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Education - Helms v. Picard [2]

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001. memo	From: Judith Winston To: Secretary Riley; RE: Helms v. Picard (3 pages)	03/26/1999	P5
002. memo	From: Paul Wolfson To: Solicitor General; RE: Helms v. Picard (25 pages)	03/05/1999	P5

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Presidential Records Act - [44 U.S.C. 2204(a)]

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P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
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Rough Draft - Confidential Attorney-Client and Work-Product Privileged Material

Thomas B. Griffith, Esq.
Senate Legal Counsel
United States Senate
Washington, D.C. 20510

Re: Helms v. Picard, No. 97-30231 (5th Cir.)

Dear Mr. Griffith:

On August 17, 1998, the United States Court of Appeals for the Fifth Circuit ruled in the above-captioned case that the application in Jefferson Parish, Louisiana, of a provision of Title VI of the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 et seq., violated the Establishment Clause. See 20 U.S.C. 7312(b)(2). On January 13, 1999, the Fifth Circuit denied the government's petition for rehearing and suggestion for rehearing en banc. I am writing to notify you that the United States has determined not to petition the Supreme Court for a writ of certiorari to review that decision. The time for filing a petition for a writ of certiorari expires on April 13, 1999. I have enclosed a copy of the Fifth Circuit's decision and order denying rehearing.

I.

The complaint in this case was filed on December 2, 1985, before Title VI was enacted. At that time, the relevant provisions were found in Chapter 2 of the Elementary and Secondary Education Act of 1965, as amended by the Education Consolidation and Improvement Act of 1981. A second amended complaint was filed on December 28, 1988, after Chapter 2 was reauthorized and revised by Title I of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988. Much of the record in this case was compiled, however, before the Hawkins-Stafford Act was enacted in 1988, and all of the pertinent portions of it were compiled before Title VI was enacted in 1994.

Under Chapter 2, the federal government provided financial assistance to state and local educational agencies (LEAs) for use in certain targeted-assistance programs. Among six forms of targeted-assistance programs for which federal funds could be used were "programs for the acquisition and use of instructional

and educational materials, including library books, reference materials, computer software and hardware for instructional use, and other curricular materials that would be used to improve the quality of instruction[.]" 20 U.S.C. 2941(b)(2) (1988). There was no requirement, however, that federal funds be used for any particular one of these six forms of targeted assistance. An LEA that sought funds under Chapter 2 was required to demonstrate to the relevant state agency that children enrolled in private nonprofit schools would be eligible to participate in the benefits of the Chapter 2 program on an equal and equitable basis. See 20 U.S.C. 2043(a)(3), 2972(a)(1), (b) (1988). In addition, benefits made available to children in private schools were required to be "secular, neutral, and nonideological." 20 U.S.C. 2972(a)(1) (1988). Although a State's application for assistance was required to set forth the allocation of funds required to implement former section 2972 (referring to participation of children enrolled in private schools), see 20 U.S.C. 2932(a)(3)(B) (1988), the Department of Education was not required to review LEAs' proposed allocations of funds for targeted-assistance programs.[1] In fact, Chapter 2 provided that LEAs should have "complete discretion in determining how funds under [the Act] [should] be divided among the areas of targeted assistance." 20 U.S.C. 2943(c) (1988).[2]

---

[1] Before the Hawkins-Stafford Act was enacted in 1988, the provisions governing the forms of assistance authorized under Chapter 2 were somewhat different. At the time this lawsuit was filed, LEAs were authorized to use federal funds for the acquisition and utilization of "school library resources, textbooks, and other printed and published instructional materials," and also "instructional equipment and materials suitable for use in providing education in academic subjects for use by children in elementary and secondary schools." 20 U.S.C. 3832(1)(A) (1982). Under the law before 1988, LEAs were required to ensure the participation of children in enrolled in private schools on an equal and equitable basis, and any aid provided was required to be secular, neutral, and nonideological.

[2] The analogous provision of Title VI now states that LEAs have complete discretion to determine how funds shall be divided "[s]ubject to the limitations and requirements of this subchapter," 20 U.S.C. 7353(c), which of course includes the requirement that Title VI resources must be secular, neutral, and nonideological, 20 U.S.C. 7372(a)(1).

Rough Draft - Confidential Attorney-Client and Work-Product Privileged Material

The plaintiffs contended in this case that the application of Chapter 2 in Jefferson Parish violated the Establishment Clause because the LEA in the Parish had provided certain forms of assistance to sectarian primary and secondary schools that were capable of diversion to the purpose of religious instruction, and that such assistance had in fact been diverted to religious ends. The record as developed during discovery in 1985-1989 demonstrated that the Jefferson Parish Public Schools (JPPS) had used Chapter 2 funds to purchase, and to lend to sectarian primary and secondary schools, materials such as "filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc." 5th Cir. Op. 48. Nonpublic schools were not required by the JPPS to sign assurances that they would use loaned materials only for secular purposes (and the Department of Education at the time also had no regulations or published guidance requiring the use of such assurances). Id. at 46. Representatives of the JPPS made occasional monitoring visits to private schools to determine whether the loaned materials were being used in accordance with the purposes of Chapter 2, and discovered in April 1985 that some of the benefits provided to children in private schools were not secular, neutral, and nonideological, as required by the statute. Id. at 47. The record also demonstrated that JPPS used Chapter 2 funds to purchase library books for loan to private school libraries. The library books were supposed to be purchased from approved lists developed by state authorities, id. at 49, but one review of library book orders by Jefferson Parish public school administrators revealed that titles had been purchased for religious school libraries in violation of Chapter 2 guidelines, and those books were required to be recalled, id. at 47.

In 1989, the parties filed cross-motions for summary judgment. On March 27, 1990, the district court initially granted summary judgment for the plaintiffs. The district court concluded that, under the Supreme Court's decisions in Meek v. Pittenger, 421 U.S. 349 (1975), Wolman v. Walter, 433 U.S. 229 (1977), and Public Funds for Public Schools of New Jersey v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974), the application of Chapter 2 to sectarian primary and secondary schools in Jefferson Parish contravened the Establishment Clause because, "due to the pervasive sectarian nature of the schools affected by the aid, the aid inescapably has the primary effect of providing a direct and substantial advancement of the sectarian enterprise." (Internal quotation

marks and brackets omitted.) The government moved for reconsideration. On January 28, 1997, the district court reversed itself, and held that the application of Chapter 2 to sectarian primary and secondary schools was in fact constitutional.

The Fifth Circuit reversed, and held that Chapter 2 (since then replaced by Title VI) was unconstitutional as theretofore applied to sectarian primary and secondary schools in Jefferson Parish. As the district court had initially concluded, the Fifth Circuit held that the case was squarely governed by the Supreme Court's decisions in Meek and Wolman invalidating certain kinds of public aid to the instructional mission of sectarian primary and secondary schools. See 5th Cir. Op. 55-62. Noting that the Supreme Court's decisions in Meek and Wolman had invalidated "state programs lending instructional materials other than textbooks to parochial schools and schoolchildren," id. at 58 (emphasis omitted), the Fifth Circuit found Meek to be "directly on point," id. at 56-57. The Fifth Circuit also expressed disagreement with the Ninth Circuit's decision in Walker v. San Francisco Unified School District, 46 F.3d 1449 (1995), which had upheld Chapter 2 as applied in that district, based on the reasoning that Meek and Wolman had been undermined by subsequent Supreme Court decisions. The Fifth Circuit also concluded that library books and materials were similar to instructional equipment and materials within the holding of Meek, and were not properly analogized to textbooks, which under the Supreme Court's decision in Board of Education v. Allen, 392 U.S. 236 (1968), may be loaned on a neutral basis to students at public and private schools, including nonprofit sectarian primary and secondary schools. See 5th Cir. Op. 62. Accordingly, the Fifth Circuit held that Chapter 2 is "unconstitutional as applied in Jefferson Parish, to the extent that [it] permits the lending of educational or instructional equipment to sectarian schools."

After the Fifth Circuit issued its decision, the Department of Education, after consultation with the Department of Justice, issued guidance for the administration of Title VI by LEAs designed to address the problem of the potential diversion of Title VI resources for religious purposes that the courts have identified in this case. That guidance (a copy of which is included with this letter) reemphasizes that services, materials, and equipment provided for the benefit of private school children under Title VI must be secular, neutral, and nonideological, and explains that LEAs should implement safeguards and procedures to

ensure that Title VI funds are used properly. First, the guidance notes that it is critical that private schools agree to the limitations on the use of any equipment and materials located in the private school, and to that end, states that LEAs should obtain from private school officials written assurances that any such equipment and materials will be used for secular purposes only, that private school personnel will be informed as to these limitations, and that such equipment materials will supplement, and in no case supplant, equipment and materials that would have been available in the absence of the Title VI assistance. Second, the guidance explains that the LEA is responsible for assuring that any equipment and materials placed in private schools are used only for proper purposes, states that LEAs should perform periodic monitoring of the use of such equipment and materials, and suggests that private schools maintain logs to document the use of Title VI equipment and materials in their schools. Third, the guidance states that LEAs should designate a specific official responsible for ensuring that Title VI services, equipment, and materials at private schools remain secular. Finally, the guidance makes clear LEAs must ensure that any violations that occur are corrected at once, including if necessary the removal of any equipment from a private school if necessary to prevent unauthorized use..

II.

For several reasons, I have determined that a petition for a writ of certiorari should not be filed in this case. In explaining the basis for that determination, I wish to assure you that the Department of Justice is firmly convinced that Title VI (including its provisions for equal and equitable participation by private school children) is facially constitutional and may be constitutionally applied throughout the country. In addition, the Department of Justice remains committed to defending the statute against constitutional attack. In that respect, I note that the Department of Education, after consultation with the Department of Justice, has recently issued guidance on Title VI, and the Department of Justice is committed to working with the Department of Education to develop any additional guidance and, if appropriate, regulations, that might be useful to sustain Title VI against further as-applied constitutional challenge. Indeed, one of the principal reasons I have decided not to file a certiorari petition in this case is that it is my opinion that a more favorable record may be developed in another challenge that might be brought against Title VI -- a record that would

substantially increase the likelihood of a favorable Supreme Court decision.

Following are the factors that principally underlie my decision not to file a petition in this case.

First, the Fifth Circuit's decision does not strike down Title VI on its face, does not adjudicate anything that the Department of Education has done or is required under the statute to do in the future as unconstitutional, and does not prevent the Department of Education from continuing to provide Title VI assistance to any LEA, including Jefferson Parish. All the Fifth Circuit has held is that Title VI (actually, Chapter 2) as previously applied by local authorities in Jefferson Parish contravened the Establishment Clause. Although that ruling does require Jefferson Parish to change the way in which it includes students at religious primary and secondary schools in the benefits of Title VI, it does not prevent the Department of Education from providing Title VI resources to the State of Louisiana for further use by the Parish. Moreover, under the statute, the Department of Education does not review in advance LEAs' plans for implementation of Title VI or inclusion of students at religious primary and secondary schools in those benefits. Accordingly, the only effect of the court's order is to place a few restrictions on the way in which the Parish may use its federal resources, not to restrict in any way the Department of Education's ability to provide the full amount of Title VI funding to the Parish.

Second, it is also important to understand that the record in this particular case is very stale and does not reflect the kinds of services, equipment, and materials that are now made available to students under Title VI. The record was developed over a decade ago, at a time when the range of instructional equipment and materials that was provided for the benefit of private school children under Chapter 2 was significantly different than is now the case under Title VI. As I noted above, the equipment made available to private schools in this case included such things as phonographs, slide projectors, and filmstrip projectors. Most of these materials are no longer provided under Title VI, which in pertinent part (concerning instructional equipment and materials) is now focused upon the provision of computer hardware and software and library services and materials. See 20 U.S.C. 7351(b)(2). A petition for certiorari in this particular case, therefore, would have a

highly abstract quality, for it would ask the Supreme Court to give its approval to a program that no longer exists in the form in which it was challenged. It is my judgment that the purposes of Title VI (and the likelihood of obtaining a favorable decision from the Supreme Court) would be much better served by presenting to the Supreme Court a case that involves the kind of materials which it is Congress's current policy to provide to private schoolchildren, namely, computer equipment and library materials.

Third, the record in this case was developed at a time when the Department of Education had no published guidance or regulations designed to ensure that instructional equipment located on the premises of private schools is not diverted to religious purposes. The Department of Education has now issued such guidance, but that guidance was not available to the Fifth Circuit when it issued its decision (or when it denied rehearing). As I noted above, the court of appeals found that Title VI resources in Jefferson Parish had in fact been used for impermissible purposes. The record in this case is therefore an unfavorable one in which to ask the Supreme Court to sustain the validity of the application of Title VI in this particular Parish. The chances of a favorable Supreme Court decision on the question of whether instructional materials can be provided for the benefit of students at sectarian primary and secondary schools would be considerably improved on a record in which there are much more extensive and effective controls on the use of such materials. The Department of Justice will also work further with the Department of Education to determine whether additional guidance and regulations are necessary to prevent the diversion of Title VI resources to religious purposes.

Fourth, although the court of appeals has invalidated the provision of instructional equipment to private sectarian primary and secondary schools, it is also important to understand that it remains possible to implement Title VI, even in the Fifth Circuit, in a fully constitutional manner. Instructional equipment is only one of many kinds of services, equipment, and materials that may be provided for the benefit of private school children under Title VI; the statute does not require that instructional equipment be made available at each school. Many of these other programs funded under Title VI, such as programs to improve higher-order thinking skills of disadvantaged students (see 20 U.S.C. 7351(b)(4)) and programs to combat student and parent illiteracy (see 20 U.S.C. 7351(b)(5)) can certainly be implemented in a manner that presents no constitutional

difficulty. Indeed, even within the instructional-materials provision of 20 U.S.C. 7351(b)(2), there may be some forms of assistance -- such as state-designed assessments and supplemental textbooks -- that can be provided at sectarian primary and secondary schools. It is therefore possible even in the Fifth Circuit for Title VI programs to conform to the statute's requirement of equal and equitable participation of private school children. In addition, I note that even in the Fifth Circuit it may well be possible to continue to place instructional equipment on the premises of private schools, provided that actual instruction on that equipment is provided by public school teachers. The Supreme Court upheld the validity of a similar program in Agostini v. Felton, 521 U.S. 203 (1997), on the ground that the instruction was provided by public, not private, school teachers, even though the instruction took place inside private school buildings. The Department of Justice is willing to work with the Department of Education to develop alternate, constitutionally unobjectionable means of implementing Title VI in the Fifth Circuit until such time as we can gain a favorable Supreme Court decision on Title VI in another case.

In sum, it is my judgment that Title VI may be constitutionally applied and successfully defended against constitutional challenge, but that it is inadvisable to use this case as a vehicle to ask the Supreme Court to render a judgment on the important constitutional questions presented that might affect the continuing validity of Title VI.

Sincerely,

Janet Reno

cc: Geraldine Gennet, Esq.
General Counsel to the Clerk
House of Representatives
Washington, D.C. 20515

Educ - Helms v Picard

mtn. 10:15 a.m.

Nos. 98-1648 and 98-1671

IN THE SUPREME COURT OF THE UNITED STATES

GUY MITCHELL, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

CECIL J. PICARD, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

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

BRIEF FOR THE SECRETARY OF EDUCATION

SETH P. WAXMAN
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Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 7351(b)(2) of Title 20 permits local education agencies receiving federal financial assistance to lend secular, neutral, and nonideological instructional equipment, instructional materials, and library materials acquired with that federal assistance to religious schools for the benefit of their students, as part of a program also serving public school students and nonsectarian private school students. The question presented is whether, in analyzing the claim that 20 U.S.C. 7351(b)(2), as applied in this case, violates the Establishment Clause of the First Amendment, the court of appeals was limited to considering the nature of the equipment and materials lent to religious schools, or whether it should also consider safeguards intended to prevent such equipment and materials from being diverted to religious use.

IN THE SUPREME COURT OF THE UNITED STATES

No. 98-1648

GUY MITCHELL, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

No. 98-1671

CECIL J. PICARD, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

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 education agencies (LEAs) for education-improvement programs, and authorizes the LEAs receiving federal financial assistance to lend instructional equipment, instructional materials, and library materials purchased with that assistance to public and private elementary and secondary schools, including nonprofit private religious schools. The application of a related state program was also challenged. The federal program at issue here 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 amended by the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3707-3716. See 20 U.S.C. 7301-7373. For simplicity we will refer to the federal program as "Title VI"; previous decisions in this case referred to it as "Chapter 2."[1]

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[1] 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. 469-480; 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, 102 Stat. 130, the program was amended and redesignated as Chapter 2 of Title I of the ESEA. See 102 Stat. 203-219; 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 current authorizations for appropriations and for disbursements by the Department of Education under Title VI extend through Fiscal Year 2000. See 20 U.S.C. 7302 (authorization through Fiscal Year 1999); 20 U.S.C. 1226a(a) (automatic one-year extension absent intervening legislation). If funds are appropriated for Title VI in Fiscal Year 2000, LEAs could expend those funds at the local level through Fiscal Year 2002. See 20 U.S.C. 1225(b). Therefore, the court of appeals' order prohibiting the loan of equipment and materials purchased with Title VI funds to religious schools affects LEAs, at a minimum, until September 30, 2002.

We have been advised that the President will shortly announce proposals for the extensive revision of the ESEA upon the expiration of its current authorization. That proposed revision would not extend the authorization for Title VI in its current form. Many practices currently funded under Title VI, however, including and especially programs that permit the loan to religious schools of computer hardware and software for instructional use, would under the President's proposal be funded

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

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under an expanded Title III of the ESEA. Title III of the ESEA currently permits LEAs to use federal funds for, among other things, the acquisition of hardware and software for use in classrooms and school libraries. See 20 U.S.C. 6844(3). The ESEA currently requires LEAs receiving assistance for programs under that subpart of Title III to allow private schoolchildren, including those in religious schools, 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 thereunder be secular, neutral, and nonideological, see 20 U.S.C. 8893(a)(2).

We anticipate that the President's proposed revision of the ESEA would consolidate the ESEA's programs for the acquisition of computer hardware and software in a new Title III. The new Title III would authorize the Department of Education to make grants to States, which would distribute such grants to local applicants, including LEAs; LEAs in turn would be authorized to use the funds for several specific purposes, including the acquisition of computer hardware and software. Moreover, as currently under Title III, LEAs would be required to afford private schoolchildren the right to equitable participation in the benefits of the federal program. Thus, we anticipate that, under the proposed revision of the ESEA, as under the current Title III and Title VI, LEAs would be authorized by federal statute to lend computer hardware and software to private schools, including religious schools, for the benefit of students attending those schools, and with similar safeguards against use of public funds and property for religious indoctrination.

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 use Title VI funds to purchase computer hardware and software for instructional use; they may also use such funds to acquire supplemental instructional materials and library materials.[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

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[2] 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 authorizes LEAs to use federal funds to purchase "instructional equipment," but it does expressly authorize the acquisition of computer hardware for instructional purposes. 20 U.S.C. 2941(b)(2) (1988); 20 U.S.C. 7351(b)(2). Both before and after the 1988 amendments, Title VI permitted LEAs to lend computer equipment for instructional purposes to religious schools. Further, computer equipment lent to religious schools has been an important part of this case since the beginning. See Complaint para. 41 (Dec. 2, 1985) (challenging loan of microcomputers to private schools for use by teachers and students); First Amended Complaint para. 43 (Jan. 13, 1987) (same); Second Amended Complaint para. 50 (Nov. 1, 1988) (same). And, as explained above (note 1, supra), we anticipate that, under the President's proposed reauthorization and revision of the ESEA, LEAs would continue to have authority to lend computer hardware and software to private religious schools.

assistance. See 20 U.S.C. 7312, 7372. Moreover, Title VI expenditures by LEAs for private schoolchildren 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 benefit provided to children in private schools, however, must be secular, and must not take the place of any services, equipment, or materials 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) (emphasis added); 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 the 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 equitable participation of private schoolchildren, and provides assurance of compliance with the statute's various requirements, including the requirement of participation of private schoolchildren 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.

The Department of Education's Title VI regulations emphasize the statute's 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 would otherwise provide

their schoolchildren, 34 C.F.R. 299.8(a), and that the LEA must keep title to all property and equipment used for the benefit of private schoolchildren, 34 C.F.R. 299.9(a). In addition, the regulations require that the public agency "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). As explained below, the Department has recently issued further guidance for LEAs on the participation of private school children in Title VI, addressing in particular procedures that LEAs should follow, and safeguards that LEAs should impose, to ensure that Title VI benefits afforded to private schoolchildren are secular. See pp. ---, infra.

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.[3]

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

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[3] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 98-1648.

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 schoolchildren in the district. Of the $214,080 budgeted for private schoolchildren, $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 were provided only on loan to private schools, and the ultimate authority and control over those items always rests with the public school system, not the private 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." Gov't Exh. D-4 in Opp. to Resp. Mot. for Summ. Judg. (State Guidelines) 22. 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 years to monitor 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 nonideological. State Guidelines 22. In addition, the SEA encourages LEAs to have religious schools sign written assurances that Title VI equipment will not be used for religious purposes. Id. at 84; Pet. App. 87a. The JPPSS has also required signed assurances from each private school that material and equipment would be used in "direct compliance" with Title VI. Woodward Dep. Exh. 13; see Pet. App. 107a.

The record compiled below showed that, in Jefferson Parish, Ruth Woodward, the coordinator of Title VI programs in the JPPSS, 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 material. Woodward Dep. 62-63 & Exh. 3. Woodward also visits each

private school every year to discuss use of the Title VI equipment with a school official, such as the principal or a librarian, and to make sure that logs of use of Title VI equipment are kept, and that Title VI equipment is properly marked as such. Id. at 96-98, 102-103, 111. Woodward specifically inquires of private school officials whether the Title VI equipment and materials are used for secular, neutral, and nonideological purposes. Id. at 102, 111. Library books purchased for loan to private schools are personally approved by Woodward and another public school official from catalogues; they also personally review all requests by private schools for library books and other instructional materials, such as videocassettes and filmstrips, and deleted titles that might indicate religiously oriented materials. Id. at 38, 88-89; Pet. App. 57a.[4]

3. On December 2, 1985, plaintiffs Mary Helms, Amy Helms, and Marie Schneider (hereafter respondents) brought suit in district court against federal, state, and local officials, claiming that several federal, state, and local programs as applied

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[4] This monitoring by state and local officials revealed occasional lapses from Title VI's requirement of secularity, which were corrected. Woodward on one occasion discovered that 191 books purchased and lent to religious school libraries were in violation of Title VI guidelines. Those books were recalled and donated to a public library. Pet. App. 51a, 91a. A monitoring visit by the SEA to JPPSS also 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, but investigation by Woodward disclosed that the book in question had not in fact been purchased with Title VI funds. Id. at 90a-91a.

in Jefferson Parish, Louisiana, including Title VI, violated the Establishment Clause.[5] 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." Second Amended Complaint ¶ 50 (Nov. 1, 1988). Respondents argued that this loan of instructional equipment and materials to private schools violated the Establishment Clause because (a) there were 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 an excessive entanglement between the government and private religious schools. Id. ¶ 52.

After discovery, the parties cross-moved for summary judgment on the constitutionality of the Title VI program in the Parish. In 1990, the district court initially concluded 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 practice of providing instructional equipment

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[5] Although the other challenged programs were the subject of extensive decisions in both lower courts, they are not directly pertinent to respondents' challenge to Title VI discussed herein, and will not be further addressed in this brief.

and materials to religious schools was controlled by this Court's decisions in 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 had invalidated state programs that provided instructional equipment and materials to religious schools.

The government moved for reconsideration, and on January 28, 1997, the district court reversed itself and upheld the Title VI program as applied in Jefferson Parish. Pet. App. 82a-108a. The court relied heavily on the Ninth Circuit's then-recent decision in Walker v. San Francisco Unified School District, 46 F.3d 1449 (1995), which upheld a "virtually indistinguishable" (Pet. App. 107a) Title VI program under which instructional equipment, including computers, was lent to religious private schools. The court emphasized that, as in Walker, the instructional equipment and materials lent to the private schools in Jefferson Parish were secular, that Title VI benefits were made available to students on a neutral basis and without reference to religion, and that all the monitoring controls in effect in Walker were also in effect in Jefferson Parish: library books and other instructional materials are prescreened by the LEA; most parochial schools sign a pledge agreeing not to use the materials for religious purposes; an LEA official visits the private schools every year; the SEA also monitors the LEA's implementation of the program; and no Title VI money is ever paid directly to religious schools. Ibid. In light

of those factors, the court found that the Title VI program in Jefferson Parish "does not have as its principal or primary effect the advancement or inhibition of religion." Id. at 108a.

4. Respondents appealed to the Fifth Circuit. The court of appeals reversed, and held that Jefferson Parish's 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. Pet. App. 53a-71a. The Fifth Circuit expressly disagreed with the Ninth Circuit's Walker decision upholding "a [Title VI] program that was, in all relevant respects, identical to the one * * * in Jefferson Parish." Id. at 59a.

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 was 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 two arguments that these absolute "boundary lines" based on the character of the aid are inapplicable to this case. First, it concluded that the Ninth Circuit in Walker had erred in attempting to distinguish Meek and Wolman on the ground that the programs struck down in those cases "directly targeted massive aid to private schools, the vast majority of which were religiously-affiliated," whereas Title VI is a "neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools." Pet. App. 69a (internal quotation marks omitted). That reading of Meek and Wolman was flawed, the court concluded, because the programs at issue in both cases were specifically designed to ensure that private schoolchildren would benefit from educational benefits equivalent to the benefits otherwise provided to public schoolchildren. Id. at 69a-70a.

Second, the court concluded that Meek and Wolman had not been called into question by Agostini v. Felton, 521 U.S. 203 (1997), which upheld a federal program under which public school teachers provide supplemental instruction to religious school students at

those students' schools. "Agostini does, it is true, discard a premise on which Meek relied -- i.e., that 'substantial aid to the educational function of sectarian schools necessarily results in aid to the sectarian school enterprise as a whole.'" Pet. App. 70a (quoting Meek, 421 U.S. at 366) (emphasis added; brackets and ellipsis omitted). But, the court stated, Agostini "does not replace that assumption with the opposite assumption; instead, Agostini only goes so far as to 'depart from the rule that all government aid that directly aids the educational function of religious schools is invalid.'" Pet. App. 70a (quoting Agostini, 521 U.S. at 225) (emphasis added by court of appeals; brackets and ellipsis omitted). Agostini, the court concluded, "says nothing about the loan of instructional materials to parochial schools and we therefore do not read it as overruling Meek or Wolman." Ibid.

Applying Meek and Wolman to this case, the court then 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. (quoting Meek, 421 U.S. at 355) (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).[6]

5. The government petitioned for rehearing and suggested rehearing en banc of the court of appeals' decision. Although one of the judges on the court of appeals called for an en banc poll, the court denied both rehearing and rehearing en banc. Pet. App. 154a. The panel amended its decision, however, to make clear that the use of Title VI funds to provide textbooks to religious school students is not prohibited by its decree. Id. at 155a.

6. In February 1999, the Department of Education issued amended Guidance for SEAs and LEAs on various aspects of Title VI, including the statutory requirement that all services, equipment, and materials made available to private school students be secular,

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[6] The court also invalidated, as applied in Jefferson Parish, Louisiana's counterpart statute permitting the loan of instructional materials to religious schools, La. Rev. Stat. Ann §§ 17:351-352 (West 1982 & Supp. 1998). See Pet. App. 71a.

neutral, and nonideological. See App., infra, 1a-9a.[7] 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 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,

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[7] A complete copy of this Guidance has been lodged with the Clerk.

and a review of any logs maintained." Id. at 4a-5a. The Guidance also states that the Department of Education believes 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.

ARGUMENT

The court of appeals has read this Court's decisions in Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977), to require invalidation of an Act of Congress, insofar as that statute has been applied to authorize the loan of instructional equipment, instructional materials, and library materials for the benefit of religious school students. Moreover, the court of appeals held that invalidation of the program was compelled by the character of the aid alone, irrespective of whether the aid was accompanied by safeguards with the purpose and effect of preventing the equipment and materials lent to religious schools from being diverted to religious purposes. That decision impairs the implementation of Title VI in the Fifth Circuit, and the decision's reasoning is likely to have similar adverse effects on other federal programs designed to ensure that all

schoolchildren -- including those in religious schools as well as those in public schools and private nonreligious schools -- have access to computers in their classrooms and school libraries. The court of appeals' decision also conflicts directly with a decision of the Ninth Circuit upholding a similar program. This Court's review is therefore warranted.

Further, while Meek and Wolman may be read as the court of appeals read them, we submit that neither the reasoning of those cases nor what this Court has identified as the fundamental principles of the Establishment Clause requires a categorical rule prohibiting the loan of all instructional equipment and materials to religious schools, without regard to whether the aid is accompanied by safeguards to prevent its diversion to religious purposes, or whether the aid is supplementary rather than a direct subsidy of the religious school's core educational program. The Court should therefore grant review to consider whether a categorical ban on lending secular instructional equipment and materials to religious schools should not apply where (a) the aid is accompanied by safeguards adequate to protect against its diversion to religious purposes, (b) the aid is only supplementary to the school's core educational functions, and (c) the aid provided to the religious school is part of a program that serves all students in public and nonprofit private schools, in a neutral and equitable fashion.

1. The court of appeals read this Court's decisions in Meek

and Wolman as establishing a categorical prohibition against lending instructional equipment or materials or library materials purchased with public funds to religious schools. The court of appeals therefore rejected the argument that such loans of equipment and materials could be made if they supplemented, rather than supplanted, the basic educational function of the schools, and if safeguards were established to prevent the diversion of the loaned materials to religious purposes.

Although that decision did not invalidate 20 U.S.C. 7351(b)(2) on its face, but rather held only that its particular application in Jefferson Parish was unconstitutional, as a practical matter it impairs the effectiveness of Title VI in the Fifth Circuit, insofar as that statute requires that private schoolchildren be permitted to participate equitably in its benefits. See 20 U.S.C. 7372(b). Title VI sets forth nine kinds of innovative-assistance programs that may be implemented with federal financial assistance. See 20 U.S.C. 7351(b); Charter School Expansion Act of 1998, Pub. L. No. 105-278, § 2(2), 112 Stat. 2682. Experience has shown, however, that often the Title VI program most useful for private schoolchildren is precisely the kind of program invalidated by the court of appeals in this case, funded under 20 U.S.C. 7351(b)(2), which permits the loan of instructional materials and equipment, especially computer hardware and software, as well as library

materials.[8] That sort of program also directly advances the important federal interest in ensuring that all schoolchildren have access to new technologies in instructional and library settings.[9]

The program at issue here provides for the loan of instructional equipment and materials to the private school, for use by students there. Because of resource constraints, it is not feasible to provide this kind of assistance by lending computers or software directly to each student, in a manner similar to the textbook-loan program upheld in Board of Education v. Allen, 392 U.S. 236 (1968).[10] Nor, for the same reason, is it feasible to hire

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[8] In school year 1997-1998, $16,472,226 was allocated in Title VI funds for programs serving students at private, nonprofit schools in 34 States. Of that amount, $12,513,910, or 76%, was used for instructional and educational materials. U.S. Dep't of Education, Elementary and Secondary Education Act (ESEA): Title VI: Innovative Education Program Strategies, National Compendium of State and Local Activities, 1997-1998 School Year 2.3 (Feb. 1999) (lodged with the Clerk). In Louisiana, of $572,751 allocated for private schoolchildren in the same year, $522,183, or 91%, was used for instructional and educational materials. See id. at 2.27.

[9] Although Section 7351(b) theoretically permits the LEA to use federal funds for other kinds of programs, some of those other programs may in some circumstances present Establishment Clause concerns in the religious school setting, because they anticipate that the benefits be provided directly to the school, rather than to the schoolchildren. See 20 U.S.C. 7351(b)(3) (educational reform projects), (7) (school reform), and (9) (school improvement programs).

[10] 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

public school teachers to supervise the use of Title VI instructional equipment and materials by students at religious schools, so as to bring the program under Agostini v. Felton, 521 U.S. 203 (1997), which permits public schoolteachers to give instruction to religious school students in religious school buildings.[11] In practical effect, therefore, the court of appeals has invalidated a form of federal assistance that is hihgly relevant for private schoolchildren, and also central to the effort to bring modern technology to all students.

Thus, although the court of appeals' decision does not prohibit the Secretary of Education from distributing funds under the statute to Louisiana for further distribution to LEAs in the State (including Jefferson Parish), it does restrict LEAs' ability to provide Title VI benefits to children who attend religious

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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 an reasonable accurate estimate of the total number of students receiving Title VI services. Therefore, Congress has appropriated, for Title VI, about $7 per student. See also Pet. App. 63a n.18 (court of appeals noting that San Francisco Title VI program provided $6.65 in benefits per student). While that amount may be sufficient to provide students at each private school with a few items of equipment and materials, it is not sufficient to provide individual students with software or computer equipment.

[11] For the same reasons, it would also be difficult, if not impossible in many instances, to hire public school teachers to give religious school students benefits under other Title VI programs, such as those designed to improve higher-order thinking skills or to combat illiteracy. See 20 U.S.C. 7351(b)(4) and (5).

schools. Under the court of appeals' ruling, LEAs may find it difficult to comply with the statutory requirement that they ensure that private schoolchildren participate equitably in the benefits of Title VI. See 20 U.S.C. 7372(a)(1). The adverse consequences of the court of appeals' decision for the equitable participation of children in religious schools in the benefits of Title VI warrant this Court's review.

In addition, the kind of assistance that the court of appeals has invalidated is precisely the sort of assistance that will be even more important in the future, in the effort to make computer-assisted learning available to all children. We are informed that the President will shortly announce proposed legislation that would substitute, for the broad menu of aid categories in Title VI, a program specifically designed to provide advanced computer technologies to students in every classroom, including students in religious schools. See note 1, supra. We anticipate that, under that proposed legislation, which recognizes the overarching importance of access to and familiarity with technology in the modern learning environment, the financial assistance currently provided to LEAs for the acquisition of computer hardware and software under Titles III and VI of the ESEA would be undertaken pursuant to an expanded Title III of the ESEA. Ibid. Although the court of appeals' decision invalidates only a particular program under Title VI, its reliance on Meek and Wolman for a broad ruling that no instructional materials or equipment of any kind may be

lent to religious schools creates a serious question as to whether LEAs may continue to provide computer hardware and software under either the current version of Title III, see 20 U.S.C. 6844(3), or the revision of it to be proposed.

2. The court of appeals' decision conflicts directly with the Ninth Circuit's decision in Walker v. San Francisco Unified School District, 46 F.3d 1449 (1995), which upheld a "virtually indistinguishable" Title VI program (Pet. App. 107a). In that case, as in this one, private schools were lent instructional equipment and materials, including computer equipment; the schools were also lent library books and instructional materials, selected from prescreened lists to ensure their secularity. Ibid. The Ninth Circuit upheld the program, concluding in particular that it did not have the primary effect of advancing religion because the benefits under the program were available on a neutral basis without reference to religion, and because "controls are in place to prevent [Title VI] benefits from being diverted to religious instruction." 46 F.3d at 1467.

The Ninth Circuit's decision is not distinguishable from the Fifth Circuit's decision in this case on the ground that the Ninth Circuit found that the San Francisco program had adequate controls to prevent the diversion of instructional equipment to religious purposes.[12] With one possible exception, those controls do not

[12] The Ninth Circuit did not consider the case before it to be controlled by Meek and Wolman in part because it read this

appear to have been significantly different from the controls in place in Jefferson Parish.[13] Indeed, even though the court of appeals in this case was aware that the program in Walker had in place various controls, it found the two programs to be, "in all relevant respects, identical." Pet. App. 59a.

More importantly, under the court of appeals' rationale in this case, the existence or extent of any such controls is simply irrelevant to the constitutional question, for the Fifth Circuit read Meek and Wolman to hold that the permissibility of aid to the educational function of a religious school is dependent entirely on the nature of the aid. See Pet. App. 66a-67a. Thus, even if the

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Court's subsequent decisions as undermining those decisions. 46 F.3d at 1464-1466. We do not suggest that the Ninth Circuit properly concluded that it was not bound by Meek and Wolman. See Agostini, 521 U.S. at 237 (emphasizing that only this Court has the prerogative of overruling its own decisions, and that lower courts should not conclude that this Court's "more recent cases have, by implication, overruled an earlier precedent"). The Ninth Circuit may, however, have identified factors that legitimately distinguish Title VI from the programs invalidated in Meek and Wolman, and could be adopted by this Court to modify the holdings of those decisions, even if the Court does not disapprove those cases on their particular facts. See Walker, 46 F.3d at 1467 (discussing supplementary nature of Title VI); pp. ---, infra (discussing point that assistance under Title VI must supplement, and not supplant, resources otherwise available to LEAs and schools).

[13] The possible exception relates to computer equipment, for the Ninth Circuit noted that, at one point, computers lent to San Francisco private schools under Title VI had been "locked" for use only with prescreened software, thus ensuring that they could not be diverted to use with religiously-oriented software. See Walker, 46 F.3d at 1464. It does not appear, however, that other instructional equipment lent to religious schools, such as overhead projectors and videocassette players, was similarly "locked" for use only with prescreened materials. See ibid.

JPPSS did have in place controls equivalent to those examined in the Walker decision, or even more extensive controls giving even greater assurance that instructional equipment would not be used for religious purposes, that would not have affected the court of appeals' resolution of this case. That conflict in the circuits warrants resolution by this Court. LEAs and SEAs across the Nation should know whether the Fifth Circuit's or the Ninth Circuit's decision sets forth a correct understanding of the constitutional limits on their ability to comply with Title VI's requirement of equitable participation by private school students by lending computer hardware and software to religious schools.

3. Meek and Wolman may fairly be read as the court of appeals read them, to prohibit flatly the loan of instructional equipment and materials for use by students at religious schools, without regard to safeguards with the purpose and effect of preventing such aid from being diverted to religious purposes. Such a broad categorical rule, however, is not necessary to secure the "bedrock" Establishment Clause principle that "[p]ublic funds may not be used to endorse [a] religious message." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 846-847 (1995) (O'Connor, J., concurring) (internal quotation marks omitted); see Bowen v. Kendrick, 487 U.S. 589, 611 (1988) (Establishment Clause "prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith") (internal quotation marks omitted); id. at 623 (O'Connor, J.,

concurring) ("any use of public funds to promote religious doctrines violates the Establishment Clause"); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973) ("the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination"). Where the assistance is appropriately limited and safeguarded, we submit that the Constitution should not be read to demand a more sweeping restriction prohibiting all loans of such equipment and materials to religious schools. Individual deviations from such safeguards resulting in Establishment Clause violations can be redressed on a case-by-case basis. Cf. Kendrick, 487 U.S. at 620-622 (opinion of the Court); id. at 623-624 (O'Connor, J., concurring). It is not necessary, however, to adopt a blanket presumption that such safeguards can never be effective or manageable. Cf. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) ("[O]ur decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes."). Accordingly, we submit that the rule of Meek and Wolman should be limited to cases in which, either because the public aid to a religious school is not supplementary, or because the provision of aid is not accompanied by effective safeguards, there is an unacceptable risk of diversion of resources to religious purposes.

To the extent that Meek and Wolman announce a categorical rule prohibiting loans of instructional equipment and materials to

religious schools, those decisions rest on two rationales, both of which are subject to reexamination in light of this Court's subsequent decisions. The first rationale is that, because religious elementary and secondary schools are typically considered pervasively sectarian, any aid to the educational function of such schools must be conclusively held to advance the religious as well as the secular aspects of the education that they provide, which are also deemed to be inextricably intertwined. See Meek, 421 U.S. at 364-366; Wolman, 433 U.S. at 249-251.

More recently, 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. To be sure, the Agostini decision, and the decisions on which it relied for the above-quoted statement (Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993), and Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986)), involved the distinct situations of instructional assistance provided directly to religious school students by public school personnel, and cash assistance provided directly to students (rather than religious schools) by public authorities. Nonetheless those decisions suggest a more nuanced rule than that announced in Meek and Wolman, so that loans of instructional equipment and materials to religious schools should not conclusively be presumed to advance the

religious mission of such schools.[14]

Second, Meek and Wolman appear to rest also on the rationale that any safeguards adequate to prevent the diversion of instructional equipment and materials to religious purposes would require detailed supervision of religious schools' instruction, resulting in an impermissible entanglement between state and religion. See Meek, 421 U.S. at 366-367 n.16 (discussing Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974), and lower-court decision in Meek). But again, in later cases, including Agostini, the Court has indicated that the stringency of its previous rules against interaction of public and religious institutions should be relaxed. Agostini observed that "[n]ot all entanglements * * * have the effect of advancing or inhibiting religion," and that "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." 521 U.S. at 233 (also citing Kendrick, 487 U.S. at 615-617); see also Aguilar v. Felton, 473 U.S. 402, 430

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[14] Indeed, much earlier, in Regan, supra, the Court upheld a state statute authorizing reimbursement to private schools for the costs of administering state-required standardized tests because "there was no substantial risk that the examinations could be used for religious educational purposes." 444 U.S. at 656; see id. at 659 (noting that the law "provides ample safeguards against excessive or misdirected reimbursement"). The Court explained in Regan that Meek should not be read to hold "'that all loans of secular instructional material and equipment' inescapably have the effect of direct advancement of religion." Id. at 661-662 (quoting Wolman, 433 U.S. at 263 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

(1985) (O'Connor, J., dissenting) ("state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute"). The danger of entanglement exists only where "pervasive monitoring," see Agostini, 521 U.S. at 234, must be employed to prevent public aid from being diverted to religious purposes.

Thus, the question is not (as the court of appeals believed) whether this Court -- having "discard[ed] a premise on which Meek relied -- i.e., that substantial aid to the educational function of sectarian schools necessarily results in aid to the sectarian school enterprise as a whole" -- has "replace[d] that assumption with the opposite assumption," namely that aid to religious schools is presumptively permissible. See Pet. App. 70a (internal quotation marks, brackets, and ellipsis omitted). Rather, each case should be assessed on its facts. Direct material aid to religious schools would violate the Establishment Clause if it were so extensive as to supplant resources that the school itself would otherwise provide or obtain, or if that aid were not protected against diversion to religious use by adequate safeguards. In this case, therefore, the court of appeals should have the opportunity to consider whether the statutory limits on the uses to which Title VI aid may be put, together with the actual safeguards put in place by the SEA and the LEA, are in fact adequate to eliminate an unacceptable risk of diversion of resources to sectarian ends. The court of appeals also should have the opportunity to consider the

Department of Education's recent Title VI Guidance explaining the kinds of safeguards that should be employed by LEAs administering Title VI programs (see pp. ---, supra).[15] And the court of appeals should then consider whether such safeguards, if adequate, are in fact so intrusive that they inhibit the ability of religious schools to fulfill their religious mission, or otherwise require "excessive and enduring entanglement." Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).[16] But a categorical ban against loans of

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[15] Accordingly, should the Court conclude that, instead of the categorical rule applied by the court of appeals, a review of the adequacy of safeguards is appropriate, the Court may wish to remand the case to the court of appeals for further consideration, rather than addressing for itself in the first instance the adequacy of the safeguards, on which no findings were made by the court of appeals.

[16] With respect to entanglement, the task of monitoring the use of instructional equipment and materials at religious schools is not likely to require the pervasive kind of surveillance about which the Court expressed concern in Lemon. In that case, involving (inter alia) 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. The same need not be true with regard to monitoring the use of instructional equipment and materials; schools can and do maintain logs documenting the classes in which such equipment and materials are used, the assignments that are carried out on them, and the teachers who use them. Such logs could be required as a condition of acceptance of the equipment and materials, and use of such equipment and materials could also be limited to classes in which the prospect of religious inculcation is relatively minimal. Cf. Allen, 392 U.S. at 248 ("Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature,

instructional equipment and materials to religious schools in all cases is not necessary to prevent "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." Kendrick, 487 U.S. at 611.

A further important point distinguishes Title VI from the assistance programs invalidated in Meek and Wolman. Title VI expressly requires that any assistance under that program (whether for private or public schools) supplement, and not supplant, non-federal resources available to the school -- reflecting the inherently supplementary role the federal government plays in education. See 20 U.S.C. 7371(b); 34 C.F.R. 299.8(a). Moreover, the aid actually provided under Title VI on a per-student basis is quite small, compared to the other resources available to private schools. See p. ---, supra (appropriation of about $7 per student). The aid provided in Meek, by contrast, was described by

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are used by the parochial schools to teach religion.").

One of the statutes examined in Lemon -- unlike Title VI -- also involved reimbursement of funds expended by religious schools. In that context, the Court held that state audits of religious schools' accounts to distinguish religious and secular expenditures would be impermissibly intrusive. See 403 U.S. at 621-622. But even if that particular rationale has survived the Court's subsequent decisions in Kendrick (see 487 U.S. at 616-617) and Agostini (see 521 U.S. at 233-234), which permit some governmental review of religious institutions' compliance with statutory requirements, the same danger is not present in Title VI. An LEA would not have to examine a religious school's books to determine whether equipment was being used for improper purposes; indeed, Title VI proscribes any direct funding or reimbursement to religious schools. The LEA could review the purposes for which loaned equipment and materials had been used by examining the information maintained on logs.

the Court as "massive" (421 U.S. at 365), and the extent of the aid in Wolman, although less clear from the Court's opinion in that case, appears to have been quite substantial as well. See 433 U.S. at 233 ($88 million biennial appropriation for auxiliary aid to nonpublic schools).

In Meek and Wolman, it was reasonable to conclude that the aid programs "relieved sectarian schools of costs they otherwise would have borne in educating their students." Zobrest, 509 U.S. at 12 (so characterizing Meek). By contrast, because of the anti-supplantation rule of Title VI and the relatively small amount of money spent per student, it would be difficult to conclude that Title VI effects a "direct subsidy" to religious schools (ibid.), or that participation in the Title VI program permits religious schools to divert other resources, which would otherwise be used for secular purposes, to religious use. In addition, because Title VI benefits are offered to all students on a neutral basis without reference to religion, Title VI does not create "a financial incentive to undertake religious indoctrination." Agostini, 521 U.S. at 231. Therefore, even if there should be a categorical rule prohibiting loan of instructional equipment and materials in some circumstances, it should be limited to situations where the aid program relieves religious schools of costs that they otherwise would bear, which is not the case under Title VI.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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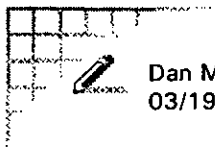
MAY 1999

Edwards v Picard



Dan Marcus
03/19/99 10:01:21 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: O'Connor

I took a quick look this morning at some of the key O'Connor opinions this morning and will get you copies before the meeting. I hadn't realized how relatively strong a view she had expressed on Estab Clause issues over the years. One striking fact is that she concurred not only in the Court's opinion but also in Souter's passionate concurrence in Lee v. Weisman, the 5-4 decision striking down the rabbi's nondenominational prayer at the public high school graduation.
I'll also give you Powell's concurrence in Wolman, which Seth suggested as a model for O'Connor.

With Breyer and Ginsburg replacing White and Blackmun, the Court is actually more separationist-leaning than it was five years ago.

521 U.S. 203 printed in FULL format.

RACHEL AGOSTINI, ET AL., PETITIONERS 96-552 v. BETTY-LOUISE FELTON ET AL. CHANCELLOR, BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS 96-553 v. BETTY-LOUISE FELTON ET AL.

Nos. 96-552, 96-553

SUPREME COURT OF THE UNITED STATES

521 U.S. 203; 117 S. Ct. 1997; 1997 U.S. LEXIS 4000; 138 L. Ed. 2d 391; 65 U.S.L.W. 4524; 37 Fed. R. Serv. 3d (Callaghan) 1051; 97 Cal. Daily Op. Service 4765; 97 Daily Journal DAR 7843; 11 Fla. Law W. Fed. S 76

April 15, 1997, Argued
June 23, 1997, * Decided
* Together with No. 96-553, Chancellor, Board of Education of the City of New York, et al. v. Felton et al., also on certiorari to the same court.

NOTICE: [*1]

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, Reported at: 1996 U.S. App. LEXIS 22981.

DISPOSITION: 101 F.3d 1394, reversed and remanded.

<=3> View References <=4> Turn Off Lawyers' Edition Display

DECISION: New York City program under which public school teachers were sent into parochial schools during regular school hours to provide remedial education held valid under establishment of religion clause of Federal Constitution's First Amendment.

SUMMARY: The city of New York implemented a program--pursuant to Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.)--under which the city sent public school teachers into parochial schools during regular school hours to provide remedial education to disadvantaged children. The program's services were available to all children who met Title I's eligibility requirements, no matter what the students' religious beliefs or where the students went to school. In order to insure compliance with the city's rules against compromising the program's secular purpose, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month. In 1978, a number of federal taxpayers, seeking declaratory and injunctive relief, brought suit in the United States District Court for the Eastern District of New York against the city's board of education, in which suit it was claimed that the program violated the establishment of religion clause of the Federal Constitution's First Amendment. The District Court granted summary judgment for the board, but the United States Court of Appeals for the Second Circuit reversed (739 F2d 48). The United States Supreme Court, in affirming, held that the program created an excessive

entanglement of church and state (Aguilar v Felton (1985) 473 US 402, 87 L Ed 2d 290, 105 S Ct 3232). On remand, the District Court entered a permanent injunction barring the board from sending public school teachers into parochial schools to provide remedial education pursuant to Title I. The board subsequently provided Title I services to parochial school students at public school sites, at leased sites, and in vans parked near the parochial schools. The additional costs incurred as a result of implementing such systems were significant. In 1995, the board and a group of parents of parochial school students entitled to Title I services filed motions in the District Court to seek relief from the injunction under Rule 60(b)(5) of the Federal Rules of Civil Procedure, which authorizes a federal court to relieve a party from a final judgment or order when it is no longer equitable that the judgment should have prospective operation. The board and the parents contended, among other matters, that the law had changed since the Aguilar decision so as to make the program legal. The District Court denied the motion on the ground that Aguilar's "demise," although perhaps imminent, had not yet occurred. The Court of Appeals affirmed (101 F3d 1394).

On certiorari, the Supreme Court reversed and remanded. In an opinion by O'Connor, J., joined by Rehnquist, Ch. J., and Scalia, Kennedy, and Thomas, JJ., it was held that (1) the program was not invalid under the establishment of religion clause, as the program did not (a) result in governmental religious indoctrination, (b) define aid recipients by reference to religion so as to give the recipients any incentive to modify their religious beliefs or practices in order to obtain services, or (c) create an excessive entanglement that advanced or inhibited religion; and (2) the significant change in the Supreme Court's post-Aguilar establishment of religion clause law entitled the board and the parents to relief under Rule 60(b)(5).

Souter, J., joined by Stevens and Ginsburg, JJ., and joined in part (as to point 2 below) by Breyer, J., dissenting, expressed the view that (1) Aguilar had been correctly decided, as the program invalidly subsidized and endorsed religion; and (2) Supreme Court cases subsequent to Aguilar had not rejected Aguilar's underlying assumptions as to government aid to sectarian school students.

Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting, expressed the view that (1) the Supreme Court Rules did not countenance the rehearing granted in the case at hand, and (2) a proper application of those rules and the Federal Rules of Civil Procedure would have led the Supreme Court to defer reconsideration of Aguilar until the issue was presented in another case.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:
[**HN1]
<=9> CONSTITUTIONAL LAW @983
establishment of religion -- government aid to sectarian schools --

Headnote: <=10> [1A] <=11> [1B] <=12> [1C]
A city's program--pursuant to Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.)--under which the city sends public school teachers into parochial schools during regular school hours to provide remedial education is not invalid under the establishment of religion clause of the Federal Constitution's First Amendment, where the program does not (1) result

in governmental religious indoctrination, (2) define aid recipients by reference to religion so as to give the recipients any incentive to modify their religious beliefs or practices in order to obtain services, or (3) create an excessive entanglement of church and state that advances or inhibits religion; such a program cannot reasonably be viewed as an endorsement of religion in violation of the establishment of religion clause. (Souter, Stevens, Ginsburg, and Breyer, JJ., dissented from this holding.)

[**HN2]
<=14> CONSTITUTIONAL LAW @983
establishment of religion -- government aid to sectarian schools -- indoctrination --

Headnote: <=15> [2A] <=16> [2B] <=17> [2C] <=18> [2D] <=19> [2E]
A city's program--such as one pursuant to Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.)--under which the city sends public school teachers into parochial schools during regular school hours to provide remedial education does not, as a matter of law, have the effect of advancing religion through indoctrination in violation of the establishment of religion clause of the Federal Constitution's First Amendment, as (1) there is no reason to presume that a full-time public employee such as a teacher under such a program will depart from assigned duties and instructions and embark on religious indoctrination simply because the employee enters a parochial school classroom, and (2) the presence of publicly employed teachers in parochial school classrooms under such a program does not, without more, create the impression of a symbolic union between church and state; such a program does not impermissibly finance religious indoctrination, where (1) such a program makes aid available only to eligible recipients, (2) that aid is provided to students at whatever school the students choose to attend, and (3) program services are, by law, supplemental to the regular curricula and thus do not relieve sectarian schools of costs that those schools otherwise would have borne in educating students. (Souter, Stevens, Ginsburg, and Breyer, JJ., dissented from this holding.)

[**HN3]
<=21> CONSTITUTIONAL LAW @983
establishment of religion -- government aid to sectarian schools --

Headnote: <=22> [3A] <=23> [3B]
A city's program--pursuant to Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.)--under which the city sends public school teachers into parochial schools during regular school hours to provide remedial education does not violate the establishment of religion clause of the Federal Constitution's First Amendment by giving aid recipients an incentive to modify their religious beliefs or practices in order to obtain services, where (1) the program's services are allocated on the basis of criteria that neither favor nor disfavor religion, and (2) the services are available to all children who meet Title I's eligibility requirements, no matter what the students' religious beliefs or where the students go to school.

[**HN4]
<=25> CONSTITUTIONAL LAW @983
establishment of religion -- government aid to sectarian schools -- entanglement --

Headnote: <=26> [4A] <=27> [4B]
A city's program--pursuant to Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.)--under which the city sends public school teachers into parochial schools during regular school hours to provide remedial education does not violate the establishment of religion clause of the Federal Constitution's First Amendment by creating an excessive entanglement of church and state that advances or inhibits religion, notwithstanding that the program requires administrative cooperation between the city's board of education and parochial schools and might increase the dangers of political divisiveness, where (1) in order to insure compliance with the city's rules against compromising the program's secular purpose, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month; and (2) there is no suggestion in the record that such unannounced monthly visits--as opposed to more pervasive monitoring--are insufficient to prevent or detect inculcation of religion by public employees. (Souter, Stevens, Ginsburg, and Breyer, JJ., dissented from this holding.)

[**HN5]
<=29> JUDGMENT @289
relief -- change in law -- government aid to sectarian schools --

Headnote: <=30> [5A] <=31> [5B] <=32> [5C]
With respect to a Federal District Court's permanent injunction--entered on remand from the United States Supreme Court's decision in Aguilar v Felton (1985) 473 US 402, 87 L Ed 2d 290, 105 S Ct 3232--which barred a city from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.), the parties bound by the injunction are entitled to relief, under Rule 60(b)(5) of the Federal Rule of Civil Procedure, from the operation of the injunction, where (1) the Supreme Court held in Aguilar that the city's program violated the establishment of religion clause of the Federal Constitution's First Amendment; (2) the Supreme Court concludes in the case at hand that the program does not violate the establishment of religion clause under current law; and (3) it is appropriate to apply the law announced in the case at hand to the parties in question, for (a) Rule 60(b)(5)--which authorizes a federal court to relieve a party from a final judgment or order when it is no longer equitable that the judgment should have prospective operation--specifically contemplates the grant of relief in the circumstances presented, and (b) there is no reason to wait for a "better vehicle" in which to evaluate the impact of subsequent Supreme Court cases on Aguilar's continued vitality, as it would be particularly inequitable for the Supreme Court to wait for another case to arise while the city labors under a continuing injunction forcing the city to spend millions of dollars on mobile instructional units and leased sites, when the city could instead be spending that money on the program in question. (Ginsburg, Stevens, Souter, and Breyer, JJ., dissented from this holding.)

[**HN6]
<=35> JUDGMENT @289
relief -- change in facts or law --

Headnote: <=36> [6]
It is appropriate to grant a motion under Rule 60(b)(5) of the Federal Rules

of Civil Procedure--authorizing a federal court to relieve a party from a final judgment or order when it is no longer equitable that the judgment should have prospective operation--when the party seeking relief from an injunction or consent decree can show a significant change either in factual conditions or in the law; for purposes of such a motion, a court may properly recognize subsequent changes in either statutory or decisional law; a court errs in refusing to modify an injunction or consent decree in light of such changes.

[**HN7]
<=37> JUDGMENT @289
relief -- change in factual conditions --

Headnote: <=38> [7]
For purposes of determining whether parties are entitled to relief, under Rule 60(b)(5) of the Federal Rules of Civil Procedure, from the operation of a Federal District Court's permanent injunction--entered on remand from a United States Supreme Court decision--which barred a city from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a government aid program, the parties fail to establish a significant change in factual conditions such that would warrant relief under Rule 60(b)(5), where (1) the parties claim that the exorbitant costs of complying with the District Court's injunction constitute such a change, but (2) the parties and the Supreme Court were aware, at the time of the Supreme Court's decision, that additional costs would be incurred if the services in question could not be provided in parochial school classrooms.

[**HN8]
<=39> JUDGMENT @289
relief -- change in law -- statements by Supreme Court Justices --

Headnote: <=40> [8]
For purposes of determining whether there has been a change in law so as to entitle parties to relief, under Rule 60(b)(5) of the Federal Rules of Civil Procedure, from the operation of a Federal District Court's permanent injunction--entered on remand from the United States Supreme Court's decision in Aguilar v Felton (1985) 473 US 402, 87 L Ed 2d 290, 105 S Ct 3232--which barred a city from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a government aid program, statements made by five Justices in another Supreme Court case, which statements express the view that Aguilar should be reconsidered or overruled, do not, in themselves, furnish a basis for concluding that the Supreme Court's establishment of religion clause jurisprudence has changed, where the question of Aguilar's propriety was not before the Supreme Court in the case at issue.

[**HN9]
<=42> CONSTITUTIONAL LAW @979
establishment of religion --

Headnote: <=43> [9]
In evaluating whether government aid violates the establishment of religion clause of the Federal Constitution's First Amendment, the United States Supreme Court (1) asks whether the government acted with the purpose of advancing or inhibiting religion, and (2) explores whether the aid has the effect of advancing or inhibiting religion.

[**HN10]
<=44> CONSTITUTIONAL LAW @979
establishment of religion --

Headnote: <=45> [10]
Government inculcation of religious beliefs has the impermissible effect of advancing religion in violation of the establishment of religion clause of the Federal Constitution's First Amendment.

[**HN11]
<=46> CONSTITUTIONAL LAW @983
establishment of religion -- sectarian school students --

Headnote: <=47> [11A] <=48> [11B]
For purposes of the establishment of religion clause of the Federal Constitution's First Amendment, there is no dispositive difference in the degree of symbolic union of church and state between (1) a sectarian school student receiving remedial instruction in a classroom on the school's campus, and (2) such a student receiving such instruction in a van parked just at the school's curbside; thus, there is no logical basis upon which to conclude that remedial education services to sectarian school students pursuant to Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.) are an impermissible subsidy of religion when offered on-campus, but not when offered off-campus. (Souter, Stevens, Ginsburg, and Breyer, JJ., dissented from this holding.)

[**HN12]
<=50> CONSTITUTIONAL LAW @983
establishment of religion -- sectarian school students --

Headnote: <=51> [12]
For purposes of the establishment of religion clause of the Federal Constitution's First Amendment, the provision of remedial instructional services under Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.) to students in sectarian schools is indistinguishable, in all relevant respects, from the provision of sign-language interpreters to such students under the Individuals with Disabilities Education Act (IDEA), 20 USCS 1400 et seq., where (1) both programs make aid available only to eligible recipients, (2) that aid is provided to students at whatever school the students choose to attend, and (3) both services are by law supplemental to the regular curricula; although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant. (Souter, Stevens, Ginsburg, and Breyer, JJ., dissented from this holding.)

[**HN13]
<=54> CONSTITUTIONAL LAW @983
establishment of religion -- sectarian school students --

Headnote: <=55> [13]
Although individual sectarian school students may not directly apply for remedial instructional services under Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.) and are not required to submit a

formal application before receiving such services, it does not follow that such services are distributed directly to the religious schools in violation of the establishment of religion clause of the Federal Constitution's First Amendment--notwithstanding that such services are provided in the religious schools during regular school hours--where (1) no Title I funds ever reach the coffers of religious schools, (2) Title I services may not, by regulation, be provided to religious schools on a schoolwide basis, and (3) Title I funds are instead distributed to a public agency that dispenses services directly to the eligible students within the agency's boundaries, no matter where the students choose to attend school. (Souter, Stevens, Ginsburg, and Breyer, JJ., dissented from this holding.)

[**HN14]
<=57> APPEAL @1029
evidence not in record --

Headnote: <=58> [14]
On certiorari to review a Federal Court of Appeals' decision as to whether a city violates the establishment of religion clause of the Federal Constitution's First Amendment by sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.), the United States Supreme Court will not conclude that Title I services supplant the remedial instruction and guidance counseling already provided in the city's sectarian schools, where claims that the sectarian schools provide such services--and reduce those services once the students begin to receive Title I instruction--rest (1) on speculation about the impossibility of drawing any line between supplemental and general education, and (2) not on any evidence in the record. (Souter, Stevens, Ginsburg, and Breyer, JJ., dissented from this holding.)

[**HN15]
<=60> APPEAL @1289
presumptions --

Headnote: <=61> [15]
On certiorari to review a Federal Court of Appeals' decision as to whether a city violates the establishment of religion clause of the Federal Constitution's First Amendment by sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.), the United States Supreme Court--in determining whether Title I services supplant the remedial instruction and guidance counseling already provided in the city's sectarian schools--will not presume that the city's board of education would violate Title I regulations by continuing to provide Title I services to students who attend a sectarian school that has curtailed its remedial instruction program in response to Title I.

[**HN16]
<=63> CONSTITUTIONAL LAW @983
aid to sectarian students --

Headnote: <=64> [16]
The validity, under the establishment of religion clause of the Federal

Constitution's First Amendment, of a government student-aid program does not depend on the number of sectarian school students who happen to receive the otherwise neutral aid.

[**HN17]
<=65> CONSTITUTIONAL LAW @979
establishment of religion --

Headnote: <=66> [17]
For purposes of determining whether a government aid program violates the establishment of religion clause of the Federal Constitution's First Amendment, the criteria by which the program identifies its beneficiaries are relevant--apart from enabling a court to evaluate whether the program subsidizes religion--in that the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination; however, the aid is less likely to have the effect of advancing religion where the aid is (1) allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and (2) is made available to both religious and secular beneficiaries on a nondiscriminatory basis.

[**HN18]
<=67> CONSTITUTIONAL LAW @979
establishment of religion --

Headnote: <=68> [18]
Not all entanglements between church and state have the effect of advancing or inhibiting religion in violation of the establishment of religion clause of the Federal Constitution's First Amendment; entanglement must be excessive before it runs afoul of the establishment of religion clause.

[**HN19]
<=69> CONSTITUTIONAL LAW @983
aid to sectarian students --

Headnote: <=70> [19]
With respect to a government aid program under which a city sends public school teachers into parochial schools to provide remedial education to disadvantaged children, the considerations that the program requires administrative cooperation between the city's board of education and parochial schools and might increase the dangers of political divisiveness are insufficient by themselves to create an excessive entanglement between church and state in violation of the establishment of religion clause of the Federal Constitution's First Amendment.

[**HN20]
<=71> EVIDENCE @417
presumptions -- violation of law --

Headnote: <=72> [20]
With respect to a government aid program under which public school teachers are sent into parochial schools to provide remedial education, the United States Supreme Court (1) will not presume that public employees will inculcate religion--in violation of the establishment of religion clause of the Federal Constitution's First Amendment--simply because such employees happen to be in

a sectarian environment, and (2) must discard the assumption that pervasive monitoring of such teachers is required to prevent or detect inculcation of religion.

[**HN21]
<=73> COURTS @776
overruling prior decisions --

Headnote: <=74> [21]
The doctrine of stare decisis does not preclude the United States Supreme Court from overruling Aguilar v Felton (1985) 473 US 402, 87 L Ed 2d 290, 105 S Ct 3232, and those portions of School Dist. v Ball (1985) 473 US 373, 87 L Ed 2d 267, 105 S Ct 3216, that are inconsistent with the court's more recent decisions, as (1) the court's jurisprudence with regard to the establishment of religion clause of the Federal Constitution's First Amendment has changed significantly since the court decided Ball and Aguilar, both of which involved the propriety, under the establishment of religion clause, of government aid programs under which public school teachers were sent into parochial schools to provide remedial education; and (2) the decision to overturn those cases thus rests on far more than a present doctrinal disposition to come out differently from the court of 1985. (Souter, Stevens, Ginsburg, and Breyer, JJ., dissented from this holding.)

[**HN22]
<=77> COURTS @775
stare decisis --

Headnote: <=78> [22]
Stare decisis is not an inexorable command, but instead reflects a policy judgment that in most matters, it is more important that the applicable rule of law be settled than that it be settled right; this policy is at its weakest when the United States Supreme Court interprets the Federal Constitution, because the Supreme Court's interpretation can be altered only by constitutional amendment or by overruling the Supreme Court's prior decisions.

[**HN23]
<=79> APPEAL @1768
law of the case -- reversal --

Headnote: <=80> [23]
On certiorari to review a Federal Court of Appeals' decision as to whether parties were entitled, under Rule 60(b)(5) of the Federal Rules of Civil Procedure, to relief from an injunction that was entered by a Federal District Court on remand from Aguilar v Felton (1985) 473 US 402, 87 L Ed 2d 290, 105 S Ct 3232--in which the United States Supreme Court held that a government aid program under which a city sent public school teachers into parochial schools to provide remedial education violated the establishment of religion clause of the Federal Constitution's First Amendment--the law of the case doctrine does not place any constraints on the Supreme Court's ability to overturn Aguilar, where (1) the Supreme Court concludes that Aguilar would be decided differently under current establishment of religion clause law, and (2) adherence to Aguilar would thus work a manifest injustice, such that the law of the case doctrine does not apply.

[**HN24]
<=82> APPEAL @1766
law of the case --

Headnote: <=83> [24]
The law of the case doctrine, under which a court should not reopen issues decided in earlier stages of the same litigation, does not apply if the court is convinced that the prior decision is clearly erroneous and would work a manifest injustice.

[**HN25]
<=84> COURTS @777.5
effect of overruling decision --

Headnote: <=85> [25]
With regard to the United States Supreme Court's general practice of applying to the parties before the court the rule of law that is announced in the case at hand, the Supreme Court will adhere to this practice even when overruling a prior case.

[**HN26]
<=86> COURTS @775
adherence to Supreme Court precedent -- overruling --

Headnote: <=87> [26]
If a precedent of the United States Supreme Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, then a Federal Court of Appeals should (1) follow the case which directly controls, and (2) leave to the Supreme Court the prerogative of overruling its own decisions; adherence to this teaching by a Federal District Court and a Federal Court of Appeals does not insulate a legal principle on which those courts relied from the Supreme Court's review to determine the principle's continued vitality.

[**HN27]
<=88> JUDGMENT @289
relief from injunction --

Headnote: <=89> [27]
With respect to a motion in Federal District Court under Rule 60(b)(5) of the Federal Rules of Civil Procedure for relief from the operation of a permanent injunction which was entered by the District Court on remand from a United States Supreme Court decision, the District Court (1) acts within its discretion in entertaining the motion with supporting allegations, but (2) is correct to recognize that the motion must be denied unless and until the Supreme Court reinterprets the binding precedent.

[**HN28]
<=90> APPEAL @1366

<=91> COURTS @777.5
discretion -- effect of overruling decision --

Headnote: <=92> [28]

A trial court's exercise of discretion cannot be permitted to stand if the United States Supreme Court finds, on review, that such exercise rests upon a legal principle that can no longer be sustained; thus, on certiorari to review a Federal Court of Appeals' decision as to whether a Federal District Court properly denied parties relief from an injunction that was entered by the District Court on remand from a United States Supreme Court decision which is overruled by the Supreme Court in the case at hand, the fact that the Supreme Court employs an abuse-of-discretion standard of review does not require the Supreme Court to depart from the general practice of applying to the parties before the Supreme Court the rule of law announced in the case at hand.

[**HN29]
<=93> APPEAL @1692.5
remand -- change in law --

Headnote: <=94> [29]
On certiorari to review a Federal Court of Appeals' decision which upheld a Federal District Court's denial of relief from an injunction--entered by the District Court on remand from the United States Supreme Court's decision in Aguilar v Felton (1985) 473 US 402, 87 L Ed 2d 290, 105 S Ct 3232--which barred a city from sending public school teachers into parochial schools to provide remedial education pursuant to Title I of the Elementary and Secondary Education Act of 1965 (20 USCS 6301 et seq.), the Supreme Court will reverse the Court of Appeals' judgment and remand the case to the District Court with instructions to vacate the order that entered the injunction, where the Supreme Court (1) overrules Aguilar, and (2) holds that the parties bound by injunction are entitled to relief, under Rule 60(b)(5) of the Federal Rules of Civil Procedure, from the operation of the injunction. (Souter, Stevens, Ginsburg, and Breyer, JJ., dissented from this holding.)

SYLLABUS:
In Aguilar v. Felton, 473 U.S. 402, 413, 87 L. Ed. 2d 290, 105 S. Ct. 3232, this Court held that New York City's program that sent public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965 necessitated an excessive entanglement of church and state and violated the First Amendment's Establishment Clause. On remand, the District Court entered a permanent injunction reflecting that ruling. Some 10 years later, petitioners--the parties bound by the injunction--filed motions in the same court seeking relief from the injunction's operation under Federal Rule of Civil Procedure 60(b)(5). They emphasized the significant [*2] costs of complying with Aguilar and the assertions of five Justices in Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 129 L. Ed. 2d 546, 114 S. Ct. 2481, that Aguilar should be reconsidered, and argued that relief was proper under Rule 60(b)(5) and Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388, 116 L. Ed. 2d 867, 112 S. Ct. 748, because Aguilar cannot be squared with this Court's intervening Establishment Clause jurisprudence and is no longer good law. The District Court denied the motion on the merits, declaring that Aguilar's demise has "not yet occurred." The Second Circuit agreed and affirmed.

Held:

1. A federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees under a program containing safeguards such as those present in New York City's Title I program. Accordingly, Aguilar, as well as that portion of its companion case, School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 87 L. Ed. 2d 267, 105 S. Ct. 3216, addressing a "Shared Time" program, are no longer good law. Pp. 8-31.

(a) Under [*3] Rufo, supra, at 384, Rule 60(b)(5)--which states that, "upon such terms as are just, the court may relieve a party . . . from a final judgment . . . [when] it is no longer equitable that the judgment should have prospective application"--authorizes relief from an injunction if the moving party shows a significant change either in factual conditions or in law. Since the exorbitant costs of complying with the injunction were known at the time Aguilar was decided, see, e.g., 473 U.S. at 430-431 (O'CONNOR, J., dissenting), they do not constitute a change in factual conditions sufficient to warrant relief, accord, Rufo, supra, at 385. Also unavailing is the fact that five Justices in Kiryas Joel expressed the view that Aguilar should be reconsidered or overruled. Because the question of Aguilar's propriety was not before the Court in that case, those Justices' views cannot be said to have effected a change in Establishment Clause law. Thus, petitioners' ability to satisfy Rule 60(b)(5)'s prerequisites hinges on whether the Court's later Establishment Clause cases have so undermined Aguilar that it is no longer good law. Pp. 8-11.

(b) To answer that [*4] question, it is necessary to understand the rationale upon which Aguilar and Ball rested. One of the programs evaluated in Ball was the Grand Rapids, Michigan, "Shared Time" program, which is analogous to New York City's Title I program. Applying the three-part Lemon v. Kurtzman, 403 U.S. 602, 612-613, 29 L. Ed. 2d 745, 91 S. Ct. 2105, test, the Ball Court acknowledged that the "Shared Time" program satisfied the test's first element in that it served a purely secular purpose, 473 U.S. at 383, but ultimately concluded that it had the impermissible effect of advancing religion, in violation of the test's second element, id., at 385. That conclusion rested on three assumptions: (i) any public employee who works on a religious school's premises is presumed to inculcate religion in her work, see id., at 385-389; (ii) the presence of public employees on private school premises creates an impermissible symbolic union between church and state, see id, at 389, 391; and (iii) any public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking, see [*5] id., at 385, 393, 395-397. Additionally, Aguilar set forth a fourth assumption: that New York City's Title I program necessitates an excessive government entanglement with religion, in violation of the Lemon test's third element, because public employees who teach on religious school premises must be closely monitored to ensure that they do not inculcate religion. See 473 U.S. at 409, 412-414. Pp. 11-16.

(c) The Court's more recent cases have undermined the assumptions upon which Ball and Aguilar relied. Contrary to Aguilar's conclusion, placing full-time government employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination. Subsequent cases have modified in two significant respects the approach the

Court uses to assess whether the government has impermissibly advanced religion by inculcating religious beliefs. First, the Court has abandoned Ball's presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence constitutes a symbolic union between government and religion. Zobrest v. Catalina Foothills [*6] School Dist., 509 U.S. 1, 12-13, 125 L. Ed. 2d 1, 113 S. Ct. 2462. No evidence has ever shown that any New York City instructor teaching on parochial school premises attempted to inculcate religion in students. Second, the Court has departed from Ball's rule that all government aid that directly aids the educational function of religious schools is invalid. Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 487, 88 L. Ed. 2d 846, 106 S. Ct. 748; Zobrest, supra, at 10, 12. In all relevant respects, the provision of the instructional services here at issue is indistinguishable from the provision of a sign-language interpreter in Zobrest. Zobrest and Witters make clear that, under current law, the "Shared Time" program in Ball and New York City's Title I program will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Thus, both this Court's precedent and its experience require rejection of the premises upon which Ball relied. Pp. 16-24.

(d) New York City's Title I program does not give aid recipients any incentive to modify their religious beliefs or practices in order to obtain program services. Although Ball and Aguilar completely ignored this [*7] consideration, other Establishment Clause cases before and since have examined the criteria by which an aid program identifies its beneficiaries to determine whether the criteria themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf. e.g., Witters, supra, at 488; Zobrest, supra, at 10. Such an incentive is not present where, as here, 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. Under such circumstances, the aid is less likely to have the effect of advancing religion. See Widmar v. Vincent, 454 U.S. 263, 274, 70 L. Ed. 2d 440, 102 S. Ct. 269. New York City's Title I services are available to all children who meet the eligibility requirements, no matter what their religious beliefs or where they go to school. Pp. 24-26.

(e) The Aguilar Court erred in concluding that New York City's Title I program resulted in an excessive entanglement between church and state. Regardless of whether entanglement is considered in the course of assessing if a program has an impermissible [*8] effect of advancing religion, Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 674, 25 L. Ed. 2d 697, 90 S. Ct. 1409, or as a factor separate and apart from "effect," Lemon v. Kurtzman, 403 U.S. 602 at 612, 29 L. Ed. 2d 745, 91 S. Ct. 2105, the considerations used to assess its excessiveness are similar: The Court looks to the character and purposes of the benefited institutions, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. Id., at 615. It is simplest to recognize why entanglement is significant and treat it--as the Court did in Walz--as an aspect of the inquiry into a statute's effect. The Aguilar Court's finding of "excessive" entanglement rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the government and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." 473 U.S. at 413-414. Under the Court's current

Establishment Clause understanding, the last two considerations are insufficient to create an "excessive entanglement" [*9] because they are present no matter where Title I services are offered, but no court has held that Title I services cannot be offered off-campus. E.g., Aguilar, supra. Further, the first consideration has been undermined by Zobrest. Because the Court in Zobrest abandoned the presumption that public employees will inculcate religion simply because they happen to be in a sectarian environment, there is no longer any need to assume that pervasive monitoring of Title I teachers is required. There is no suggestion in the record that the system New York City has in place to monitor Title I employees is insufficient to prevent or to detect inculcation. Moreover, the Court has failed to find excessive entanglement in cases involving far more onerous burdens on religious institutions. See Bowen v. Kendrick, 487 U.S. 589, 615-617. Pp. 26-29, 101 L. Ed. 2d 520, 108 S. Ct. 2562.

(f) Thus, New York City's Title I program does not run afoul of any of three primary criteria the Court currently uses to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement. [*10] Nor can this carefully constrained program reasonably be viewed as an endorsement of religion. Pp. 28-29.

(g) The stare decisis doctrine does not preclude this Court from recognizing the change in its law and overruling Aguilar and those portions of Ball that are inconsistent with its more recent decisions. E.g., United States v. Gaudin, 515 U.S. 506, , 132 L. Ed. 2d 444, 115 S. Ct. 2310. Moreover, in light of the Court's conclusion that Aguilar would be decided differently under current Establishment Clause law, adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply. Accord, Davis v. United States, 417 U.S. 333, 342. Pp. 29-31, 41 L. Ed. 2d 109, 94 S. Ct. 2298.

2. The significant change in this Court's post-Aguilar Establishment Clause law entitles petitioners to relief under Rule 60(b)(5). The Court's general practice is to apply the rule of law it is announcing to the parties before it, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485, 104 L. Ed. 2d 526, 109 S. Ct. 1917, even when it is overruling a case, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, , 132 L. Ed. 2d 158, 115 S. Ct. 2097. The Court neither acknowledges nor holds that other courts [*11] should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. Rodriguez de Quijas, supra, at 484. Respondents' various arguments as to why relief should not be granted in this case--that a different analysis is required because the Court is here reviewing for abuse of discretion the District Court's denial of relief; that petitioners' unprecedented use of Rule 60(b)(5) as a vehicle for effecting changes in the law, rather than as a means of recognizing them, will encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions; that petitioners' use of Rule 60(b) in this context will erode the Court's institutional integrity; and that the Court should wait for a "better vehicle" in which to evaluate Aguilar's continuing vitality--are not persuasive. Pp. 31-34.

101 F.3d 1394, reversed and remanded.

COUNSEL: Paul A. Crotty argued the cause for petitioners.

Stanley Geller argued the cause for private respondents.

Walter Dellinger argued the cause for federal respondents.

JUDGES: O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, [*12] in which STEVENS and GINSBURG, JJ., joined, and in which BREYER, J., joined as to Part II. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined.

OPINIONBY: O'CONNOR

OPINION: [**405] JUSTICE O'CONNOR delivered the opinion of the Court. [**HR1A] [**HR2A] [**HR3A] [**HR4A] [**HR5A] In Aguilar v. Felton, 473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985), this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our ruling. Twelve years later, petitioners--the parties bound by that injunction--seek relief from its operation. Petitioners maintain that Aguilar cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: Aguilar is no longer good law. We agree with petitioners that Aguilar is not consistent with our subsequent Establishment Clause decisions and further conclude that, on the facts presented here, petitioners [*13] are entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the operation of the District Court's prospective injunction.

I

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as modified, 20 U.S.C. @ 6301 et seq., to "provide full educational opportunity to every child regardless of economic background." S. Rep. No. 146, 89th Cong., 1st Sess. 5 (1965) (hereinafter Title I). Toward that end, Title I channels federal funds, through the States, to "local educational agencies" (LEA's). 20 U.S.C. @@ 6311, 6312. * The LEA's spend these funds to provide remedial education, guidance, and job counseling to eligible students. @@ 6315(c)(1)(A) (LEA's must use funds to "help participating children meet . . . State student performance standards"), 6315(c)(1)(E) (LEA's may use funds to provide "counseling, mentoring, and other pupil services"); see also @@ 6314(b)(1)(B)(i), (iv). An eligible student is one (i) who resides within the attendance boundaries of a public school located in a low-income area, @ 6313(a)(2)(B); and (ii) who is failing, or is at risk of failing, the State's student performance standards, @ 6315(b)(1)(B). [*14] Title I funds must be made available to all eligible children, regardless of whether they attend public schools, @ 6312(c)(1)(F), [**406] and the services provided to children attending private schools must be "equitable in comparison to services and other benefits for public school children." @ 6321(a)(3); see @ 6321(a)(1); 34 CFR @@ 200.10(a), 200.11(b) (1996).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

* Title I has been reenacted, in varying forms, over the years, most recently in the Improving America's Schools Act of 1994, 108 Stat. 3518. We will refer to the current Title I provisions, which do not differ meaningfully for our purposes from the Title I program referred to in our previous decision in this litigation.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

An LEA providing services to children enrolled in private schools is subject to a number of constraints that are not imposed when it provides aid to public schools. Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a "school-wide" basis. Compare 34 CFR @ [*15] 200.12(b) with 20 U.S.C. @ 6314 (allowing "school-wide" programs at public schools). In addition, the LEA must retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution. @@ 6321(c)(1), (2). The Title I services themselves must be "secular, neutral, and nonideological," @ 6321(a)(2), and must "supplement, and in no case supplant, the level of services" already provided by the private school, 34 CFR @ 200.12(a) (1996).

Petitioner Board of Education of the City of New York (Board), an LEA, first applied for Title I funds in 1966 and has grappled ever since with how to provide Title I services to the private school students within its jurisdiction. Approximately 10% of the total number of students eligible for Title I services are private school students. See App. 38, 620. Recognizing that more than 90% of the private schools within the Board's jurisdiction are sectarian, Felton v. Secretary, United States Dept. of Ed., 739 F.2d 48, 51 (CA2 1984), the Board initially arranged to transport children [*16] to public schools for after-school Title I instruction. But this enterprise was largely unsuccessful. Attendance was poor, teachers and children were tired, and parents were concerned for the safety of their children. Ibid. The Board then moved the after-school instruction onto private school campuses, as Congress had contemplated when it enacted Title I. See Wheeler v. Barrera, 417 U.S. 402, 422, 41 L. Ed. 2d 159, 94 S. Ct. 2274 (1974). After this program also yielded mixed results, the Board implemented the plan we evaluated in Aguilar v. Felton, 473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985).

That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. Id., at 406. Assignments to private schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. Ibid.; 739 F.2d at 53. As the Court of Appeals in Aguilar observed, a large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own. 473 U.S. at 406. The vast majority of Title I teachers also moved [*17] among the private schools, spending fewer than five days a week at the same school. Ibid.

Before any public employee could provide Title I instruction at a private school, she would be given a detailed set of written and oral instructions

emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised. [**407] Specifically, employees would be told that (i) they were employees of the Board and accountable only to their public school supervisors; (ii) they had exclusive responsibility for selecting students for the Title I program and could teach only those children who met the eligibility criteria for Title I; (iii) their materials and equipment would be used only in the Title I program; (iv) they could not engage in team-teaching or other cooperative instructional activities with private school teachers; and (v) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. Ibid. All religious symbols were to be removed from classrooms used for Title I services. 473 U.S. at 407. The rules acknowledged that it might be necessary [*18] for Title I teachers to consult with a student's regular classroom teacher to assess the student's particular needs and progress, but admonished instructors to limit those consultations to mutual professional concerns regarding the student's education. 739 F.2d at 53. To ensure compliance with these rules, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month. 473 U.S. at 407.

In 1978, six federal taxpayers--respondents here--sued the Board in the District Court for the Eastern District of New York. Respondents sought declaratory and injunctive relief, claiming that the Board's Title I program violated the Establishment Clause. The District Court permitted the parents of a number of parochial school students who were receiving Title I services to intervene as codefendants. The District Court granted summary judgment for the Board, but the Court of Appeals for the Second Circuit reversed. While noting that the Board's Title I program had "done so much good and little, if any, detectable harm," 739 F.2d at 72, the Court of Appeals nevertheless held that Meek v. Pittenger, 421 U.S. 349, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975), [*19] and Wolman v. Walter, 433 U.S. 229, 53 L. Ed. 2d 714, 97 S. Ct. 2593 (1977), compelled it to declare the program unconstitutional. In a 5-4 decision, this Court affirmed on the ground that the Board's Title I program necessitated an "excessive entanglement of church and state in the administration of [Title I] benefits." 473 U.S. at 414. On remand, the District Court permanently enjoined the Board

"from using public funds for any plan or program under [Title I] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City." App. to Pet. for Cert. in No. 96-553, pp. A25-A26.

The Board, like other LEA's across the United States, modified its Title I program so it could continue serving those students who attended private religious schools. Rather than offer Title I instruction to parochial school students at their schools, the Board reverted to its prior practice of providing instruction at public school sites, at leased sites, and in mobile instructional units (essentially vans converted into classrooms) parked near the sectarian school. The Board also offered [*20] computer-aided instruction, which could be provided "on premises" because it did not require [**408] public employees to be physically present on the premises of a religious school. App. 315.

It is not disputed that the additional costs of complying with Aguilar's mandate are significant. Since the 1986-1987 school year, the Board has spent over $ 100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites. App. 333 ($ 93.2 million spent between 1986-1987 and 1993-1994 school years); id., at 336 (annual additional costs average around $ 15 million). Under the Secretary of Education's regulations, those costs "incurred as a result of implementing alternative delivery systems to comply with the requirements of Aguilar v. Felton" and not paid for with other state or federal funds are to be deducted from the federal grant before the Title I funds are distributed to any student. 34 CFR @ 200.27(c) (1996). These "Aguilar costs" thus reduce the amount of Title I money an LEA has available for remedial education, and LEA's have had to cut back on the number of students who receive Title I benefits. [*21] From Title I funds available for New York City children between the 1986-1987 and the 1993-1994 school years, the Board had to deduct $ 7.9 million "off-the-top" for compliance with Aguilar. App. 333. When Aguilar was handed down, it was estimated that some 20,000 economically disadvantaged children in the city of New York, see 473 U.S. at 431 (O'CONNOR, J., dissenting), and some 183,000 children nationwide, see L. Levy, The Establishment Clause 176 (1986), would experience a decline in Title I services. See also S. Rep. No. 100-222, p. 14 (1987) (estimating that Aguilar costs have "resulted in a decline of about 35 percent in the number of private school children who are served").

In October and December of 1995, petitioners--the Board and a new group of parents of parochial school students entitled to Title I services--filed motions in the District Court seeking relief under Federal Rule of Civil Procedure 60(b) from the permanent injunction entered by the District Court on remand from our decision in Aguilar. Petitioners argued that relief was proper under Rule 60(b)(5) and our decision in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992), [*22] because the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." Specifically, petitioners pointed to the statements of five Justices in Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 129 L. Ed. 2d 546, 114 S. Ct. 2481 (1994), calling for the overruling of Aguilar. The District Court denied the motion. The District Court recognized that petitioners, "at bottom," sought "a procedurally sound vehicle to get the [propriety of the injunction] back before the Supreme Court," App. to Pet. for Cert. in No. 96-553, p. A12, and concluded that the "the Board had properly proceeded under Rule 60(b) to seek relief from the injunction." Id., at A19. Despite its observations that "the landscape of Establishment Clause decisions has changed," id., at A10, and that "there may be good reason to conclude that Aguilar's demise is imminent," id., at A20, the District Court denied the Rule 60(b) motion on the merits because Aguilar's demise had "not yet occurred." The Court of Appeals for the Second Circuit "affirmed substantially for the reasons stated in" the District [**409] Court's opinion. Id., at 5a. We granted certiorari, 519 U.S. [*23] (1997), and now reverse.

II [**HR6] The question we must answer is a simple one: Are petitioners entitled to relief from the District Court's permanent injunction under Rule 60(b)? Rule 60(b)(5), the subsection under which petitioners proceeded below, states:

"On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that

the judgment should have prospective application."

In Rufo v. Inmates of Suffolk County Jail, supra, at 384, we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show "a significant change either in factual conditions or in law." A court may recognize subsequent changes in either statutory or decisional law. See Railway Employees' v. Wright, 364 U.S. 642, 652-653, 5 L. Ed. 2d 349, 81 S. Ct. 368 (1961) (consent decree should be vacated under Rule 60(b) in light of amendments to the Railway Labor Act); Rufo, supra, at 393 (vacating denial of Rule 60(b)(5) motion and remanding so District Court could consider whether consent decree should be modified in light of Bell v. Wolfish, 441 [*24] U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979)); Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424, 437-438, 49 L. Ed. 2d 599, 96 S. Ct. 2697 (1976) (injunction should have been vacated in light of Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971)). A court errs when it refuses to modify an injunction or consent decree in light of such changes. See Wright, supra, at 647 ("The court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong") (internal quotation marks omitted).

Petitioners point to three changes in the factual and legal landscape that they believe justify their claim for relief under Rule 60(b)(5). They first contend that the exorbitant costs of complying with the District Court's injunction constitute a significant factual development warranting modification of the injunction. See Brief for Petitioner Agostini et al. 38-40. Petitioners also argue that there have been two significant legal developments since Aguilar was decided: a majority of Justices have expressed their views that Aguilar should be reconsidered or overruled, see supra, at 7; and [*25] Aguilar has in any event been undermined by subsequent Establishment Clause decisions, including Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986), Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 125 L. Ed. 2d 1, 113 S. Ct. 2462 (1993), and Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995).

Respondents counter that, because the costs of providing Title I services off-site were known at the time Aguilar was decided, and because the relevant case law has not changed, the District Court did not err in denying petitioners' motions. Obviously, if neither the law supporting our original [**410] decision in this litigation nor the facts have changed, there would be no need to decide the propriety of a Rule 60(b)(5) motion. Accordingly, we turn to the threshold issue whether the factual or legal landscape has changed since we decided Aguilar. [**HR7] We agree with respondents that petitioners have failed to establish the significant change in factual conditions required by Rufo. Both petitioners and this Court were, at the time Aguilar was decided, aware that additional costs would be incurred if Title I services could not be provided in parochial [*26] school classrooms. See App. 66-68 (Defendants' Joint Statement of Material Facts Not In Dispute, filed in 1982, detailing costs of providing off-premises services); Aguilar, 473 U.S. at 430-431 (O'CONNOR, J., dissenting) (observing that costs of complying with Aguilar decision would likely cause a decline in Title I services for 20,000 New York City students). That these predictions of additional costs turned out to be accurate does not constitute a change in factual conditions warranting relief under Rule

60(b)(5). Accord, Rufo, 502 U.S. at 385 ("Ordinarily . . . modification should not be granted where a party relies upon events that actually were anticipated at the time [the order was entered]"). [**HR8] We also agree with respondents that the statements made by five Justices in Kiryas Joel do not, in themselves, furnish a basis for concluding that our Establishment Clause jurisprudence has changed. In Kiryas Joel, we considered the constitutionality of a New York law that carved out a public school district to coincide with the boundaries of the village of Kiryas Joel, which was an enclave of the Satmar Hasidic sect. Before the new district was created, Satmar [*27] children wishing to receive special educational services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. @ 1400 et seq., could receive those services at public schools located outside the village. Because Satmar parents rarely permitted their children to attend those schools, New York created a new public school district within the boundaries of the village so that Satmar children could stay within the village but receive IDEA services on public school premises from publicly employed instructors. In the course of our opinion, we observed that New York had created the special school district in response to our decision in Aguilar, which had required New York to cease providing IDEA services to Satmar children on the premises of their private religious schools. 512 U.S. at 692. Five Justices joined opinions calling for reconsideration of Aguilar. See 512 U.S. at 718 (O'CONNOR, J., concurring in part and concurring in judgment); id., at 731 (KENNEDY, J., concurring in judgment); id., at 750 (SCALIA, J., dissenting, joined by REHNQUIST, C. J. and THOMAS, J.). But the question of Aguilar's propriety was not before us. The views of five [*28] Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law.

In light of these conclusions, petitioners' ability to satisfy the prerequisites of Rule 60(b)(5) hinges on whether our later Establishment Clause cases have so undermined Aguilar that it is no longer good law. We now turn to that inquiry.

[**411] III

A

In order to evaluate whether Aguilar has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which Aguilar, as well as its companion case, School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1985), rested.

In Ball, the Court evaluated two programs implemented by the School District of Grand Rapids, Michigan. The district's Shared Time program, the one most analogous to Title I, provided remedial and "enrichment" classes, at public expense, to students attending nonpublic schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of nonpublic schools. The Shared Time courses were in subjects designed to supplement the "core curriculum" of [*29] the nonpublic schools. Id., at 375-376. Of the 41 nonpublic schools eligible for the program, 40 were "'pervasively sectarian'" in character--that is, "the purpose of [those] schools [was] to advance their particular religions." Id., at 379.

The Court conducted its analysis by applying the three-part test set forth in Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971):

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." 473 U.S. at 382-383, 105 S. Ct. 3216, 87 L. Ed. 2d 267 (quoting Lemon, supra, at 612-613) (citations and internal quotation marks omitted).

The Court acknowledged that the Shared Time program served a purely secular purpose, thereby satisfying the first part of the so-called Lemon test. 473 U.S. at 383. Nevertheless, it ultimately concluded that the program had the impermissible effect of advancing religion. Id., at 385.

The Court found that the program violated the Establishment Clause's prohibition against "government-financed or government-sponsored indoctrination into the [*30] beliefs of a particular religious faith" in at least three ways. Ibid. First, drawing upon the analysis in Meek v. Pittenger, 421 U.S. 349, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975), the Court observed that "the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." 473 U.S. at 385. Meek invalidated a Pennsylvania program in which full-time public employees provided supplemental "auxiliary services"--remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services--to nonpublic school children at their schools. 473 U.S. at 367-373. Although the auxiliary services themselves were secular, they were mostly dispensed on the premises of parochial schools, where "an atmosphere dedicated to the advancement of religious belief [was] constantly maintained." Meek, 421 U.S. at 371. Instruction in that atmosphere was sufficient to create "the [**412] potential for impermissible fostering of religion." Id., at 372. Cf. Wolman v. Walter, 433 U.S. at 248 (upholding programs employing public employees to provide remedial instruction and guidance counseling to nonpublic school [*31] children at sites away from the nonpublic school).

The Court concluded that Grand Rapids' program shared these defects. 473 U.S. at 386. As in Meek, classes were conducted on the premises of religious schools. Accordingly, a majority found a "'substantial risk'" that teachers--even those who were not employed by the private schools--might "subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught]." 473 U.S. at 388. The danger of "state-sponsored indoctrination" was only exacerbated by the school district's failure to monitor the courses for religious content. Id., at 387. Notably, the Court disregarded the lack of evidence of any specific incidents of religious indoctrination as largely irrelevant, reasoning that potential witnesses to any indoctrination--the parochial school students, their parents, or parochial school officials--might be unable to detect or have little incentive to report the incidents. Id., at 388-389.

The presence of public teachers on parochial school grounds had a second, related impermissible effect: It created a "graphic symbol of the 'concert or union or dependency' of church and [*32] state," id., at 391 (quoting Zorach v. Clauson, 343 U.S. 306, 312, 96 L. Ed. 954, 72 S. Ct. 679 (1952)), especially when perceived by "children in their formative years," 473 U.S. at 390. The

Court feared that this perception of a symbolic union between church and state would "convey a message of government endorsement . . . of religion" and thereby violate a "core purpose" of the Establishment Clause. Id., at 389.

Third, the Court found that the Shared Time program impermissibly financed religious indoctrination by subsidizing "the primary religious mission of the institutions affected." Id., at 385. The Court separated its prior decisions evaluating programs that aided the secular activities of religious institutions into two categories: those in which it concluded that the aid resulted in an effect that was "indirect, remote, or incidental" (and upheld the aid); and those in which it concluded that the aid resulted in "a direct and substantial advancement of the sectarian enterprise" (and invalidated the aid). Id., at 393 (internal quotation marks omitted). In light of Meek and Wolman, Grand Rapids' program fell into the latter category. In those cases, the Court ruled that [*33] a state loan of instructional equipment and materials to parochial schools was an impermissible form of "direct aid" because it "advanced the primary, religion-oriented educational function of the sectarian school," id., at 395 (citations and quotation marks omitted), by providing "in-kind" aid (e.g., instructional materials) that could be used to teach religion and by freeing up money for religious indoctrination that the school would otherwise have devoted to secular education. Given the holdings [**413] in Meek and Wolman, the Shared Time program--which provided teachers as well as instructional equipment and materials--was surely invalid. Id., at 395. The Ball Court likewise placed no weight on the fact that the program was provided to the student rather than to the school. Nor was the impermissible effect mitigated by the fact that the program only supplemented the courses offered by the parochial schools. Id., at 395-397.

The New York City Title I program challenged in Aguilar closely resembled the Shared Time program struck down in Ball, but the Court found fault with an aspect of the Title I program not present in Ball: The Board had "adopted [*34] a system for monitoring the religious content of publicly funded Title I classes in the religious schools." 473 U.S. at 409. Even though this monitoring system might prevent the Title I program from being used to inculcate religion, the Court concluded, as it had in Lemon and Meek, that the level of monitoring necessary to be "certain" that the program had an exclusively secular effect would "inevitably result in the excessive entanglement of church and state," thereby running afoul of Lemon's third prong. 473 U.S. at 409; see Lemon, 403 U.S. at 619 (invalidating Rhode Island program on entanglement grounds because "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that the restrictions [against indoctrination] are obeyed"); Meek, 421 U.S. at 370 (invalidating Pennsylvania program on entanglement grounds because excessive monitoring would be required for the State to be certain that public school officials do not inculcate religion). In the majority's view, New York City's Title I program suffered from the "same critical elements of entanglement" present in Lemon and Meek: the aid was provided [*35] "in a pervasively sectarian environment . . . in the form of teachers," requiring "ongoing inspection . . . to ensure the absence of a religious message." 473 U.S. at 412. Such "pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." Id., at 413. The Court noted two further forms of entanglement inherent in New York City's Title I program: the "administrative cooperation" required to implement Title I services and the "dangers of political divisiveness" that might grow

out of the day-to-day decisions public officials would have to make in order to provide Title I services. Id., at 413-414.

Distilled to essentials, the Court's conclusion that the Shared Time program in Ball had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational [*36] function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence [**414] of private decisionmaking. Additionally, in Aguilar there was a fourth assumption: that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

B [**HR9] Our more recent cases have undermined the assumptions upon which Ball and Aguilar relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since Aguilar was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. See Witters, 474 U.S. at 485-486; Bowen v. Kendrick, 487 U.S. 589, 602-604, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988) (concluding that Adolescent Family Life Act had a secular purpose); Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 248-249, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) (concluding that Equal Access [*37] Act has a secular purpose); cf. Edwards v. Aguillard, 482 U.S. 578, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987) (striking down Louisiana law that required creationism to be discussed with evolution in public schools because the law lacked a legitimate secular purpose). Likewise, we continue to explore whether the aid has the "effect" of advancing or inhibiting religion. What has changed since we decided Ball and Aguilar is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

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[**HR10] As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to Aguilar have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption erected in Meek and Ball that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 125 L. Ed. 2d 1, 113 S. Ct. 2462 (1993), we examined whether the IDEA, 20 U.S.C. @ 1400 et seq., [*38] was constitutional as applied to a deaf student who sought to bring his state-employed sign-language interpreter with him to his Roman Catholic high school. We held that this was permissible, expressly disavowing the notion that "the Establishment Clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school." 509 U.S. at 13. "Such a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance." Ibid. We refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by "adding to [or] subtracting from" the lectures translated. Ibid.

In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said. Id., at 12. [**415] Because the only government aid in Zobrest was the interpreter, who was herself not inculcating any religious messages, no government indoctrination took place and we were able to conclude that "the provision of such [*39] assistance [was] not barred by the Establishment Clause." Ibid. Zobrest therefore expressly rejected the notion--relied on in Ball and Aguilar--that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students. Zobrest also implicitly repudiated another assumption on which Ball and Aguilar turned: that the presence of a public employee on private school property creates an impermissible "symbolic link" between government and religion.

JUSTICE SOUTER contends that Zobrest did not undermine the "presumption of inculcation" erected in Ball and Aguilar, and that our conclusion to the contrary rests on a "mistaken reading" of Zobrest. Post, at 9. In his view, Zobrest held that the Establishment Clause tolerates the presence of public employees in sectarian schools "only in . . . limited circumstances"--i.e., when the employee "simply translates for one student the material presented to the class for the benefit of all students." Post, at 10. The sign-language interpreter in Zobrest is unlike the remedial instructors in Ball and Aguilar because signing, [*40] JUSTICE SOUTER explains, "[cannot] be understood as an opportunity to inject religious content in what [is] supposed to be secular instruction." Ibid. He is thus able to conclude that Zobrest is distinguishable from--and therefore perfectly consistent with--Ball and Aguilar.

In Zobrest, however, we did not expressly or implicitly rely upon the basis JUSTICE SOUTER now advances for distinguishing Ball and Aguilar. If we had thought that signers had no "opportunity to inject religious content" into their translations, we would have had no reason to consult the record for evidence of inaccurate translations. 509 U.S. at 13. The signer in Zobrest had the same opportunity to inculcate religion in the performance of her duties as do Title I employees, and there is no genuine basis upon which to confine Zobrest's underlying rationale--that public employees will not be presumed to inculcate religion--to sign-language interpreters. Indeed, even the Zobrest dissenters acknowledged the shift Zobrest effected in our Establishment Clause law when they criticized the majority for "straying . . . from the course set by nearly five decades of Establishment [*41] Clause jurisprudence." 509 U.S. at 24 (Blackmun, J., dissenting). Thus, it was Zobrest--and not this case--that created "fresh law." Post, at 11. Our refusal to limit Zobrest to its facts despite its rationale does not, in our view, amount to a "misreading" of precedent.

Second, we have departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid. In Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986), we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director. Even though the [**416] grant recipient clearly would use the money to obtain religious education, we observed that the tuition grants were "'made available generally without regard to the sectarian-nonsectarian,

or public-nonpublic nature of the institution benefited.'" Id., at 487 (quoting Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-783, n. 38, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973)). The grants were disbursed directly to students, who [*42] then used the money to pay for tuition at the educational institution of their choice. In our view, this transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so "only as a result of the genuinely independent and private choices of" individuals. Ibid. The same logic applied in Zobrest, where we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction, because the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a "result of the private decision of individual parents" and "[could] not be attributed to state decisionmaking." 509 U.S. at 10 (emphasis added). Because the private school would not have provided an interpreter on its own, we also concluded that the aid in Zobrest did not indirectly finance religious education by "relieving the sectarian school of costs [it] otherwise would have borne in educating [its] students." Id., at 12. [**HR2B] Zobrest [*43] and Witters make clear that, under current law, the Shared Time program in Ball and New York City's Title I program in Aguilar will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in Ball to reach a contrary conclusion is no longer valid. First, there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in Zobrest to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students. National Coalition for Public Ed. & Religious Liberty v. Harris, 489 F. Supp. 1248, 1262, 1267 (SDNY 1980); Felton v. Secretary, United States Dept. of Ed., 739 F.2d at 53, aff'd sub nom. Aguilar v. Felton, 473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985). Thus, both our precedent and our [*44] experience require us to reject respondents' remarkable argument that we must presume Title I instructors to be "uncontrollable and sometimes very unprofessional." Tr. of Oral Arg. 39. [**HR2C] [**HR11A] As discussed above, Zobrest also repudiates Ball's assumption that the presence of Title I teachers in parochial school classrooms will, without more, create the impression of a "symbolic union" between church and state. JUSTICE SOUTER maintains that Zobrest is not dispositive on this point because Aguilar's implicit conclusion that New York City's Title I program created [**417] a "symbolic union" rested on more than the presence of Title I employees on parochial school grounds. Post, at 11. To him, Title I continues to foster a "symbolic union" between the Board and sectarian schools because it mandates "the involvement of public teachers in the instruction provided within sectarian schools," ibid., and "fuses public and private faculties," post, at 15. JUSTICE SOUTER does not disavow the notion, uniformly adopted by lower courts, that Title I services may be provided to sectarian school students in off-campus locations, post, at 8-9, even though that notion necessarily presupposes [*45] that the danger of "symbolic union" evaporates once the services are provided off-campus. Taking this view, the only difference between a constitutional program and an unconstitutional one is the location of the classroom, since the degree of cooperation between Title I instructors and

parochial school faculty is the same no matter where the services are provided. We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on the location of the public employee is neither "sensible" nor "sound," post, at 9, and the Court in Zobrest rejected it. [**HR2D] [**HR12] Nor under current law can we conclude that a program placing full-time public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only [*46] to eligible recipients. That aid is provided to students at whatever school they choose to attend. Although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant. Moreover, as in Zobrest, Title I services are by law supplemental to the regular curricula. 34 CFR @ 200.12(a) (1996). These services do not, therefore, "relieve sectarian schools of costs they otherwise would have borne in educating their students." Zobrest, 509 U.S. at 12. [**HR13] JUSTICE SOUTER finds our conclusion that the IDEA and Title I programs are similar to be "puzzling," and points to three differences he perceives between the programs: (i) Title I services are distributed by LEA's "directly to the religious schools" instead of to individual students pursuant to a formal application process; (ii) Title I services "necessarily relieve a religious school of 'an expense that it otherwise would have assumed'"; and (iii) Title I provides services to more students than did the programs in Witters and Zobrest. Post, at 13-14. None of these distinctions is meaningful. While it is [*47] true that individual students may not directly apply for Title I services, it does not follow from this premise that those services are distributed "directly to the religious schools," post, at 14. In fact, they are not. No Title I funds ever reach the coffers of religious [**418] schools, compare Committee for Public Ed. & Religious Liberty v. Regan, 444 U.S. 646, 657-659, 63 L. Ed. 2d 94, 100 S. Ct. 840 (1979) (involving a program giving "direct cash reimbursement" to religious schools for performing certain state-mandated tasks), and Title I services may not be provided to religious schools on a school-wide basis, 34 CFR @ 200.12(b) (1996). Title I funds are instead distributed to a public agency (an LEA) that dispenses services directly to the eligible students within its boundaries, no matter where they choose to attend school. 20 U.S.C. @@ 6311, 6312. Moreover, we fail to see how providing Title I services directly to eligible students results in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application. [**HR14] [**HR15] [**HR16] We are also not persuaded that Title I services supplant the remedial instruction and guidance counseling already provided [*48] in New York City's sectarian schools. Although JUSTICE SOUTER maintains that the sectarian schools provide such services and that those schools reduce those services once their students begin to receive Title I instruction, see post, at 6, 7, 13, 15-16, his claims rest on speculation about the impossibility of drawing any line between supplemental and general education, see post, at 7, and not on any evidence in the record that the Board is in fact violating Title I regulations by providing services that supplant those offered in the sectarian schools. See 34 CFR @ 200.12(a) (1996). We are unwilling to speculate that all sectarian schools provide remedial instruction and guidance counseling to their students, and are unwilling to presume that the Board would violate Title I

regulations by continuing to provide Title I services to students who attend a sectarian school that has curtailed its remedial instruction program in response to Title I. Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. Zobrest did not turn on the fact that James Zobrest had, [*49] at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school. Accord, Mueller v. Allen, 463 U.S. 388, 401, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law"). [**HR2E] [**HR11B] What is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off-campus, and Aguilar implied that providing the services off-campus is entirely consistent with the Establishment Clause. JUSTICE SOUTER resists the impulse to upset this implication, contending that it can be justified on the ground that Title I services are "less likely to supplant some of what would otherwise go on inside [the sectarian schools] and to subsidize what remains" when those services are offered off-campus. Post, at 8. But JUSTICE SOUTER does not explain why a sectarian school would not have the same incentive to "make patently significant cut-backs" in its curriculum no matter where Title I services [*50] [**419] are offered, since the school would ostensibly be excused from having to provide the Title I-type services itself. Because the incentive is the same either way, we find no logical basis upon which to conclude that Title I services are an impermissible subsidy of religion when offered on-campus, but not when offered off-campus. Accordingly, contrary to our conclusion in Aguilar, placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination.

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[**HR17] ' Although we examined in Witters and Zobrest the criteria by which an aid program identifies its beneficiaries, we did so solely to assess whether any use of that aid to indoctrinate religion could be attributed to the State. A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf. Witters, supra, at 488 (upholding [*51] neutrally available program because it did not "create a financial incentive for students to undertake sectarian education"); Zobrest, supra, at 10 (upholding neutrally available IDEA aid because it "creates no financial incentive for parents to choose a sectarian school"); accord, post, at 15 (SOUTER, J., dissenting) ("Evenhandedness is a necessary but not a sufficient condition for an aid program to satisfy constitutional scrutiny"). This incentive is not present, however, 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. Under such circumstances, the aid is less likely to have the effect of advancing religion. See Widmar v. Vincent, 454 U.S. 263, 274, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect").

In Ball and Aguilar, the Court gave this consideration no weight. Before and since those decisions, we have sustained programs that provided aid to all eligible children regardless of where they attended school. See, e.g., Everson v. [*52] Board of Ed. of Ewing, 330 U.S. 1, 16-18, 91 L. Ed. 711, 67 S. Ct. 504 (1947) (sustaining local ordinance authorizing all parents to deduct from their state tax returns the costs of transporting their children to school on public buses); Board of Ed. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 243-244, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968) (sustaining New York law loaning secular textbooks to all children); Mueller v. Allen, 463 U.S. 388, 398-399, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983) (sustaining Minnesota statute allowing all parents to deduct actual costs of tuition, textbooks, and transportation from state tax returns); Witters, 474 U.S. at 487-488 (sustaining Washington law granting all eligible blind persons vocational assistance); Zobrest, 509 U.S. at 10 (sustaining section of IDEA providing all "disabled" children with necessary aid). [**HR1B] [**HR3B] Applying this reasoning to New York City's Title I program, it is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. 34 CFR @ 200.10(b) (1996); see supra, at 2. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school, 20 U.S.C. @ [**420] [*53] 6312(c)(1)(F). The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.

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We turn now to Aguilar's conclusion that New York City's Title I program resulted in an excessive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion, Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 674, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970), and as a factor separate and apart from "effect," Lemon v. Kurtzman, 403 U.S. at 612-613. Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." [*54] Id., at 615. Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited (e.g., whether the religious institutions were "predominantly religious"), see Meek, 421 U.S. at 363-364; cf. Hunt v. McNair, 413 U.S. 734, 743-744, 37 L. Ed. 2d 923, 93 S. Ct. 2868 (1973), and the nature of the aid that the State provided (e.g., whether it was neutral and nonideological), see Everson, 330 U.S. at 18; Wolman, 433 U.S. at 244. Indeed, in Lemon itself, the entanglement that the Court found "independently" to necessitate the program's invalidation also was found to have the effect of inhibiting religion. See, e.g., 403 U.S. at 620 ("We cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion . . ."). Thus, it is simplest to recognize why entanglement is significant and treat it--as we did in Walz--as an aspect of the inquiry into a statute's effect. [**HR18] Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, see id., at 614, and we have always tolerated some level of

involvement between the two. Entanglement [*55] must be "excessive" before it runs afoul of the Establishment Clause. See, e.g., Bowen v. Kendrick, 487 U.S. at 615-617 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); Roemer v. Board of Public Works of Md., 426 U.S. 736, 764-765, 49 L. Ed. 2d 179, 96 [**421] S. Ct. 2337 (1976) (no excessive entanglement where state conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion). [**HR4B] [**HR19] [**HR20] The pre-Aguilar Title I program does not result in an "excessive" entanglement that advances or inhibits religion. As discussed previously, the Court's finding of "excessive" entanglement in Aguilar rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the Board and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." 473 U.S. at 413-414. Under our current understanding [*56] of the Establishment Clause, the last two considerations are insufficient by themselves to create an "excessive" entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off-campus. Aguilar, supra (limiting holding to on-premises services); Walker v. San Francisco Unified School Dist., 46 F.3d 1449 (CA9 1995) (same); Pulido v. Cavazos, 934 F.2d 912, 919-920 (CA8 1991); Committee for Public Ed. & Religious Liberty v. Secretary, United States Dept. of Ed., 942 F. Supp. 842 (EDNY 1996) (same). Further, the assumption underlying the first consideration has been undermined. In Aguilar, the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk pervasive monitoring would be required. But after Zobrest we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge [*57] their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here. See Bowen, supra, at 615-617. [**HR1C] To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. [*58] The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accord, Witters, 474 U.S. at 488-489 [**422] ("The mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion"); Bowen, supra, at 613-614 (finding no "'symbolic link'" when Congress made federal funds

neutrally available for adolescent counseling). Accordingly, we must acknowledge that Aguilar, as well as the portion of Ball addressing Grand Rapids' Shared Time program, are no longer good law.

C [**HR21] [**HR22] The doctrine of stare decisis does not preclude us from recognizing the change in our law and overruling Aguilar and those portions of Ball inconsistent with our more recent decisions. As we have often noted, "stare decisis is not an inexorable command," Payne v. Tennessee, 501 U.S. 808, 828, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991), but instead reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled [*59] right," Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 76 L. Ed. 815, 52 S. Ct. 443 (1932) (Brandeis, J., dissenting). That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions. Seminole Tribe of Fla. v. Florida, 517 U.S. , , 116 S. Ct. 1114, 134 L. Ed. 2d 252, 1996 U.S. LEXIS 2165 *36 (1996); Payne, supra, at 828; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94, 80 L. Ed. 1033, 56 S. Ct. 720 (1936) (Stone and Cardozo, JJ., concurring in result) ("The doctrine of stare decisis . . . has only a limited application in the field of constitutional law"). Thus, we have held in several cases that stare decisis does not prevent us from overruling a previous decision where there has been a significant change in or subsequent development of our constitutional law. United States v. Gaudin, 515 U.S. 506, , 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) (slip op., at 15) (stare decisis may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court"); Alabama v. Smith, 490 U.S. 794, 803, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989) (noting that a "later development of . . . constitutional law" is a basis for overruling [*60] a decision); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) (observing that a decision is properly overruled where "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking"). As discussed above, our Establishment Clause jurisprudence has changed significantly since we decided Ball and Aguilar, so our decision to overturn those cases rests on far more than "a present doctrinal disposition to come out differently from the Court of [1985]." Casey, supra, at 864. We therefore overrule Ball and Aguilar to the extent those decisions are inconsistent with our current understanding of the Establishment Clause. [**HR23] [**HR24] Nor does the "law of the case" doctrine place any additional constraints on our ability to overturn Aguilar. Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. Messenger v. Anderson, 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912). The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." [**423] [*61] Arizona v. California, 460 U.S. 605, 618, n. 8, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983). In light of our conclusion that Aguilar would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply. Accord, Davis v. United States, 417 U.S. 333, 342, 41 L. Ed. 2d 109, 94 S. Ct. 2298 (1974) (Court of Appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent).

IV [**HR5B] [**HR25] We therefore conclude that our Establishment Clause law has "significantly changed" since we decided Aguilar. See Rufo, 502

U.S. at 384. We are only left to decide whether this change in law entitles petitioners to relief under Rule 60(b)(5). We conclude that it does. Our general practice is to apply the rule of law we announce in a case to the parties before us. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989) ("The general rule of long standing is that the law announced in the Court's decision controls the case at bar"). We adhere to this practice even when we overrule a case. In Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995), [*62] for example, the District Court and Court of Appeals rejected the argument that racial classifications in federal programs should be evaluated under strict scrutiny, relying upon our decision in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990). When we granted certiorari and overruled Metro Broadcasting, we did not hesitate to vacate the judgments of the lower courts. In doing so, we necessarily concluded that those courts relied on a legal principle that had not withstood the test of time. 515 U.S. at 237-238. See also Hubbard v. United States, 514 U.S. 695, 715, 131 L. Ed. 2d 779, 115 S. Ct. 1754 (1995) (overruling decision relied upon by Court of Appeals and reversing the lower court's judgment that relied upon the overruled case). [**HR26] [**HR27] We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de [*63] Quijas, 490 U.S. at 484. Adherence to this teaching by the District Court and Court of Appeals in this case does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent. [**HR28] Respondents and JUSTICE GINSBURG urge us to adopt a different analysis because we are reviewing the District Court's denial of petitioners' Rule 60(b)(5) motion for an abuse of discretion. See Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257, 263, n. 7, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978). It is true that the trial court has discretion, but the exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990). The standard of review we employ in this litigation does not therefore require us to depart from our general practice. See Adarand, supra; Hubbard, supra.

Respondents nevertheless contend that [**424] [*64] we should not grant Rule 60(b)(5) relief here, in spite of its propriety in other contexts. They contend that petitioners have used Rule 60(b)(5) in an unprecedented way--not as a means of recognizing changes in the law, but as a vehicle for effecting them. If we were to sanction this use of Rule 60(b)(5), respondents argue, we would encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions premised on nothing more than the claim that various judges or Justices have stated that the law has changed. See also post, at 7 (GINSBURG, J., dissenting) (contending that granting Rule 60(b)(5) relief in this case will encourage "invitations to reconsider old cases based on 'speculations on chances from changes in [the Court's membership]"). We think their fears are overstated. As we noted above, a judge's stated belief that a case should be overruled does not make it so. See supra, at 10-11.

[**HR5C] Most importantly, our decision today is intimately tied to the context in which it arose. This litigation involves a party's request under Rule 60(b)(5) to vacate a continuing injunction entered some years ago in light of a bona fide, significant change [*65] in subsequent law. The clause of Rule 60(b)(5) that petitioners invoke applies by its terms only to "judgments having prospective application." Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6), the only remaining avenue for relief on this basis from judgments lacking any prospective component. See J. Moore, 12 Moore's Federal Practice, @ 60.48[5][b], P60-181 (3d ed. 1997) (collecting cases). Our decision will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue. Compare Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) (applying a more stringent standard for recognizing changes in the law and "new rules" in light of the "interests of comity" present in federal habeas corpus proceedings). Given that Rule 60(b)(5) specifically contemplates the grant of relief in the circumstances presented here, it can hardly be said that we have somehow warped the Rule into a means of "allowing an 'anytime' rehearing." See post, at 5 (GINSBURG, J., dissenting).

Respondents further contend that "petitioners' proposed use of Rule 60(b) [*66] will erode the institutional integrity of the Court." Brief for Respondents 26. Respondents do not explain how a proper application of Rule 60(b)(5) undermines our legitimacy. Instead, respondents focus on the harm occasioned if we were to overrule Aguilar. But as discussed above, we do no violence to the doctrine of stare decisis when we recognize bona fide changes in our decisional law. And in those circumstances, we do no violence to [**425] the legitimacy we derive from reliance on that doctrine. Casey, 505 U.S. at 865-866.

As a final matter, we see no reason to wait for a "better vehicle" in which to evaluate the impact of subsequent cases on Aguilar's continued vitality. To evaluate the Rule 60(b)(5) motion properly before us today in no way undermines "integrity in the interpretation of procedural rules" or signals any departure from "the responsive, non-agenda-setting character of this Court." Post, at 6-7 (GINSBURG, J., dissenting). Indeed, under these circumstances, it would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of [*67] dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause. [**HR29] For these reasons, we reverse the judgment of the Court of Appeals and remand to the District Court with instructions to vacate its September 26, 1985, order.

It is so ordered.

DISSENTBY: SOUTER; GINSBURG

DISSENT: JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, and with whom JUSTICE BREYER joins as to Part II, dissenting.

In this novel proceeding, petitioners seek relief from an injunction the District Court entered 12 years ago to implement our decision in Aguilar v. Felton, 473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985). For the

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"are used to measure the progress of students in secular subjects." *Id.*, at 48. It contains no indication that the measurements are taken to assure compliance with state standards rather than for internal administrative purposes of the schools. To the extent that the testing is done to serve the purposes of the sectarian schools rather than the State, I would hold that its provision by the State violates the First Amendment.

MR. JUSTICE POWELL, concurring in part, concurring in the judgment in part, and dissenting in part.

Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in *Meek* v. *Pittenger*, 421 U. S. 349, 366 (1975), that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind—even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. *Meek* itself would have to be overruled, along with *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and even perhaps *Everson* v. *Board of Education*, 330 U. S. 1 (1947). The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. See *Walz* v. *Tax Comm'n,* 397 U. S. 664, 668 (1970). The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable. Most of the Court's decision today follows in this tradition, and I join Parts I through VI of the opinion.

With respect to Part VII, I concur only in the judgment. I am not persuaded, nor did *Meek* hold, that all loans of secular instructional material and equipment "inescapably [have] the primary effect of providing a direct and substantial advancement of the sectarian enterprise." *Ante,* at 250. If that were the case, then *Meek* surely would have overruled *Allen.* Instead the Court reaffirmed *Allen,* thereby necessarily holding that at least some such loans of materials helpful in the educational process are permissible—so long as the aid is incapable of diversion to religious uses, cf. *Committee for Public Education* v. *Nyquist,* 413 U. S. 756 (1973), and so long as the materials are lent to the individual students or their parents and not to the sectarian institutions. Here the statute is expressly limited to materials incapable of diversion. Therefore the relevant question is whether the materials are such that they are "furnished for the use of *individual* students and at their request." *Allen, supra,* at 244 n. 6 (emphasis added).

The Ohio statute includes some materials such as wall maps,

charts, and other classroom paraphernalia for which the concept of a loan to individuals is a transparent fiction. A loan of these items is indistinguishable from forbidden "direct aid" to the sectarian institution itself, whoever the technical bailee. See *Meek, supra,* at 362–366. Since the provision makes no attempt to separate these instructional materials from others meaningfully lent to individuals, I agree with the Court that it cannot be sustained under our precedents. But I would find no constitutional defect in a properly limited provision lending to the individuals themselves only appropriate instructional materials and equipment similar to that customarily used in public schools.

I dissent as to Part VIII, concerning field trip transportation. The Court writes as though the statute funded the salary of the teacher who takes the students on the outing. In fact only the bus and driver are provided for the limited purpose of physical movement between the school and the secular destination of the field trip. As I find this aid indistinguishable in principle from that upheld in *Everson, supra,* I would sustain the District Court's judgment approving this part of the Ohio statute.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

The distinction between the religious and the secular is a fundamental one. To quote from Clarence Darrow's argument in the *Scopes* case:

> "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve." [1]

[1] Tr. of Oral Arg. 7, *Scopes* v. *State,* 154 Tenn. 105, 289 S. W. 363 (1927) (on file with Clarence Darrow Papers, Library of Congress) (punctuation corrected).

fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.

The judgment of the Court of Appeals must be, and is, reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

"We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 714 (1994) (O'CONNOR, J., concurring in part and concurring in judgment). This insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all. See *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *Widmar* v. *Vincent*, 454 U. S. 263 (1981). Withholding access would leave an impermissible perception that religious activities are disfavored: "[T]he message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 248 (1990) (plurality opinion). "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion." *Kiryas Joel*, *supra*, at 717 (O'CONNOR, J.). Neutrality, in both form and effect, is one hallmark of the Establishment Clause.

As JUSTICE SOUTER demonstrates, however, *post*, at 868–872 (dissenting opinion), there exists another axiom in the history and precedent of the Establishment Clause. "Public

funds may not be used to endorse the religious message." *Bowen* v. *Kendrick*, 487 U. S. 589, 642 (1988) (Blackmun, J., dissenting); see also *id.*, at 622 (O'CONNOR, J., concurring). Our cases have permitted some government funding of secular functions performed by sectarian organizations. See, *e. g., id.*, at 617 (funding for sex education); *Roemer* v. *Board of Public Works of Md.*, 426 U. S. 736, 741 (1976) (cash grant to colleges not to be used for "sectarian purposes"); *Bradfield* v. *Roberts*, 175 U. S. 291, 299–300 (1899) (funding of health care for indigent patients). These decisions, however, provide no precedent for the use of public funds to finance religious activities.

This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. It is clear that the University has established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes some 15 student publications with predictably divergent viewpoints. It is equally clear that petitioners' viewpoint is religious and that publication of Wide Awake is a religious activity, under both the University's regulation and a fair reading of our precedents. Not to finance Wide Awake, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide Awake, argues the University, violates the prohibition on direct state funding of religious activities.

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case. See *Lee* v. *Weisman*, 505 U. S. 577, 598 (1992) ("Our jurisprudence in this area is of necessity one of line-drawing"). As Justice Holmes observed in a different

context: "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types." *Irwin* v. *Gavit*, 268 U. S. 161, 168 (1925) (citation omitted).

In *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986), for example, we unanimously held that the State may, through a generally applicable financial aid program, pay a blind student's tuition at a sectarian theological institution. The Court so held, however, only after emphasizing that "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.*, at 487. The benefit to religion under the program, therefore, is akin to a public servant contributing her government paycheck to the church. *Ibid.* We thus resolved the conflict between the neutrality principle and the funding prohibition, not by permitting one to trump the other, but by relying on the elements of choice peculiar to the facts of that case: "The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Id.*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment). See also *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 10–11 (1993).

The need for careful judgment and fine distinctions presents itself even in extreme cases. *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), provided perhaps the strongest exposition of the no-funding principle: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.*, at 16. Yet the Court approved the use of public funds, in a general program, to reimburse parents for their children's bus fares to attend Catholic schools. *Id.*, at 17–18.

Although some would cynically dismiss the Court's disposition as inconsistent with its protestations, see *id.*, at 19 (Jackson, J., dissenting) ("[T]he most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented' "), the decision reflected the need to rely on careful judgment—not simple categories—when two principles, of equal historical and jurisprudential pedigree, come into unavoidable conflict.

So it is in this case. The nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's decision today, see *ante*, at 838–839. Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective.

First, the student organizations, at the University's insistence, remain strictly independent of the University. The University's agreement with the Contracted Independent Organizations (CIO)—*i. e.*, student groups—provides:

> "The University is a Virginia public corporation and the CIO is not part of that corporation, but rather exists and operates independently of the University. . . .
>
> "The parties understand and agree that this Agreement is the only source of any control the University may have over the CIO or its activities . . . ." App. 27.

And the agreement requires that student organizations include in every letter, contract, publication, or other written materials the following disclaimer:

> "Although this organization has members who are University of Virginia students (faculty) (employees), the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions." *Id.*, at 28.

Any reader of Wide Awake would be on notice of the publication's independence from the University. Cf. *Widmar* v. *Vincent*, 454 U. S., at 274, n. 14.

Second, financial assistance is distributed in a manner that ensures its use only for permissible purposes. A student organization seeking assistance must submit disbursement requests; if approved, the funds are paid directly to the third-party vendor and do not pass through the organization's coffers. This safeguard accompanying the University's financial assistance, when provided to a publication with a religious viewpoint such as Wide Awake, ensures that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective. This feature also makes this case analogous to a school providing equal access to a generally available printing press (or other physical facilities), *ante*, at 843, and unlike a block grant to religious organizations.

Third, assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message. Wide Awake does not exist in a vacuum. It competes with 15 other magazines and newspapers for advertising and readership. The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University. Besides the general news publications, for example, the University has provided support to The Yellow Journal, a humor magazine that has targeted Christianity as a subject of satire, and Al-Salam, a publication to "promote a better understanding of Islam to the University Community," App. 92. Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical. This is not the harder case where religious speech threatens

to dominate the forum. Cf. *Capitol Square Review and Advisory Bd.* v. *Pinette*, *ante*, at 777 (O'CONNOR, J., concurring in part and concurring in judgment); *Mergens*, 496 U. S., at 275.

Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. See, *e. g.*, *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 15 (1990); *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 236 (1977). There currently exists a split in the lower courts as to whether such a challenge would be successful. Compare *Hays County Guardian* v. *Supple*, 969 F. 2d 111, 123 (CA5 1992), cert. denied, 506 U. S. 1087 (1993); *Kania* v. *Fordham*, 702 F. 2d 475, 480 (CA4 1983); *Good* v. *Associated Students of Univ. of Wash.*, 86 Wash. 2d 94, 105–106, 542 P. 2d 762, 769 (1975) (en banc), with *Smith* v. *Regents of Univ. of Cal.*, 4 Cal. 4th 843, 863–864, 844 P. 2d 500, 513–514, cert. denied, 510 U. S. 863 (1993). While the Court does not resolve the question here, see *ante*, at 840, the existence of such an opt-out possibility not available to citizens generally, see *Abood*, *supra*, at 259, n. 13 (Powell, J., concurring in judgment), provides a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding, see *ante*, at 840–841; *post*, at 852–855 (THOMAS, J., concurring); *post*, at 868–872 (SOUTER, J., dissenting), and from government funds generally. Unlike moneys dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws from this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student Activities Fund, then, represents not government resources,

whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.

The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence. As I observed last Term, "[e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test." *Kiryas Joel*, 512 U. S., at 720 (opinion concurring in part and concurring in judgment). When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified. The Court today does only what courts must do in many Establishment Clause cases—focus on specific features of a particular government action to ensure that it does not violate the Constitution. By withholding from Wide Awake assistance that the University provides generally to all other student publications, the University has discriminated on the basis of the magazine's religious viewpoint in violation of the Free Speech Clause. And particular features of the University's program—such as the explicit disclaimer, the disbursement of funds directly to third-party vendors, the vigorous nature of the forum at issue, and the possibility for objecting students to opt out—convince me that providing such assistance in this case would not carry the danger of impermissible use of public funds to endorse Wide Awake's religious message.

Subject to these comments, I join the opinion of the Court.

JUSTICE THOMAS, concurring.

I agree with the Court's opinion and join it in full, but I write separately to express my disagreement with the historical analysis put forward by the dissent. Although the dissent starts down the right path in consulting the original meaning of the Establishment Clause, its misleading application of history yields a principle that is inconsistent with our Nation's long tradition of allowing religious adher-

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or to teach religious doctrines of a particular sect, would be contrary to the intent of the statute. See S. Rep. No. 98–496, p. 10 (1984). The Secretary has promulgated a series of conditions to each grant, including a prohibition against teaching or promoting religion. See App. 757. While these strictures may not be coterminous with the requirements of the Establishment Clause, they make it very likely that any particular grant which would violate the Establishment Clause would also violate the statute and the grant conditions imposed by the Secretary. Should the court conclude that the Secretary has wrongfully approved certain AFLA grants, an appropriate remedy would require the Secretary to withdraw such approval.

IV

We conclude, first, that the District Court erred in holding that the AFLA is invalid on its face, and second, that the court should consider on remand whether particular AFLA grants have had the primary effect of advancing religion. Should the court conclude that the Secretary's current practice does allow such grants, it should devise a remedy to insure that grants awarded by the Secretary comply with the Constitution and the statute. The judgment of the District Court is accordingly

Reversed.

JUSTICE O'CONNOR, concurring.

This litigation raises somewhat unusual questions involving a facially valid statute that appears to have been administered in a way that led to violations of the Establishment Clause. I agree with the Court's resolution of those questions, and I join its opinion. I write separately, however, to explain why I do not believe that the Court's approach reflects any tolerance for the kind of improper administration that seems to have occurred in the Government program at issue here.

The dissent says, and I fully agree, that "[p]ublic funds may not be used to endorse the religious message." *Post*, at

642. As the Court notes, "there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees." *Ante*, at 620. Because the District Court employed an analytical framework that did not require a detailed discussion of the voluminous record, the extent of this impermissible behavior and the degree to which it is attributable to poor administration by the Executive Branch is somewhat less clear. In this circumstance, two points deserve to be emphasized. First, *any* use of public funds to promote religious doctrines violates the Establishment Clause. Second, *extensive* violations—if they can be proved in this case—will be highly relevant in shaping an appropriate remedy that ends such abuses. For that reason, appellees may yet prevail on remand, and I do not believe that the Court's approach entails a relaxation of "the unwavering vigilance that the Constitution requires against any law 'respecting an establishment of religion.'" See *post*, at 648 (quoting U. S. Const., Amdt. 1); cf. *post*, at 630, n. 4.

The need for detailed factual findings by the District Court stems in part from the delicacy of the task given to the Executive Branch by the Adolescent Family Life Act (AFLA). Government has a strong and legitimate secular interest in encouraging sexual restraint among young people. At the same time, as the dissent rightly points out, "[t]here is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them." *Post*, at 641. Using religious organizations to advance the secular goals of the AFLA, without thereby permitting religious indoctrination, is inevitably more difficult than in other projects, such as ministering to the poor and the sick. I nonetheless agree with the Court that the partnership between governmental and religious institutions contemplated by the AFLA need not result in constitutional violations, despite an undeniably greater risk than is present in cooperative undertakings that involve less sensitive objectives. If the District Court finds

on remand that grants are being made in violation of the Establishment Clause, an appropriate remedy would take into account the history of the program's administration as well as the extent of any continuing constitutional violations.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

I join the Court's opinion, and write this separate concurrence to discuss one feature of the proceedings on remand. The Court states that "it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered 'pervasively sectarian' religious institutions, such as we have held parochial schools to be." *Ante*, at 621. In my view, such a showing will not alone be enough, in an as-applied challenge, to make out a violation of the Establishment Clause.

Though I am not confident that the term "pervasively sectarian" is a well-founded juridical category, I recognize the thrust of our previous decisions that a statute which provides for exclusive or disproportionate funding to pervasively sectarian institutions may impermissibly advance religion and as such be invalid on its face. We hold today, however, that the neutrality of the grant requirements and the diversity of the organizations described in the statute before us foreclose the argument that it is disproportionately tied to pervasively sectarian groups. *Ante*, at 610–611. Having held that the statute is not facially invalid, the only purpose of further inquiring whether any particular grantee institution is pervasively sectarian is as a preliminary step to demonstrating that the funds are in fact being used to further religion. In sum, where, as in this litigation, a statute provides that the benefits of a program are to be distributed in a neutral fashion to religious and nonreligious applicants alike, and the program withstands a facial challenge, it is not unconstitutional as applied solely by reason of the religious character of a specific recipient. The question in an as-applied challenge is not

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