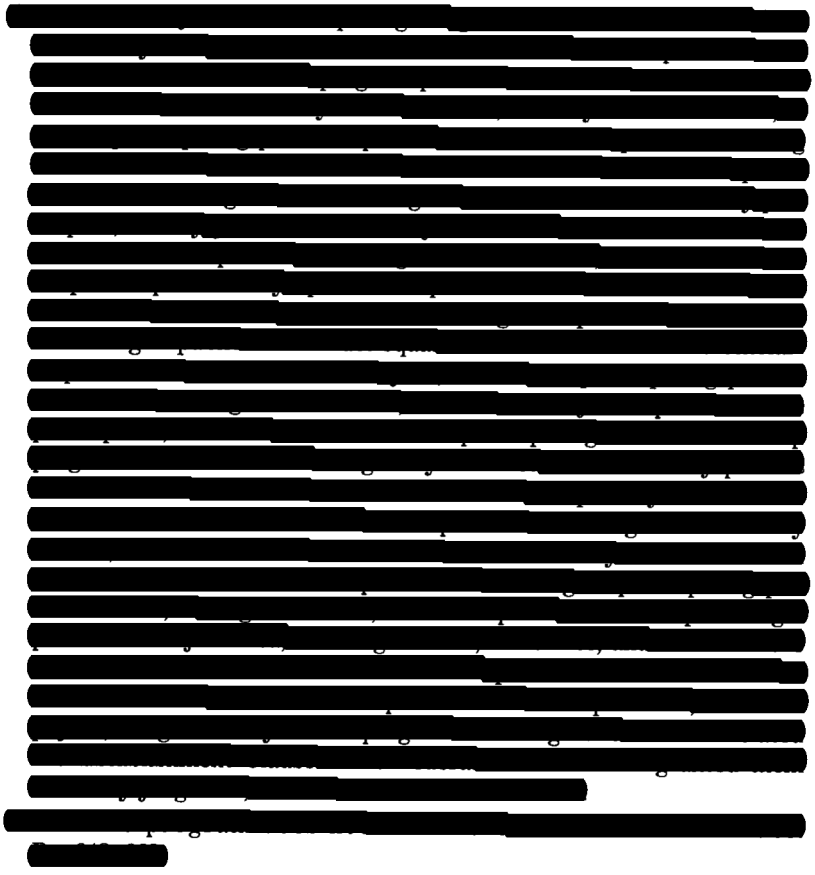
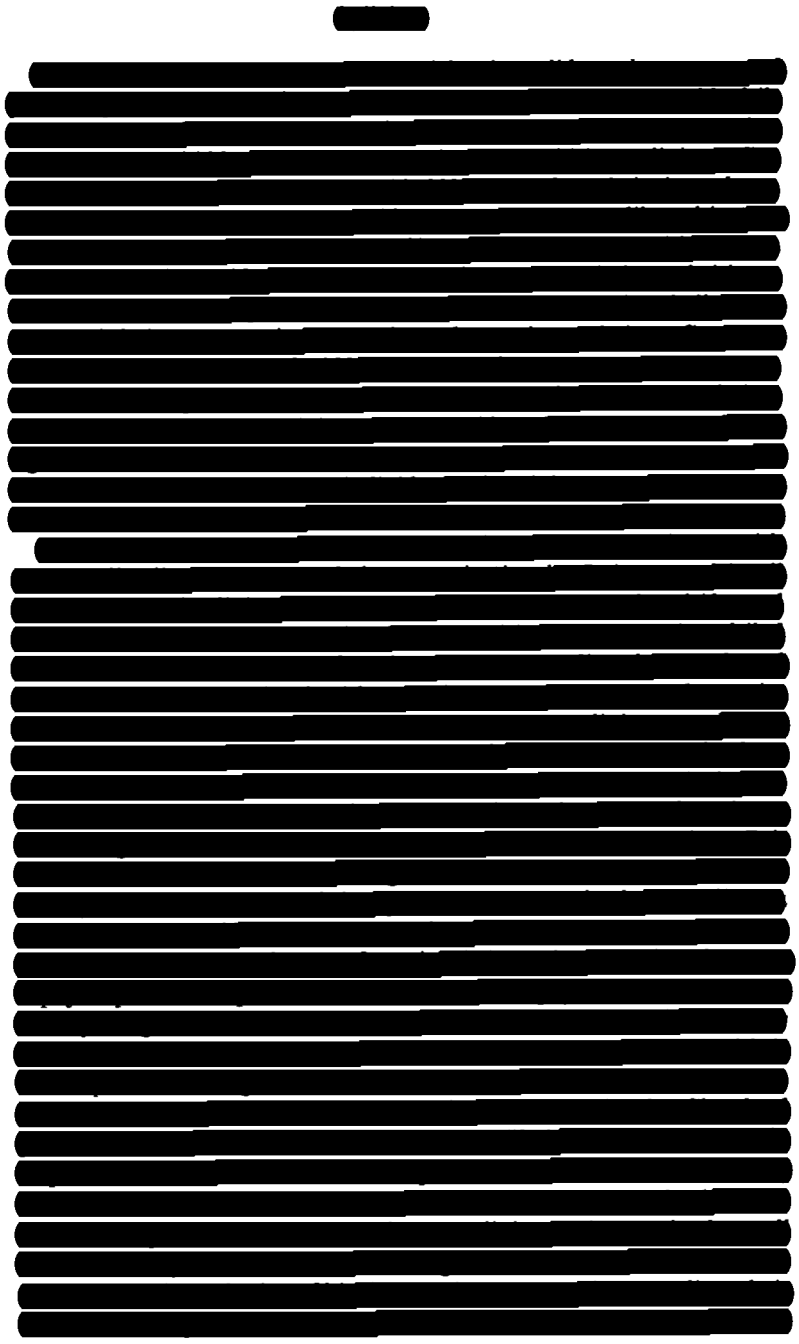
ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL. *v.* SIMMONS-HARRIS ET AL.

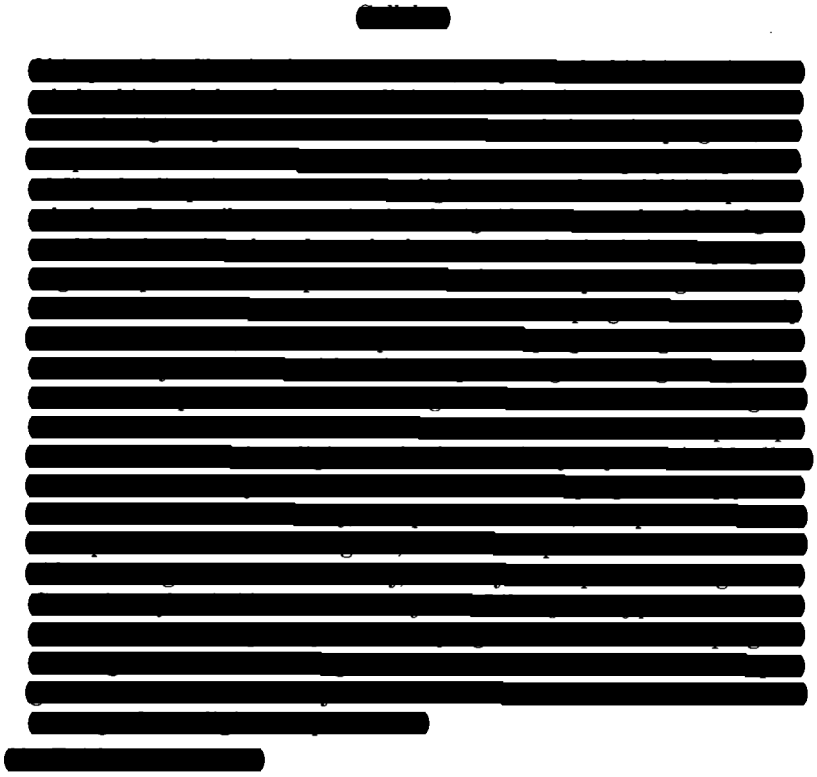
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00–1751. Argued February 20, 2002—Decided June 27, 2002*



*Together with No. 00–1777, *Hanna Perkins School et al.* v. *Simmons-Harris et al.*, and No. 00–1779, *Taylor et al.* v. *Simmons-Harris et al.*, also on certiorari to the same court.





REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., *post*, p. 663, and THOMAS, J., *post*, p. 676, filed concurring opinions. STEVENS, J., filed a dissenting opinion, *post*, p. 684. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 686. BREYER, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, *post*, p. 717.

Judith L. French, Assistant Attorney General of Ohio, argued the cause for petitioners in No. 00–1751. With her on the briefs were *Betty D. Montgomery*, Attorney General, *David M. Gormley*, State Solicitor, *Karen L. Lazorishak*, *James G. Tassie*, and *Robert L. Strayer*, Assistant Attorneys General, *Kenneth W. Starr*, and *Robert R. Gasaway*. *David J. Young* argued the cause for petitioners in No. 00–1777. With him on the briefs were *Michael R. Reed* and *David*

Counsel

J. Hessler. Clint Bolick, William H. Mellor, Richard D. Komer, Robert Freedman, David Tryon, and *Charles Fried* filed briefs for petitioners in No. 00–1779.

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General McCallum, Deputy Solicitor General Kneedler, Gregory G. Garre, Robert M. Loeb,* and *Lowell V. Sturgill, Jr.*

Robert H. Chanin argued the cause for respondents Simmons-Harris et al. in all cases. With him on the brief were *Andrew D. Roth, Laurence Gold, Steven R. Shapiro, Raymond Vasvari, Elliot M. Mincberg,* and *Judith E. Schaeffer. Marvin E. Frankel* argued the cause for respondents Gatton et al. in all cases. With him on the brief were *David J. Strom, Donald J. Mooney, Jr.,* and *Marc D. Stern.*†

---

†Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth,* Attorney General of Florida, *Thomas E. Warner,* Solicitor General, and *Matthew J. Conigliaro,* Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *M. Jane Brady* of Delaware, *Don Stenberg* of Nebraska, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, and *Randolph A. Beales* of Virginia; for the State of Wisconsin by *Stephen P. Hurley, Gordon P. Giampietro,* and *Donald A. Daugherty, Jr.;* for Gary E. Johnson, Governor of New Mexico, by *Jeffrey S. Bucholtz;* for Mayor Rudolph W. Giuliani et al. by *Michael D. Hess,* Corporation Counsel of the City of New York, *Leonard J. Koerner,* and *Edward F. X. Hart;* for Councilwoman Fannie Lewis by *Steffen N. Johnson, Stephen M. Shapiro, Robert M. Dow, Jr.,* and *Richard P. Hutchison;* for the American Education Reform Council by *Louis R. Cohen, C. Boyden Gray,* and *Todd Zubler;* for the American Civil Rights Union by *Peter J. Ferrara;* for the American Center for Law and Justice, Inc., et al. by *Jay Alan Sekulow, James M. Henderson, Sr., Colby M. May, Vincent McCarthy,* and *Walter M. Weber;* for the Association of Christian Schools International et al. by *Edward McGlynn Gaffney, Jr.,* and *Richard A. Epstein;* for the Becket Fund for Religious Liberty by *Kevin J. Hasson, Eric W. Treene, Roman P. Storzer, Anthony R. Picarello, Jr.,* and *Richard Garnett;* for the Black Alliance for Educational Options by *Samuel Estreicher;* for the Catholic League for Religious and Civil Rights by *Robert P. George;* for the Center for Education Reform et al. by *Robert A. Destro*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The State of Ohio has established a pilot program designed to provide educational choices to families with children who

---

and *Joseph E. Schmitz;* for the Center for Individual Freedom et al. by *Erik S. Jaffe;* for Children First America et al. by *Harold J. (Tex) Lezar, Jr.*, and *Stephen G. Gilles;* for the Christian Legal Society et al. by *Stuart J. Lark* and *Gregory S. Baylor;* for the Claremont Institute Center for Constitutional Jurisprudence by *Edwin Meese III;* for the Coalition for Local Sovereignty by *Kenneth B. Clark;* for the National Association of Independent Schools by *Allen G. Siegel;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin, Dennis Rapps, Nathan Diament,* and *David Zwiebel;* for the REACH Alliance by *Philip J. Murren;* for the Rutherford Institute by *John W. Whitehead, Steven H. Aden, Robert R. Melnick,* and *James J. Knicely;* for the Solidarity Center for Law and Justice, P. C., by *James P. Kelly III;* for the United States Conference of Catholic Bishops by *Mark E. Chopko, John Liekweg,* and *Jeffrey Hunter Moon;* and for *Hugh Calkins, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Committee et al. by *Howard G. Kristol, Erwin Chemerinsky, Jeffrey P. Sinensky, Kara H. Stein, Arthur H. Bryant,* and *Victoria W. Ni;* for the Anti-Defamation League by *Martin E. Karlinsky, Daniel J. Beller, Steven M. Freeman,* and *Frederick M. Lawrence;* for the Council on Religious Freedom et al. by *Lee Boothby* and *Alan J. Reinach;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Norman J. Chachkin, Elaine R. Jones, Theodore M. Shaw, James L. Cott, Dennis D. Parker,* and *Dennis Courtland Hayes;* for the National Committee for Public Education and Religious Liberty by *Geoffrey F. Aronow* and *Stanley Geller;* for the National School Boards Association et al. by *Julie K. Underwood, Scott Bales,* and *James Martin;* for the Ohio Association for Public Education and Religious Liberty by *Patrick Farrell Timmins, Jr.;* and for the Ohio School Boards Association et al. by *Kimball H. Carey* and *Susan B. Greenberger.*

Briefs of *amici curiae* were filed for the California Alliance for Public Schools by *Robin B. Johansen* and *Joseph Remcho;* for Vermonters for Better Education by *Michael D. Dean;* for John E. Coons et al. by *Mr. Coons, pro se,* and *Stephen D. Sugarman, pro se;* for Jesse H. Choper et al. by *Mr. Choper, pro se, William Bassett, Teresa Collett, David Forte, Richard Garnett, Lino Graglia, Michael Heise, Gail Heriot, Roderick Hills, Grant Nelson, Michael Perry, David Post, Charles Rice, Rosemary Salomone, Gregory Sisk, Steve Smith,* and *Harry Tepker;* and for Ira J. Paul et al. by *Sharon L. Browne.*

reside in the Cleveland City School District. The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not.

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. See *Reed* v. *Rhodes*, No. 1:73 CV 1300 (ND Ohio, Mar. 3, 1995). Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." Cleveland City School District Performance Audit 2–1 (Mar. 1996). The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§3313.974–3313.979 (Anderson 1999 and Supp. 2000) (program). The program provides financial assistance to families in any Ohio school district that is or has been "under federal court order requiring supervision and opera-

tional management of the district by the state superintendent." § 3313.975(A). Cleveland is the only Ohio school district to fall within that category.

The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. §§ 3313.975(B) and (C)(1). Second, the program provides tutorial aid for students who choose to remain enrolled in public school. § 3313.975(A).

The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. § 313.976(A)(3). Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." § 3313.976(A)(6). Any public school located in a school district adjacent to the covered district may also participate in the program. § 3313.976(C). Adjacent public schools are eligible to receive a $2,250 tuition grant for each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student. §§ 3313.976(C), 3317.03(I)(1).[1] All participating schools,

[1] Although the parties dispute the precise amount of state funding received by suburban school districts adjacent to the Cleveland City School District, there is no dispute that any suburban district agreeing to participate in the program would receive a $2,250 tuition grant *plus* the ordinary allotment of per-pupil state funding for each program student enrolled in a suburban public school. See Brief for Respondents Simmons-Harris

whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent. §§ 3313.977(A)(1)(a)–(c).

Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250. §§ 3313.978(A) and (C)(1). For these lowest income families, participating private schools may not charge a parental copayment greater than $250. § 3313.976(A)(8). For all other families, the program pays 75% of tuition costs, up to $1,875, with no copayment cap. §§ 3313.976(A)(8), 3313.978(A). These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate.[2] Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school. § 3313.979.

The tutorial aid portion of the program provides tutorial assistance through grants to any student in a covered district who chooses to remain in public school. Parents arrange for registered tutors to provide assistance to their children and then submit bills for those services to the State for payment. §§ 3313.976(D), 3313.979(C). Students from low-income families receive 90% of the amount charged for such assistance up to $360. All other students receive 75% of that amount. § 3313.978(B). The number of tutorial assistance grants offered to students in a covered district must equal the number of tuition aid scholarships provided to stu-

---

et al. 30, n. 11 (suburban schools would receive "on average, approximately, $4,750" per program student); Brief for Petitioners in No. 00–1779, p. 39 (suburban schools would receive "about $6,544" per program student).

[2] The number of available scholarships per covered district is determined annually by the Ohio Superintendent for Public Instruction. §§ 3313.978(A)–(B).

dents enrolled at participating private or adjacent public schools. § 3313.975(A).

The program has been in operation within the Cleveland City School District since the 1996–1997 school year. In the 1999–2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line. In the 1998–1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. This number was expected to double during the 1999–2000 school year.

The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren in response to the 1995 takeover. That undertaking includes programs governing community and magnet schools. Community schools are funded under state law but are run by their own school boards, not by local school districts. §§ 3314.01(B), 3314.04. These schools enjoy academic independence to hire their own teachers and to determine their own curriculum. They can have no religious affiliation and are required to accept students by lottery. During the 1999–2000 school year, there were 10 startup community schools in the Cleveland City School District with more than 1,900 students enrolled. For each child enrolled in a community school, the school receives state funding of $4,518, twice the funding a participating program school may receive.

Magnet schools are public schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students. For each student enrolled in a magnet school, the school district receives $7,746, including state funding of $4,167, the same amount received

per student enrolled at a traditional public school. As of 1999, parents in Cleveland were able to choose from among 23 magnet schools, which together enrolled more than 13,000 students in kindergarten through eighth grade. These schools provide specialized teaching methods, such as Montessori, or a particularized curriculum focus, such as foreign language, computers, or the arts.

In 1996, respondents, a group of Ohio taxpayers, challenged the Ohio program in state court on state and federal grounds. The Ohio Supreme Court rejected respondents' federal claims, but held that the enactment of the program violated certain procedural requirements of the Ohio Constitution. *Simmons-Harris* v. *Goff*, 86 Ohio St. 3d 1, 8–9, 711 N. E. 2d 203, 211 (1999). The state legislature immediately cured this defect, leaving the basic provisions discussed above intact.

In July 1999, respondents filed this action in United States District Court, seeking to enjoin the reenacted program on the ground that it violated the Establishment Clause of the United States Constitution. In August 1999, the District Court issued a preliminary injunction barring further implementation of the program, 54 F. Supp. 2d 725 (ND Ohio), which we stayed pending review by the Court of Appeals, 528 U. S. 983 (1999). In December 1999, the District Court granted summary judgment for respondents. 72 F. Supp. 2d 834. In December 2000, a divided panel of the Court of Appeals affirmed the judgment of the District Court, finding that the program had the "primary effect" of advancing religion in violation of the Establishment Clause. 234 F. 3d 945 (CA6). The Court of Appeals stayed its mandate pending disposition in this Court. App. to Pet. for Cert. in No. 00–1779, p. 151. We granted certiorari, 533 U. S. 976 (2001), and now reverse the Court of Appeals.

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose"

or "effect" of advancing or inhibiting religion. *Agostini* v. *Felton*, 521 U. S. 203, 222–223 (1997) ("[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the 'effect' of advancing or inhibiting religion" (citations omitted)). There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden "effect" of advancing or inhibiting religion.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, *Mitchell* v. *Helms*, 530 U. S. 793, 810–814 (2000) (plurality opinion); *id.*, at 841–844 (O'CONNOR, J., concurring in judgment); *Agostini*, *supra*, at 225–227; *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 842 (1995) (collecting cases), and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals, *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993). While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two decades, *Agostini*, *supra*, at 236, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

In *Mueller*, we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tu-

ition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. We began by focusing on the class of beneficiaries, finding that because the class included "*all* parents," including parents with "children [who] attend nonsectarian private schools or sectarian private schools," 463 U. S., at 397 (emphasis in original), the program was "not readily subject to challenge under the Establishment Clause," *id.*, at 399 (citing *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")). Then, viewing the program as a whole, we emphasized the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children." 463 U. S., at 399–400. This, we said, ensured that "no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.*, at 399 (quoting *Widmar*, *supra*, at 274)). We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools, saying:

> "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." 463 U. S., at 401.

That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause.

In *Witters*, we used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. Looking at the program as a whole, we observed that "[a]ny aid . . . that ulti-

mately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U. S., at 487. We further remarked that, as in *Mueller*, "[the] program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." 474 U. S., at 487 (internal quotation marks omitted). In light of these factors, we held that the program was not inconsistent with the Establishment Clause. *Id.*, at 488–489.

Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. 474 U. S., at 490–491 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., concurring) (citing *Mueller, supra*, at 398–399); 474 U. S., at 493 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 490 (White, J., concurring). Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.

Finally, in *Zobrest*, we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. Reviewing our earlier decisions, we stated 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." 509 U. S., at 8. Looking once again to the challenged program as a whole, we observed that the program "distributes benefits neutrally to any child qualifying as 'disabled.'" *Id.*, at 10. Its "primary beneficiaries," we said, were "disabled children, not sectarian schools." *Id.*, at 12.

We further observed that "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.*, at 10. Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools. *Id.*, at 10–11. See, *e. g., Agostini*, 521 U. S., at 229 ("*Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school"). Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.

Mueller, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. As a plurality of this Court recently observed:

> "[I]f numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special

favors that might lead to a religious establishment." *Mitchell*, 530 U. S., at 810.

See also *id.*, at 843 (O'CONNOR, J., concurring in judgment) ("[W]hen 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' " (quoting *Witters*, 474 U. S., at 493 (O'CONNOR, J., concurring in part and concurring in judgment))). It is precisely for these reasons that we have never found a program of true private choice to offend the Establishment Clause.

We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i. e.*, any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

There are no "financial incentive[s]" that "ske[w]" the program toward religious schools. *Witters*, *supra*, at 487–488. Such incentives "[are] not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both reli-

gious and secular beneficiaries on a nondiscriminatory basis." *Agostini, supra,* at 231. The program here in fact creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program "creates . . . financial incentive[s] for parents to choose a sectarian school." *Zobrest,* 509 U. S., at 10.[3]

Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a "public perception that the State is endorsing religious practices and beliefs." Brief for Respondents Simmons-Harris et al. 37–38. But we have repeatedly rec-

---

[3] JUSTICE SOUTER suggests the program is not "neutral" because program students cannot spend scholarship vouchers at traditional public schools. *Post,* at 697–698 (dissenting opinion). This objection is mistaken: Public schools in Cleveland already receive $7,097 in public funding per pupil—$4,167 of which is attributable to the State. App. 56a. Program students who receive tutoring aid and remain enrolled in traditional public schools therefore direct almost twice as much state funding to their chosen school as do program students who receive a scholarship and attend a private school. *Ibid.* JUSTICE SOUTER does not seriously claim that the program differentiates based on the religious status of beneficiaries or providers of services, the touchstone of neutrality under the Establishment Clause. *Mitchell* v. *Helms,* 530 U. S. 793, 809 (2000) (plurality opinion); *id.,* at 838 (O'CONNOR, J., concurring in judgment).

ognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. *Mueller*, 463 U. S., at 399; *Witters, supra*, at 488–489; *Zobrest, supra*, at 10–11; *e. g., Mitchell, supra*, at 842–843 (O'CONNOR, J., concurring in judgment) ("In terms of public perception, a government program of direct aid to religious schools . . . differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools"). The argument is particularly misplaced here since "the reasonable observer in the endorsement inquiry must be deemed aware" of the "history and context" underlying a challenged program. *Good News Club* v. *Milford Central School*, 533 U. S. 98, 119 (2001) (internal quotation marks omitted). See also *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 780 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coerc-

ing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

JUSTICE SOUTER speculates that because more private religious schools currently participate in the program, the program itself must somehow discourage the participation of private nonreligious schools. *Post,* at 703–705 (dissenting opinion).[4] But Cleveland's preponderance of religiously af-

[4] JUSTICE SOUTER appears to base this claim on the unfounded assumption that capping the amount of tuition charged to low-income students (at $2,500) favors participation by religious schools. *Post,* at 704–705 (dissenting opinion). But elsewhere he claims that the program spends *too much* money on private schools and chides the state legislature for even proposing to raise the scholarship amount for low-income recipients. *Post,* at 697–698, 710–711, 714–715. His assumption also finds no support in the record, which shows that nonreligious private schools operating in Cleveland also seek and receive substantial third-party contributions. App. 194a–195a; App. to Pet. for Cert. in No. 00–1777, p. 119a. Indeed, the actual operation of the program refutes JUSTICE SOUTER's argument that few but religious schools can afford to participate: Ten secular private schools operated within the Cleveland City School District when the program was adopted. Reply Brief for Petitioners in No. 00–1777, p. 4 (citing Ohio Educational Directory, 1999–2000 School Year, Alphabetic List of Nonpublic Schools, Ohio Dept. of Ed.). All 10 chose to participate in the program and have continued to participate to this day. App. 281a– 286a. And while no religious schools have been created in response to the program, several *nonreligious* schools have been created, *id.,* at 144a–148a, 224a–225a, in spite of the fact that a principal barrier to entry of new private schools is the uncertainty caused by protracted litigation which has plagued the program since its inception, *post,* at 672 (O'CONNOR, J., concurring) (citing App. 225a, 227a). See also 234 F. 3d 945, 970 (CA6 2000) (Ryan, J., concurring in part and dissenting in part) ("There is not a scintilla of evidence in this case that any school, public or private, has been discouraged from participating in the school voucher program because it cannot 'afford' to do so"). Similarly mistaken is JUSTICE SOUTER's reliance on the low enrollment of scholarship students in nonreligious schools

filiated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities. See U. S. Dept. of Ed., National Center for Education Statistics, Private School Universe Survey: 1999–2000, pp. 2–4 (NCES 2001–330, 2001) (hereinafter Private School Universe Survey) (cited in Brief for United States as *Amicus Curiae* 24). Indeed, by all accounts the program has captured a remarkable cross-section of private schools, religious and nonreligious. It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. See Brief for State of Florida et al. as *Amici Curiae* 16 (citing Private School Universe Survey). To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, see Ohio Educational Directory (Lodging of Respondents Gatton et al., available in Clerk of Court's case file), and Reply Brief for Petitioners in No. 00–1751, p. 12, n. 1, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater. Cf. Brief for State of Florida et al. as *Amici Curiae* 17 ("[T]he percentages of sectarian to nonsectarian private schools within Florida's 67 school districts . . . vary from zero to 100 percent"). Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less

---

during the 1999–2000 school year. *Post*, at 704 (citing Brief for California Alliance for Public Schools as *Amicus Curiae* 15). These figures ignore the fact that the number of program students enrolled in nonreligious schools has widely varied from year to year, *infra*, at 659; *e. g.*, n. 5, *infra*, underscoring why the constitutionality of a neutral choice program does not turn on annual tallies of private decisions made in any given year by thousands of individual aid recipients, *infra*, at 659 (citing *Mueller* v. *Allen*, 463 U. S. 388, 401 (1983)).

than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools. *Id.*, at 15–16 (citing Private School Universe Survey).

Respondents and JUSTICE SOUTER claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. Indeed, we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools. See *Agostini*, 521 U. S., at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid" (citing *Mueller*, 463 U. S., at 401)); see also *Mitchell*, 530 U. S., at 812, n. 6 (plurality opinion) ("*[Agostini]* held that the proportion of aid benefiting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the constitutional inquiry"); *id.*, at 848 (O'CONNOR, J., concurring in judgment) (same) (quoting *Agostini*, *supra*, at 229). The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. As we said in *Mueller*, "[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." 463 U. S., at 401.

This point is aptly illustrated here. The 96% figure upon which respondents and JUSTICE SOUTER rely discounts entirely (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance. See *supra*, at 647–648. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999–2000 school year drops the percentage enrolled in religious schools from 96% to under 20%. See also J. Greene, The Racial, Economic, and Religious Context of Parental Choice in Cleveland 11, Table 4 (Oct. 8, 1999), App. 217a (reporting that only 16.5% of nontraditional schoolchildren in Cleveland choose religious schools). The 96% figure also represents but a snapshot of one particular school year. In the 1997–1998 school year, by contrast, only 78% of scholarship recipients attended religious schools. See App. to Pet. for Cert. in No. 00–1751, p. 5a. The difference was attributable to two private nonreligious schools that had accepted 15% of all scholarship students electing instead to register as community schools, in light of larger per-pupil funding for community schools and the uncertain future of the scholarship program generated by this litigation. See App. 59a–62a, 209a, 223a–227a.[5] Many of the students enrolled in these schools

[5] The fluctuations seen in the Cleveland program are hardly atypical. Experience in Milwaukee, which since 1991 has operated an educational choice program similar to the Ohio program, demonstrates that the mix of participating schools fluctuates significantly from year to year based on a number of factors, one of which is the uncertainty caused by persistent litigation. See App. 218a, 229a–236a; Brief for State of Wisconsin as *Amicus Curiae* 10–13 (hereinafter Brief for Wisconsin) (citing Wisconsin Dept. of Public Instruction, Milwaukee Parental Choice Program Facts and Figures for 2001–2002). Since the Wisconsin Supreme Court declared the Milwaukee program constitutional in 1998, *Jackson* v. *Benson*, 218 Wis. 2d 835, 578 N. W. 2d 602, several nonreligious private schools have entered the Milwaukee market, and now represent 32% of all participating

as scholarship students remained enrolled as community school students, *id.*, at 145a–146a, thus demonstrating the arbitrariness of counting one type of school but not the other to assess primary effect, *e. g.*, Ohio Rev. Code Ann. § 3314.11 (Anderson 1999) (establishing a single "office of school options" to "provide services that facilitate the management of the community schools program and the pilot project scholarship program"). In spite of repeated questioning from the Court at oral argument, respondents offered no convincing justification for their approach, which relies entirely on such arbitrary classifications. Tr. of Oral Arg. 52–60.[6]

---

schools. Brief for Wisconsin 11–12. Similarly, the number of program students attending nonreligious private schools increased from 2,048 to 3,582; these students now represent 33% of all program students. *Id.*, at 12–13. There are currently 34 nonreligious private schools participating in the Milwaukee program, a nearly five-fold increase from the 7 nonreligious schools that participated when the program began in 1990. See App. 218a; Brief for Wisconsin 12. And the total number of students enrolled in nonreligious schools has grown from 337 when the program began to 3,582 in the most recent school year. See App. 218a, 234a–236a; Brief for Wisconsin 12–13. These numbers further demonstrate the wisdom of our refusal in *Mueller* v. *Allen*, 463 U. S., at 401, to make the constitutionality of such a program depend on "annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."

[6] JUSTICE SOUTER and JUSTICE STEVENS claim that community schools and magnet schools are separate and distinct from program schools, simply because the program itself does not include community and magnet school options. *Post*, at 698–701 (SOUTER, J., dissenting); *post*, at 685 (STEVENS, J., dissenting). But none of the dissenting opinions explain how there is any perceptible difference between scholarship schools, community schools, or magnet schools from the perspective of Cleveland parents looking to choose the best educational option for their school-age children. Parents who choose a program school in fact receive from the State precisely what parents who choose a community or magnet school receive—the opportunity to send their children largely at state expense to schools they prefer to their local public school. See, *e. g.*, App. 147a, 168a–169a; App. in Nos. 00–3055, etc. (CA6), pp. 1635–1645 and 1657–1673 (Cleveland parents who enroll their children in schools other than local public schools typically explore all state-funded options before choosing an alternative school).

Respondents finally claim that we should look to *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973), to decide these cases. We disagree for two reasons. First, the program in *Nyquist* was quite different from the program challenged here. *Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly secular purposes, *id.*, at 773–774, we found that its "function" was "*unmistakably* to provide desired financial support for nonpublic, sectarian institutions," *id.*, at 783 (emphasis added). Its genesis, we said, was that private religious schools faced "increasingly grave fiscal problems." *Id.*, at 795. The program thus provided direct money grants to religious schools. *Id.*, at 762–764. It provided tax benefits "unrelated to the amount of money actually expended by any parent on tuition," ensuring a windfall to parents of children in religious schools. *Id.*, at 790. It similarly provided tuition reimbursements designed explicitly to "offe[r] . . . an incentive to parents to send their children to sectarian schools." *Id.*, at 786. Indeed, the program flatly prohibited the participation of any public school, or parent of any public school enrollee. *Id.*, at 763–765. Ohio's program shares none of these features.

Second, were there any doubt that the program challenged in *Nyquist* is far removed from the program challenged here, we expressly reserved judgment with respect to "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." *Id.*, at 782–783, n. 38. That, of course, is the very question now before us, and it has since been answered, first in *Mueller*, 463 U. S., at 398–399 ("[A] program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause" (citing *Nyquist*, *supra*, at 782–783, n. 38)),

then in *Witters*, 474 U. S., at 487 ("Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited'" (quoting *Nyquist*, *supra*, at 782–783, n. 38)), and again in *Zobrest*, 509 U. S., at 12–13 ("[T]he function of the [program] is hardly 'to provide desired financial support for nonpublic, sectarian institutions'" (quoting *Nyquist*, *supra*, at 782–783, n. 38)). To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.[7]

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of

---

[7] JUSTICE BREYER would raise the invisible specters of "divisiveness" and "religious strife" to find the program unconstitutional. *Post*, at 719, 725–728 (dissenting opinion). It is unclear exactly what sort of principle JUSTICE BREYER has in mind, considering that the program has ignited no "divisiveness" or "strife" other than this litigation. Nor is it clear where JUSTICE BREYER would locate this presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find "divisive." We quite rightly have rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs. *Mitchell* v. *Helms*, 530 U. S., at 825 (plurality opinion) ("The dissent resurrects the concern for political divisiveness that once occupied the Court but that post-*Aguilar* cases have rightly disregarded") (citing cases); *id.*, at 825–826 ("'It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit'" (quoting *Aguilar* v. *Felton*, 473 U. S. 402, 429 (1985) (O'CONNOR, J., dissenting))).

decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

The judgment of the Court of Appeals is reversed.

It is so ordered.

[redacted]