College Board of Trustees are elected by the

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4' It is difficult to credit the Commission's conclusion that Columbia Union's Board is "objectively" more sectarian than the boards of the Catholic colleges. For example: At Mount Saint Mary's the Archbishop of Baltimore is an automatic trustee and at least one-fourth of his fellow trustees must be ordained

priests. J.A. 511. At the College of Notre Dame, approximately one-third of the trustees must be nuns. J.A. 529-530. At Loyola, the president of the College must be a member of the Society of Jesus, and the nominating committee for the Board is admonished to "maintain a suitable proportion of Jesuit representation. " J.A. 494. The Commission apparently did not inquire as to how many members of these boards were lay members of the Catholic faith. Nor did the Commission suggest any objective formula for comparing the "religiousness" of clergy board membership with lay church member board membership. Columbia Union respectfully suggests that the impossibility of making any such "objective" comparison illustrates the folly of the whole enterprise.

> South Carolina Baptist Convention, that the approval of the Convention is required for certain financial transactions, and that the charter of the College may be amended only by the Convention. But it was likewise true of the institutions involved in *Tilton [v.* Richardson, 403 U.S. 672 (1971)] that they were "governed by Catholic religious organizations."

While the district court went out of its way to note that these cases were "decided prior to *Roemer,"* J.A. 565, this aspect of *Hunt* and *Tilton* was reiterated in *Roemer* itself. *See* 426 U.S at 758 n. 21; 387 F. Supp at 1287 n.7. Under the actual holdings of *Roemer, Hunt,* and *Tilton,* Columbia Union's institutional structure plainly does not support the conclusion that the College is pervasively sectarian. *See Universidad Cent. de Bayamon v. NLRB,* 793 F.2d 383, 387 (1st Cir. 1985) (finding university not pervasively sectarian in view of the Supreme Court cases, notwithstanding fact that "the Dominican Order, a clearly religious organization, controls the University").

2. Columbia Union's Institutional Mission Cannot be Distinguished From the Mission of the Colleges Granted Funding.

Under the heading "institutional mission," the Commission focused upon various quotations from Columbia Union documents to support its conclusion that the College should be excluded from the Sellinger program because it is a "church-run college" devoted to "indoctrination." J.A. 169-170. Perhaps because Columbia Union's present Articles of Incorporation did not support the Commission's preferred conclusion, much attention was given to the College's now-superseded 1966 Articles of Incorporation.5' With respect to current documents, the Commission focused on the following quotations:

5/ The Commission did not review old versions of the articles of incorporation or other documents from the Catholic colleges, and offered no explanation of why it was fair and appropriate to review Columbia Union alone in this manner.

• A quotation from Columbia Union's current Articles of Incorporation that Columbia Union is "an integral part of the system of educational institutions established and operated by the Seventh-day Adventist Church." J.A. 169.

• A statement in the 1996-97 Columbia Union *Bulletin* that "the heart of Columbia Union College is a

Christocentric vision that affirms the goodness of life, the value of earth, and the dignity of all peoples and cultures." J.A. 169.

• A statement from the 1996-97 *Bulletin* that graduating students must demonstrate a competency in

> "spiritual identity," which requires that students "understand the basic spirituality that is the heart of the college's Mission and Statement of Community Ethos." (The Secretary's Report appeared to suggest that this was tantamount to a requirement of an affirmation of faith as a condition of graduation, but this was corrected at the Commission's meeting, and the record is clear that there is *no* such requirement at Columbia Union.) See J.A. 169.

• An excerpt from Columbia Union's *Statement of Community Ethos* that: "we value faith in God, and

> celebrate the goodness of creation, the dignity of diverse peoples and possibility of human transformation. Through worship and shared life, we uphold spiritual integrity and help one another to achieve it. " J.A. 16970.

Without any discussion or citation to facts concerning the Catholic colleges, the Commission reached the conclusion that these statements made Columbia Union very different from the colleges to which the Commission awarded Sellinger funds. Columbia Union respectfully asks this Court whether the Commission's determination can be considered fair or even-handed in view of these quotations from publicly available documents from the Catholic colleges, unmentioned by the Commission or the district court:

• **Notre Dame.** "At the College of Notre Dame of Maryland education involves a transformation of persons.

> Spiritual growth is perceived and experienced as central to this transformation. While the college is inclusive of all faiths, it is distinctly founded upon and expressive of the Judeo-Christian tradition. The college's commitment to the community, its value of the uniqueness of each person and its pursuit of truth are all informed by its Catholic foundation expressed through the charisma of the School Sisters of Notre Dame." J.A. 531.

• **Loyola.** "At Loyola, a Jesuit education means educating the whole person:

body, mind, and spirit." J.A. 500. "Loyola College in Maryland is a Catholic comprehensive university, in the tradition of the Society of Jesus and the Religious Sisters of Mary, dedicated to the ideals of liberal education and the tradition of *cura personalis*, challenging students to lead and

serve in a diverse and changing world." J.A. 499.

"The men and women who study at Loyola acquire something far more precious than a diploma: a way of life that extends their vision beyond themselves to others, challenging them to ever greater achievement in the spirit of the Jesuit motto, *"ad majorem Dei gloriam - for the greater glory of God."* J.A. 497.

The Commission failed to provide valid support for the discriminatory "comparison" of the Catholic colleges with Columbia Union. The Mission Statement and comparable documents from the Catholic colleges—as to whom the Supreme Court has already approved participation —are not distinguishable from Columbia Union' s. *See also Minnesota Federation of Teachers,* 740 F. Supp. at 715-720 (finding that college with catalog stating that "considering education in the light of Christ, there can be no division between sacred and secular subjects" was not pervasively sectarian).

3. Columbia Union's Religious Worship Policy Should Not Disqualify it From the Benefits Given to Others.

The Commission and the district court placed particular emphasis on Columbia Union's religious worship requirements for students in its "traditional" program who live in the College residence halls. *See* J.A. 170-71; 566-567.6' At Columbia Union, resident students under the age of 23 are expected to attend Chapel, and to attend worships in the residence halls. J. A. 138.

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6 The Commission and district court studiously ignored the Evening Program that constitutes a substantial part of Columbia Union's educational offerings. Over 500 adult students participate in this program, of whom over 80% have no affiliation with the Seventh-day Adventist Church. Requirements for attendance at religious services do not apply to any of these students. J.A. 474.

Students are afforded some latitude under an excuse policy, so that only 350 to 400 out of approximately 675 traditional students typically attend. J.A. 288. Attendance at these worships, however, is an important part of community activity at Columbia Union, and one in which the College's traditional students are required to participate. Just like the classroom prayers, classroom religious symbolism, and clerical garb found at the Catholic schools approved in *Roemer,* 426 U.S. at 755-757, but *not* at Columbia Union, these gatherings are important to the Columbia Union community.

Columbia Union believes strongly in the value of its worship attendance policy. Unlike the situation with primary and secondary schools, students make their own voluntary decision to join the Columbia Union community. Columbia Union acknowledges that not everyone would choose to be a part of this community, but a voluntary decision to adhere to the community's rules for reinforcing one another in spiritual life should not disqualify Columbia Union from equal treatment under the Sellinger Program.

4. Columbia Union's Religion Courses are no Different from Those at Other Colleges Found Eligible for Funding.

With respect to the factor of "religious courses," the district court was again forced to concede that this factor did not support a finding that Columbia Union was pervasively sectarian. The district court in *Roemer* explicitly found that attendance was required at theology courses at the Catholic colleges, that there was *not* "a clear indication that theology was taught as an academic discipline" and that "a possibility existed that these courses could be devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline." 387 F. Supp. at 1288. The Supreme Court noted in upholding grants to the colleges that the district court was "unable to find ... that mandatory theology or religion

courses are taught without taint of religious indoctrination." 426 U.S. at 759 n.21.

In *Roemer*, the possibility of religious influence in theology courses was found adequately addressed by the fact that no public funds were to be used for funding religion departments. *Id.* Here, of course, Columbia Union likewise has sought no funds to be used in its religion department. *See* J.A. 74. As discussed above, the district court failed to address this aspect of the Sellinger Program. In sum, while the district court quoted at length passages from Columbia Union's Bulletin that caused it "concern," J.A. 568, under *Roemer*, this "factor" provides no support for denying aid to Columbia Union.

5. The Commission's Comparative Statements about Religious Influences in Non-Theology Courses Are Not Supportable

The district court sought to bolster its opinion by attacking Columbia Union's "commitment to academic freedom." J.A. 569. Both the district court and the Commission focused upon acceptance of the 1940 American Association of University Professors Statement of Principles of Academic Freedom, restrictions allegedly placed upon faculty members, and course descriptions of non-theology courses. J.A. 567. The Commission and the district court readily concluded that Columbia Union was very different from the Catholic colleges whose funding was upheld in *Roemer*. Once again the undisputed facts are to the contrary.

The district court emphasized that Columbia Union "does not subscribe" to the 1940 AAUP Statement. J.A. 569 n.ll. In denying funding, the Commission stated that all three of the Catholic colleges "subscribe to the 1940 AAUP Statement." J.A. 175. The Commission acknowledged in a footnote that there is no evidence that Mount St. Mary's subscribes to this statement, though it found a general statement that the College "values the principles of academic freedom" sufficient to conclude that St. Mary's practice is "compatible with the AAUP

Statement. " J.A. 175 n.2. The district court disregarded the evidence that Columbia Union's support for academic freedom is "compatible" with the AAUP Statement. Had the Commission or the district court evaluated the Catholic colleges under the same harsh standard they applied to Columbia Union, they would have been forced to "question [their] commitment to academic freedom," J.A. 569 n.11, as well.

The AAUP Statement explicitly recognizes that academic freedom is not incompatible with the legitimate efforts of a religious institution to encourage instructors to promote its mission. *See* J.A.

535-540. 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." J.A. 535. The district court stated that the "1970 Interpretive Comments" to the 1940 Statement "disavowed" the recognition of academic freedom for religious institutions. J.A. 569. As commentators have noted, however, this issue is far from settled, and the validity of the 1970 limitation has not been definitively established. *See* Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities,* 53 Law and Contemporary Problems 303, 308311 (1990).

Again, the district court and the Commission failed to address the *actual* academic freedom policies of the Catholic colleges for which Sellinger funding was upheld by *Roemer* and reaffirmed by the Commission when Columbia Union's application was denied. The Commission insisted that alone among the religious institutions applying for Sellinger funds, Columbia Union subscribes to the limitation no longer endorsed by the AAUP. But the College of Notre Dame explicitly references the recognition of academic freedom for religious colleges

in the 1940 Statement, and states that it is part of the recognition of academic freedom at Notre Dame. J.A. 534. Pope John Paul II has stated as the position of the Catholic Church that "all Catholic teachers are to be faithful to, and all other teachers are to respect, Catholic doctrine and morals in their research and teachings. " *See* McConnell, *supra,* at 309 n. 16. The Commission reached its conclusion that academic freedom at Columbia Union was less than at the Catholic colleges by focusing upon the following quote from Columbia Union's statement of academic freedom:

> "[S]ince this College is established and maintained by the Seventh-day Adventist Church, the following limitations are suggested to the faculty by virtue of their church affiliation: ...
>
> "B. In exercising their duties, faculty members should bear in mind their peculiar obligation as Christian scholars and members of a Seventh-day Adventist College.
>
> "C. Faculty members are entitled to freedom in the classroom in discussing the areas of their specialties.
>
> "D. As citizens, faculty members have certain responsibilities and privileges. In exercising these rights, they have 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."

J.A. 538-540. Once again, the Commission posits a contrast between Columbia Union and its sister institutions that does not exist. For example, Mount St. Mary's statement on academic freedom provides that

> "the faculty member of 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.

J.A. 526 (emphasis added). The "Mission of Mount St. 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." J.A. 520 (emphasis added).

The district court and the Commission relied on several excerpts from CUC's *Bulletin* to support the notion that "religious objectives or influences" prevail in the non-theology departments. J.A. 569; J.A. 176-77. In response, Columbia Union simply asks this Court to review the entire *Bulletin* for itself, to see whether it believes the excerpts selected by the district court and Commission are appropriately presented in context, or whether they represent a selective effort to support a preordained conclusion. Moreover, Columbia Union respectfully asks the Court how the Commission and district court could reach the conclusion that Columbia Union is different from the Catholic colleges that receive funding under *Roemer* in light of materials from those colleges that the Commission and the court below simply refused to address:

• **Mount Saint 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 nonCatholics 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. J.A. 513.

• **Loyola.** "As an institution that is both Catholic and Jesuit, Loyola College proudly shares an 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 31 st and 32nd General Congregations.

Steeped in the spirituality and philosophy of St. Ignatius, Loyola College's educational tradition has remained faithful to its roots while adapting to the changing needs of its students during the past 128 years. We see Loyola as being specifically influenced by the insights from the Spiritual Exercises of St. Ignatius Loyola.

Our tradition, therefore, dedicates us to the education of the total person. The intellectual, the spiritual, the emotional and the social life of the individual must all be our concern as we educate our students for leadership roles within both the civic and religious communities. J.A. 498.

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6. Faculty Hiring and Evaluation at Columbia Union Reflects the Broad Educational Mission of the College.

The Commission began its analysis of this fact with a flat misstatement—that "none of the three Catholic colleges gives any preferences in faculty hiring to members of the Catholic faith." J.A. 177. In actual fact, 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. " J.A. 533. The district court again declined to address the Commission's misstatements. The undisputed facts show that the faculty of Columbia Union is broad and diverse. Seventh-day Adventists make up a large proportion of the full time faculty—currently 36 out of 40 positions. J.A. 489. Of the 130 full and part-time faculty members, 57% are Seventh-day Adventists. Episcopalian, Jewish, and Moslem faiths are represented. *Id.* There are doubtless others of whom the college has no knowledge because it has not maintained such information

for the part-time faculty. *See id.* The Commission provided no evidence regarding the religious faith of faculty members of the Catholic colleges, yet another aspect of the Commission's discriminatory decision the district court declined to address.

7. Columbia Union's Student Body Is Broad and Diverse.

The Commission reached new heights of audacity with its analysis of Columbia Union's student body. In the Secretary's Report, the Commission insists upon adhering to its conclusion that "Columbia Union intends its student body to be composed almost exclusively of members of the faith." J.A. 178. But the Commission ignored the fact that *one fifth* of Columbia Union's "traditional" student body is non-Seventh Day Adventist, and that less than 20% of the students in the Columbia Union evening program are affiliated with the Seventh-day Adventist Church. J.A. 488. Overall, CUC's President, Charles Scriven, pointed out that over the past five years, more than 56% of the total graduates of Columbia Union are *not* Seventh-day Adventists. See J.A. 188; 488.

Had the Commission made a comparison with the Catholic colleges, it would have learned that of the approximately 1,400 students enrolled at Mount Saint Mary's, "more than 80% are Catholic. " J.A. 523. The district court, for its part, acknowledged that in *Roemer* the Court noted that the great majority of students at the Catholic colleges were Roman Catholic, so that student body composition "is not dispositive." J.A. 571. The district court, however, found support for its depiction of Columbia Union as pervasively sectarian in a statement from Columbia Union's

Bulletin that it "welcomes applications from all students whose principles and interests are in harmony with the policies and principles" of Columbia Union. *Id.* The district court found on this basis that religion influenced student admissions decisions. *Id.* But this

innocuous statement is hardly tantamount to exclusion of students by Columbia Union based upon some religious test. No such test exists. This instead is another example of the degree to which Columbia Union personnel must censor even the most innocent statements if they are to avoid a severe financial penalty.

E. **The Commission's Actions Improperly Discriminate Among Religions.**

By providing funding only to those colleges which, while religiously affiliated, are in accord with the Commission's notions of "permissibly religious," the Commission discriminated among religions. The Supreme Court has said "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244 (1982); *see also Everson v. Board of Education*, 330 U.S. 1, 15 (1947)(no state can pass laws that "prefer one religion over another"). Here, the Commission essentially determined that religions whose practices of faith do not exceed the Commission's standards may have funding for their affiliated colleges. Religions whose practices seem less familiar to the Commission—such as the practices of a minority religion like Seventh-day Adventism with its strong belief in community-based activity—risk appearing out of step with prevailing norms, and so being denied the rights given citizens of other religious persuasions.

Such discrimination is particularly egregious where, as is the case here, a majority, mainstream religion is preferred over a minority, less traditional religion. *See Larson,* 456 U. S. at 245. ("Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new or

unpopular denominations.")." Thus, when the government prohibits a minority religion, such as the Jehovah's Witnesses, from engaging in activity enjoyed by "Baptists, Methodists, Presbyterian, or Episcopal Ministers, Catholic priests, Moslem mullahs, [and] Buddhist monks,

it engages in impermissible discrimination among religions. *See Fowler v. Rhode Island*, 345 U.S. 67 (1953). Particular scrutiny is surely appropriate where all applicants from a mainstream religion gain admittance, but the door is barred to a less prominent denomination.

The mere fact that the Commission denied participation in the Sellinger program to an otherwise qualified college that is affiliated with a minority religion, while simultaneously providing funds to similar colleges affiliated with a mainstream religion, provides evidence of discriminatory intent. *See Larson v. Valente,* 456 U.S. 228 (1982) (state law which exempted majority religious organizations from charitable solicitation reporting requirements impermissibly discriminated among religions); *Corporation of Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327 (1987). Moreover, Columbia Union has pointed out numerous instances in which the Commission did not apply its standards in an even-handed manner, primarily ignoring evidence about the Catholic institutions was directly comparable to evidence

upon which it relied in denying aid to Columbia Union. The district court refused to address this discriminatory government action. This Court should uphold the Constitution's guarantee of equality and reverse the finding of the district court.

7.Columbia Union College and the Seventh-day Adventist Church are not, for example, represented on the Maryland Higher Education Commission.

III. THE DISTRICT COURT ERRED IN HOLDING THAT DISCRIMINATORY DENIAL OF FUNDING TO COLUMBIA UNION WAS "NECESSARY" OR "NARROWLY TAILORED" TO AVOID VIOLATION OF THE ESTABLISHMENT CLAUSE

Even if the district court's Establishment Clause analysis were correct, which it is not, this Court would still be required to reverse the district court's dismissal of Columbia Union's Free Speech, Free Exercise, and Equal Protection claims. The sole basis for the district court's decision was that avoiding violation of what it perceived to be the requirements of the Establishment Clause constituted a compelling state interest that could justify the State's Free Speech, Free Exercise, and Equal Protection violations. Even if this were true, however, the state's action must still be "narrowly tailored" or "necessary" to achieve the compelling interest. *See, e.g., Goodall by Goodall v. Stafford County School Bd., 60* F.3d 168, 170 (4th Cir. 1995); *American Life League, Inc. v. Reno,* 47 F.3d 642, 648 (4th Cir. 1995). That showing cannot be made here.

Only the compelling interest of actually complying with the Establishment Clause could support Maryland's discriminatory action, and then only if the action was narrowly tailored to achieve that interest. *See Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703, 707-08 (4th Cit. 1994) (no compelling interest in attempting to achieve a *greater* separation of church and state than the Establishment Clause requires). Even if the district court's Establishment Clause analysis is correct, the Commission's discriminatory denial of participation to Columbia Union was not "narrowly tailored" to avoid violation of the Establishment Clause, particularly in view of the other established mechanisms available for ensuring that no Sellinger funds be used for sectarian purposes.

The district court's own analysis proves the point. Even if the district court is correct

in holding that *Witters* does not allow the direct award of Sellinger funds to Columbia Union College, *see* J.A. 572, *Witters* at least demonstrates beyond doubt the unconstitutionality of Maryland's current administration of the Sellinger Program. Maryland need not discriminate against Columbia Union College in order to aid private colleges without violating the Establishment Clause. All that would be necessary is to pay the aid *to students* on the condition that they use the funds at any college of their choice which (like Columbia Union) meets the statutory criteria and has been approved by the Commission for participation on that basis.

This readily available procedure would—by definition, given the Sellinger funding formula—precisely accomplish the Sellinger Program's funding goals. Under *Witters,* this would

indisputably meet any asserted interest in avoiding Establishment Clause violations. It would surely be easier for the Commission members than sitting in judgment on the religious practices of their fellow citizens. With this obvious alternative, discrimination against Columbia Union is neither "necessary" nor "narrowly tailored," and the district court's decision should be reversed".

Conclusion

For the foregoing reasons, the district court's grant of summary judgment to the Commission should be reversed, and the case should be remanded for entry of judgment in favor of Columbia Union College.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 1998 a true and correct copy of the

foregoing **Appellant's Brief** along with the **Joint Appendix** was sent by first class mail, postage

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ADDENDUM

THE ANNOTATED CODE

OF THE PUBLIC GENERAL LAWS

OF MARYLAND

Education

ENACTED BY CHAPTER 22, ACTS 1978

Prepared by the Editorial Staff of the Publishers

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1992

TITLE 17.

FINANCIAL AID TO INSTITUTIONS! OF HIGHER EDUCATION.

17-102

Subtitle 1. Aid to Nonpublic Institutions. Subtitle 3. Private Donation Incentive

Program

Sec.

Subtitle 1. Aid to Nonpublic Institutions.

§ 17-101. Program established.

There is a program of State aid to nonpublic institutions of higher education. (An. Code 1957, art. 77A, § 65; 1978, ch. 22, 2; 1988, ch. 246, § 2.)

Constitutionality of aid.—See American Civil Liberties Union v. Board of Pub. Works, 357 F. Supp. 877 (D. Md. 1972).

State financial aid granted under this program does not violate the establishment clause of the First Amendment to the federal Constitution. Roemer v. Board of Pub. Works, 426 U.S. 736, 96 S. Ct. 2337, 49 L. Ed. 2d 179 (1976).

§ 17-102. Administration of program.

Purpose of aid program is the secular one of supporting private higher education generally, as an economic alternative to a wholly public system. Roemer v. Board of Pub. Works, 426 U.S. 736, 96 S. Ct. 2337, 49 L. Ed. 2d 179 (1976).

Subject to review by the Board of Public Works, the Maryland Higher Education Commission shall adopt standards and procedures, not inconsistent with this subtitle, to implement and administer the aid program provided for by this subtitle, including standards and procedures for:

(1) Submitting applications for aid;

(2) Verifying full-time equivalent student enrollment by institutions that apply for aid;

(3) Submitting reports or data on the use of this money by the institutions that receive it; and

(4) Paying the aid to the institutions during the fiscal year. (An. Code 1957, art. 77A, § 68; 1978, ch. 22, § 2; 1987, ch. 641; 1988, ch. 246, § 2.)

Determination of institutions to be considered in application of aid formula.— The question of which four-year institutions, or parts of four-year institutions, are to be consid

ered in the application of the aid formula may be determined by the State Board for Higher Education. 61 Op. Att'y Gen. 343 (1976).

§ 17-103. Eligibility for aid.

(a) Determination.—The Maryland Higher Education Commission shall determine which institutions are eligible for aid under this subtitle.

(b) Standards.—To qualify for State aid under this subtitle, an institution of higher education shall: : (1) Be:

(i) A nonprofit private college or university that was established in the State before July 1, 1970;

(ii) A nonprofit private institution of higher education that formerly received State aid as a component of a private college or university that was established in this State before July 1, 1970; or

(iii) A private nonprofit institution of higher education that is established in this State and grants an associate of arts degree;

(2) Be approved by the Maryland Higher Education Commission;

(3! Be:

(i) Accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools; or

(ii! 1. A candidate for accreditation under subparagraph (i) of this paragraph;

2. Subject to an affirmative action plan approved by the Maryland Higher Education Commission; and

3. Authorized by the Maryland Higher Education Commission for participation in the program established under this subtitle.

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

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

(6) Submit 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 the new or modified program. (An. Code 1957, art. 77A, §§ 65, 66; 1978, ch. 22, § 2; 1981, ch. 2, § 3; 1982, ch. 657; 1988, ch. 246, §§ 2, 4; ch. 730; 1989, ch. 5, §§ 1, 9.)

§ 17-104. Amount of aid [Amendment subject to termination].

(a) In general.—The Maryland Higher Education Commission shall compute the amount of the annual apportionment for each institution that qualifies under this subtitle by multiplying:

(l) The number of full-time equivalent students enrolled at the institution during the fall semester of the fiscal year preceding the fiscal year for

which the aid apportionment is made, as determined by the Maryland Higher Education Commission times;

(2) An amount equal to 16 percent of the State's General Fund per fulltime equivalent student appropriation to the 4-year public institutions of higher education in this State **for the** preceding fiscal year.

(b) *Exclusion of theological and seminarian students.*—Full-time equivalent students enrolled in seminarian or theological programs shall be excluded from the computation required by subsection (a) of this section.

(c) Exclusion of private donation incentive program payments.—Payments of State General Funds under Subtitle 3 of this title shall be excluded from the computation required by subsection (a) of this section. (An. Code 1957, art. 77A, § 67; 1978, ch. 22, § 2; 1985, ch. 158; 1988, ch. 246, § 2; 1989, ch. 94.)

Editor's note.—Section 2, ch. 94, Acts 1989, effective July 1, 1989, as emended by ch. 6, Acts 1990, approved Feb. 16,1990, and effective from date of passage, provides that "this Act and all regulations adopted under this Act shall terminate and be of no effect after July 1, 1997."

Determination of institutions to be considered in application of aid formula.— The question of which four-year institutions, or parts of four-year institutions, are to be considered in the application of the aid formula may be determined by the State Board for Higher Education. 61 Op. Att'y Gen. 343 (1976).

University of Baltimore excluded.—The University of Baltimore, because of its statutory designation as an "upper-division academic institution," is not a four-year institution and must be excluded from the computation under the aid formula of this section. 61 Op. Att'y Gen. 343 (1976).

(Termination *of* amendment effective July 1, 1997.)

§ 17-104. Amount of aid.

(a) In *general.—The Maryland Higher Education Commission shall compute the* amount of *the* annual apportionment for each institution that *quali*fies under this *subtitle* by multiplying:

(1) The number of full-time equivalent students enrolled at the institution during the *fall semester of the fiscal year preceding* the *fiscal year for* which the *aid* apportionment *is made, as determined by* the *Maryland* Higher *Education Commission times;*

(2) An amount *equal to 16* percent *of* the *State's General Fund* per *full*time *equivalent student appropriation to the 4-year public institutions of* higher *education* in this *State* for *the* preceding *fiscal* year.

(b) Exclusion of theological and seminarian *students.—Full-time equivalent students enrolled in* seminarian or *theological programs shall be excluded from the computation required by subsection (a) of* this *section.*

(c) Exclusion of private donation incentive program payments.—Terminated.

(1989, ch. 94.)

Editor's note. — Section 2, ch. 94, Acts 1989, effective July 1, 1989, as amended by ch. 6, Acts 1990, approved Feb. 16, 1990, and effective from date of passage, provides that "this Act and all regulations adopted under this Act

shall terminate and be of no effect after July 1, 1997." This section is set out above as it will appear after July 1, 1997, unless further action is taken by the General Assembly.

§ 17-105. Certification and payment of aid; reductions for unreasonably duplicative programs.

(a) *Certification to* Governor.—The Maryland Higher Education Commission shall certify the amount of aid due each institution under this subtitle to the Governor, who shall include the total amount in the annual budget sub mission.

(b) Reduction *of appropriation for unreasonably duplicative programs.*—If a nonpublic institution of higher education has implemented a new or substantially modified program contrary to the recommendation of the Maryland Higher Education Commission that was based on a finding of unreasonable duplication, then the Maryland Higher Education Commission may recommend that the General Assembly reduce the appropriation by the amount of aid associated with the full-time equivalent enrollment in that program. This provision does not preclude the nonpublic institution from going forward with implementation of the new or substantially modified program.

(c) Certification to State *Comptroller; payment.*—The Maryland Higher Education Commission shall certify the amount of aid due each institution, less any reduction made by the General Assembly under subsection (b) of this section, to the State Comptroller, who shall pay it from appropriations made for this program under the normal budgetary procedures.

(d) *Reapplication for reconsideration of programs.—(1)* If the General Assembly reduces program funding under subsection (b) of this section, the affected nonpublic institution annually may reapply to the Maryland Higher Education Commission for reconsideration of the program recommendation.

(2) If the Commission determines that the unreasonable duplication no longer exists, then the Commission may recommend that there be no reduction in the institution's amount of aid. (1988, ch. 246, § 2.)

Editor's note.—Chapter 246, Acts 1988, 17-105 and enacted a new section in lieu effective July 1, 1988, repealed former thereof.

§ 17-106. Purchases through Department of General Services.

Subject to the initial approval of the Secretary of General Services, an institution that qualifies for aid under this subtitle may make any purchase through the Department of General Services in accordance with the rules and regulations of that Department. (An. Code 1957, art. 77A, § 96; 1978, ch. 22, § 2; 1978, ch. 378; 1988, ch. 246, § 2.)

1 7-202

§ 17-107. Money not to be used for sectarian purposes.

An institution may not use money payable or goods purchased under this subtitle for sectarian purposes. (An. Code 1957, art. 77A, §§ 68A, 96; 1978, ch. 22, § 2; 1988, ch. 246, § 2.)

This section generally proscribes the use Secular and sectarian activities of colleges

Of State funds to support religious instruction, are easily separated. Roemer v. Board

religious worship or other activities of a reli- of Pub. Works, 426 U.S. 736, 96 S. Ct. 2337, 49

gous nature. Roemer v. Board of Pub. Works, L. Ed. 2d 179 (1976).

426 U.S. 736, 96 S. Ct. 2337, 49 L. Ed. 2d 179

(1976).

Subtitle 2. Eminent *Scholar Program.*

§ 17-201. Established.

There is an Eminent Scholar Program to give public institutions of higher education the opportunity to attract and keep faculty who have achieved national eminence in their disciplines. (An. Code 1957, art. 77A, § 64B; 1978, ch. 22, § 2.)

§ 17-202. Qualifications of institutions.

(a) *Eligibility.*—Each public institution of higher education may participate in the Eminent Scholar Program.

(b) Institution to *adopt standards for* appointment.—The governing body of each institution that participates in the Program shall adopt standards and procedures for attracting and keeping eminent scholars in this State that include the following concepts:

(1) The appointee shall hold the rank of associate or full professor, or its equivalent, such as artist in residence;

(2) The appointee shall have achieved national eminence in his discipline as judged by his peers; and

(3) The "eminence" of the appointee:

(i) Shall be judged, generally, on evidence of effective teaching and productive research as attested to by his peers; and

(ii) If appropriate, may be judged on the basis of artistic achievement or distinguished accomplishments in areas that lie beyond academic endeavor but for which there is concrete evidence of superior talent. (An. Code 1957, art. 77A, § 64B; 1978, ch. 22, § 2.)

17-101

EDUCATION

TITLE 17.

FINANCIAL AID TO INSTITUTIONS OF HIGHER EDUCATION.

Subtitle 1. Aid to Nonpublic Institutions.

Sec.

Subtitle 1. Aid to Nonpublic Institutions.

§ 17-101. Joseph-A. Sellinger Program established.

There is a program of State aid to nonpublic institutions of higher education known as the Joseph A. Sellinger Program. (An. Code 1957, art. 77A, § 65 1978, ch. 22, § 2; 1988, ch. 246, § 2; 1993, ch. 1.)

Effect of amendments. — The 1993 amendment, effective Oct. 1, 1993, added "known as the Joseph A. Sellinger Program." Editor's note.—Section 1, ch. 393, Acts 1995, provides that "the Board of Regents of the University of Maryland System and the

Governor are requested to include as a top funding priority for higher education a mini mum of S3 million of State funds beginning in 'Fiscal Year 1997 for University of Maryland University College."

§ 17-104. Amount of aid [Amendment subject to termination].

Editor's note.

Section 1, ch. 393, *Acts* 1995, provides that "the Board of Regents of the University of Maryland System and the Governor are requested to include as a top funding priority for higher education a minimum of $3 million of State funds beginning in Fiscal Year 1997 for University of Maryland University College.

EDUCATION 17-301

17-303 ANNOTATED CODE OF MARYLAND

17-303. Audit [Subtitle subject to termination].

An affiliated foundation of an eligible institution that receives State payments shall provide the Maryland Higher Education Commission an annual audit of all pledged and paid amounts and their sources and a copy of the annual audit shall be provided to the Legislative Auditor. (1989 ch. 94.)

Cross reference.— AS 10 termination of subtitle provisions and regulations see Editor's note to 5 17-301 of this article

17-304. Application of payments; appropriations; reversion of funds [Subtitle subject to termination].

(a) *Appropriation of* payments--Amounts paid by the State under this subtitle may be applied to any eligible program at the eligible institution to which the payment is made.

(b) Appropriations; reversion *of funds.*—No more than one-half of the total mount to be paid by the State under provisions of this subtitle may be appropriated in any fiscal year. The provisions of 7-302 of the State Finance and Procurement Article do not apply to unused program funds. (1989 ch. 94.)

cross reference. — As 10 termination of subtitle provisions and regulations. see Editor's note to 17-301 of this article.

17-305. Reduction of State support [Subtitle subject to termination

Amounts paid by the State to any eligible institution under this subtitle a not directly or indirectly reduce the State General Fund or Capital Fund support for the eligible institution. (1989 ch. 94.)

cross reference. — AS 10 termination of

subtitle provisions and regulations see Editor's note to 17-301 of this article

17-306. Regulations; reports (Subtitle subject to termination.)

The Maryland Higher Education Commission shall:

(1) Adopt regulations necessary for the administration of this subtitle; (2)

(2) Submit to the Governor by December 1 1991 a report evaluating the program under this subtitle and containing recommendations as to whether it could be extended. (1989 ch. 94.)

cross reference. — As to termination of subtitle provisions and regulations see Editor's note to 17 301 of this article.

(Termination of subtitle effective July 1, 1997.)

Subtitle 3. Private Donation Incentive Program.

§§ 17-301 to 17-306. Private donation incentive program.

Terminated.

Editor's note. — Section 2 ch. 94 Acts 1989 effective July 1, 1989 as amended *by* ch. 6 Acts 1990 approved Feb. 16 1990 and effect. tive from date of passage provides that "this Act and all regulations adopted under "this Act

shall terminate and be of no effect after July 1 1997." This subtitle is set out above a, it will appear after July 1, 1997 unless further action is taken by the General Assembly

Title 13B

MARYLAND HIGHER EDUCATION COMMISSION

Subtitle 01 NONPUBLIC SCHOOLS

Chapter 02 Joseph A. Sellinger Program—Aid to Nonpublic Higher Education Institutions

Authority: Education Article, §17 102, Annotated Code of Maryland

.01 Applicability; Effective Date.

The criteria and procedures contained in this chapter apply to the program of aid to nonpublic institutions of higher education provided for by Education Article, §17-101 et seq., Annotated Code of Maryland. These amended criteria and procedures are effective beginning with the expenditure, reporting, and verification of aid awarded for the 1994 fiscal year.

.02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Commission" means Maryland Higher Education Commission.

(2) "Eligible institution" means an institution of higher education satisfying the requirements of Regulation .03 of this chapter.

(3) "Program" or "academic program" means a series of courses which are arranged in a scope and a sequence leading to a degree or **certificate, or** which constitute a major.

(4)"Religious, seminarian, or theological academic programs') means a series of courses which are arranged in a scope and a sequence either leading to a degree or certificate which indicates specialization in the study of religion or in religious, seminarian, or theological studies, or which constitute a major in any of these subject matters.

(5) "State's general fund per full-time equivalent student appropriation for the 4-year public colleges and universities" means the general fund per full-time equivalent student appropriations for Bowie State University, Coppin State College, Frostburg State Uni

versity, Morgan State University, Salisbury State University, St. Mary's College of Maryland, Towson State University, University of Maryland College Park, University of Maryland Baltimore County, and University of Maryland Eastern Shore.

.03 Qualifications for Aid.

A. The Commission shall determine which institutions are eligible for aid under this chapter.

B. To qualify for State aid under this chapter, an institution of higher education shall:

(1) Be a nonprofit private:

(a) College or university that was established in the State before July 1, 1970,

(b) Institution of higher education that formerly received State aid as a component of a private college or university that was established in this State before July 1, 1970, or

(c) Institution of higher education that is established in this State and grants an associate of arts degree;

(2) Be approved by the Commission;

(3) Be:

(a) Accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, or

(b) A candidate for accreditation under §B(3)(a) of this regulation that is subject to an affirmative action plan approved by the Commission, and is authorized by the Commission for participation in

the program established under this chapter;

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

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

(6) Submit each new program and each major modification of an existing program to the Commission for its review and recommendation as to the initiation of the new or modified program.

.04 Computation of Amount of Annual Award.

A. The Commission shall determine the annual apportionment available to each eligible institution in accordance with this regulation.

B. Eligible Credit Hours Generated.

(1) The number of eligible credit hours generated in an institu**tion during the** fall semester or quarter of the fiscal year next preceding the fiscal year for which the apportionment is to be made shall be computed by adding the number of:

(a) Credit hours of enrollment in undergraduate courses regardless of student level;

(b) Credit hours of enrollment in graduate courses regardless of student level; and

(c) Equated credit hours of enrollment in special courses.

(2) From the sum reached in §B(1) of this regulation, subtract all credit hours, regardless of subject, taken by:

(a) Undergraduates then enrolled in a religious, seminarian, or theological academic program; and

(b) Graduate students then enrolled in a religious, seminarian, or theological academic program.

C. Special Considerations for Determining Eligible Credit Hours Generated.

(1) Equated credit hours of enrollment in special courses are computed on the same basis as for a normal course. For example, if 3 weekly contact hours of English 101 equals 3 credits, then 3 weekly contact hours of prerequisite noncredit English are equated to 3 credit hours.

(2) Credit hours for short courses are prorated on the basis of a full semester. For example, if the full semester course carrying 3 weekly contact hours is for 16 weeks, and the short course is for 8 weeks, then the equated credit hours are 1.5.

(3) A student is considered to be enrolled in a religious, seminarian, or theological academic

program if, on or before the date as of which enrollment figures are computed, the student has become a declared major in religion or religious, seminarian, or theological studies, or has otherwise formally advised the institution in writing that the student is seeking a degree or certificate indicating the type

of specialization that characterizes religious, seminarian, or theological academic programs.

(4) In deducting credit hours taken by students enrolled in religious, seminarian, or theological academic programs, all credit hours of all of these students shall be deducted even if they are in subjects that do not relate directly to these programs.

D. Commission Form MHECIS S-6.

(1) An eligible institution shall fully complete Commission Form MHECIS S-6 and have it certified by an independent certified public accountant.

(2) The form may be revised from time to time by the Commission in a manner consistent with these regulations.

(3) The Commission shall furnish copies of this form to all known institutions by August 31 of each year.

(4) Institutions using the semester system shall file the form with the Commission not later than October 15 of each year, and shall reflect the number of eligible semester credit hours as of a date on which that fall's enrollment has stabilized.

(5) An institution using the quarter system shall file the form not later than October 15 of each year, indicating the number of eligible quarter credit hours generated during the fall quarter and, not later than January 15 of each year, indicating the number of eligible quarter credit hours generated during the winter quarter.

E. Calculation of Full-Time Equivalent Students Enrolled. The Commission shall calculate the number of full-time equivalent students enrolled in an institution using the:

(1) Semester system by dividing the total number of eligible credit hours generated in that fall semester by 15; or

(2) Quarter system by dividing by 15 the sum of the fall eligible quarter credit hours multiplied by 0:69 and the winter eligible quarter credit hours multiplied by 0.31.

F. Annual Apportionment.

(1) The Commission shall multiply the number of full-time equivalent students enrolled in the

institution by 16 percent of the State's general fund per full-time equivalent student appropriation to the 4-year public colleges and universities in Maryland for the preceding fiscal year. Upon approval and certification by the Commission, the resulting amount is the apportionment to the institution.

(2) The general fund per full-time equivalent student appropriation is based on the most recent prior year's appropriation as approved by the General Assembly or as revised by the Board of Public Works, and not the appropriation as subsequently reallocated by budget amendment.

.05 Administration of Program.

A. Verification and Notice**.**

(1) The Commission may verify the information submitted pursuant to Regulation .04 of this chapter as to eligible credit hours of enrollment by examining the registration or other data on which these submissions are based.

(2) If the figure resulting from the verification in §A(1) of this regulation differs from the figure submitted, the Commission shall certify to the State Comptroller an award amount based upon the corrected figure.

(3) Representatives of the institutions shall be given notice of the correction and an opportunity to discuss the basis for the correction with the Commission before the revision of the award.

B. Applications for Aid.

(1) Applications for aid shall be completed and filed not later than September 15 of the fiscal year for which aid is sought.

(2) Applications shall consist of a preexpenditure affidavit and a statement-of-intended-use report.

(3) The Commission shall distribute copies of all forms constituting an application to all known eligible institutions by June 30 of each year.

C. Preexpenditure Affidavit.

(1) The preexpenditure affidavit shall be in a form as prescribed by the Commission.

(2) The chief executive officer of the institution shall execute the preexpenditure affidavit.

(3) The chief executive officer shall certify under oath or affirmation that funds received from the State may not be used for sectarian purposes, and that the institution has adopted and shall maintain and follow the accounting procedures described in §G of this regulation until all State

funds applied for have been expended and accounted for to the Commission.

D. Statement-of-Intended-Use Report.

(1) The statement-of-intended-use report shall:

(a) Be in a form required by the Commission;

(b) Be executed by the chief executive officer or the chief financial officer of the institution; and

(c) Describe and itemize in sufficient detail the purposes for which State funds will be expended during the fiscal year for which the application is filed.

(2) If an institution later decides to use the funds for other purposes, the institution shall give the Commission prior written notice specifying the new purposes.

E. Certification and Payment of Awards.

(1) Following the receipt of timely and complete applications, and based upon its determination under Regulation .04 of this chapter, the Commission shall certify proposed awards to the State Comptroller not later than October 30.

(2) The State Comptroller's office shall make the awards by check to the institutions in two equal payments.

(3) The Commission shall forward promptly its certification of awards and request for the first payments to the Comptroller following formal approval by the Commission of awards.

(4) The Commission shall make the certification and request for the second payment not later than March 30.

F. The Commission may not pay an award to an eligible institution if the Commission has determined that the institution has failed to submit an adequate utilization-of-funds report in compliance with these regulations for any prior fiscal year.

G. Accounting Procedures.

(1) Eligible institutions shall follow the accounting procedures set forth in §G(2) of this regulation in connection with their receipt, expenditure, and accounting of State funds pursuant to these regulations.

(2) Procedures.

(a) An institution shall prepare its annual financial statements according to generally accepted accounting principles for auditing and reporting on financial statements of nonprofit institutions of higher

education, including colleges, universities, and community or junior colleges.

(b) The budget for each institution receiving State funds shall identify the specific areas of activity for which the institution will expend grant funds.

(c) State funds, when received by an institution, shall be placed in a special revenue account.

(d) Each budgeted segment reflected in the accounts of an institution shall have an expense account number for recording the expenditure of State funds.

(e) Each institution shall retain sufficient documentation of the State funds expended to permit verification by the Commission that no funds were spent for sectarian purposes for a period of 1 year following submission of a utilization-of-funds report in accordance with §I of this regulation.

(f) If the Commission determines that a verification or audit of an institution is necessary or appropriate in connection with the institution's expenditure of State funds, the institution shall:

(i) Cooperate fully with the persons designated by the Commission; and

(ii) Supply all information reasonably necessary to facilitate the fastest possible completion of the verification or audit.

H. End of Fiscal Year Reports.

(1) By the end of each fiscal year, the Commission shall send a utilization-of-funds report and a post-expenditure affidavit to all eligible institutions receiving funds for that year.

(2) An institution receiving funds shall complete and file the utilization-of-funds report and post-expenditure affidavit before the Commission may act upon any application for aid from that institution for a subsequent fiscal year.

I. Utilization-of-Funds Report.

(1) The utilization-of-funds report and the post-expenditure affidavit shall be in the form prescribed by the Commission.

(2) The chief executive officer or chief financial officer of the institution shall certify the utilization-of-funds report.

(3) The institution shall describe and itemize in the utilization-of-funds report the purposes for which State funds have been

expended during the fiscal year in sufficient detail to permit a prompt determination of whether any expenditure has been used for sectarian purposes.

J. Post-Expenditure Affidavit. The chief executive officer of an institution shall:

(1) Execute the post-expenditure affidavit under oath or affirmation; and

(2) Certify that none of the monies covered in the utilization-of-funds report have been used for sectarian purposes.

K Whenever an institution reports that it has expended any State funds for capital construction or permanent improvements, it shall report periodically, on forms and at intervals specified by the Commission, on the use being made of the building or facility in question and certify under oath or affirmation, given by its chief executive officer, that the building or facility is not being used for religious instruction or worship for any religious activity or sectarian purpose.

L. Unexpended Funds.

(1) An institution shall fully expend and report upon any funds that it did not expend by the end of the fiscal year in which the funds were paid, in the next fiscal year.

(2) In addition to the requirements of §L(1) of this regulation, the institution shall submit a new statement-of-intended-use report and a new preexpenditure affidavit by October 31.

M. Verification of Expenditures.

(1) The Commission may verify or have audited an institution's expenditure of State funds, with respect to any report required by these regulations, to determine whether funds awarded to the institution have been expended as authorized by these regulations.

(2) Before conducting a verification or audit requiring a physical examination of an institution's books or records, the Commission shall make reasonable efforts to satisfy its concern on the basis of data submitted by the institution.

(3) A verification or audit shall be conducted with the greatest possible speed and the least possible disruption of an institution's activities.

.06 Prohibition of Sectarian Use of Funds.

A. Education Article, §17-107, Annotated Code of Maryland, prohibits recipient institutions from using State funds for sectarian purposes. That provision generally prohibits the use of State funds to support religious instruction, religious worship, or other activities of a religious nature.

B. Prohibited Uses.

(1) Listed in §B(2) of this regulation are several potential uses of State funds that would violate the sectarian use prohibition. The list is not intended to be all inclusive and, if an institution is in doubt whether any other possible use of the funds might violate the sectarian use prohibition, it may consult with and seek the advice of the Commission in advance.

(2) An institution may not use State funds for:

(a) Student aid if the:

(i) Institution imposes religious restrictions or qualifications on eligibility for student aid, or

(ii) Students are enrolled in a religious, seminarian, or theological academic program;

(b) The salary, in whole or in part, of an individual who:

(i) Is engaged in the teaching of religion or theology,

(ii) Serves as chaplain or director of the campus ministry, or

(iii) Administers or supervises a program of religious activities;

(c) The portion of the cost of maintenance or repair of a building or facility used for:

(i) The teaching of religion or theology,

(ii) Religious worship, or

(iii) A religious activity;

(d) Utility bills, if the institution has a building or facility that is used in whole or in part for the teaching of religion or theology, religious worship, or religious activity, unless the building is separately metered;

(e) Utility bills for a separately metered building or facility that is used in whole or in part for the teaching of religion or theology, religious worship, or religious activity; or

(f) The construction or renovation of a building or facility that is or will be used for the teaching of religion or theology, religious worship, or religious activity.

C. The Commission shall require an institution that violates the prohibition against sectarian usage set forth in this regulation to repay to the State all monies expended in violation of this prohibition. The institution is ineligible to receive further State aid until it has repaid these funds. If the Commission determines that an institution has violated the prohibition and that the responsible officers knew or reasonably should have known that it was doing so, then the Commission shall notify the institution, and the Commission may declare the institution ineligible to receive further State aid either for a specified number of years or permanently, and so notify the institution. The institution shall be given notice and an opportunity for a hearing before the Commission under the Administrative Procedure Act, State Government Article, §§10-201—10-227, Annotated Code of Maryland, before any declaration of ineligibility.

.07 Review by Board of Public Works.

These criteria and procedures are subject to the review of the Board of Public Works.

Administrative History

Effective date: March 7, 1980 (7:6 Md. R. 476)

(Chapter recodified from COMAR 13.60.03 to 13B.01.02)

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