*1994 U.S. Briefs 329; 1995 U.S. S. Ct. Briefs LEXIS 16, **

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RONALD W. ROSENBERGER, et al., Petitioners, v. THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, et al., Respondents.

No. 94-329

SUPREME COURT OF THE UNITED STATES

1994 U.S. Briefs 329; 1995 U.S. S. Ct. Briefs LEXIS 16

October Term, 1994

January 17, 1995

[*1]

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN JEWISH COMMITTEE, AND ANTI-DEFAMATION LEAGUE, IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE

The interest of each amicus curiae is set forth in the appendix hereto. The letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

This is a religious funding case. The fundamental question here is whether the University, as a governmental entity, can fund the propagation of religious speech. At its most basic level, the Establishment Clause prohibits public monies being used to promote religious doctrine. This fact alone distinguishes this case from the access cases relied on by Petitioners. The distinction between access and funding represents a sensible limiting principle for Establishment Clause adjudication.

The conflict in this case between the Establishment and Free Speech clauses is overstated. Petitioners already possess extensive access rights to the University; here they seek to participate under a separate, closed forum for funding. Finally, this Court should decline to reconsider the test enunciated in Lemon v. Kurtzman. **[*7]** The Court should continue to use Lemon where appropriate, but not be wedded to any one analytical standard.

ARGUMENT

I. AT A FUNDAMENTAL LEVEL, THE ESTABLISHMENT CLAUSE PROHIBITS GOVERNMENT FUNDING OF RELIGIOUS SPEECH AND EXHORTATION

A. This Court Has Never Upheld the Use of Government Funds to Pay for Religious Activity.

At its core, this is a religious funding case. The central issue is whether the University of Virginia (University) is barred by the Establishment Clause from providing funds for the propagation of Petitioners' inherently religious message. n1 Both settled case law and the principles underlying the Establishment Clause instruct that the answer be "yes."

n1 The religious character and purpose of Wide Awake, as well as the religious nature of its content, are uncontested. See Pet. Brief at 6-7; J.A. 7a.

On those points with legal significance, this case is no different from a host of earlier cases where religious entities sought to use government funds for religious purposes. See Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971). In many **[*8]** ways, this case is easier than the majority of the Court's funding cases which involved issues of whether public monies could be used for purportedly secular activities and functions of religious organizations. See Bowen v. Kendrick, 487 U.S. 589 (1988); Roemer v. Board of Public Works, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672 (1971). Here, Petitioners are not asking to use public funds for a secular activity. Rather, they are asking the University to pay for the propagation of their religious message. A decision upholding their request would be unprecedented and would do untold damage to the purpose and meaning

of the Establishment Clause.

Beginning with the earliest funding case and continuing up through the present, this Court has never allowed the direct payment of public funds for the support of religious activity. In those cases where religious entities have been permitted to participate in the public fisc, it has always been with the assurance that public monies are funding secular functions and activities only. See Kendrick, 487 U.S. at 613 (noting the secular purpose and function of services under the **[*9]** Adolescent Family Life Act); Wolman, 433 U.S. at 237-41 (noting the secular nature of textbooks and standardized tests and scoring); Meek, 421 U.S. at 361 (secular textbooks); Board of Education v. Allen, 392 U.S. 236, 245 (1968) (same); Everson v. Board of Education, 330 U.S. 1, 18-19 (1947) (noting the secular nature of bus transportation); Bradfield v. Roberts, 175 U.S. 291, 298 (1899) (noting the nonsectarian character and function of a hospital). Conversely, this Court has prohibited the application of public monies where there has been a risk that funds would be used to pay for religious activities or functions or otherwise support the religious ministry of a recipient. See School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985); Aguilar v. Felton, 473 U.S. 402, 412 (1985); Wolman, 433 U.S. at 236; Meek, 421 U.S. at 370; PEARL v. Nyquist, 413 U.S. 756, 783 (1973); Lemon, 403 U.S. at 619. The Court has adhered to this no-funding rule notwithstanding the fact that many of the cases involved neutral government programs that made **[*10]** funds available to both secular and religious recipients alike.

This prohibition on funding religious activities has its basis in the nature and purpose of the Establishment Clause. At its fundamental level, the Establishment Clause is designed to preclude the "sponsorship, financial support or active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668 (1970). The purpose of the Establishment Clause, as Justice Jackson stated, "was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense." Everson, 330 U.S. at 26 (Jackson, J., dissenting). As Justice O'Connor stated more recently, "any use of public funds to promote religious doctrines violates the Establishment Clause." Kendrick, 487 U.S. at 623 (O'Connor, J., concurring) (emphasis in original). n2

n2 The state "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." Everson, 330 U.S. at 16. **[*11]**

This distinction between allowing religious entities to participate in secular government programs and prohibiting the application of public monies for religious purposes can be seen in the Court's college funding cases. n3 In all three cases the Court allowed church-related colleges to participate in generally available public grant, loan and revenue bond programs for secular activities of the institutions. But significantly, in each case the Court found that the church-related colleges were nonsectarian in character and were prohibited under the respective statutes from using public funds for any religious purpose. n4 Based on the lack of evidence that any funds were used for religious purposes, the Court held that the church-related colleges could participate in the general funding programs. While announcing this general rule, the Court was

clear as to the parameters of that rule and the precondition for religious institutions to participate under the neutral funding programs: "funds [may] not be used to support 'specifically religious activity.'" Roemer, 426 U.S. at 759. n5 The government cannot "pay for what is actually a religious education, even though it **[*12]** purports to be paying for a secular one, and even though it makes aid available to secular and religious institutions alike." Id. at 747.

n3 Roemer, 426 U.S. 736; Hunt v. McNair, 413 U.S. 734 (1973); Tilton, 403 U.S. 672.

n4 Roemer, 426 U.S. at 740, 743; Hunt, 413 U.S. at 736-37; Tilton, 403 U.S. at 675.

n5 Accordingly, in Tilton, the Court struck down that provision of the Higher Education Facilities Act, 20 U.S.C. § 745 (b)(2), that placed only a twenty year cap on the ability of recipient institutions to use funded facilities for sectarian instruction and religious worship. Tilton, 403 U.S. at 683.

The Court's more recent funding cases have adhered to this rule that the Establishment Clause prohibits the use of public funds to pay for religious activity, even when the funds are administered through neutral government programs. In Kendrick, the Court upheld the facial constitutionality of the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z et seq. (1988), as well as the eligibility of religious organizations to receive **[*13]** funding for providing Act services. Still, the Court remanded the case back to the district court to determine whether AFLA funds were going to pervasively sectarian organizations or were being used to promote religious activities of the recipient institutions. 487 U.S. at 621-22. While some of the justices were divided over the appropriateness of using the "pervasively sectarian" formula as a shorthand for determining eligibility, the Court was unanimous in holding that the public funds could not be "used to further religion." Id. at 624 (Kennedy, J., concurring). n6 As the Chief Justice stated, "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religious affiliated institutions does not have the primary affect of advancing religion." Id. at 609.

n6 "Here it would be relevant to determine, for example, whether the Secretary [of H.H.S.] has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." Id. at 621; "First, any use of public funds to promote religious doctrines violates the Establishment Clause." Id. at 623 (O'Connor, J., concurring) (emphasis in original); "The risk of advancing religion at public expense . . . is much greater when the religious organization is directly engaged in pedagogy. . . ." Id. at 641 (Blackmun, J., dissenting). **[*14]**

Similarly, in Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993), the Court found no constitutional prohibition to using funds under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. (1988), to pay for a sign language interpreter for a hearing impaired student attending a parochial school. But, consistent with the rule in Kendrick, the

Court found no evidence that the interpreter was involved in the instructional process or that the parochial school accrued any financial benefit from the presence of the interpreter. Id. at 2468-69 (distinguishing earlier aid cases involving "direct grants of government aid [which] relieved sectarian schools of costs they otherwise would have borne."). Evidence that public monies would be used to further the religious program of the host parochial school would have required a different resolution of the case, notwithstanding the neutral character and general availability of IDEA funds. n7

n7 In fact, the regulations implementing IDEA, like numerous other federal statutes and regulations, prohibit using federal funds for any religious purpose, including religious worship, instruction, or proselytization. 34 C.F.R. § 76.532(a) (1994). Cf. the Hill-Burton Act, 42 U.S.C. § 291 et seq. (1988); the American Schools and Hospitals Abroad Program, 22 U.S.C. § 2174 (1988); the Emergency Shelter Grants Program, 42 U.S.C. §§ 11371-11378 (1988 and Supp. 1994); and the Child Care and Development Block Grant of 1990, 42 U.S.C. § 9858 (Supp. 1992). **[*15]**

Unlike the above cases where both secular and religious entities used public funds to provide secular services, "religion is at the core of the subsidized activity" in this case. Kendrick, 487 U.S. at 641 (Blackmun, J., dissenting). The distinctly religious purpose and message of Wide Awake is unmistakable, from the content of its articles and editorials to the stated goal contained in its opening editorial. J.A. 45-46. Had Petitioners applied for University funding for secular activities or functions, then the Establishment Clause would not bar them from receiving the generally available benefit. But here Petitioners are seeking funding for a distinctly religious purpose: the publication of a religious magazine. n8 Such direct funding of religious activity is expressly prohibited under Establishment Clause jurisprudence. As the Court stated in Grand Rapids:

Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religion.

n8 Accordingly, amici believe that the University funding of two arguably religious organizations, the Jewish Law Student Association and the Muslim Students Association raise similar Establishment Clause concerns. As Petitioners argue, the current application of the University guidelines may result in discrimination among religions. Pet. Brief at 19-20. No religious activity or, for that matter, no clearly antireligious activity should be paid for with University fees. See Widmar v. Vincent, 454 U.S. 263, 281 (1981) (Stevens, J., concurring). The appropriate remedy, however, is for the Court to affirm the decision of the court of appeals that funding of Wide Awake is prohibited by the Establishment Clause, with instructions that the funding of any predominantly religious or antireligious activity is equally prohibited. **[*16]**

473 U.S. at 385; accord Kendrick, 487 U.S. at 611. Here the court of appeals correctly ruled that

the Establishment Clause bars such government-financed indoctrination of the Petitioners' beliefs.

B. The Court Has Never Held That the Breadth of a Recipient Class Satisfies Establishment Clause Prohibitions on the Use of Public Funds for Religious Purposes.

Petitioners assert that the Establishment Clause does not bar religious entities from participating in public benefits on an equal and nondiscriminatory basis and from applying those benefits toward a religious purpose. Pet. Brief at 22-43. Petitioners are half right. As stated above, the Establishment Clause allows religious organizations and entities to participate in neutral government programs and to apply those benefits toward secular activities and functions. Kendrick, supra. But the clause prohibits applying those same neutral benefits toward religious purposes, notwithstanding the size or breadth of the recipient class. n9

n9 "Virtually everyone acknowledges that the [Establishment] Clause bans more than formal establishments of religion in the traditional sense, that is, massive state support for religion through, among other means, comprehensive schemes of taxation." Lee v. Weisman, 112 S. Ct. 2649, 2672 (1992) (Souter, J., concurring). **[*17]**

Contrary to Petitioners' claims, this Court has never held that the breadth of the recipient class of a neutral government program resolves all Establishment Clause concerns as to how one recipient spends the funds. Pet. Brief at 30-36. In fact, many of the above-cited cases (where the Court struck down using neutral funds for religious purposes) involved government programs that were generally available to a spectrum of recipients irrespective of their public-nonpublic or secular-religious nature. In Meek, the Court struck down the provision of a Pennsylvania law that sought to extend to parochial schools instructional materials and equipment that were being made available to public schools. 421 U.S. at 351-52, 363. While noting that the state could provide secular and nonideological services to parochial schools provided they were unrelated to a religious function, the Court held that the state could not provide assistance that would inadvertently foster religion. Id. at 370-71; accord Wolman, 433 U.S. at 246. Similarly, Roemer, Hunt, and Tilton all involved large funding programs that were available to public, private secular, and church-related **[*18]** colleges alike. 426 U.S. at 740, 743; 413 U.S. 734, 741-42 (1973); 403 U.S. at 676-77. Moreover, the funds involved could be used for "a wide variety" of educational projects. Tilton, 403 U.S. at 675. n10 But neither the breadth of the recipient class nor the neutral purpose of the grants affected the constitutional ban on using the grant monies for religious purposes. n11 In fact, in Tilton, the Court reversed that portion of the Act that permitted publicly financed buildings to be used for religious purposes after twenty years, notwithstanding the breadth of the HEFA. Id. at 683.

n10 In fact, Roemer involved noncategorical grants, "subject only to the restrictions that the funds not be used for 'sectarian purposes.'" 426 U.S. at 739.

n11 In Roemer, only five of seventeen private colleges were church-related. 426 U.S. at 743. In Hunt, revenue bonds under the state Educational Facilities Authority were available to all institutions of higher education, public and private alike. 413 U.S. at 736. While no numbers are provided in Tilton, theoretically all of the nation's colleges and universities, excluding sectarian institutions, were eligible for HEFA grant monies. **[*19]**

Petitioners' argument that the Court's early aid cases -- Bradfield, Everson, and Allen -- support allowing religious groups to participate in broad, neutral programs ignores the fact that in none of those cases were funds used to support religious activities or the religious ministry of the host institutions. See Part I A, supra. Had the breadth of the recipient class been determinative in those cases, then the Court's discussion of the secular uses of the funds would have been superfluous. Instead, those decisions are consistent with the post-Lemon line of cases prohibiting public finding for religious activity but allowing religious institutions to receive funding for secular services. Thus the Court's statements that "religious institutions need not be quarantined from public benefits that are neutrally available to all," Roemer, 426 U.S. at 746, must be read within the context of the Establishment Clause's prohibitions on funding religious activity. n12

n12 Petitioners' reliance on language found in Justice Harlen's concurrence in Walz v. Tax Commission, 397 U.S. at 697, is similarly unavailing. Pet. Brief at 31. While the majority noted that houses of worship fit within a "broad class" of exemptees from property taxes, it also held that "a direct money subsidy would be pregnant with involvement. . . ." 397 U.S. at 673, 675. As Justice Brennan elaborated in his concurrence, there was no evidence that the New York exemptions directly promoted religion. "No particular activity of a religious organization -- for example, the propagation of its beliefs -- is specifically promoted by the exemptions. . . . General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." Id. at 689-90 (Brennan, J., concurring). **[*20]**

The controlling authority on this question, and the bane of Petitioners' argument, is the holding in Bowen v. Kendrick. Under AFLA, a wide spectrum of public and private organizations are eligible to receive funding to provide a range of family planning counseling services including pregnancy testing and maternity counseling, adoption counseling and referral services, prenatal and postnatal health care, and general educational services relating to adolescent premarital sexuality. n13 Although participation by religious organizations is expressly provided for in the statute, religious organizations are not the predominant recipients of AFLA monies. 487 U.S. at 608, 610 n.12. Nevertheless, notwithstanding the breadth of the recipient class and the range of funded services, the Court found that AFLA monies cannot go to fund pervasively sectarian organizations or the religious activity of otherwise eligible recipients, even if that activity is arguably related to the delivery of AFLA services. Id. at 621-22. On this last point there was no disagreement; the Court was unanimous that funds could not be used "to further religion." Id. at 624 (Kennedy, **[*21]** J., concurring). n14

n13 42 U.S.C. § 300z-1(a)(4) lists more than twenty-one different services for which grant

recipients may receive funding. Kendrick, 487 U.S. at 594 n.2.

n14 Accordingly, a ruling that government cannot prohibit the expenditure of public funds for religious purposes merely because the funds are distributed under a program that is generally available would call into question the constitutionality of prohibitions contained in a host of federal programs. See statutes listed supra n.7.

Petitioners attempt to distinguish Kendrick from this case by arguing that there is a difference between a government grantee (Kendrick) and a recipient of a general subsidy that supports multiple speech activities. Pet. Brief at 28. This distinction is unavailing. Contracted Independent Organization (CIO) recipients, like AFLA recipients, must meet certain eligibility criteria and receive University funding for enumerated activity only. Pet. App. 61a. The mere fact that secular publications, but not religious publications, generally receive funding is not qualitatively different from AFLA's funding of secular counseling and educational **[*22]** services but not religious counseling and educational services. n15 But most importantly, Petitioners are not seeking funding for activity to which religious speech is merely ancillary or represents some by-product. Petitioners are requesting funding for the religious activity itself. In this sense, this case is even easier than Kendrick and the Court's previous funding cases.

n15 In this sense, Kendrick too could be characterized as a free speech case. However, the Court seemed unconcerned with any free speech implications of providing a financial benefit for secular counseling services but not for religious counseling services.

For the same reasons, this case is distinguishable from Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986). In Witters, the petitioner was eligible for vocational assistance because of his visual disability, not for activity related to the ultimate use of the state funds. Once eligible, the petitioner had the "full opportunity to expend [the] vocational rehabilitational aid" among a "huge variety" of choices. Id. at 488. n16 In contrast, Petitioners' eligibility rests on the ultimate use of the **[*23]** funds. Unlike the situation in Witters, Petitioners are asking for direct payment for their religious activity, not for the freedom to apply funds for which they are independently entitled toward one of several choices. Finally, unlike the situation in either Witters or Mueller v. Allen, 463 U.S. 388 (1983), the University's payment for Petitioners' religious message could hardly be considered an "attenuated financial benefit." Id. at 400. Accordingly, while breadth of the recipient class was important for the Court's determination in Witters, it was not the sine qua non of the case. n17

n16 In fact, the Court analogized the situation in Witters to that of a state employee donating "all or part of [his] paycheck to a religious institution, all without constitutional barrier." Id. at 487.

n17 The Witters majority, as well as the concurrences, clearly indicated that a "direct subsidy" of the petitioner's religious education would be unconstitutional. Id. at 488. Although three justices also argued that the ultimate effect of the program should be "viewed as a whole," id. at 492

(Powell, J., concurring), thereby implying that it is unnecessary to consider the application of funds in the individual case, that statement was qualified by the decision in Kendrick where all justices agreed that, notwithstanding the breadth of the class, it would be improper to use federal funds to further a specific religious purpose. **[*24]**

Finally, Petitioners are beside the point in arguing that the mere receipt of government funds does not turn a private recipient into a state actor or result in government imprimatur of the recipient's activities. Pet. Brief at 25-26. The issue here is not government endorsement of the religious message of Petitioners' speech but of government aid and support of that religious activity. See Grand Rapids, 473 U.S. at 385-89. While the "endorsement" test may be an effective analytical tool for reviewing the constitutionality of religious symbols or access, it is less effective when the issue concerns government funding of both religious and nonreligious activities. See Kendrick, 487 U.S. at 611-13 (employing the "direct aid" analysis of Grand Rapids and Meek).

C. Contrary to Claims of Petitioners and Supporting Amici, the No-Funding Principle Is Consistent with the Principles Underlying the Establishment Clause and Longstanding Precedent.

The principle prohibiting public funding of religious activity has its basis in the events surrounding the framing of the First Amendment and is supported by approximately 150 years of judicial and legislative application **[*25]** of that amendment. One of the primary purposes of the Establishment Clause was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." Everson, 330 U.S. at 31-32 (Rutledge, J., dissenting); Lee v. Weisman, 112 S. Ct. 2649, 2662 (1992) (Blackmun, J., concurring). The language of the clause "broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes." Everson, 330 U.S. at 33 (Rutledge, J., dissenting). As designed by the Framers, the no-funding principle ensures that no person is compelled to support the propagation of any other's religious beliefs, or even his own, and protects the integrity and independence of religion by ensuring that it does not become dependent on the state for financial sustenance. n18

n18 See Thomas Jefferson, "Act for Establishing Religious Freedom" (1786), reprinted in John F. Wilson & Donald L. Drakeman, Church and State in American History 2d ed., 73-74 (Boston: Beacon Press, 1987).

Petitioners **[*26]** and their supporting amici present a crabbed, if not novel, account of the historic record supporting the Court's no-funding decisions. Contrary to Petitioners' account of the controversy surrounding the proposed Virginia assessment supporting "Teachers of the Christian Religion," see Pet. Brief at 36-37, leaders such as James Madison, George Mason and Thomas Jefferson were not concerned solely with preventing preferential support of religion but with any tax monies being used to support religious ministries. n19 Madison, for one, opposed any public support for religion, regardless of the amount or the circumstances. See Memorial and

Remonstrance P 3. n20 Accordingly, while serving as President, Madison vetoed a bill that would have granted a parcel of land to a Baptist church in the Mississippi Territory even though land grants for secular purposes were common. n21 Jefferson's opposition to all forms of public support of religion, regardless of the breadth of the class, was equally unqualified. Jefferson considered the mere existence of a religious assessment "sinful and tyrannical." Even forcing a man "to support this or that teacher of his own religious persuasion is depriving **[*27]** him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Act for Establishing Religious Freedom. Accord Everson, 330 U.S. at 41 (Rutledge, J., dissenting) ("Not the amount but 'the principle of assessment was wrong.'"). As the Everson Court stated in summarizing the Virginia controversy,

the people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or to otherwise assist any or all religions, or to interfere with the beliefs of any religious individual or group.

n19 As a threshold matter, Petitioners are incorrect in characterizing the Virginia assessment as benefitting religion solely. Undesignated tax monies would have gone to fund schools. But the exact arrangement is beside the point. As Professor Laycock has written, "Virginians understood the vote against the bill as a rejection of any form of financial aid to churches." Douglas Laycock, 'Nonpreferential' Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 897, 899 (1986).

n20 The true nature of Madison's opposition to the general assessment bill can be seen in his correspondence to his father and Jefferson in 1785. Madison contrasted the assessment bill with an act incorporating the Episcopal Church, calling the former bill "a much greater evil" because its broader application made the religious tax more palatable. See letters to Jefferson, January 9, 1785, and to his father, January 6, 1785, reprinted in Robert S. Alley, ed., James Madison on Religious Liberty 66-67 (Buffalo: Prometheus Books, 1985). Madison believed that any public support for religion would lead to the "perversion" of both religion and the civil government. Memorial and Remonstrance PP 5, 7-8 (reprinted in the Appendix to Everson, 330 U.S. at 63-72). According to Justice Rutledge, "Madison was unyielding at all times, opposing with all his vigor the general and nondiscriminatory as he had the earlier particular and discriminatory assessments proposed." Everson, 330 U.S. at 37 (Rutledge, J., dissenting).

n21 See Veto Message, February 28, 1811, reprinted in Alley, James Madison on Religious Liberty 79-80. One week earlier, Madison vetoed a bill incorporating an Episcopal church in Alexandria, Virginia, that would have vested the church with "authority to provide for the support of the poor and the education of poor children . . . [which] would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civic duty." Veto Message, February 21, 1811, reprinted in id., at 79. **[*28]**

Id. at 11. Consequently, it is absurd to suggest that these leaders of American disestablishment would have supported aid for religious speech or instruction if it had merely been packaged in a

more inclusive form of assessment. Accord, Lee, 112 S. Ct. at 2672 (Souter, J., concurring); Laycock, 'Nonpreferential' Aid to Religion, supra at 923.

Amici Christian Legal Society et al., seek to discredit the no-funding principle (and thereby taint this Court's decisions) by tying its origins to the nineteenth century conflict between Protestants and Catholics over the allocation of public funding of religious schools. The nativist-Catholic conflict of the past century was truly a sad chapter in our nation's history and was a distracting force in the evolution of America's public schools. n22 But nativism was not the only impulse that influenced the development of public education and was even less of a force in the development of the no-funding principle. Petitioners' amici oversimplify the history by omitting other significant animating impulses.

n22 See Ray Allen Billington, The Protestant Crusade, 1800-1860 142-58 (New York: The Macmillan Co., 1938); Vincent P. Lannie, Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America, 32 Rev. of Pol. 503 (1970). **[*29]**

America's first truly public schools had their beginnings in the initial three decades of the nineteenth century, before the rise in Irish and German Catholic immigration in the mid-1830s. The Free School Society of New York, later the Public School Society, was created in 1805 by reform-minded individuals to provide a system of universal education for all classes of children. The Society leaders quickly seized upon the notion of nonsectarian education as a means of attracting children of all faiths and of providing an alternative to the competitiveness found among the various denominational schools. The first funding battles raising nonestablishment arguments against funding religious instruction occurred in the 1820s between the Free School Society and Baptist and Methodist schools. In 1825, the New York Common Council decided that henceforth only nonsectarian schools would be eligible to participate in the school fund, a decision that made the Free School society, now the Public School Society, the primary recipient of the common school fund. n23

n23 William Oland Bourne, History of the Public School Society of the City of New York, 1-8, 44-75; (New York: William Wood & Co., 1870); Diane Ravitch, The Great School Wars: New York City, 1805-1973, 6-26 (New York: Basic Books, 1974); accord Lemon, 403 U.S. at 645-49 (Brennan, J., concurring). **[*30]**

The first serious challenge to the school funding formula by Catholics occurred in New York between 1840 and 1842. n24 But as Justice Brennan discussed in his Lemon concurrence, by that time the arguments against funding religious schools had pretty well been set. Lemon, 403 U.S. at 646-48 (Brennan, J., concurring). Petitions for pro rata shares of public school funds were routinely turned aside by education officials, often citing nonestablishment concerns. State legislatures also responded to the "School Question" controversy by enacting laws and constitutional provisions prohibiting appropriations for religious or sectarian instruction. n25 Religious funding proposals were no more successful in the courts where judges uniformly

struck down arrangements designed to provide public support for religious instruction. n26 Thus, as Justice Brennan summarized in Lemon, "for more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions." 403 U.S. at 648-49.

n24 See n. 23, supra.

n25 Although amici Christian Legal Society, et al., are correct that Catholic animus played a role in the events surrounding President Grant's 1875 no-funding proposal and the unsuccessful Blaine Amendment, again, other factors also motivated supporters of the Blaine Amendment and similar no-funding proposals to various state constitutions. Amici's account minimizes the widespread, sincere interest in protecting America's fledgling public education system and in ensuring conformity with understandings of nonestablishment of religion. See Steven K. Green, The Blaine Amendment Reconsidered, 36 Am. J. of Legal Hist. 38 (1992). These other motivations cannot be discounted. In one speech in support of the Blaine Amendment, Senator Oliver P. Morton of Indiana provided his understanding of the nonestablishment principle:

"It is in my opinion an essential principle of American liberty and one upon which the perpetuity of our Government depends that we shall have perfect freedom of religious worship, that there shall be no established church, no religion established by law that is taught by law, and that so far from the States being left free to establish a church if they see proper, or to establish denominational schools at public expense. I believe that the safety of this nation in the far future depends upon their being deprived of any such power. I believe that the example of one State establishing a religion, or doing what amounts to the same thing in principle, establishing denominational schools to be supported at public expense, endangers the perpetuity of the nation. The support of a school by public taxation is the same thing in principle as an established church."

4 Cong. Rec. 5585 (1876).

n26 Smith v. Donahue, 195 N.Y.S. 715 (App. Div. 1922); Knowlton v. Baumhover, 166 N.W. 202 (Iowa 1918); Williams v. Board of Trustees, 191 S.W. 507 (Ky. 1917); Dorner v. School Dist. No. 5, 118 N.W. 353 (Wis. 1908); Atchison, T. & S.F.R. Co. v. Atchison, 28 P. 1000 (Ka. 1892); Synod v. State, 50 N.W. 632 (S.D. 1891); Cook County v. Chicago Indust. School, 18 N.E. 183 (Ill. 1888); Nevada v. Hallock, 16 Nev. 373 (1882); Otken v. Lamkin, 56 Miss. 758 (1879); People v. McAdams, 82 Ill. 356 (1876); St. Mary's Indust. School v. Brown, 45 Md. 310 (1876); Jenkins v. Andover, 103 Mass. 94 (1869); People v. Board of Education, 13 Barb. 400 (N.Y. 1851). **[*31]**

Understandably, the argument that nonsectarian schools only could receive public tax monies appeared specious to Catholic leaders who saw the Protestant bias of the nation's public schools as being anything but nonsectarian. But while their critique of the purported neutrality of the public schools had merit, the inconsistencies in the application of the nonsectarian principle

could not undermine the force of no-funding principle. Many of the early leaders of the American public school movement, from DeWitt Clinton of New York to Horace Mann of Massachusetts and Henry Barnard of Rhode Island sincerely believed in the virtues of nonsectarian education and in the constitutional necessity of adhering to the no-religious funding principle. Mann, who was criticized by both Catholics and evangelicals for making his schools too secular, argued that the public funding of religious schools violated rights of conscience and would lead to religious divisiveness. Taxing a man to support religious schools, Mann wrote, "would satisfy, at once, the largest definition of a Religious Establishment." n27

n27 Horace Mann, Twelfth Annual Report of the Board of Education - 1848 113, 116-17, 127-38 (Boston: Dutton and Wentworth, Printers, 1849). **[*32]**

Thus, the no-funding principle had its basis in Madison and Jefferson's notions of noncoercion and their concern for the integrity and independence of religion. Moreover, the funding battles of the nineteenth century and the early no-funding decisions were not based primarily on Catholic animus, but on sincere attempts to protect the integrity and universality of public education while abiding by constitutional norms.

D. The Court's Access Decisions Do Not Control with Issues of Funding.

The Court's decisions upholding rights of access to public facilities for religious speech do not provide authority for the allocation of public funds for religious activity. There is nothing in Lamb's Chapel v. Center Moriches Sch. Dist., 113 S. Ct. 2141 (1993), Board of Education v. Mergens, 496 U.S. 226 (1990), or Widmar v. Vincent, 454 U.S. 263 (1981), that suggests that the rules governing access extend to providing financial aid for religious activity. See Kendrick, supra.

Access and funding are "qualitatively different" matters, as are direct subsidies and tax exemptions. Walz, 397 U.S. at 690 (Brennan, J., concurring). **[*33]** A subsidy involves "the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole." Id. In comparison, access, like an exemption, involves no such money transfer and assists the recipient only passively. In fact, access is even less similar to a subsidy than an exemption in that the access recipient accrues no financial benefit and the general taxpayer does not suffer even an indirect burden through an increased tax liability. n28

n28 Although this Court recognized the similar effect of subsidies and exemptions on recipients in Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983), it acknowledged that other structural differences exist between a subsidy and an exemption. Id. at 544 n.5 (relying on Justice Brennan's concurrence in Walz).

The fact that access is qualitatively different from a funding benefit is borne out in the Lamb's Chapel decision where the Court stated that by providing access, "any benefit to religion or the

Church would have been no more than incidental." Lamb's Chapel, 113 S. Ct. at 2148; accord Widmar, 454 U.S. at 274 ("any religious **[*34]** benefits of an open forum at UMKC would be 'incidental' within the meaning of our cases."). Significantly, in Widmar the Court distinguished the absence of a benefit to religion under the access policy with the financial benefit the church-related colleges would have received under the 20 year restriction on religious use struck down in Tilton. Widmar, 454 U.S. at 272 n.12. By contrast, the benefit to religion of a direct money subsidy is undeniable and not equivalent to the passive nature of an access policy. Walz, 397 U.S. at 689-90 (Brennan, J., concurring). Accord, Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703, 708-09 (4th Cir.), cert. denied, 114 S. Ct. 2166 (1994) (relying on the Widmar Court's distinction of Tilton to reject arguments that providing a church access to a public school at a non-profit rental rate subsidizes religious practice).

This distinction between funding and access finds support in the Framers' understanding of the nonestablishment principle. In an example strikingly on point, Thomas Jefferson supported allowing religious groups to establish chairs for religious instruction on the **[*35]** boundaries of the University of Virginia campus and providing them access to the library and other facilities. However, Jefferson categorically opposed the creation of a professorship of divinity and the expenditure of University funds for religious instruction. As he stated in a letter to Doctor Thomas Cooper on November 2, 1822:

In our annual report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of encouraging the different religious sects to establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have free use of our library, and every other accommodation we can give them; preserving, however, their independence of us and of each other. n29

n29 Letter to Doctor Thomas Cooper, November 2, 1822, reprinted in Martin A. Larson, ed., Jefferson: Magnificent Populist 260 (Greenwich, CT: Devin-Adair Pub., 1984) (emphasis supplied). Accord McCollum v. Board of Education, 333 U.S. 203, 245-46 (1948) (Reed, J., dissenting).

Following his succession of Jefferson **[*36]** as Rector of the University in 1826, Madison approved the appointment of a university chaplain, but required that his salary be paid through the voluntary contributions of the students' parents. n30 This historic evidence strongly suggests that both Jefferson and Madison approved of providing religious groups access to public facilities on a nondiscriminatory basis but saw the principle of nonestablishment as barring the expenditure of any funds for the resulting religious activity. This historic evidence also conforms with the Court's access decisions, but not with extending those decisions to allowing funding of religious activity. The Court should adhere to this limiting principle of upholding access but denying funding for religious activity.

n30 Leo Pfeffer, "Madison's 'Detached Memoranda'," in Merrill D. Peterson & Robert C. Vaughan, The Virginia Statute for Religious Freedom 296 (New York: Cambridge University Press, 1988).

II. THE CONFLICT BETWEEN THE ESTABLISHMENT AND FREE SPEECH CLAUSES IS OVERSTATED

The conflict between the Petitioners' free speech rights and the Establishment Clause prohibitions is overstated in this case. First, Petitioners already have access **[*37]** to University facilities as a CIO and have full opportunity to distribute Wide Awake on campus. They are afforded a full range of free speech rights short of a government subsidy of their speech. Pet. App. 8a; 53a n.8. Although the University has created a limited public forum for access, it has not done so for funding purposes. Religious speech is among several other forms of speech that the University has chosen not to fund.

Moreover, if a direct conflict between the Free Speech and Establishment clauses does exist in this case, it is a reflection of the inherent limiting quality of the Establishment Clause that cannot be minimized without causing injury to the clause's function and purpose. Any balancing must also take into account how government funding and support of private religious speech transforms the nature of Petitioners' free speech interest.

A. The Mere Fact That the University Has Created a Limited Public Forum for Access to Facilities Does Not Mean It Has Created a Limited Public Forum for Funding Purposes.

Petitioners' claim of content and viewpoint discrimination is necessarily dependent on the nature of the public forum the University has created for **[*38]** funding purposes. Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 800-01 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1983). Amici contend that the district court below correctly determined that the University's policy of funding only particular categories of student organizations and activities reveals an intent and a practice of maintaining a closed forum for funding purposes. Pet. App. 46a-55a. The mere fact that the University has afforded Petitioners recognition as a CIO and access to the University facilities does not affect the separate status of the Student Activities Fund (SAF).

In determining whether a limited public forum has been created in areas other than traditional or quintessential public fora, the Court looks at several factors including the physical characteristics of the property, its history and practice of past use, and the intent of the government in establishing "a place or channel of communication for use by the public at large." Cornelius, 473 U.S. at 802; ISKCON v. Lee, 112 S. Ct. 2701, 2705-06 (1992); U.S. v. Kokinda, 497 U.S. 720, 726-29 (1990). **[*39]** An examination of all of these various factors reveals the University has not created a limited public forum. Because of its discretionary, limited and controlled nature, See Healy v. James, 408 U.S. 169, 182 n.8 (1972), the SAF possesses neither the "objective, physical characteristics" nor a history or tradition of a limited public forum. Lee, 112 S. Ct. at 2718 (Kennedy, J., concurring).

As all sides acknowledge, the University is under no obligation to fund student speech. Healy,

408 U.S. at 182 n.8; Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 366 (8th Cir. 1988). Thus initially, it cannot be argued that the SAF has the physical characteristics of a public forum. Moreover, the University has not "opened the SAF coffers to all CIOs" but has excluded numerous other groups and forms of activity from receiving funding. Pet. App. 51a, 62a-63a (excluding from funding fraternities, sororities, honor societies, political organizations and activities, social entertainment expenses, philanthropic contributions and activities, and religious organizations and activities). Accord Widmar, 454 U.S. at 280 (Stevens, **[*40]** J., concurring) ("A university legitimately may regard some subjects as more relevant to its educational mission than others."). Thus the University has both a tradition and a practice, as well as a clear intent, of limiting access to the SAF. n31 As the district court found, "the consistent, purposeful exclusion of certain groups indicates that the SAF is indeed a nonpublic forum." Pet. App. 53a.

n31 The mere fact that 118 of 135 requests for funding were approved does not indicate that the University created a de facto limited public forum, only that a significant number of groups met the University's funding criteria. The more appropriate comparison is to the 343 organizations that qualified as CIOs. Accord Cornelius, 473 U.S. at 804.

Moreover, the long-standing and consistent practice of funding only certain groups and activities but not others leads to the conclusion that the University does not engage in viewpoint discrimination but content-based discrimination only. n32 See Widmar, 454 U.S. at 270-71 (UMKC's exclusion of Cornerstone constitutes content-based discrimination). This Court's finding of view-point discrimination in Lamb's Chapel **[*41]** was dependent on the facts in that case: the church sought access to make an isolated presentation on an otherwise includable topic. 113 S. Ct. at 2147. In fact, the Court reaffirmed language from Cornelius that speakers may be excluded from nonpublic fora based on their class or the content of their speech. Id. Similarly, in Gohn, the court found viewpoint discrimination existed based on evidence that the gay and lesbian students were denied funding because the student senators disagreed with the group's beliefs. 850 F.2d at 367. Here, there is no evidence the University singled out Petitioner or denied funding for Wide Awake because it disagreed with its views or because of the religious perspective of any of its articles. Instead, based on long-standing policy of funding only certain categories of activities, Petitioners were denied funding because of Wide Awake's overall status as a religious newspaper.

n32 One important indicia of viewpoint discrimination is the scope of the excluded class. Where a denial of access focuses on one group, then there is reason to suspect that an unpopular viewpoint is being suppressed. Cf. R.E.A. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring). **[*42]**

Petitioners' description of Christianity as a "worldview" as opposed to a distinct category or subject is beside the point. The focus is on the University's policies and actions. Whereas almost every action or decision by a government body can be cast as viewpoint discrimination, such did not occur here. The mere exclusion of religious activity along with other nonfunded categories

does not transform the policy into one that "suppresses expression merely because public officials oppose the speaker's view." Perry, 460 U.S. at 46.

Accordingly, the district court was correct in determining that the SAF constitutes a nonpublic forum and that, at best, the University has engaged in content-based discrimination by denying Petitioners funding.

B. Any Conflict That Exists in This Case Between the Free Speech and Establishment Clauses Is Inherent in the Nature of the First Amendment.

In their effort to show a conflict between the Establishment and Free Speech clauses Petitioners and their supporting amici devalue the purpose and role of the Establishment Clause. It is axiomatic that religious liberty is the primary value that underlies both provisions of the religion **[*43]** clause. But the religious liberty value is not synonymous with religious free exercise nor does it adequately describe the multiple functions of the nonestablishment principle. n33 Nonestablishment furthers other values such as ensuring religious pluralism and voluntarism, n34 equality among religions (ensuring that no religion gains dominance or an unfair advantage), n35 and the integrity and legitimacy of both religion and democratic government. n36 The Establishment Clause is the only provision in the First Amendment that ensures certain institutional roles and protects the liberty and equality of citizens generally. But in order to do so, the Establishment Clause, unlike other First Amendment rights, has an inhibiting quality (not solely rights enhancing) that ensures these additional values. n37

n33 See William P. Marshall, Truth and the Religion Clauses, 43 DePaul L. Rev. 243 (1994) (identifying multiple values underlying the religion clauses). Accordingly, amici reject arguments by commentators such as Richard John Neuhaus who has written: "the establishment part of the Religion Clause is entirely, and without remainder, in the service of free exercise. Free exercise is the end; proscribing establishment is a necessary means to an end." Neuhaus, A New Order of Religious Freedom, 60 Geo. Wash. L. Rev. 620, 627 (1992). Rev. Neuhaus' interpretation of the religion clauses would allow for government recognition of and support for religion generally.

n34 Allegheny County v. ACLU, 492 U.S. 573, 610-11 (1989).

n35 See Board of Education of Kiryas Joel v. Grumet, 114 S. Ct. 2481 (1994); Memorial and Remonstrance P 4; Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 Univ. Pa. L. Rev. 555, 568 (1991) ("The prohibition on laws respecting establishment is primarily an equal liberty provision; only secondarily is it concerned with religious liberty in a noncomparative sense.").

n36 See Madison's "Detached Memoranda;" Letter to Edward Livingston, July 10, 1822 (declaring that a "coalition between Government and Religion" will have a "corrupting influence on both the parties."), reprinted in Alley, James Madison on Religious Liberty, 89-94, 82-83.

n37 See Flast v. Cohen, 392 U.S. 83, 102-03 (1968) (identifying the "specific constitutional limitations imposed upon the exercise of congressional taxing and spending power" found in the Establishment Clause); accord Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 479 (1982). **[*44]**

Moreover, Petitioners' free speech claim does not involve purely private speech but speech for which government funding is sought. Hence, authority discussing bright-line distinctions between private speech and government speech is not helpful. See Pet. Brief at 24-25 (relying on Mergens, 496 U.S. at 250). As this Court has noted in the Establishment Clause context, government can effectively adopt and sponsor private speech when it finances, supports or otherwise promotes the religious speech of others. Allegheny County v. ACLU, 492 U.S. 573, 600 (1989); Stone v. Graham, 449 U.S. 39, 42 (1980). Unlike an access situation, the funding of Petitioners' speech would transform its nature into quasi government-sponsored speech and remove it from the realm of purely private speech.

III. THIS COURT NEED NOT RE-EXAMINE THE LEMON V. KURTZMAN STANDARD FOR ADJUDICATING ESTABLISHMENT CLAUSE VIOLATIONS

This Court is again asked to revisit and discard its analytical framework enunciated in Lemon v. Kurtzman, 403 U.S. at 612-13, commonly called the "Lemon test." See Pet. Brief at 39-43; Brief of the American Center for Law and Justice. **[*45]** This course has been urged on the Court before, most recently in Lee v. Weisman and last term in Board of Education of Kiryas Joel v. Grumet, 114 S. Ct. 2481 (1994). The Court declined to reconsider Lemon in those cases and in Lamb's Chapel, 112 S. Ct. at 2148 n.7; there is no compelling reason for the Court to venture down that road in this case.

This Court has never limited itself to one standard for reviewing whether a law or policy violates the Establishment Clause. As has been stated on numerous occasions, the standards of the Lemon test are "viewed as guidelines" or as "helpful signposts" and represent "no single constitutional caliper." Tilton, 403 U.S. at 677-78; Hunt, 413 U.S. at 741. The Court has declared its "unwillingness to be confined to any single test or criterion in this sensitive area," Lynch v. Donnelly, 465 U.S. 668, 679 (1984), and, over the past dozen years, has been true to its word applying several styles of analysis as appropriate. See Kiryas Joel, supra (preferential treatment; unlawful delegation of authority); Zobrest, supra (neutrality); Weisman, supra **[*46]** (coercion); Allegheny, supra (endorsement); Marsh v. Chambers, 463 U.S. 783 (1983) (historic). Even though the Lemon test has been applied intermittently to these cases, the Court's decisions clearly indicate that there is no "Grand Unified Theory" for Establishment Clause analysis. Kiryas Joel, 114 S. Ct. at 2498 (O'Connor, concurring in part and in the judgment).

Contrary to claims of confusion by Petitioners' amici, lower courts have come to recognize the flexibility in Establishment Clause adjudication and have not restricted their analysis to the Lemon factors. See e.g. Harris v. Joint Sch. Dist., No. 93-35839, 1994 U.S. App. LEXIS 32646 (9th Cir. Nov. 18, 1994); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir.), cert. denied, 113 S. Ct. 2950 (1993); Adler v. Duval County Sch. Bd., 851 F. Supp. 446 (M.D. Fla. 1994); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993). Conversely, many recent applications of the Lemon test have resulted in holdings that even Petitioners and

their amici would not consider to be hostile to religious expression. **[*47]** See Lamb's Chapel, supra; Mergens, supra; Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501 (8th Cir. 1994); Pope v. East Brunswick Bd. of Ed., 12 F.3d 1244 (3d Cir. 1993); Jones, supra; Adler, supra. Accord Weisman, 112 S. Ct. at 2661 (reaffirming that the Court's decisions express "no hostility" toward religion.). Apparently, the complaint here is not so much with the application of Lemon itself but with the outcome of particular cases with which Petitioners and their amici disagree. This does not represent a sensible rationale for reversing an analytical standard that serves as much of the basis for thirty years of Establishment Clause jurisprudence. Arizona v. Rumsey, 467 U.S. 203, 212 (1984) ("any departure from the doctrine of stare decisis demands special justification").

Consequently, the Court should decline the invitation of Petitioners and amicus ACLJ to reverse Lemon.

CONCLUSION

For the foregoing reasons, amici pray that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national nonprofit, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as amicus in many of the leading church and state cases decided by this Court, including filing an amicus brief on behalf of the petitioners in Lamb's Chapel v. Center Moriches School District. Americans United is composed of approximately 50,000 members nationwide and maintains active chapters in several states. Americans United members adhere to various religious faiths, with some holding no religious affiliation. They are united, however, in their **[*49]** commitment to the longstanding American principle of church-state separation. Americans United members sincerely believe that the funding of religious speech and activity violates core notions of church-state separation.

The American Jewish Committee

The American Jewish Committee (AJC), a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. AJC has always strongly supported the constitutional principle of separation of religion and government embodied in the Establishment Clause of the First Amendment. This principle, we believe, has been the cornerstone of religious liberty for all in America. Accordingly, we believe that it is not a proper function of government to fund any religious activities. This is why we join in the submission of the brief in this case, as we have in numerous earlier cases relating to the principle of separation.

Anti-Defamation League

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle, **[*50]** as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. In support of this principle, ADL has previously filed amicus briefs in such cases as Board of Education of Kiryas Joel v. Grumet, 114 S. Ct. 2481 (1994); Lee v. Weisman, 112 S. Ct. 2649 (1992); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986); Grand Rapids v. Ball, 473 U.S. 363 (1985); Lemon v. Kurtzman, 403 U.S. 602 (1971); and Abington v. Schempp, 374 U.S. 203 (1963). ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.