No. 00-1779

In The

Supreme Court of the United States

SENEL TAYLOR, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

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

BRIEF ON THE MERITS

CHARLES FRIED
1545 Massachusetts Avenue
Cambridge, MA 02138
Of Counsel

INSTITUTE FOR JUSTICE
CLINT BOLICK*
WILLIAM H. MELLOR
RICHARD D. KOMER
ROBERT FREEDMAN
1717 Pennsylvania Ave., NW, Suite 200
Washington, DC 20006
(202) 955-1300
* *Counsel of Record*

PORTER, WRIGHT, MORRIS & ARTHUR, L.L.P.
DAVID TRYON
1700 Huntington Building
925 Euclid Avenue
Cleveland, OH 44114
(216) 443-2560

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a program designed to rescue economically disadvantaged children from a failing public school system by providing scholarships that they may use in private, religious, or suburban public schools that choose to participate in the program – and which operates in the context of a broad array of public school choices – violate the First Amendment because in the early stages of the program most of the schools that have agreed to take on scholarship students are religiously affiliated?

PARTIES TO THE PROCEEDINGS

Petitioners are Senel Taylor, on his own behalf and as natural guardian of his daughter Saletta Taylor, Johnietta McGrady, on her own behalf and as natural guardian of her children Trinnietta and Atlas McGrady, Christine Suma, on her own behalf and as natural guardian of her children Dominic, Gloria, Emeric and Emily Suma, Arkela Winston, on her own behalf and as natural guardian of her children, Tanashia and Devonte Winston, and Amy Hudock, on her own behalf and as natural guardian of her daughter, Amber Lee Angelo.[1]

The State petitioners are Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the State of Ohio, the State of Ohio, and Saundra Berry, in her official capacity as Director of the Cleveland Scholarship and Tutoring Program.

Additional petitioners are Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran Association, Inc., Lutheran Memorial Association of Cleveland, and Deloris Jones.

Respondents are Doris Simmons-Harris, Marla Franklin, Rev. Steven Behr, Sue Gatton, Mary Murphy, Rev. Michael DuBose, Cheryl DuBose, Glenn Altschuld, and Deidra Peterson.

---

[1] None of the petitioners are corporations, and have no parent companies or subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER PUBLICATIONS

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OPINIONS BELOW

The opinion of the court of appeals is reported at 234 F.3d 945 (6th Cir. 2000) (Pet. App. at A.1). The decision of the district court is reported at 72 F. Supp. 834 (N.D. Ohio 1999) (Pet. App. at A.65).

JURISDICTION

The court of appeals entered judgment on December 11, 2000 (Pet. App. at A.1). The court of appeals denied the petitions for rehearing and rehearing en banc on February 28, 2001 (Pet. App. at A.150). The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . "

The Cleveland Pilot Scholarship Program is codified at Ohio Rev. Code §§ 3313.974-3313.979 (reprinted in full in Pet. App. at A.152).

STATEMENT OF THE CASE

A. Statement of Facts. Petitioners are five parents of children who are participating in the challenged Cleveland Pilot Project Scholarship Program, Ohio Rev. Code §§ 3313.974-3313.979 (J.A. 21a-40a). They intervened as defendants in this action, on their own behalf and on behalf of their minor children, to safeguard their children's precious educational opportunities.

The scholarship program was enacted in 1995 in response to an unprecedented crisis in the Cleveland City Public Schools (CCSD). A combination of paralyzing administrative mismanagement and abysmal educational quality led the U.S. District Court for the Northern District of Ohio, in the context of an ongoing desegregation lawsuit, to transfer control of CCSD to the State of Ohio. *Reed v. Rhodes*, slip op., No. 1:73 CV 1300 (N.D. Ohio, Mar. 3, 1995). The following year, the court commended the State for taking swift, aggressive, multifaceted action to "alleviate the emergency" in CCSD, *Reed v. Rhodes*, 934 F. Supp. 1533, 1539 (N.D. Ohio 1996), such as reorganization, a financial infusion, and providing "choices to each child which will include the opportunity to attend schools and programs of the family's selection." *Id.* at 1557.

One of the choice programs created by the State was the Cleveland Pilot Scholarship Program. Enacted in the 1995 State budget and made operational in the 1996-97 school year, the program embodies two components: (1) it expanded the pre-existing range of educational options for Cleveland schoolchildren to now include private and suburban public schools that opt to participate in the program; and (2) it created a tutorial assistance program for students remaining in CCSD.

Under the parental choice component, students may receive scholarships of either 75 or 90 percent of tuition (depending on family income) to attend the participating private schools of their parents' choice. The scholarships are capped at $2,500 (of which a maximum of $2,250 is provided by the State) or the price of tuition, whichever is less. Participating private schools may not charge more than $2,500 for tuition. Participating suburban public schools would receive the scholarship amount plus the

"average daily membership" expenditure under State law (approximately $4,294 per student), for a total of about $6,544. Ohio Rev. Code §§ 3317.03(I)(1), 3327.06, 3317.08(A)(1). The program began with students in grades K-3, expanding one grade each year through eighth grade. If more children apply for the program each year than there are spaces, as routinely occurs, they are chosen by lottery with a preference for economically disadvantaged children and a ceiling on the percentage of children who were already enrolled in private schools. Participating schools also must choose students on a random selection basis. Checks are made payable to the parents and disbursed to them at the schools they designate. *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834, 836 (N.D. Ohio 1999).

The program's second component provides an equal number of tutorial assistance grants for students remaining in CCSD. These grants are capped at $500 and may be used to obtain additional academic assistance outside regular school hours.

In the 1999-2000 school year, 3,761 students received scholarships under the program. No suburban public schools have elected to accept CCSD students under the program. However, in the same school year, 46 religious and ten nonsectarian private schools volunteered to enroll students using scholarships. Of the students in the program that year, 96 percent enrolled in religiously affiliated schools. *Id.* at 837. The program is only one of multiple school choice options available to CCSD students, including magnet schools and community (charter) schools. In 1999-2000, 16,184 Cleveland students were enrolled in magnet schools and 2,087 were enrolled in community (charter) schools. See Jay P. Greene, *The*

Racial, Economic, and Religious Context of Parental Choice in Cleveland (1999) (J.A. 217a-18a).

B. Statement of the Case. This litigation was commenced in 1996 in state court, raising the First Amendment claim at issue here along with state claims. The Ohio Supreme Court struck down the program on the grounds of a subsequently corrected defect in the manner of its legislative enactment, but upheld it against the First Amendment challenge. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). Subsequently, the plaintiffs filed the First Amendment challenge anew in federal court. In August 1999, just hours before the start of the program's fourth year, the U.S. District Court for the Northern District of Ohio enjoined the program. Four days later, the court stayed most of its own injunction. In November 1999, this Court stayed the remainder of the injunction pending disposition of the case. *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999). The district court subsequently struck down the program on cross-motions for summary judgment. *Simmons-Harris v. Zelman, supra.* A panel of the U.S. Court of Appeals affirmed the ruling over a dissent by Judge James Ryan. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000). After denying a motion for rehearing *en banc*, the Sixth Circuit granted motions to stay the mandate pending disposition in this Court.

Aside from a four-day period in the fall of 1999, the Cleveland Pilot Project Scholarship Program has been continuously operational since the 1996-97 school year, and now is in its sixth year of operation.

SUMMARY OF ARGUMENT

Forty-seven years ago, in *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court set forth a sacred promise

of equal educational opportunities for all American schoolchildren. Since that ruling, we have traveled a long and often-painful distance. Along the way, the promise has become reality for many. But for others, especially minority schoolchildren mired in many of our nation's worst urban school systems, that promise has been an illusion.

The respondents have made known their theory of the case and their disdain for the scholarship program from the earliest days of the state court case, when they contended that the parents are "inconsequential conduits" in the transmission of funds to religious schools. Reply Br. of Plaintiffs' Sue Gatton, et al. in *Gatton v. Goff*, No. 96 CVH 01-01093 (Ohio Ct. of Common Pleas, Franklin County) at 17. Respondents have it exactly backward: as a result of this program, for the first time the parents are *not* inconsequential with respect to the education of their children. Like parents of greater affluence, they have the power to choose good schools for their children now.

This program is part of a rescue plan for children in one of the worst urban school systems in the country. It enlists an array of schools – suburban public schools, private nonsectarian schools, and religious private schools – to educate several thousand economically disadvantaged schoolchildren. That the schools answering the rescue call were mainly religious provides the basis for much of the courts' finding below that the program establishes religion – a truly anomalous decision staking a statute's constitutionality on the independent choices made by private third parties.

In reality, when it designed the Cleveland Pilot Project Scholarship Program, the State and its advisors had available to them this Court's carefully articulated establishment clause guidelines with respect to aid programs

in which beneficiaries may choose religious providers.[2] Specifically, the Court has instructed that such aid is permissible so long as (1) the program includes religious entities among a broader range of choices and (2) the choice of where to expend funds is made independently by third parties. See *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep't of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). The State applied those teachings in good faith to develop a program whose primary effect is not to advance religion but to expand educational opportunities.

Petitioners do not ask this Court to endorse parental choice as a matter of public policy, nor would it be proper for the Court to do so. Rather, we ask this Court to find that the program fits well within the boundaries of neutrality and true private-choice set forth in this Court's

---

[2] As Judge Ryan observed in his dissent, *Simmons-Harris v. Zelman*, 234 F.3d at 967 (Ryan, J.) (emphasis in original):

> We may safely assume that in fashioning the new law, the Ohio legislators and the governor knew that the challenge they faced was to design a law that would survive a federal constitutional challenge on Establishment Clause grounds. That is not to say that the statute the legislators wrote and the governor signed into law is insulated from federal judicial constitutional scrutiny. Rather, it is to say what the majority does not even acknowledge: this statute is *presumed* to be constitutional. [Citations omitted.] This presumption is not a mere literary figure for rote recitation in all appellate opinions addressing the constitutionality of legislative enactments; it is a bedrock rule of statutory construction, one we are bound assiduously to honor as we begin our assessment of the validity of the Ohio statute.

establishment clause jurisprudence.[3] See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 842 (2000) (O'Connor, J., concurring in the judgment). In doing so, the Court will affirm good-faith efforts directed toward the constitutional imperative of extending educational opportunities to children who need them desperately.

ARGUMENT

I. THE COURT SHOULD ASSESS THIS PROGRAM NOT IN A VACUUM BUT IN LIGHT OF OUR RICH CONSTITUTIONAL TRADITION THAT ACCORDS GREAT WEIGHT TO PARENTAL AUTONOMY, EQUAL EDUCATIONAL OPPORTUNITIES, FEDERALISM, AND RELIGIOUS LIBERTY.

In any lawsuit, the plaintiffs enjoy a certain logistical advantage in initially framing the terms of the debate. For the respondents here, the establishment clause is the beginning and the end of the analytical construct – and we are more than happy to engage in that debate. But it would be a mistake for this Court to decide this case

---

[3] See, e.g., Michael W. McConnell, "Governments, Families, and Power: A Defense of Educational Choice," 31 *Conn. L. Rev.* 847 (1999); Catherine L. Crisham, "The Writing Is on the Wall of Separation: Why the Supreme Court Should and Will Uphold Full-Choice School Voucher Programs," 89 *Geo. L.J.* 225 (2000); Jason T. Vail, "School Vouchers and the Establishment Clause: Is the First Amendment a Barrier to Improving Education for Low-Income Children?" 35 *Gonz. L. Rev.* 187 (2000); Nicole Stelle Garnett and Richard W. Garnett, "School Choice, the First Amendment, and Social Justice," 4 *Tex. Rev. of L. & Politics* 301 (2000); Andrew A. Adams, "Cleveland, School Choice, and Laws Respecting an Establishment of Religion," 2 *Tex. Rev. of L. & Politics* 166 (1997).

bereft of other vital constitutional principles that this program implicates directly. We briefly discuss below four background principles that should help inform this Court's deliberations.

1. At its core, the Cleveland Pilot Project Scholarship Program effects a transfer of power over one of the most basic decisions in a child's education – the decision about which school a child will attend – from State officials to parents.[4]

Far from representing some radical departure, the program harmonizes with our rich constitutional tradition that recognizes the central role of parents in the educational upbringing of their children. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel v. Granville*, 530 U.S. 57 (2000). As the Court declared in *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925),

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its

---

[4] Parents with sufficient economic means already possess such power. If they are dissatisfied with their children's public schools, they either can send them to private schools or move into communities that have better public schools (with mortgages and property taxes that qualify for federal tax deductions). Indeed, over half of U.S. families with incomes above $60,000 report that they chose their neighborhood at least in part due to the quality of the public schools. Moe, *Schools, Vouchers, and the American Public* (2001) at 81. By contrast, it is beyond dispute that the vast majority of families in this program lack the essential attributes of school choice that many wealthier families enjoy. See, e.g., Greene (J.A. 215a) (average family income of scholarship recipients is $15,769); Affidavit of Senel Taylor, ¶ 8 (J.A. 174a) (parent could not afford to send his child to private school without scholarship).

> children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Quite apart from the thrust of the *Pierce* line of cases with regard to limiting state power, surely it is *permissible*, even laudatory, for the State to promote the "fundamental rights of the individual" by allowing parents "fair opportunity to procure for their children instruction which they think important. . . . " *Farrington*, 273 U.S. at 298-299.

2. Equality of educational opportunity is one of our most basic and essential civil rights. This Court declared in *Brown*, 347 U.S. at 493, that education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Indeed, "[t]he provision of education is one of the most important tasks performed by government: it ranks at the very apex of the function of a State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 848 (1982).

Private schools may be enlisted to fulfill the mandate of educational opportunity. This Court has recognized in the context of the federal Individuals with Disabilities Education Act that where the public schools have defaulted on the obligation to provide a free appropriate education, students are entitled to obtain such education in private schools at public expense. *School Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359 (1985).[5]

---

[5] Such a parentally directed private placement may be made in a religious school without violating the establishment clause. *Christen G. v. Lower Merion Sch. Dist.*, 919 F. Supp. 793 (E.D. Pa. 1996); *Matthew J. v. Mass. Dep't of Educ.*, 989 F. Supp. 380 (D. Mass. 1998).

Likewise, parental choice programs can operate as "a life preserver to . . . children caught in the cruel riptide of a school system floundering upon the shoals of poverty, status-quo thinking, and despair." *Davis v. Grover*, 480 N.W.2d 460, 477 (Wis. 1992) (Ceci, J., concurring) (describing the Milwaukee Parental Choice Program).

Despite federal court intervention and the expenditure of billions of dollars, the goal of equalizing educational opportunities and boosting student achievement has been an elusive one. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995). Again, if equal educational opportunity is a constitutional imperative, a State's efforts to promote such goals ought to merit substantial judicial deference.

3. "Courts and commentators have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth." *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part); accord, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As Justice Powell observed in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973), "No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education." In particular, "[e]ach locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence." *Id.*

The proliferation of parental choice programs reflects federalism at its best.[6] Most states now provide parents

---

[6] Though school choice for people of modest economic means is a fairly recent phenomenon at the K-12 level of U.S.

(Continued . . .)

with some choice of schools for their children, whether through open enrollment, magnet schools, charter schools,[7] private school scholarships, or a combination of those means.[8] Moffit, et al., *School Choice 2001: What's Happening in the States* (Heritage Foundation, 2001). Those policy experiments have yielded abundant data on the efficacy of choice. See, e.g., Peterson & Hassel, eds., *Learning from School Choice* (1998); Paul E. Peterson, "School Choice: A Report Card," 6 *Va. J. Soc. Pol'y & L.* 47 (1998).

Several states provide public assistance for parents choosing private schools, employing a wide variety of means. See *Mueller, supra* (upholding Minnesota's tuition tax deductions). Like Ohio, Wisconsin provides tuition vouchers for economically disadvantaged children in its

---

education, it is of course ubiquitous at the post-secondary level. Programs such as the G.I. Bill, Pell Grants, and student loans at the federal level, and similar student grant and loan programs operated by the states, typically allow students to apply public assistance at public, private, or religious institutions. Indeed, this Court unanimously approved the use of public funds for a blind student to study for the ministry at a school of divinity. *Witters, supra.*

[7] Charter schools are semi-autonomous publicly funded schools. In Ohio, they are called community schools. Community schools may be operated by private entities. They must be nonsectarian and tuition-free. Affidavit of Steven M. Puckett, ¶ 3 (J.A. 158a).

[8] With the increasing range of public school options, Catholic school enrollment has actually decreased, while the numbers of children attending schools of choice has increased substantially. Between 1965-90, enrollment in Catholic schools nationwide decreased by 50 percent. Affidavit of Joseph Viteritti, ¶ 11 (6th Cir. J.A. 01310). Today, 11 percent of all American schoolchildren attend private schools, while 13 percent attend public schools of choice. Affidavit of Paul Peterson at 251 (J.A. 87a).

largest city to choose private schools.[9] Wis. Stat. § 119.23. Florida provides opportunity scholarships for children in failing public schools to use in private or better-performing public schools. Fla. Stat. § 229.0537. For more than a century, Maine and Vermont have paid private or public school tuition for children in towns that do not have their own public schools.[10] 16 Vt. Stat. Ann. § 822; 20-A Me. Rev. St. Ann. § 5204(4). Illinois provides income tax credits for public and private school tuition. 35 Ill. St. Ch. 35 § 5/201(m). Arizona, Florida, and Pennsylvania all provide individual or corporate tax credits for contributions to private school tuition scholarship organizations.[11] Ariz. Rev. Stat. § 43-1089; 2001 Fla. Laws ch. 225; 2001 Pa. Laws 4. Florida provides scholarships for children with disabilities who opt out of their public school placements. 2001 Fla. Laws ch. 82.

This case obviously has serious ramifications for education reform all across America. In our federalist system, the State of Ohio's good-faith efforts to expand educational opportunities through parental choice merit this Court's deference.

4. This Court has defined the establishment clause standard for aid programs as encompassing the central requirement that "its principal or primary effect must be one that neither advances nor inhibits religion. . . . "

---

[9] The Milwaukee Parental Choice Program was upheld against a First Amendment challenge in *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998).

[10] The Vermont tuitioning program was upheld against a First Amendment challenge in *Campbell v. Manchester Bd. of Sch. Directors*, 641 A.2d 352 (Vt. 1994).

[11] The Arizona tax credit was sustained against a First Amendment challenge in *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999).

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The inclusion of the words "or inhibits" indicates that the Court intended to recognize a species of establishment clause violation occasioned by state action that inhibits religion. Surely this arises from the Court's sensitivity to the fact that the establishment clause is not the only clause in the First Amendment that speaks to religion; it is followed by a command that the State shall not impair the free exercise of religion.

Accordingly, this Court has charted a course of neutrality. As this Court stated in *Rosenberger*, 515 U.S. at 839, "A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion." Indeed, upon finding no establishment clause violation in the funding of a religious publication by student fees, the Court found that the exclusion of the publication violated the free-speech clause of the First Amendment. *Id.* at 834-36. The Court has invalidated state action that discriminates against religion. See, e.g., *Good News Club v. Milford Central Sch.*, 121 S.Ct. 2093 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Were religious schools not allowed to participate here, we would be left with parental choice programs in Cleveland that include private schools but single religious schools out for exclusion.[12] The primary effect of such an outcome would discriminate against religion.

---

[12] Respondents have no remaining claim against a scholarship program encompassing nonsectarian private schools. Likewise, in Ohio, nonsectarian private schools may qualify for community school status, entitling them to direct public funding. Ohio Rev. Code 3314.01, *et seq.*

Although the First Amendment does not create an affirmative obligation on the part of the State to create parental choice options that include public, private, and religious schools, surely it follows from the command of neutrality that it is constitutionally *permissible* – even prudent – to do exactly that. That is precisely the course of neutrality the State has charted in designing this program (see Parts II-4 and III, *infra*).

Given that the Pilot Project Scholarship Program accords with the fundamental constitutional principles of parental autonomy, equal educational opportunities, federalism, and religious liberty, respondents ought to face a mighty burden in seeking to invalidate it on establishment clause grounds.

II. THE PRIMARY EFFECT OF THE SCHOLARSHIP PROGRAM IS TO EXPAND EDUCATIONAL OPPORTUNITIES.

All parties agree that the main legal question is the scholarship program's "primary effect."[13] The courts below found the outcome dictated by *Committee for Public*

---

[13] Respondents do not seriously contend that the program lacks a secular purpose or creates an excessive entanglement between the State and religion. See *Lemon, supra*. As Judge Ryan stated, *Simmons-Harris v. Zelman*, 234 F.3d at 967-68 (Ryan, J.),

> The *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority, public school children from the devastating consequences of requiring them to remain in the failed Cleveland schools, if they wish to escape. There is also no serious claim that the statute is constitutionally invalid solely because it fosters an "excessive entanglement" between government and religion.

Education v. Nyquist, 413 U.S. 756 (1973), and distinguished away nearly three decades of intervening establishment clause precedents.[14] Yet, Justice Powell, the author of *Nyquist*, admonished that the proper analytical framework is "the nature and consequences of the program *viewed as a whole*." *Witters*, 474 U.S. at 492 (Powell, J., concurring) (emphasis in original).[15]

In this section, we examine the markedly different contexts in which the programs in *Nyquist* and the current program were adopted. To put it simply, in *Nyquist*, religious schools were the *ends*, while here religious schools are part of the *means* toward the goal of broadening educational opportunities. As a consequence, a secular primary effect is manifest.[16]

---

[14] That is true despite the fact that this Court has observed that "our Establishment Clause law has 'significantly changed' " over the past two decades, *Agostini v. Felton*, 521 U.S. 203, 237 (1997); specifically, "our understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. For the reasons set forth in Parts II and III, we believe that the program comports with the criteria set forth in *Nyquist*. However, to the extent that *Nyquist* conflicts with the more recent teachings of this Court, we urge the Court to reconsider and overrule *Nyquist*.

[15] Although *Witters* was unanimous, it is significant that a majority of justices either joined Justice Powell's concurring opinion (*id.* at 490) or attached themselves to its underlying reasoning. *Id.* at 490 (White, J., concurring); *id.* at 493 (O'Connor, J., concurring).

[16] That this program is about education, not religion, is nowhere more evident than in the identities of the prime movers behind this litigation, the National Education Association (*Simmons-Harris* respondents) and American Federation of Teachers (*Gatton* respondents). A perusal of their websites (www.nea.org and www.aft.org) contains plenty of anti-

(Continued . . .)

1. Respondents' extreme position that no public funds may be used in religious schools is curious not only in light of this Court's precedents over the past two decades, but in light of history. Early American education took place mainly in private and religious schools, often with direct public support. See Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* (1999) at 147. Indeed, Ohio's Constitution, which derived from the Northwest Ordinance, provides an affirmative constitutional mandate in that regard: "Religion, morality and knowledge, however, being essential to good government, it shall be the duty of the general assembly . . . to encourage schools and the means of instruction." Ohio Const. Art. I, sec. 7.

In the middle of the 19th Century, the idea of the common school took hold widely. Religious disputes arose because the public schools often expressly promoted Protestant teachings. Viteritti at 147-51. Resistance among Catholic immigrants, who developed their own private schools, prompted an anti-Catholic backlash among those who believed that all children should be

---

parental choice propaganda from an education policy perspective, but sparse mention of the issue from a First Amendment standpoint. After all, the purpose of unions is to advance their members' interests, not to vindicate First Amendment establishment clause concerns. As education researcher Terry M. Moe explains, "There is a lot at stake. The current education system spends more than $300 billion annually, provides millions of jobs, and is a motherlode of power for the public officials, administrators, and unions that are the established players in its operation. Vouchers threaten all this." Moe at 26. See also Lieberman, *The Teacher Unions* (1997).

subject to the dominant Protestant common school teachings. That backlash manifested itself in a proposed constitutional amendment sponsored by Sen. James G. Blaine to forbid public support for religious schools. The amendment was defeated in Congress, but subsequently was adopted in many state constitutions.[17] *Id.* at 151-56; see also *Mitchell*, 530 U.S. at 828 (plurality) ("a shameful pedigree that we do not hesitate to disavow"); Toby J. Heytens, "School Choice and State Constitutions," 86 *Va. L. Rev.* 117, 131-141 (2000); Joseph P. Viteritti, "Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law," 21 *Harv. J. L. & Pub. Pol'y* 657 (1998). In other words, respondents' position, which would shift the constitutional standard from neutrality to exclusion, was proposed – and *rejected* – as an amendment to the Constitution.[18]

2. Over the next century, the American public's attitude toward nonpublic schools changed. Justice Powell reflected the contemporary view that "[p]arochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve

---

[17] Interpreting its own constitution, the Arizona Supreme Court refused to apply Blaine-style language to strike down the State's income tax credit for private school scholarship contributions because it "would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it." *Kotterman*, 972 P.2d at 624.

[18] Indeed, even if the Blaine Amendment had been adopted, the scholarship program would survive scrutiny because it provides "aid" and "support" to students, not to schools. See *Jackson*, 578 N.W.2d at 621-23 (sustaining the Milwaukee Parental Choice Program under the Wisconsin Constitution's Blaine Amendment).

substantially the tax burden incident to the operation of public schools." *Wolman v. Walter*, 433 U.S. 229, 262-264 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part).

The New York program struck down in *Nyquist* was part of a broader effort to rescue Catholic schools. In the 1970s, Catholic schools faced a fiscal crisis created by declining student enrollments. Nationally, the number of Catholic schools declined from 13,000 in 1967 to 10,000 in 1972. Evan Jenkins, "High Court Dims Parochial Hopes," *New York Times* (June 27, 1973) at 19. A New York State-sponsored report predicted that at least 70 percent of Catholic grade schools and 50 percent of Catholic high schools would close by 1980. See Fleishmann, *The Collapse of Nonpublic Education* (1971). The Catholic school crisis in turn would reverberate in public schools, which would be faced with rising enrollments and costs.

The result was "parochaid," exemplified by the New York statutes struck down in *Nyquist*. The Legislature found that "the fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children. . . . " N.Y. Educ. Law, Art. 12-A, § 549(2). Likewise, "any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs," which "would seriously jeopardize quality education for all children. . . . " *Id.*, § 559(3). See *Nyquist*, 413 U.S. at 764-65.

Accordingly, the Legislature crafted an aid program comprised of (1) direct money grants to qualifying private schools for maintenance and repair, (2) a tuition reimbursement plan for parents of nonpublic school students, and (3) a tax deduction for nonpublic school tuition. All three programs conferred benefits, expressly

and exclusively, to private schools and their patrons. Given the context of the aid programs as a whole – designed as they were to bail out religious schools – it is quite understandable that the Court could conclude that the New York statutes were among those "ingenious plans for channeling state aid to sectarian schools that periodically reach this Court," *id.* at 785, for the aim and design of the programs was to prop up religious schools.

3. By contrast, the aim and design of contemporary parental choice programs is exactly the opposite: to enlist private and religious schools to bail out failing public schools. The origins of the modern parental choice movement trace to religious-school advocates and the free-market economics of Milton Friedman; but more recently, parental choice has evolved into a central component of the broader quest for education reform and educational equity. See Moe at 32-33; Bolick, *Transformation: The Promise and Politics of Empowerment* (1998) at 43-53; Floyd H. Flake, "School Choice: Why Poor Kids Need It Most of All," 2 *Amer. Experiment Q.* 35 (Spring 1999); Diane Ravitch, "The Right Thing," *The New Republic* 31 (Oct. 8, 2001).

The movement was precipitated by a 1983 report finding the quality of public schooling to be in serious decline. National Commission on Excellence in Education, *A Nation at Risk* (1983). Most dire were the educational circumstances of low-income minority youngsters in the inner cities.[19] The trends have persisted. The 1994

---

[19] Urban public schools enroll 24 percent of all public school students in the United States, 25 percent of poor students, and 43 percent of minority students. Diane Ravitch, "A New Era in Urban Education?" *Brookings Institution Policy*

(Continued . . .)

National Assessment of Educational Progress reported that only 23 percent of fourth-graders in high-poverty urban schools satisfied basic reading requirements compared to 63 percent in non-urban schools nationally. Ravitch, "A New Era in Urban Education?" at 2. Likewise, last year NAEP revealed that 63 percent of black and 56 percent of Hispanic fourth-graders are below the most basic levels of proficiency in reading. The report found that the black/white achievement gap actually has widened since 1992. National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* at 31 and 33.[20]

Graduation rates are equally grim: only 70 percent of black students and 50 percent of Hispanic students graduate on time. Robert M. Huelskamp, "Perspectives on Education in America," *Phi Delta Kappan* (May 1993) at 719. These rates have huge spillover effects: about 90 percent of prison inmates are high school dropouts. Jake Thompson, "Jackson Calls Nation's Attention to Its Educational 'Emergency'," *Kansas City Star* (Feb. 22, 1997), p. A1. At the same time, violence and disorder caused chaos

---

Brief # 35 (Aug. 1998) at 1. (This report can be found at http://www.brook.edu/comm/PolicyBriefs/pb035/pb35.htm.)

[20] Although black students were making academic gains relative to whites until the 1980s, the situation reversed and the academic gap began to widen between 1988 and 1994. Thernstrom and Thernstrom, *America in Black and White* (1997) at 355-59. The gap in reading between blacks and whites closed by 3.5 academic years between 1980 and 1988, but then widened again by nearly a year and a half from 1988 to 1994, so that "in 1994 blacks aged seventeen could read as well as the typical white child who was a month past his or her *thirteenth* birthday." *Id.* at 357 (emphasis in original). Likewise, in math the racial gap of 2.5 years in 1990 grew to 3.4 years by 1994. *Id.*

in many inner-city schools.[21] Thernstrom and Thernstrom at 376-82; Bolick at 34-36.

In 1990, two Brookings Institution scholars explored the differences between failing inner-city public schools and more-successful inner-city private schools and suburban public schools, and found the former to include bloated administrative bureaucracies more responsive to political influences than parental concerns; a lack of autonomy and mission; and a lack of parental choice. Chubb and Moe, *Politics, Markets & America's Schools* (1990), cited with approval in *Davis v. Grover*, 480 N.W.2d at 471. Around the same time, social scientists including James Coleman began to report that private schools, particularly Catholic schools, promoted greater educational attainment for minority children, regardless of background, because they provided a common academic curriculum and high academic expectations. See, e.g., Coleman, Kilgore, and Hoffer, *High School Achievement: Public, Catholic, and Private Schools Compared* (1982); Greeley, *Catholic High Schools and Minority Students* (1982). See also Ravitch, *Left Back: A Century of Battles Over School Reform* (2001) at 417-18; Derek Neal, "The Effects of Catholic Secondary Schools on Educational Achievement," 15

---

[21] Student behavior problems, particularly in areas of student absenteeism, classroom discipline, weapons possession, and student pregnancy, are more prevalent in urban public schools than other schools. Likewise, teacher absenteeism, an indicator of morale, is more of a problem in urban poverty schools. Laura Lippman, Shelley Burns, and Edith McArthur, *Urban Schools: The Challenge of Location and Poverty* (National Center for Education Statistics, 1996) at 5. (This report can be found at http://nces.ed.gov/pubs/96184ex.html.)

J. Labor Econ. 98 (1997);[22] Stern, "The Invisible Miracle of Catholic Schools," *City Journal* (Summer 1996) at 14-16; Paul Hill, Gail E. Foster, and Tamar Gendler, *High Schools with Character* (Rand Corporation, 1990).

Many states responded with various types of parental choice programs, including open enrollment, magnet schools, and charter schools. Moe at 39-40. But institutional inertia and an inadequate supply of high-quality public schools motivated reformers to look beyond the public system. In Milwaukee, the nation's first parental choice program for economically disadvantaged children was created in 1990. Initially, it was limited to nonsectarian private schools, but capacity limits led to its expansion to include religious schools in 1995.[23] See McGroarty,

---

[22] Neal found in his 1997 study that although Catholic schools produce negligible academic effects for suburban and white students, they strongly improve educational outcomes for urban minority children. Holding background factors constant, Neal found that the odds for high school graduation for urban black and Hispanic children increase from 62 to at least 88 percent in Catholic schools. In turn, he found that the likelihood of college attendance is tripled for urban minority students who attend Catholic schools. Not surprisingly, those gains translate into substantially higher wages in the labor market. Neal concludes bluntly, "Urban minorities receive significant benefits from Catholic schooling because their public school alternatives are substantially worse than those of whites and other minorities who live in rural or suburban areas." *Id.* at 98-100. See also Jeff Grogger and Derek Neal, "Further Evidence on the Effects of Catholic Secondary Schools," *Brookings Wharton Papers on Urban Affairs* (Nov. 1999).

[23] As Moe notes, presently 85 percent of all private school students are enrolled in religious schools. "This means that a voucher system that includes religious schools could immediately offer many children a range of new opportunities,

(Continued . . .)

Break These Chains (1996); Mikel Holt, *Not Yet "Free at Last"* (2000).

Not surprisingly, "the appeal of private schools is especially strong among parents who are low in income, minority, and live in low-performing districts: precisely the parents who are most disadvantaged under the current system." Moe at 164; see also *id.* at 211 (minority and low-income parents most strongly support parental choice), *id.* at 147 (also the most strongly interested in moving their children from public to private schools), *id.* at 165 (the main motivation for wanting to make a shift is academic performance). Perhaps the most tangible evidence of this phenomenon occurred in 1998, when philanthropists made 40,000 privately funded scholarships available for economically disadvantaged children nationwide and 1.25 *million* youngsters applied for them. *Id.* at 38.

Debate rages among social scientists regarding the effects of parental choice, but the main focus is not on *whether* parental choice improves educational opportunities but *in what ways and how much.* See, e.g., Paul E. Peterson, "School Choice: A Report Card," in Hassel,

---

but that a system legally restricted to nonsectarian schools could not, for supply would be quite limited and there would be *nowhere for most kids to go.*" Moe at 394 (emphasis in original). However, over time, the percentage of nonsectarian schools may rise as demand grows and the threat of litigation subsides. In the context of Milwaukee, since the successful outcome in *Jackson v. Benson*, the number of nonsectarian private schools in the parental choice program and the number of students attending nonsectarian schools both have increased substantially. Declaration of Howard Fuller, ¶¶ 18 and 21 (J.A. 234a-236a).

Learning from School Choice at 23 (if gains from the Milwaukee Parental Choice Program were replicated nationally, "they could reduce by somewhere between one-third and more than one-half the current difference between white and minority test score performance").

Parental choice also has evolved from purely a life preserver for kids in failing schools into a crucial facet in the effort to reform and improve public schools through competition. Studies indicate that public schools often perform better when parents have greater educational choices. As Harvard Professor Caroline Hoxby stated in uncontroverted testimony, "a significant effect of school choice is the effect that they have upon conventional public school districts, which have to respond to parents' having alternative school choices." Affidavit of Caroline Hoxby, ¶ 7 (J.A. 62a); see also Nina Shokraii Rees, "Public School Benefits of Private School Vouchers," *Pol'y Rev.* (Jan.-Feb., 1999). The Milwaukee Parental Choice Program apparently has triggered long-overdue reform and improvement in the public schools.[24] The Florida Opportunity Scholarship program, for instance, offers scholarships to children in public schools that have received a failing grade from the State in two academic years. After the program's first year, every public school on the State's failing list lifted itself off (see Greene, *An Evaluation of*

---

[24] After years of editorializing against the Milwaukee Parental Choice Program, the *Milwaukee Journal Sentinel* changed its position when it became clear that the program was exerting a positive influence on the city's public schools. Remarking on the public school system's recent reforms and improvements, the newspaper acknowledged that "[m]uch of what the system is doing to improve gained impetus because of the expansion of choice in Milwaukee." "MPS and the Virtues of Choice," *Milwaukee Journal Sentinel* (Jan. 31, 2001); see also "Choice: It's Not Only Money," *Milwaukee Journal Sentinel* (June 29, 2001).

the Florida A-Plus Accountability and School Choice Program (Harvard, 2001) at 7-9), and academic gains were most pronounced among the poorest-performing youngsters. *Id.* at 10-11.[25]

Again, none of this background is provided to convince the Court that parental choice is proper public policy, but rather to demonstrate the context in which contemporary parental choice programs arise. A program calculated to expand educational opportunities will look different than one designed to bail out religious schools. That is precisely the case with contemporary parental choice programs, which comprise one facet of a broader effort to reform public schools and to expand educational opportunities for economically disadvantaged schoolchildren. And it is specifically true with respect to the Cleveland Pilot Project Scholarship Program.

4. The Ohio legislature enacted the Cleveland Pilot Project Scholarship Program "to address an educational crisis in Cleveland's public schools in the wake of a U.S. District Court-ordered takeover of the administration of the Cleveland City School District" by the State of Ohio.[26]

---

[25] This study is available at www.ksg.harvard.edu/pepg.

[26] Newspaper headlines from the mid-1990s, when the program at issue in this lawsuit was created, paint a picture of a school system beset by virtually every conceivable problem, from poor academics to administrative problems to chronic violence. See, e.g., Patrice M. Jones, "9th-Graders Falter on Proficiency Tests," *Cleveland Plain Dealer* (Mar. 20, 1994) at 1B (reporting that only 11 percent of CCSD ninth graders passed the State's proficiency examinations); Scott Stephens, "Officials Continue Test-Cheating Probe," *Cleveland Plain Dealer* (Aug. 3, 1994) at 2B; Scott Stephens, "Transportation Traumas: Cleveland Parents Protest Busing Cuts," *Cleveland Plain Dealer* (Sept. 7,

(Continued . . .)

Simmons-Harris v. Zelman, 72 F. Supp.2d at 836. The educational crisis is severe and continuing. In 1999, the State of Ohio reported that CCSD failed to meet a single one of the 18 performance criteria set by the State. State of Ohio, *1999 School District Report Card* at 150 (6th Cir. J.A. 00475-00481). Among students taking ninth grade proficiency tests, only 11.6 percent of CCSD students passed, compared to 55.6 percent statewide and 22.4 percent of students in districts of similar size, poverty, geography, and tax wealth.[27] *Id.* at 151. The following year, in which expanded performance criteria were used, CCSD met zero out of 27 standards. Janet Tebben and Mark Vosburgh, "Cleveland Schools Score Lowest in State," *Cleveland Plain Dealer* (Dec. 23, 1999) at 1A. The graduation rate for CCSD students in 1996 was an appalling 39.3 percent; by 1998 it had fallen to 32.6 percent. Affidavit of Francis H. Rogers III, ¶ 2 (6th Cir. J.A. 01620-01621).

1994) at 1B; Patrice M. Jones, "Schools Slide Into Disrepair," *Cleveland Plain Dealer* (Sept. 11, 1994) at 1B; Scott Stephens, "School Board Unveils Steps to Curb Violence," *Cleveland Plain Dealer* (Oct. 29, 1994) at 1B; Patrice M. Jones, "[Mayor] White Says It's Time for a Change in Schools," *Cleveland Plain Dealer* (Nov. 13, 1994) at 1A; Mark Skertic, "Cleveland Public Schools: Ohio's Largest District in Chaos," *Cincinnati Enquirer* (Mar. 19, 1995) at A1; Evelyn Theiss, "School Board Repeats Failed Reform Pattern," *Cleveland Plain Dealer* (Aug. 27, 1995) at 6B; "Sweeps Week Continues With 91 More Truants," *Cleveland Plain Dealer* (Sept. 27, 1995) at 4B; Maggi Martin, "East High Student Shot by Man in Ski Mask," *Cleveland Plain Dealer* (Dec. 12, 1995) at 2B; Patrice M. Jones, "Summit on School Woes Draws 2,000: City Parents, Students, Others Look for Ways to Fix System," *Cleveland Plain Dealer* (Jan. 28, 1996) at 2B.

[27] Cleveland Catholic schools boast much higher academic performance. See Buckeye Institute, *Public Choices, Private Costs: An Analysis of Spending and Achievement in Ohio Public Schools* (1998) at 207 (6th Cir. J.A. 00536).

The conditions in CCSD motivated Cleveland Councilwoman Fannie Lewis, who represents the economically impoverished Hough neighborhood, to charter buses to transport parents to the State Capitol to lobby for parental choice. Declaration of Fannie Lewis, ¶ 9 (Dist. Ct. Record No. 37). As Councilwoman Lewis testified, *id.*, ¶ 4, "[T]he scholarship program is essential to improving the educational opportunities for the children of the Hough community. . . . [F]amilies of limited economic means desperately need educational alternatives beyond those currently available in the Cleveland public schools. . . . "

The children in the program – including those who already were attending private schools – are overwhelmingly poor and minority. Scholarship students have lower family incomes than CCSD students ($15,769 vs. $19,948); they are more likely to be raised in single-parent homes (68.2 percent vs. 40 percent); and they are mostly black (68.7 percent vs. 45.9 percent). Greene (J.A. 215a-216a).

As the official State evaluation of the program found, "The most important factors for applying to the scholarship program were educational quality and school safety," which were identified by 96.4 percent and 95 percent, respectively, of parents in the program. Indiana University, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program (1996-99)* (6th Cir. J.A. 00448). Of the five main factors for choosing a school, religion was identified as least important. *Id.* After the first two years, the State study found limited but positive effects on student achievement. *Id.* at 00453.

The hopes and opportunities for the program resound in the voices of the parents. Senel Taylor, a scholarship father, describes his daughter's experience:

> Our daughter, Saletta, is ten years old and is in the fourth grade at New Hope Christian Academy, a private school.
>
> When I heard about the Cleveland Scholarship and Tutoring Program, I jumped at the chance to apply for a scholarship for Saletta. She has been in the program for two years. The scholarship has allowed Saletta to receive an excellent education.
>
> Saletta attended public school for a couple of years. She failed first grade and had to repeat it. Fortunately, it was right at that time that I learned of the [program]. We applied and thankfully Saletta was accepted.
>
> Saletta's progress at New Hope Christian Academy has been excellent. Her grades have improved dramatically. She likes Second New Hope much better than her public school, and as a result is excelling at school. . . .
>
> If the [program] is not allowed to continue, Saletta will have to go back to public school. My wife and I cannot afford to send her to Second New Hope without a scholarship. This would be devastating to Saletta.

Taylor Aff., ¶¶ 2-5 and 8 (J.A. 173a-174a); see also Affidavits of Johnietta McGrady (J.A. 176a-178a), Amy Hudock (J.A. 179a-181a), Christine Suma (J.A. 220a-222a). See also McGroarty, *Trinietta Gets a Chance* (2001).

In the real-world context of education reform, it is plain that the program's primary effect is not to subsidize religion, but to broaden educational options for disadvantaged families. As former Milwaukee Public Schools Superintendent Dr. Howard Fuller testifies,

> The critical issue is not whether children go to private or public schools, to religious or nonsectarian schools, but whether they go to good schools

> or bad schools. More options for parents means that more families have more opportunities to choose schools best for their children. Cleveland's scholarship program increases educational opportunity. . . . The primary effect of programs like . . . Cleveland's is to expand educational choices for low-income families, which is good for the children and their families, and also good for the educational system by fomenting institutional reform and improvement within the public schools.

Fuller Decl., ¶ 19 (J.A. 235a).

For all those reasons, the Ohio Supreme Court categorically concluded, "The primary beneficiaries of the School Voucher Program are children, not sectarian schools." *Simmons-Harris v. Goff*, 711 N.E.2d at 211. It is that court's ruling, and not the erroneous conclusion reached by the federal courts below, that this Court should follow.

III. THE SCHOLARSHIP PROGRAM IS NEUTRAL ON ITS FACE AND FUNDS ARE DIRECTED TO RELIGIOUS SCHOOLS ONLY THROUGH THE TRUE PRIVATE CHOICES OF INDIVIDUAL PARENTS, THEREFORE SATISFYING ESTABLISHMENT CLAUSE REQUIREMENTS.

Throughout this litigation, the respondents have divided the world of establishment clause jurisprudence into two polar opposites – *Nyquist* versus all the cases subsequent to it – and have attempted to shoehorn the scholarship program into the first category with the consequence of pre-ordained unconstitutionality. In reality, there are not two worlds of establishment clause jurisprudence, but one; and the principles articulated have been consistently applied throughout. Viewed against the

backdrop of this jurisprudential continuum, the Cleveland Pilot Project Scholarship Program plainly meets this Court's standards.

The Sixth Circuit held that the outcome of this case was dictated by *Nyquist*, even though the question presented here was expressly left open in that case; specifically "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist* at 782 n.38.

Since *Nyquist*, the Court has answered that question repeatedly.[28] As Justice Powell subsequently observed in *Witters*, 474 U.S. at 490-91 (Powell, J., concurring), "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate" the primary effect test.[29] That is true even if government funds an individual's choice to attend religious schools, so long as "[a]ny aid . . . that ultimately

---

[28] But by pigeon-holing this case within a rigid *Nyquist* framework, the panel majority below "refus[ed] to conduct any meaningful analysis of the Supreme Court's several Establishment Clause decisions" in the years since *Nyquist* was decided. *Simmons-Harris v. Zelman*, 234 F.3d at 963 (Ryan, J.).

[29] Rather than marking some about-face on the part of Justice Powell, the author of *Nyquist*, it is fairly clear that this is precisely the rule of neutrality intended in *Nyquist*. On the same day the Court decided *Nyquist*, it also dismissed an appeal in which a state court upheld a student loan program in which students could apply funds to the college of their choice, public or private, religious or secular. *Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972), *appeal dismissed for want of substantial federal question*, 413 U.S. 902 (1973).

flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[30] *Witters*, 474 U.S. at 487. Accord, *Mitchell*, 530 U.S. at 838-41 (O'Connor, J., concurring in the judgment); *Agostini, supra; Zobrest, supra; Witters, supra; Mueller, supra.*

Rather than presenting divergent rules, then, *Nyquist* and the cases decided in the intervening 28 years establish a single set of principles: where tuition aid is directed to a class defined without reference to religion, religious schools may be included so long as the choice of where to spend the funds is made by parents or students.

Applying those principles, the Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program in *Jackson*, 578 N.W.2d at 614 n.9, observing that "[i]n *Nyquist*, each of the facets of the challenged program directed aid exclusively to private schools and their students. The MPCP, by contrast, provides a neutral benefit

---

[30] It is that characteristic – "true private-choice" – that distinguishes indirect aid programs such as those at issue in *Mueller, Witters,* and *Zobrest*, from direct aid programs such as the ones sustained in *Agostini* and *Mitchell*. The Court has recognized "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger*, 515 U.S. at 842. Hence, in direct aid cases, it is relevant whether public funds "ever reach the coffers of religious schools." *Agostini*, 521 U.S. at 228. Even there, however, the Court has "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225. By contrast, as even the dissenters to the more recent cases have acknowledged, "When government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion." *Zobrest*, 509 U.S. at 22-23 (Blackmun, J., dissenting); see also *Mitchell*, 530 U.S. at 889 (Souter, J., dissenting).

to qualifying parents of school-age children in Milwaukee Public Schools." The Ohio Supreme Court applied those same principles in sustaining the Cleveland scholarship program, *Simmons-Harris v. Goff*, 711 N.E.2d at 208-11; as did the Arizona Supreme Court in the context of scholarship tax credits, *Kotterman*, 972 P.2d at 615-17; and the Vermont Supreme Court in the context of its tuitioning program. *Campbell*, 641 A.2d at 360-61. See also *Simmons-Harris v. Zelman*, 234 F.3d at 963-74 (Ryan, J.).

It is from these principles that the Sixth Circuit departs. Despite the fact that the scholarship program confers benefits on a class defined without reference to religion, that public funds are transmitted only as the result of independent choices of parents, and that the program creates no incentive to choose religious schools, the court found it had the primary effect of establishing religion. Its decision is untenable. Simply put, *Nyquist* does not control this case, for the program was carefully designed as precisely the type of neutral, indirect student aid program on which the Court expressly reserved judgment in that case, and which the Court repeatedly has sustained without exception ever since.

A. Neutrality. "In distinguishing between [religious] indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 U.S. at 809 (plurality); accord, *id.* at 838 (O'Connor, J.) ("Our cases have described neutrality in precisely this manner, and we have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid"). As this Court emphasized in *Zobrest*, 509 U.S. at 8, "Given that a contrary rule would lead to . . . absurd results, we

have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."

There can be no doubt that the Cleveland Pilot Scholarship Program confers educational assistance to a class defined without reference to religion. "On its face, the statutory scheme does not define its recipients by reference to religion." *Simmons-Harris v. Goff*, 711 N.E.2d at 209. In contrast to *Nyquist*, in which aid was directed expressly and exclusively to private schools and their patrons, the scholarship program here is available to all Cleveland schoolchildren, with a preference for children attending Cleveland public schools and for children below 200 percent of the poverty level.[31] Ohio Rev. Code § 3313.978(A). See *Simmons-Harris v. Zelman*, 234 F.3d at 969 (Ryan, J.). The statute does not disburse aid directly to private schools at all, and eligible schools again are

---

[31] Respondents repeatedly have noted that despite a cap on the percentage of children in the program who were already enrolled in private schools, a substantial percentage of scholarship recipients in fact never attended CCSD. The assertion is misleading. The phenomenon is attributable to the fact that in its early years, the program expanded one grade each year, meaning that children in the program would progress along and that most new entrants to the program would be in kindergarten – hence, never previously having attended public (or private) schools. Regardless of when their children joined the program, the low average income of scholarship families ($15,769) (see Greene (J.A. 215a)), suggests that most would not be able to afford private school tuition otherwise or could do so only at great sacrifice.

defined "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782 n.38. Accordingly, "[i]t is obvious that the Ohio statute does not have the remotest effect of providing governmental indoctrination in any religion, to say nothing of having such a primary effect." *Simmons-Harris v. Zelman*, 234 F.3d at 968 (Ryan, J.).

1. The program's facial neutrality should end the inquiry; but curiously, the court below embarked upon a far-flung inquiry to identify supposed indicia of partiality. Instead of applying this Court's test of facial neutrality, the panel majority substituted a mathematical analysis, to wit that because at the time of the lawsuit 82 percent of the participating schools were sectarian, and 96 percent of the children were attending religious schools, the program is unconstitutional. *Simmons-Harris*, 234 F.3d at 959.

This Court on at least two occasions has explicitly rejected the Sixth Circuit's proposed standard. In *Mueller*, 463 U.S. at 400-01, the plaintiffs made precisely the same arguments as do the respondents here, presenting almost identical statistics in an effort to invalidate Minnesota's tuition tax deduction:

> Petitioners argue that, notwithstanding the facial neutrality [of the challenged program], in application the statute primarily benefits religious institutions. Petitioners rely . . . on a statistical analysis of the type of persons claiming the tax deduction. They contend that most parents of public school children incur no tuition expenses . . . ; moreover, they claim that 96% of the children in private schools . . . attended religiously affiliated institutions. Because of all this, they reason, the bulk of deductions . . . will be claimed by parents of children in sectarian schools.

To this assertion, the Court's response was unambiguous: "We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* at 401. Quoting that language, the Court reiterated in *Agostini*, 521 U.S. at 229, "Nor are we willing to conclude that the constitutionality of an aid program depends upon the number of sectarian school students who happen to receive the otherwise neutral aid."[32]

Substitution of this Court's rule with the statistical formula applied by the Sixth Circuit would result in precisely the "absurd results" against which this Court warned in *Zobrest*, 509 U.S. at 8. First, "[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated." *Mueller*, 463 U.S. at 401. The court below did not suggest any line of statistical demarcation. How many religious schools or students choosing them is too much? Ninety percent? Fifty percent plus one? What if the program is on one side of the tipping point one year, and on the other side the next? In essence, the proposed rule creates a third-party veto over the constitutionality of a facially neutral program – if certain individuals or entities choose not to participate in ways that satisfy

---

[32] Displaying a talent for creating distinctions without a difference, respondents have argued that these admonitions do not apply where the percentage of *schools*, rather than *students*, is disproportionately religious. The reasons for a standard of facial neutrality apply with equal force in both instances, and we reiterate that the program is facially neutral with regard to participation by both schools and students.

some unknown statistical standard, the program is rendered invalid. Surely constitutionality cannot depend on the independent decisions of third parties.

Moreover, the present statistics present only a snapshot in the evolving life of the program, and they are subject to substantial change. As the court below acknowledged, *Simmons-Harris v. Zelman*, 234 F.3d at 949, as many as 22 percent of scholarship students attended nonsectarian schools at one point in the program, compared to four percent when the program was challenged in federal court.[33] Those numbers could change fairly dramatically again, for instance, if suburban public schools decided to participate in the program, or if new nonsectarian schools open. Indeed, the older Milwaukee Parental Choice Program has experienced substantial demographic changes, particularly since litigation ended in 1998. In Milwaukee, the number of nonsectarian private schools participating in the program increased from seven to 30 between 1990 and 2000, and now comprise 30 percent of the schools in the program; the enrollment of students in nonsectarian schools increased nearly ten-fold during that same period from 337 to 3,025, or 37.5 percent of the 8,066 students in the program. Fuller Decl., ¶¶ 18 and 21 (J.A. 234a-236a). It is not surprising that in the early days of an inner-city parental choice program most of the schools are religiously affiliated, because religious schools often are the only ones that can help subsidize the tuition of economically disadvantaged children. But as

---

[33] The reason for the change is that the two largest nonsectarian private schools participating in the scholarship program converted to community school status, which provides substantially increased remuneration from the State. Affidavit of Caroline Hoxby, ¶¶ 4c and 5c (J.A. 56a, 60a).

the record from Milwaukee shows, that can change as new schools open to serve increased demand.[34]

Further, the statistical approach untenably hitches the program's constitutionality to the way that third parties exercise their independent choices. The court below concludes that because suburban public schools made no spaces available in the program, "[t]herefore, the program clearly has the impermissible effect of promoting sectarian schools." *Simmons-Harris v. Zelman*, 234 F.3d at 959. One can only speculate why suburban public schools declined to open their doors to inner-city Cleveland schoolchildren.[35] But more than 50 private schools decided to participate, agreeing to accept low-income children on a random selection basis for tuition not to

---

[34] Litigation, too, can impact the mix. The threat of having the program discontinued obviously impedes the investment necessary to start new schools. In this case, the injunction imposed by the district court drove two nonsectarian schools out of the program. See Declarations of David P. Zanotti, ¶ 9 (J.A. 226a); Dr. Barbara Kurtz, ¶ 4 (6th Cir. J.A. 00573) (injunction "had a devastating effect on our school"); Cassandra Brown-Collier (6th Cir. J.A. 00576-00578). By contrast, as Dr. Fuller testifies in the context of the Milwaukee Parental Choice Program, "Since the litigation cloud was lifted, the growth of the program has been dynamic, in terms of both religious and nonreligious school participation." Fuller Decl., ¶ 18 (J.A. 235a).

[35] Respondents have argued that the State could have ensured public school choices by *requiring* suburban districts to participate. But the program in this regard treats public and private schools exactly alike: both are allowed to opt in or out, as they choose.

exceed $2,500.[36] The import of the ruling below is perverse: because only *some* schools were willing to provide an educational life preserver, then *none* will be permitted to do so.

All of this underscores why this Court's bright-line rule of facial neutrality – rather than the hopelessly arbitrary and subjective statistical standard proposed by the Court below – is the proper measure of constitutionality.

2. The court below went on to suggest that "[p]ractically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs."[37] *Simmons-Harris v. Zelman*, 234 F.3d at 959. Specifically, "[a]t a maximum of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program."[38] *Id.* at 959.

---

[36] As Judge Ryan observed, *Simmons-Harris v. Zelman*, 234 F.3d at 971 (Ryan, J.),

> It is probably true that no private school, religious or nonreligious, can educate a child for the voucher value of $2,500. But, in all probability, the participating private schools are willing to accept the voucher as meeting a portion of the actual educational costs for these children and are willing to absorb the differential cost as part of their *pro bono* service in Cleveland to help save as many of these children as possible from the disastrous consequences of continuing in the city's failed public schools.

[37] For this proposition, central to its holding, the court cites to nothing in the record, but only to a law review article.

[38] Again, premising a decision on the notion that the amount of the scholarship is *too low* creates a hopelessly subjective standard.

The premise is factually inaccurate. Under State law, participating suburban schools would receive the scholarship amount *plus* the "average daily membership" expenditure under State law (approximately $4,294 per student), for a total of about $6,544. Ohio Rev. Code §§ 3317.03(I)(1), 3327.06, 3317.08(A)(1). Given the advantageous treatment conferred to public schools, no financial disincentive exists for public schools to participate. The explanation for nonparticipation must lie elsewhere. Whether their motivations are malign or beneficent, however, should be irrelevant to a facially neutral program's constitutionality.[39]

Given the premium that participating suburban public schools would receive, the base amount of the scholarship understandably was set at about the median cost of private school tuition.[40] But the program plainly creates no financial windfall for private schools, and indeed may not even constitute a break-even proposition. Unlike the Milwaukee Parental Choice Program, which reimburses schools for tuition or actual costs, whichever is greater, see Wis. Stats. § 119.23(4), the Ohio statute caps the amount of the scholarship at 90 percent of the amount of tuition up to $2,250. Ohio Rev. Code §§ 3313.976(A)(8)

---

[39] As this Court remarked in *Mueller*, 463 U.S. at 401, "[T]he fact that private persons fail in a particular year to claim the tax relief to which they are entitled – under a facially neutral statute – should be of little importance in determining the constitutionality of the statute permitting such relief."

[40] Average private elementary school tuition is $2,138 per year. Average Catholic school tuition is $1,628 annually. See Center for Education Reform, *Elementary and Secondary Education Statistics at a Glance* (2001) (http://www.edreform.com/pubs/edstats.htm).

and 3313.978(C)(1). If the Sixth Circuit's premise is accurate that religious schools subsidize their students, what that means is that every time a religious school admits a scholarship student, it must raise funds to subsidize that child – hardly a formula for enriching private schools.

3. As the foregoing discussion suggests, the scholarship program is not merely neutral in practical effect, but what might be characterized as "neutral-plus": *all* of the incentives created by this program and related State programs operate to encourage public schools, or to a lesser extent private nonsectarian schools, rather than religious schools. As this Court observed in *Zobrest*, 509 U.S. at 10, where a program "creates no financial incentive for parents to choose a sectarian school," the fact that aid ends up there "cannot be attributed to state decisionmaking."

As Professor Hoxby attested in uncontroverted testimony, "Cleveland parents have an incentive to choose a public school (community, conventional, or magnet) over a private school." Hoxby Aff., ¶ 4f-g (J.A. 58a). A Cleveland public school student is backed by over $7,000 in public funding. Community schools receive $4,518 per pupil, and are eligible for disadvantaged student assistance and special education funding. *Id.*, ¶¶ 4a, 4c, and 4d (J.A. 56a) (see Table 1 at 41, *infra*). By contrast, scholarship students receive a maximum of $2,250 from the State; and unlike public or community school students, they must make up ten percent of the costs of tuition. Moreover, only public school students are eligible for the tutorial assistance grants that the same program created.

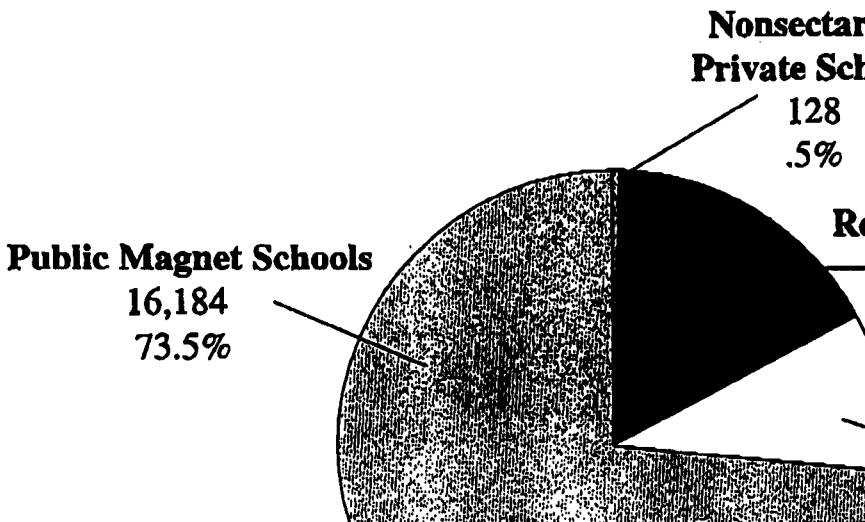
Schools of Choice Available to Cleveland School Children

Type	Public or Private	No. of Students	Per-Pu Fund
Magnet	Public	16,184	$7,0
Community	Public	2,087	$4,518 m
Scholarship	Private*	3,765	$2,2

**Open to Suburban Public*

Table 2

Distribution of Students in Public, Nonsectarian Private, and Religious Sc 1999-2000 School Year



In terms of attractiveness to schools, the scholarship program is the poor relative among Cleveland parental choice programs. Nonsectarian private schools may become community schools and receive nearly twice as much in tuition.[41] *Id.*, ¶ 5b-c (J.A. 59a-60a). Religious schools are the only schools whose participation in choice programs is limited to the scholarship program. And to do so, they not only must accept $2,500 as full payment of tuition, but they must also agree to accept students on a random selection basis with a preference for economically disadvantaged youngsters. *Simmons-Harris v. Zelman*, 234 F.3d at 948. If this is a means to funnel subsidies to religious schools, surely it is a strange way to do it.

All of this underscores the wisdom underlying this Court's rule of facial neutrality. Once the State has fashioned a neutral program, there is no way to predict with certainty how individuals will exercise their choices. The link between State action and religious school choices is severed. As the Ohio Supreme Court observed, "It is difficult to see how the School Voucher Program could result in governmental indoctrination. No governmental actor is involved in religious activity, no governmental actor works in a religious setting, and no government-provided incentive encourages children to attend sectarian schools." *Simmons-Harris v. Goff*, 711 N.E.2d at 209.

Plainly, under this program, "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231. The Cleveland Pilot Project

---

[41] And that is exactly what the two largest nonsectarian private schools in the scholarship program did. Hoxby Aff., ¶¶ 4c and 5c (J.A. 56a, 60a).

Scholarship steers precisely the course of neutrality that the First Amendment requires.

B. True Private-Choice. As in *Mueller*, 463 U.S. at 399, here "public funds become available only as a result of numerous private choices of individual parents of school-age children." It is not a per-capita aid program, but a scholarship program.

The fact that the aid here is indirect, like under the G.I. Bill, Pell Grants, daycare vouchers, and other forms of general assistance programs, is important for three reasons, as identified by Justices O'Connor and Breyer in *Mitchell*. First, "[t]he fact that aid flows to the religious school and is used for the advancement of religion is . . . *wholly* dependent on the student's private decision." *Id.* at 842 (O'Connor, J.) (emphasis in original). That is true here, too – no one is compelled either to participate in the scholarship program at all, or to choose a religious school.

Second, the distinction "is significant for purposes of endorsement." *Id.* Unlike a direct per-capita subsidy,

> when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." [Citation omitted.] Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.

Id. at 843. Here, any link of State sponsorship of religious schools is attenuated by the act of individual choice. Symbolically, as well, the link is further severed by the act of making checks "payable to the parents of the student entitled to the scholarship," and "mailed to the school selected by the

parents." *Simmons-Harris v. Zelman*, 234 F.3d at 948. As the Ohio Supreme Court found, "Whatever link between government and religion is created by the School Voucher Program is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government." *Simmons-Harris v. Goff*, 711 N.E.2d at 209 (citation omitted).

Finally, the distinction "is important when considering aid that consists of direct monetary subsidies," which present special dangers. *Mitchell*, 500 U.S. at 843 (O'Connor, J.). Unlike a per-capita aid program, the scholarship program here is not self-executing. It is an enablement of students, not an entitlement to schools. Not a single dollar crosses the threshold of a religious school unless a parent foregoes public school options, enrolls in the program, and chooses a religious school. The Cleveland Pilot Project Scholarship was designed to – and does in fact – satisfy the concerns addressed by the insistence that public funds must be dispensed through true private-choice.

1. The court below found the promise of choice "illusory."[42] *Simmons-Harris v. Zelman*, 234 F.3d at 959. There can be no question that the program expands the options available to economically disadvantaged Cleveland families. As Judge Ryan observed, even viewing the scholarship program in isolation, Cleveland schoolchildren have the option of remaining in public schools,

---

[42] As one commentator aptly has observed, "To hold that no genuine option exists regarding whether to attend a religious school or nonreligious school is simply to ignore reality that prior to the Voucher Program, low-income students effectively had no choice as to what school to attend." Matthew D. Fridy, "What Wall? Government Neutrality and the Cleveland Voucher Program," 31 *Cumb. L. Rev.* 709, 762 (2000).

obtaining a scholarship and choosing a religious school, obtaining a scholarship and choosing a nonsectarian private school, remaining in the public schools and obtaining a tutorial assistance grant, or obtaining a scholarship and attending a suburban public school. *Simmons-Harris v. Zelman*, 234 F.3d at 968 (Ryan, J.). None of the latter four choices existed before the scholarship program. The fifth choice presently is foreclosed as a practical matter not because of the program, but because of independent decisions made by suburban public school districts. No one is compelled or pressured in any way to participate in the program. It merely adds new options to a preexisting array of parental choices. To exercise that choice, parents must be willing to forego completely free public school tuition and the prospect of a tutorial assistance grant – sacrifices several thousand parents in Cleveland have opted to make to secure what they perceive is a better education for their children.

2. The court of appeals steadfastly refused to examine "other options available to Cleveland parents such as the Community Schools," dismissing them as "at best irrelevant." *Simmons-Harris v. Zelman*, 234 F.3d at 958. In so doing, the court ignored this Court's frequent admonitions to examine a challenged program in its broader context. See, e.g., *Zobrest*, 509 U.S. at 10 ("part of a general government program"); *Mueller*, 463 U.S. at 396 ("only one among many deductions" provided by Minnesota law). As this Court observed in sustaining public funding for a religious publication in *Rosenberger*, 515 U.S. at 850,

> Wide Awake does not exist in a vacuum. It competes with 15 other magazines and newspapers for advertising and readership. The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes

the danger that the message of any one publication is perceived as endorsed by the University.

Unlike the Sixth Circuit's eagerness to go beyond facial neutrality and examine the choices actually made by participants in the scholarship program – which are wholly determined by the independent choices of third parties – it refused to examine the program in the broader context of educational options even though those choices exist *as a matter of law*. See *Reed v. Rhodes*, 934 F. Supp. at 1557 (commending the State for making a range of school choices available to meet the educational crisis in the Cleveland City Public Schools); Ohio Rev. Code § 3314.01, *et seq.* (community schools program).

Good reasons exist for this Court's instruction to examine the surrounding context. The State could, of course, have adopted magnet schools, community schools, and scholarships in one omnibus education reform package. Had it done so, the entire basis of the Court of Appeals' decision would collapse. As a matter of logic and constitutional law, why is the legal consequence any different if the programs are adopted separately? It is a bedrock principle of constitutional law that States are free to respond to a problem one step at a time. See, e.g., *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955). Here, public school choices (magnet and community schools) were created, then private school (combined with suburban public school and tutorial assistance grant) options were subsequently added. The rule of law advanced below would, strangely, obligate the State to

include private school options in the first instance or forever have that option foreclosed.[43]

What the State of Ohio has done, in essence, is to make student funding[44] transportable, and to add one option at a time.[45] The overall system operates like many state systems of post-secondary education: the State maintains its own system of schools, whose tuition is free or subsidized, and also makes scholarships available for use at other institutions, including eligible private and public schools. Like the religious publication in *Rosenberger*,

---

[43] For a State that already had completely open enrollment in public schools, for instance, such a rule seemingly would make it impossible to add private school options, no matter how neutral the program nor how dependent on true private choices, thus eviscerating the standards this Court has carefully constructed.

[44] For public schools, Ohio bases its State funding on the number of pupils, with a "base formula amount," Ohio Rev. Code § 3317.02, multiplied by a "cost of doing business" amount for each locality, Ohio Rev. Code § 3317.02(N), minus a "charge-off amount." Ohio Rev. Code § 3317.022.

[45] This factor was important to the Wisconsin Supreme Court in sustaining the Milwaukee Parental Choice Program, which was expanded in 1995 to include religious schools, in *Jackson v. Benson*, 578 N.W.2d at 614 n.9 and 618 n.16:

> The amended MPCP, viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to MPS children. . . . Qualifying public school students may choose from among the Milwaukee public district schools, magnet schools, charter schools, suburban public schools, trade schools, schools developed for students with exceptional needs, and now sectarian or nonsectarian private schools participating in the amended MPCP. In each case, the programs let state funds follow students to the districts and schools their parents have chosen.

the schools in the scholarship program must compete with many other educational options. *Rosenberger*, 515 U.S. at 850. Unlike *Rosenberger*, *id.*, however, the schools are not "all supported on an equal basis" by the State – scholarship school pupils receive substantially less funding from the State, as Table 2 on page 41 illustrates.[46]

As Professor Greene found in his study of the racial, social, and religious context of parental choice in Cleveland, "When one looks at the broader system of choice in Cleveland, it is clear that a small percentage of publicly-financed choosers attend religious schools." Greene (J.A. 218a). As Table 2 (p. 41) demonstrates, if scholarships are properly viewed in the overall context of publicly financed schools of choice[47] in Cleveland, *the percentage of students attending religious schools of choice is only 16.5 percent.* Even if the Court of Appeals were correct to adopt a statistical test to determine the program's neutrality, applying it in the proper context of the range of educational choices available to Cleveland parents yields a starkly different result, one that demonstrates beyond doubt that the primary effect of the program is to expand educational choices.

The program is neutral on its face and in effect, and its neutrality is buttressed by a system of true parental-choice. The program therefore comports fully with this Court's establishment clause precedents.

---

[46] The sources for the chart are Hoxby Aff., ¶ 4c-d (J.A. 56a) and Greene (6th Cir. J.A. 00428-00429).

[47] In other words, this figure includes magnet and community schools, but does not include the vast majority of Cleveland pupils who are in regular district schools. If it included all schools, the percentage enrolled in religious schools using scholarships would be even smaller.

CONCLUSION

Nothing in this brief is intended in the slightest to disparage public schools or the yeoman's work many of them do in educating our nation's children; nor to diminish in any way the magnitude of the task facing the CCSD and other inner-city school systems. But that is exactly the point: as this Court has recognized in the context of aid for disabled children, sometimes we must go outside the public schools to fulfill the goals of public education. It is essential that the Court preserve this option for policymakers who are trying in good faith to dispatch their most important responsibilities.

Many of the themes in this case reflect those raised 47 years ago in *Brown v. Board of Education*. There, children were forced to travel past good neighborhood schools to attend inferior schools because the children happened to be black; today, many poor children are forced to travel past good schools to attend inferior schools because the schools happen to be private. In the quest to fulfill the promise of equal educational opportunity, we must enlist every resource at our disposal.

The Cleveland Pilot Project Scholarship Program was not designed to test the boundaries of constitutional law,

but to fit safely within them. We respectfully ask this honorable Court to affirm that it does.

Respectfully submitted,

CHARLES FRIED
1545 Massachusetts Avenue
Cambridge, MA 02138
Of Counsel

INSTITUTE FOR JUSTICE
CLINT BOLICK*
WILLIAM H. MELLOR
RICHARD D. KOMER
ROBERT FREEDMAN
1717 Pennsylvania Ave., NW, Suite 200
Washington, DC 20006
(202) 955-1300
* *Counsel of Record*

PORTER, WRIGHT, MORRIS & ARTHUR, L.L.P.
DAVID TRYON
1700 Huntington Building
925 Euclid Avenue
Cleveland, OH 44114
(216) 443-2560

Counsel for Petitioners