THE AMERICAN RECOVERY & REINVESTMENT ACT OF 2009:
THE DISCRIMINATORY NATURE OF THE BUILDING FUNDS PROVISION

February 3, 2009

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I. INTRODUCTION

A provision in the Senate version of the economic stimulus bill would prohibit universities that allow student groups to use facilities for Bible studies or worship services from receiving federal funds for building improvements and renovations. Among the American Recovery and Reinvestment Act of 2009's many funding provisions is one providing grant funds for colleges and universities "to modernize, renovate, or repair facilities of the institution that are primarily used for instruction, research, or student housing." Amend. 98 to H.R. 1, § 803.

Funded activities may include:

- repairing roofs, electrical wiring, plumbing, sewage systems, lighting, heating, insulation, ventilation, or air conditioning systems
- compliance with fire and safety codes, installing fire alarms, removal of asbestos, and modernizing buildings for emergency preparedness
- improving energy efficiency and upgrading renewable energy generation and heating systems
- compliance with accessibility requirements of the Americans with Disabilities Act of 1990
- improving science and engineering laboratories, libraries, instructional facilities, and educational technology infrastructure
- other modernization or repair projects that are primarily for instruction or research

Prohibited uses of funds include:

modernization, renovation, or repair of facilities—
(i) used for sectarian instruction, religious worship, or a school or department of divinity; or
(ii) in which a substantial portion of the functions of the facilities are subsumed in a religious mission.

Omitted from the proposal are definitions of key terms, including “sectarian instruction,” “religious worship,” “substantial portion” or “subsumed in a religious mission.” The funding prohibition applies to any facilities that are ever “*used*” for sectarian instruction, religious worship, or a divinity school; it is not limited to facilities that are “*primarily used*” for such purposes. Thus, an otherwise eligible college facility that is primarily used for instruction, research, or student housing that is in need of fire alarms, plumbing repairs, asbestos removal, wheelchair accessibility, or improved technology would become ineligible for funding if it is ever *used* for “sectarian instruction” or “religious worship” or is part of a divinity school. This broad restriction would apply to any dormitory in which one student engages in religious worship as well as any college building that is opened for use by student or community groups if there is one religious group that uses the building for religious worship or sectarian instruction.

In stark contrast, the bill only prohibits the use of funds for “modernization, renovation, or repair of stadiums or other facilities” when those facilities are “*primarily used* for athletic contests or exhibitions or other events for which admission is charged to the general public.” In other words, the occasional use of a facility for athletic or other events for which admission is charged *does not* automatically make the facility ineligible for funding (so long as the facility is not *primarily* used for such activities), but occasional use of a facility for religious worship or sectarian instruction *would automatically* render the facility ineligible for funding.

II. Prohibiting funding for facilities a substantial portion of whose functions “are subsumed in a religious mission”

Because the nature of a school’s mission determines the nature of every function that takes place on its property and in its facilities, subsection (ii) of the building funds provision would effectively bar every religiously-affiliated institution of higher learning from receiving federal building funds. In the United States, there are over 900 religious institutions, each of which is defined by a religious mission.[1] For example, in its mission statement, the University of Notre Dame describes itself as “a Catholic academic community of higher learning, animated from its origins by the Congregation of Holy Cross. The University is dedicated to the pursuit and sharing of truth for its own sake. As a Catholic university, one of its distinctive goals is to provide a forum where, through free inquiry and open discussion, the various lines of Catholic thought may intersect with all the forms of knowledge found in the arts, sciences, professions, and every other area of human scholarship and creativity.”[2] Baylor University’s mission statement explains that the “mission of Baylor University is to educate men and women for worldwide leadership and service by integrating academic excellence and Christian commitment within a caring community.”[3] Finally, Yeshiva University’s mission statement says that it “bring[s] wisdom to life by combining the finest, contemporary academic education with the timeless teachings of Torah. It is Yeshiva’s unique dual curriculum, which teaches knowledge

[1] SchoolsintheUSA.com, *Christian Colleges and Universities*, http://www.schoolsintheusa.com/ChristianCollegesUniversities.cfm (last visited Feb. 3, 2009).
[2] University of Notre Dame, *About Notre Dame, Mission Statement*, http://nd.edu/aboutnd/mission-statement/ (last visited Feb. 3, 2009).
[3] Baylor University, *About Baylor, Read Our Mission Statement*, http://www.baylor.edu/about/index.php?id=48040 (last visited Feb. 3, 2009).

enlightened by values, that helps our students gain the wisdom to make their lives both a secular and spiritual success."[4]

As the very purpose of these schools is to further a *religious* mission, every aspect of the administration of these schools and every function that takes place on their campuses will be subsumed in that religious mission. As such, there is no classroom, cafeteria, or gymnasium on a religious school's property that would qualify for federal building funds under this bill. The Senate bill's blanket prohibitions against religiously-affiliated schools under the provision clearly violate the First Amendment's Establishment Clause and must therefore be removed from the bill.

A. Establishment Clause Violation

As a matter of well-settled law, the First Amendment's Establishment Clause does not "require a relentless extirpation of all contact between government and religion." *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989). Indeed, Justice Kennedy once explained that

> [g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. . . . [W]e must be careful to avoid "[t]he hazards of placing too much weight on a few words or phrases of the Court," and so we have "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history.

Id. at 657 (second alteration in original) (quoting *Walz v. Tax Comm'r*, 397 U.S. 664, 670-71 (1970)). As drafted, however, subsection (ii) of the building funds provision seeks to compel that "relentless extirpation of all contact between government and religion" by prohibiting any federal funds from being used for the "modernization, renovation, or repair of facilities . . . in which a substantial portion of the functions of the facilities are *subsumed in a religious mission.*" Not only is this subsection not necessary to prevent an Establishment Clause violation, but if enacted as part of the economic stimulus package, it would in fact *offend* the Establishment Clause by both exhibiting hostility towards religion and fostering excessive government entanglement with religion.

The First Amendment, as interpreted time and again by the Supreme Court, dictates that the government may not interpose itself in the affairs of religious institutions. In 1872, the Supreme Court held that court may not review a religious body's determinations on points of faith, discipline, and doctrine. *Watson v. Jones*, 80 U.S. 679 (1872). Almost one hundred years later, the Supreme Court reiterated this point by explaining that government action runs afoul of the Establishment Clause when it fosters "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). Just one year prior to *Lemon*, the Court held that any government involvement with religion that requires official or continuous surveillance leads to the kind of government entanglement with religion prohibited by the Establishment Clause. *Walz*, 397 U.S. at 675. By basing a facility's *ineligibility* for federal funds under subsection (ii)

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[4] Yeshiva University, *Mission Statement*, http://www.yu.edu/MissionStatement/index.aspx (last visited Feb. 3, 2009).

on the religious nature of the mission in furtherance of which a substantial portion of its functions are performed, subsection (ii) would require the kind of official, continuous surveillance that the First Amendment prohibits.

In *Widmar v. Vincent*, the Supreme Court noted that a public university's use policy which strictly excluded religious speech and worship actually fostered government entanglement with religion by requiring the school, a government actor, to "determine which words and activities fall within 'religious worship and religious teaching.'" 454 U.S. 263, 272 n.11 (1981). The Court further explained that such a policy would require continuous surveillance of religious groups, *id.*—a violation of the principle established in *Walz*. In *Board of Education v. Mergens*, the Court relied on *Widmar* to find that a school more effectively avoids the risk of government entanglement by implementing an open use policy rather than one that excludes religious uses and thus requires an assessment of whether certain uses are indeed religious or not. 496 U.S. 226, 248 (1990). The Court has clearly demonstrated that policies requiring government review of religious doctrine, government monitoring of religious entities, or government assessment of a program's religious nature cannot withstand a First Amendment challenge. Government action simply cannot foster excessive entanglement between the government and religion.

Like the use policies at issue in *Widmar* and *Mergens*, subsection (ii) would require the government to make certain determinations on points of faith, discipline and doctrine, thus requiring official and potentially continuous surveillance of religious groups. As a fundamental premise, in order *not* to violate the prohibition, the government would first be required to determine whether an educational institution's mission was in fact religious in nature. If so, the government would then be required to determine whether a substantial portion of the functions performed in a particular facility were performed in relation to or in furtherance of that religious mission. In other words, the government would be required to determine whether the functions performed in the facility sufficiently comported with the institution's religious mission. Finally, even if there were an *eligible* facility at a religious institution, there is no guarantee that that facility would remain eligible, and the government would thus be required to engage in continuous surveillance of the religious nature of that facility's functions so as not to violate the funding prohibition. As the Court determined in *Mergens*, the government would avoid the risk of government entanglement if it offered the building funds under an "open use" policy rather than excluding facilities involving functions subsumed in a religious mission.

Finally, it should be pointed out that not only does subsection (ii) foster excessive government entanglement with religion, but it also demonstrates hostility toward religion by prohibiting *any* religiously-affiliated educational institution from receiving federal building funds under its blanket prohibition. The *Mergens* Court noted that

> if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."

Id. (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)). Similarly, under the Senate bill, the government would undoubtedly demonstrate hostility toward religion by refusing to allow religiously-affiliated schools to access building funds that are available to other educational institutions.

III. Prohibiting funding for facilities "used for sectarian instruction, religious worship, or a school or department of divinity"

The broad prohibition against providing funds "to modernize, renovate, or repair facilities . . . that are primarily used for instruction, research, or student housing" but that are also "used for sectarian instruction, religious worship, or a school or department of divinity" violates the First Amendment. While providing funding for improved technology, removal of safety hazards, and emergency preparedness on college campuses is a laudable public objective, there is no legitimate secular purpose for singling out classrooms, dormitories, and other facilities where religious worship or sectarian instruction may occur or where divinity school offices are located for exclusion from such funding. The primary effect of the funding restriction is to encourage public universities to deny equal access to their facilities for religious organizations and to encourage all universities to identify and eliminate religious activities, programs, and instruction on their campuses. The expansive restriction invites public universities to violate the First Amendment and is unsupported by the Establishment Clause.

A. Discrimination Against Private Religious Speech

The Senate bill penalizes public universities that grant equal access to their facilities to religious student or community groups and encourages them to either discriminate against religious organizations or close their facilities to all organizations. In *Widmar v. Vincent*, the Court held that the University of Missouri-Kansas City violated the First Amendment by making its facilities generally available for student activities while prohibiting the use of its facilities for religious worship and discussion. The Court rejected the university's claim that it was required to exclude religious groups from its facilities by the Establishment Clause, stating:

> [i]t is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

454 U.S. at 273 (citations omitted). Noting that a broad range of religious and nonreligious groups would use the facilities at issue, the Court explained that

> [t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect. If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair."

Id. at 274-75 (citations omitted). Just as the Establishment Clause does not require municipalities to leave public sidewalks in front of churches in disrepair, it does not require Congress to leave

classrooms or dormitories that are occasionally used for religious purposes or that house divinity schools with outdated technology, safety hazards, or wheelchair inaccessibility.

Moreover, Congress should not do what the Establishment Clause does not do, namely, require government funding programs to exclude potential recipients that are connected to religious instruction or activities. In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court held that a public university violated the First Amendment by prohibiting student publications that conveyed a religious viewpoint or proselytizing message from receiving student activities funding on the same basis as other student publications. The Court's rejection of the university's reliance upon the Establishment Clause as a justification for excluding funding for religious publications is relevant to the proposed restrictions on funding for college facility renovations in the stimulus bill:

> If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar, Mergens*, and [*Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993)] would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. . . . Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis.

Id. at 843-44 (emphasis added) (citations omitted).

In addition, the Court declared:

> It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses is paid from a student activities fund to which students are required to contribute. The government usually acts by spending money. *Even the provision of a meeting room, as in Mergens and Widmar, involved governmental expenditure, if only in the form of electricity and heating or cooling costs*.

Id. at 842-43 (emphasis added). Similarly, the Establishment Clause does not prohibit nondiscriminatory funding of college facility improvements without regard to whether religious activities or instruction occasionally take place there because any benefit to religion is incidental to the government's legitimate secular purposes. To the contrary, *Widmar* and *Rosenberger*

suggest that the principle of neutrality is best served by facilitating, not discouraging, equal access to public facilities for religious groups.

B. The restriction is not required by the Establishment Clause

The plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), is representative of how the current Court would likely approach school funding issues under the Establishment Clause. The *Mitchell* plurality upheld a program that funded the acquisition of educational equipment and materials by local agencies that loaned them to public and private schools. Justice Thomas's plurality opinion, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, stated that the relevant test was whether the program "result[ed] in governmental indoctrination; define[d] its recipients by reference to religion;[5] or create[d] an excessive entanglement." *Id.* at 808 (Thomas, J., plurality) (quoting *Agostini v. Felton*, 521 U.S. 203, 234 (1997)). Regarding governmental indoctrination, the relevant question is "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Id.* at 809. More specifically,

> [i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.

Id. at 809-10 (citations omitted).

The plurality also considered whether "the criteria for allocating the aid 'create a financial incentive to undertake religious indoctrination'" and noted that "'[t]his incentive is not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.'" *Id.* at 813 (quoting *Agostini*, 521 U.S. at 231). While previous cases considered how the neutrality principle applies in "direct" and "indirect" aid situations, the

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[5] *See also Zelman v. Simmons-Harris*, 536 U.S. 639, 654, n.3 (2002) (stating that whether a school aid program "differentiates based on the religious status of beneficiaries or providers of services" is "the touchstone of neutrality under the Establishment Clause") (citing *Mitchell*, 530 U.S. at 809 (plurality opinion)).

Establishment Clause does not categorically forbid "direct" funding programs where religious indoctrination is not attributable to the government. *Id.* at 815-16, 820, n.8. The plurality explained that "[t]he issue is not divertibility of aid but rather *whether the aid itself has an impermissible content*. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school." *Id.* at 822 (emphasis added); *see also id.* at 820 ("[s]o long as the governmental aid is not itself 'unsuitable for use in the public schools because of religious content,' and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern").[6]

The plurality rejected the idea that all aid to religious schools directly or indirectly furthers religious indoctrination in violation of the Establishment Clause.

> Presumably, for example, government-provided lecterns, chalk, crayons, pens, paper, and paintbrushes would have to be excluded from religious schools under respondents' proposed rule. But we fail to see how indoctrination by means of (*i.e.*, diversion of) such aid could be attributed to the government. In fact, the risk of improper attribution is less when the aid lacks content, for there is no risk (as there is with books), of the government inadvertently providing improper content.

Id. at 824.

In addition, the plurality expressly rejected the claim that, based on previous cases, "pervasively sectarian" schools are categorically ineligible to participate in neutral government aid programs. *Id.* at 826-29. The plurality stated that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now." *Id.* at 829. The plurality declared that

> the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.

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[6] In this regard, *Agostini* and *Mitchell* have clearly undermined earlier cases like *Tilton v. Richardson*, 403 U.S. 672 (1971) that interpreted the Establishment Clause to impose broader restrictions on religious school participation in general aid programs. *See, e.g., Zelman*, 536 U.S. at 649 ("our jurisprudence with respect to the constitutionality of direct aid programs has 'changed significantly' over the past two decades") (citing *Agostini*, 521 U.S. at 236); *Johnson v. Economic Development Corp.*, 241 F.3d 501, 518-19 (6th Cir. 2001) (Nelson, J., concurring) (arguing that, under *Mitchell*, providing tax-exempt financing for the construction, renovation, or improvement of an auditorium building at a divinity school would be consistent with the Establishment Clause).

Id. at 827-28.

The Establishment Clause does not require Congress to exclude funding for university renovations for facilities that are used by a divinity school or that are used on occasion for religious worship or sectarian instruction. A funding provision that is neutral toward religion would not result in indoctrination attributable to the government, define its recipients by reference to religion, or create an excessive entanglement with religion. *See id.* at 808. Any aid provided on a neutral basis would have the effect of furthering the government's secular purposes (enhancing student safety, improving access for disabled students, etc.) and "no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *See id.* at 809-10 (citations omitted). The aid itself is neutral (new fire alarms, better technology, etc.) just like the "government-provided lecterns, chalk, crayons, pens, paper, and paintbrushes" discussed in *Mitchell*, see id. at 824, and the program does not "create a financial incentive to undertake religious indoctrination." *Id.* at 813.

In a similar vein, in *Locke v. Davey*, 540 U.S. 712 (2004), the Court concluded that the Free Exercise Clause did not forbid Washington state from prohibiting the use of scholarship funding for the pursuit of a degree in devotional theology. Importantly, however, the Court stated that "there is no doubt that the State *could*, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . . ." *Id.* at 719 (citations omitted) (emphasis added). In other words, the Establishment Clause does not prohibit public scholarship programs that provide funding on a neutral basis without regard to whether the student's degree is devotional in nature. The funding of asbestos removal, installation of fire alarms, or improved technology in a college classroom or dormitory that is primarily used for instruction, research, or student housing—but happens to be used at some point for religious worship or sectarian instruction or is used by a divinity school—is further removed from any governmental support of religious indoctrination than the funding of a student's pursuit of a devotional theology degree. *See also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("We have never said that 'religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs'"); *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (noting that Congress may not "discriminate invidiously in its subsidies in such a way as to '[aim] at the suppression of dangerous ideas'"); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 746 (1976) ("Religious institutions need not be quarantined from public benefits that are neutrally available to all").

Moreover, the broad restriction on funding for any classroom, dormitory, or other facility that is ever used for religious worship, sectarian instruction, or divinity school activities may reasonably be viewed as having the purpose or effect of showing hostility toward religion. The Supreme Court has repeatedly held that the Establishment Clause neither requires nor allows government hostility toward religion. *See, e.g., Rosenberger*, 515 U.S. 819; *Lamb's Chapel*, 508 U.S. at 395; *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989); *Roemer*, 426 U.S. at 747. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary*." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (emphasis added).

CONCLUSION

The Senate should remove Section 803's discriminatory restriction and ensure that colleges and universities have access to funding for building improvements on a nondiscriminatory basis.

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