THE WHITE HOUSE

WASHINGTON

August 10, 1984

MEMORANDUM FOR MICHAEL E. BARODY
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PUBLIC AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Solicitor General Filing in Secretary, United States Department of Education v. Betty-Louise Felton

Today the Solicitor General will file a jurisdictional statement before the Supreme Court to appeal the decision of the United States Court of Appeals for the Second Circuit in the above-referenced case. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701 et seq., established a program under which Federal funds are used to pay teachers for remedial reading, remedial mathematics, and English as a second language instruction. In enacting Title I, Congress specified that these programs were to be available to educationally deprived children in private schools as well as those in public schools. On July 9, 1984, the United States Court of Appeals for the Second Circuit, considering a case originating in New York, held that Title I was unconstitutional. The court ruled that Title I violated the Establishment Clause by authorizing use of federal funds to send public teachers into religious schools to carry on instruction.

In his filing today the Solicitor General contends that the Establishment Clause does not erect a per se barrier to sending public teachers to religious schools for remedial instruction, and that the facts of this case do not present the dangers of excessive entanglement between church and state that the Establishment Clause was designed to prevent. The Solicitor General notes that the Supreme Court has already agreed to hear School District of the City of Grand Rapids v. Ball, cert. granted, No. 83-990. That case, arising from the Sixth Circuit, concerns a state program similar in many respects to Title I. The Solicitor General recommends that the Court note probable jurisdiction in Felton (the equivalent to a grant of certiorari in an appeal), and consolidate the case with Ball.

cc: Larry Speakes

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MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

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Consistent with our usual practice in such cases, I have prepared a memorandum for Baroody, copy to Speakes, advising them of the filing.

Attachment

No. 83-990

In the Supreme Court of the United States

OCTOBER TERM, 1983

SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS, ET AL., PETITIONERS

v.

PHYLLIS BALL, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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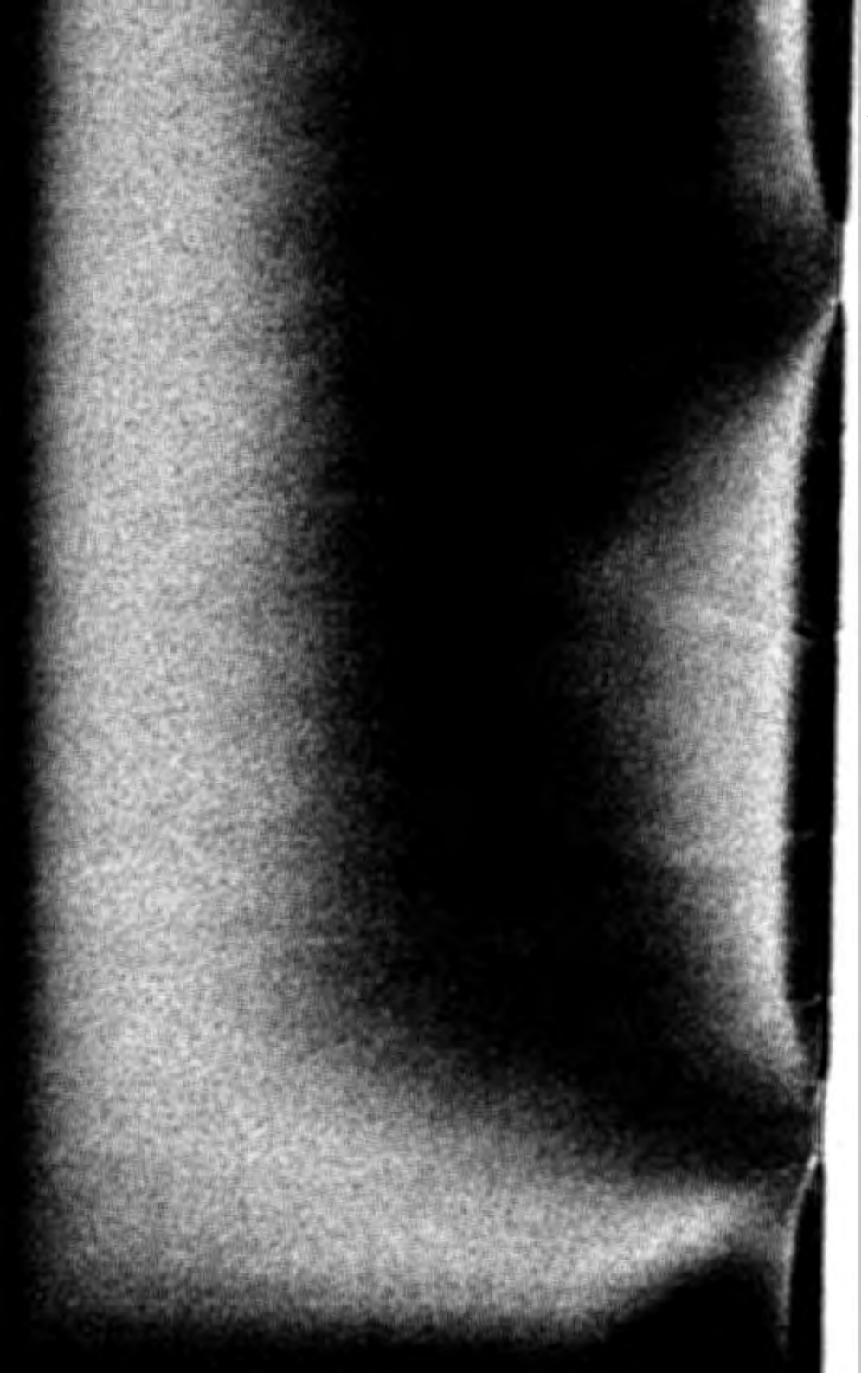

QUESTION PRESENTED

The United States will address the following question:

Whether it constitutes a per se violation of the Establishment Clause for a local school district, as part of an enrichment and remedial educational program made available to all children in the district, to provide—under public school control—secular, supplementary, nonsubstitutionary courses of instruction to private school students on premises leased from religiously-oriented nonpublic schools.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-990

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INTEREST OF THE UNITED STATES

This case involves the constitutionality of the "Community Education" and "Shared Time" programs of the School District of the City of Grand Rapids, Michigan, insofar as they provide educational services on the leased premises of nonpublic schools. The United States has a substantial interest in this matter because, since 1965, federal legislation has provided for grants-in-aid "to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means * * * which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. (Supp. II 1978) 2701. See Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, 20 U.S.C. (Supp. II 1978) 2701 *et seq.*,

now superseded by 20 U.S.C. 3801 *et seq.*[1] The Act specifically requires that provisions be made for the participation of eligible students who attend nonpublic schools. 20 U.S.C. 3806. Many local educational agencies have met this requirement by providing Title I remedial education services to eligible children on the premises of nonpublic schools.

The practice of providing Title I educational services on the premises of nonpublic schools has been defended by the federal government in several cases. In *National Coalition for Public Education & Religious Liberty (PEARL)* v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y.), appeal dismissed for want of jurisdiction, 449 U.S. 808 (1980), a three-judge district court upheld the practice on the basis of a thorough examination of the actual operations of the Title I program in New York City. Three other cases are pending at various stages in the federal courts. See *Felton* v. *Secretary, United States Department of Education*, Civil No. 78 CV 1750 (ERN) (E.D.N.Y. Oct. 4, 1983) (upholding constitutionality of the New York City Title I program), appeal pending, No. 83-6359 (2d Cir. filed Dec. 27, 1983); *Barnes* v. *Bell*,

[1] Effective July 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 464, codified at 20 U.S.C. 3801 *et seq.* Chapter 1's major objective is to continue to provide federal financial assistance to meet the special educational needs of the educationally deprived children served under Title I while, at the same time, eliminating burdensome and unnecessary federal supervision, direction, and control. See 20 U.S.C. 3801. Although Chapter 1 generally contains fewer and less restrictive program requirements than Title I, the provisions concerning the participation of children in private schools are virtually identical. Compare 20 U.S.C. (Supp. II 1978) 2740 (former Title I provision) with 20 U.S.C. 3806 (current Chapter 1 provision). Moreover, Chapter 1, at 20 U.S.C. 3803, expressly incorporates by reference several sections from Title I, as follows: 20 U.S.C. (Supp. II 1978) 2711-2713, 2721-2722, 2761-2763, 2771-2772, 2781-2783, 2791-2792, 2841-2844, 2853-2854. Accordingly, the government in this brief will continue to refer to this federal program by its familiar Title I name, but we will refer to the current Chapter 1 provisions where appropriate.

Civil No. C-80-0501-L(B) (W.D. Ky. filed Oct. 1, 1980); *Wamble* v. *Bell*, Civil No. 77-0254-CV-W-8 (W.D. Mo. filed Apr. 4, 1977).[2]

Although this case does not involve a challenge to educational services funded under Title I (Pet. App. 73a n.5),[3] this Court's decision is likely to have a substantial impact on the lower courts' consideration of the somewhat analogous legal and factual issues presented in the pending Title I cases. The United States therefore has compelling reasons for presenting its views on the constitutionality of the programs challenged here, and for informing the Court of the relevant elements of the Title I program.

STATEMENT

1. The School District of the City of Grand Rapids, using state funds (Pet. App. 72a-73a), operates Shared Time and Community Education programs to provide schoolchildren a variety of courses that supplement the schools' core curriculum. These courses, with one exception not relevant here,[4] are not required for graduation or for progression from grade to grade (Pet. App. 7a, 8a-9a, 77a, 78a). As the courts below found, the challenged course offerings are strictly supplemental to the nonpublic schools' curriculum; none of the courses would

[2] In addition, the government, in its Brief for the United States as Amicus Curiae at 27-36, *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), argued that the use of public school teachers to provide Title I remedial educational services to educationally deprived children on private school premises would not violate the Establishment Clause of the First Amendment.

[3] The parties entered a stipulation, approved by the district court, expressly providing that "the scope of the instant litigation does not include any claim by plaintiffs which challenges the constitutionality of the Title I Program of the Board of Education of the Grand Rapids Public Schools under the Elementary and Secondary Education Act of 1965" (J.A. 30-31).

[4] The exception was a Shared Time physical education course in secondary school (Pet. App. 7a, 77a). The district court's judgment against the continuation of that course was not appealed (J.A. 38-39).

otherwise be available at the nonpublic schools (Pet. App. 7a, 9a, 77a, 78a).

The Shared Time and Community Education programs are authorized, but not required, under state law (*Traverse City School District* v. *Attorney General*, 384 Mich. 390, 411 n.3, 185 N.W.2d 9, 17-18 n.3 (1971)), and are wholly funded by the State (Pet. App. 72a-73a). In the 1981-1982 school year, approximately 11,000 nonpublic school students participated in the Grand Rapids Shared Time and Community Education programs (Pet. App. 4a, 74a), which operated on a budget of approximately $3 million (Pet. App. 74a n.6).

The Shared Time Program is designed to make available to nonpublic school students some of the courses that are available to public school students as part of the public schools' more varied general curriculum. Shared Time courses have been available in the State of Michigan since 1921. See *Traverse City School District* v. *Attorney General*, 384 Mich. 390, 407 n.2, 185 N.W.2d 9, 15 n.2 (1971); see also Pet. App. 6a, 76a. In the past, Shared Time classes had been offered only in public school buildings—off the premises of the private schools (Pet. App. 6a, 76a). Since 1976, however, the Grand Rapids Shared Time program has provided educational services on leased premises at both secular and religious private schools (Pet. App. 7a, 76a).

At the elementary school level, the Shared Time courses include remedial and enrichment mathematics, remedial and enrichment reading, art, music, and physical education (Pet. App. 7a, 76a). At the secondary school level, the courses include remedial mathematics (*ibid.*). These courses are taught by 131 public school teachers. Of these, 13 had been previously employed by nonpublic schools (J.A. 193). The Shared Time courses constitute "a relative small portion"—about 10%—of the average nonpublic school student's "total educational experience" (Pet. App. 8a, 77a).

The Community Education program in Grand Rapids began in the early 1970s and, since 1975, has included

offerings on leased premises at nonpublic schools (Pet. App. 8a, 77a). Courses in this program are offered only outside regular school hours (Pet. App. 8a, 77a). At the elementary school level, courses focus on leisure-time activities (Pet. App. 8a, 77a-78a), such as arts and crafts (J.A. 206-213). The courses are completely voluntary and are only offered when 12 or more students are enrolled (Pet. App. 9a). No Community Education courses at the secondary level remain at issue (J.A. 30-31).

More than 300 instructors are employed on a part-time basis by the public school district in connection with the Community Education program. Most of these are regular full-time instructors at the same school—public or nonpublic, as the case may be—where they teach Community Education courses. Pet. App. 9a, 78a. The district court and the court of appeals found that the reason for using teachers at the "home" school is that a "well known teacher able to attract students" is "essential" to inducing participation by sufficient students to justify the course offering (*id.* at 9a, 78a). For purposes of the Community Education program, however, these instructors are part-time *public* school teachers under exclusive public school supervision and control (Pet. App. 8a, 77a). The courts below found no evidence during the six years these programs have been conducted in their present form that "any teacher in either Shared Time or Community Development classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion" (*id.* at 35a).

The public school district pays a modest rental ($6 per week per class at elementary schools, $10 per week per class at secondary schools) for use of facilities on private school premises used for Shared Time and Community Education classes (Pet. App. 5a, 74a). Class areas used by the programs are designated by signs as public school classrooms, and contain no religious symbols or artifacts (*id.* at 5a, 75a).

2. Respondents, six state taxpayers residing within the Grand Rapids school district (Pet. App. 66a-67a), filed suit in the United States District Court for the Western District of Michigan against the school district and various state officials to challenge certain features of the Shared Time and Community Education programs as violating the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment (Pet. App. 66a). After a lengthy trial on the merits, which produced a voluminous factual record on the history and administration of the programs, the district court declared the challenged programs unconstitutional insofar as they involved "the use of premises leased from religious nonpublic schools" (Pet. App. 123a), and enjoined petitioners "from continuing to operate and conduct" those programs (*ibid.*). Petitioners were unable to obtain a stay of that judgment (Pet. 8), which was affirmed by a divided panel of the court of appeals (Pet. App. 1a-63a).[5]

SUMMARY OF ARGUMENT

I. The Shared Time and Community Education programs operated by the School District of the City of Grand Rapids do not violate the Establishment Clause of the First Amendment. That these programs are in part operated in facilities leased from private schools (secular as well as religious) and thereby accommodate the educational needs and convenience of schoolchildren attending private schools does not detract from the challenged programs' secular purpose; nor does it transform the programs into a vehicle for advancing religion or give rise to excessive government entanglement with religion. The Grand Rapids programs therefore meet all the requirements of the three-part Establishment Clause test

[5] The Shared Time program has been upheld by Michigan state courts under both the Michigan and United States Constitutions. *Traverse City School District* v. *Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971); *Citizens to Advance Public Education* v. *State Superintendent of Public Instruction*, 65 Mich. App. 168, 237 N.W.2d 232 (1975), leave to appeal denied, 397 Mich. 854 (1976).

articulated by the Court in *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971).

A. It is well established that the states have a legitimate interest in helping to improve the secular education of students attending nonpublic schools. See, *e.g.*, *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 6-7. There is no room for doubt that the supplemental educational programs at issue here were designed and implemented for purely secular purposes, as the district court and court of appeals below correctly held (Pet. App. 92a, 94a, 21a).

B. The primary effect of the Shared Time and Community Education programs is not to advance religion but to improve the secular education of Grand Rapids schoolchildren. The courses taught in these supplemental educational programs are made available by the school district to *all* schoolchildren, whether they are enrolled in private or in public schools, and without regard to whether a given private school is religious or secular. Any benefits that might flow to religiously-oriented schools are "indirect, remote and incidental" and, therefore, not prohibited by the Establishment Clause. *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 13. Moreover, the record evidence—covering six years of actual operations of these on-premises programs—demonstrates that the school district has, in fact, been successful in providing secular supplemental instruction without in the least advancing the cause of religion. Although the beneficiaries of these programs include students who attend religiously affiliated schools, it is the schoolchildren—and not the private schools—who benefit.

C. The Shared Time and Community Education programs do not foster excessive government entanglement with religion. These programs are controlled and supervised entirely by the public school system. They are not seriously susceptible to diversion—and in fact have never in any way been diverted—to religious purposes. The programs occasion only minimal and routine administrative contacts between school district and religious

school authorities. Whatever potential dangers of administrative entanglement could be feared or imagined under these circumstances, the six-year factual record of actual program operations documented in this case shows that they have not materialized in Grand Rapids.

II. The federal Title I program shares many features of the Shared Time and Community Education programs, but it also has significant differences. Because no program funded under Title I is at issue in this case, there is no occasion here to defend its constitutionality. But the Court's decision in this case is, nevertheless, likely to affect the Title I cases pending in the lower federal courts. We therefore take this opportunity to provide a general description of the Title I program design for purposes of comparison with the two Grand Rapids programs challenged in this case.

ARGUMENT

I. THE USE OF PUBLIC SCHOOL TEACHERS TO PROVIDE SHARED TIME AND COMMUNITY EDUCATION SERVICES TO CHILDREN IN LEASED CLASSROOMS ON PRIVATE SCHOOL PREMISES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Federal, state, and local educational authorities unquestionably have a legitimate interest in providing to all schoolchildren, in nonpublic as well as public schools, a "fertile educational environment" (*Wolman* v. *Walter*, 433 U.S. 229, 236 (1977)) and an "ample opportunity to develop to the fullest their intellectual capacities" (*Meek* v. *Pittenger*, 421 U.S. 349, 352 n.2 (1975)). Accordingly, diverse programs such as Title I at the federal level, and Shared Time and Community Education at the state and local level in Michigan, have been established to provide secular remedial and enrichment courses, not otherwise available, to students attending both public and nonpublic schools, under conditions strictly controlled and supervised by public school authorities.

There are, undoubtedly, persons who view all private schooling as a threat to public education, and oppose, in principle, any services or assistance to private school children that might indirectly make alternatives to public schools more affordable or attractive. As a matter of policy, to be decided by Congress, legislatures, and school boards, theirs is a legitimate position, at least insofar as it does not interfere with the constitutional rights of parents to choose private schooling for their children. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). This Court has, however, consistently rejected attempts to use the Establishment Clause for the purpose of protecting public schools from private alternatives. *E.g.*, *Mueller* v. *Allen*, No. 82-195 (June 29, 1983); *Wolman* v. *Walter*, *supra*; *Meek* v. *Pittenger*, *supra*.

Merely because "children are helped" to attend nonpublic schools (*Everson* v. *Board of Education*, 330 U.S. 1, 17 (1947)), or because private religious schools may derive an "attenuated financial benefit" (*Mueller* v. *Allen*, slip op. 11), does not make a program of assistance to private school students, for that reason alone, constitutionally invalid. See *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 13; *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 771 (1973). Indeed, the Religion Clauses of the First Amendment point in the opposite direction. This nation's "traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas" (*Lynch* v. *Donnelly*, slip op. 8), including education. See *Pierce* v. *Society of Sisters*, *supra*. The secular approach and atmosphere of the public schools (see, *e.g.*, *Stone* v. *Graham*, 449 U.S. 39 (1980)), is available to all; however, many parents and children prefer (and some feel impelled as a matter of religious conviction to seek out) schools where religious truths, as they understand them, are incorporated into the curriculum. This has been particularly true of adherents to faiths outside the mainstream of Protestant Christianity, for whom religious schools have been an important means of maintaining religious identity.

Thus, religious (as well as secular) alternatives to public education are tolerated—even welcomed—as part

of our pluralistic heritage. If the government then wishes to enrich and enhance the education available to all, the challenge is to find a means to do so without conferring a direct or substantial benefit on, or becoming excessively entangled with, religious institutions, in violation of the Establishment Clause. This requires a "practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman* v. *Walter*, 433 U.S. at 247 n.14.

This case provides an opportunity for this Court to assess the actual operations and effects of a program which is characteristic of many programs adopted across the country. In this case, unlike others that have reached this Court,[6] there is an extensive factual record documenting these operations and effects over a period of six years. The facts are "largely undisputed" (Pet. App. 4a, 73a). The Court is therefore in a position to conduct a "careful evaluation of the facts of the particular case" (*Wheeler* v. *Barrera*, 417 U.S. 402, 426 (1974)) and assess issues of purpose, effect, and entanglement, not in the abstract, but on the basis of a comprehensive record.

It is important to appreciate the practical problems associated with programs that seek to provide supplemental remedial and enrichment courses, not otherwise available, to children attending both public and nonpublic schools. For public school students, the logistics are straightforward: remedial courses are provided by specialists during the regular school day, and enrichment courses are offered on school grounds after regular hours. To reach private school students is more difficult. In this, the Michigan experience with Shared Time and Community Education parallels the frequent national experience with Title I. In both instances, the decision to provide services on private school premises has been made "only after experimenting with alternative programs," with "discouraging" results. *PEARL* v. *Harris*, 489 F. Supp. at 1255. See J.A. 325, 359-360 (comprehensive feasibility

[6] *E.g.*, *Wolman* v. *Walter*, *supra*; *Meek* v. *Pittenger*, *supra*; *Wheeler* v. *Barrera*, 417 U.S. 402 (1974).

study). The success of the programs depends on the active participation—attendance and attentiveness—of the students. Many educators testified at trial—and there was no contrary evidence—that the most effective means of providing educational services to children is to do so at their regular school. The record in this case makes clear, and the courts below did not dispute, that the challenged programs are offered on the premises of the private schools specifically because on-site instruction is educationally superior—as well as less costly and easier to administer. J.A. 325.

We believe the courts below erred in concluding that the Shared Time and Community Education programs of the School District of the City of Grand Rapids were in violation of the Establishment Clause. In analyzing the challenged programs, we, like the courts below, will employ the familiar three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). That test was developed by this Court in the very context presented in this case: governmental aid to private (including religiously-oriented) schools or schoolchildren. Whatever questions might be raised about the suitability of that test when it is sought to be applied outside its original context (see *Lynch* v. *Donnelly*, slip op. 9; *Marsh* v. *Chambers*, No. 82-23 (July 5, 1983); *Larson* v. *Valente*, 456 U.S. 228 (1982)), the *Lemon* test, sensitively applied, would seem to furnish an appropriate "framework of analysis" (*Nyquist*, 413 U.S. at 761 n.5) for governmental programs of assistance to the education of children attending nonpublic schools.

A. The Secular Purpose Of The Grand Rapids Shared Time And Community Education Programs Is Not Disputed And Is Not At Issue

The district court found that "[t]he purpose[s] of the Shared Time and Community Education programs are manifestly secular" (Pet. App. 92a), and that the programs were "instigated * * * for purely secular purposes"

(Pet. App. 94a). The court of appeals expressly affirmed that finding (Pet. App. 21a). Further review of that finding by this Court is therefore unnecessary. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); see generally *Mueller* v. *Allen*, slip op. 5-6.

B. The Primary Effect Of The Grand Rapids Shared Time And Community Education Programs Is Neutral; The Programs Do Not Advance Religion

This Court has repeatedly rejected interpretations of the Establishment Clause under which any law or program "that confers an 'indirect,' 'remote,' or 'incidental' benefit on [religion] is, for that reason alone, constitutionally invalid." *Lynch* v. *Donnelly*, slip op. 13 (brackets in original), quoting *Nyquist*, 413 U.S. at 771; see also *Widmar* v. *Vincent*, 454 U.S. 263, 273-274 (1981); *Walz* v. *Tax Commission*, 397 U.S. 664, 671-672, 674-675 (1970); *McGowan* v. *Maryland*, 366 U.S. 420, 450 (1961). The approach taken by this Court is reflected in the formulation of the "effects" prong of the three-part test: "The crucial question is not whether *some* benefit accrues to a religious institution as a consequence of the legislative program, but whether its *principal* or *primary* effect advances religion." *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971) (emphasis added).

1. *The Primary Effect Of The Programs Is To Enrich The Education Provided To Private School Students, Not To Advance Religion*

The record evidence covering a period of six years provides a firm basis for concluding that the primary effect of the Grand Rapids programs is to enrich the education provided to children at public and nonpublic schools, and not to advance religion. See J.A. 329-346, 346-353; cf. *PEARL* v. *Harris*, 489 F. Supp. at 1258-1265; see also Pet. App. 53a-54a (Krupansky, J., dissenting). The evidence gives no support to the conclusion that the challenged programs promote the sectarian activities of the private schools involved. On the contrary, the evidence establishes that the principal effect of the programs is,

as petitioners intended, to help the children themselves. The educational benefits to the children served by these programs are revealed clearly—even poignantly—in the district court testimony of educators and parents familiar with the programs. See, *e.g.*, Record vol. VIII B, at 1392-1393. As the district court found, "both of these [challenged programs] do in fact have a positive impact on the participating nonpublic school students" (Pet. App. 95a).

The courses involved—remedial and enrichment mathematics, remedial and enrichment reading, art, music, physical education, and leisure-time activities such as arts and crafts (Pet. App. 7a, 8a, 76a, 77a-78a)—are themselves purely secular in character. The evidence shows further that the courses have not in any way been used to endorse or inculcate any religious teaching or belief. As the court of appeals acknowledged, "[t]here is no proof that any teacher in either Shared Time or Community Development classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion" (Pet. App. 35a). And there is no evidence that the programs have enabled the private schools involved to expand their enrollments[7] or to cut back on their own course offerings.[8] In short, the *primary* effect is to broaden the educational opportunities of schoolchildren, not to benefit religious institutions.

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[7] The percentage of school age children attending nonpublic schools in the Grand Rapids area remained constant (within 1% of 30%) for the ten year period from 1971 to 1981. The institution of the on-premises Shared Time and Community Education programs in 1976 thus had no discernible effect on enrollments. J.A. 215-221, 355-357.

[8] The courts below acknowledged that none of the challenged courses would otherwise be available to private school students, and that the courses are not substitutes for private school offerings (Pet. App. 7a, 9a, 77a, 78a; see J.A. 109, 138, 146, 304, 347). Nor are the courses required for graduation (Pet. App. 7a, 8a-9a, 77a, 78a) or required by the State to be offered as part of the basic core curriculum (J.A. 361).

2. *The Programs Provide Comparable Educational Opportunities For All Schoolchildren, Public and Private, On A Neutral Basis*

If the "primary effect" analysis is not to be reduced to a definitional device for reaching a preordained conclusion, that analysis must be directed to the program as a whole. To "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch* v. *Donnelly*, slip op. 10. See *Mueller* v. *Allen*, slip op. 8; *Widmar* v. *Vincent*, 454 U.S. at 274. A program that assists a broad class of beneficiaries without regard to religion does not violate the Establishment Clause merely because some—even many—of the beneficiaries happen to be religious. *Mueller* v. *Allen*, slip op. 8; *Roemer* v. *Board of Public Works*, 426 U.S. 736, 746 (1976); *Nyquist*, 413 U.S. at 782 n.38; *Tilton* v. *Richardson*, 403 U.S. at 687.

The Grand Rapids programs at issue here are designed to benefit *all* schoolchildren, whether they are enrolled in public or private schools, and whether the private school is secular or religious. This fact is readily apparent with regard to the Community Education program because it is operated in the same fashion, under the same name, in both public and private schools throughout the school district (Pet. App. 8a-10a, 77a-79a).[9] Although the Shared Time program, as such, is operated *under that name* only on the leased premises of private schools, it is undisputed that the school district offers the same supplementary courses to public school students as part of the public schools' more varied general curriculum (Pet. App. 6a, 76a).[10] Thus, the courses offered under both of the challenged programs are made available to *all* students within the school district on an equal and equitable basis.[11]

[9] Indeed, another part of the Community Education program, not challenged here, provides enrichment courses for some 35,000 local residents in the evenings at various locations, including factories, senior citizen centers, hospitals, and public and nonpublic schools (J.A. 298). Thus, the benefits extend to a much broader segment of the community even than schoolchildren.

[10] Presumably, the school district could, if it chose, establish a single program—analogous to the single Community Education program—that would cover the supplemental courses offered in nonpublic schools under the Shared Time program and in public schools as part of the more varied general curriculum. This hypothetical change in form would serve to highlight the fact that this educational program is offered to *all* students in the Grand Rapids school district—not just those who attend the private schools. See *Meek* v. *Pittenger*, 421 U.S. at 360 n.8 (Stewart, J.) ("So long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two.").

[11] We are at a loss to understand why the district court concluded that "[t]he challenged programs impact upon a very narrow religious class of beneficiaries" (Pet. App. 108a), that the program "directly benefits nonpublic school students * * * while at the same time it excludes members of the public at large" (*ibid.*), and that "the beneficiaries are wholly designated on the basis of religion" (*id.* at 109a). As the "largely undisputed" facts (*id.* at 73a) clearly show, the programs are open to participation by all schoolchildren, totally without regard to religion, in both public and private schools. These inexplicable statements by the district court, which are contradicted by that court's own findings of fact, were not relied on by the court of appeals, though they were quoted (Pet. App. 23a-24a). In fact, the court of appeals agreed that the challenged programs provided supplies and services "to all schools, including parochial schools" (*id.* at 40a).

[12] The one exception is *Nyquist*, which involved a government aid program designed exclusively for the benefit of parents with children in nonpublic schools rather than a general program for the benefit of all schoolchildren.

3. *The Programs Provide Benefits Directly To The Eligible Schoolchildren*

This Court has found it "noteworthy that all but one of [its] recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves." *Mueller* v. *Allen*, slip op. 10.[12] Direct financial aid to parochial schools was cited in *Lemon* v. *Kurtzman*, 403 U.S. at 621, as a "factor [that] distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out

that state aid was provided to the student and his parents—not to the church-related school." See also *Walz* v. *Tax Commission*, 397 U.S. at 675 (noting difficulties presented by "direct money subsidy" program).[13]

The Grand Rapids programs provide no subsidy or other financial assistance to nonpublic schools.[14] The record demonstrates that effective measures have been taken to ensure that none of the secular services or materials provided to students in connection with these programs can be diverted to any use by the nonpublic schools (J.A. 329-330, 331-342). The record also shows that none of the courses offered through these supplemental programs relieve the private schools of any burdens or responsibilities previously undertaken by or required of them (Pet. App. 7a, 9a, 76a-77a, 78a; see note 8, *supra*).

The benefits that supposedly flow to religiously-oriented schools from these programs are a consequence simply of the fact that *students* at these schools—in common with all other students—have access to some educational programs that would otherwise be unavailable to them. It may be that these schools will, as a consequence, be regarded in a more favorable light by pupils and potential pupils and their parents.[15] But the same could, of course, be said of *any* form of aid to nonpublic school students. If this is an impermissible consequence, it is the inexorable conclusion that *all* such aid must be prohibited—a conclusion firmly rejected by this Court's cases. See, *e.g.*, *Board of Education* v. *Allen*, 392 U.S. 236, 242 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 17 (1947). "The historic purposes of the [Establishment Clause] simply do not encompass th[is] sort of attenuated financial benefit." *Mueller* v. *Allen*, slip op. 11.

[13] Of course, the presence of even a direct governmental subsidy to a religiously-oriented school is not necessarily fatal to the constitutionality of a government aid program. See *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980); *Roemer* v. *Board of Public Works*, *supra*; *Tilton* v. *Richardson*, *supra*. Cf. *Marsh* v. *Chambers*, *supra*, (upholding constitutionality of direct government payments to legislative chaplains); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899) (upholding constitutionality of federal aid to hospitals operated by a religious order).

[14] The school district does, however, pay rent for use of leased facilities (Pet. App. 5a, 74a). The rent is paid for value received, and does not constitute a subsidy to the lessors (J.A. 324). See *Committee for Public Education* v. *Regan*, 444 U.S. at 657-659. Neither the district court nor the court of appeals relied on the rental payments as a basis for their findings of unconstitutionality. Cf. *State ex rel. School District of Hartington* v. *Nebraska State Board of Education*, 188 Neb. 1, 195 N.W.2d 161, cert. denied, 409 U.S. 921 (1972) (Title I leasing arrangement with Roman Catholic school held constitutionally permissible).

4. *The Decision Below Was Based On Speculation Not Supported By The Record*

The decision below appears to be based on preconceived notions about aid to parochial schools rather than any actual demonstration that the "primary effect" of the program is to advance religion. The court stated (Pet. App. 40a):

> The Shared Time and Community Education programs at issue in this case clearly give direct aid to parochial schools in parochial school buildings. By so

[15] The court of appeals also suggested that a teacher's "effective teaching in the Shared Time or Community Education class may so impress the student as to become a role model" (Pet. App. 42a)—thus having the effect of furthering that teacher's religious ministry. But this argument surely proves too much. Any public school teacher—whether part-time or full-time—who is personally devout, and also an effective teacher, may become something of a role model for the children. Under the court of appeals' reasoning, his very effectiveness as a teacher would be cause for constitutional concern, even though he may in no way have used his position to inculcate his religious beliefs.

In any event, the findings here demonstrate simply that "a well known teacher able to attract students is essential to the establishment of a successful Community Education program" (Pet. App. 9a, 78a). Thus, the primary effect of the arrangement is that the popularity of a private school teacher is exploited by Community Education to attract students to its programs. And none of this has any bearing on the Shared Time program, which uses full-time public school teachers.

doing, they also assist those schools in performing their religious missions, in violation of the First Amendment.

This simply mischaracterizes the case. The undisputed facts make clear that the programs provided no "direct aid to parochial schools" whatsoever. The programs have the purpose and effect of providing supplemental education to all students. And even the "indirect" benefit to the religious schools is exiguous: being strictly supplementary, the programs relieve the private schools of none of their own educational responsibilities or costs. And being substantially identical in public and private schools, the programs are unlikely to attract students to the private schools.

Without identifying any demonstrable—let alone "primary"—effect of promoting the "religious mission" of the private schools involved, the court of appeals speculated that the programs "are bound to have had [such] an effect" (Pet. App. 43a) because of their very existence as publicly-funded programs on the premises of religiously-oriented private schools. In effect, the court of appeals adopted the per se rule against on-premises educational services rejected by this Court in *Wheeler* v. *Barrera*, 417 U.S. at 426. And in the face of a "flawless record" of neutral administration (Pet. App. 56a-57a (Krupansky, J., dissenting)), merely speculative possibilities of impermissible effect do not provide an adequate basis for a finding of a constitutional violation. As this Court stated in *Tilton* v. *Richardson*, 403 U.S. at 679, although "[a] possibility always exists * * * that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement * * * judicial concern * * * cannot, standing alone, warrant striking down a statute as unconstitutional." See also *Marsh* v. *Chambers*, slip op. 11; *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 662, 656 (1980); *Wolman* v. *Walter*, 433 U.S. at 242.[16]

[16] The relevant portions of *Meek* v. *Pittenger*, *supra*, did not address the "effects" prong of the *Lemon* analysis, but focused instead on the entanglement question (see 421 U.S. at 369). The district court's reliance on *Meek* for its analysis of the challenged programs' primary effect (Pet. App. 99a-102a) is therefore misplaced.

We suspect that the decision below was based more on the court of appeals' professed concern for "public education as a major aspect of the American goal of equality of opportunity" (Pet. App. 40a) than on the Constitution's prohibition of an established religion. The court of appeals was plainly moved by its fears that these programs might expand in the future. Finding state legislatures "in many states" to be "vulnerable to pressures from religious constituencies," the court of appeals speculated that "[u]nder such pressures legislatures can be expected" to adopt programs that would prove unconstitutional in effect (Pet. App. 40a). In substance, the court of appeals adopted the "no aid" interpretation of the Establishment Clause, despite its rejection by this Court, on the basis of a speculative distrust of legislatures. That is, of course, an entirely inappropriate basis for a federal court to invalidate a state program under the Constitution.

In fact, there is a deep inconsistency in the court of appeals' holding—that enriching the educational opportunities of private school students is a legitimate public *purpose*, but that, if successfully accomplished, the *effect* of so doing is unconstitutional. The "purpose" and "effect" inquiries, properly understood, are not so strangely inharmonious; they are the subjective and objective aspects of the same inquiry. *Lynch* v. *Donnelly*, slip op. 3-4 (O'Connor, J., concurring). Here the purpose of the program is legitimate, the means selected are suited to that purpose, and the consequence of the program is to secure that purpose. In order to find such a program repugnant to the Constitution, some unintended consequence must surely be *specifically* identified, one that is substantial enough so that it can fairly be said to outweigh the program's intended purposes and thus to constitute its "primary" effect. The court of appeals plainly has not identified anything of the sort. The "primary effect" of

providing Shared Time and Community Education courses on private school premises is that the intended beneficiaries of these programs can better take advantage of them. The programs are not, therefore, repugnant to the First Amendment.

C. The Grand Rapids Shared Time And Community Education Programs Do Not Foster Excessive Government Entanglement With Religion

1. *The Grand Rapids Programs Have Not Occasioned Excessive Administrative Entanglement With Religion*

Excessive administrative entanglement with religion is likely to occur in connection with a government program that requires "comprehensive, discriminating, and continuing state surveillance" over religious authorities. *Lemon* v. *Kurtzman*, 403 U.S. at 619. To determine whether such entanglement is involved, it is usually necessary to "examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority" (*id.* at 615).

In this case, we submit that the question of the "character and purposes of the institutions that are benefited" does not arise at all: the Grand Rapids programs benefit schoolchildren, not schools. Insofar as it can be said that there are incidental benefits conferred on participating schools, there is no dispute about their "character and purposes": both public and private schools participate; the latter include one purely secular private school and schools of five religious denominations. The programs are open to all.[17]

The "nature of the aid" provided here—providing certain supplemental educational programs—strongly militates against a finding of excessive church-state entangle-

[17] The Grand Rapids Baptist Academy, which operates four elementary schools and one high school, refuses to participate in the challenged programs because "it cannot live with the requisite loss of control" (J.A. 373).

ment. The courses themselves are strictly secular, and the school district has adopted, publicized, and enforced guidelines to preserve the independence of the programs from any influence or control by private school authorities. J.A. 184-185, 214, 329, 333, 335, 338, 344-345. Although within the premises of the nonpublic schools involved, the Shared Time and Community Education classrooms are leased by the public school district, are designated as public school classrooms, are exclusively under the control of the public school district, and are free of any religious symbols or artifacts. The Shared Time instructors testified, without exception, that they have never felt any religious pressure or influence exerted on them by the private school teachers or officials and that any religious "atmosphere" in the private schools has had "absolutely no impact or effect" on their teaching (J.A. 331).

The Shared Time instructors are full-time public school teachers, specialists in their field, who travel from school to school, both public and private. They are trained, supervised, and evaluated solely by public school authorities, without involvement by private school authorities (J.A. 328-340). The Community Education instructors are generally regular members of the faculty of the school, public or private, at which they teach, but, for purposes of Community Education, are hired, paid, assigned, supervised, and evaluated solely by the public school district (J.A. 350-352). The public school district exercises no authority over these teachers during the regular school day, and the private school exercises no authority over them during Community Education. The record provides no support for—and indeed affirmatively rebuts—the inference that, because of their regular employment by a religious institution, these teachers have required extensive monitoring or have allowed their courses (model building, rug hooking, arts and crafts, and the like) to lose their secular character.[18]

[18] Some teachers involved in the programs—perhaps especially those also employed by religiously-oriented schools—will presumably

Most importantly, "the resulting relationship between the government and the religious authority" in this case is not of the kind that has led or could be expected to lead to excessive administrative entanglement. This relationship takes the form of the routine and minor administrative contacts occasioned by disseminating information about the programs, processing requests for services, and resolving scheduling problems (Pet. App. 118a-119a). Such minimal contacts with the operation of the nonpublic schools scarcely reflect the degree of intrusiveness by governmental authorities that this Court has identified as amounting to impermissible entanglement. See *Mueller* v. *Allen*, slip op. 14; *Committee for Public Education* v. *Regan*, 444 U.S. at 660-661; *Walz* v. *Tax Commission*, 397 U.S. at 674-676.[19]

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be personally devout. It cannot be presumed, however, that devout individuals are disabled from service as part-time (or full-time) public school teachers because of a supposed inability to comply with secular requirements. So long as a teacher is subject exclusively to public supervision and control in connection with his public duties, his religious affiliation or outside employment should not be deemed evidence of unfitness to teach secular subjects in a public school program. Cf. *McDaniel* v. *Paty*, 435 U.S. 618 (1978).

[19] *Meek* v. *Pittenger*, *supra*, does not govern this case. In *Meek*, a state program of aid to private schools was challenged on its face as soon as it was enacted, and was struck down by this Court because there were insufficient safeguards against the possibility of excessive entanglements. Here, by contrast, the challenged programs were carefully designed to avoid church-state contacts or friction, and the record demonstrates that the potential problems foreseen by this Court in *Meek* have not materialized. See *PEARL* v. *Harris*, 489 F. Supp. at 1265, 1267, 1269. On this record—entirely different from that in *Meek*—the court of appeals erred in treating *Meek* as a per se holding that "any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities"—an interpretation this Court rejected in *Committee for Public Education* v. *Regan*, 444 U.S. at 661. See also *Wolman* v. *Walter*, 433 U.S. at 247 (upholding a program where "the danger perceived in *Meek* [did] not arise"); *State ex rel. School District of Hartington* v. *Nebraska State Board of Education*, *supra*.

The only administrative entanglement specifically relied upon by the court of appeals was the need to monitor the activities of Shared Time and Community Education teachers to ensure that they do not promote the religious mission of the private schools involved (Pet. App. 43a). Even as to this, however, the basis for the court's concern was pure speculation—indeed, speculation of a particularly inappropriate sort. The court expressly acknowledged that the challenged programs have not in actual practice entailed "significant monitoring" (*ibid.*) —and that there nonetheless is no evidence that any teacher in the programs had sought to use the programs to promote his religion (*id.* at 35a). This finding that extensive monitoring has not been necessary to prevent abuses ordinarily would suffice to eliminate the "monitoring" problem from the case. But the court of appeals observed that the religious organizations currently involved in the program "have reputations for social responsibility" (*id.* at 43a), and warned that "[m]any less orthodox religious sects would be equally entitled to public funds [20] from those programs" (*ibid.*). The court predicted that "[m]any of them," as a result of their "religious zeal and economic need," might act less responsibly than the current participants (*ibid.*).

It should go without saying that invidious stereotypes about hypothetical "less orthodox religious sects" should play no part in constitutional adjudication. Cf. *Larson* v. *Valente*, 456 U.S. 228 (1982). In the absence of any actual findings of excessive entanglement, the Grand Rapids programs should have been upheld.

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[20] We do not know what "public funds" the court of appeals was referring to. No public funds other than some rental payments go to religious institutions under the challenged programs. The rents themselves are not otherwise discussed by the court of appeals and do not appear to be a basis for its decision. See note 14, *supra*.

2. *The Court's Finding Of "Political Divisiveness" Is Neither Legally Nor Factually Supportable*

One of the major emphases of the court of appeals was on the supposed "political divisiveness" of the Shared Time and Community Education programs. See Pet. App. 43a-44a. The court's reasoning on this point should not be sustained.

The concept of "political divisiveness" derives from the observation in *Lemon* v. *Kurtzman*, 403 U.S. at 622, that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." But "this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct." *Lynch* v. *Donnelly*, slip op. 14. Although the existence of political divisiveness may suggest that the program at issue may be suspect under other parts of the Establishment Clause inquiry, it is not "an independent test of constitutionality." Slip op. 3 (O'Connor, J., concurring).

This is for sound reasons. As Justice O'Connor has pointed out, "[g]uessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise." *Lynch* v. *Donnelly*, slip op. 3 (concurring opinion). Moreover, it is awkward for the judiciary to inquire into, and perhaps discourage, the "uninhibited, robust, and wide-open" debate on public issues characteristic of our political system. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). It may also be difficult to know which side in a religiously-related dispute should prevail when a court determines that the political divisiveness of the controversy is too great to permit resolution by elected officials. In this case, for example, it may be thought more "divisive" to deny schoolchildren who attend religiously-affiliated schools access to supplementary educational services otherwise available than it would be to extend the services neutrally to all.[21]

[21] Ironically, the courts below cited as examples of "political divisiveness" the fact that the school board in millage elections and candidates in school board elections have been known to publicize the Shared Time and Community Education programs as a means of broadening the base of support for school taxes or for their candidacies (Pet. App. 26a-29a, 111a-114a). While the district court could be correct that "the spectre of Board candidates dividing voters over the [Shared Time and Community Education programs] haunts the political process" (*id.* at 114a), this phenomenon might as easily be interpreted as evidence that the challenged programs have wide popular appeal—that they *decrease*, rather than *increase*, political divisiveness over local educational issues. See J.A. 357-358.

In addition, the court of appeals failed to recognize that when a "case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, * * * no inquiry into potential political divisiveness is even called for." *Lynch* v. *Donnelly*, slip op. 14 (citation omitted); see *Mueller* v. *Allen*, slip op. 15 n.11. Further, the six-year history of these programs in Grand Rapids has produced no evidence of significant political divisiveness (Pet. App. 56a).[22]

II. THE VALIDITY OF THE FEDERAL TITLE I PROGRAM, WHICH IS A COMPREHENSIVE EDUCATIONAL ENRICHMENT PROGRAM FOR THE BENEFIT OF DISADVANTAGED PUBLIC AND PRIVATE SCHOOLCHILDREN, PRESENTS INDEPENDENT ISSUES THAT NEED NOT BE ADDRESSED IN THIS CASE

This case does not itself involve any program funded under Title I (see note 3, *supra*). There is therefore no need to describe the nationwide Title I program in full detail or to engage in extended discussion of its constitutionality. Nevertheless, because the Court's decision in this case will unavoidably carry implications for judicial treatment of the pending Title I suits, we think it appropriate to provide a description of the general Title I

[22] This litigation must surely not be allowed to serve as evidence of political strife. "A litigant cannot, by the very act of commencing a lawsuit, * * * create the appearance of divisiveness and then exploit it as evidence of entanglement." *Lynch* v. *Donnelly*, slip op. 15.

program design for purposes of comparison with the two Grand Rapids programs challenged in this case. See also *Wheeler* v. *Barrera*, *supra* (containing some general description of Title I program); *PEARL* v. *Harris*, *supra* (describing New York City Title I program).[23]

A. Title I, along with other portions of the Elementary and Secondary Education Act of 1965, was designed to "'bring better education to millions of disadvantaged youth who need it most.'" S. Rep. 146, 89th Cong., 1st Sess. 5 (1965) (citation omitted). See 20 U.S.C. (Supp. II 1978) 2701; 20 U.S.C. 3801 (declarations of congressional policy under former Title I and under Chapter 1 successor program). To carry out this congressional policy, Title I (now Chapter 1) provides for federal grants to state educational agencies (20 U.S.C. 3802), which, in turn, distribute funds to the eligible local educational agencies that have submitted appropriate applications for approval (20 U.S.C. 3805). A student's eligibility for participation in a Title I program is determined by reference to neutral criteria based on the concentration of poverty-level families in the student's particular area of residence and on the student's educational deficiencies. See 20 U.S.C. 3805(b). Title I funds may be used only to supplement, and in no case to supplant, nonfederal funds that otherwise would be expended for the participating children (20 U.S.C. 3807(b)). Educational services that may be made available under Title I include remedial reading, remedial mathematics, English as a second language, diagnostic testing, and clinical and guidance programs.

Congress made clear, in passing this legislation, that a student was not to be excluded from the benefits of Title I merely because of attendance at private, rather than public, school. See *Wheeler* v. *Barrera*, 417 U.S. at 406 (emphasis in original; footnote omitted) ("since the legislative aim [of Title I] was to provide needed assistance

[23] Both petitioners (Pet. 26) and respondents (Resp. Br. in Opp. 5-6) readily acknowledge that there are "important differences" (*id.* at 6) between Title I and the Grand Rapids programs.

to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act"). Congress thus specifically provided (20 U.S.C. 3806(a)):

> To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for special educational services and arrangements * * * in which such children can participate * * *. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

The particulars of the Title I program for eligible private school students were left by Congress to the local educational agencies, but it was clear that an equitable program involving proportionately equal expenditures is required (S. Rep. 146, *supra*, at 11-12).

With regard to the question of making public school teachers available in private school facilities, Congress indicated that such a program could be proper, but "only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school" (S. Rep. 146, *supra*, at 12). See also 111 Cong. Rec. 5747-5748 (1965) (remarks of Reps. Carey and Perkins, managers of the House bill).

Federal programs, such as Title I, differ in one fundamental respect from state aid programs for private school children. Unlike the states, the federal government does not operate a school system available to all school-age children. Therefore, in order to provide serv-

ices on a neutral and equitable basis for all schoolchildren, the federal government must include children attending private, as well as public, schools in programs such as Title I.

B. The Department of Education's regulations implementing the Title I program (now Chapter 1) are set forth in 34 C.F.R. Pt. 200. Several of these regulations specifically address participation in Title I programs by educationally deprived children in private schools. See 34 C.F.R. 200.70-200.85. The regulations require that local educational agencies (known as "LEAs") shall provide eligible private schoolchildren with Title I services that "assure participation on an equitable basis" (34 C.F.R. 200.70(a)(1)). The LEA must allow such children "to participate in a manner that is consistent with the[ir] number and special educational needs" (34 C.F.R. 200.70 (b)). While so doing, however, the LEA must "exercise administrative direction and control over [Title I] funds and property" used in such programs (34 C.F.R. 200.70 (c)). Moreover, the Title I services to private school children must be provided either by public employees or by contract with a person or organization "independent of the private school and of any religious organizations" (34 C.F.R. 200.70(d)(1)).[24]

Several regulatory provisions are specifically designed to effectuate the congressional intent that no financial aid or services be provided "to a private institution," as distinguished from the educationally deprived *schoolchildren* who attend a private institution. S. Rep. 146, *supra*, at 11. Thus, one provision stipulates that Title I funds may be used only "to provide services that supplement the level of services" that would otherwise be available to the eligible private school children (34 C.F.R. 200.72 (a)).[25] Another provision specifies that Title I funds

[24] In this respect, the Title I program differs from the Grand Rapids Community Education program.

[25] In this respect, the Title I program is similar to the challenged programs here. See page 13 & note 8, 16, *supra*.

may be used only "to meet the special educational needs of children in private schools" and not to meet any "needs of the private schools" themselves or any "general needs" of the private school children (34 C.F.R. 200.72(b), (1) and (2)).

Although the LEAs are permitted to make public employees available on the premises of private schools, this approach may be used only as "necessary to provide equitable [Title I] services" and only "[i]f those services are not normally provided by the private school" (34 C.F.R. 200.73(a) and (b); cf. S. Rep. 146, *supra*, at 12). Moreover, "a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with [Title I] funds" (34 C.F.R. 200.74(a); cf. S. Rep. 146, *supra*, at 12).[26] Finally, the regulations expressly prohibit use of Title I funds "for repairs, minor remodeling, or construction of private school facilities" (34 C.F.R. 200.75; cf. S. Rep. 146, *supra*, at 11).[27]

C. As noted above, several cases challenging the Title I program are now pending in the lower courts. In our view, and in accord with *Wheeler* v. *Barrera*, *supra*, the decision in the present case should be limited to the facts and specific issues presented by the two Grand Rapids programs. Although a decision in favor of respondents would affect resolution of several of the legal issues that have arisen in connection with Title I, the lower courts in the Title I cases should not be foreclosed from addressing

[26] The challenged programs here have a similar policy. J.A. 341-342.

[27] According to the most recent data available in the record in *Felton* v. *Secretary, United States Department of Education*, *supra*, over $3 billion ($3,104,317,000) was appropriated for Title I program expenditures in Fiscal Year 1982. During the 1980-1981 school year, Title I services were provided to 5,170,935 public school children and 192,994 private school children. In other words, only about 3.7% of the Title I students attended private schools. And approximately $105,200,000—about 4% of the total Fiscal Year 1980 appropriation—was expended on Title I services for children attending private schools.

the analogous but distinct factual and legal issues presented there.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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8/8/84

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QUESTION PRESENTED

Whether Title I of the Elementary and Secondary Education Act of 1965, which authorizes federal funding of remedial education for all educationally deprived children in low-income areas, violates the Establishment Clause of the First Amendment insofar as it authorizes the funding of secular remedial classes taught by public school teachers under public school control on the premises of religious schools.

PARTIES TO THE PROCEEDING

The Secretary of Education and the Chancellor of the Board of Education of the City of New York were named as defendants and were appellees in the court of appeals. Yolanda Aguilar, Lillian Colon, Miriam Martinez, and Belinda Williams intervened as defendants in the district court and were appellees in the court of appeals. Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side, and Allen H. Zelon were the plaintiffs in the district court and appellants in the court of appeals.

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is not yet reported. The opinion of the district court (App., *infra*, 55a-59a) is unreported. The opinion in *National Coalition for Public Education and Religious Liberty* v. *Harris* (App., *infra*,), on which the district court relied, is reported at 489 F. Supp. 1248.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 104a-105a) was entered on July 9, 1984. A notice of appeal (App., *infra*, 106a-107a) was filed on August 2,

1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1979).[1]

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[1] The court of appeals held that the Establishment Clause of the First Amendment forbids the expenditure of funds appropriated under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*, on remedial instruction for students of nonpublic religiously oriented schools, if that instruction occurs on the premises of those schools. As this Court has held (*Wheeler* v. *Barrera*, 417 U.S. 402, 422-423 (1974)) and as the court of appeals explicitly recognized (App., *infra*, 6a n.2, 24a), Title I authorizes such expenditures. Indeed, the legislative history of Title I shows that Congress specifically contemplated on-premises instruction (S. Rep. No. 146, 89th Cong., 1st Sess. 12 (1965)), and a regulation specifies, that such instruction is to be provided only "to the extent necessary to" satisfy the statutory mandate that comparable services be supplied to public and nonpublic school students (34 C.F.R. 200.73(a)).

We submit that the court of appeals has, therefore, "held [Title I] unconstitutional as applied to a particular circumstance" (*United States* v. *Darusmont*, 449 U.S. 292, 293 (1981)) and an appeal lies to this Court under 28 U.S.C. 1252. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 404-407 (1982). Cf. *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 553 (1939). While the court of appeals did not explicitly state that Title I was unconstitutional as applied, such a determination "was a necessary predicate to the relief" that it granted (*United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980)).

We note that in *Flast* v. *Cohen*, 392 U.S. 83, 88-91 (1968), this Court held that a claim that New York City's Title I program violated the Establishment Clause—the same claim that is made by plaintiffs here—was properly brought before a three-judge court convened pursuant to 28 U.S.C. (1970 ed.) 2282. The interpretation of Section 2282 sheds light on the meaning of Section 1252 because Section 2282 provided for a three-judge court when an injunction was sought against the enforcement of an Act of Congress "on grounds of unconstitutionality" and both Section 1252 and Section 2282 were enacted as part of the same statute (Judiciary Act of 1937, ch. 754, §§ 2, 3, 50 Stat. 752.

If the Court determines that it lacks appellate jurisdiction in this case, we request that it treat this Jurisdictional Statement

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set out at App., *infra*, 108a-127a.

STATEMENT

1. On February 27, 1984, this Court granted certiorari in *School District of the City of Grand Rapids* v. *Ball*, No. 83-990, to consider whether it is a per se violation of the Establishment Clause for a local school district, pursuant to a state-funded enrichment and remedial educational program made available to all children in the district, to provide secular supplementary instruction to nonpublic school students on the premises of religiously oriented schools. The United States filed a brief *amicus curiae* in *Grand Rapids*,[2] pointing out that Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*, authorizes federal grants-in-aid to local educational agencies for the purpose of improving the education of economically and educationally deprived children. Our brief explained that Title I "specifically requires that provisions be made for the participation of eligible students who attend nonpublic schools", and that "[m]any local educational agencies have met this requirement by providing Title I remedial education services to eligible children on the premises of nonpublic schools." 83-990 U.S. Br. 1-2. We noted that the validity of the Title I program is being litigated in various federal courts, and that "this Court's decision [in *Grand Rapids*] is likely to have a substantial impact on the lower courts' consideration of the somewhat analogous legal and factual issues presented in the pending Title I cases." 83-990 U.S. Br. 3.

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as a petition for a writ of certiorari (see 28 U.S.C. 2103) and grant the petition.

[2] We have sent copies of this brief to the appellees.

This case is one of the pending federal cases we identified in which the validity of the federal Title I program has been drawn into question. See 83-990 U.S. Br. 2. On July 9, 1984, the United States Court of Appeals for the Second Circuit held in this case that the Establishment Clause renders Title I unconstitutional insofar as it authorizes the inclusion of students of religiously oriented nonpublic schools in a program that makes on-premises remedial education available on an across-the-board basis to all public and nonpublic school children who are economically and educationally deprived. We now seek review of that decision.

2. Congress enacted Title I in order to "'bring better education to millions of disadvantaged youth who need it most'" (S. Rep. 146, 89th Cong., 1st Sess. 5 (1965) (citation omitted)).[3] For nearly two decades, Title I has provided federal funds "to local educational agencies serving areas with concentrations of children from low-income families" for the purpose of "expand[ing] and improv[ing]" local educational programs that help meet "the special educational needs of educationally deprived children" (20 U.S.C. 2701). Title I funds typically sup-

[3] Effective July 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 464 (codified at 20 U.S.C. 3801 *et seq.*). Chapter 1 continues to provide federal financial assistance to meet the special educational needs of the educationally deprived children served under Title I (see 20 U.S.C. 3801), and its provisions concerning the participation of children in private schools are virtually identical to those of Title I. Compare 20 U.S.C. 2740 with 20 U.S.C. 3806. See also App., *infra*, 3a n.1. Because there are no material differences between the two statutes, and because the declaratory and injunctive relief ordered by the court of appeals (see *id.* at 54a) is not affected by the changes made by Chapter 1, this case is not moot. See, *e.g.*, *Schall* v. *Martin*, No. 82-1248 (June 4, 1984), slip op. 7 n.2. Like the court of appeals, we will continue to refer to the program as "Title I."

port programs such as remedial reading, remedial mathematics, and English as a second language (see H.R. Rep. 1137, 95th Cong., 2d Sess. 6 (1978)).

Local educational agencies seeking Title I funds submit an application, describing the programs for which funding is sought, to a state agency for approval. The state agency must file certain assurances with the Department of Education, which has authority to administer the program at the federal level and distribute appropriated funds. 20 U.S.C. 3802, 3871, 3876. The statute specifies criteria that a local program must meet in order to qualify for Title I funds. 20 U.S.C. 3805(b). In particular, the program must channel funds to students (i) who are educationally deprived, that is, who perform at a level below normal for their age, and (ii) who live in an area that has a high concentration of families with incomes below the poverty level. 28 U.S.C. 3805(b).

Congress was aware that many families in low-income urban areas send their children to nonpublic schools. See *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1974). Congress made it clear that students are not to be discriminated against in the provision of Title I benefits because they attend nonpublic schools: the statute requires each recipient local agency to ensure that "[e]xpenditures * * * for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools" (20 U.S.C. 3806(a); see also *Wheeler*, 417 U.S. at 420-421; S. Rep. 146, *supra*, at 11-12).

In particular, this Court has already recognized that Title I authorizes funds for remedial instruction of nonpublic school students, by public school teachers, on the premises of nonpublic schools. See *Wheeler*, 417 U.S. at 422-423. The statute and its implementing regu-

lations carefully specify the conditions under which such instruction will be permitted. The legislative history of Title I states that "public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school" (S. Rep. No. 146, *supra*, at 12). See also 111 Cong. Rec. 5747-5748 (1965) (remarks of Reps. Carey and Perkins). Regulations require the recipient local educational agency to "exercise administrative direction and control over [the] funds and property" used in Title I programs (34 C.F.R. 200.70(c)) and specifically mandate that local educational agencies provide Title I services to nonpublic school children only by using public employees or contracting with a person or organization "independent of the private school and of any religious organizations" (34 C.F.R. 200.70(d)(1)). The regulations permit educational services funded by Title I to be provided on the premises of the nonpublic school only "[t]o the extent necessary to provide equitable services" to public and nonpublic school students and only if those services "are not normally provided by the private school" (34 C.F.R. 200.73(a) and (b)). A public educational agency "must keep title to and exercise continuing administrative control of all equipment and supplies * * * acquire[d] with [Title I] funds" (34 C.F.R. 200.74(a)).

3. This case concerns the largest Title I program in the nation, that operated by the Board of Education of the City of New York. This program has now been in operation for 18 years, and the facts concerning its operation have been developed in detail in the record of this case. Those facts are essentially undisputed (App., *infra*, 10a, 56a n.1.).

Approximately 13% of the over 300,000 students enrolled in Title I programs in New York City attend nonpublic schools, most of which are religiously oriented (App., *infra*, 7a; C.A. App. A32, A80-A81). Title I students are taught remedial reading, remedial mathematics, and English as a second language, and are provided a clinical and guidance program designed to enhance achievement in those subjects (App., *infra*, 10a-11a). In accordance with Title I and its implementing regulations (see S. Rep. 146, *supra*, at 12; 34 C.F.R. 200.73(b)), Title I funds are not used to provide a program to the students of a nonpublic school if that school is itself offering a similar remedial program.

Initially, the Board did not offer Title I instruction on the premises of nonpublic schools. Instead, it required nonpublic school students who wished to participate in Title I programs to travel to public schools after regular school hours. Attendance at these sessions was poor. The Board then decided to hold some Title I classes in the nonpublic schools but after regular school hours. App., *infra*, 7a. This approach proved unsuccessful for similar reasons: "both students and teachers were tired, * * * there was concern about the safety of children travelling home after dark or in inclement weather, and * * * communication between Title I teachers and other professionals and the regular classroom teachers of the nonpublic schools was virtually impossible" (*id.* at 8a).

The Board then considered holding the remedial classes for nonpublic school students in the public schools during school hours, but this plan was abandoned because of concerns that it would violate the New York Constitution (App., *infra*, 8a). In addition, a study showed that the transportation and other noninstructional costs that would have been incurred by conducting Title I classes for nonpublic school students at sites away from their schools would have amounted

to 42% of the entire Title I budget for nonpublic school children. In order to pay these costs, the Board would have had to deny Title I services to more than one-third of the nonpublic school students who were eligible for them (App., *infra*, 8a, 72a-73a).

After unsuccessfully "experimenting with [these] alternative programs" (App., *infra*, 71a), the Board decided, in 1966, to provide Title I instruction on the premises of nonpublic schools during school hours. All the teachers and other professionals who provide Title I services, with the exception of some physicians under special contract, are regular full-time employees of the Board. Teachers who are willing to teach Title I classes are assigned to nonpublic schools by the City. The Board does not inquire into teachers' religious affiliations when making assignments; the undisputed evidence is that the vast majority of the Title I teachers work in nonpublic schools with a religious affiliation different from their own. App., *infra*, 11a-12a, 74a. In addition, 78% of the teachers, and all of the non-teacher professionals, spend fewer than five days a week in any one school and work in more than one school in the course of the week.

The program of on-premises Title I instruction of nonpublic school students is designed to "'create[ ] the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school'" (App., *infra*, 14a (citation omitted)). Title I teachers are issued detailed written instructions and oral instructions that emphasize that they are independent public service employees who are in no way responsible to the nonpublic school authorities. The nonpublic school principals are also informed of the requirement that the Title I teachers' role be kept distinct from the school's religious aspects. Title I teachers are instructed not to introduce any reli-

gious matters into their programs. They are also instructed not to engage in team teaching or cooperative instructional activities; they may consult with a nonpublic school teacher about a student's needs, but if they do they are not to engage in any religious discussion. App., *infra*, 12a, 74a.

Pursuant to instructions given by the Board to participating nonpublic schools, Title I teachers use classrooms that are specifically designated for Title I instruction and that are free from any religious symbols. The nonpublic schools are not reimbursed for the classroom space. Both the nonpublic schools and the Title I teachers are informed that the Title I teachers have sole responsibility for selecting students for the program. The materials used in the classes have no religious content. Moreover, the Board retains title to the materials and equipment used in Title I classes; the teachers are instructed to keep the materials locked in storage cabinets when they are not in use, and the materials are subject to an annual inventory. App., *infra*, 13a, 74a-75a.

Each Title I teacher is supervised by a field supervisor, employed by the Board, who is to make at least one unannounced visit a month to the Title I classroom. The field supervisors answer to the Board's program coordinators, who also make occasional unannounced visits. In addition, the Board holds monthly training sessions for those employees serving as Title I professionals. No Title I teacher, in the entire time that on-premises instruction has been provided, has complained that nonpublic school authorities were attempting to interfere in his work for religious reasons; nor is there any recorded complaint that a teacher was injecting religious matter into a class. App., *infra*, 13a-14a, 1256-1257.

4. This suit was brought in 1978 in the United States District Court for the Eastern District of New York by

six federal taxpayers. The plaintiffs alleged that the Constitution prohibits public employees from providing remedial education on the premises of religiously oriented nonpublic schools. They sought declaratory and injunctive relief against the operation of New York City's Title I program. Four individuals whose children attend private elementary schools in New York City and receive Title I educational assistance subsequently intervened as defendants (App., *infra*, 9a-10; C.A. App. A2, A3-A7).

The district court stayed proceedings in this case pending the outcome of another suit, also challenging New York City's program of on-premises Title I instruction, that was pending before a three-judge court. *National Coalition for Public Education & Religious Liberty (PEARL)* v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y.), appeal dismissed for want of jurisdiction, 449 U.S. 808 (1980) (App., *infra*, 60a-103a). The three-judge court in *PEARL* upheld the constitutionality of the program. The parties to this case then stipulated that this case would be heard on the record developed in *PEARL*, as supplemented by various affidavits and documents (App., *infra*, 10a, 56a).

The district court granted summary judgment for the defendants (App., *infra*, 55a-57a). The court agreed with the reasoning of the three-judge court in *PEARL* and rejected the plaintiffs' argument that *Meek* v. *Pittenger*, 421 U.S. 349, 367-373 (1975), compelled the conclusion that the Title I program was unconstitutional (App., *infra*, 56a-57a):

> Simply put, the relevant equivalent of the extensive evidence derived from the many years of operation of the Title I program was not before the courts in *Meek*. * * *
>
> * * * [A]lthough arguably some of the circumstances of the title I program parallel the State program in *Meek*, the direct evidence demon-

> strates that the concerns of the *Meek* Court about the potential for the unconstitutional mingling of government and religion in the administration of this type of program have not materialized. Undoubtedly, the Supreme Court will not ignore the direct evidence of how Title I has functioned and operated in New York City's nonpublic schools for some seventeen (17) years in favor of plaintiffs' conjecture about the possibility of unconstitutional government activity * * *.

The court of appeals, relying principally on *Meek* v. *Pittenger*, *supra*, reversed (App., *infra*, 1a-54a). The court of appeals did not question any of the factual conclusions reached by the district courts that had considered New York's Title I program (see *id.* at 10a). Indeed, the court of appeals stated (*id.* at 4a):

> We have no doubt that the program here under scrutiny has done much good and that, apart from the Establishment Clause, the City could reasonably have regarded it as the most effective way to carry out the purposes of the Act. We likewise have no doubt that the City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion.

The court of appeals also noted that "[w]hile other ways of using Title I funds for the benefit of students in religious schools can be found, these * * * are almost certain to be less effective, more costly, or both" (*id.* at 52a) and remarked that it could understand why the district court and the three-judge court in *PEARL* "struggled to find constitutional justification for a program that apparently has done so much good and little, if any, detectable harm" *(ibid.)*.

The court nevetheless ruled, principally on the authority of *Meek*, that "the Establishment Clause, as it has been interpreted by the Supreme Court * * * con-

stitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise" (App., *infra*, 4a; see *id.* at 36a-39a, 50a-53a). The court of appeals interpreted *Meek* as creating a per se rule that the supervision needed to ensure that public employees do not further a nonpublic school's religious purposes necessarily creates "a constitutionally excessive entanglement of church and state" (*id.* at 36a (footnote omitted)). The court specifically stated that it was not ruling on "the merits of the argument" that the supervision of public school teachers in a nonpublic school need not create an unconstitutional degree of entanglement (*id.* at 33a); it made clear that it simply felt itself to be bound by the dictates of *Meek*. The court of appeals refused to consider the contention that the facts in the record about the actual operation of the New York program demonstrated that public employees can teach in religiously affiliated schools without endangering the values underlying the Establishment Clause; the court stated that this Court in *Meek* "was aware that programs having safeguards like the City's could be devised and might prove sufficient to prevent teachers and counselors from fostering religion" (*id.* at 37a n.16) but had nonetheless ruled that all such programs necessarily violate the Establishment Clause.

THE QUESTION IS SUBSTANTIAL

The court of appeals has invalidated a central feature of the nation's largest, most important, and most successful federal program for improving the education of disadvantaged children. Even though the court had before it an extensive and undisputed factual record, its decision rests not on an assessment of the actual operation of the program at issue but on *a priori* suppositions about the effects of allowing public employees to teach in nonpublic schools. Contrary to the court of ap-

peals, this Court's decisions do not establish a per se rule absolutely forbidding public employees from providing remedial instruction on the premises of religiously oriented schools. Moreover, the facts of this case furnish no basis for concluding that New York City's Title I program fosters a constitutionally impermissible degree of entanglement between church and state or violates the Establishment Clause in any other way. Further review is therefore warranted.

1. "Under the precedents of this Court a [measure] does not contravene the Establishment Clause if it has a secular * * * purpose, if its principal or primary effect neither advances or inhibits religion, and if it does not foster an excessive entanglement with religion." *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980); see, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). There is no question that the Title I program has the secular purpose of providing educational opportunities for disadvantaged children (see App., *infra*, 76a-77a); plaintiffs have so conceded (C.A. Br. 20). It is also clear that the Title I program does not have the principal or primary effect of advancing religion. Title I remedial instruction is provided to all school children, in public and nonpublic schools alike, on an equal basis. See *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 8-9. The undisputed record demonstrates that Title I teachers in New York City's nonpublic religiously oriented schools did not further the religious mission of those schools at any time; they taught secular subjects and there is no evidence that they ever injected religious material into their classes. Of course, the availability of on-premises remedial instruction may have made the religiously oriented schools more attractive to students and their parents than they would otherwise have been, but it is settled that that possibility does not make the program of on-premises instruction suspect under the Establishment Clause. See, *e.g.*, *Board of Education* v. *Allen*,

392 U.S. 236, 242 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 17 (1947).

As the court of appeals explicitly stated (App., *infra*, 38a), the sole basis of its holding was its conclusion that New York City's Title I program brings about excessive entanglement between the government and religiously oriented schools. The court ruled that constitutionally impermissible entanglement results from "the active and extensive surveillance which the City has provided" to ensure that Title I teachers do not aid the religious mission of nonpublic schools (*id.* at 39a).[4] But the only "surveillance" involved in New York City's Title I program is the supervision of public school employees by public education authorities. The City does not conduct any "surveillance" of persons subject to the authority of any nonpublic school (cf. *Lemon*, 403 U.S. at 614-621) or in any way involve itself in the "details of administration" of a religious institution (*id.* at 615, quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 695 (1970) (opinion of Harlan, J.)). The requirements imposed on the nonpublic school by virtue of the fact that instruction takes place on its premises are unambigious and resemble those of other public regulatory programs, such as fire and building safety codes: the nonpublic school must maintain a classroom in a certain condition and must allow supervisors on the premises for unannounced inspections.[5] The City's supervi-

[4] It is at least ironic that the Establishment Clause should be deemed violated for the very reason that scrupulous care has been taken to guard against its violation.

[5] The Title I program involves certain other limited contacts between public employees and nonpublic school personnel—for example, they must discuss scheduling problems and other minor administrative details (see C.A. App. A55, A58) and consult about students' educational needs (see App., *infra*, 12a)—but these contacts would occur even if Title I classes were taught on the premises of public schools. Moreover, consultations about minor administrative concerns are most unlikely ever to implicate religion (see C.A. App. A58), and any public welfare

sion of the Title I teachers, by contrast, covers more facets of their day-to-day performance and may require the supervisors to make subjective judgments. But such supervision does not entangle church and state; it only "entangles" the public education authorities with their own employees.

It is true that one purpose of the supervision is to ensure that Title I teachers do not inject any impermissible religious material into their classes. But public school authorities routinely supervise all of their teachers partly for the purpose of ensuring that they do not improperly impose on their students their personal views on religion or other sensitive subjects. This Court has upheld off-premises remedial instruction, by public school teachers, of classes composed entirely of sectarian school students. *Wolman* v. *Walter*, 433 U.S. 229, 246-248 (1977). There is no justification for the court of appeals' conclusion that the mere fact that such a class is conducted on nonpublic school premises necessarily and inevitably means that the government's supervision of its own employees will involve an "entanglement" with religion.

Meek v. *Pittenger* should not be considered controlling in this case. *Meek* involved a state statute that provided for, among other things, remedial instruction by public school teachers on the premises of nonpublic schools. The Court invalidated this program on entanglement grounds, but its holding rested in significant part on the conclusion that the statute "create[d] a serious potential for divisive conflict over the issue of aid to religion—'entanglement in the broader sense of continuing political strife'" (421 U.S. at 372, quoting *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 794 (1973); see App., *infra*, 94a-95a n.12). This danger was present because state aid to nonpublic school students and state appro-

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agency that deals with a sectarian school student may have occasion to consult with his teachers.

priations for public schools were addressed by separate statutory schemes and considered by the legislature—in an annual appropriations process—independently of each other (see 421 U.S. at 352, 372). As a result, the amount of aid to be provided to nonpublic school students would have been a subject of recurring controversy, creating of repeated confrontation[s] between proponents and opponents of the * * * program [and] * * * political fragmentation and division along religious lines" (*id* at 372). Title I, by contrast, is a single statutory scheme that provides aid to students in both public and nonpublic schools according to a fixed rule of per-student parity. See 20 U.S.C. 3806(a). As a result, Title I does not focus debate on the amount of aid to be given to nonpublic school students. In its nearly 20 years of operation, Title I has not precipitated religious division in the political arena; the court of appeals did not suggest otherwise. The danger of "political entanglement" that was an important basis of the holding in *Meek* therefore does not call into question the validity of any Title I program.

More important, the state program at issue in *Meek* was challenged soon after it was enacted, and the record provided little information on how it was implemented. See App., *infra*, 96a-97a. The Court accordingly did not have an opportunity to determine whether a comparable program could be administered in a way that would prevent excessive entanglement.[6] In this case, however, the Court has before it a record demonstrating that New York City has avoided the dangers identified by the Court in *Meek*.

For example, a premise of the decision in *Meek* was that the remedial instruction would be offered under circumstances "in which an atmosphere dedicated to the

[6] See also *Regan*, 444 U.S. at 661 (*Meek* did not hold "that any aid to even secular education functions of a sectarian school * * * is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities").

advancement of religious belief is constantly maintained" (421 U.S. at 371). By contrast, in *Wolman* v. *Walter*, *supra*, the Court upheld the provision of remedial instruction to sectarian school students by public school teachers when "the services are to be offered under circumstances that reflect their religious neutrality" (433 U.S. at 247). Here, New York has taken care to offer Title I instruction only in circumstances that reflect religious neutrality.

Similarly, in *State ex rel. School District of Hartington* v. *Nebraska State Board of Education*, 188 Neb. 1, 195 N.W. 2d 151, cert. denied, 409 U.S. 921 (1972), the Nebraska Supreme Court upheld a Title I program that provided remedial instruction on the premises of a Catholic high school; Justice Brennan, concurring in the denial of certiorari, explained that "the school district * * * [has] no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses * * * operate completely independently of that curriculum and of the Catholic school administration." 409 U.S. at 926. The record in this case shows that New York City's Title I program operates in the same way.

2. As we have noted, in *School District of the City of Grand Rapids* v. *Ball*, cert. granted, No. 83-990, this Court has agreed to review a question similar to that presented here in the context of a state program that resembles Title I in some, but not all, respects; the parties in *Grand Rapids* agree that there are "important differences" between Title I and the Grand Rapids program (Br. in Opp. 6; see Pet. 26). We have discussed the similarities and differences between the *Grand Rapids* program and Title I in the Brief for the United States as Amicus Curiae in *Grand Rapids* (83-990 U.S. Br. 25-30). As we explain there, a decision by this Court in favor of the parties challenging the state program at issue in *Grand Rapids* will not necessarily re-

solve the constitutionality of Title I instruction of the kind involved here. We believe that this case should be heard by the Court together with Grand Rapids.[7] The two cases will illumine each other and give the Court an opportunity to give comprehensive and informed consideration to the important issues presented by federal and state efforts to improve the education of American children on an across-the-board basis—one that does not discriminate against those who choose to exercise their constitutional right to send their children to religiously oriented schools. More particularly, we believe that there are important considerations that militate in favor of considering this case now on plenary briefs and argument rather than simply holding it for disposition in light of this Court's eventual decision in *Grand Rapids*.

a. The court of appeals' decision strikes down an integral aspect of a large and very important federal education program. It is therefore appropriate for the Court to review the court of appeals' decision without the additional delay that would be occasioned by an order remanding this case for further consideration in light of *Grand Rapids*.

Annual appropriations under Title I are on the order of $3 billion, and over five million students participated in Title I programs in a recent year (C.A. App. A251). As we have noted (see page , *supra*), when Congress

[7] In order to enable the Court to hear *Grand Rapids* without undue delay, we will be prepared to file a brief on the merits in this case by October 15, 1984. This should enable the Court, if it wishes, to hear oral argument in *Grand Rapids* and this case during the December argument session. The Chancellor of the Board of Education of the City of New York and the private defendants who intervened in the district court have also appealed from the judgment of the court of appeals and we are advised that they intend to file jurisdictional statements. We have been authorized to state that they too will be prepared to file briefs by October 15, should the Court wish to consolidate the three appeals.

enacted Title I it was aware that many disadvantaged students attend nonpublic schools, and it was concerned that they not be denied equal benefits because their parents chose to provide them that form of education. As this Court has said about Title I, "[t]he Congress * * * recognized that all children from educationally deprived areas do not necessarily attend the public schools, and * * * since the legislative aim was to provide needed assistance to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act." *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1979) (emphasis in original; footnote omitted).

The public officials whom Congress made responsible for administering the Title I program at issue in this case concluded, after experimenting with alternative programs, that it would be self-defeating to attempt to provide remedial education to nonpublic school students in any way other than on the premises of the nonpublic school. See pages - , *supra*. The record of this case shows—and every court that has considered the record has agreed—that their conclusion was amply justified. The court of appeals itself recognized that as a result of its decision, many students who now receive Title I remedial instruction would no longer be able to do so (see App., *infra*, 4a, 8a, 52a).

The court of appeals' decision has, therefore, frustrated Congress's intentions in a direct way. This Court should review promptly—without a second round of proceedings in the court of appeals—a decision that has such a far-reaching impact and that is so inconsistent with Congress's design. Congress's principal purpose in enacting 28 U.S.C. 1252 (the statute under which we invoke the Court's jurisdiction) was to ensure prompt review by this Court of judicial decisions that affect many persons and frustrate Congress's intentions. See, *e.g.*, *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip op. 11-12 & nn. 14, 16, 19; *McLucas* v.

DeChamplain, 421 U.S. 21, 31 (1975); H.R. Rep. No. 212, 75th Cong., 1st Sess. 2 (1937).[8]

b. The constitutionality of Title I remedial instruction on the premises of religiously oriented schools is a frequently recurring issue that has been before this Court before. See *Wheeler* v. *Barrera*, *supra*; *State ex rel. School District of Hartington* v. *Nebraska State Board of Education*, *supra*. See also *Flast* v. *Cohen*, *supra*; *Committee for Public Education & Religious Liberty* v. *Harris*, appeal dismissed for want of jurisdiction, 448 U.S. 808 (1980). Indeed, in *Wheeler*, the Court granted plenary review of this question, then determined that it was inappropriate to resolve the issue until a specific Title I program was before it. See page , *infra*. Title I programs in Kentucky and Missouri have also been challenged, on Establishment Clause grounds, in cases pending in district courts. *Barnes* v. *Bell*, Civil No. C-80-0501-L(B) (W.D. Ky,. filed Oct. 1, 1980); *Wamble* v. *Bell*, Civil No. 77-0254-CV-W-8 (W.D. Mo. filed Apr. 4, 1977). It seems likely that this important constitutional question, which arises so frequently, will at some point have to be resolved by this Court. This case is a particularly—perhaps uniquely—appropriate one for the Court to review for that purpose. It presents

[8] The sponsor of the bill that became Section 1252 stated that its purpose was to "shut[ ] off a long period of suspense for the litigants in other cases" if a federal statute were declared unconstitutional (81 Cong. Rec. 3254 (1937) (remarks of Rep. Sumners); as we note (page , *infra*), other challenges to Title I programs are now pending. This Court has already held that a challenge to New York City's Title I program had to be brought before a three-judge court convened pursuant to 28 U.S.C. (1970 ed.) 2282—a statute enacted simultaneously with Section 1252 and serving comparable purposes (see page , note 1, supra)—precisely because a decision upholding a "constitutional attack on New York City's federally funded program[ ] * * * would cast sufficient doubt on similar programs elsewhere to cause confusing approaching paralysis to surround the challenged statute." *Flast* v. *Cohen*, 392 U.S. 83, 89-90 (1968).

the Establishment Clause question in the context of a major national program. Moreover, the court of appeals' ruling applies to the largest Title I program in the nation; the remedial education of one-fifth of all the nonpublic school students in the nation who receive Title I services will be affected by the decision in this case (see C.A. App. A32, A251). The issues have been considered by a three-judge court as well as by the district court and court of appeals below.

Perhaps more important, the record in this case provides a detailed—and essentially undisputed—portrait of the operation of an on-premises instructional program over a period of more than 15 years. In *Wheeler* v. *Barrera*, *supra*, this Court, after granting certiorari on the question of the constitutionality of on-premises Title I instruction, declined to resolve the issue in part precisely because it lacked concrete facts about the operation of any particular program (417 U.S. at 426):

> [If] on-the-premises parochial school instruction [is provided], * * * the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated. For example, a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week. At this time we intimate no view as to the Establishment Clause effect of any particular program.
>
> The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. See, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971). It would be wholly inappropriate for us to attempt to render an

.....

> opinion on the First Amendment issue when no specific plan is before us.

In this case, the Court has before it not only a specific plan but a detailed record of how that plan was implemented over an extended period.

In general, the Court's decisions under the "entanglement" branch of Establishment Clause analysis rest on empirical judgments about several issues: how public employees will perform on the premises of religiously oriented schools; what means are available to education officials in their efforts to supervise teachers; how willing officials are to provide, and teachers are to accept, the necessary supervision; and whether these must be extensive and problematic dealings between public authorities and the nonpublic schools whose students are aided by the public program. The record in this case provides the Court with an unusually complete basis for making these empirical judgments.

c. Finally, the nature of adjudication under the Establishment Clause in cases involving aid to nonpublic school students makes it particularly appropriate for the Court to consider this case in tandem with *Grand Rapids*. As the Court has frequently noted, in this area the law must be particularly sensitive to the specific facts of the program at issue, and doctrine develops on a case-by-case basis, not in broad strokes. See, *e.g.*, *Lemon*, 403 U.S. at 624-625; *Regan*, 444 U.S. at 662; *Nyquist*, 413 U.S. 756, 761 & n.5 (1973).

By considering this case and *Grand Rapids* together, the Court will be afforded a more complete view of the "range of possibilities" (*Wheeler*, 417 U.S. at 426) of on-premises remedial instruction. As a result, the Court will be able to make its decision on the basis of greater information and will be able to provide more complete guidance to lower courts concerning which aspects of a program are significant and how far the principles of decision should extend. By contrast, a decision in *Grand Rapids* alone may leave unresolved the constitutional questions that the court of appeals' decision

raises about the program that has been challenged in this case.

CONCLUSION

Probable jurisdiction should be noted. We ask that the Court schedule the case for oral argument in tandem with No. 83-990, *School District of the City of Grand Rapids* v. *Ball*, and we are prepared to file our brief on the merits on an an accelerated basis to the end that this may be done without undue delay.[9]

Respectfully submitted.

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AUGUST 1984

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[9] As we explained (see page , note, *supra*), all of the parties appealing from the court of appeals' decision are prepared to file a brief by October 15, 1984, in time to allow the Court to hear oral argument on this case (and *Grand Rapids*) during the December argument session.

U.S. Department of Justice
Office of the Deputy Attorney General

8/17

To: John Roberts

From: Roger Clegg

Attached is some background information on the crime legislation. The main purpose of this document is to explain what the House is and isn't doing, and what the Department thinks of what it is and isn't doing.

Our public affairs people are sending this to your public affairs people, and Tex is sending a copy to Ciccóni.

POINTS TO MAKE IN DISCUSSING CRIMINAL LAW REFORM EFFORTS

First, as to the progress of criminal law reform in both houses, the Senate has acted, but the House has not. The Senate has passed a comprehensive, 46-part crime package by the overwhelmingly vote of 91 to 1. It has also passed by wide margins separate bills dealing with habeas corpus, the exclusionary rule, and capital punishment. The Administration strongly supports each of these bills. Meanwhile, in the House, the leadership has taken a piecemeal approach that so far has been unproductive, and in some respects counterproductive.

Second, given recent polls showing that crime ranks among the foremost concerns of American voters, it is no wonder that the Speaker of the House and the Chairman of the House Judiciary Committee have finally agreed to process several of the bills that have been stuck for months at the committee stage. These include House proposals on bail, sentencing, forfeiture, drug diversion, foreign currency transactions, and the insanity defense. The issues raised by these proposals deserve the fullest debate on the House floor. Debate should not be cut short by parliamentary techniques.

Third, the remarkable fact is, however, that the leadership desires to process only these 6 items. There are no fewer than 27 items upon which the House has yet to act this year, and which evidently the leadership believes can continue to sit in committee in-boxes. These include amendments concerning labor racketeering, violent crime, serious non-violent offenses, and various procedural issues. They also include habeas corpus, the exclusionary rule, and capital punishment. Reform of the federal criminal laws should be comprehensive, covering all of the laws in need of repair. The urgency is for the House to process each and every proposal, and to consider, as the Senate has, every area of the law where criminals now prosper at the expense of society.

Fourth, as to the substance of legislation under active consideration in the House, a few proposals parallel the ones passed by the Senate and do promise to achieve significant reform. One of these, for example, is the proposal on forfeiture. Most of the proposals under consideration would, however, fall short of accomplishing the necessary reform. And some would be counterproductive -- they would only worsen the imbalance in the law that currently favors the rights of criminals over those of their victims and society.

One of these is the sentencing bill reported by the House Judiciary Committee. The basic problem is that this bill would weaken the sanctions of the current system. For example, it would retain a parole system, facilitating release of felons long before they finish serving their time. Also, it would make sentencing more lenient by, among other things, sharply limiting sentences for persons convicted of multiple offenses. Too, it

would make guidelines less binding upon the sentencing judge. Further, it would allow defendants to harrass victims by giving them the right to subpoena witnesses. The bill would also allow defendants with previous felony convictions to deny that such convictions ever occurred. In its current form, the House sentencing bill would have to be considered not reform, but anti-reform. The sentencing provision in the Senate's comprehensive crime package, by contrast, constitutes authentic reform, and it deserves full consideration in the House.

Fifth, finally, and obviously, there can be no criminal law reform until the House of Representatives finally does act. Yet it is not just action of any kind that is needed. Reform worthy of the name must be comprehensive in scope and must address the serious defects in our federal criminal law. The American people deserve nothing less than the best efforts of both houses of Congress.