

ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: GUY MITCHELL, ET AL., Petitioners v. MARY L.
HELMS, ET AL.

CASE NO: 98-1648

PLACE: Washington, D.C.

DATE: Wednesday, December 1, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GUY MITCHELL, ET AL., :
4 Petitioners :
5 v. : No. 98-1648
6 MARY L. HELMS, ET AL. :
7 - - - - - X

8 Washington, D.C.

9 Wednesday, December 1, 1999

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:04 a.m.

13 APPEARANCES:

14 MICHAEL W. McCONNELL, ESQ., Chicago, Illinois; on behalf
15 of the Petitioners.

16 BARBARA D. UNDERWOOD, Deputy Solicitor General, U.S.

17 Department of Justice, Washington, D.C.; on behalf of
18 the Respondent United States.

19 LEE BOOTHBY, ESQ., Washington, D.C.; on behalf of the
20 Respondent Helms, et al.

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25

	C O N T E N T S	
		PAGE
2	ORAL ARGUMENT OF	
3	MICHAEL W. McCONNELL	
4	On behalf of the Petitioners	3
5	BARBARA D. UNDERWOOD	
6	On behalf of the Respondent United States	21
7	LEE BOOTHBY	
8	On behalf of the Respondent Helms, et al.	30
9	REBUTTAL ARGUMENT OF	
10	MICHAEL W. McCONNELL	
11	On behalf of the Petitioners	55
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-1648, Guy Mitchell v. Mary L. Helms.

5 Mr. McConnell.

6 ORAL ARGUMENT OF MICHAEL W. McCONNELL

7 ON BEHALF OF THE PETITIONERS

8 MR. McCONNELL: Mr. Chief Justice, and may it
9 please the Court:

10 The Fifth Circuit held that the
11 constitutionality of government provision of educational
12 resources pursuant to neutral statutes depends upon the
13 medium in which the resources are provided. That is to
14 say, that if it's provided in the form of a textbook or in
15 the form of a public employee providing remedial education
16 services, it is constitutional, but if the -- but if
17 similar material is provided in the form of
18 computer-assisted instruction or library books, it is
19 unconstitutional.

20 I'd like to make two principal points this
21 morning. The first is that the distinctions of this sort
22 have not -- are pedagogically meaningless and
23 counterproductive and have no relation to the principles
24 of the First Amendment, and secondly, that the criteria
25 laid down by this Court in its decision in Agostini v.

1 Felton, 2 years ago, provide a principal basis for
2 resolution of issues of this sort.

3 The statute at issue here, Chapter 2, was
4 originally enacted in 1965. It provides for grants to
5 local education agencies through state education agencies
6 for the purchase of educational materials and equipment.
7 Today, that means principally, in the case of non-public
8 schools, library books, computers, computer software, and
9 an equal per-capita sum per student is provided to the
10 local education agency for all students, no matter what
11 accredited school they attend. These materials -- then
12 the statute provides that the LEA will then purchase
13 secular, neutral, and non-ideological materials and
14 equipment which will then provide for the use of the
15 students at the schools where they attend.

16 The Fifth Circuit held that -- as I said, that
17 the computer-assisted instructional equipment and the
18 textbooks are unconstitutional, relying upon this Court's
19 decisions in the mid -- late 1970's, Meek v. Pittenger and
20 Wolman v. Walter. It is our submission that that is an
21 erroneous decision and that, under the criteria in
22 Agostini v. Felton, this program is entirely
23 constitutional.

24 Indeed, we don't consider that this case is even
25 particularly difficult because the statute was designed in

1 a particularly careful way providing safeguards that, if
2 anything, go beyond any constitutional requirement --

3 QUESTION: Mr. McConnell --

4 MR. McCONNELL: -- that this Court has laid
5 down.

6 QUESTION: -- the Fifth Circuit relied primarily
7 on Meek and Wolman, I gather, in its decision. In order
8 to find in your favor, do you think we need to overrule
9 those cases here?

10 MR. McCONNELL: Well, Justice O'Connor, I don't
11 think that you actually have to overrule them. I think
12 that the principle under which those cases was decided has
13 already been explicitly rejected by this Court in
14 Agostini.

15 The judgment in those cases could be sustained
16 because, if you read the opinions carefully, you will see
17 that the Court presumed in those cases that the statutes
18 were not neutral; that is, it analyzed the cases as if
19 what they were looking at were entirely grants to
20 non-public schools which were disproportionately --

21 QUESTION: But, Mr. McConnell --

22 MR. McCONNELL: -- religious in nature.

23 QUESTION: -- that was contrary to fact because
24 the public schools were getting those same benefits. So I
25 can see you saying, yes, you have to overrule those cases,

1 but the kind of distinction that would be made, it seems
2 to me so artificial, whether it's in one statute that
3 covers public and private or separate statutes added
4 together is the same thing?

5 MR. McCONNELL: Well, Your Honor, I'm not going
6 to plead here for keeping Meek and Wolman alive, which I
7 consider to have been decisions that have led to
8 tremendous misunderstanding and mischief in this area and
9 --

10 QUESTION: Indeed, you -- you probably would
11 welcome the notion that if you have a statute that is
12 narrowly directed to -- to religious schools, but which
13 gives them nothing more than what is already given to
14 public schools under another statute, that is not a --
15 that is not a statute that is narrowly targeted to
16 religious schools.

17 MR. McCONNELL: Yes, I agree with you and
18 Justice Ginsburg on that.

19 The Court in Meek and Wolman did say the
20 contrary, however, and if this Court prefers to
21 distinguish rather than overrule the cases on that ground,
22 it would be able to decide for us without so doing. I
23 don't necessarily recommend that.

24 The three criteria spelled out in Agostini
25 versus --

1 QUESTION: Well, let me just ask you a question
2 on that. Do you -- do you adhere to -- subscribe to the
3 fact that there's a distinction between supplanting and
4 supplementing the educational mission?

5 MR. McCONNELL: Your Honor, this statute does
6 contain a supplement/not supplant requirement which is
7 enforced. We do not believe that is constitutionally
8 required.

9 QUESTION: That's what I thought.

10 MR. McCONNELL: But we also do urge the Court to
11 be -- not to treat that as a constitutional requirement.
12 It isn't really at issue in this case, since it is
13 present, and there are contexts, including earlier cases
14 in this Court, where the --

15 QUESTION: So, in your view, it would be
16 perfectly constitutional for the -- in a neutral statute
17 to say we will provide all the computers and all the desks
18 for both public and private schools.

19 MR. McCONNELL: Well, no, Your Honor. All I
20 would say is that it isn't really necessary for the Court
21 to consider that --

22 QUESTION: But that's the --

23 MR. McCONNELL: -- here.

24 QUESTION: That's the place where your position
25 would take us, wouldn't it?

1 MR. McCONNELL: Well, that's the place where
2 some earlier decisions of this Court seem to take us --
3 take a reason --

4 QUESTION: Well, I'm -- I'm just asking you
5 whether that's -- that's where your position would take us
6 because --

7 MR. McCONNELL: No, Your Honor. Our position is
8 that this statute is constitutional, and whether that
9 particular feature of the statute is constitutionally
10 required is not something I think that the Court should
11 decide in a case where it is not at issue.

12 QUESTION: I guess I'm -- I'm not sure what --
13 what your answer is to Justice Stevens. You -- you have
14 said, as I understand it, that you don't think that the
15 supplement/supplant distinction is a constitutionally
16 required distinction; is that correct?

17 MR. McCONNELL: That is our -- our submission.

18 QUESTION: Right.

19 MR. McCONNELL: However, but even if it were,
20 this stat -- this case would still come out --

21 QUESTION: No, but let's -- let's --

22 MR. McCONNELL: -- as we say --

23 QUESTION: Let's assume it is not a
24 constitutionally required distinction and, therefore, at
25 least in some categories of aid, there could be a complete

1 supplantation --

2 MR. McCONNELL: Whether there could --

3 QUESTION: -- and I take it that is also your
4 position.

5 MR. McCONNELL: Whether there is a complete
6 supplantation is another question, but whether there might
7 be some degree --

8 QUESTION: Well, but if the distinction -- if
9 the distinction is not required, then I presume there are
10 certain categories of aid in which the government in
11 effect or categories of supply to -- to sectarian schools
12 that the government could take over completely without
13 violating any constitutional norm.

14 MR. McCONNELL: Well, I --

15 QUESTION: Maybe I don't understand what you say
16 when you say the -- the distinction is not
17 constitutionally required.

18 MR. McCONNELL: Well, it -- it -- this is not,
19 of course, an either/or proposition. There can be
20 questions of degree.

21 The position I would strongly urge this Court
22 not to constitutionalize, the idea that any time any
23 expenditure by the school is displaced that it becomes
24 automatically unconstitutional.

25 QUESTION: Well, that's what --

1 MR. McCONNELL: On the other hand, a complete
2 supplantation might present a different issue.

3 QUESTION: Well, what about a situation where
4 the -- the county says, well, we're building a new public
5 school and, just in -- to be neutral, we're going to build
6 a new parochial school, too, at our expense?

7 MR. McCONNELL: Your Honor, first, I do -- I
8 believe so much depends, Your Honor, upon the way a
9 statute is designed, what its --

10 QUESTION: Well, could --

11 MR. McCONNELL: -- enforcement mechanisms are --

12 QUESTION: But why --

13 MR. McCONNELL: -- and so forth --

14 QUESTION: Why don't you -- could -- could you
15 answer that question?

16 MR. McCONNELL: -- but I -- I strongly expect
17 that the entanglement that would be entailed under such a
18 program would be excessive.

19 QUESTION: Well, no, that --

20 MR. McCONNELL: So it's hard for me to imagine

21 --

22 QUESTION: Well --

23 MR. McCONNELL: -- that such a provision --

24 QUESTION: -- let's say --

25 MR. McCONNELL: -- be constitutional.

1 QUESTION: -- there's -- we're not going to do
2 anything until we turn this school -- the lock or the
3 turnkey job on the school and that's it.

4 MR. McCONNELL: The -- the different -- may I
5 explain the difference between that and this case?

6 QUESTION: Well, I hope you will --

7 MR. McCONNELL: Because I think it will --

8 QUESTION: -- get to an answer fairly soon.

9 MR. McCONNELL: Well, I -- well, the answer is
10 --

11 QUESTION: The Chief Justice often --

12 MR. McCONNELL: -- I do believe that --

13 QUESTION: -- encourages counsel --

14 MR. McCONNELL: -- that would be --

15 QUESTION: -- to answer yes or no when they can
16 and then explain.

17 MR. McCONNELL: I do believe that would be
18 unconstitutional, Your Honor, but it's hard to say for
19 sure because it would depend to a certain extent upon the
20 nature of the program.

21 QUESTION: Well, then doesn't that mean that --
22 that supplant and supplement perhaps do play a role in --
23 in this doctrine?

24 MR. McCONNELL: It may very well play a role,
25 but as an absolute rule, Your Honor, it would be -- it

1 would -- as -- as -- if supplement/not supplant meant that
2 there could be no displacing of any expenditure, however
3 small, that would be a -- a very damaging holding.

4 QUESTION: You're -- you're talking about --

5 MR. McCONNELL: At the other extreme --

6 QUESTION: -- supplementing -- everybody is
7 talking about supplement and supplant as though that's an
8 easy call. What -- what causes it? Suppose you -- a --
9 if you have a poor religious school that doesn't have --
10 that doesn't have window shades, providing window shades
11 would be supplementing, but if -- if it was a rich
12 religious school that already had window shades, window
13 shades would be supplanting?

14 MR. McCONNELL: Your Honor, that is one of many
15 problems. If supplement/supplant were -- /not supplant
16 were interpreted as an -- as an absolute constitutional
17 rule, you would have distinctions among schools --

18 QUESTION: Yes, Mr. McConnell.

19 MR. McCONNELL: -- and -- and a --

20 QUESTION: It may be a very difficult line to
21 draw, but I'm -- but I'm really seeking what is your
22 limiting principle. Is it simply neutrality, or is there
23 something else beside neutrality that limits the amount of
24 aid that the government can give to schools on an equal
25 basis, building schools for both parochial and public.

1 MR. McCONNELL: Well, the three --

2 QUESTION: What is the limiting principle?

3 MR. McCONNELL: The three criteria, and there's
4 not -- neutrality is just one of the three criteria laid
5 down in Agostini. The other two are that there may not be
6 governmental inculcation of religion, which we interpret
7 primarily as meaning that the materials must be neutral,
8 secular, and non-ideological, and there must not be
9 excessive entanglement. When --

10 QUESTION: But on the Chief Justice's question,
11 every one of those criteria is satisfied. The -- there --
12 there is -- there is certainly no doctrinal element in the
13 bricks, and his hypothesis is that the school gets turned
14 over and the government's contact with it ceases at the
15 moment the teaching begins. So I presume that would be --
16 that would be entirely constitutional.

17 MR. McCONNELL: Again, Your Honor, it may very
18 well be that there are some limitations having to do with
19 total supplantation --

20 QUESTION: Well, what are they?

21 MR. McCONNELL: -- where the government provides
22 the entire amount.

23 QUESTION: That's Justice Stevens' question, and
24 it's mine. What is your limiting principle?

25 MR. McCONNELL: The facts of this case are so

1 far from that, that they are not very useful and --

2 QUESTION: But we'd like to know what the
3 principle is that we ought to bear in mind in -- in
4 deciding all of these cases, and I want to know what yours
5 is.

6 MR. McCONNELL: Your Honor, what I would
7 recommend to you is that the -- is that the three
8 principal criteria of Agostini be reaffirmed and that the
9 lower courts be asked to evaluate specific --

10 QUESTION: No, but that does not --

11 MR. McCONNELL: -- statutes and circumstances.

12 QUESTION: With respect, I don't think that
13 answers our question because it seems to me that in answer
14 to the question a moment ago, in referring to the three
15 Agostini principles, you in effect came up with a scheme
16 which would lead to the conclusion in the Chief Justice's
17 hypothesis that building the school for the -- for the
18 parochial school would be entirely constitutional.

19 You back off from that conclusion, and I
20 understand why you would, but I don't know what your
21 limiting principle is for backing off from it.

22 MR. McCONNELL: Your Honor, as -- as the
23 government assumes a larger and larger share of the -- of
24 the expenses of the school, the entanglement problems grow
25 exponentially because it --

1 QUESTION: There is no entanglement problem in
2 building that school. That is the hypothesis of the
3 question.

4 MR. McCONNELL: The entanglement comes in the
5 various conditions and limitations that are going to be
6 attached to the use of the school.

7 QUESTION: In the hypothesis, the government
8 says here's the school, it's yours.

9 MR. McCONNELL: Your Honor, the government has
10 never simply said here is the school, it's yours.

11 QUESTION: Maybe it hasn't, but the Chief
12 Justice just did, and -- and that's -- that's the --
13 (Laughter.)

14 QUESTION: That's the hypothesis of the
15 question.

16 MR. McCONNELL: Well, with respect, the reason I
17 resist the hypothesis is the very purpose of the
18 entanglement doctrine has been as a protection for the
19 autonomy of schools that comes from the types of
20 limitations and conditions that the government typically
21 attaches to its -- its grants of aid. It's the -- it's
22 the other side, the protective side of that wall of
23 separation.

24 To hypothesize that there are no limitations or
25 conditions is contrary to the very theory under which

1 entanglement --

2 QUESTION: Mr. McConnell --

3 MR. McCONNELL: -- makes sense.

4 QUESTION: -- it's not going to happen. Why
5 don't you say it's no good? I mean, why don't you just
6 say it's no good because you just can't supplement the
7 whole thing? You're not giving away anything that's ever
8 going to -- going to occur in the real world.

9 MR. McCONNELL: It is certainly true that this
10 isn't going to occur in the real world.

11 QUESTION: Yeah, but then what would the
12 difference be between that case and saying we'll just
13 supply the desks and computers? That would be the same
14 case, wouldn't it?

15 MR. McCONNELL: I don't --

16 QUESTION: You use them any way you want. We
17 don't want to interfere with the -- with the teaching
18 program that you want to administer.

19 MR. McCONNELL: Well, Your Honor --

20 QUESTION: That would be the same case.

21 MR. McCONNELL: -- of course, the case here is
22 not one in which the computers can be used for whatever
23 you want. There's specific congressional purposes,
24 narrowly targeted purposes and --

25 QUESTION: But you just told us those were not

1 necessary. You said that the statute did a lot of things
2 that the Constitution did not require, and I'm still
3 trying to find out what your limit is, other than pure
4 neutrality, and if -- if that's the limit, I think the
5 government may subsidize and may avoid entanglement
6 problems by simply saying use the stuff the way you want
7 to and -- which would have a lot of merit to it because
8 one of the dangers here is you interfere with the teaching
9 mission of the parochial school.

10 MR. McCONNELL: One of those limitations is,
11 however, excessive entanglement, and you cannot evaluate
12 the entanglement without knowing what the -- what the
13 range of limitations and conditions are going to be on the
14 -- on the building. May I --

15 QUESTION: But if I make the hypothesis of --

16 MR. McCONNELL: The building --

17 QUESTION: -- no regulation whatsoever, whatever
18 we buy or lend to use just as you want to, so there would
19 be no entanglement.

20 MR. McCONNELL: But -- but the question is to
21 whom? That will be to a school. Well, what is a school?
22 There will be definitions of what a school is. Those
23 definitions will include such things as what kind of
24 content it has to do, what kind of -- of requirements it
25 has to meet. It is literally an impossibility to imagine

1 that the government simply says we're going to give you a
2 building and you can use it for whatever you wanted to.
3 If it did, if you think every American --

4 QUESTION: But do you think it's impossible to
5 imagine --

6 MR. McCONNELL: -- in the country, a building, I
7 would think --

8 QUESTION: -- that they would say we'll supply
9 your computers?

10 MR. McCONNELL: I beg your pardon?

11 QUESTION: Do you think it's impossible to
12 assume they might say we will supply all the computers and
13 you just use them the way you want to?

14 MR. McCONNELL: Well, actually, I think that is
15 -- that is at least conceivable that, for example, the
16 government could provide a personal computer to every
17 student within certain age groups in America to have at
18 their own home and that there would be no need for
19 entanglement because no need for any kind of limitation on
20 religious use.

21 Again, that's not the statutory scheme that we
22 have here, and similarly, if the government wanted to give
23 a building to every person in the United States, it would
24 not be unconstitutional to use the building for a -- for a
25 church even. But if the government --

1 QUESTION: But as you -- as you point out,
2 though, in the real world, there -- there are conditions
3 and there will be at least threats of entanglement, and --
4 and as I understand it so far, you've said, you know,
5 there are limits. In other words, there's -- there's a --
6 there's a -- somehow there's a point beyond which the
7 government cannot go. Is that point defined in your
8 judgment entirely by the entanglement concept? In other
9 words, there's a point in which there's too much
10 entanglement or a threat of too much entanglement? Is
11 that what defines the point at which something becomes --
12 aid becomes too much?

13 MR. McCONNELL: Well, there are also the other
14 two aspects, including the prohibition on governmental
15 indoctrination of religion, and that's, of course,
16 extremely important as well.

17 QUESTION: Right, but -- but in -- in the -- in
18 the practical terms of this case, I take it, it's an --
19 this is really an entanglement issue?

20 MR. McCONNELL: In the practical terms of this
21 case, because we have a supplement/not supplant provision
22 and we have very rigorous no religious use requirements --

23 QUESTION: No, but we have to police it.

24 MR. McCONNELL: -- you don't have to reach
25 either of those.

1 QUESTION: We have to police it. We -- we have
2 to police the supplement/supplant distinction, and I
3 thought that raised the entanglement point.

4 MR. McCONNELL: Well, it does, but -- but in --
5 but the entanglement is so minimal when -- when what is --
6 when what is at stake is things like library books and
7 computers. It's not something like teachers or entire
8 buildings where you have to have some sort of elaborate
9 scheme of monitoring. These are very discrete pieces of
10 equipment that are used for discrete tasks. It is a -- it
11 is a relatively simple and routine matter to know what
12 they're being used for, and so the entanglement problem
13 here is, if anything, less than in other cases where --
14 where this Court has approved the program.

15 I'd like to --

16 QUESTION: Mr. McConnell, the reason limitations
17 questions were asked is your brief goes pretty far. It
18 even suggests that it might be a violation of the free
19 exercise clause not to give the kind of assistance that's
20 involved here.

21 MR. McCONNELL: Well, Your Honor, there's a
22 political judgment to be made whether legislatures or
23 Congress want to give aid to non-public education. When
24 government -- if the government does make that decision,
25 which is certainly a political judgment we do not claim as

1 a constitutional right at all, there are constitutional
2 limitations on discriminating between secular and
3 religious private schools, and so, if the government were
4 to enact a program which provides money or other sorts of
5 equipment or resources to private secular schools, there
6 would be some free exercise and free speech concerns in --
7 in denying similar benefits to religious schools.

8 QUESTION: I read your brief to say if they gave
9 it to the public schools and not these schools.

10 MR. McCONNELL: That is certainly not --

11 QUESTION: You didn't mean it.

12 MR. McCONNELL: -- definitely not our position,
13 Justice Ginsburg.

14 I would like to reserve the remainder of my time
15 for rebuttal.

16 QUESTION: Very well. You shall, Mr. McConnell.

17 Ms. Underwood, we'll hear from you.

18 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

19 ON BEHALF OF THE RESPONDENT UNITED STATES

20 MS. UNDERWOOD: Mr. Chief Justice, and may it
21 please the Court:

22 This statute is constitutional because it is not
23 only neutral with respect to religion, but also it does
24 not directly support religious instruction indoctrination.
25 It provides secular materials for secular uses in a way

1 that supplements and does not supplant the existing budget
2 of the school, and I think it's important to recognize
3 that this last requirement applies not only to religious
4 schools, but to secular, private, and public schools as
5 well. It's an essential feature of this particular aid
6 program.

7 QUESTION: Well, you're -- you're -- when you
8 speak of a requirement, Ms. Underwood, you're talking
9 about a statutory --

10 MS. UNDERWOOD: Yes.

11 QUESTION: -- requirement.

12 MS. UNDERWOOD: Yes. I'm describing the statute
13 and explaining that these features guarantee its
14 constitutionality. This --

15 QUESTION: But I understood you to -- your brief
16 to take the position that this supplement/supplanting
17 distinction is constitutionally mandated.

18 MS. UNDERWOOD: The supplement-and-not-supplant
19 distinction or something like it is -- I wouldn't say --
20 go so far as to say that it itself would always be
21 constitutionally mandated, but it performs the function
22 here of guaranteeing two things, guaranteeing -- helping
23 to ensure two things: that the government aid doesn't go
24 to the religious mission of the school and that the aid
25 doesn't become so substantial as to in effect subsidize

1 the whole operation of the school.

2 QUESTION: Well, why -- why would that be bad?

3 Suppose -- suppose you have a -- a state that makes a
4 determination that a certain amount of money per capita,
5 per student, is necessary to provide an adequate secular
6 education. It enacts a statute requiring all accredited
7 schools within the state to provide that minimum secular
8 education, and then it gives to all schools in the state,
9 both public schools -- and public schools the minimum
10 amount of money necessary to achieve that secular
11 education. And it examines students to be sure that they
12 have gotten that minimum secular education.

13 Now, that, it seems to me, might well be
14 supplanting instead of supplementing, but all you're --
15 all you're providing is the secular education, which the
16 -- which the state has decided requires a certain minimum
17 amount of expenditure. Why would that be
18 unconstitutional?

19 MS. UNDERWOOD: Well, the constitutional problem
20 that it would raise is the one that this Court has
21 repeatedly recognized as the separate concern that when so
22 much aid -- when the core functions of -- of a religious
23 school are subsidized by the government, at some point it
24 becomes impossible to say that it is only the secular
25 function that is being supported, that the aid is --

1 QUESTION: No, but in my hypothetical, the --
2 the state has tried to be careful about that. It -- it --
3 you know, it tests whether you've given a secular
4 education, and it's made the determination for our public
5 schools, which don't give anything but secular education,
6 this amount of money is necessary. So we're going to
7 subsidize the -- the secular education, whatever school
8 you go to. Now, you want to add something else to that
9 secular education, that's your business. Do it on your
10 money, but -- but we're just subsidizing secular education
11 for everybody wherever they want to get it.

12 MS. UNDERWOOD: Well, I --

13 QUESTION: Ms. Underwood --

14 MS. UNDERWOOD: Yes.

15 QUESTION: -- does that bring to mind perhaps
16 this Court's holding in Ball on the Community Education
17 Act? Do you suppose that's still good law?

18 MS. UNDERWOOD: Yes. In Ball -- as long ago as
19 Ball and as recently as Agostini, on a number of occasions
20 in between, this Court has articulated a separate
21 principle not only that the -- that the money not be
22 itself directly used for -- or the money -- or the aid in
23 this case because it's not money, it's -- it's material
24 that is -- that is loaned -- that it not be directly used
25 for religious instruction, but also that when it is --

1 when the aid is sufficiently substantial as to in effect
2 support the whole operation of the school, when without it
3 the school couldn't operate, then the fact that the
4 dollars can be by -- by accounting assigned only to
5 secular functions isn't sufficient to remove the
6 appearance and the understanding and the fact that the
7 government is in effect subsidizing this school in
8 totality with all its --

9 QUESTION: Is this sort of a mystic appearances
10 problem? Is that -- is that what it is?

11 MS. UNDERWOOD: Well, I don't think it's mystic.
12 I think appearances are part of the problem. I think when
13 the government supports a religious school, without any
14 mysticism involved --

15 QUESTION: The government is paying for the
16 secular education, which is -- which is provided in the
17 school.

18 MS. UNDERWOOD: Well, the government is paying
19 --

20 QUESTION: It -- it has made a determination
21 that it costs that much to provide it. What -- what
22 possible constitutional problem is there if it -- if a
23 school chooses to add to that something else?

24 MS. UNDERWOOD: The problem is that at some
25 point while your -- while your hypothesis has the number

1 of dollars being -- the dollars that the secular part of
2 the education -- that would require overturning a long
3 line of this Court's cases holding that the government
4 can't directly --

5 QUESTION: I take it, the principle you're
6 talking about -- you don't get in a sentence all of the
7 gray areas and the gradations that you might be talking
8 about.

9 MS. UNDERWOOD: That's -- that's correct, but
10 what supplement but not supplant does, it is one mechanism
11 along with the -- the array of safeguards in the statute
12 to ensure or to attempt to ensure that the materials are
13 used for secular purposes, and there were -- there --
14 there are everything from asking for assurances from the
15 schools to asking -- to marking the materials --

16 QUESTION: May I ask one question about the
17 distinction? Because that is a difficult line to draw.
18 Supposing a school had 20 students and 20 computers and
19 they got 10 more students. The enrollment went up, and
20 the government provided the extra 10 -- this is a
21 parochial school -- the government provided 10 more
22 computers. Would that be supplementing or supplanting?

23 MS. UNDERWOOD: I think that's a -- a --
24 possibly a boundary question. I would be inclined to
25 characterize that as supplanting because, if the school's

1 position was that it was provided --

2 QUESTION: Everybody should have a computer.

3 MS. UNDERWOOD: Yes. Then it would be simply
4 providing the same thing to the additional students.

5 QUESTION: Ms. Underwood, I take it, in response
6 to an earlier question, you spoke of secular materials,
7 and just recently, you spoke of the need to monitor even
8 materials that were -- were provided, which did not
9 supplant.

10 Do you think there is a legitimate distinction
11 to be drawn between secular materials that have a -- a
12 preestablished content, like a math textbook, and
13 materials like a computer which in effect are neutral,
14 they can transmit anything and be used for anything, for
15 purposes of the monitoring?

16 MS. UNDERWOOD: Well, they present slightly
17 different issues of monitoring, although, of course, even
18 a textbook with preestablished content can be used by a
19 teacher in a wide variety of ways, including religious
20 ways.

21 QUESTION: But at -- at some -- basically, on
22 the textbook theory, if we follow our prior cases, once
23 the textbook has been screened as having no independently
24 religious content, the government's interest in the
25 textbook constitutionally is over. I mean, I -- and I

1 take it that's your starting point here, too.

2 MS. UNDERWOOD: Yes.

3 QUESTION: But that is not the case for the
4 computer.

5 MS. UNDERWOOD: That's correct.

6 QUESTION: And the reason is?

7 MS. UNDERWOOD: The reason -- the reason is
8 that, on the one hand, one could say that a computer is
9 even more neutral than a textbook, it has no content of
10 its own, and on the other hand, it is capable. It is
11 readily usable as distinguished from -- unlikely to be
12 used for wholly sectarian teaching and the prohibition on
13 that; that is, the prohibition on having it be in support
14 of sectarian teaching is -- is necessary --

15 QUESTION: And that's why the monitoring is
16 required.

17 MS. UNDERWOOD: That's correct.

18 QUESTION: Well, what if -- what if you have a
19 lectern, you know, and you can put a secular book on it or
20 you could put a very religious book on it? That -- that
21 doesn't meant that the lectern needs to be monitored, does
22 it?

23 MS. UNDERWOOD: Well, I think if lecterns were
24 provided with Title 6 funds, there -- I mean, there might
25 well be a restriction that they not be used in the

1 theology classroom or, for that matter, the pulpit of the
2 chapel when -- when worship services were engaged in.

3 QUESTION: Well, isn't the lectern in effect
4 like the general bricks and mortar prohibition? You can't
5 build a school, we assume, and I -- I suppose you then
6 would have the same issue if you start furnishing the
7 school.

8 MS. UNDERWOOD: Yes, although a lectern, not
9 being the whole school, but something that's used in an
10 individual class, one could imagine putting a lectern in
11 the chemistry lab and having it be part of the -- the
12 furnishing of a chemistry lab that was more elaborate than
13 the school had previously been able to or inclined to
14 undertake and -- and be subject to the restrictions that
15 are imposed on those facilities, those --

16 QUESTION: Does the government feel that the
17 jurisprudence here would be helped if we started
18 developing, more or less, hard-and-fast categories, like
19 no bricks and mortar and, hence, no lecterns and no desks,
20 but textbooks are okay and maybe other books are okay?
21 Would that be an approach to what is an almost impossible
22 line-drawing problem?

23 MS. UNDERWOOD: Well, it might be helpful. On
24 the other hand, sometimes I think it works better to deal
25 with the laws that Congress and the states actually passed

1 and see what -- I mean, there is a general notion here.
2 There is a general principle that supporting the whole
3 school when it is a religious school is inappropriate and
4 it violates the establishment clause and supporting the
5 distinctively religious functions violates the
6 establishment clause, and item by item, we can assess the
7 aid programs that the states and Congress provide.

8 QUESTION: Thank you, Ms. Underwood.

9 Mr. Boothby, we will hear from you.

10 ORAL ARGUMENT OF LEE BOOTHBY

11 ON BEHALF OF THE RESPONDENT HELMS, ET AL.

12 MR. BOOTHBY: Mr. Chief Justice, and may it
13 please the Court:

14 At stake in this case is our historic commitment
15 to the principle that taxpayers must not be compelled to
16 subsidize the religious education of sectarian schools.

17 As I've listened to the arguments this morning,
18 I would have to agree with the Secretary's brief, and it
19 encompasses the view of the Respondents, that the
20 supplement-and-not-supplant requirement of Chapter 2 and
21 the provision with reference to non-divertibility are both
22 constitutionally required.

23 This is in distinction --

24 QUESTION: Would you give me an example of some
25 supplementation that you think is appropriate under the

1 First Amendment?

2 MR. BOOTHBY: I think in the Agostini case, that
3 represents an example where, as the Court clearly pointed
4 out, the Chapter 1 program was a supplemental program. It
5 was a program that was actually being conducted by the
6 public school under the public school supervision. The
7 equipment and materials were kept separate and utilized
8 for that supplemental program.

9 As I understand the debate that took place
10 within the Court on that question was whether you could
11 draw the line between a supplemental program and a general
12 educational program, and the Court indicated that that
13 line could be drawn.

14 I think it's much more difficult, however, to
15 start drawing the line within the area where it's general
16 education, where these are core educational classes, core
17 educational functions.

18 QUESTION: Well, the Court has allowed the
19 furnishing of textbooks to students, even though those
20 students -- to all students, public and private and
21 parochial, right?

22 MR. BOOTHBY: That -- that is --

23 QUESTION: You would accept that --

24 MR. BOOTHBY: Yes.

25 QUESTION: -- or is that -- does that violate

1 the Constitution?

2 MR. BOOTHBY: No, I --

3 QUESTION: Was that decision wrong?

4 MR. BOOTHBY: No, I don't think so.

5 Now, the Court has previously made the
6 distinction there on the basis -- on two bases, actually;
7 one, that -- that it is not direct aid to the school. In
8 the Allen case, the Court indicated that it was the
9 understanding of the Court that historically the parents
10 had purchased the books. So it did not relieve the school
11 of an educational cost they would otherwise have to
12 assume, and there was not a problem with divertibility
13 because the book -- books that were furnished were books
14 that could be looked at, in fact, were, in fact, utilized
15 in the public schools, and therefore, there was not a
16 problem of divertibility and it was not --

17 QUESTION: Well, it's fair -- it's fair --

18 QUESTION: Well, yeah. How about software for
19 particular subjects where you can examine the content of
20 it and don't give it to the school, just maintain the
21 ownership in the public agency, but allow it to be used,
22 or a map? What's the matter with that if we allow
23 textbooks?

24 MR. BOOTHBY: Taking the software -- and there
25 are two issues we have to look at -- the one issue is

1 whether supplanting, at least in Louisi -- in Louisiana,
2 there are standards that are required that a certain
3 amount of software has to be -- has to be owned by -- or
4 -- or within the -- in the control of both the public and
5 non-public schools.

6 QUESTION: What about textbooks? I mean, if you
7 acknowledge the textbook case is okay, you really think
8 that textbooks was -- was supplanting or supplementing?
9 What do you think?

10 MR. BOOTHBY: No.

11 QUESTION: The schools didn't have textbooks
12 before?

13 MR. BOOTHBY: No. There --

14 QUESTION: There has to have been supplanting,
15 no?

16 MR. BOOTHBY: Well, when I went to parochial
17 school, I had to buy my textbooks, and so it was a cost
18 either to either myself and my parent.

19 QUESTION: Well, everybody who goes to parochial
20 school has to pony up the money to -- for the school and
21 -- and tuition. So, I mean, that would apply to all.

22 MR. BOOTHBY: As I understand, for instance, in
23 -- in the Zobrest case, the question was there as to
24 whether the -- the government funding relieved the school
25 of a cost they would otherwise have to assume and with

1 reference -- as -- as you've just indicated, Justice
2 Scalia, when you went to -- to the parochial school, you
3 had to pony up with the amount of money that was necessary
4 in order to provide the textbooks. So the school was not
5 relieved of any cost they would have otherwise had to have
6 assumed.

7 QUESTION: I see.

8 MR. BOOTHBY: It was -- it was direct aid to --
9 to the parent, and I -- and I think the
10 supplement-and-not-supplant requirement that's in Chapter
11 2 is just another way of saying that we will not give
12 direct aid to the school, but it is permissible to give
13 aid directly to the parent. I think that's where the
14 distinction is.

15 QUESTION: Well, what is it? Suppose you said,
16 to go back to Justice O'Connor, that textbooks -- that
17 computers today are what textbooks were 30 years ago, and
18 so, really, it's just an application of whatever principle
19 there was then. You can't get on without computers today
20 in a school any more than you could get on without
21 textbooks, and they can be regulated so that they deal
22 with secular subjects in roughly the same way as textbooks
23 could. So there's no difference; in other words, QED this
24 case. What do you say?

25 MR. BOOTHBY: Well, I would respectfully

1 disagree with that. There are two major distinctions
2 between the textbooks and with reference to the computers.
3 The first distinction is, as pointed out by the brief
4 filed by the National School Boards Association -- is that
5 computers are -- are -- are required to be in the school,
6 and as -- as indicated earlier by -- by the counsel for
7 the -- for the government, those are things that a school
8 has to have to operate.

9 It is true that textbooks must be used for a
10 school to operate, but as I indicated, as I understand the
11 Allen decision and the decisions that have come down since
12 then, it was determined that that was something that the
13 parents normally purchased. It did not relieve the school
14 of the -- of the cost they would otherwise have to bear.

15 QUESTION: So, if you -- if you have two school
16 districts -- or let's say you have two parochial schools.
17 One buys the texts for the students. The other makes the
18 students buy the texts for themselves. That would be a
19 distinction that the government would have to follow in --
20 in -- in funding for -- in giving textbooks --

21 MR. BOOTHBY: It --

22 QUESTION: -- in one they could and the other
23 they couldn't? That doesn't make much sense.

24 MR. BOOTHBY: It is a distinction that this
25 Court has previously made, and -- and as I've indicated,

1 that would be certainly nothing that would be divertible.

2 The textbook is not divertible --

3 QUESTION: Well, was --

4 MR. BOOTHBY: -- but the computer is certainly
5 divertible. It can be used for almost any purpose.

6 QUESTION: Was Allen the first -- the only case
7 we've ever had that allowed the furnishing of textbooks?

8 MR. BOOTHBY: Well, I think the Cochran case
9 allowed it, and -- and --

10 QUESTION: Did that make the point that the
11 parents were paying for the textbooks?

12 MR. BOOTHBY: Well, the point was made in
13 Cochran that it -- it -- it did not relieve the school of
14 a cost of otherwise educating the student. In fact, I
15 think that's the first time that the Court made that
16 observation.

17 QUESTION: How about the cases that have come
18 after Allen? Have some of them approved the grant of
19 money for textbooks?

20 MR. BOOTHBY: To my knowledge, all the cases
21 that have dealt with textbooks have approved that on -- on
22 the -- on the -- on both bases that I've indicated that it
23 did not supplant and that it was not a divertible type of
24 material.

25 QUESTION: Well, what -- what do you understand

1 the term "supplant" to mean?

2 MR. BOOTHBY: I understand the term "supplant"
3 to mean generally the same thing as -- as -- as Your Honor
4 indicated in the Zobrest case that it did not relieve the
5 school of a cost that they would otherwise have to bear in
6 -- in the education -- the core education of the -- of the
7 students that were in --

8 QUESTION: Is this determined school by school?

9 I'm -- I'm not sure how you apply this. I mean, if one
10 school bought the books and -- and charged a tuition that
11 was -- you know, you couldn't segregate what part of the
12 tuition went to books or anything else and another school
13 charged a lower tuition, but the parents bought the books,
14 would it be supplanting in one school and supplementing in
15 the other?

16 MR. BOOTHBY: No. I -- I would say it should
17 not be. Perhaps the one basis would be that what is
18 required within the state -- for instance, the State of
19 Louisiana requires that a certain number of text --
20 certain number of library books be purchased each year and
21 that they be called out, and -- and the interesting thing
22 --

23 QUESTION: Well, so that if a state doesn't
24 require computers and you have a very parochial school in
25 an affluent suburb that does have a lot of computers, you

1 say you could provide computers even though the school
2 already has it?

3 MR. BOOTHBY: No. I think that there's --

4 QUESTION: Well, then you must be doing it
5 school by school.

6 MR. BOOTHBY: No. I think there are certain
7 items that are so fundamental in the operation of a
8 school, such as a library, that you cannot function, you
9 cannot operate a school without --

10 QUESTION: I can see that.

11 MR. BOOTHBY: -- having those items, like desks
12 and blackboards and --

13 QUESTION: Right.

14 What about computers?

15 MR. BOOTHBY: I would say the same thing about
16 computers today. They are basic to the operation of the
17 school, and therefore, like bricks, like mortar, like
18 blackboards, like desks, they must be -- they must be
19 provided if you are going to operate a school. And if the
20 government provides that, then the government is actually
21 supporting that particular school.

22 QUESTION: So supplant -- supplant and
23 supplement means unimportant and important. The
24 government can't do anything that's important.

25 MR. BOOTHBY: No. I think the government can do

1 many things that are important, but as I understand, our
2 historic commitment is that taxpayers will not be required
3 to -- whether they're members or non-members of the faith
4 -- be required by -- by tax law to contribute to religious
5 education, and certainly, within the schools and Jefferson
6 Parish, we know that they do not separate out religion
7 from the secular classes, and the -- the decision for this
8 Court has historically always been that we may not engage
9 in the type of funding that -- that provides the aid that
10 may aid both religion and the secular. But one of the
11 things that I would like to point out is the fact that in
12 this particular case, we are dealing with an applied
13 determination that the law was not constitutional. It was
14 not constitutionally applied, and we know that -- we know
15 in Jefferson Parish, it wasn't just some books that were
16 furnished. The testimony from the assistant
17 superintendent of schools for the archdiocese that had
18 jurisdiction over these schools testified -- and this is
19 on page 63a of the Joint Appendix.

20 He testified the monies that were allocated for
21 Chapter 2 of state library books were first used, and then
22 if that library wanted additional volumes, then if monies
23 were available, they -- they would use those funds. In
24 many cases, there were no funds available. They had to
25 rely on the Chapter 2 of the state library in order to

1 furnish their libraries.

2 Well, that sounds to me like supplanting. That
3 does not sound to me like a situation where someone is
4 merely supplementing a few additional books.

5 QUESTION: Are -- are you saying, then, that any
6 aid given directly to the school rather than to students
7 or parents is -- is it bad under the First Amendment?

8 MR. BOOTHBY: No. I -- I would not go that far.
9 I think that it is --

10 QUESTION: How -- how far would you go?

11 MR. BOOTHBY: I think it is con -- I think it is
12 conceivable that one might in the approp -- if the statute
13 was properly drawn and properly administered -- make some
14 determination that it is merely supplementing a particular
15 -- maybe in a particular field or -- or utilizing --

16 QUESTION: Well, give me an example of what you
17 think would be permissible in furnishing aid directly to
18 schools.

19 MR. BOOTHBY: I think it might be permissible,
20 for instance, to provide some arrangements for musical
21 instruments to be utilized within the school. That might
22 be supplemental. I don't know.

23 QUESTION: What if they played "Oh Come All Ye
24 Faithful" on --

25 (Laughter.)

1 MR. BOOTHBY: I -- I wouldn't have a problem
2 with them paying -- playing "Oh Come All Ye Faithful" or
3 any other song.

4 QUESTION: What about school buses?

5 MR. BOOTHBY: I have no problem with school
6 buses. If -- if --

7 QUESTION: A lot of schools really couldn't
8 operate unless they -- unless they had school buses.

9 MR. BOOTHBY: Well, I have no problem with
10 transporting children to and from school. I do have
11 problems --

12 QUESTION: The buses are given to the school.

13 MR. BOOTHBY: Well, I would have prob -- well, I
14 think --

15 QUESTION: I mean, just as the children read the
16 books, but the books are given to the school, the children
17 ride the buses, but the buses are given to the school. I
18 don't see any distinction between that and books.

19 MR. BOOTHBY: But as the Court pointed out in
20 Wolman, once you would give the bus to the school, then
21 they could use it for whatever purposes. They certainly
22 could be utilized for a whole variety of purposes in
23 addition to that which was -- which was approved in -- in
24 the Everson case.

25 QUESTION: You know, deciding what is -- what is

1 supplementing and what is supplanting on an item-by-item
2 basis is so difficult and so hard to do on a generalized
3 basis. Might it not be better to adopt some rule that,
4 you know, you can provide some aid, but not so much that
5 -- that you're effectively enabling schools to -- to
6 function which otherwise would not be able to do so?
7 Wouldn't that be an easier -- easier principle to -- to
8 follow?

9 MR. BOOTHBY: I think it's much easier to follow
10 the principles that at least we have some historical
11 precedent for than to adopt some new neutrality concept
12 where we don't know whether you can build schools or you
13 can buy desks or --

14 QUESTION: The historical --

15 MR. BOOTHBY: -- or where the line can be drawn.

16 QUESTION: -- precedent isn't a very happy
17 historical precedent when it says you can supply maps, but
18 you can't supply globes, and, you know, as Senator
19 Moynihan asked, what if you have a -- what -- or you can
20 provide books, but you can't provide -- you can't provide
21 globes, and Senator Moynihan says what if you have a book
22 that has a -- that has a map in it. You know, the
23 precedent doesn't stick together very well.

24 MR. BOOTHBY: Well, of course, the distinction
25 in that case was, again, whether you were relieving the

1 school of a cost they would otherwise have to assume.

2 QUESTION: No, but that -- that in and of itself

3 --

4 MR. BOOTHBY: In the case of the text --

5 QUESTION: -- has never been a sufficient
6 criterion because, if that were the only criterion,
7 Everson would have gone the other way, I presume, or at
8 least it certainly would in this day and age in which
9 schools by and large have to do a lot of transportation,
10 and if -- if that's our criterion, I don't know what it
11 limits.

12 Don't you think that what we have been doing is
13 -- is groping in the direction of trying to identify forms
14 of aid by reference to the risk that they can be used
15 directly for religious teaching? Is -- is that not the
16 reason why we say okay, some textbooks can be supplied, a
17 math book could be perhaps? It might go to the -- to the
18 -- to the core function in -- of all teaching, but it
19 doesn't have a risk that it's going to be used to -- to
20 inculcate religious beliefs. Anything is possible, but
21 it's not very high.

22 On the other hand, if you start paying teacher
23 salaries in religious schools in which the very mission of
24 the school includes a religious inculcation, you cannot
25 possibly separate what pays for the religion and what --

1 what does not, and don't you think that we are groping in
2 -- in the direction of some kind of a risk of direct
3 religious use criterion?

4 MR. BOOTHBY: Yes, I would agree that perhaps
5 one of the most important concerns in reaching a solution
6 to this very important question is whether there is an
7 appreciable risk or a substantial risk that what the
8 government is doing will ultimately result inculcation.

9 I also think, however, you cannot completely
10 eliminate the concern that the government may through its
11 funding -- may not be directly inculcating, but may take
12 over such -- such an amount or a certain amount of the --
13 of the -- of the cost of the education of the program
14 where all you -- where all you have is -- is the -- left
15 is the prohibition against the teaching in the religion
16 class, and we know that that would not prevent the
17 inculcation of religion in sectarian schools because
18 sectarian schools do not compartmentalize the teaching of
19 religion and they should not. And that is one of the
20 problems with this particular program, with this
21 particular statute, and with the guidance that I
22 understand that the Secretary has propounded.

23 As I understand the guidance that is being
24 propounded and what each of the schools -- school
25 principals must sign an assurance not to do is to use the

1 items for any kind of sectarian purpose.

2 QUESTION: Because those items carry a risk of
3 that kind of use.

4 MR. BOOTHBY: That is --

5 QUESTION: Library book as a category can
6 include religious books. Computers can be used, I guess,
7 for religious instruction.

8 MR. BOOTHBY: That is correct, but the problem
9 is -- is that what you're really doing by those kind of
10 rules is to say to the school, well, while you're teaching
11 religion and you're using the sectar -- the
12 government-provided tools, you have to suppress your
13 religious views.

14 QUESTION: Well, but the -- the school is
15 perfectly free to accept or reject aid. You know, beggars
16 can't be choosers, and if they don't want this aid because
17 they think they're having to suppress religion, they can
18 say okay, we won't take it.

19 MR. BOOTHBY: But -- but there is a powerful --
20 there is a powerful argument out there to -- to take the
21 aid and compromise your religious views, and that was --
22 that was one of the reasons why Marie Schneider at
23 Catholic and one of the plaintiffs in this lawsuit found
24 the aid to be something that was very distasteful and she
25 felt to be unconstitutional because it would tend to

1 secularize the school --

2 QUESTION: Well, she --

3 MR. BOOTHBY: -- that she supported.

4 QUESTION: Well, she should have gone to the
5 archdiocese, not to court.

6 MR. BOOTHBY: Well, I think she did that, but
7 found that it was necessary to go to court to ultimately
8 resolve the problem.

9 QUESTION: But even -- I take it on your
10 argument, even -- you know, even if -- if we reject the
11 sort of Roger Williams argument that you've -- I think it
12 was Roger Williams who first made the argument in this
13 country at least -- we would still have a problem simply
14 because we -- we assume that there would still be a risk
15 of mixing, and so we'd have entanglement.

16 MR. BOOTHBY: That -- that is inherent every
17 time that government furnishes aid that goes to something
18 like computers, something like --

19 QUESTION: Science labs would be okay under
20 Justice Souter's theory of identifying things that, you
21 know, can likely be subverted to religious use or not, I
22 guess.

23 MR. BOOTHBY: Well, not in the --

24 QUESTION: You could buy little science labs for
25 every parochial school in the country, and that would be

1 all right.

2 MR. BOOTHBY: Not in the sectarian school I
3 attended where creation was taught as the -- as the -- as
4 the origin of life. I think it would --

5 QUESTION: Well --

6 MR. BOOTHBY: Might be very difficult.

7 QUESTION: Well, we talk -- I mean, yes, I
8 suppose it is possible to do that, but it's pretty remote.
9 There -- there's nothing that you can't use to teach a
10 religious lesson, I assume, absolutely nothing. If that's
11 going to be your test, then Justice Souter's approach
12 doesn't -- doesn't make any sense at all.

13 MR. BOOTHBY: I would agree with Your Honor
14 that, for instance, it makes no sense to say that a
15 geography book might be used for sectarian purposes
16 because somebody might pick it up and say, oh, there is
17 Salt Lake City or there is the Vatican or there is some
18 other place that has some kind of religious purpose.

19 QUESTION: Right, but --

20 MR. BOOTHBY: But I --

21 QUESTION: -- a science lab, you think is a lot
22 different?

23 MR. BOOTHBY: Well --

24 QUESTION: I think it's a lot different because
25 it costs a lot more money, myself, but --

1 MR. BOOTHBY: I think the science lab may be
2 different, but I am certain about computers where -- which
3 is probably the most highly divertible type of item that
4 can ever be utilized within a school. You can use it for
5 almost any purpose.

6 QUESTION: The -- that is, according to your
7 opponents, anyway, that you had 4 years in discovery and
8 searched the files and were unable to come up with one
9 instance anywhere in which the computer actually had been
10 diverted. I'm interested in your comment on that and also
11 in your comment on the San Francisco case where I think
12 the San Francisco case involved pretty strict control so
13 that the computer would not be diverted to religious
14 teaching. What -- what do you think of that? Why isn't
15 that satisfactory?

16 MR. BOOTHBY: With reference to the computer in
17 -- in San Francisco, that was a locked computer, and that
18 could not, as I understand the technology, be diverted to
19 a religious purpose.

20 The -- the remaining problem would be if the
21 Court would find that that was the type of equipment that
22 all schools would ordinarily have to purchase in order to
23 function and whether if the Court continues to agree with
24 the fact that one should not fund in whole or in part what
25 might be termed the secular aspect of the school, but --

1 but with reference to -- to the computer in San Francisco,
2 I think it did take care of the divertibility problem.

3 QUESTION: And here -- then -- then that would
4 be all right. In your opinion, the program would be like
5 San Francisco.

6 MR. BOOTHBY: Well, it might solve the
7 divertibility problem. It would not solve the supplanting
8 problem, which I still believe --

9 QUESTION: What if you have a supplanting
10 problem? Why don't you ask the Secretary to do something?
11 Because under the statute in the regs, that would be
12 illegal if it was supplanting rather than supplementing.

13 QUESTION: Oh, it is. It's --

14 QUESTION: I mean, doesn't the program require
15 supplementing and not supplanting?

16 MR. BOOTHBY: That -- that's correct. The
17 problem of it --

18 QUESTION: Well, if that's correct, then if
19 they're doing the opposite, don't you have a remedy under
20 the program to say don't do it, you're not following the
21 program?

22 MR. BOOTHBY: The problem of it is -- and again,
23 this is an administration-of-the-program case. As I
24 understand it, Ms. Underwood agreed that it might be a
25 problem if you added a computer because there were more

1 students. On page 186 of the Joint Appendix of the
2 Immaculata High School in its needs assessment in
3 describing why it needed various types of equipment said:
4 While effective use has been made of the audiovisual
5 materials which have been purchased with Chapter II funds,
6 they must be replaced and updated from time to time. Our
7 enrollment has increased somewhat, so that more students
8 use the library materials and consequently, more
9 audiovisual software is needed.

10 That sounds to me like supplementing, and the
11 problem of it is --

12 QUESTION: Only if you're right. If you're
13 right, my basic question is you've had 4 years to look for
14 examples of program violation. The government would say
15 you should have more time, send it back so you can keep
16 doing it, but from the point of view of the statute, if --
17 isn't -- why isn't it good enough from your constitutional
18 point of view to say, well, we have a remedy under this
19 statute, if either of these things is going on, diversion
20 or supplementation, and we would assume that the statute
21 corrects for that? Now, what's wrong with that?

22 MR. BOOTHBY: The problem is -- is that you have
23 to -- you have to find out whether the statute is being
24 carried out in accordance with the way it is written. The
25 problem is this. As I understand the guidance that is now

1 given to us by the Secretary in 1999 after the decision of
2 the court of appeals, he now looks to usage logs. He says
3 okay, you can have usage logs and you'll know whether the
4 computer was -- was used properly or not.

5 The problem in Jefferson Parish, the only two
6 cases where we had usage logs, they mixed the Chapter II
7 and their own equipment together. So, when you looked at
8 the usage log -- and we do have an example of the usage
9 log in -- on page 206a and 207a and we find that the
10 theology department had the next-to-the-highest usage out
11 of 3 of the 4 years, but the answer was, well, you don't
12 know whether it was purchased by Chapter II funds or
13 whether it was purchased by school funds, that was the
14 answer that was given to us and --

15 QUESTION: And did you know?

16 MR. BOOTHBY: Pardon?

17 QUESTION: And did you know?

18 MR. BOOTHBY: How would one know? We don't
19 know, but the problem of it is, is that the school
20 district couldn't know either. That's the problem. They
21 could -- they could look at the usage logs and they
22 wouldn't be any more informed.

23 QUESTION: Maybe -- maybe they didn't keep
24 records, but I -- as I understand it, these things have to
25 be labeled to make it clear that they were the product of

1 these Federal funds and couldn't be used for these secular
2 purposes, right?

3 MR. BOOTHBY: Well, in Jefferson Parish --

4 QUESTION: And these -- these schools you're
5 complaining of, all -- all believe in the Seventh
6 Commandment, I assume. I think it's the seventh, isn't
7 it?

8 MR. BOOTHBY: That isn't the problem, as I
9 understand it.

10 For instance, there -- the -- Mr. Lewis who was
11 head of the program in the State of Louisiana, he
12 explained one of the problems was that there was such a
13 major turnover of the people that were in charge of the
14 Chapter II program of the sectarian schools that many
15 times those that were in charge of the program weren't
16 really fully instructed and didn't know. The insurance is
17 they're only -- only signed once every 3 years, and the
18 people that were involved with the program weren't
19 informed.

20 The second problem was indicated with these 191
21 books that were furnished and -- and returned to us 9 days
22 after our lawsuit was filed, and when we went to one of
23 the teachers, Ms. Cannon from St. Anthony School, her
24 explanation was -- she said I would never have ordered
25 those books, and I believe her. She said, though, we gave

1 the task to a volunteer parent, and she selected the books
2 and I looked to see whether the total was within our
3 allotment.

4 QUESTION: Mr. Boothby, all that sounds like
5 faulty implementation that, if only the schools did what
6 they pledged to do, it would be okay, and I thought that
7 wasn't your position.

8 MR. BOOTHBY: Our problem is twofold. First of
9 all, I think it's almost impossible to have certain
10 equipment like computers provided that will not be
11 diverted unless you do have locked computers, but if you
12 have just the normal computer that you can do anything
13 with, hooking into the Internet, I don't know how you're
14 ever going to police the, regardless of the --

15 QUESTION: Well, I'm not willing to assume that
16 without some evidence that there is an overwhelming
17 problem of these -- of these religious schools flouting
18 the law. I'm not prepared to assume that that's a
19 widespread problem that -- that invalidates this law.

20 MR. BOOTHBY: Your Honor --

21 QUESTION: Now, you say you haven't found any
22 problems. I'm not willing to posit that there -- there is
23 just this widespread problem of -- of infraction.

24 MR. BOOTHBY: Your Honor, with reference to the
25 Internet, I would agree. This is not the case to decide

1 that issue.

2 This case came before Vice President Gore
3 invented the Internet, and I really don't know what the
4 problems might be with reference to the Internet and
5 computers. I really don't know the answer to that, and I
6 think that case must come later and then we'll find out
7 what requirements are necessary in order to prevent that
8 problem from occurring.

9 In conclusion, Respondents assert that when the
10 government elects -- when the government elects to provide
11 aid directly to and under the meaningful control of
12 church-operated elementary and secondary schools for their
13 core or essential educational functions, it results in an
14 unconstitutional subsidy to pervasively sectarian
15 institutions, and when the aid provided, which consists of
16 government resources, still legally owned by the
17 government is also divertible to religious use by those in
18 possession, the aid program also bears the substantial
19 risk of being used as an instrument to inculcate sectarian
20 doctrine.

21 Now, as I understand -- as I understand the
22 argument of the Petitioners, what they want this Court to
23 do is to adopt a concept which basically says it's --

24 QUESTION: Thank you, Mr. Boothby.

25 Mr. McConnell, you have 2 minutes remaining.

1 REBUTTAL ARGUMENT OF MICHAEL W. McCONNELL

2 ON BEHALF OF THE PETITIONERS

3 MR. McCONNELL: Thank you, Mr. Chief Justice.

4 Essentially, what this case is about is bringing
5 programs of this sort up -- up to date, that the Meek and
6 Wolman, the cases upon which the Fifth Circuit relied and
7 the Respondents are mired in the technology of the 1970's
8 and the jurisprudence of the 1970's -- since that time,
9 education has changed and this Court's doctrines have
10 changed.

11 There may very well be limits on -- if the
12 government in some hypothetical case which seems
13 politically extremely unlikely were to assume total
14 support for schools, that would mean that the religious
15 elements within those schools are being subsidized by the
16 government, but that has not been enacted. It is not
17 likely to be enacted.

18 This Court should take cases one at a time, and
19 when the Congress passes a statute that provides secular,
20 neutral, non-ideological equipment and material for
21 children on a neutral basis, that not only is not a
22 constitutional threat, Your Honors, that is something
23 which is in the finest tradition of the First Amendment
24 because it leaves people free to be able to make
25 educational choices for themselves.

1 The government then is not subsidizing and it is
2 not favoring religion, but on the other hand, it is not in
3 the rather illiberal position of denying basic
4 technological tools of the 20th century to some children
5 because their parents have chosen religious schools.

6 Thank you, Your Honor.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
8 McConnell.

9 The case is submitted.

10 (Whereupon, at 12:02 p.m., the case in the
11 above-entitled matter was submitted.)

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The United States in the Matter of:

GUY MITCHELL, ET AL., Petitioners v. MARY L. HELMS, ET AL.
CASE NO: 98-1648

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BY Ann Marie Frederic -----

(REPORTER)