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OPINION	:	No. 82-509
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of	:	<u>FEBRUARY 4, 1983</u>
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THE CALIFORNIA EDUCATIONAL FACILITIES AUTHORITY has requested an opinion on the following question:

May the California Educational Facilities Authority issue tax-exempt bonds to loan monies from revenue raised thereby to the University of Judaism for it to refinance an existing loan that was used to build classroom and administration facilities?

CONCLUSION

Whether or not the California Educational Facilities Authority may issue tax-exempt bonds and make a loan from revenue derived therefrom to the University of Judaism to refinance an existing loan that it used to build classroom and administration facilities would depend on the Authority's determining, based on the facts presented to it, (a) whether the University requires its students to receive "instruction in the tenets" of Judaism, (b) whether the University is "pervasively sectarian," and (c) whether the monies

loaned the University will be used for "sectarian purposes." An affirmative resolution of any of these inquiries would preclude the Authority from acting on the University's behalf.

## ANALYSIS

Under section 94151 of the California Educational Facilities Authority Act (Stats. 1972, ch. 1432, p. 3127, § 1, as amended and recodified by Stats. 1976, ch. 1010, p. 2384, § 2; Ed. Code, pt. 59, ch. 2, § 94100 et seq.)<sup>1</sup> the California Educational Facilities Authority is authorized to "loan funds to a participating institution and to provide for the issuance of [tax exempt revenue] bonds for the purpose of refinancing projects not originally funded pursuant to [the Act]." (§ 94151; cf. §§ 94149, subd. (d), 94144-91446, 94150, 94156; 26 U.S.C.A. § 103(a)(1).) To be eligible to receive such funds however, an institution may "neither [restrict] entry on racial or religious grounds nor [require] all students . . . to receive instruction in the tenets of a particular faith" (§ 94110, participating college; see fn. 3, *post*) and no aid may be given in any event for a project which involves "any facility used or to be used for sectarian instruction [or] as a place for religious worship or any facility used or to be used primarily in connection with any part of the program of a school or department of divinity." (§ 94110, "project"/"educational facility"; see fn. 3, *post*.)

The University of Judaism—the West Coast Branch of the Jewish Theological Seminary of America (see fn. 6, *post*) and an institution of higher education specializing in the study of Judaism and Judaica - has applied to the Authority for a loan in the amount of \$6 million in order to refinance an existing loan that it had secured in order to construct classroom and administration facilities. Because of its particular and narrow specialization, and perhaps because of its name, question has arisen as to whether the Authority is permitted to grant the application.<sup>2</sup> We have been asked by the Authority whether it may issue bonds and loan revenues derived therefrom to the University for the requested purpose.

Resolution of the issue however depends on a careful determination of intricate issues of *fact*, an area into which opinions of this office are not wont to venture. (See 64 Ops.Cal.Atty.Gen. 856, 859 (1981); 64 Ops.Cal. Atty.Gen. 1 (Foreword).) Nevertheless we can describe the parameters and define the setting in which those factual

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<sup>1</sup> Unidentified section references are to the Education Code (Reorganized) unless otherwise stated.

<sup>2</sup> The Authority has exercised its powers on behalf of institutions of higher learning with denominational ties—e.g., Loyola—Marymount University (Catholic), Santa Clara University (Catholic), Saint Mary's (Catholic), University of San Diego (Catholic), Pepperdine University (Church of Christ), and the California Lutheran Colleges.

determinations must be made. So doing we conclude that whether or not the Authority may issue tax-exempt bonds to loan requested monies from the revenue derived therefrom to the University of Judaism would depend on *its* making a determination based upon a resolution of the factual issues presented to it as to: (a) whether the University requires all students to receive instruction in the tenets of Judaism; (b) whether the University is pervasively sectarian; and (c) whether the monies loaned will be used for sectarian purposes. An affirmative resolution in any of the areas of inquiry would preclude the Authority from acting on the University's behalf.

### Background

Article IX, section 1, of the California Constitution directs the Legislature to "encourage by all suitable means the promotion of intellectual improvement." In response to that mandate the Legislature enacted the California Educational Facilities Authority Act, the declared purpose of which is "to give this and future generations of youth the fullest opportunity to learn and develop their intellectual and mental capacities by providing private institutions of higher education within the state an additional means by which to expand, enlarge, and establish dormitory, academic, and related facilities, to finance such facilities, and to refinance existing facilities." (§ 94100.)

The Act creates the California Educational Facilities Authority (§ 94120) and empowers it, inter alia, to issue tax-exempt revenue bonds (§§ 94140, subd. (d), 94144-94146, 94150; cf. § 94156; 26 U.S.C.A. § 103(a)(1)), and with monies so derived to make loans to "participating colleges" to undertake or to *refinance* permissible projects.<sup>3</sup>

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<sup>3</sup> Section 94110 defines "participating college" to mean "a private college which *neither restricts entry on racial or religious grounds nor requires all students gaining admission to receive instruction in the tenets of a particular faith*, and which, pursuant to the provisions of this chapter, participates with the authority in undertaking the financing and construction or acquisition of a project." "Private college" is defined to be "an institution for higher education other than a public college, situated within the state and which, by virtue of law or charter, is a non-profit educational institution empowered to provide a program of education beyond the high school level." The term "college" embraces "university" as well since the Act draws no distinction among institutions of higher education. (*California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 597, fn. 3.)

Section 94110 defines "project" as "a dormitory or an educational facility or any combination thereof" and defines "educational facility" as follows:

"Educational facility" means a structure suitable for use as a dormitory, dining hall, student union, administration building, academic building, library, laboratory, research facility, classroom, health care facility (including for an institution of higher education which maintains and operates a school of medicine, structures or facilities providing or designed to provide services as a hospital or clinic, whether such hospital or clinic is

(§ 94151.) (See generally, *California Educational Facilities Authority v. Priest*, *supra*, 12 Cal.3d at pp. 596-597.)

In *California Educational Facilities Authority v. Priest*, *supra*, 12 Cal.3d 593, our Supreme Court unanimously upheld the constitutionality of the Act against a challenge made on various federal and state constitutional grounds as to the aid it *might* enable to be provided to "sectarian institutions of higher education." (12 Cal.3d at p. 598 & 598, fn. 5; see 12 Cal.3d at pp. 599-606 discussing U.S. Const., amend. I; Cal. Const., art. I, § 4 (free exercise of religion without preference), art. IX, § 8 (no public money for sectarian or denominational school), art. XVI, § 5 (then art. XIII, § 24) (no grant of anything to or in aid of any church, religious sect or sectarian purpose or help to support or sustain any school, college, university controlled by any creed, church or sectarian denomination); art. XVI, § 3 (then, art. XIII, § 21) (no public money for benefit of private organization); art. XVI, § 6 (then, art. XIII, § 25) (no pledging state's credit for corporate liability); see also *Hunt v. McNair* (1973) 413 U.S. 734 which upheld a South Carolina statute identical in all pertinent respects to the Act.) The Court held the Act did not violate any of the constitutional proscriptions upon which challenge was made. "[A]lthough in certain subtle respects" said the Court, "the Act appears to approach state involvement with religion [citation], we cannot say that in the abstract it crosses the forbidden line." (12 Cal.3d at 606.) Nevertheless caution was given that—

"—if the Authority were to exercise its powers in aid of an institution which is *pervasively sectarian* within the meaning of the *Hunt* test, [i.e., an institution in which a substantial portion of its functions is subsumed in its religious mission] a different conclusion might be compelled. 'Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these [disqualifying] characteristics.' (*Tilton v. Richardson* (1971) *supra*, 403 U.S. 672, 682.) (12 Cal.3d at 602, fn. 8.)

The instant request in effect poses such a challenge for we are asked whether the Authority may exercise its powers in aid of an institution of higher learning whose

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operated directly by the institution of higher education or by a separate nonprofit corporation, the member or members of which consist of the educational institution or the members of its governing body), and parking, maintenance, storage or utility facility and other structures or facilities related thereto or required or useful for the instruction of students or the conducting of research or the operation of an institution for higher education, and the necessary and usual attendant and related facilities and equipment, *but shall not include any facility used or to be used for sectarian instruction nor as a place for religious worship or any facility used or to be used primarily in connection with any part of the program of a school or department of divinity.*"

general particulars, if not whose proposed specific use of the funds, might disqualify it for such aid.

As noted prefatorily, the genesis of this opinion stems from the University having applied to the Authority for a loan with more favorable terms than could be secured conventionally,<sup>4</sup> for it to refinance an outstanding indebtedness that it incurred to build classroom and administration facilities, as part of a capital expansion program designed to complete its campus. The proposed loan from the Authority involves long term takeout financing for six million dollars, to be carried over a period of 15 years at an interest rate of eight and one-half percent. Absent that financing the University will continue to be obligated under its existing loan with a commercial lender which requires the University to obtain refinancing in 1987. By obtaining financing through the Authority the University would not have to refinance in 1987 under uncertain market conditions and its monthly payments would immediately be maintained at a significantly lower level. The University asserts that the requested financing is essential to its continued growth and development. Our answer as to whether that financing may be provided by the Authority involves a discussion of the statutory provisions of the Authority Act and of federal and state constitutional provisions often recounted but not easily exposed.

#### The California Educational Facilities Authority Act

By terms of the California Educational Facilities Authority Act itself, which circumscribes and defines the Authority's powers (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 105; *Motor Transit Co. v. Railroad Commission* (1922) 189 Cal. 573, 577; *Morton Bros. v. Pacific Coast S.S. Co.* (1898) 122 Cal. 352, 356; *Blatz Brewing Co. v. Collins* (1945) 69 Cal.App.2d 639,645-646; cf. Gov. Code, § 11342.1), the CEFA may *not* provide a loan to an institution which restricts entry on religious grounds<sup>5</sup> or *requires all students gaining admission to receive instruction in the tenets of a particular faith*

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<sup>4</sup> The lower interest rate obtainable in a loan made by the Authority is made possible by the fact that the underlying bond issue from which revenues for the loan are derived is marketed at a significantly lower interest rate than other bonds because of its tax-exempt status. (§ 94156; 26 U.S.C. § 103(a)(1); § 94120; *California Educational Facilities Authority v. Priest, supra*, 12 Cal.3d at p. 593; cf. *Hunt v. McNair, supra*, 413 U.S. at p. 739.)

<sup>5</sup> The University does not formally restrict entry on religious grounds, as all of its programs and activities are open to all qualified applicants on a nondiscriminatory basis. The focus of the University on Jewish Civilization though undoubtedly creates a high percentage of those professing the Jewish faith among the student body and faculty. The Authority should determine whether this predominance is in fact natural and not a consequence of requirements or criteria for admission. Should the latter be the case, the University would in effect be restricting admission on religious grounds and be ineligible for a CEFA loan.

(§ 94110) and in no event may it loan monies for any facility to be used for *sectarian instruction* or in connection with any part of the program of a school of divinity. (*Ibid.*)<sup>6</sup> Section 94151, subdivision (a), authorizes the Authority to loan funds to a *participating institution* and to provide for the issuance of bonds for the purpose of refinancing *projects* not originally funded. To be eligible as a "*participating college*," however, a private institution may not require that all of its admittees receive instruction in the tenets of a particular faith, and a "project" (qua "educational facility") which is used "for sectarian instruction" is not eligible to be funded (§ 94110).

Taking these qualifications in turn, the Authority will first have to determine whether the University requires all students gaining admission to receive instruction in the tenets of Judaism. In doing so it will have to bear in mind that just because the University offers and perhaps might even require students to take courses in Judaism and Judaica does not *necessarily* mean that the University thereby falls within the statutory prohibition on loaning monies to an institution which "requires instruction in the tenets of a particular faith." Taken quite literally of course, the language of the statute *might* require that result, but such a construction would also mean that *any* institution which requires its students to take *any* courses involving *any* religious matters would be rendered ineligible for CEFA loans. We cannot believe that consequence to have been intended by the Legislature when it enacted the California Educational Facilities Authority Act upon a constitutional mandate to "encourage by all suitable means the promotion of intellectual improvement." (Cal. Const., art. IX, § 1, *supra*; *California Educational Facilities Authority v. Priest*, *supra*, 12 Cal.3d 593, 605; see also § 94100, *supra*.) The study of religion, the Bible, and even the Talmud itself, when pursued in a nontendentious, pluralistic, objective and secular setting, has been recognized as being an integral and necessary part of one's education, and their being so studied at public expense has been upheld by the courts. (*Abington School Dist. v. Schempp* (1963) 374 U.S. 203, 225; *Evans v. Selma Union High School Dist.* (1924) 193 Cal. 54, 60.) Indeed, no less an authority than the High Court has said that "one's education is not complete without a study of comparative religion and its relationship to the advancement of civilization . . . ." (*Abington School Dist. v. Schempp*, *supra*), and as we had occasion to note earlier in an opinion prophetic of later court rulings:

"Although direct instruction in religious principles may not be given in the public schools, it does not follow that every reference to anything religious is prohibited. A course in the history of California which did not

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<sup>6</sup> Although connected with the Jewish Theological Seminary of America, the school of divinity or the conservative rabbinate, the University itself does not offer theological degrees, and we understand ordination cannot be had solely on the degrees that it does offer. Nevertheless, the Authority should examine the relationship between the University and the JTSA to determine if aid to the University would falter because of the restriction on aiding a "school of divinity."

describe the early Catholic missions is unthinkable; Father Junipero Serra is justly regarded as one of the great figures in our history and in fact his statue is one of two representing California in the Hall of Fame at the nation's capitol. A high school course in European history could not properly omit reference to the great religious controversies of the middle ages, such as the struggle over lay investiture; and such a course would also devote substantial time to a study of the Protestant Reformation. Instruction concerning the Constitution would similarly involve study of the history of the struggle for religious freedom in colonial times. Religious subjects have many times been used in art and music; Da Vinci's 'Last Supper,' Michelangelo's 'Moses,' the 'Winged Victory' of Samothrace, an Indian totem pole--all have religious significance, and yet all are appropriate for study in a public school class on art. The playing of passages from Beethoven's 'Missa Solemnis' in a music class would not violate constitutional restrictions any more than the playing of Wagner's 'The Valkyrie'.

"Even the Bible itself need not be excluded. It has exerted, and still exerts, a great influence upon English and American literature. Not only may it be discussed in a general way in an appropriate literature class but specific passages, because of their eloquence of poetic beauty, may be used for special study, such as the Song of Ruth or Paul's great tribute to Charity.

"No doubt the indirect use of religious subjects in classes in art, music, literature, and history could be carried to extremes which would offend constitutional guarantees. *Properly presented, however, such materials need not involve the promotion of religion. Use of the Bible in the public schools may be proper even though public school use of the Bible for religious purposes is prohibited by our constitutions.*" (25 Ops.Cal.Atty.Gen. 316, 325 (1955); emphasis added.)

In construing the statutory prohibition on CEFA loans to institutions which require their students to "receive instruction in the tenets of a particular faith" we must presume that the Legislature was aware of these pronouncements (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 65; *Kusior v. Silver* (1960) 54 Cal.2d 603, 618; *English v. Marin Mun. Water Dist.* (1977) 66 Cal.App.3d 725, 731; *California Correctional Officers' Assn. v. Board of Administration* (1978) 76 Cal.App.3d 786, 794; cf. *People v. Hallner* (1954) 43 Cal.2d 715; *People v. Fox* (1977) 73 Cal. App.3d 178, 181) and appreciated the vital part the study of religion has in the educational scheme. Thus a literal reading of the statute, which would thwart that study of religion, must be eschewed. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 113.) We therefore read the statute's prohibition on CEFA loans to institutions which require "*instruction* in the tenets of a particular faith" more generously to the study

of religion in a secular setting. We do not believe that the phrase "instruction in the tenets of a particular faith" is equivalent to "the study of religious principles." It implies, rather, more of an absolute, commanding and inflexible presentation of religious matters that is not to be questioned and which approaches inculcation or indoctrination. And it implies a *religious* as opposed to a secular academic atmosphere and motive for the required study. (Cf. *California Educational Facilities Authority v. Priest*, *supra*, 12 Cal.3d at p. 601; *Hunt v. McNair*, *supra*, 413 U.S. at pp. 744-745.) Thus the fact that an institution requires all of its students to take particular courses in religion does not *necessarily* disqualify it from receiving a CEFA loan as a "participating institution." The institution's courses of study must be examined and their content and tenor evaluated so as to determine whether or not instruction is indeed being required "in the tenets of a particular faith."

The Authority will also have to make a similar examination to determine whether or not the University's use of the funds, involving as it does classroom facilities, would have it disqualified from receiving a loan for "a facility to be used for sectarian instruction." (§ 94110.) In 60 Ops.Cal.Atty.Gen. 103 (1977) we had occasion to discuss the meaning of the term "(non)sectarian." Examining the dictionary definitions and the case law, we concluded that "an institution which is owned by, operated by, affiliated with, or associated with a *religious group* or sect would not be described as 'nonsectarian.'" (*Id.*, at p. 108.) In 64 Ops.Cal.Atty.Gen. 61 (1981) we touched the concept again, and after a similar review equated the term "sectarian" with the term "religious" and contraposed both of them to the term "secular." (*Id.*, at pp. 69-72.) So cast, the disqualifier "to be used for *sectarian instruction*" becomes understood in the context of the dichotomy that has been drawn between aiding the secular educational aspects of a religiously oriented school and aiding its sectarian or religious aspects. There, *if* the two can be separated in a particular situation, it is only aid to the latter that is forbidden as state involvement with and advancing of religion. As the High Court has said, even "sectarian schools perform secular education functions . . . and . . . some forms of aid may be channeled to the secular [aspects] of them without [impermissibly] providing direct aid to the sectarian." (*Committee for Public Education v. Nyquist* (1972) 413 U.S. 756, 775; cf. *Hunt v. McNair*, *supra*, 413 U.S. at pp. 744-745; *Committee For Public Education v. Regan* (1980) 444 U.S. 646, 658-662; *California Educational Facilities Authority v. Priest*, *supra*, 12 Cal.3d at pp. 601 & 602, fn. 8.) Thus for example, close to what we have here (the use of the funds for classroom facilities), the Court has upheld the propriety of state grants to various *indisputably sectarian* institutions to build such projects as libraries, a music, drama and arts building, a science building and a language laboratory upon its finding that the aid was for nonsectarian purposes—the building of facilities in which religion played no part<sup>7</sup> and

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<sup>7</sup> "There is no evidence that 'religion seeps' into the use of any of the facilities. Rather it showed that there had been no religious services or worship in the facilities, that there [were] no religious

which were indistinguishable from any typical state university facilities. (*Tilton v. Richardson* (1971) 403 U.S. 672, 680-681; but see *California Teachers Assn. v. Riles* (1981) 29 Cal.3d 794, discussed, *infra*, which held the loan of *textbooks* by the state to precollegiate nonpublic nonprofit schools violated Cal. Const., art. IX, § 8 (no public money to support any sectarian school) and art. XVI, § 5 (no grant of anything to or in aid of any church or religious sect or help to support any school controlled by a church or a sectarian denomination).)

The Authority will therefore have to examine the curricula of the various schools of the University of Judaism not only to see whether the courses required of the students involve instruction in the tenets of Judaism, but now also to determine whether religious or sectarian instruction will play a part *at all* in the use of the facilities for which CEFA funding is sought.

Superimposed on these statutory hurdles loom the federal and state constitutional considerations discussed in *California Educational Facilities Authority v. Priest*, *supra*, 12 Cal.3d 593 and the Authority must examine their ramifications as well. Of particular concern are the related prohibitions imposed by the First Amendment to the United States Constitution and article XVI, section 5, of the California Constitution.

#### The First Amendment's Establishment Clause

The First Amendment to the federal Constitution,<sup>8</sup> which is binding on the states (*Committee for Public Education v. Nyquist* (1973) 413 U.S. 756, 760, fn. 3), forbids the sponsorship, financial support and active involvement of the sovereign<sup>9</sup> in religious activity. (*Id.*, at p. 772.) To pass muster under it, state action must (1) have a secular purpose; (2) must have a primary effect that neither advances nor inhibits religion; (3) must not foster an excessive government entanglement with religion, and (4) must not inhibit the free exercise thereof. (*Tilton v. Richardson*, *supra*, 403 U.S. at p. 678; *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-613; *Hunt v. McNair*, *supra*, 413 U.S. at p. 741; *California Educational Facilities Authority v. Priest*, *supra*, 12 Cal.3d at p. 600; 64 Ops.Cal.Atty.Gen. 61, 62-63 (1981).)

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symbols or plaques in or on them, and that they had been used solely for nonreligious purposes." (*Tilton v. Richardson*, *supra*, 403 U.S. at pp. 680, 681.)

<sup>8</sup> The First Amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

<sup>9</sup> Action by CEFA under the Act constitutes "state action," since CEFA is a public instrumentality performing essentially a public function. (*California Educational Facilities Authority v. Priest*, *supra*, 12 Cal.3d at p. 596; cf. § 94120, subd. (a).)

In the beginning when it was enacted, our Supreme Court upheld the constitutionality of the Authority Act against a challenge of its possibly aiding sectarian institutions. (*California Educational Facilities Authority v. Priest, supra*, following *Hunt v. McNair, supra*, upholding a South Carolina statute identical to it in all significant aspects; cf. *Tilton v. Richardson, supra*, upholding the Higher Education Facilities Act of 1963, 77 Stat. 364, as amended 20 U.S.C. § 711 et seq.) It found the purpose of the Act, i.e., that of aiding higher education, to be manifestly secular (*Priest, supra*, at pp. 600-601; cf. *Hunt, supra*, at pp. 741-742; *Tilton v. Richardson, supra*, at pp. 678-679); that the Act did not have a primary effect of advancing religion (*Priest, supra*, at pp. 601-602; cf. *Hunt, supra*, at pp. 744-745); and that it did not lead to a fostering of an excessive governmental entanglement with religion (*Priest, supra*, at pp. 602-603; cf. *Hunt, supra*, at pp. 745-749).<sup>10</sup> Thus under the Act the state could constitutionally provide church-related schools with secular, neutral, or nonideological services, facilities or materials. (*Priest, supra*, at 601; cf. *Tilton v. Richardson, supra*, at 679.) The Court found it particularly significant that the institutions involved were ones of *higher education* and that being so, the fact that they might be affiliated with or governed by a religious organization was "insufficient, *without more* to establish that aid to [those] institution[s] advances religion." (*California Educational Facilities Authority v. Priest, supra*, at p. 602, fn. 8 citing *Hunt v. McNair, supra*, at p. 743 and *Tilton v. Richardson, supra*, at pp. 686-687; accord, *California Teachers Assn. v. Riles, supra*, 29 Cal.3d at p. 813, fn. 16; cf. *id.*, at p. 808, fn. 12.)

As mentioned earlier, the High Court has also recognized that "sectarian schools perform secular, educational functions as well as religious ones, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian." (*Committee for Public Education v. Nyquist, supra*, 413 U.S. at p. 775.) "But," as it has also observed, "the channel is a narrow one" (*ibid.*) and we learn that a different result ensues when aid is granted an institution which is "pervasively sectarian," i.e., one in which

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<sup>10</sup> The fourth prong of the First Amendment test as it would affect the situation before us seems to have been answered in *Tilton v. Richardson, supra*, 403 U.S. 672. There the High Court held that the free exercise of religion was not inhibited by a persons having to pay taxes the proceeds of which in part financed grants under the federal Higher Education Facilities Act of 1963 through which federal aid was granted to institutions of higher education including church-related colleges. (403 U.S., *supra*, at 689.) The compulsion of unwilling support is more attenuated here since the monies for the loans are not public funds derived from general taxation but rather come from specially floated bond issues. (*California Educational Facilities Authority v. Priest, supra*, 12 Cal.3d at pp. 603-604.) Indeed because of the particular nature of the source of the funds for the Authority's loans, neither article XVI, section 3 (no public money for private organization), article XII, section 8 (no public money for sectarian school) nor article XVI, section 6 (no pledging the state's credit for payment of private liability) applies. (*Id.*, at 603, 606.) The bonds do not constitute public monies and the loans made therefrom are not expenditures from public funds (*id.* at pp. 603, 606) or a pledge of the state's credit (*id.*, at p. 606).

religion is so pervasive that a substantial portion of its functions are subsumed in its religious mission and it thus becomes impossible to separate its secular from its religious aspects. (*Hunt v. McNair, supra*, 413 U.S. at p. 743; *California Educational Facilities Authority v. Priest, supra*, 12 Cal.3d at p. 602, fn. 8; cf. *Tilton v. Richardson, supra*, 403 U.S. at p. 682.) There, where the secular is not separate and indisputably marked off from the religious function of an institution (cf. *Everson v. Board of Education* (1947) 330 U.S. 1, 18) but rather the two are inextricably intertwined (cf. *Meek v. Pittenger* (1975) 421 U.S. 349, 366; *Wolman v. Walter* (1977) 433 U.S. 229, 250-251), in an integrated secular and religious educational program (*Lemon v. Kurtzman, supra*, 403 U.S. 615-619, 657), direct aid to the former inevitably would flow to the latter, and be unconstitutional. (See, e.g., *Wolman v. Walter, supra*; *Meek v. Pittenger, supra*; *Hunt v. McNair, supra*; *Lemon v. Kurtzman, supra*; *Everson v. Board of Education, supra*; and *California Teachers Assn. v. Riles, supra*, 29 Cal.3d 794, 802-804, 808-809 & 880-809, fn. 12.) Such aid would not have a secular purpose, would have the primary effect of advancing religion and would find the government hopelessly entangled in religion and in the quagmire of trying to sort the religious from the secular in an effort to determine whether the aid was proper. Needless to say, too, aid to fund a specifically religious activity, albeit in an otherwise substantially secular setting, would likewise be prohibited, as would aid to fund specific projects which are not "discrete and clearly identifiable" as being secular. (*Committee For Public Education v. Regan* (1980) 444 U.S. 646, 658-666 & 660, fn. 7.) (*Hunt, supra*; *Priest, supra*; *Tilton v. Richardson, supra*.) Thus although enactments such as the Authority Act have been upheld, the door has been left open for individual projects under them "to be properly evaluated for . . . disqualifications." (*Tilton v. Richardson, supra*, 403 U.S. at p. 682; *California Educational Facilities Authority v. Priest, supra*, 12 Cal.3d at p. 602, fn. 8.)

The Authority will thus have to examine the nature of the University to determine whether it is "pervasively sectarian", that is, whether its secular educational functions are so intertwined with religious or sectarian teaching that the two are impossible to separate. And it will again have to examine the particular use for which funds are sought to see if religious activity is involved. Of course that undertaking will probably first involve a determination being made as to whether the nature of the project for which the funds are sought can be discretely and clearly characterized as being either sectarian/religious or secular/educational.

Unfortunately these efforts are herculean and without easy answer. The High Court decisions in the area are not entirely consistent (*California Teachers Assn. v. Riles, supra*, 29 Cal.3d at p. 809) and they provide no "litmus-paper test to distinguish permissible from impermissible aid . . ." (*Committee For Public Education v. Regan, supra*, 444 U.S. at p. 662.) Moreover, as the Court itself has noted:

". . . Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. . . [O]ur decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability or flexibility, but this promises to be the case until the continuing interaction between the courts and the States--the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth--produces a single, more encompassing construction of the Establishment Clause." (*Ibid.*)

Nevertheless, an examination of the situations presented in several Establishment Clause cases can furnish a yardstick against which to measure for it would show the types of facts which were deemed to be significant by courts in making their ultimate determinations on the issues.

—In *Tilton v. Richardson, supra*, 403 U.S. 672 question was raised about the propriety of grants under the Higher Education Facilities Act to four related colleges and universities in Connecticut. It was claimed that because of the relationship between the institutions and the (Catholic) religious authorities, the content of the colleges' curricula, and other indicia of their religious character, that they were sectarian and ineligible for the federal grants. (403 U.S. at p. 676.) In support of that contention a "composite profile" of the "typical [pervasively] sectarian institution" was presented to the court as one that "imposes religious restrictions on admissions, requires attendance at religious activities, compels obedience to the doctrines and dogmas of the faith, requires instruction in theology and doctrine, and does everything it can to propagate a particular religion." (403 U.S. at p. 682.)<sup>11</sup> The Court however found that the institutions in question did not fit that mold.

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<sup>11</sup> Virtually the same profile of typically sectarian institutions was presented in *Committee For Public Education v. Nyquist, supra*, 413 U.S. 756, as those which—

"(a) impose religious restriction on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach." (413 U.S. at pp. 767-768.)

For a variation on the theme see *Meek v. Pittenger, supra*, 421 U.S. 349 at pages 363-366 quoted in *California Teachers Assn. v. Riles, supra*, 29 Cal.3d at pages 808-809, footnote 12:

(*Ibid.*) Particularly significant to that determination were the facts that: (1) the schools did not require attendance at religious services, (2) that whatever theology courses were offered were taught from an "academic" and pluralistic approach (some being taught by rabbis) and (3) that no attempt was made to indoctrinate students or to proselytize. (*Id.*, at pp. 686-687.) In short, found the court "the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." (*Id.*, at p. 687.) They were not to be disqualified because of their nature from receiving the federal aid.

The Court found it particularly significant that the institutions were ones of higher learning where the likelihood of a mission of religious indoctrination was lessened:

"There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' *Walz v Tax Comm'n. supra*, at 671, 25 L Ed2d at 702. There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students." (403 U.S. at pp. 685-686; fns. omitted.)

"Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of

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". . . The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman*, 403 U.S. at 616-617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' *Id.*, at 657 (opinion of Brennan, J.) . . . ."

secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws." (*Id.*, at p. 687; fns. omitted.)

The significance of the distinction between post-secondary institutions and elementary and secondary ones, as we have already seen, has been accepted by the California Supreme Court (*California Teachers Assn. v. Riles, supra*, 29 Cal.3d at p. 813, fn. 16; cf. *id.*, at p. 808, fn. 12, distinguishing that case from its holding in *Priest*), and, as we shall also see may be crucial to the issue before the Authority.

As alluded to before, in *Tilton* the Court found that the individual projects involved - viz. (1) a library building at Sacred Heart University; (2) a music, drama, and arts building at Annhurst College; (3) a science building at Fairfield University; (4) a library building at Fairfield; and (5) a language laboratory at Albertus Magnus College - did not involve religious activity and were indistinguishable from typical state university facilities. (*Id.*, at pp. 680-681.) They were not sectarian or impermissibly funded. However the Court *did* strike down a portion of the Act which imposed only a 20 year prohibition on using a facility for religious purposes, since it would "obviously open the facility to use for any purpose at the end of that period." (*Id.*, at pp. 683-684, 687.)

—*Roemer v. Maryland Public Works Bd.* (1976) 426 U.S. 736 involved challenge to grants by the State of Maryland to four private colleges which had religious affiliations with the Catholic Church. The Court found them not to be pervasively sectarian. (*Id.*, at pp. 758-759.) Significant to that conclusion were the facts (a) that despite their formal affiliation with the Roman Catholic Church, the colleges were characterized by a high degree of institutional autonomy; (b) that despite the holding of religious services on campus, attendance was not required; (c) that while mandatory religion and theology courses were taught by clerics, the courses only supplemented a curriculum covering the spectrum of a liberal arts program; (d) that apart from the theology department faculty, hiring decisions were not made on a religious basis; and (e) that, although the great majority of students at each of the colleges were Roman Catholic, the student bodies were chosen without regard to religion. (*Id.*, at pp. 755-757.) Aid to the colleges was thus upheld, but the court did note that each college would have to satisfy the grantor state council that the funds would not be put to sectarian use. (*Id.*, at p. 760.)

—*Hunt v. McNair, supra*, 413 U.S. 734, mentioned above, involved aid to a Baptist College under a South Carolina statute virtually identical to the Authority Act. Although members of the Board of Trustees were elected by the South Carolina Baptist Convention which had to approve certain of its financial transactions and amend its charter, and although 60 percent of the student body were Baptist, aid was permitted. (*Id.*, at pp. 743-744.) There were no religious qualifications for faculty membership or student admission and the percentage of Baptists enrolled approximated that in that area of South Carolina. (*Ibid.*) On the record there was no showing that the college's operations were oriented significantly toward sectarian rather than secular education. (*Id.*, at p. 744.)

The Court did formulate a test however for disqualification of such aid.

*"Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In Tilton v. Richardson, supra, the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. MR. CHIEF JUSTICE BURGER, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held open that possibility for future cases:*

*"Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics.' Id., at 682." (413 U.S. at p. 734.)*

This is the *Hunt* test mentioned by the California Supreme Court in *Priest* upon which projects and institutions would be disqualified from receiving loans under the California Educational Facilities Authority Act. (12 Cal.3d at p. 602, fn. 8.)

—In *Smith v. Bd. of Governors of University of N.C.* (D.N.C. 1977) 429 F.Supp. 871, tuition grants extended by North Carolina's State Education Assistance Authority to students attending church-related colleges (Belmont Abbey and Pfeiffer College) were called into question (although the grants to students attending Duke University, also church-related, were not), based on the contention that they were pervasively sectarian. (*Id.*, at p. 872.) Belmont Abbey College was affiliated with the Catholic Church; 70 percent of the students professed that faith; religious symbols abounded at the college and Benedictine monks went about in clerical garb. (*Id.*, at p. 875.) The college offered a broad liberal arts undergraduate program and did not offer a major in theology. Although *two* courses in theology were required, that requirement could be

satisfied without emphasis in Catholicism and there was no attempt to persuade students to accept either Christian or Catholic doctrines. (*Ibid.*) There was no requirement that students attend religious services and while some classes were opened with prayer, the norm was for religion not to be injected into the classroom. When religion was the subject of the theology course, the tone was "that of the academician and not the spreader of the Gospel." (*Ibid.*) Academic freedom prevailed at the college.

Peiffer was a liberal arts college with affiliations with the United Methodist Church, but there was no evidence presented that any Methodist agency attempted to influence its governance. *Forty* percent of the student body was Methodist, and a substantial number of them were pre-ministerial students. (*Id.*, at p. 876.) Courses in religion were required, but taught "according to the academic requirements intrinsic to the subject matter [without] . . . attempts to propagate articles of Christian faith . . . ." (*Ibid.*) Academic freedom prevailed at the college. (*Id.*, at p. 877.)

After reviewing the cases, and finding the situation indistinguishable from that in *Roemer, supra*, 426 U.S. 736, the district court held the colleges *not* to be so pervasively sectarian as to render the tuition aid unconstitutional. Said the court:

"In all of these schools there was a presence of religion, but each of them is a liberal arts college in which the inculcation of religion is not the primary purpose. Formal religious ties are present, but beyond the minimal requirement of courses in religion or theology, taught as academic exercises, religion is not forced upon the students. Their general liberal arts curricula are not designed to prepare students for service in a religious vocation, and students are neither required to accept a set of religious beliefs nor to practice religious rituals.

"Since these colleges are not distinguishable from those with which the Supreme Court dealt in *Roemer*, we conclude that they are not so pervasively religious that their secular activities cannot be separated from their sectarian ones." (*Id.*, at p. 878.)

The Authority will have to first scrutinize the University and the courses it offers looking for factors similar to those viewed by the courts in performing their review in these cases. This will involve it making factual determinations regarding the University as to whether (a) academic freedom prevails; (b) restrictions are placed on admission to student body or staff (see fn. 5, *ante*); (c) whether courses in religion are offered, and, if so, whether they are taught from an academic pluralistic approach and are part of a more broadly based (liberal arts) curriculum; (d) whether a student can successfully matriculate without taking any courses in religion and if not how many courses are required of him/her

to be graduated; (e) whether any theological degrees are offered; (f) whether religious services are held on campus or prayers in the classroom; (g) whether efforts are made to indoctrinate or inculcate; (h) whether clerics teach the courses; (i) whether religious symbols abound; and above all (j) whether the religious aspects of the University, such as they may be, may be separated clearly and discretely from its nonreligious aspects. From the mosaic presented by these primary factual determinations the Authority will then have to make an ultimate determination as to whether the University is "pervasively sectarian." If the Authority should determine that the University is in fact *pervasively* sectarian, it may not loan it monies to refinance classroom and administration facilities, for the inevitable effect of such a loan would be to subsidize and advance the religious mission of the school. (*Committee For Public Education, v. Nyquist, supra*, 413 U.S. at pp. 774-780 (maintenance & repair of facilities); *Tilton v. Richardson, supra*, 403 U.S. at pp. 683-684, 687 (unrestricted-as-to-use grant to build facilities); cf. *California Teachers' Assn. v. Riles*, discussed *infra*, 29 Cal.3d at pp. 802-804, 807-813 (textbooks & instructional materials).)

But the Authority's inquiry does not stop there. Even if it should determine that the University is *not* pervasively sectarian as a whole, it must also consider the specific project contemplated to determine whether it will be sectarian in orientation. While a loan to build an administration facility might not be constitutionally offensive, aid to build or refinance classroom facilities in a religious setting would be deemed to be for a sectarian purpose. Thus before making a loan the Authority will have to ponder once again whether the aid to be provided will clearly be used for a secular purpose and indeed whether it can even make that determination (of what is being taught in the classrooms) without becoming hopelessly entangled with religion. Needless to say, if the Authority should find that its loan will be used to fund a facility which is to be used for religious purposes, or if it cannot receive positive satisfaction that the facility will *not*, the loan, again, may not be given. (*Tilton v. Richardson, supra*, 403 U.S. at pp. 776-777; *Hunt v. McNair, supra*, 413 U.S. at p. 744; *Committee For Public Education v. Nyquist, supra*, 413 U.S. at pp. 776-777 ("If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair."); *California Educational Facilities Authority v. Priest, supra*, 12 Cal.3d at pp. 601, 606; cf. §§ 94110, 94151, subd. (a) discussed *supra*.)

#### Article XVI, Section 5, of the California Constitution

We turn to a consideration of article XVI, section 5, of the California Constitution, which provides:

"Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, *or grant anything to or in aid of* any 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*; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever . . . ."

In 37 Ops.Cal.Atty.Gen. 105, 107 (1961) we characterized the section as constituting "the definitive statement of the principle of government impartiality in the field of religion." By its terms it forbids the grant of *anything to or in aid of any sectarian purpose* and prohibits public help to "support or sustain" a sectarian-controlled school. "[It] 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." (*California Educational Facilities Authority v. Priest, supra*, 12 Cal.3d at p. 605, fn. 12; but see fn. 13, *post.*) Loans made by CEFA under the Act come within its ambit. (*Id.*, at p. 605.)

In *California Educational Facilities Authority v. Priest, supra*, 12 Cal.3d 593, the Authority Act was upheld in general against an article XVI, section 5 (then art. XIII, § 24) challenge, since it was found to have an identifiable secular objective *and* a primary purpose which did not necessarily lead to "direct, immediate, and substantial effect of advancing religion." (12 Cal.3d at pp. 605-606.) The court however alluded to the possibility of *another result* in circumstances in which the supporting of religious activity or the benefiting of a religious/sectarian institution in other than an indirect, remote and incidental way could be demonstrated. (*Ibid.*) Indeed such a demonstration was recently accepted in *California Teachers Assn. v. Riles, supra*, 29 Cal.3d 794 where the state's loan of textbooks to *precollegiate* level religious schools was held to violate the provisions of article XVI, section 5. (29 Cal.3d at pp. 812, 813.)

That case involved the propriety of the Superintendent of Public Instruction making loans of textbooks to nonpublic, nonprofit schools under sections 60316 and 60246. The recipient schools were for the most part (87%) religious schools and of them 72 percent were controlled and operated by the Catholic Church and while offering instruction in secular subjects, they had as their primary purpose the teaching of the tenets of Catholicism. (29 Cal.3d at p. 799.) More than 97 percent of the students at those schools were Catholic and they were required to receive religious instruction, attend religious services during the school day and participate in prayer and religious ceremonies. (*Id.*, at

p. 800.) Sectarian symbols and pictures were distributed throughout the schools' buildings and the teachers were for the most part members of the church. (*Ibid.*) In short it was found that because the religious character of the schools was so pervasive and designedly so intertwined with their secular aspect for the purpose of providing an integrated secular and religious education, aid such as a loan of textbooks, albeit secular, would "inescapably," and hence impermissibly, support their religious function. (*Id.*, at pp. 802-804, 807-813, citing, inter alia, *Meek v. Pittenger*, *supra*, 421 U.S. 349, *Lemon v. Kurtzman*, *supra*, 403 U.S. 602; *Committee For Public Education & Religious Liberty v. Nyquist*, *supra*, 413 U.S. 756; and *Gaffney v. State Department of Education* (1974) 220 N.S.2d 550, 192 Neb. 358.)

*Riles* thus holds the loan of textbooks to a pervasively sectarian school to be unconstitutional.<sup>12</sup> We see no appreciable difference between the loan of instructional materials such as textbooks and a loan of monies to finance classroom facilities.

The court in *Riles* though, while not expressly validating *Priest*, took care to distinguish that case from *Priest* on the grounds that "[t]he statute in that case [the Authority Act] provided assistance to students at the college level . . . , its benefits were restricted to colleges which did not require students to receive religious instruction, and it did not involve the expenditure of public funds for the support of sectarian schools." (29 Cal.3d at p. 813, fn. 16.) The first factor certainly is and the second *may* also be manifest with the situation before the Authority involving the University of Judaism.<sup>13</sup> Thus, as

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<sup>12</sup> To be clear, *Riles* found the loan of textbooks impermissible under article XVI, section 5 of the California Constitution (29 Cal.3d at pp. 811-813) and it thus avoided the First Amendment issue under which the loan of textbooks and other secular instructional material to sectarian schools is open to question. (63 Ops.Cal.Atty.Gen. 69, 79, fn. 14 (1980) discussing *Board of Education v. Allen* (1968) 392 U.S. 236, *Meek v. Pittenger*, *supra*, 421 U.S. 349, and *Wolman v. Walter* (1977) 433 U.S. 229.) In *Riles* the court said it was "unable to harmonize the holdings of [the High Court] cases [on the matter]" (29 Cal.3d at p. 808) and that indeed that court "itself ha[d] implied that its decisions on the subject [of textbooks and instructional materials] cannot be reconciled." (*Id.*, at p. 809.) The court seemed to reject application of the "child benefit doctrine" (by which the loan of textbooks has been upheld as in *Allen*, *supra*) as leading to results which are logically indefensible and at least were not relevant in the case before it. (*Ibid.*) Agreeing with the observation of the Nebraska Supreme Court in *Gaffney v. State Department of Education* (1974) 192 Neb. 358 [220 N.W.2d 550, 556] the court said "the application of the 'child benefit' theory in this circumstance 'ignores substance for form, reality for rhetoric, and would lead to total circumvention of the principles of our Constitution.' Nebraska's provisions are virtually identical to section 5 of article XVI of the California Constitution." (*Id.*, at p. 811.)

<sup>13</sup> It is difficult to reconcile the court's deeming the "public moneys" factor to be a significant distinction between *Riles* and *Priest* with its view in *Priest* that article XVI, section 5 covers more than a loan of or from public moneys since it prohibits the giving of anything in aid of sectarian purposes. (12 Cal.3d at p. 605, fn. 12, *supra*.)

before, it will be for the Authority to examine the particulars of the University and its use of the loan-monies to determine whether it is a pervasively sectarian institution and if the use of the funds will be for religious purposes and thus run afoul of the proscriptions of article XVI, section 5.

The Authority's task then, in connection with its making a loan to the University of Judaism to refinance an existing loan that was secured to build administration and classroom facilities would be as follows: after satisfying itself that the University neither restricts admission on religious grounds (see fn. 5, *ante*) nor is a school of divinity (see fn. 6, *ante*), the Authority would have to determine: (a) whether or not the University requires all students "to receive instruction in the tenets" of Judaism; (b) whether or not the monies to be borrowed will be used for "sectarian instruction" or otherwise involve religious purposes, and (c) whether or not the University is pervasively sectarian. An affirmative resolution in any area of inquiry would preclude the Authority from issuing bonds and making a loan on the University's behalf.

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