SUPREME COURT OF THE UNITED STATES

Nos. 00–1751, 00–1777 and 00–1779

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL., PETITIONERS

00–1751 *v.*

DORIS SIMMONS-HARRIS ET AL.

HANNA PERKINS SCHOOL, ET AL., PETITIONERS

00–1777 *v.*

DORIS SIMMONS-HARRIS ET AL.

SENEL TAYLOR, ET AL., PETITIONERS

00–1779 *v.*

DORIS SIMMONS-HARRIS ET AL.

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

[June 27, 2002]

JUSTICE O'CONNOR, concurring.

The Court holds that Ohio's Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§3313.974–3313.979 (Anderson 1999 and Supp. 2000) (voucher program), survives respondents' Establishment Clause challenge. While I join the Court's opinion, I write separately for two reasons. First, although the Court takes an important step, I do not believe that today's decision, when considered in light of other longstanding government programs that impact religious organizations and our prior Establishment Clause jurisprudence, marks a dramatic break from the past. Second, given the emphasis the Court places on

verifying that parents of voucher students in religious schools have exercised "true private choice," I think it is worth elaborating on the Court's conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents. To do otherwise is to ignore how the educational system in Cleveland actually functions.

I

These cases are different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds. The share of public resources that reach religious schools is not, however, as significant as respondents suggest. See, *e.g.*, Brief for Respondents Simmons-Harris et al. 1–2. Data from the 1999–2000 school year indicate that 82 percent of schools participating in the voucher program were religious and that 96 percent of participating students enrolled in religious schools, see App. in Nos. 00–3055, etc. (CA6), p. 1679 (46 of 56 private schools in the program are religiously-affiliated; 3,637 of 3,765 voucher students attend religious private schools), but these data are incomplete. These statistics do not take into account all of the reasonable educational choices that may be available to students in Cleveland public schools. When one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent. If magnet schools are included in the mix, this percentage falls to 16.5 percent. See J. Greene, The Racial, Economic, and Religious Context of Parental Choice in Cleveland 11, Table 4 (Oct. 8, 1999), App. 217a (reporting 2,087 students in community schools and 16,184 students in magnet schools).

Even these numbers do not paint a complete picture. The Cleveland program provides voucher applicants from

low-income families with up to $2,250 in tuition assistance and provides the remaining applicants with up to $1,875 in tuition assistance. §§3313.976(A)(8), 3313.978(A) and (C)(1). In contrast, the State provides community schools $4,518 per pupil and magnet schools, on average, $7,097 per pupil. Affidavit of Caroline M. Hoxby ¶¶4b, 4c, App. 56a. Even if one assumes that all voucher students came from low-income families and that each voucher student used up the entire $2,250 voucher, at most $8.2 million of public funds flowed to religious schools under the voucher program in 1999–2000. Although just over one-half as many students attended community schools as religious private schools on the state fisc, the State spent over $1 million more—$9.4 million—on students in community schools than on students in religious private schools because per-pupil aid to community schools is more than double the per-pupil aid to private schools under the voucher program. Moreover, the amount spent on religious private schools is minor compared to the $114.8 million the State spent on students in the Cleveland magnet schools.

Although $8.2 million is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions. Religious organizations may qualify for exemptions from the federal corporate income tax, see 26 U. S. C. §501(c)(3); the corporate income tax in many States, see, *e.g.*, Cal. Rev. & Tax. Code Ann. §23701d (West 1992); and property taxes in all 50 States, see K. Turner, Property Tax Exemptions for Nonprofits, 12–Oct. Probate and Property 25 (1998); and clergy qualify for a federal tax break on income used for housing expenses, 26 U. S. C. §1402(a)(8). In addition, the Federal Government provides individuals, corporations, trusts, and estates a tax deduction for charitable contributions to qualified religious groups. See §§170, 642(c). Finally, the Federal Government and cer-

tain state governments provide tax credits for educational expenses, many of which are spent on education at religious schools. See, *e.g.*, §25A (Hope tax credit); Minn. Stat. §290.0674 (Supp. 2001).

Most of these tax policies are well established, see, *e.g.*, *Mueller* v. *Allen*, 463 U. S. 388 (1983) (upholding Minnesota tax deduction for educational expenses); *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970) (upholding an exemption for religious organizations from New York property tax), yet confer a significant relative benefit on religious institutions. The state property tax exemptions for religious institutions alone amount to very large sums annually. For example, available data suggest that Colorado's exemption lowers that State's tax revenues by more than $40 million annually, see Rabey, Exemptions a Matter of Faith: No Proof Required of Tax-Free Churches, Colorado Springs Gazette Telegraph, Oct. 26, 1992, p. B1; Colorado Debates Church, Nonprofit Tax-Exempt Status, Philadelphia Enquirer, Oct. 4, 1996, p. 8; Maryland's exemption lowers revenues by more than $60 million, see Maryland Dept. of Assessment and Taxation, 2001 SDAT Annual Report (Apr. 25, 2002), http://www.dat.state.md.us/sdatweb/stats/01ar_rpt.html; Wisconsin's exemption lowers revenues by approximately $122 million, see Wisconsin Dept. of Revenue, Division of Research and Analysis, Summary of Tax Exemption Devices 2001, Property Tax (Apr. 25, 2002), http://www.dor.state.wi.us/ra/sum00pro.html ($5.688 billion in exempt religious property; statewide average property tax rate of $21.46 per $1,000 of property); and Louisiana's exemption, looking just at the city of New Orleans, lowers revenues by over $36 million, see Bureau of Governmental Research, Property Tax Exemptions and Assessment Administration in Orleans Parish: Summary and Recommendations 2 (Dec. 1999) ($22.6 million for houses of worship and $14.1 for religious schools). As for the Federal Government, the

tax deduction for charitable contributions reduces federal tax revenues by nearly $25 billion annually, see U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 344 (2000) (hereinafter Statistical Abstract), and it is reported that over 60 percent of household charitable contributions go to religious charities, *id.*, at 397. Even the relatively minor exemptions lower federal tax receipts by substantial amounts. The parsonage exemption, for example, lowers revenues by around $500 million. See Diaz, Ramstad Prepares Bill to Retain Tax Break for Clergy's Housing, Star Tribune (Minneapolis-St. Paul), Mar. 30, 2002, p. 4A.

These tax exemptions, which have "much the same effect as [cash grants] . . . of the amount of tax [avoided]," *Regan* v. *Taxation With Representation of Wash.,* 461 U. S. 540, 544 (1983); see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 859–860, esp. n. 4 (1995) (THOMAS, J., concurring), are just part of the picture. Federal dollars also reach religiously affiliated organizations through public health programs such as Medicare, 42 U. S. C. §§1395–1395ggg (1994 ed. and Supp. V), and Medicaid, §1396 *et seq.*, through educational programs such as the Pell Grant program, 20 U. S. C. §1070a, and the G. I. Bill of Rights, 38 U. S. C. §§3451, 3698; and through child care programs such as the Child Care and Development Block Grant Program (CCDBG), 42 U. S. C. §9858 (1994 ed., Supp. V). Medicare and Medicaid provide federal funds to pay for the healthcare of the elderly and the poor, respectively, see 1 B. Furrow, T. Greaney, S. Johnson, T. Jost, & R. Schwartz, Health Law 545–546 (2d ed. 2000); 2 *id.*, at 2; the Pell Grant program and the G. I. Bill subsidize higher education of low-income individuals and veterans, respectively, see Mulleneaux, The Failure to Provide Adequate Higher Education Tax Incentives for Lower-Income Individuals, 14 Akron Tax J. 27, 31 (1999); and the CCDBG program finances child care for low-

income parents, see Pitegoff, Child Care Policy and the Welfare Reform Act, 6 J. Affordable Housing & Community Dev. L. 113, 121–122 (1997). These programs are well-established parts of our social welfare system, see, *e.g.*, *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 782, n. 38 (1973), and can be quite substantial, see Statistical Abstract 92 (Table 120) ($211.4 billion spent on Medicare and nearly $176.9 billion on Medicaid in 1998), *id.,* at 135 (Table 208) ($9.1 billion in financial aid provided by the Department of Education and $280.5 million by the Department of Defense in 1999); Bush On Welfare: Tougher Work Rules, More State Control, Congress Daily Feb. 26, 2002, p. 8 ($4.8 billion for the CCDBG program in 2001).

A significant portion of the funds appropriated for these programs reach religiously affiliated institutions, typically without restrictions on its subsequent use. For example, it has been reported that religious hospitals, which account for 18 percent of all hospital beds nationwide, rely on Medicare funds for 36 percent of their revenue. MergerWatch, New Study Details Public Funding of Religious Hospitals (Jan. 2002), http://www.mergerwatch.org/inthenews/publicfunding.html. Moreover, taking into account both Medicare and Medicaid, religious hospitals received nearly $45 billion from the federal fisc in 1998. *Ibid*. Federal aid to religious schools is also substantial. Although data for all States is not available, data from Minnesota, for example, suggest that a substantial share of Pell Grant and other federal funds for college tuition reach religious schools. Roughly one-third or $27.1 million of the federal tuition dollars spent on students at schools in Minnesota were used at private 4-year colleges. Minnesota Higher Education Services Office, Financial Aid Awarded, Fiscal Year 1999: Grants, Loans, and Student Earning from Institution Jobs (Jan. 24, 2001). The vast majority of these funds—$23.5 million—flowed to relig-

iously affiliated institutions. *Ibid*.

Against this background, the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs. While this observation is not intended to justify the Cleveland voucher program under the Establishment Clause, see *post,* at 26–27, n. 19 (SOUTER, J., dissenting), it places in broader perspective alarmist claims about implications of the Cleveland program and the Court's decision in these cases. See *post,* at 3 (STEVENS, J., dissenting); *post,* at 32–34 (SOUTER, J., dissenting); *post,* p. 1 (BREYER, J., dissenting).

II

Nor does today's decision signal a major departure from this Court's prior Establishment Clause jurisprudence. A central tool in our analysis of cases in this area has been the *Lemon* test. As originally formulated, a statute passed this test only if it had "a secular legislative purpose," if its "principal or primary effect" was one that "neither advance[d] nor inhibit[ed] religion," and if it did "not foster an excessive government entanglement with religion." *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971) (internal quotation marks omitted). In *Agostini* v. *Felton*, 521 U. S. 203, 218, 232–233 (1997), we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, see *ibid*., and the degree of entanglement has implications for whether a statute advances or inhibits religion, see *Lynch* v. *Donnelly*, 465 U. S. 668, 688 (1984) (O'CONNOR, J., concurring). The test today is basically the same as that set forth in *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 222 (1963) (citing *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947); *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961)), over 40 years ago.

The Court's opinion in these cases focuses on a narrow

question related to the *Lemon* test: how to apply the primary effects prong in indirect aid cases? Specifically, it clarifies the basic inquiry when trying to determine whether a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion, *Lemon* v. *Kurtzman*, *supra,* at 613–614, or, as I have put it, of "endors[ing] or disapprov[ing] . . . religion," *Lynch* v. *Donnelly*, *supra,* at 691–692 (concurring opinion); see also *Wallace* v. *Jaffree*, 472 U. S. 38, 69–70 (1985) (O'CONNOR, J., concurring in judgment). See also *ante*, at 10. Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is "no," the program should be struck down under the Establishment Clause. See *ante*, at 10–11.

JUSTICE SOUTER portrays this inquiry as a departure from *Everson*. See *post,* at 2–3 (dissenting opinion). A fair reading of the holding in that case suggests quite the opposite. Justice Black's opinion for the Court held that the "[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary." *Everson*, *supra*, at 18; see also *Schempp*, *supra*, at 218, 222. How else could the Court have upheld a state program to provide students transportation to public and religious schools alike? What the Court clarifies in these cases is that the Establishment Clause also requires that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries. Such a refinement of the *Lemon* test

surely does not betray *Everson*.

III

There is little question in my mind that the Cleveland voucher program is neutral as between religious schools and nonreligious schools. See *ante*, at 11–12. JUSTICE SOUTER rejects the Court's notion of neutrality, proposing that the neutrality of a program should be gauged not by the opportunities it presents but rather by its effects. In particular, a "neutrality test . . . [should] focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction." *Post,* at 13 (dissenting opinion). JUSTICE SOUTER doubts that the Cleveland program is neutral under this view. He surmises that the cap on tuition that voucher schools may charge low-income students encourages these students to attend religious rather than nonreligious private voucher schools. See *post,* at 12, 21–22. But JUSTICE SOUTER's notion of neutrality is inconsistent with that in our case law. As we put it in *Agostini*, government aid must be "made available to both religious and secular beneficiaries on a nondiscriminatory basis." 521 U. S., at 231.

I do not agree that the nonreligious schools have failed to provide Cleveland parents reasonable alternatives to religious schools in the voucher program. For nonreligious schools to qualify as genuine options for parents, they need not be superior to religious schools in every respect. They need only be adequate substitutes for religious schools in the eyes of parents. The District Court record demonstrates that nonreligious schools were able to compete effectively with Catholic and other religious schools in the Cleveland voucher program. See *ante*, at 14–15, n. 4. The best evidence of this is that many parents with vouchers selected nonreligious private schools over religious alternatives and an even larger number of parents

send their children to community and magnet schools rather than seeking vouchers at all. *Supra*, at 2. Moreover, there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program, let alone a community or magnet school. See 234 F. 3d 945, 969 (CA6 2000) (Ryan, J., concurring in part and dissenting in part); Affidavit of David L. Brennan ¶8, App. 147a.

To support his hunch about the effect of the cap on tuition under the voucher program, JUSTICE SOUTER cites national data to suggest that, on average, Catholic schools have a cost advantage over other types of schools. See *post,* at 22–23, n. 15 (dissenting opinion). Even if national statistics were relevant for evaluating the Cleveland program, JUSTICE SOUTER ignores evidence which suggests that, at a national level, nonreligious private schools may target a market for different, if not higher, quality of education. For example, nonreligious private schools are smaller, see U. S. Dept. of Ed., National Center for Education Statistics, Private Universe School Survey, 1997–1998, (Oct. 1999) (Table 60) (87 and 269 students per private nonreligious and Catholic elementary school, respectively); have smaller class sizes, see *ibid.* (9.4 and 18.8 students per teacher at private nonreligious and Catholic elementary schools, respectively); have more highly educated teachers, see U. S. Dept. of Ed., National Center for Education Statistics, Private Schools in the United States: A Statistical Profile, 1993–1994, (NCES 97–459, July 1997) (Table 3.4) (37.9 percent of nonreligious private school teachers but only 29.9 percent of Catholic school teachers have Master's degrees); and have principals with longer job tenure than Catholic schools, see *ibid.* (Table 3.7) (average tenure of principals at private nonreligious and Catholic schools is 8.2 and 4.7 years, respectively).

Additionally, JUSTICE SOUTER's theory that the Cleve-

land voucher program's cap on the tuition encourages low-income student to attend religious schools ignores that these students receive nearly double the amount of tuition assistance under the community schools program than under the voucher program and that none of the community schools is religious. See *ante*, at 5.

In my view the more significant finding in these cases is that Cleveland parents who use vouchers to send their children to religious private schools do so as a result of true private choice. The Court rejects, correctly, the notion that the high percentage of voucher recipients who enroll in religious private schools necessarily demonstrates that parents do not actually have the option to send their children to nonreligious schools. *Ante,* at 14–19. Likewise, the mere fact that some parents enrolled their children in religious schools associated with a different faith than their own, see *post*, (SOUTER, J., dissenting), at 20–21, says little about whether these parents had reasonable nonreligious options. Indeed, no voucher student has been known to be turned away from a nonreligious private school participating in the voucher program. *Infra*, at 10. This is impressive given evidence in the record that the present litigation has discouraged the entry of some nonreligious private schools into the voucher program. Declaration of David P. Zanotti ¶¶5, 10, App. 225a, 227a. Finally, as demonstrated above, the Cleveland program does not establish financial incentives to undertake a religious education.

I find the Court's answer to the question whether parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools persuasive. In looking at the voucher program, all the choices available to potential beneficiaries of the government program should be considered. In these cases, parents who were eligible to apply for a voucher also had the option, at a minimum, to send their children to community

schools. Yet the Court of Appeals chose not to look at community schools, let alone magnet schools, when evaluating the Cleveland voucher program. See 234 F. 3d, at 958. That decision was incorrect. Focusing in these cases only on the program challenged by respondents ignores how the educational system in Cleveland actually functions. The record indicates that, in 1999, two nonreligious private schools that had previously served 15 percent of the students in the voucher program were prompted to convert to community schools because parents were concerned about the litigation surrounding the program, and because a new community schools program provided more per-pupil financial aid. Many of the students that enrolled in the two schools under the voucher program transferred to the community schools program and continued to attend these schools. See Affidavit of David L. Brennan ¶¶3, 10, App. 145a, 147a; Declaration of David P. Zanotti ¶¶4–10, *id.,* at 225a–227a. This incident provides strong evidence that both parents and nonreligious schools view the voucher program and the community schools program as reasonable alternatives.

Considering all the educational options available to parents whose children are eligible for vouchers, including community and magnet schools, the Court finds that parents in the Cleveland schools have an array of nonreligious options. *Ante,* at 13–14. Not surprisingly, respondents present no evidence that any students who were candidates for a voucher were denied slots in a community school or a magnet school. Indeed, the record suggests the opposite with respect to community schools. See Affidavit of David L. Brennan ¶8, App. 147a.

JUSTICE SOUTER nonetheless claims that, of the 10 community schools operating in Cleveland during the 1999–2000 school year, 4 were unavailable to students with vouchers and 4 others reported poor test scores. See *post,* at 18–19, n. 10 (dissenting opinion). But

that analysis unreasonably limits the choices available to Cleveland parents. It is undisputed that Cleveland's 24 magnet schools are reasonable alternatives to voucher schools. See *post,* at 17–18, n. 9 (SOUTER, J., dissenting); http://www.cmsdnet.net/administration/EducationalServices/magnet.htm (June 20, 2002). And of the four community schools JUSTICE SOUTER claims are unavailable to voucher students, he is correct only about one (Life Skills Center of Cleveland). Affidavit of Steven M. Puckett ¶12, App. 162a. JUSTICE SOUTER rejects the three other community schools (Horizon Science Academy, Cleveland Alternative Learning, and International Preparatory School) because they did not offer primary school classes, were targeted towards poor students or students with disciplinary or academic problems, or were not in operation for a year. See *post,* at 18–19, n. 10. But a community school need not offer primary school classes to be an alternative to religious middle schools, and catering to impoverished or otherwise challenged students may make a school more attractive to certain inner-city parents. Moreover, the one community school that was closed in 1999–2000 was merely looking for a new location and was operational in other years. See Affidavit of Steven M. Puckett ¶12, App. 162a; Ohio Department of Education, Office of School Options, Community Schools, Ohio's Community School Directory (June 22, 2002), http://www.ode.state.oh.us/community_schools/community_school_directory/default.asp. Two more community schools were scheduled to open after the 1999-2000 school year. See Affidavit of Steven M. Puckett ¶13, App. 163a.

Of the six community schools that JUSTICE SOUTER admits as alternatives to the voucher program in 1999–2000, he notes that four (the Broadway, Cathedral, Chapelside, and Lincoln Park campuses of the Hope Academy) reported lower test scores than public schools during the

school year *after* the District Court's grant of summary judgment to respondents, according to report cards prepared by the Ohio Department of Education. See *post,* at 18–19, n. 10 (dissenting opinion). (One, Old Brooklyn Montessori School, performed better than public schools. *Ibid.*; see also Ohio Department of Education, 2001 Community School Report Card, Old Brooklyn Montessori School 5 (community school scored higher than public schools in four of five subjects in 1999–2000).) These report cards underestimate the value of the four Hope Academy schools. Before they entered the community school program, two of them participated in the voucher program. Although they received far less state funding in that capacity, they had among the highest rates of parental satisfaction of all voucher schools, religious or nonreligious. See P. Peterson, W. Howell, & J. Greene, An Evaluation of the Cleveland Voucher Program after Two Years 6, Table 4 (June 1999) (hereinafter Peterson). This is particularly impressive given that a Harvard University study found that the Hope Academy schools attracted the "poorest and most educationally disadvantaged students." J. Greene, W. Howell, P. Peterson, Lessons from the Cleveland Scholarship Program 22, 24 (Oct. 15, 1997). Moreover, JUSTICE SOUTER's evaluation of the Hope Academy schools assumes that the only relevant measure of school quality is academic performance. It is reasonable to suppose, however, that parents in the inner city also choose schools that provide discipline and a safe environment for their children. On these dimensions some of the schools that JUSTICE SOUTER derides have performed quite ably. See Peterson, Table 7.

Ultimately, JUSTICE SOUTER relies on very narrow data to draw rather broad conclusions. One year of poor test scores at four community schools targeted at the most challenged students from the inner city says little about the value of those schools, let alone the quality of the 6

other community schools and 24 magnet schools in Cleveland. JUSTICE SOUTER's use of statistics confirms the Court's wisdom in refusing to consider them when assessing the Cleveland program's constitutionality. See *ante*, at 17. What appears to motivate JUSTICE SOUTER's analysis is a desire for a limiting principle to rule out certain nonreligious schools as alternatives to religious schools in the voucher program. See *post,* at 16, 17–18, n. 9 (dissenting opinion). But the goal of the Court's Establishment Clause jurisprudence is to determine whether, after the Cleveland voucher program was enacted, parents were free to direct state educational aid in either a nonreligious or religious direction. See *ante*, at 14. That inquiry requires an evaluation of all reasonable educational options Ohio provides the Cleveland school system, regardless of whether they are formally made available in the same section of the Ohio Code as the voucher program.

Based on the reasoning in the Court's opinion, which is consistent with the realities of the Cleveland educational system, I am persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the Establishment Clause.