No. 98-1648

In the
Supreme Court of the United States
October Term, 1999

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 *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, NEW YORK STATE SCHOOL BOARDS ASSOCIATION AND HORACE MANN LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. The interest of the *amici curiae*[1] is as follows.

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of this nation's state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, Guam, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. These boards govern more than 15,000 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary public school students in the nation. NSBA has had a longstanding interest in educational policy, including those touching on the Establishment Clause.

The New York State School Boards Association (NYSSBA) is a not-for-profit membership corporation incorporated under the laws of the State of New York located in Albany, New York. NYSSBA's membership

[1] This brief was written entirely by counsel for *amici* and not in any part by counsel for either party. No person or entity other than *amici* has made a monetary contribution to the preparation or submission of this brief.

consists of approximately 697 or 94 percent of the public school districts in New York State. NYSSBA has often appeared as an *amicus curiae* in federal and state court cases affecting educational policy, with particular interest in those involving separation of church and state issues.

The Horace Mann League of the United States of America was founded by a group of leading educators in 1922. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a most necessary unifying and dynamic influence in American life. According to the League's beliefs, our public schools should be free, classless, non-sectarian, and open to all children of all of the people. The schools should be dominated by such purposes as will ensure the preparation of children and youth for effective citizenship in our democracy.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in the brief of Respondents. Briefly, this case originated in Louisiana where a group of taxpayers of a local public school district challenged the school district's provision of instructional materials and equipment, including hardware to religious schools. The materials and

equipment were made available to the religious schools under Chapter 2 of Title I of the Elementary and Secondary Education Act.

According to the taxpayers, loaning instructional materials and equipment to religious schools violates the Establishment Clause of the First Amendment to the United States Constitution. The U.S. Court of Appeals for the Fifth Circuit agreed.

ARGUMENT

I. Introduction

This case, like all prior cases regarding state aid to private religious elementary and secondary schools that have come before this Court, involves an examination of the limitations imposed on any such aid by the Establishment Clause of the First Amendment to the United States Constitution.

Specifically, this case raises the issue of whether the Establishment Clause permits the use of federal funds available under Chapter 2 of Title I of the Elementary and Secondary Education Act ("Chapter 2") to loan to religious schools instructional equipment, instructional and library materials including computer hardware and software.[2] The

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[2] In 1994 Congress redesignated Chapter 2 as Title VI of the Elementary and Secondary Education Act, currently found at 20 U.S.C. §§ 7301-7373. Consistent with the decision below, the *amici* will refer to

Petitioners' main contention, and that of the Secretary of Education, is that such use is permissible under this Court's pronouncements in *Agostini v. Felton*, 521 U.S. 203 (1997). They also contend that this Court's more recent decisions have implicitly overruled *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), both of which invalidated state statutory schemes allowing the loan of instructional materials and equipment to religious schools.

However, *Agostini* is distinguishable from the present case, and the principles underlying *Meek v. Pittenger* and *Wolman v. Walter* remain good law. Moreover, the tests applied by this Court in *Agostini* and other cases to determine whether governmental aid to religious schools violates Establishment Clause principles and objectives have always been only guidelines "not [to] be viewed as setting the precise limits to the necessary constitutional inquiry." *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S.

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the program in question as "Chapter 2" but will cite any references to individual sections of the statute as found in the current United State Code.

The statute in its present form expressly authorizes the purchase and loan of computer hardware and software. (20 U.S.C. §7351[b][2]). In his Brief, the U.S. Secretary of Education has noted that the term "instructional equipment" includes items such as "computer monitors and slide projectors", and that the term "instructional materials" refers to items such as "workbooks, CD-ROMs, filmstrips, and recorded videos." (Brief for the U.S. Secretary of Education, at 18, fn. 8, *Mitchell v. Helms*, 151 F3d 347 (5th Cir. 1999), *cert granted*, 119 S.Ct. 2336 (U.S. June 14, 1999) (No. 98-1648)).

383 (1985), citing *Meek v. Pittenger*, 421 U.S. at 359; *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971). In the end, resolution of Establishment Clause issues in this context, "like many problems in constitutional law, is one of degree." *Meek v. Pittenger*, 421 U.S. at 359, citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). In the present case the bounds of permissibility have been crossed.

For the reasons set forth below, the present case is inapposite to this Court's decision in *Agostini v. Felton* It is also clearly distinguishable from other decisions where this Court has upheld aid to religious schools. Consequently, a reversal of the decision of the court below would leave school districts throughout this nation even more adrift in a sea already filled with confusion regarding their responsibilities toward religious school students.

In addition, the loan of computer hardware and other instructional materials and equipment to religious schools serves to supplant rather than supplement core educational responsibilities of religious schools. As such, it establishes a parallel system of education that provides for governmental support of religious schools in contravention of the Establishment Clause. It also imperils the survival of our system of public education by spurring religious schools to

seek offerings from government to sustain their integral operations to the detriment of public schools.

II. Chapter 2 provisions allowing for the loan of computer hardware to religious schools, unlike the placement of public school employees on religious school premises in *Agostini v. Felton*, present a substantial risk of impermissible use for religious indoctrination.

In *Agostini v. Felton,* this Court ruled that:

> ...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...

521 U.S. at 234-35.

The federally funded program at issue in *Agostini* was Title I of the Elementary and Secondary Education Act of 1965 ("Title I"), and New York City's plan for implementing Title I. The Petitioners and the Secretary of Education rely on the *Agostini* decision to support the efforts by the State of Louisiana to implement the provisions of Chapter 2, including the loan of computer hardware, among other items, to religious schools.

Agostini, however, involved the placement of full-time public school teachers on religious school premises for the purpose of delivering Title I services to eligible children attending those schools. This is significant because the court ruled that the Establishment Clause does not preclude such a placement. This Court has not changed the general principles used to review the legality of governmental aid to students attending religious schools. Rather, it determined that application of these principles in the prior cases of *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, to foreclose such placements rested upon assumptions which have been undermined by more recent cases.

These assumptions included the notion 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...[and] that all government aid that directly aids the educational function of religious schools is invalid.

521 U.S. 203 at 223-25. They also included a presumption that the placement of public employees in religious schools "impermissibly finances religious indoctrination" and results in prohibited excessive entanglement between church and

state caused, in part, by the need for ongoing inspection to prevent the communication of a religious message. *Id.* at 228, 232-34.

Under *Agostini*, there is no reason to presume that a full-time public employee entering a classroom in a religious school "will depart from her assigned duties and instructions and embark on religious indoctrination" or that "a program placing full time public employees on parochial campuses...would impermissibly finance religious indoctrination." *Id.* at 226, 228. Instead, the operative presumption is that public school employees will discharge their responsibilities dutifully. 521 U.S. 203 at 224, 227.

Unlike *Agostini*, however, the present case does not concern the placement of full-time public school employees who can be expected and directed to fulfill their duties in a manner consistent with their employer's obligation to observe and maintain the separation of church and state required by the Establishment Clause. Instead, it involves the placement of instructional materials and equipment in religious schools for use by religious school staff expected and required to advance the sectarian mission of the religious school. As such, the present case is more analogous to the Community Education Program invalidated by this Court in

School Dist. of the City of Grand Rapids v. Ball, 347 U.S. 203, and not reversed by the *Agostini* decision.

A companion case to *Aguilar v. Felton*, the *Grand Rapids* case involved two separate programs offered in nonpublic schools. The first was the Shared Time Program which this Court has analogized to the New York City Title I Program at issue in *Aguilar* and *Agostini*. 501 U.S. 203, 221. It offered remedial and enrichment classes to nonpublic school students. The classes were intended to supplement core academic subjects and were taught by full-time public school teachers on the premises of the nonpublic schools during the regular school day. 473 U.S. 373, 375-76.

The second, and more important program for our purposes here, was a Community Education Program offering voluntary classes such as Arts and Crafts, Spanish, Chess, and Drama among others. Classes were held at the end of the regular school day at various sites, including facilities leased from nonpublic schools. A hiring preference was given to teachers already teaching within the nonpublic schools where classes were offered. Thus, "virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school" *Id.* at 376-77 (citations omitted).

Students attending both the Shared Time and Community Education programs were labeled as "part-time public school students." However, those attending classes at facilities leased from nonpublic schools also attended those schools during the regular school day. 473 U.S. at 378.

The defect found by this Court in invalidating the Community Education Program was the one identified by the district court, namely that:

> virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school.... These instructors...are expected during the school day to inculcate their students with the tenets and beliefs of their particular religious faiths. Yet the premise of the program is that those instructors can put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the schoolday is over. Moreover, they are expected to do so before the same religious school students and in the same religious school classrooms that they employed to advance religious purposes during the 'official' schoolday...

Id. at 386-87.

This Court did not "question that the dedicated and professional religious school teachers employed by the Community Education Program will attempt in good faith to

perform their secular mission conscientiously." *Id.* at 387. In this Court's view, however, there was "a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school." *Id.*

In the case herein there is a substantial risk that the full-time religious school teachers will use the instructional materials available under Chapter 2 to infuse the religious message that they are expected to impart to their students during the regular school day. This is particularly the case with respect to computer hardware. Hardware is easily divertible to multiple uses, including access to computer software and programs, as well as to Internet websites which communicate a religious message and serve to fulfill the sectarian mission of religious schools. Moreover, integration of technology into the curriculum is fast becoming the hallmark of good teaching. Consequently, there is an "appreciable risk" that governmental aid provided under Chapter 2 in the form of computer hardware can be diverted for use in religious instruction and indoctrination. *See, Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1979).

Even if it is assumed that religious school employees will not "attempt in bad faith to evade Constitutional

requirements," like in the Community Education Program in *School Dist. of the City of Grand Rapids v. Ball*, and unlike in *Agostini*, the potential for risk of financing impermissible indoctrination "inheres in the situation." *Id.* at 646. This risk is not diminished by the regulatory requirement that Chapter 2 materials and supplies be used only for "proper purposes...," *see*, 34 C.F.R. 299.9(c), and that religious schools provide assurances that they will make use of Chapter 2 materials and equipment "only for secular, neutral and nonideological purposes." *See,* Appendix to Brief of the Secretary of Education at 4a. The risk is not diminished either by the requirement that a public agency retain title to any "materials, equipment, and property" made available thereunder and that a public agency administer Chapter 2 "funds and property." *See*, 20 U.S.C. 7372(c)(1); 34 C.F.R. 299.9(a)

III. The loan of computer hardware under Chapter 2 to religious schools engages local public school districts in excessive entanglement between church and state.

In *Agostini v. Felton,* this Court observed that it still continues to:

> ask whether the government acted with the purpose of advancing or inhibiting religion...whether the aid has the 'effect' of advancing or inhibiting religion. What has changed...is...the criteria used to assess whether aid to religion has an impermissible effect.

521 U.S. 203, 222-23.

Similarly, this Court continues to ask whether a particular governmental action results in excessive entanglement between church and state, except that it now treats entanglement "as an aspect of the inquiry into a statute's effect." *Id.* at 232-33.

Under *Agostini* and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), the provision of federally funded services to eligible students on religious school premises does not foster excessive governmental entanglement with religion because public school employees delivering such services are expected and required to uphold

constitutional mandates. Similarly, the loan of textbooks to religious school students approved in *Board of Education v. Allen*, 392 U.S. 236 (1968), can be effected within constitutional constraints because local public schools can ensure their secular content by limiting loans to items on textbook lists approved for use in the public schools. Likewise, prescreening of state-prepared tests approved in *Committee for Public Education and Religious Liberty v. Regan,* serves to avoid their use for religious purposes.

In comparison, the placement of computer hardware and other instructional equipment and materials on religious school premises permits no such simple restraints. Because the use of computer hardware is so discretionary, it is fraught with the potential for diversion to religious uses. Public school officials would have to engage in pervasive and ongoing monitoring of its use by religious schools to ensure that actual use remained within constitutional limits.

It is important to note that U.S. Department of Education "Guidance" on Chapter 2 places the responsibility on local school districts to ensure that "any equipment and materials placed in a private school are used only for proper purposes... [and to] perform periodic on-site monitoring of the use of the equipment and materials[,] * * * includ[ing] on-the-spot checks of the use of the equipment and

materials..." Appendix to Brief of the Secretary of Education at 4a-5a. The level of interaction between public and religious school personnel necessary to ensure that computer hardware is not diverted to religious use would provoke the type of excessive entanglement which this Court in *Agostini* indicated would have an impermissible effect under the Establishment Clause.

The Guidance's suggestion that private schools, including religious schools, maintain logs documenting the use of Chapter 2 materials and equipment to facilitate the monitoring of such use only increases the level of governmental entanglement with religion. *See,* Appendix to Brief of the Secretary of Education at 4a. There is no incentive for religious schools to log any improper use of Chapter 2 materials and equipment, as any such admission may result in the removal of such materials and equipment. *See*, Appendix to Brief of the Secretary of Education at 5a; *see also*, 34 C.F.R. 299.9(d). The stakes are made higher when costly computer hardware is involved. Therefore, local school agencies responsible for ensuring the proper use of Chapter 2 materials and equipment must engage in intrusive and discriminating review of any such logs which, in turn, deepens the governmental entanglement with religion.

IV. The loan of computer hardware does not supplement the general curricula, but rather relieves religious schools of costs they otherwise would bear in educating their students.

One of the cornerstones of this Court's decision in *Agostini v. Felton* was the determination that the Title I services "supplement, and in no case supplant, the level of services already provided by the private school[s]." 521 U.S. 203, 210. It is difficult to fathom how the provision of computer hardware to religious schools can be characterized as a mere supplement to their curricula.

Without dispute, computer literacy and the use of computers as an instructional tool are fast becoming a basic component of elementary and secondary education. To stay competitive and appropriately prepare their students for post-secondary education and the most basic of job market demands, elementary and secondary schools must make their students computer literate. However, the cost of acquiring and maintaining up-to-date computer hardware can be financially onerous. Thus, the loan of computer hardware serves to relieve religious schools of costs they would otherwise have to bear in educating their parochial students.

Computer technology has become an integral tool in the delivery of classroom instruction. The "focus is on how

technology can enhance learning – and be imbedded in real projects–rather than simply on how to work the machines." [3] In a 1999 survey, 51% of the teachers listed "finding out about ideas and information" as their objective for students using the computer in the classroom.[4] As explained in Education Week by a Louisiana teacher: "Technology is the vehicle that will change the teacher for the future." [5]

Corporations, like IBM, are working with school districts to help teachers integrate technology into instruction.[6] Forty-two states now require prospective teachers to take technology classes[7] on how to integrate technology into the curriculum and technology-enabled teaching as part of their professional preparation.[8]

In 1999 more than half of the teachers in 69% of schools were using a computer daily.[9] Primary grade

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3 "Changing the Way Teachers Teach," *Education Week*, Oct. 1, 1998, at 41.

4 "Use of Technology," *Education Week*, Sept. 23, 1999, at 63.

5 "Changing the Way Teachers Teach,". *Education Week*, Oct. 1, 1998, at. 41.

6 The CEO Forum, *School Technology and Readiness Report, Year Two*, (Feb 22, 1999).

7 *"State Policies on Teacher Training," Education Week*, Sept. 23, 1999, at 42.

8 The CEO Forum, *School Technology and Readiness Report, Year Two*, (Feb 22, 1999).

9 "Use of Technology, " *Education Week*, Sept. 23, 1999, at 69.

teachers who use technology for instruction, in fact, most often use it for language arts (90%) and math (90%).[10]

In light of the ever expanding role of technology in education, it is difficult to understand how the provision of computer hardware under Chapter 2 will supplement rather than supplant the general curricula of religious schools who are thus relieved of costs they would otherwise have to incur themselves. As such, the placement of computer hardware on religious school premises is direct aid to the school and therefore violates the Establishment Clause.

It has been argued that the modest amount of benefits available under Chapter 2 reflects its role as supplementary aid permissible under the Establishment Clause. Brief of the Secretary of Education, at 42. The Establishment Clause principle that mandates separation of church and state can be violated irrespective of the amount of funds involved.

V. The present case is distinguishable from other decisions where this Court has upheld governmental aid to religious school students.

As set forth above, this Court in *Agostini v. Felton*, expressly rejected the assumption that all aid to religious schools violates separation of church and state principles.

[10] "Survey Highlights," *Education Week*, Sept. 23, 1999 at 53.

However, in validating New York City's Title I program, this Court in *Agostini* also observed that "Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a 'school wide' basis." 521 U.S. 203 at 210.

The observation is significant when examined in light of this Court's prior decisions upholding aid for religious school students. In *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1[redacted]), this Court upheld under the Establishment Clause, a program providing for the transportation of private school students. Two decades later it upheld a program providing for the loan of textbooks to private school students in *Board of Education v. Allen*, and has subsequently reaffirmed that approval. *See, Meek v. Pittenger*, 421 U.S. 349; *Wolman v. Walter;* 433 U.S. 229. Likewise, this Court has approved the provision of therapeutic, guidance and remedial services, as well as the services of a sign language interpreter onsite at religious school facilities. *See, Wolman v. Walter; Agostini v. Felton, Zobrest v. Catalina Foothills School Dist.* It also has allowed vocational training assistance for a blind student studying to become a member of the clergy. *See, Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

The main difference between the above-referenced cases and the instant case is that the assistance therein was discrete and targeted at an identifiable group of eligible students. Chapter 2, on the other hand, makes computer hardware and other instructional materials available on a school-wide basis. More significantly, Chapter 2 aims to effectuate "innovative assistance" programs "which are part of an overall educational reform program." 20 U.S.C. § 7351(b)(2); *see*, Brief of the Secretary of Education at 4. As such, the present case is distinguishable from the historic decisions where this Court has upheld governmental aid to religious school students under the Establishment Clause. The aid at issue in the instant case is pervasive throughout the curriculum and school.

The distinction becomes even more problematic constitutionally to the extent that computer hardware is divertible to multiple purposes, including religious instruction and indoctrination. In this context, it is noteworthy that in *Meek v. Pittenger,* both Chief Justice Rehnquist and Justice White, although dissenting, found persuasive the rationale of the district court which had upheld the statute at issue therein except to the extent that it "permit[ted] the loan of instructional equipment which can

be easily diverted to religious use." 421 U.S. at 389, n.1 (citation omitted).

In *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, this Court approved of a statutory scheme allowing payment to religious schools for the administration of state-approved tests. Previously, in *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973), the Court had invalidated certain statutory provisions which allowed reimbursement to religious schools for costs associated with the administration of teacher-prepared tests. The Court in *Levitt* had been concerned that:

> ...despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.

413 U.S. at 480.

In *Regan*, on the other hand, the tests were prepared by the State and, although administered by nonpublic school personnel, the nonpublic schools had "no control whatsoever over the content of the tests." *Id.* at 654.

Implicit in the *Regan* decision was the premise that the state-prepared tests, unlike the teacher-prepared tests in *Levitt*, were not subject to diversion for religious purposes.

But had they been susceptible to such uses, the Court would have viewed the case differently. For as the Court went on to observe:

> If the State furnished state-prepared tests, thereby relieving the nonpublic schools of the expense of preparing their own examinations, but left the grading of the tests to the schools, and 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.

Similarly, it can be concluded that the provision of computer hardware and other instructional materials on a school wide basis, for the discretionary use of full-time religious school employees and readily divertible to religious purposes, constitutes direct aid to religious education in violation of Establishment Clause principles.

VI. Petitioners' free exercise right to enroll their children in religious schools does not require that they be provided access to educational opportunities equal to those available to students attending public schools.

Petitioners further contend that their right to enroll their children in religious schools under the Free Exercise Clause of the First Amendment to the United States Constitution entitles them to receive the same neutral, secular educational benefits provided to public school students. Although this Court has recognized the right of parents to provide their children with a religious education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *see also, Wisconsin v. Yoder*, 406 U.S. 205 (1972), it has also stated that neutrality is not necessarily dispositive of a statute's constitutionality under the Establishment Clause. *See, Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994); *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 772 (1995) (O'Connor, J., concurring).

Petitioners' argument seeks to subordinate the Establishment Clause to the Free Exercise Clause contrary to well-established precedent from this Court. For example, it is established law that government may accommodate

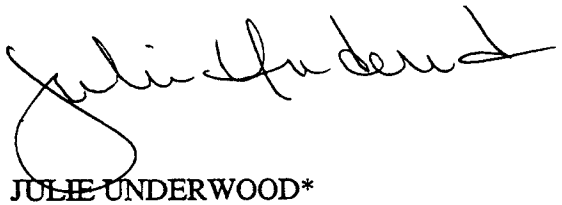
religion. But time and again this Court has required that any such accommodation survive scrutiny under the Establishment Clause so that it does not "devolve into 'an unlawful fostering of religion.'" *Corporation of Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-335 (1987); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144 (1987); *see, Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 719 (1981); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

In addition, the Petitioners' argument would not only make the Free Exercise Clause paramount to separation of church and state principles, but it would also allow the diversion of limited financial resources for education to purposes otherwise deemed to be constitutionally impermissible.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the court of appeals decision in this case.

Respectfully submitted,



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