No. 98-1648

In the Supreme Court of the United States

GUY MITCHELL, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF EDUCATION

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In our opening brief (at 22), we pointed out (as the Court stated in *Agostini* v. *Felton*, 521 U.S. 203, 225 (1997)) that the Court has "departed from the rule * * * that all governmental aid that directly assists the educational function of religious schools is invalid." Rather, in recent Establishment Clause cases where the Court has examined government aid to education, the Court has considered whether the government program defines its beneficiaries neutrally and without reference to religion; whether the program has safeguards sufficient to ensure that the government aid is not used in the inculcation of religion; and whether the aid is supplementary to the core educational function of religious schools (thereby preventing the schools from

using the aid to shift resources from their secular to their religious functions). See Gov't Br. 22-27.[1]

Respondents and their amici make two kinds of arguments in response. First, respondents and some amici argue categorically that the government may not give direct assistance of any kind to the instructional function of religious schools, because all instruction at religious schools will inevitably have a religious component that cannot be separated from the secular aspects of the education. See Resp. Br. 19-22, 31-35; PEARL Br. 8-10; IRLF Br. 7-19; see also NEA Br. 13-16. Second, respondents and amici argue that, even if some government aid might theoretically be provided to religious schools in some circumstances, the program at issue in this case should be invalidated because it has not been shown that the instructional material and equipment lent to religious schools could not be used for religious purposes. Resp. Br. 35-44; ACLU Br. 17-28; NEA Br. 19-21. Both contentions are wide of the mark.

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[1] In this brief, "Gov't Br." refers to our opening brief on the merits; "Resp. Br." refers to respondents' brief on the merits; "PEARL Br." refers to the brief of amici curiae National Committee for Public Education and Religious Liberty et al.; "ACLU Br." refers to the brief of amici curiae American Civil Liberties Union et al.; "IRLF Br." refers to the brief of amici curiae Interfaith Religious Liberty Foundation et al.; and "NEA Br." refers to the brief of amicus curiae National Education Association.

1. The Government May Directly Provide Supplemental Assistance To The Secular Aspects Of Education At Religious Schools, With Safeguards To Ensure That The Assistance Does Not Subsidize The Inculcation Of Religion

Respondents argue broadly that the government may not give any direct aid to the instructional function of religious schools because, they maintain (Resp. Br. 31), "state educational aid under the use and control of parochial school teachers will unconstitutionally further the religious educational mission of parochial schools." That follows, respondents contend, from the "pervasively sectarian" nature of religious schools (*id.* at 32); since, in their view, all instruction at religious schools is at least partly religious in content, government aid to such instruction necessarily advances religion.

While (as we have acknowledged, see Gov't Br. 20) there is language in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Wolman* v. *Walter*, 433 U.S. 229 (1977), to support that submission, the Court's more recent decisions, culminating in *Agostini*, indicate that the Court no longer applies a blanket rule that instruction at religious schools has no separate secular content that the government may legitimately assist. In *Agostini* itself, as we have just noted, the Court expressly rejected a rule invalidating all "government aid that *directly assists* the educational function of religious schools." 521 U.S. at 225 (emphasis added); see also ACLU Br. 12 (noting same point); *Committee for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980) (upholding state reimbursement to religious schools for administering and scoring secular standardized tests).

Respondents point out (Resp. Br. 28) that *Agostini* and the principal cases on which it relied, *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), did not involve situations in which the public authorities transmitted resources directly to religious schools. Nevertheless, the Court in *Agostini* plainly understood that the program at issue "directly aid[ed] the educational function of [the] religious schools" (521 U.S. at 222) as well as the students attending them. In any event, we have not argued that the identity of the most direct recipient of governmental aid (the religious school or the student) is irrelevant to Establishment Clause analysis; that fact may be quite important in determining, for example, whether safeguards are needed to ensure that governmental aid is not used by a religious school for the inculcation of religion. Our point rather is that the Court does not rigidly separate government-aid cases into two analytical universes ("direct aid to schools" and "direct aid to students").

Thus, to the extent that the Court in *Meek* and *Wolman* might have distinguished the loan of instructional materials and equipment to *schools* (which it invalidated) from the loan of textbooks to *students* (which it upheld in both cases, as well as in *Board of Education* v. *Allen*, 392 U.S. 236 (1968)) *solely* on the ground that the books were transmitted directly to students but the other instructional materials and equipment were not, that rigid distinction appears no longer tenable after *Agostini*. And respondents fail to explain how a categorical rule prohibiting the loan of instructional materials to religious schools can otherwise be reconciled with the Court's decisions permitting the loan of textbooks to students attending

such schools. Respondents and their amici attempt to liken the textbook-loan programs this Court has upheld to the broad assistance programs at issue in *Witters* and *Zobrest*. They argue that, like the sign-language interpreter assigned to a student in *Zobrest*, a textbook is lent directly to each student "for his or her own use" (Resp. Br. 35), and that textbook-loan programs therefore provide only "indirect and incidental benefits" to religious schools (PEARL Br. 15).

Respondents' effort to analogize textbook-loan programs to the programs at issue in *Zobrest* and *Witters*, however, is unrealistic. First, it is difficult to see a textbook-loan program as providing only an incidental benefit to a religious school's educational function. Textbooks are, of course, used in the classroom. Further, even if each student is conventionally lent a textbook for "his or her own use," in the sense that students do not usually share textbooks, that point does not control the constitutional analysis, as the Court made clear in *Agostini*. See 521 U.S. at 228 (observing that, "[a]lthough Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant"). In addition, unlike the situations in *Witters* and *Zobrest*, where "[a]ny aid * * * that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices" of the students who receive the aid (cf. *Witters*, 474 U.S. at 487), under a textbook-loan program, schools, not students, determine which textbooks are necessary for instruction, and students make their choice of school before, not after, receiving textbooks. Cf. *ibid.* (noting that "[a]s far as the record shows, vocational assistance provided under the Washington program is paid directly to the student, who

transmits it to the educational institution of his or her choice"). In fact, the Court was aware in *Allen*, *Meek*, and *Wolman* of the seemingly obvious point that the textbooks lent to students were prescribed for the course of study by the schools that the students attended.[2]

Thus, in our view, the salient point about the textbook-loan programs upheld in *Meek*, *Wolman*, and *Allen* is not that the textbooks were provided for students' individual use. Rather, the important point is that (in addition to the fact the loan programs were neutral as to religion) textbooks can be screened in advance to ensure that they have a secular content. In *Allen*, the Court concluded that this safeguard was sufficient to ensure, at least as a presumptive matter, that the textbooks would be used for the secular aspects of classroom instruction, and would not be used by religious schools to inculcate religion. See 392 U.S. at 244-245, 248. Of course, the Court in *Allen* could not have been unaware that it was *possible* that even

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[2] See *Allen*, 392 U.S. at 239 n.3 (noting that New York statute defined "text-book" as "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends"); *id.* at 244 n.6 (noting that religious school was permitted to forward request for textbooks to public authorities on behalf of students); Appellants Br. 19, *Allen* (arguing that, "[t]hrough its involvement in the administration of the statute, it is the parochial school which is the dominant consideration in the selection and distribution of the books, not the students"); *Meek* v. *Pittenger*, 374 F. Supp. 639, 669-670 (E.D. Pa. 1974) (Higginbotham, J., concurring in part and dissenting in part) (reviewing procedures by which religious schools submitted requests on behalf of parents for textbook loans), aff'd in part, rev'd in part, 421 U.S. 349 (1975); *Wolman*, 433 U.S. at 236-237 (opinion of Blackmun, J.) (similar).

physics textbooks, as used in a religious school, might be used for religious purposes, but given the secular content of the textbooks the Court declined to presume that they would be so used, at least in the absence of evidence of such religious use. See *id.* at 248.

The Court's textbook-loan decisions therefore support our submission that the Court has looked to the existence of safeguards intended to prevent government subsidization of the inculcation of religion, rather than a blanket rule against any "direct" aid to religious schools, to protect the values of the Establishment Clause. Contrary to the suggestion of respondents and amici (Resp. Br. 27-29; ACLU Br. 9-11), our submission is also consistent with the part of *Wolman* invalidating government-financed field trips by religious schools (see 433 U.S. at 252-255) and the part of *School District of Grand Rapids* v. *Ball*, 473 U.S. 373, 386-387 (1985), invalidating the "Community Education" program of government-financed supplemental classes taught by religious school teachers.[3] Although the statute authorizing reimbursement for field trips at issue in *Wolman* required the trips to "enrich the secular studies of students," 433 U.S. at 252, the public authority did not review the content of the field trips in advance, nor did it attempt to monitor those trips to ensure that they were secular in nature. There were therefore no safeguards in place to ensure that government re-

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[3] *Ball* also invalidated a separate "Shared Time" program under which full-time employees of the public schools provided instruction in extra-curricular secular subjects to religious school students at religious schools. See 473 U.S. at 375-376, 387-389. That aspect of *Ball* was overruled in *Agostini*, see 521 U.S. at 222-230, 235-236.

sources were not used to underwrite field trips that were religious in nature.[4]

In *Ball*, the Court invalidated a program under which public authorities paid religious school teachers to give instruction to religious school students in various subjects (including "Christmas Arts and Crafts," see 473 U.S. at 376-377). The classes were not specifically monitored to ensure that they were secular in content. *Id.* at 387. In addition, the teachers engaged under the Community Education program were also employed at the religious school, and in some cases taught regular religious school classes to students who took courses under the Community Education programs. *Ibid.* The Community Education program therefore amounted to a salary supplement for religious school teachers similar to that invalidated in *Lemon* v. *Kurtzman*, 403

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[4] The Court stated in *Wolman* that any such safeguards would involve the public authority in excessive entanglement with religious schools. 433 U.S. at 254. We have argued that, since the decision in *Wolman*, the Court has adopted a more permissive approach under the anti-entanglement principle towards safeguards that a public authority may put in place to ensure that government aid is not diverted to the inculcation of religion. See Gov't Br. 27-28. But even if it would remain true today that safeguards to ensure the secularity of religious schools' field trips would involve excessive entanglement, that would not necessarily mean that safeguards adequate to ensure the secular use of instructional materials and equipment lent by public authorities to religious schools would also require excessive entanglement. As we have observed, instructional materials, like textbooks, can be reviewed in advance to ensure their secular content, and the use of instructional equipment can be reviewed through the maintenance and inspection of logs. See *id.* at 39-41, 44. The content of field trips, by contrast, may not be so readily susceptible to advance review and documentation, given the somewhat less structured environment in which field trips take place.

U.S. 602 (1971). And, as we have observed (Gov't Br. 44-45), government-financed salary supplements for teachers present entanglement problems that are far more serious than those potentially raised by the loan of instructional materials and equipment.

In the end, respondents' categorical argument against any government aid to instruction at religious schools—that every element of instruction by a religious school must conclusively be deemed to be at least partly religious in nature—is not one the Court currently accepts, nor one that it accepted in *Allen*. We do not intend to suggest, by that observation, that a religious mission is not important to many religious schools, or that there is no difference between religious elementary and secondary schools and religiously-affiliated postsecondary educational institutions. We do suggest, however, that one should not leap from the premise (which is not disputed) that many religious elementary and secondary schools understand the inculcation of religious beliefs to be a central aspect of their function to the conclusion that there is no identifiable secular instruction at such schools that may be assisted by the government. Nor do we agree with respondents' melancholy prediction that such government assistance to education will lead to a "cleansing" of the religion from religious schools (Resp. Br. 33). It may be that some religious schools will find themselves unable, as a matter of conscience, to accept aid offered by the government on the condition that it be used only for secular instruction; some schools may also be unwilling to accept the safeguards required by a public authority to ensure compliance with that condition (although, if those safeguards are similar to those described in the Department of Education's Title VI Guidance, see Gov't Br. App. 4a-5a, they should not

involve excessive entanglement, see Gov't Br. 44-45). Other religious schools, however, may conclude that the inculcation of religion does not permeate their curriculum in that way, and that government aid may be accepted with the requisite safeguards. If a public authority can obtain adequate assurances that aid provided to such religious schools will be used only for the secular aspects of education (and if such aid is provided neutrally and is supplemental), then the Establishment Clause should permit the government to provide that assistance.

2. Respondents Have Not Shown That The Program Challenged In This Case Presents A Serious Danger Of Diversion Of Government Aid To The Inculcation Of Religion

Respondents and amici also argue that, even if the government is not absolutely barred from providing material assistance to the secular aspects of education at religious schools, nonetheless the program at issue in this case is unconstitutional because the Jefferson Parish Public School System (JPPSS) did not have in place adequate safeguards to ensure that the assistance was neither religious in content nor diverted to religious purposes. As we have noted (Gov't Br. 46), the court of appeals made no findings on those issues, and so the Court may wish to consider remanding the case to that court to address those questions. Moreover, because the courts must determine whether the controlling legal principles and the record warrant a prospective permanent injunction barring the loan of instructional equipment and materials to religious schools in Jefferson Parish, the courts should consider as well the Guidance on the Title VI program recently issued by the Department of Education (see Gov't Br.

1a-9a), which sets forth safeguards that local education agencies should have in place to prevent instructional equipment and materials from being diverted to religious use.[5]

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[5] Respondents contend (Resp. Br. 46-48) that, because the record in this as-applied constitutional challenge was compiled with reference to the JPPSS Title VI program in the 1980s, the courts should not consider the Department's recent Title VI Guidelines setting forth safeguards to accompany the loan of instructional equipment and materials to religious schools. That contention is incorrect. Because respondents seek a prospective, permanent injunction (J.A. 52a-53a), and not damages, they must show that the JPPSS Title VI program as it will be implemented in the future will violate the Establishment Clause. Cf. *United Transp. Union* v. *State Bar*, 401 U.S. 576, 584 (1971) ("An injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct.").

Respondents have not argued that the JPPSS has not complied in the past with applicable federal and state statutes, regulations, and administrative guidance in administering its Title VI program; rather they have argued that even those legal constraints are insufficient to prevent a violation of the Establishment Clause. But if (as we have argued) the existence and adequacy of such constraints are relevant to determining whether the loan of instructional equipment and materials to religious schools is permissible, then a reviewing court should consider *all* such constraints in determining whether such loans should be enjoined in the future. Moreover, it is appropriate to assume, at least absent evidence to the contrary, that the JPPSS will follow the Department of Education's Title VI Guidance, and so the courts should consider whether the *entire* legal framework governing JPPSS' program in the future is sufficient to satisfy the Establishment Clause. Cf. *Shalala* v. *Grijalva*, 119 S. Ct. 1573 (1999) (remanding due process challenge to procedures used by health-maintenance organization to review beneficiary's request for health services for

But as we have also explained (Gov't Br. 46-50), if this Court reaches that issue itself, it should conclude that the Title VI program as implemented by JPPSS, at least in its general contours, is sufficient to satisfy the Establishment Clause. Bearing in mind that respondents bear the burden of proof to establish a violation of the Constitution, and that respondents had several years of discovery in which to attain evidence of such violations, one cannot conclude that respondents have shown that the JPPSS Title VI program has the effect of advancing religion. While respondents have pointed to a handful of occasions on which religious schools may have received inappropriate library books under Title VI, they have not demonstrated that these incidents are anything more than *de minimis* deviations from a policy of secularity conscientiously observed by the JPPSS, or that the JPPSS program's safeguards entail a serious danger of diversion of government resources to the inculcation of religion.

Respondents first contend (Resp. Br. 36-39) that instructional equipment lent by the JPPSS to religious schools, such as audio-visual equipment and computers, has been used for religious purposes in the past. The parts of the record relied on by respondents, however, simply do not establish that fact. Respondents point out that records in one school show that the theology department used the school's visual equipment, "much of which . . . was purchased with federal funds." *Id.* at 36; see J.A. 205a. Nothing to which respondents point indicates, however, that the theology department at that school used *Title VI* equipment, and Ruth

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further consideration in light of new statute and regulations expanding beneficiaries' procedural protections).

Woodward, the Title VI coordinator for the JPPSS, testified at her deposition that religious school officials responsible for Title VI equipment were aware that Title VI equipment was to be used only for secular, neutral, and nonideological purposes. J.A. 153a-154a. Moreover, the school records documenting use of Title VI equipment relied on by respondents (J.A. 206a-208a) demonstrate that it is in fact possible for religious school administrators to track which teachers and departments use Title VI equipment, and therefore to ensure that such equipment is not used in religion classes.

Respondents also question (Resp. Br. 38-39) whether Title VI equipment such as computers lent to religious schools can in fact be supplementary to a religious school's core educational function. They point out that Louisiana state law requires that all schools (including religious schools) offer courses in computer literacy. The Director of the Louisiana state education agency (SEA) overseeing Title VI, however, expressly informed Title VI administrators that, precisely because the State requires a computer literacy course as a condition for graduation, computers purchased with Title VI funds may not be used to meet the state computer-literacy requirement for graduation. J.A. 175a-176a. The Director explained that, "[a]s you know, federal funds must be used to supplement and not supplant local and state efforts. It is considered supplanting to expend federal funds to meet state standards." J.A. 175a.[6] That instruction indicates

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[6] That letter from the Director of the SEA was distributed to religious school Title VI administrators by Ruth Woodward. See Gov't Br. 10; J.A. 155a-156a. The letter also reminded Title VI ad-

that the anti-supplantation rule of Title VI (20 U.S.C. 7371(b); 34 C.F.R. 299.8(a)) prevents religious schools from using Title VI resources to underwrite their core secular instruction and thereby shift resources to religious functions. See also Gov't Br. App. 6a-7a (Department of Education Guidance, explaining that Title VI funds may not be used to carry out state-mandated programs).

Finally, respondents argue (Resp. Br. 40-43) that the JPPSS' review of library books lent to religious schools under Title VI has been inadequate to prevent religious schools from receiving inappropriate religious books. At most, however, respondents have identified about a dozen books that might have been inappropriately obtained for a Title VI program once Ruth Woodward put in place a review of all titles requested by religious schools. Those minor lapses, although possibly suggesting that an adjustment of the JPPSS' review procedures might be in order, hardly justify a permanent injunction against all further loans of library books to religious schools in any circumstances.[7] Even when a

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ministrators that Title VI funds may not be used to purchase religious materials. J.A. 176a.

[7] Respondents and amici argue (Resp. Br. 42; ACLU Br. 24-26) that the JPPSS' review procedure was inadequate because Woodward's staff reviewed only the titles, and not the actual content, of library books requested by religious schools under Title VI. Woodward's explanation of her review of titles indicates, however, that she was probably overcautious in ensuring that religious materials were not sent to religious schools under Title VI; if she had reason to believe that a requested title was religious in nature, she disallowed the acquisition without consulting officials of the religious school. See J.A. 138a ("If, in my judgment, it's inappropriate, I strike through it and away we go. That's it."). Further, even if this Court might conclude that a review of the

constitutional violation is found, "a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) (internal quotation marks omitted). Accordingly, respondents have identified no basis for the complete termination of the JPPSS Title VI program, insofar as it authorizes the loan of supplemental, neutral instructional equipment and materials to religious schools while also providing a range of Title VI benefits to students at public and nonreligious private schools.

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For the foregoing reasons, and for those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1999

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actual *content* (rather than merely the title) of a library book requested by a religious school would be necessary to ensure compliance with the Establishment Clause, such a ruling would only require that adjustments be made to the JPPSS' review procedures; it would not require that *all* loans of instructional and materials to religious schools be disallowed.