No. 98-1648

In the Supreme Court of the United States

GUY MITCHELL, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

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

BRIEF FOR THE SECRETARY OF EDUCATION

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QUESTION PRESENTED

Whether Title VI of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 7301 *et seq.*, which permits local educational agencies to lend supplementary, secular instructional materials and equipment purchased with federal funds to religious schools for the benefit of students, as part of a program also serving public school and non-sectarian private school students, is consistent with the Establishment Clause of the First Amendment when non-entangling safeguards are in place to prevent the equipment and materials from being used for the inculcation of religion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 151 F.3d 347. The opinion of the district court upholding the constitutionality of the challenged program (Pet. App. 79a-118a) is unreported, as is an earlier opinion of the district court declaring the challenged program unconstitutional and granting summary judgment to respondents (Pet. App. 137a-151a).[1]

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1998. A petition for rehearing was denied on January 13, 1999. Pet. App. 153a. The petition for a writ of

[1] Under this Court's Rule 12.6, the Secretary of Education is nominally a respondent in this case. For purposes of this brief, however, references to "respondents" are to the plaintiffs Mary L. Helms, et al.

certiorari was filed on April 13, 1999, and was granted on June 14, 1999. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Establishment Clause of the First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion."

Relevant portions of Title VI of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 7301 *et seq.*, are reprinted at Pet. App. 157a-177a. Relevant Department of Education regulations under Title VI of the ESEA, 34 C.F.R. Pt. 299, are reprinted at Pet. App. 178a-193a.

Reprinted in an appendix to this brief (App., *infra*, 1a-9a) are relevant portions of the Department of Education's February 1999 Guidance for Title VI of the ESEA. A complete copy of that Guidance has been lodged with the Clerk.

STATEMENT

1. This case involves an Establishment Clause challenge to the application, in Jefferson Parish, Louisiana, of a federal program that provides financial assistance to local educational agencies (LEAs) for education-improvement programs, and authorizes the LEAs to lend instructional equipment, instructional materials, and library materials purchased with that federal assistance to religious schools, as part of a program that also benefits students in public and nonreligious private schools.[2] The application of a related state program was also challenged. The federal program

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[2] In this brief, all references to "schools" (such as "religious schools") are to elementary and secondary schools, and not to postsecondary institutions such as colleges and universities.

was substantially amended twice during the course of this litigation and has had several titles; it is currently found at Title VI of the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89-10, as added by the Improving America's Schools Act of 1994, Pub. L. No. 103-382, Tit. I, § 101, 108 Stat. 3707-3716. See 20 U.S.C. 7301-7373. For simplicity we refer to the federal program as "Title VI"; previous decisions in this case referred to it as "Chapter 2."[3]

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[3] When this lawsuit was commenced, the federal program was known as Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, Tit. V, Subtit. D, 95 Stat. 469; see 20 U.S.C. 3811-3863 (1982). Subsequently, in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, Tit. I, § 1001, 102 Stat. 203-219, the program was amended and redesignated as Chapter 2 of Title I of the ESEA. See 20 U.S.C. 2911-2976 (1988). In 1994, the program was again redesignated as Title VI of the ESEA, see 20 U.S.C. 7301-7373, as explained in the text. Unless otherwise indicated, references in this brief to provisions of Title 20 of the United States Code are to the current (1994) edition.

The President has announced a proposal for the extensive revision of the ESEA upon the expiration of its current authorization at the end of Fiscal Year 2000. Copies of the text of the President's proposed legislation, along with a section-by-section analysis, have been lodged with the Clerk. Although that proposed revision would not extend the authorization for Title VI in its current form, programs similar to those that are currently funded under Title VI, permitting the loan to private schools, including religious schools, of computer hardware and software for instructional use, would be funded under an expanded Title III of the ESEA. Title III currently permits LEAs to use federal funds for the acquisition of hardware and software for use in classrooms and school libraries, see 20 U.S.C. 6844(3), requires LEAs to allow religious school students to participate in the benefits of those programs on an equitable basis, see 20 U.S.C. 8893(a)(1) and (b)(1)(D), and also requires that any benefits made available be secular, neutral, and nonideological, see 20 U.S.C. 8893(a)(2). The proposed revision of the ESEA, like the current Title III and Title VI, would authorize LEAs to lend computer hardware and software to schools (including religious schools) for the benefit of students attending those schools, would require LEAs to afford religious

a. Title VI authorizes financial assistance to LEAs and to state educational agencies (SEAs) to implement nine kinds of "innovative assistance" programs. See 20 U.S.C. 7351(a) and (b); see also Charter School Expansion Act of 1998, Pub. L. No. 105-278, § 2(2), 112 Stat. 2682. Among the kinds of programs that may be implemented with Title VI funds are programs "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program." 20 U.S.C. 7351(b)(2). As pertinent here, LEAs may now use Title VI funds to purchase computer hardware and software for instructional use; they may also use such funds to acquire supplementary instructional materials and library materials.[4]

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school students the opportunity to participate in program benefits on an equitable basis, and would contain statutory restrictions against the use of public funds or property for religious worship or instruction.

[4] When this case was commenced in 1985, the permitted purposes of financial assistance under the program were somewhat differently focused. In particular, the program then expressly permitted LEAs to use federal funds for (among other things) the acquisition and utilization of "instructional equipment and materials suitable for use in providing education in academic subjects for use by children and teachers in elementary and secondary schools." 20 U.S.C. 3832(1)(B) (1982). LEAs could, at that time, use federal funds to purchase instructional equipment such as slide projectors, cassette players, and filmstrip projectors, as well as computers. As a result of the 1988 amendments, the statute no longer expressly provides a broad authorization to LEAs to use federal funds to purchase "instructional equipment," but it does expressly authorize the acquisition of computer hardware for instructional purposes. See 20 U.S.C. 2941(b)(2) (1988); 20 U.S.C. 7351(b)(2).

Title VI requires that LEAs ensure that children enrolled in private nonprofit schools (as well as those in public schools) have the opportunity to benefit from programs financed with Title VI assistance. See 20 U.S.C. 7312, 7372. Moreover, Title VI expenditures by LEAs for private school students must "be equal (consistent with the number of children to be served) to expenditures * * * for children enrolled in the public schools of the [LEA], taking into account the needs of the individual children and other factors which relate to such expenditures." 20 U.S.C. 7372(b).

Any benefits provided to children in private schools, however, must be secular, and must not take the place of any benefits that the private school would offer or obtain in the absence of federal assistance. Thus, Section 7372 expressly provides that LEAs "shall provide for the benefit of such children in such [private] schools secular, neutral, and nonideological services, materials, and equipment." 20 U.S.C. 7372(a)(1); see also 20 U.S.C. 8897 ("Nothing contained in this chapter shall be construed to authorize the making of any payment under this chapter for religious worship or instruction."). Title VI also requires that the control of all Title VI funds "and title to materials, equipment, and property * * * shall be in a public agency * * * and a public agency shall administer such funds and property." 20 U.S.C. 7372(c)(1). In addition, any services provided for the benefit of private school students must be provided by "a public agency" or by a contractor who, "in the provision of such services, is independent of such private school and of any religious organizations." 20 U.S.C. 7372(c)(2). Further, Title VI funds for innovative-assistance programs must supplement, and in no case supplant, the level of funds that, in the absence of Title VI funds, would be made available for those programs from "non-Federal sources." 20 U.S.C. 7371(b).

An LEA that wishes to receive federal funds for a Title VI program must present an application to the pertinent SEA. The SEA is required to certify the LEA's application for funds if that application explains the planned allocation of funds among the nine kinds of programs permitted under the statute, sets forth the allocation of funds required to assure the participation of private school students in the program on an equitable basis, and provides assurance of compliance with the statute's various requirements, including the requirement that private school students participate equitably in secular benefits under the program. 20 U.S.C. 7353(a)(1)(A)-(B) and (3). The LEA must also agree to keep records sufficient to permit the SEA to evaluate the LEA's implementation of the program. 20 U.S.C. 7353(a)(4). The statute does not provide for review by the Department of Education of the LEA's application for Title VI funds.

b. The Secretary of Education, who is responsible for ensuring compliance with the requirements of Title VI, see 20 U.S.C. 7373(b), has issued regulations emphasizing the limitations on assistance that may be provided to children at private schools. Those regulations explain that services obtained with federal funds must supplement, and not supplant, services that the private school students would receive in the absence of the Title VI program. 34 C.F.R. 299.8(a).[5] The regulations also require that the LEA keep

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[5] Although the Department of Education has not had occasion to apply the statutory and regulatory provisions prohibiting use of Title VI funds to supplant funds from non-federal sources in the context of an enforcement proceeding involving a particular private school, it has applied the anti-supplantation rule of Title VI in the context of public agencies. The Department has stressed that Title VI funds may not be used for activities that, in the absence of Title VI funds, would have been funded from any non-federal source, even if that source would not have been the SEA or the LEA. See *Appeal of Louisiana*, E.A.B. Docket No. 11-(275)-88 (Dep't of Educ. May 1, 1989), slip op. 7; *Appeal of California*,

title to all property and equipment used for the benefit of private school students. 34 C.F.R. 299.9(a). In addition, LEAs may use Title VI funds only "to meet the special educational needs of participating children who attend a private school," and not for "[t]he needs of the private school." 34 C.F.R. 299.8(b). Finally, the LEA must "ensure that the equipment and supplies placed in a private school * * * [a]re used only for proper purposes of the program." 34 C.F.R. 299.9(c).

In February 1999, after the court of appeals issued its decision in this case, the Department of Education issued additional Guidance for SEAs and LEAs on the participation of private school children in Title VI. That Guidance addressed procedures that LEAs should follow, and safeguards that LEAs should impose, to ensure that Title VI benefits afforded to private school students are secular, neutral, and nonideological. See App., *infra*, 1a-9a. The Guidance explains that LEAs "should implement safeguards and procedures to ensure that Title VI funds are used properly for private school children." *Id.* at 4a. First, "it is critical that private school officials understand and agree to the limitations on the use of any equipment and materials located in the private school." *Ibid.* To that end,

> LEAs should obtain from the appropriate private school official a written assurance that any equipment and materials placed in the private school will be used only for

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E.A.B. Docket No. 34-(298)-88 (Dep't of Educ. Mar. 17, 1990), slip op. 11 (settled on appeal to Ninth Circuit) (both decisions lodged with the Clerk). The Department has also stated that "[c]entral to the statutory scheme for the use of grant funds is the planned, programmatic and evaluated educational experience. Federal assistance is not generic aid to be used haphazardly as an apparent need arises." *Ibid.* (internal quotation marks omitted). Therefore, a recipient may not use Title VI funds "to plug gaps in its own programs." *Ibid.*

> secular, neutral and nonideological purposes; that private school personnel will be informed as to these limitations; and that the equipment and materials will supplement, and in no case supplant, the equipment and materials that, in the absence of the Title VI program, would have been made available for the participating students.

Ibid.

Second, the Guidance makes clear that the LEA "is responsible for ensuring that any equipment and materials placed in the private school are used only for proper purposes." App., *infra*, 4a. Thus, the LEA should "determine that any Title VI materials * * * are secular, neutral and nonideological[,] * * * mark all equipment and materials purchased with Title VI funds so that they are clearly identifiable as Title VI property of the LEA[, and] * * * perform periodic on-site monitoring of the use of the equipment and materials[,] * * * includ[ing] on-the-spot checks of the use of the equipment and materials, discussions with private school officials, and a review of any logs maintained." *Id.* at 4a-5a. The Guidance also states that, to monitor compliance with the requirements of Title VI, "it is a helpful practice for private schools to maintain logs to document the use of Title VI equipment and materials located in their schools." *Id.* at 4a. Furthermore, the Guidance emphasizes that LEAs "need to ensure that if any violations occur, they are corrected at once. An LEA must remove materials and equipment from a private school immediately if removal is needed to avoid an unauthorized use." *Id.* at 5a; see also 34 C.F.R. 299.9(d).

2. In Louisiana, the State Bureau of Consolidated Educational Programs administers the Louisiana Title VI program. After Louisiana receives its Title VI funds from the federal government, the SEA allocates 80% of the funds to LEAs. Eighty-five percent of those funds is allocated to

LEAs based on the number of participating elementary and secondary school students in both public and private schools, and 15% is allocated based on the number of children from low-income families. Pet. App. 86a.

For the school year 1984-1985 (immediately before this lawsuit was commenced), the Jefferson Parish Public School System (JPPSS) received $655,671 in Title VI funds. Approximately 70% of that money ($456,097) was used for equipment, materials, and services at public schools in the JPPSS, and the remaining amount ($199,574) was used for Title VI programs provided to students at private schools in the district. Pet. App. 86a. For the school year 1986-1987, the JPPSS received $661,148 in Title VI assistance. Approximately 32% of that amount ($214,080) was used to provide Title VI benefits to private school students in the district. Of the $214,080 budgeted for private school students, $94,758 was spent to provide library and media materials, and $102,862 was spent for instructional equipment. *Id.* at 90a. With respect to the State of Louisiana as a whole, about 25% of the total Title VI allotment was used for children in private schools. *Id.* at 86a.

The State of Louisiana, in administering Title VI, "never transmits dollars to [any] non-public school." Pet. App. 87a (brackets in original omitted). Moreover, because the statute requires that a public authority retain title to all Title VI equipment and materials, such resources are provided only on loan to private schools, and "the ultimate authority [over those items] always rests with the public school system, not the nonpublic schools." *Ibid.*

The SEA and the LEA monitor the use of Title VI equipment and materials in private schools to determine whether they are used for purposes consistent with Title VI, including the requirement that they be used only for secular purposes. Title VI Guidelines issued by the Louisiana SEA emphasize to the LEAs that "the LEA must ensure that

[Title VI] equipment and materials * * * are used for secular, neutral and non-ideological purposes." J.A. 219a. The State Guidelines suggest that LEA representatives visit each private school site at least yearly and check the materials ordered to ensure that they are secular, neutral, and nonideological. *Ibid.* Representatives of the SEA visit each LEA every two or three years to review the LEA's implementation of the Title VI program, including the LEA's compliance with statutory requirements. Pet. App. 56a. In those monitoring visits, the SEA representatives examine whether the services, material, and equipment provided to private schools are secular, neutral, and non-ideological. J.A. 235a. In addition, the SEA encourages LEAs to have religious schools sign written assurances that Title VI equipment will not be used for religious purposes. J.A. 120a-121a, 260a-261a; Pet. App. 87a. The JPPSS has required signed assurances from each private school that material and equipment would be used in "direct compliance" with Title VI. J.A. 196a; Pet. App. 107a.

The record compiled below showed that, in Jefferson Parish, Ruth Woodward, the coordinator of Title VI programs in the JPPSS, is responsible for ensuring compliance with the requirements of Title VI regarding services for private school students. Woodward notifies private schools each year of the allotment of Title VI funds available for services to students at those schools; those notices are accompanied by a reminder from the Director of the SEA that Title VI prohibits the acquisition of religiously oriented materials. J.A. 155a-156a, 176a. Woodward visits each private school every year to discuss use of the Title VI equipment with a school official, to determine whether use of Title VI equipment is properly documented, and to make sure that Title VI equipment is marked as such. J.A. 141a-144a. Woodward specifically inquires of private school officials whether the Title VI equipment and materials are used for secular,

neutral, and nonideological purposes. J.A. 146a-147a, 178a. Woodward also personally reviews all requests by private schools for library books and instructional materials, such as videocassettes and filmstrips, under Title VI. If she concludes that requested books or instructional materials are inappropriate under Title VI (including the possibility that they are religiously oriented), she deletes those titles from the order. J.A. 137a-138a; Pet. App. 57a.[6]

3. In 1985, respondents brought suit in district court against federal, state, and local officials, claiming that several federal, state, and local programs as applied in Jefferson Parish, Louisiana, including Title VI, violated the Establishment Clause.[7] Respondents did not challenge Title VI on its face. Rather, they contended that one provision, authorizing federal funds to be used for the purchase of instructional equipment and materials, had been unconstitutionally applied in the Parish because such equipment and materials had been "transferred to nonpublic schools for their use." J.A. 40a. Respondents argued that the loan of instructional equipment and materials to religious schools under Title VI violated the Establishment Clause because (a) there were

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[6] This monitoring by state and local officials revealed occasional lapses from Title VI's requirement of secularity, which were corrected. A monitoring visit by the SEA to JPPSS revealed a possible inappropriate purchase of a religious book for a religious school library, which led to a recommendation by the SEA that JPPSS be more careful in its oversight of Title VI. Investigation by Woodward disclosed that the book in question had not in fact been purchased with Title VI funds. Pet. App. 90a-91a; see J.A. 129a-130a. Nevertheless, Woodward examined records of library book purchases before her tenure, and discovered that 191 books purchased and lent to religious school libraries were in possible violation of Title VI guidelines. Woodward ordered those books recalled and donated to a public library. Pet. App. 57a, 91a; J.A. 131a-132a.

[7] Other programs challenged in respondents' complaint, including a state counterpart to Title VI, see Pet. App. 71a, were also the subjects of decisions in the lower courts, but we do not address them in this brief.

allegedly no safeguards in place to prevent the property lent to the private schools from being used for religious purposes, and (b) any monitoring that would be useful in preventing the use of instructional equipment for religious purposes would create excessive entanglement between the government and private religious schools. *Ibid.*

After discovery, the parties cross-moved for summary judgment on the constitutionality of the JPPSS Title VI program. The district court initially ruled that the program was unconstitutional, and granted summary judgment to respondents on that issue. Pet. App. 137a-151a. The court concluded (*id.* at 148a-150a) that the loan of instructional equipment and materials to religious schools was impermissible under *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *Wolman* v. *Walter*, 433 U.S. 229 (1977), and *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974), which invalidated state programs that provided instructional equipment and materials to religious schools.

The government moved for reconsideration, and the district court reversed itself and upheld the JPPSS Title VI program. Pet. App. 82a-108a. The court relied on *Walker* v. *San Francisco Unified School District*, 46 F.3d 1449 (9th Cir. 1995), which upheld a "virtually indistinguishable" Title VI program under which instructional equipment, including computers, was lent to religious private schools. Pet. App. 107a. The court emphasized that, as in *Walker*, the instructional equipment and materials lent to private schools by the JPPSS are secular, Title VI benefits are made available to students on a neutral basis and without reference to religion, and all the controls in effect in *Walker* to prevent the use of Title VI equipment and materials for sectarian purposes are also in effect in the JPPSS program. *Ibid.* The court thus found that the JPPSS Title VI program "does not have as its

principal or primary effect the advancement or inhibition of religion." *Id.* at 108a.

4. Respondents appealed, and the court of appeals reversed. Pet. App. 1a-78a. The court held that the JPPSS Title VI program, insofar as it was applied to provide instructional equipment and materials and library materials to religious schools, was unconstitutional under this Court's decisions in *Meek* and *Wolman*. *Id.* at 53a-71a.

After examining this Court's decisions regarding aid to religious schools and students, particularly *Meek*, *Wolman*, *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), the court of appeals concluded that those decisions "drew a series of boundary lines between constitutional and unconstitutional state aid to parochial schools, based on the character of the aid itself." Pet. App. 66a. Whereas *Allen* had upheld the loan of textbooks to religious school students, *Meek* and *Wolman*, "while both reaffirming *Allen*, nevertheless invalidated state programs lending instructional materials other than textbooks to parochial schools and schoolchildren." *Id.* at 67a. The court of appeals also concluded that the "boundary lines" between permissible and impermissible assistance based entirely on the character of the aid had been reaffirmed by *Regan*, which upheld aid to religious schools for the administration of standardized tests developed and required by the State, and which "clarified that *Meek* only invalidates a particular kind of aid to parochial schools—the loan of instructional materials." *Id.* at 68a. The court rejected arguments (*id.* at 69a-70a) that *Meek* and *Wolman*, and their rule applying absolute "boundary lines," had been undermined by subsequent decisions such as *Agostini* v. *Felton*, 521 U.S. 203 (1997), which upheld a federal program under which public school teachers provide supplementary instruction to religious school students in those students' schools.

Applying *Meek* and *Wolman* to this case, the court concluded that Title VI was unconstitutional as applied in Jefferson Parish "to the extent that [it] permits the loaning of educational or instructional equipment to sectarian schools." Pet. App. 71a. The court's prohibitory decree "encompasses such items as filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc." *Ibid.* The decree also "necessarily prohibits the furnishing [to such schools] of library books by the State, even from prescreened lists." *Ibid.* The court could "see no way to distinguish library books from the periodicals . . . maps, charts, sound recordings, films, or any other printed and published materials of a similar nature prohibited by *Meek*." *Ibid.* (internal quotation marks and brackets omitted). "The Supreme Court has only allowed the lending of free textbooks to parochial schools; the term 'textbook' has generally been defined by the case law as 'a book which a pupil is required to use as a text for a semester or more in a particular class he legally attends.' We do not think library books can be subsumed within that definition." *Ibid.* (quoting *Allen*, 392 U.S. at 239) (citation omitted).

SUMMARY OF ARGUMENT

I. Title VI of the Elementary and Secondary Education Act of 1965, which permits local educational agencies (LEAs) to lend supplementary secular, neutral, and nonideological instructional equipment and materials to sectarian elementary and secondary schools as part of a neutral program also serving students in public and nonreligious private schools, may be applied in a manner consistent with the Establishment Clause. The Clause does not absolutely prohibit the government from lending secular instructional equipment and materials to religious schools for use in the secular

aspects of the education provided to students at those schools. Although the Court's decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Wolman* v. *Walter*, 433 U.S. 229 (1977), may indeed be read as the court of appeals read them, to hold that such loans of instructional materials and equipment are *per se* impermissible, the Court's subsequent decisions indicate that such a flat rule is no longer consistent with the Court's Establishment Clause jurisprudence. The Court's recent decisions suggest that a more flexible approach is warranted, and that government programs assisting the secular aspects of the educational functions of religious schools should be evaluated in a practical manner and on the facts of each case, to determine whether the assistance has the impermissible effect of advancing or inhibiting religion. The holdings of *Meek* and *Wolman* should therefore be modified to reflect the developments in the Court's case law.

A. *Meek* and *Wolman* rest on two rationales: first, that any assistance to pervasively sectarian institutions such as religious schools must inevitably result in the advancement of religion, and second, that any safeguards that would be adequate to prevent such assistance from being diverted to sectarian purposes would involve the government and religious schools in an impermissible degree of entanglement. These assumptions have been undermined by later decisions. First, later decisions have tended to examine whether safeguards in government programs and restrictions on the use of public resources are adequate to prevent a public aid program from being used for government indoctrination of religion. Second, the Court has relaxed its understanding of the Establishment Clause's restrictions on interaction between public and religious institutions, and has emphasized that only excessive entanglement, amounting to pervasive monitoring of religious institutions by public authorities, is forbidden by the Clause. Third, the Court has ascribed

greater analytical significance to the constitutional requirement that the aid be allocated under criteria that are neutral as to religion. While these decisions have arisen in different contexts and have not directly involved equipment and materials used in instruction at a religious school, their analysis of the requirements of the Establishment Clause is relevant here as well.

B. The Court's current analytical framework of the Establishment Clause's restrictions on government aid to religious schools is set forth in *Agostini* v. *Felton*, 521 U.S. 203 (1997). *Agostini* requires examination of three factors to determine whether a government aid program will have an impermissible effect with respect to religion. The first inquiry is whether the aid program involves the government in the inculcation of religious beliefs. That inquiry is not limited to examining whether the assistance provided by the government is itself secular in content; in the context of a religious school, safeguards (including statutory restrictions on the permissible uses of aid and monitoring to ensure that those restrictions are observed) are necessary to ensure that secular aid is not diverted to religious instruction. Second, the aid program must not be allocated in a manner that advances or inhibits religion; it must be allocated according to neutral criteria, and it must not constitute such a great subsidy of the religious school's secular functions that the school would be encouraged and enabled to shift its resources to its sectarian functions. Third, the safeguards to ensure that the aid remains secular and supplementary must not involve the public authority in pervasive monitoring of the religious school's functions.

C. Title VI may be applied in a manner that satisfies these constitutional requirements. The statute itself, as well as implementing regulations and Guidance of the Department of Education, make clear that a religious school may not use instructional equipment and materials for sectarian

purposes. The statute, regulations, and Guidance also make clear that the equipment and materials must supplement, and in no case supplant, resources that a religious school would have available from non-federal sources. If LEAs implement these requirements in a manner consistent with the statute, regulations, and Guidance, then public resources should not be used to advance religion. Instructional materials can be reviewed in advance to determine their secular content. Also, LEAs can and should require religious schools to explain how equipment and materials will be used, examine them at the religious school to determine whether their use is in fact for authorized purposes, and if there is evidence that equipment and materials are used for impermissible purposes, take corrective action, including removing the equipment and materials if necessary. The requirements that the aid be provided on a neutral basis and be supplementary should suffice to avoid any incentive for, or any indirect subvention of, sectarian activities. These requirements and safeguards can be implemented without intrusive monitoring of the religious schools' functioning, through undertakings by the schools, periodic inspection of the equipment and materials, and documentation of their use.

II. Because the court of appeals examined the Title VI program at issue in this case under the flat rule of *Meek* and *Wolman*, it did not address whether the program would meet the fact-sensitive standards outlined herein. The Court may therefore wish to remand this case for a determination by the court of appeals in the first instance whether the program at issue here satisfies those standards. If the Court does not remand the case and proceeds to make that determination itself, it should conclude that the JPPSS program is valid. The program is neutral as between religious and secular schools. Respondents have failed to establish that the safeguards in place are insufficient to prevent the

diversion of equipment and materials to sectarian purposes, or that the program as implemented violates the requirement that resources lent to religious schools be supplementary. Nor do the safeguards implemented by the LEA involve pervasive monitoring of religious schools by public authorities. The judgment of the court of appeals invalidating the program should therefore be reversed.

ARGUMENT

I. INSTRUCTIONAL EQUIPMENT AND MATERIALS MAY BE LENT TO RELIGIOUS SCHOOLS UNDER TITLE VI IN A MANNER CONSISTENT WITH THE ESTABLISHMENT CLAUSE

The court of appeals invalidated the Title VI program at issue in this case on the ground that *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Wolman* v. *Walter*, 433 U.S. 229 (1977), flatly prohibit public authorities from lending instructional equipment and materials to religious schools for the benefit of their students.[8] Moreover, the court of appeals held that

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[8] For ease of reference, we refer hereafter in this brief to the aid at issue as "instructional equipment and materials." By "instructional equipment," we refer to equipment of substantial value that is used in classroom instruction but does not itself have instructional content, such as a computer monitor or slide projector. By "instructional materials," we refer to educational materials that do have instructional content, such as workbooks, CD-ROMs, filmstrips, and recorded videos. The line between equipment and materials is not necessarily bright, however, and the terms are more useful as shorthand for concepts than as precise categorical definitions. See also J.A. 89a (SEA's working definition of instructional equipment and materials).

This case also involves a challenge to the loan of equipment and materials to religious schools for use in their school libraries, as well in classrooms. Any Establishment Clause restrictions on the loan of equipment and materials for religious school libraries are necessarily no stricter than the restrictions on loan of equipment and materials for classroom use. Students are generally likely to use library equipment and materials on

invalidation of the program was compelled by the character of that aid alone, irrespective of whether the aid is supplementary to services and materials otherwise provided by the religious school to its students, or whether the aid is accompanied by safeguards to prevent the equipment and materials lent to religious schools from being diverted to sectarian purposes. The question before the Court is whether such a flat prohibition reflects a correct understanding of the Court's current Establishment Clause jurisprudence, or whether, in light of recent decisions, it is appropriate to adopt a less categorical rule—permitting the loan of instructional equipment and materials to religious schools where the aid is part of a neutral program also serving public school and nonsectarian private school students, the aid is accompanied by safeguards that prevent its diversion to sectarian purposes, such safeguards are not impermissibly entangling, and the aid is supplementary rather than a direct subsidy of the religious school's core educational program.[9]

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their own, rather than under the direct supervision of a classroom teacher, and so there is a diminished likelihood that the loan of library equipment and materials will lead to government-financed inculcation of religion. Even if a student uses the library equipment and materials for purposes of completing assignments, that student will make, at least initially, an independent analysis of the information that he or she finds in the library. Some schools may use library equipment and materials in classroom instruction as well; in such cases the standards we discuss in this brief regarding instructional equipment and materials should govern such library equipment and materials when used in the classroom.

[9] The only Establishment Clause issue in this case is whether such loans of instructional equipment and materials to religious schools would have the prohibited *effect* of advancing religion. This Court has consistently held that, to survive Establishment Clause scrutiny, government aid affecting religiously-affiliated institutions must have a secular purpose, and must not have the principal or primary effect of advancing or inhibiting religion. See *Agostini* v. *Felton*, 521 U.S. 203, 222-223 (1997). No question about purpose arises in this case, for it is undisputed that

Meek and *Wolman* may fairly be read as the court of appeals read them, but we submit that what this Court has identified as the fundamental principles of the Establishment Clause do not require a categorical rule prohibiting in all cases the loan of instructional equipment and materials to religious schools. The Court's more recent decisions, culminating in *Agostini* v. *Felton*, 521 U.S. 203 (1997), indicate that the Court no longer adheres to certain broad assumptions underlying the decisions in *Meek* and *Wolman*—namely, that any assistance to the educational function of a religious school necessarily results in the advancement of religion, and that the interaction between religious schools and public educators that would be necessary to prevent such assistance from being used for sectarian purposes is presumptively impermissible. Rather, the more appropriate questions are practical ones: whether equipment and materials lent to a religious school by public authorities will be used for the inculcation of religion; whether such aid is provided in a manner that favors or disfavors religious schools; and whether the aid indirectly results in a subvention of religion

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Title VI, including its provision for loan of instructional equipment and materials to religious schools (along with public and nonsectarian private schools), has the valid secular purpose of advancing the secular aspects of elementary and secondary education. See *Wolman*, 433 U.S. at 236 (plurality opinion) (loan of instructional equipment and materials to religious schools reflected State's "legitimate interest in * * * providing a fertile educational environment for all [its] schoolchildren"); *Meek*, 421 U.S. at 363 (accepting "legitimacy of [the] secular legislative purpose" of "extending the benefits of free educational aids to every schoolchild"). In addition, the Court has previously undertaken a separate inquiry into whether a program would foster excessive entanglement between government and religion. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). In *Agostini*, the Court made clear that the entanglement inquiry is to be undertaken as part of the analysis of the challenged program's effect. See 521 U.S. at 232-233.

by enabling a religious school to shift significant resources to sectarian functions.

That practical approach requires an examination of the facts of a particular program, rather than the application of blanket rules. The Court's decisions suggest three principles to guide such an examination. First, when the aid provided under a program is not itself religious in content, and when there are attendant safeguards to ensure that the aid is not diverted to sectarian purposes, then the program will not result in government-financed inculcation of religion. Second, when the program is for the equal benefit of students in public and private schools on the same basis, and when the program does not assume the costs of a religious school's core educational functions, then it will not favor or disfavor religious education. Third, when the program is designed so that the accompanying safeguards do not inhibit a sectarian school's ability to fulfill its religious mission and do not require close supervision by public authorities of classroom instruction, then the program should not result in an excessive entanglement between government and religion. Title VI's provision for loans of instructional equipment and materials to religious schools may be applied in a manner consistent with these principles.

A. The Court Has Abandoned The Premises Of A Blanket Rule Prohibiting All Loans Of Instructional Equipment And Materials To Religious Schools

The categorical rule articulated in *Meek* and *Wolman*, prohibiting all loans of instructional equipment and materials to religious schools, rests on two rationales, both of which are subject to reexamination in light of the Court's subsequent decisions, including *Agostini*.

1. The first rationale of *Meek* and *Wolman* is that, because religious elementary and secondary schools are typically considered pervasively sectarian, any aid to the educa-

tional function of such schools advances the religious as well as the secular aspects of the education that they provide, which are deemed to be inextricably intertwined. Thus, in *Meek*, although the Court noted that the instructional materials and equipment at issue were inherently secular, see 421 U.S. at 365, it nonetheless concluded that any substantial aid to the educational function of a religious school "necessarily results in aid to the sectarian school enterprise as a whole," and thus "inescapably results in the direct and substantial advancement" of religion, *id.* at 366. See also *Wolman*, 433 U.S. at 249-250 ("even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise").

Since *Meek* and *Wolman*, however, the Court has "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. Instead of applying such a blanket prohibition, the Court has more recently examined whether government aid affecting a religiously-affiliated organization is accompanied by safeguards to ensure that the aid does not result in government-financed inculcation of religion. Thus, in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), the Court upheld a New York statute that provided for nonpublic school employees to administer and grade state-required achievement tests (including tests involving essay questions not subject to standardized scoring) and also reimbursed the schools for the cost of administering and scoring the tests. The Court stressed that "the chance that grading the answers to state-drafted questions in secular subjects could or would be used to gauge a student's grasp of religious ideas was minimal, especially in light of the complete state procedures designed to guard against serious

inconsistencies in grading and any misuse of essay questions." *Id.* at 656 (internal quotation marks omitted); cf. *id.* at 657 (observing that, "if the grading procedures could be used to further the religious mission of the school, serious Establishment Clause problems would be posed"). The Court also found no Establishment Clause problem in the state reimbursement, for "the New York law provide[d] ample safeguards against excessive or misdirected reimbursement," *id.* at 659, in that the services for which reimbursement was made were "discrete and clearly identifiable," and the reimbursement process was "straightforward and susceptible to * * * routinization," *id.* at 660. Thus, the Court concluded, the grading and reimbursement scheme was permissible because "it had been shown with sufficient clarity that [it] would serve the State's legitimate secular ends without any appreciable risk of being used to transmit or teach religious views." *Id.* at 662.

In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court ruled that a school district may, consistent with the Establishment Clause, provide and pay for a sign-language interpreter to assist a disabled student at a sectarian high school. The Court held that the provision of the interpreter could not be understood as *government* advancement of religion, because "ethical guidelines require interpreters to transmit everything that is said in exactly the same way it was intended," and the interpreter "will neither add to nor subtract from [the religious school] environment" independently chosen by the student's parents for his education. *Id.* at 13 (internal quotation marks omitted); see also p. 30, n.13, *infra*.

Outside the religious school context, the Court has similarly emphasized the existence of safeguards in other government programs that provide assistance to religious organizations. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court upheld on its face a federal grant statute which pro-

vided funding for services relating to adolescent sexuality and pregnancy, and which permitted religiously-affiliated organizations to receive grants under the program. The Court first noted that, in previous Establishment Clause cases involving grants, it had "referred not only to the language of the statute but also to the manner in which it had been administered in practice." *Id.* at 601. The Court also observed that "[t]he services to be provided under the [statute] are not religious in character," *id.* at 604-605, and that Congress had clearly expressed the intent that grant funds were not to be used "to promote religion, or to teach the religious doctrines of a particular sect," *id.* at 614-615. Although the Court recognized the possibility that grantees might misuse funds for sectarian purposes, it stressed that grantees were obligated "to disclose in detail exactly what services they intend to provide and how they will be provided," they were further required to make reports on their uses of funds, and the government was authorized to monitor the grantees "to determine whether the funds [were], in effect, being used by the grantees in such a way as to advance religion." *Id.* at 615. "These provisions, taken together, create[d] a mechanism whereby the Secretary [could] police the grants * * * to ensure that federal funds are not used for impermissible purposes." *Ibid.*[10]

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[10] In *Kendrick*, the Court distinguished the case before it from previous cases (including *Meek*) that involved assistance to "pervasively sectarian" institutions such as religious schools, and found the case more comparable to other decisions involving aid to postsecondary religious institutions, which have not been presumptively considered pervasively sectarian. See 487 U.S. at 611, 616. The Court did not rule in *Kendrick*, however, that any grant under the challenged statute to a pervasively sectarian institution would inevitably be unconstitutional, without regard to the way in which such a religious institution actually used its grant money. See *id.* at 610 (noting that, in previous cases, a *relevant factor* had been whether the statute directed aid to pervasively sectarian insti-

In *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), the Court held that the Establishment Clause does not prohibit a state university from making disbursements from a student activities fund to a third-party contractor for the benefit of a religiously-oriented student group (in that case, for the expenses of

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tutions); see also *id.* at 624-625 (Kennedy, J., concurring) (suggesting that the relevant "question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant").

While we submit that the Establishment Clause does not flatly prohibit the loan of instructional materials and equipment even to "pervasively sectarian" religious schools under certain circumstances, we do not suggest there is no constitutionally pertinent distinction between religious schools and other religiously-affiliated institutions that have not been considered pervasively sectarian. The Court has observed on several occasions that, as a general matter, religiously-affiliated postsecondary institutions—unlike religious elementary and secondary schools—are not so infused with a religious character that it is appropriate to presume that instruction at those postsecondary institutions will have religious content. See *Roemer* v. *Board of Pub. Works*, 426 U.S. 736, 762 (1976) (plurality opinion); *Hunt* v. *McNair*, 413 U.S. 734, 743-744 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 680-682 (1971) (plurality opinion). The Court has consistently considered sectarian elementary and secondary schools to be different from religiously-affiliated postsecondary institutions, and we do not disagree. As a result, although the government should not be prohibited as a blanket matter from assisting the educational function of a religious school by lending it instructional equipment and materials, it may be that more extensive safeguards will be necessary to prevent the diversion of such equipment and materials to sectarian purposes than are required in the case of a religiously-affiliated postsecondary institution. If such safeguards are in place, the question then is whether they are so intrusive as to be impermissibly entangling. As we explain (pp. 27-28, *infra*), while the Court in *Meek* believed that any safeguards adequate to prevent such diversion would involve excessive entanglement, the Court has subsequently adopted a more permissive view towards safeguards of this nature, and the Court's discussion about the entangling aspect of safeguards in *Meek* (421 U.S. at 366 n.16) does not reflect the Court's current jurisprudence on that point.

printing the religious group's newsletter), as part of a neutral program of benefits available to student organizations related to the educational purpose of the university. The Court stressed that safeguards accompanying the university's program of funding student activities eliminated any realistic danger that the university would be identified as the promoter of the religious group's speech: the university took "pains to disassociate itself from the private speech," *id.* at 841, it made payments to a contractor rather than to the religious group, *id.* at 843, and the payments were made for discrete and readily verifiable expenses, *id.* at 844.[11]

In *Agostini*, the Court summarized its recent cases as having "modified" in "significant respects" the approach it had previously used to assess the danger of government indoctrination of religion in a government-aid program affecting religious schools. 521 U.S. at 223. *Agostini*, to be sure, involved a situation distinct from this one, in which instructional assistance was provided directly by public school personnel to religious school students. But, for present purposes, the important point about *Agostini* is that the Court declined to *presume* that any public employee who works on the premises of a religious school would inculcate religion in his or her work, see *id.* at 222, 224, 226, given the "detailed set of written and oral instructions" directing

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[11] In her concurring opinion in *Rosenberger*, Justice O'Connor also underscored the existence of the safeguards. She agreed that the university's disclaimer of control over independent student groups ensured that it would not be seen as endorsing the magazine's religious perspective, and that the practice of directing payment to a third-party contractor rather than directly to the religious student group "ensure[d] that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective," and made the program "unlike a block grant to religious organizations." 515 U.S. at 849-850 (O'Connor, J., concurring).

public school teachers to avoid introducing religious matter into their instruction or becoming involved in the religious activities of the private schools, *id.* at 211. *Agostini* therefore suggests that the likelihood that government assistance to the educational function of a religious school will advance religion should not be analyzed under blanket rules and presumptions, but rather with respect to the particular context, including an evaluation of safeguards in place to prevent government support of sectarian activities.

2. *Meek* and *Wolman* also appear to rest on the rationale that the implementation of any safeguards to prevent the diversion of instructional equipment and materials to sectarian purposes would require continual interaction between public authorities and religious schools, and would therefore result in an impermissible entanglement between state and religion. See *Meek*, 421 U.S. at 366 n.16 (discussing lower-court decision and *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974)); see also 421 U.S. at 370-372 (relying on entanglement to invalidate provision of auxiliary services to students by public school personnel at religious schools); *Wolman*, 433 U.S. at 254 (relying on entanglement to invalidate state expenditures for religious school students' field trips); *Aguilar* v. *Felton*, 473 U.S. 402, 410-414 (1985) (similar; relying on *Meek*'s discussion of entanglement), overruled by *Agostini*, *supra*.

But again, in later cases, including *Agostini*, this Court has indicated that the stringency of its previous rules against interaction of public and religious institutions should be relaxed. In *Kendrick* (which did not involve grants to "pervasively sectarian" schools, see p. 24, n.10, *supra*), the Court referred critically to the entanglement analysis that prohibits interaction of public and religious institutions sufficient to ensure that public aid is applied to permissible purposes as a kind of "'Catch-22' argument: the very super-

vision of the aid to assure that it does not further religion renders the statute invalid." 487 U.S. at 615. The Court in *Kendrick* found no excessive entanglement in the government's review of educational materials that a grantee proposed to use, or government employees' visits to clinics and offices where the grant programs were being carried out, to ensure that the program was being administered in accordance with statutory and constitutional requirements. *Id.* at 617.

In *Agostini*, the Court did not abandon entanglement analysis as an aspect of the Establishment Clause, as some had suggested that it do, but it made clear that "[i]nteraction between church and state is inevitable, and we have always tolerated some level of involvement between the two." 521 U.S. at 233 (citation omitted). Accordingly, the Court stressed that entanglement "must be 'excessive' before it runs afoul of the Establishment Clause." *Ibid.* Further, in the context of government aid affecting the educational function of religiously-affiliated schools, the Court emphasized that mere administrative cooperation in establishing the details of a government program will not constitute excessive entanglement. *Ibid.* Rather, the danger of entanglement will be recognized only if the government program requires "*pervasive* monitoring" of religious school functions by public authorities. *Id.* at 234. In that case, the Court found no threat of "pervasive monitoring" in unannounced monthly visits to religious school sites by public school supervisors to ensure that the public school teachers at those sites carry out the program properly. *Ibid.*

3. Finally, the Court's recent decisions have placed considerable weight on a factor that was given little consideration in the parts of either *Meek* or *Wolman* at issue here: whether "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." *Agostini*, 521 U.S. at 231.[12] In *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court ruled that the Establishment Clause does not forbid a state agency from providing a vocational rehabilitation grant to a student who wishes to use the grant at a sectarian college for training in a religious field. The Court stated in that case that, although

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[12] In the pertinent parts of *Meek* and *Wolman*, the Court did not specifically address whether the instructional materials and equipment were to be made available to religious and secular schools on a neutral basis, perhaps because the statutes under challenge in those cases were framed specifically to provide aid to nonpublic schools, the great majority of which were sectarian. See *Meek*, 421 U.S. at 354-355, 363-364; *Wolman*, 433 U.S. at 233-234. Rather, the Court's principal emphasis was on the fact that the aid was provided directly to the school rather than to the student. See *Meek*, 421 U.S. at 362-363 (noting that, "[a]lthough textbooks are lent only to students," instructional materials and equipment are provided "directly to qualifying nonpublic elementary and secondary schools"); *Wolman*, 433 U.S. at 250.

We do not suggest, however, that the Court in *Meek* and *Wolman* based its decisions invalidating the statutes authorizing the loan of instructional equipment and materials to religious schools on the ground that those statutes were not neutral, or favored religious schools over secular schools. The Court observed in *Meek* that the challenged statute was intended to treat private and public schools equitably, by extending to private schools benefits that had already been made available to public schools. See 421 U.S. at 351-352, 363. The statute in *Wolman* might have been more difficult to characterize as neutral, for the instructional equipment and materials at issue in that case (such as weather forecasting charts, globes, and science kits) were purportedly provided directly to nonpublic school students rather than to schools (as had been the case in *Meek*). See 433 U.S. at 249-250. It is doubtful that the State pursued a similar policy of providing instructional equipment directly to public school students. The Court found that "the technical change in legal bailee" from nonpublic school to student was of no consequence, and that the actual recipient of the aid was the nonpublic school, *id.* at 250, but the Court did not state whether the aid program was properly considered neutral.

the State may not provide a "direct subsidy" to a religious school, the Establishment Clause is not violated merely because a religious institution receives resources "previously in the possession of a State." *Id.* at 486-487. The Court also emphasized that the aid was "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," and was "in no way skewed towards religion." *Id.* at 487-488. Similarly, in *Zobrest*, where the Court ruled that a school district may furnish a state-paid interpreter to assist a disabled student at a religious secondary school, the Court stressed that the service at issue was "part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled,'" and created "no financial incentive for parents to choose a sectarian school." 509 U.S. at 10. The Court summarized that, "[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that is in no way skewed towards religion, it follows * * * that provision of that service does not offend the Establishment Clause." *Ibid.* (internal quotation marks and citation omitted).[13]

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[13] *Witters* and *Zobrest*, of course, involved aid provided by the government directly to students (who made an independent decision whether to use that aid at religious or secular institutions) rather than aid provided to a religious institution for its use in secular education. See *Zobrest*, 509 U.S. at 9-10; *Witters*, 474 U.S. at 486; see also *Agostini*, 521 U.S. at 226. Those decisions, however, do not establish as an absolute constitutional rule that aid must be provided to students directly by the government rather than through a religious organization, and much of the Court's reasoning in those decisions, as summarized in the Court's general analytical framework set forth in *Agostini*, is applicable to this case as well. Appropriate regard, however, must be given for the difference in context, and so, when aid is provided directly to religious schools, safeguards preventing the use of those resources for sectarian purposes are necessary to avoid the government's participation in the inculcation of religion.

Kendrick and *Rosenberger* also emphasized the neutrality of the programs at issue in those cases. In *Kendrick*, the Court rejected the argument that the challenged statute was invalid because it enlisted religiously-affiliated organizations in preventing adolescent pregnancy and sexuality; the Court observed that participation in the grant program was open to both religious and nonreligious organizations, and that the statute observed "a course of neutrality" among them. 487 U.S. at 607; see *id.* at 608 ("nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution"). In *Rosenberger*, the Court explained that "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion," 515 U.S. at 839, and found the exclusion of a religiously-oriented group from the university program insupportable in light of the program's overall "neutral * * * design," *ibid.* *Agostini* summarized these developments in the Court's jurisprudence by stating that, "where 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[,] * * * the aid is less likely to have the effect of advancing religion." 521 U.S. at 231.

B. The Establishment Clause Permits The Loan Of Supplementary, Secular Instructional Equipment And Materials To Religious Schools, Under A Neutral Program And Accompanied By Nonentangling Safeguards To Ensure That The Equipment and Materials Are Not Diverted To Sectarian Purposes

The developments in the Court's jurisprudence discussed above indicate that a blanket rule invalidating all loans of instructional equipment and materials to religious schools is

no longer consistent with the Court's Establishment Clause jurisprudence, and that insofar as *Meek* and *Wolman* articulate such a blanket rule, the reasoning they reflect has been superseded (whether or not the precise outcomes on the facts of those cases remain correct, see pp. 42-43, *infra*). Rather, in evaluating whether a government program has the impermissible effect of advancing or inhibiting religion, the Court considers three factors outlined in *Agostini*:

1. First, the program must not result in "government inculcation of religious beliefs." 521 U.S. at 223. That prohibition is stated at a high level of generality, and might be interpreted several different ways. 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. If the Court's statement in *Agostini* were interpreted that way, then presumably it would also be permissible for the government to provide, for example, building materials to a religious school (as long as those materials, or a range of similar benefits, were provided neutrally to all schools), which the religious school could then use as it wished, even to build a chapel. Such a rule, however, would contradict several of this Court's decisions, beyond *Meek* and *Wolman*.[14] Indeed,

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[14] See *Committee for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 774 (1973) (invalidating loans to religious schools for maintenance and repair because "[n]othing in the statute * * * bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel"); *Tilton*, 403 U.S. at 682-683 (plurality opinion) (invalidating 20-year restriction on government's recoupment of construction grants made to religious universities if grants are used in violation of statutory purposes, because, "at the end of 20 years, the building [could be] converted into a chapel"); see also *Roemer*, 426 U.S. at 747 (plurality

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, an outcome that would be difficult to square with *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which prohibits public payment for the salaries of religious school teachers. Thus, the Court's reference in *Agostini* to a prohibition against "government inculcation of religious beliefs," 521 U.S. at 223, presently encompasses, in our view, a requirement that public authorities not make resources directly available to religious schools in the absence of adequate assurance that the resources will not be used for the inculcation of religion.[15] At a minimum, it is unnecessary in this case to consider whether the Establishment Clause permits the government to provide equipment and materials to religious and secular schools on a neutral basis *without* a requirement that such equipment and materials not be used for the inculcation of religion, for as we explain below (pp. 37-50, *infra*), Title VI itself has such a requirement, and has been implemented by the JPPSS in conformity with that restriction.

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opinion) ("The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity.").

[15] Cf. *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring) (summarizing previous cases as holding that government may fund "secular functions performed by sectarian organizations" but may not allow "the use of public funds to finance religious activities"); *id.* at 852 (cautioning that Court's decision "neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence"); *Kendrick*, 487 U.S. at 623 (O'Connor, J., concurring) (emphasizing that "*any* use of public funds to promote religious doctrines violates the Establishment Clause").

But while the government may not directly subsidize the inculcation of religious beliefs, it does not necessarily act in a prohibited manner when it assists only the secular aspects of education. This Court has long recognized that point in upholding grant programs in which religious colleges and universities, and their students, have been allowed to participate, as long as their participation is restricted to nonsectarian activities. See *Roemer* v. *Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Tilton* v. *Richardson*, 403 U.S. 672 (1971). To be sure, those cases did not involve benefits provided to religious elementary and secondary schools, which the Court has characterized as "pervasively sectarian." See *Hunt*, 413 U.S. at 743; see also p. 24, n.10, *supra*. And yet the Court has also upheld at least some assistance to the educational function of religious schools, where there was adequate assurance in the program that the aid would not be used for the religious aspects of the education. *Agostini* upheld the provision by public school teachers to religious school students of secular instruction that was supplementary to the education provided by religious schools; *Regan* upheld state reimbursement for administration of secular tests by religious schools; and even *Meek* and *Wolman* reaffirmed the Court's holding in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), that secular textbooks may be lent to students at religious schools, as long as there are "protections against abuse" in the textbook-loan program. See *Wolman*, 433 U.S. at 237-239 (plurality opinion); *Meek*, 421 U.S. at 361-362 (plurality opinion). Therefore, in examining whether an aid program will result in government indoctrination of religion, the question to be decided is whether, on the facts of the actual program, including any safeguards required or actually in place, public resources will be used for inculcation of religious beliefs.[16]

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[16] In addition, not every classroom discussion of religion accompanied

2. The second important factor under *Agostini* is whether the program is administered under "criteria [that] might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." 521 U.S. at 231. It may be safe as a general matter to conclude that such an incentive is not present when a program applies neutrally to public schools and to religious and secular private institutions, but while neutrality is a necessary condition to prevent a public program from favoring religion, it may not always be sufficient to do so. There is also a concern that excessive public subsidies to the secular functions of a religious institution that pursues both religious and secular goals may allow, indeed encourage, a substantial shift of the institution's resources to sectarian purposes.

To be sure, the Court has in other contexts rejected the argument that, "in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends." *Roemer*, 426 U.S. at 747 (plurality opinion); see also *Committee for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 775 (1973). But *aiding* the secular functions of a religious school is not the same as *assuming* the secular functions of a religious school. If, for example, the government offered to assume the costs of teaching secular subjects in both religious and secular

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by Title VI equipment and materials is prohibited by the Establishment Clause, just as not every discussion of religion is prohibited in public schools. Even in the public school setting, religious issues may arise during classroom discussion, and it is not necessarily inappropriate for a teacher to address those issues, provided that the discussion does not convert the fundamental nature of the instruction into the inculcation of religious beliefs. And of course it would be difficult to teach some subjects, such as American colonial history, without examining the role of religion. What is prohibited, under *Agostini*, is government-funded *advancement* of religion, not government-funded discussion of religion.

schools, upon a representation by a school that such assistance were needed, then religious schools would be enabled, and perhaps encouraged, to shift their resources to religious purposes and request the subsidy for the secular aspects of their instruction. Thus, when the Court reexamined *Meek*'s prohibition against loans of instructional equipment and material in *Zobrest*, it observed (509 U.S. at 12) that the program in *Meek* "relieved sectarian schools of costs they otherwise would have borne in educating their students."

The example discussed above, and the language quoted from *Meek* in *Zobrest*, suggests that the Court presently recognizes limits to the permissibility even of neutral assistance, with safeguards, to religious schools. One important limit may be the very factor identified in *Zobrest*—namely, whether the government relieves religious schools of costs they otherwise would have borne, and thereby enables religious schools to shift substantial resources to sectarian functions. It is therefore appropriate to consider whether the government aid is supplementary to the core educational function of the religious schools (as well as the nonsectarian schools). If the aid is supplementary, and if there are safeguards in place to ensure that it remains so, then the religious school will not shift resources from its secular to its religious functions, and there will be little danger that the aid will be used as an indirect subvention of religious activities. Cf. *Agostini*, 521 U.S. at 229-230 (upholding services supplementary to religious schools' regular curricula, and observing that such services do not result in "greater financing of religious indoctrination").

3. Finally, under *Agostini*, the program, including any safeguards to prevent diversion of resources to sectarian purposes and to ensure the supplementary nature of the program, must not result in excessive entanglement between government and religion. 521 U.S. at 232-233. The Court has definitively rejected the position that governmental re-

view of the administration of an aid program to ensure that it serves secular rather than religious ends must inevitably involve the government in excessive entanglement with religious institutions. See *id.* at 233 (discussing review held permissible in *Kendrick* and *Roemer*). The anti-entanglement principle therefore does not prohibit all governmental review of a religious institution's secular functions, at least where that review is similar to the monitoring of secular institutions. What is prohibited is *pervasive* monitoring. See *id.* at 234. The pertinent question is whether the program requires "comprehensive, discriminating, and continuing state surveillance" of a religious institution's functions. *Lemon*, 403 U.S. at 619.

C. Under Title VI, Instructional Equipment And Materials May Be Lent To Schools In A Permissible Manner

Under the principles outlined above, LEAs may permissibly use Title VI funds to lend instructional equipment and materials to religious schools for the benefit of their students.

1. Instructional equipment and materials may be lent to religious schools under Title VI without fostering government-financed inculcation of religion. The statute itself, along with administrative implementation of it, provides substantial assurance that aid will not be used for religious indoctrination. Title VI itself requires that all benefits under the program be secular, neutral, and nonideological, and prohibits the use of benefits for religious worship or instruction. 20 U.S.C. 7372(a)(1), 8897. Further, title to all equipment and materials lent to a private school must remain with the public agency, and under no circumstances may funds be provided directly to a private school. 20 U.S.C. 7372(c)(1). It would therefore be plainly inconsistent with Title VI for a school to use equipment and

materials lent to it for religious indoctrination, or for an LEA to provide a religious school with such equipment and materials with knowledge that they would be used for sectarian purposes. Should evidence come to light that a religious school has misused the equipment and materials on loan, the LEA must retrieve them. 34 C.F.R 299.9(d).

Administrative implementation of Title VI underscores the statute's restrictions against use of instructional equipment and materials for sectarian purposes. The Department of Education's regulations make clear that the LEA may not provide funds directly to a private school, the LEA must keep title to all materials and equipment, and equipment and materials must benefit only the students at a private school, and not the school. 34 C.F.R. 299.8(a), 299.9; see pp. 6-7, *supra*.

The Department of Education's Title VI Guidance elaborates further on these requirements. See pp. 7-8, *supra*; App., *infra*, 1a-9a. The Guidance states, in particular, that LEAs "should implement safeguards and procedures to ensure that Title VI funds are used properly for private school children." *Id.* at 4a. To that end, LEAs should obtain from each private school a written undertaking that any equipment and materials placed in the private school will be used only for secular, neutral, and nonideological purposes; that private school personnel will be informed as to these limitations; and that the equipment and materials will supplement, and in no case supplant, the equipment and materials that, in the absence of the Title VI program, would have been made available for the participating students. *Ibid.* In addition, the LEA must ensure that equipment and materials lent to a private school "are used only for proper purposes." *Ibid.* Thus, the LEA should "determine that any Title VI materials * * * are secular, neutral and nonideological[,] * * * mark all equipment and materials purchased with Title VI funds so that they are clearly

identifiable as Title VI property of the LEA[, and] * * * perform periodic on-site monitoring of the use of the equipment and materials[,] * * * includ[ing] on-the-spot checks of the use of the equipment and materials, discussions with private school officials, and a review of any logs maintained." *Id.* at 4a-5a. The Guidance also states that "it is a helpful practice for private schools to maintain logs to document the use of Title VI equipment and materials located in their schools." *Id.* at 4a. Finally, LEAs must ensure that, "if any violations occur, they are corrected at once. An LEA must remove materials and equipment from a private school immediately if removal is needed to avoid an unauthorized use." *Id.* at 5a.

If Title VI is implemented in conformity with the statute's restrictions and the Department of Education's regulations and Guidance, then the loan of instructional equipment and materials to religious schools should not lead to government-financed inculcation of religion. An LEA should certainly have little difficulty in ensuring that instructional materials lent to religious schools are secular. The Court has three times upheld the loan of secular textbooks to religious school students; in each case, the textbooks were chosen from lists of textbooks that were also appropriate for public school education, and the public authorities were therefore able to determine in advance that the textbooks provided on loan were secular. See *Wolman*, 433 U.S. at 237-238 (plurality opinion); *Meek*, 421 U.S. at 360-361 (plurality opinion); *Allen*, 392 U.S. at 244-245. There is no reason why instructional materials other than textbooks cannot be reviewed in the same way.[17] See App., *infra*, 4a (Department of Education

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[17] Several Justices have expressed the view that it is impossible to draw a principled distinction between textbooks and other instructional materials, and that the two should either stand or fall together. See *Meek*, 421 U.S. at 377-382 (Brennan, J., concurring in part and dissenting in

Title VI Guidance, explaining that a "good benchmark" is that the instructional materials "would be appropriate for use in public schools"). In this case, in fact, the record shows that a JPPSS official reviews all requests for instructional materials in advance to ensure that they are secular, and disapproves any requests for religious titles. See p. 11, *supra*.

The loan of instructional equipment presents a somewhat different question, but, again, with appropriate safeguards such as those set forth in the Department of Education's Title VI Guidance, it should be permissible to lend such equipment to religious schools. Before an LEA approves the use of instructional equipment in a religious school, the LEA can and should require the school to explain how that equipment will be used. If the school's explanation is not sufficiently specific to assure the LEA that the equipment will be used only for secular purposes, then the LEA can request further information, or deny that particular request for Title VI benefits and offer other secular services available under Title VI, such as drop-out prevention, gifted-and-talented student, or literacy programs provided by the public agency. Also, an LEA can and should require that

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part); *id.* at 389-391 (Rehnquist, J., concurring in the judgment in part and dissenting in part); *Wolman*, 433 U.S. at 258-260 (Marshall, J., concurring in part and dissenting in part). The basis for the Court's distinction in *Meek* and *Wolman* between textbooks and other instructional materials appears to have been that the instructional materials were lent to the religious school rather than the students. See *id.* at 263-264 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part). The difference between aid provided to students and aid provided to schools may be constitutionally significant in some contexts, but it should not be controlling here, for the distinction does not explain why the loan of instructional materials to religious schools presents a greater danger of inculcation of religion than the loan of textbooks to students, when the materials can be reviewed in advance to ensure their secular content.

religious schools execute written undertakings to the effect that all instructional equipment will be used in conformity with the requirements of Title VI, including the requirement of secular use.

In addition, an LEA can and should require religious schools to maintain documentation of the use of the instructional equipment, and make periodic on-site visits to determine whether the equipment is being used in accordance with the purposes represented by the religious school. If the LEA determines that the religious school is using the equipment for purposes other than those that were represented by the school, or if the religious school has failed to document use of the equipment in a way that would allow the LEA to make that determination, then the LEA can insist that corrections be made and, if necessary, remove the equipment. For example, if a religious school represents that it intends to use Title VI computer equipment in a chemistry lab, but the LEA official visiting the school finds the equipment in use elsewhere, or if the school's documentation either fails to demonstrate adequately how the equipment was actually used or indicates that the equipment was used for purposes other than those that were represented, the LEA should take action.

2. The loan of instructional equipment and materials under Title VI presents no "financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. Under Title VI, as under the related federal program upheld in *Agostini*, "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." *Ibid.* Benefits under Title VI must be provided equitably to private and public school students. 20 U.S.C. 7312, 7372(b). Title VI therefore does not create an incentive on the part of parents to shift their

children to religious schools in order to receive greater federal benefits there.

In addition, all assistance under Title VI, whether provided to religious or public school students, must supplement, and must not supplant, the level of funds that would be made available from non-federal sources. See 20 U.S.C. 7371(b). Under the Department of Education's interpretation of the anti-supplantation rule, benefits that private school students receive from Title VI federal funds must not supplant any benefits that private schools would otherwise have provided themselves (or obtained from any other source). 34 C.F.R. 299.8(a); see App., *infra*, 4a (Title VI Guidance explains that "the equipment and materials [must] supplement, and in no case supplant, the equipment and materials that, in the absence of the Title VI program, would have been made available for the participating students"). Those restrictions ensure that, in providing Title VI benefits, the federal government does not assume responsibility for the core functions of educating private school students. The supplementary role of Title VI is also borne out by the relatively modest amount of benefits made available under the program.[18]

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[18] For Fiscal Year 1999, Congress appropriated $375,000,000 to carry out the pertinent innovative-assistance programs under Title VI. See Department of Education Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(f), Tit. III, 112 Stat. 2681-368. We are informed by the Department of Education that approximately 53,400,000 students received Title VI services in school year 1994-1995 (the latest year for which such statistics were available). That number of students may be slightly overstated, because some students may receive services under more than one Title VI program, but it is believed to be a reasonably accurate estimate of the total number of students receiving Title VI services. Therefore, Congress has appropriated, for Title VI, about seven dollars per student. That modest undertaking contrasts with the "massive" aid to religious schools at issue in *Meek*, see 421 U.S. at 365, and *Wolman*, see 433 U.S. at 233 ($88 million biennial appropriation for auxiliary aid to nonpublic

The anti-supplantation rule of Title VI prevents religious schools from using Title VI as an indirect subvention of religious instruction, for it prohibits schools from shifting resources from secular educational topics to religious functions and using Title VI merely to continue instruction in the secular topics that was, or would have been, undertaken in the absence of Title VI assistance. The anti-supplantation rule therefore presents an important factor distinguishing Title VI from the programs invalidated in *Meek* and *Wolman*. In neither of those programs was state assistance to religious schools limited to supplementation, and in *Zobrest*, the Court observed that the aid program invalidated in *Meek* "relieved sectarian schools of costs they otherwise would have borne in educating their students." 509 U.S. at 12. Thus, even if, under the Court's present jurisprudence, programs like those at issue in *Meek* and *Wolman* might still be constitutionally questionable on the ground that they might enable religious schools to shift resources from secular to religious functions, that is decidedly not true of Title VI.

Enforcement of the anti-supplantation rule should present no extraordinary difficulties. As discussed above (p. 40, *supra*), before approving a religious school's request for instructional equipment and materials under Title VI, an LEA can and should obtain information from the school indicating how the equipment and materials will be used—which can and should include information showing that the equipment and materials will supplement, and not supplant, benefits that would otherwise be provided. Furthermore, in the context of auditing public agencies under the anti-supplantation rule, the Department of Education has stated that a school may not use Title VI funds to "plug gaps in its own programs." See p. 7, n.5, *supra*. Thus, LEAs can and

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schools). The aid in *Wolman* was estimated at $176 per student per year. See J.S. App. at A32, *Wolman* v. *Walter*, *supra*.

should determine that equipment and materials lent to a religious school will provide an additional and discrete, secular educational benefit that students at that school would not otherwise receive.

3. The safeguards discussed above, to ensure that Title VI benefits remain secular and supplementary, may be enforced without excessive entanglement. Advance review of instructional materials by the LEA to ensure their secular content does not require the LEA to visit the religious school at all; the review can be carried out entirely on paper, in the LEA office. As for instructional equipment, the important safeguards, as noted, should be undertakings by religious schools to the LEA that equipment and materials will be used in specific ways consistent with statutory and administrative limitations, and review by the LEA to ensure that those representations are fulfilled. An LEA should be able to determine whether a religious school has acted in accordance with its representations by checking logs and holding discussions with religious school officials, and should not have to monitor classroom instruction to determine whether the equipment is used for sectarian purposes. If the equipment is not being used for authorized purposes, then the LEA should insist on corrective action, and if necessary, remove the equipment.

The task of monitoring the use of instructional equipment and materials at religious schools is not likely to require the kind of surveillance about which the Court expressed concern in *Lemon*. In *Lemon*, which invalidated state-sponsored salary supplements for religious school teachers, the Court observed that "a teacher cannot be inspected once so as to determine * * * subjective acceptance of the limitations imposed by the First Amendment," and that any effective means to prevent religious school teachers paid by the State from fostering religion would require "comprehensive, discriminating, and continuing state surveillance."

403 U.S. at 619. Indeed, even if religious school teachers whose salaries were paid by the government adhered strictly to a requirement that they pursue only secular subjects in their formal classroom instruction, those teachers would normally have many functions outside the classroom, such as providing general guidance to students in the development of their education and values, and assisting students with extracurricular interests. In a religious school setting, it would be unsurprising—indeed it would be expected—that a teacher and student would pursue religious subjects on such occasions. It is therefore difficult to see how religious school teachers can be confined to secular subjects in their interactions with their students. The same is not true of instructional equipment. Schools can and do maintain logs documenting the classes in which such equipment is used, and the equipment ordinarily should not be used for other purposes.

It is perhaps true that an LEA cannot provide *absolute* assurance that Title VI equipment will not be used for religious purposes. Even in a chemistry class, a religious topic might arise, and a teacher might direct students to use Title VI computer equipment to pursue that religious topic. Such use of the equipment, however, would be improper and inconsistent with the school's undertaking, and would provide cause for the LEA to remove it. Cf. *Tilton*, 403 U.S. at 682-684 (plurality opinion).

II. THE VALIDITY OF THE SPECIFIC TITLE VI PROGRAM AT ISSUE IN THIS CASE MUST BE REEVALUATED UNDER THE PROPER STANDARDS; IF THIS COURT REACHES THAT QUESTION, IT SHOULD CONCLUDE THAT THE PROGRAM SATISFIES THE REQUIREMENTS OF THE ESTABLISHMENT CLAUSE

We have explained that it is possible for LEAs to lend instructional equipment and materials purchased with Title VI funds to religious schools in a manner consistent with the Establishment Clause. There remains the question whether Title VI has been applied in a constitutional manner in Jefferson Parish. Because the court of appeals held the JPPSS Title VI program invalid under a flat rule under which the permissibility of the aid turned solely on the character of the aid, that court did not determine whether the statutory and administrative restrictions against the use of Title VI equipment and materials for sectarian purposes, along with the safeguards actually in place in Jefferson Parish to ensure that those restrictions are observed, are adequate to ensure the constitutional implementation of Title VI and are not excessively entangling. Accordingly, should the Court accept our principal submission that, under the Establishment Clause, instructional equipment and materials may be lent to religious schools under certain circumstances, the Court may wish to remand this case to the court of appeals for further consideration rather than addressing in the first instance the adequacy of the safeguards in place in Jefferson Parish, on which no findings were made by the court of appeals. Cf. *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237-239 (1995).

If the Court proceeds to decide whether the Title VI program in Jefferson Parish satisfies the requirements of the Establishment Clause, then the Court should conclude that

the record compiled in the trial court does not establish that the JPPSS program has an impermissible effect of advancing or inhibiting religion. The burden of proof to establish a constitutional violation rests with respondents. Cf. *Batson* v. *Kentucky*, 476 U.S. 79, 93 (1986). Thus, in the absence of evidence, notwithstanding full discovery, that Title VI materials and equipment in Jefferson Parish are used for sectarian purposes, or that the attendant restrictions and safeguards are inadequate to prevent such use, judgment should be entered sustaining the constitutionality of the JPPSS Title VI program.

The record supports the conclusion that the JPPSS program has been administered in accordance with the requirements set forth in *Agostini*. The program has been carried out in a neutral fashion towards religious and secular schools and their students. Only 30% of Title VI funds in the JPPSS have been used for private school students, and in Louisiana as a whole, only 25% of the State's total Title VI allotment has been used for private school students. See Pet. App. 86a, 90a. The SEA has emphasized to LEAs in its Guidelines that expenditures under Title VI must supplement, and not supplant, funds available from non-federal sources, J.A. 231a, and that nonpublic schools should give assurances of their adherence to that requirement, J.A. 260a. The JPPSS has requested and obtained such assurances of compliance with the anti-supplantation rule from nonpublic schools. J.A. 196a.[19]

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[19] Respondents may suggest that Catholic schools in Jefferson Parish have received library books from the JPPSS in contravention of Title VI's anti-supplantation rule. See J.A. 63a (deposition of Catholic school official, indicating that schools used Title VI and state funds to purchase library books before using other sources of funds). Even if occasional acquisitions of library books were inconsistent with the anti-supplantation rule, respondents have not pointed to evidence indicating that those acquisitions were anything other than atypical deviations from general adherence to

As noted above (p. 11, *supra*), religious schools' requests for instructional materials are reviewed by a JPPSS administrator to ensure that the materials are secular, and that official disallows requests for religiously oriented materials. Respondents have not identified any inappropriate instructional materials that escaped that review and were lent improperly to religious schools.[20] Nor does the JPPSS' review of instructional materials foster excessive entanglement. That process is quite straightforward: a JPPSS administrator simply disallows any requested material that appears to be religious in content. The review process, moreover, is conducted in the offices of the public agency, and not at the religious school site. J.A. 138a.

As for the loan of instructional equipment, the record indicates that the Louisiana SEA and JPPSS have put in place reasonable and effective safeguards to prevent the use of Title VI equipment for religious indoctrination. Title VI Guidelines promulgated by the SEA and distributed to all LEAs make clear that LEAs must submit applications in conformity with Title VI to be certified by the State to re-

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the rule, or that the use of Title VI funds to purchase those library books enabled religious schools to use other sources of funds for sectarian purposes. In the absence of evidence that the JPPSS safeguards are generally inadequate to prevent religious schools from using Title VI benefits to supplant other sources of funds, an injunction against the JPPSS program is not justified. Cf. *Lewis* v. *Casey*, 518 U.S. 343 (1996).

[20] As we have noted (p. 11, n.6, *supra*), JPPSS at one point recalled 191 books that had been previously lent to religious school libraries. Those books, however, had apparently been lent to religious schools before JPPSS put in place a system of reviewing requested titles before they were ordered for the Title VI program. Moreover, the recall underscores that JPPSS' review was undertaken seriously and carried out diligently. Indeed, JPPSS' review process continued to develop after the recall of library books and achieved such a level of success that respondents have been unable to cite a single subsequent incident of an alleged diversion to religious uses of Title VI resources.

ceive Title VI funds. J.A. 212a-213a. The SEA conducts training for all LEA Title VI coordinators. J.A. 91a. The SEA also obtains written assurances from each LEA that the LEA's Title VI program complies with all statutory requirements, including those governing the participation of private school students. J.A. 237a-238a. LEAs are required to complete and submit state-designed forms providing information sufficient to permit the State to evaluate each LEA's Title VI programs and activities. J.A. 239a-241a. State officials visit each LEA every two or three years to review the LEA's compliance with Title VI requirements, including the requirement that only secular materials and equipment be lent to religious schools. J.A. 95a, 100a, 225a-227a; Pet. App. 56a.

At the LEA level, JPPSS holds annual orientation sessions for participating religious schools to review the statutory and regulatory requirements of the program. J.A. 194a-195a. JPPSS requires and receives signed assurances from participating religious schools that equipment and materials will be used in "direct compliance" with Title VI. J.A. 196a-197a. No money is transmitted to any religious school. J.A. 172a. A JPPSS administrator conducts annual visits to every religious school that participates in the Title VI program. During those visits, the administrator discusses use of the Title VI equipment with a school official, reminds school officials that the equipment is not to be used for religious purposes or by religion teachers, and specifically inquires whether the Title VI equipment and materials have been used in accordance with the school's representations, and for secular, neutral, and nonideological purposes. She also examines the equipment itself, to see whether it is clearly marked as Title VI equipment, and whether the school keeps records of its use. See pp. 10-11, *supra*; J.A. 141a-149a.

Notwithstanding extensive discovery, respondents were unable to identify a single instance in which Title VI equip-

ment in Jefferson Parish has been diverted to an impermissible religious use. Nor has implementation of the JPPSS safeguards resulted in excessive entanglement with the religious schools. Nothing in the record indicates that the public and religious school officials have had any significant disagreements about the permissible uses of Title VI equipment. Accordingly, if the Court reaches the issue of the validity of the JPPSS program, it should conclude that respondents have failed to establish that the Title VI program implemented by the JPPSS has an impermissible effect with respect to religion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1999

APPENDIX

ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA)

as amended by

IMPROVING AMERICA'S SCHOOLS ACT OF 1994 (IASA)

GUIDANCE

for

Title VI of the ESEA
Innovative Education
Program Strategies

U.S. DEPARTMENT OF EDUCATION
WASHINGTON, D.C.

[Seal Omitted]

February 1999

[iii]

PURPOSE OF THIS GUIDANCE

This document contains guidance for Title VI of the Elementary and Secondary Education Act, as amended by the Improving America's Schools Act. Guidance in this document replaces all prior non-regulatory guidance for Chapter 2 of Title I of the former ESEA—the predecessor program to Title VI. Previous regulations for the former Chapter 2 program are no longer applicable, and no regulations will be issued for Title VI.

This document includes an explanation of statutory requirements contained in Title VI and provides guidance for carrying out programs under Title VI. This document does not impose any requirements beyond those in the Title VI statute and other applicable Federal statutes and regulations, but encourages varying views and focuses upon what can be done, rather than setting limits. State and local recipients that follow the guidance in this document shall be deemed in compliance with Title VI and other applicable Federal statutes and regulations by U.S. Department of Education officials, including the Inspector General.

Throughout the document, we have used several devices to aid the reader in the guidance. Examples are provided in several places and appear in thick-lined boxes. Examples are merely illustrative, and the Department encourages State Education Agencies (SEAs) and local educational agencies (LEAs) to refer to them only as guides that might be helpful in designing and implementing programs under Title VI. Other information that the Department believes will be help-

ful in planning and implementing programs appears in thin-lined boxes.

This document also includes interpretations that are in direct response to questions raised by the Title VI State coordinators. These interpretations appear throughout the document under the hearing "Supplemental Guidance."

For ready reference, an index of "Frequently Asked Questions" is included at the end of this document. These questions are cross-referenced to pages in the guidance answers can be found. Also, the relevant statutory and regulatory citations appear in parentheses following each question.

* * * * *

LEAs should implement safeguards and procedures to ensure that Title VI funds are used properly for private school children.

First, it is critical that private school officials understand and agree to the limitations on the use of any equipment and materials located in the private school. Therefore, LEAs should obtain from the appropriate private school official a written assurance that any equipment and materials placed in the private school will be used only for secular, neutral and nonideological purposes; that private school personnel will be informed as to these limitations; and that the equipment and materials will supplement, and in no case supplant, the equipment and materials that, in the absence of the Title VI program, would have been made available for the participating students.

Second, the LEA is responsible for ensuring that any equipment and materials placed in the private school are used only for proper purposes. The LEA should determine that any Title VI materials, such as library books and computer software, are secular, neutral and nonideological. A good benchmark for this review is that the equipment and materials would be appropriate for use in public schools. The LEA should mark all equipment and materials purchased with Title VI funds so that they are clearly identifiable as Title VI property of the LEA. The LEA also should maintain an up-to-date inventory of all Title VI equipment and materials provided for the benefit of private school students. The Department also believes it is a helpful practice for private schools to maintain logs to document the use of Title VI equipment and materials located in their schools. The LEA also should perform periodic on-site monitoring of the use of the equipment and materials.

The monitoring could include on-the-spot checks of the use of the equipment and materials, discussions with private school officials, and a review of any logs maintained.

Third, the LEA should designate one public school official to oversee Title VI services for private school students and ensure that services, materials and equipment provided for these students are secular, neutral and nonideological. The designated official also should be responsible for receiving and handling any complaints or allegations that Title VI funds are being used for improper activities for private school students.

Finally, LEAs need to ensure that if any violations occur, they are corrected at once. An LEA must remove materials and equipment from a private school immediately if removal is needed to avoid an unauthorized use.

Supplemental Guidance

Benefit to Students—If Title VI funds are used to provide services for children enrolled in private, nonprofit schools, these services must primarily benefit the children, not the schools. (See section 6402(a)(1), 20 USC 7372(a)(1), which states that an LEA shall provide for services for the benefit of the children in private schools.) A question has arisen as to whether this precludes an LEA from providing reform-oriented Title VI services to private school children because of the likelihood that such services would benefit the private schools, rather than the children. The Department's interpretation is that if the LEA can show that the private school students will receive the primary benefit of reform-oriented Title VI services, the LEA may provide those services for the private school

students, even if the private schools also happen to benefit. If the primary benefit of the reform-oriented Title VI services would fall to the private schools, however, the Department believes that the LEA would not be able to provide reform-oriented Title VI services for the private school children.

FISCAL REQUIREMENTS

Supplement, Not Supplant

Section 6401(b) of Title VI of the ESEA provides that an SEA or an LEA may use and allocate Title VI funds only to supplement and, to the extent practical, increase the level of funds that would, in the absence of funds made available under Title VI, be made available from non-Federal sources. Title VI funds may not be used to supplant funds from non-Federal sources. (20 USC 7371(b))

Whether an SEA or LEA may use Title VI funds as part of any State-mandated program however, depends upon whether non-Federal funds are already available to carry out activities under the State-mandated plan. Section 6401(b) of Title VI prohibits the use of Title VI funds where such use would result in supplanting funds available from non-Federal sources. Presumably, in the absence of Title VI funds, the SEA or LEA would use State funds to carry out a State-mandated plan. To use Title VI funds in connection with the plan would therefore violate the supplement, not supplant requirement of Title VI. However, Title VI funds might be used in connection with the plan, without violating the supplement, not supplant requirement, if the Title VI funds are used for supplemental activities that would not have been provided but for the availability of the Title VI funds.

Example:
A State has a mandated program to test all students in grades one, four, six, nine and twelve. The State decides to use Title VI funds to test students in grades two, five and seven as part of a dropout prevention program. This use of Title VI funds is allowable.

In general, an SEA or LEA should determine what educational activities it would support if no Title VI funds were available. If the result of this determination is that no State or local funds remain available to fund certain activities, then the SEA or LEA may be able to use Title VI funds for those activities. In no event, however, may an SEA or LEA decrease State or local funds for particular activities because Title VI funds are available.

Example: An LEA that qualified for State funds has been conducting a program for gifted and talented students. The State funds were based on the number of such children attending schools in the LEA. The number of these children in the LEA decreases and the LEA therefore no longer qualifies for the State funds. The LEA may choose to continue to operate this program using Title VI funds without violating the supplement, not supplant clause. This example presumes that the LEA would not fund the program out of other non-Federal funds in the absence of Title VI.

Maintenance of Effort

SEAs are required to maintain effort in order to receive their full allocation of Title VI funds for any fiscal year. The SEA maintains effort when either the

combined fiscal effort per student or the aggregate expenditures within the State with respect to the provision of free public education for the preceding fiscal year was not less than 90 percent of the combined fiscal effort or aggregate expenditures for the second preceding fiscal year. (See section 6401(a), 20 USC 7371(a)(1).)

The Department interprets "preceding fiscal year" to mean either the Federal fiscal year or the twelve-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are available.

Both State and local expenditures for free public education within the State are to be considered in determining whether a State has maintained effort under Title VI. The Department interprets "aggregate expenditures for free public education" to include expenditures such as those for administration, instruction, attendance, health services, pupil transportation, plant operation and maintenance, fixed charges, and net expenditures to cover deficits for food service and student body activities. States may include in the maintenance of effort calculation expenditures of Federal funds for which no accountability to the Federal government is required. (Impact Aid funds are an example of such funds; however, there is a requirement of accountability for certain Impact Aid funds, such as those received for children with disabilities. Therefore, Impact Aid funds may be included in a State's maintenance of effort calculation under Title VI, but only to the extent that there is no accountability for their expenditure.)

States must be consistent in the manner in which they calculate maintenance of effort from year to year in order to ensure that the annual comparisons are on the

same basis (i.e., calculations must consistently, from year to year, either include or exclude expenditures of Federal funds for which accountability to the Federal government is not required). Moreover, States that choose to include expenditures of Federal funds for which accountability to the Federal government is not required, must do so with the understanding that future years' maintenance of effort calculations may be affected by fluctuating Federal appropriations over which neither the Department, nor a State, has any control.

Finally, it is the Department's position that expenditures not to be considered in determining maintenance of effort under Title VI are expenditures for community services, capital outlay, debt service, or any expenditures of Federal funds for which accountability to the Federal government is required.