The following brief was joined by James E. Andrews, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). It was filed in the United Stated Court of Appeals for the Eleventh Circuit on July 24, 1995.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-9376

LOUIS A. SIEGEL,	>	
Plaintiff/Appellant,	>	On Appeal from the
	>	U.S. District Court
v.	>	for the Northern
	>	District of Georgia
TRUETT-McCONNELL COLLEGE,	>	Civ. # 2:93-cv-148-wco
et al.,	>	William O'Kelley, C.J.
Defendants/Appellees.	>	

BRIEF *AMICUS CURIAE* OF ABILENE CHRISTIAN UNIVERSITY, JAMES ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A), ASSOCIATION OF SOUTHERN BAPTIST COLLEGES AND SCHOOLS, BAYLOR UNIVERSITY, BRIGHAM YOUNG UNIVERSITY, CHARLESTON SOUTHERN UNIVERSITY, CHRISTIAN EDUCATION COORDINATING BOARD OF THE BAPTIST GENERAL CONVENTION OF TEXAS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, CHURCH OF THE NAZARENE, COALITION OF CHRISTIAN COLLEGES AND UNIVERSITIES, EDUCATION COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EDUCATION COMMISSION OF THE GEORGIA BAPTIST CONVENTION, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, MERCER UNIVERSITY, AND PEPPERDINE UNIVERSITY AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*

The *amici* joining this brief are religiously-affiliated colleges and universities, associations of such schools, or religious bodies that have such affiliated schools.[1] *Amici* have varying views about the

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[1]Because of the number and variety of *amici*, the specific features and interest of each are set forth in the Appendix to this

extent to which it is good or wise for a religiously-affiliated college to prefer members of its own faith community in employment. But each amici agrees strongly that the decision whether to have such a preference is for the college to make, and not the government through Title VII or any other law. This case is an easy one in which to affirm that freedom, for Truett-McConnell College unquestionably is religiously controlled and supported and thus protected from liability by § 703(e)(2) of Title VII. However, since this likely will be the first appellate decision to turn on the meaning of § 703(e)(2), amici believe it is vital for this Court, in setting forth an interpretation of the provision, to be aware of the features of religious colleges in America. If Truett-McConnell is not protected, then hundreds of such colleges likewise face liability for refusing to hire an employee from outside their faith -- the very result that Congress sought to avoid when it added § 703(e)(2) to Title VII in 1964.

SUMMARY OF ARGUMENT

When Congress made religious discrimination in employment illegal under Title VII of the Civil Rights Act of 1964, it recognized at the same time that churches and other religious organizations have an important interest in being free to carry out their work and mission through members of their own faith community, if they choose.

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brief.

Accordingly, Title VII includes several provisions permitting religious organizations to make employment decisions on the basis of religion, including the provision involved here: that a school may favor persons of a particular religion in employment if the school "is, in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious" entity. Section 703(e)(2), 42 U.S.C. § 2000e-2(e)(2). As the district court found, Truett-McConnell College is unquestionably both substantially "controlled" and substantially "supported" by the Georgia Baptist Convention and therefore has the right to prefer members of the Christian faith in employment. This Court should affirm the grant of summary judgment dismissing the plaintiff's claim of religious discrimination.

Section 703(e)(2) was added to the 1964 civil rights bill because Congress believed that narrower exemptions already in the bill did not sufficiently protect the right of religiously-affiliated colleges to hire members of their own faith. Thus, Congress meant the concepts of "substantial control or support" to be understood broadly and flexibly -- excluding schools with merely nominal religious connections, but including a wide range of colleges with varying ties to a religion or to another religious entity. An interpretation that covers only schools with especially close religious ties, or that exhibit one particular form of control or support, should be rejected.

Under these principles, Truett-McConnell is easily protected by § 703(e)(2), as a matter of law. A college may be "controlled" by a religion or religious entity in a variety of ways: control over the governing board, over property, over the college's charter. The Georgia Convention's relation to Truett-McConnell includes all of these methods. The Convention also gives "substantial support" to the College, more than $600,000 a year. In claiming that these ties are not substantial, the plaintiff proposes standards that are entirely unrealistic given the realities of church-related higher education, and that would strip a large majority of religious colleges of § 703(e)(2)'s protection and expose them to liability for hiring members of their own faith.

This Court should also reject the plaintiff's claim that the College loses its right to prefer members of its own faith as soon as its students or programs receive government financial aid. The plaintiff's challenge to the funding of the College is not even properly raised in this case. If the Court addresses the issue, however, it should follow established Supreme Court case law and make clear that colleges need not strip themselves of their religious affiliations or features in order to benefit from public funds that support higher education in general.

ARGUMENT

A. Courts Should Interpret § 703(e)(2) Generously, To Give Clear Protection To A Wide Range Of Religiously-Affiliated Colleges To Hire Members Of Their Own Faith.

Section 703(e)(2) of Title VII, 42 U.S.C. § 2000e-2(e)(2), provides in full that

> it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association or society.[2]

There has been little caselaw concerning this provision, especially the question presented here: When is a college controlled or supported in substantial part by a religion or religious entity? However, several basic principles can be derived from § 703(e)(2)'s legislative history and the policy behind the provision.

1. Section 703(e)(2) should be read generously.

First, § 703(e)(2) should be interpreted generously, to ensure that a wide range of religiously-affiliated colleges will be protected from lawsuits forcing them to hire persons outside their faith community. Congress did not pass § 703(e)(2) merely to exempt a few schools with unusually close or extensive ties to a religion. Rather, the terms "substantial . . . support[or] control[ ]" should be read to

[2]This case does not involve the second part of § 703(e)(2), which permits religion-based employment if the school's curriculum "is directed toward the propagation of a particular religion."

protect the typical religiously-affiliated college, and to exclude only those whose religious ties are nominal or perfunctory.

By its terms, § 703(e)(2) does not require that the college be completely controlled, supported, or owned by the religion or religious entity: only "in substantial part." The qualifier "substantial" does not mean "extensive" or "overwhelming" control or support -- a construction that would exclude many colleges from coverage. The legal term "substantial" has been defined as "actually existing; real; not seeming or imaginary; not illusive [or] merely nominal." Black's Law Dictionary 1280 (5th ed. 1979). This generous construction is necessary to serve the purposes of § 703(e)(2), as we will now show.

Section 703(e)(2) was added in the House as an amendment to the original civil rights bill and was "extensively debated." Pime v. Loyola University of Chicago, 803 F.2d 351, 357 (7th Cir. 1986) (Posner, J., concurring); see 110 Cong. Rec. 2585-93 (Feb. 8, 1964). The sponsor, Representative Purcell, and other supporters argued that the amendment was necessary because the exemptions already contained in the bill might leave many church-related schools unprotected. For example, they feared, the exemption for religious corporations, 42 U.S.C. § 2000e-1, would be insufficient because many religious schools "are chartered under the general corporation statutes as nonprofit institutions" rather than as religious corporations. 110 Cong. Rec. at

2585 (Rep. Purcell); accord id. at 2587 (Rep. Roush).[3] Likewise, they feared, many religion-based hiring decisions would not obviously meet the standard of "bona fide occupational qualification" under 42 U.S.C. § 2000e-2(e)(1). Purcell wanted broader and clearer protection:

> The church-related school should never be called upon to defend itself for failure to hire an atheist or a member of a different faith. . . . It should be so spelled out that there is no question of [schools'] right to hire employees on the basis of religion.

110 Cong. Rec. at 2585. Numerous supporters of the amendment also indicated that it would protect a significant number of religious colleges. See, e.g., id. at 2587 (Rep. Roush) (exemption "would touch almost every Member here because surely they have a denominational school in their district"); id. at 2588 (Rep. Poage) (exemption necessary because "there are hundreds of church-affiliated schools throughout the United States"); id. at 2592 (Rep. Kornegay) ("[i]n my district and State there are many religious and church-related colleges" and other institutions that should be free to employ adherents only).

The amendment was adopted in the House on a voice vote with few

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[3]Several cases cited by plaintiff (Appellant's Br. at 21-22) involve § 2000e-1. E.E.O.C. v. Townley Engineering & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), cert. denied, 489 U.S. 1077 (1989); E.E.O.C. v. Kamehameha Schools, 990 F.2d 458 (9th Cir.), cert. denied, 114 S. Ct. 439 (1993). For this reason, among others, those cases are inapplicable to the "more lenient" exemption in § 2000e-2(e)(2). Fike v. United Methodist Children's Home, 547 F. Supp. 286, 290 n.3 (E.D. Va. 1982), aff'd on other grounds, 709 F.2d 284 (4th Cir. 1983); Kamehameha, 990 F.2d at 460 n.4.

if any dissenters, since the floor manager of the overall bill, Representative Celler, eventually accepted the amendment. 110 Cong. Rec. at 2592-93.[4] The large majority that adopted § 703(e)(2) plainly thought it was extending protection to the typical religiously-affiliated school. Courts should be mindful of that background and should not set standards for religious affiliation that are so high that most colleges would fail them -- whether as of 1964, when the Act was adopted, or as of today. Such a result would destroy the purpose of broadening protection beyond the more limited exemptions that already existed. "Absent clear congressional intent to the contrary," this Court should "assume the legislature did not intend to pass vain or meaningless legislation." Gulf Life Insur. Co. v. Arnold, 809 F.2d 1520, 1524 (11th Cir. 1987); cf. Board of Education v. Mergens, 496 U.S. 226, 244 (1990) (rejecting an interpretation of the Equal Access Act that would make it apply to "almost no schools" and "would render [it] merely hortatory").

This analysis corresponds to the reasoning of Judge Posner's concurrence in Pime, the only federal appellate opinion to discuss this provision at length. Judge Posner stated (803 F.2d at 358) that "[i]f the governance arrangements of Loyola [University, the defendant] are typical of those of Catholic universities, then I would have little

[4]Although the Senate made significant changes in the House bill before adopting it (by a 73-27 vote), it left § 703(e)(2) unchanged. 110 Cong. Rec. 14511 (June 19, 1964).

doubt that Loyola was within the protection of" § 703(e)(2) -- in other words, the provision should extend to the "typical" religious college, not just a minority of cases. In Pime, however, the record did not show which church-college relations were typical (id.); this brief fills that gap with figures from a number of leading surveys of religious colleges. Those surveys make clear that there are many ways for a college to be religiously controlled or supported -- and that the Georgia Baptist Convention's ties to Truett-McConnell are not only "substantial," but unusually extensive and close.

This Court should also interpret § 703(e)(2) generously because of the magnitude of the interest at stake. The right of religious entities to prefer members of their own faith as workers stems from the First Amendment value of free exercise of religion. Supporters of § 703(e)(2) made clear that they sought to safeguard religious freedom and church/state separation against Title VII regulation. See 110 Cong. Rec. at 2585 (Rep. Purcell); id. at 2586 (Rep. Gathings); id. at 2590 (Rep. Clausen); id. at 2591 (Rep. Ashmore); id. at 2592 (Rep. Bennett); id. (Rep. Kornegay). As the Supreme Court recognized in Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987), laws that compel religious organizations to employ members of other faiths create "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Id. at 335 (upholding constitutionality of 42 U.S.C. § 2000e-1, which

protects right of religious corporations to hire on religious basis). Thus, the Title VII exemptions "reflect a decision by Congress that the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention." Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991)(holding that Catholic school had statutory right to discharge teacher who had contravened Catholic moral teachings).[5] In Little, the Third Circuit explained, in words equally applicable here, that

> Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's religious activity. Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly.

Id. This Court should likewise read § 703(e)(2) broadly because of the constitutional interests at stake. The decision of a religious school whether to hire from its own faith is a quintessentially religious

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[5]Congress had strong reasons in § 703(e)(2) for protecting faith-based hiring in all of a college's activities, not just supposedly "religious" ones. Above all, as Amos stated, "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." 483 U.S. at 336. In addition, supporters of § 703(e)(2) noted that a wide range of employees might come in contact with students and influence them (110 Cong. Rec. at 2586 (Rep. Poff); id. at 2589 (Rep. Poage)); and that religious bodies might hire their own members for varying positions as a form of charity (id. at 2588 (Rep. Roberts)).

decision that is no business of government's.[6]

Section 703(e)(2) does not cover colleges that have "merely nominal" or vestigial ties to a religion or religious entity.[7] However, the concepts of "substantial support or control" should be read realistically in the light of the actual features of most religious colleges in America, those whose religious ties are not "merely nominal." This Court should avoid a reading that makes it too difficult, in practical terms, for such colleges to claim the protection of § 703(e)(2).

A corollary is that "control" and the other terms in § 703(e)(2) should be interpreted to encompass a variety of arrangements by which a school is tied to a religious faith or a religious entity. The most extensive survey of church-affiliated colleges, the Danforth Report,

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[6]Although this case (like Amos) primarily turns on a statutory exemption, we agree with the defendants that Truett-McConnell also had a constitutional right under current caselaw to refuse the plaintiff employment. A rule forbidding religion-consciousness in hiring singles out religion as a concern and thus triggers strict scrutiny when applied to religious employers. Church of Lukumi Baaulu Aye v. City of Hialeah, 113 S. Ct. 2217, 2226-27 (1993); Employment Division v. Smith, 494 U.S. 872, 881-82 (1990). It is analogous to telling the Sierra Club that it must hire someone who does not believe in protecting the environment. Given the strength of a religious entity's interests in hiring its own members (Amos; Little), the government has no "compelling interest" in preventing religious colleges from doing so. See Appellees' Br. at __-__.

[7]Consider, for example, "Harvard, Yale, Columbia, Princeton, and Brown, which were all founded by a church but are not now regarded as religiously affiliated or church-related." E. Gaffney and P. Moots, Government and Campus: Federal Regulation of Religiously Affiliated Higher Education 10 (1982).

concluded that "the relationships between colleges and religious bodies are varied and often complex." M. Pattillo and D. Mackenzie, Church-Sponsored Higher Education in the United States: Report of the Danforth Commission 52 (1966). Colleges use many elements, in varying combinations, to define their religious nature and their relation to a particular religion or to a specific religious entity. Id. at 30-54.

Congress contemplated that § 703(e)(2) would protect a wide variety of religiously-affiliated schools. See, e.g., 110 Cong. Rec. at 2587 (Rep. Chelf) (referring to Catholic, Trappist, Baptist, Presbyterian, and Mormon schools, and stating that all should be protected); id. at 2592 (Rep. Kornegay) (referring to "Baptist, Methodist, Quaker, Catholic, Presbyterian, Christian, Masonic Order, and others"). This overall understanding can only be effectuated if courts read terms such as "control" and "support" flexibly to encompass the wide variety of college-church relationships. The statute should also be read in this way so as to avoid transgressing the bedrock constitutional principle "that one religious denomination" -- in this case, one religious polity or structure -- "cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). For the same reason, any interpretation of § 703(e)(2) should be careful to protect colleges that are related to "a particular religion," even if not to any specific religious organization or

entity.[8]

As we will show, Truett-McConnell is substantially controlled and supported by the Georgia Baptist Convention in a host of ways; therefore, this case does not come close to the limits of the relationships encompassed by § 703(e)(2). However, the plaintiff here argues that only certain narrowly-defined forms constitute sufficient control under this provision. This Court should reject such arguments and implement the statutory policy of protecting all religious groups.

2. The application of § 703(e)(2) is a question for the court, not the fact-trier.

Moreover, the plaintiff is misguided when he challenges the grant of summary judgment here by claiming that "a material issue of fact exists" concerning the applicability of § 703(e)(2) (Appellant's Br. at 22). As we will show, Truett-McConnell's entitlement to protection is clear. More fundamentally, given the undisputed underlying facts concerning the relation of the College to the Georgia Baptist Convention,[9] the ultimate question whether those facts mean the College

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[8]Although Truett-McConnell is clearly related to a specific religious entity, there are a number of independent or interdenominational colleges "that cannot be classified technically as church related but do have a definite religious orientation." Pattillo and Mackenzie, supra, at 19. Such colleges certainly qualify as controlled "by a particular religion" under § 703(e)(2), even if not by a specific religious entity.

[9]The plaintiff does attempt to conjure up one or two alleged issues of underlying historical fact. These are dealt with in detail in the appellees' brief.

is substantially "owned, supported, controlled, or managed" by a religion or religious entity under § 703(e)(2) is an issue for the court, not for the fact-trier. "The proper interpretation of a statute . . . is purely a question of law." Keys Jet Ski v. Kays, 893 F.2d 1225, 1227 (11th Cir. 1990).

It is especially important for the application of § 703(e)(2) to be delineated by courts. To give wide case-by-case discretion to triers of fact would leave religious colleges uncertain whether their religion-based hiring was legally protected. This would undermine the section's purpose to "spell[ ] out that there is no question of [colleges'] right to hire employees on the basis of religion." 110 Cong. Rec. at 2585 (Rep. Purcell).[10] In another area with constitutional implications, the Supreme Court has held that judges in defamation cases "must independently decide," without deferring to the fact-trier, "whether the evidence in the record is sufficient to cross the constitutional threshold" and permit liability consistent with free speech principles. Bose Corp. v. Consumers' Union, 466 U.S. 485, 511 (1984). The reason for that policy applies equally here: just as a jury as fact-trier "'is unlikely to be neutral with respect to the

[10]Accord 110 Cong. Rec. at 2589 (Rep. Bromwell) ("so long as there is any question about the interpretation of this we should nail it down with the amendment"); id. at 2590 (Rep. Quie) ("in order to make [the right] absolutely clear this amendment should be adopted"); id. at 2591 (Rep. Ashmore) ("if there is any doubt about what the bill now provides, we should support the amendment").

content of speech'" (Bose, 466 U.S. at 510-11 (quotation omitted)), a jury might allow its dislike of a particular faith to influence its decision whether a school fell within § 703(e)(2) or other Title VII exemptions. To ensure consistency and clarity, courts must control fact-triers' discretion. Accordingly, the district court acted properly in determining, as a matter of law, that Truett-McConnell fit within the protections of § 703(e)(2).

B. Truett-McConnell Is Substantially Controlled By The Georgia Baptist Convention Under § 703(e)(2).

Truett-McConnell is "controlled" in "substantial part" by a particular religious entity, the Georgia Baptist Convention. Any sensible reading of § 703(e)(2) must lead to this conclusion. It is undisputed that the Convention has the power to elect and remove all of the College's trustees (who are and always have been Georgia Baptists, and 25 percent of whom must be Baptist ministers); that it owns all of the College's real property;[11] and that the College charter provides that the Convention must approve any amendments to the charter, including the provisions for trustee election and removal (as plaintiff himself admits, see Appellant's Br. at 10; Appellees' Br. at __). The relationship between the Convention and Truett-McConnell, therefore, exhibits every feature that, according to a leading survey, gives a

[11]The ownership of property shows not only "control" as well as "support," but also that the College is "substantial[ly] . . . owned" by the Convention -- an additional ground for affirmance.

religious body "considerable influence and control over what happens at a campus." P. Moots and E. Gaffney, Church and Campus: Legal Issues in Religiously Affiliated Higher Education 8 (1979) (discussing control over governing documents, control over governing board, membership of board, and control over assets). Each of the above factors gives the Georgia Baptists substantial -- more than "nominal" -- control over Truett-McConnell. Taken together, the control is unquestionable.

The right to elect and remove all trustees in itself gives the Convention substantial control, since the trustees in turn oversee the administrators who run the College. Provisions for the election or removal of some or all trustees are a "widespread" method for a religious body to ensure control over its affiliated college. See Pattillo and Mackenzie, supra, at 38; accord Moots and Gaffney, Church and Campus, supra, at 7.

The focus on the above features does not in any way imply that only a school as tightly controlled as Truett-McConnell is protected by § 703(e)(2). The arrangements here -- property ownership, all trustees elected by the Convention, all trustees being Georgia Baptists -- reflect an especially close control by a religious body. Many other colleges "are church affiliated by virtue of only one or two specific kinds of relationship." Pattillo and Mackenzie, supra, at 52. Such relations should also fit within the generous reading of § 703(e)(2) outlined in part A.

At many religious colleges, a religious entity maintains control by electing only a portion of the governing board, often a sufficient number to block major changes. The Danforth Report found that if even "a substantial fraction of the trustees of a college is elected by a church body, that body can have a large measure of control over the affairs of the institution, including its religious character." Pattillo and Mackenzie, supra, at 40 (emphasis in original).

At many other colleges, religious control is assured by a provision that all of the trustees, or at least a substantial bloc, be members of the particular faith or religious body. See, e.g., Pime, 803 F.2d at 352 (one-third-plus-one of trustees, enough to block amendments to bylaws, were required to be Jesuits); Pattillo and Mackenzie, supra, at 36 (Table 12) (noting significant number of colleges with membership requirement for part of board). In those cases, the religious identity of the governing board amounts to control "by [the] particular religion" within the terms of the exemption. See id. at 52 (board composition is a "potentially significant means of shaping the character of an institution").

In the light of all these elements of "control," to hold that Truett-McConnell is not protected by § 703(e)(2) would logically mean that a vast number of other colleges, with equal or fewer elements present, would be unprotected as well, in violation of the broad purpose of the provision. Plaintiff's arguments on appeal confirm that

his position would greatly impair the effectiveness of § 703(e)(2). His overall theme is that by creating a trustee board to govern Truett-McConnell, "the Convention established an independent institution with its own charter and bylaws that placed control in the hands of the board of trustees." Appellant's Br. at 10. He adds that the "trustees are not bound to vote according to the dictates of the Church hierarchy that is found in the Convention," in contrast to a college where the "trustees are bound to obey their superiors and would be compelled to vote as they were instructed." Id. at 11, 15-16.

These arguments are fatally flawed. As already noted, the charter and bylaws give the Convention substantial control over the trustees through election and removal powers. Moreover, even apart from those powers, the membership requirement for trustees ensures control by the religion or religious entity -- as does the control over real property.

Of course, the Convention does not "dictate to" or "instruct" the College in an ongoing manner. But if that is how plaintiff insists that "control" be defined, his argument is misguided and unrealistic. "Control" in the legal sense involves the "power or authority to manage, direct, . . . or oversee" (Black's Law Dictionary 298 (5th ed. 1979) (emphasis added)) -- not necessarily the actual exercise of hands-on management. As a practical matter, a religious body must nearly always delegate authority to administrators who run the college day-to-day and trustees who concentrate their attention on overseeing

the college. As a former president of the national Southern Baptist Convention has written, "There is no practical way our Convention could operate its institutions except through trustees, unless it were willing to stay in constant session." James L. Sullivan, Baptist Polity As I See It 157 (1983). Similarly, regarding Catholic colleges,

> [m]ajor superiors [i.e., leaders of religious orders] and their councils are responsible for many more Religious subjects and for a variety of important undertakings. They can no longer give a college the personal and regular attention it deserves. Meanwhile the complexity of college operation has increased immeasurably. Assets formerly computed in the thousands of dollars are now valued in millions. Today each college needs and deserves its own functional board of trustees.

Edward V. Stanford, A Guide to Catholic College Administration 14 (1965). By delegating authority to trustees while holding them accountable (as the Georgia Convention has done here in numerous ways), a religious entity "can operate with confidence and still give the institutions the degree of flexibility they need to be efficient operations." Sullivan, supra, at 160.

The plaintiff's arguments would thus cripple colleges' ability to use trustee boards. But his arguments would be particularly devastating to colleges related to Baptist and other congregationally organized religious groups, for whom the notion of a "Church hierarchy" dictating to trustees (Appellant's Br. at 11) is inappropriate. Colleges are controlled by the Baptist faith or Baptist entities through an assortment of other means, including election of trustees,

membership requirements for trustees, or ownership of property. Moreover, the Baptist principle of "voluntary cooperation" does not prevent Baptist control over colleges as plaintiff asserts (id.). Under Baptist polity, local congregations are "autonomous, self-governing and self-determining," and their cooperation with others through Baptist conventions is voluntary. Sullivan, supra, at 25, 27. But not all colleges are in the same position: while the forms of connection vary, at least some Baptist colleges (including, clearly, Truett-McConnell) are religiously controlled by through one or more of the means described above. By demanding one particular form of control (a "Church hierarchy"), plaintiff would disqualify all Baptist colleges from protection under § 703(e)(2). That result not only impermissibly disfavors one form of religious polity (supra p. 11); it also contravenes numerous statements by congressmen that Baptist colleges would be among those protected. See 110 Cong. Rec. at 2586 (Rep. Harris); id. at 2587 (Rep. Chelf); id. at 2592 (Rep. Gary); id. (Rep. Kornegay).

Because Truett-McConnell has so many features that make a college religiously controlled, this Court need not explore in detail the outer boundaries of coverage under § 703(e)(2). Amici do believe that the case on which plaintiff primarily relies, Pime v. Loyola University, 585 F. Supp. 435 (N.D. Ill. 1985), aff'd on other grounds, 803 F.2d 351 (7th Cir. 1986), erred in holding that Loyola was not substantially

controlled by the Jesuit order, given that Jesuits constituted a sufficient percentage on the trustee board to block any bylaw amendments (585 F. Supp. at 437). However, Pime can easily be distinguished without undermining the principle that § 703(e)(2) should cover a wide variety of church-college relations. The minority bloc of trustees was virtually the only element of Jesuit control at Loyola: unlike a large number of Roman Catholic colleges, Loyola was not owned in any part by the order, received no net financial support from it, and (with isolated exceptions such as the theology department) gave no religious preference to Jesuits. Id. at 437.[12]

C. Truett-McConnell Is Substantially Supported By The Convention Under § 703(e)(2).

Truett-McConnell College receives more than $600,000 a year, from the Georgia Baptist Convention -- about 10 percent of its budget, and enough to pay the salaries and benefits of 19 of the 25 full-time faculty at its main campus. D. Ct. Op. at 12 (R. Tab 54). As an independent ground for affirmance, this Court should uphold the district court's ruling that such a contribution "demonstrate[s] substantial support by a particular religion" under § 703(e)(2) as a

[12]By contrast, a 1964 survey of 339 Catholic colleges showed that 94.7 percent were owned by a religious order or congregation, 97 percent received financial support, and 74.3 percent gave preference to Catholics in faculty and staff employment. Pattillo and Mackenzie, supra, at 35 (Table 11). Thus, at least in terms of 1964 features, Loyola by the 1980s had "attenuated its relationship to the Jesuit order far beyond that of other Catholic universities." Pime, 803 F.2d at 358 (Posner, J., concurring).

matter of law. Id.; see also id. at 22-23.

The district court's holding is the only possible reading of § 703(e)(2) given the realities of religiously-affiliated higher education. The contributions from the Convention to Truett-McConnell are far more than nominal. A college that lost 10 percent of a year's budget would be forced to make drastic cutbacks in programs, personnel, or salaries. Surely the plaintiff, were he a full-time teacher at the College, would not wish to see his own salary drop by 10 percent. A Methodist study sums up the reality:

> Church funds do not constitute a large percentage of the income of most institutions, but the amount provided by the church may make the difference between a balanced budget and a deficit or between the maintenance of educational quality and undesirable cutbacks forced by financial difficulties.

National Commission on Methodist Higher Education, Toward 2000: Perspectives on the Environment for United Methodist and Independent Higher Education 49 (1976).

If (as plaintiff claims) the support here is "insubstantial" simply because it constitutes only 10 percent of the College's budget, then once again § 703(e)(2) will fail to protect most religiously-affiliated colleges, in frustration of statutory purpose. Contributions from the related religious body are often that low or lower in percentage terms -- even though, as here, they are crucial to

the college and large in absolute terms.[13] In the mid-1960s, when § 703(e)(2) was passed, almost 60 percent of church-related colleges (473 of 817 surveyed) received 10 percent or less of their general income through contributions from the denomination or order. Pattillo and Mackenzie, supra, at 43 (Table 18). And recently, even among a class of "seriously religious" colleges, more than half (53 percent) received 5 percent or less of their funding from the religious body. Robert T. Sandin, Autonomy and Faith: Religious Preference in Employment Decisions in Religiously Affiliated Higher Education 39 (1990) (Table 5). These figures do not show a lack of support from religious bodies; rather, they reflect both the steep costs of higher education and the large size of many church-related colleges. As with the concept of "control," this Court should read the concept of "support" in a practical manner. A six-figure contribution that makes up a typical percentage of a college's budget compared to other religiously-affiliated colleges is "substantial support" as a matter of law. Here, the percent given by the Convention is much larger than average, and thus the "support" is unquestionable.[14]

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[13]As with most private colleges, church-related colleges generate the largest share of their revenues from tuition and fees. See, e.g., David W. Breneman, Liberal Arts Colleges: Thriving, Surviving, or Endangered? 82-84 (1994) (Tables 4-8 to 4-10).

[14]In computing the amount and share of "support," we have not even taken into account contributions from Baptist congregations and donors who particularly identify themselves as Baptist. Even without such figures, the support here is "substantial." But such

D. The Government Assistance From Which Truett-McConnell Benefits Does Not Disqualify It From The Protection Of § 703(e)(2).

Plaintiff claims that state and federal assistance from which Truett-McConnell benefits somehow strips it of the protection of § 703(e)(2) and subjects it to the requirement that it hire employees without regard to religious faith. But the text of § 703(e)(2) contains no such limit on its coverage. Given the large number of religious colleges that benefit from funding,[15] Congress would not have contemplated stripping the provision of effect in this way.

Plaintiff also claims that the aid the College receives "would be illegal if the College were affiliated with the Baptist Convention." Appellant's Br. at 27. In effect, plaintiff argues that the College cannot constitutionally receive government aid and also engage in religion-based hiring. To the extent plaintiff challenges the College's receipt of aid, however, the argument is not properly raised; plaintiff's attempt to add a taxpayer claim challenging the aid was correctly rejected by the district court as untimely and unfairly

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contributions -- which are crucial to many religious colleges, including those with whom some amici are concerned -- should also qualify as support "by a particular religion" under § 703(e)(2).

[15]See, e.g., Gaffney and Moots, Government and Campus, supra, at 11-12 (85 percent of church-related colleges receive direct aid and virtually every one has students who receive aid). Congressmen debating § 703(e)(2) were well aware that even in 1964, "there [wa]s hardly a large private college in this country that d[id] not receive substantial amounts of Federal funds." 110 Cong. Rec. at 2590 (Rep. Gill).

prejudicial. D. Ct. Op. at 25-27 (R. Tab 54). If, however, this Court reaches the merits of the argument, the law is clear that a college may benefit from government funding and still maintain religious affiliations and prefer members of its own faith in employment. Thus, the Court should reject plaintiff's constitutional attack, whether it is directed at the application of the exemption or at the College's receipt of government aid.

A significant portion of the government aid here consists of grants and loans to students, who choose to use them in one of Truett-McConnell's programs. D. Ct. Op. at 20-22 (R. Tab 54). The Supreme Court has repeatedly upheld the provision of neutral aid to students on such terms -- even if students choose to use it at a "pervasively religious" school, where personnel are clearly selected based on religious considerations. In Witters v. Dept. of Services for the Blind, 474 U.S. 481 (1986), the Court upheld the use of government funds by a student studying for the ministry at a pervasively religious bible school. In Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462, 2464 (1993), the Court upheld the use of a government-provided sign language interpreter by a deaf student at a "pervasively sectarian" school where employees were required to follow and exemplify Catholic moral teachings (see id. at 2472 & n.3 (Blackmun, J., dissenting)). Moreover, to the extent plaintiff complains of the College's use of public facilities for classes (see Appellant's Br. at

27-28), the Court has made clear that government need not bar religious groups from using public property or receiving public services. Rosenberger v. Rectors of Univ. of Virginia, No. 94-329 (June 29, 1995) (printing services for religious magazine); Lamb's Chapel v. Center Moriches School Dist., 113 S. Ct. 2141 (1993) (access to school classrooms).

Even if the aid in this case is treated as flowing directly to the College, it does not strip the College of its right to exercise religious preferences. The Supreme Court has also repeatedly held that religiously-affiliated colleges may receive direct aid unless (1) the aid is used specifically for religious activity or (2) the college is so "pervasively sectarian" that any activity there will be religious. See Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Roemer v. Board of Public Works, 426 U.S. 736 (1976); see also Bowen v. Kendrick, 487 U.S. 589 (1988) (approving aid to religiously-controlled social services that were not "pervasively sectarian"). Colleges may receive aid even if they are institutionally controlled by a religious body and even if they prefer members of their own faith in employment. See Tilton, 403 U.S. at 686 (approving construction grants even though colleges "[we]re governed by Catholic religious organizations, and the faculty and student bodies at each [we]re predominantly Catholic"); Hunt, 413 U.S. at 743 (approving state construction bonds even though (as with Truett-McConnell) college

trustees were elected by state Baptist convention and charter could only be amended by convention).

Plaintiff cites only one case for his radical position that no college receiving government funds may engage in religion-based hiring: an unreported district court opinion, Dodge v. Salvation Army, No. S88-0353 (S.D. Miss. 1989). That case is not only erroneous, but also distinguishable: it involved a single position directly funded by government aid. It is a giant further step to hold that any entity that receives government funds is barred from hiring on a religious basis. Such a holding would invalidate not only § 703(e)(2), but also every other religious exemption in Title VII -- as well as a host of provisions in other federal civil rights statutes that permit religiously-affiliated entities to hire on the basis of religion while still receiving federal funds.[16]

Contrary to the plaintiff's suggestion (Appellant's Br. at 30), Truett-McConnell has never disclaimed its religious affiliation, nor does it need to in order to benefit from government aid. Conversely,

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[16]The basic funding statutes exclude religious discrimination from the list of prohibited forms of discrimination by recipients. See 42 U.S.C. § 2000d (forbidding discrimination by race, color, or national origin); 20 U.S.C. § 1681 (sex discrimination); 29 U.S.C. § 794 (discrimination by handicap); 42 U.S.C. § 6102 (age discrimination). Some provisions explicitly state that religiously-affiliated recipients may engage in religious discrimination. See, e.g., 20 U.S.C. § 1132f-1 (college construction loans); 20 U.S.C. § 1132c et seq. (loans for historically black colleges); 41 C.F.R. § 60-1.5(a)(5) (Executive Order 11246, concerning federal contractors).

the College is not "pervasively sectarian," nor does it need to be in order to claim the protection of § 703(e)(2). Plaintiff attempts to put Truett-McConnell and other religious colleges across the nation on the horns of a dilemma: they must either give up all government aid or give up efforts to ensure that their work and mission are done by members of their own faith. The Supreme Court has repeatedly refused to subject religiously-affiliated colleges to that Hobson's choice.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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