No. 98-1648

IN THE

Supreme Court of the United States

GUY MITCHELL, *et al.*,

Petitioners,

—v.—

MARY L. HELMS, *et al.*,

Respondents.

ON *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY AND AMERICANS FOR RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

Marshall Beil
Attorney of Record
Philip Goldstein
Catherine Rogers
Christine Fecko
ROSS & HARDIES
65 East 55th Street
New York, New York 10022
(212) 421-5555

Counsel for Amici

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INTERESTS OF THE *AMICI CURIAE*[1]

The National Committee for Public Education and Religious Liberty ("National PEARL") is a national coalition of organizations sharing the objective of preserving religious freedom and the separation of church and state in public education.[2] Since 1968, National PEARL has filed or joined numerous *amicus* briefs in the federal circuit courts of appeal and in the United States Supreme Court on issues affecting religious liberty and public education. This organization regularly participates in litigation of this nature, including cases before this Court, and seeks to make meaningful contributions to the questions of constitutional law at issue here. National PEARL is able to bring the issues raised in this case the

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[1] Pursuant to United States Supreme Court Rule 37.3(a), counsel of record have filed letters with the Clerk of Court consenting to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no person other than the *amici curiae*, their members and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The constituent members of National PEARL include the following organizations: A. Philip Randolph Institute; American Ethical Union; The American Federation of Teachers; American Humanist Association; American Jewish Committee; American Missionary Association, United Church Board for Homeland Ministries, United Church of Christ; Americans for Religious Liberty; The Community Church of New York; Council for Secular Humanism; Freethought Society of Greater Philadelphia; Minnesota Civil Liberties Union; Monroe Citizens for Public Education and Religious Liberty; National Council of Jewish Women; National Jewish Labor Committee; New York State United Teachers; and Washington Area Secular Humanists.

perspective of a national organization dedicated to protecting religious liberties for all citizens.

Americans for Religious Liberty ("ARL") is a nationwide nonprofit educational organization, founded in 1981, dedicated to defending individual freedoms, public education, and the constitutional principle of separation of church and state. ARL has been an *amicus curiae* in numerous briefs to the United States Supreme Court.

PRELIMINARY STATEMENT

Following the fundamental tenets of Establishment Clause jurisprudence, the Court should find that Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301 *et. seq.* and its Louisiana counterpart, La. Rev. State. Ann. § 14:351-52 (West 1982 & Supp. 1998), as applied by the Jefferson Parish School Board in Jefferson Parish, Louisiana (the "School Board") (collectively, the "Chapter 2 Program" or the "Program") to be unconstitutional. This Court in *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter,* 433 U.S. 229 (1977), expressly held that direct government aid to parochial schools in the form of lending educational materials and equipment — the kind of aid at issue here — violates the Establishment Clause. The Court has never overruled *Meek* or *Wolman*, and has repeatedly recognized the distinction between "direct and substantial" aid to parochial schools, which is impermissible, and "indirect and incidental" aid, which, with appropriate safeguards, may be permissible. *Compare School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (invalidating direct state aid); *PEARL v.*

Nyquist, 413 U.S. 756 (1973) (same), *with Agostini v. Felton*, 521 U.S. 203 (1997) (permitting indirect state aid); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (same); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986) (same); *Mueller v. Allen*, 463 U.S. 388 (1983) (same); *PEARL v. Regan*, 444 U.S. 646 (1980) (same).

The Chapter 2 Program makes public funds available for the purchase of educational materials and equipment and the distribution of these materials and equipment to parochial schools. This equipment includes: library and reference books, slide projectors, television sets, tape recorders, maps, globes, curricular aids, computers, and computer software. Because there are, and can effectively be, no restrictions on the content — the films, audio cassettes, videotapes, CD-ROM programs, computer software, etc. — that can be used with this equipment, and the selection of the content will be made solely by schoolteachers and administrators hired to provide students with a pervasively sectarian education, the Chapter 2 Program provides an impermissible direct economic benefit to the parochial school system, in violation of the First Amendment's admonition against the establishment of religion. *Ball*, 473 U.S. at 393-94; *Wolman,* 433 U.S. at 250; *Meek*, 421 U.S. at 366.

Petitioners argue that the Court in *Agostini* disavowed *Meek* and *Wolman* (Pet'r Br. at 18-19) and, in particular, any distinction between "direct and substantial" aid and "indirect and incidental" aid. Petitioners are wrong. The Court in *Agostini* reaffirmed use of the *Lemon* framework and continued

to distinguish between direct and indirect aid, although it noted that such a distinction should not be mechanically applied. *See Agostini*, 521 U.S. at 223, 225. Accordingly, the underpinnings of *Meek* and *Wolman* as they relate to the distinction between direct aid and indirect aid survive *Agostini* and should be applied by the Court in this case.

SUMMARY OF ARGUMENT

This Court should affirm the holding of the Court of Appeals for the Fifth Circuit that the Chapter 2 Program is unconstitutional as applied by the School Board. Petitioners would have this Court do away with the constitutionally sound holdings of *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977) — which proscribed direct aid to religious schools — based upon a misreading of this Court's later cases, including *Agostini v. Felton*, 521 U.S. 203 (1997). *Agostini*, however, did not eradicate the dichotomy between improper direct aid and permissible indirect aid, but rather required that appropriate safeguards be present and enforced.

Because the Chapter 2 Program here provides direct economic benefits to pervasively sectarian institutions, it should be struck down for having the effect of advancing religion. *Agostini*, 521 U.S. 203, 224; *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).[3]

[3] For the purpose of this brief, *amicus curiae* concede that the Chapter 2 Program, as applied in Jefferson Parish, has a (continued...)

Even assuming that the Program offers indirect aid to the parochial school system, for the reasons discussed below and in Respondents' Brief and in the *Amici Curiae* Brief of the American Civil Liberties Union, et al. ("ACLU Brief"), among others, it lacks adequate necessary safeguards to prevent the parochial schools from using the publicly funded educational materials to teach religion and from otherwise advancing the schools' goal of religious inculcation.

ARGUMENT

POINT I.

THE CHAPTER 2 PROGRAM IS UNCONSTITUTIONAL AS IT HAS THE EFFECT OF ADVANCING RELIGION BY PROVIDING DIRECT AID TO RELIGIOUS SCHOOLS

A. *Meek* and *Wolman* Control The Analysis Of The Public Aid Program At Issue

The Establishment Clause bars all government aid that could be used for indoctrination in the religious precepts of, or otherwise advancing the religious mission of, parochial schools. *See, e.g., PEARL v. Nyquist*, 413 U.S. at 756, 774-75 (1973) (striking grants to schools for maintenance and repair of the

[3](...continued)
secular purpose: to provide educational materials to all students in the Parish. The Program as applied, however, subsidizes parochial schools and their religious activities, and thus has the impermissible effect of advancing religion.

facilities and equipment and tuition reimbursement to parents, because "direct aid in whatever form is invalid"); *Lemon*, 403 U.S. at 613-14 (striking state payments for parochial teachers' salaries in respect of their secular teaching duties).

On at least two separate occasions this Court has considered and invalidated state aid programs akin to the Chapter 2 Program. The Court in *Meek* overturned a program that lent state-owned instructional materials and equipment directly to religious schools, *Meek*, 421 U.S. at 365-66; and in *Wolman* it struck down a program lending the same kind of instructional tools to the parents of parochial schoolchildren. *Wolman*, 433 U.S. at 250. Finding in each case that the aid relieved the recipient parochial schools of normal operational expenditures of the schools, the Court held that the programs contributed to the overall educational function of the religious schools, and thus necessarily contributed impermissible aid to their religious educational function as well. *Meek*, 421 U.S. at 366; *Wolman*, 433 U.S. at 250. The Court concluded that:

> even though ostensibly limited to wholly neutral, secular instructional material and equipment, [the loan program] *inescapably results in the direct and substantial advancement of religious activity.*

Meek, 421 U.S. at 366 (emphasis added); *accord Wolman*, 433 U.S. at 250.

The Court has continued to apply the direct/indirect dichotomy since its decisions in *Meek* and *Wolman*.

Approximately ten years after *Wolman*, the Court in *Ball* struck down a program wherein religious schools received teachers and teaching material directly from the state because it "provide[d] 'direct and substantial advancement of the sectarian enterprise.'" *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 393 (1985) (quoting *Wolman*, 433 U.S. at 250). The Court's opinion in *Ball* explained that the Constitution was not violated by "indirect, remote or incidental" benefits — but that a constitutional violation arose where the benefits were "direct and substantial." *Ball*, 473 U.S. at 393-94.

The principle underlying the holdings of *Ball* and *Meek* is the universal and repeatedly reaffirmed tenet of Establishment Clause jurisdiction that bars direct government subsidies to religious groups for use in distinctly religious activity. *See Lemon*, 403 U.S. at 612 ("the three main evils against which the Establishment Clause was intended to afford protection [are]: 'sponsorship, financial support, and active involvement of the sovereign in religious activity'") (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970)). This principle in the context of aid to religious education is the basis for the Court's firm commitment to prohibiting the use of public funds to supplant or subsidize expenditures by parochial schools for normal or regular school operations. This Court should continue to adhere to the prohibition on direct aid to religious education as applied in *Meek* and *Wolman*, not only because it is good law, but also because it is sound law.

Whether the educational materials supplied to parochial schools under the Chapter 2 Program are used in aid of the religious or the secular mission of the school depends entirely

on the conduct of the teachers and administrators who staff the recipient parochial schools. Since the founding principle of such schools is to provide a pervasively sectarian education to their students, as the Court found in *Lemon*, a "conflict of functions *inheres* in the situation." *Lemon*, 403 U.S. at 617 (emphasis added). Basic teaching tools placed in the hands of parochial schoolteachers will invariably be used to teach religion — a point on which the Solicitor General agrees[4] — and state funding for those tools, therefore, has the unavoidable effect of advancing religion. *See Agostini*, 521 U.S. at 246 (Souter, J. dissenting) ("it would be an obvious sham, say, to channel cash to religious schools to be credited only against the expense of 'secular' instruction").

This situation, thus, is unlike *Agostini*. There, the public school teachers were engaged in conducting special education classes on secular subjects. The Court refused to presume that these teachers, paid and properly supervised by public school administrators, would improperly use their classes

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[4] In his brief, the Solicitor General admits that parochial school teachers would likely use general educational materials for both secular and religious purposes:

> It is . . . difficult to see how religious school teachers can be confined to secular subjects in their interactions with their students. . . . Even in a chemistry class, a religious topic might arise, and a teacher might direct students to use [Chapter 2] computer equipment to pursue that religious topic.

(Solicitor Gen. Br. at 45).

to inculcate religion. *Agostini*, 521 U.S. at 226. In the Chapter 2 Program, however, the educational equipment and materials are fundamental tools of any educational program and can be used by religious schoolteachers and administrators in *all* classrooms and subjects. Use of the state-funded equipment for inculcating religious belief and aiding religious education, thus, is inevitable.

Government programs, like the one here, that provide basic teaching tools for parochial schools necessarily support religious education. Indeed, nothing could illustrate the "impossibility of separating the secular education function from the sectarian," *Wolman*, 433 U.S. at 250, more vividly then where the government places chalk, or a slide projector, tape recorder, VCR or computer in the hands of "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets." *Lemon*, 403 U.S. at 618. The equipment will be used to play religious videos or songs or to show religious slides or project notes on religious subjects. It is inevitable and, absent a public monitor continually monitoring the equipment at all times, unavoidable. It is, in fact, no different from the construction of the parochial school building itself. *See Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

As Justice O'Connor cogently explained in her concurrence in *Ball:*

> When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial

> school supervision, . . . the program has the perceived and actual effect of advancing the religious aims of the church-related schools.

Ball, 473 U.S. at 399-400 (O'Connor, J. concurring). When these same full-time parochial teachers receive educational equipment and materials for use in all of their courses, the Chapter 2 Program that provides the equipment and materials creates exactly the situation described by Justice O'Connor in *Ball,* as distinguished from the Court's analysis of the role of the public aid in *Agostini*. As in *Ball*, the Chapter 2 Program constitutes an impermissible direct benefit to a religious institution and should be struck down.

The Chapter 2 Program simply goes too far by permitting direct government funding, and therefore government endorsement, of religious education. To eliminate the fundamental prohibition on direct government aid to subsidize religious education would mean that the government "must in constitutional principle be free to assume, or assume payment for, the entire cost of instruction provided in any ostensibly secular subject in any religious school." *Agostini*, 521 U.S. at 246 (Souter, J., dissenting) (citing *Ball*, 473 U.S. at 394, 396).[5] Agreeing that the Court has not eviscerated the

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[5] In rejecting the argument that aid to religious school students that seeks to duplicate the educational benefits available to public school students should be treated as if it were a general welfare benefit available to all students, the Court found that:

> the argument proves too much, for it would also

(continued...)

prohibition on direct aid, the Solicitor General also argues that to do so would open the door to the state's full sponsorship of religious education:

> It might be argued, for example, that the government is never responsible for the inculcation of religious beliefs whenever it provides secular benefits to a religious school, because any use of the benefits for sectarian purposes is entirely the independent responsibility of the religious institution.
>
> We do not read the Court's decisions to go so far. . . . *Indeed, since there is nothing inherently religious about money, if the only Establishment Clause restrictions on the provision of aid were that the aid be itself secular and that it be provided neutrally, then the government presumably would be authorized to provide direct grants to religious schools for teacher salaries.*

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[5](...continued)

> provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools -- a result wholly at variance with the Establishment Clause.

Nyquist, 413 U.S. at 782, n.38 (emphasis added).

(Solicitor Gen. Br. at 32-33) (emphasis added).

As the Solicitor General recognizes, if this Court eliminated from its Establishment Clause review the threshold consideration of the direct or indirect nature of the benefit afforded to parochial schools, there would be no principled limitation to the state's sponsorship of religious education, including the construction of religious schools themselves. Accordingly, the Court should adhere to its long-standing and well-reasoned rulings in *Meek* and *Wolman* and invalidate the Chapter 2 Program at issue here as impermissible direct aid.

B. The Court Has Consistently Acknowledged The Direct/Indirect Distinction, And It Remains A Vital Component To Establishment Clause Jurisprudence

None of the cases Petitioners cite contravenes the fundamental rule that direct subsidies to parochial schools are unconstitutional (Pet'r Br. at 18-19) (citing *PEARL v. Regan*, 444 U.S. 646 (1980); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997)). Indeed, a thorough reading of these cases shows that they are entirely consistent with the Court's refusal to permit general state educational aid which directly supports the educational function of pervasively sectarian institutions. *See Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1470 (9th Cir. 1995) (Fernandez, J., dissenting). The cases Petitioners cite, in contrast, all involved indirect aid that afforded only incidental

benefits to religious schools.

In *Regan*, the Court upheld a program reimbursing religious teachers for administering state prepared tests on secular subjects. In so doing, the Court found that the testing did not assist with any religious teaching or otherwise "directly aid[] religious education." *Regan*, 444 U.S. at 657. Nor is *Mueller* relevant. There the Court considered a tax deduction scheme for parents of parochial schoolchildren, not the parochial schools themselves, that was generally applicable to all educational expenses. *Mueller*, 463 U.S. at 399 (distinguishing its ruling from cases invalidating state aid that "involved the *direct transmission of assistance from the state to the schools themselves*") (emphasis added). Moreover, the programs in both cases provided reimbursements and, accordingly, offered less of an incentive to attend parochial school than the direct institutional aid at issue here.

Neither the ruling in *Witters* nor in *Zobrest* repudiates the Court's precedent against direct aid or subsidization of religious schools, as both involved indirect state aid to individual students. In *Witters*, the vocational aid was given to a blind student who then chose on his own the school where he would use the aid. *Witters*, 474 U.S. at 488. Indeed, the Court in *Witters* explicitly found that "the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Witters*, 474 U.S. at 487 (quoting *Ball*, 473 U.S. at 394). Similarly, the deaf student in *Zobrest*, who received the services of a sign language interpreter, directed where the state aid would be used. *Zobrest*, 509 U.S. at 12. To further

demonstrate that the aid was indirect, the Court emphasized that the public benefits sustained in *Witters* and *Zobrest* did not take over any of the religious schools' educational functions. *Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 12. The rulings in these cases, permitting aid to individual students, offer no justification for the systematic aid to parochial schools provided by the Chapter 2 Program.

Finally, in *Agostini*, the Court permitted parochial school students to receive secular remedial instruction from public teachers, expressly finding that the program was one that provided indirect aid to parochial schools. *Agostini*, 521 U.S. at 228. The Court reasoned that:

> While it is true that individual students may not directly apply for Title I services, *it does not follow from this premise that those services are distributed "directly to the religious schools." In fact, they are not.* . . . Title I funds are instead distributed to a public agency (an LEA) that dispenses services directly to the eligible students within its boundaries, no matter where they choose to attend school.

Agostini, 521 U.S. at 228-29 (internal citations omitted) (emphasis added).

In contrast, this case involves direct aid to pervasively sectarian institutions and thus, in contrast with *Agostini*, presents the Court with the opportunity to reaffirm its longstanding prohibition on direct government aid to parochial

schools. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 852 (1995) (O'Connor, J., concurring) (recognizing that "the funding prohibition in Establishment Clause jurisprudence" endures).

As these cases demonstrate, the Court has allowed public funds to reach religious schools only where the funds were targeted to specific areas of general student welfare (not systematic, school-wide support), did not support the basic religious teaching functions of the schools, and provided only indirect and incident benefits to the religious institutions. *See also Board of Educ. v. Allen*, 392 U.S. 236 (1968) (permitting public lending of state-approved textbooks to parochial schools); *Everson v. Board of Educ. of Ewing*, 330 U.S. 1 (1947) (permitting public busing of parochial school students). The aid to religious education provided by the Chapter 2 Program goes directly to the schools themselves and materially assists in the performance of their basic and fundamental religious educational purposes. The public funds spent under the Chapter 2 Program eliminates the need for religious schools to buy for themselves basic educational equipment and instructional material, which they can and will use in religious teaching as well as in secular courses. The Program simply cannot be disguised as aid to non-religious educational functions or as assistance directly to students.

The Chapter 2 Program, as applied in Jefferson Parish, is, in short, an impermissible, direct state subsidy for religious activity and not a limited or incidental aid to the schools that individual students may choose to attend. Such aid in this context has been unconstitutional at least since *Meek* and

Wolman. Neither *Agostini* nor any other case cited by Petitioners hold, or even suggest, otherwise.

C. The Chapter 2 Program Provides A Direct Subsidy Of Religious Schools, Which Is Prohibited By Controlling Law

Because the relevant principles underlying *Meek* and *Wolman* remain vital, the Fifth Circuit's decision striking down the Jefferson Parish's Chapter 2 Program should be affirmed.

The Chapter 2 Program puts significant responsibility for the overall educational program of religious schools on the government's shoulders. Under this Program, the state lends to parochial schools a wide array of general teaching tools: library books, reference books, slide projectors, television sets, tape recorders, other media equipment, maps, globes, other curricular aids, computers, and computer software. *See Helms v. Picard*, 151 F.3d 347, 367 (5th Cir. 1998). This equipment and material constitute the basic tools of a fully functioning school for use with a wide array of course material, religious and secular.

The Court's holdings in *Meek* and *Wolman* are directly applicable to the Chapter 2 Program at issue here. In *Meek*, the Court struck down a program that lent parochial schools the following kinds of instructional aids: periodicals, photographs, maps, charts, sound recordings, films, projecting equipment, recording equipment and lab equipment. *Meek*, 421 U.S. at 355. The program invalidated in *Wolman* would have provided parochial schools with similar types of educational aids:

projectors, tape recorders, record players, maps, globes, science kits, weather forecasting charts. *Wolman*, 433 U.S. at 249. Because the direct aid program here seeks to make available to parochial schools the same basic teaching tools that the Court struck down in *Meek* and *Wolman*, the Court should likewise strike down the Chapter 2 Program in Jefferson Parish.

POINT II.

EVEN ASSUMING THAT THE PROGRAM PROVIDES INDIRECT AID, IT IS UNCONSTITUTIONAL AS IT FAILS TO OFFER ADEQUATE SAFEGUARDS AGAINST DIVERSION OF PUBLIC FUNDS TO RELIGIOUS ACTIVITY

Even if the Court finds that the Chapter 2 Program provides only indirect aid to parochial schools, the Court should, for the reasons presented below and more fully in Respondents' Brief and the ACLU Brief, among others, invalidate the Program because it provides insufficient safeguards to prevent diversion of state benefits to religious purposes.

Indirect government aid to parochial schools has been permitted only where the nature of the aid prevents the schools from diverting it to advance religious indoctrination. *See, e.g., Agostini,* 521 U.S. at 229 (finding that the aid was available only to eligible students, was supplemental to the regular curricula and would not flow to religious schools on a school-wide basis); *Zobrest*, 509 U.S. at 13 ("The sign-language interpreter . . . will neither add to nor subtract from [the

religious] environment"); *Witters*, 474 U.S. at 488 (finding no aid "ultimately flowing to the [religious institution] as resulting from a state action sponsoring or subsidizing religion"); *Regan*, 444 U.S. at 656 (finding that the grading of state prepared tests by religious teachers presented no opportunity for the religious schools to control the content or result of the tests); *see also Lemon*, 403 U.S. at 616-17 (acknowledging that bus transportation, school lunches, public health services, and secular textbooks supplied to all students were non-divertible indirect aid and did not offend the Establishment Clause).

Public funds may only provide services that benefit the health and welfare of children and that cannot — because of the nature of the aid or the safeguards put in place — be readily, regularly and easily diverted to a religious purpose. *Compare Levitt v. PEARL*, 413 U.S. 472, 480 (1973) (striking down a program that funded tests created by religious schools "because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian functions") *with Regan*, 444 U.S. at 655-56 (upholding a program that reimbursed religious teachers for administering state prepared tests on secular subjects where procedures were in place to prevent the use of the tests in religious teaching). Thus, government aid may be rendered to religious schools only in the form of equipment and material that has "no substantial risk" of being diverted to "religious educational purposes." *Regan*, 440 U.S. at 656.

Non-divertability also underlies the Court's ruling in *Agostini*, where special education in secular subjects was delivered by public schoolteachers who, in turn, were

supervised by public officials. While publicly paid teachers should not be presumed to be incapable of avoiding impermissible religious instruction, *Agostini*, 521 U.S. at 226, instructional equipment and materials provided directly to religious schools for religious schoolteachers' use cannot benefit from the same presumption against divertability. The degree to which the educational materials maintain their religious neutrality depends wholly on the actions of religious school employees who control, effectively unsupervised by the state, the use of the state-provided equipment. Since these teachers and administrators, however, are employed by institutions founded for the purpose of providing religious education, it can be presumed that they will *seek* — not avoid — to use the material for religious purposes. With regard to the enforcement of Establishment Clause principles, the Court has found that religious educators have an *inherent* conflict. *Lemon*, 403 U.S. at 617.

Moreover, unlike *Agostini*, where public employees attempted at least one unannounced monthly visit to each teacher's classroom, here public employees neither perform on-site administration nor monitor how the equipment and materials are put to use. Indeed, given the nature of the equipment and materials at issue, unless constantly monitored, diversion of equipment and materials provided by the state under the Chapter 2 Program for religious purposes will be inevitable and will inevitably go undetected.

The instructional material and equipment loaned under the Chapter 2 Program in Jefferson Parish lends itself to use in all education – religious and secular – without

distinction.[6] A computer can be used to draft an essay about religious beliefs or visit a religious website just as readily as it can be used to draft a chemistry lab report or download information about the latest political upheaval overseas. A VCR can play a religious film as well as an American history documentary. A tape player can play hymns during a religious service as well as a sing-a-long tape featuring Sesame Street characters during a music lesson.

In short, because the instructional materials and equipment provided under Chapter 2 are easily divertable for religious purposes and there are insufficient assurances that these public benefits will not support the parochial schools' religious function, the Court should invalidate the Chapter 2 Program.[7]

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[6] In fact, the record reveals lapses (e.g., the purchase of 191 religious books in 1982 alone). *See Helms*, 151 F.3d at 368 ("When State Chapter 2 monitors visited the [School District] in April, 1985, the monitors found that 'the services, materials, equipment, [and] other benefits provided to nonpublic schools' in Jefferson Parish were not 'neutral, secular and non-ideological'").

[7] Alternatively, should the Court decide that the validity of this Program turns on the efficacy of the safeguards, we join the Solicitor General (Solicitor Gen. Br. at 46), and ask that the case be remanded so that the facts may be fully developed at trial.

CONCLUSION

For the reasons stated, *amici* National Committee for Public Education and Religious Liberty and Americans for Religious Liberty respectfully urge this Court to affirm the holding of the Court of Appeals insofar as that court held that the Chapter 2 Program for the provision of educational materials, books and equipment as applied and administered in Jefferson Parish violates the Establishment Clause of the First Amendment.

Dated: October 4, 1999

Respectfully submitted,

Marshall Beil
Philip Goldstein
Catherine A. Rogers
Christine M. Fecko
ROSS & HARDIES
65 East 55th Street
New York, New York 10022
212/421-5555
Attorneys for *Amici Curiae*