No. 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 for *Amici Curiae* American Civil Liberties Union, American Federation of Teachers, American Jewish Committee, American Jewish Congress, Americans United for Separation of Church and State, Anti-Defamation League, Hadassah, Jewish Council for Public Affairs, and People for the American Way Foundation in Support of Respondents**

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## INTEREST OF THE *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights, including the separation of church and state. The ACLU of Louisiana is one of the ACLU's state affiliates. Founded in 1920, the ACLU has participated in numerous Establishment Clause cases filed in this Court, from *Everson v. Board of Educ.*, 330 U.S. 1 (1947), to *Agostini v. Felton*, 521 U.S. 203 (1997).

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The American Federation of Teachers ("AFT") is a national labor union affiliated with the AFL-CIO and is the parent organization of various state and local affiliates across the country. AFT represents over one million members, who work in public schools, community colleges, universities, state government, and health care. The vast majority of AFT members work as teachers and teaching assistants in public primary and secondary schools, many of which are in school districts with Chapter II programs similar to the one at issue in this case. AFT has a long-standing interest in First Amendment issues that have an impact on AFT's membership, and AFT has previously filed *amicus* briefs in numerous Establishment Clause cases, including *Agostini*.

* * *

The American Jewish Committee ("AJC"), a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. AJC has always strongly supported the constitutional principle of

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1. Letters of consent to the filing of this brief have been filed with the Clerk of the Court. *See* Sup. Ct. R. 37. Counsel for the parties to this action did not write this brief, in whole or in part, and only *Amici* and their counsel of record made monetary contributions to the preparation of this brief. *See* Sup. Ct. R. 37.6.

separation of church and state embodied in the Establishment Clause, which AJC believes provides the most solid foundation for ensuring religious freedom for people of all faiths. Through the years, AJC has participated as an *amicus* in a wide array of cases in support of this vital principle, and AJC does so again in the belief that public funds should be used to support secular education only.

* * *

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious, and economic rights of American Jews. It has taken a special interest in the separation of church and state, especially as it relates to government funding of religious education. Over the past four decades, the American Jewish Congress has participated in most cases involving such aid.

* * *

Americans United for Separation of Church and State ("Americans United") is a national, nonsectarian, public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Americans United maintains active chapters in several states and has 60,000 members nationwide. Americans United members adhere to various religious faiths, with some holding no religious affiliation. All members are united, however, in their commitment to the long-standing principle of church-state separation. Since its founding in 1947, Americans United has participated as a party or an *amicus* in many of the leading Establishment Clause cases decided by this Court.

* * *

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle that these goals and the general stability of our



democracy are best served through the separation of church and state and the right to free exercise of religion. To that end, ADL has filed *amicus* briefs in such cases as *Lee v. Weisman*, 505 U.S. 577 (1992), *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *School Dist. v. Schempp*, 374 U.S. 203 (1963). ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

* * *

Hadassah is the largest Jewish membership organization and the largest women's membership organization in the United States, with over 300,000 members nationwide. While traditionally known for its health care institutions in Israel, Hadassah also has a proud history of defending the rights of the Jewish community in the United States. Hadassah has long been committed to the strict separation of church and state that serves as a guarantee of religious freedom and diversity. Hadassah has participated in numerous *amicus* briefs upholding this fundamental principle.

* * *

The Jewish Council for Public Affairs ("JCPA"), formerly the National Jewish Community Relations Advisory Council, is an umbrella organization of 13 national and 122 local Jewish public affairs and community relations agencies. Founded in 1944, JCPA is committed to the dual mission of safeguarding the rights of Jews in the United States and abroad and promoting a just society for all Americans. JCPA believes that the Establishment Clause is an essential bulwark in protecting the religious freedoms of people of all faiths, and it has participated as *amicus* in numerous Establishment Clause cases before the Court, including *Agostini*. JCPA strongly opposes most public funding for religious schools on the grounds that such support violates the constitutional mandate of church-state separation

and has a detrimental effect on our nation's public school system. Two organizations under the JCPA umbrella do not participate in the filing of this brief. The Union of Orthodox Jewish Congregations of America does not join in this brief, having joined in an *amicus* brief in support of Petitioners. The Jewish Community Relations Council of New York takes no position on the issues at stake in this brief and, therefore, abstains.

* * *

People for the American Way Foundation ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For has over 310,000 members nationwide. People For has frequently acted as counsel to litigants and filed *amicus* briefs in this Court, seeking to promote effective public education and defend First Amendment principles, including the free exercise of religion and the separation of church and state.

* * *

Collectively, *Amici* are strongly committed to the First Amendment principle that government aid may not be used to advance religion through subsidies or indoctrination. *Amici* are also committed to the principle that, consistent with the Constitution, the government has a substantial and legitimate interest in ensuring that all American children receive an adequate secular education. Because this case presents the question of how these principles may properly be reconciled, *Amici* have a significant interest in its outcome.



## SUMMARY OF ARGUMENT

For over thirty years, this Court has expressed a deep and abiding concern that government aid to religious institutions not be diverted to religious uses in violation of the Establishment Clause. Accordingly, the Court has required that adequate safeguards be put in place to prevent such diversion of public funds, and the Court has declared government aid programs unconstitutional where appropriate safeguards were found wanting. The Court's actions reflect its recognition of the principle that the greater the risk that government aid may be diverted to religious uses, the greater the safeguards necessary to meet constitutional requirements.

Measured against these criteria, the federal Chapter II[2] program, as implemented in Jefferson Parish, Louisiana, violates the Establishment Clause. In Jefferson Parish, the government provided highly divertable aid in the form of computers, computer software, and library books. Many of these items were, in fact, inherently religious. Nevertheless, only minimal, inadequate, and ineffective safeguards were implemented. Accordingly, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

## ARGUMENT

There is no single test for determining compliance with the Establishment Clause. The constitutionality of a challenged program can be assessed only through a close examination of its facts. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 598 (1992); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980); *Lemon v. Kurtzman*, 403 U.S. 602,

2. "Chapter II" refers to Chapter II of Title I of the Elementary and Secondary Education Act of 1965. On October 20, 1994, Congress enacted the Improving America's Schools Act of 1994, Pub. L. 103-382, 108 Stat. 3518. Former Chapter II is now labeled "Subchapter VI-Innovative Education Program Strategies" and is codified at 20 U.S.C. §§ 7301-73. For ease of reference, this brief refers to the new Subchapter VI as "Chapter II."

612 (1971). In the context of government aid to education, the Court has consistently applied the framework that was articulated in *Lemon*, 403 U.S. at 612, and refined most recently in *Agostini v. Felton*, 521 U.S. 203, 222 (1997). This requires consideration of the purpose of the program and its primary effect, including an examination of whether the program will result in excessive entanglement between government and religion. *Id.* at 222-23, 232-33. Through repeated application of this analysis, the Court has acknowledged certain constitutional criteria. Most relevant for present purposes are the mandates that there must be no "appreciable risk" that aid will be diverted to transmit or teach religious views, *Regan*, 444 U.S. at 662, there must be "effective means for insuring" that only secular purposes are served, *id.* at 659, and assistance must not cause excessive entanglement between government and religion, *Agostini*, 521 U.S. at 232-33.

## I. The Court's Decisions, From *Board of Education v. Allen* To *Agostini v. Felton*, Make It Clear That Different Forms Of Government Aid Engender Varying Risks Of Diversion And, Accordingly, Require Different Types Of Safeguards.

### A. Concerns About Divertability, Safeguards, And Excessive Entanglement Consistently Have Played A Crucial Role In This Court's Establishment Clause Jurisprudence.

The Constitution prohibits government-funded advancement of religion and religious indoctrination. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986). Since *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968), and consistently through *Agostini v. Felton*, 521 U.S. 203 (1997), the Court's Establishment Clause opinions have, therefore, expressed a deep and abiding concern with the possibility that government aid to religious institutions



might be diverted to religious uses. Accordingly, the Court has required safeguards to prevent such diversion.[3]

In *Allen*, 392 U.S. at 248, the Court approved of the provision of government-purchased textbooks to religious schools, given the lack of any evidence that textbooks were diverted to religious uses, either as a general matter or on the particular record under consideration. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court struck down a program providing salary supplements to religious schoolteachers, who taught secular subjects. As explained in *Lemon*, the difference between the textbooks approved in *Allen* and the salary supplements disapproved in *Lemon* was the degree to which each posed a threat to the separation between the religious and secular aspects of education. *Lemon*, 403 U.S. at 617. The Court could not "refuse . . . to recognize that teachers have a substantially

3. By highlighting divertability and safeguards, *Amici* seek only to discuss the most relevant of the Establishment Clause principles implicated in the context of government aid to religious schools. *Amici* do not intend to propose a new test or to exclude other factors the Court might consider. Resolving concerns about the divertability of a particular form of aid does not, for example, answer the question of whether such a program might impermissibly supplant the obligations of religious schools. *See, e.g., Agostini*, 521 U.S. at 218 (permitting government-funded remedial instruction, which was "supplement[al] to the core curricula" and did not relieve the religious schools of costs they otherwise would have borne); *Zobrest*, 509 U.S. at 12 (reimbursement for sign language interpreter is not "an impermissible direct subsidy" because the religious school is "not relieved of an expense it otherwise would have assumed in educating its students") (internal quotations omitted); *Meek v. Pittenger*, 421 U.S. 349, 361 n.10 (1975) (upholding textbook program where previously religious school students purchased their own textbooks); *Allen*, 392 U.S. at 244 n.6 (government-purchased textbooks approved where there was no evidence that religious schools, whose students received the textbooks, previously bought the books for their students). Thus, a program that fully funds libraries for religious schools would be unconstitutional under the foregoing precedents, even if all of the books provided were secular.

different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." *Id.* In order to verify that only secular topics were taught by recipients of the salary supplements, the program in *Lemon* required government supervision of spending, as well as inquiry into the nature of the religious schoolteachers' instruction, which the *Lemon* Court found constituted excessive entanglement. *Id.* at 620-21.

The Court's concern with the divertability of government aid can be seen with particular clarity through the distinctions that the Court has found constitutionally significant in a variety of programs. In *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973), for example, the Court struck down a program that funded tests written by religious schools, in part, because of the "substantial risk that these examinations . . . [would] be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." Later, in *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980), the Court upheld a program that involved state reimbursement to religious schools for the grading of tests that were prepared, mandated, and administered by the state. Unlike the program in *Levitt*, the religious schools in *Regan* had no influence on the tests' content, there was "no substantial risk" that the tests could be used for religious purposes, and there were "effective means for insuring that the cash reimbursements would cover only secular services." *Regan*, 444 U.S. at 654, 656, 659. The Court emphasized that "if the grading procedures could be used to further the religious mission of the school, serious Establishment Clause problems would be posed under the Court's cases, for by furnishing the tests it might be concluded that the State was directly aiding religious education." *Id.* at 657.

Thus, taken together, *Levitt* and *Regan* underscore the need to examine the risk of diversion posed by each type of aid



challenged.[4] *Levitt* and *Regan* also illustrate the interconnected nature of the inquiries into the likelihood of diversion, the adequacy and effectiveness of the safeguards necessary to prevent diversion, and the accompanying risk of excessive entanglement. *Levitt* found excessive entanglement because continuous review of the tests prepared by religious schoolteachers was required to avoid diversion, while the state-prepared and administered tests in *Regan* required no supervision and avoided excessive entanglement. *Regan*, 444 U.S. at 660; *Levitt*, 413 U.S. at 480; *see also Wolman v. Walter*, 433 U.S. 229, 240-41 (1977) (Chief Justice Burger and Justices Blackmun, Stewart, and Powell affirming use of government funds for standardized testing at religious schools because the schools do not "control the content of the test or its result," which "prevent[s] the use of the test as a part of religious teaching" and "eliminates the need for the supervision that gives rise to excessive entanglement").[5]

Similar contrasts are found in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), and *Wolman*. *Everson* approved of a program allowing reimbursements to parents for the costs of daily public transportation to and from religious schools.

4. The Department of Education ("DOE") embraces an analysis similar to that described herein, recognizing the Court's traditional concerns about the need for safeguards to prevent diversion of government aid to religious uses. DOE's analysis, however, fails to acknowledge the need to examine the relationship between the risk of divertability presented by a particular type of aid and the corresponding safeguards. Instead, DOE focuses on a generalized requirement that safeguards be provided. Moreover, as applied by DOE, this test does not confront, in a forthright manner, the risks of diversion presented by the computers, software, and library books provided in Jefferson Parish or the inadequacy and ineffectiveness of the safeguards at issue.

5. There may be instances — and this case may be one such instance — where government aid poses such a high risk of diversion to religious uses that the only safeguards adequate to prevent diversion would inevitably result in a finding of excessive entanglement. Under such circumstances, *Amici* submit, government aid cannot constitutionally be provided.

*Everson*, 330 U.S. at 17. *Wolman* struck down a program that funded transportation for religious schools' field trips. *Wolman*, 433 U.S. at 253-54. Critical to *Everson*, the *Wolman* Court noted, was that the school had no control over the expenditures, and the effect of the expenditures was unrelated to the content of the education provided. *Wolman*, 433 U.S. at 253. *Wolman*'s program was in "sharp contrast" to *Everson*'s because, in *Wolman*, religious schools controlled the destination, timing, frequency, meaningfulness, and content of the field trips, all of which created "an unacceptable risk of fostering of religion." *Wolman*, 433 U.S. at 253-54; *see also id.* at 253 ("[T]he bus fare program in *Everson* passed constitutional muster because the school did not determine how often the pupil traveled between home and school — every child must make one round trip every day — and because the travel was unrelated to any aspect of the curriculum."). Further, in *Wolman*, "public school authorities [would have been] unable adequately to insure secular use of the field trip funds without close supervision of the nonpublic teachers," which would have resulted in excessive entanglement. *Id.* Thus, the juxtaposition of *Everson* and *Wolman* illuminates the Court's concerns with divertability and its recognition of the need for appropriate safeguards that do not cause excessive entanglement.[6]

6. A similar concern about diversion is apparent from a comparison of the Court's decisions in *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). *Tilton* upheld a program involving government funds for the construction of college facilities, which were to be used for secular purposes. Although the nature of the facilities did not preclude their use for religious purposes, the program was upheld because the statute prohibited diversion, and significantly, the recipient institutions presented evidence "that there had been no religious services or worship in the federally financed facilities, that there are no religious symbols or plaques in or on them, and that they had been used solely for nonreligious purposes." *Tilton*, 403 U.S. at 679-80. Later, *Nyquist* struck down a program giving government funds to elementary and secondary religious schools for unrestricted use in the maintenance and repair of their facilities and equipment because of the lack of "an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." *Nyquist*, 413 U.S. at 774-75, 780.



With regard to instructional materials and equipment, such as those at issue here, divertability has always been a concern. This Court summarily affirmed the district court's opinion in *Public Funds for Pub. Sch. v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), which struck down a program providing instructional material and equipment to religious elementary and secondary schools. *Marburger v. Public Funds for Pub. Sch.*, 417 U.S. 961 (1974). The district court noted that the statutory requirement that materials be used only for secular purposes was "merely designed to assure that the State's aid [would] not be diverted from a secular function in a religious institution to a religious function, which result would clearly violate the Establishment Clause." *Marburger*, 358 F. Supp. at 36. The district court also recognized, however, that the restrictive statutory language was not dispositive and that the secular nature of the materials did not prevent their use in religious teaching. *Id.* ("The presence of such limiting language is . . . not alone determinative of the primary or principal effect of that legislation."); *id.* at 38-39 ("Although it is obvious that 'supplies,' 'instructional materials,' and 'equipment' are inherently neutral, the uses to which they can be put are clearly varied. Most of these items obviously can be used with equal facility in the teaching of religious studies as well as they can be used for the teaching of secular-nonideological subjects."). The district court was particularly concerned about "the excessive entanglement of church and state [that] would result from attempts to police use of material and equipment that were readily divertible to religious uses." *Meek v. Pittenger*, 421 U.S. 349, 366, n.16 (1975) (citing *Marburger*, 358 F. Supp. at 38-39).

It is out of this context that the two cases upon which the Fifth Circuit relied most heavily — *Meek* and *Wolman* — emerged. In *Meek*, the Court invalidated programs that authorized government lending of instructional materials and

equipment[7] directly to religious schools. *Meek*'s conclusions regarding instructional materials and equipment were based partially on an assumption that *Agostini* later rejected, namely that all government aid programs that directly aid the educational function of religious schools are invalid.[8] Taken as a whole, however, the *Meek* decision clearly also rested on concerns about the divertable nature of the aid provided. In contrast to its holding regarding instructional materials and equipment, *Meek* upheld a program in which textbooks were provided to religious school students, given that the record contained "no suggestion that religious textbooks [would] be lent or that the books provided [would] be used for anything other than purely secular purposes." *Meek*, 421 U.S. at 361-62; *see also id.* at 385 (Burger, C.J., concurring in relevant part); *id.* at 387-88 (Rehnquist, J., and White, J., concurring in relevant part).

Perhaps more clearly than *Meek*, *Wolman* evidences the Court's concerns with divertability and its acknowledgement that the greater the divertability of a particular form of aid, the more extensive the accompanying safeguards must be to avoid running afoul of the Establishment Clause. In *Wolman*, a majority of the Justices, writing in separate opinions, approved of several forms of aid that could not easily be diverted to religious uses, including textbooks, diagnostic services, and counseling. *Wolman*, 433 U.S. at 237-38, 244, 248. Diagnostic

7. The instructional materials included periodicals, sound recordings, films, and printed and published materials. *Meek*, 421 U.S. at 354-55. The equipment at issue included projection, recording, and laboratory equipment. *Id.* at 355.

8. Petitioners' argument that *Meek* and *Wolman* are historical aberrations, which rest solely on this "substantial aid theory" (*see, e.g.*, Brief for Petitioners, pp. 33-38), either inadvertently ignores or studiously avoids the significant concerns about divertability, safeguards, and excessive entanglement present in *Meek*, *Wolman*, and the other Establishment Clause cases discussed herein.



services were permitted because, "unlike teaching or counseling, [they] have little or no educational content and are not closely associated with the educational mission of the nonpublic school." *Id.* at 244. Thus, the Court concluded that the pressure on a public employee to mix religious with secular education was greatly diminished. *Id.* Also, because of the limited contact between the diagnostician and the child, as well as the use of objective professional testing methods, the situation "[did] not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student." *Id.* Similarly, *Wolman* held that counseling services provided by public employees off religious school premises were constitutional because there was little risk that the public employee would "alter his behavior from its normal course" to promote religion. *Id.* at 247-48.

*Wolman* simultaneously invalidated other programs that provided more readily divertable aid to religious students and their parents, namely, instructional materials, equipment,[9] and the costs of field trip transportation. In part, these portions of *Wolman* were based on the assumptions that religious and secular educational functions are inextricably intertwined, and that aid to one necessarily constitutes aid to the other. *Wolman* was also, however, based on the acknowledgement that different types of aid are susceptible to diversion to varying degrees. Although the materials and equipment in *Wolman* were required by statute to be "incapable of diversion to religious use," *Id.* at 248, this, alone, did not suffice to satisfy the Establishment Clause. *Wolman* declined to extend *Allen* to instructional materials and equipment, recognizing that "*Allen* was premised on the view that the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses" and that "restriction of textbooks to those provided the public schools [was] sufficient to ensure that the books [would] not be used for religious purposes."

9. In *Wolman*, the items provided included projectors, tape recorders, record players, maps, and charts. *Wolman*, 433 U.S. at 249.

*Wolman*, 433 U.S. at 251 & n.18. *Wolman* concluded that no comparable safeguards or low risk of divertability existed to justify extending "the unique presumption created in *Allen*" to instructional materials and equipment. *Wolman*, 433 U.S. at 251 n.1.

The same concerns with divertability have continued to animate the Court's Establishment Clause jurisprudence throughout recent years.[10] *Agostini*, for example, upheld a program providing supplemental, remedial instruction to eligible religious school students. *Agostini*, 521 U.S. at 234-35. The remedial services were provided by public schoolteachers under the scrutiny of public officials, who were required to attempt at least one unannounced visit to each teacher's classroom every month. *Id.* at 212, 234. The plain implication of *Agostini* is that publicly paid teachers under public supervision are presumed to be incapable of being diverted to religious instruction, and accordingly, in certain circumstances, their placement in religious schools does not offend the Establishment Clause. *See id.* at 226, 234-35 (limiting holding to instances "when [remedial] instruction is given on the premises of sectarian schools by *government* employees" and concluding that "there is no reason to presume that, simply because she enters a

10. Significantly, no case has required a showing that government aid was *actually* diverted to religious use. Instead, the substantial risk of diversion, without appropriate attendant safeguards, renders a program unconstitutional. *See, e.g., Levitt*, 413 U.S. at 480 (finding dispositive "the substantial risk that . . . examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church"); *see also Regan*, 444 U.S. at 656 (describing as "minimal" the chance that religious bias would enter process of grading state-drafted tests in secular subjects, given "complete" state safeguards); *Wolman*, 433 U.S. at 254 (noting "unacceptable risk of fostering of religion" as "an inevitable byproduct" of teacher-accompanied field trips); *Meek*, 421 U.S. at 372 (finding "potential for impermissible fostering of religion"); *Lemon*, 403 U.S. at 619 (same).



parochial school classroom, a full-time *public* employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination") (emphasis added). Similarly, the "underlying rationale" of *Zobrest* — which upheld government provision of sign language interpreters to deaf religious school students — was "that public employees will not be presumed to inculcate religion." *Agostini*, 521 U.S. at 225 (explaining *Zobrest*, 509 U.S. at 13); *see also Zobrest*, 509 U.S. at 13 ("Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to transmit everything that is said in exactly the same way it was intended.") (internal quotation and citation omitted). Taken as a whole and in their proper context, this Court's decisions — from *Allen* to *Agostini* — continuously emphasize the need for school funding programs to include adequate safeguards to prevent the diversion of public funds to religious uses.

### B. The Court Has Never Renounced Its Concerns About The Risk Of Diversion Or The Need For Adequate Safeguards.

Nothing in the Court's opinions suggests a renunciation of its concerns with the possibility of diversion of government aid to religious uses or the adequacy of the safeguards necessary to prevent diversion. In this sense, the Court has consistently embraced the crucial principles that underlie *Meek*, *Wolman*, and the other Establishment Clause cases discussed above. Yet, Petitioners posit a three-part test, which is based on an extremely narrow reading of *Agostini* and requires that government aid be distributed without regard for whether organizations are religious or secular, that the aid not result in religious inculcation conducted directly by government actors, and that the aid not result in excessive entanglement. (Brief for Petitioners, p. 20.) In their application of this test, Petitioners contend that the most meaningful prerequisite to the receipt of government aid is that the same aid be offered to public schools, i.e., "neutrality."

Neutrality, however, is not the *sine qua non* of Establishment Clause compliance. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (majority opinion describing neutrality as being a "significant factor"); *id.* at 852 (O'Connor, J., concurring) (describing neutrality and the prohibition against government funding of religious activities as two "bedrock principles," which are "of equal historical and jurisprudential pedigree"); *id.* at 864 (Breyer, J., Ginsburg, J., Souter, J., and Stevens, J., dissenting and stating that "evenhanded availability is not by itself enough to satisfy constitutional requirements for any aid scheme that results in a benefit to religion"); *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) ("even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of establishing religion"); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) ("The State may not, for example, pay for what is actually a religious education, even though . . . it makes its aid available to secular and religious institutions alike.").

Further, an approach that places too great a reliance on neutrality does little to fulfill the Establishment Clause's goals of preventing "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970). Nor does such an approach prevent government funding of the advancement of religion or religious indoctrination. *See Zobrest*, 509 U.S. at 12; *Witters*, 474 U.S. at 487. Taken to its logical extreme, Petitioners' approach would allow — indeed, it would require — the government, in the name of properly educating all American children, to provide unlimited aid to religious schools since similar aid is offered to public schools. Petitioners' test is no test at all, but rather a prescription for eviscerating this Court's Establishment Clause doctrines. As emphasized in *Levitt*, the essential inquiry is into the primary effect of the program, and "[t]hat inquiry would be irreversibly frustrated if the



Establishment Clause were read as permitting a State to pay for whatever it requires a private school to do." *Levitt*, 413 U.S. at 481-82.

Against the backdrop of this case, where some of the items lent under Chapter II were religious and others were used for religious purposes, it is particularly obvious why a neutrality-centered test is inadequate. It fails to acknowledge the relevance of the Court's historical concerns about providing religious institutions with aid that is easily diverted to religious uses, and it does nothing to ensure that safeguards are proportional to the risk of diversion posed by any given type of aid.

## II. The Government Aid Provided To Jefferson Parish's Religious Schools, In Some Instances, Was Inherently Religious, And In Other Instances, It Was Readily Divertable, While The Safeguards To Prevent Diversion Were Wholly Insufficient.

Three primary types of instructional materials and equipment were provided in Jefferson Parish: computers, computer software, and library books. Although each of these items was readily divertable to religious uses, so far as the record reveals, there were no meaningful safeguards in place to ensure that these instructional materials and equipment were not so used. In the absence of such safeguards, the Fifth Circuit's opinion striking down the Chapter II program, as applied in Jefferson Parish, was proper and should be affirmed.

### A. The Computers Provided In Jefferson Parish Presented A High Risk Of Diversion, But No Particular Policies, Systems, Or Technologies Were Employed To Safeguard Against Such Diversion.

By their very nature, computers can be used for religious purposes as easily as for secular ones. Utilizing a computer as a word processor, a student can be instructed to write an essay on the role of the sacrament in Christian theology or the role of the

Constitution in American democracy. Utilizing a computer as a gateway to the Internet, a student can be told to research Talmudic interpretations of the Bible or Supreme Court interpretations of the Bill of Rights. Thus, computers "can be used with equal facility in the teaching of religious studies as well as they can be used for the teaching of secular-nonideological subjects." *Public Funds for Pub. Sch. v. Marburger*, 358 F. Supp. 29, 38-39 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974).[11]

State and local officials in Jefferson Parish unabashedly admitted that nothing prevented the Chapter II computers from being used for religious instruction. (Joint Appendix ("J.A.") 102a, 118a, 164a-66a.) At the time the record was developed, methods of monitoring computer usage were known to officials in Jefferson Parish. (J.A. 165a-66a). Nevertheless, officials had not implemented any particular policies, systems, or technology to minimize the likelihood of the computers' diversion to religious uses. Obviously, in light of the complete lack of safeguards implemented in Jefferson Parish, this case does not require the Court to rule on the sufficiency or insufficiency of any particular set of safeguards.[12]

11. *Amici* have no interest in impugning religious schools or their teachers. On the contrary, *Amici* — many of which are religiously-affiliated organizations — know that religious institutions and their employees have played important and beneficial roles in creating the thriving, democratic, and diverse American society we enjoy today. The issue here is merely how much government aid to such institutions is permissible, and in that vein, it would defy logic to ignore the difference between secular and religious schools. *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) ("The very purpose of many of those schools is to provide an integrated secular and religious education"); *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 671 (1970) ("to assure future adherents to a particular faith" is "an affirmative if not dominant policy of church schools").

12. The record is similarly lacking with regard to whether public funds were used to supplant programs already existing at religious schools. A 1985 Monitoring Report reveals that there was some

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It is worth noting, however, that school districts, other than the one in Jefferson Parish, have seen fit to employ a wide variety of safeguards. In the San Francisco Unified School District, for example, technology was used to "lock" computers and software to ensure that they would be put to secular uses only. *See Walker v. San Francisco Unified School Dist.*, 46 F.3d 1449, 1464 (9th Cir.), *reh'g and reh'g en banc denied*, 62 F.3d 300 (9th Cir. 1995).[13] In the New York school districts that were

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evidence that the "supplement, not supplant" mandate was not fulfilled. (J.A. 112a.) Further, in 1985, the Louisiana State Board of Elementary and Secondary Education mandated that computer literacy courses be provided to high school students, and schools receiving Chapter II funds were advised that as a result of this requirement, "Chapter 2 funds [could] not be used to purchase computers to meet this new state standard." (J.A. 175a.) Yet, there is no record of any monitoring for compliance with the rule against supplantation, except for questioning of school officials. (J.A. 119a-20a.) In at least one school, Chapter II funds were used to increase library book collections to meet American Library Association Standards. (J.A. 105a.) In this setting, the constitutionality of Chapter II, as applied, cannot be found, and affirmance of the Fifth Circuit's ruling is necessary.

13. For the reasons discussed herein, the Ninth Circuit's decision in *Walker* erred in its rejection of *Meek* and *Wolman*. In any event, *Walker* is wholly inapposite because it involved a factual record containing evidence of safeguards not present here. In *Walker*, private schools were required to certify that the materials and equipment would not be used for religious purposes, and the computer hardware and software provided to private schools were "locked" so that these items could not be diverted to religious use. *Walker*, 46 F.3d at 1464. In finding Chapter II constitutional, the *Walker* court emphasized that "monitoring by the District had not uncovered a single instance of improper diversion, and plaintiffs had offered no evidence that any diversion has occurred." *Id.* at 1467. *Walker* concluded that, "[u]nder these circumstances, preventing parochial schools from participating in the generally available Chapter 2 program based solely on the *mere possibility* that Chapter 2

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scrutinized in *Agostini v. Felton*, 521 U.S. 203 (1997) a variety of approaches were used to limit computer usage. Most of the desktop computers purchased with federal funds were kept in rooms dedicated solely to computer instruction, and only certain employees were permitted to enter those rooms. (Declaration of Margaret O. Weiss at ¶ 68.[14]) Most of the computers were "dumb" terminals that had no disk drives or central processing units. (*Id.* at ¶ 64.) The computers automatically connected themselves by modem or dedicated telephone lines to a Board of Education office, and data recording students' work was transmitted electronically to that office to be monitored by public officials. (*Id.* at ¶ 60, 62, 64.) Use of the computers required a password, which, when entered, automatically placed the student in the remedial program designated for him or her. (*Id.* at ¶ 67.) For computers that were not "dumb," only Board of Education-approved software was kept in the floppy disk drives, locked security devices covered these disk drives, and only public officials possessed the keys necessary to access them. (*Id.* at ¶¶ 65, 66.) Laptop computers were restricted by "encryption" so that they could be used only for remedial instruction. (*Id.* at ¶ 71.) Further, laptops had no hard drive, and their hardware had been altered so that they could read only certain floppy

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benefits will be diverted, would unfairly discriminate against religion." *Id.* at 1454 (emphasis added). By contrast, here, many of the items provided were religious or highly divertable to religious uses, and the safeguards in place were minimal and ineffective. This case involves the purchase of religious materials, as well as actual diversion, not the "mere possibility" thereof.

14. The Declaration of Margaret O. Weiss was included in the Appendix to the Petition for a *Writ of Certiorari* to the United States Court of Appeals for the Second Circuit in *Agostini* and is publicly available on LEXIS at 1996 U.S. Briefs 553 (Oct. 7, 1996). Ms. Weiss was the Director of the Bureau of Nonpublic School Reimbursable Services of the Board of Education of the City School District of the City of New York, and she was responsible for implementing the federal program that was at issue in *Agostini*.



disks, which would automatically connect the computer, by modem, to the software company. (*Id.* at ¶ 72.) The appropriate remedial instruction would then be transmitted to the laptop, and public school officials could electronically monitor students' work, as with the desktop computers. (*Id.* at ¶ 72.)[15]

Despite the variety of methods available to lessen divertability and increase surveillance, the computers provided in Jefferson Parish were not subject to any such restrictions. Religious schools were not required to provide assurances that they would use computers bought with Chapter II funds for secular purposes only. *Helms v. Picard*, 151 F.3d 347, 368 (5th Cir. 1997), *amended*, 165 F.3d 311 (5th Cir. 1999); (J.A. 94a-95a). Nor was there any set policy regarding the steps to be taken when and if noncompliance had been found. (J.A. 145a.) Except for questioning school officials and looking at the location of the computers within each school, no monitoring was conducted of software and computer usage,[16]

15. *Amici* include an explanation of these measures for purposes of comparison with Jefferson Parish. *Amici*, however, recognize that the constitutionality of any program actually implementing such measures would need to be assessed to determine, among other things, whether excessive entanglement between religion and government might result. *See Agostini*, 521 U.S. at 233-34 (administrative cooperation, alone, does not make entanglement excessive); *Walz*, 397 U.S. at 675 ("sustained and detailed administrative relationships for enforcement of statutory or administrative standards" constitute excessive entanglement).

16. In defense of Chapter II, DOE relies on a February 1999 Guidance containing various suggested "safeguards," such as the use of logbooks prepared and maintained by parochial school officials, to reveal the uses of the Chapter II computers. (Brief for Secretary of Education, pp. 8, 39.) The February 1999 Guidance was issued well after the district court's initial decision (1990), the district court's subsequent decision (1997), and the Fifth Circuit's decision (1998), and reliance on the February 1999 Guidance merely underscores the lack of adequate evidence in the record from which this Court could conclude that Jefferson Parish implemented Chapter II in a constitutional manner. Moreover, there is nothing in the record from which

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nor was there, at the time the district court rendered its opinion, any plan to conduct such monitoring in the future. (J.A. 118a, 164a-66a.) In some schools, the computers were networked and employees could write their own software, and in at least one school, the principal candidly admitted that the computer purchased with Chapter II funds was used whenever the master computer, which held the school's network together, broke down. (J.A. 77a, 258a.)

Although title to computers technically remained in the local educational agency ("LEA"), there was no set policy in Jefferson Parish for dealing with old computers, and an LEA employee testified that the computers would probably have been given outright to religious schools. (J.A. 161a.) This likely outcome is forbidden under *Tilton v. Richardson*, 403 U.S. 672, 683 (1971), which invalidated the part of a government program that provided funds for building construction at religious schools, but lifted the prohibition against use of the constructed facilities for religious purposes after twenty years: "If, at the end of 20 years, the building is . . . converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Id.*; *see also Marburger*, 358 F. Supp. at 37 (in effect, program involved direct grant, not loan, where title remained in the state, but items were allocated indefinitely to religious schools). Likewise, here, allowing religious schools to keep the computers without any restrictions is an impermissible method of donating them to religious use and advancing religion.

Clearly, in the Chapter II program, as applied in Jefferson Parish, the constitutional problems arise from the inappropriately lax relationship between public and religious authorities, not from any excessive entanglement. Nevertheless,

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it could be determined what types of descriptions should be contained in the proposed logbooks or whether the descriptions therein would have been sufficient to determine whether the equipment was put to secular or religious uses.



it must be acknowledged that the need for monitoring and the corresponding concerns about the possibility of excessive entanglement are increased, given that the computers provided were highly susceptible to diversion, their use was controlled by religious, rather than public, employees, and the students were in elementary and secondary schools. *See Roemer v. Board of Pub. Works*, 426 U.S. 736, 764-65 (1976) (in Establishment Clause context, affirming district court's decision to give "primary consideration" to the character of the recipient institutions as either university level or elementary and secondary level schools); *see also Hunt v. McNair*, 413 U.S. 734, 744 (1973); *Tilton*, 403 U.S. at 682; *Lemon v. Kurtzman*, 403 U.S. 602, 617-18 (1971).

### B. The Library Books And Computer Software Provided To Jefferson Parish's Religious Schools Were Inadequately And Ineffectively Screened For Religious Content At The Outset, And There Were No Effective Safeguards To Prevent Items Already Purchased From Being Diverted To Religious Uses.

The risk of divertability with regard to library books and computer software is not as high as where computers are concerned. Since the contents of each of these items can be effectively screened, they present a situation more analogous to the textbook programs approved in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), than to the instructional equipment and materials programs struck down in the latter two cases. A crucial factor, which weighed in favor of upholding the textbook programs, was that they lent only secular textbooks approved for use in the public schools or by public officials. *See Wolman*, 433 U.S. at 237 (textbooks lent to religious schools must be approved by public officials for use in public schools); *Meek*, 421 U.S. at 354, 362 n.11 (textbooks must be "acceptable for use in any public, elementary or secondary school" and approved by public authorities); *Allen*, 392 U.S. at 244-45 (textbooks must be designated for use in

public schools or approved by public authorities). This, coupled with the fact that the textbooks' content could be reviewed in advance, sufficiently lessened the risk of diversion and, correspondingly, the types of additional safeguards that were necessary.

In Jefferson Parish, however, there was no effective protection against the purchase of religious software and library books, nor were there safeguards to prevent items already purchased from being diverted to religious uses. Compliance with constitutional and statutory requirements was monitored mainly through visits to LEAs by state officials every two years (once every three years prior to 1984) (J.A. 95a), and visits to religious schools by local officials every year ( J.A. 151a, 219a). The LEA visits to religious schools were always scheduled two weeks to one month in advance, lasted 45 minutes to two hours, and involved communication only with each school's designated contact person. (J.A. 142a, 151a-53a.)

As the sole safeguard against government funds being used to purchase religiously oriented library books, a public, off-site employee would review a list of the books' titles. (J.A. 63a, 128a-29a, 209a.) Such cursory screening was an inherently imprecise and inadequate method of identifying religious content. Just as a book cannot be judged by its cover, its contents cannot necessarily be judged by its title. A glimpse at the titles of a number of popular religious children's books reveals clearly that the titles often do not hint at the religious nature of the books, including: "One Wintry Night," Mrs. Billy Graham's story of the Christian faith; "Tale of Three Trees," a book about the Christmas and Easter holidays; and "Sing a New Song," which compiles phrases from the Psalms.[17] Even the title of Fulton Oursler's quintessentially religious classic, "The Greatest Story Ever Told," about the life of Jesus Christ, would not instantly suggest a religious or spiritual work. These religious books might be appropriate coming from a parent or church.

17. *See* "Books and Bibles for Boomers' Babies," *Publishers' Weekly*, June 9, 1997, at 24.



Their distribution to religious school children, however, should not be funded by the government — a likely result under the system implemented in Jefferson Parish.

Here, in fact, the record with regard to library books and computer software bears witness to the validity of the Court's concerns about diversion.[18] In Jefferson Parish, for example, a large number of religious books were improperly purchased for use by religious schools. Upon reviewing book titles from 1982 alone, the Coordinator of the Chapter II program in Jefferson Parish found 191 books in violation of Chapter II guidelines, including one entitled, "The Illustrated Life of Jesus." (J.A. 131a-32a; *see also* J.A. 84a-86a (1986 order forms from various religious schools with no indication that books, such as "A Child's Book of Prayers" or "A Christmas Story," had been rejected or recalled), 122a (describing purchase of materials

18. DOE argues that the review of library book titles is sufficient because this was the procedure followed in *Wolman*, *Meek*, and *Allen*, all of which upheld the provision of textbooks to religious schools. (Brief for Secretary of Education, p. 39.) Nothing in those cases, however, indicates that the method used by public officials to approve textbooks was merely a review of the titles. Even if this were the chosen method, public school officials approving purchases are more likely to be familiar with textbook titles than with the titles of the potentially infinite number of library books a religious school could seek to purchase. (*See* J.A. 136a (LEA official familiar with approximately 1/3 of titles on order forms).) More important, however, none of those cases was decided in the context of a record, like that at issue here, which revealed that religious books had, in fact, been purchased with government funds. *See Wolman*, 433 U.S. at 237 (stipulation that books lent to religious schools were the same as those used in public schools); *Meek*, 421 U.S. at 361-62 ("the record in the case before us . . . contains no suggestion that religious textbooks will be lent or that the books provided will be used for anything other than purely secular purposes"); *Allen*, 392 U.S. at 248 ("Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, or particular books").

that were not secular, neutral, and nonideological), 138a (inappropriate titles ordered subsequent to 1985 Monitoring Report), 281a-84a (1992 order forms from religious schools including the following titles with no indication they were rejected or recalled: "We Celebrate Easter," "Draw 50 Holiday Decorations," "Cajun Night Before Christmas," "Rudolph," "David and Goliath," and "Nativity").) Further, in at least one school receiving Chapter II funds, officials unsuccessfully sought computer software for guidance and counseling, and "[o]ne school . . . used two software packages in its counseling and guidance program. One assisted students in clarifying career goals. (The other simulated a psychologist, which students seemed to enjoy.)" (J.A. 258a.)[19]

Petitioners and DOE, respectively, characterize the purchases of religious books as "isolated events" and "occasional lapses," suggesting that the religious books inexplicably slipped through the cracks of an otherwise functioning system. (Brief for Petitioners, pp. 9-10; Brief for Secretary of Education, pp. 11 n.6, 47 n.19.) In truth, the Chapter II program in place in Jefferson Parish was not designed to prevent, safeguard against, or rectify such purchases. Rather, the purchase of religious materials was endemic to the program, not an unforeseeable exception to it, and such purchases evidence the impermissible and substantial risk that Chapter II funds would be used to promote religion. *See Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973); *Wolman*,

19. In religious schools, government funding of resources to provide counseling and guidance runs a high risk of being used for religious purposes and cannot be accomplished without safeguards. *See Wolman*, 433 U.S. at 244, 247-48 (recognizing that relationship between counselor and student provides an opportunity for "the transmission of sectarian views," but allowing such services where they were provided on public property by public officials under public supervision).



433 U.S. at 254; *Meek*, 421 U.S. at 372; *Lemon*, 403 U.S. at 619.[20]

A substantial risk that government aid will be diverted to religious uses is constitutionally unacceptable under any circumstances, but is even greater and more troubling when aid is directed to elementary and secondary school students and administered by teachers, who are strongly beholden to their church's mission of religious inculcation.[21] As implemented in Jefferson Parish, Chapter II results in less oversight of *religious school employees* than the oversight endured by *public* employees in *Agostini*. In *Agostini*, monitors attempted to make at least one unannounced visit to each teacher's classroom every month, whereas in Jefferson Parish, monitoring visits were conducted yearly, lasted a maximum of two hours, and were scheduled in advance. *Agostini*, 521 U.S. at 212, 234; *see also Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 659-60 (1980) (schools seeking reimbursement

20. Additional problems compounded the danger that First Amendment violations would occur in Jefferson Parish. First, religious school officials requested the library books from a corporate wholesaler, who was free to provide religious publications. (J.A. 56a.) Second, in some of the religious schools, volunteers ordered the books, but were not informed of the prohibition against ordering religious books. (J.A. 59a, 100a.) Third, the library books bought with Chapter II funds were visibly marked as such (J.A. 99a), and when religious books are marked in this manner, impermissible endorsement by the state of the religious books' content — and by extension, the school's religious teachings — is likely. *See Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

21. *See* J.A. 73a (Archdiocese Secondary Schools Handbook stating that preference should be given to hiring Catholic teachers, and if that is not possible, "care should be taken that they be persons committed to a Christian philosophy of life and supportive of the Catholic philosophy which permeates the school"), 74a (same, classroom teacher is obliged to observe all policies of the Archdiocesan School Board), 75a (each classroom must contain "a small table with either the Old or New Testament displayed, along with any other religious articles deemed appropriate").

for state-mandated testing were subject to reporting, auditing, inspection, and remedial requirements). In short, the use of Chapter II equipment and materials in Jefferson Parish is determined by religious schoolteachers, and regardless of how well-motivated they may be, they simply are not constitutionally acceptable guardians of the separation between religion and government. Absent proper regard for the divertability of the aid provided and appropriate safeguards to ensure compliance with the Establishment Clause, Chapter II, as applied, must be found to be unconstitutional.

## CONCLUSION

For the reasons stated above, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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