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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 AMICUS CURIAE OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States.[1] The USCC advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity, the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the USCC are the

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[1]Counsel for a party did not author this brief in whole or in part. No person or entity other than the amicus curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

protection of the first amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

In this case, this Court should ensure that all American children will continue to benefit from a major, longstanding Federal program that provides secular and neutral educational assistance, such as library books, computer hardware and software and other instructional materials, for all schoolchildren regardless of the schools they attend. That program, enacted in 1965, has provided inestimable support for countless children, and has remained vibrant, growing and changing with advances in educational technology. The court below invalidated the program by applying the vestiges of case law implicitly abandoned in recent cases culminating in *Agostini*. In upholding this program, this Court should also confirm that the series of decisions most recently exemplified by *Agostini v. Felton*, 521 U.S. 203 (1997), provides direction for interpretation of the Establishment Clause. This amicus has long advocated the functional approach signaled in *Agostini* and urges the Court to continue on that path.

Through their counsel, the parties have consented to the filing of this brief amicus curiae.

SUMMARY OF ARGUMENT

The program at issue here had its origins more than thirty years ago, as one component of the "Great Society" program intended to improve educational opportunities for this country's children. Originally passed as Title II of the Elementary and Secondary Education Act of 1965 ("ESEA"), this program directs state and local educational agencies to provide innovative assistance of a "secular, neutral and nonideological" nature to all children attending schools that

desire to participate in the program, on a per capita basis. That program has been reauthorized several times since 1965 and is referred to here as "Chapter 2."[2] Children are equally eligible for Chapter 2 benefits whether they have chosen to attend a public school, a private nondenominational school, or a religiously affiliated school. The court below, however, found that the participation of schoolchildren who attend religious schools in Jefferson Parish, Louisiana, cannot be permitted. That decision, if not reversed, would mean that children in private religiously affiliated schools, represented by the petitioner parents, would have to be deprived of those benefits for no other reason than their parents' decisions to send them to religious schools. It could also have profound negative consequences for millions of schoolchildren attending religiously affiliated schools across this country who now benefit from the Chapter 2 program.

The decision below is unjust, a rejection of the considered judgment of Congress, and a slap at this Court's most recent Establishment Clause decisions. It threatens to penalize the thousands of children in Jefferson Parish who will be denied the Chapter 2 library books, computers, and other resource materials that are integral parts of modern education. It is contrary to the will of Congress repeatedly expressed through the legislative authorization and reauthorization process over decades. Those factors are especially important as the court below refused to be guided by the criteria enunciated by this Court in *Agostini v. Felton*, *supra*. Under that standard,

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[2]Pub. L. No. 89-10, 79 Stat. 27. The original program was subsequently reauthorized in a variety of legislative formats, most recently in the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518, enacted as Title VI of ESEA, *codified at* 20 U.S.C. §§ 7301-7373. In accord with the parties' references, this program will be referred to by amicus as "Chapter 2," the way in which the program was referred to when the lawsuit was filed.

equal participation in the Chapter 2 program by children attending religiously affiliated schools is manifestly constitutional.

Agostini v. Felton went far in confirming the direction that this Court intends its jurisprudence to take. That case continues the path of applying the Establishment Clause according to the intentional values the Clause was written to protect -- the protection of the institutions of both religion and government from intrusions upon their own institutional autonomy and proper spheres of authority, while permitting the cooperation of religion and government in religion neutral programs to advance the common good. The decision below ignored these values entirely, instead applying an outdated and discredited arbitrary, "bright line" rule which focused simply on the form of the aid, standing alone. As might be expected, this drastic oversimplification of Establishment Clause jurisprudence did more to hinder the Fifth Circuit's analysis than it did to strengthen it. An adherence to constitutional values and an application of the *Agostini* criteria both dictate reversal of the decision below. By applying authentic constitutional standards, drawn from the history and purposes of the Establishment Clause, the Court will correct an erroneous decision below, resolve a conflict between two federal circuits, confirm the validity of a vital governmental program for the nation's schoolchildren, and set a proper course for the Court's jurisprudence in this area in the future.

ARGUMENT

I. This Court's First Amendment Jurisprudence Has Evolved Away from Arbitrary, Situation-Specific Rules, Towards a Flexible and Genuinely Neutral Emphasis on Fundamental Constitutional Values.

In *Agostini v. Felton*, 521 U.S. 203 (1997), this Court overturned both *Aguilar v. Felton*, 473 U.S. 402 (1985), and related portions of its opinion concerning the "Shared Time Program" in *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). In doing so, the Court "conclude[d] that our Establishment Clause law has 'significant[ly] change[d]' since we decided *Aguilar*." *Agostini*, 521 U.S. at 237. The Court has abandoned the formulaic rigidity of some of its past decisions, and emphasizes instead the values underlying the Establishment Clause, relying on judges' abilities to sift facts and circumstances rather than on rigid rules. Amicus urges the Court to maintain the course it has set in recent years and find the Chapter 2 program at issue here, as applied in Jefferson Parish, Louisiana, constitutional.

The Fifth Circuit below considered itself bound to apply *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). This Court is not so bound. At the same time, the Fifth Circuit suggested that further clarity from this Court would be important. It did not recognize that this Court had already undermined the presumptions of invalidity that characterize the *Meek* and *Wolman* cases. If the Court were now to reject the Petitioners' position in this matter, it could only do so by departing radically from the law in *Agostini*, and from the values that underlie the Religion Clauses themselves.

A. This Court Should Reaffirm That Its Establishment Clause Jurisprudence Must Be Guided by History and Experience.

This Court has regularly noted that a proper construction and application of the Religion Clauses[3] must keep faith with history and experience. *Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984). The Religion Clauses reflect the experience of their Framers that an officially preferred religion generates intolerance and infringes upon personal liberty. *E.g.*, *School District of Abington Township v. Schempp*, 374 U.S. 203, 228 (1963) (Douglas, J., concurring); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). The Establishment Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two that would impair the religious liberty of persons and their faith communities. *See Lynch*, 465 U.S. at 682-83. Thus, there is both an individual and an institutional aspect to the goals of the Framers. Not only did they seek to protect individuals in their religions or the lack thereof, they guarded against the intrusions of the institutions of government into the precincts of religion (and vice versa).[4]

[3]"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof... " U.S. Const. amend. I.

[4]This essential constitutional requirement operates in both conceptual directions. Religion may not exercise the proper functions of civil government. *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 690 (1994) (state statute is "tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires government impartiality toward religion ... [and so] ... violates the prohibition against establishment"); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (state statute gave religious groups a veto power over liquor license applications). By the same token, government and its agents cannot intrude into matters of religious belief, worship or governance. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (application of religion exemption to Title VII's prohibition against religious discrimination in

Lemon v. Kurtzman, 403 U.S. 602, 612, 620, 624 (1971).

For the authors of the Religion Clauses, "establishment" of religion was a reference to the fact that the Church of England was "sponsored and supported by the Crown as a state, or established, church." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). Other political states "established" other churches. *Id.* The Establishment Clause, the Court wrote in its 8-1 decision in *Walz*, was designed to prohibit the sovereign's "sponsorship, financial support, and active involvement ... in religious activity." *Id.* What the Court was concerned about, when measured by the history and experience of the Clause, was religion *qua* religion -- for example, worship, proselytizing, liturgy, doctrine, and selection and supervision of clergy and the tasks that support them. It was not a ban upon beneficial government action that strengthened the common good, even if religiously motivated.[5] The simple fact that broad governmental social programs may have some effect of aiding religious institutions, among others, or of working toward goals that

employment to employment decisions of religious organizations does not violate the Establishment Clause); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (schools operated by church were not within the jurisdiction granted to NLRB by National Labor Relations Act); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (upholding tax exemptions for real property held by religious organizations for worship purposes). If neither form of intrusion by one institution into the other's proper area of operation or decision making exists, or only a theoretical possibility of such an intrusion exists, then the Establishment Clause is not threatened.

[5]A governmental entity cannot "require[ ] religious exercise" by others. *Lee v. Weisman*, 505 U.S. 577, 594 (1992). Except in extraordinary circumstances, it also may not actually engage in it. *Abington Township*, 374 U.S. at 305 (Goldberg, J., concurring). For example, government funding of a legislative chaplain has been held constitutional, *Marsh v. Chambers*, 463 U.S. 783 (1983), and government has historically paid for military and prison chaplains.

government and religious entities both view as important, cannot be cause for invalidating a program on Establishment Clause grounds.

The distinction to be drawn is between religion and religious activity properly so called -- such as the conduct of religious worship services or the teaching of religious beliefs -- and other actions such as pursuing social service goals. The Establishment Clause precludes the first, not the second. *Bowen v. Kendrick*, 487 U.S. 589 (1988); *see* note 5, *infra*. Religious entities may have religiously motivated reasons to accomplish a variety of social goals, from feeding the hungry to assisting refugees, but government can still cooperate with them in public-private programs to accomplish those goals so long as the government does not thereby sponsor or participate in religious activity "as religion."[6]

That the government should be suspicious of education provided in religiously affiliated schools would have struck the Framers as odd. Churches provided most education through the first quarter of the Nineteenth Century. *Abington Township,* 374

[6]To expand upon the example just mentioned, if a government agency were to aid a soup kitchen operated by a church so that the destitute in the surrounding area could be fed, as part of a broadly available program administered without regard to religion, this would be constitutionally unobjectionable whether or not the church belonged to a denomination that believed as a matter of religious doctrine that they had an obligation to feed the poor. If, on the other hand, the government were to provide funding to the church itself in order to favor or support one religious group over another, or because the government wanted to involve itself in any fashion in the church's religious beliefs or worship activities, then Establishment Clause concerns would genuinely be raised.

U.S. at 238 n.7 (Brennan, J., concurring).[7] Even when "public" schools began to flourish, clergy often performed the teaching. *Id.*, *citing* Alexis de Tocqueville, *Democracy in America* (Bradley ed. 1945) 309 n.4.[8] The evolution of "public" education did not occur because of the Establishment Clause, but because of political and cultural conditions incident to the rapid expansion of the country. These schools shared the duties of educating children with private and religious schools. There were, and still are, many state involvements *in religiously affiliated schools* that do not violate the Establishment Clause. *Agostini*, *supra*; *Board of Education v. Allen*, 392 U.S. 236 (1968). The alternative would be to impose the sort of "quarantine" of religious institutions from governmental benefits neutrally available to all, which was rejected by the Court in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976). This can never be the correct constitutional rule in this country. No such quarantine is necessary in order to "chart a course," Chief Justice Burger wrote approvingly in *Walz*, "that preserve[s] the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz*, 397 U.S. at 672.

[7]In New England, where church-state connections were strongest, town churches operated the schools in colonial times. In the more religiously diversified middle Atlantic colonies, the various denominations each ran their own schools. In the agrarian south, the wealthy were tutored at home; the less fortunate were educated at Anglican charity schools. William Clayton Bower, *Church and State in Education*, 23-24 (1944). *See* William Kailer Dunn, *What Happened to Religious Education,* 14-17 (1958). *See generally* Chester J. Antieau, *et al.*, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses*, 11-13, 65-72 (1964).

[8]The funds for these schools came from taxes, sales of public lands, private donations, and tuition. Rockne M. McCarthy, *et al.*, *Disestablishment a Second Time*, 53-54 (1982). *See* Dunn, *supra* note 7, at 68-69 (discussing, *e.g.*, New York).

We submit that a proper analysis of the Establishment Clause is illustrated by *Walz* and its nearly unanimous validation of property tax exemptions for houses of worship. The historical goal of protecting against governmental sponsorship of religion, government financial support of religion, or active governmental involvement in religious activity was met in *Walz* because neither the legislature's purpose, nor the effect of the program in question, was to aid or to hinder religion. 397 U.S. at 670-72. "The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility.... [New York] has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.* at 672-73. Since colonial times, the Court said, government has considered it appropriate "to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference." *Id.* at 676-77. No governmental action contrary to the "no sponsorship, financial support, and active involvement" principle was shown.[9]

Walz also foreshadowed *Agostini* when the Court emphasized that reviewing courts must focus not on

[9]Indeed, even where a legislature's enactment of a law may actually have aided a religion in effecting its religious goals, this, standing alone, is of no constitutional moment, as is clear from *Corporation of the Presiding Bishop v. Amos*, *supra*. "Undoubtedly, religious organizations are better able now to advance their purposes than they were prior to the 1972 amendment to § 702. But religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster...." *Amos*, 483 U.S. at 336.

presumptions, but on actual evidence about the effects of the program in question. "Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief." *Walz*, 397 U.S. at 678. In other words, in *Walz*, the evidence (there from America's history) did not demonstrate that the sort of government program at issue had led to state sponsorship, financial support, or active involvement of the government in religious activity, and so the Establishment Clause was not violated.

This attitude toward constitutional adjudication has origins in the nineteenth century. "[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1809). Rather there must be "clear incompatibility" with the Constitution. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1871). For there to be a violation of the Establishment Clause, a mere possibility of an unconstitutional action is not enough. As this Court's more recent cases make clear, the mere risk of unconstitutional conduct remains insufficient to invalidate a government program. *Agostini, supra*; *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980). The State must be directly and substantially involved with religion as religion, rather than contact occasioned by cooperation in the public interest. *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (plurality). The burden must remain on the challenger to overcome these hurdles. *Legal Tender Cases*, *supra* at 531.

The Court should not veer off that well-charted course now. The correct constitutional course "cannot be an absolutely

straight line; rigidity could well defeat the basic purpose of these provisions, which is to ensure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz*, 397 U.S. at 669. The procedural and substantive principles exemplified in *Walz*, illustrative of this Court's concern for the proper construction of the Establishment Clause, must control.

B. *Agostini* Provides a Useful Standard for Analyzing Establishment Clause Questions in the Governmental Aid Context.

Agostini provides a way to follow that course that is consistent both with the goals of the Establishment Clause itself, and the Court's prior well-reasoned precedent. There is sufficient flexibility in *Agostini*'s criteria to apply broadly to review of any government program, whatever the particular form of aid or context. *Agostini* provides standards that can be applied with consistency and coherence, and focuses the analysis on the facts and circumstances of the actual operation of the program under review.

The changes to the law described by Justice O'Connor in *Agostini* were not genuinely "effected" by that decision -- they were only implemented and explicated. The Court pointed to its 1993 decision in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, not *Agostini* itself, as the turning point. "[I]t was *Zobrest* – and not this case -- that created fresh law'." *Agostini*, 521 U.S. at 225. Two years after *Zobrest*, in *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995), the Court wrote that it is a "central lesson" of its Establishment Clause decisions "that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger*, 515 U.S. at 839. This principle was held to be served, not undercut, by funding of a student religious newspaper where

that funding was made available for the use of the student religious organization on the same basis as it was to other student groups, following "neutral criteria and even handed policies." *Id.* These same neutral criteria and even handed policies are implemented in Chapter 2 to permit children in private religious schools in Jefferson Parish to benefit in the same ways that children in public and private nondenominational schools do.

In *Agostini*, the Court focused principally and properly on the features of the government aid program in question, Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301, *et seq.*, as applied to the New York City school system's program for providing remedial education for educationally deprived children in low income areas. Title I is the "companion piece" to the federal Chapter 2 program at issue here, which is codified at 20 U.S.C. §§ 7301-7373. The Court in *Agostini* asked whether New York's Title I program provided for services to be allocated on the basis of criteria that neither favor nor disfavor religion, whether the program required that these services be available to all children who meet the Act's eligibility requirements, and whether the program provided those benefits no matter what the children's religious beliefs or where they went to school. *Agostini*, 521 U.S. at 232.

One of the *Agostini* Court's principal criticisms of the opinion in *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), was that it had not emphasized the way in which that program had been designed and intended to work, but rather turned upon unsupported assumptions about how it might theoretically be misused. *Agostini*, 521 U.S. at 219-20. Hypothetical and unproven suspicion about the potential for misuse of the program would not be permitted to "trump" the legitimate design of the program. *Zobrest*, 509 U.S. at 12-13. In fact in *Agostini*, as in *Zobrest*, the program provided for

religiously neutral funding through which the government was not itself conveying or encouraging any religious message at all.

The Court in *Agostini* also declined to apply blanket presumptions about the nature of the program that could legitimately be provided, or about where it could be provided.[10] Thus, the Court saw no absolute bar to placing public school teachers on the premises of nonpublic schools. "Such a flat rule ... would indeed exalt form over substance." 521 U.S. at 223-24. The Court in *Agostini* also rejected the rule that the presence of public school teachers on religious school premises itself created a symbolic union of religion with government. *Id.* at 226-27. And it rejected the quintessential "bright line" distinction -- between receiving aid on a religious school's campus, and receiving it just over the school's property line in a van parked curbside -- as having no constitutional significance, being neither "sensible" nor "sound." *Id.* at 227-28.[11]

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[10]The Court in *Agostini* explicitly rejected the previous emphasis on the possibility of misuse of government aid funds as a reason to declare programs unconstitutional. Specifically, one reason the Court noted for overturning *Aguilar* was its emphasis on the level of monitoring needed to be certain that the Title I program had only secular effect. This requirement had been rejected in *Zobrest*, in favor of reviewing the record for actual evidence of violations. *Agostini*, 521 U.S. at 224.

[11]Fourteen years before *Agostini*, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court had explicitly rejected another appeal for inflexible rules of a different sort, when it decided that the constitutionality of a tax deduction program could not turn upon the statistical characteristics of those who most frequently took advantage of the program. Such an analysis, the Court said, whatever its result, provided no appropriate basis for evaluating a facially neutral program. *Mueller*, 463 U.S. at 401. Rather, the constitutionality of the program was to be decided based on the "essential feature[s]" of the program in question, operating as it was designed to do. *Id.* at 396-98.

Even more significantly, the Court in *Agostini* abandoned the two principal presumptions that were key to the analyses in both *Aguilar* and *Ball*, which were based on notions gleaned from *Meek* and *Wolman*. *Agostini*, 521 U.S. at 218-223. The Court suggested, as a doctrinal matter, that use of these sorts of presumptions was an intrinsically unfair way to test a program's effect for "secularity." *Id.* at 223-24. First among these was the presumption that public teachers, when doing their jobs on parochial school premises, will engage in religious indoctrination that will be perceived as "state-sponsored." The assumption that teachers will not fulfill their responsibilities but rather will violate them had already been rejected in *Zobrest*, which demanded evidence of record to the contrary before it would find the assistance unconstitutional. 509 U.S. at 13. *Ball* failed, in part, because "the Court disregarded the lack of evidence of any specific incidents of religious indoctrination as largely irrelevant, reasoning that potential witnesses ... might be unable to detect or have little incentive to report the incidents." *Agostini*, 521 U.S. at 220. Quite to the contrary, the *Agostini* Court decided that the assumption properly to be made was that the program *had* been properly carried out and that *no* prohibited inculcation of religion had occurred. *Id.* at 224.

Secondly, the Court in *Agostini* abandoned the presumption that all government aid that directly aids the educational function of religious schools is invalid. *Id.* at 225-26. In 1986, *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, had decided that, where education grants were generally available to eligible recipients without regard to an institution's public, private, or religious nature, it made no constitutional difference if the proceeds of that grant ultimately flowed to a religious institution *if* it did so as a result of private, and not governmental, decision making. 474 U.S. at 487. This same standard was echoed in *Zobrest*, 509 U.S. at

10.[12]

Agostini confirms that where a program makes aid available to all eligible recipients, is provided to students at any school they choose to attend, and is designed and managed so that the aid is used in a religiously neutral fashion to further educational and not religious interests, that the program is implemented in both private, including religious, and public schools, makes no constitutional difference. A reviewing court must examine the record to see what evidence of noncompliance the challenger has presented. Speculation about the program and hypothetical actions, even if they might be seen as assisting the religious function of the school in some sense, are not enough. These principles must be applied to the instant case.

II. The Chapter 2 Program as Applied in Jefferson Parish is Constitutional. It Meets the *Agostini* Criteria and, More Importantly, Does Not Derogate the Values of the Religion Clauses.

Long before *Agostini*, it was settled that only a government's actions, not a private person's or entity's, can have a constitutionally prohibited "purpose" or "effect" of advancing or inhibiting religion so as to violate the Establishment Clause. The government conduct itself must directly support or participate in activities that are truly religious in nature, not merely those activities that are congruent with a common goal shared by church and state, even if motivated, on the part of the church, by religious beliefs. It must be the government itself, and not the private acts of an aid recipient,

[12]In *Zobrest*, arising under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, "no funds traceable to the government ever find their way into sectarian schools' coffers." 509 U.S. at 10. As described in greater detail *infra*, this is also the case under Chapter 2 as implemented in Jefferson Parish.

that must implement that purpose or have that effect, for the Establishment Clause to be implicated. This conclusion is clear from cases that arose both in the government aid context and outside of it. Where it is *not* the government's decision making or actions that are at issue, but rather it is the private choice of individuals or private entities that may result in religious activity, then the Establishment Clause is *not* offended. This Court verbalized that standard using the rubric "does not result in government indoctrination; define its recipients by reference to religion; or create an excessive entanglement" in *Agostini*, 521 U.S. at 234-35. The underlying interests are the same.

This focus on how government aid is actually used and who makes those decisions, is consistent with another Establishment Clause value -- the permissibility of useful and socially effective interaction between religion and government in areas where each independently has important interests. In between "governmentally established religion" and "governmental interference with religion," *Walz*, 397 U.S. at 669, lies a broad range of simple and socially desirable interactions which frequently occur where both religion and government are working to further similar goals. This area particularly calls for "a benevolent neutrality." *Id.* Chapter 2 is an example of implementation of the "more realistic view" urged by Chief Justice Burger in his opinion in *Meek v. Pittenger*, when he wrote that "carefully limited aid to children is not a step toward establishing a state religion -- at least while this Court sits." *Meek*, 421 U.S. at 387 (Burger, C.J., concurring in the judgment in part and dissenting in part).

A. Chapter 2 Provides No Governmental Support for or Participation in Religion, and Is Compatible with Constitutional Principle.

In *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), this Court upheld a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, which explicitly exempted religious organizations from that statute's prohibition against religious discrimination in employment. To be unconstitutional under the Establishment Clause, the Court said, the government itself must have had the purpose of abandoning neutrality to promote a particular point of view in a religious matter. 483 U.S. at 335. Finding a valid purpose, the Court wrote that for "a law to have forbidden 'effects' ... it must be fair to say that the *government itself* has advanced religion through its own activities and influence...." *Id.* at 337 (emphasis in original). "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Id.* (emphasis in original).

In reviewing the constitutionality of government aid in *Witters v. Washington Department of Services for the Blind*, *supra*, the Court applied the same guidelines. Tuition grants were "made available [by the government] generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefitted," 474 U.S. at 488, citing *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 782-83 n. 38 (1973), and were "in no way skewed towards religion." *Witters,* at 488. Because the government did not design the program to assist or impede any religious beliefs, the function of the program was not to support or inhibit religion. The individual grant recipient alone decided where the grant would be used, and his choice to spend his scholarship at a religious entity was of no constitutional significance. *Id.* at 488-89. In all these respects, *Witters* echoes the intentional standards

of *Walz*, not the "presumptions of invalidity" found in *Meek* and *Wolman*.[13]

A focus on the government's intentions and its own conduct in the design and implementation of a public program recognizes the practical reality that there are vast areas of interest that government and religion have in common. A program should be evaluated based on whether the challenger has clearly shown, on the evidence, that his personal liberty is substantially infringed by the program or that the program undermines the institutional autonomy of religion or government. When each institution remains in its own proper sphere, and the program only facilitates cooperation to advance the common good of society, the Establishment Clause is not violated.

Helping children to receive education is one of those areas of common concern. *Everson v. Board of Education*, 330 U.S. 1 (1946), approved the use of taxpayer funds to reimburse parents for bus fares for all schoolchildren, including those attending religious schools. "It is undoubtedly true that children are helped to get to church schools ... [and] [t]here is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets." *Id.* at 17. The

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[13]The approach used in *Meek* and *Wolman* marked a serious departure from the functional approach to Establishment Clause questions consistent with the Framers' intentions and attempted by the Court in its decisions even prior to *Lemon v Kurtzman*, 403 U.S. 602 (1971). *Meek* and *Wolman* applied a presumption of invalidity, labeling religious schools "pervasively sectarian." The very term smacks of something sinister, to be avoided. Richard Baer, "The Supreme Court's Discriminatory Use of the Term 'Pervasively Sectarian,'" 6 J.L. & Pol. 449, 453 (1990). Beyond that, the analytic method of those cases was expressly abandoned in *Agostini*. Those cases should be overruled.

First Amendment, however, "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." *Id.* at 18. Indeed, "we must ... be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief." *Id.* at 16. Both religion and government had an interest in this issue, and some government assistance made broadly available to try to further those social goals, even if of help to religion, was not constitutionally prohibited.

Similarly, a century ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899), this Court approved construction grants for "isolating buildings" for the treatment of communicable diseases, even though the hospital itself was owned and controlled by a religious order. "[T]he fact that its members ... are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial...." *Bradfield*, 175 U.S. at 298. While the order had religious motivations to operate the hospital, governmental assistance could be given to the hospital to further the social goal of improved health care. The government did not intend to, nor did it in fact, participate in *religion* by so acting.

Agostini itself arose in the context of an aid program designed to provide remedial education to disadvantaged children, and *Zobrest* involved a program to provide services to children with disabilities pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* Government and religious organizations cooperated in government funded projects nationwide under the Adolescent Family Life Act, which was upheld against a facial challenge in *Bowen v. Kendrick*, *supra*. In each of these cases, public programs that included religious organizations were

constitutionally approved, implementing the sort of "benevolent neutrality" approved in *Walz*, even where government funds or funded services ultimately were received by, or provided on the premises of, religious entities. The First Amendment does not require "hermetic separation" between religion and government, particularly when their interests are congruent or overlapping. *Roemer v. Board of Public Works*, 426 U.S. at 746. This is especially so where both their interests advance the common good of the society.

The instant case deals with yet another program where religious entities and government have interests in the same goal. Chapter 2, like Title I, was part of President Lyndon Johnson's "Great Society" education program. It provides for the purchase and loan of instructional materials and library books for the use of public and private schoolchildren nationwide, allocated on a per capita basis, and provided through grants to state educational agencies and local educational agencies. 20 U.S.C. §§ 7301-7373. Chapter 2 here passes Establishment Clause muster because the government is not itself conducting any religious activity properly so called, or, for that matter, taking part in any religious activity at all. The government is not making any religiously relevant decision about how the aid funds will be used except to require that the materials provided must be "secular, neutral and nonideological." 20 U.S.C. § 7372(a)(1). The government is not thereby acting to provide sponsorship or financial support to any religious school, as a religious school, in Jefferson Parish. The level of participation is triggered by enrollment, a matter entirely in the hands of parents.[14] Chapter 2 does not result in

[14]Under Chapter 2 the funds in question go to state and local educational agencies and are spent by, and title to materials purchased remains in, the local educational agencies. 20 U.S.C. §§ 7301, 7351, 7372(c). Thus, no funding goes directly to any school, public, religious or otherwise nonpublic, in any event.

government "sponsorship, financial support, and active involvement ... in religious activity." Chapter 2 simply allows children who attend religious schools to have access, on a religiously neutral, per capita basis, to the same government education benefit program in which all other children in public and private schools may participate.

The goal of this Court's efforts must be to keep the government out of the business of religion, and religion out of the business of governance, without destroying the potential for beneficial cooperation in areas of mutual interest. Nothing in this Court's First Amendment jurisprudence should require discrimination against children attending private religious schools by excluding them from the benefits of neutrally available programs. Chapter 2 passes that test.

B. The Chapter 2 Program, As Applied, Is Valid under the *Agostini* Criteria.

The Court in *Agostini* described three criteria to evaluate government aid programs under the Establishment Clause. The first is whether the aid program results in government indoctrination of religion. *Agostini*, 521 U.S. at 223-24. Second, is that aid distributed using "criteria that neither favor nor disfavor religion," *id.* at 231, so that the program "does not define its recipients by reference to religion." *Id.* at 234. The last of the *Agostini* criteria is that the aid program in question may not "create an excessive entanglement" between government and religion. *Id.* at 232-34.[15] The instant case meets these standards.

[15]The Court in *Agostini* changed the contours of "excessive entanglement" in significant ways. That is, after *Agostini* neither the existence of "administrative cooperation" between government and religious entities, nor the potential for "political divisiveness," can themselves constitute excessive entanglement. *Id.* at 233-234.

First, Chapter 2 does "not result in governmental indoctrination" of religious beliefs. *Agostini*, 521 U.S. at 234. Chapter 2 is a broadly available general benefit program and the materials provided thereby must, by law, be "secular, neutral and nonideological." 20 U.S.C. § 7372(a)(1).[16] Thus, the library books, computers and instructional materials provided with Chapter 2 funds cannot themselves operate to "indoctrinate" any religious beliefs. They are the same kinds of materials and resources being supplied in the public schools. 20 U.S.C. § 7351(b). In and of themselves, they have no religious character. Indeed, compared to Title I (which supplied

[16]As was the case with the Title I program upheld in *Agostini*, the Chapter 2 program at issue in this case also provides that the assistance is to be used to "supplement" and "not supplant" certain other funding sources. This is not a constitutional requirement but a statutory one. 20 U.S.C. § 7371(b) provides in relevant part that "a State or local educational agency may use and allocate funds received under this part so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of Federal funds made available under this part, be made available from non-Federal sources, and in no case may such funds be used so as to supplant funds from non-Federal sources." Schools could not decide to forego some operational element from their budgets that would have been funded from state, local or private funds, in favor of using funds from the federal government.

In *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980), the Court upheld a program which provided direct cash reimbursements to private schools, including religious schools, for performing state mandated functions. The reimbursements the state paid in *Regan* were for services the religious schools would have had to pay for with their own funds, the operative equivalent of supplanting funds that would have come from other sources. But if, for example, a state educational agency intentionally decided to misuse Chapter 2 funds to pay for religion training at either public or private schools, then that would be constitutionally defective. It would be unconstitutional because the *government* would thereby be directly supporting religion, and actively participating in specifically religious activities, not because the funds were thereby used to "supplant funds from non-Federal sources." 20 U.S.C. § 7371(b).

teachers), Chapter 2 programs appear to pose less chance of indoctrination, for it is the government itself that must be performing the indoctrination for it to be objectionable. *Agostini*, 521 U.S. 222-23. If in some fashion a school at which this aid is provided does attempt to use it to indoctrinate its students with particular religious beliefs, then that could constitute a violation of the statute itself, perhaps leading to the loss of the aid in question.

Second, the Chapter 2 program clearly "does not ... define its recipients by reference to religion." *Agostini*, 521 U.S. at 234. By its own terms Chapter 2 manifestly imposes no religious guidelines and in fact provides aid equally, on a per-student basis, without taking religion into account in any fashion whatsoever. 20 U.S.C. § 7372. The statute, regulations and implementing materials in Jefferson Parish say absolutely nothing about religious qualifications for receiving the use of this aid. Joint Appendix ("JA") at 212a.

Third, there can be no argument that the Chapter 2 program as conducted in Jefferson Parish "excessively entangles" government with religion. In *Agostini*, 521 U.S. at 232-35, this Court decided that unannounced monthly monitoring visits by publicly employed supervisors, to religious schools, were insufficient to establish an "excessive entanglement," and noted as well that "we have not found excessive entanglement in cases in which states imposed far more onerous burdens on religious institutions than the monitoring system at issue here." *Id.* at 234, *citing Bowen v. Kendrick, supra*. The Court reminds us in this context that "excessive entanglement," in itself, has no independent weight. Rather, consistent with the values underlying the Establishment Clause, entanglement rises to the level of a constitutional problem when it has "the effect of advancing or inhibiting

religion." *Id.* at 233.[17] As described below, federal, state, and local agencies implement the program, and provide for meaningful protective measures. The reasonable procedures in place in Jefferson Parish so that aid is properly utilized clearly do not have the effect of advancing or inhibiting religion. The issue is not whether there is some conceivable hypothetical possibility of misuse of the materials. Enforcement of the program does not require a guarantee of perfect certainty in advance. It was not required in *Agostini* in relation to Title I programs, and indeed is not required as a matter of law in any other federal program.

The program at issue in this case presents a legal and factual scenario nearly identical to that presented in *Agostini*. There is only one arguable difference, and it is of no constitutional significance. In *Agostini*, public school employees implemented the federal aid program under Title I, and in the Chapter 2 program the teachers who use Chapter 2 materials in private schools are employees of those schools.

This is a difference without a distinction. The persons and organizations charged with maintaining the program are public officials in both cases. Title to all Chapter 2 materials remains with local educational agency officials, who are public employees. 20 U.S.C. § 7372(c). Relevant state and local public employees are responsible for record-keeping and for enforcing compliance with the provisions of Chapter 2. 20 U.S.C. §§ 7332(a), 7353(a). These same state agencies must keep records necessary for financial audits and program evaluation by the U.S. Department of Education. 20 U.S.C. §

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[17] Amicus curiae believes that the real problem that "excessive entanglement" addresses is a free exercise violation through *inhibition*. *E.g.*, Brief for Amicus Curiae United States Catholic Conference at 17-21, *Aguilar v. Felton*, 473 U.S. 402 (1985) (No. 84-237).

7332(a)(4). Louisiana has issued guidelines for how the program is to be run, provides training, secures written assurances from local educational agencies that materials will be used only for authorized purposes, and has created and implemented a reporting and monitoring system. Jefferson Parish school system officials have and enforce procedures that guard against misuse of Chapter 2 materials and equipment. Thus, public employees in Louisiana are responsible for the conduct of the program, as they are under Title I. JA at 214a.

Although public school teachers provide Title I remedial instruction, and private school teachers use some of the Chapter 2 instructional materials in their classes, this difference is constitutionally inconsequential. First, it is evidence of record to which the Court must look to evaluate whether misuse is occurring at all, *Agostini*, 521 U.S. at 224, and there is none here. Hypothetical speculation that some teacher at some point in the future might misuse the program to teach religion at the public's expense was precisely what the Court rejected in *Agostini*. *Id.* at 226-27. Second, teachers are bound to follow Chapter 2's requirements. Professional teachers in private schools are no less likely to fulfill their responsibilities under the law than publicly employed teachers are.[18] There is no evidence

[18]That portion of *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), which survived *Agostini* is not to the contrary. That portion of *Ball* dealt with the Community Education program, which involved classes taught at private schools after the end of the school day by part-time public employees, who were otherwise employed full-time by the same private school in which they taught their Community Education courses. The expenditures in question there were to pay teachers who otherwise were full-time employees of the private schools in question, creating a conflicted situation and communicating mixed messages to students. But in the instant case, the aid funds in question are used by public officials to pay for "secular, neutral and nonideological" instructional materials, not to pay for the services of teachers. Chapter 2 materials are subject to extensive prescreening, record-keeping, monitoring and other controls described

in this record that teachers involved in private schools are less professional or trustworthy than the teachers in Title I programs are. *Id.* at 223-24. Indeed, the suggestion is inherently insulting to all private school teachers, as well as being without factual foundation. When schools and teachers agree to participate in a federal program and give written assurances that the program's guidelines will be followed, those assurances are entitled to be believed until proven otherwise.

Third, the program's design has been well-constructed in Jefferson Parish to comply with Chapter 2. The program there incorporates both state and local regulations, record-keeping and review, training and inspection visits. These programmatic (not constitutionally required) measures add an additional layer of assurance that the Chapter 2 program in Jefferson Parish is designed to prevent misuse and to respond appropriately if it occurs.

Fourth, even assuming that occasional or incidental religious use of Chapter 2 materials would be impermissible, it does not follow that the Establishment Clause has been violated. Where the government has behaved in a neutral manner and has taken reasonable steps to ensure the proper use of educational materials, an occasional lapse (should it occur) is merely a regulatory or statutory violation and should be treated as such. Chapter 2's standards and limitations should be enforced in the same way as the limitations upon any other government assistance program are -- by monitoring the way the program is conducted, correcting violations if they should occur, and then

above. Finally, in *Ball*, the Community Education teachers were supervised, even in their roles as part-time employees, by their parochial school principals. *Ball*, 473 U.S. at 399 (O'Connor, J., concurring in the judgment in part and dissenting in part). Supervision and monitoring of the use of Chapter 2 materials is the responsibility of a public employee of the Jefferson Parish public school system.

ultimately revoking funding for particular programs in appropriate cases. To require absolute certainty, before the fact, that no misuse of Chapter 2 materials could possibly occur, would put that program to a task to which literally no other government assistance program (or the government's conduct itself) is subject.[19] In all, there is no reason for this Court to treat Chapter 2 differently than Title I, or any other cooperative effort to advance basic education.

This Court in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), wrote that there is no constitutional requirement that government "show a callous indifference to religious groups." Rather, it may affirmatively accommodate government actions to fit religious interests and needs. To do otherwise is to embrace -- out of suspicion, fear, or pursuit of the chimera of absolute certainty -- the "hermetic separation" of religion from government which the Constitution and the Court have never embraced. Such a rule would ill serve both governmental and religious interests and, most importantly, the common good. Children attending private religious schools would be deprived of a broadly available educational program which Congress intended for the benefit of all schoolchildren, not only those attending public and private nonreligious schools.

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[19]For example, virtually every local educational agency in the country participates in federally funded programs like Chapter 2, and therefore is required to provide written assurances that it will comply with various civil rights statutes, *e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. There are a myriad of cases involving allegations of violations of Title IX (and other federal civil rights statutes) by public school districts. In many instances violations will be found and appropriate judicial remedies will be imposed. In other instances federal administrative agencies may require corrective measures to be taken by public school districts to remedy violations. Public school districts clearly are not required to demonstrate certainty, in advance, that no violation will ever occur before they are allowed to participate in federally funded programs. Corrective measures can be taken when and if violations occur.

"[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadows." *Abington Township*, 374 U.S. at 308 (Goldberg, J., concurring). Chapter 2 is no threat to the values embraced in the Establishment Clause. Upholding Chapter 2 in a way that confirms the functional approach of *Agostini* and continues this Court's use of the principles that inhere in the Establishment Clause satisfactorily resolves the present conflict. It does so in a manner that keeps faith with the past and points the way for the future.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed, to declare the Chapter 2 program as applied in Jefferson Parish, Louisiana, constitutional.

Respectfully submitted,

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