

**UNCONSTITUTIONAL MIXING OF RELIGION AND THE
JUDICIARY: AN ANALYSIS OF THE FUGITIVE SAFE
SURRENDER PROGRAM UNDER ESTABLISHMENT CLAUSE
JURISPRUDENCE**

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*Fugitive safe surrender is a program of the United States Marshals Service, in partnership with public, private, and faith-based organizations, which temporarily transforms a church into a courthouse, so fugitives can turn themselves in, in an atmosphere where they feel more comfortable to do so, and have nonviolent cases adjudicated immediately.*¹

I. INTRODUCTION

In an effort to bolster public safety and capture fugitives, U.S. Marshal for the Northern District of Ohio Peter Elliot created an innovative program called Fugitive Safe Surrender.² This program “temporarily transforms a church into a courthouse, so fugitives can turn themselves in, in an atmosphere where they feel more comfortable to do so.”³ Elliot thought that fugitives would feel more comfortable surrendering at a church because it provides a safe environ-

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¹ Fugitive Safe Surrender Act, 42 U.S.C.A. § 16989(a)(1) (West Supp. 2007) (emphasis added).

² Press Release, U.S. Marshals Service, Cleveland U.S. Marshal Named “Top Cop” of the United States (Mar. 28, 2007), *available at* <http://www.usmarshals.gov/news/chron/2007/032807.htm> [hereinafter March 28, 2007, U.S. Marshals Press Release]; *see also* U.S. Marshals Service, Fugitive Safe Surrender, <http://www.usmarshals.gov/safesurrender/index.html> (last visited Mar. 7, 2008) [hereinafter Fugitive Safe Surrender: Overview].

³ 42 U.S.C.A. § 16989(a)(1).

ment that is not associated with violence.⁴ The pilot program in Cleveland, Ohio, produced successful results, as over 800 fugitives surrendered over a four-day period.⁵ Based on the pilot program's success, the U.S. Marshals Service revealed its plan to implement the program nationally,⁶ and identical bills were introduced into the House and Senate to provide federal funding for this innovative program.⁷ The bills were passed as part of the Adam Walsh Child Protection and Safety Act and provided federal funding to the U.S. Marshals Service for any state implementing the program between 2007 and 2009.⁸

While the goal of the program is commendable, it raises serious issues under the Establishment Clause of the First Amendment, which prohibits Congress from making any law that respects an establishment of religion.⁹ The program is constitutionally suspect because it does not adhere to the separation of church and state doctrine.

The Supreme Court first examined separation of church and state in *Everson v. Board of Education of the Township of Ewing*¹⁰ and embraced strict separation of the two. Justice Black, writing for the majority, explained,

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or prac-

⁴ Phil Trexler, *Inspiration Delivers Fugitives to Church: U.S. Marshal Gets Idea for Surrender Program*, AKRON BEACON JOURNAL (Ohio), Apr. 2, 2007, at AK-0402.

⁵ Press Release, U.S. Dep't of Justice, Fugitive Safe Surrender Succeeds (Aug. 8, 2005), available at <http://www.usmarshals.gov/district/oh-n/news/chron/2005/080805.htm> [hereinafter Aug. 8, 2005, DOJ Press Release].

⁶ U.S. Marshals Service, Fugitive Safe Surrender: Future Expansion, <http://www.usmarshals.gov/safesurrender/expansion.html> (last visited Mar. 7, 2008) [hereinafter Fugitive Safe Surrender: Future Expansion].

⁷ H.R. 5459, 109th Cong. (2006); S. 2570, 109th Cong. (2006).

⁸ Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, § 632, 120 Stat. 587, 641-42 (2006) (Fugitive Safe Surrender Act codified at 42 U.S.C.A. § 16989 (West Supp. 2007)).

⁹ U.S. CONST. amend. I.

¹⁰ 330 U.S. 1 (1947).

tice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”¹¹

Over the past sixty years, Establishment Clause jurisprudence has evolved and become increasingly complex.¹² However, the Supreme Court has provided guidelines for analyzing claims of Establishment Clause violations in the form of three tests: the *Lemon* test,¹³ the endorsement test,¹⁴ and the coercion test.¹⁵

This Comment argues that Fugitive Safe Surrender violates the Establishment Clause under current jurisprudence and that the program should be offered in a non-sectarian environment so that its tremendous benefits may be obtained through constitutional means. Part II discusses the creation and funding of the program, its implementation in two different cities, and President Bush’s faith-based initiative, which demonstrates his desire to allow programs of this nature. Part III discusses the three main tests under Establishment Clause jurisprudence and analyzes Fugitive Safe Surrender according to those tests. Additionally, Part III discusses how those tests have evolved and the role of public policy in Establishment Clause decisions. Finally, Part IV proposes reform for the program with an eye toward maintaining separation of church and state.

II. THE CREATION OF THE FUGITIVE SAFE SURRENDER PROGRAM

The concept of the church as a refuge for fugitives is not new. Historically, sanctuaries served as places of refuge where fugitives were safe from the penalties of the law.¹⁶ This concept was so accepted that it was considered sacrilegious to commence violence in these safe havens or to forcibly remove an individual from them.¹⁷ In

¹¹ *Id.* at 15–16 (citation omitted).

¹² The split decisions in most recent Supreme Court cases dealing with Establishment Clause violations demonstrate the different views held by the Justices. *See generally* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000). In addition, these cases demonstrate that no test or factor has been established as the sole test to use in Establishment Clause cases but instead that several considerations are considered under many levels of different tests.

¹³ *See* *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

¹⁴ *See* *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring).

¹⁵ *See* *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

¹⁶ THE COLUMBIA ENCYCLOPEDIA 2501 (6th ed. 2007).

¹⁷ *Id.*

Egypt and Greece, temples enjoyed this hallowed status, and in Rome, Christian churches were chosen as sanctuaries by Constantine I.¹⁸ In medieval law, churches maintained sanctuary status, and felons obtained a religious right of asylum should they safely reach such a destination.¹⁹ English law recognized churches and temples as sanctuaries from the Fourth to the Seventeenth century, and once inside, fugitives enjoyed the right to be safe from arrest.²⁰ When abuses of sanctuaries began to encourage crime, the notion of a safe haven was abolished, and modern penal codes no longer recognize this right to asylum for fugitives.²¹

Today, the concept of the church as a sanctuary has resurfaced in the form of the Fugitive Safe Surrender program, created by Peter Elliot, U.S. Marshal for the Northern District of Ohio.²² The U.S. Marshals Service intends to implement the program nationally by 2009.²³ The program “temporarily transforms a church into a courthouse”²⁴ by placing state judges in churches to adjudicate non-violent

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ *Id.*

²¹ *Id.*

²² March 28, 2007, U.S. Marshals Press Release, *supra* note 2.

²³ 42 U.S.C.A. § 16989(a)(4), (c) (West Supp. 2007).

²⁴ The Fugitive Safe Surrender Act reads in full:

(a) Findings. Congress finds the following:

(1) Fugitive Safe Surrender is a program of the United States Marshals Service, in partnership with public, private, and faith-based organizations, which temporarily transforms a church into a courthouse, so fugitives can turn themselves in, in an atmosphere where they feel more comfortable to do so, and have nonviolent cases adjudicated immediately.

(2) In the 4-day pilot program in Cleveland, Ohio, over 800 fugitives turned themselves in. By contrast, a successful Fugitive Task Force sweep, conducted for 3 days after Fugitive Safe Surrender, resulted in the arrest of 65 individuals.

(3) Fugitive Safe Surrender is safer for defendants, law enforcement, and innocent bystanders than needing to conduct a sweep.

(4) Based upon the success of the pilot program, Fugitive Safe Surrender should be expanded to other cities throughout the United States.

(b) Establishment. The United States Marshals Service shall establish, direct, and coordinate a program (to be known as the “Fugitive Safe Surrender Program”), under which the United States Marshals Service shall apprehend Federal, State, and local fugitives in a safe, secure, and peaceful manner to be coordinated with law enforcement and community leaders in designated cities throughout the United States.

cases in which the fugitives have no history of violence.²⁵ Elliot and other promoters of the program, such as U.S. Marshal for Arizona David Gonzales, emphatically claim that the program is not an amnesty program.²⁶ However, the fugitives do receive “favorable consideration” for surrendering.²⁷ This includes release without bail, quashed warrants, and lesser penalties at sentencing.²⁸ The adjudication that takes place at the church includes meeting with judges, public defenders, and prosecutors; conducting arraignments, plea agreements, and bond hearings; and setting dates for sentencing.²⁹ Finally, some of the programs have involved the use of priests acting as advocates for the fugitives.³⁰

Elliot believes this program will benefit both the fugitives and the community by providing an environment where fugitives feel comfortable surrendering and by keeping fugitive arrests off the streets.³¹ In a recent interview, Elliot stressed the effectiveness of comfort and trust as motivating factors for surrendering:

I’ve been in law enforcement 24 years and I didn’t feel the community trusted police for the most part. I felt the community

(c) Authorization of Appropriations. There are authorized to be appropriated to the United States Marshals Service to carry out this section—

- (1) \$3,000,000 for fiscal year 2007;
- (2) \$5,000,000 for fiscal year 2008; and
- (3) \$8,000,000 for fiscal year 2009.

(d) Other Existing Applicable Law. Nothing in this section shall be construed to limit any existing authority under any other provision of Federal or State law for law enforcement agencies to locate or apprehend fugitives through task forces or any other means.

42 U.S.C.A. § 16989.

²⁵ See Troy Graham, *High Court Blocks Plan for Camden Fugitives: The Chief Justice, Citing Credibility and Safety, Won’t Let Judges Take Part in a Program for Criminals to Surrender in a Church*, PHIL. INQ., Jul. 18, 2006, at B1.

²⁶ Dennis Wagner & Lindsey Collom, *Fugitives Answer Call to Surrender: Program Gives Suspects Chance for “Favorable Consideration”*, USA TODAY, Nov. 16, 2006, at 3A.

²⁷ U.S. Marshals, *Fugitive Safe Surrender, Frequently Asked Questions*, <http://www.usmarshals.gov/safesurrender/faqs.html> (last visited Mar. 13, 2008) [hereinafter *Fugitive Safe Surrender: FAQ*].

²⁸ See Dennis Wagner, *Arizona Fugitives Will Get to Surrender—In Church*, ARIZ. REPUBLIC, Jan. 14, 2006, at 1A; Wagner & Collom, *supra* note 26; WKYC News, *Fugitive Safe Surrender: 33-Year-Old Man Becomes First to Turn Himself In* (July 25, 2005), http://www.wkyc.com/news/news_fullstory.asp?id=38380.

²⁹ See Wagner, *supra* note 28; Wagner & Collom, *supra* note 26; WKYC News, *supra* note 28.

³⁰ See Dick Russ, WKYC News, *Fugitive Safe Surrender: Fugitives on Run Given Chance to Peacefully Turn Themselves In* (July 23, 2005), http://www.wkyc.com/news/news_fullstory.asp?id=38311.

³¹ Trexler, *supra* note 4.

trusted their minister the most. The minister is the one who is there at birth, at marriages and at burials. They're with the people every day, building trust. So I thought we could bring the whole justice center and put it in a church and let the minister be the advocate for the program and allow these people to surrender in a comfortable environment.³²

Several cities have already completed the four-day program, including Cleveland, Ohio (pilot program); Phoenix, Arizona; Washington, D.C.; Indianapolis, Indiana; Akron, Ohio; Memphis, Tennessee; and Nashville, Tennessee.³³ In addition, many other cities have indicated their desire to launch the program in the near future, including Atlanta, Georgia; Camden, New Jersey;³⁴ Columbia, South Carolina; Dallas, Texas; Detroit, Michigan; Pittsburgh, Pennsylvania; Scranton, Pennsylvania; Richmond, Virginia; Rochester, New York; and Syracuse, New York.³⁵

A. *Fugitive Safe Surrender Legislation*

Congresswoman Stephanie Tubbs Jones (Ohio) and Senator Mike DeWine (Ohio) introduced identical bills into the House and Senate to authorize funding for the program.³⁶ President Bush signed the bill into law on July 27, 2006, as part of the Adam Walsh Child Protection and Safety Act.³⁷ The bill allocates federal funding to the U.S. Marshals Service in cities implementing the Fugitive Safe Surrender program and provides \$3 million for fiscal year 2007, \$5 million for fiscal year 2008, and \$8 million for fiscal year 2009.³⁸ The

³² *Id.*

³³ Fugitive Safe Surrender: Overview, *supra* note 2.

³⁴ Deborah Poritz, former Chief Justice of the Supreme Court of New Jersey, vehemently opposed the program and refused to allow state judges to participate in it. *See* Graham, *supra* note 25. The program relies on participation by state judges because the fugitives involved have outstanding warrants issued by the state for state crimes. *See id.* Poritz expressed two main concerns about the program: separation of church and state and neutrality. *Id.* She was primarily concerned with what she believed to be a disregard for separation of church and state. *Id.* Secondly, she asserted the importance of neutrality for courts and that participation by state judges would seem like the courts were working for law enforcement and the prosecution. *Id.*

³⁵ Fugitive Safe Surrender: Future Expansion, *supra* note 6.

³⁶ H.R. 5459, 109th Cong. (2006); S. 2570, 109th Cong. (2006).

³⁷ Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, § 632, 120 Stat. 587, 641-42 (2006) (Fugitive Safe Surrender Act codified at 42 U.S.C.A. § 16989 (West Supp. 2007)).

³⁸ 42 U.S.C.A. § 16989(c)(1)-(3) (West Supp. 2007).

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bill also states that the program should expand and eventually become a national program.³⁹

Remarkably, the plain language of the bill, which entangles law enforcement efforts, judicial responsibilities, and churches, reads:

(a) Findings. Congress finds the following:

(1) Fugitive Safe Surrender is a program of the United States Marshals Service, in partnership with public, private, and faith-based organizations, which temporarily transforms a church into a courthouse, so fugitives can turn themselves in, in an atmosphere where they feel more comfortable to do so, and have nonviolent cases adjudicated immediately.⁴⁰

The program has received tremendous support in general,⁴¹ and the bill easily passed in both the House and the Senate.⁴²

*B. The Fugitive Safe Surrender Programs in Cleveland and Phoenix*⁴³

Mount Sinai Baptist Church in Cleveland, Ohio, was the site for the pilot of Fugitive Safe Surrender.⁴⁴ On August 3–6, 2005, fugitives were encouraged to voluntarily surrender themselves at church with a rare opportunity to receive a “first and most crucial step toward community re-entry.”⁴⁵ Radio, television, and outdoor companies provided billboard space and airtime to promote the program and to inform fugitives about the opportunity.⁴⁶ In addition, volunteers posted and distributed more than three thousand fliers in the target area and sent over two thousand mailers to fugitives’ last known addresses.⁴⁷ Fugitives and their families could also call a toll-free hot-

³⁹ *Id.* § 16989(a)(4).

⁴⁰ *Id.* § 16989(a)(1).

⁴¹ See Bruce Wilson, New National Program to “Temporarily Transform Churches into Courthouses,” *Talk to Action* (Oct. 29, 2006), <http://www.talk2action.org/story/2006/10/29/05334/588> (last visited Apr. 2, 2008).

⁴² *Tubbs Jones Announces Passage of Fugitive Safe Surrender Act as Part of Adam Walsh Child Protection and Safety Act of 2006*, PR NEWswire, Aug. 15, 2006.

⁴³ Cleveland and Phoenix were the sites for the first two programs. See U.S. Marshals, Fugitive Safe Surrender, Phoenix, Arizona, <http://www.usmarshals.gov/safesurrender/phoenix.htm> (last visited March 13, 2008).

⁴⁴ See Kristin Anderson, WKYC News, Fugitive Safe Surrender: Cleveland Church Gets Ready to Become Courtroom (July 24, 2005), http://www.wkyc.com/news/news_fullstory.asp?id=38349.

⁴⁵ Fugitive Safe Surrender: Overview, *supra* note 2.

⁴⁶ Press Release, U.S. Marshals Service, First-of-Its-Kind Program Gives Felony Fugitives Incentive to Surrender (July 26, 2005), available at <http://www.usmarshals.gov/district/oh-n/news/chron/2005/072605.htm>.

⁴⁷ *Id.*

line for more information.⁴⁸ Promoters advertised the program as a community re-entry opportunity mainly for felons that had no history of violence.⁴⁹ While indicating that the program was not an amnesty program, promotions and advertisements stated that the fugitives who participated would receive “favorable consideration” for taking advantage of the voluntary surrender opportunity and that the church was a safe place for these fugitives to surrender.⁵⁰

One of the fugitives who participated was a thirty-three-year-old man whose case was heard in the pastor’s office by Judge Janet Burnside.⁵¹ Judge Burnside provided favorable consideration by dropping one felony charge in exchange for a guilty plea to a different felony charge.⁵² The judge released the man on his signature and scheduled sentencing for the following month.⁵³

Public defenders assisted those who showed up at the church, and non-profit organizations provided family counseling and child-care services.⁵⁴ A total of 842 fugitives surrendered during the four-day pilot program, including 324 wanted for felony crimes.⁵⁵ Although the program targeted felons wanted for nonviolent crimes with no history of violence, it provided assistance to anyone with an outstanding warrant.⁵⁶ The city planned a fugitive sweep to commence immediately following termination of the pilot program, with the intention of capturing fugitives choosing not to participate in the program.⁵⁷ The city would not provide favorable consideration to the fugitives captured by the sweep the way it did to those taking advantage of the program.⁵⁸ The success of the pilot program led the U.S. Marshals Service to announce its goal to implement the program nationally.⁵⁹

Pilgrim Rest Baptist Church, in Phoenix, Arizona, was the site for the next launch of Fugitive Safe Surrender on November 15–18,

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ WKYC News, *supra* note 28.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Wagner, *supra* note 28.

⁵⁵ Aug. 8, 2005, DOJ Press Release, *supra* note 5.

⁵⁶ See Fugitive Safe Surrender: Overview, *supra* note 2; Aug. 8, 2005, DOJ Press Release, *supra* note 5.

⁵⁷ Anderson, *supra* note 44.

⁵⁸ *Id.*

⁵⁹ Fugitive Safe Surrender: Future Expansion, *supra* note 6.

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2006.⁶⁰ Promoters advertised the Phoenix program the same way as the Cleveland pilot program and also aired public service announcements featuring NBA star Shaquille O'Neal and Arizona Republican Senators John McCain and Jon Kyl.⁶¹ Again, fugitives who surrendered met with public defenders and Superior Court judges.⁶² One hundred twenty fugitives surrendered during the first four hours of the program.⁶³ These fugitives were wanted for crimes such as drunken driving, disorderly conduct, failure to pay fines, and probation violations.⁶⁴ In all, 1300 fugitives surrendered during the four-day program in Phoenix.⁶⁵ U.S. Marshal for Arizona David Gonzales stated that fugitives would receive favorable consideration for participating, which "means they may be released without bail after appearing at the church and may be given leniency later at sentencing."⁶⁶ One of the fugitives in the Phoenix program was a thirty-two-year-old man wanted for DUI, probation violation, and failure to appear in court.⁶⁷ He had one of his warrants quashed and was free to leave after the proceedings.⁶⁸ The Phoenix program received a \$600,000 Federal Office of Justice Program grant for assembly and operation, but Gonzales only expected it to cost approximately \$75,000.⁶⁹ In an effort to publicize the program, the Maricopa County Superior Court issued an administrative order to allow more media coverage.⁷⁰ The order lifted the forty-eight-hour advance notice requirement for submitting a video-camera-in-the-courtroom request for any proceeding that was part of the Fugitive Safe Surrender Program.⁷¹

⁶⁰ Press Release, U.S. Dep't of Justice, Over 1,300 Fugitives Surrender to U.S. Marshals at Church Site (Nov. 21, 2006), *available at* <http://www.usmarshals.gov/safesurrender/news/112106.htm> [hereinafter Nov. 21, 2006, DOJ Press Release].

⁶¹ Wagner, *supra* note 28.

⁶² Jerry Seper, *1,300 Fugitives Give Up in Phoenix: Operation Seeks to Reduce Risk*, WASH. TIMES, Nov. 23, 2006, at A4; *see also* Nov. 21, 2006, DOJ Press Release, *supra* note 60.

⁶³ Wagner & Collom, *supra* note 26.

⁶⁴ *Id.*

⁶⁵ Seper, *supra* note 62.

⁶⁶ Wagner, *supra* note 28.

⁶⁷ Wagner & Collom, *supra* note 26.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ In the Matter of Cameras in Courtrooms for Fugitive Safe Surrender, Admin. Order No. 2006-130 (Nov. 15, 2006), *available at* <http://www.superiorcourt.maricopa.gov/SuperiorCourt/AdministrativeOrders/2006.asp>.

⁷¹ *Id.*

C. *President Bush's Faith-Based Initiative*

Debate over federal funding for programs taking place in religious institutions is nothing new. Appropriation of federal funds for use in churches has steadily increased since President George W. Bush announced his faith-based initiative. During the second week of his term, President Bush announced that promoting faith-based organizations would be one of his foremost legislative priorities.⁷²

The relationship between government and faith-based organizations has always been delicate. In 1996, Congress attempted to regulate this relationship by creating Charitable Choice.⁷³ Charitable Choice was part of the Welfare Reform Act of 1996 and was designed to place religious institutions on equal footing with nonreligious institutions regarding government funding for social services.⁷⁴ In addition, Charitable Choice provided that faith-based organizations could not be required to alter their religious character in order to participate in government-funded programs.⁷⁵

Bush's faith-based initiative was his attempt to advance and enforce Charitable Choice.⁷⁶ Pursuant to his initiative, President Bush established the White House Office of Faith-Based and Community Initiatives.⁷⁷ The goal of the agency was to eliminate obstacles that faith-based organizations faced in receiving federal funding for the provision of social services.⁷⁸ The agency succeeded in achieving its goal as the amount of federal funding to faith-based organizations increased dramatically.⁷⁹ Fugitive Safe Surrender requires that faith-based organizations receive federal funding in order to provide social services to the fugitives who surrender.⁸⁰ Therefore, this program falls under the umbrella of President Bush's faith-based initiative.

⁷² Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 2 (2005); Jill Goldenziel, Note, *Administratively Quirky, Constitutionally Murky: The Bush Faith-Based Initiative*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 359, 361 (2004).

⁷³ Goldenziel, *supra* note 72, at 360 (citing Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. § 604a (2000)).

⁷⁴ *Id.*; 42 U.S.C. § 604a(b) (2000).

⁷⁵ Goldenziel, *supra* note 72, at 361 (citing 42 U.S.C. § 604a(d) (2000)).

⁷⁶ See Exec. Order No. 13279, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Goldenziel, *supra* note 72, at 364.

⁸⁰ 42 U.S.C.A. § 16989(c) (West Supp. 2007).

III. FUGITIVE SAFE SURRENDER UNDER ESTABLISHMENT CLAUSE JURISPRUDENCE

The Establishment Clause of the First Amendment of the United States Constitution provides that “Congress shall make no law respecting an establishment of religion”⁸¹ The Establishment Clause was intended to afford protection from three main concerns: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”⁸² While Establishment Clause jurisprudence has evolved and become increasingly ambiguous,⁸³ courts still look at three tests as the guideposts in Establishment Clause cases:⁸⁴ the *Lemon* test,⁸⁵ the endorsement test,⁸⁶ and the coercion test.⁸⁷ Courts “are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them.”⁸⁸ Therefore, an analysis of Fugitive Safe Surrender under Establishment Clause jurisprudence must address these three tests.

A. *Lemon Test*

Despite heavy criticism, the *Lemon* test has never been overruled and has consistently been used as the appropriate starting point to analyze any program under the Establishment Clause.⁸⁹ Most courts still use the *Lemon* test, or some variation of it, as the main test to determine claims of Establishment Clause violations, particularly with cases involving federal aid to sectarian organizations for secular services.⁹⁰ The *Lemon* test derived from *Lemon v. Kurtzman*,⁹¹ in which

⁸¹ U.S. CONST. amend. I.

⁸² *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

⁸³ See *supra* note 12 and accompanying text.

⁸⁴ See generally *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (analyzing principles from all three tests to invalidate the school district’s policy of permitting student led prayers before high school football games); *Newdow v. U.S. Cong.*, 328 F.3d 466, 485–87 (9th Cir. 2002) (explaining that the *Lemon* test, endorsement test, and coercion test are the three tests that the Supreme Court uses to analyze alleged Establishment Clause violations).

⁸⁵ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁸⁶ See *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O’Connor, J., concurring).

⁸⁷ See *Lee v. Weisman*, 505 U.S. 577 (1992).

⁸⁸ *Newdow*, 328 F.3d at 487.

⁸⁹ See *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006).

⁹⁰ See *Lambeth v. Bd. of Comm’rs*, 407 F.3d 266, 268–69 (4th Cir. 2005); *Mellen v. Bunting*, 327 F.3d 355, 370–71 (4th Cir. 2003) (endorsing the *Lemon* test as the proper test for analyzing Establishment Clause issues, and incorporating the endorsement and coercion tests into the *Lemon* test as part of the second prong analysis); *Gray v. Johnson*, 436 F. Supp. 2d 795, 799 (W.D. Va. 2006).

⁹¹ 403 U.S. 602 (1971).

the Supreme Court analyzed two state statutes that provided state aid to church-related elementary and secondary schools and teachers for secular instruction.⁹² The Rhode Island statute provided for annual salary supplements, up to fifteen percent, to teachers of secular subjects in nonpublic elementary schools.⁹³ The Pennsylvania statute provided for state reimbursement of nonpublic elementary and secondary schools for costs of teachers' salaries, textbooks, and instructional materials in specified secular subjects.⁹⁴ The Court in *Lemon* established a three-prong test to analyze Establishment Clause claims: the purpose prong, the effect prong, and the entanglement prong.⁹⁵ Violations of a single prong under the *Lemon* test means a government action is unconstitutional.⁹⁶

1. The Purpose Prong

The first prong of the *Lemon* test, the purpose prong, mandates that the statute or program in question have a secular purpose.⁹⁷ This prong is not satisfied by the mere existence of a secular purpose if the program is dominated by religious purposes.⁹⁸ Under the purpose prong of the test, a court must ascertain "whether government's actual purpose is to endorse or disapprove of religion."⁹⁹ In order to determine the purpose of a program, and thus to determine its secularity, courts look at the face of the statute at issue,¹⁰⁰ as well as at the legislative history.¹⁰¹ As Justice O'Connor explained, courts look to the true governmental purpose, rather than just giving deference to a pretextual purpose.¹⁰² While Justice O'Connor recognized that "[i]t is of course possible that a legislature will enunciate a sham secular purpose," she confidently proclaimed that "our courts are capable of distinguishing a sham secular purpose from a sincere one"¹⁰³

⁹² *Id.* at 607–11.

⁹³ *Id.* at 607.

⁹⁴ *Id.* at 609.

⁹⁵ *Id.* at 612–13.

⁹⁶ See *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) ("State action violates the Establishment Clause if it fails to satisfy any of [the *Lemon*] prongs.").

⁹⁷ *Lemon*, 403 U.S. at 612.

⁹⁸ See *Stone v. Graham*, 449 U.S. 39, 41 (1980).

⁹⁹ *Edwards*, 482 U.S. at 585 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

¹⁰⁰ See *Lemon*, 403 U.S. at 613.

¹⁰¹ *Larson v. Valente*, 456 U.S. 228, 254 n.100 (1982).

¹⁰² See *Wallace v. Jaffree*, 472 U.S. 38, 75–76 (1985) (O'Connor, J., concurring).

¹⁰³ *Id.* at 75.

Fugitive Safe Surrender is driven by a secular purpose: to provide fugitives a comfortable and safe place to surrender and to keep arrests off the streets.¹⁰⁴ While the language on the face of the Act about transforming a church into a courthouse could intimate a religious purpose, the Act further states that its goal is to provide fugitives with a comfortable atmosphere for surrender.¹⁰⁵ Moreover, the thin legislative history includes a speech by Senator DeWine, which reinforces that the purpose of the program is to bolster public safety by motivating fugitives to submit and keeping fugitive arrests off of the streets.¹⁰⁶ Thus, there is insufficient evidence to argue a sham purpose. Therefore, the program does not violate the first prong of the *Lemon* test.

2. The Effect Prong

The second prong of the *Lemon* test, the effect prong, requires that the “principal or primary effect [of the program] . . . neither advances nor inhibits religion.”¹⁰⁷ The inquiry is not whether the intent behind the program is to inhibit or advance religion, but whether the program has that effect regardless of intent.¹⁰⁸

The effect prong of the *Lemon* test has evolved and emerged as the primary focus of cases involving governmental funding of secular services provided by sectarian organizations.¹⁰⁹ In *Agostini v. Felton*,¹¹⁰ the Court expanded the analysis under the effect prong of the *Lemon* test in order to analyze governmental aid that was given to sectarian schools.¹¹¹ The Court also examined entanglement as part of this expanded analysis, rather than considering it as an independent prong under the *Lemon* test.¹¹² While the underlying question of the effect prong—whether religion is actually advanced or inhibited—remains fairly simple, *Agostini* made the framework much more complex by creating a new test subsumed within the effect prong of the *Lemon* test.¹¹³ The *Agostini* Court explained that, for determining whether

¹⁰⁴ See Fugitive Safe Surrender: Overview, *supra* note 2.

¹⁰⁵ 42 U.S.C.A. § 16989(a) (1) (West Supp. 2007).

¹⁰⁶ 152 CONG. REC. S3231, 3231 (daily ed. Apr. 6, 2006) (statement of Sen. DeWine).

¹⁰⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

¹⁰⁸ See *Wallace*, 472 U.S. at 56 (internal quotations omitted).

¹⁰⁹ See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997).

¹¹⁰ 521 U.S. 203 (1997).

¹¹¹ *Id.* at 234–35.

¹¹² *Id.* at 232–35.

¹¹³ *Id.*

governmental aid provided to sectarian organizations for secular services has the effect of advancing or inhibiting religion, a court must use a three-part inquiry: whether the government aid (1) “result[s] in governmental indoctrination,” (2) “define[s] its recipients by reference to religion,” or (3) “create[s] an excessive entanglement.”¹¹⁴

a. Government Indoctrination

Agostini's first criterion, determining whether the government aid results in governmental indoctrination, is “a question whether any religious indoctrination that occurs . . . could reasonably be attributed to governmental action.”¹¹⁵ The Court places most of the emphasis on neutrality in its attempt to discern religious indoctrination that can be attributed to governmental action.¹¹⁶ The Court explained that “[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”¹¹⁷ While acknowledging that neutrality is an integral part of the analysis under this first *Agostini* criterion, Justice O'Connor expressed her concern that the Court placed too much emphasis on this one factor, thus making it “a single and sufficient test for the establishment constitutionality.”¹¹⁸ Even prior to *Agostini*, the Court began to lean heavily on the neutrality analysis, giving it more weight than other Establishment Clause concerns.¹¹⁹

As part of the neutrality analysis, a court should consider whether the government aid is provided to the sectarian organizations “as a

¹¹⁴ *Id.* at 234.

¹¹⁵ *Mitchell v. Helms*, 530 U.S. 793, 809 (2000).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 838 (O'Connor, J., concurring) (quoting *id.* at 900 (Souter, J., dissenting)).

¹¹⁹ See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988). *Bowen* involved a claim that the Adolescent Family Life Act (AFLA) violated the Establishment Clause. *Id.* at 597. The Act authorized grants to public and nonprofit private organizations, including religious organizations for services and research in the area of premarital adolescent sexual relations and pregnancy. 42 U.S.C. §§ 300z-1-10 (1982). The Court upheld the Act's constitutionality, emphasizing its neutrality in including both religious and secular service providers. *Bowen*, 487 U.S. at 602. The focus of the Court's neutrality analysis in this case was on the organizations that would receive the funds. *Id.* *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), involved a state law that carved out a separate school district to serve exclusively a community of highly religious Jews. Again, the Court focused on neutrality in finding that the law violated the Establishment Clause partly because it singled out a particular religious sect for special treatment. *Id.* at 696. This case focused on neutrality in terms of treating different religions equally. *Id.*

result of the genuinely independent and private choices of individuals” ultimately receiving the benefit.¹²⁰ Private choice “guarantee[s] neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program”¹²¹

Private choice was the primary focus of the Court’s analysis in *Zelman v. Simmons-Harris*.¹²² That case involved a Cleveland school voucher program that gave financial assistance to families in Ohio school districts who wished to send their children to participating public or private schools, including religious schools.¹²³ Ninety-six percent of the 3700 participating students enrolled in religious schools.¹²⁴ The Court upheld the constitutionality of the program, considering the true private choices of citizens to be of primary importance.¹²⁵ The Court found that the federal funding was not sent directly to the schools themselves, but rather was granted to individual families, who then made the choice to send their children to religious schools.¹²⁶ Therefore, the program allowed the students a private choice, without regard to their religious beliefs and tendencies.¹²⁷ The Court drew attention to the three previous cases in which claims of Establishment Clause violations were rejected primarily on the basis of the true and independent private choices by the beneficiaries.¹²⁸ These cases established that the proportion of

¹²⁰ *Mitchell*, 530 U.S. at 810 (quoting *Agostini v. Felton*, 521 U.S. 203, 226 (1997)); see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993) (holding that an interpreter provided by the government for a deaf child did not violate the Establishment Clause despite the fact that the interpreter would be interpreting religious teachings because the material being interpreted was the truly private and independent choice of the child).

¹²¹ *Mitchell*, 530 U.S. at 810.

¹²² 536 U.S. 639 (2002).

¹²³ *Id.* at 645–46.

¹²⁴ *Id.* at 647.

¹²⁵ *Id.* at 652.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Zelman*, 536 U.S. at 649–53 (citing *Mueller v. Allen*, 463 U.S. 388, 397–401 (1983) (rejecting an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses because public funds were made available to religious schools as a result of the truly private and independent choices of the parents, regardless of the fact that the vast majority of beneficiaries were parents of children in religious schools); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 487–90 (1986) (rejecting an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor based on the independent private choices that determined where the money went, and once again deeming the amount of government aid channeled to religious institutions by individual aid recipients to be irrelevant); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8–12 (1993) (rejecting an Establishment Clause challenge to a federal program that per-

aid that ultimately reaches sectarian organizations is irrelevant as long as the aid reaches those organizations as the result of the truly private and independent choices of the individual beneficiaries.¹²⁹ Any advancement of religion would clearly be attributable to the individual, not to the government.¹³⁰

Further addressing concerns under the first *Agostini* criterion, the Court in *Mitchell v. Helms*¹³¹ explored the argument that the mere possibility of government funding being diverted for religious purposes is unconstitutional because it constitutes government indoctrination of religion. That case involved a challenge to Chapter 2 of the Education Consolidation and Improvement Act of 1981 (“Chapter 2”), a federally funded program through which educational materials and equipment are distributed to schools.¹³² Under Chapter 2, the federal government distributed funds to states, which then channeled them to state and local agencies that lent educational materials and equipment to public, parochial, and secular nonprofit private schools.¹³³ The Court was split on its analysis of the divertibility argument. Justice Thomas, writing for the plurality, and joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, argued that, because the diversion of funds could not be attributed to government indoctrination, divertibility was irrelevant so long as the government’s intention was neutral and the aid was suitable for public schools (meaning it did not include religious content).¹³⁴ Justice Thomas reasoned that the content of the aid was the true concern, not divertibility, by explaining that “the prohibition against the government providing impermissible content resolves the Establishment Clause concerns that exist if aid is actually diverted to religious uses.”¹³⁵

The majority of the Court in *Mitchell* did not agree with the plurality opinion, particularly the plurality’s view that the Court should not inquire into potential safeguards against such divertibility.¹³⁶ Justice O’Connor, writing a concurring opinion joined by Justice Breyer, rejected the idea that actual diversion of funding by religious organi-

mitted sign-language interpreters to assist deaf children enrolled in religious schools based on the neutrality in determining the recipients of the aid and the true private choice of allowing those recipients to decide where to direct the aid)).

¹²⁹ *Zelman*, 536 U.S. at 651 (citing *Mueller*, 474 U.S. at 490–91).

¹³⁰ *Id.* at 652.

¹³¹ 530 U.S. 793 (2000).

¹³² *Id.* at 801–02.

¹³³ *Id.* at 802.

¹³⁴ *Id.* at 820.

¹³⁵ *Id.* at 822.

¹³⁶ *Id.* at 837–38 (O’Connor, J., concurring), 903 (Souter, J., dissenting).

zations is always constitutionally permissible.¹³⁷ O'Connor argued that the plurality's acceptance of actual diversion of federal funds for religious purposes conflicts with existing Supreme Court precedent¹³⁸ and that such precedent "demonstrate[s] that we have long been concerned that secular government aid not be diverted to the advancement of religion."¹³⁹ O'Connor further posited that the dispositive issue is whether there is merely the potential for divertibility of funds for religious use or actual diversion of funds for religious use.¹⁴⁰ In order to make this determination, O'Connor said that good faith should be presumed in the absence of evidence of actual diversion and that pervasive monitoring should be abandoned so as not to lead to excessive entanglement.¹⁴¹ Furthermore, Justice O'Connor explained that there should not be an absolute rule against potential divertibility when the government aid consists of "instructional materials and equipment,"¹⁴² but distinguished the concerns raised by potential divertibility of aid in the form of cash. She supported this distinction by explaining that "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition."¹⁴³

Justice Souter, writing a dissenting opinion in *Mitchell*, joined by Justices Stevens and Ginsburg, argued that the possibility of divertibility should render a program unconstitutional unless appropriate safeguards are in place to ensure that diversion does not ensue.¹⁴⁴

Determining whether Fugitive Safe Surrender has the effect of advancing or inhibiting religion requires examination of the federal funding for the program under the *Agostini* criteria.¹⁴⁵ Therefore, the first question under the first *Agostini* criterion is whether the government aid for Fugitive Safe Surrender results in government indoctrination, or whether any indoctrination that may occur could be at-

¹³⁷ *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring).

¹³⁸ Justice O'Connor explained that prior cases have shown that the Court has always been concerned about actual diversion of funds for sectarian purposes. *Id.* (citing *Agostini v. Felton*, 521 U.S. 203, 226-27 (1997); *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 248 (1968)).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 855-57.

¹⁴¹ *Id.* at 857-60.

¹⁴² *Id.* at 856.

¹⁴³ *Mitchell*, 530 U.S. at 856.

¹⁴⁴ *Id.* at 885 (Souter, J., dissenting).

¹⁴⁵ See *supra* note 99 and accompanying text.

tributed to the government.¹⁴⁶ The funding is provided to the U.S. Marshals Service in the city implementing the program and is used for preparing and implementing the program.¹⁴⁷ Ultimately, the fugitives are the beneficiaries, and while no fugitive is actually denied participation because of his or her religion or lack thereof, fugitives who are unwilling to go to church are constructively denied participation. Therefore, the aid is not provided neutrally because it does favor one group over another. Peter Elliot's own comments indicate that fugitives will be motivated to surrender because they trust their ministers.¹⁴⁸ But this trust would not exist between Jews, Muslims, atheists, or agnostics and the ministers at these churches.

Furthermore, there is no private choice involved with this program because the aid never passes through the hands, literally or figuratively, of the fugitives before finding its way to the churches.¹⁴⁹ Therefore, the fugitives are not presented the opportunity to choose whether the funding ultimately goes to sectarian or secular organizations. The choice is made for these fugitives that if they want to benefit from the governmental aid they must do so at church. Private choice itself is not a constitutional requirement, but it is an important factor that the Court considers in its neutrality analysis.¹⁵⁰ While the Supreme Court has indicated that disproportionate use of funding is irrelevant for determining neutrality,¹⁵¹ it has done so in the context of funding that was directed by the private choice of the beneficiaries.¹⁵² Therefore, the disproportionate use of the governmental aid by Christians that is likely to result from Fugitive Safe Surrender is a major concern.

Turning to the issue of divertibility, the lack of uniformity by the Supreme Court is apparent. Justice Thomas's plurality opinion indicated that divertibility is irrelevant as long as the government's intent is neutral and the content is permissible,¹⁵³ but this contention cannot apply to the current program. The permissible content requirement can only apply to government aid that is not in the form of

¹⁴⁶ See *Mitchell*, 530 U.S. at 809.

¹⁴⁷ See 42 U.S.C.A. § 16989(c) (West Supp. 2007).

¹⁴⁸ See *supra* note 32 and accompanying text.

¹⁴⁹ 42 U.S.C.A. § 16989(c).

¹⁵⁰ See *Mitchell*, 530 U.S. at 810.

¹⁵¹ See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 651 (2002) (citing *Mueller v. Allen*, 463 U.S. 388, 490–91 (1983)).

¹⁵² See *Zobrest*, 509 U.S. at 13–14; see also *Zelman*, 536 U.S. at 651 (citing *Mueller*, 463 U.S. at 490–91).

¹⁵³ *Mitchell*, 530 U.S. at 802.

money. Indeed, Justice Thomas's discussion that diversion cannot be an issue so long as the content of the aid is not religious involved only cases in which the aid was not in the form of money.¹⁵⁴ Furthermore, Justice O'Connor explained that divertibility would be more disconcerting when the aid is in the form of cash.¹⁵⁵ The federal aid here consists of monetary aid, not aid such as instructional materials and equipment. This distinction is crucial because aid in the form of instructional materials and equipment could not be diverted for religious purposes if the content is permissible. However, funding in the form of cash creates significant concerns because it can easily be diverted for sectarian use, thus advancing religion. Therefore, Justice Thomas's interpretation of the divertibility issue is inapplicable to the Fugitive Safe Surrender program.

Justice O'Connor's formulation of the divertibility issue provides that only evidence of actual diversion would make a program unconstitutional and that, absent such evidence, there should be a presumption of good faith.¹⁵⁶ The infancy of the Fugitive Safe Surrender program makes it difficult to discern whether there is actual diversion. Ordinarily, a presumption of good faith when the aid is in the form of cash is a risky proposition because of the heightened danger of divertibility. However, in the present case, monetary aid is provided from the federal government to the U.S. Marshals Service in the state implementing the program. The U.S. Marshals Service then uses the money to provide the necessary funds for the four-day program. Since the U.S. Marshals Service is a government agency with no religious affiliation, it is reasonable to presume that this agency will distribute the aid in good faith.

Under Justice Souter's formulation of the divertibility issue, Fugitive Safe Surrender might be unconstitutional because no safeguards are implemented to ensure that actual diversion does not occur.¹⁵⁷ However, the main safeguard is the fact that the aid is indirect, first passing through the U.S. Marshals Service before it is provided to the church.¹⁵⁸ This safeguard ought to be sufficient because, as a

¹⁵⁴ *Id.*; *Zobrest*, 509 U.S. at 4; *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 487–90 (1986).

¹⁵⁵ *Mitchell*, 530 U.S. at 856 (O'Connor, J., concurring).

¹⁵⁶ *See id.* at 855–57.

¹⁵⁷ *See id.* at 908 (Souter, J., dissenting) (explaining his concern about divertibility when no safeguards are in place to protect against actual diversion); *see also supra* Part II.B (the description of the Fugitive Safe Surrender programs in Cleveland and Phoenix notably did not mention the inclusion of any safeguards to ensure that funds were not diverted for religious purposes).

¹⁵⁸ *See* 42 U.S.C.A. § 16989(c) (West Supp. 2007).

neutral government agency, it is unnecessary to monitor the U.S. Marshals Service to ensure that no funds are provided for sectarian use.

b. Defining Recipients by Reference to Religion

Agostini's second criterion significantly overlaps with the first because many of the same factors are applied and many of the same questions are asked.¹⁵⁹ This criterion, like the first criterion, examines the neutrality and independent private choice involved, but to determine whether the government has defined the recipients of the funding by reference to religion.¹⁶⁰ The *Agostini* Court explained that a crucial part of this inquiry is whether the aid "creat[es] a financial incentive to undertake religious indoctrination."¹⁶¹ This financial incentive is not present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a non-discriminatory basis."¹⁶² Furthermore, a truly private and independent choice would indicate that the government has not provided any incentive for the recipient of the funding to use it for religious purposes.¹⁶³ This ensures that the government has not defined the recipients of the funding by reference to religion.¹⁶⁴ While the Court in *Mitchell* explained that direct aid to sectarian organizations, which does not literally pass through the hands of the private beneficiary, can still be constitutional if it is directed to the organization of the beneficiary's independent choosing, it does create more of a concern that the government aid will have the effect of advancing religion.¹⁶⁵

When analyzing a government aid case to determine whether the government has defined the recipients of the aid by reference to religion, it is necessary to pinpoint the primary beneficiaries because these are the ones who must have access to the government aid in a neutral and unbiased fashion.¹⁶⁶ To this end, the Court in *Zobrest v. Catalina Foothills School District* dealt with a challenge to a federal program in which the government aided deaf children by providing sign-

¹⁵⁹ *Mitchell*, 530 U.S. at 813.

¹⁶⁰ *Id.*

¹⁶¹ *Agostini v. Felton*, 521 U.S. 203, 231 (1997).

¹⁶² *Id.*

¹⁶³ *Mitchell*, 530 U.S. at 814.

¹⁶⁴ *Id.* at 813–14.

¹⁶⁵ *Id.* at 813–14, 818–20 & n.8.

¹⁶⁶ *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993).

language interpreters.¹⁶⁷ James Zobrest, a deaf child aided by the program, chose to enroll in a Roman Catholic high school, meaning that the government-provided interpreter would be interpreting religious teachings.¹⁶⁸ The Court said that the program's primary beneficiaries were "[d]isabled children, not sectarian schools."¹⁶⁹ Therefore, the Court upheld the program because the primary beneficiaries received aid based on neutral criteria and because the aid was directed to the sectarian institutions at the behest of these primary beneficiaries.¹⁷⁰ Moreover, the Court determined that the number of interpreters ultimately sent to religious schools was irrelevant.¹⁷¹

Under the second *Agostini* criterion, the same factors that were considered under the first—neutrality and private choice—are considered to determine whether Fugitive Safe Surrender defines its recipients by reference to religion.¹⁷² This inquiry is predicated on whether the beneficiaries of the aid are presented with "incentive[s] to undertake religious indoctrination."¹⁷³ Based on the reasoning in *Zobrest*, it is important to recognize that the primary beneficiaries here are the fugitives. Fugitive Safe Surrender provides incentives for the fugitives to undertake religious indoctrination in two ways: (1) sending them the message that the church is saving them and (2) merely getting them into church. First, the implicit message to the fugitives that the church is saving them or giving them a second chance is likely to restore faith in fugitives who lost it or create faith in those who never found it. The fact that this pro-religion, and more specifically pro-Christian, message is funded by the federal government is impermissible because it advances religion. Second, the fact that the program occurs only in church provides an incentive for fugitives to go to the church, and their presence alone provides an opportunity for inculcation. The federal aid advances religion by giving churches this opportunity. While the government aid is allocated for the benefit of all fugitives regardless of religion and is provided on a nondiscriminatory basis, the program's neutrality is significantly compromised by the fact that it takes place only inside a church.

¹⁶⁷ *Id.* at 4.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 12.

¹⁷⁰ *Id.* at 13–14.

¹⁷¹ *See id.*; *see also* *Zelman v. Simmons-Harris*, 536 U.S. 639, 651–53 (2002) (explaining that the "amount of government aid channeled to religious institutions by individual aid recipients [is] not relevant to the constitutional inquiry").

¹⁷² *Mitchell v. Helms*, 530 U.S. 793, 813 (2000).

¹⁷³ *Agostini v. Felton*, 521 U.S. 203, 231 (1997).

Therefore, Fugitive Safe Surrender fails under the second *Agostini* criterion.

c. Excessive Entanglement

Finally, *Agostini*'s third criterion, excessive government entanglement with religion, was originally the third prong under the *Lemon* test.¹⁷⁴ The *Agostini* Court made this factor part of the analysis under the effect prong of the *Lemon* test because "cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect."¹⁷⁵ Excessive entanglement is discussed in the next section of this Comment as the third prong of the traditional *Lemon* test.¹⁷⁶

The only conclusion to draw from analyzing Fugitive Safe Surrender under the effect prong is that it has the effect of advancing religion by getting people into church and creating the opportunity for the church to reach individuals it otherwise would not reach. The program gets people into churches by running the program only at churches. The Fugitive Safe Surrender Act uses the word "church" as the location for the program and even says that running the program in a church increases the likelihood of surrender because it provides an environment where fugitives feel safe and comfortable.¹⁷⁷ Moreover, all of the programs completed thus far have used a church as the location for the program.¹⁷⁸ This has the effect of advancing Christianity, even if that is not the intention, because many of these fugitives may be Jews, Muslims, or simply nonreligious individuals such as atheists and agnostics. These fugitives must accept the exposure to church or forego the opportunities provided by the program. It is more likely that they will accept the exposure to church because of the incentives provided in the form of favorable consideration.¹⁷⁹ This advances the church by giving ministers the chance to talk to people they otherwise could not reach. In fact, in the Cleveland pilot program, ministers acted as advocates for the fugitives who turned

¹⁷⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

¹⁷⁵ *Mitchell*, 530 U.S. at 808 (citing *Agostini*, 521 U.S. at 232–33).

¹⁷⁶ See *infra* Part III.A.3.

¹⁷⁷ 42 U.S.C.A. § 16989(a)(1) (West Supp. 2007).

¹⁷⁸ See, e.g., Aug. 8, 2005, DOJ Press Release, *supra* note 5; Nov. 21, 2006, DOJ Press Release, *supra* note 60; Fugitive Safe Surrender: Overview, *supra* note 2.

¹⁷⁹ See Fugitive Safe Surrender: FAQ, *supra* note 27.

themselves in.¹⁸⁰ In addition, the fact that the church provides a second chance is likely to instill in these fugitives some sense of loyalty, gratitude, or even indebtedness toward the church. Even though divertibility is not a concern because the funding is provided to the U.S. Marshals Service, rather than the churches themselves, the second prong of the *Lemon* test is violated because the program has the effect of advancing religion. Therefore, Fugitive Safe Surrender is unconstitutional under the *Lemon* test.

3. The Entanglement Prong

The third prong of the *Lemon* test, the entanglement prong, requires that the program “not foster ‘an excessive government entanglement with religion.’”¹⁸¹ Originally, government funding created an excessive and impermissible entanglement when the program in question required “comprehensive . . . and continuing state surveillance.”¹⁸² State surveillance or pervasive monitoring would be necessary if government funding could be used by the recipient to achieve sectarian goals.¹⁸³ Therefore, the federal funding would require “vast governmental suppression, surveillance, or meddling in church affairs”¹⁸⁴ in order to ensure that federal funds are not used for sectarian purposes. The need for continuous observation in such a situation—to prevent sectarian use—constituted excessive entanglement according to the Court in *Lemon*.¹⁸⁵

However, the *Agostini* Court modified the concept of excessive entanglement in several ways. First, as mentioned previously, excessive entanglement became the third criterion under the effect prong of the *Lemon* test and was no longer an independent prong.¹⁸⁶ Second, the Court became more lenient regarding permissible entanglement.¹⁸⁷ The Court expressed this leniency by stating that “[n]ot all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be ‘excessive’ before it runs afoul of the Estab-

¹⁸⁰ Russ, *supra* note 30.

¹⁸¹ *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674 (1970)).

¹⁸² *Id.* at 619.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 634 (Douglas, J., concurring).

¹⁸⁵ *Id.* at 616, 620–21.

¹⁸⁶ *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997).

¹⁸⁷ *Id.* at 233.

ishment Clause.”¹⁸⁸ The *Agostini* Court continued by explaining that administrative cooperation and political divisiveness, which once were concerns under an excessive entanglement analysis, are no longer concerns for excessive entanglement.¹⁸⁹ Finally, the Court relaxed the previous standard for pervasive monitoring by changing the prior presumption that public employees will inculcate religion in a sectarian environment and by adopting a presumption of good faith.¹⁹⁰ The presumption that public employees will act in good faith eliminates the need for the state monitoring to be pervasive, which means that the entanglement is not excessive.¹⁹¹

Based on the current state of the excessive entanglement analysis used by the Supreme Court, the main question posed by Fugitive Safe Surrender is whether it would necessitate pervasive monitoring.¹⁹² Even though the *Agostini* Court concluded that continuous state surveillance is no longer necessary due to the presumption of good faith,¹⁹³ this presumption was suggested in the context of aid that was not in the form of cash.¹⁹⁴ Therefore, the content of the aid could be regulated, thus eliminating the need to monitor how the aid is used. Here, the aid is in the form of cash, but it is provided indirectly—first going through the U.S. Marshals Service and then to the churches.¹⁹⁵ This safeguard should be sufficient to ensure that, even if some monitoring is necessary, it does not reach the level of pervasive monitoring because the U.S. Marshals Service has no incentive to siphon off money for sectarian purposes. Therefore, the government would not have to pervasively monitor the U.S. Marshals Service and its interaction with participating churches in each city implementing the program, which means there would be no excessive entanglement. This does not, however, save Fugitive Safe Surrender from violating the *Lemon* test, because the program still has the effect of advancing religion.¹⁹⁶

The analysis of Fugitive Safe Surrender under the *Lemon* test has demonstrated that the program is unconstitutional. The first prong of the test—the purpose prong—is not violated because the program has the secular purpose of providing fugitives with a safe and com-

¹⁸⁸ *Id.* (internal citations omitted).

¹⁸⁹ *Id.* at 233–34.

¹⁹⁰ *Id.* at 234.

¹⁹¹ *Id.*

¹⁹² *Agostini*, 521 U.S. at 234.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 42 U.S.C.A. § 16989(c) (West Supp. 2007).

¹⁹⁶ *See supra* Part III.A.2.

portable place to surrender.¹⁹⁷ The second prong—the effect prong—is violated because Fugitive Safe Surrender advances religion merely by compelling fugitives to attend church.¹⁹⁸ The program is also likely to advance religion by creating a sense of gratitude in the fugitives toward the church for providing a second chance. The third prong—the excessive entanglement prong—is no longer an independent prong of this test and, regardless, is not violated by Fugitive Safe Surrender because the U.S. Marshals Service should be entitled to a presumption of good faith.¹⁹⁹ Even though this program has a secular purpose and does not require excessive entanglement, it fails the *Lemon* test because a violation of a single prong, in this case the effect prong, is a failure under the test.²⁰⁰

B. Endorsement Test

The endorsement test was developed in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*.²⁰¹ That case involved a challenge to Pawtucket, Rhode Island's inclusion of a crèche, or nativity scene, in the city's Christmas display in a park owned by a nonprofit organization located in the shopping district.²⁰² Justice O'Connor explained that "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."²⁰³ She expressed her concern that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."²⁰⁴ The question becomes whether an objective observer would perceive the state's action as endorsement of a particular religion.²⁰⁵ Justice O'Connor's formulation of the "objective observer" describes an individual with knowledge on the subject and the laws.²⁰⁶ In addition, practices that endorse or disapprove of religion, "*in reality or public perception*,"²⁰⁷ violate the endorsement test. The endorse-

¹⁹⁷ See *supra* Part III.A.1.

¹⁹⁸ See *supra* Part III.A.2.

¹⁹⁹ See *supra* Part III.A.3.

²⁰⁰ See *supra* note 96 and accompanying text.

²⁰¹ 465 U.S. 668 (1984).

²⁰² *Id.* at 671.

²⁰³ *Id.* at 687 (O'Connor, J., concurring).

²⁰⁴ *Id.* at 688.

²⁰⁵ *Id.* at 690.

²⁰⁶ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

²⁰⁷ *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (emphasis added).

ment test has been embraced by the majority of the Supreme Court as a way to analyze Establishment Clause cases.²⁰⁸

Justice O'Connor also noted that mere government acknowledgement of religion is not equivalent to government endorsement of religion.²⁰⁹ She explained that practices such as legislative prayers,²¹⁰ printing of "In God We Trust" on money, and opening court sessions with "God save the United States and this honorable court" would constitute acceptable government acknowledgement of religion.²¹¹ Justice O'Connor supported this position by explaining that these practices constitute government acceptance of religion, rather than government endorsement, because of their lengthy history.²¹²

The *Agostini* criteria discussed previously for determining whether government aid advances or inhibits religion are also used to determine whether aid endorses or disapproves of religion under the endorsement test.²¹³ To this end, the Supreme Court recognized that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."²¹⁴

An "objective observer," as formulated by Justice O'Connor, would recognize that Fugitive Safe Surrender offers a safe and comfortable environment for fugitives to surrender,²¹⁵ a benefit that is not shared by fugitives of all religions. Therefore, non-Christian and nonreligious fugitives would not feel as comfortable as Christian fugitives surrendering in a church, a Christian place of worship.²¹⁶ The

²⁰⁸ See *Santa Fe*, 530 U.S. at 301–10; see also *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 865–66 (2005) (holding that displays of the Ten Commandments in courthouses violated the Establishment Clause).

²⁰⁹ *Lynch*, 465 U.S. at 692–93 (O'Connor, J., concurring).

²¹⁰ *Id.* at 693 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

²¹⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639, 654–55 (2002).

²¹⁵ See 42 U.S.C.A. § 16989(a)(1) (West Supp. 2007).

²¹⁶ Though not the focus of this Comment, it is important to note that the Fugitive Safe Surrender program may also violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. While the program does not deny its benefits to any person on its face, the effect of having the program in the church may deny the benefits to certain groups of people. This program would most likely be subject to rational basis review, meaning that the state would need to show that the program has a ra-

program is biased toward those who feel comfortable in a Christian institution.²¹⁷ An objective observer would also recognize that the program offers “favorable consideration” to its participants.²¹⁸ Providing favorable consideration—such as release without bail, quashing warrants, and sentencing benefits²¹⁹—to fugitives willing to enter a church sends a message of government endorsing religion. In particular, the government sends a message of endorsing Christianity, while disfavoring other religions, by using only churches for the program rather than also using Muslim or Jewish sanctuaries.²²⁰ Furthermore, the program creates the public perception of endorsing religion by involving members of the judiciary branch of government (state judges) and having them perform services inside a house of worship (the church).²²¹ As Chief Justice Poritz of the Supreme Court of New Jersey warned, this eliminates the perception of neutrality in the judicial system and gives the appearance of judges working for law enforcement.²²² It also creates the appearance that the judicial system is working for, or at least in conjunction with, religious houses of worship, and only Christian ones at that.

Fugitive Safe Surrender further violates the endorsement test because, under *Agostini*, the federal aid provided for the program creates the perception of endorsing religion.²²³ As analyzed previ-

tional basis to a legitimate state purpose. *See generally* Ry. Express v. New York, 336 U.S. 106 (1949); *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552 (1947).

²¹⁷ Jon Levine and Richard Moreland, psychology professors at the University of Pittsburgh, have conducted extensive psychological research on groups and behaviors in groups. Their research indicates that out-group members feel uncomfortable when infiltrating groups and that conflict can exist when out-group members attempt to infiltrate an existing group. *See* Jon Levine & Richard Moreland, *Progress in Small Group Research*, in 41 ANNUAL REVIEW OF PSYCHOLOGY 585 (1990). This research suggests that non-Christians (out-group members to the Christian community) would feel uncomfortable infiltrating the Christian community, which leads to the conclusion that these out-group members are less likely to take advantage of the Fugitive Safe Surrender program than Christian in-group members.

²¹⁸ Fugitive Safe Surrender: FAQ, *supra* note 27.

²¹⁹ Wagner, *supra* note 28; Wagner & Collom, *supra* note 26.

²²⁰ No mention is made in the act about using Jewish or Muslim places of worship for the program. Only the word “church” is used. 42 U.S.C.A. § 16989(a)(1) (West Supp. 2007). Additionally, the programs completed thus far have used Christian churches. *See* U.S. Marshals Service, Fugitive Safe Surrender, <http://www.usmarshals.gov/safesurrender/expansion.html> (last visited Mar. 7, 2008) (Listed on the left side of the home page are several links for descriptions of the cities in which the program has been instituted so far. Descriptions of each individual program, including the Christian churches used by the program, are available through the link provided in the name of the individual city.).

²²¹ *See* 42 U.S.C.A. § 16989(a)(1); Graham, *supra* note 25.

²²² Graham, *supra* note 25.

²²³ *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

ously, Fugitive Safe Surrender does not involve private choice and is constructively partisan toward religion, specifically Christianity.²²⁴ For the same reasons that the governmental aid advances religion, it also causes the reasonable observer to believe that government has endorsed religion.

An argument that Fugitive Safe Surrender merely acknowledges religion would be tenuous because this line of reasoning hinges on the practice having a lengthy history,²²⁵ and Fugitive Safe Surrender is new. In addition, the practices accepted as mere acknowledgement of religion recognize the existence and observance of religion in general but do not endorse one particular religion over another.²²⁶ Fugitive Safe Surrender, on the other hand, endorses one religion over others by providing its benefits primarily to individuals that feel the most comfortable in churches, presumably Christians. This cannot be explained as mere acknowledgement of religion. Therefore, the Fugitive Safe Surrender program endorses religion and violates the Establishment Clause under the endorsement test.

C. Coercion Test

The coercion test was developed in *Lee v. Weisman*.²²⁷ Due to the coercive nature of the religious activity, the *Lee* Court invalidated a school's practice of inviting a member of the clergy to deliver a non-sectarian prayer at a commencement.²²⁸ The Court stressed that "at a minimum, the constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."²²⁹ The Court determined that, while attendance at the graduation ceremony was technically voluntary, the children's only option to avoid the coercion was not to participate in the graduation ceremony, thus missing out on its benefits.²³⁰ Though an individual's decision to participate in a particular religious exercise may be voluntary, courts have determined that compelled attendance at a ceremony or function in which exposure to religion is unavoidable will violate the coercion test.²³¹ Therefore, compelled or pressured exposure to gov-

²²⁴ See *supra* Part III.A.2.a–c.

²²⁵ *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

²²⁶ See *id.*

²²⁷ 505 U.S. 577 (1992).

²²⁸ *Id.* at 590.

²²⁹ *Id.* at 587.

²³⁰ *Id.*

²³¹ See *id.*; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (striking down a policy that authorizes a school's student body to vote on whether an invocation would be delivered at its football games). The Court in *Santa Fe* indicated that

ernment-sponsored religious activity presents the dangers that the Establishment Clause was intended to prevent.²³²

Neither the fact that prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.²³³

Based on the analysis under the coercion test, Fugitive Safe Surrender is not voluntary because fugitives are compelled to attend the church in order to receive the benefits of the program. As previously discussed, the program offers “favorable consideration,”²³⁴ which includes release without bail, quashing warrants, and sentencing benefits.²³⁵ Therefore, fugitives who wish to avoid religious exposure could not participate in the program and could not attain these substantial benefits. Furthermore, at the conclusion of both the Cleveland and Phoenix programs, the respective cities conducted a sweep to capture fugitives who chose not to participate in the program.²³⁶ The fugitives captured by these sweeps did not receive the favorable consideration that the programs’ participants did.²³⁷ This further demonstrates the coercion because fugitives choosing to avoid religious exposure might be captured and receive harsher penalties than if they submitted to the religious exposure. Like the children in *Lee*, fugitives have to deny themselves of the program’s substantial benefits if they wish to avoid exposure to religion.

while attendance at football games was technically voluntary, there was “immense social pressure” to attend and not attending to avoid exposure to religious worship would deny the individuals the benefits of being at the game. *Id.* at 311–12; *Warner v. Orange County Dep’t of Probation*, 115 F.3d 1068, 1069 (2d Cir. 1996) (holding that coerced participation in religion-tinged AA meetings violated the Establishment Clause); *Kerr v. Farrey*, 95 F.3d 472, 473–74 (7th Cir. 1996) (holding that coerced participation in religion-tinged NA meetings violated the Establishment Clause).

²³² See *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985) (invalidating a statute mandating a moment of silence in the public schools for meditation or voluntary prayer); *Engel v. Vitale*, 370 U.S. 421, 430–31 (1962) (striking down a school board policy that required daily recitation of a prayer in the state’s elementary and secondary schools).

²³³ *Engel*, 370 U.S. at 430.

²³⁴ Fugitive Safe Surrender: FAQ, *supra* note 27.

²³⁵ *Wagner*, *supra* note 28; *Wagner & Collom*, *supra* note 26.

²³⁶ *Anderson*, *supra* note 44; Nov. 21, 2006, DOJ Press Release, *supra* note 60.

²³⁷ *Anderson*, *supra* note 44; Nov. 21, 2006, DOJ Press Release, *supra* note 60.

Moreover, a finding of coercion does not require a finding of required participation in religious worship or activity; mere exposure or compelled presence at religious exercises will suffice to establish coercion.²³⁸ Participants of Fugitive Safe Surrender are coerced into exposure to religious practices, or at the very least, religious symbols, expressions, and connotations. Some of the programs have further increased coercion by having ministers act as advocates for the fugitives.²³⁹ Not only might fugitives of other religions or non-religious fugitives feel uncomfortable with ministers as their advocates, but if the fugitives are not Christians this could affect the ministers' zeal in their role as advocates. Fugitives in this position are more likely to submit to inculcation and are more susceptible to coercion because of their precarious situation. This "uniquely susceptible" position further compromises the fugitives' freedom to avoid religious exposure.²⁴⁰ Individuals should not be "requir[ed] . . . to alienate themselves from the . . . community in order to avoid a religious practice."²⁴¹ Fugitive Safe Surrender violates the coercion test because fugitives must face coerced exposure to religion in order to participate in the program.

D. Public Policy Concerns

The Supreme Court has accorded some weight in its Establishment Clause analysis to the notion that a program successfully addresses a pressing social need or public policy concern.²⁴² For example, the majority opinion in the *Zelman* decision focuses at length on the magnitude of the crisis in the Cleveland school system, and suggests that the voucher system is an innovative and successful solution to the problem.²⁴³ Justice Souter, in his dissent in *Zelman*, implied

²³⁸ See *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972). The Court determined that a practice in which all cadets and midshipmen at military academies were required to attend Protestant, Catholic, or Jewish chapel services on Sundays violated the Establishment Clause because government may not require an individual to engage in religious practices or to be present at religious exercises. *Id.* at 284; see also *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003). In *Mellen*, although the claim failed due to qualified immunity, the Court said that a practice in which students at a military school were not required to pray but were required to be present at a mandatory supper prayer violated the Establishment Clause. *Mellen*, 327 F.3d at 360.

²³⁹ Russ, *supra* note 30.

²⁴⁰ *Mellen*, 327 F.3d at 371.

²⁴¹ *Id.* at 372 n.9 (citing *Lee v. Weisman*, 505 U.S. 577, 596 (1992)).

²⁴² See *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 (2002) (Thomas, J., concurring).

²⁴³ *Id.* at 643–46 (majority opinion).

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that the majority is in fact motivated by such public policy concerns in their decision:

The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse.²⁴⁴

From a public policy perspective, Fugitive Safe Surrender does cure a pressing social need. The success of the pilot program in Cleveland,²⁴⁵ as well as the success of the Phoenix program,²⁴⁶ demonstrates the program's ability to respond to the social concern of securing the capture of fugitives in a safe fashion and limiting crime. However, as Justice Souter pointed out in his dissent in *Zelman*, there is no excuse for leniency with respect to the Establishment Clause, even for a truly beneficial purpose, and if violations are allowed because they help to cure societal ills, then even greater societal ills are created.²⁴⁷

IV. PROPOSAL FOR REFORMING FUGITIVE SAFE SURRENDER

While violating some important principles in Establishment Clause jurisprudence, Fugitive Safe Surrender also presents an innovative way to correct a societal concern. Therefore, the program should not be abandoned but should be improved to make sure that its benefits are realized by society while separation of church and state is maintained.

Rather than providing fugitives with this opportunity at church, Fugitive Safe Surrender should provide this opportunity at community buildings with little or no religious affiliation and where all religious and irreligious people feel equally comfortable. For example, the program would succeed in a public library or a local YMCA. Despite actually being a "Young Men's Christian Association," and thus having some religious affiliation, a YMCA does not bear the same religious associations in a community as a church and is widely used by people of all religions and no religion at all.

Offering the program in a more neutral community building eliminates Establishment Clause concerns. No advancement of religion or excessive entanglement would ensue because this would not

²⁴⁴ *Id.* at 686 (Souter, J., dissenting).

²⁴⁵ Aug. 8, 2005, DOJ Press Release, *supra* note 5.

²⁴⁶ Nov. 21, 2006, DOJ Press Release, *supra* note 60.

²⁴⁷ *Zelman*, 536 U.S. at 686 (Souter, J., dissenting).

increase the number of people present in church and there could be no diversion of governmental funding for sectarian use. There would be no endorsement of religion because a reasonable observer would not perceive the program as promoting one religion over another or as promoting religion generally. This would also eliminate coercion because fugitives would not be forced to expose themselves to church in order to participate. Meanwhile, the program would still provide a successful solution to an important problem because the intended benefits of the program—providing fugitives an environment to surrender where they feel safe and comfortable and keeping fugitive arrests off the streets—would be accomplished.

This alternative would still need to address the concern that the program may compromise the unbiased appearance of the judiciary and give the impression that judges are working for law enforcement.²⁴⁸ This was one of the concerns expressed by former Chief Justice Poritz when she considered the program for New Jersey.²⁴⁹

Measures should be taken to ensure that fugitives are aware that the judges are not working for law enforcement, are completely neutral, and are simply there to assist the fugitives. For example, the intense advertising campaign for the program could include assurances that the program is meant simply to move these proceedings to a more fugitive-friendly environment and that these judges are agreeing to move from the courthouse to the community center for that purpose. In addition, at the proceedings the judges themselves could make sure to stress to the fugitives that they are not working for law enforcement or taking sides. As long as the fugitives understand the distinct roles played by all parties involved, the program can flourish, and one of this country's most vital principles—ensuring that Congress and state legislatures do not make any law respecting an establishment of religion—can be securely protected.

V. CONCLUSION

While Fugitive Safe Surrender is a novel program that provides a benefit to society, it is vital to use caution when interaction between religion and government exists. The government creates a slippery slope when it uses constitutionally suspect means to achieve a goal—no matter how commendable the goal. Where is the line drawn? In the words of Thomas Jefferson: “History I believe furnishes no example of a priest-ridden people maintaining a free civil government.

²⁴⁸ Graham, *supra* note 25.

²⁴⁹ *Id.*

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This marks the lowest grade of ignorance, of which their political as well as religious leaders will always avail themselves for their own purpose.”²⁵⁰

²⁵⁰ Letter from Thomas Jefferson to Baron von Humboldt (month, day 1813), in *THE GREAT QUOTATIONS* 370, 370 (George Seldes ed., Citadel Press, 1983).