

 UNIVERSITY OF  
**NOTRE DAME**  
The Law School  
Religious Liberty Clinic

AMICUS CURIAE

NATALIA JARAMILLO SANDOVAL ET AL. VS. UNIVERSIDAD NACIONAL DE  
COLOMBIA  
File T9117732

Presented by

**Notre Dame Law School - Religious Liberty Clinic**

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This *Amicus Brief* is presented to this Honorable Constitutional Court by the undersigned so that the considerations and arguments contained therein are helpful in the just resolution of the conflict submitted to your knowledge and that, for purposes of clarity, are structured as follows:

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## I. PRESENTATION

The Notre Dame Law School Religious Liberty Clinic (hereafter, "RLC") advocates for the right of all people to exercise, express, and live according to their religious beliefs and defends individuals and organizations of all faith traditions against interference with these vital liberties.

In this line, the RLC seeks to ensure that government actors, such as the National University of Colombia, do not silence or penalize religious expression nor discriminate against their students or the organizations they constitute in the educational context.

## II. THE OBJECT OF THE *AMICUS CURIAE*.

This presentation seeks that this Honorable Court, at the moment to review the case "*Natalia Jaramillo Sandoval et al. vs. The National University - File T9117732*", adequately weigh the legitimate exercise of the rights of the students of the CUR English and Study group (hereafter, the "CUR group"), avoiding that they are subject to discrimination on religious grounds in the educational context.

In this line, this *Amicus Curiae* seeks to deliver the context of international human rights law and the applicable norms to Colombia, not only in the context of international responsibility but also as rules currently in force in the domestic legislation under the provisions of Article 93 of the Constitution of Colombia.

This presentation also aims to develop the way in which the U.S. Constitution and the U.S. Supreme Court have harmonized the church-state separation approach, the duty of neutrality, and the effective guarantee of religious freedom in the educational context. All those arguments are outlined in this presentation as a subsidiary interpretative criterion of the international human rights law applicable to the case.

Finally, this *Amicus Curiae* applies international human rights law and comparative law practice to this specific case, demonstrating how the discrimination suffered by the plaintiff students, based on their religious beliefs, violates international human rights treaties signed and ratified by Colombia, the norms related to church-state separation in the Constitution of Colombia, as well as in the statutory regulations, and finally, how the National University has incurred in manifest misuse of power by deciding to deprive the sponsorship.

### III. PRIMARY SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW THAT ESTABLISH OBLIGATIONS PROHIBITING DISCRIMINATION ON RELIGIOUS GROUNDS IN THE EDUCATIONAL CONTEXT ARE CURRENTLY BINDING IN COLOMBIA.

Non-discrimination on religious grounds in education is expressly prohibited in international human rights treaties, whether regional or universal. Moreover, many of them are ratified by Colombia and therefore impose international obligations of direct and immediate effect, not subject to progressive implementation. But, in addition, and applying Article 93 of the Colombian Constitution, this Honorable Court has held that the human rights contained in international treaties are part of the *block of constitutionality* and therefore represent an international and domestic obligation simultaneously.<sup>12</sup>

Additionally, it is crucial to highlight the variety of binding provisions for the Colombian government and those that, without being binding, can be considered subsidiary sources for the correct and adequate interpretation of Colombian domestic legislation.

Among the international human rights treaties ratified by Colombia and whose norms prohibit discrimination on religious grounds in the educational context, we can point out the following:

#### 1) **Universal Declaration of Human Rights, article 7, in conjunction with article 26.**

Although the Universal Declaration of Human Rights does not constitute a legally binding treaty, this Honorable Constitutional Court has pointed out that, taken as a whole, they constitute *principles of jus cogens*<sup>3</sup> and, therefore, would become *intransgressible* principles of customary international law.

In this line, article 7 of the Declaration states that "*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against*

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<sup>1</sup> Constitution of Colombia, article 93, "International treaties and conventions ratified by Congress, which recognize human rights and prohibit their limitation in states of emergency, prevail in the domestic order. The rights and duties enshrined in this Charter shall be interpreted in accordance with the international human rights treaties ratified by Colombia."

<sup>2</sup> Constitutional Court, Sentence T-483-99, July 8, 1999, reporting magistrate Antonio Barrera-Carbonell. Available

<sup>3</sup> Colombian Constitutional Court, judgments C-225 of 1995, Exp. LAT-040, M.P.: Alejandro Martínez Caballero, and C-578 of 1995, process D-958, actor: Jaime Córdoba Triviño, M.P.: Eduardo Cifuentes Muñoz.

*any incitement to such discrimination*"<sup>4</sup>. Clearly, when the Declaration talks about all discrimination, the prohibition includes discrimination on religious grounds.

Next, article 26 states in the pertinent part, "*Everyone has the right to education (...) higher education shall be equally accessible to all on the basis of merit (...) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace (...)*".<sup>5</sup> Thus, as can be seen, the Universal Declaration already frames a right of access to higher education for all, complementing that the core content of this right is aimed at the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms; *It shall promote understanding, tolerance, and friendship among all nations and all ethnic or religious groups.*

That said, it is possible to argue that the full development of the human personality includes a material and a spiritual realm and that the latter develops, in part, through the exercise of fundamental rights and freedoms, including the practice of religious liberty. In addition, education aims at *understanding, tolerance, and friendship among all religious groups*, which ratifies the prohibition of discrimination based on religious grounds in the educational context.

There is no coincidence. As Mary Ann Glendon describes from the drafting process of the Universal Declaration of Human Rights, "*an important change was made in the article on education, directly influenced by memories of the National Socialist regime's efforts to turn Germany's notorious education system into a mechanism for indoctrinating young people with the government's program. The draft already contained a paragraph, based on a proposal put forward by the World Jewish Congress, which said education should promote tolerance, understanding and respect for human rights.*"<sup>6</sup> Thus, the reality is that educational and religious freedom were recognized in international human rights law in a joint and interrelated way, mainly because of the atrocities we witnessed in the twentieth century.<sup>7</sup>

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<sup>4</sup> *Universal Declaration of Human Rights*, 10 December 1948, Article 7.

<sup>5</sup> *Ibid.*, Article 26.

<sup>6</sup> MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 181 (2001).

<sup>7</sup> Barrera-Rojas, Jorge, *Educational Adequacy: Balancing the Right to Education, Parents' Rights, and Educational Freedoms under the International Covenant of Economic, Social and Cultural Rights* (February 6, 2023). *George Washington International Law Review*, Forthcoming, available in SSRN: <https://ssrn.com/abstract=4350256>

**2) International Covenant on Economic, Social and Cultural Rights, article 2(2), in conjunction with article 13. (Entered into force in Colombia on January 3, 1976, through Law 74 of 1968)**

Similar to the Universal Declaration of Human Rights, Articles 2(2) and 13 of the International Covenant on Economic, Social, and Cultural Rights (hereafter, "ICESCR") expressly prohibits discrimination on the basis of religion in relation to the exercise of the right to education.<sup>89</sup>

The Committee on Economic, Social, and Cultural Rights, which is the treaty-mandated body to monitor the implementation of the Covenant, has upheld in its General Comment No. 13 several minimum core obligations for States, explicitly concerning the right to education. According to Saul, Kinley, and Mowbray, these obligations can be divided into five categories:<sup>10</sup>

- i. Guarantee access to public institutions in a non-discriminatory manner.
- ii. Ensure that the educational provision complies with the objectives set out in Article 13(1).
- iii. Provide a compulsory and free primary school for all, following Article 13 (2).
- iv. Adopt and implement a national education strategy, including providing secondary, higher, and primary education for all.

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<sup>8</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Article 2(2), "2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>9</sup> *Ibid.*, Article 13, " 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State "

<sup>10</sup> BEN SAUL, DAVID KINLEY & JACQUELINE MOWBRAY, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS* 1160 (2016).

- v. Guarantee the free choice of education without interference by the State or third parties, provided that the minimum educational standards provided for in Article 13(3)(4) are met.

Thus, it is possible to appreciate how access to public educational institutions must be guaranteed equally and without discrimination, including all religious discrimination. The previous is reinforced by the minimum core and immediate obligation to ensure that educational provision meets the objectives contained in Article 13(1), which includes, as the Universal Declaration does, the obligation to *promote understanding, tolerance and friendship among all nations and among all racial groups. ethnic or religious.*

Finally, the International Court of Justice has also ruled on non-discrimination in the enjoyment of economic, social, and cultural rights with reference to the provisions of the ICESCR.

Indeed, in the Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 2004,<sup>11</sup> the Court speaks openly about the principle of self-determination of peoples<sup>12</sup> in reference to Israel's ratification of the ICESCR, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.<sup>13</sup> In this regard, the Court referred to the non-territorial limitation of the scope of application of the ICESCR,<sup>14</sup> further affirming the applicability of the right to education in Articles 13 and 14 of the Covenant.<sup>15</sup> To conclude, the Court declared that there should be the elimination of any and all discriminatory obstacles to the rights of the ICESCR, including the right to education, giving direct applicability to its provisions.<sup>16</sup>

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<sup>11</sup> UNGA, Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, A/ES-10/273.

<sup>12</sup> *Id.* at 88.

<sup>13</sup> *Id.* at 103.

<sup>14</sup> *Id.* at 112.

<sup>15</sup> *Id.* at 130.

<sup>16</sup> *Id.* at 133 and 134.

3) **American Convention on Human Rights of 1969, Articles 12 and 26, supplemented by Articles 3 and 13 of the Protocol of San Salvador. (The American Convention entered into force in Colombia on July 18, 1978, through Law 16 of 1972. While the Protocol of San Salvador, entered into force on November 16, 1999, through Law 319 of 1996)**

The American Convention on Human Rights originally contained only two provisions regarding the right to education. The first is precisely in the article that enshrines religious freedom. Article 12 states:

- " 1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to **provide for** the religious and moral education of their children or wards that is in accord with their own convictions.<sup>17</sup> (emphasis added)

Article 26 of the Convention also states:

"Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, **educational**, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires." (emphasis added)<sup>18</sup>

Finally, article 3 of the Protocol of San Salvador includes the prohibition of discrimination on religious grounds<sup>19</sup> and expressly guarantees the right to education in Article 13, similar to those of the International Covenant on Economic, Social, and Cultural Rights.<sup>20</sup>

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<sup>17</sup> *American Convention on Human Rights*, 22 November 1969, Article 12.

<sup>18</sup> *Ibid.* Article 26.

<sup>19</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"*, November 17, 1988. Article 2 "The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition."

<sup>20</sup> *Ibid.*, Article 13, "1. Everyone has the right to education. 2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and



On the application of these provisions, the Inter-American Court of Human Rights has held that "(...) [Under the] the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, in relation to the obligation to ensure progressive development contained in Article 26 of the American Convention, the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development."<sup>21</sup>

In short, the mandates of the American Convention and the Protocol of San Salvador account for a specific and immediate obligation of non-discrimination on religious grounds in exercising the right to education, added to the progressive obligation of states to establish conditions conducive to the full development of students.

**4) Convention on the Elimination of All Forms of Discrimination against Women, articles 1, 2, and 10. (Entered into force in Colombia on September 3, 1981, through Law 51 of 1981)**

Article 1 of the Convention states that "*For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*"<sup>22</sup>

In turn, Article 2 establishes a duty of States parties to take all appropriate measures, including legislation, to amend or repeal existing laws, regulations, customs, and practices that constitute discrimination against women,<sup>23</sup> which

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should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace. 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education: a. Primary education should be compulsory and accessible to all without cost; b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education; c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education; d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction; e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies. 4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above. 5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties."

<sup>21</sup> Inter-American Court of Human Rights. *Case of the Girls Yean and Bosico vs. Dominican Republic*.

Preliminary Objections, Merits, Repairs and Costs. Judgment of September 8, 2005. Series C No. 130, parr 185.

<sup>22</sup> *Convention on the Elimination of All Forms of Discrimination against Women* of 3 September 1981, Article 1.

<sup>23</sup> *Ibid*, Article 2: " States Parties condemn discrimination against women in all its forms, agree to

certainly includes any discrimination on the basis of religion. Moreover, the Convention also contains an explicit mandate in Article 10, which states that "*States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure their equal rights with men in the field of education and in particular to ensure equality of men and women.*"<sup>24</sup>

**5) Convention on the Rights of the Child, Article 2(1), in conjunction with Article 28. (Entered into force on September 2, 1990, by Law 12 of 1991)**

Finally, the Convention on the Rights of the Child explicitly addresses in Article 2 a mandate of non-discrimination,<sup>25</sup> including discrimination on religious grounds, in relation to Article 28, dealing with the right to education.<sup>26</sup>

In this regard, in the case of *H.M. v. Spain*, adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child, CRC/C/87/D/115/2020, the Committee found that:

"12.6 The Committee recalls that article 2 of the Convention explicitly requires States parties to respect and ensure the rights set forth in the Convention, which implies the following: The obligation to respect [the right to education] requires States parties to avoid measures that hinder

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pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.."

<sup>24</sup> *Ibid.* Article 10.

<sup>25</sup> *Convention on the Rights of the Child*, 2 September 1990, Article 2(2), " States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

<sup>26</sup> *Ibid.* Article 28, " 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates. 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. 3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries..

or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. (citing Committee on Economic, Social and Cultural Rights, general comment No. 13 (1999), para. 47. See also Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child (2017), according to which "[t]he Committees strongly urge States to immediately reform regulations and practices that prevent migrant children, in particular to the undocumented, enroll in schools and educational institutions" (para. 60).)"<sup>27</sup>

Adding that:

"12.8 On the second point to be determined – namely, whether the refusal to enrol A.E.A. constituted discriminatory treatment under article 2 of the Convention – the Committee recalls that the discrimination prohibited by article 2 may be "overt or hidden". This means that discrimination can be de jure or de facto and direct or indirect. In the case at hand, the facts have shown direct, de facto differentiation based on the irregular administrative status of A.E.A and, consequently, his national origin. Once again, the Committee notes that, although the State party itself recognizes that those living on its soil have an unrestricted right to education, the author has shown that, despite the National Police's official confirmation of her son's actual residence in Melilla, the local authorities still refused to enrol him. In the absence of any justification by the State party for such a distinction based on the administrative status of A.E.A., the Committee is of the view that the failure to enrol A.E.A. for almost two years constituted a violation of his right not to be discriminated against under article 2 of the Convention, read in conjunction with article 28."<sup>28</sup>

Further, the Committee held in *A.B.A. and F.Z.A. v. Spain* that not every distinction, exclusion, or restriction based on the grounds enumerated in the Convention is discrimination. Thus, there is no discrimination if state actions are based on reasonable and objective criteria necessary and proportionate for achieving a legitimate aim under the Convention. However, the Committee has also pointed out that the obligation to demonstrate that differentiation has been established to pursue a legitimate objective is a heavy burden that falls on the State

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<sup>27</sup> Committee on the Rights of the Child, *H. M. v. Spain*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child, CRC/C/87/D/115/2020, paragraph 12.6.

<sup>28</sup> Committee on the Rights of the Child, *H. M. v. Spain*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child, CRC/C/87/D/115/2020, paragraph 12.8.

party,<sup>29</sup> which at all times must always seek to give effect to all the human rights provisions, and endeavor to harmonize conflicting interests with the overarching need to implement all human rights.<sup>30</sup>

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<sup>29</sup> Committee on the Rights of the Child in *A.B.A. and F.Z.A. v. Spain*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child, 12 September 2022, CRC/C/91/D/114/2020, CRC/D/91/D/116/2020, CRC/C/91/117/2020, CRC/C/91/D/118/2020, paragraphs 10.7, 10.8, and 10.9.

<sup>30</sup> The Committee has stressed on several occasions the need to combat *de jure* or *de facto* and direct and indirect discrimination, including in relation to access to education. See CRC/C/AUT/CO/3-4, para. 25; CRC/C/VNM/CO/3-4, para. 29; and CRC/C/THA/CO/3-4, para. 33. See also the various international instruments which recognize as discrimination any distinction having as its object (object) or effect (result): United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education, art. 1; International Convention on the Elimination of All Forms of Racial Discrimination, art. 1; Convention on the Elimination of All Forms of Discrimination against Women, art. 1; Convention on the Rights of Persons with Disabilities, art. 2; Human Rights Committee, general comment No. 18 (1989), para. 7; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 7 (including reference to direct or indirect discrimination).

#### IV. COMPARATIVE CONSTITUTIONAL PRACTICE AND HARMONIZATION OF RELIGIOUS FREEDOM, CHURCH-STATE SEPARATION AND EDUCATIONAL FREEDOMS. THE CASE OF THE UNITED STATES OF AMERICA

##### 1) First Amendment to the U.S. Constitution.

The First Amendment to the U.S. Constitution articulates two supplemental clauses by stating that "*Congress make no law respecting an establishment of religion or prohibiting its free exercise*"<sup>31</sup> That is, at the same time that the establishment of an official religion is prevented, the free exercise of religion as a fundamental right is guaranteed. In this line, the U.S. Supreme Court has interpreted these clauses as complimenting each other.<sup>32</sup> The first clause has been interpreted as requiring a degree of church-state separation, while the second clause calls for respect and non-interference with people's religious beliefs and practices.<sup>33</sup>

As discussed in the following paragraphs, neutrality in religious matters is frequently illustrated in religious freedom cases in the United States.

##### 2) The Doctrine of Religious Neutrality.

To achieve the objectives of these two clauses, U.S. courts have created a set of rules and principles that guide their decisions. Courts in the United States typically decide two things: (1) whether the State has violated a person's right to the free exercise of his or her religion, including by discriminating against them on religious grounds, and (2) whether the State is endorsing or promoting religion in a way that violates the Establishment Clause. For both determinations, the Court is guided by the doctrine of neutrality.

The doctrine of neutrality requires that, regardless of the religious or non-religious status of a person or group, they should not be discriminated against on the basis of their faith, i.e., that "*No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance*"<sup>34</sup> For example, once the State offers a benefit to the public, it must allow individuals and religious groups equal access to that benefit.<sup>35</sup> The U.S. Supreme Court has spoken clearly about this – states cannot discriminate against religious providers when they extend benefits to private providers. That's in the education context, in the social services context, all of it.<sup>36</sup> Thus, if the State does not neutrally treat people

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<sup>31</sup> First Amendment to the Constitution of the United States.

<sup>32</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2414 (2022).

<sup>33</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

<sup>34</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

<sup>35</sup> *Sherbert v. Verner*, 374 U. S. 398, 404 (1963).

<sup>36</sup> See <https://catholicreview.org/jewish-parents-challenge-california-ban-on-special-education-funds->

on the basis of their religion, this constitutes a violation of its fundamental guarantee of free exercise.

The principles and rules set forth above have been applied in important cases before the U.S. Supreme Court. Recently, in *Trinity Lutheran Church v. Comer*, one State had created a program that allocated money to nonprofit daycare. With public funds, daycare centers replaced playgrounds with floors made from recycled rubber tires. The Trinity Lutheran Child Learning Center (the plaintiff in the case) applied for funding, and although it would typically have qualified for such funds, the State denied its application. Justifying its decision, the State explained that it refused to give money to a religious organization because it thought doing so would be a violation of a state constitutional provision mandating a greater degree of church-state separation than the Establishment Clause.<sup>37</sup> The Supreme Court explained that the State had explicitly discriminated against religious organizations, so it was evident that the Center was not treated neutrally.<sup>38</sup> If the Center had been a non-religious organization, they would have qualified to receive money. Instead, the Center had two options: receive the benefits by stopping its religious practice, or continue its religious practices without being able to receive the benefits that the State was granted to the public.<sup>39</sup> Because Trinity Lutheran was deprived of a public benefit solely because of their religious beliefs, they were not treated neutrally, and the State violated their constitutional right to the free exercise of their religious faith.

### 3) Hallmarks of an Established Religion.

. In *Kennedy v. Bremerton School District*,<sup>40</sup> the Supreme Court explained that historically, government action that coerced individuals to participate in a religious exercise on pain of legal penalty "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." The Court also cited another concurring opinion by Justice Gorsuch in *Shurtleff*, which described other relevant hallmarks of an established religion that are prohibited under the Establishment Clause. The opinion states as follows: Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. *First*, the government exerted control over the doctrine and personnel of the established church. *Second*, the government mandated attendance in the established church and punished people for failing to participate. *Third*, the government punished dissenting churches and individuals for their religious exercise. *Fourth*, the government restricted political

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[at-religious-schools/](#)

<sup>37</sup> *Trinity* at 2018

<sup>38</sup> *Trinity Lutheran Church of Columbia, Inc. v. Eat*, 137 S. Ct. 2012, 2024 (2017)

<sup>39</sup> *Trinity* in 2022

<sup>40</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2327 (2022).

participation by dissenters. *Fifth*, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And *sixth*, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.<sup>41</sup>

Thus, in cases when the Court is identifying whether a government practice constitutes a violation of the Establishment Clause, it will look to whether the challenged practice resembles one of these hallmarks in important respects.

#### 4) Religious Freedom in the Education Context.

The Supreme Court has also recently addressed religious freedom in the educational context in *Carson v. Makin*.

In *Carson v. Makin*, the State of Maine was distributing money to help students pay for private education, as they lived in localities where there were no public education options. However, the State refused to give money to students who wanted to attend what they called, a "sectarian school,"<sup>42</sup> meaning faith-based schools. In addition, the State claimed they were interested in maintaining a greater degree of church-state separation that was required by the Establishment Clause and refused to fund private religious schools.<sup>43</sup> Finally, the Supreme Court said there "*was nothing neutral*" about the program Maine instituted, but instead that the program explicitly discriminated against religious schools.<sup>44</sup>

According to the Court's view, the previous constituted a clear violation of the doctrine of neutrality, and the Court proceeded to analyze whether the law could survive under strict scrutiny. Finally, the Court held that interest could not be considered "*compelling or of the highest importance*." In this sense, the State was going beyond what known Judicial decisions established were required by the Establishment Clause. Moreover, The State was needlessly discriminatory, violating the religious freedom of students who wanted to attend faith-based schools.<sup>45</sup> To make this determination, the Supreme Court was supported by previously adopted decisions, where other states had similar laws, and the Court had decided that they had to allow parents to choose where to send their children without discriminating against religious schools.<sup>46</sup>

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<sup>41</sup> *Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring) (emphasis added) (citation omitted).

<sup>42</sup> *Carson v. Makin*, 142 S. Ct. 1987, 1994-96 (2022)

<sup>43</sup> *Ibid.*, 1994

<sup>44</sup> *Ibid.*, 1998

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, 1992 Quoting *Trinity Lutheran, y Espinoza*.

V. APPLICATION TO THE SPECIFIC CASE OF THE STANDARDS AND CRITERIA  
OUTLINED ABOVE

1) **The National University has arbitrarily discriminated against its students based on a suspicious category and prohibited grounds: their religious beliefs.**

*A. The actions of the National University are contrary to international human rights law in an intersectional and simultaneous manner and impact several of Colombia's treaty obligations, which are of direct and immediate effect*

As noted in this presentation, non-discrimination on religious grounds in education is expressly prohibited in many international human rights treaties, whether regional or universal, as discussed in detail.

Likewise, many of these treaties are ratified by Colombia and therefore impose international obligations of direct and immediate effect, not subject to progressive implementation. But in what is relevant, and in the application of Article 93 of the Constitution of Colombia,<sup>47</sup> this Honorable Court has held that the human rights contained in international treaties are part of the *block of constitutionality* and therefore represent an obligation not only internationally but also at a domestic level.<sup>48</sup>

Thus, the discriminatory actions on religious grounds on the part of the National University of Colombia constitute a manifest violation of the provisions contained in the following international instruments:

1. Universal Declaration of Human Rights, Article 7 (prohibition of non-discrimination, including cases on the grounds of religion) in conjunction with Article 26 (right to education).

2. International Covenant on Economic, Social and Cultural Rights, Article 2(2) (non-discrimination, including on the basis of religion) in conjunction with Article 13 (right to education).

3. American Convention on Human Rights, Articles 12 and 26, including Articles 3 and 13 of the Protocol of San Salvador.

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<sup>47</sup> Constitution of Colombia, article 93, "International treaties and conventions ratified by Congress, which recognize human rights and prohibit their limitation in states of emergency, prevail in the domestic order. The rights and duties enshrined in this Charter shall be interpreted in accordance with the international human rights treaties ratified by Colombia."

<sup>48</sup> Constitutional Court, Sentence T-483-99, July 8, 1999, reporting magistrate Antonio Barrera-Carbonell. Available



The preceding provisions contain all operative obligations of Colombia. Accordingly, all are obligations of immediate effect, in addition to other applicable international human rights law provisions that aim to protect and guarantee religious freedom in the educational context without misusing Colombian constitutional rules of church-state separation, to violate the right not to be discriminated against, whether *de jure* or *de facto*.

Indeed, it is clear from the facts that there was a positive intention of the National University to discriminate against the group CUR Inglés y Estudio on religious grounds. That is clear, among other evidence, considering they asked plaintiff students to sign an agreement. But, then, despite the CUR members signing the agreement in the exacted terms requested by the National University, the educational institution denied the sponsorship anyway, arguing a violation of church-state separation.

The actions of the National University openly violate what the right to education is and the specific purpose of education under international human rights law.

Colombia, as a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), is bound explicitly under Article 13(1) to "recognize the right of everyone to education...[and] agree[s] that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms." They further agree that "education shall enable all persons to participate effectively in a free society, promote understanding, tolerance, and friendship among all nations and all racial, ethnic, or religious groups, and further the activities of the United Nations for the maintenance of peace."

Excluding the CUR group on religious grounds does not provide education directed to the full development of human personality and dignity, and neither does it strengthen respect for human rights and fundamental freedoms. The National University's discriminatory actions towards the CUR group on religious grounds do not create education that enables all persons to participate effectively in a free society, and they certainly did not promote understanding, tolerance, and friendship among all racial, ethnic, or religious groups as required in the international human rights law right to education under Article 13(1) of the ICESCR.

As this Honorable Court will be able to consider, it was nothing more than an excuse on the part of the higher education institution, which cannot be accepted as legitimate in light of the fundamental rights and freedoms that assist the

students of the CUR group, which are expressly enshrined in several international human rights treaties, that are part of the Colombian Constitution as it as states and are rightly applicable in the constitutional controversy aired in this seat.

In conclusion, the actions of the National University openly contravene the *jus cogens* prohibition of non-discrimination in international human rights law insofar as these actions discriminate, impede, and adversely impact all students' equal abilities to enjoy the internationally guaranteed right to education.

***B. The actions of the National University depart from comparative constitutional practice and do not adequately harmonize the church-state separation mandate with the exercise of religious freedom in the educational context.***

As has been noted in the context of the United States, discrimination on religious grounds, under the guise of a defense of church-state separation, constitutes **non-neutral treatment against a religious organization, setting additional requirements that other organizations do not have to meet**. Indeed, the agreement signed by the CUR group constituted an additional requirement not demanded of any other student organization. The worst thing is that even though the students signed this agreement, the National University also excused itself from an alleged violation of the church-state clause in the Constitution of Colombia, directly violating their fundamental rights.

In addition, Colombian law of Higher Education Institutions allows promoting activities that seek the spiritual development of students, as established in article 117 of Law 30 of 1992.<sup>49</sup> Therefore, the sponsorship of religious organizations in the context of secular activities aimed at spiritual development is constitutionally valid and expressly contained in Colombian legislation and cannot be used as an excuse to restrict, limit or suspend religious freedom.

Finally, and as the Supreme Court of the United States decided in *Carson* and *Kennedy*, it is not possible to violate religious freedom in the educational context, given the mere suspicion of a potential violation of the principle of church-state separation, on the understanding that "*in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.*"<sup>50</sup>

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<sup>49</sup> According to article 117 of Law 30 of 1992, Higher Education Institutions must carry out welfare programs understood as the set of activities that are oriented to the physical, psycho-affective, spiritual and social development of each of the students, teachers and administrative staff applying criteria of equity and solidarity that favor the coexistence and practice of institutional values.

<sup>50</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2432 (2022)

## 2) The actions of the National University are contrary to the Colombian Constitution. Religious Freedom and Church-State Separation

As indicated by the claim filed by the plaintiff, in Colombia, the Constitutional Court has understood the *Secular State* as a model of *pluralistic State in religious matters* that recognizes the equality between all confessions that exist in the territory, without this implying an official consecration or giving legal preeminence to any religious creed. In this sense, neutrality clauses are always intended to protect religious freedom and in no way enable its instrumentalization to restrict, limit, or suspend fundamental rights.<sup>51</sup>

In what is relevant, article 2 of Law 133 of 1994 states that "*No Church or religious confession is or will be official or state. However, the state is not atheist, agnostic, or indifferent to the religious feelings of Colombians.*" (Emphasis added) In this way, it is contrary to the Law to interpret church-state separation as a concept that pursues atheism or agnosticism. Still, on the contrary, it seeks to guarantee that there is no official religion in Colombia to protect – and not violate – the religious freedom of all.<sup>52</sup>

Indeed, the transcribed norm is fundamental for applying the so-called *principle of concrete harmonization*, which, in the words of this Honorable Court, "[p]revents the possibility that the effectiveness of one right be sought through the sacrifice or restriction of another. **In accordance with this principle, the interpreter must resolve collisions between legal rights so as to maximize the effectiveness of each of them.** The collision of rights should not, therefore, be resolved by a superficial weighing or abstract priority of one of the conflicting legal assets. This balancing requires taking into account the various assets and interests at stake and tending to harmonize them in the specific situation, as a prior and necessary moment to any hierarchy or prevalence of one constitutional norm over another. The principle of concrete harmonization implies the mutual delimitation of the conflicting goods, through the practical concordance of the respective constitutional norms, so as to ensure their maximum effectiveness."<sup>53</sup> (Emphasis added)

Therefore, based on *concrete harmonization*, the principle of church-state separation can't have an abstract preference over religious freedom without considering a concrete harmonization of the interests and rights at stake. Thus, it

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<sup>51</sup> Constitutional Court. Decision C-350 of 1994. MP. Alejandro Martínez Caballero, Constitutional Court. Decision C-766 of 2010. MP. Humberto Antonio Sierra Porto, Constitutional Court. Decision T-524 of 2017. MP. Antonio José Lizarazo Ocampo, Constitutional Court. Sentence C-570 of 2016. MP. Luis Guillermo Guerrero Perez.

<sup>52</sup> Art 2. Law 133 of 1994

<sup>53</sup> Constitutional Court, Judgment No. T-425/95.

is illegitimate that, under the mere enunciation of the duty of neutrality, the sponsorship of a religious group, which, like any other secular group, applies to receive the support of the institution of higher education, is deprived.

The preceding would not only undermine the true meaning and scope of the principle of church-state separation but would constitute a violation of religious neutrality. Indeed, and strictly speaking, what the University is doing is demanding additional requirements from the members of the CUR group, conditions that, despite having been met, also concluded in a discriminatory act by the state educational institution.

### 3) The actions of the National University are contrary to the Colombian Constitution: Misuse of Power.

As this Honorable Court has pointed out, "*The vice of the misuse of power in the issuance of an administrative act arises when an organ of the State, acting in exercise and within the limits of its competence, complying with procedural formalities and without incurring in violation of the law, uses its powers or attributions for the purpose of seeking an intention contrary to public or social interests, in general, or the specific and concrete ones, which the legislator sought to satisfy when granting the respective competence.*"<sup>54</sup> (emphasis added)

In this sense, the Honorable Court has not only recognized the misuse of power as a possible defect of the legality of administrative acts but has even gone further, recognizing the possibility that Congress may fall into such a vice at the time of the lawmaking process.<sup>55</sup>

All the facts show a clear case of misuse of power from the National University regarding the decision not to endorse the CUR group. The institution used the wording of constitutional provisions to supposedly "protect" church-state separation to hide that it intended to discriminate against the CUR group members on religious grounds.

Indeed, as indicated in the *Tutela*, on February 22, 2021, a meeting was held between the Deanship of Human Sciences and Jorge Gracia (the professor who endorsed the CUR group). The members of the Deanship openly raised doubts generated by the project. However, the authority itself **made the unilateral**

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<sup>54</sup> Constitutional Court, Judgment E-456/98.

<sup>55</sup> *Ibid.*

**decision to require the drafting of an agreement if the group wished to request the (re)endorsement of the CUR.**

This commitment contained three elements,<sup>56</sup> to which the CUR group **responded by accessing every and each of them.** Nevertheless, despite having complied with this clear additional requirement –which no other student group demanded to get the sponsorship–the authority also decided not to endorse them under the excuse of an alleged violation of the secular State.

As seen by this Honorable Court, it is evident that the National University has invoked church-state separation provisions to arbitrarily discriminate against the CUR group on the basis of their religious beliefs.

Thus, the university authority has proceeded to use the words of the Constitution for a purpose that the framers did not originally establish, nor has it been established by Congress in the statute, as has been developed at length in this presentation.

Logically, it was never among the objectives of the provisions that govern church-state separation that they were used to discriminate against students based on religious grounds, violating their fundamental rights and guarantees contained in the Colombian Constitution, as well as in the treaties ratified by Colombia and that are currently in force.

## VI. CONCLUSIONS.

As it has been possible to appreciate by this Honorable Constitutional Court, the participants of this *Amicus Curiae* have delivered the context of the norms of international human rights law applicable to Colombia, which not only establish direct and immediate obligations at the international level but in turn, constitute norms applicable to domestic law under the provisions of article 93 of the Constitution of Colombia. In this regard, it has become clear that discrimination on religious grounds in exercising the right to education is prohibited both *de jure* and *de facto*. Therefore, the acts carried out by the National University are inconsistent with current Colombian legislation.

Additionally, we have explained to this Honorable Court the way and manner in which the Constitution and the Supreme Court of the United States of

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<sup>56</sup> The commitments required by the authority were: "Maintain a relationship of openness to ecumenical dialogue with other study groups or religious militancy in the university"; b) "Do not endorse any political movement", and (c) "Respect and promote the defense of sexual diversity and autonomy over the body."

America have harmonized the Establishment Clause, the duty of neutrality, and the effective guarantee of religious freedom in the educational context, avoiding discrimination on religious grounds by public authorities. Moreover, those of us who subscribe believe that the arguments developed can be helpful as a subsidiary interpretative criterion to the norms of international human rights law applicable to the current case.

Further, this presentation has shown how the constitutional rules applicable to the case have been used to discriminate against students in the CUR group, discrimination based directly on their religious beliefs. As has been demonstrated, the previous violates international human rights treaties signed and ratified by Colombia, the true meaning and scope of church-state separation in the Constitution, and the statutory regulations. Finally, the National University has also misused its power by deciding to deprive the plaintiffs of sponsorship using the letter of the Constitution for a purpose other than that established and fixed by the framers.

Thus, and reiterating what was decided by the U.S. Supreme Court in *Carson* and *Kennedy*, it is not possible to violate religious freedom in the educational context, only in the face of a mere suspicion that the principle of church-state separation is possibly being violated, in the understanding that "*in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.*"<sup>57</sup>

For all the arguments developed in this *Amicus Brief* before this Honorable Constitutional Court, we respectfully request that the *tutela action* filed by Natalia Jaramillo Sandoval et al. be granted.

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<sup>57</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2432 (2022)