

CASE NO. 07-1247

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO CHRISTIAN)
UNIVERSITY,)
)
Plaintiff-Appellant,)
)
v.)
)
RAYMOND T. BAKER, et al.,)
)
Defendants-Appellants.)

On Appeal from the United States District Court
for the District of Colorado
The Honorable Judge Marcia S. Krieger
D.C. No. 1:04-cv-02512-MSK-BNB

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE
SUPPORTING APPELLANT AND URGING REVERSAL

JAY ALAN SEKULOW
American Center for Law & Justice
201 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 546-8890

FRANCIS J. MANION
GEOFFREY R. SURTEES
American Center for Law & Justice
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

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/s/

JAY ALAN SEKULOW

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INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is a nonprofit legal organization dedicated, *inter alia*, to the defense of religious liberty. ACLJ attorneys litigated the cases of *Locke v. Davey*, 540 U.S. 712 (2004); *Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004); and *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), all dealing with state financial assistance to school choice. The ACLJ is committed to the principle that educational grants, loans, or scholarships that are otherwise available to students attending private schools ought not to be denied simply because of the religious character of the schools the students (or their parents) choose.

This brief is being filed with the consent of the parties. *See* Fed. R. App. P. 29(a). Letters granting consent are being filed herewith.

SUMMARY OF ARGUMENT

Amicus wishes to make three main points.

First, the district court erred to the extent it believed a practice (here, pursuing a serious religious education) must be religiously *mandatory* to receive Free Exercise protection. On the contrary, as common sense dictates -- and as both the Supreme Court and other circuit courts have held -- both optional and mandatory religious practices come within the scope of the Free Exercise Clause.

Second, the challenged restriction discriminates against religious viewpoints. The term “pervasively sectarian,” as used in the pertinent Colorado statute, is a rough measure of religiosity. The statute therefore targets those who approach education from the most seriously religious perspective. Such anti-religious targeting is precisely what the Free Exercise Clause forbids.

Third, while the parties have disputed whether or not strict scrutiny applies, the challenged restriction fails even under the rational basis test. Defendants have identified no legitimate interest furthered by the statute. The interest in complying with supposed state constitutional directives is circular and question-begging. Other asserted interests, like the interests in avoiding tax funding of clergy training or direct payments for religious instruction, are inapposite. Still other interests, like restricting student religious choices or penalizing religious autonomy, are illegitimate. And the interest in avoiding entanglement with religion actually militates against, rather than for, Colorado’s scrutiny of *how religious* an institution is. In short, the restriction at issue here cannot pass even rational review.

ARGUMENT

This amicus brief focuses on three particular legal propositions relevant to the disposition of this appeal. First, a person’s religion need not *require* the conduct

at issue in order for the Free Exercise Clause to apply. Second, the scholarships restriction at issue here blatantly targets religious *viewpoints*. And third, the challenged restriction flunks even *rational basis* review.

I. RELIGIOUS CONDUCT NEED NOT BE REQUIRED BY ONE’S FAITH TO BE PROTECTED UNDER THE FREE EXERCISE CLAUSE.

The district court seemed to think that a practice must be religiously *required* in order to receive Free Exercise protection. *See* Doc. No. 85, Op. & Order Granting Mot. for Summary Judgment (D. Colo. May 18, 2007) [hereafter “slip op.”] at 13 (“CCU cites to no facts that indicate that its students’ religious beliefs *require* them to attend pervasively sectarian universities (or *prohibit* them from attending anything other than a pervasively sectarian one)”) (emphasis in original). This is simply incorrect. The Free Exercise Clause protects *nonmandatory* practices of religion as well as mandatory practices.

As a matter of common sense, whether a practice is religiously mandatory or optional is beside the point. Attending daily Mass, going on a pilgrimage, reading books of religious meditations, and -- as here -- pursuing studies in a seriously religious environment are all “religious exercises” even if not religiously *mandatory*. A government *ban* on these practices would plainly violate the Free Exercise Clause *because these are exercises of religion*.

Not surprisingly, then, the Supreme Court does not insist that a religious practice be religiously *compelled* in order to fall within the Free Exercise Clause. To the contrary, the Court has upheld Free Exercise protection without any showing of religious compulsion.

In *McDaniel v. Paty*, 435 U.S. 618 (1978), for example, the Court unanimously struck down a Tennessee state constitutional provision that barred ordained ministers from serving as delegates to state constitutional conventions. Nothing in the Court's decision hinged on any assertion that the minister-plaintiff was *compelled* by his faith to serve as a delegate. Indeed, a concurring opinion specifically noted that the *absence of religious compulsion* did not undermine the Free Exercise Clause. *See* 435 U.S. at 634 (Brennan, J., concurring in judgment) (immaterial that "participation in the constitutional convention is a voluntary activity not itself compelled by religious belief"). Yet, a Court majority overturned the restriction under the Free Exercise Clause. *Id.* at 629 (plurality); *id.* at 630 (concurrence).

Other federal circuits have reached the same conclusion. *See Tenaflly Eruv Ass'n v. Borough of Tenaflly*, 309 F.3d 144, 171-172 (3d Cir. 2002) (both mandatory and optional religious practices come within Free Exercise Clause), *cert denied*, 539 U.S. 942 (2003); *Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir.

2003); *Levitan v. Ashcroft*, 281 F.3d 1313, 1319-20 (D.C. Cir. 2002). “A requirement that a religious practice be mandatory to warrant First Amendment protection finds no warrant in the cases of the Supreme Court or of this court.” *Levitan*, 281 F.3d at 1319.

As the *Levitan* court explained, a requirement that religious practices be mandatory to be protected would make no sense:

religions that lack the concepts of commandments necessary for the salvation of the soul would find themselves outside the scope of First Amendment protection altogether. Nothing in the free exercise clause suggests that it only protects religions that incorporate mandatory tenets.

Many cherished religious practices are performed devoutly by adherents who nonetheless do not or cannot insist that those practices are mandated. Neither the Supreme Court nor this court has ever adopted a rule limiting protection to practices that are compelled by a litigant’s religion.

Id. at 1320. Moreover, “[t]o confine the protection of the First Amendment to only those religious practices that are mandatory would necessarily lead us down the un navigable road of attempting to resolve intra-faith disputes over religious law and doctrine.” *Ford*, 352 F.3d at 593.

The district court may have thought *Locke v. Davey*, 540 U.S. 712 (2004), was to the contrary. Slip op. at 12-13. But while *Locke* referred to requiring someone to choose *between* religious exercise and government benefits, 540 U.S. at 720-721, *Locke* nowhere insisted that the pertinent religious exercise *itself* be

religiously required.

Moreover, having courts determine whether religious practices were mandatory would lead to a separate set of constitutional problems. “Repeatedly, and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion” *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990). Assessing whether a religion *required*, or *strongly urged*, or merely *recommended* a given practice would be no more a permissible matter for judicial scrutiny than are questions of the “centrality” or “relative merits” of given religious tenets. *See id.* A secular court is simply not competent to decide whether a given practice (e.g., tithing, giving two years as a Mormon missionary, keeping a particular degree of kosher observance, wearing a headscarf, etc.) is theologically compulsory.

In short, the religiously obligatory nature *vel non* of a given practice is simply *not* an element of a *prima facie* Free Exercise claim, and the district court erred in suggesting it was.

II. COLORADO’S CATEGORICAL EXCLUSION OF ONLY “PERVASIVELY SECTARIAN” SCHOOLS DISCRIMINATES AGAINST RELIGIOUS VIEWPOINTS.

The restriction at issue here -- Colorado’s categorical disqualification of “pervasively sectarian” institutions from its educational assistance programs --

blatantly discriminates against *religious* viewpoints. The district court essentially admitted as much. Slip op. at 16 (“it is clear that students wishing to study [even] religion -- at least to study religion *from a secular perspective, free of indoctrination* -- can receive tuition assistance to do so”) (emphasis added).

The label “pervasively sectarian” is a measure of commitment to a religious perspective. The pertinent Colorado statute¹ thus taken into account such factors as a school’s insistence that its board and faculty subscribe to the institution’s guiding faith, that its students participate in religious activities, and that its students actually be taught religion and theology from the point of view that certain doctrines are true. *See* slip op. at 3 n.4 (listing statutory factors).

Thus, the more seriously committed an institution is to its religious heritage, the more likely the institution will be deemed “too religious” for its students to be eligible for tuition assistance. Under the Colorado scheme, tepid or moderate (or no) religiosity is acceptable; taking faith very seriously is not.

¹ The elements listed in the state statute are *not* equivalent to the term “pervasively sectarian” as used in Supreme Court cases, and the district court erred by using the two interchangeably. A state can no more redefine “pervasively sectarian” than it can redefine any other concept of constitutional law, such as “establishment of religion” or “cruel and unusual punishment.” The anti-religious viewpoint bias inherent in using this label to disqualify otherwise eligible schools, however, is not dependent upon which definition of “pervasively sectarian” is used.

Targeting religion as such, however, is precisely what the Free Exercise Clause forbids.² The government may not “impose special disabilities on the basis of religious views or religious status” or bar “acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.” *Employment Div. v. Smith*, 494 U.S. at 877. Yet that is precisely what Colorado has done. “The provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity.” *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in judgment). *See also Swaggart v. Board of Equalization*, 493 U.S. 378, 390 (1990) (noting special “danger” when “religious activity is being singled out for special and burdensome treatment”).

Importantly, the *Locke* decision countenances no such relegation of “excessively” religious institutions to second-class status. To the contrary, the program at issue in *Locke* “permit[ted] students to attend pervasively religious schools” and to “take devotional theology courses” at such schools while receiving state assistance. 540 U.S. at 724-25. While *Locke* upheld a restriction on the tax funding of clergy training, it did not purport to issue a *carte blanche* for

² The targeting of a religious viewpoint also runs afoul of the Free Speech Clause. *E.g.*, *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995).

categorical discrimination against institutions deemed “too religious.”

This manifest hostility to a seriously religious viewpoint renders the Colorado scheme unconstitutional under the Free Exercise Clause.

III. THE CHALLENGED RESTRICTION FAILS EVEN RATIONAL BASIS REVIEW.

The district court and the parties have hotly contested whether the challenged restriction triggers strict scrutiny or merely rational basis review. This Court need not resolve that issue, as the restriction at issue fails even the lower standard of rational basis review. Defendants have simply failed to identify *any* valid state interest furthered by the challenged restriction.

A. The *Locke* Interest in Avoiding Tax Funding of Clergy Training Is Inapposite.

The district court held that the “same reasoning” in *Locke v. Davey* “compels the conclusion” that Colorado’s interest here is “legitimate.” Slip op. at 17. But this ignores the fact that the interest at stake in *Locke* is *not* at stake here.

The *Locke* Court was crystal clear:

the *only* interest at issue here is the State’s interest in *not funding the religious training of clergy*. Nothing in our opinion suggests that the State may justify any interest that its “philosophical preference” commands.

540 U.S. at 722 n.5 (emphasis added).

Unlike the provision at issue in *Locke*, the Colorado restriction is *not* linked to clergy training. The interest identified in *Locke* is therefore inapposite here.

B. The Alleged Interest in Observing State Constitutional Restrictions Begs the Question Whether Such Restrictions Are Constitutional.

The district court ruled that Colorado had a legitimate interest in following a state constitutional provision that purportedly bars the educational assistance. But even assuming defendants have correctly interpreted the *state* constitution, that begs the *federal* question whether such a restriction is constitutional.

Under the federal Supremacy Clause, U.S. Const. art. VI, cl. 2, both the “[c]onstitution” and the ordinary “[l]aws” of a *state* must yield to the *federal* “Constitution.” *Id.* Hence, invocation of a *state’s* constitution cannot justify what would otherwise be an infringement of the First Amendment’s Free Exercise Clause. *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978) (state constitutional provision struck down under Free Exercise Clause). *Cf. Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (state constitutional interest in “achieving greater separation of church and State” is “limited by the Free Exercise Clause and in this case by the Free Speech Clause as well”).

In short, the defendants’ invocation of the state constitution does not answer the question what legitimate interest justifies, for *federal constitutional* purposes,

the challenged restriction. If the interest in following a state constitutional provision were sufficient by itself to pass muster under rational basis review, then a state constitution would be self-justifying, and no state constitutional clause could ever fail that standard. That is not the law. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (striking down provision of Colorado Constitution under rational scrutiny).

C. An Interest In Not Funding “Religious Indoctrination” Is Inapposite Where the Program Funds Students, Not Schools.

The district court alluded to an interest in “excluding funding for all religious indoctrination,” slip op. at 31, or alternatively an interest in funding only “a secular education free from religious indoctrination,” *id.* at 31 n.27.³ The tuition assistance programs, however, fund *students*, not *institutions*. Hence, this interest is inapposite to the challenged restriction on *institutions*.

If the state were itself providing the instruction, or contracting with private agencies to do so, a state interest in avoiding establishment concerns would come into play. But here, it is private parties -- the students -- who make the educational choices. Hence, the “link between government funds and religious training is

³ The district court’s use of the pejorative term “indoctrination” is unfortunate. A neutral term would be “inculcation.” *E.g., Bethel School Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (role and purpose of public schools includes “inculcation” of fundamental values necessary to democracy).

broken by the independent and private choice of recipients.” *Locke*, 540 U.S. at 719 (and cases cited).

In *Locke*, the state excluded particular *students* -- who were being directly funded -- namely, those who were pursuing ministerial degrees. *Id.* at 725 (“not funding the pursuit of devotional degrees”), 717 (“could not use his scholarship to pursue a devotional theology degree”), 721 (“Training someone to lead a congregation”). By contrast, the restriction at issue here is *not* student-specific. In no way, then, can the *students*’ choice to pursue an education informed by a religious perspective be attributed to state tuition assistance.

In short, it is no more rational to credit the funding of *all students* with the pursuit by some of religious instruction than it would be to credit a pay raise for *all state employees* with the increase by some of their contributions to church collection plates.

In actuality, the interest here is not the avoidance of tax-funded religious instruction, but rather the *constraint of the private educational choices* of tax-funded students. *That* interest is not legitimate.

D. An Interest in “Not Funding Discrimination” Is Both Inapposite and, in this Context, Illegitimate.

In the court below, defendants asserted an interest in choosing “not to fund

discrimination,” Doc. No. 62, Defendants’ Summary Judgment Motion at 10 (D. Colo. Sept. 11, 2006), citing *Norwood v. Harrison*, 413 U.S. 455, 463-465 (1973).

This argument misses the mark.

First, *Norwood* is inapplicable. That case dealt with racial discrimination, which governments have an overriding interest in eradicating, even in private education. *E.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

Governments have *no* legitimate interest whatsoever in preventing *religious* organizations from implementing *religious* criteria. Indeed, *Norwood* itself distinguished the two categories. 413 U.S. at 464 n.7 (“The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools”).

Second, the education assistance at issue here funds *students*, not *schools*. As discussed *supra* § III(C), the state interest here is not in limiting *schools* but in constraining *student religious choices*, an interest that is not legitimate.

Third, as defendants themselves admit, Doc. No. 62, Defts’ Summ. Judg. Mot. at 10, the alleged “discrimination” here is the constitutionally protected self-determination of religious bodies. Could a municipality withhold tax-funded police and fire protection to churches because they “discriminate”? Certainly not. Yet that is the interest defendants proffer here.

E. The Challenged Restriction Does Not Further but in Fact Undercuts an Interest in Avoiding “Entanglement.”

Defendants argued below that the disqualification of “pervasively sectarian” institutions from the tuition assistance programs furthers an interest in avoiding “excessive entanglement with religion.” Doc. No. 74, Defendants’ Response to Plaintiff’s Summary Judgment Motion and to Brief of Amicus Curiae United States at 25 (D. Colo. Sept. 29, 2006). This is highly ironic, as the statutory exclusion actually *increases*, rather than *avoids*, entanglement with religion.

Enforcement of the state’s discrimination between “*pervasively sectarian*” religious institutions and *other* religious institution requires a governmental assessment of the *degree of “sectarianism”* of the institution. Such an inquiry necessarily puts the state in the position of assessing the religiosity of the institutions, an inquiry with obvious entanglement overtones. By contrast, treating all otherwise eligible institutions equally would eliminate the need for this religion-laden inquiry. As in other contexts, an approach of genuine equality “would in fact *avoid* entanglement with religion,” *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality) (emphasis in original; citation omitted).

* * *

In sum, defendants have identified no legitimate interest served by the arbitrary disqualification of certain institutions as “too religious” for students receiving educational assistance to attend. The challenged restriction fails even rational basis review.

CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully submitted,

/s/ _____

JAY ALAN SEKULOW
American Center for Law & Justice
201 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 546-8890

FRANCIS J. MANION
GEOFFREY R. SURTEES
American Center for Law & Justice
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

September 21, 2007

CERTIFICATE OF COMPLIANCE

Undersigned counsel for amicus hereby certifies, pursuant to Rule 32(a)(7)(C), Fed. R. App. P., that the Amicus Brief of the American Center for Law and Justice in Support of Appellant and Urging Reversal was printed using WordPerfect version 10, Times New Roman proportional typeface in 14-point type size, and that the brief complies with the type-volume limitations of Rule 32(a)(7), Fed. R. App. P. Exclusive of material not counted under Rule 32(a)(7)(B)(iii), the brief contains 3,002 words.

/s/ _____
JAY ALAN SEKULOW

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 25(d), Fed. R. App. P., that an original and seven copies of the Amicus Brief of the American Center for Law and Justice in Support of Appellant and Urging Reversal were sent this day to the clerk of this Court by first-class mail, postage-prepaid, and that two copies of the same brief were served this day, by first-class mail, postage prepaid, upon counsel for all other parties to this case, as listed below. In addition, this brief was filed electronically to esubmission@ca10.uscourts.gov and served by email upon counsel for all other parties at the email addresses listed below. I hereby certify that the PDF attachments are exact copies of the written documents and have been scanned for viruses (VirusScanOnline, Engine Version 4.1.60, DAT Version 4.0.4226, DAT File Created 9/30/2002) and are virus-free, and that no privacy redactions were applicable.

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Clerk
U.S. Court of Appeals for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257
(303) 844-3157

Service List

Counsel for Plaintiffs-Appellees

Gregory S. Baylor
Center for Law & Religious Freedom
8001 Braddock Road
Suite 300
Springfield, VA 22151
Phone: (703) 642-1070 x 3502
Fax: (703) 642-1075
Email: gbaylor@clsnet.org

Counsel for Defendant-Appellant

John R. Sleeman, Jr.
First Assistant Attorney General
Education State Services
Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
Phone: (303) 866-5264
Fax: (303) 866-5671
Email: john.sleeman@state.co.us

/s/

JAY ALAN SEKULOW

September 21, 2007