No. 98-1648

In The

Supreme Court of the United States

GUY MITCHELL, *et al.*,

Petitioners,

v.

MARY L. HELMS, *et al.*,

Respondents.

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

BRIEF *AMICI CURIAE* OF THE INSTITUTE FOR JUSTICE, THE AMERICAN EDUCATION REFORM FOUNDATION, THE CENTER FOR EDUCATION REFORM, CEO AMERICA, FLORIDIANS FOR SCHOOL CHOICE, THE GREATER EDUCATIONAL OPPORTUNITIES FOUNDATION, THE MILTON AND ROSE D. FRIEDMAN FOUNDATION, AND PARENTS FOR SCHOOL CHOICE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations strongly committed to education reform and particularly to expanding parental choice in education. The legal issues raised in the instant case directly implicate *amici*'s institutional concerns.

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Toward that end, the Institute has defended or is presently defending the constitutionality of programs in Arizona, Florida, Illinois, Ohio, and Wisconsin that give parents greater freedom to send their children to the schools of their choice.

The American Education Reform Foundation is a nonprofit organization dedicated to improving educational options for all students by creating and expanding publicly-financed school choice programs throughout the United States. Based in Milwaukee, Wisconsin, home to the nation's first publicly-financed school choice program, the Foundation's goal is to provide incentives for all American schools to improve by giving parents the right to choose the schools their children will attend.

The Center for Education Reform ("CER") is a national, independent, nonprofit advocacy organization

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[1] In conformity with Supreme Court Rule 37, *amici* have obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. *Amici* also state that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amici*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

founded in 1993 to provide support to individuals who are working to bring fundamental reforms to their schools. A results-oriented advocacy group, CER serves as a clearinghouse for information on innovative reforms in education and works in states and communities across the country to advance the cause of educational excellence by, among other goals, encouraging greater educational opportunities and choices for teachers and parents.

CEO AMERICA is a nonprofit organization whose mission is to promote parental choice in education through private tuition grants and tax-funded options, giving all families the power to choose the K-12 school that best fulfills the hopes and dreams they have for their children.

Floridians for School Choice ("FSC") is a nonprofit corporation that seeks to give every family in Florida the opportunity to choose their child's school. Supported by a grassroots organization of Floridians, FSC helped to win enactment of Florida's opportunity scholarship program, the first statewide parental choice program in the nation.

The Greater Educational Opportunities (GEO) Foundation is a nonprofit research and educational institution that promotes increased understanding of the benefits of educational opportunity for all children. The GEO Foundation strongly supports all forms of increased flexibility for families in their children's education through educational choice in the form of vouchers, educational tax credits, charter schools, and privately-funded scholarship programs.

The Milton and Rose D. Friedman Foundation is a nonprofit organization whose mission is to promote public understanding of the need for major reform in K-12 education and of the role that competition through educational choice can play in achieving that reform.

Parents for School Choice ("PSC") is a nonprofit community organization that provides information and support for economically disadvantaged Milwaukee parents to expand the range and quality of educational opportunities available to their children. PSC was the leading catalyst for the expansion of the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, which allows up to 15,000 low-income Milwaukee children to use their share of state education funds at private schools. PSC was an intervenor/defendant in litigation challenging the choice program's constitutionality.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Chapter 2 program at issue in this case is designed to enhance the quality of education received by our nation's children, particularly those from families of modest means. Under Chapter 2, the federal government provides block grants which local education agencies use to purchase instructional materials, such as library books, reference materials, and computer hardware and software, for students in public and private schools.

The present *amici* are primarily interested in an additional, alternative approach to improving the quality of educational opportunities offered to children from low-

income families. We promote and defend programs that expand the range of educational options available to the children of low-income parents through publicly-funded vouchers and scholarships, as well as tax credits for educational expenses and donations to scholarship funds. To maximize their effectiveness, these programs must include the widest possible variety of educational options, including high-quality religious schools. These school choice programs are the subject of multiple ongoing lawsuits that present constitutional issues closely related to those that the Court will consider here.

Amici believe that the principles this Court has enunciated in its prior establishment clause cases are fully consistent with the conclusion that school choice programs are constitutional – a conclusion reached by three state supreme courts in the past two years. *Amici* do not, of course, ask the Court to address this question in the instant case. Rather, we ask only that this Court remain cognizant of school choice in crafting its opinion, and that the Court reaffirm the principles *amici* believe establish the constitutionality of school choice programs.

Solutions to the crisis in the education of underprivileged children inevitably will involve private and religious schools, which currently are often the only institutions able to provide high-quality education in inner cities. Unfortunately, our present system too often consigns poor parents and their children to failing public schools. Parental choice programs give these parents a way out. By providing partial or full tuition for parents who choose private or alternative public schools, school choice programs empower parents to control their children's future, promote accountability, and provide

incentives for improvement among the schools in competition for parents' tuition dollars.

Two fundamental aspects of school choice programs ensure that they do not constitute an establishment of religion: such programs are neutral with respect to religion and funds are only directed to religious schools through the private and independent decisions of individual parents. School choice programs that give parents the option of sending their children to religious schools are neutral towards religion because they provide assistance to a class of beneficiaries defined without reference to religion and do not in any way create an incentive to choose religious schools over nonreligious schools. Moreover, school choice programs do not constitute direct aid to religious institutions because no funds are transmitted to schools except upon the private choices of individual parents. Whatever the outcome of the instant case, this Court should once again reaffirm these core establishment clause principles of neutrality and private decision making.

ARGUMENT

I. SCHOOL CHOICE IS A PROMISING SOLUTION TO THE CRISIS CONFRONTING OUR NATION'S INNER-CITY PUBLIC SCHOOLS.

A. Our Nation's Public School System Is Failing to Adequately Educate Low-Income and Minority Children.

The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400

(1923). Indeed, this Court has observed that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). This Court has further recognized that education plays a vital role "in maintaining our basic institutions" and that a deficient education has a "lasting impact . . . on the life of [a] child." *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

Unfortunately, however, state and local governments are too often failing to live up to their responsibility to provide all of our nation's children with an adequate education. Moreover, this failure is particularly pronounced in those public schools serving low-income and minority youngsters.

The statistics tell a grim tale. 1998's National Assessment of Educational Progress (NAEP) reports that only 31 percent of our nation's fourth-graders, 33 percent of eighth-graders, and 40 percent of 12th graders are proficient in reading.[2] The situation is no better in math and science. In 1996, the Third International Mathematics and Science Study compared the math and science knowledge of high school seniors in 21 countries. American students ranked 19th, outperforming their counterparts in only Cyprus and South Africa.[3]

While the general state of affairs is not good, the reality facing low-income and minority schoolchildren is

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[2] See Patricia L. Donahue, et al., NAEP 1998 Reading Report Card for the Nation and the States (1999) at 20.

[3] See Mark Skertic, "U.S. 12th-Graders Trail Others," *Cincinnati Enquirer*, Feb. 25, 1998, at A1.

stark and profoundly disturbing. On the 1998 NAEP, for example, only ten percent of black fourth-graders and 13 percent of Hispanic fourth-graders were proficient in reading (as compared to 39 percent of whites).[4] An astonishing 64 percent of black and 60 percent of Hispanic fourth-graders scored "below basic," indicating that they were unable to understand the overall meaning of what they read.[5]

Black students on average score 194 points below white students on the Scholastic Aptitude Test (SAT),[6] reflecting the fact that the typical black high school senior is four academic years behind the typical white senior – a gap that has widened substantially over the past decade.[7] This disparity is further evidenced on statewide achievement tests. In Virginia, for instance, 75 percent of black high-school students failed at least one subject on the Old Dominion's Standards of Learning (SOL) examinations as compared to 41 percent of whites.[8]

The educational crisis is particularly acute in inner-city public schools, which typically serve minority children from low-income families. In the District of Columbia public schools, for example, only ten percent of

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[4] See Donahue, et al., *supra* note 1, at 70.

[5] See *id.*

[6] See Jack E. White, "Help Yourself, Why a Defender of Affirmative Action Is Quitting," *Time*, Jul. 5, 1999, at 34.

[7] See Stephan Thernstrom & Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* 355 (1997).

[8] See Robert Holland, "The Fine Print Casts Doubt on the Clintonites' High Standards For All," *Richmond Times Dispatch*, May 26, 1999, at A19.

fourth-graders are proficient in reading according to the 1998 NAEP.[9] In Hartford, that city's fourth-graders are only one-tenth as likely as other Connecticut students to demonstrate proficiency on the state's three achievement tests.[10] In Detroit, less than nine percent of 11th graders are proficient in science according to Michigan's statewide exam.[11] And in Cleveland, only two percent of Cleveland's minority 10th graders have taken algebra,[12] and a student in the Cleveland public schools has less chance of graduating on-time at senior level proficiency than of becoming a victim of crime at school each year. Nationally, students eligible for the federal free and reduced lunch program and those living in central cities are significantly less likely to be proficient readers than their more affluent and suburban counterparts.[13]

Despite the massive investment of public and private resources, little progress has been made toward delivering high-quality educational opportunities to poor inner-city children, a fact that is likely attributable in large part to the highly bureaucratic nature of large public urban school systems. See, e.g., John E. Chubb and Terry M. Moe, *Politics, Markets & America's Schools* 181 (1990). Additionally, the vast majority of the children served by the most inadequate public schools lack the financial

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[9] See Donahue, et al., *supra* note 1, at 120.

[10] See Matthew Miller, "A Bold Experiment to Fix City Schools," *The Atlantic Monthly* (July 1999) at 16.

[11] See *id.*

[12] See *id.*

[13] See Donahue, et al., *supra* note 1, at 79, 81.

resources to exercise their right to exit the system. For these children, there is currently no way out.[14]

B. Solutions to This Crisis Must Include Private and Religious Schools

This Court has recognized "the central importance of [private] schools in fulfilling the Nation's educational mission." *McKeesport Area Sch. Dist. v. Pennsylvania Dep't of Educ.*, 446 U.S. 970, 973 (1980) (White, J., concurring). And nowhere is the role of private schools more vital than in inner cities, where they often provide the only means for poor, minority children to receive a quality education.

Numerous studies have documented private schools' success with inner-city students that urban public schools routinely fail to properly educate. Religious schools produce substantial academic gains among urban minority

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[14] Kenneth Clark, the educator and psychologist whose work with African-American children influenced this Court's decision in *Brown*, delivered one of the earliest critiques of the monopolistic American education system:

> [I]t appears that the present system of organization and functioning of large urban public schools is a chief blockage in the mobility of the masses of Negro and other lower-status minority group children. . . . [M]inority group children are . . . victims of the monopolistic inefficiency of the present pattern of organization and functioning of our public schools.

Kenneth B. Clark, "Alternative Public School Systems," *Network News & Views*, July 1994, at 8, 15 (reprinted from 38 Harvard Educational Review (Winter 1968)).

students. Students attending these schools are dramatically more likely to graduate from high school and from college than students attending urban public schools. See Derek Neal, "The Effects of Catholic Secondary Schooling on Educational Achievement," 15 *J. Labor Econ.* 98 (1997).

The RAND Corporation compared the performance of disadvantaged children in New York City's public and Catholic high schools. Researchers discovered that the students in New York City's Catholic schools had a 95 percent on-time graduation rate compared to 25 percent for those disadvantaged students in the public schools. Furthermore, over four times as many students in Catholic schools took the SAT as in public schools, and the average score of students in Catholic schools was over 150 points higher.[15] A recent New York State Department of Education report also revealed that students attending New York City Catholic elementary schools with 81 to 100 percent minority enrollment significantly outscored students at public schools with the same percentage of minority enrollment on standardized achievement tests in reading, writing, and mathematics.[16]

Disadvantaged students in Catholic schools also have a lower dropout rate than their peers in public schools, and parent participation in Catholic schools, particularly among African-Americans, is much higher than in public schools. See Diane Ravitch, "Somebody's Children," *The Brookings Review* at 9 (Fall 1994). Furthermore, the gap in

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[15] See Sol Stern, "The Invisible Miracle of Catholic Schools," *City Journal*, Summer 1996, at 14.

[16] See *id.*

white/minority student achievement is narrower in Catholic schools than in public schools. Anthony S. Bryk, et al., *Catholic Schools and the Common Good* 246-48 (1993).

While the record of private schools in educating urban minority children is impressive, far too many of these youngsters are unable to afford the relatively modest tuition charged by such schools. Instead, they are trapped in low-performing public schools, with no access to the options available to millions of their more affluent counterparts.

C. School Choice Programs Improve Education By Enabling Poor Parents to Choose the Best Schools For Their Children

By transferring control over state education funding from government officials to parents, school choice programs both broaden the range of educational options available to low-income children and create competition among schools for these students and the dollars they command. Parental choice thus not only furnishes low-income children with access to high-quality schools, but also creates incentives for positive reform within the public school system.

The nation's largest school choice program in terms of student participation is located in Milwaukee, Wisconsin. In 1989, the Wisconsin legislature enacted the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, allowing up to 1,000 economically disadvantaged youngsters to use their portion of state public school funds at participating nonsectarian private schools which would

agree to admit students with vouchers on a random selection basis and to accept the state's funding as full payment of tuition. In 1995, the legislature expanded the program, lifting the exclusion of religiously affiliated schools and raising the cap on participation to approximately 15,000 students. While an injunction delayed the entry of religious schools into the program, such schools began participating last fall following the Wisconsin Supreme Court's decision upholding the program's constitutionality. *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

In the 1998-99 school year, over 6,000 K-12 students in 86 private schools participated in the Milwaukee Parental Choice Program. Approximately 2,100 students attended 30 nonreligious schools while about 4,000 students went to 56 religious schools. Reflecting choice's popularity with parents, the program will grow in the 1999-2000 school year with 99 private schools signed up and thousands of additional students expected to participate.[17]

A team of researchers led by Dr. Paul Peterson of Harvard University's John F. Kennedy School of Government has attempted to assess the impact of the program on the overwhelmingly minority student population it serves. His team compared test scores of students who were admitted to private schools in the program through random selection with students who were not selected for the program. It found substantial academic gains after

[17] "Milwaukee Voucher Program Expected to Grow Next Year," *Education Week* (May 19, 1999) at 4.

students' third and fourth years in the program, reducing substantially the chronic achievement gap between minority and non-minority students. See Jay P. Greene, Paul E. Peterson, and Jiangtao Du, *The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data from the Program's Evaluation* (1996).

Moreover, the positive impact of the program has not been limited to students attending private schools. The program's existence has stimulated positive reform efforts within the Milwaukee Public Schools, a phenomenon acknowledged even by those who were at first skeptical of the program. See, e.g., "Competition in Education Proving Its Worth," *Milwaukee Journal Sentinel* (Mar. 15, 1999) at 10. The Milwaukee Public Schools, for instance, recently pledged that all MPS students either will learn to read at grade level by the end of the second grade or the district will pay for them to receive individual tutoring. This promise was seen as a step to making the Milwaukee Public Schools "more competitive in the growing educational marketplace." "MPS Guarantees Help for Poor Readers," *Milwaukee Journal Sentinel*, (Dec. 23, 1998).

In Cleveland, over 3,600 K-5 students received partial tuition scholarships to attend private schools during the 1998-1999 school year through the Cleveland Scholarship Program, Ohio Rev. Code Ann. §§ 3313.974-.979. Started in the fall of 1996, the Cleveland Scholarship Program provides overwhelmingly low-income and minority parents with a voucher worth 90 percent of their child's private school tuition, up to a maximum of $2,250. Last year, 59 private schools participated in the program, 47 of which were religious and 12 of which were nonreligious.

Although the Ohio Supreme Court in May invalidated the program under the "single subject" provision of the Ohio Constitution, the state legislature quickly reenacted the program and expanded it to include the sixth grade.[18] Therefore, thousands of low-income Cleveland youngsters will once again attend private schools this year because of the program.

Like in Milwaukee, the Cleveland Scholarship Program has also been evaluated by a team of Kennedy School researchers. Its recently released study shows that parents of voucher recipients are substantially more satisfied with their children's schools than are similar parents of children in the Cleveland public schools. Moreover, scholarship students attending the two private schools with the largest enrollment of scholarship students showed dramatic increases on standardized reading and math tests during their first two years in the program. See Paul E. Peterson, William G. Howell, and Jay P. Greene, *An Evaluation of the Cleveland Voucher Program After Two Years* (1999).

Florida, this year, became the first state to enact a statewide voucher program. The opportunity scholarship program, which was passed as part of a broader package of public education reforms emphasizing standards and accountability, allows children in failing public schools to attend higher-performing public schools or participating private schools at state expense. Fla. Stat. ch. 229.0537. Already, 58 children assigned to two failing Pensacola

[18] See Thomas Suddes, "$17.2 Billion Spending Bill Passes: Voucher Program Included in Budget," *The Plain Dealer* (June 25, 1999) at 4B.

elementary schools have received scholarships to attend private schools this fall and another 78 students are using the program to go to better public schools. The program is likely to expand significantly in coming years. Seventy-eight Florida public schools received failing grades from the Florida Department of Education this spring and the tens of thousands of students assigned to these schools will become eligible for vouchers if their school receives an "F" grade in any one of the next three years.

Although it is obviously too early to assess the effect of the opportunity scholarship program on those students who have chosen to attend new schools, it has already become clear that the program is spurring badly-needed efforts to improve student performance at failing public schools. At the two Pensacola public schools, for instance, whose students qualified for vouchers this fall, officials are lengthening the school year, providing afterschool and Saturday tutorials, and devoting greater blocks of time to reading, writing, and math. See Jeb Bush and Frank Brogan, "Students Will Not Be Left Behind," *St. Petersburg Times* (July 26, 1999).

States are also using tax credits to expand educational opportunities for low-income children. Arizona has enacted a School Tuition Organization Tax Credit Program, A.R.S. § 43-1089, which provides a credit against state income taxes of up to $500 for contributions to organizations devoting at least 90 percent of their revenue to scholarships enabling children to attend private schools. Despite the uncertainty caused by the litigation regarding the tax credit's constitutionality, the Arizona Department of Revenue reports that almost $2 million in donations were made to scholarship funds in 1998.

This year, the State of Illinois acted to expand educational opportunities through a second type of tax credit. Due to legislation recently signed by Governor George Ryan, Illinois parents will receive a credit against state income taxes for 25 percent of tuition, book fees, and lab fees incurred on behalf of K-12 students at public or private schools, up to a maximum of $500. 35 ILCS 5/201(m).

While the contours of the school choice programs described here differ, they tend to share certain features: (1) funds are placed at the disposal of parents in the form of vouchers, scholarships, or tax credits; (2) private schools are added to the range of public school options; and (3) aid is targeted to economically disadvantaged youngsters.

The evidence so far shows that parental choice holds considerable promise for enhancing the quality of education received by low-income children and stimulating much-needed public school reform. Furthermore, it is clear that the demand for additional educational options is overwhelming. This year, approximately 1.25 million low-income children applied for 40,000 scholarships made available through the Children's Scholarship Fund, a privately-financed choice program. This sum included approximately one-third of all eligible children in New York City, Washington, DC, and Baltimore. See Andrew Young, "Let Parents Choose Their Kids' Schools," *Los Angeles Times* (April 29, 1999) at B9. *Amici* believe that more publicly-financed choice programs are necessary to meet this tremendous demand and will continue to work toward this goal.

II. UNCHALLENGED PRINCIPLES OF NEUTRALITY AND PRIVATE DECISION MAKING ESTABLISH THE CONSTITUTIONALITY OF STATE-FUNDED SCHOOL CHOICE PROGRAMS.

In *Committee for Public Education v. Nyquist*, 413 U.S. 756, 782 n.38 (1973), this Court specifically left open the question of whether "some sort of public assistance (e.g., scholarships) made available generally without reference to the sectarian-nonsectarian, public-nonpublic nature of the institution benefited" was constitutional. And in an unbroken line of cases over the last 16 years, this Court has answered this question in the affirmative. This Court has consistently upheld "government programs offering general educational assistance," which give recipients the option of choosing religious schools. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 9 (1993) (allowing the public provision of an interpreter for a deaf student attending a Catholic high school); see *Agostini v. Felton*, 521 U.S. 203 (1997) (sustaining the provision of public remedial teachers in religious schools); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986) (upholding the use of postsecondary public grants for use by a student attending divinity school); *Mueller v. Allen*, 463 U.S. 388 (1983) (sustaining tax deductions for educational expenses incurred at public, private and religious schools).

All of the programs upheld by this Court share two features in common. First, they are neutral toward religion, treating religious and nonreligious options equally and providing participants with no incentive to choose religious schools over nonreligious schools. And second, funds in these programs only reach religious institutions

indirectly through the independent and private decisions of individuals. This Court summarized the applicable principles most recently in *Agostini*, 521 U.S. at 231, stating that assistance programs do not offend the establishment clause where "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."

The school choice programs previously described fit squarely into what is permissible under this Court's jurisprudential framework. They are neutral because the class of beneficiaries is defined without reference to religion and no incentive is given for parents to choose religious schools over nonreligious schools. And all public funds are directed by private decision making; parents choose to which school their children's voucher or scholarship money will go.

Four state supreme courts have considered contemporary school choice programs in the establishment clause context and have faithfully applied this Court's precedents. In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998), the Wisconsin Supreme Court upheld the constitutionality of the Milwaukee Parental Choice Program. Distilling the principles set forth in this Court's jurisprudence, the Wisconsin Supreme Court explained that "state educational assistance programs do not have the primary effect of advancing religion if those programs provide aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children."

Id. at 617. The Court observed that the Milwaukee Parental Choice Program exists against the backdrop of a wide range of educational options, the vast majority of them involving public schools. *Id.* at 618 n.16. Accordingly, the Court concluded that the parental choice program did not violate the establishment clause, because it "place[d] on an equal footing options of public and private school choice, and vest[ed] power in the hands of parents to choose where to direct the funds for their children's benefit." *Id.* at 619.

Similarly, the Arizona Supreme Court rejected an establishment clause challenge to the Arizona School Tuition Organization Tax Credit Program earlier this year. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999).[19] Finding *Mueller v. Allen* to be the most applicable precedent, the Court found that the tax credit is only one among many provided by the state for a variety of purposes, *id.* at 612-613, and that funds reach religious schools only through "multiple layers of private choice." *Id.* at 614. In sum, the Court concluded that the tax credit "does not prefer one religion over another, or religion over nonreligion," *id.* at 616, and "is completely devoid of state intervention or direction and protects against the government 'sponsorship, financial support, and active involvement' that so concerned the framers of the Establishment Clause." *Id.* at 614 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

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[19] A petition for writ of certiorari is currently pending before this Court in this case. *Kotterman v. Killian*, Nos. 98-1716, 1718 (U.S. filed April 26, 1999).

Most recently, the Ohio Supreme Court upheld the Cleveland Scholarship Program against an establishment clause challenge. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). The Court emphasized the importance of neutrality and private decision making, noting that "benefits are available irrespective of the type of alternative school the eligible students attend," *id.* at 209, and that any "link between government and religion . . . 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." *Id.* (quoting *Witters*, 474 U.S. at 487).

The Vermont Supreme Court, in *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (1994), similarly held that the state could reimburse a parent for the costs incurred in sending his son to a religious school. In a system known as "tuitioning," many small towns in Vermont do not maintain a public high school but instead pay the tuition costs of local students to attend "an approved public or independent high school, to be selected by the parents or guardians of the pupil."[20] Overturning a 1961 precedent,[21] the Court held that the establishment clause posed no bar to a parent being reimbursed for tuition costs at a religious high school because this Court's evolving jurisprudence now lent greater

[20] Vt. Stat. Ann. tit. 16 § 822(a)(1).

[21] *Swart v. South Burlington Sch. Dist.*, 167 A.2d 514 (Vt. 1961).

weight to the presence of parental choice in directing neutrally provided state assistance.[22]

Unfortunately, not all courts have appropriately applied this Court's recent establishment clause jurisprudence. Both the First Circuit and the Maine Supreme Court have concluded that the establishment clause requires the State of Maine to exclude religious schools from the options available to parents under the tuitioning system that exists in most Maine school districts. *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999).[23]

While this case does not provide an appropriate vehicle for resolving this split in authority,[24] we urge the

[22] Subsequent to *Campbell*, the Vermont Department of Education prohibited tuitioning districts from reimbursing parents for tuition, ordering that they pay the tuition directly to the schools selected by parents. It also stated that such direct payments, unlike the reimbursements at issue in *Campbell*, would violate the establishment clause. This result was challenged by a tuitioning district in *Chittenden Town School District v. Vermont Department of Education*, No. 97-275, 1999 Vt. LEXIS 98 (Vt. June 11, 1999), in which for the first time the Vermont Supreme Court held its state constitution to be more restrictive than the establishment clause. Relying solely on state grounds to invalidate payments to religious schools, the Vermont Supreme Court did not overturn its First Amendment decision in *Campbell*.

[23] The Institute for Justice represents the plaintiffs in *Bagley* and has filed a petition for writ of certiorari in that case, which is currently pending before this Court. *Bagley v. Raymond Sch. Dep't*, No. 99-163 (U.S. filed July 22, 1999).

[24] Besides the previously referenced petitions for U.S. Supreme Court review, there are three pending cases challenging the constitutionality of parental choice programs.

Court to once again reaffirm the two principles it has emphasized in its recent jurisprudence: neutrality and private decision making. As Justice Powell observed, "[P]rograms that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* [403 U.S. 602 (1971)] test because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at 491 (Powell, J., concurring).[25]

III. THIS COURT SHOULD APPLY THE PRINCIPLES OF NEUTRALITY AND PRIVATE DECISION MAKING IN EVALUATING THE CONSTITUTIONALITY OF THE CHAPTER 2 PROGRAM.

This Court should analyze the Chapter 2 program under the same framework that it employed in *Mueller*, *Witters*, *Zobrest*, and *Agostini*. If this Court determines that Chapter 2 is consistent with principles of neutrality and private decision making, it should uphold the constitutionality of the program under the primary effect prong

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These cases are currently being litigated in state courts in Florida and Illinois, see *Holmes v. Bush*, No. 99-3370 (Fla. Cir. Ct., filed June 22, 1999); *Griffith v. Bower*, No. 99-CH-0049 (Ill. Cir. Ct., filed July 12, 1999), and in federal court in Ohio. *Simmons-Harris v. Zelman*, No. 1:99 CV 1740 (N.D. Ohio, filed July 20, 1999).

[25] Justice Powell's concurrence in *Witters* was joined or approved of by four other Justices. *Witters*, 474 U.S. at 490, 491, and 493.

of the *Lemon* test.[26] If, however, this Court concludes that Chapter 2 consists of direct institutional aid rather than indirect aid to religious schools, *amici* state no opinion regarding the proper outcome of the case, but rather hope that the Court will take care to distinguish such direct aid from indirect aid guided by the private choices of individual parents.

As for neutrality, it seems obvious that Chapter 2 is a neutral program. Chapter 2 services are provided to children enrolled in both public and private schools. See 20 U.S.C. § 7312(a). Furthermore, the program "provides for the participation of private school students on an equitable basis, with equal expenditures for private and public school students." *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1454 (9th Cir. 1995); see 20 U.S.C. § 2972(a), (b); 34 C.F.R. §§ 298.31, 298.34. Public schools and nonreligious private schools receive the overwhelming majority of Chapter 2 assistance, and no allegation has

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[26] *Amici* express no view regarding the entanglement issues in the instant case involving the segregation of religious from nonreligious instruction. School choice programs neither require schools to engage in such segregation nor require the government to monitor such segregation. Schools provide education as they see fit (subject only to the ordinary requirements for state accreditation) and receive payment for their services from the parents of the children who attend. While the state may establish certain minimal requirements for school participation in a choice program, such as nondiscrimination in admissions, the state does not otherwise interact with the school or involve itself in the school's internal affairs. Thus, no entanglement concern is present. See, e.g., *Jackson v. Benson*, 578 N.W.2d at 619-20.

been made here that religious schools receive a disproportionate share of Chapter 2 money. See *Walker*, 46 F.3d at 1467 (seventy-four percent of Chapter 2 benefits went to public schools in 1988-89 with a substantial amount of the remaining twenty-six percent going to nonreligious private schools).

In short, Chapter 2 contains every hallmark of a neutral program. It does not define its beneficiaries with respect to religion: all students may participate in the program whether they attend a public, private, or religious school. Money is distributed pursuant to neutral criteria: eighty-five percent is determined by the total population of participating public and private school students while fifteen percent is based on the number of participating low-income students. *Helms v. Picard*, 151 F.3d 347, 367-68, (5th Cir. 1998); see 20 U.S.C. § 7312(a). And, Chapter 2 creates no incentive for a parent to choose a religious school over a nonreligious school: all schools equitably participate in the program with equal expenditures made for public and private school students.

Applying the principle of private decision making to the Chapter 2 program is a more difficult endeavor. *Amici* believe a powerful argument can be made that Chapter 2 funds are guided by the private choices of parents. Because benefits are allocated according to a school's overall population of participating students and low-income students and because Chapter 2 provides equal expenditures for private and public school students, the program, it can be argued, ties a certain amount of aid to the back of each child. Therefore, any benefit that goes to a religious school does so "only as a result of the genuinely independent and private choices of individuals." *Agostini*, at 226 (citations and internal quotation marks omitted).

The private decision making mechanism, however, is far less transparent in Chapter 2 than in school choice programs. Under Chapter 2, parents never receive a voucher or scholarship that they choose to redeem at a particular school, and no statutory entitlement exists to a particular grant of per-pupil aid. Chapter 2 materials travel directly from the government to schools, although the expenditure for each school is largely determined by the numerous independent choices of individual parents.[27] Chapter 2 thus is in some ways similar to institutional aid programs this Court addressed in *Tilton v. Richardson*, 403 U.S. 672 (1971), *Hunt v. McNair*, 413 U.S. 734 (1973), and *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976) and in other ways similar to parental choice programs.

Ultimately, *amici* have no view as to whether Chapter 2 funds are sufficiently guided by private decision making to qualify as permissible aid.[28] It does seem, however,

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[27] For that reason, this Court's observation that no "funds ever reach the coffers of religious schools," *Agostini*, 521 U.S. at 228, while never deemed a dispositive factor for the Court, nonetheless has more salience in a direct aid case than in a context where funds are placed at the disposal of third parties who can make independent choices.

[28] To the extent that Chapter 2 funds are consistent with the principles of neutrality and private decision making, the requirement that Chapter 2 materials only be used for secular instruction is unnecessary for the program to withstand constitutional scrutiny. Such segregation may be required, however, if Chapter 2 funds are considered "direct" aid.

that there are strong similarities between the nature of the Chapter 2 program at issue here and the Title I program upheld in *Agostini* as "aid is provided to students at whatever school they choose to attend." *Agostini*, 521 U.S. at 228.

Whatever the resolution of the instant case, however, *amici* urge the Court to carefully distinguish direct aid from indirect aid and to reaffirm the core principles of neutrality and private decision making *amici* believe establish the constitutionality of school choice programs.

CONCLUSION

Today, millions of low-income and minority children are consigned to public schools unable to provide them with an adequate education. Fortunately, school choice programs are giving thousands of such youngsters the opportunity to receive a high-quality education and are stimulating systemic public school reform. *Amici* ask this Court to take care in the instant case not to disturb these existing programs and not to jeopardize the potential for expanding these efforts so that all of our nation's children

have access to the broadest range of high-quality educational options.

Respectfully submitted,

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