No. 98-1048

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 OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has consistently supported the principle of fair and even-handed treatment for children who attend Jewish and other religious schools. Over the past 31 years, since *Board of Educ. v. Allen*, 392 U.S. 236 (1968), COLPA has filed *amicus* briefs in nearly all of this Court's educational funding cases involving the Religion Clauses of the First Amendment.

COLPA submits this *amicus* brief on behalf of, and is joined by, the following national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada -- The oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America -- The nation's largest grassroots Orthodox Jewish organization, with chapters in numerous Jewish communities throughout the United States and Canada. One of Agudath Israel's functions is to serve as an advocate

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[1] No party or party's counsel authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. See Rule 37.6.

for the cause of Jewish schools and Jewish education.

- National Council of Young Israel -- A coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

- The Rabbinical Alliance of America -- An Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

- The Rabbinical Council of America -- The largest Orthodox Jewish rabbinical organization in the world with a membership that exceeds one thousand rabbis and is deeply involved in issues related to religious freedom.

- Torah Umesorah-National Society for Hebrew Day Schools -- The coordinating body for more than 600 Jewish Day schools across the United States and Canada.

- The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") -- The largest Orthodox Jewish synagogue organization in North America with over one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

Each of these organizations subscribes to the view that Jewish education is a key, if not *the* key, to Jewish

continuity and survival. The overwhelming majority of these organizations' constituents, as well as an increasing number of Jewish parents who are not affiliated with these organizations, choose to send their children to Jewish elementary and secondary schools. Thus they have a direct stake in the outcome of this case.

The growth of Jewish day schools has been dramatic. In New York State, home to the largest concentration of Jewish families in the United States, State Education Department figures for school year 1980-81 show 215 Jewish elementary and secondary schools servicing some 56,000 students. Ten years later, for school year 1990-91, the number of Jewish schools had grown to 258; the number of students to more than 82,000. For school year 1997-98 (the most recent year for which figures are available), the New York State Education Department counted 308 Jewish schools servicing more than 97,000 students.[2] Similar growth patterns – albeit not as dramatic – have occurred in other parts of the country.

But with growth come growing pains. Many Jewish schools, especially those that service children from low-income backgrounds, struggle mightily to meet skyrocketing budgets. Outstanding teachers leave their jobs because they are paid too little, too late or not at all. School facilities are often inadequate, basic maintenance and repairs unavailable, and books and educational materials in short supply – all for a lack of funds. And while it is heartening that the American Jewish community has committed a greater percentage of its charitable resources to Jewish education, many Jewish schools continue to face serious fiscal problems.

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[2] NEW YORK STATE EDUCATION DEPARTMENT, NONPUBLIC SCHOOL ENROLLMENT AND STAFF: NEW YORK STATE (University of the State of N.Y., 1998)

These problems frequently result from the dual program of instruction that typifies Jewish elementary and secondary schools across the United States. Each school is, in effect, two schools in one -- a religious studies school, staffed by rabbis and scholars of Jewish learning, whose purpose is to educate students in the traditions of the Jewish religious faith, and a separate secular studies school, staffed by teachers of various faiths, whose purpose is to provide a secular education substantially equivalent to that provided in public and non-denominational private schools. Given this rigorous dual academic track, the cost of education in Jewish day schools is constantly increasing.

The decision of the court below forecloses governmental assistance necessary to help Jewish day schools enter the new century with the modern-day technological equipment and supplies needed to access contemporary sources of learning. This is unfair to parents who conscientiously practice the Jewish faith.

It is precisely because the stakes are so substantial that COLPA and the Orthodox Jewish organizations it represents ask this Court to take this opportunity to re-evaluate the continued vitality of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The ruling in that case barred secular studies teachers in religious schools from receiving any portion of their salaries from governmental sources. As elaborated below, that decision was premised on constitutional assumptions that have since been repudiated in the Court's more recent Establishment Clause jurisprudence. Disavowal of the *Lemon* holding would not only protect the important Chapter 2 program at issue in this case. It would enable schools created by the Jewish community to share equally in secular governmental assistance that is designed to make all Americans of all faiths better informed citizens who can contribute, as they mature, to the welfare of American society and to world progress.

INTRODUCTION

Almost thirty years ago, the Court decided *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which invalidated Rhode Island and Pennsylvania statutes that respectively supplemented and reimbursed salaries paid to teachers of secular subjects in two States' nonpublic elementary and secondary schools. With only Justice White dissenting, the Court concluded that teachers in private religious schools, even if hired only to teach secular subjects, present a "*potential* for impermissible fostering of religion." 403 U.S. at 619 (emphasis added). The Court also held that the First Amendment's Religion Clauses require a State to be "*certain* . . . that subsidized teachers do not inculcate religion." *Id.* (emphasis added). The Rhode Island law was struck down in *Lemon* because the Court "simply recognize[d] that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." 403 U.S. at 618. The Court added, with respect to both state programs, that preventing subsidized teachers from "inculcating religion" will involve governmental authorities in "comprehensive, discriminating, and continuing state surveillance" that would violate the "no entanglement" principle announced in earlier Religion Clause cases. 403 U.S. at 619-624.

This *amicus curiae*, the National Jewish Commission on Law and Public Affairs, filed an *amicus* brief in *Lemon v. Kurtzman* and in its companion case, *Tilton v. Richardson*, 403 U.S. 672 (1971), on behalf of all the major Orthodox Jewish institutions and organizations in the United States, supporting the constitutionality of the Rhode Island and Pennsylvania statutes, as well as the constitutionality of the administration of the Higher Education Facilities Act of 1963 that provided construction grants for the building of projects dedicated to secular educational programs at church-

related colleges. A copy of COLPA's brief in those cases is attached hereto as an Appendix.

The almost three decades that have passed since *Lemon v. Kurtzman* was decided have proved that this Court's 1971 decision was unsound. The need for public financial support for the secular programs of religious elementary and secondary schools has not abated; if anything, it has dramatically increased. The legislative programs that are being endorsed and enacted across the land to achieve the salutary goal of supporting the secular functions of religious schools have varied, and they continue to generate perplexing and contentious constitutional debate. *See e.g., Simmons-Harris v. Goff*, 711 N.E. 2d 203 (Ohio 1999); *Jackson v. Benson*, 578 N.W. 2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 467, 142 L. Ed. 2d 419 (U.S. 1998); *School Voucher Bill Gets Bush Signature*, FLA. TIMES-UNION, June 22, 1999, at A1; *Federal Lawsuit Filed Against Cleveland's Tuition Voucher Program*, THE ASSOCIATED PRESS STATE AND LOCAL WIRE, July 20, 1999, *available in* LEXIS, Regional News Library, Ohio News Sources File; *Johnson Drops 12-Year Voucher Phase-In*, ALBUQUERQUE J., July 18, 1999, at B5; *Teacher Union Chief Fights School Choice's Spread Beyond City, NEA Head Fears Vouchers Will Ruin Public Education*, MILWAUKEE J. SENTINEL, July 4, 1999, at 1.

There has been much discussion, in recent years, regarding the "three-pronged" Establishment Clause test articulated in *Lemon v. Kurtzman*, which has been explicitly disapproved by a majority of the Court's current Justices. (See the enumeration in Justice Scalia's concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398-399 (1993).) The purpose of this *amicus* brief is not, however, to address the "*Lemon* test" or to seek repudiation of that "test." This brief asks the Court to recognize the unsoundness of the actual *holding* of the Court

in *Lemon v. Kurtzman* and to overrule the Court's *result* in the challenge to the Rhode Island and Pennsylvania statutes.

Such a ruling would, we submit, be dispositive of this case. If we are correct and *Lemon v. Kurtzman* is overruled, the form of governmental aid to religious schools challenged in this case would plainly be permissible. If the salary of a teacher of secular subjects in a religious school may constitutionally be reimbursed or supplemented notwithstanding the "potential" that the teacher could stray from secular instruction and indoctrinate his or her students in religious principles, it surely follows, *a fortiori*, that a State or the federal government may constitutionally provide secular nonideological texts or materials to a parochial school with no concern that the books or materials would be "diverted" for religious instruction.

ARGUMENT

I

AGOSTINI REPUDIATED THE PRINCIPAL JUSTIFICATION FOR THE DECISION IN *LEMON V. KURTZMAN*

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court described in detail the reasoning which a Court majority had utilized in arriving at its holding in *Meek v. Pittenger*, 421 U.S. 349 (1975). The first rationale for the Court's decision in *Meek* was essentially identical to the first reason given by the Court in *Lemon v. Kurtzman* for striking down the Rhode Island Salary Supplement Act -- *i.e.*, that even secular teachers "may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs" (*School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985), quoted in *Agostini*, 521 U.S. at 219) and that this

gives rise to "[the] potential for impermissible fostering of religion" (473 U.S. at 386, quoted in *Agostini* 521 U.S. at 219).

This Court repudiated this rationale in *Agostini*. It said, "[W]e have abandoned the presumption enacted in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." 521 U.S. at 223. The majority in *Agostini* explicitly rejected Justice Souter's limiting interpretation of *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), in which he sought to distinguish between publicly financed employees who "simply translate" and those who might have "an opportunity to inject religious content in what [is] supposed to be secular instruction." 521 U.S. at 224, *discussing*, 521 U.S. at 248.

By a parity of reasoning, the identical rationale of *Lemon v. Kurtzman* -- *i.e.*, that teachers of secular subjects in parochial schools "will inevitably experience great difficulty in remaining religiously neutral" (403 U.S. at 618) -- has been effectively abandoned by the Court and is no longer a viable ground for invalidating a government program aimed at financing the secular education component of education at a religious school. To be sure, the secular teachers whose salaries were supplemented or reimbursed under the laws invalidated in *Lemon v. Kurtzman* were private employees rather than the "public employees" involved in *Agostini*. But the overriding constitutional principle was the same: In both instances, the government financed only secular instruction, and the basis for the constitutional challenge was the apprehension -- or "potential" -- that the teacher who had undertaken to provide only secular instruction might stray into the area of religious indoctrination, thereby resulting in the government financing of religion.

This Court said in *Agostini* that the presumption that secular teachers on the public payroll are "uncontrollable and sometimes very unprofessional" was unjustified. 521 U.S. at 227. The same conclusion applies, we submit, to secular teachers who are paid principally from private funds but who personally undertake -- if their salary is augmented or reimbursed from the public coffers -- to limit their instruction to secular material only. Indeed, the experience in the secular departments of Jewish day schools throughout the country is that they are maintained and operated as entirely separate divisions from the religious studies departments, and their programs of secular instruction are essentially indistinguishable from those of public schools and non-denominational private schools. Our model has been what Justice White, in dissent in *Lemon*, repeated from the district court opinion in the Rhode Island case -- *i.e.*, that "good secular teaching was itself essential for implementing the religious mission of the parochial school." 403 U.S. at 667. In this case, as in *Tilton v. Richardson*, 403 U.S. 672 (1971), the Constitution permits government sponsorship of programs that are "characterized by an atmosphere of academic freedom rather than religious indoctrination." 403 U.S. at 681.

II

AGOSTINI ALSO REJECTED THE NO-ENTANGLEMENT JUSTIFICATION FOR THE DECISION IN *LEMON V. KURTZMAN*

The second rationale provided in *Lemon v. Kurtzman* for striking down the Rhode Island and Pennsylvania statutes was that the process of policing the teachers of secular subjects will inevitably be so intrusive that it will result in

"excessive and enduring entanglement between state and church." 403 U.S. at 619. Justice White correctly observed in dissent that this proposition "creates an insoluble paradox for the State and the parochial schools." 403 U.S. at 668. Teaching religion in a publicly financed secular class of a religious school is, under this reasoning, constitutionally impermissible, but enforcing the assurance that no religion will be taught is itself a reason for invalidating the entire program.

This Court categorically rejected the identical entanglement argument in *Agostini*. It noted that only "excessive" entanglement is constitutionally forbidden, and it subsumed the "no-entanglement" inquiry in the overall appraisal of a statute's effect. 521 U.S. at 232. The Court observed that "[u]nder our current understanding of the Establishment Clause," neither "administrative cooperation" between government officials nor the possibility of "political divisiveness" (discussed in *Lemon*, 403 U.S. 622-624) amounts to "excessive" entanglement. 521 U.S. at 232. And it concluded that when the Court abandoned the assumption that secular teachers would necessarily inculcate religion "simply because they happen to be in a sectarian environment" (521 U.S. at 233), it made *pervasive* monitoring -- the only kind of surveillance that is, by current standards, constitutionally impermissible -- unnecessary.

The Court's opinions in *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); and *Agostini*, 521 U.S. 203 (1997), have, therefore, as significantly "undermined the assumptions" (521 U.S. at 206) on which *Lemon v. Kurtzman* was decided as they "undermined the assumptions" of *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985). Recent significant changes in constitutional doctrine led to this Court's explicit overruling

of *Ball* and *Aguilar*, and they justify, as well, the explicit overruling of *Lemon v. Kurtzman*.

III

DENYING GENERALLY AVAILABLE GOVERNMENT AID FOR SECULAR PROGRAMS TO PARENTS WHO ENROLL THEIR CHILDREN IN RELIGIOUS SCHOOLS VIOLATES THE FIRST AMENDMENT OBLIGATION OF GOVERNMENT NEUTRALITY

Our *amicus* brief of three decades ago *in Lemon v. Kurtzman* (reproduced in the Appendix) argued that excluding religiously affiliated schools from the class of those whose teachers of secular subjects receive government sponsorship would violate the Free Exercise Clause because it would discriminate against the religiously observant. See Appendix, pp. 9-12. In the intervening thirty years, this Court has developed another constitutional doctrine -- most recently applied in *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) -- that follows essentially the same course and leads to the same result.

The Court noted in its *Rosenberger* opinion that programs providing government financing to education will pass constitutional muster only if they are "neutral . . . towards religion." 515 U.S. at 839. This was the dispositive rule as early as *Everson v. Board of Educ. of Ewing*, 330 U.S. 1 (1947), where the Court warned that "general state law benefits" had to be available equally to all so that no "members of any . . . faith, *because of their faith, or lack of it*," would be excluded "from receiving the benefits of public welfare legislation." 330 U.S. at 16 (emphasis in original). Justice Black said in *Everson* that the First Amendment "requires the state to be neutral in its relations

with groups of religious believers and non-believers; it does not require the state to be their adversary." 330 U.S. at 18.

This Court's *Rosenberger* opinion traced the "neutrality" principle from *Everson* through a series of later decisions of the Court. 515 U.S. at 839-842. The Court held in *Rosenberger* that excluding publications with religious content from the category of those entitled to government subsidies would manifest "pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." 515 U.S. at 846.

By the same token, this constitutional principle -- developed in a series of decisions that were rendered *after Lemon v. Kurtzman* (including principally *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990); and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)) -- warrants overruling the *holding* in *Lemon v. Kurtzman*. The result reached by the majority in *Lemon* effectively disqualified religious schools -- which have come to be described as "pervasively sectarian"[3] -- from programs of government financing for secular education entirely because they provide religious teaching to their students *in addition to* secular instruction.

Parents who are conscientiously moved to enroll their children in religious schools in order that they may receive intensive religious training are constitutionally entitled to be free of governmental discrimination based on their religious

[3] Several Justices of the Court have indicated their disapproval of this classification and deplored its damaging consequences. See Justice Thomas, dissenting from the denial of certiorari in *Columbia Union College v. Clark*, 119 S. Ct. 2357 (1999). Justices Kennedy and Scalia, concurring in *Bowen v. Kendrick*, 487 U.S. 589, 624-625 (1998), expressed a similar view.

beliefs. Yet *Lemon v. Kurtzman* has precisely such a discriminatory effect. It forbids sponsorship of secular teachers in religious schools even though comparable private schools that do not teach religion qualify, under the *Lemon* ruling, for secular teacher reimbursement or salary supplementation. The court below invoked the decisions that followed *Lemon* to deny secular computer technology to the secular programs of religious schools, thereby discriminating against parents and students "because of their faith." This denies to observant Jews, Christians, or Muslims who send their children to parochial schools the benefits of generally available governmentally financed educational programs. The principle of neutrality prohibits that result.

CONCLUSION

For the foregoing reasons, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), should be overruled and the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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CONCLUSION

For the foregoing reasons, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), should be overruled and the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

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