

TWENTY-SIXTH DISTRICT

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Defendants-Appellees.

[illegible]

COA09-1

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INTRODUCTION

Although Davidson College (“Davidson”) is not a party to this case, its outcome could have a profound effect on Davidson’s campus security, jeopardize Davidson’s public safety operations, and provoke additional litigation.

Davidson, like many of North Carolina’s private and public colleges, has determined that it can best provide a safe and secure campus by having a campus police agency comprised of commissioned police officers and certified under the Campus Police Act, N.C.G.S. § 74G. The Campus Police Act (the “Act”) reflects the General Assembly’s conclusion that such campus police agencies serve an important public purpose by protecting the safety and welfare of students, faculty, and staff. The Act states that its further purpose is to ensure that this protection is available to **all** of the state’s accredited nonprofit colleges and universities, public and private, irrespective of any historic or ongoing denominational affiliation. N.C.G.S. § 74G-2(b) and (c). The Act incorporates legislative findings that demonstrate that its inclusion of denominationally-affiliated colleges is neutral in both purpose and effect. Following its enactment in 2005, the Attorney General established a comprehensive Campus Police Program.

In addition, the Attorney General’s Campus Safety Task Force has found that campus police agencies are an important component of an overall approach to campus safety. The Task Force’s report, prepared in January 2008 following the

Virginia Tech campus shootings, observed that “[s]worn police officers have greater training and enforcement functions,” including the power of arrest and crisis intervention training, when compared to security guards.¹

The Campus Police Act thus embodies North Carolina’s public policy favoring the formation and certification of trained, proficient campus police agencies for the purpose of enforcing the state’s laws, enhancing public safety on its college campuses, and supplementing state and local law enforcement agencies.

Defendant, who was convicted of driving while impaired on a street bordering the Davidson campus after a traffic stop made by a Davidson College Police Department officer, now seeks to disrupt this important public policy. She contends that the Attorney General’s certification of the Davidson College Campus Police pursuant to the Act violates the Establishment Clause of the United States Constitution because Davidson retains some ties to the Presbyterian denomination. She raises this contention even though she concedes, as she must, that the Campus Police Act serves an important secular, neutral purpose, and that it does not have the effect of advancing religion. (R p 23, Finding of Fact 33). She raises this contention even though she cannot point to any way in which her arrest and conviction were affected by the fact that it was a Davidson College police officer,

¹ Report of the Campus Safety Task Force Presented to Attorney General Roy Cooper (2008), <http://ncdoj.gov/Top-Issues/School-Safety.aspx> .

rather than a Town of Davidson police officer or Charlotte-Mecklenburg County police officer, who stopped her while she was driving drunk.

Defendant's contention fails for three reasons. First, the Campus Police Act, as enacted by the legislature and as applied to Davidson, has a neutral purpose and is neutral in effect. Second, under the United States Supreme Court's recent Establishment Clause jurisprudence, the fact that the Campus Police Act does not have the primary effect of advancing or inhibiting religion persuasively disproves any argument by Defendant that the Act causes "excessive entanglement" between the state and religion. Third, even under the outdated approach taken by the 4-3 majority in this Court's *State v. Pendleton* decision, Davidson College cannot be said to be a "religious institution" within the meaning of the Establishment Clause cases on which Defendant relies. The trial court's well-supported findings of fact and sound conclusions of law bear this out, and should lead this Court to turn aside Defendant's Establishment Clause challenge to her conviction.

IDENTITY OF *AMICUS CURIAE*

Davidson College is an independent liberal arts college located in the Town of Davidson in Mecklenburg County. Davidson has roughly 1,800 students, 91 percent of whom live on campus. Davidson also employs over 800 full and part-time staff and faculty. Davidson is consistently rated one of the best liberal arts colleges in the United States.

Davidson was founded in 1837. By an 1838 Act of the General Assembly, *amicus curiae* The Trustees of Davidson College was incorporated and empowered to manage the college's affairs. Davidson was founded by Presbyterians, but in its 1838 Act the General Assembly recognized that Davidson's purpose was to "educate youth of all classes, without regard to the distinction of religious denominations, and thereby promote the more general diffusion of knowledge and virtue"²

Today, Davidson continues to admit students without regard to religious belief or profession of faith. (R p 22, Finding of Fact 14). At Davidson, students of different faiths and no faith pursue a rigorous liberal arts education in an atmosphere of academic and religious freedom. (See R p 22, Findings of Fact 22-24). Davidson's Statement of Purpose, contained in the Preamble to its Constitution, states: "The primary purpose of Davidson College is to assist students in developing humane instincts and disciplined and creative minds for lives of leadership and service." (Exs. p 22).

STATEMENT OF THE CASE

Amicus adopts the State's Statement of the Case and of the Standard of Review. N.C. R. App. P. 28(f). *Amicus* further notes that as a non-party to the

² Articles of Incorporation of The Trustees of Davidson College, ratified by the General Assembly on 28 December 1838, available at <http://www.secretary.state.nc.us/corporations/Filings.aspx?PItemId=5070296>.

proceedings in the trial court and Court of Appeals, it has not previously had an opportunity to submit any brief or argument on the Establishment Clause challenge raised by Defendant. In addition, unless reversed, the Court of Appeals' decision will disable the Davidson College Police Department from operating and will cast doubt on the continued operation of campus police agencies at North Carolina's other denominationally-affiliated colleges and universities.

STATEMENT OF THE FACTS

Amicus adopts the State's Statement of Facts. N.C. R. App. P. 28(f). In addition, *amicus* draws the Court's attention to the following Findings of Fact made by the trial court, which are supported by competent evidence and therefore binding on appeal, as well as other undisputed facts of record:

While Davidson is voluntarily associated with the Presbyterian Church (USA) (the "PCUSA"), the PCUSA plays no role in the admissions process, in employment decisions regarding faculty or staff, or in setting Davidson's curriculum. (R p 22, Findings of Fact 12, 13, 18). Davidson's campus is owned by The Trustees of Davidson College, not the PCUSA. (R p 22, Finding of Fact 17). Davidson is accredited by the Commission on Colleges of the Southern Association of Colleges and Schools, and its principal mission is educational. (R p 22, Finding of Fact 19). The trial court, the Hon. W. Robert Bell, found as a fact that Davidson values academic freedom. (R p 22, Finding of Fact 16).

The Trustees of Davidson College own, manage, and control Davidson College. (Exs. p 5, Def. Ex. 3). Neither the PCUSA nor any other religious denomination or body runs or controls the campus. (R p 22, Finding of Fact 10).

Trustees are elected from various constituencies: sixteen are elected by the Trustees from among members of the PCUSA in North Carolina, then confirmed by their respective Presbyteries; eight are elected by the trustees from outside North Carolina, then confirmed by their Presbyteries; twelve (four of whom must be alumni) are directly elected by the Trustees; and eight additional alumni are elected by the Alumni Association and the senior class. The President of Davidson College is also a voting Trustee. (Exs. p 5, Def. Ex. 3).

The college's Bylaws further provide that "[i]n openness and respect for the world's various religious traditions and the variety of religious preferences among the graduates and friends of Davidson," up to 20 percent of the trustees need not be members of any Christian church. (Exs. p. 6, Def. Ex. 3).

Religious life at Davidson reflects its students' diversity of belief, and includes a Jewish Student Union and Muslim Student Association as well as an Interfaith Fellowship that brings together Jewish, Muslim, Hindu, and Buddhist students along with students of no specific religious tradition. (R p 22, Findings of Fact 23, 24; *see also* Exs. pp 18-19, Def. Ex. 5).

Davidson's campus police are sworn law enforcement officers who patrol the campus and adjacent streets, consistent with § 74G-6(a) and (b), which closely limit the territory within which they can make arrests and charge for infractions. The officers take an oath to uphold state and federal law without bias. (R p 23, Findings of Fact 27, 28). When exercising their power to arrest, Davidson's campus police officers apply only standards established by state and federal law, and their exercise of the arrest power is reviewable by state and federal courts. (R p 23, Findings of Fact 30, 31). Thus their authority supplements, but does not displace, the concurrent authority of the Town of Davidson Police Department, the Division of Alcohol Law Enforcement, and other state and local law enforcement agencies. Davidson's police officers are prohibited from making arrests to enforce campus policies or rules. If they observe violations of campus rules, they report them to the college administration for disposition. (R p 24, Finding of Fact 32).

As the Court of Appeals recognized, the evidence of record demonstrates that "Davidson College is primarily an educational institution with well-established principles of academic freedom and religious tolerance." *State v. Yencer*, No. COA09-1, slip op. at 10 (N.C. Ct. App. Aug. 17, 2010). The Court of Appeals failed, however, to fully consider the new Campus Police Act or to re-evaluate this Court's *State v. Pendleton* decision in light of more recent Establishment Clause jurisprudence. This Court now has the opportunity to do so.

ARGUMENT

I. THE CAMPUS POLICE ACT IS NEUTRAL IN PURPOSE AND EFFECT AND DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

In assessing Defendant's Establishment Clause challenge to her arrest and conviction, this Court should start from first principles. And recent decisions of the United States Supreme Court have made clear that the first principle to which courts should look in analyzing claims under the Establishment Clause of the First Amendment is neutrality: whether the government program or practice being challenged is neutral toward religion. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839, 115 S. Ct. 2510, 2521 (1995) (“[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.”); *Agostini v. Felton*, 521 U.S. 203, 234, 117 S. Ct. 1997, 2016 (1997) (program providing “supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under Establishment Clause” even if offered at sectarian schools by government employees, because program has no improper effect when “aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis”); *Mitchell v. Helms*, 530 U.S. 793, 809, 120 S. Ct. 2530, 2541 (2000) (in assessing risk of government-funded religious indoctrination, Supreme Court “has

consistently turned to the principle of neutrality”); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662, 122 S. Ct. 2460, 2473 (2002) (tuition voucher program was “entirely neutral with respect to religion” and did not offend Establishment Clause). The Campus Police Act, N.C.G.S. § 74G, is strictly neutral toward religion and raises no Establishment Clause concern.

A. With the Campus Police Act, the Legislature Achieved an Important Secular Purpose with a Strictly Neutral Statute.

The purpose of the Campus Police Act is to “protect the safety and welfare of students, faculty and staff in institutions of higher education by fostering integrity, proficiency, and competence among campus police agencies and campus police officers.” Further, the Act provides that its purpose is also to assure that such protection is not denied to institutions “originally established by or affiliated with religious denominations.” The Act then achieves its two-fold purpose by establishing a set of neutral requirements that apply even-handedly to public and private institutions. In § 74G-4, it authorizes the Attorney General to establish standards and procedures for campus police agencies; in § 74G-6 it defines the oaths required of campus police officers and defines their powers and authority. The remaining sections of the Act regulate the operations of campus police agencies in an entirely neutral way, and apply equally to all campus police agencies. Plainly, the Act’s purpose of promoting public safety is an appropriate governmental purpose having nothing to do with religion. Defendant has admitted

as much by conceding the first “secular purpose” prong and the second “effect” prong of the test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971). (R p. 23, Finding of Fact 33).

B. Under *Agostini* and Settled Supreme Court Jurisprudence, the Campus Police Act Does Not Violate the Establishment Clause.

1. *Agostini* Reformulated the Historic *Lemon* Test.

The Court of Appeals, viewing itself as constrained by this Court’s 1994 decision in *State v. Pendleton*, 339 N.C. 379, 451 S.E.2d 274 (1994), *cert. denied*, 515 U.S. 1121, 115 S. Ct. 2276 (1995)³ quoted the 1971 formulation of the *Lemon* test and put emphasis on the “excessive government entanglement” language that constituted the third prong of that test. The Court of Appeals failed to recognize that subsequent decisions of the United States Supreme Court (including *Rosenberger*, *Agostini*, *Mitchell*, and *Zelman*) have reformulated the *Lemon* test in important ways. Most significantly for this case, in 1997 the Court in *Agostini v. Felton* “folded the entanglement inquiry into the primary effect inquiry.” *Zelman*, 536 U.S. at 668, 122 S. Ct. at 2476 (O’Connor, J., concurring). In other words, “excessive entanglement” became simply one way to assess effect. *See Mitchell*, 530 U.S. at 845, 120 S. Ct. at 2560 (O’Connor, J., concurring).

³ Because the enabling statute here is the Campus Police Act enacted in 2005, N.C.G.S. § 74G, rather than the very different former Company Police Act, § 74A, *Pendleton* may be viewed by this Court as no longer controlling authority. *Id.* at 382, 451 S.E.2d 276, n.1 (stating opinion was directed solely to former § 74A).

Accordingly, the Supreme Court in *Zelman*, decided in 2002, cited *Agostini*'s reformulation and made clear that the Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing religion." Courts are thus to analyze Establishment Clause questions in two steps, asking "whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the 'effect' of advancing or inhibiting religion (citations omitted)." *Zelman*, 536 U.S. at 649, 122 S. Ct. at 2465, quoting *Agostini*, 521 U.S. 222-23, 117 S. Ct. at 2010.

2. The Campus Police Act Is Neutral in Purpose and Effect and Neither Advances nor Inhibits Religion.

This refinement of the Court's Establishment Clause analysis and reformulation of the *Lemon* test are highly relevant here for two reasons.

First, the Defendant has conceded that the Campus Police Act was enacted for a secular purpose and not to advance religion, and that the certification of Davidson's Police Department under the Act has not had the effect of advancing religion. The trial court's Finding of Fact 33 and Conclusion of Law 1 note that the Defendant conceded the first "secular purpose" prong and the second "effect" prong under the historical *Lemon* test. (R p 23). The Defendant has thus conceded the critical questions in the Establishment Clause inquiry as reformulated in *Agostini* and *Zelman*.

Second, the *Agostini* court recognized that the third “excessive entanglement” prong of *Lemon* had misled courts into finding Establishment Clause violations when a government program necessitated some interaction between the government and a parochial or denominationally-affiliated school, even when that interaction did not have the effect of advancing or inhibiting religion. In *Agostini*, for example, the lower courts had refused to lift an injunction that prevented disadvantaged children from receiving remedial instruction by city-paid teachers at their parochial schools based on fear of “excessive entanglement.” Reversing, the Supreme Court observed that “the factors we use to assess whether an entanglement is ‘excessive’ are similar to the factors we use to examine ‘effect.’” 521 U.S. at 232, 117 S. Ct. at 2015. It went on to explain:

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable . . . and we have always tolerated some level of involvement between the two. Entanglement must be “excessive” before it runs afoul of the Establishment Clause.

Id. at 233, 117 S. Ct. at 2105. The Court then held that the remedial instruction program at issue did not run afoul of the Establishment Clause because it did not result in religious indoctrination, did not define its recipients by reference to religion, and did not create an excessive entanglement. Because the program was offered on a “neutral basis,” it was not invalid under the establishment clause. *Id.* at 234, 117 S. Ct. at 2016.

The insight of *Agostini* was that a government program that is offered on the basis of “neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis” was unlikely to have the impermissible effect of advancing religion. *Id.* at 231, 117 S. Ct. at 2014. When such programs have neither the purpose nor the effect of advancing religion and are administered on a neutral basis, they may not be invalidated merely because of the administrative interaction necessary for the government benefit to be provided. Such administrative interaction is not the type of “excessive entanglement” the Establishment Clause prohibits.

Agostini’s language exactly describes the Campus Police Act: the Act permits all accredited colleges to obtain certification of their campus police agencies based on “neutral, secular criteria,” and certification is available on an explicitly nondiscriminatory basis to both secular and denominationally-affiliated colleges alike. N.C.G.S. § 74G-2 *et seq.* There is simply no “entanglement” with religion.⁴

⁴ This is because the “entanglement” with religion, in the form of a denominationally-affiliated college, is no greater with that college than it is with an entirely secular college, or with a public college. All three types of colleges must comply with the same certification process through the Attorney General’s office, so government is no more or less “entangled” with Davidson than with it is with, for example, UNC Wilmington, which also has a certified campus police department. <http://www.uncw.edu/ba/police/> . Documents cited herein as available on the Internet may be judicially noticed. N.C. R. Evid. 201(b) and (d).

Notably, Defendant here sought to invalidate the Campus Police Act as applied to Davidson's Police Department **only** on the basis of claimed "excessive entanglement." By conceding the first two prongs of the old *Lemon* test, Defendant admitted that the operation of Davidson's police force serves a secular purpose and does not have the effect of advancing religion. These admissions are sufficient under the reformulated *Lemon* test to turn back any Establishment Clause challenge. In arguing only the "excessive entanglement" prong of *Lemon*, Defendant invited the trial court to disregard the "purpose" and "effect" criteria that *Agostini*, *Mitchell*, and *Zelman* have since held to be paramount.

However, the trial court concluded -- based on competent evidence and thorough findings of fact -- that Davidson is "religiously affiliated" but not a "religious institution within the meaning of First Amendment." Rather, Davidson is "an institution of higher education whose predominant higher education mission is to provide its students with a secular education." (R p 24, Conclusions of Law 7-9).

On that basis, the trial court correctly concluded there was no "excessive entanglement" between government and religion arising from the certification of the Davidson College campus police department. *See* Section II A. and B., *infra* (discussing Davidson College's purpose and governance as consistent with academic and religious freedom).

3. Because the Campus Police Act Is a Religion-Neutral Statute, *Larkin v. Grendel's Den* Is Inapposite.

The trial court and Court of Appeals viewed themselves as bound by the 1994 *State v. Pendleton* decision, notwithstanding the subsequent developments in Establishment Clause jurisprudence or the 2005 enactment of the Campus Police Act, N.C.G.S. § 74G.⁵ *Pendleton*, in turn, had based its analysis on *Larkin v. Grendel's Den*, a 1982 decision by the United States Supreme Court that invalidated a Massachusetts statute under the Establishment Clause. *Larkin*, however, addressed a very different type of statute which presented a very different Establishment Clause concern. In light of the Supreme Court's more recent Establishment Clause cases, it is inapposite here.

Larkin addressed a Massachusetts statute that ceded to "the governing bodies of churches and schools the power to effectively veto applications for liquor licenses within a 500-foot radius" of their locations. When Holy Cross Armenian Catholic Church in Cambridge successfully blocked a nearby restaurant, *Grendel's Den*, from obtaining a liquor license, the restaurant challenged the statute on Establishment Clause grounds. *Larkin*, 459 U.S. 116, 117-18, 103 S. Ct. 505, 507-

⁵ *State v. Pendleton* expressly addressed only former N.C.G.S. § 74A. The Court of Appeals' similar decision in *State v. Jordan*, 155 N.C. App. 146, 574 S.E.2d 166 (2002) was based on former § 74E, the Company Police Act, which at that time permitted educational institutions to apply for certification of their police departments as company police agencies.

09 (1982). The Supreme Court concluded that the statute did violate the Establishment Clause, but its reasons for doing so illustrate why the statute in *Larkin* has nothing in common with the Campus Police Act, and why the *Larkin* holding should not be applied to a campus police program for institutions of higher education.

- The statute in *Larkin* gave “veto power” over liquor licenses to churches. This was a delegation of **political power** – “substituting the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications.” *Id.* at 127, 103 S. Ct. at 512.
- The delegation of **political power** was **absolute** – a “veto power” to be wielded by churches in a “standardless” way, “calling for no reasons, findings or reasoned conclusions.” The Holy Cross church’s objection was simply enforced by the Cambridge License Commission without any review. The statute was thus **exclusive**, precluding local government from reviewing and supervising a church’s decision. *Id.* at 125, 103 S. Ct. at 511.
- The delegation of **absolute** and **exclusive political power** was made to the governing body of a **church**, which the statute defined as a building “dedicated to divine worship.” While the opinion refers loosely at times to “religious institutions,” the statute and the case involved only a **church**, *i.e.* a house of worship.

Concluding its opinion, the Supreme Court emphasized that the statute violated the Establishment Clause because it “enmeshes churches in the processes of government and creates the danger of ‘[political] fragmentation and divisiveness on religious lines,’” *Id.* at 127, 103 S. Ct. at 512, *quoting Lemon*, 403 U.S. at 623, 91 S. Ct. at 2116.

To describe the rationale of *Larkin* is to demonstrate why it is inapplicable to the Campus Police Act and the certification of Davidson College's police department under that statute. First, the Campus Police Act does not delegate **political** power; it delegates police power, with the attendant power of arrest. While policing certainly involves the exercise of discretion, it does not constitute political power, and is fundamentally different from the exercise of legislative power. And the delegation of police power to private, for-profit companies and other institutions has been accepted under N.C.G.S. § 74A and § 74E for decades without concern that **political** power has been wrested from local governments.

Second, the police power accorded to campus police agencies under the Campus Police Act is not **absolute** or standardless; the Act carefully regulates it. Campus police may only enforce state and federal laws and their territorial jurisdiction is strictly limited under § 74G-6(b). Arrests, the principal discretionary power exercised by campus police, are also subject to judicial review by trial and appellate courts, unlike the unreviewable "veto" exercised in *Larkin*. Moreover, unlike the "veto power" delegated by the liquor license statute, campus police agencies do not have **exclusive** authority. Their authority supplements, but does not displace or exclude, the authority of other state and local law enforcement agencies which exercise concurrent jurisdiction. N.C.G.S. § 74G-2(b) (6) – (9) and § 74G-6(b)(1) – (3).

Third, the Campus Police Act does not delegate police power to **churches**. The many cases that have addressed government programs that aid higher education establish that there are important distinctions for Establishment Clause purposes between accredited colleges and universities that have a denominational affiliation, but are primarily educational institutions, and churches or other houses of worship. *See, e.g., Rosenberger*, 515 U.S. at 814, 115 S. Ct. at 2522 (“the neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches”); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 507 (4th Cir. 2001) (state aid to religiously-affiliated colleges permissible because it was subject to prohibition on using state funds for religious purposes and safeguards against such diversion, and because “the features of the college environment . . . mean that aid is much less likely to have a constitutionally impermissible effect” than direct aid to primary and secondary religious schools).

Larkin is put in context by *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, one of the few subsequent Supreme Court opinions to cite *Larkin* as precedential. New York’s legislature passed a statute that created a separate school district for the Village of Kiryas Joel, a village incorporated with boundaries exactly coextensive with 320 acres owned by members of the Satmar Hasidic sect. The special separate school district allowed Kiryas Joel to provide a state-funded special education program for handicapped children at its public school, while

other village children attended its religious school or went into other public school districts while having their tuition paid from the Village's public funds. *Kiryas Joel*, 512 U.S. 687, 693-94, 114 S. Ct. 2481, 2486 (1994).

In *Kiryas Joel*, the Supreme Court cited *Larkin* for its holding that delegating important governmental powers to "religious bodies," and thus achieving "fusion of governmental and religious functions," was impermissible under the Establishment Clause. *Id.* at 702, 114 S. Ct. at 2490. It noted that *Larkin* was premised on the absence of any guarantee that the delegated power would be used exclusively for "secular, neutral, and nonideological purposes" and because the statute at issue in *Larkin* gave the "appearance of a joint exercise of legislative authority by Church and State." *Id.* at 697, 114 S. Ct. at 2488 (quoting *Larkin*, 459 U.S. at 125-26, 103 S. Ct. 511). Thus, the Court held in *Kiryas Joel*, the *Larkin* case "teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion." State authority over schools "cannot be delegated to a local school district defined by the State in order to grant political control to a religious group." *Id.* at 698, 114 S. Ct. at 2488.

Kiryas Joel therefore highlights the factors that drove the decision in *Larkin*: What is impermissible under the Establishment Clause was the exclusive delegation of political power to a house of worship – or, in *Kiryas Joel*, a group of worshipers who were identified as "recipients of government authority by

reference to doctrinal adherence.” *Id.* at 700, 114 S. Ct. at 2489. These factors are simply not present here: the delegation of police power is not a delegation of political or legislative power; it is not exclusive, but supplemental to government authority; and the opportunity to obtain certification of campus police agencies under the new Campus Police Act is made available to all public and private non-profit colleges and universities (not churches) without regard to religious affiliation. On this ground alone, this Court should reverse the Court of Appeals.

II. CERTIFICATION OF DAVIDSON’S POLICE DEPARTMENT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. Davidson College’s Governance and Purpose Do Not Implicate the Establishment Clause.

The Court of Appeals’ opinion recited the respects in which Davidson retains ties to the PCUSA and continues to be guided by its Presbyterian heritage. As described previously, just over half of Davidson’s trustees are members of PCUSA presbyteries, and 80 percent must be Christian while up to 20 percent can be non-Christian. Davidson’s President must be a Christian and a Presbyterian who is active at Davidson College Presbyterian Church, a nearby church historically associated with the college but not part of Davidson College itself. Faculty need not be Christian so long as they can “work with respect for the Christian tradition” and “live in harmony” with the College’s Statement of

Purpose. (Exs. P 11, Def. Ex. 3). Davidson has attracted an accomplished faculty of diverse beliefs.

Davidson's Statement of Purpose acknowledges its commitment to the Christian tradition and recognizes God as the source of all truth, but goes on to say that God is "bound by no church or creed" and so extends

the loyalty of the college . . . beyond the Christian community to the whole of humanity and necessarily includes openness to and respect for the world's various religious traditions. Davidson dedicates itself to the quest for truth and encourages teachers and students to explore the whole of reality, whether physical or spiritual, with unlimited employment of their intellectual powers.

It then emphasizes that Davidson welcomes students, faculty and staff from varying traditions and "provides a range of opportunities of worship" The Statement of Purpose is thus perfectly consistent with an atmosphere of academic and religious freedom, and with Davidson's role as a liberal arts college dedicated to free inquiry.

Nowhere in its opinion does the Court of Appeals suggest that these ongoing acknowledgements of Davidson's Presbyterian roots in any way interfere with academic or religious freedom on its campus. To the contrary, the Court of Appeals concluded that the evidence showed that "Davidson College is not a religious institution for Establishment Clause purposes," *State v. Yencer*, slip op. at 9 (citing *Tilton v. Richardson*, 403 U.S. 672, 685-86, 91 S. Ct. 2091, 2099 (1971)). It concluded, based on *Tilton*, that "Davidson College is primarily an educational

institution with well-established principles of academic freedom and religious tolerance.” *State v. Yencer*, slip op. at 10. Davidson’s Statement of Purpose, form of governance, and curricular requirements simply do not raise the “proselytizing” and “indoctrination” concerns that were present in *Pendleton*, and certification of Davidson’s campus police department does not implicate the Establishment Clause in the way that led to the *Pendleton* result. See *Columbia Union Coll.*, 254 F.3d at 504-08 (discussing why neutral direct-aid program, with adequate safeguards established by legislature, could be provided to Seventh-Day Adventist College).

Moreover, nowhere did the Court of Appeals suggest that Davidson’s denominational ties had any affect whatsoever on the operations of the Davidson College Campus Police Department or Defendant’s arrest. There is no such contention, and no such evidence.

Similar ties and statements of purpose are common among the state’s colleges and universities that were founded by religious denominations. For example, Duke University’s Bylaws state:

The aims of Duke University ... are to assert a faith in the eternal union of knowledge and religion set forth in the teachings and character of Jesus Christ, the son of God; to advance learning in all lines of truth; to defend scholarship against all false notions and ideals; to develop a Christian love of freedom and truth; to promote a sincere spirit of tolerance; to discourage all partisan and sectarian strife; and to render the largest permanent service to the individual, the state, the nation, and the church.

Of Duke's 36 trustees, 24 are elected by the North Carolina Conferences of the United Methodist Church.⁶ Duke's motto is "Religio et Eruditio" – "Religion and Knowledge" – and it is well-known for its School of Divinity and Duke Chapel, which serves the Duke community as a house of worship. None of these ties to Duke's Methodist history conflict with or undermine its fundamental educational mission, and Duke University is just that – a university, not a church. Such institutions of higher education are simply different than churches or synagogues, and they are treated much differently under the Establishment Clause because they present far less risk of infringement. *Columbia Union Coll.*, 254 F.3d at 507.

B. The Trial Court Properly Determined That Davidson's Primary Purpose is Education and It is Not a "Religious Institution Within The Meaning of the First Amendment."

The trial court expressly found as a fact that Davidson values academic freedom. It then concluded that "Davidson is not a religious institution," and although voluntarily affiliated with the PCUSA, its "predominant higher education mission is to provide its students with a secular education."

The trial court's use of the term "religious institution" can be traced to this Court's decision in *Pendleton*, which it turn can be traced back to the United State's Supreme Court's *Larkin* decision. Upon re-examining the *Larkin* decision,

⁶ The Bylaws of Duke University, <http://trustees.duke.edu/governing/bylaws.php>.

however, it becomes clear than when it used the term “religious institution” it was referring only to the churches, and church-like houses of “divine worship,” upon which the liquor license statute improperly conferred political power. *Larkin* itself does not suggest or even imply that it meant to include denominationally-affiliated colleges when it referred to “religious institutions.”

Arguably, then, this Court’s use of the term “religious institution” in *Pendleton* to characterize Campbell University misread and overextended *Larkin*. It is not necessary to accept that argument, however, to acknowledge that there are major differences between Campbell University (circa 1994) as described in *Pendleton* and Davidson College today. The findings in *Pendleton* were that:

- Campbell was a self-proclaimed “Baptist University.”
- Campbell’s property was owned by the North Carolina Baptist Convention.
- The N.C. Baptist Convention nominated and elected Campbell’s trustees.
- Campbell’s mission was, in part, to “provide students with the option of a Christian world view.”
- Campbell students were required to adhere to a Code of Ethics that included “wholehearted obedience to moral law as set forth in the Old and New Testament and exemplified in the life of Christ”
- All students were required to take Religion 101, a basic Bible course.
- All elective religion courses related to “the Judeo-Christian religion.”

Based on these and related findings, the trial court in *Pendleton* determined that “Campbell’s religious purpose is inextricably intertwined with its secular activities and it unabashedly attempts to proselytize and indoctrinate its students.” *Id.* at 389, 451 S.E.2d at 280.

These facts depict an avowedly and “unabashedly” Christian college, actively engaged in proselytizing and indoctrination, which required its students to abide by its Christian beliefs. It is no criticism of Campbell to say that Campbell’s approach was very different from Davidson’s, which intentionally fosters a pluralistic environment of academic freedom and diversity of religious belief. These differences matter. The trial court’s findings in *Pendleton* contrast starkly with Judge Bell’s findings of fact and conclusions of law in this case, which were that Davidson was **not** a religious institution as that term is used in *Larkin* and *Pendleton*, but an institution of higher education whose predominant mission was providing its students with a secular education. However the *Pendleton* decision characterized Campbell, this Court cannot plausibly label Davidson a church-like “religious institution” equivalent to the Holy Cross Armenian Church in *Larkin*. Davidson is an educational institution whose ties to Presbyterianism are not even alleged to interfere with its secular academic mission.

C. Davidson College Cannot Be Considered “Sectarian.”

Amicus adopts the portion of the New Brief For the State that addresses the “pervasively sectarian” line of cases that began with *Tilton*. Here, both the trial court and the Court of Appeals rejected the notion that Davidson College could be characterized as “pervasively sectarian.” It is unclear what further force those cases retain, *see Columbia Union Coll.*, 254 F.3d at 508 and n.2, but Davidson

meets none of the four criteria by which a college could be deemed “pervasively sectarian.” *Id.* at 508-10. Likewise, the appellate courts of Michigan and Indiana have concluded that colleges closely affiliated with other Protestant denominations could have campus police forces under similar state statutes without infringing the Establishment Clause. *People v. Tubbergen*, 642 N.W.2d 368 (Mich. Ct. App. 2002) (holding Hope College not a “religious institution” and delegation of police power did not result in “excessive entanglement,” distinguishing *Larkin*); *Myers v. State*, 714 N.E.2d 276 (Ind. Ct. App. 1999) (holding Valparaiso University not a “religious institution,” distinguishing *Larkin*, and adopting *Pendleton* dissent).

III. REFUSAL TO EXTEND THE CAMPUS POLICE ACT TO ALL QUALIFYING COLLEGES ON RELIGIOUS GROUNDS WOULD CONTRAVENE THE FREE EXERCISE CLAUSE AND § 74G-2.

If the Court of Appeals’ decision is not reversed, it will create a countervailing First Amendment problem and potentially violate the rights of Davidson College and its students under the Constitution’s Free Exercise clause. If Defendant’s Establishment Clause challenge results in a ruling denying Davidson students the enhanced campus security provided by a certified campus police agency and sworn, commissioned officers, that would infringe their Free Exercise rights. Such a ruling would violate the principle of neutrality derived from both Religion Clauses of the First Amendment by singling out and barring Davidson, as a denominationally-affiliated college, from certification under the Campus Police

Program the State makes available to public and secular colleges. It would create two different Free Exercise problems.

First, as the Fourth Circuit explained in *Columbia Union*, by refusing to allow a religiously-affiliated college to obtain benefits that are generally available to other colleges “solely because of religion, the government risks discriminating against a class of citizens solely because of faith. The First Amendment requires government neutrality, not hostility, to religious belief.” 254 F.3d at 510.

Similarly, Justice O’Connor observed in *Rosenberger*: “This insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all ‘The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion.’” 515 U.S. at 846, 115 S.Ct. at 2525 (quoting *Kiryas Joel*, 512 U.S. at 717, 114 S. Ct. at 2498) (O’Connor, J., concurring); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-33, 113 S.Ct. 2217, 2226-27 (1993) (discussing principle of neutrality and application of Free Exercise clause to prohibit discrimination against religious belief).

Second, a ruling that Davidson’s governance, purpose and policies were sufficiently “religious” to disqualify it from participating in the State’s Campus Police Program would promptly embroil the courts in a series of inquiries into

which colleges were “too religious” and which were “not too religious.” This would require the courts to compare colleges’ mission statements, governance, curricula, and policies in an effort to assess their degrees of religiosity. Not only is this an awkward task for which courts are ill-suited, it is offensive to the Free Exercise Clause and not required by the Establishment Clause. “[T]he inquiry into . . . religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs.” *Mitchell*, 530 U.S. at 827, 120 S.Ct. at 2551.

With the Campus Police Act now in place, the legislature has avoided both these problems. Under N.C.G.S. § 74G-2, the opportunity to obtain certification of a campus police agency is made available on neutral terms to all colleges and universities that meet specified, neutral criteria. These criteria neither advance nor inhibit religion, and they make it unnecessary for the state to conduct any inquiry into the particular practices of a denominational school. The Act was plainly crafted to address and avoid the Establishment Clause concerns that led to the decision in *Pendleton* while assuring, consistent with the Free Exercise Clause, that the protection of campus police agencies “is not denied to students, faculty, and staff at private nonprofit institutions of higher education originally established by or affiliated with religious denominations.” N.C.G.S. § 74G-2(b).

Accordingly, this Court should turn aside Defendant's attempt to invalidate the Campus Police Act in order to avoid her conviction. The Campus Police Act is neutral in purpose and effect and is applicable to all qualifying colleges on a non-discriminatory, neutral basis. Refusing to allow Davidson to retain its campus police would infringe on the Free Exercise rights of the college and its students and would contravene the legislature's intent in enacting the Campus Police Act.

CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals and affirm the constitutionality of the Campus Police Act and the certification under that Act of Davidson College's campus police department.

This the 8th day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief of *Amicus Curiae* The Trustees of Davidson College was served, via regular U.S. mail, addressed as follows:

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