

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

CALIFORNIA STATEWIDE  
COMMUNITIES DEVELOPMENT  
AUTHORITY,

Plaintiff and Appellant,

v.

ALL PERSONS INTERESTED IN THE  
MATTER OF THE VALIDITY OF A  
PURCHASE AGREEMENT,

Defendants and Respondents.

Case No. S124195

Court of Appeal  
Third Appellate District  
Nos. C042944, C042947,  
C042948 (Consolidated)

Sacramento County  
Superior Court  
Nos. 02AS03351, 02AS03353,  
02AS04563

From Judgment of the Superior Court of the State of California  
County of Sacramento  
The Honorable Loren E. McMaster

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN  
CALIFORNIA, ACLU FOUNDATION OF SOUTHERN CALIFORNIA AND  
THE AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND  
IMPERIAL COUNTIES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Northern California, the ACLU Foundation of Southern California and the American Civil Liberties Union of San Diego and Imperial Counties are the regional California affiliates of the American Civil Liberties Union (“ACLU”), a nationwide, nonprofit, nonpartisan membership organization dedicated to the defense and promotion of the guarantees of individual liberty secured by the state and federal Constitutions. Since its inception, the ACLU has worked to maintain the constitutional separation between church and state, believing that in a democracy the independence of religion from government strengthens both. This case raises important constitutional issues involving government aid to religious schools. Accordingly, the ACLU submits this brief in the hope that it will assist the Court in resolving those issues.

## INTRODUCTION

The California Constitution unequivocally prohibits the government from financially assisting religious education. Conduit financing is a form of financial assistance. By issuing tax-exempt bonds, the government significantly reduces the cost of borrowing money. The public subsidizes this low-cost loan, because it loses the substantial tax revenue that ultimately benefits the borrower. When the government grants this tax-exempt loan to buy buildings and equipment used for religious education, it plainly violates the state Constitution.

This Court has issued two unanimous decisions that control this case. In 1974, this Court ruled that conduit financing is a form of “aid” under the state Constitution, *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593 (1974), and in 1981, this Court ruled that aid to schools that infuse religious doctrine into academics violates the California Constitution. *California Teachers Association v. Riles*, 29 Cal. 3d 794 (1981). Here, a government agency proposes to issue tax-free bonds to lower the cost of improvements at three schools that integrate religion into every aspect of campus life. Because religious indoctrination pervades the teaching at these schools, the trial and appellate courts correctly ruled that the California Constitution prohibits this direct aid to religion. The California Statewide Communities Development Authority (“Authority”), seeking to reverse those decisions, makes three basic claims. They are incorrect and inconsistent.

*First*, the Authority asserts that conduit financing is so unique a form of aid that it can be provided to any school, no matter how sectarian the study it supports. Claiming support for this position in *CEFA v. Priest*, the Authority uses a sleight of hand. The portion of the opinion that characterizes conduit financing as a unique form of aid discusses Article IX, Section 8, which prohibits public *funds* for religious education. Because conduit financing is unique in the sense that it does not involve appropriations, Article IX, Section 8 does not apply. 12 Cal. 3d at 603. However, this Court arrived at precisely the *opposite* conclusion in determining whether Article XVI, Section 5, which prohibits aid to religion,

applies to conduit financing. Despite the absence of public funds, issuing tax-exempt bonds to lower the cost of borrowing money *is* a form of “aid” that triggers the prohibition of Article XVI, Section 5. 12 Cal. 3d at 605-606 and n. 12. For purposes of the No Aid Clause, this Court found nothing unique about conduit financing. Indeed, it is far more substantial than many symbolic benefits to religion barred by the Clause. What was critical in *CEFA v. Priest* was that numerous safeguards ensured that the tax-exempt financing would not be used for religious education. Here, it will.

*Second*, the Authority reasons that because Article XVI, Section 5 bars aid to *all* schools controlled by religious creeds, and because *CEFA v. Priest* approved conduit financing of *some* religiously-affiliated schools, it necessarily approved conduit financing of *all* religious schools, pervasively sectarian or not. But this overlooks both the language of Article XVI, Section 5 and the *CEFA* opinion. The No Aid Clause bars aid to “any religious purpose.”<sup>1</sup> Even a school with no sectarian ties whatever would violate the Clause by using tax-exempt financing to buy equipment and buildings used for religious education—and certainly a pervasively sectarian school would. That is why this Court stressed in *CEFA v. Priest* that the law challenged in that case was constitutional only because statutory safeguards prevented aid from flowing to religiously infused teaching.

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<sup>1</sup> Because the No Aid Clause reaches any “religious purpose,” it prohibits aid even to secular organizations that intend to conduct religious functions. *Paulson v. City of San Diego*, 294 F.3d 1124 (9<sup>th</sup> Cir. 2002), discussed *infra*.

*Third*, and inconsistent with its sweeping claims about conduit financing as a unique form of aid that can be provided to subsidize any education, the Authority claims that the covenant against religious instruction buried deep in the loan documents prevents constitutional problems. However, the Authority's assertion that these pervasively sectarian schools can and do teach purely secular subjects cannot be reconciled with the record or the Authority's own representations. The covenant is unenforceable and, indeed, creates new constitutional problems of entanglement as applied to pervasively sectarian schools. That is why the statutory safeguards critical to the holding in *CEFA v. Priest* included requirements that schools applying for conduit financing not discriminate along religious lines in hiring or admissions or require religious instruction. Through those restrictions, the statute upheld in *CEFA v. Priest* excluded pervasively sectarian schools from eligibility for tax-exempt bond financing, thus making the additional proviso that none of the buildings financed with low-cost loans be used for religious education realistic and enforceable.

#### STATEMENT OF FACTS

##### A. Conduit Financing Confers Significant Cost Reduction at Government Expense.

The Authority is a public agency that issues bonds to help nonprofit organizations build facilities and buy equipment. By serving as a conduit between private investors and nonprofit organizations, the Authority makes the loan free of state and federal taxation, significantly reducing the cost of borrowing money.



One of the applicant schools in this case, for example, will reduce its interest rate by 6% and save \$52,000 per month by financing its improvements through tax-exempt bonds rather than a conventional loan.<sup>2</sup> While borrowers, in this case religious schools, benefit greatly from this form of financing, the state loses significant tax revenue.<sup>3</sup>

**B. The Applicant Schools Do Not Segregate Religious from Secular Instruction.**

The three applicants for conduit financing in this case are pervasively sectarian Christian schools located in Southern California. They discriminate in hiring and admissions along religious lines, they require attendance at religious services, and they intertwine Christian fundamentalist doctrine into every aspect of campus life.

The Authority filed this default validation proceeding seeking a legal opinion on whether it could issue tax-exempt bonds to reduce the cost of buying equipment and building facilities for institutions “considered pervasively sectarian schools, as that term has been used in Establishment Clause jurisprudence,” citing *Hunt v. McNair*, 413 U.S. 734 at 743 (1973). (AA 0120-1; AA 0366-7; AA 0632-3.) That case defined a pervasively sectarian school as one that integrates religion

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<sup>2</sup> AA 0159; Court of Appeal Opinion at 30.

<sup>3</sup> Additionally, the state’s own cost of borrowing increases as its bonds compete for investors with bonds issued for the benefit of private organizations. *See Note*, “Financing Religious Education With Tax-Exempt Public Bond Proceeds,” 83 *B.U. L. Rev.* 685 (2003) (“Financing Religious Education”).

into all aspects of campus life.<sup>4</sup> The Authority has, in every court, consistently represented that the applicant schools are pervasively sectarian.<sup>5</sup> However, inconsistently, it attempts to redefine the schools by claiming that they can and do teach purely secular subjects, and that they can and will abide by the covenant in the financing documents that prevents any religious influences in the education that will be taught with computers or in classrooms purchased through tax-exempt financing.

It is too late for the Authority to revise the factual basis of this lawsuit. In addition to the stipulated fact under which this case has been litigated, *everything* in the record indicates that religion pervades all aspects of life, both curricular and extracurricular, at the Christian fundamentalist schools. Thus, this Court should decide the case on those facts. This Court cannot accept a version of the facts that has no support whatever in the record; at the least, a remand would be needed for a trial at which the schools can demonstrate how, contrary to the facts asserted in their incorporation documents and promotional materials, they intend to use the computers, laboratories and buildings financed with tax-exempt bonds for purely secular teaching.

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<sup>4</sup> That is, “an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission...” *Id.*

<sup>5</sup> Appellants’ Consolidated Opening Brief at 21; Court of Appeal Opinion at 15-17.

## 1. The Schools Are Incorporated As Religious Corporations.

The three applicant schools are incorporated in California as “nonprofit religious corporations,” like churches. By incorporating as religious corporations, the Christian schools are accorded broad autonomy from the oversight that the Attorney General gives to other nonprofits in California. Corporations Code Section 9230(a).<sup>6</sup> To qualify for this immunity from government regulation, the schools were required to state in their articles of incorporation that they exist “primarily or exclusively for religious purposes.” Corporations Code Section 9130(b). They have thus certified to the state that any secular functions are inconsequential or nonexistent. They cannot now represent that they will regularly and permanently use all of the buildings and equipment bought with the public assistance of tax-exempt financing for purely secular purposes—which they have certified do not exist or exist only incidentally. Corollary to the immunity from government oversight that the schools have acquired by choosing to incorporate as religious corporations is the principle is that the public may not subsidize the religious purposes for which they exist.

Religious corporations are exempt from California’s employment discrimination laws. Government Code Section 129222 states: “Notwithstanding any other provision in this part, an employer that is a religious corporation may

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<sup>6</sup> Religiously affiliated nonprofits that provide secular services and receive public funds—for example, religiously affiliated universities, hospitals and social service agencies—generally incorporate as nonprofit public benefit corporations, which exist for “public or charitable” purposes. Corporations Code Section 5130(b).

restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized.” The schools are allowed to discriminate in hiring—which they do, requiring all faculty and staff to be Christians. This is permissible under Section 129222, if *all* their employees, including faculty, administrators and coaches, are performing religious duties in carrying out their curricular and extracurricular duties.

2. The Schools Describe Themselves as Intertwining Religion With All Facets of Curricular and Extracurricular Life.

*Oaks Christian School.* Oaks Christian School, located in Westlake Village, California, teaches students in grades six through twelve.<sup>7</sup> It explicitly discriminates in hiring faculty on the basis of religion. Teachers must sign a statement of faith.<sup>8</sup> The schools will not hire or retain teachers whose personal life violates Biblical doctrine, by, for example, engaging in sexual relations outside of marriage.<sup>9</sup>

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<sup>7</sup> We supplement the factual information presented by the Authority with promotional materials published by the applicant schools themselves, and posted on their web sites, describing their hiring, admissions, religious requirements, and academic programs. The applicant schools, which are financing this litigation (AA 0070, AA 0319, AA 0568), are the real parties in interest in this case. The Authority, representing their interests, has never disputed the truth of facts posted on the schools’ web sites to attract students and donors.

<sup>8</sup> Declaration of Paul Oberhaus, Director of Business Operations at Oaks Christian School (hereafter “Oberhaus Declaration”) at AA 0141.

<sup>9</sup> [http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page&ContentResource\\_ID=184](http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page&ContentResource_ID=184) (visited April 5, 2005).

The school also effectively restricts admission of students by religious criteria, by compelling every student and parent to subscribe to the school's "religious mission, statement of faith, Biblical goals and objectives."<sup>10</sup> That statement of faith is "based on the historic Christian tenets of trinity, inerrancy of Scripture, and salvation based upon faith in Jesus Christ."<sup>11</sup> Religion is both mandatory and integral to every aspect of student life at Oaks Christian School. "Oaks Christian School strives to be an environment which models the Christian life. Students participate in weekly chapel, Bible study, and community outreach programs."<sup>12</sup>

Religion is integrated in classroom instruction. As promotional materials stress: "Course work integrates the Christian faith with academic disciplines to assist students in the development of a Christian worldview."<sup>13</sup> "At the core of the educational experience at OCS [Oaks Christian School] will be the Bible."<sup>14</sup> And, the "academic curriculum at OCS incorporates the whole student: mind, body,

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<sup>10</sup> Oberhaus Declaration at AA 0142.

<sup>11</sup> [http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page & ContentResource\\_ID=25](http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page&ContentResource_ID=25) (visited April 5, 2005).

<sup>12</sup> [http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page& ContentResource\\_ID=25](http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page&ContentResource_ID=25)(last visited April 5, 2005).

<sup>13</sup> [http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page& ContentResource\\_ID=20](http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page&ContentResource_ID=20) (last visited April 5, 2005).

<sup>14</sup> [http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page& ContentResource\\_ID=136](http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page&ContentResource_ID=136) (last visited April 5, 2005).

soul, and spirit. Besides learning from standard texts in their classes, students will be confronted with the implications of a biblical worldview.”<sup>15</sup> Speaking of the truths of the Scripture—Creation, the Fall, Redemption, and Future Hope—the school says that “It is through these ideas that we look at art, history, science, indeed at *all* subject areas.”<sup>16</sup>

*California Baptist University.* California Baptist University is a Christian university located in Riverside, California. It discriminates in faculty hiring. Faculty members must be Christian and at least 51% of the faculty must be Baptist.<sup>17</sup> The university admits only Christians, and, once enrolled, they must attend church regularly.<sup>18</sup> In addition, students must complete nine units of coursework in Bible studies and must attend weekly chapel service.<sup>19</sup> California Baptist University also infuses its academic curriculum with a Christian perspective. The University’s promotional materials describe its academic coursework by quoting one of its faculty members: “A Christian worldview

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<sup>15</sup> [http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page&ContentResource\\_ID=20](http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page&ContentResource_ID=20) (last visited April 5, 2005). In 2003, the web site added: “Teachers do not separate intellectual life from the spiritual.”

<sup>16</sup> [http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page&ContentResource\\_ID=210](http://www.oakschristian.org/index.cfm?fuseaction=ContentLoader.Page&ContentResource_ID=210) (last visited April 25, 2005) (emphasis added).

<sup>17</sup> Declaration of Calvin Sparkman, Director of Financial Operations at California Baptist University (hereafter “Sparkman Declaration”) at AA 0390.

<sup>18</sup> *Id.* at AA 0389.

<sup>19</sup> <http://www.calbaptist.edu/admissions/default3.aspx?id=1690&formid=154> (last visited April 5, 2005).

impacts everything you read, do, write, think, or say. It is the thread that runs through a California Baptist University education.”<sup>20</sup> Students are expected to live in accordance with Biblically based Christian principles.<sup>21</sup> University students, for example, may not engage in “unmarried cohabitation with members of the opposite sex” or “homosexual behavior.”<sup>22</sup>

*Asuza Pacific University.* Asuza Pacific University is an evangelical Christian university “built on four cornerstones: Christ, Scholarship, Community, and Service.”<sup>23</sup> “Belief in Christ is central to all that we think and do, and who we are. It is this understanding of God’s love that informs all our pursuits: academic, service, and community.”<sup>24</sup> Thus, the university defines its academic principles: “We are called to scholarship permeated by our Christian faith.”<sup>25</sup> The university hires only Christian faculty members who sign a Statement of Faith, attesting, among other things, to the infallibility of the Bible. Faculty members must affirm these principles “without reservation...as interpreted by conservative evangelical

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<sup>20</sup> <http://www.calbaptist.edu/academics> (last visited April 5, 2005).

<sup>21</sup> Sparkman Declaration at AA 0389.

<sup>22</sup> <http://www.calbaptist.edu/admissions/default3.aspx?id=1690&formid=154> (last visited April 5, 2005).

<sup>23</sup> <http://www.apu.edu/admissions/undergraduates//cornerstones> (last visited April 5, 2005).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Christians,” and must promptly notify their supervisors if their beliefs diverge from these official theological positions.<sup>26</sup> Students must attend chapel three times a week.<sup>27</sup>

These schools contrast sharply with the universities and colleges eligible for conduit financing in *CEFA v. Priest*. There, the statute authorizing the issuance of tax-exempt bonds for higher education defined eligible schools as *only* those that did not discriminate in hiring faculty or staff or in admitting students and did not require worship. Thus, the law upheld against a facial challenge in *CEFA v. Priest* disqualified the kinds of schools—pervasively sectarian schools—that now want the aid. The significance of that exclusion, which the Authority dismisses, is that it makes realistic the restriction against the use of financed facilities for religious education. Schools that welcome teachers and students of all faiths *do* have purely secular classes and activities that are distinct from any religious instruction they also provide. Schools restrict both employment and admission to co-religionists so that faith may pervade all aspects of campus life. Public aid to those schools violates the California Constitution.

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<sup>26</sup> <http://www.apu.edu/info/apps/staffapp.pdf> (last visited April 5, 2005).

<sup>27</sup> <http://www.apu.edu/chapel/attendance> (last visited April 5, 2005).



## ARGUMENT

### I.

#### CALIFORNIA'S NO AID CLAUSE IS FAR STRICTER THAN THE FEDERAL ESTABLISHMENT CLAUSE

Article XVI, Section 5 prohibits the government from “granting anything to or in aid of a religious sect, church, creed or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever.” Because of its expansive language, this clause most clearly reflects California’s commitment to the separation of church and state. It represents the “definitive statement of government impartiality in the field of religion.” 37 Ops. Cal. Atty. Gen. 105, 107 (1961). It “forbids all forms of governmental aid to religion, whether that aid be in the tangible form of cash or intangible form of prestige or power.” *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 802 (1978) (Bird, C.J., concurring). It “admits of no *de minimis* exception.” *Id.*

The No Aid Clause, added to the state Constitution in 1879, “does not mirror or derive from any aspect of the federal Constitution.” *Id.* The clause is textually different and far more specific than the United States Constitution’s Establishment Clause. This Court has departed from federal precedent in applying the No Aid Clause to support for religious schools.

In *California Teachers Association v. Riles*, 29 Cal. 3d 794 (1981), this Court unanimously struck down a program of loaning public school textbooks to

parents of children attending private schools, including parochial schools. This Court ruled that the loan program violated the No Aid Clause, although the textbooks were loaned to parents who made a private choice to send their children to secular or religious schools. This Court rejected both the reasoning and result of a United States Supreme Court precedent, *Board of Education v. Allen*, 392 U.S. 236 (1968), which upheld a functionally identical program under the First Amendment.

Thus, even if the Authority were correct in predicting that shifting federal constitutional doctrine will ultimately result in approval under the Establishment Clause of conduit financing of pervasively sectarian institutions, federal law is irrelevant to the California constitutional analysis. This Court has squarely rejected the doctrinal underpinnings of the two opinions relied upon by the Authority, which, over dissent, uphold bond financing of pervasively sectarian religious schools under the Establishment Clause.<sup>28</sup> In California, neither the

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<sup>28</sup> These two cases, *Steele v. Industrial Development Board*, 301 F.3d 401 (6<sup>th</sup> Cir. 2002) and *Virginia College Building Authority v. Lynn*, 260 Va. 608, 538 S.E.2d 682 (2000), uphold conduit financing of pervasively sectarian schools under the First Amendment. Both recognize (contrary to the Authority's central argument) that the United States Supreme Court has not overruled the pervasively sectarian test. *Steele*, 301 F.3d at 408-409; *Lynn*, 538 S.E.2d at 694. However, they sustain the financing because they perceive in the Supreme Court's recent decisions upholding vouchers and loans of equipment to religious schools a doctrinal shift in federal analysis, permitting programs that neutrally benefit secular and sectarian entities and that rely on private choices to direct public benefits.

The Virginia Supreme Court did not conduct an independent analysis of its state Constitution, because it, unlike this Court, interprets the scope of its religion

neutral availability of the program's benefits to secular and religious entities nor the role of private choice in selecting a religious institution validates government aid to religious schools. *Riles, supra*.

The only questions under Article XVI, Section 5 are: (1) is the lower interest rate made available through issuance of tax-exempt bonds a form of "aid;" and (2) if so, is the aid to religion indirect and incidental to a secular public purpose? This Court has resolved both issues. Conduit financing is a form of governmental aid, which directly benefits the religion when it flows to sectarian schools that intertwine religious doctrine with academic instruction.

## II.

### CONDUIT FINANCING IS A FORM OF GOVERNMENT AID

In *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593 (1974), this Court rejected the argument that special features of conduit financing—absence of direct financial support, outlay of public money, or extension of the state's credit—immunize it from scrutiny under the No Aid Clause. This Court unanimously held that that the terms of Article XVI, Section 5 "forbid granting 'anything' to or in aid of sectarian purposes, and prohibit public

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clause as indistinguishable from the federal Establishment Clause. *Lynn*, 538 S.E.2d at 626. Before perceiving a shift in federal doctrine, the Virginia Supreme Court ruled that conduit financing of pervasively sectarian institutions *did* violate both the United States and Virginia Constitutions. *Habel v. Industrial Development Authority*, 241 Va. 96, 400 S.E.2d 516 (1991).

For academic criticism of *Steele* and *Lynn*, see Note, "Financing Religious Education," *supra* n. 1.

help to ‘support or sustain’ a sectarian-controlled school.” 12 Cal. 3d at 606, n. 12.

Thus:

The section thus forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct immediate, and substantial effect of promoting religious purposes.

*Id.*<sup>29</sup>

Conduit financing, Justice Mosk wrote, “clearly provides a ‘benefit’ in that it enables sectarian institutions to borrow money through the use of a state instrumentality at a cost below that of the marketplace.” 12 Cal. 3d at 605. The magnitude of that benefit is illustrated by this case. By issuing bonds for Oaks Christian School, the Authority would reduce its loan cost by more than half a million dollars a year compared with the cost of borrowing money on the open market.<sup>30</sup> This happens only because the Authority, a government agency, intervenes in the finance market to arrange a low-cost loan for Oaks Christian School, which receives the benefit of tax revenues that would normally go to the state.<sup>31</sup>

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<sup>29</sup> In contrast, conduit financing is structured in a way that it does not trigger application of other California constitutional provisions, such as Article IX, Section 8, which prohibits “an appropriation of public money” to religious schools. 12 Cal. 3d at 603.

<sup>30</sup> See n.2 and accompanying text.

<sup>31</sup> The active participation of the Authority in arranging for a tax-exempt loan, to reduce dramatically the cost of financing improvements, distinguishes this form of aid from situations in which the government simply leaves a religious entity alone in the use of its property. *East Bay Asian Local Development Corporation v. State*

Plainly, issuing tax-exempt bonds provides a substantial benefit to the Christian schools. The crucial question is whether the benefit directly promotes religion. Since the applicant schools infuse sectarian doctrine into all their classes, it does.

### III.

#### CONDUIT FINANCING OF SECTARIAN INSTRUCTION IS A DIRECT BENEFIT TO RELIGION

Where tax-exempt bonds lower the cost of constructing buildings and equipment exclusively used for education with no religious content, the issuing agency directly promotes only a *public* purpose: *secular* education. Where, as, in *Priest*, religiously affiliated institutions save money in constructing or equipping buildings that house secular instruction, they may devote more of their own funds to religious instruction and worship. But that benefit to religion is indirect, incidental and remote. 12 Cal.3d at 605. The government aid itself benefits only secular education, a public purpose.

If, however, the facilities and equipment acquired with low-cost loans are used for teaching infused with religious doctrine, the aid to religion is direct, immediate, substantial and unconstitutional. *Riles, supra*. Aid to religious

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*of California*, 24 Cal. 4<sup>th</sup> 693 (2000) (exemption of church property from historic preservation laws). It is also far more active than an exemption from property tax. And even that exemption is not consistent with the No Aid Clause. It is only permissible because the provision for tax exemptions for churches and other religious houses of worship superseded the No Aid Clause in authorizing the tax exemption. *Lundberg v. County of Alameda*, 46 Cal. 2d 644, 653-4 (1956).

education is, in fact, the paradigm of a function barred by the No Aid Clause. And this is precisely what the Authority proposes to do by issuing tax-exempt bonds for three pervasively sectarian fundamentalist Christian schools.

This Court upheld the statute challenged in *CEFA v. Priest* against a facial challenge because it contained numerous safeguards to ensure that only *secular* education be financed. In establishing the California Statewide Education Authority, the Legislature inserted four clear limits: a college or a university could not qualify for tax-free bond financing if (1) it discriminated in admission or hiring on religious criteria; (2) it required religious inculcation; (3) it used the subsidized facilities for sectarian instruction; or (4) it used the new or renovated buildings for religious worship. 12 Cal. 3d at 605. These safeguards excluded pervasively sectarian schools and ensured that none of the facilities at religiously affiliated universities constructed or improved through low-cost bonds would advance religious doctrine or worship. This Court indicated that even with these safeguards, the law approached the constitutional line. 12 Cal. 3d at 606. Justice Mosk warned that “if the Authority were to exercise its powers in aid of an institution which is pervasively sectarian,” a different case would arise—one in which the government would directly benefit religion and thus cross even the federal constitutional line. 12 Cal. 3d at 602 n. 8. Since the California Constitution is far stricter than the Establishment Clause, it would certainly violate the No Aid Clause.

This Court underscored the constitutional line between aiding the clearly defined secular portions of a religiously affiliated university and aiding a pervasively sectarian school or college in *Riles*. In that case, this Court struck down the state's loan of secular textbooks to children attending private nonprofit (religious and secular) schools. The trial court had ruled, as the Authority argues in this case, that the aid to religion was incidental to a public purpose: education. This Court unanimously reversed. Because the religious schools, like the Christian schools in this case, permeated academic courses with religious doctrine, the aid directly advanced their religious mission. This Court distinguished *Priest* as a case in which "all aid to religious projects was prohibited." 29 Cal. 3d at 806. If the Authority were correct that aiding any and all education is a public purpose, regardless of the degree to which religious doctrine enters the classroom, *Riles* would have been decided differently.

*Riles* underscores the constitutional line between aiding the clearly defined secular portions of a religiously affiliated university and aiding a pervasively sectarian school or college. The Authority's repeated assertions that the "pervasively sectarian" concept is bigoted, abandoned in federal law, and foreign to California constitutional doctrine, are untrue. The very cases the Authority has invoked as legal support for conduit financing of pervasively sectarian schools under federal law both hold that only a plurality of Justices has criticized the

pervasively sectarian concept and that the Supreme Court has not overruled it.<sup>32</sup> California courts have not frequently used the term “pervasively sectarian” because Article IX, Section 8 of our state Constitution flatly prohibits public funding of *any* private secular or religious school. Thus, unlike federal courts, California courts have not needed to consider the character of the non-public institution in any case involving appropriations.

The No Aid Clause, however, applies to assistance that does not involve public appropriations. It “forbids all forms of governmental aid to religion, whether that aid be in the tangible form of cash or intangible form of prestige or power.” *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 802 (1978) (Bird, C.J., concurring). Thus, the character of the institution receiving aid *is* important, to ensure compliance with the constitutional prohibition against the government granting anything “in aid of” any “sectarian purpose.” Article XVI, Section 5. In cases like this one, involving aid to religious schools through a mechanism that does not involve public appropriations, courts must determine whether the aid will support permissible secular education or impermissible sectarian instruction. Whether a school separates religion from secular teaching—whether, in short, it is pervasively sectarian—is an important principle in California law. That is why this Court considered it in both *Priest* and *Riles*.

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<sup>32</sup> *Steele, supra*, 301 F.3d at 408-409; *Lynn, supra*, 538 S.E.2d at 694.



The Attorney General is correct in stating that *Priest* and *Riles* together compel a conclusion that conduit financing of religiously affiliated institutions violates Article XVI, Section 5 if *any* of the following facts exist: the participating school restricts admission by religious criteria, requires its students to receive religious instruction, is pervasively sectarian, or uses the funds received from the sale of tax exempt bonds for sectarian instruction. 66 Ops. Cal. Atty. Gen. 50 (1983). The Christian schools seeking bond financing in this case violate *all* of these restrictions. After *Riles*, it is clear that a California agency cannot divert tax funds from state coffers, where they subsidize public schools, to sectarian schools providing religious instruction.

*Riles* also refutes the Authority's analogy of conduit financing to municipal services. It held that the secular textbooks promoted religion because the books were integral to teaching classes that mixed religion with academics. This Court distinguished textbooks from municipal services, such as police and fire protection, that are universally available to all residents and businesses and therefore have no inherent role in education. 29 Cal. 3d at 811-812. Computers, laboratories and classrooms, like textbooks, are integral to education.

The Authority's argument that conduit financing is so unique a form of aid that the state Constitution allows it to benefit religious education is not only contrary to *Riles* and *Priest*, but is also inconsistent with every case interpreting Article XVI, Section 5. In *Paulson v. City of San Diego*, 294 F.3d 1124 (9<sup>th</sup> Cir. 2002), the Ninth Circuit (en banc) held that a city violated The No Aid Clause by

structuring the sale of parkland so that a secular historic nonprofit that intended to maintain a cross on the property could purchase it at lower rates than an equivalent organization that intended to remove the cross. The Court, emphasizing “the text of the provision has enormous breadth,” 294 F.3d at 1129, explained:

It is possible for the government’s transfer of “anything” to violate this provision if the transfer is “in aid of” any “sectarian purpose.” Therefore, all forms of government aid are subject to scrutiny. Further, when this provision was adopted in 1879, the term “purpose” commonly meant in this context an “[e]nd, effect [or] consequence.” Worcester, Joseph E., *A Dictionary of the English Language* 1158 (New Ed. Supp. 1897). In other words, a sectarian purpose simply meant aid to a sectarian use.

*Id.*

The significant savings afforded to religious schools by conduit financing represent a far more substantial benefit than the aid deemed unconstitutional in other precedents. The government may violate the No Aid Clause by nominal expenditures of cash,<sup>33</sup> or indeed, by but providing a symbolic benefit to religion while saving money.<sup>34</sup> Moreover, even if the Authority’s subjective purpose were to promote secular education, its action would be unconstitutional because the effect of issuing tax-exempt bonds will be a benefit to religious instruction. Even important secular

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<sup>33</sup> *Hewitt v. Joyner*, 940 F.2d 1561, 1570-1572 (9<sup>th</sup> Cir. 1991) (promoting tourism at park with biblical statutes violated No Aid Clause).

<sup>34</sup> *Feminist Women’s Health Center v. Philibosian*, 157 Cal. App. 3d 1076, 1092 (1984) (providing fetal remains for religious burial ceremony violated No Aid Clause).

purposes, such as historic preservation<sup>35</sup> and promoting tourism,<sup>36</sup> cannot immunize an action that has the effect of aiding a religious purpose.

#### IV.

#### INSERTING A CLAUSE INTO LOAN PAPERS CANNOT IMMUNIZE AID TO PERVASIVELY SECTARIAN SCHOOLS

In the lower courts, the Authority broadly argued that conduit financing of any school—even a divinity school—was permissible, because any education, no matter how theological, constituted a public benefit. (AA 0130.) In this Court, the Authority has de-emphasized this extreme position, and instead has put major reliance on a clause in its sale agreement, where the Authority mechanically replicated the wording of the *Priest* safeguard that prohibited the use of any building financed with bond proceeds “for sectarian instruction or as a place of religious worship or in connection with any part of the programs of any school or department of divinity for the useful life of the Project.”<sup>37</sup> Both the Authority and a trustee will have authority to monitor compliance with this covenant.<sup>38</sup>

However, the fact that the Authority copied a provision from the law upheld in *CEFA v. Priest* and inserted it into 50 single-spaced pages of loan papers

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<sup>35</sup> *Frohlinger v. Richardson*, 63 Cal. App. 209 (1923) (restoring San Diego Mission).

<sup>36</sup> *County of Los Angeles v. Hollinger*, 221 Cal. App. 2d 145 (1963) (filming Christmas parade).

<sup>37</sup> AA 0312, AA 0390, AA 0659.

<sup>38</sup> AA 0308, AA 0395, AA 0655.

is an empty formalism. These pervasively sectarian schools clearly and proudly assert in their promotional materials that Christian doctrine permeates every class, every homework assignment, every rule about dating, everything students “read, do, write, think or say.”<sup>39</sup> This is why the schools refuse to hire Jewish, Muslim or Buddhist teachers or coaches, and why the law allows these religious corporations to discriminate in hiring: because their job is to inform all teaching and extracurricular activities with a Christian theological perspective.

The Authority has never hinted as to how it plans to enforce the covenant against religious instruction, which is, in fact, unenforceable. Declarations from two school finance officials included identical stock paragraphs asserting that the corporations will accept the covenant (AA 0390, AA 0659), but no one testified to any specific plans for ensuring that the computers or classrooms or playing fields bought with tax-exempt financing would be forever strictly free of any religious content. Nor is there evidence of how anyone at the schools would interpret the provision. Are prayers before football games allowed in a conduit-financed stadium? Is a teacher permitted to criticize evolution and promote the alternative theory of creationism in a conduit-financed building? With conduit-financed computers? Is employee-conducted grace before meals permitted in conduit-financed dining halls? Would all three schools answer these questions the same way? Would the Authority staff or the trustee?

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<sup>39</sup> See <http://www.calbaptist.edu/academics> (last visited April 5, 2005).

Neither the Authority nor its designated trustee (usually a bank or an accountant) can segregate religion from secular education at these schools without stationing a monitor in every classroom every day. Indeed, if the government truly monitored the schools to prevent religious doctrine from creeping into the computers and classrooms financed with tax-exempt bonds, it would hopelessly entangle the state with religion and create an independent constitutional violation. Recognizing this fact is not an attack on the integrity of the applicant schools, as the dissent below charged. It reflects a legitimate concern at the government's disturbingly cavalier attitude toward the California Constitution in its apparent assumption that copying the wording of one of the *Priest* restrictions in an inch-thick sheaf of loan papers discharges its duty to ensure that the government abides by the religion clauses of the California Constitution.

In contrast to the Authority, this Court has insisted that formalism cannot control church-state cases in California. In *Riles*, this Court looked beyond the technical structure of the challenged loan program to the real-life operation of the system. This Court concluded that, whatever, the technical loan arrangement on paper, it was "pure fantasy" to characterize the program as run by and for the benefit of parents rather than private schools. 29 Cal. 3d at 810. In this case, the Court of Appeal also refused to allow legal fiction to erode constitutional values.

## V.

### POLICY CONSIDERATIONS DO NOT SUPPORT CHANGING LONGSTANDING CONSTITUTIONAL PRINCIPLES

The Authority's claim that continuing to ban pervasively sectarian schools from tax-exempt loans will have harmful practical effects—entangling bond authorities in religion and depriving California students of educational benefits—is insupportable. The opposite is true.

Bonding authorities in California have distinguished between religiously affiliated and pervasively sectarian institutions for over 20 years. The Attorney General has required them to do so. 66 Ops. Cal. Atty. Gen. 50 (1983). This task has been facilitated by the Legislature's creation of the option for nonprofits to incorporate as religious corporations that exist "primarily or exclusively" for religious purposes. Corporations Code Section 9111. Religious corporations are in essence pervasively sectarian institutions, which obtain immunity from Attorney General oversight and employment discrimination laws, and are, correspondingly, barred from receiving government assistance. California uses the separate incorporation of religious corporations and public benefit corporations as a guide to ensure that public benefit programs do not violate the No Aid Clause. *See, e.g., Wilson v. State Board of Instruction*, 75 Cal. App. 4<sup>th</sup> 1125, 1143 (1999)

(California's charter school statute complies with Article XVI, Section 5 because the law disqualifies religious corporations from operating charter schools).<sup>40</sup>

In contrast, the new rule the Authority seeks to establish *would* seriously entangle the government with religion. By issuing tax-exempt bonds for the benefit of pervasively sectarian schools, the Authority would be forced to do more than insert language in a stack of loan papers: it would undertake to monitor the use of equipment and the teaching in classrooms financed with those bonds, to ensure that state aid did not advance religious instruction. Religious schools would be subject to constant government surveillance of their teaching.

Contrary to the Authority's claim, the constitutional principles enforced in this case will not harm California students. Maintaining existing limits on conduit financing will preserve substantial tax revenues that would otherwise be lost. The state can use this money to fix dilapidated buildings and modernize outdated

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<sup>40</sup> Amici curiae religious schools make the extreme argument that the First Amendment *requires* inclusion of pervasively sectarian schools in conduit financing programs. In fact, it is not clear whether the First Amendment even *permits* conduit financing of pervasively sectarian schools. See "Financing Religious Education," *supra*, n. 1. The argument that the federal Constitution forbids the government from excluding pervasively sectarian institutions from public benefit programs, regardless of state constitutional limits, would, if adopted, invalidate many California programs, such as our charter school laws. No court has adopted the extreme position that religious education *must* be subsidized equally with secular education. Indeed, the Supreme Court this Term rejected that argument. *Locke v. Davey*, 124 S. Ct. 1307 (2004) (state may exclude divinity school from scholarship program). States may implement voucher programs that exclude religious schools. See, e.g., *Strout v. Albanese*, 178 F.3d 57 (1<sup>st</sup> Cir. 1999); *Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me. Sup. Ct. 1999); cf. *Chittenden Town School Dist. v. Dept. of Education*, 738 A.2d 539 (Vt. 1999).

equipment in California public schools. Conduit financing will also remain available for private and religiously affiliated schools that ensure secular education and welcome students and faculty of all faiths. Only schools that discriminate in hiring and admission and infuse their instruction with religious inculcation will be excluded from public support through tax-exempt bonds. Those schools, which are structured as religious communities, are and should be supported by members of their own faiths.

## CONCLUSION

The Oaks Christian School, California Baptist University and Asuza Pacific University have exercised their right to religious autonomy. They have created Christian communities that exclude members of other faiths, require church attendance, restrict student activities in accordance with theological doctrine and infuse religion into all aspects of the curriculum. By incorporating as religious corporations, that exist primarily or exclusively for religious purposes, they have great freedom from state oversight and regulation.<sup>41</sup> But the freedom they have obtained from obligations that the government imposes on other organizations has consequences: the corollary principle is that they cannot constitutionally receive government aid.

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<sup>41</sup> “By choosing to incorporate as a public benefit corporation, an entity gives up the relatively high degree of freedom in the management of its own affairs, and freedom from oversight by the Attorney General, that religious corporations enjoy.” *McKeon v. Mercy Healthcare Sacramento*, 19 Cal. 4<sup>th</sup> 321, 329 (1998).



The California Constitution's strict No Aid Clause advances religious liberty in two important ways: it reduces the potential for religious strife caused by competition among minority and majority sects for public benefits, and it maintains the autonomy of religious institutions. The Court of Appeal opinion advances both constitutional values.

The proposed bond financing of religious education violates the California Constitution. This Court should affirm the judgment.

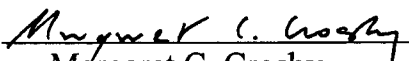
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## CERTIFICATE OF COMPLIANCE

I am one of the lawyers for amicus curiae American Civil Liberties Union in this case. According to the Word Count feature of Microsoft Word, the accompanying brief, including footnotes, is 5,645 words. It is printed in 13 point Times New Roman type.

  
MARGARET C. CROSBY

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California Statewide Communities Development Authority v.  
All Person Interested, etc.

Case No. S124195

I, Leah Cerri, declare that I am a citizen of the United States, employed in the City and County of San Francisco; I am over the age of 18 years and not a party to the within action or cause; my business address is 1663 Mission Street, Suite 460, San Francisco, California, 94103.

On April 7, 2005, I served a copy of the attached

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF  
NORTHERN CALIFORNIA, ACLU FOUNDATION OF SOUTHERN  
CALIFORNIA AND THE AMERICAN CIVIL LIBERTIES UNION  
OF SAN DIEGO AND IMPERIAL COUNTIES AS AMICI CURIAE  
IN SUPPORT OF RESPONDENT

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 7, 2005, at San Francisco, California.

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