No. 98-1648

IN THE
SUPREME COURT OF THE UNITED STATES

GUY MITCHELL, ET AL.,
Petitioner,

v.

MARY L. HELMS, ET AL.
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE FOR THE PETITIONERS

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QUESTION PRESENTED FOR REVIEW

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

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE FOR THE PETITIONERS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dep't of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including the following cases: *Davis v. Monroe County*, 119 S. Ct. 29 (1998); *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118 (1999); and *Board of Regents v. Southworth*, Sup. Ct. No. 98-1189 (October Term, 1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred cases nationally, including numerous public school issues involving the Establishment Clause, the Freedom of Speech Clause and the Free Exercise of Religion Clause. The Institute has published educational materials and taught continuing legal education seminars in this area as well.[2]

[1] The consent of counsel for both parties has been obtained. Counsel for The Rutherford Institute authored this brief in its entirety, with able research assistance from Lee J. Strang, University of Iowa Law School (*J.D.* expected 2001). No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

Congress and the State of Louisiana, recognizing that "[w]e are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), and consequently wishing to "accommodate[] the public service to [Americans'] spiritual needs," *id.* at 14, enacted 20 U.S.C. § 7301 *et seq.* (hereinafter "Chapter 2")[3] and its state companion,

[2] John W. Whitehead has published several dozen books and articles on constitutional and civil rights issues. *See, e.g., Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992); *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997); and *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMPLE POL. & CIV. RTS. L. REV. 773 (1998).

[3] 20 U.S.C. § 7301 *et seq.* (1994). 20 U.S.C. § 7301 *et seq.* was enacted by Congress to "support local education reform efforts which are consistent with and support statewide reform efforts under Goals 2000: Educate America Act; to support State and local efforts to accomplish the National Education Goals; to provide funding to enable State and local educational agencies to implement promising educational reform programs; to provide a continuing source of innovation, and educational improvement, including support for library services and instructional and media materials; and to meet special educational needs of at risk and high cost students." 20 U.S.C. § 7301 (b).

LA. REV. STAT. ANN. § 17: 351- 52,[4] providing aid to children who attend nonpublic schools.

The programs in question, Chapter 2 and LA. REV. STAT. ANN. § 17: 351- 52, provide "secular, neutral, and nonideological services, materials, and equipment" on a religion-neutral basis to "increas[e] the academic achievement level of *all* children and particularly educationally disadvantaged children," 20 U.S.C. § 7303 (emphasis added), in both "public and private" religious and nonreligious schools. 20 U.S.C § 7372 (a) (1). The materials and equipment of Chapter 2 neither advance nor inhibit religion, nor are any direct payments from Chapter 2 ever made to nonpublic schools.

III. ARGUMENT

A. CHAPTER 2 AND LA. REV. STAT. ANN. § 17: 351- 52 BENEFIT THE CHILDREN AND PARENTS OF JEFFERSON PARISH ON A RELIGION NEUTRAL BASIS AND ARE THEREFORE NOT SUBJECT TO AN ESTABLISHMENT CLAUSE CHALLENGE.

The present case concerns a government program like programs previously upheld by the Court by which government

[4] LA. REV. STAT. ANN. § 17: 351- 52 (West 1999). This enactment declares that the State "shall supply without charge to the children of this state at the elementary and secondary levels out of funds appropriated therefor by the legislature," and that "[t]he State Board of Elementary and Secondary Education... shall take such action as is necessary to assure that all school books, films, and booklets related thereto... and any other similar materials of instruction are thoroughly screened, reviewed, and approved as to their content by the State..." LA. REV. STAT. ANN. §§ 17: 351 (A) (1), 352 (A) (1) .

programs distributed their benefits neutrally, and the programs' aid did not directly benefit nor (in the Court's recent phraseology) have the "effect of advancing religious organizations."[5] *See infra* section C (discussing the abandonment of the direct/ indirect aid distinction).

Chapter 2 does not define the recipients of its aid on the basis of religion. Chapter 2 and its Louisiana counterpart, LA. REV. STAT. ANN. § 17: 351- 52, seek to help educate all children who are enrolled in both "public and private, nonprofit schools." 20 U.S.C. § 7312. The aid is distributed on the basis of the number of students attending each school. *See id.* When

[5] *See Agostini v. Felton*, 521 U.S. 203 (1997) (holding that Title I was constitutional in that remedial instruction was given on a neutral basis without advancing religion); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (finding the Individuals with Disabilities in Education Act constitutional because the program's benefits were distributed neutrally and did not directly aid the religious school); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1985) (finding that since Washington's program was generally available and neutral, and did not directly support a religious school, the program was constitutional); *Mueller v. Allen*, 463 U.S. 388 (1982) (holding that Minnesota's tax deduction for the educational expenses of all children was neutral and did not have the primary effect of advancing religion); *Board of Educ. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1967) (finding a statute providing textbooks to children who attend private schools constitutional because *all* children received the benefits of the program, and because parents and children, and not private schools, received the program's aid); *Everson v. Board of Educ. of the Township of Ewing*, 330 U.S. 1 (1946) (finding constitutional a state program to provide for the transportation of children to private schools because the benefits were neutrally available to all children and any benefit to private schools was indirect); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930) (upholding a program of neutral application because the benefits from the program accrued to parents and children); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (sustaining a statute providing monies to a religious order for the purpose of building a hospital because the Congress' purpose was religion-neutral, with no direct aid accruing to a particular religious denomination).

addressing the education of children, we must ever be mindful that "[t]he state has ... a legitimate interest in facilitating education of the highest quality for *all* children within its boundaries, whatever school their parents have chosen for them." *Wolman v. Walter*, 433 U.S. 229, 262 (1976) (Powell, J., concurring in part and dissenting in part) (emphasis added).

The programs here in question do not differ in any substantial sense from the program upheld in *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930). *Cochran* involved a program in which private school children were to receive school books from the state. The Supreme Court upheld the program, finding that "the school children and the state are the beneficiaries" of the program, and not the private schools. *Id.* at 375 (quoting *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 1020 (1929)). The Court emphasized the fact that the private school students were receiving only what public school students already received. *See id.* The Court also found that the religious schools were not "relieved of a single obligation" because of the program. *Id.* Likewise, in the instant case, the benefits the government provides through Chapter 2 and LA. REV. STAT. ANN. § 17: 351- 52 are for the "public purpose" of enabling all schoolchildren to receive the best quality of education possible. *Id.* Here, the children attending private school do not receive any benefit not already bestowed upon public school children.

The Court in the seminal Establishment Clause case of *Everson v. Board of Educ. of the Township of Ewing*, 330 U.S. 1 (1946), placed particular emphasis on the neutral position which government must maintain toward religion, stating that government "cannot exclude... the members of any ... faith ... from receiving the benefits of public welfare legislation." *Id.* at 16. Here, as in the New Jersey program upheld in *Everson*,

"[t]he state contributes no money to the schools. It does not support them. Its legislation ... does no more than provide a general program to help parents [procure for] their children, regardless of religion," the best education possible. *Id.* at 18. More recently, in *Zobrest v. Catalina Foothills Sch. Dist.*, the Court let stand the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 *et seq.* because the program provided for the neutral distribution of benefits to "any child qualifying as 'disabled' under the IDEA," 509 U.S. 1, 10 (1993), and because the aid did not have the effect of "a direct subsidy to the religious school," *id.* at 12 (quoting *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1985)). The aid from the program was intended, and acted, for the benefit of all handicapped children regardless of religion. The Court found that it was the children and their parents who received the benefits of the neutral government program, and not the religious school, stating, "[d]isabled children, not sectarian schools, are the primary beneficiaries of the IDEA." *Id.*

The Supreme Court in the above cases held constitutional general welfare programs which neutrally benefitted all children. In the case at bar, Chapter 2 was specifically enacted to help provide all children with the best possible education. *See* 20 U.S.C. §§ 7301, 7303. To find Chapter 2 and LA. REV. STAT. ANN. § 17: 351- 52 unconstitutional would be to deprive private school children of a government benefit simply because they are educated at a religious school at their parents' behest, and would be tantamount to "preferring those who believe in no religion over those who do believe." *Zorach*, 343 U.S. at 314. What both programs seek to achieve is not the indoctrination of children, but rather a better education for all children. It is the children in nonpublic schools, and not the schools themselves who benefit, and it is the children who would suffer if deprived of the

best education they could have received, if these programs are found unconstitutional. Chapter 2 and LA. REV. STAT. ANN. § 17: 351- 52 provide benefits to all children on a religion-neutral basis, without having the effect of advancing religion, *see infra* section C, and should therefore be found constitutional.

B. THE SUPREME COURT'S RECENT ESTABLISHMENT CLAUSE JURISPRUDENCE HAS ELIMINATED THE FOUNDATIONAL PRESUMPTIONS UPON WHICH APPELLANTS RELY TO URGE THE CONSTITUTIONAL INFIRMITY OF THE AID IN QUESTION.

While the Supreme Court, when evaluating Establishment Clause challenges to government aid programs, continues to ask "whether the government acted with the purpose of advancing or inhibiting religion," and whether the government "aid has the 'effect' of advancing or inhibiting religion," *Agostini*, 521 U.S. at 222-23, three of its recent cases have "undermined the assumptions upon which *Ball* and *Aguilar* relied," *Agostini*, 521 U.S. at 222-23, and implicitly the foundation on which *Meek v. Pittenger*, 421 U.S. 349 (1974), and *Wolman*, 433 U.S. 229, rested. *See Agostini*, 521 U.S. 203; *Zobrest*, 509 U.S. 1; *Witters*, 474 U.S. 481 (1985).

In *Witters*, the Court upheld Washington's vocational rehabilitation program on the basis of its finding that the program distributed benefits on a neutral nonsectarian basis. *Witters*, 474 U.S. at 487. The Supreme Court found that the rehabilitation program did not have the impermissible effect of advancing religion, stating, "the Establishment Clause is not violated every time money in the possession of a state is conveyed to a religious institution." *Id.* at 486. The program

did not have the impermissible effect of advancing religion because it was "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," *id.* at 487 (quoting *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 782-783, n. 38 (1973)), and there was no danger of the program creating a "financial incentive for students to undertake sectarian education." *Id.* at 487-88. Rather, the "aid provided under Washington's program [was] a result of ... genuinely independent and private choices." *Id.* at 487. Further, the aid in question was not unrestricted in its uses and therefore did not threaten to "subsidize the religious functions of [the] institution." *Id.* at 489.

The Court in *Witters* upheld a subsidy to a religious school's educational function in view of the program's religious neutrality. *See id.* at 487. Whereas *Meek* and *Wolman* had relied on the assumption that to aid a religious school's educational function was to advance religion and had rejected such programs on that basis, *see Meek*, 421 U.S. at 366; *Wolman*, 433 U.S. at 250, *Witters* imparted true neutrality to the *Lemon* test by allowing religious organizations to participate in government programs equally with nonreligious groups. "Direct" aid to a religious school's educational function was no longer presumptively unconstitutional. *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

In *Zobrest*, the Supreme Court found that allowing a publicly paid signing translator to accompany a disabled student to a parochial school pursuant to the Individuals with Disabilities in Education Act was constitutional. *Zobrest*, 509 U.S. 1. Again, the Court emphasized that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily

subject to an Establishment Clause challenge." *Id.* at 8. More importantly, the Court declined to assume that public employees in religious schools would participate in the indoctrination of children and stated that it would instead rely on the record to determine if there were actual sectarian activities by public employees because "[s]uch a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance." *Id.* at 13. The Court also "implicitly repudiated another assumption on which *Ball* and *Aguilar* turned: that the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion." *Agostini*, 521 U.S. at 224. In addition, the Court again rejected the prior ban on "direct" aid to a religious organization's educational function, where the programs in question are religion-neutral on their face. *Id.* at 10.

After *Zobrest*, the Court no longer assumes that government indoctrination will result if public employees are placed in a religious school, as was the case in *Ball*,[6] *Meek*[7] and *Aguilar*. *See Aguilar v. Felton*, 473 U.S. 402, 412 (1985). Instead, the Court will require a finding of indoctrination in fact. *Zobrest*, 509 U.S. at 13.

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) highlighted the Court's emphasis on government neutrality towards religious organizations. Government may provide a benefit to a religious organization if it is providing that same benefit to similar, nonreligious

[6] *See School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985) (stating that teachers placed in religious schools "may subtly or overtly indoctrinate the students in particular religious tenets at public expense.").

[7] *See Meek*, 421 U.S. at 369 (finding "the potential for impermissible fostering of religion" in the placing of public employees in religious schools).

groups. If it were otherwise, "the state and religion would be aliens to each other-- hostile, suspicious, and even unfriendly." *Zorach*, 343 U.S. at 312. In addition, by relying on the neutrality of the program, the *Rosenberger* Court allowed the government to distribute aid directly to a religious organization, refusing to continue the amorphous direct/ indirect aid distinctions previously used in *Meek*, *Wolman* and *Ball*.[8]

Agostini swept away old presumptions upon which the *Lemon* test relied, and made explicit the sea change in Establishment Clause jurisprudence suggested in *Witters* and *Zobrest*. *See Agostini*, 521 U.S. at 223, 225. No longer would government exclude religious organizations from public programs available to all groups in the vain attempt to attain a government neutrality which, in reality, resulted in government hostility towards religion. The Court in *Agostini* began its analysis of the Establishment Clause issue by stressing the changes the Court had made to the approach it uses to "assess indoctrination." *Id.* at 223. "First we have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination." *Id.* "Second, we have departed from the rule... that all government aid that directly assists the educational function of religious schools is invalid." *Id.* at 225. Along with *Witters* and *Zobrest*, *Agostini* repudiated the assumption used in *Meek* and *Wolman* that the educational and religious functions of religious schools are "inextricably intertwined." *See Meek*, 421 U.S. at 363; *Wolman*, 433 U.S. at 250. Consequently, *Agostini* stands for the proposition that it is permissible to aid the educational function of religious schools. *See Agostini*, 521 U.S. at 225.

[8] *See Meek*, 421 U.S. at 365; *Wolman*, 433 U.S. at 250; *Ball*, 473 U.S. at 380.

The Court also rejected the claim that the aid in question was not supplemental. The Court instead relied on the record before it in view of its "unwilling[ness] to speculate that all sectarian schools provide remedial instruction...." *Id.* at 229. The Court thus seems no longer willing to assume the worst in a case by speculating that public employees are indoctrinating children and that schools already provide the aid in question; instead, the Court will ask for hard evidence from the record for such a charge. In other words, the Court, building on *Rosenberger*, will not presume an aid program has the impermissible effect of advancing religion when "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 231. In lieu of a presumption of invalidity, the plaintiff must now make a showing that the aid in question is non-neutral and that government benefits are conferred on the basis of religion. *See id.* at 226, 229. The Court now seeks direct evidence of an improper effect of government aid advancing or inhibiting religion, along with evidence of administrative entanglement and a showing that indoctrination has in fact occurred, necessitating "pervasive monitoring."*Id.* at 234.

C. IN LIGHT OF THE COURT'S RECENT JURISPRUDENCE, THE PROGRAM IN QUESTION DOES NOT IMPERMISSIBLY ADVANCE OR INHIBIT RELIGION.

Agostini observed that in considering the third prong of the *Lemon* test, "the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'" *Agostini*, 521 U.S. at 232. In other words, the issue of excessive entanglement "is ultimately an inquiry into the effect of the aid program," and when government becomes

so involved in the affairs of a religious organization that it either advances or inhibits that organization, the Court views such involvement as excessive.[9]

Meek v. Pittenger struck down a program similar to the program in question here, in which instructional materials and equipment were lent to nonpublic schools. The Court emphasized the fact that more than 75% of the nonpublic schools receiving such aid were religiously affiliated, *see Meek*, 421 U.S. at 363, and since the educational and religious missions of such schools were "inextricably intertwined," *id.* at 366 (quoting *Lemon*, 403 U.S. at 657), the program resulted in the "direct and substantial advancement of religio[n]." *Id.* The impermissible effect, therefore, was to advance religion. *Agostini* undermined *Meek's* rationale by declining "to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Agostini*, 521 U.S. at 229. Likewise, the Court in *Wolman* struck down Ohio's program of providing "instructional materials ... and equipment ... which [are] 'incapable of diversion to religious use.'" *Wolman*, 433 U.S. at 248 (discussing OHIO REV. CODE ANN. § 3317. 06 (B), (C)). As in *Meek*, the *Wolman* Court found the program had the "primary effect of providing a direct and substantial advancement of sectarian enterprise," because "of the impossibility of separating the secular education function from the sectarian, [where] the state aid inevitably flows in part in support of the religious role of the school." *Id.* at 250.

In *Zobrest*, however, the Court clarified that

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[9] Jeremy T. Bunnow, Note, *Reinventing the Lemon: Agostini v. Felton and the Changing Nature of Establishment Clause Jurisprudence*, 1998 WIS. L. REV. 1133, 1157 (1998).

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

Zobrest, 509 U.S. at 8. The *Zobrest* Court, like *Witters*, undermined the predicate assumption of *Meek* and *Wolman* that the religious and secular roles of religious schools were so intertwined that to aid the secular aspect of the school's mission was to aid the religious aspect.

In *Agostini*, the Supreme Court finally expressly departed from the rule that "all government aid that directly assists the *educational function* of religious schools is invalid." *Agostini*, 521 U.S. at 225 (emphasis added) (citing *Witters*, the Supreme Court emphasized the neutral basis on which benefits were distributed). No longer, as in *Meek* and *Wolman*, would the Supreme Court assume that aid to a religious school's educational aspect would automatically advance religion, *see id.*, because "religious schools pursue two goals, religious instruction and secular education," *Board of Educ. of Central Sch. Dist. No. 1*, 392 U.S. at 237, 245, and the two are no longer seen as "inextricably intertwined." *Meek*, 421 U.S. at 363. Consequently, Chapter 2, which aids only students and the secular educational aspect of religious schools, and is provided on a neutral, nonreligious basis to all students, does not have the impermissible effect of advancing religion.

IV. CONCLUSION

Chapter 2 and LA. REV. STAT. ANN. § 17: 351- 52 do not advance or inhibit religion, nor create an "excessive" entanglement between the government and religious schools.

With the Supreme Court's recent decisions, a true government neutrality has come to light. Religious organizations are treated as equal partners with other secular organizations. The programs in question are religion-neutral, defining who receives aid by the number of eligible students attending a given school. The Court will not assume the aid is used by the schools for indoctrination with no evidence in the record. The Court's recent cases exemplify an understanding of the Establishment Clause whereby neutral programs may aid religious organizations.

Chapter 2 and LA. REV. STAT. ANN. § 17: 351- 52 do not excessively entangle the government with the religious schools here in question. Chapter 2 provides aid consisting of "secular, neutral, and nonideological services, materials, and equipment"on a religion-neutral basis to aid students in both "public and private" religious and nonreligious schools. 20 U.S.C § 7372 (a) (1). There is no need of pervasive monitoring to insure that the aid is not used for religious purposes, and there is also no need for close "administrative cooperation;" therefore, the threat of political divisiveness here is no greater than the threat posed when any sector of society is served by the government. Consequently, the threat of "excessive entanglement" between the government and religious organizations is minimal, and without evidence in the record to support a finding of "excessive entanglement" the Supreme Court should not assume such.

The Court must ever be wary of striking down neutral programs such as these, for

> [i]f the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the 'benevolent neutrality' that we

> have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.

Wallace v. Jaffree, 472 U.S. 38, 90 (1985) (Burger, C.J., dissenting).

For the reasons stated above, The Rutherford Institute respectfully suggests that this honorable Court find that Chapter 2 and LA. REV. STAT. ANN. § 17: 351- 52 pass constitutional scrutiny.

Respectfully submitted,

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