Nos. 98-1648

In the Supreme Court of the United States

GUY MITCHELL, ET AL.,
Petitioners,
v.
MARY L. HELMS, ET AL.
Respondents.

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

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
R. SHAWN GUNNARSON
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

August 19, 1999

QUESTION PRESENTED

Whether a program under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.*, which provides federal funds to state and local education agencies to purchase and lend neutral, secular, and nonreligious materials such as computers, software, and library books to public and nonpublic schools for use by the students attending those schools, and which allocates the funds on an equal per-student basis, regardless of the religious or secular character of the schools the students choose to attend, violates the Establishment Clause of the First Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
STATEMENT	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE ESTABLISHMENT CLAUSE DOES NOT COMPEL CONGRESS TO EXCLUDE PRIVATE RELIGIOUS SCHOOLS FROM RECEIVING AID UNDER A NEUTRAL PROGRAM WHOSE BENEFICIARIES COMPRISE A BROAD CLASS DEFINED WITHOUT REGARD TO RELIGION	7
A. Private Religious Schools May Receive Public Aid When a Government Program Is Sufficiently Neutral	7
B. When Distributing Aid Under a Neutral Program, Congress Need Not Discriminate Against Private Religious Schools to Satisfy the Establishment Clause	15
II PRIVATE RELIGIOUS SCHOOLS MAY FULLY PARTICIPATE IN CHAPTER 2 WITHOUT RUNNING AFOUL OF THE ESTABLISHMENT CLAUSE	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:	Page
Abington Sch. Dist. v. *Schempp*, 374 U.S. 203 (1963)	17
Agostini v. *Felton*, 521 U.S. 203 (1997)	*passim*
Aguilar v. *Felton*, 473 U.S. 402 (1985)	10, 11
Board of Educ. v. *Allen*, 392 U.S. 236 (1968)	5
Board of Educ. of Kiryas Joel v. *Grumet*, 512 U.S. 687 (1994)	6, 15
Committee for Public Educ. v. *Nyquist*, 413 U.S. 756 (1973)	8, 9, 12
Committee for Public Educ. and Religious Liberty v. *Regan*, 444 U.S. 646 (1980)	5
McDaniel v. *Paty*, 435 U.S. 618 (1978)	15
Meek v. *Pittenger*, 421 U.S. 349 (1975)	5, 13–14
Mueller v. *Allen*, 463 U.S. 388 (1983)	*passim*
Roemer v. *Maryland Public Works Bd.*, 426 U.S. 736 (1976)	16
Rosenberger v. *Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995)	4, 15–16
Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)	11
Texas Monthly, Inc. v. *Bullock*, 489 U.S. 1 (1989)	13
Vernonia School Dist. 47J v. *Acton*, 515 U.S. 646 (1995)	1
Walker v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995)	2, 5, 18
Walz v. *Tax Comm'n*, 397 U.S. 664 (1970)	13
Witters v. *Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986)	*passim*
Wolman v. *Walter*, 433 U.S. 229 (1977)	5, 14
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)	*passim*
Zorach v. *Clauson*, 343 U.S. 306 (1952)	15

Constitutional Provisions, Statutes, and Rules:	
34 C.F.R. § 299.9(a) (1998)	3, 19
FED. R. CIV. P. 60(b)	11
MINN. STAT. § 290.09 (1982)	8

TABLE OF AUTHORITIES—Continued

	Page
TEX. TAX CODE ANN. § 151.312 (1982)	13
20 U.S.C. § 7301	*passim*
20 U.S.C. § 7311	2, 18, 19
20 U.S.C. § 7312	2, 19
20 U.S.C. § 7351	2
20 U.S.C. § 7371	3, 19
20 U.S.C. § 7372	3, 19
U.S. CONST. amend. I (Establishment Clause)	*passim*

Other Materials:	
FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE (1995)	17
Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968)	16
Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989)	15
Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986)	17

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 States. WLF regularly appears in legal proceedings before federal and state courts to defend and promote free enterprise and individual rights. WLF has previously appeared before this Court in cases involving primary and secondary education. *See Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646 (1995).

WLF is filing the attached brief because of its ongoing interest in championing high quality education for every American. It has no direct economic interest in the outcome of this lawsuit or in other suits raising similar issues. For that reason, WLF believes that it can assist the Court by supplying a disinterested perspective distinct from that of any party. WLF is filing this brief with the consent of all parties, as granted by the blanket consent on file with the Clerk of the Court.[1]

STATEMENT

In the interest of judicial economy, WLF incorporates by reference the factual statement as it appears in the petition for writ of certiorari. In addition, we wish to emphasize certain aspects of the record.

Congress has allocated money to improve the Nation's schools. Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.* (Chapter 2), distributes "block grants" to state education agencies (SEAs) and local education

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, contributed monetarily to the preparation and submission of this brief.

agencies (LEAs). *See id.* at §§ 7301, 7351. Chapter 2 funding goes to purchase "instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials . . . ." *Id.* at § 7351(b)(2).

Grants to SEAs are calculated according to the number of children living in the state between the ages of five and 17. *See id.* at § 7311(b). LEAs (mainly school districts) receive their Chapter 2 funding based on the number of elementary and secondary schoolchildren within their jurisdiction, adjusted for the number of children from low income families, from areas where many other low income families live, or from thinly populated areas. *See id.* at §§ 7312(a)-(b).

Millions of American schoolchildren—53.4 million, at last count, Brief for the Secretary of Education (Br. Sec.) 19 n.10—receive a more potent education because of Congress's efforts to invest in quality schooling. Naturally, by far the greater proportion of Chapter 2 monies have benefitted students at public schools. In 1988–89, for instance, 74% of Chapter 2 funding went to public schools. *See Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1467 (9th Cir. 1995). "In Louisiana, more than 70 percent of Chapter 2 funds are spent for the benefit of public school students." Pet. 5. To ensure that every schoolchild in America enjoys the educational benefits of modern technology, however, Congress wrote Chapter 2 to provide for "the participation of private school students on an equitable basis, with equal expenditures for private and public school students." *Walker*, 46 F.3d at 1454.

Chapter 2 funding arrives at private schools with many strings attached. In Jefferson Parish, Chapter 2 funding provides only "library books, instructional materials, reference materials, and computer software and hardware." Pet. 5. With the constitutional ramifications of funneling grants to private religiously affiliated schools evidently in mind, Congress and the Department of Education have constructed numerous "safeguards to ensure that Chapter 2 funds achieve the statutory purpose of providing supplemental secular educational benefits to all schoolchildren . . . ." *Id.* at 6. Among other statutory and regulatory conditions set on the receipt of Chapter 2 assistance, materials purchased with Chapter 2 funds must not "supplant funds from non-federal sources." 20 U.S.C. § 7371(b). They must be "secular, neutral and nonideological." *Id.* at § 7372(a)(1). And private schools only *borrow* Chapter 2 materials and equipment: the materials and equipment remain the property of LEA officials. *See id.* at § 7372(c)(1); 34 C.F.R. § 299.9(a) (1998).

Louisiana and the Jefferson Parish Public School System (JPPSS) have adopted yet more safeguards. *See* Pet. 7–9. Under the JPPSS Chapter 2 program, monies never go directly to a school. *See id.* at 8. Instead, a school orders materials and equipment from JPPSS. *See id.* at 8–9. "Library books for use by nonpublic schoolchildren in Jefferson Parish must be ordered by submitting requests to the [JPPSS], which places orders from catalogs that are provided by 'book jobbers' that are under contract with the JPPSS." *Id.* at 8. JPPSS officials review any order placed by a private school and delete "any item that might indicate religiously-oriented material." *Id.* at 8–9. In addition, any materials or equipment purchased with Chapter 2 funding must be marked

as the property of the JPPSS. *See id.* at 9. JPPSS officials also conduct annual visits of each school to monitor compliance with Chapter 2 and its federal and state regulations. *See id.*

Suing "solely in their capacity as federal, state, and local taxpayers," *id.* at 9 n.3, Respondents "claimed that the federal Chapter 2 program . . . as applied and administered in Jefferson Parish, Louisiana, violates the Establishment Clause." *Id.* at 10. Chief Judge Heebe granted plaintiffs' motion for partial summary judgment on their Chapter 2 claim. *Id.* Seven years later (following Chief Judge Heebe's retirement and the case's reassignment), Judge Livaudais granted Petitioners' motion for reconsideration and vacated Judge Heebe's original order. *Id.* at 11. Relying on this Court's decisions in *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) and *Rosenberger* v. *Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), Judge Livaudais concluded that "the design and implementation of the [JPPSS] program provided adequate assurance that educational assistance could be provided to all students, including those who attend religiously affiliated schools." Pet. 11. Respondents appealed to the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed, holding that the federal and state Chapter 2 programs "are unconstitutional as applied in Jefferson Parish, to the extent that either program permits the loaning of educational or instructional equipment to sectarian schools." Pet. App. 71a. The court's decree specifically extended to "filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc." *Id.* It also

embraced "the furnishing of library books by the State, even from prescreened lists." *Id.*

The court of appeals grounded its reasoning on this Court's opinions in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *Wolman* v. *Walter*, 433 U.S. 229 (1977), and *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646 (1980). In those decisions, the court of appeals perceived "a series of boundary lines between constitutional and unconstitutional state aid to parochial schools, based on the character of the aid itself." *Id.* at 66a. It found that this Court's precedent justifies "textbook loans to parochial schools," *id.*, but not "state programs lending instructional materials other than textbooks to parochial schools and schoolchildren." *Id.* at 67a. Since the Chapter 2 program established by JPPSS operates as a loan to private religious schools of materials besides textbooks, the court of appeals concluded that the program violated the Establishment Clause. *See id.* at 71a.

Despite an acknowledged conflict with the Ninth Circuit's decision in *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1454 (9th Cir. 1995), the Fifth Circuit denied motions for rehearing and suggestions for rehearing *en banc*. Pet. App. 152a. This Court granted certiorari. 119 S. Ct. 2336 (1999).

SUMMARY OF ARGUMENT

Congress has attempted to make computers, videos, and other modern technology available to enrich the education of every schoolchild in America. Nothing in the Establishment Clause outlaws that farsighted investment in our Nation's future.

This Court's decisions confirm that the Establishment Clause poses no bar to religious schools receiving government aid under the terms of a neutral program whose beneficiaries comprise a broad class defined without regard for their religious affiliation. In such circumstances, the Constitution does not obligate the government to discriminate against private religious schools. This conception of neutrality safely navigates between the Scylla and Charybdis of the First Amendment Religion Clauses: Government must treat religion with neither favoritism nor hostility. *See Board of Educ. of Kiryas Joel* v. *Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

The Chapter 2 program implemented by the JPPSS passes this test of neutrality. Its beneficiaries comprise a broad class defined in objective, non-religious terms. Furthermore, the proportion of aid flowing to religious schools and the character of the aid available under Chapter 2 demonstrate that the program is genuinely neutral. Narrowing the range of benefits available to private religious schools participating in Chapter 2, as the lower court did, cannot be justified on constitutional grounds. Nothing in the Establishment Clause compels the government to prevent children attending private religious schools from enjoying the same educational tools available on equal terms to children attending school elsewhere.

ARGUMENT

Chapter 2 offers every American student attending elementary and secondary school the opportunity to enjoy computers and other tools of modern technology. *See* Pet. 3–5. The Fifth Circuit has determined, however, that Congress may not extend such advantages to children attending private religious schools without offending the Establishment Clause. *See* Pet. App. 71a. Perhaps unintentionally, this decision reduces such children to a condition of educational apartheid.

> [T]he decision below consigns those who attend religiously affiliated schools to the use of textbooks under the program, while children of other taxpayers are using graphing calculators to solve polynomial equations and reading about the latest in Mesopotamian archeological discoveries on CD-ROMs.

Pet. 15. The question presented essentially asks whether the Establishment Clause demands this result. We argue that it does not.

I. THE ESTABLISHMENT CLAUSE DOES NOT COMPEL CONGRESS TO EXCLUDE PRIVATE RELIGIOUS SCHOOLS FROM RECEIVING AID UNDER A NEUTRAL PROGRAM WHOSE BENEFICIARIES COMPRISE A BROAD CLASS DEFINED WITHOUT REGARD TO RELIGION

A. Private Religious Schools May Receive Public Aid When a Government Program Is Sufficiently Neutral.

The Establishment Clause declares, "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. "It is not at all easy . . . to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools." *Mueller* v. *Allen*,

463 U.S. 388, 393 (1983). Amid the vicissitudes of Establishment Clause jurisprudence, however, one rule has persisted:

> [G]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). Four cases illustrate the application of this rule particularly well: *Mueller* v. *Allen*, 463 U.S. 387 (1983), *Witters* v. *Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986), *Zobrest*, 509 U.S. 1, and *Agostini* v. *Felton*, 521 U.S. 203 (1997).

Mueller, 463 U.S. 387, arose out of a state law that let parents deduct the cost of "tuition, textbooks, and transportation," *Id.* at 390 n.1 (quoting MINN. STAT. § 290.09, subd. 22 (1982)), spent on their children's primary and secondary education. There the Court rejected a claim that such a deduction breaches the Establishment Clause, when applied to defray the cost of private religious schooling. *Id.* at 404. Among other reasons for doing so, the Court emphasized the neutrality of the law. "[T]he deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools." *Id.* at 397.

As the Court pointed out, the neutrality of the Minnesota law favorably distinguished it from the law at issue in *Committee for Public Educ.* v. *Nyquist*, 413 U.S. 756 (1973). "There, public assistance

amounting to tuition grants was provided only to parents of children in *nonpublic* schools." *Mueller*, 463 U.S. at 398. As the Court noted, such discrimination in favor of private schools had "considerable bearing," *id.*, on its decision to invalidate the law in *Nyquist*. Having determined that the Minnesota law "neutrally provides state assistance to a broad spectrum of citizens," *id.* at 398–99, the Court found that the Establishment Clause posed no bar to its enforcement.

In *Witters*, 474 U.S. 481, the Court held that the Establishment Clause did not forbid the State of Washington from supplying vocational training to a blind student attending a Christian college and preparing "for a career as a pastor, a missionary, or youth director." *Id.* at 483. Its decision, once again, rested (at least in part) on the fact that the law made vocational training available to a broad class of recipients (blind residents seeking vocational training), regardless of whether they attended public or private institutions. *See id.* at 488. Moreover, the Court emphasized, the program was "in no way skewed towards religion." *Id.* As evidence of this, the Court found that the law grants no "greater or broader benefits for recipients who apply their aid to religious education . . . nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions." *Id.* Thus, the Court determined, "the Washington program works no state support of religion prohibited by the Establishment Clause." *Id.* at 489 (footnote omitted).

In *Zobrest*, 509 U.S. 1, the Court stoutly rejected a claim that the Establishment Clause justified a public school district in refusing to pay for a sign-language interpreter to assist a parochial school

student. *Id.* at 3. The Court was primarily guided by the rule stated above, affirming the general validity of "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion." *Id.* at 8.

The majority found that supplying a sign-language interpreter was "part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' . . . without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." *Id.* at 10. Indeed, the Court emphasized that such neutrality would save a law from unconstitutionality, even if the government program delivered services in a private religious school itself. "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' . . . it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Id.* (quoting *Witters*, 474 U.S. at 488).

And only two terms ago, in *Agostini*, 521 U.S. 203, the Court conducted a searching reappraisal of its Establishment Clause doctrine in a case whose procedural posture was extraordinary. *Agostini* presented the question whether the Establishment Clause barred New York City from implementing a congressionally mandated program by directing public schoolteachers to teach remedial courses to disadvantaged students in private religious schools. *See id.* at 208. In *Aguilar* v. *Felton*, 473 U.S. 402 (1985), the Court had held that the First Amendment prohibited the city from sending public teachers into religious schools and permanently enjoined the city from doing so. *Id.* Twelve years later, New York City—the same

party bound by the Court's order in *Aguilar*—filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure, seeking relief from that injunction. *Id.* at 214. The city justified its motion on the ground that the Court's later decisions "have so undermined *Aguilar* that it is no longer good law." *Agostini*, 521 U.S. at 217–18. The Court agreed.

> [A] federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here.

Id. at 234–35.

Among its reasons for concluding that "Establishment Clause law has 'significantly changed' since [it] decided *Aguilar*," *id.* at 237 (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992), the Court observed that it had "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225. The Court pointed to its reasoning in *Witters*, 474 U.S. 481, and *Zobrest*, 509 U.S. 1, as evidence of that change. *Agostini*, 521 U.S. at 226–32. Applying the reasoning of those decisions, the Court discerned that neither the mere presence of public schoolteachers in a religious school, the threat of a symbolic union of church and state, nor the possibility of using taxpayer funds to underwrite religious instruction posed a bona fide constitutional obstacle to the city's program. *See id.* at 226–30.

On this last point, neutrality provided the Court with its guiding principle. A majority found that New York City's program did not subsidize religion for three reasons: "aid is provided to students at whatever school they choose to attend," *id.* at 228, the remedial "services are by law supplemental to the regular curricula," *id.*, and no government funds "ever reach the coffers of religious schools." *Id.* The Court also rejected the argument that the criteria by which the law identified eligible aid recipients "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Id.* at 231.

> This incentive is not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.

Id.

Mueller, *Witters*, *Zobrest*, and *Agostini* make it clear that the government does not offend the Establishment Clause when religious groups receive assistance under the terms of a neutral program whose class of beneficiaries is defined without regard to religion.

Stated this way, a statute must do more than define its class of recipients broadly to survive Establishment Clause scrutiny. It must also avoid the cardinal sin of defining that class in terms of religion. Justice Harlan succinctly described how to tell when a statute falls in the category of those "ingenious plans for channeling state aid to sectarian schools that periodically reach this Court." *Committee for Pub. Educ.* v. *Nyquist*, 413 U.S. 756, 784 (1973).

> Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.

Walz v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

The Court has applied this analysis to statutes whose neutrality proved to be less than authentic. In *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), a state sales tax exemption was struck down because it embraced only "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." *Id.* at 5 (quoting TEX. TAX CODE ANN. § 151.312 (1982)). Because the statute defined the eligible class of recipients so narrowly, the Court concluded that "[i]t is difficult to view Texas' narrow exemption as anything but state sponsorship of religious belief . . . ." *Id.* at 15. By the same reasoning, the Court has upheld statutes that it found were "in no way skewed towards religion." *Witters*, 474 U.S. 488; *see also Zobrest*, 509 U.S. 1, 10 (1993) (sustaining a government program that provided a sign-language interpreter to a deaf parochial student).

But does a program's neutrality provide thick enough armor to defend it from an Establishment Clause attack? Passages from *Meek* v. *Pittenger*, 421

U.S. 349 (1975) and *Wolman* v. *Walter*, 433 U.S. 229 (1977) seem to deny it, and the lower court evidently thought itself bound by their reasoning. Pet. App. 65a. However, a close reading of *Meek* and *Wolman* exposes them as doubtful authorities on which to decide this case.

In *Meek*, the Court invalidated a Pennsylvania law lending educational material and equipment to private religious schools, *see Meek*, 421 U.S. at 363, on the presumption that "[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole." *Id.* at 366. *Wolman* turned on much the same rationale. There the court struck down an Ohio program that lent educational materials and equipment to private religious schools. *See* 433 U.S. at 251. Again, the Court determined that "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." *Id.* at 250.

Times have changed, and so has the Court's approach to Establishment Clause adjudication. It has acknowledged having "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225. With this the Court has cast doubt on the continuing viability of *Meek* and *Wolman*. Stripped of a key premise, *Meek* and *Wolman* no longer furnish any support for retreating from the rule of neutrality that has governed the Court's more recent decisions in *Mueller*, *Witters*, *Zobrest*, and *Agostini*.

B. When Distributing Aid Under a Neutral Program, Congress Need Not Discriminate Against Private Religious Schools to Satisfy the Establishment Clause.

Numerous decisions by this Court and statements by its Members teach that the Establishment Clause dictates neutrality toward religion, not "callous indifference" or "hostility." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); *see also McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment) ("The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."); *Board of Educ. of Kiryas Joel* v. *Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools.") (citation omitted). Denying children who attend religious schools the full range of benefits available to other schoolchildren departs from the rule of neutrality, because it displays both indifference and hostility.

Whether denial of aid can be fairly said to treat religious schools with unnecessary indifference or hostility depends, of course, on where the baseline is drawn. "To determine whether religion has been 'aided' or 'penalized' (terms the Court has used synonymously with 'advanced' and 'inhibited') one needs a baseline: 'aid' or 'penalty' as compared to what?" Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 11 (1989); *see Rosenberger* v.

Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (Thomas, J., concurring).

Drawing the baseline at the point of neutrality—let all eligible citizens and their organizations compete for public benefits on an equal basis, without regard for their religious affiliation—serves two constitutionally significant purposes.

> First, it guards against governmental abuse: by requiring the government to act neutrally, we make it less likely that legislators and government officials will use their power, perhaps inadvertently, to promote or retard religion. . . . Second, neutrality reduces (and in theory eliminates) the impact that governmental action has upon individual choice with respect to religion. If government treats competing activities that are secular the same way it treats religious activities, it will create neither incentives nor disincentives to engage in religious activities.

Id. at 11.

Moreover, as one scholar has noted, "The importance of the principle of political neutrality increases with the expanding role of government." Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 522 (1968). Drawing the baseline at the point of "no aid to religion" assumes that government aid is the exception rather than the rule. In reality, the opposite is true. Our redistributionist, administrative state "makes itself felt . . . pervasively." *Roemer* v. *Maryland Public Works Bd.*, 426 U.S. 736, 745 (1976). For this reason

alone, "the no-aid baseline is implausible in the late twentieth century as a measure of the neutrality of government action." FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 58 (1995).

Applied to the definition of neutrality in Establishment Clause jurisprudence, the no-aid baseline signifies at best indifference, and at worst hostility, toward religion.

> If it is true, as Justice Douglas maintained, that "[t]he most effective way to establish any institution is to finance it," it is equally true that the most effective way for the modern state to disparage any institution is to deny it financial benefits to which others are entitled as a matter of course.

Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 354–55 (1986) (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 229 (1963) (Douglas, J., concurring)). Denying religious schools government funding when they qualify under the terms of a neutral program imposes a special burden on private religious schools and the children who attend them, solely because of their religiosity—a result that the Constitution (at the very least) does not require.

II PRIVATE RELIGIOUS SCHOOLS MAY FULLY PARTICIPATE IN CHAPTER 2 WITHOUT RUNNING AFOUL OF THE ESTABLISHMENT CLAUSE

Chapter 2, as applied in Jefferson Parish, satisfies the test of neutrality demanded by the Establishment Clause.

First, Chapter 2 beneficiaries comprise a broad class defined without regard for religion. The Secretary of Education writes that Chapter 2 distributes federal aid to "ensur[e] that *all* schoolchildren have access to new technologies in instructional and library settings." Br. Sec. 18–19 (emphasis added). To serve this great purpose, Congress did not discriminate between public and private schools. Each was to receive funding on an equal basis. *See Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1454 (9th Cir. 1995). And this congressional largesse has so far assisted millions of American schoolchildren to receive a technologically enriched education. *See* Br. Sec. 19 n.10. Chapter 2 beneficiaries thus form a class of "all" elementary and secondary schoolchildren. A broader class, at least for purposes of educational funding, is difficult to imagine.

Second, the criteria by which state and local education agencies qualify for funding "neither favor nor disfavor religion." *Agostini*, 521 U.S. at 231. SEAs obtain block grants calculated according to the number of resident children between the ages of five and 17. *See* 20 U.S.C. § 7311(b). LEAs receive funding based on the number of elementary and secondary schoolchildren within their jurisdiction—with adjustments for the number of children

from impoverished and rural areas. *See id.* at §§ 7312(a)-(b).

Third, the neutrality of the Chapter 2 program administered by JPPSS is borne out by the same factors that influenced the *Agostini* Court to sustain the Title I program at issue there. Under Chapter 2, "aid is provided to students at whatever school they choose to attend." 521 U.S. at 228. Each school receives assistance in direct proportion to the number of students it serves. *See* 20 U.S.C. §§ 7311(b) and 7312(a)-(b). Chapter 2 materials and equipment are "by law supplemental," 521 U.S. at 228, to those ordinarily supplied by each school. *See* 20 U.S.C. § 7371(b). And no Chapter 2 funds "ever reach the coffers of religious schools." 521 U.S. at 228. Instead, Chapter 2 materials and equipment are purchased by LEAs, who give the items to private schools on loan. *See* 20 U.S.C. § 7372(c)(1); 34 C.F.R. § 299.9(a) (1998).

Chapter 2, as applied in Jefferson Parish, is thus entirely neutral. Its beneficiaries comprise a broad class—America's schoolchildren—whose eligibility is in no way defined in terms of religion. The lower court has insisted that the Establishment Clause relegates schoolchildren in private religious schools who receive Chapter 2 assistance to using only textbooks. *See* Pet. App. 71a. This Court's reasoning in *Mueller*, *Witters*, *Zobrest*, and *Agostini* say otherwise. Nothing in the Establishment Clause prevents children attending private religious schools from enjoying the full range of benefits available under Chapter 2—computers and all.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation urges the Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

Daniel J. Popeo
R. Shawn Gunnarson
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Counsel for *Amicus Curiae*

August 19, 1999