Nos. 00-1751, 00-1777, 00-1779

IN THE
SUPREME COURT OF THE UNITED STATES

SUSAN TAVE ZELMAN, et al., Petitioners,
vs.
DORIS SIMMONS-HARRIS, et al., Respondents.

HANNA PERKINS SCHOOL, et al., Petitioners,
vs.
DORIS SIMMONS-HARRIS, et al., Respondents.

SENEL HERMAN TAYLOR, et al., Petitioners,
vs.
DORIS SIMMONS-HARRIS, et al., Respondents.

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

BRIEF OF ANTI-DEFAMATION LEAGUE, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

MARTIN E. KARLINSKY, ESQ.
(COUNSEL OF RECORD)
ROSENMAN & COLIN LLP
575 Madison Avenue
New York, New York 10022
(212) 940-8800

22155040.01

DANIEL J. BELLER, ESQ.
JONATHAN H. HURWITZ, ESQ.
SHELLEY J. KLEIN, ESQ.
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

JOSHUA B. COHEN, ESQ.
GARY, NAEGELE & THEADO
446 Broadway
Lorain, Ohio 44052-1797
(440) 244-4809

STEVEN M. FREEMAN, ESQ.
STEVEN C. SHEINBERG, ESQ.
ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, New York 10017
(212) 490-2525

FREDERICK M. LAWRENCE, ESQ.
BOSTON UNIVERSITY SCHOOL OF LAW
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-3103

Attorneys for Anti-Defamation
League, *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE STATUTES

Nos. 00-1751, 00-1777, 00-1779

IN THE
SUPREME COURT OF THE UNITED STATES

SUSAN TAVE ZELMAN, et al., Petitioners,
vs.
DORIS SIMMONS-HARRIS, et al., Respondents.

HANNA PERKINS SCHOOL, et al., Petitioners,
vs.
DORIS SIMMONS-HARRIS, et al., Respondents.

SENEL HERMAN TAYLOR, et al., Petitioners,
vs.
DORIS SIMMONS-HARRIS, et al., Respondents.

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

BRIEF OF ANTI-DEFAMATION LEAGUE, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

22155040.01

INTEREST OF *AMICUS*[1]

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of Church and State embodied in the Establishment Clause of the First Amendment. Separation, ADL believes, preserves religious freedom and protects our democracy.[2]

---

[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *amicus* has obtained and lodges herewith the written consents of the parties to the submission of this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, made a monetary contribution to its preparation or submission.

[2] In furtherance of this belief, ADL has participated in the major church-state cases of the last half-century. *See* ADL briefs *amicus curiae* filed in *Mitchell v. Helms*, 530 U.S. 793 (2000); *Santa Fe Indep. School Dist. v.* Doe, 530 U.S. 290 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Engel v. Vitale*, 370 U.S. 421 (1962); and *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "A union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

INTRODUCTION

Time and again, this Court has reaffirmed the view that a clear separation between Church and State is a *sine qua non* of the flourishing of religion in our country. The Establishment Clause "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Bd. of Educ.*, 333 U.S. 203, 212 (1948). The Court has properly recognized that religion is not aided by government funding, but rather hurt by it. "The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring), quoting *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985).

Consistent with these underlying precepts, the Court has never permitted government subsidization of religious activities through direct monetary

payments to religious institutions. That core principle of Establishment Clause jurisprudence marks the bright line between permissible and impermissible government assistance programs. It is supported by a compelling rationale.

When government seeks to fund religion, it damages its own strength, undermines its credibility as a neutral voice for all its peoples, and promotes conflict. "Anguish, hardship and bitter strife" result "when zealous religious groups struggle with one another to obtain the Government's stamp of approval." *Engel*, 370 U.S. at 429. As Justice Souter noted in his dissent in *Agostini v. Felton*:

> Th[e] flat ban on subsidization . . . expresses the hard lesson learned over and over again in the American past and in the experiences of the countries from which we have come, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion.

Agostini v. Felton, 521 U.S. 203, 243 (1997) (Souter, J., dissenting).

The Ohio voucher program at issue in this case is squarely at odds with that "flat ban." The predominant effect of the Ohio program is to provide to religious schools direct and unrestricted government monetary payments that may be, and are, used for religious education, and that may be used for other religious purposes extending from purchases of religious icons and prayer books to payment of the

salaries of clergy employed by the schools. The program provides such monies not as the result of genuine, independent parental choice, but through a structure that provides financial incentives almost exclusively to religious schools to participate in a school voucher program, and deprives students who wish to attend secular public schools of any benefit from that program. Because, for all practical purposes, parents who do not wish to give their children a religious education may not participate in it, the program conveys a clear message that government endorses religious education to the detriment of, and in preference to, secular education. In so doing, the program erodes the principles of separation that are fundamental to the Establishment Clause.

STATEMENT OF FACTS

Through the Ohio Pilot Scholarship Program (the "Ohio Program" or "Program"), the State of Ohio provides tuition monies, commonly called "vouchers," for children located within the public school district of Cleveland to attend schools that participate in the Program. *See* Ohio Rev. Code §§ 3313.975(C)(1), 3313.976(A)(1) and (3), and 3313.976(C). Under the Program, vouchers are not available to enable children to attend public schools in the Cleveland public school district. Public schools in adjacent districts are permitted—but not required—to accept vouchers, but not a single eligible public school has done so since the Program was enacted in 1995. Thus, Cleveland parents wishing to take advantage of the benefits of the Ohio Program are faced with a scheme heavily weighted in favor of non-public schools.

Of the non-public schools that participate in the Program, the vast majority (82%) are religious schools. As a result, since the date of its enactment, between 88% and 96% of the participants in the Ohio Program have enrolled in and attended religious schools, and government funds distributed under the Program have gone to such schools. As the court of appeals concluded, the structure of the Ohio Program provides strong financial incentives for non-public religious schools—and *not* secular schools—to participate in the program. *Simmons-Harris v. Zelman*, 234 F.3d 945, 959-60 (6th Cir. 2000). The Program provides vouchers of up to slightly below $2500 per pupil annually—roughly equal to tuition at private religious schools—and prohibits participating schools from charging any more than nominal additional tuition to low-income families participating in the Program. Ohio Rev. Code § 3313.976(8). Participating schools also must give a preference in admissions in the lower grades to low-income children eligible for vouchers. *Id*. § 3313.977(A)(1). As the court of appeals noted:

> Practically 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. *See* Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999) (finding that voucher funding levels typically "approximate[] the tuition level set by parochial schools [which] reflects subsidies from other sources").

Simmons-Harris, 234 F.3d at 959.

The State of Ohio delivers the voucher monies by check directly to schools participating in the Program. Although the checks are made payable to the parents of students at the school participating in the Program, the parents must present themselves at the school and must then endorse the check over to the school. Ohio Rev. Code § 3313.979. Thus, all monies disbursed under the Ohio Program flow directly from the State into the coffers of the participating schools. Parents never obtain title to or custody of the funds and, once the funds are disbursed, parents have no say in how they are used.

As is entirely appropriate to *their* missions, the religious schools participating in the Ohio Program teach religion and incorporate religious practices as an integral and pervasive part of their educational programs. Summarizing the evidentiary record before it, the court of appeals noted:

> The sectarian schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects.

Simmons-Harris, 234 F.3d at 949. The secular and the religious are inseparably entwined in the participating schools. The overwhelming majority of students in the Program receive religious instruction while in school. Students participating in the Program spend a material part of their school day learning religious beliefs and engaging in worship and other forms of religious activity, funded by direct and unrestricted

government cash payments made pursuant to the Program.

State funds provided under the Ohio Program need not be used only for "secular, neutral, and nonideological services, materials and equipment," *Mitchell* v. *Helms*, 530 U.S. 793, 861 (2000) (O'Connor, J., concurring), but may also be employed by the recipient institutions "to advance the religious missions of the recipient schools," *id.* at 840. Schools receiving state funds under the Program may use them to purchase religious books or articles of worship such as religious icons and prayer books, or in any other way they wish that may promote religion or religious beliefs. In short, the Ohio Program provides government monies directly to religious schools to fund religious education and religious activities.

SUMMARY OF ARGUMENT

1. The Ohio Program unconstitutionally uses public funds to finance religious education and other religious activities. State monies supporting between 88-96% of the students participating in the Program flow directly to religious schools, with no restrictions as to the use of the money. Those funds are used to further religion, to finance religious practices, and to support schools whose central mission is to instill religious beliefs in the students who attend them. The direct, unrestricted use of public money to finance such religious activities violates the Establishment Clause.

2. The Ohio Program provides a significant financial incentive to religious schools—and not to public schools or to secular private schools—to participate in the Program. Because the Ohio Program

inherently biases the "choices" made by parents who wish to take advantage of the Program in favor of religious schools, it does not provide to parents whose children participate in the Program the opportunity to exercise a genuinely independent and private parental choice.

3. The direct governmental support of religious activity involved in this case also cannot be justified in fact on the ground that government funds that flow into the coffers of religious schools supported by the Program do so solely as the result of genuinely independent and private parental choice. Parents wishing to take advantage of vouchers cannot use them to send their children to public schools because none of the public schools theoretically eligible to participate in the Program in fact do so, and there is no reason to believe they that they will do so in the future. (Indeed, the lack of public school participation in the Program is as much an act of the State as the decision to enact the Program, and reinforces its unconstitutionality.) Parents thus have no meaningful opportunity to use the vouchers to send their children to non-public secular schools, and no real "choice."

4. For all of these reasons, the Ohio Program employs government monies to advance religion, and violates the First Amendment.

* * *

ARGUMENT

I. THE OHIO PROGRAM IS IRREMEDIABLY IN CONFLICT WITH THE COURT'S PRECEDENTS UNIFORMLY FORBIDDING THE PROVISION OF GOVERNMENT FUNDING TO RELIGIOUS SCHOOLS FOR RELIGIOUS PURPOSES.

For more than a half century, this Court has consistently refused to permit public funds to flow directly to religious institutions to be used for religious purposes. As Justice Black wrote for the Court in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), under the Establishment Clause "[n]o 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 practice religion." *Id.* at 16.

Everson upheld against Establishment Clause challenge a state program that authorized reimbursement to parents for the cost of the public transport of children to and from school. The Court reasoned that, while reimbursement of costs in transporting children to school undoubtedly helped some children attend religious schools, *id.* at 17, school transportation costs were among those "general government services" that are "separate and so indisputably marked off from the religious function" as not to implicate Establishment Clause issues. *Id.* at 18. The Court emphasized that:

> The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of

> their religion, safely and expeditiously to and from accredited schools.

Id.

The Court has consistently reaffirmed that direct governmental financial support of religious activities in religious schools is forbidden. In *Committee For Public Education* v. *Nyquist*, 413 U.S. 756 (1973), a case the court of appeals viewed as controlling here (*Simmons-Harris*, 234 F.3d at 953), the Court held that a New York statute providing various forms of financial assistance to nonpublic (mostly religious) schools, including tuition assistance to parents, violated the Establishment Clause. Of dispositive significance to the *Nyquist* Court was that none of the assistance provided pursuant to the statute was restricted in use. The state made "no endeavor to guarantee the separation between secular and religious education functions and to ensure that the State financial aid supports only the former." *Nyquist*, at 783. Thus, the Court found, "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that *direct aid in whatever form is invalid*." *Id.* at 780 (emphasis added).

The Court has scrupulously maintained the line drawn in *Everson* and *Nyquist.* Consistent with the principle that government monetary payments may not be used to fund religious activities, the Court has upheld government assistance to religious schools only where the assistance is indirect or cannot be used to further the recipients' religious mission. In *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986), the Court noted that "[i]t is . . . well-settled . . .

that the State may not grant aid to a religious school . . . where the effect of the aid is that of a direct subsidy to the religious school." *Id.* at 487. Similarly, *Agostini* v. *Felton*, 521 U.S. 203 (1997), which approved use of federal funds to send public school teachers to religious schools to provide remedial instruction, did so only because the teachers were instructed that they "could not . . . become involved in any way with religious activities of the private schools" and "[n]o . . . federal funds ever reach[ed] the coffers of religious schools." *Id.* at 211, 228.

The same approach underlies the Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). There, the University of Virginia authorized student activities fund payments for the costs of student publications, yet withheld such payments with respect to one student group because of the religious content of its publications. *Id.* at 823-26. Invalidating that ban because state discrimination against speech on the basis of content violates the Speech Clause of the First Amendment (*id.* at 837), the Court also sustained the funding under the Establishment Clause. The Court held that the "governmental program here is neutral toward religion . . . [which] distinguishes the student fees [here] from a tax levied for the direct support of a church . . . ." *Id.* at 840. Consistent with this holding, the Court identified the "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Id.* at 842 (citations omitted).

In *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court's most recent decision in this arena, the Court upheld a school aid program in which the federal government distributed funds to state and local

governmental agencies, which in turn purchased and lent educational materials and equipment to public and private schools. As Justice Thomas noted, speaking for the plurality, the aid program incorporated important elements protecting against government endorsement and entanglement, by requiring that the services, materials, and equipment lent to the schools be "secular, neutral, and nonideological." *Id*. at 831.[3]

Justice O'Connor's concurring opinion made clear that the Establishment Clause does not permit government to make direct money payments to religious institutions where those payments may be used without restriction to advance religious purposes. Reaffirming the Court's admonition in *Rosenberger* that "special dangers" exist where "'government makes direct money payments to sectarian institutions,'" *Mitchell*, 530 U.S. at 843 (quoting *Rosenberger*, 515 U.S. at 842), Justice O'Connor emphasized 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. *See*,

---

[3] The question of "divertibility" addressed by the various opinions in *Mitchell* (*i.e.*, whether the government may constitutionally provide aid in the form of secular goods or services that are capable of being diverted for religious use) is not at issue in this case. Here, funds are provided to the coffers of religious schools free of restriction against use for the teaching and inculcation of religion. For that reason the concern expressed by the *Mitchell* plurality—that a "no-divertibility" rule would be unworkable—is not raised here.

> *e.g.*, *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970) ("[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity").

Id. at 856.

Justice O'Connor focused on the key line of demarcation in Establishment Clause jurisprudence. "[A]lthough 'our cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'" *Id.* at 840 (quoting *Rosenberger*, 515 U.S. at 840 (O'Connor, J., concurring)). Thus, Justice O'Connor noted, where a program does not provide an effective means of guaranteeing that government money is used exclusively for secular purposes, and a plaintiff can show "that the aid in question actually is, or has been, used for religious purposes," the plaintiff has demonstrated a "First Amendment violation." *Id.* at 857.

Applying the principles that emerge from these cases to the Ohio Program can yield only one result: the Ohio Program crosses the settled line of demarcation under the Establishment Clause. The Ohio Program channels government aid in the form of monetary payments directly to religious schools in a manner that furthers religious activity. Secular purposes served by the aid cannot cure the constitutional infirmity because those purposes are inextricably entwined with the dominant religious purposes of the institutions receiving the aid.

There can be no doubt that the funds under the Ohio Program are received directly from the state; that the check is initially drawn to a parent is hollow formalism, serving only to compound the constitutional defect. Indeed, the only constitutional significance this fact has is that the ritual that the Ohio Program requires of a participating parent—visiting the religious school where the government check has been delivered, and there being required to sign the check over to the school—underscores the message of government endorsement of religion.

In contrast to the programs approved in *Agostini* and *Mitchell*, where the aid to religious schools was girded with restrictions against the use of the aid for religious purposes, the monies disbursed here may freely be used for any purpose, including religious purposes. Because the religious and secular functions of the schools participating in the Ohio Program are inextricably intertwined, the aid necessarily furthers the schools' religious missions. As a result, students who attend these schools and whose tuition is paid by the government necessarily are involved in religious instruction and in worship supported by tax dollars. This result is impermissible under any of this Court's readings of the Establishment Clause.

In sum, in asking the Court to uphold the Ohio Program, petitioners would have the Court cross a line never before crossed, and reach an outcome wholly inconsistent with the Court's clear precedents. Because the Ohio Program puts government money directly into the coffers of religious schools, which then may and do use the funds for religious activities, the Ohio Program violates the Establishment Clause.

II. THE OHIO PROGRAM IS STRUCTURED SO THAT THE DISPOSITION OF GOVERNMENT FUNDS TO RELIGIOUS SCHOOLS IS NOT THE RESULT OF GENUINE PARENTAL CHOICE.

This case does not require the Court to consider whether true parental choice may justify government monetary assistance to religious schools free of restrictions against religious use. Here, choice in favor of religious over secular schools is driven by the nature of the government program. In this case, the "choice" afforded participants is a consequence of an unconstitutional structuring of the Ohio Program that strongly favors religious schools—the Program permits only very limited non-religious choice for the overwhelming majority of pupils, and as a result merely serves to channel aid primarily to religious schools.

This Court's precedents clearly teach that "choice" has meaning in this context only if there is a real ability to employ government aid for secular as well as religious uses. For example, in *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, (1986), the state was permitted to provide tuition assistance to a student attending a religious school because, unlike here, the student was able to choose among hundreds of secular as well as religious programs. *Id.* at 488. In *Mueller v. Allen*, 463 U.S. 388 (1983), the tax deduction at issue was available for all school expenses, private or public, religious or secular. And, in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), funds were available for use in any high school, not just religious ones. *See also*

Widmar v. *Vincent*, 454 U.S. 263, 274 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.").

"Choice" also cannot save a school aid program if the choice is influenced by features of the program that provide a financial incentive favoring religious uses for the aid. Thus, in *Committee For Public Education* v. *Nyquist*, 413 U.S. 756 (1973), the Court rejected the argument that, because the grants were paid to the parents, and the parents were not compelled to spend the grants on tuition, the grant provision was constitutional. The Court reasoned, "[i]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into sectarian institutions." *Id*. at 786.

Likewise, as Justice O'Connor's opinion for the majority in *Agostini v. Felton*, 521 U.S. 203 (1997), recognized,

> [a] number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. *Cf. Witters*, 474 U.S. at 488 (upholding neutrally available program because it did not "creat[e] [a] financial incentive for students to

> undertake sectarian education"); *Zobrest*, at 10 (upholding neutrally available aid because it "creates no financial incentive for parents to choose a sectarian school").

Agostini, 521 U.S. at 231.

The Ohio Program offers no true choice within the meaning of these principles. Students who wish to avail themselves of government tuition aid may choose only schools that participate in the Program. Because *all* of the schools participating in the Program are non-public, and the overwhelming majority of them are religious, the "choice" available to parents and their children overwhelmingly favors religious over secular education.

The structure of the Ohio Program itself provides incentives for private religious schools—and not for public or non-public secular schools—to participate in the Program. The Program provides no benefit to parents whose children remain in the Cleveland public schools. While the Program ostensibly permits public schools in adjacent districts to participate in the Program, none of those districts in fact participates.

It is axiomatic that the decisions of these public school districts not to participate in the Program are also decisions of the State. *See* Ohio Revised Code § 2744.01(C)(2)(c) (stipulating that school districts provide "governmental function"); Ohio Revised Code § 2744.01(F) (school district is a political subdivision of the State). Here, because they further deprive children and parents of a true choice between religious and secular education, such acts merely serve to reinforce

the unconstitutional structure of the Program. It would be anomalous to suggest that a state can rely on the putative action of a political subdivision (the surrounding public school districts) in support of the constitutionality of a voucher program such as the Ohio Program, and then fail to command that subdivision to take that action.

With respect to non-public schools, the Program inherently provides an incentive to participate only to schools that are able or willing to charge their students tuition of approximately $2500 (the value of the voucher plus permitted additional tuition) or less. As the court of appeals recognized, by and large only religious schools are able to charge fees close to that amount. *Simmons-Harris*, 234 F.3d at 959. Thus, the Ohio Program by its nature creates a financial incentive for religious schools, but not public or non-public secular schools, to participate in it.

Finally, the condition of the Cleveland public school system—which petitioners point to as justification for the Program (Brief of State Petitioners at 2-3)—only exacerbates the absence of real choice faced by parents whose children are eligible for it. Those parents who wish to use vouchers to escape that system cannot send their children to public schools in other districts (which do not accept vouchers), and must therefore choose among non-public schools participating in the Program, the overwhelming majority of which are religious schools.

Although the Ohio Program was adopted in response to a federal court order that placed the Cleveland school district under state supervision due to pervasive mismanagement by its school board and a history of racial segregation, *Simmons-Harris*, 234 F.3d

at 948; *Reed* v. *Rhodes*, 934 F. Supp. 1533, 1536-37 (N.D. Ohio 1996), this is no answer. For in seeking to remedy one constitutional violation, the state has merely substituted another. A "choice" to use vouchers to enroll children in religious schools—where the State provides few or no feasible alternatives—is no choice at all, and cannot justify the advancement of religion that is the effect of the Program.

In sum, the Ohio Program's channeling of funds to religious schools is far from being "wholly dependent on the student's private decision," *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring). It is, rather, a result of the nature and structure of the Program itself. Because the Ohio Program creates a strong financial incentive for parents to choose a religious school, notions of parental "choice" cannot immunize it from constitutional infirmity.

* * *

The avoidance of government entanglement in the affairs of religious institutions and of government endorsement of religion are core values of American democracy. They not only preserve religion, they allow it to flourish; they help to sustain our secular, democratic form of government. Consistent with those values, the Court has approved government aid that indirectly benefits religious institutions, but it has never approved direct government monetary payments to religious schools that advance religious activities, as the payments in question here do. To approve such payments would do violence to these core values and transgress the line long observed by the Court. The Ohio Program violates the Establishment Clause of the First Amendment, and should be invalidated.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

MARTIN E. KARLINSKY, ESQ.
(COUNSEL OF RECORD)
ROSENMAN & COLIN LLP
575 Madison Avenue
New York, New York 10022
(212) 940-8800

DANIEL J. BELLER, ESQ.
JONATHAN H. HURWITZ, ESQ.
SHELLEY J. KLEIN, ESQ.
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

JOSHUA B. COHEN, ESQ.
GARY, NAEGELE & THEADO
446 Broadway
Lorain, Ohio 44052-1797
(440) 244-4809

STEVEN M. FREEMAN, ESQ.
STEVEN C. SHEINBERG, ESQ.
ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, New York 10017
(212) 490-2525

FREDERICK M. LAWRENCE, ESQ.
BOSTON UNIVERSITY SCHOOL OF LAW
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-3103

Attorneys for Anti-Defamation League, *Amicus Curiae*

December 2001